**Judgment Title:** Minister for Justice Equality and Law Reform v Bailey

**Neutral Citation:** [2012] IESC 16

**Supreme Court Record Number:** 174/2011

**High Court Record Number:** 2010/144 EXT

**Date of Delivery:** 01/03/2012

**Court:** Supreme Court

**Composition of Court:** Denham C.J., Murray J., Hardiman J., Fennelly J., O'Donnell J.

**Judgment by:** Denham C.J.

**Status of Judgment:** Approved

| Judgments by | Link to Judgment | Result |
|---|---|---|
| Denham C.J. | Link | Appeal allowed - set aside High Court Order |
| Murray J. | Link | Appeal allowed - set aside High Court Order |
| Hardiman J. | Link | Appeal allowed - set aside High Court Order |
| Fennelly J. | Link | Appeal allowed - set aside High Court Order |
| O'Donnell J. | Link | Appeal allowed - set aside High Court Order |

**Outcome:** Allow And Set Aside

**THE SUPREME COURT**

**[Appeal No: 174/2011]**

**Denham C.J.**
**Murray J.**
**Hardiman J.**
**Fennelly J.**
**O'Donnell J.**

**Between/**

**The Minister for Justice, Equality and Law Reform**

**Applicant/Respondent**

**and**

**Ian Bailey**

**Respondent/Appellant**

**Judgment delivered on the 1st March, 2012 by Denham C.J.**

1. This appeal arises in unique circumstances and raises unprecedented questions of law.

2. A European Arrest Warrant, hereinafter referred to as "the warrant", was issued by the Republic of France and dated the 19th February, 2010, in respect of Ian Bailey, the respondent/appellant, referred to as "the appellant". The warrant relates to the murder of Mme. Sophie Toscan du Plantier, a French citizen, on or about the 23rd December, 1996, in Schull, County Cork, Ireland.

3. The appellant has resisted his surrender pursuant to the warrant to France.

4. On the 18th March, 2011, the High Court (Peart J.) delivered a judgment and ordered the surrender of the appellant to the French authorities. However, on the 13th April, 2011, the High Court certified that the decision involved a point of law of exceptional public importance. Thus, the appellant has brought an appeal to this Court, pursuant to s. 16(12) of the European Arrest Warrant Act, 2003, as amended by s. 12 of the Criminal Justice (Miscellaneous Provisions) Act, 2009.

**Certified Question**

5. On the 13th April, 2011, the High Court certified that the following is a point of law of exceptional public importance and that it is in the public interest that an appeal should be taken to this Court:-

> "Whether the surrender of a person is prohibited by section 44 of the Act where the offence for which surrender is sought is committed in the State and where the victim is a national of the requesting State which seeks to exercise an extra-territorial jurisdiction to prosecute the offence under its own laws and in circumstances where the Director of Public Prosecutions in this State has decided not to prosecute the person in respect of that offence."

**Grounds of Appeal**

6. The appellant filed a Notice of Appeal on the 15th April, 2011, in which the grounds of appeal were stated as follows:-

The learned High Court judge erred in law and/or in fact or in a mixed question of law and fact in that he:

> (i) found there was jurisdiction to surrender the appellant pursuant to the European Arrest Warrant Act, 2003;
>
> (ii) found that there was jurisdiction to surrender the appellant in that he found that the prohibition on surrender contained in s. 44 of the Act of 2003 related only to cases where the offence for which surrender is sought was committed outside the territory of the State (Ireland) and the issuing state;
>
> (iii) found that s. 42(c) of the Act of 2003 as originally enacted

did not prohibit the surrender of the appellant in that he found that the scope of the amendment to section 42 of the Act of 2003 contained in s. 68 of the Criminal Justice (Terrorist Offences) Act, 2005 was such that the said amendment applied to the European Arrest Warrant issued in respect of the appellant;

(iv) found that the surrender of the appellant, in the circumstances of the case, was not:

(a) an abuse of process, or

(b) contrary to s. 37 of the Act of 2003, or

(c) contrary to the provisions of the Framework Decision, or

(d) oppressive, invidious or unjust;

(v) found that the surrender of the appellant was not prohibited by s. 21 A of the Act of 2003, in other words that the learned trial judge ought to have been satisfied that a decision has not been made to charge the appellant with, and try him for, the offence (for which surrender is sought) in the issuing state;

(vi) found as a fact that, as a matter of French law, before the criminal proceedings in the issuing state could proceed, the attendance of the appellant was required before the *juge d'instruction* in the issuing state;

(vii) made findings of fact in regard to French law based on sections of the French legal criminal code not properly adduced in evidence and in respect of which the parties did not have an opportunity to consider and/or make submissions;

(viii) failed to require the provision of additional documentation pursuant to s. 20(1) of the Act of 2003, whether to determine the ground as set out at paragraph 5 above or otherwise.

**Background Facts**

7. The background facts were stated by the High Court (Peart J.), from which account I set out the following summary:-

7(i) The surrender of the appellant is sought by a judicial authority in France on foot of the warrant which issued there on the 19th February, 2010. That warrant was transmitted to the Central Authority here, following which, on the 23rd April, 2010, it was endorsed for execution by the High Court. On that date also, the appellant was arrested. On the following day he was brought before the High Court as required by s. 13 of the European Arrest Warrant Act, 2003 as amended, and has been on bail since that date pending the completion of this application.

7(ii) The warrant states that surrender is sought for the purposes of prosecuting the appellant on a charge of murdering Mme. Sophie Toscan du Plantier, a French citizen, on the night of 22nd /23rd December 1996 in West Cork, Ireland.

7(iii) An unusual aspect of this application for surrender is that the murder in question occurred in this State and not in France. However, the victim of the murder was a citizen of France, and under the laws of France, the French courts have jurisdiction to prosecute and put on trial an accused in relation to the murder of a French citizen even where it occurs outside France.

7(iv) Another unusual feature of this case is that the appellant was questioned by An Garda Síochána here following the death of Mme. Sophie Toscan du Plantier, as were a considerable number of other persons. A file was sent to the Director of Public Prosecutions, referred to as 'the DPP', and a decision was made that the appellant would not be prosecuted on any charge relating to her death. A letter dated the 5th July, 2010, from the DPP to the appellant's solicitor, Frank Buttimer, confirmed this, and further stated that the file has been reviewed on a number of occasions since that decision was made, and most recently in 2007. The DPP stated again that on all occasions the original decision not to prosecute the appellant was confirmed. In accordance with the DPP's general policy no reasons for this decision were given, but it was stated in the letter that it was in accordance with the DPP's Guidelines for Prosecutors available on the DPP's website.

**Issues**

8. There are four main issues on this appeal. They are:-

(i) The meaning and application of s. 44 of the European Arrest Warrant Act, 2003, referred to as 'the Act of 2003'.

(ii) The meaning and application of s. 42 of the Act of 2003, and its amendment by the Criminal Justice (Terrorist Offences) Act, 2005, referred to as 'the Act of 2005'.

(iii) The meaning and application of s. 21A the Act of 2003, as amended by the Act of 2005.

(iv) Section 37 of the Act of 2003, and submissions on fair procedures and abuse of process.

**Motion**

9. On the 13th January, 2012, the appellant brought a motion to this Court seeking, *inter alia*, liberty to adduce new evidence in the proceedings. This new evidence was referred to as:-

(a) disclosure material as set out in the letter from the DPP to the solicitors for the appellant (including enclosures) dated the 4th November, 2011; and

(b) disclosure material as set out in the letter from the Mutual Assistance Division of the Department of Justice (including enclosures) to the solicitors for the appellant dated the 9th November, 2011.

10. The Court granted the application on the 13th January, 2012, and indicated that it would give its reasons at a later date.

11. The new evidence was advanced as being material and especially relevant to the fourth issue.

12. The appeal commenced before the Court on the 16th January, 2012. On the 18th

January, 2012, Mr. Barron S.C., counsel for the Minister for Justice and Equality, requested the Court to decide the first three points of law which had been argued at that time, before considering the fourth issue. This application was made after a new document from the French authorities was before the Court on the 17th January, 2012, with the English translation proffered on the 18th January, 2012. Mr. Giblin, S.C., counsel for the appellant, referred to the distress of the appellant and his family during these proceedings, and stated that it was a pity that the new document from the French authorities had not been before the High Court. He stated that his instructions were not to object to the Court dealing with the three legal issues at this stage. He stated that his client accepted that this would be best.

13. Consequently, the Court reserved judgment on the first three issues raised in this appeal, and adjourned the balance of the appeal.

14. I will address the three issues in the order in which they were argued before the Court. Thus, the first issue arises on the meaning and application of s. 44 of the Act of 2003

**Section 44 and extra-territoriality**

15. Section 44 of the Act of 2003 provides:

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

16. The appellant, who, though resident in West Cork for many years, is a citizen of the United Kingdom, submitted that surrender is prohibited under the provisions of s. 44 of the Act of 2003, since the offence was committed outside the issuing State (France), and the law of the executing State (Ireland) does not permit the prosecution in the State of an offence of murder committed outside the State where the accused person is other than an Irish citizen. As provided for in s. 9 of the Offences Against the Person Act, 1861, as amended, only an Irish citizen is amenable to such a charge in this State. The section stands to be interpreted in the light of the provisions of Article 3 of the Offences Against the Person Act 1861 (Section 9) Adaption Order, 1973 (S.I. 356 of 1973).

17. In the circumstances of this case the alleged offence was not committed in the issuing state – France. The query then arises as to whether s. 44 covers the situation in this case, where the alleged offence occurred in Ireland. It is a question of construing section 44.

18. The High Court interpreted s. 44 by reading into it the additional words: "and other than this State". The learned High Court judge held:-

> "But in reaching a conclusion on this issue the Court must look at the entire Act and the Framework Decision and interpret section 44 by reference to any other relevant sections of the Act of 2003, and in the light of the aims and objectives of the Framework Decision. If one has regard to the manner in which section 42 has been enacted, and has regard also to the absence of any provision of the Framework Decision which requires that surrender be refused in the circumstances of this particular offence, it is not *contra legem* to hold that section 44 of the Act of 2003 prohibits surrender in respect of offences which are

committed in a country other than the issuing state and other than this State (i.e. in a third state), and where under the law of this State such an offence does not, by reason of having been committed in a third state, constitute an offence. That does not do violence to section 44 when one considers section 42 and the Framework Decision in tandem with it.

I conclude therefore that surrender is not prohibited by the provisions of section 44 or Article 4.7 of the Framework Decision and in particular paragraph (b) thereof. "

[Emphasis added]

19. The Framework Decision provided grounds for optional non-execution of a warrant. It states in Article 4 that the executing judicial authority may refuse to execute the warrant in a number of circumstances, including, in paragraph 7:-

> "4.7: where the European arrest warrant relates to offences which:
>
> (a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such;
>
> or
>
> (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory."

20. The Framework Decision thus provides two options in Article 4.7 for non execution of a warrant. The choice of applying the options was made by the Oireachtas.

21. In Ireland, the initiating legislation was the Act of 2003. Article 4.7(a) was ultimately not incorporated as part of Irish legislation, and thus it is not an option open to the Court.

22. The option described in Article 4.7.b of the Framework Decision was implemented by the legislature in the provisions of s. 44 of the Act of 2003, which has not been amended in any later legislation and which retains the same wording since its enactment.

23. It appears to me that the words of s. 44 are clear: a person shall not be surrendered if two specific conditions are satisfied. The first part of the section states that:-

> "A person shall not be surrendered under this Act if the offence specified in the European Arrest Warrant in respect of him or her was committed in a place other than the issuing State …"

The first of these conditions is that the offence was committed or alleged to have been committed in a place other than the issuing State. In this case the offence of murder of Mme. Toscan du Plantier took place in Ireland and thus outside the issuing State, which is France. Therefore, the first condition is met. However, this finding is insufficient to prohibit surrender under s. 44 of the Act of 2003 and it is necessary to

consider the balance of the section, the second condition.

24. This first issue therefore turns on the meaning of the words in the balance of s. 44, which sets the second condition as:-

> "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".

It is helpful to read the third phrase before the second, in construing the meaning of the section. This would thus be:

> "and the act or omission of which the offence consists does not, constitute an offence under the law of the State, by virtue of having been committed in a place other than the State".

These are clear words and so may be considered and applied literally. The section prohibits the surrender of a person where the act of which the offence consists does not constitute an offence in Ireland by virtue of having been committed, i.e. because it was committed, in a place other than Ireland.

25. The terms of s. 44 are an option, exercised by Ireland, grounded on Article 4.7.b. of the Framework Decision.

26. The European Arrest Warrant procedure is based on the concept of mutual trust and confidence between judicial authorities of the Member States. However, Article 4.7 of the Framework Decision and s. 44 of the Act of 2003 reflect other principles also. It is necessary to analyse the Article and the section to determine the issue raised by the appellant.

27. The *travaux préparatoires* on Article 4.7 of the Framework Decision, and thus on the foundations of s. 44 of the Act of 2003, are of interest. It is unfortunate that they were not opened to the Court by counsel.

28. The concept of reciprocity has long been utilised by States in making extradition treaties.

29. The European Convention of Extradition 1957 provided in its Article 7:

Article 7 – Place of Commission

> "1. The requested Party may refuse to extradite a person claimed for an offence which is regarded by its law as having been committed in whole or in part in its territory or in a place treated as its territory.
>
> 2. When the offence for which extradition is requested has been committed outside the territory of the requesting Party, extradition may only be refused if the law of the requested Party does not allow prosecution for the same category of offence when committed outside the latter Party's territory or does not allow extradition for the offence concerned."

30. Article 26 provided for reservations, stating:-

> "1. Any Contracting Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention.

2. Any Contracting Party which has made a reservation shall withdraw it as soon as circumstances permit. Such withdrawal shall be made by notification to the Secretary General of the Council of Europe.

3. A Contracting Party which has made a reservation in respect of a provision of the Convention may not claim application of the said provision by another Party save in so far as it has itself accepted the provision."

31. The Explanatory Memorandum on Article 7 states:-

"Paragraph 1 permits a Party to refuse extradition for an act committed in whole or in part within its territory or in a place considered as its territory. Under this paragraph it is for the requested Party to determine in accordance with its law whether the act was committed in whole or in part within its territory or in a place considered as its territory. Thus, for example, offences committed on a ship or aircraft of the nationality of the requested Party may be considered as offences committed on the territory of the Party.

Paragraph 2 was inserted in order to take into account the law of countries which do not allow extradition for an offence committed outside the territory of the requesting Party. This paragraph provides that extradition must be granted if the offence has been committed outside the territory of the requesting Party, unless the laws of the requested Party do not authorise prosecution for an offence of the same kind committed outside its territory, or do not authorise extradition for the offence which is the subject of the request.

Under the terms of Article 26, a reservation may be made in respect of this paragraph, making it subject to reciprocity."

32. Thus, under the previous Extradition system, where treaties were made between states, the specific treaty could make provision for a reservation, and make it subject to reciprocity.

33. The document dated 4th December, 2001, from the Permanent Representatives Committee, to Council, entitled "Proposals for a Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States", 14867/01 COPEN 79 CATS 50 stated:

"3. Grounds for optional non-execution.

3.1 Grounds linked to the place where the act on which the grounds for the European arrest warrant was committed:

Several delegations (NL/EL/IRL/L,/DK/A and S) wanted to introduce additional grounds for optional non-execution, making it permissible to refuse to execute a European arrest warrant issued for acts committed in whole or in part on the territory of the executing Member State or committed outside the territory of the issuing Member State, if the law of the executing Member State does not allow prosecution of offences of the same type committed outside the territory of the executing Member State. This question should be examined together with the

French proposal referred to in point 1 above.

The Presidency will make a proposal to COREPER/COUNCIL on this point as part of an overall compromise."

The Framework Decision annexed (as of 4th December 2001) included:

"7. [Where the act on which the European arrest warrant is based was committed in whole or in part in the territory of the executing State or in a place treated as the territory of that Member State, and the competent authority of the executing State undertakes to conduct the prosecution or to execute the sentence **2**.]"

The footnote 2 stated:-

"NL (supported by EL/IRL/L/DK/A and S) has made a broader proposal, based on Article 7 of the 1957 European Extradition Convention:

'Where the European arrest warrant envisages offences which:

(1) are regarded by the law of the executing Member State as having been committed in whole or in part in its territory or in a place treated as the territory of that Member State;

(2) have been committed outside the territory of the issuing member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside the territory of the executing Member State.'"

Thus, Ireland was one of the delegations seeking to introduce additional grounds for optional non-execution at this stage of the consideration of the proposed Framework Decision.

34. At the 2396th Council Meeting – Justice, Home Affairs and Civil Protection – Brussels, on the 6th and 7th December, 2001, the Council examined a draft Framework Decision on the European Arrest Warrant and the surrender procedures between Member States, on a compromise proposal. The Presidency was able to record the agreement of 14 delegations on its compromise. One delegation was unable to support the proposal. The main features of the compromise were:-

- The arrest warrant is broad in scope. In particular, it gives rise to surrender in respect of 32 listed offences … without verification of the double criminality of the act and provided that the offences are punishable in the issuing Member State by a custodial sentence of a maximum of at least 3 years.

- A territoriality clause making it optional to execute an arrest warrant in respect of offences committed in the executing State for acts which took place in a third State but which are not recognised as offences by the executing State.

- A retroactivity clause making it possible for a Member State to process requests submitted prior to the adoption of the Framework Decision under existing instruments relating to

extradition.

35. On the 6th December, 2001, the Presidency noted agreement of 14 delegations on the draft Framework Decision, one delegation could agree only on a narrower list of offences in Article 2(2). The draft Article 4 was headed as grounds for optional non-execution. It contained seven sections by which "[t]he executing judicial authority may refuse to execute the European arrest warrant" if the conditions in any section were adopted into domestic law. The draft Article 4.7 was:-

> "The executing judicial authority may refuse to execute the European arrest warrant […]
>
> 7. Where the European arrest warrant envisages offences which:
>
> (3) are regarded by the law of the executing Member State as having been committed in whole or in part in its territory or in a place treated as the territory of that Member State;
>
> (4) have been committed outside the territory of the issuing member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside the territory of the executing Member State."

This draft indicates an agreement that the second option not to surrender would lie when the offence in issue had been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offence when committed outside the territory of the executing Member State.

36. The final wording agreed upon for Article 4.7 of the Framework Decision was:-

> 7. where the European arrest warrant relates to offences which:
>
> (a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such;
>
> or
>
> (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

37. Ireland did not opt for Article 4.7.a. But the roots of Article 4.7.b. may be seen in Article 7 of the European Convention on Extradition, 1957, and there is a clear line of thought through to Article 4.7.b. of the Framework Decision.

38. Whether one classifies it as an option as to extra-territoriality or reciprocity, Article 4.7.b. makes provision for an exception to the requirement of surrender which is a fundamental principle of the Framework Decision.

39. Article 4.7 has been described as an example of the principle of reciprocity in the Framework Decision. As stated in **Blextoon and van Ballegooij, eds., Handbook on the European Arrest Warrant**, (T.M.C. Asser Press, 2005) in chapter 6. The Principle of Reciprocity, by Harman van der Wilt at p. 74:-

> "Only one provision in the Framework Decision alludes to the principle of reciprocity. According to Article 4, s. 7 sub. (b), the executing judicial authority is allowed to refuse the execution of a European Arrest Warrant, whenever such a warrant envisages offences which have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside the territory of the executing Member State. In the corresponding situation the executing state would simply not be able to issue an arrest warrant due to a lack of jurisdiction. The provision restores the equilibrium by offering this state the possibility to restrict the scope of its performances to its own expectations in similar circumstances. This section mirrors Article 7, s. 2 of the European Convention on Extradition."

40. Therefore it is necessary to consider the law in Ireland on extra-territoriality and the offence of murder. This is to be found in s. 9 of the Offences Against the Person Act, 1861, as amended, as follows:

> "Where any Murder or Manslaughter shall be committed on Land out of the United Kingdom, whether within the Queen's Dominions or without, and whether the Person killed were a Subject of Her Majesty or not, every Offence committed by any Subject of Her Majesty, in respect of any such Case, whether the same shall amount to the Offence of Murder or of Manslaughter, may be dealt with, inquired of, tried, determined, and punished in any County or Place in England or Ireland in which such Person shall be apprehended or be in Custody, in the same Manner in all respects as if such Offence had been actually committed in that County or Place; provided that nothing herein contained shall prevent any Person from being tried in any Place out of England of Ireland for any Murder or Manslaughter committed out of England or Ireland, in the same Manner as such Person might have been tried before the passing of this Act."

41. This section was adapted by S.I. No. 356/1973: Offences Against the Person Act, 1861 (Section 9) Adaptation Order, 1973, which provided:-

> "The Government, in exercise of the powers conferred on them by section 12 of the Adaptation of Enactments Act, 1922 (No. 2 of 1922) (as adapted in consequence of the enactment of the Constitution), and section 5 of the Constitution (Consequential Provisions) Act, 1937 (No. 40 of 1937), hereby order as follows:
>
> 1. This Order may be cited as the Offences against the Person Act, 1861 (Section 9) Adaptation Order, 1973.
>
> 2. The Interpretation Act, 1937 (No. 38 of 1937), applies to this Order.
>
> 3. Section 9 of the Offences against the Person Act, 1861, shall be construed and have effect as if—
>
> (a) the reference to land out of the United Kingdom, whether within the Queen's dominions or without, were a reference to land outside the

area of application of the laws of the State,

(b) the reference to a subject of Her Majesty were a reference to a citizen of Ireland and the reference to any subject of Her Majesty were a reference to any citizen of Ireland, and

(c) the first reference to England and Ireland were a reference to the area of application of the laws of the State."

42. Thus, applying the above law, Ireland could request France to surrender to Ireland an Irish citizen for an alleged murder committed in France. However, Ireland could not make a successful request to France to surrender to Ireland a citizen of the United Kingdom for the offence of an alleged murder committed in France. The act of murder in another state is not an offence which may be prosecuted in this State except where it is committed by an Irish citizen. There is no jurisdiction in Ireland to prosecute for an offence of murder committed outside the area of the application of the laws of the State, unless an ingredient in that crime is that the alleged offender was an Irish citizen.

43. It appears to me that the learned High Court judge fell into error in adding the words "and other than this State" to the words of s. 44 of the Act of 2003 in his analysis. The words of s. 44 are clear, are not ambiguous, and do not include the words "and other than this State".

44. By section 44 of the Act of 2003, Ireland adapted into Irish law Article 4.7.b. of the Framework Decision, which itself had roots in the Convention on Extradition, 1957, Article 7. The systems of extradition following on the Convention on Extradition, 1957 were different, separate treaties were entered into between States. Today in Europe, pursuant to the Framework Decision, there is a new system, a system of surrender of persons between judicial authorities, based on mutual trust and confidence. However, s. 44, and Article 4.7.b., have roots in the system of reciprocity that existed under the earlier regime and this informs the construction of s. 44.

45. I construe s. 44 as enabling Ireland to surrender a person in respect of an offence alleged to have been committed outside the territory of the issuing State in circumstances where the Irish State would exercise extra-territorial jurisdiction in reciprocal circumstances. Ireland would not have jurisdiction to surrender to France a citizen of the United Kingdom for a murder committed in France. Applying s. 44, and the principles upon which it was founded, the appellant has established grounds to succeed on the first legal issue. The reciprocity that is required in construing s. 44 is a factual reciprocity concerning the circumstances of the offences. Offences that take place outside of the territory of a State require specification of the circumstances when that State will exercise jurisdiction. The reciprocity in this case requires Ireland to examine its law as if the circumstances of the offence were reversed. Here the circumstances are that a non-citizen of either the issuing or executing State is sought by the issuing State in respect of a murder of one of its citizens which took place outside the issuing State. The Court then must determine under Irish law if Ireland could request the surrender of a non-citizen of either Ireland or the executing State in respect of a murder of one of its citizens which took place outside Ireland. Ireland does not have jurisdiction to seek the surrender of a British citizen from France in respect of a murder of a person of any citizenship and which took place outside of Ireland. Thus, I would allow the appeal on this first

issue.

**Section 42 of the Act of 2003, and its amendment by the Act of 2005**

46. The second legal issue on this appeal relates to the construction and application of s. 42 of the Act of 2003, and its amendment by the Act of 2005.

47. Section 42 of the Act of 2003 provided originally:-

> "A person shall not be surrendered under this Act if—
>
> (a) the Director of Public Prosecutions or the Attorney General is considering, but has not yet decided, whether to bring proceedings against the person for an offence,
>
> (b) proceedings have been brought in the State against the person for an offence consisting of an act or omission that constitutes in whole or in part the offence specified in the European arrest warrant issued in respect of him or her, or
>
> (c) the Director of Public Prosecutions or the Attorney General, as the case may be, has decided not to bring, or to enter a *nolle prosequi* under section 12 of the Criminal Justice (Administration) Act 1924 in proceedings against the person for an offence consisting of an act or omission that constitutes in whole or in part the offence specified in the European arrest warrant issued in respect of him or her, for reasons other than that a European arrest warrant has been issued in respect of that person."

48. However, s. 42 of the Act of 2003 was amended by the Criminal Justice (Terrorist Offences) Act, 2005, which provided in section 83:-

> "The Act of 2003 is amended by the substitution of the following section for section 42:
>
> '42.—A person shall not be surrendered under this Act if—
>
> (a) the Director of Public Prosecutions or the Attorney General is considering, but has not yet decided, whether to bring proceedings against the person for an offence, or
>
> (b) proceedings have been brought in the State against the person for an offence consisting of an act or omission of which the offence specified in the European arrest warrant issued in respect of him or her consists in whole or in part.'."

49. Thus paragraph (c), as appeared in the earlier statute, is not retained as part of the statute law from 2005.

50. Section 42(a) of the Act of 2003 provides that where the DPP or the Attorney General is considering, but has not yet decided, whether to bring proceedings against the person for an offence, the person shall not be surrendered. This section does not apply to the appellant. The DPP has considered and decided not to

prosecute the appellant.

51. Section 42(b) of the Act of 2003 provides that where proceedings have been brought in the State against the person for an offence which constitutes in whole or in part the offence specified in a European Arrest Warrant, a person shall not be surrendered. This section also does not apply to the appellant. Proceedings were not brought in this State as the DPP decided that the appellant should not be prosecuted for the murder of Mme. Toscan du Plantier.

52. I will consider s. 42(c) of the Act of 2003 in the context of the facts of the case.

53. The DPP informed the appellant sometime after his arrest in 1998 that he did not intend to prosecute him for the murder of Mme. Toscan du Plantier. Later, s. 42(c) of the Act of 2003 would have precluded the surrender of the appellant to France. Thus, if France had sought the surrender of the appellant between 2003 and 2005 this subsection would have been a ground upon which to prohibit his surrender. However, s. 42(c) was omitted from the amended section in 2005. Thus, it is necessary to consider whether the appellant obtained and/or retained any rights under s. 42(c) of the Act of 2003.

54. Under s. 42(c) of the Act of 2003, the appellant could not have been surrendered to France for the alleged offence of the murder on the night of 22nd to 23rd December, 1996 of Mme. Toscan du Plantier. This raises the issue as to whether the amended s. 42 of the Act of 2005 has any effect on the position of the appellant.

55. The Act of 2005 introduced a number of changes in the Act of 2003, and they were set out in Part 8. Section 68 provided:

> "The amendments effected by this Part (other than section 83) shall apply to European Arrest Warrants, and facsimile and true copies thereof, that are endorsed under section 13, or produced under section 14(7), of the Act of 2003 after the passing of this Act."

[Emphasis added]

Thus all amendments, except the amendment to s. 42, are expressly stated to apply to European Arrest Warrants that are endorsed under s. 13 or produced under s. 14(7) of the Act of 2003, after the passing of the Act.

56. The amendment to s. 42 of the Act of 2003 by s. 83 of the Act of 2005, is not included in the specifically stated provision quoted. So it is necessary to construe the statute.

57. To construe s. 42(c) of the Act of 2003, and its removal, the appellant submitted that it would be helpful to look at the Interpretation Act, 2005. However, this Interpretation Act came into force on the 1st January, 2006, *per* s. 1, whereas the Act of 2005 (the Criminal Justice (Terrorist Offences) Act, 2005), was signed into law on the 8th March, 2005, *i.e.* before the Interpretation Act, 2005 became law. Thus, it is more appropriate to consider s. 21 of the Interpretation Act, 1937, which provides:-

> "(1) Where an Act of the Oireachtas repeals the whole or a portion of a previous statute, then, unless the contrary intention appears, such repeal shall not—
>
> (a) revive anything not in force or not existing immediately

before such repeal takes effect, or

(b) affect the previous operation of the statute or portion of a statute so repealed or anything duly done or suffered thereunder, or

(c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under the statute or portion of a statute so repealed, or

(d) affect any penalty, forfeiture, or punishment incurred in respect of any offence against or contravention of the statute or portion of a statute so repealed which was committed before such repeal, or

(e) prejudice or affect any legal proceedings, civil or criminal, pending at the time of such repeal in respect of any such right, privilege, obligation, liability, offence, or contravention as aforesaid.

(2) Where an Act of the Oireachtas repeals the whole or a portion of a previous statute, then, unless the contrary intention appears, any legal proceedings, civil or criminal, in respect of any right, privilege, obligation, or liability acquired, accrued, or incurred under or any offence against or contravention of the statute or portion of a statute so repealed may be instituted, continued or enforced, and any penalty, forfeiture, or punishment in respect of any such offence or contravention may be imposed and carried out as if such statute or portion of a statute had not been repealed."

[Emphasis added]

58. The Interpretation Act, 1937, expressly provides that, unless the contrary intention appears, any repeal of a statute shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under the statute. The Interpretation Act, 1937, refers to the right of a person which has been acquired. Before considering whether a contrary intention appears, it must be determined whether the appellant acquired a right.

59. If the Interpretation Act, 2005 is considered, the appellant having submitted that it would be helpful, the same issue arises - as to whether the appellant acquired a right, which protects him from being surrendered, under s. 42(c) of the Act of 2003.

60. There is no general right not to be prosecuted. In relation to the issue of a prosecution in Ireland, the DPP has decided, based upon the enquiries of the Garda Síochána, that the appellant will not be prosecuted in Ireland for the offence of the murder of Mme. Toscan du Plantier in County Cork. Further, after a number of reviews, this decision was affirmed on each occasion. The appellant has been informed of the decision.

61. A decision of a prosecutor not to prosecute may be reviewed if, for example, new evidence is discovered. Thus, the decision may change – even in a cold case. An accused does not have a general right or privilege not to be prosecuted.

62. The issue on this appeal is whether or not the appellant should be surrendered

pursuant to the warrant, under the European Arrest Warrant procedure. Thus, the issue is whether he has acquired a right not to be surrendered. Of primary importance is that the procedures under the Act of 2003, as amended, mandate surrender, unless specific conditions are met.

63. Under the extradition system a person does not have a general right not to be extradited. In particular, a change in the law on extradition does not give rise to a general right not to be extradited. The circumstances of each case require to be considered.

64. In **Sloan v. Culligan** [1992] 1 I.R. 223 s. 3 of the Extradition (European Convention on the Suppression of Terrorism) Act, 1987, referred to as 'the Act of 1987', excluded a range of offences from the definition of political offence. Section 1(4) of the Act of 1987 provided: "[t]his Act applies, except where otherwise provided, in relation to an offence whether committed or alleged to have been committed before or after the passing of this Act," It was submitted that the Act of 1987 could not remove from offences deemed political in 1980 the right or entitlement not to be extradited because this would breach the Article 15.5 and Article 40.3 of the Constitution of Ireland, 1937. In giving the decision of the Court Finlay C.J. stated at 272 to 273:

> "The Court is satisfied that the plaintiff did not have at any material time what has been described in the submissions before the Court as a vested right, either to freedom or to protection from being delivered up to serve these sentences on the basis that the offences in respect of which they were imposed constituted political offences, either of which rights has been interfered with or left unprotected by virtue of the effect and provisions of the Act of 1987 and, in particular, of s. 1, sub-s, 4 thereof. The right of the plaintiff, as of every other citizen, concerning the question of his delivery into another State for the purpose of serving a sentence lawfully imposed on him in that State, was, the Court is satisfied, a right at any given time to proper, due and fair procedures concerning an investigation of the validity of the warrant in respect of which he is delivered, and to a fair, proper and due inquiry into the protections applicable in law, within the State at the time of the application for his delivery, which may afford him a protection arising from the concept of a political offence or from any other of the concepts appropriate to prevent such a delivery. The provisions of the Act of 1987 constitute a development of the law applicable to the delivery of persons out of the jurisdiction of this State and into the jurisdiction of the Northern Ireland courts, amongst others, which the legislature in accordance with the decision of the State to ratify the European Convention on the Suppression of Terrorism, done at Strasbourg on the 27th January, 1977, has validly decided to enact. Upon the passing of that statute the right of every citizen and every person affected by it simply is to its due application, and its application with regard to the provisions of s. 3 thereof to a case where an offence was committed before the passing of the Act of 1987, but where a warrant requesting the delivery of the person concerned was not issued until after the passing of the Act, does not constitute, the Court is satisfied, any failure on the part of the State to defend, vindicate or protect any personal right of the plaintiff.
>
> The Court is, therefore, satisfied that s. 1, sub-s. 4 of the Act of 1987 has not been established as being invalid, having regard to any

provision of the Constitution."

65. Applying that rationale to this case, I am satisfied that the appellant has not established any vested right not to be surrendered. He has a right to due and fair procedures. On this issue, the second of the legal issues, on the application of s. 42 of the Act of 2003, the appellant has not established any vested right not to be surrendered that would be protected under s. 21 of the Interpretation Act, 1937, or s. 27 of the Interpretation Act, 2005. A consequence of this finding is that the question of whether a contrary intention is apparent does not arise.

66. The current law is to be found in s. 42 of the Act of 2003, as amended. I am not satisfied that the appellant has established that he has a right to a benefit of a section of an Act which has been repealed, and thereby that he may not be surrendered. Consequently, I would not allow the appeal on this ground.

**Section 21A of the Act of 2003, as amended by the Act of 2005**

67. The third legal issue relates to the warrant. There is a fundamental obligation on Member States to surrender a person under the Framework Decision. The Framework Decision, in Article 1, defines the warrant and the obligation to execute it. It states that:-

> "The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or …"

Thus, Member States shall execute any warrant on the basis of the principle of mutual recognition and in accordance with the Framework Decision.

68. Section 10 of the Act of 2003, as amended, provides, *inter alia*:-

> "Where a judicial authority in an issuing state issues a European arrest warrant in respect of a person –
>
> (a) against whom that state intends to bring proceedings for an offence to which the European arrest warrant relates,
>
> (b) who is the subject of proceedings in that state for an offence 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."

Therefore, a state shall surrender a person when a judicial authority is an issuing state issues a warrant in respect of a person against whom the issuing state intends to bring proceedings, subject to the Act of 2003, as amended, and the Framework Decision. The appellant in this case has raised the issue of the law pursuant to s. 21A of the Act of 2003, as amended.

69. The third legal issue submitted on behalf of the appellant is based on s. 21A of the Act of 2003, as inserted by s. 79 of the Act of 2005.

70. Section 21A of the Act of 2003, as inserted by the Act of 2005, provides:-

> "(1) Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicted of an offence specified therein, the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state.
>
> (2) Where a European arrest warrant is issued in respect of a person who has not been convicted of an offence specified therein, it shall be presumed that a decision has been made to charge the person with, and try him or her for, that offence in the issuing state, unless the contrary is proved."

[Emphasis added]

71. Thus s. 21A(1) provides that where a European Arrest Warrant is issued in the issuing State, in this case France, in respect of a person who has not been convicted of an offence specified, then the High Court "shall", i.e. it is mandatory, 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, the offence in the issuing State." The key words require that a decision has been made to charge the person with and to try him for the offence in France.

72. A presumption is raised in s. 21A(2). It provides that where a European Arrest Warrant is issued for a person who has not been convicted it shall be presumed that a decision has been made "to charge the person with, and try him or her for", the offence in the issuing State, unless the contrary is proved. In this case the issue is determined on the documents before the Court, which address the matter of the steps taken in the issuing State.

73. Thus it is necessary to consider the warrant and other documents to determine the application of s. 21A.

**The Warrant**

74. The first, and most important, document, is the warrant itself. The translation of the first paragraph states:-

> "This warrant has been issued by a competent judicial authority. I request that the person as hereafter identified be arrested and transferred to the judicial authorities for the purpose of conducting a criminal prosecution, or for the execution of a custodial sentence or detention order."

Thus this is not helpful as it states the alternative purposes for which a warrant could be sought, but does not identify the purpose in this warrant.

75. A later paragraph states that the decision on which this warrant is based is a warrant for arrest issued on the 16th February, 2010, by Mr. Patrick Gachon, Examining Magistrate at the High Instance Court of Paris, for the purpose of criminal prosecution. Thus the purpose of the warrant is identified.

76. The warrant states that it relates to one violation of a "ticked-box offence" under Article 2.2 of the Framework Decision. It sets out a series of statements, including

that Mme. Toscan du Plantier died in a house she owned in Co. Cork.

77. Included in the series of statements, on the warrant, is the following:-

> "In the course of the investigation carried out by the Garda, serious and convincing clues were accumulated against a journalist named Ian Bailey, of such a nature as to justify that he be charged."

Thus the warrant relies on the Garda investigation in Ireland and states that it justifies that the appellant be charged. In fact, the DPP has decided, and reviewed the decision on a number of occasions, that the results from the Garda investigation do not warrant that the appellant be charged.

78. There are a series of further statements relating to evidence from the Garda investigation. It includes:

> "Marie Farrell stated she had seen Ian Bailey on 23rd December 1996 around 03.00 a.m., nearby Kealfada Bridge, namely at a short distance from the residence of the victim. By repeated acts of intimidation, directly or indirectly Ian Bailey tried to cause Marie Farrell to change her statement."

There is no reference to other events subsequent to Ms. Farrell's first statement, or to the subsequent investigation relating to the statement.

79. The warrant is stated to be for murder, pursuant to sections 221 – 1 and 221 – 3 of the Penal Code. The offence is ticked in the list of offences as being "wilful homicide and serious assault and battery".

80. The warrant also states that it relates to the seizure and transfer of the items susceptible of being used for prosecution purposes.

81. The warrant is signed by Mrs. Nicole Blondet, described as "Vice Prosecutor, Magistrate of the Judicial Order".

**Evidence of foreign law**

82. In the High Court there was evidence of foreign law advanced by the appellant. A statement of law by Dominique Tricaud, a specialist in criminal law, made on the 13th August, 2010, includes the following paragraphs:-

> "In this case, it is not clear how precisely the proceedings began. Normally, there is a preliminary examination (*L'inquete preliminaire*) which may or may not result in the appointment of an investigating judge. In criminal matters in France, (one should understand that this term corresponds to the most serious offences, such as murder, rape, armed robbery, etc.), the preliminary enquiry can be entrusted to the police under the authority of the Public Prosecutor before the appointment of an investigating judge.
>
> As a result of the preliminary stage of the proceedings, I do not have automatic access to the file of the investigating Judge Gachon. I will have a right to see the Court file when the Respondent first appears before the investigating judge in France. I could apply at this stage of the proceedings to His Honour Judge Gachon to be recognised as the lawyer of the Respondent, but this application does not have to be granted.

> My impression is based on a reading of the European Arrest Warrant, and as a result of conversations with Mr. Frank Buttimer, the solicitor of the Respondent in Ireland, that the appointment of the investigating judge, Judge Gachon, was on foot of the information sent by the Irish Police only. However, I cannot put it further than being my impression only as I do not have access to the files of the investigating judge at this moment.
>
> The issuing of the said arrest warrant on the 16th February, 2010, is roughly equivalent to charging the Respondent with the offence. It means that the investigating judge has indicated that there is sufficient evidence against the respondent to warrant further criminal prosecution (though not necessarily enough evidence to place him on trial). The prosecution is now in the phase of "*l'instruction",* or the examination phase. When the person (in this case the Respondent) has been arrested and appears before the investigating judge, the investigating judge can confirm the charge or simply hear the person as a witness.
>
> It is worth noting that the case of the Respondent is unusual in two respects Firstly, his whereabouts are known, and secondly, he lives outside France. Normally, if the person under investigation was present in France, and his whereabouts were known, the investigating judge would simply direct his arrest and have him/her brought before the investigating judge without formally issuing a warrant for arrest.
>
> After the end of the current phase, "l'instruction" or examination, the "juge d'instruction" or investigating judge, Patrick Gachon, will make a decision whether or not there is sufficient evidence to send the Respondent for trial which will be in the Court d'Assize, a court for the trial of serious offences.
>
> It cannot be inferred from the existing French proceedings that there is sufficient evidence to send the Respondent for trial, or that there has been a decision to try the Respondent. Only the investigating judge can make the decision whether or not to send the Respondent for trial. If there is not sufficient evidence the Respondent will not be sent for trial, the process will end at the examination phase. If the investigating judge refuses to send the Respondent for trial, this decision may be appealed to the Court of Appeal."

83. In this Court there were submissions that the warrant did not meet the requirements of s. 21A. The appellant was permitted to put in fresh evidence, as was the Minister for Justice and Equality, the applicant/respondent, referred to as "the Minister".

84. A further statement was filed from Dominique Tricaud on behalf of the appellant. The statement is dated the 12th January, 2012. The statement includes the following paragraphs:-

> " I refer to the warrant for arrest issued in respect of the Appellant on the 16th February, 2010, by Mr. Patrick Gachon, Investigating judge at the High Instance Court of Paris for the purpose of criminal prosecution (hereafter referred to as "His Honour Judge Gachon"). I also refer to the European Arrest Warrant issued in respect of the Appellant by Mrs Nicole Blondet, Vice Prosecutor, Magistrate of the

Judicial Order, issued on the 19th February, 2010.

His Honour Judge Gachon is the investigating judge or *juge d'instruction* in the case of the Appellant.

I also refer to the Judgment of the High Court in the above entitled matter dated the 18th March, 2011 of his Honour Mr. Justice Michael Peart. It contains an interpretation of Article 80 of the *Procedure Penale* of France which, in my view, is incorrect.

It has been stated in the above-mentioned judgment at page 28 that 'it is a necessary procedural step in the [French] prosecution procedure he may not be put on trial until this right has been afforded to him … it is apparent that until his right has been afforded to the Appellant, no final decision to send him forward for trial on the charge can be made.' Further it has been stated at page 31 that 'but it is also clear that he is correct in saying that only at the end of the instruction or examination phase, which cannot occur to the Appellant is brought before the Judge can a decision be made to put the Appellant on trial'. Both above propositions of French law are incorrect. All phases of French Criminal procedure can proceed in the absence of the Appellant. If the surrender of the Appellant is refused in the above entitled proceedings His Honour Judge Patrick Gachon can proceed with his examination in his absence and, further, the Appellant can be tried and sentenced *in absentia*.

Obligation to close the phase of l'instruction and send forward for trial once there is sufficient evidence.

His Honour Judge Patrick Gachon, pursuant to Article 175 of Procédure Pénal, once he considers that there is sufficient evidence to send the Appellant for trial to the Court d'Assize (or other competent trial court) he loses jurisdiction. In other words, if he concludes that there is sufficient evidence, he must close the file and send the Appellant for trial.

I therefore know as a matter of certainty that His Honour Judge Patrick Gachon has formed the view that there is not enough evidence, at the moment, to send the Appellant for trial and therefore close the examination phase or phase of *l'instruction*. I am aware from checking with the relevant Court office in Paris that the case was not closed as of the 3rd November, 2011. It therefore is the case that the decision to prosecute is dependent on the investigation producing sufficient evidence to put the Appellant on trial."

85. According to the first statement of Dominique Tricaud, on this expert evidence, the issuing of the arrest warrant in France is roughly equivalent to a decision to charge the appellant with the offence. However, there is also the requirement under s. 21A of the Act of 2003, as amended, that there have been a decision to try him for the offence.

86. New evidence was admitted in this Court, on the application of the Minister, on behalf of the issuing State. It is headed "Observations by the State prosecutor at the Paris Tribunal de Grande Instance on the affidavit from Mr. Daniel Tricaud dated the

12th January, 2012." It commences:-

> "First of all, it should be specified that Mr. Tricaud is not acting as lawyer for Mr. Ian Bailey in the judicial inquiry under way in France, because the latter has not been indicted in France and has therefore not yet been able to appoint officially, before the investigating judge, a lawyer to assist him.
>
> Mr. Tricaud therefore has no access to the case being examined in Paris under the authority of Mr. Patrick Gachon, the Vice-President in charge of the investigation.
>
> Consequently, anything Mr. Tricaud may report about his knowledge of the case is based only on rumours or impressions and can in no way result from an analysis of the case.
>
> In order to understand properly Mr. Bailey's current procedural situation in France, it seems to me necessary to specify, first of all, certain points of the French investigation and decision procedure, and then, more specifically, the default *(in absentia*) decision mentioned by Mr. Tricaud if Mr. Bailey were not handed over. I shall conclude with a few observations on the different points raised in the affidavit.
>
> This manner of proceeding will provide you with a better grasp of the French judicial system and consequently of the future that would await Mr. Bailey if he were handed over by the Irish authorities.
>
> <u>Points of French judicial procedure that will be of interest to Ian Bailey</u>
>
> Mr. Ian Bailey was issued with a European arrest warrant by my good offices on the basis of an arrest warrant issued by the investigating judge.
>
> Mr. Bailey has therefore not yet been tried or even indicted.
>
> The Code of Criminal Procedure (Article 122) states that an arrest warrant can be issued if serious or corroborating circumstantial evidences exist regarding a person which makes it likely that he or she could have taken part, as perpetrator or accomplice, in committing a crime.
>
> These are the same criteria which oblige the investigating judge to indict a person when he or she is physically present.
>
> Put very simply, when a crime is committed, the state prosecutor may – or in criminal cases must – refer the matter to the investigating judge. It is then the investigating judge who takes charge of "investigating" the case – i.e. leading the inquiry. This phase of investigation precedes that of the trial, which focuses on the person's level of culpability.
>
> The role of the investigating judge must therefore be distinguished from that of any jurisdiction that may try Mr. Ian Bailey. The investigating judge is only responsible for a procedure preparatory to

the trial procedure.

A second level of investigating jurisdiction exists: the investigating chamber of the court of appeal, which may subsequently issue a ruling on appeal about the decisions taken by the investigating judge."

87. The document from the State Prosecutor of the Paris *Tribunal de Grande Instance* continued:-

"A)The investigation phase

If he were handed over to France by the Irish authorities, Ian Bailey would be at the investigation procedure stage of the case.

Principles:

The investigating judge is a magistrate of the *Tribunal de Grande Instance*.

Like all the magistrates of that court, he is **independent**. The judicial authority's independence is enshrined in the constitution (Article 64); the independence of the court's magistrates is reinforced by their permanence, also enshrined in the constitution.

These rules are recalled in Article 4 of the Statute of the Magistracy.

The aim of the investigation is to reveal the truth; it must consequently examine **evidence of both innocence and guilt**. This principle is set out in Article 81 of the Code of Criminal Procedure.

By virtue of this principle, all the points under investigation are gathered in a single case file, the investigation case file, which may be consulted at any time by all the parties.

Before becoming a party to the investigation, a person cannot have access to the case file. Because Ian Bailey is not yet a party to the proceedings, neither he nor his lawyers have yet been able to consult the investigation case file.

Any person indicted becomes party to the investigation, after which his/her counsel is able to consult the case at any time. Indeed, under French law the defence has access to the case file. The first publication of each document is free of charge.

The Code of Criminal Procedure (preliminary article) lays down the principle of the **presumption of innocence**, whereby a person is presumed innocent as long as his/her guilt has not been established, i.e., as long as the person has not been sentenced by a trial court, since only such a court can convict a person subject to trial.

This principle therefore obviously applies to the investigation of a criminal matter. Indeed, this is only an interlocutory procedure during which the person subject to trial can be indicted but he/she cannot, under any circumstances, be sentenced at this stage of the procedure."

[Emphasis as in the original document]

Thus it is clear that if the appellant were surrendered to France on the warrant it would be at the investigation stage of the case.

88. This document sets out clearly the investigation and decision procedure in France. It states plainly that if the appellant were handed over to France by the Irish authorities he would be at the investigation procedure stage of the case.

89. It is a question of Irish law as to whether this meets the requirements of s. 21A of the Act of 2003, as amended.

90. The Irish law is stated clearly, and with no ambiguity, in s. 21A of the Act of 2003, as amended. It provides that where a warrant is issued in an issuing State in respect of a person who has not been convicted of an offence specified in the warrant, the 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 for, the offence in the issuing State. It is expressed in a mandatory form.

91. There are two areas where tensions of interpretation may arise. Differences may arise between the legal systems of the Member States, which apply the Framework Decision. Also, the implementing legislation in Member States may differ, although such legislation should be interpreted to implement the Framework Decision, unless it is *contra legem*.

92. In **Criminal Proceedings against Pupino (Case C-105/03)** [2005] E.C.R. 1-05285, the Court of Justice adopted the principle of conforming interpretation to framework decisions adopted pursuant to the Treaty on the European Union. It was stated at para. 43 that:-

> "[t]he Court Concludes that the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 2(b) EU."

However, the principle was qualified at para. 44 and 47:-

> "It should be noted, however, that the obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, … The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of interpretation in conformity [with Community law] cannot serve as the basis for an interpretation of national law *contra legem*. That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision."

93. In **Minister for Justice, Equality and Law Reform v. Dundon** [2005] 1 I.R. 261, **Minister for Justice, Equality and Law Reform v. Altaravicius** [2006] 3 I.R. 148 and **Minister for Justice, Equality and Law Reform v. Tobin** [2008] 4 I.R. 42, this Court has restated and applied these principles.

94. In a recent decision of this Court issues arising under s. 21A were considered and analysed.

95. In **Minister for Justice, Equality and Law Reform v. Olsson** [2011] 1 I.R. 384, the accused was a citizen of Sweden in this jurisdiction, against whom the Swedish authorities issued a European Arrest Warrant in relation to four offences, for which they intended to prosecute him. The High Court ordered the respondent's surrender to Sweden, and his appeal to this Court was dismissed. The primary issue in that case was as to legal assistance, which is not in issue in this case. However, consideration was given also to s. 21A of the Act of 2003, as amended.

96. O'Donnell J., in giving a judgment with which the other members of the Court agreed, analysed s. 21A. He stated at pp. 399 – 400:-

> "Thus, the concept of the 'decision' in s.21A should be understood in the light of the 'intention' referred to in s.10 of the Act of 2003 and the 'purpose' referred to in art. 1 of the Framework Decision.
>
> When s.21A speaks of 'a decision' it does not describe such decision as final or irrevocable, nor can it be so interpreted in the light of the Framework Decision. The fact that a further decision might be made eventually not to proceed, would not therefore mean that the statute had not been complied with, once the relevant intention to do so existed at the time the warrant was issued. The Act of 2003 does not require any particular formality as to the decision; in fact, s.21A 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 Murray C.J., pointed out in *Minister for Justice v. McArdle* [2005] IESC 76, [2005] 4 I.R. 260, that result is not altered by the fact that there may be a continuing investigation, or indeed that such investigation will be assisted by the return of the requested person.
>
> It would be entirely within the Framework Decision and the Act of 2003 if, after further investigation, the prosecution authorities decided not to prosecute because, for example, they had become convinced of the requested person's innocence. There would still have been an 'intention' to prosecute, and a decision to do so at the time the

> warrant was issued and executed. Accordingly the warrant would have been issued for the purposes of conducting a criminal prosecution. What is impermissible is that a decision to prosecute should be dependent on such further investigation producing sufficient evidence to put a person on trial. In such a situation there is in truth no present 'decision' to prosecute, and no present 'intention' to bring proceedings. Such a decision and intention would only crystallise if the investigation reached a certain point in the future. In such a case any warrant could not be said to be for the purposes of conducting a criminal prosecution: instead it could only properly be described as a warrant for the purposes of conducting a criminal investigation. In such circumstances, a court would be satisfied under s.21A of the Act of 2003, as amended that no decision had been made to charge or try the requested person."

[Emphasis added]

97. Consequently, applying that judgment, a court is to refuse to surrender a requested person when it is satisfied that no decision has been made to charge and try him. A warrant issued for the purposes of their investigation of an offence alone, in circumstances where that investigation might or might not result in a prosecution, would be insufficient. In such circumstances a court could be satisfied under s. 21A of the Act of 2003, as amended, that no decision had been made to charge and try the requested person.

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

99. Under Irish law, s. 21A of the Act of 2003, as amended, ensures persons are not surrendered for the purposes of investigation. Section 21A requires that the Court shall refuse to surrender the person sought if it is satisfied that a decision has not been made to charge the person with and try him for the offence of murder of Mme. Toscan du Plantier.

100. On the evidence before the Court, it is clear that a decision has been made equivalent to a decision to charge the appellant. However, no further decision has been made. The appellant is sought for a criminal investigation, for the investigation procedure in France, and no decision has yet been made in France to try him for the murder. Consequently, he may not be surrendered in accordance with section 21A of the Act of 2003, as amended. The national law is clear on the requirements it lays down.

101. This third issue is decided on Irish law, on the terms of s. 21A of the Act of 2003, as amended, which require that a decision have been made in France "to charge the person with, and try him or her for" the offence. It is clear from the facts of the case on the documents before the Court, that while a decision has been made in France equivalent to charging the appellant, that decision does not incorporate a decision to try him for the murder of Mme. Toscan du Plantier. Thus a court could not be satisfied that the terms of section 21A are met.

102. Therefore, I would allow the appellant's appeal on this ground of appeal.

103. For the reasons given, I would allow the appeal of the appellant on the legal

issue raised on s. 44 of the Act of 2003. The appellant raised also the terms of s. 42 of the Act of 2003, as amended. I do not find that the appellant has established any right or privilege arising under the repealed s. 42(c) of the Act of 2003. Thus, I would not allow an appeal on this second legal issue. The third legal issue raised the terms of s. 21A of the Act of 2003, as amended. For the reasons given, it is clear that the requirements of Irish law have not been met, for while there has been a decision equivalent to charging the appellant in France, there has been no decision to try him for the murder of Mme. Toscan du Plantier. Consequently, the requirements of s. 21A of the Act of 2003 have not been met. I would allow the appeal on this ground also.

104. Consequently, I would allow the appeal in the first and third of the legal issues.

105. The fourth issue raised by the appellant and the motion were adjourned pending the determination of these three legal issues. As I would allow the appeal on two of the issues raised, in accordance with the jurisprudence of this Court, there is no necessity to proceed to consider a further issue. In fact if the fourth issue were to proceed it could not be completed in this Court, but would have to be remitted to the High Court for a full hearing. In all the circumstances, it is not necessary to proceed with the fourth issue as I would allow the appeal on the first and third legal issues.