



**AN CHÚIRT UACHTARACH  
THE SUPREME COURT**

**S:AP:IE:2021:000093**

**A:AP:IE:2020:000144**

**High Court Record No. 2016/203 EXT**

**MacMenamin J.  
Dunne J.  
Charleton J.  
Baker J.  
Hogan J.**

**IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003 (AS  
AMENDED) AND IN THE MATTER OF LIAM CAMPBELL**

**BETWEEN/**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**Respondent**

**- AND -**

**LIAM CAMPBELL**

**Appellant**

**JUDGMENT of Ms. Justice Baker delivered 9<sup>th</sup> May 2022**

**1.** The appellant is sought to face trial in the Republic of Lithuania in relation to three offences of: smuggling, the possession of firearms and terrorism. The Court of Appeal, Edwards J. (Kennedy and Binchy JJ. agreeing) [2021] IECA 219, upheld the order of

Donnelly J. in the High Court made on 13 July 2020 ([2020] IEHC 344) for the surrender of the appellant in accordance with the provisions of s. 16(1) of the European Arrest Warrant Act 2003 (as amended) (“the Act of 2003”). This is the appeal from that order.

2. This Court gave leave to appeal by determination dated 22 September 2021: [2021] IESCDET 107, the matter of general public interest there identified being the interpretation and application of s. 21A of the Act of 2003 in the light of what the appellant says are conflicting decisions of this Court in *Minister for Justice, Equality and Law Reform v. Olsson* [2011] IESC 1, [2011] 1 I.R. 384 (“*Olsson*”) and *Minister for Justice, Equality and Law Reform v. Bailey* [2012] IESC 16, [2012] 4 I.R. 1 (“*Bailey*”).

3. It is argued that a “decision” has not been made to charge and try the appellant in the issuing state. The key argument made by the appellant in the application for leave was that s. 21A must be interpreted literally and the word “decision” in the section cannot be given an interpretation in conformity with EU law.

4. The grounds of appeal are short and succinct:

- (a) That the Court of Appeal erred in law and fact in dismissing the appeal from the High Court;
- (b) That the Court of Appeal erred in determining that s. 21A of the Act of 2003 was capable of a conforming interpretation with the Framework Decision; and
- (c) The Court of Appeal erred in law and in fact in finding that there was on the evidence a decision to charge and try the applicant in accordance with s. 21A.

5. The respondent in an equally succinct and clear grounds of opposition traverses these three grounds of appeal.

### **Background facts**

6. The European Arrest Warrant (EAW) was issued in respect of three offences described in Part (e) of the EAW: that the appellant is alleged to have made arrangements while acting in an organised terrorist group (the Real Irish Republican Army) to acquire

firearms and explosives from Lithuania and smuggle these into Ireland between 2006 and 2007; conspiracy to acquire firearms and explosives and to provide money for the purchase of weapons.

7. The EAW is of some vintage having issued on 26 August 2013. The attempt to surrender the appellant has had a complicated history. An EAW issued on 18 December 2008 and the appellant was then arrested in the State and granted bail. He was later arrested in Northern Ireland and bail was refused. On 13 July 2009, Lithuania withdrew the EAW in respect of this State. Surrender from Northern Ireland was refused on 16 January 2013 by the Recorder's Court in Belfast, a decision upheld by the High Court of Northern Ireland on 22 February 2013. The argument made against surrender at that point concerned prison conditions in Lithuania, and especially the conditions in the prison where the appellant was likely to be detained pending trial.

8. The second EAW issued on 26 August 2013 and was endorsed in the State by the High Court on 25 November 2016. The appellant was arrested on 2 December 2016 and granted bail. The Minister sought a clear and unambiguous undertaking that the appellant would be held in an identified prison, the conditions in which did not give rise to concern. There was then a relatively long period of time during which details were sought and provided by Lithuania. The issue of prison conditions is no longer one of concern.

9. A s. 16 hearing occurred in the High Court before Donnelly J. between 18 and 20 October 2017 and was adjourned with the consent of the appellant to await the decision in *Minister for Justice and Equality v. Lissauskas* [2018] IESC 42, and the hearing resumed on 9 June 2020.

10. On 13 July 2020, Donnelly J. made an order for surrender on the grounds that the evidence was that a decision had been made to charge and try the appellant.

11. Leave to appeal the decision was sought, and Donnelly J. granted leave on the sole question she certified:

“Is s. 21A amenable to a conforming interpretation with the Framework Decision so that an intention to put a respondent on trial is coterminous with the decision to put a respondent on trial for the purposes of s. 21A?”

12. It is that question that also falls for determination in this appeal.

### **The High Court and Court of Appeal decisions**

13. Donnelly J. considered that the evidence suggested that the judicial authority had sufficient evidence to allow it to “suspect” the appellant of having committed the crime and that was sufficient to lead to a court in Vilnius to impose a constraint measure of arrest upon him. Donnelly J. came to the view that the EAW had been issued with a view to putting the appellant on trial. Although the pre-trial investigative processes in Lithuania are quite unlike those which operate in Ireland, she was satisfied that the Lithuanian authorities had concluded that the appellant would be prosecuted and put on trial.

14. The Court of Appeal agreed with the analysis of the trial judge. The decision in the Court of Appeal was that while s. 21A does not itself transpose any express provision of the Framework Decision, it does reflect the Statement made by Ireland prior to its adoption. Edwards J. concluded that it was possible to interpret the word “decision” in s. 21A(1) as being coterminous with “intention” and he there relied on the reasoning of O’Donnell J. in *Olsson* where he held that s. 21A can be read in a manner that conforms with the Framework Decision.

### **The legislation**

15. Section 21A of the Act of 2003 provides as follows:

“21A. — (1) Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicted of an offence specified therein, the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state.

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

16. Surrender will be refused if there is no decision to charge and try the requested person, and, as has been noted in the authorities, the legislation is clearly stated as a conjunctive and no argument to the contrary is made: see for example para. 288 of the decision of Hardiman J. in *Bailey* where he noted the emphatic punctuation of s. 21A of the Act. Section 21A(1) appears to be clear in its terms in providing that surrender shall 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 a presumption that a decision has been made to charge a person with and try him or her for that offence, such that the onus of establishing that the requirements of s. 21A(1) are not satisfied lies on the person resisting surrender. The negative phrasing of s.21A(1) supports that view: return must be refused if no decision to charge and try has been made.

17. Article 1 of the Framework Decision contains a definition of the EAW and the obligation on a Member State to execute it:

#### *Article 1*

##### **Definition of the European arrest warrant and obligation to execute it**

1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

##### **The evidence**

18. The appellant submits that his surrender is precluded by reason of s. 21A of the Act of 2003 on the grounds that no decision has been made to try him.

**19.** For the purpose of the High Court hearing, an affidavit of Ms. Inga Botyriene dated 9 April 2017 was relied on by the appellant to explain the procedural steps of prosecution in Lithuania. Briefly these steps are: a pre-trial investigation, the presentation of an indictment at the end of that pre-trial investigation, and a trial leading to acquittal or conviction. The essential aspects of the process for the purpose of the present case is that the Lithuanian Criminal Procedure Code provides for the participation of a suspect in the pre-trial investigation stage and that a person is recognised as a suspect if there are facts which justify “a minimal possibility” that the person committed a criminal act and the prosecutor subjectively believes this to be the fact. That part of the process has not yet occurred and requires the presence of Mr. Campbell in Lithuania. Ms. Botyriene’s avers that it is only if sufficient information is gathered at pre-trial stage that a decision could be made to put Mr Campbell on trial and to draft and present an indictment.

**20.** When the prosecutor is satisfied that sufficient information to charge a person has been gathered at pre-trial stage the prosecutor will draft and present an indictment to that person and the court. As Donnelly J. noted, the suspect is then categorised as “an accused” and it is upon the decision made by the prosecutor that the suspect becomes an accused person.

**21.** The request for information sent by the Minister to the Lithuanian authorities dated 10 May 2017 sought confirmation that there was an intention to charge and try the appellant and that there is sufficient evidence that he be charged and put on trial. The answer provided is as follows:

“Hereby we do uphold that criminal case No. 10-9-00105-07 has sufficient evidence which allows to suspect that Liam Campbell has committed criminal offences described in the European arrest warrant. It should be noted that the fact of the sufficient amount of data for drawing up an official Notification of Suspicion against L. Campbell has been approved by Vilnius City District Court which has imposed a

constraint measure of arrest upon L. Campbell. In addition to that, the entirety of the data obtained in the context of this case allows making a conclusion that in case of his surrender there is a high probability that a Bill of Indictment would be drawn up against Liam Campbell, that is, charges would be brought against this person and the case referred to the court. Hereby we do assure you that by measures of criminal proceedings we are seeking to implement the principles of fairness.”

22. The appellant argues that, at best, there exists an intention to conduct and complete the process of investigation which may lead to the preferring of charges, but that this process could not be said to yet have become a decision to charge and try him in Lithuania. The appellant argues that the fact there is no more than “a high probability” that he would be charged and tried supports the proposition that no decision has yet been made to charge him in Lithuania.

23. It is apparent, therefore, that the factual and legal point of difference now arising for consideration is whether Lithuania seeks the appellant for the purpose of an investigation or if it can be said that a decision has been made to charge him and put him on trial.

#### **The appeal: the legal arguments**

24. The appellant argues that a tension exists between two recent decisions of this Court, those in *Olsson* and *Bailey*, as to the meaning and application of s. 21A(1), and that, as this subsection precludes surrender in any circumstances when a positive decision has not been made to charge and try a person, the express requirements provided in s. 21A(1) are more restrictive than those found in the Framework Decision.

25. The respondent denies that any tension exists between these two decisions of this Court, and that the legislation is consistent with the reservation made by Ireland in the course of the negotiations for the Framework Decision that:

“Ireland shall, in the implementation into domestic legislation of this Framework Decision, provide that the European Arrest Warrant shall only be executed for the

purposes of bringing that person to trial or for the purposes of executing a custodial sentence or detention order.”

**26.** The key argument in this appeal is the proposition that there is a different emphasis and a different interpretation of the meaning of s. 21A(1) in *Olsson* and *Bailey*, and that O’Donnell J. (as he then was) in *Olsson* strayed outside the literal meaning of the word “decision” in s. 21A. The appellant argues that *Bailey* modified or overruled *Olsson* and that the test deriving from *Bailey* is a more narrow one.

**27.** The appellant argues that whilst the Framework Decision contemplates surrender for the conduct of a criminal prosecution in a very general sense, including for the continuation or completion of an investigative procedure which may or may not lead to a decision to try a person, Irish legislation precludes surrender unless the conjunctive requirements in s. 21A are satisfied. The appellant urges this Court to conclude that in its express terms s. 21A(1) evidences an intention to limit the manner in which the Framework Decision was implemented and that the interpretative process cannot therefore involve a search for a conforming interpretation.

**28.** The appellant argues that s. 21A must be seen as departing from the Framework Decision and that Irish law consciously chose a test for surrender which did not mirror that in the Framework Decision and which was more rigorous. This approach is argued to flow from the Statement made by Ireland at a late stage in the negotiations leading to the adoption by the Council of the European Union of the Framework Decision. The Statement was discussed by this Court in *Bailey*, and Fennelly J. in particular noted, that the Statement did not find its way exactly into s. 21A in that it used the formulation “the purposes of bringing that person to trial”. It is not argued that the Statement is an interpretative tool as such, but rather that it forms a useful background to understand the position of the State that surrender for investigation was not permissible.



29. The appellant therefore argues that the analysis of Edwards J. in the Court of Appeal and his reliance on the *dicta* of O'Donnell J. in *Olsson* are incorrectly premised on an attempt to achieve a conforming interpretation, and that the plain language of s. 21A contains a restriction on surrender not found in the Framework Decision and may be contrary to its provisions.

30. The respondent argues that the legislation must be interpreted in the context of the aim of the Framework Decision, but also because of the divergent legal systems across Member States, the concept of charging and trying a person cannot be so narrowly interpreted as to bear only those meanings as are in conformity with Irish criminal procedures. For that reason, “decision to try” is a question of fact to be determined in the light of the purpose of the legislation, recited in the Long Title, to give effect to the Framework Decision.

31. The respondent asserts that there is no difference in the interpretation or even the emphasis between *Bailey* and *Olsson*, and the short temporal distance between the delivery of the two judgments, with a significant overlap in the judges who sat in both appeals, is offered as support. Denham C.J. in *Bailey* specifically approved the reasoning of O'Donnell J. in *Olsson* and accepted that his analysis in *Olsson* was “helpful” (para. 98). It is argued by the respondent that in *Bailey* the evidence was unequivocal that no decision had yet been made to try Mr. Bailey, and *Olsson* was distinguished on its facts but not on its reasoning.

32. The respondent points to the fact that the language used in s. 21A is not that contained in the Statement and that therefore the Statement does not offer any useful interpretative basis, save perhaps that it confirms the general Irish position apparent from the legislation that Ireland will not surrender a person for the purposes of investigation only.

### **Section 21A of the European Arrest Warrant Act 2003**

33. Section 21A of the Act of 2003 was inserted by s. 79 of the Criminal Justice (Terrorist Offences) Act 2005 and was contained in Part 8 of that Act, s. 68 of which provided that the

amendments thereby effected should apply to European arrest warrants after the passing of that Act. The amendments and substitutions thereby made were done for the purpose of incorporating into Irish law the provisions of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and surrender procedures between Member States. The Long Title recites the purpose:

“An Act to enable the State to meet commitments undertaken as part of the international community, to amend the Offences Against The State Acts 1939 to 1998 and The European Arrest Warrant Act 2003, and to make provision for related matters, including the retention of communications data.”

**34.** Article 1 of the Framework Decision provides a mandatory obligation on the part of Member States to execute any European Arrest Warrant and to do so “on the basis of mutual recognition” and in accordance with its provisions.

**35.** The mandatory requirement to surrender is reflected in 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 which provides that a person in respect of whom a European Arrest Warrant has issued *shall* be arrested and surrendered to the issuing state in accordance with the provisions of the Act.

**36.** Article 1 also defines a European Arrest Warrant as a judicial decision issued by a Member State “with a view to the arrest and surrender by another person of a requested person, for the purpose of conducting a criminal prosecution or executing a custodial sentence or detention order”.

**37.** For the purposes of the present case the relevant part of that definition is that the warrant is issued for the purpose of *conducting a criminal prosecution*.

### **Evolution of the principles**

**38.** The requirement that a European Arrest Warrant be enforceable only and insofar as the requesting State has made a decision to charge and try a person has been the subject of

recent decisions in this Court. Two of these, *Olsson* and *Bailey*, were the main focus of the arguments on appeal.

**39.** The earlier decision of this Court in *Minister for Justice, Equality and Law Reform v. Altaravicius* [2006] IESC 23, [2006] 3 I.R. 148 is also worth noting. There, Murray C.J. commented on the purpose of the Framework Decision to introduce a simplified method of surrender between Member States and to remove the potential for delay inherent in a system where the requested State engaged in a high degree of scrutiny. Recital 6 in Article 1.2 were, he noted, founded on the mutual recognition of judicial decisions and judicial cooperation and the mechanism of the Framework Decision was based on a high level of confidence between Member States (p. 153). I have read and agree with the concurring judgment of Charleton J. in this appeal where he examines the importance of these factors, and I do not therefore repeat them here.

**40.** The tension argued to exist between the judgment of this Court in *Olsson* and that in *Bailey* is best exemplified by the discussion of O'Donnell J. in *Olsson* regarding the meaning of the word “decision” in s. 21A(1) which he said could be equated to an “intention” in s. 10 of the Act of 2003, and that a “decision” does not need to be final or irrevocable. Further, he noted that the reference to the “purpose” of the warrant in the Framework Decision must mean that a decision not to prosecute may be made eventually and that the test of whether a decision or intention exists is to be applied at the date of the issue of the warrant. In *Olsson* the Court was satisfied on the facts that the Kingdom of Sweden did intend to, and had decided to, try the respondent.

**41.** The test articulated in that judgment permits a continuing investigation even after return, provided an intention to prosecute and try the requested person existed at the date of issue of the warrant and provided the decision to prosecute is not dependent on such future investigation producing sufficient evidence to put a person on trial, such that a decision or

intention to try a person was dependent on the gathering of evidence and the results of an investigation.

**42.** The difference may be illustrated by reference to the decision of Edwards J. in *Minister for Justice and Equality v. Jociene* [2013] IEHC 290. There surrender to the Republic of Lithuania was refused as on the evidence Edwards J. was not satisfied that he had received a sufficiently clear answer to the question as to whether a decision had been taken to try the respondent for the offence in question. He was satisfied that the case was still at a pre-trial investigation stage in Lithuania and that sufficient evidence did exist to charge her and to treat her to that extent as a suspect. The response received to the question concerning whether a decision to prosecute had been made was neither clear and was “highly contingent” as the evidence was that, were either respondent to be surrendered and were sufficient information to be gathered in evidence of her having committed the crime then she would be put on trial. The conditionality of that answer was sufficient to rebut the presumption. It is noteworthy that there was in that case a certificate for the purposes of s. 11 in that in response to questions from the Court a confirmation was received from the requesting authorities that the respondent was sought for the purposes of criminal prosecution and it was intended to charge her. What was absent was a clearly articulated intention to prosecute and indeed the evidence pointed in the other direction.

**43.** The Minister in the course of the present case argued in the Court of Appeal that the High Court decision in *Jociene* was wrongly decided, although the Minister had not sought to appeal the refusal of surrender in that case. That argument was not further pursued on the appeal to this Court.

**44.** It is fair to say that the two central authorities relevant to the discussion in the present case were each found at opposite ends of the spectrum where the facts led to different decisions on the merits.

**Minister for Justice, Equality and Law Reform v. Olsson**

45. The first in time of the two recent decisions is the decision of this Court on appeal from the High Court in *Olsson*.

46. There the Swedish authorities had issued a European Arrest Warrant in relation to four offences and asserted that an intention had been formed to prosecute Mr. Olsson on surrender. As part of a process necessitated by the criminal procedures in Sweden, the Swedish police were required to interview the requested person before it could be said that the criminal investigation had concluded and before he could formally be tried. Thus, a final decision on whether he would be prosecuted had, as a matter of Swedish procedural requirements, to await that interview.

47. The respondent argued that as the criminal matter was still at the investigative stage a decision to prosecute him for the purposes of s. 21A had not been made. Evidence was adduced of Swedish law and the evidence of the lawyer instructed on behalf of the respondent was that he was “on probable cause suspected of committing serious crimes” and that he should be taken into custody. The conclusion drawn by that witness was that Mr. Olsson was not being sought for the purposes of standing trial as the required decision had not been made, and surrender was for the purposes of continuing the investigation and not for either charging him or trying him in respect of any offence, still less the offence specified in the European Arrest Warrant. As noted by O’Donnell J., at para. 32, the deponent of the affidavit seemed to presume that the process of investigation and prosecution were “mutually exclusive.”

48. This Court, on appeal from a decision of the High Court which had ordered surrender to the Swedish authorities ([2008] IEHC 37), dismissed the appeal in the light of an interpretation of Article 1(1) of the Framework Decision and of the evidence presented of an intention to prosecute.

**49.** O'Donnell J. noted that because the Act of 2003 was to make provision for a reciprocal execution of warrants between different legal systems, that the words "charge" and "prosecute" should be understood in the broader context and were not confined to how those terms are used in the Irish criminal justice system.

**50.** The replying affidavit submitted on behalf of the requesting State identified the steps in Swedish criminal procedure and that an investigation process may be formerly concluded only when an accused is present as he or she must be presented with the information obtained in the investigation and given the opportunity to reply. Until that happens no formal charges can be laid because the prosecution is "legally incapable of arriving at a final decision to prosecute". Those stages were described as "an essential part of the process", and designed to protect the rights of the accused person. The affidavit went on to say that there was an intention to prosecute on the basis of the available evidence but because the respondent had at all material times been abroad and unable to be interviewed the final step could not be concluded.

**51.** Three factors were relevant. The starting point for the Court in *Olsson* was the presumption inserted to s. 21A(2) of the Act of 2003 by s. 25 of the Act of 2005, that if a warrant has been validly issued there is a presumption that a decision has been made to charge the person and try him or her for the offence. It could be said that the presumption where a county's prosecutorial process requires an extra step not found in Irish criminal procedure the presumption contained in s. 21A(2) advances the process of the surrender of persons even if the actual process of prosecution requires an additional procedural step.

**52.** Second, O'Donnell J. noted that the opening lines of the EAW itself recited and contained a request that the person be arrested and surrendered for the purpose of conducting a criminal prosecution. That stated purpose provides an evidential basis for the conclusion that a decision to charge and try has been made.

**53.** The third factor to which O'Donnell J. referred was recital 10 of the Framework Decision which describes the European Arrest Warrant as a mechanism “based on a high level of confidence between Member States”.

**54.** From these three factors, the presumption, the formal matters stated in the European Arrest Warrant itself, and the level of confidence between Member States reflected in the Framework Decision and required as a matter of EU law to be observed and protected, he drew the conclusion that “cogent evidence is required to raise a genuine issue as to the purpose for which a warrant has been issued and surrender sought” (para. 26). The expression “cogent evidence” might seem to need little analysis and is the self-same expression as used by Murray C.J. in his decision in *Minister for Justice v. McArdle* [2005] IESC 76, [2005] 4 I.R. 260 at p. 268 where he noted that the combined effect of the recitals in the Framework Decision and the fact that an application to enforce a European Arrest Warrant is accompanied by a certificate referred to in s. 11(3) of the Act of 2003 which certifies and states that the surrender of the person is sought for prosecution and trial, that at least *prima facie* evidence exists which would “normally require cogent evidence to the contrary to raise a genuine issue as to the purpose for which the warrant in question has been issued and the surrender sought”.

**55.** O'Donnell J. derived much of his reasoning from the Framework Decision and its relationship with the Act of 2003. He drew the conclusion that, if surrender could occur only in response to warrants emanating from a criminal justice system which had procedures broadly identical to those of Ireland, then the Act of 2003 would not achieve its purpose or that of the Framework Decision. Therefore, the correct approach required regard to both the origins of the Act of 2003 and the fact that reciprocal execution of warrants between different legal systems was anticipated and intended to be facilitated. While the matter to be resolved was a matter of Irish law it did relate to the “sometimes difficult intersection between different legal systems and cultures”.

**56.** The approach adopted by this Court in *Olsson* involved an analysis of the purpose of the Act of 2003 and its origins in the Framework Decision. Because that Act established a procedure for the reciprocal execution of warrants within legal systems which had quite different processes and procedures, O'Donnell J. considered that the Act would have been ineffective in achieving that object were Irish legal procedures and their meanings to wholly govern an analysis of the facts in order to ascertain whether a decision had been made to charge and try a respondent. Thus the provisions of s. 21A(1) had to be interpreted in a manner that respected different criminal processes between Member States and a literal meaning was not always correct:

“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 Article 1 of the Framework Decision.” (para. 32)

**57.** The sometimes difficult task of reconciling different criminal legal processes was considered by the U.K. House of Lords in *In re Ismail* [1999] 1 AC 320, [1998] 3 All ER 1007 (at pp. 326-327) where Lord Steyn noted the difference between criminal proceedings in the United Kingdom and civil law jurisdictions and considered that the term “accused” in the U.K. Act was not a term of art and that the correct approach was to analyse the context in which this is used. The test is at all times a question of whether on the facts a person passes the threshold test of being an accused person and that what he described as a “broad and generalist construction” insofar as this was possible should be preferred. Lord Steyn described the approach as “purposive” or “cosmopolitan” which he thought necessary to accommodate the differences between legal systems. That reasoning was adopted by O'Donnell J.

**58.** In essence the approach in *Olsson* is to look at the substance and not the form of the requirements of the relevant legal systems.



59. Of note is the fact that this Court confirmed that the requirements of s. 21A would not be complied with where a warrant had issued for the purposes of investigation alone, and that particular proposition took centre stage in the case decided a year later in *Bailey*.

**Minister for Justice, Equality and Law Reform v. Bailey**

60. In *Bailey* the evidence was that a decision had not been taken to prosecute the requested person, although a decision had been made to charge him. It was clear that the respondent was sought for the continuation of an investigative process in France and it could not have been said that there was a decision or intention to prosecute him until the investigative process had concluded. This Court distinguished *Olsson* on that basis as the respondent was sought for investigation and not for the purposes of prosecuting him.

61. On one analysis the decision in *Bailey* was inevitable because, as the evidence evolved, it became, as Fennelly J. said, “crystal clear” that a decision had not been made to try Mr. Bailey. The situation fell precisely at the side of the line identified by O’Donnell J. in *Olsson*, that surrender in order to conduct investigation or further investigation to produce sufficient evidence to try a person is impermissible. The *Bailey* decision must also be seen against the backdrop of the recognised mischief sought to be prevented in Irish legislation, to avoid persons being returned and incarcerated for long and unascertainable periods of time as part of an investigative process.

62. The facts in *Bailey* unequivocally showed that while a decision had been made to charge Mr. Bailey, the decision whether he should be sent forth for trial was one that could be made only by the investigating judge and only after completing the phase of “I’instruction” or the examination phase. This Court therefore concluded on that evidence that surrender should be refused as the conjunctive requirements of s. 21A could not be said to have been met. Surrender was refused, in the language of Denham C.J. (at p. 32), as it would be “at the investigation stage of a case”. The Court considered that a decision had been made to charge Mr. Bailey, as the charge was effected by the issuing of an arrest

warrant on the authority of an investigating judge who indicated that he had sufficient evidence to warrant the criminal prosecution (*per* Fennelly J. at p. 113). The element missing was the decision to try, as this could not be made until the investigation was complete.

**63.** The judgments in *Bailey* are complex and run to 534 paragraphs, or 146 pages in the reported version. While O'Donnell J. dissented on the result he did not disagree on the principles. The other four members of the Court agreed on the result and refused to allow the surrender of the respondent to France. For the present appeal, the relevant proposition is that as the French process remained at the investigative stage, there did not exist sufficient evidence to justify placing the respondent on trial, although there was sufficient evidence to charge him.

**64.** The analysis of Lord Thomas, the Lord Chief Justice of England and Wales and two other judges sitting as a Divisional Court in *Puceviciene v. Lithuanian Judicial Authority* [2016] EWCA 1862, quoted with approval and at length from the decision of *Olsson*. The Court also referred to *Bailey* and *Attorney General v Pocevicus* [2015] IESC 59, and the decision of Murphy J. in *Minister for Justice and Equality v Czajkowski* [2014] IEHC 649.

**65.** The Divisional Court considered the decision of this Court in *Olsson* “very persuasive” on the question of whether a decision to try may nonetheless considered to be a decision to try even if it is conditional or subject to review and said:

“There will, for example, be a decision to try, even if it is taken subject to the completion, after extradition, of formal stages, such as an interview and subject to those stages not causing a reversal of the decision already made even informally, to charge and try.” (para. 54)

**66.** Thus a decision to go ahead with the process of taking a person to trial may well be one that is made subject to hearing what a defendant has to say or to subsequent review. In England and Wales, as in Ireland, a decision to charge is almost always a decision to try but

in other legal systems, as is clearly the case in Lithuania, these decisions must be regarded as separate stages of a process. Conditionality or contingency may exist at either stage.

**Further investigation: does this preclude surrender?**

67. The first factor apparent from the decisions in *Olsson* and *Bailey* which requires further comment in this appeal concerns the possibility that a decision to charge a person may be revoked.

68. The place of further investigation, and whether a final irrevocable and full decision has been made to prosecute and try a person was considered by this Court in *McArdle* and again in *Olsson*. At para. 35 of his judgment in *Olsson*, O'Donnell J. explored the possibility that the prosecuting authorities might decide not to prosecute after an order for surrender had been made. In those circumstances he considered that the intention to prosecute might still exist as the test of whether a decision to prosecute and an intention to do so exists is made at the time of the hearing and in the light of the purpose at that point in time for which it is issued.

69. It is apparent from that analysis that on the one hand the decision to try a person must not be contingent on the outcome of a further factual investigation (*per* Murray J. at para. 19 of *McArdle*), but that continuing or parallel investigation can occur.

70. This is logical and reasonable, and further investigation may lead to a conclusion by the prosecuting authority that the prosecution should not be continued. A simple example is illustrative: if at the time a decision to charge and try a person is made there is no reliable DNA evidence or analysis and the decision is based on other evidence, including other circumstantial evidence, the process will be stopped if, at a later stage in the continued investigation, DNA evidence emerges which exonerates the accused, a reasonable and logical approach, and one which is fair to the accused.

71. Thus, an investigation may continue after a person is charged and a decision made to try him or her, but if a criminal process is at an investigative stage only, and where return is

sought in order to further question the person to enable the assembling of more evidence, or to enable the prosecution to take a view on the charge to be preferred or the reliability of the account given by a person under questioning, then the warrant could not be said to be one issued for the purpose of charging and trying a person, because the criminal process is still only at an investigative stage and the threshold test is not met. In such a case there would be no intention to prosecute, and therefore no decision could be said to have been made to do so as the decision was wholly contingent on the outcome of future investigation.

**72.** It is not argued by the appellant in the present appeal that a final or irrevocable decision to charge and try the requested person must have been made by the requesting state. That proposition was roundly rejected by this Court in *Olsson*, but it is also a proposition that does not accord with any concept of fairness or reasonableness, and as in the example that I gave above, it is intrinsic to the criminal justice system that the State will not unnecessarily continue a prosecution when evidence emerges that makes a conviction improbable, or indeed where a material gap in the evidence would reasonably lead to a conclusion that the prosecution should be stopped. It is inimical to the rule of law and the proper role of a prosecuting authority that a prosecution be commenced or continued without sufficient evidence to put a person on trial, not least because of the risk that a person would be wrongly convicted, but also because the exposure to a criminal prosecution is likely to be distressing and could in some cases amount to oppression. The right not to be unjustifiably prosecuted is a principle that must be seen as deriving from the presumption of innocence and the right to a fair trial.

**73.** It was of some importance in *Olsson* that the evidence from the prosecutor Ms. Maderud was that there was an intention to prosecute the requested person on the basis of the available evidence but that a formal charge could not be laid as the prosecutor was legally incapable of arriving at a final decision until the accused had been given an opportunity to object to prosecution.

**Conforming interpretation: an obligation to seek to achieve**

74. The second factor relevant to the present appeal concerns the interpretive process.

75. This involves an analysis of the limits to the principle of conformity as set out in Case C-105/03, *Criminal proceedings against Pupino*, ECLI:EU:C:2005:386. There the ECJ considered the force of the binding obligation on Member States to achieve the principle of conforming interpretation and its answer was stated in para. 45:

“When applying national law, the national court that is called upon to interpret it must do so as far as possible in light of the wording and purpose of the Framework Decision in order to obtain the result which it pursues and thus comply with Article 34(2)(b) EU.”

76. The Court was clear however that that obligation is limited by the general principles of law. This led the Court to consider first, that an obligation exists on the national court to refer to the contents of the Framework Decision when interpreting the relevant rules of its national law. Second, that obligation could not serve as a basis for interpretation as national law *contra legem*, or to a result which was incompatible with national law. Third, the principle of conforming interpretation requires the national court to consider the whole of national law to assess “how far it can be applied in such a way as not to produce a result contrary to that envisaged by the Framework Decision”. It is a matter for the national court to determine whether a conforming application of national law is possible. It is useful to observe that Advocate General Kokott in her opinion had suggested that it was not obvious that an interpretation of national law in conformity with the Framework Decision is *impossible*, and that the national court had an obligation to seek a conforming interpretation only and insofar as that could be achieved.

77. That calls for an interpretative process in active engagement with the Framework Decision and its purpose and effect, and does not always permit an interpretation of national law wholly in the light of domestic principles of statutory interpretation.

### **The purpose of the Act of 2003**

**78.** The Act of 2003 is the mechanism by which the State performed its obligations under the Framework Decision. Fennelly J. in *Dundon v. Governor of Cloverhill Prison* [2005] IESC 83, [2006] 1 I.R. 518 (at p. 544), advocated an interpretive approach that had regard to this purpose:

“The 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 retain the result which it pursues.’”

**79.** In *Bailey*, Fennelly J. considered that the Irish legislation fell to be interpreted in conformity with Article 4(7)(b) of the Framework Decision and as had O’Donnell J. before him in *Olsson*, relied on the *dicta* of Murray C.J. in *McArdle* which stressed the principle of mutual recognition sought to be protected by the Framework Decision and that the principle was a cornerstone of judicial cooperation in the field of European Arrest Warrants. Those *dicta* placed emphasis of the fact that where a judicial authority of a Member State issues a European Arrest Warrant accompanied by a certificate referred to in s. 11(3) of the Act of which states and certifies that the surrender of the person is sought for the purposes of prosecution and trial, that this is evidence of that purpose (at p.268 of the judgment of Murray C.J.). From there, Murray C.J. derived the principle that “cogent evidence” would be required to raise a genuine issue as to the true purpose of the arrest warrant.

**80.** Earlier Murray C.J. considered the position in *Minister for Justice v. Altaravicius* [2016] IESC 23, [2006] 3 I.R. 148, (at pp. 153-154) again stressing the terms of the Framework Decision and what it sought to achieve. Simplification of surrender was a key objective as was the desire to remove delays inherent in a process that requires a high degree of scrutiny. Mutual recognition and a high level of confidence were the guiding principles

**81.** But the principles of respect and mutual cooperation and recognition do not amount to a mandatory force which dictates an answer, and as was illustrated by the different factual

scenarios that presented in *Olsson* on the one hand and *Bailey* on the other hand, and there will invariably be cases where the application of domestic implementing provisions might lead to a refusal to surrender, because, notwithstanding the requirement for efficiency, speed, and mutual respect, the facts do not permit a conclusion to be drawn that a decision to prosecute has been made in the requesting state.

**82.** In *Bailey* Fennelly J. considered that it was not possible to construe s. 21A of the Act of 2003 wholly in the light of the purpose of the Framework Decision without ignoring its clear requirement that the Court be satisfied that a decision had been made to try the requested person.

**83.** Hardiman J. placed some emphasis on the limitations expressed in *Pupino* that a Member State is obliged to achieve a conforming interpretation “insofar as that is possible”. Hardiman J. noted that the doctrine of conforming interpretation could not lead to a decision that disregarded the wording of the Irish legislation especially as the Act of 2003 is as he put it “couched as a prohibition against execution of the warrant in certain circumstances.” (at para. 325)

**84.** In his judgment Hardiman J. noted the Statement made by Ireland (referred to above at p. 25) which, whilst it does not provide an interpretative tool and has no direct legal force, does explain to an extent what was contemplated by the Irish implementing legislation. Both Fennelly J. and Hardiman J., noted that the legislation did not take the form indicated by this Statement but introduced an explicit requirement that a decision be made to try a person. The phrase “bringing that person to trial” is much broader and permits of an interpretation which could in a suitable case lead to surrender when the investigative process is ongoing, although it would in all cases most likely be a matter of degree. There was a concern that persons sought should not be subject to long periods in detention while investigation was carried out in the issuing state.

**Is a conforming interpretation possible?**

**85.** Counsel argues that a conforming interpretation is not possible, and I would commence the discussion by observing that a conforming interpretation is not necessary provided Irish domestic legislation can be read in the way that respects mutual cooperation and the obligation to have regard to the purpose and intention of the Framework Decision. I read the judgment of O'Donnell J in *Olsson* as seeking a meaning that respects the Framework Decision and treats it as an interpretative tool, not because he thought s. 21A(1) is ambiguous and therefore required that the Court depart from a literal meaning, but because an interpretation required regard to be had to the stated objectives of the Act as a whole and because the principle of sincere cooperation could not be met by a narrow interpretation which failed to respect differences in legal systems in other Member States.

**86.** This means that a literal interpretation may not always yield the correct result if the purpose of the legislation could be frustrated by a narrow literal approach. The Act of 2003 admittedly imposes a more rigorous test for surrender than that found in the Framework Decision but can be, and has been, interpreted in a manner consistent with the Decision.

**87.** Much of the difficulty that arises from the interpretation, but more especially the application, of the Act of 2003, stems from the intersection between different systems and requirements in domestic criminal procedure, and not from any ambiguity or complexity in Irish legislation. Having regard to the recited purpose of the Irish legislation it could not have been intended that there would be excluded from surrender a request from many, if not most, EU Member States where the criminal law procedures require that a person be confronted with, and given an opportunity to respond to, allegations before a formal charge or decision to try is made. Very often in those circumstances it is the requested person's very absence from the requesting state that makes it difficult to characterise the particular stage which has been reached in the process. In some cases there does exist in the requesting state sufficient evidence to charge and try the requested person but the formal process cannot be



completed. *Olsson* is an illustration of a request where the facts permitted such conclusion, *Bailey* an illustration where, because surrender was requested to obtain that necessary evidence, the opposite conclusion was drawn.

**88.** What is required then is a scrutiny of the substance of the criminal procedure in the requesting state, such scrutiny to be engaged in a manner that respects the purpose of the Framework Decision itself to facilitate speedy and cooperative process for surrender and also one which respects the procedures in the requesting state. This is what the courts of England and Wales have described as a “cosmopolitan” approach, by which is meant that the process of applying domestic legislation, must not be so restrictive as to require conformity in both form and substance with domestic criminal procedure.

**89.** It was in that context that O’Donnell J. in his analysis of the concept of “decision” considered it to be synonymous with “intention”. He thought that no difference in meaning is to be discerned between an intention to bring proceedings and the decision to do so. It is difficult to discern what difference there might be if an intention is the result of the decision-making process, because a decision to charge and try a person is an expression of an intention to do so, the intention being formulated after an assessment of the factors required to be analysed.

**90.** The focus of a court in ascertaining whether the exemption for which s. 21A provides exists is a question of fact: has the decision to prosecute has been made? Intention may in some circumstances carry a connotation of conditionality, so that one speaks of an intention to do something if circumstances are correct. However one does not always thus qualify an intention, not all intentions are conditional, and while a statement of intention is an expression of a future state of affairs, intentionality is a present fact, as is fact of the making of the decision.

**91.** Counsel argues that while an intention is required for a decision to be made, an intention is not a decision. I disagree. In the context of surrender, an intention to do

something is a present expression and not merely of a proposal. In other words, a decision has been taken that something will be done. Intentionality, therefore, is not a state of mind that leads to a particular outcome, but is itself a fact.

**92.** A decision to try a person is a decision that he or she be sent forth for trial, and not a statement that the trial process has commenced. It cannot yet commence in Lithuania, as it could not in *Olsson* have commenced in Sweden, because of a procedural formality and mandatory step which remained to be taken. Thus a decision to try person is not coterminous with the fact that the trial has commenced, but is rather a state of facts or state of affairs which means that sufficient evidence exists or is thought to exist to put a person to trial. That was precisely what was missing in *Bailey*. It is useful to note that in *Puceviciene v Lithuanian Judicial Authority* the Divisional Court laid particular emphasis on the fact that what was required was a decision to charge and try a person not that the person had been charged and that the focus was on the word decision and not a form of act having been taken.

**93.** Finally it is worth commenting that at p. 57 of her judgment in the High Court Donnelly J. suggested that the criminal procedure in Lithuania which required that the accused person be given an opportunity to comment before the process is completed is a requirement of fairness. I accept that there was no direct evidence of this, but that proposition seems to me nonetheless to be correct. The evidence does point to the fact that the opportunity to respond as part of the bundle of rights that an accused has in the Lithuanian legal system: the prosecutor avers that the requirement to put the evidence to the requested person seeks “to implement the principles of fairness”. It is a reasonable and correct inference that this opportunity derives ultimately from the presumption of innocence, and this the perceived correctness of not bringing a person to trial unless evidence sufficient to try that person exists, as the criminal trial process which takes the presumption of innocence as its starting point ought not to expose a person to the rigours of a criminal prosecution and

the risk of conviction when evidence does not exist to support a view that the person has committed a crime.

**94.** On an application to surrender what the court must assess for the purposes of s. 21A is whether a present decision has been made or a present intention exists to prosecute the person, that is to charge and try him in accordance with the criminal procedures in the requesting state, and whether the requesting state has sufficient evidence to form that decision or intention. It is not permissible to surrender a person in order to gather that required evidence.

**95.** The answer to this appeal, therefore, lies in an analysis of the evidence in the present case.

**Analysis of evidence from Lithuania.**

**96.** The affidavits offered on behalf of the appellant suggest that there may not be sufficient evidence available to the Lithuanian Courts to enable Liam Campbell to be tried, and that the evidence collected in the case of his brother Michael Campbell might be accepted as evidence in his trial and that the appellant would thereby be deprived of the opportunity to examine the truth of that evidence, its fairness and/or its reliability. That has been refuted by the Lithuanian authorities who say they do have sufficient evidence, that the evidence will be fully tested at trial, and that there is no risk that the evidence garnered against Michael Campbell is part of the bundle of evidence on foot of which the European Arrest Warrant issued or which forms the basis for the assertion that a decision has been made to charge and try Liam Campbell for the offences. The third paragraph on p. 6 of the response from the Lithuanian authorities says that there is “sufficient evidence” to allow them to “suspect that Liam Campbell has committed criminal offences described in the European Arrest Warrant.”

**97.** In that context the word “suspect” may be seen to carry a stronger connotation than the word sometimes has in the English language, in that the suspicion is linked to the

evidence which the Lithuanian authorities say they do have and which is sufficient to charge and try the appellant. Accordingly in my view, one must read that sentence as saying that Lithuania believes it has sufficient evidence to regard Mr. Campbell as a suspect and has sufficient evidence to put before a court.

**98.** The answer must be taken as meaning that the Lithuanian authorities do not think it necessary to seek the surrender of Mr. Campbell to gather further evidence before prosecuting him for the crimes in question. On that basis he is not sought for questioning so that the evidence may be gathered to try him. That evidence is already available.

**99.** The answer continues by saying that the Vilnius City District Court was satisfied that it had sufficient evidence to draw up an official “notification of suspicion”, a document which seems to have the broad purpose of an indictment in Irish law. Further, that District Court has imposed a “constraint measure of arrest”, as that Court was satisfied it had sufficient evidence to direct that he be arrested and held on foot of that charge.

**100.** The explanation from the Lithuanian authorities goes on as follows: the evidence gathered allows the Lithuanian authorities to come to the conclusion that “in the case of his surrender there is a high probability that a Bill of Indictment would be drawn up against Liam Campbell, that is, charges would be brought against this person and the case referred to the court”.

**101.** The obvious question is whether a “high probability” is equivalent to or means that a decision has been made, or an intention formed, that he would be charged and tried. This decision or intention is subject only to the taking of a procedural and formal step, which can or could lead to the reversal of the decision and to a conclusion that the account given by an accused person of his movements or his response to question and evidence is persuasive and sufficiently convincing to result in a dropping of charges.

**102.** The appellant argues that while there is evidence that he is a “suspect” a “high probability” that he will be tried cannot mean that a decision to put him on trial has in fact

been made, and indeed the appellant argues that the use of that language is a tacit acceptance that a decision has not yet been made.

**103.** I accept in broad terms the argument made by Mr. Campbell's counsel that s. 21A asks the Court to consider whether as a matter of historic fact a decision has been made to try and charge a person. The Act in clear terms precludes surrender for the purpose of investigation, but also precludes surrender when no decision has been made to charge and try the person. Surrender is for the purpose of bringing a person to trial. The making of a decision that this be done is crucial and central to the analysis.

**104.** The circumstances here are materially different from those prevailing in *Bailey*. Mr Bailey was certainly a suspect in one meaning of the word, but the French authorities conceded that he was not yet a suspect in the sense in which it could be said that it was believed on the evidence that he had committed the crime of murdering Mme. du Plantier.

**105.** Lithuania has said it has sufficient evidence to treat Mr. Campbell as a suspect for the crime, and that all of the data collected to date allows it to conclude that, once that evidence is presented to him for comment, he will be charged and tried on the entirety of that evidence. Its assertion that he will be so tried and charged is not based on an assumption that further evidence will be collected or needs to be collected, but rather that there now exists enough evidence against Mr. Campbell to try and charge him in Lithuania. There remains a procedural step to be taken but that procedural step is not the step of deciding to try and charge the appellant but the actual charging of that person and the actual sending forth to trial of him or her. It is those procedural steps that have not yet happened and the Lithuanian authorities have said that they are satisfied that the evidence gathered to date is sufficient for the process to happen.

**106.** It seems to me that the Lithuanian authorities have shown that sufficient evidence now exists for them to be satisfied that Liam Campbell is properly speaking a suspect.

**107.** That evidence must be seen in the light of the presumption in s. 21A(2), and to say that there is a “high probability” that Mr. Campbell will be brought to trial is not to express a contingency that he will be brought to trial if certain things happen, but expresses the possibility that the present decision to try him and the present intention to do so may be reversed, or may be frustrated by, for example, the loss of evidence or the death of an important witness. One might express some disquiet if a requesting authority stated that it was “certain” that the requested person would be tried, as such a level of certainty is inconsistent with the presumption of innocence and fair procedures, and could not on any understanding of criminal procedures be a reliable statement. Events happen and choices are made in the light of events, including fresh and compelling evidence that mandates that the trial not go ahead, or that the process be discontinued.

**108.** The presumption means that it is for the requested person to establish that a decision to try and charge him or her has not been made by the requesting state. The test is met on the civil standard of the balance of probabilities, and that means in the present case that the appellant would have to establish evidence or argument that on the balance of probabilities the Lithuanian authorities had not made a decision to try and charge him. The evidence points the other way: an intention exists to try and charge him, a decision has been made this will be done, and on the balance of probabilities it will happen. Indeed the evidence is that as a matter of high probability this will happen. At its height the appellant’s argument is that he may not be charged and tried and that the ultimate result of the process is unclear. That argument is not sufficient to rebut the presumption and the evidence supports the proposition that he will be tried and charged. The test in the legislation does not require proof that a person will *certainly* be tried and charge, but that a decision has been made that this will happen. A decision that a future event will occur can never be a statement that the event will certainly happen .

**109.** The argument of the appellant regarding the evidence of the Lithuanian authorities is not sufficient to rebut the presumption, because it amounts to an argument that there is an absence of certainty. To put it another way, it is an argument that a high probability that Mr Campbell will be charged and tried is insufficient to form a basis for his surrender to Lithuania. Because of the legislative presumption the appellant would have to do more than argue that the Lithuanian authorities would be required to establish a certainty that he will be tried and charged. The test for this Court is whether an intention exists to charge and try Mr. Campbell, and that taking all of the evidence his surrender is not sought in order to question him before a decision or intention can properly be formed. The Lithuanian authorities have shown on evidence that the investigative process has led them to a position where they have made a decision and formed an intention to try and prosecute Mr. Campbell, his return is not sought to gather evidence against him, and on the balance of probabilities he will be tried in charged on the evidence that now exists.

**110.** Section 21A is not a direct reflection of the Framework Decision and it does impose a higher burden than that which the Framework Decision itself provides. There is no requirement that the interpretation of s. 21A be read in strict conformity with the Framework Decision, but it must in its application not result in an interpretation that is so narrow that it manifestly fails in almost all cases of requests from civil law countries to achieve its purpose of mutual cooperation and speedy surrender. Such an interpretation would fail equally to respect the purpose recited in the Long Title to the Act. O'Donnell J. in *Olsson* thought that it would be “surprising” if the Framework Decision or the Act were to be interpreted in such a way as to prevent surrender when that last stage in the process had not been concluded, especially when the requesting authority had in the warrant itself and in sworn evidence in the case stated that a warrant had issued for the purposes of intending a criminal prosecution, and not merely for the purposes of continuing or completing the investigative process.

**111.** In my view, s. 21A must be given a workable interpretation which makes allowances for the diversity of the different legal systems comprising the European Union. It cannot be interpreted to mean that surrender can *never* take place unless the requesting State gives a form of solemn undertaking to prosecute the accused, come what may. Absent very clear words, the Oireachtas must be taken as having intended that s. 21A could admit of application to the variety of different legal systems from which EAWs can emanate.

**112.** So it is the case here. It is clear that the Lithuanian prosecutors presently intend to prosecute Mr. Campbell, but just as was the case with regard to the Swedish system in *Olsson*, no final decision to this effect can properly be taken by them until the charges are formally put to the accused given that such is required by Lithuanian law. Just as in *Olsson*, but unlike the situation in *Bailey*, the request is not to enable the authorities question the suspect or conduct a form of evidence gathering. There is on the facts an intention to prosecute in the sense required by s. 21A because, just as in *Olsson*, the prosecuting authorities in both instances had, or have, committed themselves to a prosecution to the greatest extent currently possible under their respective legal systems.

**113.** That does not mean that an interpretation or application of the Act must be strained, but it does mean that an overly technical analysis which demands conformity with Irish criminal process is inappropriate and wrong. Thus there may be a degree of flexibility in the application of s. 21A provided that does not offend its meaning and purpose.

**114.** An inference that a decision has been made on surrender to try or charge a requested person is not sufficient. Section 21A requires that the High Court refuse surrender if no decision to charge and try has been made, the presumption makes that fact a starting point provided the other procedural requirements are met, and if evidence is adduced the permits the requested court to conclude that a decision has not been made, or that the evidence is such that the best the court can do is draw an inference from circumstances, the legislation in its terms must be interpreted as meaning that surrender is precluded.



**115.** The present appeal does not require an inference to be drawn that Mr. Campbell will be tried and charged. The evidence goes considerably further, and points to a present decision by the Lithuanian authorities that he will be charged and tried, and that there is a high probability that the decision will in due course be realised and the trial proceed following the completion of the mandatory preliminary questioning.

**116.** The appellant has not rebutted the presumption and the appeal should be dismissed.