

THE HIGH COURT

Record No. 2016/203 EXT

BETWEEN/

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

-AND-

LIAM CAMPBELL

RESPONDENT

JUDGMENT of Ms. Justice Donnelly dated this 26th day of June, 2020

Introduction

1. The respondent is sought by the Republic of Lithuania ("Lithuania"), on foot of a European Arrest Warrant ("EAW") issued on the 26th August, 2013, for the purposes of prosecuting him for three offences:
 - a. 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 sentence for a term of up to ten years.
 - b. Terrorism under Article 250(6) of the Lithuanian Criminal Code which has a maximum sentence for a term of up to twenty years.
 - c. Illegal possession of firearms under Article 253(2) of the Lithuanian Criminal Code which has a maximum sentence for a term of up to eight years.
2. 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.

Procedural History of the Attempt to Surrender the Respondent to Lithuania

3. The long procedural history of the attempt to surrender the respondent is complicated. It involves a first EAW (hereinafter, "EAW 1") issued by Lithuania and executed by the arrest *seriatim* of the respondent in two jurisdictions (Ireland and Northern Ireland).

Subsequent to the refusal to surrender the respondent by the judicial authorities of the United Kingdom of Great Britain and Northern Ireland (hereinafter "the UK") , this EAW (hereinafter, "EAW 2") was issued. In 2016, EAW 2 was executed by the arrest of the respondent in this jurisdiction. For the sake of clarity, the following is a chronology of events:

Chronology

18 December 2008	EAW 1 issues by a Lithuanian judicial authority
20 January 2009	Respondent arrested in Ireland on EAW 1 - bail granted
22 May 2009	Respondent arrested in Northern Ireland on EAW 1 (attempt 2) bail refused
13 July 2009	Lithuania withdraws EAW 1 in Ireland
16 Jan 2013	Belfast Recorder's Court refuses surrender on EAW 1 (attempt 2)
22 Feb 2013	On appeal, the High Court of Northern Ireland refuses surrender on EAW 1 (attempt 2)
20 March 2013	Assurance provided by Lithuania that those extradited from UK to Lithuania will be held in Kaunas Prison
16 April 2013	Irish High Court refuses surrender of Brendan McGuigan
31 July 2013	Supreme Court (UK) refuses to allow appeal on EAW 1 (attempt 2)
5 August 2013	Respondent is released and returns home
26 August 2013	EAW 2 issues by a Lithuanian judicial authority (a public prosecutor)
31 May 2016	Assurance given to the UK to keep persons in Kaunas Prison is revoked
17 October 2016	EAW 2 received in this jurisdiction
25 November 2016	EAW 2 endorsed by High Court
2 December 2016	Respondent arrested on EAW 2 - bail granted
2 May 2017	Minister seeks clear and unambiguous undertaking that Respondent will be held in Kaunas
10 May 2017	Additional information from Vilnius Regional Prosecutor's

	Office on fair trial rights and decision to prosecute
12 May 2017	Additional information from Prosecutor General's Office on conditions in Lukiskes and trial rights
13 June 2017	Lithuania provides details of appropriate person to be contacted on prison inspection
23 June 2017	Lithuania refuses inspection for Professor Morgan
18-20 October 2017	Section 16 hearing in the High Court
25 October 2017	Section 20 request on prison conditions
22 November 2017	Reply from Lithuanian authorities providing assurance that the respondent will be held in Kaunas Remand Prison.
5-7 December 2017	Resumed Section 16 hearing in the High Court
7 December 2017	Case adjourned to await decision in Lisauskas (see below)
1 July 2019	Lukiskes prison is closed
9th June, 2020	Resumed hearing in the High Court

4. The respondent was arrested in this jurisdiction on the 2nd December, 2016. By the following December these proceedings were heard to completion but had to be adjourned with the consent of the respondent, pending the outcome of a reference made by the Supreme Court in the case of *Minister for Justice and Equality v. Lisauskas* [2018] IESC 42 concerning the validity of an EAW which had been issued by a public prosecutor in Lithuania. The decision of the CJEU in that case spawned further litigation. This case had to be adjourned until all legal challenges were finalised. That issue is no longer a live one for the purpose of this case. I am satisfied that the EAW has been issued by an issuing judicial authority within the meaning of the European Arrest Warrant Act, 2003 as amended (hereinafter, "the Act of 2003") and the Council Framework Decision of the 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (hereinafter, "the Framework Decision").

Uncontested Matters

5. Before dealing with the specific points raised by the respondent in objecting to his surrender, I will address the formal requirements of the Act of 2003 with which this Court must be satisfied if it is to make an order of surrender.

A Member State that has given effect to the 2002 Framework Decision

6. I am satisfied that by the European Arrest Warrant Act 2003 (Designated Member States) (No. 3) Order 2004 (S.I. 206 of 2004), the Minister for Foreign Affairs designated Lithuania as a Member State for the purposes of the Act of 2003.

Section 16(1) of the Act of 2003

7. Under the provisions of s. 16 (1) of the Act of 2003 as amended, the High Court may make an order directing that the person be surrendered to the issuing State provided that:
- a) the High Court is satisfied that the person before it is the person in respect of whom the EAW was issued,
 - b) the EAW has been endorsed in accordance with s. 13 for execution,
 - c) the EAW states, where appropriate, the matters required by section 45,
 - d) the High Court is not required, under sections 21A, 22, 23 or 24 of the Act of 2003 as amended, to refuse surrender,
 - e) the surrender is not prohibited by Part 3 of the Act of 2003.

Identity

8. No issue has been raised in relation to the respondent's identity. I am satisfied on the basis of the information in the EAW, and on the affidavit of James A. Kirwan, member of An Garda Síochána, and on the affidavit of the respondent, that Liam Campbell who appears before me is the person in respect of whom the EAW issued.

Endorsement

9. The EAW was received by the central authority on the 17th October, 2016 and was endorsed by this Court on the 25th November, 2016. The warrant was executed on the 2nd December, 2016 whereby the respondent was duly arrested and brought before this Court and thereafter remanded on bail. The matter was adjourned on several occasions to allow counsel prepare papers for the s. 16 hearing which were listed before this Court on 18th, 19th and 20th October, 2017. On that final date the matter was adjourned pending a response from the issuing authority on matters raised by way of a s. 20 request for additional information.

Section 45 of the Act of 2003

10. The respondent is sought for prosecution in this case and the provisions of s. 45 of the Act of 2003, which concern trials in absentia, are not applicable. The surrender of the respondent is therefore not prohibited under s. 45 of the European Arrest Warrant Act, 2003, as amended.

Sections 21A, 22, 23 and 24 of the Act of 2003

11. The respondent claims that his proposed surrender would constitute a breach of s. 21A of the Act of 2003, as there had been no decision to charge and try him in respect of the offence for which his surrender is sought. I will address this point later in this judgment, but having scrutinised the documentation before me, I am satisfied that I am not required to refuse the surrender of the respondent under ss. 22, 23 and 24 of the Act of 2003.

Part 3 of the Act of 2003

12. Subject to further consideration of ss. 37 and 38 of the Act of 2003 and having scrutinised the documents before me, I am satisfied that I am not required to refuse the surrender of the respondent under any other section contained in Part 3 of the said Act.

Points of Objection

13. Counsel on both sides of the proceedings acknowledged that many of the points raised in this proceeding are similar to those raised in *Minister for Justice, Equality and Law Reform v. McGuigan* [2013] IEHC 216. The respondent in that case was a co-accused in Lithuania with the respondent in this case. It is therefore not of coincidence that the points raised are somewhat identical.

14. The respondent's points of objection to his surrender were condensed to four substantive points during the course of the hearing in October and December 2017. These are:

- (a) prison conditions and, in particular, that one cannot rely upon assurances given by the Republic of Lithuania;
- (b) a point under s. 21A of the 2003 Act;
- (c) a fair trial point, particularly relating to translation of documents and the EU Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings; and
- (d) an abuse of process point related to the fact that this is the second time in this jurisdiction, and the third time in total, that Lithuania have sought his surrender from another EU State. He spent four years in custody in Northern Ireland and was only released when he succeeded in his objection that to surrender him would breach his Article 3 rights because of the prison conditions in Lithuania.

15. An objection to surrender based upon Article 8 personal and family rights was also made and was mainly argued as part of the abuse of process point. I will address all of these points in due course.

16. The respondent also raised general issues of compliance with the Act of 2003 without proceeding to the substantive arguments. The respondent claims that the offences detailed in the EAW for which he is alleged to have committed are not punishable offences in this State and the issue of correspondence under s. 38, and to a lesser extent s. 44 of the Act of 2003, therefore arises. I shall deal with these points first.

Section 38 of the Act of 2003

17. The issuing judicial authority indicates in the EAW an intention to avail of the opportunity to dispense with the requirement of double criminality. It does so by relying on offences within the list of conduct set out in Article 2(2) of the Framework Decision by ticking the box 'terrorism' and 'illicit trafficking in weapons, munitions and explosives' in respect of the offences of terrorism under Article 250(6) of the Lithuanian Criminal Code and of illegal possession of firearms under Article 253(2) of the Lithuanian Criminal Code. I am satisfied that these are not a manifestly incorrect designation for the second and third

offences contained in the warrant. The provisions of minimum gravity have also been met. Therefore, the surrender of the respondent on offences (b) and (c) is not prohibited by the provisions of s. 38 of the Act of 2003.

18. Correspondence with an offence in this jurisdiction must be found for offence (a), preparation for a crime under Article 21(1) and Article 199(2) of the Lithuanian Criminal Code, in order to satisfy s. 38 of the Act of 2003. Counsel for the Minister submits that correspondence can be found under the common law offence of 'conspiring to export firearms without authorisation'; export without authorisation being an offence contrary to s. 16 of the Firearms Act, 1925. This has previously been accepted to be an approved corresponding offence in *McGuigan*, and I am satisfied that that was a correct decision. There is correspondence with the offence contrary to common law of conspiring to export firearms without authorisation.
19. The respondent submits that it is unclear as to what offence the reference to "preparation to smuggle a big amount of powerful firearms, ammunition, explosives, explosive substance" contained in part (e)II of EAW 2, relates. I am satisfied that it is clear as to what the reference relates; these are the preparatory acts set out in EAW 2. The description of that offence both in its legal terms and in the acts set out indicate that the preparatory acts are being carried out as part of a conspiracy. Thus there is no lack of clarity and there is correspondence.

Extraterritoriality

20. Section 44 of the Act of 2003 as amended provides as follows:

"A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State."

21. The respondent claims that the offences specified in the EAW were alleged to have been committed in a place other than the issuing State and the act or omission of which the offences consist does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State.
22. In the view of the Court, this submission falls at the first hurdle. The alleged offences are clearly based in the territory of Lithuania and partially in Ireland, and to that extent are not extraterritorial offences. No further consideration of this is required.

Main Points of Objection

Article 3 of the European Convention on Human Rights

Prison Conditions

23. The respondent contests his surrender on the grounds that his surrender would be incompatible with his constitutional rights and the State's obligations under the European Convention on Human Rights and/or the Protocols thereto ("the Convention"), in

particular, on the basis that his right not to suffer inhuman or degrading treatment or punishment would be breached.

24. This claim is raised on foot of evidence based on the affidavit of Ms. Ingrida Botyriene, a Lithuanian lawyer of I. Botyriene & R.A. Kucinskaite Law Firm. She averred that should the respondent be surrendered to Lithuania, he would be incarcerated in Lukiskes prison, a prison which has been held by this Court and other jurisdictions to be in breach of Article 3 of the Convention.
25. Virtually the entire legal argument, prior to the resumed hearing on the 9th June, 2020, concerned Lukiskes prison, the conditions there and the undertakings that have been given by the Lithuanian authorities in respect of same. The position now is that Lukiskes prison has closed (in fact since the 1st July, 2019).
26. I am satisfied that the point as regards prison conditions has no merit at this stage of the proceedings. The respondent's complaint was about Lukiskes prison. That has now closed. Aside from the important legal consideration that the EAW procedure is based upon mutual trust between judicial authorities which stems from the high level of mutual confidence between Member States, there is nothing in this case that raises even a question of whether this mutual trust ought to be set aside. There is simply no other evidence (or even submission) before me that demonstrates that there is a real risk that this respondent will be subjected to inhuman and degrading prison conditions should he be surrendered to Lithuania. Indeed, the respondent's own expert, Professor Morgan had no issue with the conditions in Kaunas Remand Prison, which was the alternative prison to which the respondent was liable to be sent (and the subject matter of an assurance by the Lithuanian prison authorities). The respondent has rather cryptically "maintain[ed] his complaint about the undertaking provided and the efficacy of same." I fail to understand why this Court should engage in an entirely hypothetical consideration of undertakings not to house this respondent in Lukiskes prison when this is no longer a valid issue.
27. For the foregoing reasons, I am satisfied that s. 37 does not prohibit the surrender of this respondent to Lithuania because of any issue arising out from prisons conditions in that Member State.

Section 21A of the Act of 2003

28. The respondent submits that his surrender is precluded by reason of Section 21A of the Act of 2003 in circumstances where he submits no decision to try him has been made.
29. Section 21A of the 2003 Act as amended provides as follows:

"(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.”
30. The respondent relies on the affidavit of Ms. Ingrida Botyriene, dated the 9th April, 2017 where she set out the procedural steps of prosecution in Lithuania. She explains that the Criminal Procedure Code of 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.
31. 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. Botyriene expresses the opinion that if the respondent 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.”
32. In light of her detailed knowledge of the facts of this case, having represented Mr. Michael Campbell, co-accused, she expresses the view that the evidence as against the respondent is likely to be much more limited than that as against Mr. Michael Campbell and it is her view that having regard to the very substantial differences between the cases, that “it will undoubtedly be the case that pre-trial investigation will be required.” She therefore concludes that Lithuania seeks the respondent for the purposes of an investigation and consequently no decision appears to have been made at this stage to have the respondent charged and put on trial and same will await the conclusion of the pre-trial investigation which has yet to take place.
33. In response to her affidavit, the Minister sought additional information dated the 2nd May, 2017 from the Lithuanian authorities requesting confirmation that there was an intention on the part of the prosecutor to “charge and try” the respondent and that there is sufficient evidence to enable the respondent to be “charged and put on trial” and that this was the present intention of the relevant authority in Lithuania.

34. The Lithuanian authorities responded by letter dated the 10th May, 2017 stating:

“[h]ereby 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 principle of fairness.”

35. The issuing judicial authority also responded in detail to claims that this respondent would be at risk of an unfair trial because of what occurred in the course of the pre-trial investigation and trial of his brother, Michael Campbell, in Lithuania. In the course of that response, the issuing judicial authority had stated:

“In accordance with provisions of C.C. and P.C., as well as practices of Lithuanian courts, the court may substantiate its judgment solely on the evidence of witnesses or suspects given before a pre-trial judge or the court. This means that in every single case during pre-trial investigation the witness whose evidence is of relevance for the investigation of the criminal case and trial thereof must be interviewed before the court as well. Following the established practice, in order to ensure the protection of the rights of the suspect or the accused, the person who is being charged with the commission of the crime may be given possibility to pose questions for certain parties to the proceedings.”

The issuing judicial authority also stated that:

“Therefore any forecast made in advance as to the possibility of posing questions or conducting cross-examinations are unsubstantiated by any valid data and are contrary to the provisions of C.P.C. as well as the existing case law.”

36. That answer had been given to contradict the views of Ms. Botyriene as to restrictions in Michael Campbell’s ability to defend himself. The reference to the high probability that a bill of indictment would be drawn up against this respondent appears to have also been stated in respect of the opinion of Ms. Botyriene that the case against this respondent was more limited than that against his brother Michael Campbell. At the conclusion of their response, the issuing judicial authority emphasised that the process of substantiation/proving is governed by the rule of law for the purpose of determining the existence or non-existence of a criminal offence to ensure a fair trial so that a person who has committed a crime receives fair punishment and that an innocent person is not convicted. The issuing judicial authority refers to the principle of competitiveness and,

from what they say, this appears to equate with the principle of adversarial procedure which they had referred to earlier in their letter.

37. The respondent has also relied upon the reference at p. 3 of the EAW to the fact that the respondent is "suspected of criminal offences". He also said that there is no dispute between their expert and the Lithuanian authorities that this process is at the pre-trial investigation. He particularly relied on the fact that the Lithuanian authorities have stated that there is a high probability that a bill of indictment would be drawn up and the respondent submits that in the words of s. 21A: "A decision has not been made to charge the person with, and try him or her for, that offence."
38. There is no dispute that the requirements of s. 21A must be read conjunctively and not disjunctively. There is a requirement that there has been a decision to try the requested person as well as a decision to charge the requested person. The respondent primarily relied upon the decision of the High Court (Edwards J.) in *Minister for Justice v. Jociene* [2013] IEHC 290, which was another Lithuanian case. In that case, Edwards J. held that in light of the responses he had received from the Lithuanian authorities, no decision to try the respondent had been taken. He held that the presumption in s. 21A(2) stood rebutted and he refused her surrender.
39. In the respondent's submission, the height of the indication given by Lithuania is that there exists an intention and decision to conduct a criminal prosecution against him. They submit that that can never be regarded as analogous to a decision to charge and try a respondent. They submit that s. 21A is explicit and clear in its terms. It is not open to the court to apply a principle of conforming interpretation and that s. 21A cannot be traced back to the Framework Decision. It would be *contra legem* to interpret its provisions as providing for anything other than a requirement to charge and try a requested person.
40. Much of the oral and written submissions in this case concentrated on the two central Supreme Court decisions of *Minister for Justice v. Olsson* [2011] 1 I.R. 384 and *Minister for Justice v. Bailey* [2012] IESC 16. In each of those cases, the Supreme Court gave extensive judgments concerning the interpretation and application of the provisions of s. 21A of the Act of 2003. Without doing a disservice to the submissions in this case, I identify the main thrust of the respondent's submissions regarding those cases is that there is a tension between them. The tension, according to the respondent, may have arisen from the failure to have regard to a statement made on behalf of Ireland in the course of negotiation of the Framework Decision. That statement provides:

"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 purpose of executing a custodial sentence or detention order."

Fennelly J. in his judgment in *Bailey* had stated that:

"If s. 21A had been expressed in those terms, it might well, in view of the obligation of conforming interpretation, have been possible to interpret the section in such a way as to permit the surrender of a person in the position of the appellant. The legislation did not, however, take the form indicated in the government's statement. It introduced an explicit requirement that a decision have been made to try the person."

41. Thus, in the respondent's submission, even though the judgments in *Bailey* may have referred to the *Olsson* decision in favourable terms, the assumptions made by O'Donnell J. in *Olsson* in relation to the applicability of the principle of conforming interpretation were misplaced, as the genesis of s. 21(A) was found in the above statement rather than in the Framework Decision. In other words, the statement indicates a reluctance by Ireland to commit completely to the surrender of persons in accordance with the provisions of the Framework Decision and that the express provisions in s. 21(A) are more restrictive than that found in the Framework Decision. In those circumstances, the finding by O'Donnell J. that the existence of an intention to bring proceedings against a requested person is "virtually coterminous with a decision to bring proceedings sufficient for the purposes of s. 21(A)" does not sit easily with the judgments in *Bailey* on this issue which were delivered by Murray C.J., Denham J., Fennelly J. and Hardiman J.
42. Counsel for the Minister has contested that there is any tension or even contradiction between the decision of O'Donnell J. in *Olsson* and the various judgments in *Bailey*. In the Minister's submission, the *Olsson* judgment was approved in *Bailey*.
43. The High Court has already spoken on this issue on a number of occasions. Indeed in the case of the *Minister for Justice and Equality v Jočienė*, Edwards J. referred to his previous judgments in the case of *Minister for Justice and Equality v. Holden* [2013] IEHC 62 and *Minister for Justice and Equality v. Connolly* [2012] IEHC 575 on this question of whether in *Bailey* the Supreme Court had departed from or modified the approach advocated in its earlier judgment in *Olsson*.
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, provides 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."

45. In 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*.
46. It is important to acknowledge that s. 21(A) contains a presumption 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. Therefore, this Court must approach the matter that it is for the respondent to prove that no decision has been made to charge or try him in Lithuania.
47. Insofar as the respondent relies on the reference to the respondent being "suspected of criminal offences" the use of such wording does not overturn the presumption that a decision has been made to charge and try him. As O'Donnell J. stated in *Olsson*, relying on Lord Steyn in the UK House of Lords case in *Re Ismail* [1999] 1 AC 320, words such as 'charge' and 'prosecution' are not only to be understood as meaning a charge or prosecution as in the Irish criminal justice system. Thus, the use of the word 'suspect' of itself does not overturn the presumption that a decision has been made to charge and try this respondent.
48. Furthermore, O'Donnell J. referred to s. 10 of the Act of 2003 (as substituted by s. 71 of the Criminal Justice (Terrorist Offences) Act 2005 and as amended by s. 6 of the Criminal Justice (Miscellaneous Provisions) Act, 2009, which provides that where an authority in an issuing State issues an EAW in respect of a person "against whom that state intends to bring proceedings for the 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". He also referred to Article 1 of the Framework Decision which provides that an EAW 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 purpose of conducting a criminal prosecution or executing a custodial sentence or a detention order*" (*emphasis added*). This is reflected in the statement at the front of this EAW that "the prosecutor general's office of the Republic of Lithuania requests that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution."
49. As O'Donnell J. stated:

"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 and the "purpose" referred to in article 1 of the Framework Decision.

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 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.

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

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.”

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 *Jociene*. 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 Jociene 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 Jociene case, the issuing judicial authority had stated as follows:*
- “If A. Jociene 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.21 A(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.21 A(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.21 A(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 Jociene was wrongly decided. No appeal was taken in the case of Jociene 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 Jociene. 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 *Jociene*. 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 pre-trial 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. Botyriene 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. Botyriene 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.

Section 37 of the Act of 2003

Fair Trial

61. The respondent claims that should he be surrendered to the issuing State, he will not receive a fair trial. The respondent claims in particular that the criminal process in Lithuania is fundamentally deficient in that:

- a) The trial process does not permit adequate notice of witnesses nor an adequate opportunity to cross examine same.
 - b) That the trial process does not permit adequate disclosure such as to permit the mounting of an effective defence.
 - c) That the trial process does not afford translation of all relevant material, evidence and trial proceedings to foreign nationals.
62. The respondent relies on a number of sources supporting his contentions that there are substantial deficits in the system of justice in Lithuania, insofar as it applies to those who do not speak Lithuanian.
63. The respondent provides four sources of evidence in support of his fair trial point. The first of this is provided by Mr. Michael Campbell, who was tried in Lithuanian for the same offences as set out in the within warrant. In his affidavit dated the 30th March 2017, Mr. Michael Campbell outlined the difficulty he faced preparing for his case owing to the limited provision of documents in the English language. He states that the only documents that were translated were the Notification of Suspicion, the decisions on the remand hearings (those decisions prolonging his remand in custody), the written decisions, and the indictment. He refers also to a very small number of documents which were actually in English, such as statements made by certain English-speaking witnesses.
64. He stated that the lack of translated documents led to considerable practical difficulty in understanding the case against him and instructing his solicitor. He speaks of his frustration in actively engaging in the case with his solicitor. When he was provided with disclosure, a translator came to the prison in the presence of the prosecutor while the files were inspected. He questions the ability of the translators and states that the system was completely unworkable. He was unable to take copies of the documents or mark them up. He avers that he never got the book of evidence, or witness statements or transcripts of the audio recordings in English. During the proceedings, the translation provided was limited to translation of the proceedings rather than the documents for the accused. Thus, both in advance of the trial and for the proceedings themselves, Mr Michael Campbell contends that he was greatly hampered in his ability to engage with the case.
65. The second source of evidence in this regard is from Ms. Botyriene in her affidavit dated the 9th April, 2017 who confirms the difficulties she had in representing Mr. Michael Campbell. She adds that even where certain documents were translated, such as the indictment, translation was incomplete or incorrect. She states that in accordance with Lithuanian law, the only matters required to be translated are the Notification of Suspicion, the indictment, the decisions on continued detention and the substantive written decisions of the Courts. She contends that the system provided was completely unworkable and found it an enormous obstacle in taking instructions from her client. She stated, as an example, that she was not in a position to challenge the failure to provide case materials in English. She states that it was apparent to her that one of the

interpreters was not properly qualified and she expresses the view that even the minimum rights afforded in Lithuanian law, were flouted. She gives a particular example of when her client was unable to understand a particular witness owing to an unqualified translator being provided. While a complaint was made, no decision was ever taken in respect of it. Ms. Botyriene confirms that Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings ("Translation Directive") was due for national transposition by 27th October 2013 but to date has not been transposed into Lithuanian law.

66. The third source of evidence is that of the affidavit of Mr. Donal Denham sworn on the 29th September, 2017. Mr Denham is a retired Irish diplomat and former Ambassador to Lithuania between the years 2005 and 2010. He outlines his experience of dealing with English speakers in the prison system in Lithuania, and the fact that the legal system also presents difficulties, in particular, engaging with one's legal representative and being provided with a sufficient opportunity to examine and fully understand the charges in advance of the trial. He expresses a general view that the Lithuanian legal system has inherited many of the repressive and poor practices of the Soviet legal system from which it emerged.
67. The respondent also provided evidence in the form of an affidavit from James MacGuill, Solicitor on record for the respondent, dated the 3rd October, 2017. In that affidavit, Mr. MacGuill sets out his concerns as to the failure of Lithuania to implement the Translation Directive. That affidavit was a follow on of his previous affidavit dated the 3rd April, 2017 where he states that:

"this measure [the Translation Directive] was due for national transposition by 27 October 2013 but to date has not been transposed into Lithuanian national law. I believe that the Commission views the situation so gravely that infringement proceedings are being actively considered if not already commenced."

In both affidavits, Mr. MacGuill sets out his attempts to request documentation from the European Commission relating to the ongoing Infringement Proceedings against Lithuania. Those correspondences are attached as exhibits to those affidavits.

68. Counsel for the respondent submitted that there is something by way of independent corroboration of the accounts given in relation to the difficulties faced by English speaking persons in the Lithuanian criminal justice system when consideration is given to the affidavits of James MacGuill. These relate to the existence of infringement proceedings against Lithuania for the failure to provide safeguarding of fair trial rights of persons before courts in a language other than their own and, in particular, the failure to provide for the Translation Directive. These proceedings are ongoing.

Decision

69. There is a general assumption in accordance with the mutual trust and comity principle that the fundamental rights of the respondent will be protected upon surrender. To

overcome this assumption, the respondent is required to adduce sufficient evidence to show that in respect of his individual circumstances, his right to a fair trial will be denied. This was made clear in *Minister for Justice, Equality and Law Reform v Koncis* [2006] IEHC 379 when the court stated that “[a] respondent seeking to unsettle such a presumption and understanding has a heavy onus to discharge and a high hurdle to overcome before his/her surrender will be refused”. Murray CJ. (as he then was) further elaborated this in *Minister for Justice v Brennan* [2007] IESC 21 when he stated:

“That is not by any means to say that a court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances such as a clearly established and fundamental defect in the system of justice of a requesting State, where a refusal of an application for surrender may be necessary to protect such rights.”

70. In this case, the respondent has provided evidence that the requesting State in another similar trial provided limited translation of documents in what appears to have been a long and complex trial. Counsel for the Minister submits that the respondent’s complaints about Michael Campbell not receiving necessary documents needed for the defence of his trial, were essentially complaints about non-core documents. The contention is that Michael Campbell in his case did receive all the necessary documents required for his defence. Furthermore, the respondent makes the claim that it would appear that Lithuania has failed to implement a European Directive which was directed at Member States for the purposes of enhancing mutual trust among Member States, that being the Translation Directive.

71. The principles set out in the Translation Directive are largely derived from the case law of the European Court of Human Rights. It lays down “common minimum rules to be applied in the fields of interpretation and translation in criminal proceedings with a view to enhancing mutual trust among Member States.” In particular, it provides for the provision of written translation of all documents “which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.” While there is limited case law on what amounts to an essential document, a recent decision of the European Court of Justice in *Criminal proceedings against Franck Sleutjes* (Case C-278/16) considered the provisions of the Directive and stated as follows:

“...as the Advocate General stated in point 33 of his Opinion, it follows both from recitals 14, 17 and 30 of Directive 2010/64 and from the very wording of Article 3 of that directive, in particular, of paragraph 1 thereof, that the right to translation provided for is designed to ensure that the persons concerned are able to exercise their right of defence and to safeguard the fairness of the proceedings (judgment of 15 October 2015, Covaci, C-216/14, EU:C:2015:686, paragraph 43).”

72. The Translation Directive states:

“Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for the translation of documents or passages thereof and, when a translation has been provided, the possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings.”

73. What is envisaged is that *essential* documents will be translated and that a person has a right in accordance with national law to challenge a decision finding that there is no need for the translation of documents or passages thereof.
74. The issue this Court must deal with is whether the respondent will receive a fair trial in the issuing Member State should he be surrendered, based on the evidence provided by the respondent that in a previous case, limited translations of documents pertaining to the case had been provided to Michael Campbell in his case, and that the Translation Directive had not been implemented.
75. I will start with the issue of the Translation Directive. In the most recent hearing it was confirmed that the Translation Directive has now been transposed by Lithuania. Indeed, from my understanding of the situation, it was never correct to say that it had not been transposed; it was only certain aspects of it that had not been transposed. In my view, the fact that it has now been transposed takes the ground away from the respondent under this heading. The principle of mutual trust and confidence, especially where the law of the Member State requires compliance, would outweigh any evidence regarding the factual situation in another case heard a number of years ago. For that reason, I would reject this point of objection. I would make a number of points on the ground generally.
76. The information provided by the respondent and the issuing judicial authority coincide in that certain rights were granted to Mr. Michael Campbell. According to the affidavit of Ms Botyriene, Michael Campbell in his case, was provided a translator, though she remarks that the translator provided was not qualified to do so. Ms. Botyriene also clarifies that at least certain documents were made available and that she did not challenge any further the failure to provide further documentation because as:

“a matter of Lithuanian law, the aforementioned documents required to be translated (Notification of Suspicion the indictment etc.) represent the height of what is required to be provided by way of written translation in Lithuanian law, and so I was not in a position to challenge the failure of the provision of the case materials in English”.

77. Furthermore, additional information received by the central authority from the issuing judicial authority dated the 10th May, 2017 also makes reference to the law as pertaining to the rights of accused persons to a translator. It states:

“Article 8 of CPC indicates that criminal proceedings in the Republic of Lithuania shall be conducted in Lithuanian. The parties to the case who do not know Lithuanian shall be granted the right to plead, give evidence and explanations,

make motions and complaints, and speak in the court in their native language or any other language they know. In all the above cases and also when the parties to the case examine the materials of the case they shall have the right to make use of the services of a translator/interpreter in the manner laid down in this Code. The suspect, the accused or the convicted person as well as the other parties to the case shall, in the manner laid down in this code, be presented the documents of the case translated into their native language or any other language they know. It is obvious from the case material that in the course of the entire process the most significant part of this documentation has been translated or served translated to Michael Campbell by following the determined order and principle.”

78. That additional information goes on further to explain that during the course of the trial, Michael Campbell and his legal counsel did not seek to raise a translation issue, and only made a complaint after the pre-trial investigation had finalised. The issuing judicial authority informs that:
- “His [Michael Campbell’s] complaint was assessed by Decision of 15/4/2009 where it was stated that the assumptions of M. Campbell about the slow in ineffective translation in the course of familiarization with the pre-trial case material due to the unqualified translator contradict to the data existing in translation schedule. The schedule shows that starting from 13/03/2009 up to the date of receipt of his application, M. Campbell could on daily basis with only some exceptions get familiar with the case material covering approximately one volume per day or quite a considerable part of the documentation. This decision has been overruled”.
79. Indeed, the issuing judicial authority goes on to explain that a time-limit extension was provided to Michael Campbell in order for him to further familiarise himself with the case materials. He was provided with a Bill of Indictment translated into English following completion of the Pre-trial investigation process. It is stated that Michael Campbell also actively participated in the trial by asking questions relating to the subject matter of the case. This is evidenced from Court minutes.
80. Furthermore, the issuing judicial authority informs that Michael Campbell’s case was examined by the Court of Appeal and the Court delivered its judgment on the 14th April, 2017 and acknowledged him guilty of the crimes alleged and did not find any alleged breaches of the laws governing translation.
81. Having taken all of the above into consideration, it becomes clear that Michael Campbell did not have his fair trial rights violated during the course of his trial, as he was afforded documents deemed necessary by Lithuanian law and he was able to engage in the trial by asking questions. Presumably, those questions were asked as a matter of clarifying issues of law or fact that may have arisen during the translation process of the proceedings. Furthermore, in circumstances where the Court of Appeal held that no translation issue arose during the course of the trial of Michael Campbell, the evidence provided by the respondent in this case is of quite limited relevance and must be rejected.

82. In any event, as I have said, I am satisfied that there is no longer any merit in this point as it now appears that the Directive has been transposed by Lithuania. It should also be noted that by way of the previous mentioned additional information, the issuing judicial authority provided an assurance that the respondent's rights to a translator will be "strictly complied with" should he be surrendered. I do not have to consider that assurance of the case in light of my findings. It is sufficient to say that the issuing Member State must be presumed to comply with the provisions of the Framework Decision. There is no reason to even suspect that such a presumption has been set aside.
83. As the respondent has not even come close to reaching the level of proof required to satisfy this Court that his surrender must be prohibited on the basis that there is a real risk that he will face an unfair trial should he be surrendered, I therefore dismiss this point of objection.

Abuse of Process

84. Under this objection, the respondent submits that the application to surrender him has already been the subject of an application in the Irish High Court and in the courts of the United Kingdom of Great Britain and Northern Ireland. The UK refused to surrender the respondent [*Lithuania v. Campbell* [2009] NICty 5; *Lithuania v. Campbell*, Belfast Recorder's Court, 16th January 2013; *Lithuania v. Campbell* NIBQ 19; *Lithuania v. Campbell*, Supreme Court (UK)]. The respondent claims, having regard to the circumstances and background of the case, that the application to have him surrendered now amounts to an abuse of the Court's processes or gives rise to a complaint of *estoppel*.
85. The EAW dated the 18th December, 2008 ("EAW 1") refer to offences that are the same as the offences contained within the warrant endorsed in this case, dated the 26th August, 2013 ("EAW 2"). Both EAW's set out allegations that the respondent, along with his brother Michael Campbell, Brendan McGuigan and others, were involved in a plot to acquire a large quantity of firearms and explosives in Lithuania with a view to importing them into the State for the benefit of RIRA.
86. By way of background, the respondent was arrested in this jurisdiction on EAW 1 in January 2009 and was granted bail by the High Court on foot of same. He was then residing at his family home which is situated on the border with Northern Ireland. On the 22nd May, 2009, the respondent was driving his wife to work in Northern Ireland (not in breach of his then High Court bail) and was arrested by the PSNI on the same EAW (EAW 1) in Northern Ireland. This was attempt no. 2 to surrender him on EAW 1 as noted in the chronology. The surrender hearing took place before the Belfast Recorder's Court and on the 16th January, 2013, that Court refused to surrender the respondent on the basis that surrender would expose him to a real risk of being subjected to inhuman and degrading treatment by reason of the prison conditions in Lithuania.
87. The judgment was appealed by the requesting State and the High Court of Justice in Northern Ireland refused the appeal on the 22nd February, 2013. The UK Supreme Court refused the requesting State permission to appeal on the 31st July, 2013 on the basis of

the case not having raised a point of general importance. The proceedings having concluded, the respondent returned to his family home in early August 2013 having spent some four years in custody in Northern Ireland. He then resided openly at his home until his arrest in December 2016 on EAW 2.

88. The respondent gave evidence on affidavit of what he categorises as degrading and inhuman treatment whilst on remand for almost four years in Northern Ireland, including a period in which he claims he was subjected to solitary confinement for three years. He explains that for a period of over two and a half years in Maghaberry prison he was locked up for 23 hours a day in solitary confinement and allowed 1 hour per day to exercise in the yard on his own. His only interaction with other prisoners was at Sunday mass for 20 minutes. This was his daily routine until March 2013 when he was granted bail.
89. Counsel for the respondent submits that the Court must give some consideration to his remand conditions in refusing surrender in light of the oppression the respondent suffered as a result of the delay resulting in his deprivation of liberty. Moreover, counsel refers to the decision of this Court in the case of *Minister for Justice and Equality v. McLaughlin* [2017] IEHC 598 which lends evidential support to understanding the nature of the conditions in which the respondent was held. Counsel for the respondent submits that the fact that he was remanded in custody for four years must be taken into consideration, in particular, on considering that to surrender him would be oppressive.
90. The Court is in possession of reports from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT Reports") and from the United Kingdom's National Preventative Mechanism ("NPM") that demonstrate that the type of solitary confinement in which the respondent is found, that is, confinement for good order and protection of life within the prison, as distinct from punishment, were particularly onerous. I note that the respondent does not appear to have taken any proceedings himself. While I do not have to, and am not, determining that they breached Article 3 conditions in that regard, undoubtedly, the respondent endured a particularly difficult period of imprisonment.
91. In addition to this, the respondent submits that there has been a significant delay from the date of the issue of EAW 2, being almost immediately after the UK authorities refused his surrender on EAW 1, to when it was sent over to this jurisdiction in October 2016. There has been no explanation for that delay. There has been some suggestion by the central authority in this jurisdiction that it may have been because of the situation with regard to the giving of guarantees in respect of the remand prison and the subsequent withdrawal of those guarantees. They had apparently been withdrawn after the decision of the Court of Justice of the European Union in *Aranyosi and Căldăraru (Joined Cases C-404/15 and C-659/15)*, on the issue of prison conditions in requesting States. On the other hand, the respondent says that that explanation cannot be true on the basis that Mr. McGuigan, whose surrender was refused by the High Court in Dublin on the same basis that his was refused by the High Court in Northern Ireland, has not been sought by a fresh European Arrest Warrant.

92. In my view, the delay can only be treated as unexplained. I do not have an explanation from Lithuania as to why there was a delay. The Minister has submitted that if the delay was on its own in the case and there was no repeat application, it would not be significant, and the Court would not stop the surrender. While that may be the case, the delay is nonetheless to be considered against the background of what took place in this case. That background includes the fact that the respondent had been in Northern Ireland for four years in custody and his surrender was refused on the basis of the prison conditions.
93. Is it oppressive and an abuse of process, therefore, to surrender the respondent on foot of EAW 2, he having suffered a deprivation of liberty of four years – almost three of which were spent in solitary confinement - and having led a free life for three years after the conclusion of his UK proceedings, only to be arrested again on foot of EAW 2, the content of which is similar to that of EAW 1, on which surrender was refused? I will come back to this central question shortly, but it seems fitting here to address the Article 8 point that the respondent makes as part of the abuse of process point; he claims that the delay caused by the UK proceedings led to some difficulty for his family's private life, in particular for his children who were sitting exams at the time.

Article 8 of the European Convention on Human Rights

94. The respondent claims that if surrendered, such surrender will disproportionately interfere with his family life and thereby result in a breach of Article 8 of the European Convention on Human Rights. This point of objection can immediately be dismissed in a summary manner in accordance with the decision of the Supreme Court in *Minister for Justice and Equality v J.A.T. (No 2)* [2016] 2 I.L.R.M. 262. In that case, O' Donnell J. stated:
- "In any future case, where all or any of the above factors may be relied on, it would not, in my view, be necessary to carry out any elaborate factual analysis or weighing of matters unless it is clear that the facts come at least close to a case which can be said to be truly exceptional in its features. Even in such cases, which must be rare, it is important that the considerations raised are scrutinised rigorously."*
95. The disruption to the private family interests of the respondent are no more difficult or different from the expected disruption to a person's life by virtue of the extradition process. The facts here are nowhere near the type of situation that applied in *J.A.T. (No 2)*. This respondent has raised issues about stress and anxiety, but he has not produced any medical report and I am only going to have minimal regard to that. It is important that these issues as per O' Donnell J. in *J.A.T. (No 2)*, are scrutinised rigorously. The respondent's averment is no more than a statement of his unprofessional medical view.
96. The respondent does not have the specific family concerns that existed in *J.A.T. (No 2)*, where there was a very specific illness relating to an adult son. This respondent's wife is a nurse, and apart from stating in his affidavit that he has children, the respondent has not provided details of his family circumstances. No details arise as to the age of the children. There is no information on any adverse effect surrender may have on the

children which may be more severe than the expected impact a parent vacating the home may have.

97. Overall, no evidence has been provided to this Court on the impact surrender will have on the family that goes beyond that which is expected as a result of extradition proceedings. There is nothing particularly harmful, injurious or oppressive in surrendering him. This is not a case which comes even remotely close to being of the type of exceptional case where surrender must be prohibited. Should the respondent be surrendered, there is nothing that prohibits contact with his family via the normal prison communication system, *albeit*, as the affidavit of the respondent's brother highlights, the process of communication within the Lithuanian prison system may be slower than would be expected.
98. I therefore reject the point that to surrender the respondent would be a disproportionate interference with his private family life.

Is it oppressive and an abuse of process to surrender the respondent?

99. Both sides submit that the state of the case law pertaining to the abuse of process point is unsatisfactory. In the case of *Minister for Justice and Equality v. Tobin* [2012] 4 I.R. 147, the Supreme Court was split on whether the facts in that case amounted to an abuse of process. In *J.A.T. (No 2)*, the Supreme Court delivered two judgments and each appears to a majority judgment of the Court. One of the judgments queries whether there was a sufficient basis for the finding of an abuse of process. Both judgments agree that where the High Court's finding of abuse of process stand, there had to be a refusal to surrender in those circumstances. Admonishment alone is insufficient. Both sides in this case have accepted that it is difficult to discern principles. This Court is left to seek to determine those principles in circumstances where all sides agree that that is the position.
100. In *Minister for Justice and Equality v. J.A.T.* [2014] IEHC 320, Edwards J. held that an abuse of process occurs where there is a repeat application which renders the subsequent proceedings unconscionable: "[...]to seek the extradition of such a person is not per se abusive of the process. It would only be abusive of the process where to do so is unconscionable in all the circumstances." As this case considered *Tobin*, and its finding on abuse of process was undisputed by the Supreme Court, it is an important precedent.
101. Since the initial hearing of this case, the High Court and the Court of Appeal have both pronounced on the decision in *J.A.T. (No. 2)*. Peart J. in *Minister for Justice and Equality v. Downey* [2019] IECA 182 stated as follows:

"It is clear from J.A.T (No. 2) that there can be circumstances which justify the High Court refusing an application for surrender on the basis of abuse of process. But it is equally clear firstly that such cases require some exceptional circumstance to justify such refusal, but, and critically, that the abuse asserted to exist must be of the processes of the High Court here dealing with the application for surrender, and therefore must relate to the application for surrender itself, and not to the prosecution of the offences which the respondent will face if he/she is surrendered.

The different question whether there might be an abuse of process were the respondent put on trial for the offences for which surrender is sought is not a matter for determination in this jurisdiction on an application for surrender. Absent any suggestion that there is no possibility of a fair hearing of any application to have his trial on these offences stayed, and there has been no such suggestion made by the appellant, it is in my view clear that any such question of abuse of process will be a matter to be pursued by the appellant before the courts in the requesting jurisdiction.”

102. The facts of Downey were very different from the present case but the principles are important. It is only where the case has exceptional circumstances that an abuse of process will be found (although exceptionality is not the test) and that the abuse of process is that of the High Court in this jurisdiction rather than a concern about an abuse of process to put the requested person on trial.
103. All parties agree that the law is such that there is no bar in this jurisdiction to bringing a fresh application to the court for surrender (*Tobin, J.A.T (No. 2)*, *Bolger v. O'Toole & Bolger v. Haughton* [2008] IESC 38).
104. The fact of a repeat application appears to be a required starting point for this type of abuse of process, although it is not necessary to make such an explicit finding in this case. There was an acceptance by the parties that there had been a repeat application. I would remark however that this repeat application is somewhat unusual in this case. While it is abundantly clear that the respondent did not breach his bail bond in crossing into Northern Ireland while the application for his surrender was pending in the High Court in Dublin, nonetheless, by his own voluntary action in going to another Member State of the EAW, he put himself in the way of being arrested there. In my view, there can be no criticism of either the Northern Ireland authorities or indeed the Lithuanian authorities for seeking to enforce his surrender from there as it appears that each Member State is bound to execute an EAW where a requested person is found to be within their jurisdiction. As a second EAW has issued for him, I will proceed on the basis that this is a repeat application.
105. In this case, it is also important to consider the aspect of public interest. Edwards J. in *J.A.T* set out very clearly the issues of public interest that may arise in an abuse of process case. Those are issues of public interest which, broadly speaking, can be either in favour of one party or against another party. In that regard, there is a broad public interest in bringing things to finality in one set of proceedings. There is however, in this case, an implicit acknowledgement by counsel for the respondent that repeat applications are permitted in this jurisdiction and indeed counsel submits that this is implicit within the judgment of *Aranyosi and Căldăraru*. If that is the case, then the particular criticisms that applied in both *Tobin* and *J.A.T*, which in the *Tobin* case was the Minister's persistence in remaking applications for surrender in circumstances where it was said by the Supreme Court that the law was clear in prohibiting that surrender. This was viewed as a want of care and oppressive in itself. In *J.A.T (No. 2)* there was a failure on the part

of the UK authorities to draft the initial warrant in a careful and precise manner and a failure on the part perhaps of the Minister to ensure that the warrant was in order before presentation.

106. In the present case, the Minister bears no blame at all. Any blame in this case is not so much attributable to the wording in the EAW itself but, counsel for the respondent submits, to Lithuania, who for two decades now since their accession to the Council of Europe, have failed to organise their prison institutions in such a way as to ensure that fundamental Article 3 rights have not been breached. While that does not go to the drafting of the EAW, in certain ways it goes to the much more fundamental matter of the protection of human rights generally. In that sense, the conduct of the overall State in seeking surrender in circumstances where their prison conditions could not in general satisfy the most basic rights of human beings who are incarcerated there, is a matter of considerable concern.
107. In my view, however, the motive in seeking surrender on EAW 2 is not in itself improper or *mala fides*. The Lithuanian authorities understandably seek the surrender of this respondent for the purpose of being prosecuted for these particularly serious offences. There is nothing malicious or improper in seeking that. Furthermore, it is not the fact that they are seeking to have him punished in a way that violates Article 3, they are simply saying that they wish to prosecute him and have now made clear that he will be held in Article 3 compliant conditions (as seen either by the assurances (although contested) on behalf of the Lithuanian authorities or by the closure of Lukiskes). *Mala fides* or an improper motive is not a necessary precondition for an abuse of process (*J.A.T. (No 2)*) however.
108. It is also accepted that it is not for the Court to apply a strict rule that prohibits second applications; that is not being urged on the Court. What is being urged, as has been said previously, is that the cumulative factors will make this oppressive or in the words of Edwards J., unconscionable to surrender him.
109. It seems that the true issues are the delay and the fact that he has spent some considerable time in Northern Ireland awaiting his surrender. In respect of that matter, the Court can say that it is regrettable that proceedings took so long in any jurisdiction but unfortunately that can occur, particularly with appeal processes. The respondent urges upon the Court that these alleged offences occurred some 14 years ago. The respondent points to the responsibility for that time period as laying with the issuing Member State. It was the responsibility of Lithuania to have a prison system that respected the most basic and essential fundamental human rights.
110. Naturally there is a concern that any person should have to wait 14 years for a prosecution to take place. That is unsatisfactory. On the other hand, there is no specific prejudice to the respondent by that fact. This is not a case where the delay is said to affect his defence of the trial. Indeed, he has known of the allegations for a considerable time and in light of the possibility that he could have been surrendered on EAW 1, he had the opportunity to marshal, in general terms at least, as he did not have all the detailed

evidence alleged against him, his defence to the relatively detailed allegations set out in the warrant. As stated above, no specific adverse consequences for the respondent or his family have been identified.

111. It must also be said that Lithuania is not entirely to blame for the periods at stake. In the first place, the criminal offences were not complete until 2008 and it is difficult to see how time can be said to run against Lithuania until 2008 thus being a period of 12 years. Allowing for some period of investigation and internal decision making with respect to proceedings, EAW 1 was issued reasonably promptly against him, being within 12 months from January 2008. His arrest in this jurisdiction was made promptly. It was not the fault of the Minister or of Lithuania that he was arrested in Northern Ireland. The length of those proceedings cannot be laid at the door of Lithuania or of the Minister. Moreover, the time it has taken to finalise the within proceedings are not the responsibility of Lithuania but are as a consequence of challenges to public prosecutors as issuing judicial authorities.
112. The respondent points to the general failure with regard to safeguarding fundamental rights and points to the closure of Lukiskes prison in July 2019 as the crucial point when it could be said that Lithuania were finally in a position to abide by the requirements of the Framework Decision. I have stated above, that it is not necessary to deal with the issue of assurances. It is necessary to make one brief observation however. The respondent's main contention was that Irish law on extradition did not permit an assurance to be accepted. In my view, as a matter of European law and in accordance with the Framework Decision, the CJEU has accepted in *M.L. (Generalstaatsanwaltschaft Bremen)* [2018] C-220/18 PPU that assurances from an agency of a Member State other than a judicial authority may be accepted when considering whether fundamental rights will be respected in the issuing Member State. Thus, as a matter of European law, Lithuania were within their rights to issue the assurance and there can be no blame on them, if as a matter of Irish law, the courts here were not entitled to accept it. Therefore, it is appropriate to take October 2017 as the date the assurance was given that he would not be detained in Lukiskes prison and thus from that point on, it would not be appropriate to fix Lithuania with any responsibility for delaying human rights protections. Thus, the maximum length of time for which the respondent can assert that there was a lack of protection with respect to fundamental rights is from the issue of EAW 1 in December 2008 to the assurance given in October 2017. This is a period of less than 9 years.
113. As regards the time he spent in custody, it has never been suggested that if he were to be convicted this would not be taken into account in any sentence he may receive. That is of only marginal importance because he is a person entitled to a presumption of innocence and if surrendered he would be sent over to face prosecution and quite likely custody in Lithuania on remand pending trial. Moreover, as stated above, the four years in custody were particularly difficult ones.
114. The Court is cognisant of the fact that this a serious set of offences for which the respondent is sought. Two of the offences amount to terrorist offences (as indicated in

the EAW). The maximum sentence on a single offence is 20 years. These are important factors.

115. The objective of the Framework Decision is to provide a simplified system of surrender. The obligation on Member States is to surrender in accordance with the provisions of the Framework Directive. In *Minister for Justice and Equality v. L.M.* (Case C-216/18) the Grand Chamber of the CJEU stated:

"41. *In the field governed by Framework Decision 2002/584, the principle of mutual recognition, which, as is apparent in particular from recital 6 of that framework decision, constitutes the 'cornerstone' of judicial cooperation in criminal matters, is applied in Article 1(2) thereof which lays down the rule that Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of the framework decision. Executing judicial authorities may therefore, in principle, refuse to execute such a warrant only on the grounds for non-execution exhaustively listed by the framework decision and execution of the warrant may be made subject only to one of the conditions exhaustively laid down in Article 5. Accordingly, while execution of the European arrest warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly (see, to that effect, judgment of 10 August 2017, Tupikas, C 270/17 PPU, EU:C:2017:628, paragraphs 49 and 50 and the case-law cited). [...]*

43. *Nonetheless, the Court has recognised that limitations may be placed on the principles of mutual recognition and mutual trust between Member States 'in exceptional circumstances' (see, to that effect, judgment of 5 April 2016, Aranyosi and Căldăraru, C 404/15 and C 659/15 PPU, EU:C:2016:198, paragraph 82 and the case-law cited)".*

116. In *Aranyosi and Căldăraru* and *L.M.*, the CJEU recognised that protection of fundamental rights could constitute such an exceptional circumstance, a position already adopted by the Supreme Court in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] 3 I.R. 783. The Supreme Court in *Tobin and J.A.T. (No 2)* held that an abuse of process was also a ground on which surrender could be refused. As stated in *J.A.T. (No 2)* by O'Donnell J., that was a rare and exceptional case. In my view, the fact that it is only in exceptional cases that an abuse of process will be found is consistent with the jurisprudence of the CJEU that surrender in accordance with the Framework Decision is the norm and it is only in exceptional circumstances that surrender can be refused on another basis.
117. I have considered the issues in this case. While there has been no explanation for the delay in forwarding this EAW to this jurisdiction, I am not satisfied that this is a crucial factor which points inexorably to an abuse of process. O'Donnell J. in *J.A.T. (No 2)* was wholly unconvinced by the argument on delay. I too am unconvinced here. There can be many reasons for not giving an explanation as to delay. Indeed, the experience of this Court has been that the fact that we are not part of the Schengen Alert System is not

always appreciated by all issuing judicial authorities in those Member States who participate. There is an assumption that putting the EAW on the Schengen Alert System is sufficient. There can otherwise be human error. While that is unsatisfactory it would only exceptionally amount to an abuse of process. As I have already found, there is no suggestion here of *mala fides*. I also do not find it relevant that Mr. McGuigan has not been sought again. In short, the lack of explanation adds little to this issue, although as per the decision of Denham J. in *J.A.T. (No. 2)*, it is a factor to be taken into account.

118. The CJEU in *Aranyosi and Căldăraru* anticipate that there may be a delay before the fundamental rights protection can be made. They indicated that cases may be adjourned for a reasonable time. The CJEU has made no determination that it is not possible to take further proceedings. In my view, there is no bar in EU law from renewing an application for surrender. Moreover, there is no bar in Irish law from seeking further extradition.
119. In *J.A.T. (No. 2)*, the question of public policy was highlighted by O'Donnell J. That is an important aspect to bear in mind. There is a strong public interest in Ireland complying with its international obligations and that persons who are sought for prosecution or to serve a sentence in another country should be surrendered in accordance with the relevant extradition provisions. An abuse of process permits (indeed requires) the Court not to extradite. No court should make such a finding lightly.
120. Has the behaviour of the Lithuanian authorities been such as to abuse the process of this court? Is that behaviour when coupled with the lapse of time and in particular the detention of the respondent in Northern Ireland been so oppressive that to surrender him would be an abuse of process?
121. Central to the respondent's contention is that in seeking his surrender, in particular over an extensive period, while their prisons violated fundamental rights to human dignity, the Lithuanian authorities were engaged in an abuse of process. In my view, even accepting that their prisons (Lukiskes in particular) was an unacceptable place of detention, this is not of itself an abuse of process. It is in the nature of litigation that faults and defects are highlighted and ruled upon. The extent of a Member State's obligations was only defined in a series of cases beginning with *Aranyosi and Căldăraru*. The CJEU directed an individual assessment of the real risk to a particular requested person, a recognition that it is not necessarily every place of detention in a requesting State that will give rise to the real risk of a person being detained in inhuman and degrading conditions. The question of the giving of assurances at a European level was only authoritatively dealt with in *M.L.*
122. I do not accept that it is *mala fides* for a judicial authority to seek surrender when prisons may subsequently be found to be defective. Indeed, as the case law developed it became clear that not all prisons in Lithuania were deemed to violate Article 3 by virtue of their conditions of detention. Those findings were made in the courts in this jurisdiction as well as in the courts of other Member States. I do not accept that even in the absence of a finding of *mala fides*, that it is an abuse of process to seek to have a person surrendered again. I do not accept that the behaviour of Lithuania complained of by the respondent reaches the level required to amount to an abuse of process.

123. Furthermore, I do not accept that this Court would be oppressing the respondent by surrendering him to the Lithuanian authorities. Neither can it be said that it would be unconscionable, nor would it be an abuse of process to do so. It is regrettable that the respondent suffered detainment and periods of isolated confinement in the UK prison, and it is unfortunate that a serious delay occurred before these proceedings, which includes EAW 1, could be determined. However, it must again, be highlighted that there would only be one warrant had the respondent not willingly left the jurisdiction whilst on bail. This certainly may have prevented the delays and the prolonged detainment in difficult circumstances that occurred. He is not to be faulted for that but neither can Lithuania be faulted for the length although there is some responsibility for the fact that their prison conditions were found to be such as to constitute a real risk to him of being subjected to inhuman and degrading treatment. Furthermore, there is no absolute bar to repeat warrants being issued. It is not unusual for issuing judicial authorities to reissue warrants where previous warrants were refused, especially where in the public interest, the surrender of the respondent, whom is sought for very serious offences, would be in the interest of the administration of justice.
124. Having considered all the factors relevant to the abuse of process, I am satisfied that individually or cumulatively there is no abuse of process. However unique the circumstances are in this case, they do not reach a level of unjust harassment or oppression that means it would be an abuse of the processes of this Court to surrender him. This point of objection must accordingly fail.

Other Developments

125. The respondent has drawn the attention of the Court to the fact that he has instituted plenary proceedings seeking a declaration in relation of the failure of this State to implement Council Framework Decision 2008/909/JHA and Council Framework Decision 2008/829/JHA. The first Directive is on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. The Second mentioned Directive is on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. In addition, the General Court has annulled the European Commission's decision to refuse access to documents concerning Ireland's failure to implement these measures.
126. The above has been drawn to the attention of the Court without comment or indication as to why it has relevance to the issue before this Court; namely, whether the surrender of the respondent to Lithuania is prohibited under the Act of 2003 or otherwise. I am satisfied that the fact he had taken these proceedings is not relevant to the issue before me.

Conclusion

127. For the reasons set out above I am satisfied that an Order for the surrender of the respondent in accordance with the provisions of s. 16(1) of the Act of 2003 may be made. As this judgment is being delivered electronically, I will make that Order when the

respondent appears in person in the High Court on the 13th July next. If the respondent wishes to apply for a certificate for leave to appeal, he should submit the question and brief written submissions within one week of this judgment being delivered. The Minister has one week in which to respond. I will hear any such application on the 13th July next.