



**THE COURT OF APPEAL**

**Edwards J.  
Kennedy J.  
Binchy J.**

**Neutral Citation Number [2021] IECA 219**

**Court of Appeal Record No: 2020/144**

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

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**-V-**

**LIAM CAMPBELL**

**APPELLANT**

**JUDGMENT delivered by Mr Justice Edwards on the 28th of July, 2021.**

**Introduction**

1. This is an appeal against the judgment of Donnelly J. of the 20th of June, 2020, and her subsequent order perfected on the 13th of July, 2020, directing pursuant to s. 16(1) of the European Arrest Warrant Act, 2003, as amended, that the appellant should be surrendered to such person as is duly authorised to receive him on behalf of the Republic of Lithuania to face trial in respect of three offences the subject matter of a European arrest warrant issued by a judicial authority in Lithuania and dated the 26th of August, 2013, ("the EAW") on foot of which the appellant's rendition was sought.
2. The appeal involves a net issue, the High Court having certified, for the purposes of s. 16(11) of the Act of 2003, that its decision involved points of law of exceptional public importance and that it was desirable in the public interest that an appeal should be made to an appropriate appellate court. The points certified were:
  - 1) *Is section 21A (of the Act of 2003) amenable to a conforming interpretation with the Framework Decision so that an intention to put a respondent on trial is coterminous with a decision to put the respondent on trial for the purposes of section 21A?*
  - 2) *Is it necessary to demonstrate exceptional circumstances before the court would make a finding of abuse of process?*
  - 3) *Is there a necessity to demonstrate mala fides before the court will make a finding of abuse of process?*
  - 4) *Does a finding of abuse of process require the court to refuse surrender?*

3. The appellant has now appealed to this Court but confines his appeal to the first of the certified points.

### **Background to the appeal**

4. The EAW in this case sought the rendition of the appellant to face trial in Lithuania in relation to three offences, namely:
  - i. preparation for a crime under Article 21(1) and Article 199(2) of the Criminal Code of Lithuania ("the Lithuanian Criminal Code") which has a maximum potential sentence of imprisonment/detention for up to ten years;
  - ii. terrorism under Article 250(6) of the Lithuanian Criminal Code which has a maximum potential sentence of imprisonment/detention for up to twenty years; and,
  - iii. illegal possession of firearms under Article 253(2) of the Lithuanian Criminal Code which has a maximum potential sentence of imprisonment/detention for up to eight years.
5. The facts alleged are succinctly summarised in paragraph 2 of Donnelly J.'s judgment of the 26th of June 2020:

*"Further details of the three offences are described in part (e) of the European Arrest Warrant. The respondent is alleged to have made arrangements, while acting in an organised terrorist group, the Real Irish Republican Army ("RIRA"), to acquire a substantial number of firearms and explosives from Lithuania and smuggle it into Ireland. The EAW states that during the period from the end of 2006 to 2007, the respondent made arrangements with Seamus McGreevy, Michael Campbell (his brother), Brendan McGuigan and other unidentified persons ("named persons") to travel to Lithuania for the purposes of acquiring firearms and explosives, including, automatic rifles, sniper guns, projectors, detonators, timers, trotyl, and to return them to Ireland, without specific permission from the Lithuanian authorities and without declaring them to the Irish customs. In the middle of 2007, the respondent organised conspiracy meetings concerning the logistics of how to acquire the firearms and explosives and provided money for the purchase of the weapons to the named persons and instructed them to go to Lithuania to test the weapons, purchase them, arrange training of how to use the weapons with the weapons dealer, and return them to Ireland without the detection of custom. In this way, the EAW states that the respondent, together with the named persons, provided support to the terrorist group."*

6. Numerous grounds of objection to the appellant's surrender were argued and relied upon before the High Court. However, in this appeal the sole issue in controversy is the High Court's rejection of the appellant's objection to his surrender based upon s. 21A of the Act of 2003. In substance, the appellant maintained before the High Court, and continues to maintain, that he is wanted by the requesting state in connection with its investigation

into alleged crimes and that there has not been a decision in his case to charge and try him with the offences the subject matter of the EAW. He says that in those circumstances the High Court ought to have refused to surrender him in reliance on s. 21A of the Act of 2003, and that it was in error in ordering his surrender.

### **The relevant statutory provision**

7. S. 21A of the Act of 2003, provides:

- "(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."*

### **Other legislative provisions of potential relevance**

8. S. 10 of the Act of 2003 deals with the obligation to surrender, and in the form in which it was enacted at the time of the decision in *Minister for Justice v Olsson* [2011] 1IR 384 it provided:

- "10. Where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person—*
- (a) against whom that state intends to bring proceedings for an offence to which the European arrest warrant relates,*
- (b) who is the subject of proceedings in that state for an offence in that state to which the European arrest warrant relates,*
- (c) who has been convicted of, but not yet sentenced in respect of, an offence in that state to which the European arrest warrant relates, or*
- (d) on whom a sentence of imprisonment or detention has been imposed in respect of an offence in that state to which the European arrest warrant relates,*

*that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing state."*

9. It should be noted in passing that the words "*and the Framework Decision*" on the penultimate line were removed by s. 5 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act, 2012, to address persistent criticisms, in cases such as *Minister for Justice, Equality and Law Reform v*

*Altaravicius* [2006] 3 I.R. 148 and *Minister for Justice, Equality and Law Reform v Rimsa* [2010] IESC 27, that requiring compliance with both the domestic statute and the Framework Decision was fraught with potential for difficulty in circumstances where the transposing legislation and the Framework Decision might not necessarily be completely in sync (an entirely possible and permissible situation in circumstances where the Framework Decision was not directly effective and it was up to each member state to transpose it in their own way). To have required compliance with both the domestic statute and the Framework Decision was characterised, in the words of Murray C.J., in *Altaravicius* as being “an idiosyncratic method of legislating.” However, as of the date of the Supreme Court’s decision in *Olsson*, i.e., in January, 2011, s. 10 of the Act of 2003 had not yet been amended in that respect.

10. It is also appropriate under this heading to draw attention to Article 1 of the Framework Decision, which is in the following terms:

*"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.*
2. *Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.*
3. *This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."*

**The legal battle lines on this appeal**

11. In terms of relevant jurisprudence there are two leading cases in which the Supreme Court has considered s. 21A in detail, namely *Minister for Justice, Equality and Law Reform v Olsson* [2011] 1 I.R. 386 and *Minister for Justice, Equality and Law Reform v Bailey* [2012] 4.I.R. 1. The appeal was opened to us on the basis that a tension exists between the *Olsson* and *Bailey* decisions, and that the appellant would seek to make the case before us that *Olsson* was wrongly decided. In thus laying out his stall, counsel for the appellant stated:

*"One thing I should say at the outset is we are not entirely unconscious of the rules relating to precedent, of stare decisis and so on. And we do appreciate that ultimately that may be a question that is better addressed in another forum. But nonetheless, we say there is a basis for the making of the argument, and we will bring the Court through that".*

12. The core point relied upon by the appellant in support of his contention that the suggested tension exists, and that *Olsson* was wrongly decided, rests on O'Donnell J.'s statement at paragraph 32 of his judgment in *Olsson* that:

"... the concept of the "decision" in s. 21A should be understood in the light of the "intention" referred to in s.10 of the Act of 2003 and the "purpose" referred to in Article 1 of the Framework Decision".

13. The appellant's case is that there must be considerable doubt over certain of the underlying assumptions made by O'Donnell J. in relation to the applicability of the principle of conforming interpretation in circumstances where the genesis of s. 21A is to be found in a statement made on behalf of Ireland at the time of the adoption of the Framework Decision (as described by Hardiman J. in his judgment in *Minister for Justice Equality and Law Reform v. Bailey* [2012] 4.I.R. 1 at 74 [paras 299 to 301], and by Fennelly J. in the same case at 117/118 [para 477]) rather than in the Framework Decision itself. It is suggested that this is particularly in circumstances where the terms of s. 21A run contrary to the express requirements of the Framework Decision in that they appear to impose a wholly extraneous bar to surrender by reason of domestic constitutional requirements. As such, the appellant contends that rather than reading s. 21A as a section which must conform with the Framework Decision, the opposite is the case - that it is a piece of Irish law which runs deliberately contrary to the express requirements of the Framework Decision. The appellant maintains that in those circumstances it was untenable to apply a conforming interpretation to s. 21A as O'Donnell J. had purported to do.
14. It should be noted that while this is the first time that it has been argued at appellate level that the *Olsson* decision is incompatible with that of *Bailey*, and was perhaps wrongly decided, that argument was run before the High Court some years ago and rejected in the case of *Minister for Justice and Equality v. Connolly* [2012] IEHC 575. In both *Minister for Justice and Equality v. Jociené* [2013] IEHC 290 and in *Minister for Justice and Equality v. Holden* [2013] IEHC 62, the views expressed in *Connolly* were again quoted and reiterated.
15. The appellant has a fall-back position, namely that even if *Olsson* was correctly decided, the decision of the trial judge in this case was, in effect, against the weight of the evidence. In *Jociené*, the High Court judge, having rejected the argument that the *Olsson* and *Bailey* decisions were not capable of being reconciled, went on nevertheless to conclude that, on the evidence before him, he was obliged to refuse surrender having regard to the terms of s. 21A of the Act of 2003. The appellant in the present appeal says that the trial judge should have approached the analysis of the evidence before her in the same manner as the High Court judge in the *Jociené* case had analysed the evidence before him; and maintains that if she had done so she would also have concluded that surrender should be refused on s. 21A grounds. As we shall see, the trial judge in the present case felt that the circumstances of *Jociené* were distinguishable from those of the present case.

16. In the present appeal, the respondent (i.e., the Minister) supports the High Court judge's conclusion in *Jocienė* (and in *Connolly* and *Holden*) that there is in fact no tension between *Olsson* and *Bailey*, but paradoxically contends that that case was ultimately wrongly decided on the merits. This argument was advanced before us notwithstanding that the Minister did not seek to appeal the refusal of surrender on s. 21A grounds in the *Jocienė* case.

### **Relevant Evidence before the High Court**

17. The relevant evidence, at least from the appellant's perspective, is well summarised in paragraph's 5 to 7 of the appellant's written submissions, the accuracy of which is not contested, and it is therefore convenient to adopt that summary:
- "5. *The European arrest warrant provides on its face, at page 3 of the translated copy, that the Appellant is "suspected of criminal offences." As set out in the affidavit of Ms Ingrida Botyrienė dated 9 April 2017 (a Lithuanian lawyer providing evidence on behalf of the Appellant) the Criminal Procedure Code in Lithuania (CPC) effectively provides three main procedural steps: a pre-trial investigation, the presentation of an indictment at the end of the pre-trial investigation and (if applicable) a conviction. The CPC provides that the suspect is a participant in the pre-trial investigation and requires that they must be recognised as a suspect if there are facts which justify "the minimal possibility" that the person committed a criminal act and the prosecutor subjectively believes in it. The affidavit further provides that the prosecutor is entitled to break off the pre-trial investigation when satisfied that there is not enough evidence to bring a case against a person or there is not enough evidence to establish a criminal act or there are other obstacles.*
6. *The affidavit further sets out that where the prosecutor is satisfied that there is sufficient information gathered during the pre-trial investigation of the criminal culpability of the suspect for committing a criminal act, the prosecutor will draft and present an indictment. When an indictment is drafted and presented to the person and the court, the suspect is then categorised as an accused. Thus, it is upon the decision made by the prosecutor that the suspect becomes an accused person who is a party to judicial proceedings. Ms Botyrienė expresses the opinion that if the Appellant is surrendered to Lithuanian, it is only "if there was sufficient information gathered in the pre-trial investigation of Liam Campbell having committed a criminal offence, that a decision would be made by the prosecutor to put him on trial, to draft and present an indictment and to then categorise the suspect as an accused.*
7. *In light of her detailed knowledge of the facts of this case, having represented a co-accused, Ms Botyrienė expresses the view that the evidence as against the Appellant in this case is likely to be much more limited than the case against the said co-accused and it is her view, having regard to the very substantial differences between the two cases, that "it will undoubtedly be the case that pre-trial investigation will be required." She therefore concludes that Lithuania seeks the*

*Appellant for the purposes of an investigation and consequently no decision appears to have been made at this stage to have the Appellant charged and put on trial and same will await the conclusion of the pre-trial investigation which has yet to take place."*

18. From the Minister's perspective, she attaches importance to the response, dated the 10th of May, 2005, of the Lithuanian authorities to a request for additional information from the Irish Central Authority dated the 2nd of May, 2005. The Central Authority's letter had asked (*inter alia*):

*"(iii) The respondent [i.e., the appellant in this appeal] argues that his surrender is precluded by reason of section 21A of the European Arrest Warrant Act 2003 (as amended) in circumstances where no decision to try the respondent has been made (see point 10 of the Points of Objection). In support of this point, the respondent seeks to rely upon the affidavit of Ingrida Botyrienė, dated 9th April 2017.*

- *Please confirm that at the time the warrant was issued there was an intention on the part of the prosecutor to charge and try the respondent.*
- *Please also confirm that evidence exists against the respondent which is sufficient to enable the respondent to be charged and put on trial if he is surrendered to Lithuania and that is the present intention of the relevant authority in Lithuania.*

*Under Irish law (Section 21A of the European Arrest Warrant Act 2003) it is not possible to surrender a person under a European arrest warrant if no decision has been made in the requesting state based on sufficient existing evidence to charge the person with the offences and also to put him/her on trial for the offences included in the EAW.*

*It is important to note that notwithstanding that there may be at present intention to charge and try the respondent, the investigation into the commission of the offence can be continued and indeed the decision to charge and try the respondent could be changed. However, what has been held by the Irish Supreme Court to be impermissible is for a person to be sought pursuant to an EAW for the purpose of securing sufficient evidence to charge and try the person once they are surrendered."*

(Commentary in square brackets is by this Court.)

19. The letter indicating the response of the Lithuanian authorities dated the 10th of May, 2015, is lengthy and detailed covering many issues relied upon by the respondent to object to his surrender, including, but by no means confined to, the s. 21A objection. Insofar as it related to the s. 21A objection it stated:

*"Thank you very much for your cooperation in criminal case No.10-9-00105-07, the investigation of which is being conducted under Article 21 paragraph 1, Art. 199*

*paragraph 2, Art. 250 paragraph 6, Art. 253 paragraph 2 of the Criminal Code of the Republic of Lithuania (CC RL), i.e. on illegal disposal of considerable amount of powerful firearms, ammunition, explosive devices and substances, the attempt to conduct smuggling thereof, and the support to the terrorist group. We want to confirm that the pretrial investigation in respect of Liam Campbell and Brendan McGuigan is still underway.*

*I refer to the Affidavits of Liam Campbell, Lawyer Ingrida Botyrienė and that of Michael Campbell, and our position is that the presented statements are inaccurate and incorrect due to the following reasons and motives.*

...

*The affidavits put forward an opinion that there are no sufficient data (evidence) regarding the participation of Liam Campbell in the commission of the crimes and that the surrender of Liam Campbell for the law enforcement authorities of the Republic of Lithuania has been requested for investigation purposes only. ... .*

*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 the measures of criminal proceedings we are seeking to implement the principle of "fairness".*

### **The High Court's judgment on the issue**

20. In the course of her judgment, the trial judge quoted the following passage from the High Court's earlier judgment in *Minister for Justice and Equality v Holden* [2013] IEHC 62:

*"44. In Holden, Edwards J. stated as follows:*

*"The Court sees no reason to deviate from the view that it expressed in the Connolly case that Olsson was not overturned or significantly modified by Bailey and that it remains good law. To be fair to counsel for the respondent he has not suggested otherwise. However, to the extent that he has submitted that the Olsson approach was "refined" in Bailey I do not regard that as being a correct characterisation, and I think it is an over-statement. In this Court's view it is more correct to say, as counsel did acknowledge later on in his submission, that the Supreme Court in Bailey took the opportunity to reiterate and stress, or lay particular emphasis upon, a number of matters that had previously been alluded to*



*by O'Donnell J. in his judgment in Olsson; and, in addition, to set out the background to the enactment of s. 21A (to which O'Donnell J. had not specifically alluded in his judgment in Olsson) as evidenced within the travaux préparatoires relating to the Proposal for a Council Framework Decision on the European arrest warrant, and in particular the Statement by Ireland contained within a document entitled "Corrigendum to the Outcome of Proceedings", 6/7 December 2001, and dated 11th December, 2001, in which it is asserted that "Ireland shall, in the implementation into domestic legislation of this Framework Decision, provide that the European Arrest Warrant shall only be (sic) executed for the purpose of bringing that person to trial or for the purpose of executing a custodial sentence or detention order".*

21. The trial judge observed that, *"[i]n my view, the above quotation from Edwards J. deals with the issue that Olsson overturned, significantly modified or even refined Bailey. This Court is therefore bound to apply the law as the Supreme Court has found in both Olsson and Bailey"*.
22. The trial judge attached importance to the presumption in s. 21A (2) and proceeded on the basis that it was for the respondent to prove that no decision was made to charge or try him in Lithuania. She considered that the use of the phrase *"suspected of criminal offences"* in the response dated the 10th of May, 2015, did not overturn the presumption, drawing support for her view from O'Donnell J.'s approach to the use of language in Olsson, who in turn had followed that of Lord Steyn in the UK House of Lords in the case of *Re Ismail* [1999] 1 A.C. 320.
23. At paragraph 32 of his judgment in *Olsson*, O'Donnell J. had indicated that the concept of the *"decision"* in s. 21A should be understood in the light of the *"intention"* referred to in s. 10 of the Act of 2003 and the *"purpose"* referred to in Article 1 of the Framework Decision. Having noted this observation, the trial judge in the present case went on to quote the *ipsissima verba* of paragraphs 33 to 35 inclusive of O'Donnell J.'s judgment in *Olsson*. The learned Supreme Court judge had suggested, *inter alia*, that, *"[t]he requirement of the relevant decision, intention or purpose can best be understood by identifying what is intended to be insufficient for the issuance and execution of a European arrest warrant"*; making it clear that, *"[a] warrant issued for the purposes of investigation of an offence alone, in circumstances where that investigation might or might not result in a prosecution, would be insufficient"*. However, in that regard, the existence in that case of a stated intention on the part of the Kingdom of Sweden to bring (criminal) proceedings against the requested person, for which purpose they had issued the EAW, was *"virtually coterminous with a decision to bring proceedings sufficient for the purposes of s.21A"*. That result was not altered,

*"... by the fact that there may be a continuing investigation, or indeed that such investigation will be assisted by the return of the requested person.*

*It would be entirely within the Framework Decision and the Act if, after further investigation, the prosecution authorities decided not to prosecute because, for*

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

24. The trial judge ultimately determined the s. 21A issue arising in the present case as follows:

- "50. *In my view, the most appropriate manner in which this Court should assess whether s. 21(A) prohibits surrender is to proceed as follows: in the first place the Court must accept the presumption contained in s. 21(A) that a decision to charge and try this respondent has already been made. Then the Court must proceed to assess whether there is cogent evidence to the contrary (see Minister for Justice v. McArdle [2014] IEHC 132). If the Court is satisfied that the presumption that a decision has been made to charge him has not been rebutted, the Court should proceed to assess whether the presumption that a decision has been made to try him has been rebutted. The Court must bear in mind that the issue in respect of whether no such decision either express or implied to put the appellant on trial (or to charge him) has been made is "a fairly net issue of fact" (as per Murray J. in Bailey when dealing with the question of decision to try).*
51. *In this case, there is a statement that the proceedings were issued for the purposes of conducting a criminal prosecution. It is also clear that a district judge in Vilnius has given a decision that he should be arrested in respect of these matters. Nothing Ms. Botyriene has submitted amounts to cogent evidence that no decision has been made to charge this respondent.*
52. *In respect of the respondent's submission that the evidence reveals that no decision has been made to try him, the respondent laid great emphasis on the finding of Edwards J. in Jocienė. In the view of this Court, the High Court as an executing judicial authority, must be wary of treating a decision made on the facts of that particular case, as binding on the High Court on the basis of the principle of stare decisis. Issues of law such as the decision by Edwards J. as to the impact of the decision of the Supreme Court in Bailey of that of the earlier decision in Olsson is binding on this Court. A decision on the facts may also be binding where precisely identical issues of fact arise and the Court has made a determination of law based*

*on those facts. That is different from cases where the facts are different, and in those cases the appropriate approach of the Courts is to apply the law as previously determined to the facts as the Court finds them.*

53. *It is unnecessary to set out in any great detail the facts in the Jocienė case, save to say that the statements as to the law in Lithuania, and more importantly as to the factual position with regard to the respondent in that case and the respondent in this case, are different. In particular, in the Jocienė case, the issuing judicial authority had stated as follows: 'If A. Jocienė was surrendered to Lithuania on the grounds of the EAW and there was sufficient information gathered in evidence of her committing the crime specified in Section (e) of the EAW, then she would be put on trial (for the first offence) and recognised as an accused.'*

54. *As Edwards J. stated:*

*'That response is highly contingent and is strongly indicative that a decision to try the respondent has not yet been taken. It suggests that more evidence has yet to be gathered and that it will only be at a point in the future where it is adjudged that sufficient evidence implicating her in the crime has been gathered that a decision will be taken to put her on trial. It invites the inference that that point has not yet been reached, and that in fact no decision has yet been taken to try her. I am prepared to draw that inference and to hold that the conjunctive requirements of s.21A (1) of the Act of 2003 have not been met in this case. While the evidence establishes that there has indeed been a decision to charge the respondent, the evidence does not establish that there has been a decision to try her. The evidence is in fact to the contrary, and in circumstances where the s. 21A (2) presumption stands rebutted, I am satisfied to hold that a decision has not been made to try the respondent for the first offence on the warrant in the issuing state. In the circumstances, I am obliged in accordance with s. 21A (1) to refuse to surrender the respondent.'*

55. *Counsel for the Minister has submitted that on the facts as set out in that case, the decision in Jocienė was wrongly decided. No appeal was taken in the case of Jocienė and it appears that leave for such an appeal was not sought. On that basis, it is a surprising submission from the Minister. More importantly however, it is not for this Court to review the correctness or otherwise of the decision that Edwards J. took in Jocienė. In my view, my duty is to consider the facts before me and apply the law as set out in Olsson and Bailey to them.*

56. *There is no statement in the present case that equates with the statement made by the issuing judicial authority in Jocienė. Indeed, the statement is to the contrary. The statement of the issuing judicial authority on the contrary, shows that the issuing judicial authority, namely the prosecutor, has sufficient evidence which allows them to suspect the respondent of having committed the alleged offences. That has led to the Vilnius court imposing a constraint measure of arrest upon him*

*having considered the official notification of suspicion. In addition, in the present case, the issuing judicial authority state that there is a high probability that a bill of indictment would be drawn up against the respondent; that charges would be brought against him and the case referred to the Court. That is stated in the context of the law concerning pre-trial investigation in Lithuania. As set out above, the principle of fairness in Lithuania requires the pre-trial investigation judge to consider matters placed before him, including the evidence from witnesses for the respondent. That has never been contested by the expert for the respondent.*

- 57. In the present case, the respondent has never presented evidence that no decision in this case has been taken to charge him with or try him for the alleged offences. The expert on the contrary has set out the fact that a system which is not similar to the Irish criminal justice system operates in Lithuania. This incorporates a pre-trial investigation stage and the presentation of an indictment at the end of that stage and if applicable a conviction after trial. She has not stated that a decision cannot be taken which is coterminous with an intention to try the respondent on these offences. On the contrary, the evidence in the case including that by reply from the issuing judicial authority, demonstrates an intention to put the respondent on trial as is indicated by the fact that there is a high probability that a bill of indictment will be lodged against him. The Lithuanian proceedings require this step of the pre-trial proceedings and the import of what this Court has been told by the issuing judicial authority, and indeed by the respondent's expert, is that the step to indict him cannot proceed without the finalisation of the pretrial investigation stage.*
- 58. This is not a situation where the issuance of the EAW has been for the prohibited step of only carrying out an investigation. Instead, the EAW has been issued with a view to putting him on trial for these matters, but Lithuanian law requires that he has an opportunity to present his case during the investigative stage and it must also be said that the prosecution have also an entitlement to present evidence at that point.*
- 59. In my view, this case is entirely unlike the factual situation that applied in the Bailey case. In the case of Bailey, a key statement from the French authorities had been sent to the Supreme Court that "it must be clearly understood that the evidence in the case, supporting the charge against [the appellant] or exonerating him, is not complete." It was also emphasised that the investigation stage was not complete and no decision to try the appellant would be made until it was complete. Therefore, in that case there had been an express statement that no decision to try him had actually been made. On the contrary in this case, the evidence does not substantiate that. In fact, Ms. Botyriené had referred to very substantial differences between the case of this respondent and that of his brother Michael Campbell and that having regard to those differences, "it would undoubtedly be the case that pre-trial investigation will be required." The issuing judicial authority have contradicted that statement and have in fact stated that it is highly probable that he would be put on trial. That statement of Ms. Botyriené raises the very clear inference that it*

*is not every case which requires pre-trial investigation. That undermines any contention by the respondent that Lithuanian law operates in such a manner that because of their pre-trial investigation requirement that no respondent could ever be surrendered until that was completed and a bill of indictment had been drawn up. On the contrary, each case must be assessed separately and in this case the issuing judicial authority has laid to rest any possible doubts, even though this Court in fact did not have doubts, that no decision had been made to charge and try this respondent.*

60. *Therefore, I am satisfied that the respondent's surrender is not prohibited by the provisions of s. 21(A) of the Act of 2003".*

### **Submissions**

25. Both sides have filed helpful written submissions for which the Court is grateful, and which it has found to be of assistance. These written submissions were supplemented and amplified where necessary by oral argument. We will refer to same to the extent that we consider necessary in the final section of this judgment.

### **The Court's Analysis and Decision**

26. We consider it appropriate to quote in full what O'Donnell J. had to say in *Olsson* concerning what he viewed as the correct approach to the interpretation of s. 21A. He said [at paras 26 to 32 inclusive]:

*"[26] The issue here, however, is not merely one of the evidence before the court. As is apparent, s. 21A (2) of the Act of 2003, as inserted by s. 25 of the Act of 2005, contains a presumption that a decision has been made to charge the person and try him or her for the offence. Furthermore, the opening lines of the European arrest warrant itself, request that the person mentioned below 'be arrested and surrendered for the purposes of conducting a criminal prosecution ...' That statement, and the further statements made in Ms. Maderud's affidavit in relation to the practice of the Kingdom of Sweden, must also be read in the light of recital 10 of the Framework Decision which describes '[t]he mechanism of the European arrest warrant [as being] based on a high level of confidence between Member States'. It is clear, therefore, that cogent evidence is required to raise a genuine issue as to the purpose for which a warrant has been issued and surrender sought. This was emphasised in the judgment of Murray C.J. in *Minister for Justice v. McArdle* [2005] IESC 76, [2005] 4 I.R. 260 at p. 268: -*

*'[24] The European Arrest Warrant Act 2003 gives effect in this jurisdiction to the European Council Framework Decision of the 13th June, 2002, on the European arrest warrant and the surrender procedures between member states. The recitals to that decision make reference to the implementation of "the principle of mutual recognition of criminal proceedings" and in particular recital number 6 which states "the European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European*

*Council refer to as the 'cornerstone' of judicial cooperation". Accordingly, it seems to me that where a judicial authority of a member state issues a European arrest warrant and that is accompanied by a certificate referred to in s.11(3) of the Act of 2003, both of which state and certify respectively, that the surrender of the person named in the warrant is sought for the purpose of prosecution and trial, that must be acknowledged as at least prima facie evidence of the purpose for which the request is made. It would, in my view, 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.'*

[27] Murray C.J. also observed, at pp. 266 to 267:-

*'[19] ... The surrender of a person for purpose of prosecution and trying him or her on a criminal offence means that the decision taken by the relevant authority to prosecute and try that person is not contingent on the outcome of further factual investigation. That requirement does not of course preclude the pursuit of any continuing or parallel investigation into the circumstances of the offence. It means that the decision to prosecute is not dependant on such further investigation producing sufficient evidence to justify putting a person on trial.'*

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

*'Given the divergent systems of law involved, and notably the differences between criminal procedures in the United Kingdom and in civil law jurisdictions, it is not surprising that the legislature has not attempted a definition [of the word "accused"] ... It is, however, possible to state in outline the approach to be adopted. The starting point is that "accused" in s. 1 of the Act of 1989 is not a term of art. It is a question of fact in each case whether the person passes the threshold test of being an "accused" person. Next there is the reality that one is concerned with the contextual meaning of 'accused' in a statute intended to serve the purpose of bringing to justice*

*those accused of serious crimes. There is a transnational interest in the achievement of this aim. Extradition treaties, and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permits it in order to facilitate extradition: Reg. v. Governor of Ashford Remand Centre, Ex parte Postlethwaite [1988] A.C. 924, 946-947. That approach has been applied by the Privy Council to the meaning of "accused" in an extradition treaty: Rey v Government of Switzerland [1999] A.C. 54, 62G. It follows that it would be wrong to approach the problem of construction solely from the perspective of English criminal procedure, and in particular from the point of view of the formal acts of the laying of an information or the preferring of an indictment ...*

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

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

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

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

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

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

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

27. I consider it to be of importance, and of relevance, that the Supreme Court's respective decisions in *Olsson* and *Bailey* were delivered in close temporal proximity. The decision in *Olsson* was handed down on the 13th of January, 2011, while the decision in *Bailey* was handed down on the 1st of March, 2012, a temporal separation of just under fourteen months. Moreover, each case was decided by a bench of five, and shared three judges in common, namely Murray J., O'Donnell J., and Fennelly J.
28. There was no dissent expressed in the *Olsson* case; rather Murray C.J., Fennelly J., Macken J. and MacMenamin J. all expressed agreement with the judgment of O'Donnell J.
29. In *Bailey*, while O'Donnell J. dissented in part from the decision of the majority in so far as it related to an issue concerning s. 44 of the Act of 2003, there was no dissent on the s. 21A issue, with all members of the court agreeing that s. 21A precluded the surrender of Mr Bailey to France in the circumstances of the case. The judgment of O'Donnell J. in *Olsson* was expressly referenced by several members of the Supreme Court in their respective judgments and no criticisms of it were expressed, nor reservations expressed concerning the correctness of the legal approach adopted, or of the decision arrived at on the merits of that case, just fourteen months earlier.
30. On the contrary, *Olsson* was merely distinguished on its facts, with Denham C.J. observing [at 35, para 98]:

*"Minister for Justice v. Olsson [2011] IESC 1, [2011] 1 I.R. 384 was decided on its facts, and the facts in this case are different. That case turned on the evidence before the court, and this case turns on the evidence before this court. I would distinguish the determination in that case, because of the facts of this case. However, the analysis is helpful".*

31. The precise point of distinguishment was the fact that during the hearing in *Bailey*, counsel for the Minister was forced to concede, based on evidence received from a Mme Chaponneaux, described as a *vice procurer* of the French Republic, that he could no longer rely upon the *Olsson* case, as he had previously stated he intended to do. How this unfolded is set forth in several of the judgments.
32. Thus, Murray J., having expressly quoted paragraphs 32 and 33 respectively of the judgment of O'Donnell J. in *Olsson*, and having further referenced paragraphs 35 and 36 respectively, stated (at pp 55/56 [paras 201 to 205]):

*"[201] In that case O'Donnell J. in effect concluded that the evidence before the court, notwithstanding the procedural process, namely the interview of the accused by the prosecutor, which had to be carried out after his surrender and before he could be formally charged and tried, Mr. Olsson had not discharged the onus placed*



upon him by s. 21A(2) of the Act of 2003. That is to say there was not sufficient evidence produced by him to satisfy the court that no decision had been taken to prosecute and try him.

[202] After the document prepared by the French prosecutor and referred to earlier in this judgment, had been lodged with the court on behalf of the applicant, counsel for the Minister conceded that he could not rely on the decision in *Minister for Justice v. Olsson* [2011] IESC 1, [2011] 1 I.R. 384 to the extent which he had in his submissions to this court in the course of oral argument the previous day.

[203] As I have already indicated, the key statement in the prosecutor's document is the following '[i]t must be clearly understood that the evidence in the case, supporting the charge against the appellant or exonerating him, is not complete'. It was emphasised also that the 'phase d'instruction' was not complete and no decision to try the appellant would be made until it was complete.

[204] No argument was advanced on behalf of the Minister seeking to reconcile those statements with the approach adopted by this court in *Minister for Justice v. Olsson* [2011] IESC 1, [2011] 1 I.R. 384.

[205] On the facts of this case as outlined above and in particular as explained in the document of the French prosecutor presented on the last day of the hearing, the conclusion must be that there has not been, expressly or impliedly, any decision to try the appellant for the offence specified in the European arrest warrant".

33. In the same vein, Hardiman J. recounts in his judgment (at pp. 75/76 [paras 305 – 308]):

"[305] In the argument on the second day of the hearing of this appeal, before the French authorities' statement of French law was produced, counsel for the applicant and the "Central Authority" had argued that a decision to place the appellant on trial had in fact been taken. He made this statement on the authority of the decision of this court in *Minister for Justice v. Olsson* [2011] IESC 1, [2011] 1 I.R. 384. This case, which related to a European arrest warrant issued by Sweden, is notable for its finding at p. 399 that: -

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

[306] Further on p. 399, however, it is said that: -

'[34] The requirement of the relevant decision, intention or purpose can best be understood by identifying what is intended to be insufficient for the issuance and execution of a European arrest warrant. A warrant issued for the purposes of investigation of an offence alone, in circumstances where

*that investigation might or might not result in a prosecution, would be insufficient' (all emphasis supplied).*

*[307] The last sentence quoted seems to me to be entirely apt to describe the circumstances of the appellant's case. It has been stated by the vice procureur that the appellant, if forcibly removed to France, will be so removed for the 'investigation procedure stage of the case'; that this stage is merely a preparatory procedure after which he may, or may not, be sent for trial. The decision whether or not to send him for trial has not yet been taken; the investigative procedure may also end in his not being sent for trial. At the end of the investigating procedure the investigating judge will tell him 'soit qu'elle n'est pas mise en examen, soit qu'elle est mise en examen'. This form of words precisely mirrors the Minister for Justice v. Olsson [2011] IESC 1, [2011] 1 I.R. 384 formulation at para. 34, p. 400, referring to 'a warrant issued for the purposes of an investigation of an offence alone, in circumstances where that investigation might or might not result in a prosecution'. This has been explicitly held by this court to be insufficient.*

*[308] It is recorded above that, after the production of the French expert opinion and its translation on Wednesday, the 19th January, 2012, counsel for the Minister stated that its effect was that he could not rely on Minister for Justice v. Olsson [2011] IESC 1, [2011] 1 I.R. 384 as he had done the previous day. The reason for this statement is now, in my view, crystal clear. No decision to try the appellant for the offence mentioned in the warrant has been taken, and none can be taken until the conclusion of the 'investigation procedure stage'. Only then, according to the vice procureur, will the investigating judge notify him 'either that he is, or that he is not, indicted'. The presentation of this expert opinion has taken the ground from under the Minister's case as it was argued, and no alternative route to the same conclusion has been suggested to the court. In my view, there is no such alternative route".*

34. How the matter was treated of in the judgment of Fennelly J. is also illuminating. He deals with it thus (at pp.116/117 [from para 471 to 476]:

*"[471] I will recall but will not repeat that this court is under a duty of conforming interpretation as laid down in Criminal Proceedings against Pupino (Case C-105/03) [2005] E.C.R. 1-5285, which I have cited above and which is also cited by Denham C.J. in her judgment. The court is obliged to interpret the Act of 2003 in conformity with the Framework Decision, though only so far as possible.*

*[472] The Framework Decision is, therefore, designed to provide, subject to the protection of individuals guaranteed in particular by the European Convention on Human Rights 1950, an efficient and speedy procedure for the surrender of suspects between member states in accordance with the principles of mutual respect and confidence. It necessitates a degree of respect for, and understanding of, different legal systems and, in particular, different criminal procedures.*

*O'Donnell J. explained the matter very well in his judgment in Minister for Justice v. Olsson [2011] IESC 1, [2011] 1 I.R. 384 at p. 397: -*

*'[28] In approaching the question of the interpretation of the Act of 2003, it is necessary to keep both the nature of the Act and its origins in view. One thing which can be said with assurance is that the Act of 2003 does not intend that words such as "charge" and "prosecution" should only be understood as meaning a charge or prosecution in the Irish criminal justice system. The Act establishes a procedure for the reciprocal execution of warrants with legal systems, almost all of which differ in some ways, even at times significantly from that of this jurisdiction. If the Act of 2003 intended that only warrants emanating from a criminal justice procedure which was identical to that of Ireland would be executed here, then the Act would manifestly fail to achieve its object, and indeed that of the Framework Decision.'*

*[473] Section 21A of the Act of 2003 obliges the High Court to refuse surrender of a person who has not yet been convicted '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'. I do not think there is any problem in this case about the rebuttal of the presumption in s. 21A(2) of the Act of 2003. The evidence of the two French lawyers is, in its most relevant aspects, virtually agreed.*

*[474] In my view, it is clear from this evidence that a decision has been made to charge the appellant. Clearly, a decision to charge is not, in France, equivalent to a decision to put a person on trial. Indeed, it might be argued that, in our own system, a decision by the Director of Public Prosecutions to charge a person does not necessarily lead to his being put on trial and is, in any event, not the same thing as putting him on trial. It is unnecessary, however, to debate the matter any further. Mme. Tricaud accepts that the issue of the warrant for arrest in France was the equivalent of a charge. Furthermore, she speaks of 'further prosecution'. The object of the Framework Decision is, in a case such as the present, that the person be surrendered to the issuing state 'for the purposes of conducting a criminal prosecution' (see art. 1(1) of the Framework Decision.) I do not think that there is any evidence to rebut the presumption that a decision has been made 'to charge' the appellant. Rather to the contrary, it has been decided to charge him.*

*[475] The same cannot be said with regard to a decision 'to try' him. The position in French law, as it has been explained to this court, is crystal clear. The appellant, if surrendered to France, will find himself in the midst of the stage of instruction or investigation. As O'Donnell J. explained the matter in Minister for Justice v. Olsson [2011] IESC 1, [2011] 1 I.R. 384, at para. 35, p. 400, '[w]hat is impermissible is that a decision to prosecute should be dependent on such further investigation producing sufficient evidence to put a person on trial'. That passage applies, a fortiori, to a decision to try a person. Where, as here, the evidence is so*

*compellingly clear that the court must be, as the section says 'satisfied,' that no decision has been made to try the appellant, s. 21A of the Act of 2003 explicitly obliges the court to refuse the order for surrender. That could not be a clearer case for application of the notion of contra legem. It is not possible to construe s. 21A of the Act of 2003 in the light of the Framework Decision, without disobeying its clear command.*

*[476] I am, therefore, compelled to agree that the section prohibits the surrender of the appellant. If this section were not in such terms, it could be plausibly argued that, looking at the French criminal procedure in its entirety, and even accepting that it is still only at the stage of instruction, the surrender of the appellant is sought 'for the purposes of conducting a criminal prosecution' (art. 1.1 of the Framework Decision). A broad, purposive and conforming interpretation could well lead to that result. But the section is quite explicit. It is not open to the court, by means of conforming interpretation, to circumvent the clear terms of s. 21A of the Act of 2003".*

35. It is manifest that the decision in *Bailey* on the s. 21A issue was a decision based on clear and unequivocal evidence that a decision to place Mr Bailey on trial had not yet been taken, and that indeed he was wanted for the purposes of submitting to an ongoing investigation that might or might not result in him being indicted and placed on trial. The absence of any "decision" by the French authorities to try Mr Bailey was not ultimately in controversy. Unlike in *Olsson*, the Supreme Court was not concerned with the nuances of what might constitute a "decision" for the purposes of s. 21A. *Bailey* was not a marginal case in that respect on the s. 21A issue. Having regard to the facts established in evidence in *Bailey*, there was absolutely no room for doubt but that a decision to try him had not been made. S. 21A of the Act of 2003 was *acte clair* in regard to what was to happen in a situation such as that obtaining in *Bailey*, and *Olsson* did not purport to suggest otherwise.
36. What *Olsson* does make clear, however, is that s. 21A must be read in context, and that context is provided by the Act of 2003 into which it has been inserted, and the Framework Decision which that Act in turn was enacted to transpose. Notwithstanding that s. 21A provides for an additional ground on which surrender might be refused, over and above the mandatory grounds required to be included in any transposing legislation by virtue of Article 3, and the optional grounds that might also have been included by virtue of Articles 4 and 4a, of the Framework Decision, as amended; and that the likely genesis of s. 21A is to be found in the Statement made by Ireland prior to the adoption of the Framework Decision, it is nonetheless part of the legislative scheme enacted by our State to enable it to participate in the European arrest warrant scheme.
37. I do not therefore accept the contention advanced by the appellant that the provisions of section 21A are *contra legem* as regards the provisions of the Framework Decision, or indeed that the provisions of s. 21A "cannot be traced back to the Framework Decision". Rather, the Act of 2003, as amended, of which s. 21A forms part, is central to Ireland's

adoption of, and willingness to participate in, the EAW system. Section 21A has to be interpreted and evaluated in that context, and cannot be viewed, as the appellant would have us do, as a hermetically sealed provision standing alone in dissonant isolation from the rest of the Act of which it forms part. It requires to be given a conforming interpretation but only to the extent that such an interpretation would not be *contra legem*. However, I do not believe that O'Donnell J.'s view that the concept of the 'decision' in s. 21A should be understood in the light of the 'intention' referred to in s. 10 of the Act of 2003 and the 'purpose' referred to in art. 1 of the Framework Decision involved giving s. 21A a *contra legem* interpretation.

38. It is of course true that this section, which provides an additional ground on which surrender might be refused, does not itself transpose any provision of the Framework Decision, but it is not unique in that respect. Other potential grounds, not being either mandatory grounds of refusal or optional grounds of refusal covered by Articles 3-4a of the Framework Decision, on foot of which an Irish executing authority might, depending on the circumstances, be obliged to refuse surrender, could arise under s. 22 of the Act of 2003, as amended (in case of failure by issuing state in its laws to respect the rule of specialty), under s. 23 of the Act of 2003, as amended (in case of anticipated onward surrender), and under s. 24 of the Act of 2003, as amended (in case of anticipated onward extradition). In that regard s. 15 (1) (dealing with consent cases), and s. 16(1) (dealing with contested cases), of the Act of 2003 both make any possible surrender subject to the proviso that the High Court "*is not required under section 21A, 22, 23 or 24 (inserted by sections 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005) to refuse to surrender the person under this Act*" (See specifically s. 15 (1)(c) and s. 16(1)(d), respectively). Moreover, it is also the case that s. 37 of the Act of 2003 provides grounds for refusal of surrender that are neither mandatory grounds of refusal nor optional grounds of refusal covered by Articles 3-4a of the Framework Decision, although it has to be accepted that the references, in recitals 12 and 13, to the Framework Decision respecting fundamental rights, and to the fact that Member States are not prevented from applying certain constitutional rules, arguably implicitly authorises non-surrender in an appropriate case on fundamental rights grounds.
39. Despite the fact that s. 21A does not directly transpose any provision of the Framework Decision, the genesis of it, at least in terms of being its likely inspiration, is to be found in the Statement made by Ireland at a late stage of the negotiations leading to the adoption of the Framework Decision by the Council of the European Union. That much has been acknowledged and accepted by the Supreme Court in *Bailey*. While the respondent validly makes the point that the formulation "*purposes of bringing that person to trial*" used in the Statement on behalf of Ireland did not ultimately find its way into s. 21A, a point also emphasised by Fennelly J. in his judgment in *Bailey*, he does not seek to gainsay that the Statement can be inferred as having played an influential role in the Oireachtas's decision to enact s. 21A. Although O'Donnell J. did not allude to that genesis in his judgment in *Olsson*, the Supreme Court went on to do so in *Bailey* in circumstances where they expressly referenced O'Donnell J.'s approach to the interpretation of s. 21A and did not

demur from it in any respect. On the contrary, his analysis was expressly endorsed by the then Chief Justice as being “*helpful*”.

40. Ultimately, I find myself in full agreement with the submission made at paragraph 63 of the respondent’s written submissions that the mere fact Ireland made the statement that it did during negotiations in 2001 was simply not a basis to discard the principles of conforming interpretation; in circumstances where it is plain that the legislative intent in enacting the Act of 2003, and subsequent early amendments thereto including the insertion of s. 21A, was to give proper effect to the Framework Decision while making the State’s position clear that it would not surrender an individual for investigation only. Accordingly, I am not persuaded that there is any reason to doubt the correctness of the analysis in *Olsson*, or that there was at least tacit, and arguably express, approval of O’Donnell J.’s approach in *Bailey*; albeit that the Supreme Court felt that it could distinguish the circumstances of the *Bailey* case from those in *Olsson*.
41. It seems to me that what *Olsson* establishes, amongst other things, is that where the High Court, acting in its capacity as an executing judicial authority for the purpose of the EAW system, has received evidence in the course of an application for the surrender of a requested person on foot of which it is contended the s. 21A(2) presumption is rebutted, that court is obliged to submit any such contention, and the evidence relied on in support of it, to a rigorous examination and analysis; all with a view to determining the reality of the claim that no decision has been made to charge and/or try the requested person. It follows that characterisations used concerning, or labels attached to, actions or procedures described in evidence may not necessarily be determinative of what will ultimately questions of fact, i.e., whether a decision or decisions has/have been taken to both charge and try the requested person for the offence concerned in the issuing state.
42. O’Donnell J stresses in *Olsson* [at paragraph 33] that:

*“[33] When s. 21A speaks of “a decision” it does not describe such decision as final or irrevocable, nor can it be so interpreted in the light of the Framework Decision. The fact that a further decision might be made eventually not to proceed, would not therefore mean that the statute had not been complied with, once the relevant intention to do so existed at the time the warrant was issued. The Act of 2003 does not require any particular formality as to the decision; in fact, s. 21 focuses on (and requires proof of) the absence of one. The issuing state does not have to demonstrate a decision. A court is only to refuse to surrender a requested person when it is satisfied that no decision has been made to charge or try that person. This would be so where there is no intention to try the requested person on the charges at the time the warrant is issued. In such circumstances, the warrant could not be for the purposes of conducting a criminal prosecution”.*
43. The argument being advanced by the appellant before us is to the effect that in *Olsson*, O’Donnell J. sought to give s. 21A (1) an interpretation that conformed with the Framework Decision, but at the expense of the clear literal meaning of the provision, in circumstances where he was not entitled to do so. I do not accept that that is the case.

O'Donnell J. has never sought to suggest that s. 21A (1) means anything other than that surrender must be refused if the High Court is not satisfied that the conjunctive requirements that a decision has been made to charge the requested person with, and try him or her for, the offence concerned in the issuing state have been met.

44. It seems to me that in saying that "*the concept of the 'decision' in s. 21A should be understood in the light of the 'intention' referred to in s. 10 of the Act of 2003 and the 'purpose' referred to in art. 1 of the Framework Decision*", O'Donnell J. did not cross a forbidden line. He was not seeking to suggest that s. 21A bears any meaning other than its literal meaning, which is that there is an explicit requirement that a decision should have been taken to charge and try the person. However, by the same token, he was urging that the legislative context in which s. 21A is placed, and the legislative scheme of which it forms part, is relevant to how the concept of a "decision" for the purposes of the section should be interpreted and understood. The court must determine that as a matter of substance rather than form.
45. In conclusion on this issue, I stand over the views that I expressed as a judge of the High Court, in the cases of *Connolly*, *Holden* and *Jocienė*, respectively, to the effect that the Supreme Court's decisions in *Olsson* and *Bailey* are perfectly capable of being reconciled, and rejecting any suggestion that *Bailey* implicitly overruled or significantly modified the interpretative approach to s. 21A commended by O'Donnell J. in *Olsson*. For the avoidance of doubt, I consider that *Olsson* remains good law, and that this Court is obliged to follow it and apply it. Accordingly, the High Court judge was correct, in my belief, in also taking that view.

#### **Decision on the s. 21A issue in the present case**

46. In circumstances where I regard this Court as being bound by the approach to s. 21A commended by the Supreme Court in the *Olsson* case, I have no hesitation in endorsing the analysis and decision of the trial judge. It seems to me that the trial judge's approach was rigorous and impeccable. This is, at the end of the day, a case that turns on the facts as established in the evidence adduced before the High Court. The decisions in *Bailey* and in *Jocienė* were fact-specific and are of limited assistance in a case such as the present with different facts. I therefore agree with the observations in paragraphs 56 and 59 of the High Court's judgment.
47. In paragraph 57 of her judgment, the High Court judge stated, inter alia:

*"In the present case, the respondent has never presented evidence that no decision in this case has been taken to charge him with or try him for the alleged offences. The expert on the contrary has set out the fact that a system which is not similar to the Irish criminal justice system operates in Lithuania. This incorporates a pre-trial investigation stage and the presentation of an indictment at the end of that stage and if applicable a conviction after trial. She has not stated that a decision cannot be taken which is coterminous with an intention to try the respondent on these offences. On the contrary, **the evidence in the case including that by reply from the issuing judicial authority, demonstrates an intention to put the***

**respondent on trial as is indicated by the fact that there is a high probability that a bill of indictment will be lodged against him.** *The Lithuanian proceedings require this step of the pre-trial proceedings and the import of what this Court has been told by the issuing judicial authority, and indeed by the respondent's expert, is that the step to indict him cannot proceed without the finalisation of the pretrial investigation stage.*

*58. This is not a situation where the issuance of the EAW has been for the prohibited step of only carrying out an investigation. Instead, the EAW has been issued with a view to putting him on trial for these matters, but Lithuanian law requires that he has an opportunity to present his case during the investigative stage and it must also be said that the prosecution have also an entitlement to present evidence at that point".*

(emphasis added)

48. Despite trenchant criticism by counsel for the appellant that the highlighted sentence represents a "*non-sequitur*", and that it is not possible to infer intention from high probability, I reject that criticism. As *Olsson* makes clear, when s. 21A speaks of a "decision" it does not describe such decision as final or irrevocable. It is clear to me on the evidence that there is an existing intention to both charge and try Mr Campbell. As in *Olsson*, there are procedural steps, which remain to be taken in accordance with Lithuanian criminal procedure that could, in theory, lead to the existing intention being re-visited and result in the matter not ultimately proceeding, but the strong likelihood is that it will proceed. Hence, the issuing judicial authority's careful choice of words in stating 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*". It will be recalled that this statement, from the additional information provided on the 10th of May, 2005, followed the unequivocal assertions earlier in the same paragraph that, "*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*", and 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*".
49. The issuing judicial authority further explains that, "*by the measures of criminal proceedings we are seeking to implement the principle of fairness*". One aspect of that commitment to fairness and fair procedures will involve them confronting Mr Campbell upon his return with the evidence that has been gathered and offering him an opportunity to respond to it. In theory, that exercise could lead to a decision on the part of the prosecuting authorities not to proceed further. However, the fact that this, and possibly other steps mandated under Lithuanian criminal procedure, has/have not yet occurred does not mean that insufficient evidence exists at present to place him on trial, or that



whether or not he will be charged and tried will depend on further investigation producing sufficient evidence to justify placing him on trial. All the indicators are that sufficient evidence exists at present to allow him to be charged and placed on trial. There is a theoretical possibility that this effective decision could be reversed, but that does not mean that there has not been such a decision.

50. Further, while it would not have been determinative of the issue on its own, I do regard it as being of significance that the EAW states, at the commencement thereof, that "*the Prosecutor General's Office of the Republic of Lithuania request that the person mentioned below be arrested and surrendered **for the purposes of conducting a criminal prosecution***" (emphasis added). Clearly a choice has been made here between the options provided for in the standard form to be used for the issuance of an EAW, which standard form refers to "... *the purposes of conducting a criminal prosecution **or** executing a custodial sentence or detention order*" (emphasis added). Accordingly, it is not a case of the issuing judicial authority unthinkingly reproducing what is sometimes referred to as the "boilerplate text" from the beginning of the form. It is manifest that the issuing judicial authority in this case carefully considered for what purpose he wished to seek the surrender of the respondent, and expressly certified that it was for the purposes of conducting a criminal prosecution. Mutual recognition requires that this certification be accepted and recognised, absent the existence of cogent evidence suggesting the contrary. There is no such evidence in this case. Rather, in my view, the evidence strongly supports that which has been certified.
51. Finally, the point must again be made that by virtue of s. 21A (2) of the Act of 2003 as amended, the issuing state is presumed to have decided to both charge and try the requested person, and the onus is on the person concerned to rebut that which is presumed to do so by adducing, or pointing to, cogent evidence suggesting the contrary. I do not consider that the respondent has succeeded in doing that, and like the trial judge in this case I am not satisfied that the statutory presumption has been rebutted.
52. I find no error on the part of the High Court judge, and I would dismiss the appeal.

**Kennedy J:** I agree with the judgment of Edwards J and would also dismiss the appeal.

**Binchy J:** I also agree with the judgment of Edwards J and I too would dismiss the appeal.