High Court of Ireland Decisions

Judgment Title: The Minister for Justice & Equality -v- Martin Gerard Holden

Neutral Citation: [2013] IEHC 62

High Court Record Number: 2011 208 EXT

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Court: High Court

Composition of Court:

Judgment by: Edwards J.

Status of Judgment: Approved

Neutral Citation [2013] IEHC 62

THE HIGH COURT

[2011 No. 208 EXT.]

BETWEEN/

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

- AND -

MARTIN GERARD HOLDEN

Respondent

JUDGMENT of Mr Justice Edwards delivered on the 11th day of February, 2013

Introduction
The respondent is the subject of a European arrest warrant issued by the Republic of Lithuania on the 12th August, 2010. The warrant was endorsed by the High Court for execution in this jurisdiction on the 8th June, 2011, and it was duly executed on the 31st January, 2012. The respondent was arrested by Gda. Kevin Nolan on that date, following which he was brought before the High Court on the following day pursuant to s. 13 of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003"). In the course of the s. 13 hearing a notional date was fixed for the purposes of s. 16 of the Act of 2003 and the respondent was remanded on bail to the date fixed. Thereafter the matter was adjourned from time to time ultimately coming before the Court on the 10th October, 2012 for the purposes of a surrender hearing.

The respondent does not consent to his surrender to the Republic of Lithuania. Accordingly, this Court is now being asked by the applicant to make an Order pursuant to s. 16 of the Act of 2003 directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. The Court must consider whether the requirements of s. 16 of the Act of 2003, both controversial and uncontroversial, have been satisfied and this Court's jurisdiction to make an order directing that the respondent be surrendered is dependant upon a judicial finding that they have been so satisfied.

Uncontroversial s. 16 issues
The Court has received an affidavit of Garda Kevin Nolan sworn on the 3rd February, 2012 testifying as to his arrest of the respondent and as to the respondent's identity. In addition, counsel for the respondent has confirmed that no issue arises as to either the arrest or identity.

The Court has also received and has scrutinised a true copy of the European arrest warrant in this case. Further, it has of its own initiative taken the opportunity to inspect the original European arrest warrant which is on the Court's file and which bears this Court's endorsement.

The Court is satisfied following its consideration of these matters that:

(a) The European arrest warrant was endorsed for execution in this State in accordance with s. 13 of the 2003 Act;

(b) The warrant was duly executed;

(c) The person who has been brought before the Court is the person in respect of whom the European arrest warrant was issued;

(d) The warrant is in the correct form;

(e) The warrant purports to be a prosecution type warrant and the respondent is wanted in Lithuania for trial in respect of the five offences particularised in Part E of the warrant. Further, the domestic decision upon which the European arrest warrant is based is a ruling of Vilnius City 3rd District court of the 29th July, 2010 "to impose measure of constraint –

arrest";

(f) The issuing judicial authority has invoked paragraph 2 of article 2 of Council Framework Decision 02/584/J.H.A. on the European arrest warrant and the surrender procedures between Member States, O.J. L190/1 18.7.2002 (hereinafter referred to as "the Framework Decision") in respect of all five offences to which the warrant relates, by the ticking of the box in Part E.I of the warrant relating to "swindling". Accordingly, subject to the Court being satisfied that the invocation of paragraph 2 of article 2 is valid (*i.e*. that the minimum gravity threshold is met, and that there is no basis for believing that there has been some gross or manifest error), it need not concern itself with correspondence;

(g) The minimum gravity threshold in a case in which paragraph 2 of article 2 of the Framework Decision is relied upon is that which now finds transposition into Irish domestic law within s. 38(1)(b) of the Act of 2003, as amended, namely that under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than three years. Each of the five offences which are the subject matter of the European arrest warrant in this case carries a potential penalty of up to eight years imprisonment. Accordingly, the minimum gravity threshold is comfortably met in each case;

(h) There is no reason, upon a consideration of the underlying facts set out in Part E of the warrant, to believe that the ticking of the box relating to swindling was in error;

(i) No issue as to trial *in absentia* arises in the circumstances of this case and so no undertaking is required under s. 45 of the Act of 2003;

(h) There are no circumstances that would cause the Court to refuse to surrender the respondent under s.22, s.23 or s.24 of the Act of 2003, as amended.

In addition, the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) (No. 3) Order 2004 (S.I. No. 206) of 2004 (hereinafter "the 2004 Designation Order"), and duly notes that by a combination of s. 3(1) of the Act of 2003, and Article 2 and the Schedule to the 2004 Designation Order, "Lithuania" (or more correctly the Republic of Lithuania) is designated for the purposes of the Act of 2003 as being a State that has under its national law given effect to the Framework Decision.

The Points of Objection

The respondent has filed Points of Objection dated the 28th March, 2012. This document contains nine grounds (or purported grounds) of objection set out in numbered paragraphs. However, some of these were not proceeded with, while others were raised prematurely (in as much as they purported to set out grounds for a postponement of surrender under s. 18 of the Act of 2003 in the event of the Court being disposed to make an order under s. 16(1) of the Act of 2003). Accordingly, it is only necessary for the purposes of this judgment to set out those points of objection that were in fact proceeded with, and that were relevant to whether or not the Court should make an order under s. 16(1).

The relevant points were:-

"3. The surrender of the Respondent is prohibited by s.37 of the *European*

Arrest Warrant Act 2003 in that to surrender the Respondent in respect of such offences would be to breach his constitutional right to bodily integrity and well-being and/or present a risk to his life by being subject to other inhumane and/or degrading treatment and in the premises his surrender should be prohibited.

4. The surrender of the Respondent is prohibited by s.21A of the *European Arrest Warrant Act 2003 (as amended)* in that no decision has been made to charge the Respondent with any alleged offence.

5. The surrender of the Respondent is prohibited by s.21A of the *European Arrest Warrant Act 2003 (as amended)* in that no decision has been made to try the Respondent with any alleged offence."

The evidence adduced by the respondent

The respondent has filed an affidavit sworn by him on the 23rd April, 2012. In it he avers to the following matters that seem to the Court to be potentially relevant to the objections raised:-

"6. I say and believe that I have contacted my Lithuanian Lawyer Mr. Zilvinas Zarnauskas who has provided me with a copy of a Judgment of the 3rd District Court of Vilnius City dated the 25th day of May, 2010. I say that it appears therefrom that a hearing was held before a sitting of the 3rd District Court Vilnius City before Judge D. Korsakovas whereby the Public Prosecutor applied for a supervision measure, namely the arrest and custody of your Deponent and appears to have heard evidence as follows which is contained within a copy of the said Judgement of the Court:

> *"The Suspect is suspected of committing two serious offences and attempting to commit two more serious offences. During the pre-trial investigation Martin Gerard Holden violated the terms of his bail and absconded from the investigation, his whereabouts have not been determined and he has no substantial social ties to Lithuania.*
>
> *Seeking to guarantee the Suspect's presence during the proceedings, an uninterrupted pre-trial investigation and the hearing of the case in Court it is appropriate to apply a supervision measure – arrest and custody.*
>
> *Pursuant to Section 119 – 113, 125, 130 and 131 of the Criminal Proceedings Code of the Republic of Lithuania the Judge has directed the application of a supervision measure – arrest and custody of the Suspect Martin Gerard Holden."*
>
> I beg to refer to a copy of the certified translation of the Judgement of the Vilnius City 3rd District Court dated the 25th of May, 2010 upon which marked with the letter "A" I have signed my name prior to the swearing hereof.

7. I say that it is clear from the content of the said Judgement of the Court that no decision has been made to charge and/or to try your Deponent with any offences and it is further clear that the process remains at the pre-trial investigation stage.

8. It is further of note that an application was made on behalf of your

Deponent during the hearing on the 25th day of May, 2010 that the Public Prosecutors application should be rejected on the grounds that *"the case had no legal perspective, that issues between the parties should be resolved by way of civil proceedings, that the parties are in talks and there is no point in applying the supervision measure."*

9. I say that your Deponent was arrested on or about the 12th day of February, 2010 on foot of a similar *"supervision measure"*, and was detained in custody until the 25th day of February, 2010 when by direction of the Public Prosecutor your Deponent was released on bail.

10. I say that when I was arrested on or about the 12th day of February, 2010 I was detained in a Police Holding Area in Vilnius City. On the first night I was held there, there were approximately twelve to thirteen people detained in the same room. The room contained metal beds with a sheet metal surface and no mattress. I was given what can only be described as a dirty blanket. I say that it was mid-February and the temperature was approximately minus twenty degrees outside. I say that I was forced to sleep with all of my clothes and a heavy coat on. In the absence of any adequate insulation the said room remained extremely cold. I say that all persons were assigned bunk beds in the same room and there was a toilet and sink located in one corner with no means of privacy. I say that I was held in this Holding Area for seven nights.

11. The following day, at approximately 4:00pm I was taken to a Courthouse. I say and believe that an application for bail was refused and I was returned to the same holding cell that night. I say that I was detained over a *"bank holiday weekend"* but unlike in Ireland it appeared that the weekend lasted until the following Wednesday. During all of this time I was confined to the same small room with various people being held on each individual night. It was not possible to eat anything. Despite the fact that we were given food it was wholly inedible and for the duration of the seven nights that I was held there I consumed only water.

12. I say that on the following Thursday (the 18th day of February 2010) [I was moved to a Detention Centre in the centre of Vilnius. I say that I was detained in a prison cell with three to four other people including one person convicted of various drugs offences and another person having been convicted or murder. I say that one of the other prisoners, who had been sentenced to fourteen years imprisonment, spent the entirety of his duration in the cell beating his head against the concrete wall and screaming and shouting. I say and believe that this was very distressing.

13. I say that I was held in the Detention Centre for another seven days until my release on the 25th day of February, 2010. I say that the room in which I was held was approximately eight feet by twelve feet in dimension and as previously stated was used to detain three to four men at any one time. Further, I say that again as it was minus twenty degrees on the outside and there was no adequate insulation the room was extremely cold. I was again forced to spend the entire of my time with all of my clothes and coat on. The bed consisted of steel sheeting with a dirty and very thin mattress. Again I was given a dirty blanket/duvet which was wholly inadequate for the temperatures I was exposed to. I say that the toilet and sink were again contained in the same small room.

14. I say that the walls of the cell in the Detention Centre were smeared in excrement. Most of the smears were in fact writing and contained dates

going back to 1979. It was very clear that no effort was made to clean the prison cell and the persistent smell was revolting.

15. I say and believe that whilst I was held in the Detention Centre I was permitted to go outside to the exercise yard for approximately one hour per day. I say that the yard was very small 20ft x 20ft. However, as it was minus twenty degrees on the outside and snowing heavily this was not an option and therefore I was confined to the same cell for the duration of my period of detention.

16. I say that the treatment afforded to me for the period between the 12th of February, 2010 and the 25th of February, 2010 whilst I was detained by the authorities at Vilnius was wholly inhuman and degrading, and I say and believe and am advised, constituted a breach of human rights.

17. I say that it is also alleged in the Warrant that I absconded and breached my conditions of bail. I have been advised by my Lithuanian Lawyer that if I am returned to the Republic of Lithuania that I will be held in custody in accordance with the *"supervision measure"* for the duration of the remaining pre-trial investigation and if I am sent forward for trial on indictment for the duration of the trial. I say that if I am held in custody for that period of time, such a period of custody, and, conditions of custody will constitute a breach of my human rights.

18. I say that a number of reports have been prepared by independent, international, entities which have found that the prison conditions in the Republic of Lithuania are of such a poor standard as to constitute inhuman and degrading treatment of the detainees held therein. I beg to refer to a copy of the said reports upon which fixed together and marked with the letters "***B***" I have signed my name prior to the swearing hereof.

19. I therefore pray this Honourable Court to refuse to surrender your Deponent pursuant to the European Arrest Warrant as requested."

The Court has read and considered the contents of the exhibited documents. The "reports" exhibited marked "B" consist of (a) the Report to the Lithuanian Government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 14 to 18 June 2010 (hereinafter "the 2010 CPT Report"), and (b) the U.S. Department of State 2010 Country Reports on Human Rights Practices – Lithuania (hereinafter "the 2010 U.S. State Department Report")

Additional information

Arising from issues raised in the respondent's Points of Objection and grounding affidavit the applicant sought certain additional information from the issuing judicial authority by means of a letter dated the 25th May, 2012. To the extent that it related to the issues with which the Court is now concerned the letter stated:-

"(6) Under Irish law it is not possible to surrender a person under an European arrest warrant unless a decision has been made in the requesting state to charge the person with an offence and also to put him on trial for the offence. Under Irish law a "charge" means that the person has been formally accused of having committed a stated offence, i.e. an expression which includes, in these circumstances, an indictment for an offence. To be "put on trial" refers to a decision being made to bring the accused before a court which will determine whether the accused committed the offence with which they are charged.

In general this means that Ireland is unable to surrender a person where they are being sought for questioning and investigation to allow a decision to be made whether or not to charge (indict) the person with the offence or for a decision to be made whether to put the person on trial. Where, however, a warrant is issued during the course of an investigation but there is an intention, at the time the warrant is issued, to put the person on trial, then it is possible for Ireland to surrender the subject. The issues upon which we need to be clear are whether the warrant has been issued either where the subject has already been charged (indicted) or with the intention of charging (indicting) the subject and with the intention of putting the subject on trial.

It is in order to clarify the position in this case that we require the following information:

(i) Has a decision been made to charge (indict) the requested person?

a. If so is the charge (indictment) reflected in any summons, indictment or other formal document?

b. If it has, please provide a copy of this document.

(ii) If a decision to charge (indict) the requested person has been made does this mean that a decision to put the requested person on trial has also been made?

(iii) Does a decision to put the person on trial have to be made separately from the decision to charge him or her and, if so, has a decision to put the requested person on trial been made in this case?

In addition please provide any other information that you feel might be useful in addressing this issue.

(7) With regard to the issue of prison conditions as raised in the respondent's points of objection, affidavit and supporting exhibits, please provide any information the Lithuanian authorities may wish to have presented to the High Court in order to counter the claims made by the respondent in relation to prison conditions in Lithuania."

A response was subsequently received from the issuing judicial authority dated the 8th June, 2012. It states (inter alia):-

"Please be advised that the decision of a prosecutor of Vilnius City District Prosecutor's Office to recognize Martin Gerard Holden as a suspect was made on 5 November 2009. On 12 November 2009 the said suspect was announced wanted. On 10 February 2010 the suspect Martin Gerard Holden was detained, on 11 February 2010, upon his signature, he has been served the said decision to recognize him as a suspect dated 5 November 2011 (a copy whereof attached hereto), on the same day he was questioned as a suspect in presence of his advocate. On 12 February 2010, a hearing took place in Vilnius City 3rd District Court, during which the issue of imposing a measure of constraint - arrest upon the suspect was considered. Martin Gerard Holden personally attended the hearing together with his advocate. By a ruling dated 12 February 2010 of Vilnius City 3rd District Court, a

measure of constraint - arrest for 1 month was imposed upon the suspect Martin Gerard Holden. By a decision dated 25 February 2010 of a prosecutor of Vilnius City District Prosecutor's Office Martin Gerard Holden was released on bail (the amount whereof was LTL 50,000.00) by imposing seizure of personal identification documents (his passport has been seized and annexed to the case file). On 25 February 2010, the suspect was explained about his duty: to appear before a pre-trial investigation officer, prosecutor, judge or court when summoned; not to hinder the course of the proceedings; not to commit new criminal acts. Having signed for, he gave a pledge to execute this duty. He has been notified upon his signature, that the measures of constraint imposed by this decision may be changed to stricter measures of constraint in the event he fails to execute his obligations. On 28 April 2010, his wife Mariana Holden was served a summons regarding his arrival for questioning; however, on 30 April 2010 Martin Gerard Holden failed to appear for questioning. By a ruling dated 25 May 2010 of Vilnius City 3rd District Court the suspect Martin Gerard Holden was imposed a measure of constraint - arrest and he was announced wanted. After Vilnius City 3rd District Court, by its ruling dated 29 July 2010, in addition, supplemented one criminal act to the suspicions, the suspect Martin Gerard Holden repeatedly was imposed a measure of constraint - arrest.

Therefore, Martin Gerard Holden was aware what he was suspected of, moreover, during consideration of imposing the measure of constraint - arrest he was personally present at the hearing.

For the purpose of clarification we would like to provide an outline of the criminal procedure stages in Lithuania. In the Republic of Lithuania the criminal procedure is defined by the Code of Criminal Procedure. It was approved on 14 March 2002 by the Law No. 1X-785 and came into force on 1 May 2003. The said code specifies the following procedural stages of the criminal procedure: 1) pre-trial investigation; 2) trial procedure at the courts of first instance; 3) procedure of appeal; 4) enforcement of rulings and judgements; 5) procedure of cassation.

The criminal case in respect of Martin Gerard Holden is in the first stage of the criminal procedure, which in the Republic of Lithuania is called the pre-trial investigation.

In the course of the first stage of the criminal procedure, i.e. in the pre-trial investigation, the prosecutor and the pre-trial investigation officer, within the limits of their competence, shall take all measures provided by the law in the shortest possible time to thoroughly disclose the criminal act, to prosecute the perpetrators and properly apply the law. The data relevant to the case is collected, checked and assessed at this stage, thus, all steps are taken to prepare the case for the second stage of the criminal procedure - the trial procedure at the court of first instance.

During the pre-trial investigation, the person who possibly committed a criminal act is the suspect. The person shall be deemed the accused person from the moment when the prosecutor, while finalizing the pre-trial investigation, adopts a bill of indictment, whereof he transfers to the court together with the case material. The accused shall be a party to judicial proceedings (Article 22 of the Code of Criminal Procedure of the Republic of Lithuania).

With regard to the conditions in imprisonment institutions in the Republic of

Lithuania, we herewith send commentaries of the Ministry of Justice of the Republic of Lithuania (copy of a letter No. (1.39.)7R-3701 dated 16 May 2012 together with their translation into the English language) pertaining to another case concerning a surrender pursuant to the European arrest warrant.

Thank you for cooperation.

ANNEXES:

1. Copy of the decision of the prosecutor of Vilnius City District Prosecutor Office to recognize the person as a suspect together with the confirmation that the decision in question has been served - 3 pages;

2. Copy of the letter of the Ministry of Justice of the Republic of Lithuania No. (1.39.)7R-3701 dated 16 May 2012 with its translation into the English language."

It is convenient to address the annexed documents in reverse order.

In so far as letter of the 16th May, 2012 is concerned, the Court will refer to this to the extent considered necessary in dealing later in this judgment with the s. 37 point relating to prison conditions.

In so far as the decision of the prosecutor to recognise the respondent as a suspect is concerned, and which is dated the 5th November, 2009, the Court is in receipt of a translation of this document and it is appropriate to refer to it at this stage. It is in the following terms:-

"DECISION

TO ACKNOWLEDGE AS A SUSPECT

5 November 2009 Vilnius

Jolita Kanèauskienè, prosecutor at Vilnius City District Prosecutor's Office, First Criminal Act Investigation Division, having familiarised herself with the material of pre-trial investigation No. 10-2-470-07,

Has established as follows:

Vilnius County Police Headquarters, Crime Investigation Board, Economic Crime Investigation Division is conducting a pre-trial investigation No. 10-2-470-07 on the basis of the elements of the crime defined in the Criminal Code of the Republic of Lithuania, Article 182, paragraph 2, concerning swindling.

Sufficient data was collected during the pre-trial investigation which confirms that Martin Gerard Holden, a citizen of the Republic of Ireland, born on 2 February 1966, committed a criminal act defined in the Criminal Code of the Republic of Lithuania, Article 182, paragraph 2, however, in the absence of the possibility of interviewing Martin Gerard Holden about the criminal act that he is suspected of, since his whereabouts is unknown, in accordance with the provisions of the Code of Criminal Procedure of the Republic of Lithuania, Article 21, Martin Gerard Holden is to be acknowledged as a suspect of the criminal act defined in the Criminal Code

of the Republic of Lithuania, Article 182.

Under the Code of Criminal Procedure of the Republic of Lithuania, Article 21.

Has decided as follows:

1. To acknowledge Martin Gerard Holden, a citizen of the Republic of Ireland, born on 2 February 1966, as a suspect in pre-trial investigation case No. 10-2-470-07.

2. On the basis of this Decision to consider that MARTIN GERARD HOLDEN, born on 2 February 1966, is suspected of the criminal act defined in the Criminal Code of the Republic of Lithuania, Article 182, paragraph 2, namely,

He is suspected of having acquired, by deceit, for his benefit, another person's property of high value, namely:

[Facts underlying offence no. 1 in Part E of the European Arrest Warrant then recited]

By the said actions Martin Gerard Holden committed the crime defined in the Criminal Code of the Republic of Lithuania, Article 182, paragraph 2.

[Facts underlying offence no. 2 in Part E of the European Arrest Warrant then recited]

Prosecutor, /Signature/ Jolita Kanèauskienè First Criminal Act Investigation Division

The suspect has the following rights defined under Article 21, paragraph 4, of the Criminal Procedure Code of the Republic of Lithuania: to know what he/she is suspected of; to have a counsel for the defence from the moment of detention or first interview; to give testimony; to produce documents and items relevant to the investigation; to make requests; to raise objections; to familiarize himself with the pre-trial investigation material; to lodge complaints on the actions and decisions of the pre-trial investigation officer, prosecutor or pre-trial investigation judge.

The Decision was served and the suspect's rights were explained on 11 February 2010.

Suspect /Signature/ Martin Gerard Holden

Senior investigator /Signature/ Ivona Purkiniene"

Yet further additional information was sought by the applicant in a letter to the issuing judicial authority dated the 19th June, 2012. In so far as it is relevant to the s. 21A issue, the applicant asked:

"(iii) With regard to your response to our query regarding what stage of the prosecution process the matter is at under Lithuanian law your response is most instructive but unfortunately it does not clarify the matter under Irish Law.

It might be helpful for the purpose of avoiding confusion if we set out the position under Irish law as determined by the Irish Supreme Court.

The Irish Courts will only surrender a person sought for the purpose of prosecution if the appropriate authority in the issuing state intends to put the person on trial for the offences and surrender is sought to realise that

intention. This does not mean that the investigation phase must be closed, it can continue. What is not permissible is for the realisation of the intention to put the person on trial to be dependent on such further investigation producing sufficient evidence for that purpose.

I am to ask therefore whether in this case that is the position in respect of Mr. Holden?"

A response was subsequently received from the issuing judicial authority dated the 25th June, 2012. It states *(inter alia)*:-

"iii) Please note the fact, that pursuant to Paragraph 2 of Article 121 of the Code of Criminal Procedure of the Republic of Lithuania, the measures of constraint may be imposed only in case there is sufficient data, which allow assuming that a suspect has committed a criminal act. The strictest measure of constraint - arrest was imposed upon Martin Gerard Holden three times: by the ruling dated 12 February 2010 of Vilnius City 3rd District Court; by the ruling dated 25 May 2010 of Vilnius City 3rd District Court and by the ruling dated 29 July 2010 of Vilnius City 3rd District Court. Both, the prosecutor when filing a motion to court regarding imposing the measure of constraint - arrest, and the court when imposing the arrest, have considered whether there was sufficient data which would allow to assume that the suspect had committed the criminal act. Considering the fact that the measure of constraint - arrest has been imposed upon Martin Gerard Holden, as per estimations of the prosecutor and the court, there was sufficient data to assume that the said suspect had committed the criminal act.

Please also be advised that pursuant to Paragraph 1 of Article 218 of the Code of Criminal Procedure of the Republic of Lithuania, the prosecutor being convinced that sufficient data was collected during the pre-trial investigation, which would substantiate the suspect's guilt in relation to commission of the criminal act, declared that the pre-trial investigation has been completed. In order to attain such conviction of the prosecutor, to finalize the pre-trial investigation, to draw up an indictment and to bring the case with the said indictment to the court, it is necessary to execute the rest of the proceedings; therefore, personal participation of Martin Gerard Holden is necessary in the criminal procedure which is taking place in Lithuania."

On the 31st July, 2010, the applicant wrote again to the issuing judicial authority seeking yet more information, and the request was in the following terms:-

"I refer to correspondence received from your office dated 8th June 2012.

Following consultation with our legal advisors, we have been advised to request copies (accompanied by certified translations) of the following documents:

(i) The ruling of Vilnius City 3rd District Court dated 12th February 2010 in which a measure of constraint-arrest for 1 month was imposed.

(ii) The decision of the Vilnius City District Prosecutor's Office dated 25th February 2010 to release Martin Gerard Holden on bail.

(iii) The ruling of Vilnius City 3rd District Court, dated 25th May 2010 in which measure of constraint-arrest and announcing that Mr. Holden as wanted [*sic*], was imposed

(iv) The ruling of Vilnius City 3rd District Court dated 29th July 2010, supplementing one criminal act to the suspicions and imposing a measure of constraint-arrest."

This request was duly responded to and the requested documents were enclosed under cover of a letter from the issuing judicial authority dated the 20th September, 2012.

The translated ruling of the 12th February, 2010 is in the following terms:-

"VILNIUS CITY THIRD DISTRICT COURT

RULING

12 February 2010 Vilnius

Alberta Baltuðytë, pre-trial investigation judge of Vilnius City Third District Court, with the participation of secretary Raminta Martinkaitë. interpreter Viktorija Kniaginina, prosecutor Gaudentas Balèiûnas, counsel for defence Saulius Þentelis and suspect Martin Gerard Holden, at a court hearing, considered the statement of Gaudentas Balèiûnas, prosecutor at Vilnius City District Prosecutor's Office, First (Criminal Act Investigation) Division, on the validity of the imposition of arrest as a pre-trial supervision measure and on the setting of the arrest period for suspect Martin Gerard Holden, identification number 9IRL6602026M0612058, citizen of the Republic of Ireland (passport No.PT1850211, issued on 17 January 2008) born in Ireland on 2 February 1966, according to him, place of residence for the last three years: 7 Willow drive, Belfield, Ferry bank, Waterford, Ireland, place of residence in Lithuania: Ukmergës 300c-52, Vilnius, single, with secondary education, with no criminal record in Lithuania. The judge has familiarised herself with the material of pre-trial investigation No. 10-2-470-07 concerning fraudulent acquisition of another person's property of high value, and

Has established as follows:

The data collected during the pre-trial investigation indicates that suspect Martin Gerard Holden acquired, by deceit, for his benefit, another person's property of high value, namely:

[Facts underlying offence no. 1 in Part E of the European Arrest Warrant then recited]
By the said actions Martin Gerard Holden committed the crime defined in the Criminal Code of the Republic of Lithuania, Article 182, paragraph 2.
[Facts underlying offence no. 2 in Part E of the European Arrest Warrant then recited]
By the said actions Martin Gerard Holden committed the crime defined in the Criminal Code of the Republic of Lithuania, Article 182, paragraph 2.

Data showing that suspect Martin Gerard Holden committed the crime incriminated to him is the following: material received from Qatar law-enforcement authorities according to the request for legal assistance, material received from the bank Swedbank AB (former Hansabankas AB) and from DnB NORD bank AB, material received from Irish law-enforcement authorities and other case materials.

Arrest as a pre-trial supervision measure should be imposed, since by taking less strict pre-trial supervision measures it is impossible to attain the goals established in the Code of Criminal Procedure of the Republic of Lithuania, Article 119, of ensuring participation of the suspect in the

proceedings and an unhindered pre-trial investigation, and of preventing new criminal acts, since it is reasonably believed that the suspect will go into hiding from the pre-trial investigation officers, prosecutor or court, as the above-mentioned person is suspected of a serious crime carrying a severe prison sentence only, in accordance with the law. The pre-trial investigation did not establish the whereabouts of Martin Gerard Holden, therefore, a wanted notice should be issued. Also he does not have a permanent place of residence in Lithuania, does not have a legal source of living and has no strong social ties with Lithuania. The materials received from the Department of Justice, Equality and Law Reform of the Republic of Ireland according to the request for legal assistance show that he with his family does not live at the registered address of the place of residence and has no property. In the case, foreign citizens who suffered property damage in the amount of LTL 254,962 from the crime are to bring civil actions for damages. The suspect can try to avoid payment of damages by hiding from prosecution. All actual data collected in this case indicates that arrest as a pre-trial supervision measure is necessary, since by taking other pre-trial supervision measures, without restricting the liberty of suspect Martin Gerard Holden, there is no possibility for ensuring unhindered investigation of the case and court hearing. Moreover, the suspect will commit further crimes defined in the Code of Criminal Procedure of the Republic of Lithuania, Article 122, paragraph 4. Reasonable assumption that the person can commit at least one of the crimes defined in the Code of Criminal Procedure of the Republic of Lithuania, Article 122, paragraph 4, can be confirmed by information on that person's role in committing crimes, suspicion notification of the commission of several crimes, receipt of means of subsistence from criminal activity, the victims' and witnesses' testimony and other data. It is laid down in Decision No. 50 of the Senate of the Supreme Court of Lithuania of 30 December 2004 concerning Case Law in Imposing Arrest and Home Arrest, and in Extending the Arrest Period, paragraph 1, sub-paragraph 10, that "On the grounds indicated in the Code of Criminal Procedure of Republic of Lithuania, Article 122, paragraph 1, subparagraph 3, arrest can be imposed or extended, if a person suspected of at least one of the crimes defined in the Code of Criminal Procedure of the Republic of Lithuania, Article 122, paragraph 4." Martin Gerard Holden is suspected of serious crimes. The characterisation of Martin Gerard Holden shows that for him crimes have become his lifestyle; therefore, there is quite a high probability that, if freed, he can commit further crimes. The number of criminal acts and the circumstance that, in the Republic of Lithuania, Martin Gerard Holden does not have any legal source of living allow a reasonable assumption that proceeds of crime are or can be the source of living of Martin Gerard Holden. Request is made for keeping suspect Martin Gerard Holden under arrest and for-setting a two-month arrest period.

The suspect and his counsel for defence asked for the refusal of the prosecutor's request.

The prosecutor's request is to be granted. By taking less strict pre-trial supervision measures against suspect Martin Gerard Holden than arrest it is impossible to attain the goals established in the Code of Criminal Procedure of the Republic of Lithuania. Article 119, and to ensure participation of the suspect in the proceedings, an unhindered pre-trial investigation and court hearing, and also to prevent new criminal acts.

This conclusion is made after the evaluation of the fact that the material received from Qartar law-enforcement authorities according to the request for legal assistance, material received from the bank Swedbank AB (former

Hansabankas AB) and from DnB NORD bank AB, and other case materials form a sufficient basis for the suspicion that suspect Martin Gerard Holden could have committed the acts incriminated to him. Although Martin Gerard Holden stated that he has a place of residence in Lithuania, is married and has no criminal record, he is suspected of two premeditated serious crimes and, if found guilty, can receive a long prison sentence. A wanted notice was issued in the case. In these circumstances, there is a firm basis for assuming that suspect Martin Gerard Holden may go into hiding from the pre-trial investigation officers, prosecutor or court (Code of Criminal Procedure of the Republic of Lithuania, Article 122, paragraph 2). Moreover, he is suspected of two serious crimes defined in the Criminal Code of the Republic of Lithuania, Article 182, paragraph 2; therefore, it should be concluded that the suspect may commit new crimes (Code of Criminal Procedure of the Republic of Lithuania, Article 122, paragraph 4). In order to prevent new possible criminal acts and to ensure participation of suspect Martin Gerard Holden in the proceedings, an unhindered pre-trial investigation and court hearing, suspect Martin Gerard Holden. identification number 91RL6602026M0612058, should be kept under arrest as a pre-trial supervision measure which was imposed by the Decision of Vilnius City Third District Court of 10 November 2009 and a one-month arrest period should be set.

In accordance with the Code of Criminal Procedure of the Republic of Lithuania, Article 119, Articles 121-123, Article 125 and Article 130,

Has decided as follows:

To keep suspect Martin Gerard Holden, identification number 9IRL6602026M0612058, born in Ireland on 2 February 1966, under arrest as a pre-trial supervision measure which was imposed by the Decision of Vilnius City Third District Court of 10 November 2009.

To set a one-month arrest period. The arrest period should be calculated from 10 February 2010, the date on which the suspect was detained.

The suspect and his counsel of defence can appeal against the Ruling to Vilnius Regional Court through Vilnius City Third District Court within 20 days of its issue.

Judge /Signature/ Alberta Baltuðytë

Stamp: Republic of Lithuania, Vilnius City Third District Court/

Martin Holden 12/02/10 /Signature/"

The translated Decision on Bail of the 25th February, 2010 is in the following terms:

"VILNIUS CITY DISTRICT PROSECUTOR'S OFFICE

DECISION TO

IMPOSE PRE-TRIAL SUPERVISION MEASURES: BAIL AND SEIZURE OF DOCUMENTS

25 February 2010 Vilnius

Gaudentas Balèiûnas, prosecutor at Vilnius City District Prosecutor's Office, First (Criminal Act Investigation) Division, in pre-trial investigation case No. 10-2-470-07,

Has established as follows:

Vilnius County Police Headquarters, Crime Investigation Board, Economic Crime Investigation Division has been conducting a pre-trial investigation in case No. 10-2-470-07 on the basis of the elements of the crime defined in the Criminal Code of the Republic of Lithuania, Article 182(2) concerning swindling.

On 11 February 2010, Martin Gerard Holden was served with the notification of suspicion of the criminal acts defined in the Criminal Code of the Republic of Lithuania, Article 182(2) concerning fraudulent acquisition of another person's property of high value for his benefit, namely:

[Facts underlying offences nos. 1 and 2 in Part E of the European Arrest Warrant are then recited]

Data showing that suspect Martin Gerard Holden committed the crimes incriminated to him is the following: material received from Qatar law enforcement authorities according to the request for legal assistance, material received from the bank Swedbank AB (former Hansabankas AB) and from DnB NORD bank AB, material received from Irish law-enforcement authorities according to the request for legal assistance and other case materials.

During the pre-trial investigation, a wanted notice for Martin Gerard Holden had been issued on 12 November 2009 and arrest as a pre-trial supervision measure which had been imposed by the Decision of Vilnius City Third District Court of 10 November 2009 was left in effect by the court Decision of 12 February 2010 when the suspect was detained.

Evaluation of the seriousness of the criminal acts which are under investigation in the case, i.e. the fact that Martin Gerard Holden is suspected of two serious crimes, evaluation of the data characterising the suspect, i.e. the fact that he has no criminal record in Lithuania, evaluation of his social ties in Lithuania, i.e. the fact that he has a place of residence in Lithuania and is married, and evaluation of the amount of the sum that has to be credited to the deposit account of the prosecutor's office as a deposit show that several less serious pre-trial investigation measures than arrest, i.e. bail and seizure of documents, should be imposed at the same time on suspect Martin Gerard Holden, identification number 9IRL6602026M0612058, in order to attain the goals established in the Code of Criminal Procedure of the Republic of Lithuania, Article 119, of the participation of the suspect in the proceedings, an unhindered pre-trial investigation and a court hearing, and in order to prevent new criminal acts.

In reference to the above and in accordance with the Code of Criminal Procedure of the Republic of Lithuania. Article 119, Article 121, Article 125, Article 133 and Article 134,

Has decided as follows:

1) To set bail at LTL 50,000 (fifty thousand) for suspect Martin Gerard Holden, identification number 9IRL6602026M0612058, as a pre-trial supervision measure;

2) The amount of the bail making up LTL 50,000 (fifty thousand) has to be

paid into the deposit account No. LT107044060000304886 (SEB bankas AB, Gedimino Ave. 12, Vilnius) of Vilnius City District Prosecutor's Office by bail giver Martin Gerard Holden, identification number 9IRL6602026M0612058 or other persons;

3) To impose a pre-trial supervision measure of seizure of documents on suspect Martin Gerard Holden, identification number 91RL6602026M0612058;

4) To seize the passport of the citizen of the Republic of Ireland No. PT1850211 issued on 17 January 2008 from the suspect;

5) To issue the suspect with the document seizure note.

Prosecutor */Signature/* Gaudentas Balèiûnas

The Decision has been translated to me and announced on 25 February 2010. The duty has been explained to me, if summoned, to appear before the pre-trial investigation officer, prosecutor, judge or the court, not to interfere with the course of the proceedings and not to commit new criminal acts.

I pledge to fulfil this duty. I have been warned that, if I neglect this duty, the bail will pass to the state and pre-trial supervision measures imposed by this Decision can be replaced with tougher ones.

Suspect /*Signature*/ Martin Holden

The payment of LTL 50,000 (fifty thousand) litas was made by Mariana Lešèenko, identification number 47604201359, at the bank Swedbank AB on 19 February 2010. Payment document: payment order of 19 February 2010.

Prosecutor /*Signature*/ Gaudentas Balèiûnas

I have received a copy of the decision:

Suspect 25-02-2010 *M Holden*

(Signature)"

The translated Ruling of the Vilnius City Third District Court of the 25th May, 2010 is in the following terms:-

"VILNIUS CITY THIRD DISTRICT COURT

RULING

25 May 2010 Vilnius

D. Korsakovas, judge of Vilnius City Third District Court, with the participation of secretary R. Martinkaitë, prosecutor G. Balèiûnas and counsel for defence S. Þentelis, at a court hearing, considered the statement of Vilnius City District Prosecutor's Office on the imposition of arrest as a pre-trial supervision measure on suspect Martin Gerard Holden, identification number 9IRL6602026M0612058, citizen of the Republic of Ireland, born on 2 February 1966, married, unemployed, residing at 7 Willow Drive, Belfield, Ferry Bank, Waterford, Ireland (the data provided by Irish

law-enforcement authorities indicates that he has no permanent place of residence), place of residence in the Republic of Lithuania: Ukmergës 300C-52, Vilnius, with no criminal record in Lithuania.

Has established as follows:

The data collected during the pre-trial investigation indicates that suspect Martin Gerard Holden acquired, by deceit, for his benefit, another person's property of high value, namely:

[Facts underlying offence no. 1 in Part E of the European Arrest Warrant then recited]
By the said actions Martin Gerard Holden committed the crime defined in the Criminal Code of the Republic of Lithuania, Article 182, paragraph 2.
[Facts underlying offence no. 2 in Part E of the European Arrest Warrant then recited]
By the said actions Martin Gerard Holden committed the crime defined in the Criminal Code of the Republic of Lithuania, Article 182, paragraph 2.
[Facts underlying offence no. 3 in Part E of the European Arrest Warrant then recited]
By the said actions Martin Gerard Holden committed the crime defined in the Criminal Code of the Republic of Lithuania, Article 22, paragraph 1, and Article 182, paragraph 2.
[Facts underlying offence no. 4 in Part E of the European Arrest Warrant then recited]
By the said actions Martin Gerard Holden committed the crime defined in the Criminal Code of the Republic of Lithuania, Article 182, paragraph 2.

Data leading to the conclusion that the suspect could have committed the criminal act incriminated to him is the following: material received from Qatar law-enforcement authorities according to the request for legal assistance, material received from the bank Swedbank AB (former Hansabankas AB) and from DnB NORD bank AB, material received from Irish law-enforcement authorities according to the request for legal assistance, the victims' testimony, replies from the State Enterprise Centre of Registers and other case materials.

During the pre-trial investigation, a wanted notice for Martin Gerard Holden had been issued on 12 November 2009 and arrest as a pre-trial supervision measure which had been imposed by the Decision of Vilnius City Third District Court of 10 November 2009 was left in effect by the court Decision of 12 February 2010 when the suspect was detained. By the Decision of the prosecutor of 25 February 2010, the suspect was released from custody and, by the Decision of 25 February 2010, two less strict pre-trial supervision measures than arrest - bail and seizure of documents - were imposed. Martin Gerard Holden, however, violated the conditions of the pre-trial supervision measures and went into hiding from pre-trial investigation officers, the prosecutor and the court. If summoned, he fails to appear before pre-trial investigation officers, and he does not live at the residential address: Ukmergës 300C-52, Vilnius, Republic of Lithuania.

The prosecutor requests the imposition of arrest as a pre-trial supervision measure on the suspect.

The counsel for defence of the suspect has asked for the refusal of the prosecutor's request. He has stated that the case has no judicial perspective, the relations between the parties should be tackled by means of civil procedure and the parties are conducting negotiations, therefore there is no need to impose the strictest pre-trial supervision measure on the suspect.

The prosecutor's request should be granted.

The suspect is suspected of two serious crimes and of an attempt to commit two more serious crimes. During the pre-trial investigation, Martin Gerard Holden violated the conditions of the pre-trial supervision measures and went into hiding from the investigation, his whereabouts have not been determined and he has no strong social ties with Lithuania.

In order to ensure the participation of the suspect in the proceedings, an unhindered pre-trial investigation and a court hearing, it is purposeful to impose arrest as a pre-trial supervision measure on him.

In accordance with the Code of Criminal Procedure of the Republic of Lithuania, Articles 119-123, Article 125, Article 130 and Article 131, the judge

Has decided as follows:

To impose arrest as a pre-trial supervision measure on suspect Martin Gerard Holden.

The suspect or his counsel for defence can appeal against this Ruling to Vilnius Regional Court through Vilnius City Third District Court within 20 days of its issue.

Prosecutor /*Signature*/ D. Korsakovas"

Finally, the translated Ruling of the Vilnius City Third District Court of the 29th July, 2010 is in the following terms:

"VILNIUS CITY THIRD DISTRICT COURT

RULING

29 July 2010 Vilnius

D. Korsakovas, judge of Vilnius City Third District Court, with the participation of secretary I. Bagdonavièienë, prosecutor G. Balèiûnas and counsel for defence S. Þentelis, at a court hearing, considered the statement of Vilnius City District Prosecutor's Office on the imposition of arrest as a pre-trial supervision measure on suspect Martin Gerard Holden, identification number 9IRL6602026M0612058, citizen of the Republic of Ireland, born on 2 February 1966, married, unemployed, residing at 7 Willow Drive, Belfield, Ferry Bank, Waterford, Ireland (the data provided by Irish law-enforcement authorities indicates that he has no permanent place of residence), place of residence in the Republic of Lithuania: Ukmergës 300C-52, Vilnius, with no criminal record in Lithuania.

Has established as follows:

The data collected during the pre-trial investigation indicates that suspect Martin Gerard Holden acquired, by deceit, for his benefit, another person's property of high value, namely:

[Facts underlying offence no. 1 in Part E of the European Arrest Warrant then recited]

By the said actions Martin Gerard Holden committed the crime defined in the Criminal Code of the Republic of Lithuania, Article 182, paragraph 2.

[Facts underlying offence no. 2 in Part E of the European Arrest Warrant then recited]
By the said actions Martin Gerard Holden committed the crime defined in the Criminal Code of the Republic of Lithuania, Article 182, paragraph 2.
[Facts underlying offence no. 3 in Part E of the European Arrest Warrant then recited]
By the said actions Martin Gerard Holden committed the crime defined in the Criminal Code of the Republic of Lithuania, Article 22, paragraph 1, and Article 182, paragraph 2.
[Facts underlying offence no. 4 in Part E of the European Arrest Warrant then recited]
By the said actions Martin Gerard Holden committed the crime defined in the Criminal Code of the Republic of Lithuania, Article 22, paragraph 1, and Article 182, paragraph 2.
[Facts underlying offence no. 5 in Part E of the European Arrest Warrant then recited]
By the said actions Martin Gerard Holden committed the crime defined in the Criminal Code of the Republic of Lithuania, Article 22, paragraph 1, and Article 182, paragraph 2.

Data leading to the conclusion that the suspect could have committed the criminal act incriminated to him is the following: material received from Qatar law-enforcement authorities according to the request for legal assistance: material received from the bank Swedbank AB (former Hansabankas AB) and from DnB NORD bank AB, material received from Irish law-enforcement authorities according to the request for legal assistance, the victims' testimony, replies from the State Enterprise Centre of Registers and other case materials.

During the pre-trial investigation, a wanted notice for Martin Gerard Holden had been issued on 12 November 2009 and arrest as a pre-trial supervision measure which had been imposed by the Decision of Vilnius City Third District Court of 10 November 2009 was left in effect by the court Decision of 12 February 2010 when the suspect was detained. By the Decision of the prosecutor of 25 February 2010, the suspect was released from custody and, by the Decision of 25 February 2010, two less strict pre-trial supervision measures than arrest - bail and seizure of documents - were imposed. Martin Gerard Holden, however, violated the conditions of the pre-trial supervision measures and went into hiding from pre-trial investigation officers, the prosecutor and the court. If summoned, he fails to appear before pre-trial investigation officers, and he does not live at the residential address: Ukmergës 300C-52, Vilnius, Republic of Lithuania.

By the Decision of Vilnius City Third District Court of 25 May 2010, arrest as a pre-trial supervision measure was imposed on Martin Gerard Holden.

On 29 July 2010, G. Balèiûnas, prosecutor at the Division of Vilnius City District Prosecutor's Office reapplied to the pre-trial investigation judge to impose arrest as a pre-trial supervision measure on the suspect, since suspect Martin Gerard Holden's suspicion had been supplemented with one more episode.

The counsel for defence of the suspect has asked for the refusal of the prosecutor's request. He has stated that the case has no judicial perspective, the relations between the parties should be tackled by means of civil procedure and the parties are conducting negotiations, therefore there is no need to impose the strictest pre-trial supervision measure on the suspect.

The prosecutor’s request should be granted.

The suspect is suspected of two serious crimes and of an attempt to commit

three more serious crimes. During the pre-trial investigation, Martin Gerard Holden violated the conditions of the pre-trial supervision measures and went into hiding from the investigation, his whereabouts have not been determined and he has no strong social ties with Lithuania.

In order to ensure the participation of the suspect in the proceedings, an unhindered pre-trial investigation and a court hearing, it is purposeful to impose arrest as a pre-trial supervision measure on him.

In accordance with the Code of Criminal Procedure of the Republic of Lithuania, Articles 119-123, Article 125, Article 130 and Article 131, the judge

Has decided as follows:

To impose arrest as a pre-trial supervision measure on suspect Martin Gerard Holden.

The suspect or his counsel for defence can appeal against this Ruling to Vilnius Regional Court through Vilnius City Third District Court within 20 days of its issue.

Prosecutor /Signature/ D. Korsakovas"

The s. 21A issue

The respondent's submissions

Counsel for the respondent commenced by urging upon the Court that s. 21A is almost unique in the context of the Framework Decision and the statutory regime surrounding it. He submitted that it stands apart from Framework Decision. It is, in his submission, a deliberate, willful, and intentional deviation from the framework by the Oireachtas and represents, from the point of view of a common law jurisdiction, the setting of a *ne plus ultra* in respect of systems different to ours.

The Court's attention was drawn to the fact that the warrant commences with request by the Prosecutor General that the respondent "be arrested and surrendered for the purposes of conducting a criminal prosecution." It was submitted that this must be viewed in the context of the information in Part F of the warrant which appears under the heading "Other circumstances relevant to the case (optional information) and states that:-

> *… Pursuant to part 3 art 95 of the Criminal Code of the Republic of Lithuania, if a person who committed a criminal offence hides from the pre-trial investigation or trial, then calculation of the term of limitations shall be suspended. Martin Gerard Holden hid from pre-trial investigation (on 25-05-2010 he was announced wanted), thus the course of limitation of the judgement of conviction has been suspended."*

Counsel for the respondent points out that the reference to *"the pre-trial investigation or trial"* is in the disjunctive, and there is an express assertion that *"Martin Gerard Holden hid from pre-trial investigation"*. While accepting that the Court would have to have regard to the totality of the information before it, counsel for the respondent contends that this is "the starting point".

It was further urged that when one goes on subsequently to look at some of the further material that was made available by the issuing judicial authority it provides support for

the proposition that the case was still under active investigation.

Counsel for the respondent pointed in particular to the following reference in the letter from the issuing judicial authority dated the 8th June, 2012, in response to the applicant's letter of the 25th May, 2012 (which counsel characterises as accurately and clearly setting out the position in Irish law): The issuing judicial authority stated (*inter alia*):-

> "On 28 April 2010, his wife Mariana Holden was served a summons regarding his arrival for questioning; however, on 30 April 2010 Martin Gerard Holden failed to appear for questioning. By a ruling dated 25 May 2010 of Vilnius City 3rd District Court the suspect Martin Gerard Holden was imposed a measure of constraint - arrest and he was announced wanted. After Vilnius City 3rd District Court, by its ruling dated 29 July 2010, in addition, supplemented one criminal act to the suspicions, the suspect Martin Gerard Holden repeatedly was imposed a measure of constraint - arrest."

It was urged that the issuing state was confirming that at that stage the respondent was still the subject of pre-trial investigation, and that that was borne out by the service of a summons on him for the purpose of securing his attendance for questioning. Moreover, it was suggested, the matter is put beyond any doubt by the further averment later in the same document:-

> "In the Republic of Lithuania the criminal procedure is defined by the Code of Criminal Procedure. It was approved on 14 March 2002 by the Law No. 1X-785 and came into force on 1 May 2003. The said code specifies the following procedural stages of the criminal procedure: 1) pre-trial investigation; 2) trial procedure at the courts of first instance; 3) procedure of appeal; 4) enforcement of rulings and judgements; 5) procedure of cassation.
>
> The criminal case in respect of Martin Gerard Holden is in the first stage of the criminal procedure, which in the Republic of Lithuania is called the pre-trial investigation."

It was submitted that that is as plain and unvarnished a statement of the position as could have been made.

In addition, it was submitted, the applicant had asked the direct question "Has a decision been made to charge (indict) the requested person?", and the response received was the passage just quoted. It was urged that what can be inferred from this is that the direct answer to the question asked is "No, he is at the pre-trial investigation stage". Moreover, the point is made that this question is almost immediately followed by the further question "If a decision to charge (indict) the requested person has been made does this mean that a decision to put the requested person on trial has also been made?", in circumstances where the position in Irish law had earlier been set out in crystal clear terms. This second question is not directly, or even indirectly, answered. Rather a fairly nuanced response to the query was provided which, it was urged, does not indicate or flag up any lack of understanding as to what was being asked, and which sought to side-step the issue. The reply was in these terms:-

> "In the course of the first stage of the criminal procedure, i.e. in the pre-trial investigation, the prosecutor and the pre-trial investigation officer, within the limits of their competence, shall take all measures provided by the law in the shortest possible time to thoroughly disclose the criminal act, to prosecute the perpetrators and properly apply the law. The data relevant to the case is collected, checked and assessed at this stage, thus, all steps are taken to prepare the case for the second stage of the criminal procedure - the trial procedure at the court of first instance.

> During the pre-trial investigation, the person who possibly committed a criminal act is the suspect. The person shall be deemed the accused person from the moment when the prosecutor, while finalizing the pre-trial investigation, adopts a bill of indictment, whereof he transfers to the court together with the case material. The accused shall be a party to judicial proceedings (Article 22 of the Code of Criminal Procedure of the Republic of Lithuania)."

Counsel for the respondent then points to the follow up request dated the 19th June, 2012 wherein the applicant, expressly for the purpose of avoiding confusion, set out again the position in Irish law in what counsel for the respondent characterises as "crystal clear terms". It is urged that in the circumstances the issuing judicial authority could not possibly have failed to understand that which they were being asked. The response was then that contained in the letter of the 25th June, 2012 received from the issuing judicial authority and quoted earlier in this judgment. It was urged that while the language used is express in asserting that the pre-trial investigation had been completed, that assertion leaves more questions unanswered than answered. In particular, it was submitted, it is not expressly indicated that a decision has been made to try the respondent. However, even if one could infer from the language of the reply read as a whole that such a decision had been taken, it is not clear if such a decision had been reached in relation to all of the offences to which the warrant relates, spanning as they do from 2007 to February/March 2010, and there appeared to be no reference at all to the questions asked by the applicant concerning when such a decision was made if indeed it was made; whether a formal document recording it exists, and whether a charge or indictment exists.

Counsel for the respondent also draws to the Court's attention that throughout every one of the documents containing Decisions of the Prosecutor, and Rulings of the Vilnius City 3rd District Court, the respondent is referred to as the "suspect" and not as the "accused".

In relation to the s. 21A(2) presumption, counsel for the respondent submitted that he was entitled to rely on material put forward by the issuing judicial authority for the purpose of contending that that which is presumed stands rebutted. While he acknowledged that his client bears the evidential burden in terms of rebutting the s. 21A(2) presumption, he contended that once the presumption "had become unsettled" by the response received to the initial request for additional information, in circumstances where the nature of the query raised was clear and unambiguous, and yet it was not directly answered, the Court should treat the presumption as having been rebutted and proceed to enquire into whether, as of the date on which the European arrest warrant was issued, a decision had in fact been made to charge and try the respondent in respect of all five of the offences to which the warrant relates.

It was submitted that in all the circumstances of the case this Court could not be satisfied on the information provided to it that a decision had been made to charge and try the respondent in respect of all, or indeed any, of the offences to which the warrant relates.

In support of his submissions, counsel for the respondent opened various passages from the judgments in *Minister for Justice, Equality and Law Reform v. Bailey* [2012] IESC 16 (Unreported, Supreme Court, 1st March, 2012). It was submitted that the Supreme Court's earlier decision in *Minister for Justice and Equality v. Olsson* [2011] IESC 1, [2011] 1 I.R. 384 has been "refined" (to use counsel's exact words) in *Bailey*. Counsel accepted that it was apparent from the judgment of the Chief Justice in *Bailey* that *Olsson* was still good law, but he contended that the Chief Justice, in quoting from the judgment of O'Donnell J. in *Olsson*, had sought to place particular emphasis on certain matters. It was submitted that the Chief Justice (in paragraph 71 of her judgment) had sought, *inter alia*, to emphasis the mandatory language used in s. 21A and also the conjunctive nature

of the decision of which the Court must be satisfied, *i.e.*, that the Court must be satisfied that there has been a decision both to charge the person with ***and*** also try him or her with the offence(s) in question in the issuing state (this Court's emphasis). Further, the Chief Justice had indicated that the starting point in any consideration of the possible application of s. 21A was the warrant itself. In the *Bailey* case she found the first paragraph of the warrant to be *"not helpful as it states the alternative purposes for which a warrant could be sought, but did not identify the purpose of the warrant"*. It was conceded by counsel for the respondent that the same can not be said in the present case, in as much as the first paragraph of the warrant with which the Court is presently concerned indicates that surrender is sought *"for the purposes of conducting a criminal prosecution"*. The Chief Justice had then referred extensively to the evidence before the Court in *Bailey* concerning foreign law for the purpose of ascertaining the factual position with regard to what stage the proceedings in France had reached when the European arrest warrant was issued. Counsel for the respondent accepted that it was an important feature of that case that both sides were in agreement as to the position under French law, namely that if the appellant (Mr. Bailey) were handed over to France by the Irish authorities he would be at the investigation procedure stage of the case, and that while a decision had been made in France equivalent to a decision to charge the appellant that decision did not incorporate a decision to try him for the murder of Mme. Toscan du Plantier and indeed no further decision had been made. Nevertheless, counsel urges upon this Court that in so far as the Chief Justice's judgment in *Bailey* addressed the s. 21A(1) requirement at the level of principle it has important implications for the present case. In particular, the Court was referred to paras. 95 to 98 of the Chief Justice's judgment in *Bailey*, wherein she stated:-

> "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."

For completeness it should also be recorded that the Court's attention was also drawn to certain further passages contained in the judgments of the other members of the Supreme Court in *Bailey*, as well as to the judgment of the Supreme Court (Murray C.J. with whom Denham, Hardiman, Geoghegan and Fennelly JJ. agreed) in *Minister for Justice, Equality and Law Reform v. Mc Ardle* [2005] IESC 76, [2005], 4 I.R. 260. While it is not proposed to quote specifically from this material the Court has nonetheless had regard to it, and has taken account of it.

The applicant's submissions

Counsel for the applicant referred to the fact that the European arrest warrant, which is dated 12 August 2010 relates to five offences, and the warrant itself requests that the respondent "be arrested and surrendered for the purposes of conducting a criminal prosecution". Counsel submits that it to be presumed in accordance with s. 21A(2) that a decision has been taken to charge and try the respondent. That presumption is capable of being rebutted but it was submitted that the Court should not seek to look behind that which is presumed unless the respondent can point to cogent evidence tending to rebut the presumption.

Elaborating on this submission, it was urged by counsel for the applicant that her opponent was seeking "to turn the presumption on its head", in suggesting that the Court could not be satisfied on the evidence before it that a decision had been taken (as of the time at which the European arrest warrant was issued) to both charge and try the respondent in respect of all five offences to which the warrant relates.

It was submitted that the correct position in law is that the High Court is not required to engage in the first instance in an assessment of the available evidence for the purpose of satisfying itself in regard to such matters. Rather it may presume the existence of a decision to charge and try the respondent, and act upon that presumption, ***unless*** it has been demonstrated that cogent evidence exists tending to rebut that which is presumed. The respondent bears an evidential burden in regard to the adduction and/or identification to the Court of such evidence. It is only where the Court is satisfied that cogent evidence exists tending to rebut the presumption that it becomes necessary for the Court to seek to look behind that which is presumed. It was counsel for the applicant's submission that the respondent had not discharged the evidential burden upon him and that the Court was obliged to act on foot of the s. 21A(2) presumption.

Counsel for the applicant further submitted that, in any event, the material relied upon by the respondent, far from tending to rebut the s. 21A(2) presumption, in fact supports that which is presumed. In particular, the underlying domestic judicial decision, namely, the ruling of the 29th July, 2010 "imposing measure of constraint – arrest", which clearly predates the issuance of the European arrest warrant, covers all five offences to which the European arrest warrant relates. It was urged that this important fact must be considered in conjunction with all of the additional information provided in this case, but in particular the information contained in the letter dated the 25th June, 2012 from the issuing judicial authority to the effect that:-

> "…pursuant to Paragraph 2 of Article 121 of the Code of Criminal Procedure of the Republic of Lithuania, the measures of constraint may be imposed only in case there is sufficient data, which allow assuming that a suspect has committed a criminal act."

The letter then goes on to state:-

> "The strictest measure of constraint – arrest was imposed upon Martin Gerard Holden three times: by the ruling dated 12 February 2010 of Vilnius City 3rd District Court; by the ruling dated 25 May 2010 of Vilnius City 3rd District Court and by the ruling dated 29 July 2010 of Vilnius City 3rd

> District Court. Both, the prosecutor when filing a motion to court regarding imposing the measure of constraint – arrest, and the court when imposing the arrest, have considered whether there was sufficient data which would allow to assume that the suspect had committed the criminal act. Considering the fact that the measure of constraint – arrest has been imposed upon Martin Gerard Holden, as per estimations of the prosecutor and the court, there was sufficient data to assume that the said suspect had committed the criminal act.
>
> Please also be advised that pursuant to Paragraph 1 of Article 218 of the Code of Criminal Procedure of the Republic of Lithuania, the prosecutor being convinced that sufficient data was collected during the pre-trial investigation, which would substantiate the suspect's guilt in relation to commission of the criminal act, declared that the pre-trial investigation has been completed."

Counsel for the applicant submitted that far from creating doubt as to whether a decision was taken to charge and try the respondent, this information strongly supports that which is to be presumed.

Counsel for the applicant made the further point that even if the Court was persuaded as to the existence of cogent evidence tending to rebut the s. 21A(2) presumption, that would not be the end of the matter. Even where the presumption stands rebutted, the Court would require to be "satisfied" on the basis of cogent evidence that, at the material time, a decision had not been made to charge the respondent with, and try him or her for, the offences in question in the issuing state, before it would be justified in refusing to surrender the respondent on s. 21A(1) grounds. The Court was referred to paragraph 36 of the judgment of O'Donnell J. in the case of *Minister for Justice, Equality and Law Reform v. Olsson* [2011] IESC 1, [2011] 1 I.R. 384 in support of this submission:-

> "It is noteworthy, that on the evidence in this case, the position in relation to the respondent is not by any means unusual in the Swedish system, and indeed represents the norm in a number of European countries. It would be a surprising result if either the Framework Decision or the Act of 2003 were to be interpreted so as to prevent the execution of the European arrest warrant in respect of such countries and where (as here) the requesting authority had in the terms of the warrant, and in sworn evidence in the case, stated that the warrant was issued for the purposes of conducting a criminal prosecution. The High Court was entirely correct to conclude that there was here a clear intention to bring proceedings within the meaning of s. 10, and that the warrant could be said to be for the purposes of conducting a criminal prosecution within the meaning of the Framework Decision and that the only thing which stood in the way of commencement of such prosecution was the requirement of the presence of the respondent and the interview where he could respond to the investigation. In short the intention of the Swedish prosecution authority to bring the respondent before the Swedish Court for the purpose of being charged is but a step in the prosecution process. For the reasons set out above the High Court was correct to conclude that the respondent was not being sought only to be questioned as part of the investigation and that there was a decision to charge the respondent within the meaning of the Act of 2003. Certainly even without the presumption contained in s. 21A(2), the section requires clear proof. Once a court finds the European arrest warrant to be in order (and therefore on its face a request made for the purpose of prosecution or trial), then before a court can refuse to surrender a person requested under such a warrant, it must be satisfied by cogent evidence to the contrary that a decision has not been made to charge the particular person with, and try

> him or her for, the offence. This has not been established. I would dismiss the appeal."

Counsel for the applicant submitted that even if the Court was not satisfied to rely upon the presumption, the Court could not be satisfied on the totality of the evidence before the Court that, as of the material date, a decision had not been made to charge, and try, the respondent for the offences in question in the issuing state.

Finally, it was submitted that the circumstances giving rise to the decision of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Bailey* [2012] IESC 16 (Unreported, Supreme Court, 1st March, 2012) not to surrender Mr. Ian Bailey to the Republic of France were quite unique, and readily distinguishable from the circumstances of the present case.

The Court's decision

I find myself in agreement with the submissions of counsel for the applicant, both with respect to how the statutory presumption in s. 21A(2) of the Act of 2003 is to be approached, and also with respect to whether there is cogent evidence tending to rebut that which is presumed.

Having considered the totality of the evidence before the Court, and in particular the European arrest warrant itself, all of the additional information provided by the issuing judicial authority, and the various rulings and decisions of the Vilnius City Third District Court that were exhibited, I do not consider that respondent succeeded in demonstrating the existence of cogent evidence tending to rebut the s. 21A(2) presumption so to justify this Court in seeking to look behind that which is presumed. On the contrary, the Court agrees with counsel for the applicant that the available evidence when considered as a whole, each piece having been placed in its proper context, tends in fact to support that which is presumed.

In so far as the case law is concerned, in the intervening period since the conclusion of the s. 16 hearing in the present case and during which my judgment has been reserved, I delivered a judgment in a case of *Minister for Justice and Equality v. Connolly* [2012] IEHC 575, (Unreported, High Court, Edwards J., 6th December, 2012) in which I said the following at paragraph 8.20:-

> "As the Court understands the decision in *Minister for Justice, Equality and Law Reform v. Bailey* the Supreme Court did not depart from or modify the analysis of s. 21A by O'Donnell J. in *Minister for Justice, Equality and Law Reform v. Olsson* [2011] IESC 1, [2011] 1 I.R. 384. Rather, it seems to have been accepted that O'Donnell J.'s analysis was correct at the level of principle (even though O'Donnell J.'s analysis does not allude to the Irish Government's reservation, a matter on which much emphasis was placed in the majority judgments in the *Bailey* case). However, when what might be called the *Olsson* analysis was applied in the particular circumstances of the *Bailey* case it was impossible to conclude, on the evidence before the Court in that case, that a decision had been made to try the respondent in that case."

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 prèparatoires* 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 executed for the purpose of bringing that person to trial or for the purpose of executing a custodial sentence or detention order."*

In conclusion on this issue, the Court is satisfied in all the circumstances that it is entitled to, and must, in accordance with s. 21A(2) of the Act of 2003, proceed upon the presumption that, as of the date of issuance of the European arrest warrant in this case, a decision had been taken both to charge the respondent with, and also to try him for, the five offences to which the European arrest warrant relates in the issuing state.

In the circumstances the Court is not disposed to uphold the s. 21A(1) objection raised by the respondent.

The s. 37 issue - the objection based upon prison conditions

The starting point in respect of any rights based objection must be the presumption in s. 4A of the Act of 2003, which states:-

> "It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown"

The requirements of the Framework Decision in regard to Fundamental Rights are in recitals 12 and 13, respectively, to that instrument. They state:-

> "(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union [Footnote 1: OJ C 364, 18.12.2000, p. 1.], in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.
>
> This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.
>
> (13) No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

The position is, therefore, that this Court must, by virtue of s. 4A of the Act of 2003, presume that the issuing state will respect and have due regard to the respondent's fundamental rights in the event of him being surrendered. This presumption may of course be rebutted.

The principles contained in recitals 12 and 13 of the Framework Decision find reflection in s. 37 of the Act of 2003. In the particular circumstances of this case, the Court is concerned primarily with s. 37(1)(a) and s. 37(1)(b). These provisions are in the following

terms:-

> 37.—(1) A person shall not be surrendered under this Act if—
>
> (a) his or her surrender would be incompatible with the State's obligations under—
>
> (i) the Convention, or
>
> (ii) the Protocols to the Convention,
>
> (b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38 (1)(b) applies)"

Section 37(2) of the Act of 2003 provides that the "Convention" referred to is the European Convention on Human Rights and Fundamental Freedoms, 1950, as amended, and the "Protocols" referred to are the protocols to that Convention listed in the same subsection.

The respondent's case is that if surrendered in respect of the offences to which the European arrest warrant relates he would face a real risk of breach of his rights under Article 3 of the Convention, or alternatively his personal rights to bodily integrity and human dignity as guaranteed under Article 40.3 of the Constitution of Ireland. He contends that to surrender him in such circumstances would be incompatible with this State's obligations to him under the Convention, and would constitute a contravention of his rights under the Constitution of Ireland, and his surrender must therefore be regarded as prohibited.

The law

This Court in its judgment in *Minister for Justice, Equality and Law Reform v. Mazurek* [2011] IEHC 204, (Unreported, High Court, Edwards J., 13th May, 2011), and more recently in its judgments in *Minister for Justice, Equality and Law Reform v. Wlodarcyzk* [2011] IEHC 209 (Unreported, High Court, Edwards J., 19th May, 2011); *Minister for Justice, Equality and Law Reform v. Mihai* (High Court, *ex tempore*, Edwards J., 10th October, 2011) and *Minister for Justice, Equality and Law Reform v. Machaczka* [2012] IEHC 434, (Unreported, High Court, Edwards J., 12th October, 2012), reviewed and applied the jurisprudence of the Supreme Court concerning resistance to surrender based upon apprehended subjection to inhuman and degrading treatment, alternatively breach of the right to bodily integrity, contrary to a person's constitutional and convention rights, and in particular a person's rights under Article 3 of the Convention.

I said in *Mazurek* that the following principles can be distilled from the authorities:-

> - "The normal presumption is" (per Fennelly J. in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45, [2010] IESC 45) "the courts of the executing member state, when deciding whether to make an order for surrender must proceed on the assumption that the courts of the issuing member state will, as is required by Article 6.1 of the Treaty on European Union, 'respect ... human rights and fundamental freedoms'." (*per* Fennelly J. in *Minister for Justice, Equality and Law Reform v. Stapleton* [2007] IESC 30, [2008] 1 I.R. 669);
>
> - However, "by virtue of the absolute nature of the obligation imposed by

Article 3 of the European Convention on Human Rights and Fundamental Freedoms, which provides that *'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'*, the objectives of the system of surrender pursuant to the Council Framework Decision on the European Arrest Warrant cannot be invoked to defeat an established real risk of ill treatment contrary to aArticle 3" (*per* Fennelly J. in *Rettinger*);

- The two foregoing principles are readily reconcilable and they do not imply that "there is any underlying conflict between the Convention and the Framework Decision" (*per* Fennelly J. in *Rettinger*);

- The subject matter of the court's enquiry "is the level of danger to which the person is exposed" (*per* Fennelly J. in *Rettinger*);

- "[I]t is not necessary to prove that the person will probably suffer inhuman or degrading treatment. It is enough to establish that there is a '*real risk*'" (per Fennelly J. in *Rettinger*) "in a rigorous examination." (*per* Denham J. in *Rettinger*). However, the mere possibility of ill treatment is not sufficient to establish an applicant's case (*per* Denham J. in *Rettinger*);

- A court should consider all the material before it, and if necessary material obtained of its own motion (*per* Denham J. in *Rettinger*);

- Although a respondent bears no legal burden of proof as such a respondent nonetheless bears an evidential burden of adducing cogent "evidence capable of proving that there are substantial grounds for believing that if he (or she) were returned to the requesting country he, or she, would be exposed to a real risk of being subjected to treatment contrary to article 3 of the ECHR" (*per* Denham J. in *Rettinger*);

- It is open to a requesting State to dispel any doubts by evidence. This does not mean that the burden has shifted. Thus, if there is information from an applicant as to conditions in the prisons of a requesting State with no replying information, a court may have sufficient evidence to find that there are substantial grounds for believing that if the applicant were returned to the requesting state he would be exposed to a real risk of being subjected to treatment contrary to article 3 of the ECHR. On the other hand, the requesting State may present evidence which would, or would not, dispel the view of the court (*per* Denham J. in *Rettinger*);

- The court should examine the foreseeable consequences of sending a person to the requesting State (*per* Denham J. in *Rettinger*). In other words the Court must be forward looking in its approach;

- The court may attach importance to reports of independent international human rights organisations, such as Amnesty International, and to governmental sources, such as the U.S. State Department.

The letter of 16th May, 2012

It will be recalled that the letter from the issuing judicial authority to the applicant dated the 8th June, providing additional information in response to queries raised by the applicant in a letter of the 25th May, 2012, enclosed a document described as *"commentaries of the Ministry of Justice of the Republic of Lithuania (copy of a letter No. (1.39.)7R-3701 dated 16 May 2012 together with their translation into the English language) pertaining to another case concerning a surrender pursuant to the European*

arrest warrant." The other case in question is one in respect of which this Court also has seisen, and in which judgment on a surrender application stands reserved.

The letter of the 16th May, 2012 refers predominantly to Lukiðkës Remand Prison, and seeks to engage with specific criticisms contained in the affidavit of an expert put forward by the respondent in the case in question relating to confinement conditions in that institution. In the present case, there is no evidence as to what prison the respondent may be detained at in the event of his surrender. His brief detention to date appears from his own affidavit to have been initially in what he describes as "a Police Holding Area" in Vilnius City, and subsequently at "Vilnius City Detention Centre" (which the Court believes to be the "Vilnius City Police Detention Centre" referred to in the 2010 CPT report exhibited with his affidavit). However, it is to be inferred from the issuing judicial authority's reliance on the letter of the 16th May, 2012 that it is at least possible, and perhaps likely, that in the event of his surrender he would be detained at Lukiðkës Remand Prison, which the Court understands from knowledge gleaned in other cases, including the case to which the letter of the 16th May, 2012 relates, to be located in Vilnius and to be one of a number of adult remand prisons (as distinct from police detention facilities) in the Republic of Lithuania.

The letter of the 16th May, 2012 states:-

> "Please find the comments of the Ministry of Justice of the Republic of Lithuania on the affidavit of Prof. Rod Morgan about the confinement conditions in the Lukiðkës Remand Prison.
>
> *1) On the objects chosen for supervision by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter referred as CPT) during the visit to Lithuania in 2010*
>
> By commenting the opinion expressed by the Prof. Rod Morgan that the visit of 14-18 May 2010 to Lithuania concentrated almost exclusively on Juvenile Interrogation Isolator - Correctional Facility of Kaunas, hereby we note that in the CPT Report of 2010 visit it is directly stated that this object was chosen for the reason that during the visit to Lithuania in 2008 the confinement conditions in the said Facility were recognized as improper and it was sought to evaluate the progress achieved by responsible Lithuanian institutions implementing the recommendations outlined on the CPT Report on visit to Lithuania in 2008.
>
> It should be also noted that CPT Report on visit to Lithuania in 2008 in relation to other prison facilities checked (Lukiðkës Remand Prison, 3rd Correction Facility of Pravieniskës) does not state that the confinement conditions in these facilities violate the human rights and degrade the dignity of the imprisoned persons; only some drawbacks were indicated that in most of the cases were removed by the competent Lithuanian institution prior to the submission of the Governmental Report on the Implementation of the Recommendations to CPT (in 2009).
>
> *2) The comparison of the number of persons kept in the Lukiðkës Remand Prison since 2000 until 2012.*
>
> When comparing the number of persons kept in the Lukiðkës Remand Prison in 2000 with present situation it should be highlighted that the average number of the prisoners kept in this facility has reduced by 30 per cent. This reduction has been affected by the essential changes of Lithuanian criminal policy, since in 2003 new Code - Criminal Code and Criminal Procedure Code - had come into force. We would like to draw your attention that in 2000 1574 arrested persons and 253 sentenced persons in average were kept in Lukiðkës Remand Prison. According to the data of 2012 1141

arrested person and 555 sentenced persons in average have been kept in this facility. Thus, when in 2003 the number of the persons imprisoned in this facility began significantly to reduce, the number of vacancies in the prison cells was also reduced, as a result of this the capita living space in prison cells had increased. It should be also noted that since 2008 the European Court of Human Rights has adopted not a single decision that would recognise that the confinement conditions in Lukiðkës Remand Prison failed to meet the requirements set forth in the provisions of the Convention on Human Rights and Fundaments Freedoms.

3) On works done to improve the confinement conditions in Lukiðkës Remand Prison

We would like to draw your attention to the fact that despite the economic downturn and reduced budgetary allocations, the reconstruction works in Lukiðkës Remand Prison were still continued in the period of 2008-2011 that allowed not only improving the prisoners' welfare, but also doing of the major repairs and full renewal of 67 per cent of all prison cells, where arrested persons are kept. The repair works of other premises and spaces used by the prisoners were also done, namely: the renewal of shower rooms and courtyards for walking; the instalment of 3 gyms with sports equipment; the instalment of the premises for demonstration of films and of the cabinet of chaplain, and etc.

4) on actions of Lithuanian Government when dealing with the issue of moving Lukiðkës Remand Prison to new premises

We would like, to inform you that the Imprisonment Facility Modernisation Strategy and Plan on it Implementing Measures approved by the Government of the Republic of Lithuania on 30 September 2009 (in the section that covers the issue of moving Lukiðkës Remand Prison to new premises) foresee to transfer the sentenced persons kept in the said facility to a new Pravieniðkës Prison, and the arrested persons - to a new Vilnius Remand Prison until 2014. The Ministry of Justice believes that a major progress has been achieved in the process of the implementation of these plans, as the Government of the Republic of Lithuania has already approved all documents related with a project of a new Pravieniðkës Prison, thus a public tender shall be announced for the purpose of selecting an operator, who will have to carry out all necessary works until 2014 in order the sentenced persons, currently kept in Lukiðkës Remand Prison, were transferred to Pravieniðkës Prison. And the vacant cells will be occupied by the arrested persons kept in Lukiðkës Remand Prison until 2017, when a new Vilnius Remand Prison is planned to be built. As a result of this, the requirements for proper confinement conditions will be fully met already in the period mentioned and there will be no problems related with overcrowded prison population.

In summary it could be noted that the Ministry of Justice does not consider that the confinement conditions in Lithuanian prison facilities could be deemed as violating the human rights, as they fully meet minimal international standards for confinement conditions, despite some minor shortages. By the same token it can be noted that [named person] during his trial may be not necessarily kept in Lukiðkës Remand Prison but in other facilities executing the coercive measure - arrest, for example, in a fully modernised Kaunas Remand Prison."

The respondent's submissions

Counsel for the respondent submitted that the evidence relied upon by his client—namely his relatively recent personal experience of detention in two different police detention centres/facilities in Vilnius, Lithuania as recounted in his affidavit, and the descriptions and criticisms of conditions of detention in remand prisons and detention centres in Lithuania as contained in the two reports exhibited with his affidavit, *i.e.*, the 2010 CPT

Report and the 2010 U.S. State Department Report—represent evidence of sufficient cogency to rebut the presumption in s. 4A of the Act of 2003, and to put this Court upon its enquiry concerning whether or not there are substantial grounds for believing that the respondent would face a real risk of being subjected to inhuman or degrading treatment, or alternatively breach of his rights to bodily integrity and to be treated with human dignity, in the event of him being surrendered.

Counsel for the respondent further submitted that when the Court engages in the rigorous examination of the evidence before it which it must engage in, it will inevitably be left with doubts, and that in the absence of any meaningful or substantive engagement by the issuing state with evidence as to the respondent's own experience, and with the country of origin evidence upon which he also relies, those doubts will not have been dispelled. It was submitted that what the respondent has sworn to amounts to inhuman and degrading treatment. Regardless of how long or how short it continues for, the conditions of detention that he describes are simply not good enough and they amount to inhuman and degrading treatment. He submitted that in such circumstances the Court is obliged to refuse to surrender the respondent.

Submissions on behalf of the applicant

Counsel for the applicant indicated that she was relying on the s. 4A presumption and upon the principles laid down by the Supreme Court in *Rettinger* and applied by this Court in its judgments in *Mazurek, Wlodarczyk,* and *Mihai*. Counsel emphasised that the Court must be forward looking. The experiences described by the applicant are historic and occurred in 2012. Moreover, the 2010 CPT report and the 2010 U.S. State Department Reports relate to the situation in 2010. The respondent has adduced no evidence as to the up to date situation such as would displace the s. 4A presumption. It is not true to say that there has been no engagement with the evidence by the issuing state. While there is no evidence to contradict the applicant's description of his personal experiences in 2010, the 2010 CPT report was responded to and engaged with by the Lithuanian government. (The Court, with the acquiescence of the respondent, was provided with a copy of the Response of the Lithuanian Government, which is dated 29th April, 2011 and which was published by the CPT at the Lithuanian Government's request on the 19th May, 2011).

Counsel for the applicant makes the further point that the 2010 CPT report was concerned predominantly with short term police detention centres; with juvenile detention centres and with alleged secret detention centres, and not to adult remand prisons. Moreover, in relation to Lukiðkës Remand Prison where he may possibly be detained, the letter of the 16th May, 2012 addresses recent criticisms of conditions in that institution.

Decision on s. 37 issues

It is correct to say that there has been no specific engagement with the respondent's evidence as to his own personal experiences of short term police detention in Lithuania in 2010. Moreover, the conditions that he describes are consistent with those observed by the delegation from the Council of Europe's "European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment" (hereinafter the CPT) that visited a number of police detention centres, including several in Vilnius, between the 14th and 18th June, 2010. The Court has therefore no reason to doubt the credibility or reliability of the respondent's evidence in that regard.

However, the 2010 CPT report must be read in its context. It is the latest in a series of such reports commencing with a baseline report published in the year 2000, with follow up reports published in 2004, 2008 and most recently in 2010. (It is understood there was a further CPT visit to Lithuania in 2012, but the 2012 report has not yet been published. For consistency hereinafter these will referred to in abbreviated format as "the 2000 CPT report", "the 2004 CPT report", etc.) To properly understand the context of the

2010 CPT report it is necessary to refer to the earlier reports, all of which are to be found on the Council of Europe website using the url: http://www.cpt.coe.int/en/states/ltu.htm.

Before doing so, however, the Court wishes to reiterate its agreement with views expressed by Latham L.J. in *Miklis v. Lithuania*, [2006] EWHC 1032 (QB) and with which I have previously expressed concurrence in other judgments. In that case Latham L.J., who was giving judgment on behalf of a Divisional High Court in the Queen's Bench Division in England, said at para. 11:-

> "It is, however, important that reports which identify breaches of human rights, or other reprehensible activities on the part of governments or public authorities are kept in context. The fact that human rights violations take place is not of itself evidence that a particular individual would be at risk of being subjected to those human rights violations in the country in question. That depends upon the extent to which the violations are systemic, their frequency and the extent to which the particular individual in question could be said to be specifically vulnerable by reason of a characteristic which would expose him to human rights abuse."

The 2000 visit by the CPT focused on police detention centres, prisons, the prison convoy division, and the "Foreigners Registration Centre in Pabradë". Some ten police stations/police detention centres were visited, and three prisons (including one prison hospital) were visited. Of the three prisons, only Vilnius prison (later renamed Lukiðkës) had remand prisoners as well as sentenced prisoners.

The 2004 follow up visit focused again on police establishments and prisons, as well as on psychiatric hospitals. There were four prisons visited, two of which had remand prisoners *i.e.*, Kaunas Juvenile Remand Prison and Correction Home and Lukiðkës Remand Prison.

The 2008 follow up visit again focused on police establishments, prisons, and psychiatric hospitals, adding on this occasion residential care homes. Three prison establishments were visited, two of which had remand prisoners *i.e.*, Kaunas Juvenile Remand Prison and Correction Home and Lukiðkës Remand Prison.

Most recently, the 2010 follow up visit focused on police establishments (9 of these were visited), one particular juvenile remand prison (*i.e.*, Kaunas Juvenile Remand Prison and Correction Home) and "secret detention" (the alleged transportation and confinement of persons detained by the C.I.A. on Lithuanian territory).

At the very outset of the 2000 CPT report, the relationship between police detention and prison remand in Lithuania is explained. (The explanation is reiterated in subsequent reports, most recently at para. 9 of the 2010 CPT report). It was stated in 2000 that:-

> "9. In Lithuania, a criminal suspect can remain in police custody for up to 48 hours on the authority of a police interrogator, a criminal investigator or a public prosecutor. The person concerned must be brought before a judge within the first 48 hours of detention, who may remand him in police custody for a further 15 days.
>
> While in police custody, suspects are held in designated police detention centres, but can be removed during the day for questioning or to attend legal proceedings. Further, persons who are remanded in a prison establishment can be returned to police custody for questioning or further investigation.
>
> 10. The police are also responsible for the custody of persons in administrative detention (mostly fine defaulters) and of persons whose detention has been ordered by a judge to ensure that they fulfil their obligation to act as witnesses in court proceedings. Although a person may

> be required to serve up to three consecutive administrative detention sentences, it is unlikely that a period of more than three months would actually be spent in a police detention centre. It would appear that, when a longer period is involved, the persons concerned are offered some home leave after each three-month period.
>
> 11. In addition, a person can be detained by the police for identification for up to three hours (a period which can be extended to 48 hours under aliens law provisions), or for up to five hours while completing police proceedings concerning administrative offences. The police can also detain a person for sobering up or for the purpose of enforcing compulsory medical treatment or health care measures."

(The specific provisions of the Lithuanian Criminal Code providing for the regime described are identified in footnotes to the report.)

It is clear from the above that in the event of the respondent being surrendered, he will not be detained in a police detention centre, but rather will be detained in an adult remand prison, possibly (or perhaps even probably) Lukiðkës Remand Prison. The available information indicates that he no longer qualifies to be detained in police detention. He has already been through police detention, he has been brought before a judge and he is now the subject of "arrest as a pre-trial supervision measure" as ordered by the Vilnius City Third District Court. He does not face administrative detention, nor is he required to be detained for "sobering up". While it is theoretically possible for him to be returned to police detention for up to 15 days from any remand prison to which he is sent, there is nothing in the evidence to suggest that the authorities have a present intention to do this in his particular case. That said, it is noted that the respondent was summoned for questioning by the prosecutor on the 28th April, 2010, and failed to attend. The pre-trial supervision measure that has since been imposed is expressed as being necessary (*inter alia*) "to ensure the participation of the suspect in the proceedings". In the circumstances the Court must acknowledge a possibility that if he is surrendered the public prosecutor may indeed request his temporary return to police detention for the purpose of questioning him.

In any event, even if it does occur it will be of short and finite duration, limited to up to 15 days under Lithuanian law. As I stated in *Minister for Justice and Equality v. Machaczka* [2012] IEHC 434, (Unreported, High Court, Edwards J., 12th October, 2012) at para. 152:-

> "…[I]ll-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 E.C.H.R. The assessment of this minimum level is, in the nature of things, relative; ***it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim*** (see *Vilvarajah and Others v. the United Kingdom*, E.Ct.H.R. 30 October 1991, Series A, no. 215, p. 36, § 107; *Kud³a v. Poland* [GC], App No. 30210/96, § 91, E.Ct.H.R. 2000-XI; and *Peers v. Greece*, App No. 28524/95, § 67, E.Ct.H.R 2001-III). The European Court of Human Rights has consistently stressed that the suffering and humiliation involved must in any event go beyond that which is inevitably connected with a given form of legitimate treatment or punishment. As regards prisoners or detainees, the Court has repeatedly noted that measures depriving a person of his liberty may often involve such an element. However, under Article 3 E.C.H.R, the state must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health

and well-being are adequately secured."

(emphasis added)

While the conditions experienced by the respondent in police detention, and described in his affidavit, must have been very uncomfortable and indeed unpleasant for him, I am not convinced given the short duration of his stay in police detention that it amounted in his particular circumstances to inhuman or degrading treatment amounting to a breach of article 3 of the Convention, or that it breached his rights to bodily integrity and to be treated with human dignity under Article 40.3 of the Constitution.

Similarly, the Court would not regard the theoretical possibility of a short term return to police detention (assuming conditions have not changed since 2010) as giving rise to substantial grounds for believing that the respondent would face a real risk of being subjected to inhuman or degrading treatment, alternatively breach of his rights to bodily integrity and to be treated with human dignity, without evidence of particular vulnerability in his case. Clearly, long term exposure to the conditions described could indeed breach a person's rights, but one would not expect shorter term exposure to do so unless the person was specifically vulnerable in some respect.

In arriving at the view just expressed the Court has taken due account of the following passages from paras. 23 and 24 of the 2010 CPT report:-

> "23. The CPT has already on many occasions expressed its misgivings about the practice of returning remand prisoners to police detention facilities for investigation purposes.
>
> In this regard, the delegation was informed that, since the 2008 visit, the legislation had been amended so as to reduce the number of such returns. They could now take place only on the basis of a reasoned decision by the competent authority, and the remand prisoners concerned had the right to appeal against the decision. These new provisions had apparently resulted in a significant decrease in the number of remand prisoners returned to police establishments.
>
> 24. Unfortunately, the situation observed by the delegation was not so positive. It quickly became apparent that returning remand prisoners to police establishments was still a widespread practice. The majority of remand prisoners with whom the delegation spoke (including juveniles) had been returned to police establishments on a number of occasions. In this connection, a review of the files revealed that the decisions on which these returns were based often consisted solely of stereotypical phrases. Furthermore, although the maximum period for which a remand prisoner could be held in a police establishment was 15 days, the delegation met many remand prisoners (adults) who had in fact remained in police establishments for prolonged periods – several successive periods of 15 days, interrupted by a brief return (sometimes for only one or two days) to prison.
>
> The CPT must stress once again that, from the standpoint of the prevention of ill-treatment but also in view of the conditions prevailing in police detention centres (see paragraphs 25 to 27), it is far preferable that further questioning of persons already committed to a remand prison be undertaken by police officers in prison rather than on police premises. The return of remand prisoners to police establishments should be sought and authorised only very exceptionally, for specific reasons and for the shortest possible period of time. ***The CPT recommends that the Lithuanian***

authorities pursue their efforts to achieve this objective."

The Court has also taken into account the response of the Lithuanian Government, which states (*inter alia*) at p. 6 that:-

> "Pursuant to Article 2(2) of the Law on Detention, prior to being sent to a remand prison, persons placed under detention may be held in the detention facility of a territorial police establishment for a period not exceeding 15 days. By decision of a pre-trial investigator, a prosecutor or a court, remand prisoners may be moved to police custody from remand prison in order to carry out pre-trial investigation actions or due to court hearings of cases, but for a period not exceeding 15 days. This article also provides that such persons must be immediately released from the police detention facility when their detention is no longer necessary. The same provisions of this Law have been transposed into legal acts regulating the activities of police detention facilities.
>
> It should be noted that the possibility to review laws and regulations regulating the temporary placement of the detained and sentenced persons in police detention facilities and the keeping of persons punished by administrative arrest in police detention facilities is currently discussed at the inter-institutional level (with the presence of the Ministry of Justice and the Ministry of the Interior, also the Police Department under the Ministry of the Interior).
>
> ….[D]ue consideration is currently being given to the issue of transferring the function of carrying out the provisional measure, i.e. detention, (which is currently entrusted to police detention facilities and which can be described as being uncharacteristic to police) over to the establishments subordinated to the Prisons Department under the Ministry of Justice of the Republic of Lithuania, and police establishments will only have premises for short-term (not exceeding 5 hours) and long-term (not exceeding 48 hours) keeping of persons."

In so far as the respondent faces pre-trial detention in an adult remand prison in the event of his surrender, he has not put forward much evidence at all as to the conditions in such prisons. He has no personal experience of an adult remand prison in Lithuania; he puts forward no third party evidence concerning conditions in such prisons; the 2010 CPT report does not deal with conditions in adult remand prisons (none were visited in that year); and while the 2010 U.S. State Department Report contains broad and general criticisms *e.g. "conditions in prisons and detention centres were poor, and physical mistreatment of prisoners and overcrowding were reported"*, the principal source upon which it relies is the 2008 CPT report which the respondent has not specifically sought to draw to the Court's attention, and which is now more than four years old.

The 2010 U.S. State Department Report also said the following, at pp. 2 – 3, with respect to prison and detention centres generally (including police detention centres and juvenile detention facilities):

> "Prison and detention center conditions did not meet international standards. The government permitted monitoring visits by independent human rights observers, and such visits occurred during the year. Although government measures to upgrade prisons brought them closer to international standards, domestic human rights advocates reported that conditions remained poor in some prisons.
>
> According to Prison Department data, there were 9,139 prisoners at year's end, including 421 women and 158 juveniles. In its June 2009 report, the

> CPT delegation noted that it received several allegations by prisoners that staff of Lukiskes Prison mistreated them; the mistreatment consisted of punches, baton blows, and blows with books. In some cases the prison personnel inflicting the mistreatment were said to have been drunk. The delegation also heard inmates' allegations that personal [sic] at the Pravieniskes Corrections Home No. 3 and the Kaunas Juvenile Remand Prison and Correction Home engaged in mistreatment (see section 6, children).
>
> Three correctional institutions remained overcrowded. For example, on December 31, a correctional facility in Siauliai held 676 inmates, despite a capacity of 435. The CPT report noted that renovated cells at the Lukiskes Prison were overcrowded, sometimes to 'an outrageous degree,' with six prisoners in a cell measuring eight square meters (approximately 86 square feet).
>
> Authorities did not respond to a 2008 judgment of the European Court on Human Rights (ECHR) that declared conditions at Lukiskes Remand Prison and the Rasu Prison to be violations of the prohibition of inhuman or degrading treatment as defined by European Convention on Human Rights.
>
> During the year the parliamentary ombudsman received 865 complaints from prisoners, compared with 267 in 2009. Most complaints involved the failure of administrators to give proper attention to prisoners' grievances about such conditions as poor hygiene in prisons' visiting rooms and other premises; the practice of turning off the electricity during half of the day to save money; mistreatment by prison personnel; restrictions on such prisoners' rights as access to information; and inappropriate investigation of complaints. The ombudsman's investigators found 330 of these complaints to be justified and 456 to be groundless, while the remainder were judged to be outside the ombudsman's purview. During the year the ombudsman received, and dismissed as groundless, one allegation that working inmates received less than they were supposed to be paid."

The 2008 judgment of the European Court of Human Rights (hereinafter "ECtHR") referred to in the 2010 U.S. State Department Report was a judgment in the case of *Savenkovas v. Lithuania* (Application No. 871/02, 18th November, 2008). In that case the applicant was initially in pre-trial detention while suspected of robbery and other offences. His trial took place on 17th October, 2000 before Vilnius City Third District Court and he was convicted, and was sentenced to five years and ten months imprisonment. It appears from the judgment of the ECtHR in that case that he was held in detention at the Lukiðkës Remand Prison in the centre of Vilnius from 20th September, 1999 to 27th October, 2000, when he was transferred to the Rasø Prison which is also in Vilnius. He stayed there until 5th January, 2001, when he was transferred back to the Lukiðkës Prison for a week (5th to 12th January, 2001). Subsequently, from 12th January, 2001 to 6th June, 2002, the applicant stayed in the Rasø Prison, with the exception of a period from 29th June, 2001 to 10th August, 2001, when he was placed in a prison hospital. Thereafter, until his release on 30th July, 2003, the applicant was held in the Lukiðkës Prison, with short, periodic transfers to other prisons.

The applicant's case before the ECtHR alleged, *inter alia*, breach of his rights under article 3 of the European Convention on Human Rights and Fundamental Freedoms on the basis of alleged overcrowding and poor general conditions of detention. Although the Lithuanian government contested many of the factual allegations made by the applicant, the ECtHR found that the Lithuanian Government had in fact breached the applicant's article 3 rights. The Court stated in its judgment at paras. 80-82:-

> "80. The Court notes the parties' disagreement as to the extent of the overcrowding at the Lukiðkës Remand Prison at the material time. However, the Court is assisted in this matter by the objective reports of the CPT (paragraphs 63-68 above).

81. The applicant claimed that 2 to 8 persons had had to share a cell of about 9 m², all the detainees being confined to the cell for most of the day. The Government contended that there had been some 2.86 m² of floor space per person in that institution at the material time. However, the Court notes that the CPT found less available space during its visit in 2000 – 1.3 m² per person – which had further deteriorated by the time of their second visit to that prison in 2004 to 1.16 m² (paragraphs 64 and 68 above). Whilst each person apparently had a bunk bed to sleep on, the Court observes that the overcrowding was just as severe as that condemned in the aforementioned *Kalashnikov v. Russia* case (0.9 to 1.9 m²; ibid. § 97). Moreover, each cell at Lukiðkës had had an open toilet without sufficient privacy. In addition, as a remand prisoner, the applicant had been obliged to stay in such cramped conditions some 23 hours a day, with no access to work, or educational or recreational facilities (*cf*. the aforementioned judgments of *Karalevièius v. Lithuania*, §§ 34-41, and *Peers v. Greece* judgment, §§ 75-76).

82. It is true that the applicant did not suffer any palpable trauma as a result of these conditions. Nevertheless, the Court finds that they failed to respect basic human dignity and must therefore have been prejudicial to his physical and mental state. Accordingly, it concludes that the severely overcrowded and unsanitary conditions of the applicant's detention at the Lukiðkës Remand Prison amounted to degrading treatment in breach of Article 3 of the Convention."

For completeness it should also be recorded that, notwithstanding that the respondent in the present case does not place direct reliance upon it, the Court notes that the 2008 CPT Report recorded the following criticisms in regard to Lukiðkës Remand Prison:-

"44. At *Lukiðkës Remand Prison*, material conditions varied considerably from one part of the prison to another. The best conditions were to be found in the recently renovated sections (in particular, wing 1 of Building 2, containing approximately 60 cells). However, the cells were still overcrowded, sometimes to an outrageous degree (for example, up to six prisoners in a cell measuring approximately 8 m²). In the sections which had not been renovated (Building 3 and most of wing 2 of Building 2), conditions – which were described as very poor in the report on the 2004 visit – had deteriorated to the extent that they could be described as deplorable (dilapidated cells and furnishings, poor ventilation, etc.). Some of the cells were dirty. Furthermore, several prisoners complained that the buildings were not sufficiently heated in winter.

In the CPT's opinion, the cumulative effect of overcrowding and poor material conditions (to which must be added the lack of a programme of out-of cell activities, see paragraph 48) could be considered to be inhuman and degrading, especially when persons are being held under such conditions for prolonged periods (i.e. up to several months).

The delegation was informed that there were plans to build a new remand prison near Vilnius and to close Lukiðkës Remand Prison in 2011 (sentenced prisoners would be transferred to Pravieniðkës-2 Correction Home No. 1). The CPT welcomes these plans and ***recommends that the Lithuanian authorities implement them as quickly as possible***. In this regard, ***the CPT would like to receive a detailed schedule concerning the construction/commissioning of the new Remand Prison in Vilnius***.

45. The CPT is aware that the construction of new buildings inevitably absorbs a significant amount of the financial resources available. However,

> care should be taken to ensure that this does not lead to unacceptable situations; the decision to deprive a person of his or her liberty entails a correlative duty upon the State to provide decent conditions of detention. Regardless of the timetable for the above-mentioned developments, ***the CPT recommends that the necessary steps be taken to ensure that all persons detained in Lukiðkës Remand Prison, including remand prisoners, have acceptable conditions of detention as regards cell equipment and furnishings, as well as heating during cold weather***. Furthermore, ***all prisoners should be provided with cleaning products (in sufficient quantity) for their cells***.
>
> 46. In the *two establishments* mentioned, the delegation noted that, in spite of the legislation and regulations adopted following the CPT's 2004 visit,many inmates did not have essential personal hygiene products (soap, toilet paper, sanitary towels, toothpaste, toothbrushes).
>
> ***The CPT reiterates its recommendation that steps be taken to ensure that all prisoners in Lithuania have adequate quantities of essential personal hygiene products.***"
>
> (emphasis as in original).

It is clear from the decision of the ECtHR in *Savenkovas* that during the periods when the applicant in that case was in Lukiðkës Remand Prison/Lukiðkës Prison, the conditions of detention there were capable of amounting to breach of a prisoner's rights under article 3 of the Convention, and Mr. Savenkovas's said rights were in fact breached. Moreover the situation had not materially improved by 2008 when the CPT concluded *"the cumulative effect of overcrowding and poor material conditions (to which must be added the lack of a programme of out-of cell activities, see paragraph 48) could be considered to be inhuman and degrading, especially when persons are being held under such conditions for prolonged periods (i.e. up to several months)."* If these stark findings had not been engaged with by the issuing state they might have provided sufficiently cogent evidence for this Court to treat the s. 4A presumption as having been rebutted, and have raised sufficient doubts in the Court's mind to put it on enquiry as to whether or not substantial grounds exist for believing that if the respondent were returned to the requesting country he would be exposed to a real risk of being subjected to treatment contrary to article 3 of the Convention.

However, the contents of the letter of the 16th May, 2012 furnished by the issuing judicial authority are of significance in this context. Among the points made is that in the period from 2000 to 2012 the average number of prisoners kept in Lukiðkës Remand Prison has reduced by 30%, and that as a result of this the *per capita* living space in prison cells has increased. Moreover, since 2008 the ECtHR has made no further adverse findings against Lithuania in connection with conditions at Lukiðkës Remand Prison. Furthermore, between 2008 and 2011 works continued, notwithstanding the budgetary downturn, to repair and improve the physical infrastructure at Lukiðkës Remand Prison. Some 67% of all cells have been the subject of "full renewal" and repair works to other premises and spaces used by the prisoners were also carried out, namely: the renewal of shower rooms and courtyards for walking; the installation of three gyms with sports equipment; the provision of film showing facilities, and chaplains' facilities. Finally, the point is made that there are plans in the medium term to close the existing Lukiðkës Remand Prison premises and move remand prisoners to a new Vilnius Remand Prison by 2017. However, the plan is to move sentenced prisoners from Lukiðkës earlier than that to a new Pravieniðkës Prison due to open in 2014. It is asserted that once sentenced prisoners leave Lukiðkës remand prisoners will occupy the cells vacated by them (pending the 2017 move to the new Vilnius Remand Prison) and "there will be no problems related with overcrowded prison population."

In the Court's view the letter of the 16th May, 2012 does represent an engagement by the issuing state with the fact that there have been findings in the past that conditions of detention at Lukiðkës Remand Prison were capable of breaching a prisoner's article 3 rights, particularly in the matter of overcrowding, and in at least some cases actually did so. The letter of the 16th May, 2012 suggests an already somewhat improved, and continually improving situation. In particular, overcrowding has

already been addressed to a degree and there is a definite plan, and timescale, to eliminate it altogether. Moreover, since 2008 there has been a program of repairs and upgrades to the existing infrastructure and facilities for prisoners so as improve conditions of detention. The evidence is one way in that regard, there is no evidence tending to contradict it. In the circumstances this Court finds that any doubts that it might have had arising solely out of the findings of the ECtHR in *Savenkovas*, and the 2008 CPT report, are dispelled.

I must digress for a moment to say I am aware that in a recent judgment handed down by the former Recorder of Belfast in a case of *Lithuania v. Campbell*, (Unreported, High Court of Northern Ireland, Burgess J., 16th January, 2013) the Northern Ireland High Court refused to surrender a respondent (Campbell) on the basis that it was satisfied that if returned to Lithuania he would be exposed to a real risk that he would be subject, or would be likely to be subjected to, inhuman and degrading treatment by reason of prison conditions in Lithuania. However, the decision contains no novel proposition of law. It was decided by the application of well established and uncontroversial legal principles to the facts of the particular case as found by the Court on the basis of the evidence before it. It is important to appreciate that each case, including the present case, must be decided by application of the law to its own peculiar facts as established in evidence. It is clear from the judgment in *Campbell*, a copy of which I have procured, that the evidence leading to the factual findings in that case was very different to the evidence in the case before me.

In particular, the Court in *Campbell* had evidence before it from a learned academic (coincidently the same expert as is referred to in the letter of the 16th May, 2012) who had personally participated in a number of CPT visits to Lithuania where conditions at Lukiðkës Remand Prison were examined, and who had returned to Lithuania in a private capacity in May 2010 on which occasion he had taken the opportunity of re-visiting Lukiðkës Remand Prison. He opined in evidence that there had been no material improvement in conditions since 2008. Unlike in *Campbell* there is no evidence before me concerning conditions in Lukiðkës Remand Prison since 2008 other than the contents of the letter of 16th May, 2012. Moreover, it is to be observed that following the private visit of the academic in question to Lukiðkës Remand Prison in May 2010 as described in the *Campbell* judgment, a further two years had elapsed before the issuing judicial authority wrote its letter of the 16th May, 2012 to the Irish Central Authority. Yet further time has elapsed since then.

Returning to the issue under consideration, this Court has to be forward looking in its approach and therefore can only act on evidence, direct or inferential, concerning present day conditions in Lithuanian remand prisons. While evidence as to the situation in the past in Lukiðkës Remand Prison might to some extent point to the likely present situation in Lithuanian remand prisons generally, the older the evidence the less reliable it is going to be as an indicator of the present situation. In that regard, such evidence (apart from the letter of the 16th May, 2012) as has been adduced before this Court, or that the Court has otherwise been able to obtain from reliable sources (e.g. the 2000, 2004 and 2008 CPT reports), cannot be regarded as recent.

I consider that such evidence as I have before me, apart from the letter of the 16th May, 2012, is, at this stage, quite old and that it cannot be relied upon as an accurate indicator of current conditions in Lithuanian remand prisons, although as previously stated it might just have been enough to put this Court on its enquiry if the letter of the 16th May, 2012 was not in evidence. However, when the letter of the 16th May, 2012 is taken into account, the evidence as a whole lacks the degree of cogency necessary to justify this Court in regarding the presumption under s. 4A of the Act of 2003 as rebutted in the case of the respondent. In my view there is insufficient evidence as to current adverse prison conditions in Lithuania to rebut that which is presumed, *i.e.*, that the issuing state will respect the respondent's fundamental rights, including his rights under article 3 of the Convention, in the event that he is surrendered to the issuing state on foot of the European arrest warrant with which the Court is presently concerned.

It follows that the Court is also not persuaded that to surrender the respondent would

give rise to real risk that his rights to bodily integrity and/or to be treated with human dignity, guaranteed under Article 40.3 of the Constitution of Ireland, would be breached.

In the circumstances I am not disposed to uphold the objection raised by the respondent under s. 37 of the Act of 2003.

Conclusion

The Court is not obliged under s. 21A of the Act of 2003 to refuse to surrender the respondent. Further, the Court is not obliged to regard the surrender of the respondent as being prohibited by part 3 of the Act of 2003. In the circumstances, being otherwise satisfied that the requirements of s. 16(1) of the Act of 2003 are met, I am disposed to make an order directing the surrender the respondent to such person as is duly authorised by the issuing state to receive him.
