



[2021] EWHC 2290 (Admin)

Case No: CO/3401/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 August 2021

Before :

LORD JUSTICE DINGEMANS
and
MRS JUSTICE CHEEMA-GRUBB DBE

Between :

Jemma Killoran
- and -
Investigative Judge, Antwerp Court of First
Instance, Belgium

Appellant

Respondent

Ben Watson QC and Graeme Hall (instructed by **Sonn Macmillan Walker**) for the
Appellant
John Hardy QC and David Ball (instructed by **the Crown Prosecution Service**) for the
Respondent

Hearing date: 28 July 2021

Approved Judgment

Lord Justice Dingemans:

Introduction

1. This is an appeal against an order for the extradition of the appellant, Jemma Killoran, made by District Judge Jabbitt (“the judge”) dated 17 September 2020. The issue on the appeal is whether a decision to try Ms Killoran in Belgium had been made, as required by sections 11(1)(aa) and 12A of the Extradition Act 2003 (“the 2003 Act”).
2. The European Arrest Warrant (“EAW”) was issued by the Respondent, the Investigative Judge, Antwerp Court of First Instance, Belgium on 16 January 2000 and it was certified on 19 January 2020. The Investigative Judge is also referred to in the evidence as an examining magistrate or investigating magistrate. It is an accusation warrant relating to offences of people smuggling said to have been committed by Ms Killoran with Saman Ahmed Taha. The appellant appealed pursuant to section 26 of the 2003 Act. Mr Taha had also appealed but he has now withdrawn his appeal and has been extradited.

The European Arrest Warrant and further information

3. In box c of the EAW, next to the words “Maximum length of the custodial sentence or detention order which may be imposed for the offence(s)” was “prison sentence of 15 to 20 years”. In box e of the EAW, it was said that: “This warrant relates to in total several offences committed probably between August 2018 and the present date”.
4. The description of the circumstances in which the offences were committed is set out below:

“The investigation has revealed that a criminal organisation presumably led by TAHA AHMED Saman (born in Iraq on 10 June 1990), also known as SARDAR SLEMAN Sarmand, has been using motorway parking areas along the E34 in Oud-Turnhout and Vosselaar, along the E313 Maasmechelen and along the E40 Aire de Crisnée for smuggling victims to the United Kingdom against the payment. The victims of the organisation either need to travel from Brussels to the motorway parking areas on foot and with public transport (railway and bus), where they receive further instructions from the members of the organisation, or are picked by the members of the organisation at the railway station and are then taken to the motorway parking area in the vehicle. After their arrival at the parking area, the smugglers lead the victims into the loading spaces heavy goods vehicles that are parked there, which include refrigerator trucks. Several facts of human smuggling that can be attributed to the criminal organisation and the motorway parking areas have now been added to the investigation. These events took place on 28 September 2018, 30 November 2018, 30 October 2019 and 7 November 2019. Within the framework of his human smuggling operations, **TAHA AHMED Saman is assisted by several individuals, including his girlfriend KILLORAN Jemma**, the individual named ASSAD (possibly identified as the individual named KOLUNI Assad), individual named SORAN, the individual named ALI and the individual named IBRAHIM. Up to now, it has been impossible to identify all suspects. **The investigation has revealed that, during several nights, KILLORAN Jemma, the girlfriend of TAHA AHMED Saman and a British national, was registered in the surroundings of the motorway parking areas along the E34 in Oud Turnhout and along the E313 in Maasmechelen, and that she**

transported victims from the Turnhout railway station to the motorway parking area along the E34 in Oud-Turnhout during several nights.” (emphasis added).

5. As to the nature and legal classification of the offences and applicable statutory provisions, the EAW said this: “A. Smuggling of human beings, committed against minors, during which the victim’s life was exposed to serious danger, as a habit, and within the framework of a criminal organisation. B. Smuggling of human beings, during which the victim’s life was exposed to serious danger, as a habit, and within the framework of a criminal organisation. Offences punishable in accordance with Section 66 of the Criminal Code and Sections 77, 77quater, 77quinquies and 77sexies of the Law of 15 December 1980 on the access to the territory, stay, establishment and return of the foreigners.”
6. Further information was provided by the Antwerp Public Prosecutor’s Office. This stated that the police investigation in the case began on 28 September 2018. Since then, the examining magistrate had started an “instruction” against Mr Taha for offences of smuggling human beings; the public prosecutor asked the examining magistrate to expand his instruction by adding additional facts; warrants were issued for phone tapping; requests were made for mutual legal assistance and the EAWs for Mr Taha and the appellant were issued. The examining magistrate will refer the case back to the public prosecutor when he or she considers sufficient evidence has been gathered.
7. The public prosecutor then added as follows:

“In light of the existing evidence in this case, I have already decided that once the Examining Magistrate refers the case back to me, **I will refer it to the Council Chamber so that the case may go to a full criminal trial**” (emphasis added).
8. Further information received in July 2019 indicates that the appellant “can be placed on highway parkings E34 Oud Turnhout and E313 Maasmechelen, and this during several smuggling nights in period August 2018 until April 2019”. The appellant is described as being “**responsible for transporting victims/migrants from the train station in Turnhout to highway parking E34 Oud Turnhout**, this while making use of a car registered to her name” and “**responsible for transporting TAHA AHMED Saman and other members of the organization to the parking and picking them back up after completing the smuggling activities**” (emphasis added).
9. It is added that “**she has smuggled victims/migrants from France to the UK by ferry**” (emphasis added). The appellant’s role is said to include “**purchasing cars in the UK used for smuggling activities**” (emphasis added). These cars were said to have been transported by the appellant by ferry from Dover to the mainland and handed over to Mr Taha or used herself to provide assistance during smuggling activities. The appellant is said to have been informed about the financial aspects of the activities of Mr Taha. She knew what price victims had to pay to be smuggled to the UK. She was responsible for transferring money on behalf of Mr Taha. She knew how the financial arrangements were made. She knows what Mr Taha has earned with regards to his smuggling activities. She is said to have given advice to Mr Taha as to how he should execute his smuggling activities, for example advising him to change phones, and knew the other members of the organisation. The further information ends with this:

“She’s alleged to have committed human trafficking in period 01/08/2018 until 20/01/2020, with a maximum sentence of 15 years, which up until present time 15 offences can be identified” (emphasis added).

10. This prompted further questions, the answers to which clarified that the maximum sentence provided for law was 20 years, but that this was reduced to a maximum of 15 years “as a result of the (mandatory) acceptance of mitigating circumstances in case of referral of the matter to the correctional court”. Further detail was given as to the appellant’s involvement in the offences, including the dates of the occasions when she was present at the parking areas on the E34 and E313 and what was shown by the evidence from the authorised telephone intercept.
11. It is only right to record that as these are extradition proceedings, Ms Killoran has not set out her defence to the allegations made against her.

Sections 11(1)(aa) and 12A of the 2003 Act

12. Sections 11(1)(aa) and 12A of the 2003 Act were inserted into the 2003 Act by section 156 of the Anti-Social Behaviour, Crime and Policing Act 2014 (“the 2014 Act”). The legislative background is set out in the decision of the Divisional Court (Aikens LJ and Nicol J) in *Kandola v Generalstaatsanwaltschaft Frankfurt* [2015] EWHC 619 (Admin); [2015] 1 WLR 5097 at paragraphs 20 to 24. This analysis of the mischief to which section 12A was directed was adopted by the Divisional Court (Lord Thomas CJ, Burnett LJ and Ouseley J) in *Puceviciene v Prosecutor General’s Office of the Republic of Lithuania* [2016] EWHC 1862 (Admin); [2016] 1 WLR 4937 at paragraphs 10 and 11. The Divisional Court (Beatson LJ and Ouseley J) revisited section 12A of the 2003 Act in *Docì v The Court of Brescia, Italy* [2016] EWHC 2100 (Admin).
13. Although section 12A did not form part of the Council Framework Decision of 13 June 2002 on the European arrest warrant and surrender procedures (“the Framework Decision”) to which domestic effect was given in the 2003 Act, other jurisdictions including THE Republic of Ireland and Gibraltar have adopted similar provisions to section 12A. *Puceviciene* confirmed that section 12A was inserted in Part 1 of the 2003 Act with the aim of ensuring that those extradited under “accusation” EAW’s should not be subject to long periods in detention while investigations were carried out in the requesting state.
14. Section 11(1)(aa) of the 2003 Act provides: “(1) If the judge is required to proceed under this section he must decide whether the person’s extradition to the category 1 territory is barred by reason of- ... (aa) the absence of prosecution decision; ...”.
15. Section 12A of the 2003 Act is headed “Absence of prosecution decision” and provides:
“(1) A person’s extradition to a category 1 territory is barred by reason of absence of prosecution decision if (and only if)— (a) it appears to the appropriate judge that there are reasonable grounds for believing that— (i) the competent authorities in the category 1 territory have not made a decision to charge or have not made a decision to try (or have made neither of those decisions), and (ii) the person’s absence from the category 1 territory is not the sole reason for that failure, and (b) those representing the category 1 territory do not prove that— (i) the competent authorities in the category 1 territory have made a decision to charge and a decision to try, or (ii) in a case where one of those

decisions has not been made (or neither of them has been made), the person's absence from the category 1 territory is the sole reason for that failure."

16. "To charge" and "to try" are defined in section 12A(2) to mean "(a) to charge the person with the offence in the category 1 territory ..."; and "(b) to try the person for the offence in the category 1 territory."

Proceedings before the Judge

17. The extradition hearing took place at Westminster Magistrates' Court on 13 and 17 July 2020 before the judge. So far as is relevant the judge heard oral evidence from: Christophe Marchand, a Belgian lawyer on behalf of Mr Taha who had produced a report dated 23 March 2020; and from Mr Hans Van der Wal, a Belgian lawyer on behalf of the appellant who had produced reports dated 20 February 2020 and 27 May 2020. There was also a document "Clarification on the Belgian Judicial System" which had been served as part of the evidence in *Belgian Judicial Authority v McPhillips and Hatherley*, an earlier Belgian case decided by District Judge Tempia on 25 October 2018, which was admitted in evidence in these extradition proceedings.
18. The evidence before the judge from Mr Marchand was summarised in paragraphs 37 to 50 of the judgment below. Mr Marchand said that the investigating magistrate concludes the investigation and sends the case to the prosecutor, who can either ask for more investigations or issue an opinion with regard to the investigation. The prosecutor's opinion is sent to the Council Chamber and the judge at the Council Chamber will either agree or disagree to the case proceeding. Mr Marchand said that it was the Council Chamber that made the decision to send the case to trial. Mr Marchand accepted it was difficult to draw comparisons between the Belgian and English legal systems. Mr Van der Wal had equated a decision to charge as equivalent to the formal decision by an investigating judge to consider a person a suspect. Mr Marchand considered that a decision to charge had been taken but no decision to try had been taken, that was taken just before the trial itself. It was taken by the Council Chamber after hearing all present parties, including the public prosecutor and suspect, and any civil parties.
19. The evidence before the judge from Mr Van der Wal was summarised in paragraphs 51 to 58 of the judgment below. Mr Van der Wal said that it was the prosecutor who asks for the case to be sent to court, but it was only the judge who decides if there was enough evidence to send the case for trial. Mr Van der Wal said that an information was a case led by the prosecution which could go direct to court, but an instruction was a process whereby it was the Council Chamber that made the decision to try. Mr Van der Wal accepted that there had been a decision to charge, but the decision to try was made at the end of the investigation by the Council Chamber.

The judgment below

20. The judge found as a fact that the appellant was wanted in Belgium for serious allegations of people smuggling from Belgium to the UK from August 2019. The judge set out the relevant provisions of section 12A of the 2003 Act and what needed to be shown under the section. The judge set out relevant dicta from *Kandola*. The judge also referred to *Docic* at paragraph 32 that "the decision to charge shows, in the absence of anything else, that there is a decision to try".

21. The judge referred to the Clarification on the Belgian Judicial System provided by the Belgian authorities in *Belgium v McPhillips*. The judge noted that in that case District Judge Tempia had said that the case before her was at the first filter, where an investigating judge conducts the investigation and gathers evidence and that when that was completed the case went to the pre-trial chamber to judge whether criminal proceedings should be initiated, which was the second filter.
22. The judge acknowledged that the Framework Decision was based on the proposition that extradition under the EAW system relied on the principle of mutual recognition and stated that the procedure for bringing individuals to trial differed considerably between states. Boundaries between the stages are not necessarily precise and decisions are often informal. The judge held that a decision to charge was made when the relevant decision maker had decided that there was sufficient evidence under the relevant procedural system to make an allegation that the person had committed the crime alleged. A decision to try was made when the relevant decision maker had decided to go ahead with the process of taking to trial the person against whom the allegation was made. A decision to charge or try remains such a decision even if it is conditional or subject to review.
23. The judge, adopting a purposive and cosmopolitan approach, concluded that the decision of the Council Chamber (Chambre du Conseil) was not the equivalent of a decision to try because the Belgian system was very different from the English system, and it was not possible to find equivalence. A decision to charge had been made. The judge held that in this case the decision to charge contained the decision to try. The judge held that there were no reasonable grounds to consider that there had been no decision to charge or try.

The respective cases

24. Mr Watson QC, on behalf of Ms Killoran, submitted that the Divisional Court in *Puceviciene* had taken a wrong approach to the provisions of section 12A of the 2003 Act, and that properly understood a “decision to try” meant that a case had to be “trial ready”. Mr Watson noted that section 12A was an additional bar to extradition, added in by Parliament to supplement the bars set out in the Framework Decision to meet particular concerns, and he referred to various Parliamentary materials which he submitted the Court should consider when interpreting section 12A under the rule in *Pepper v Hart* 1993 AC 593, and in determining the mischief that the new bar was intended to meet. Mr Watson submitted that the approach taken to section 12A in *Puceviciene* was contrary to the law, and so infringed the specific guidance about “contra legem” given by the Court of Justice of the European Union (“CJEU”) in *Criminal Proceedings against Pupino (Case C – 105/03)* [2006] QB 83. Mr Watson referred to the jurisprudence of the Irish Supreme Court and submitted that this Court should adopt the approach taken in *Kandola*. He submitted that *Kandola* was right in relation to the issue of mutual legal assistance when consideration was given to the issue of whether the absence of the requested person was the sole reason for the absence of a decision to try.
25. Mr Watson further submitted that the judge had been wrong to find that there had been a decision to try, and that the approach taken by District Judge Tempia in *McPhillips and Hatherley* was to be preferred to the approach taken by this judge. The decision to try could only be taken by the Chambre de Conseil, and if it could be taken by the public

prosecutor, such a decision could only be taken after completion of the investigations by the examining magistrate. This would avoid Ms Killoran being subjected to lengthy pre-trial detention in Belgium while investigations continued and enduring a long separation from her young child during those investigations.

26. Mr Hardy QC, on behalf of the Investigative Judge, Antwerp Court of First Instance, Belgium, submitted that there was no ambiguity in the statutory wording and so the Court was not entitled to consider the Parliamentary materials to interpret section 12A of the 2003 Act. Mr Hardy accepted that the Court could look at the Parliamentary materials to determine the purpose or mischief that the section was intended to meet, but that had already been done in both *Kandola*, *Puceviciene* and *Docu* and he submitted that there was no difference, material to this case, between the decision in *Kandola* and *Puceviciene*. Mr Hardy submitted that the expert evidence was of little assistance in deciding, as a matter of English law, whether there had been a decision to charge or try within the meaning of section 12A. Mr Hardy submitted that the judge was right to order the extradition of Ms Killoran and had been right to find that the body competent to make the decision to try was the prosecutor. The public prosecutor had given clear evidence that he had decided that he would send the case to the Chambre du Conseil when the file was returned to him by the examining magistrate.
27. I am very grateful to Mr Watson and Mr Hardy, and their respective legal teams, for their helpful written and oral submissions. It is apparent that the issues for this Court to determine are: (1) whether the Parliamentary materials identified on behalf of Ms Killoran can be relied on under *Pepper v Hart* to support the submission that “decision to try” meant “trial ready”; (2) whether the Judge was right to find that there were no reasonable grounds to consider that there had been no decision to charge or try; and if not (3) whether the Judge was right to find if he was wrong about that first conclusion, that the Investigative Judge had proved that a decision to try had been made.

The Parliamentary materials – issue one

28. Mr Watson relied on a number of extracts from Parliament as set out in the Hansard reports to support his submission that “a decision to try” meant that the case had to be “trial ready”. The first passage was from the Minister for Policing and Criminal Justice introducing the new provisions to the Commons on 16 July 2013. The Minister stated:
- “New clause 24 [Now section 12A] contains provisions to deal with pre-trial detention. UK courts will be able to bar surrender of the subject of the EAW where the issuing state has not taken both a decision to charge and a decision to try the person, unless the person’s presence in that country is required in order to do so. It will ensure that extradition takes place only where the issuing state is truly ready to prosecute and, accordingly, it will help to prevent people from spending potentially long periods in pre-trial detention following their extradition while the issuing state continues to investigate the offence. It may very well have prevented the extradition of Andrew Symeou, at least at the stage when he was extradited, and quite possibly altogether.”
29. The reference to Andrew Symeou was a reference to a British citizen extradited to Greece who waited for over a year for his trial, at which he was acquitted. Later in the debate the Minister referred again to the case of Andrew Symeou and said that the “purpose of the new clause is to try to stop that”. He stated: “If the trial is going to go ahead, extradition can take place. If it is not going ahead, extradition cannot take place.”

30. In a later debate on 15 October 2013 the Minister stated that, what became section 12A was intended to “stop extradited persons languishing in a foreign jail while an investigation takes place.”
31. Mr Watson relied in particular on what was said by Lord Taylor, the Government Minister responsible for the Bill in the Lords. In answering proposed amendments to the Bill the Minister referred to that part of the Bill which would become section 12A and said “This will have the same effect ... that is, a person will not be surrendered before the issuing state **is ready to try the person**. However, the clause has the added benefit of requiring the issuing state to prove that both a decision to charge and a decision to try the person have been made, if the judge has any doubt that either—or both—of those decisions has been taken ” (emphasis added).
32. The Explanatory Notes accompanying the 2014 Act which introduced section 12A provided:

“462. Subsection (2) inserts new section 12A into the 2003 Act, which provides for a new bar to extradition in Part 1 cases on the grounds of ‘absence of prosecution decision’. This is intended to ensure that a case is sufficiently advanced in the issuing State (that is, there is a clear intention to bring the person to trial) before extradition can occur, so that people do not spend potentially long periods in pre-trial detention following their extradition, whilst the issuing State continues to investigate the offence.”
33. The final passage relied on by Mr Watson was a statement given by the then Home Secretary to the House of Lords Select Committee on Extradition Law on 4 December 2014 to the effect that the protection was to ensure that extradition under an EAW only takes place once a case is ‘trial ready’. This statement was made after the enactment of the 2014 Act.
34. As is well known statutory material is admissible under the principles set out in *Pepper v Hart* if: (1) the provision is ambiguous, obscure or leads to absurdity; (2) a statement as to the meaning is made by a minister or other promoter of the Bill; and (3) the statement is clear. This, it was held, did not involve any infringement of article 9 of the Bill of Rights 1689 which provides “that the freedom of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament” but it was also stated that it was necessary for Courts to understand the restrictions set out in article 9. Article 9 of the Bill Rights is “a provision of the highest constitutional importance”, see Lord Browne-Wilkinson at page 638D of *Pepper v Hart*. It is one of the foundations of the separation of the legislative, executive and judicial branches of Government in the United Kingdom. It helps to ensure comity between two of those branches of Government, namely the judiciary and the legislature. In *Pepper v Hart* the Court accepted that it would only be in rare cases that what was described as a “crock of gold” for the purposes of interpreting a statute, would be found from an analysis of Parliamentary materials, see Lord Browne-Wilkinson at page 637G.
35. Bennion, Bailey and Norbury on Statutory Interpretation, Seventh Edition, at paragraph 24.12 state that it is also permissible to consider legislative debates, outside the rule in *Pepper v Hart* 1993 AC 593, to supply context or identify the mischief at which legislation is aimed, see *Presidential Insurance Co Ltd v Resha St Hill* [2012] UKPC 33; [2013] 3 LRC 7 at paragraph 23. There Lord Mance accepted that this was a

different basis from the rule in *Pepper v Hart*, even though *Pepper v Hart* was part concerned with identifying the mischief at which the statutory provision was aimed by the legislature. This additional basis for considering material can only be relied on if the Parliamentary material clearly discloses the mischief aimed at or the legislative intention. I should also add that any such use of Parliamentary materials must still comply with the provisions of article 9 of the Bill of Rights.

36. I will deal first with the submission that the Parliamentary materials are admissible under the rule in *Pepper v Hart* so that “a decision to try” should be interpreted as meaning “trial ready”. In my judgement section 12A of the 2003 Act is not ambiguous or obscure and its literal interpretation does not lead to absurdity. Section 12A requires the identification of whether there has been a decision to charge and try the requested person in the requesting state. That can raise difficult factual issues to be determined because of the different criminal procedures adopted by different category 1 states, but it does not raise any issues of interpretation. Mr Watson’s attempt to rely on *Pepper v Hart* therefore falls at the first hurdle because it is not admissible for the purposes for which he attempts to rely on it.
37. I also note that in his submissions Mr Watson relied mainly on what Lord Taylor had said in the debate in the House of Lords when he used the phrase “ready to try the person”. That phrase, however, was not used when the Minister for Policing and Criminal Justice introduced the new provisions to the Commons on 16 July 2013, who set out the mischief against which section 12A was aimed, and referred to a decision to charge and a decision to try. In those circumstances it is not apparent that Lord Taylor’s statement would amount to “the crock of gold”, as it was termed in *Pepper v Hart*, that would affect the interpretation of the phrases “decision to charge” and “decision to try”.
38. It is right to record that the Secretary of State for the Home Department did use the phrase “trial ready” when addressing the Select Committee about extradition law and stating what the amendment which became section 12A had been intended to achieve. The attempted use of this material was, in my judgment, impermissible. This is because it was a statement by a Minister about the Minister’s understanding of the effect of the Act, once it had been enacted. This is not permitted under the rule in *Pepper v Hart*. This is because the interpretation of the statute once it has been enacted is a matter to be determined by the Courts. The costs of Court proceedings will rise, and cases will take longer to determine, if parties attempt to adduce inadmissible Parliamentary materials to support their case on the interpretation of statutes.
39. It was common ground that the Parliamentary materials were admissible to identify the mischief at which section 12A was aimed. This mischief was identified in the judgments of the Divisional Court in *Kandola* at paragraphs 21 and 22 and *Puceviciene* at paragraphs 11 and 12 which both came to similar conclusions. Section 12A was intended to ensure that a case was sufficiently advanced in the requesting state before extradition could occur, to avoid persons spending long periods in pre-trial detention following their extradition, while investigations continued. The requirements for there to be a decision to charge and a decision to try are important additional safeguards for those whose extradition has been requested. This is because it means that the prospect of being extradited while investigations continue before a decision to charge or try has been made is avoided.

40. The only difference in approach between *Kandola* and *Puceviciene* related to the issue of whether it was necessary to go through mutual legal assistance procedures before a requesting state could prove that a person's absence from the category 1 territory was the sole reason for the failure to make decisions to charge or try. This difference is not relevant to the issues before this Court, and neither *Kandola* nor *Puceviciene* is authority for the proposition that the requesting state needed to be "trial ready". Indeed the use of the phrase "trial ready" can mean different things to different people. I can see no basis for saying that the interpretation of section 12A in *Kandola* and *Puceviciene*, which was followed by the judge in this case, was wrong. I note that a similar attempt to rely on Parliamentary materials to reinterpret section 12A was rejected in *Doci* at paragraph 28.
41. For all of these reasons the Parliamentary materials are not admissible under the rule in *Pepper v Hart* in support of the attempt to interpret a "decision to try" as meaning "trial ready". It is common ground that the Parliamentary materials are admissible to identify the mischief at which section 12A was aimed, but that mischief was properly identified in both *Kandola* and *Puceviciene*. In my judgement the approach to the interpretation of the meaning of "decision to try" in both *Kandola* and *Puceviciene* was right and there was no error of legal approach made by the judge.

A decision to try - issue two

42. It is common ground that in this case a decision to charge Ms Killoran has been made so it is not necessary to identify the evidence relating to that decision. The issue relates to a decision to try. It is necessary to identify some principles applicable to the interpretation of section 12A of the 2003 Act. It is established that, because of the transnational interest in bringing those accused of serious crime to justice, extradition statutes should be accorded "a broad and generous interpretation so far as to the texts permit it in order to facilitate extradition", see *In re Ismail* [1999] 1 AC 320 at 327 but that "generosity must be balanced against the rights of the persons who are sought to be removed under these procedures", see *Cando Armas* [2006] 2 AC 1 at paragraph 24. It is not possible to ignore the words of a statutory provision in order to achieve conforming interpretations, because such a result would be contrary to the law, see *Pupino*.
43. Statements in warrants are to be accorded the mutual respect due to other judicial authorities in category 1 states although, as Mr Watson points out, the public prosecutor in Belgium is not a judicial authority. The provisions in section 12A need to be interpreted in a "cosmopolitan way", see *Kandola* at paragraph 27 and *Puceviciene* at paragraph 38. The need for a "cosmopolitan" approach to the issue is because of the varying criminal procedures adopted by different jurisdictions.
44. There are two stages set out in section 12A. The first is to ask whether there are reasonable grounds for believing that at least one of two decisions (to charge and to try) has not been made. The second stage is to consider whether the absence of the requested person from the requesting state is not the sole reason for the failure to make one or other of both of those two decisions. As *Kandola* confirmed at paragraph 31 "it may be clear from the warrant itself, read as a whole, that the appropriate authorities have or have not taken the two decisions. If the matter is clear from the terms of the warrant as a whole that the decisions have been taken, then the district judge should

look no further ...”. This point was expressly confirmed in *Puceviciene* at paragraph 51.

45. A decision to charge and a decision to try is all that is required, see *Puceviciene* at paragraph 50(ii). There is no need for formality “in relation to the making of a decision, as a prosecutor is entitled to make a decision to try a defendant before implementing any formal steps necessary, unless the procedural law of the requesting state prevents informality ... There will ... be a decision to try even if it is taken subject to the completion, after extradition, of formal stages ...”, see paragraph 54. As *Puceviciene* at paragraph 56 makes clear “a decision to try is simply a decision where the relevant decision-maker has decided to go ahead with the process of taking to trial the defendant against whom the allegation is made. The requesting judicial authority’s description of its own law and procedure should be accepted at face value in the absence of impropriety or bad faith, see *Puceviciene* at paragraphs 58 and 62. It is also relevant to note that “the decision for the judge will be a decision on the evidence presented to him. It will be highly fact-sensitive”, see *Puceviciene* at paragraph 57.
46. As is well known Belgium is a civil law jurisdiction whereas England and Wales is a common law system. It can therefore be difficult to equate procedures in England and Wales with procedures in Belgium, and it is not necessary to attempt to do so because it is only necessary to determine whether there has been a decision to charge or a decision to try.
47. The first question for this court is to determine whether the judge was correct in concluding there were no reasonable grounds for believing that the “competent authorities” in Belgium have not made a decision to charge or have not made a decision to try.
48. It is apparent, and might be expected, that there was much common ground between the experts on Belgian law and the document headed “Clarification on the Belgian Judicial System”. So far as is relevant for this case, the public prosecutor directs public criminal prosecutions. Although a public prosecutor has certain powers if coercive measures are required, the papers are forwarded to the investigating judge (also referred to as an examining magistrate or investigating magistrate). The examining magistrate will continue the investigation and has more powers than the public prosecutor, for example to order house searches or telephone taps. The examining magistrate’s duty is to investigate, both “for and against the suspect”. The examining magistrate may arrest a suspect and keep the suspect in detention when that is considered to be appropriate. It is the examining magistrate (the Investigative Judge, Antwerp Court of First Instance, Belgium) who issues the EAW applying the test of whether there is sufficient indication of guilt of a suspect. The examining magistrate does not make any final determination of guilt or innocence. Even though a suspect will have been questioned by the police, the examining magistrate will also question the suspect.
49. Once the examining magistrate has completed their investigation the case is sent back to the public prosecutor. The public prosecutor can then either ask for the case to be dismissed, ask for more investigations to be carried out, or refer the case to the *Chambre du Conseil* (literally translated as the room of advice, but translated by the Belgian lawyers to mean “Court in Chambers”, and also referred to in the papers before the Court as the “Council Chamber”).

50. Once the case is before the Chambre du Conseil, the judge will then consider the papers, with the parties and legal representatives. The case can be dismissed, the accused person can accept the charges (although sentencing will take place in another court) or the case can be sent for trial in another court. I do not accept, on the basis of the evidence which is before this court, Mr Watson's submission that it is the Chambre du Conseil which is the body which will make a decision to try. This is because although it is right that the Chambre du Conseil may dismiss the charges, that is true of courts after a decision to try has been made. What is required is a decision to try, and not a decision to convict (or even to acquit). The fact that the decision to try must have been made before the proceedings in the Chambre du Conseil part appears from the fact that the accused may plead guilty in the Chambre du Conseil. A decision to try cannot sensibly mean a decision of a Court, albeit sitting in Chambers, before which the accused person may plead guilty. On the evidence before this court, it is apparent that there is no formality required for a decision to try, and the decision is made by the public prosecutor.
51. As appears from the summary of evidence set out in paragraph 7 above, it is apparent that the public prosecutor has "already decided that once the examining magistrate refers the case back to me, I will refer it to the Council Chamber so that the case may go to a full criminal trial." In my judgement, given this evidence, there is no reason to believe that a decision to try has not been made in this case. It has therefore not been shown that the Judge was wrong to make the finding below about the decision to try.
52. I should record that Mr Watson relied on an apparent difference of approach between the decision of the District Judge in *McPhillips* and this case. Having looked carefully at the decision in *McPhillips* it is not clear that there was such a difference. In *McPhillips* the case against the requested person was, as here, before the examining magistrate. There does not seem to have been, however, any evidence from the public prosecutor in that case that a decision to try had been made. As appears from the summary of procedure set out above the case would be referred, on completion of the investigations, from the examining magistrate back to the public prosecutor. The public prosecutor would then consider all of the evidence before deciding whether to discontinue proceedings or refer the case to the Chambre du Conseil so that a trial might be brought. In the absence of positive information from the public prosecutor that a decision to try had been made, it would not be possible to discern such a decision in Belgium from the fact that the case was before the examining magistrate.
53. On the particular facts of this case, by contrast, the public prosecutor has enough information already to say that Ms Killoran will be tried, and there are no reasonable grounds for believing that such a decision to try has not been made.

Proof of a decision to try – issue three

54. This means that it is not necessary to determine the third question, namely whether the requesting state has proved, so that we are sure, that the competent authorities in Belgium have made a decision to charge and a decision to try Ms Killoran. I can confirm that, if it was necessary to do so, I would have been sure, on the materials before this court, that a decision to try Ms Killoran had been made.

Conclusion

55. For the detailed reasons set out above: (1) the Parliamentary materials are not admissible under the rule in *Pepper v Hart* in support of the attempt to interpret a “decision to try” as meaning “trial ready”; (2) the public prosecutor has said Ms Killoran will be tried, and there are no reasonable grounds for believing that a decision to try has not been made; and (3) it is not necessary to determine the third question, but in any event I am sure, on the materials before this court, that a decision to try Ms Killoran had been made. The appeal is therefore dismissed.

Mrs Justice Cheema-Grubb:

56. I agree.