

## THE HIGH COURT

Record No. 2016/70 EXT

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

GERCHARDAS FIRANTAS

RESPONDENT

**JUDGMENT of Ms. Justice Donnelly delivered this 21st day of July, 2020.**

1. The surrender of the respondent is sought by the Republic of Lithuania to face trial for two offences of theft and criminal damage pursuant to a European Arrest Warrant ("EAW") dated 15th April, 2016. One of the central issues in these proceedings is whether the Public Prosecutor who issued the warrant can be considered an issuing judicial authority within the meaning of the European Arrest Warrant Act, 2003 (as amended) (hereinafter, "the Act of 2003"). This case was adjourned to await the decision of the Supreme Court (and then the Court of Justice of the European Union (CJEU)) in *Minister for Justice and Equality v. Lisauskas* [2018] IESC 42. *Lisauskas* returned to the High Court for a final determination in accordance with the decision of the CJEU in that case and in two other cases concerning public prosecutors as judicial authorities. Although a determination was made in *Lisauskas* that on the information received from the Lithuanian authorities, that there was an appeal to a court against the decision to issue the EAW, the respondent in this case continues to contend for the opposite. Other points of objection include an abuse of process point arising out of the translation of the EAW.

**The background to the EAW****A Member State that has given effect to the Framework Decision**

2. The surrender provisions of the Act of 2003 apply to those Member States of the European Union that the Minister for Foreign Affairs has designated as having, under their national law, given effect to the Council (EC) Framework Decision of 13 June, 2002 (2002/584/JHA) on the European arrest warrant and the surrender procedures between Member States (as amended) (hereinafter, "the 2002 Framework Decision"). I am satisfied that by the European Arrest Warrant Act 2003 (Designated Member States) (No. 3) Order 2004 (S.I. 206 of 2004), the Minister for Foreign Affairs has designated Lithuania as a Member State for the purposes of the Act of 2003.

**Identity**

3. I am satisfied on the basis of the affidavit of Patrick O'Reilly, member of An Garda Síochána, the affidavit of the respondent and the details set out in the European Arrest Warrant ("EAW"), that the respondent, Gerchardas Firantas, who appears before me is the person in respect of whom the EAW has issued.

**Endorsement**

4. I am satisfied that the EAW has been endorsed in accordance with s. 13 of the Act of 2003, for execution in this jurisdiction.

**Sections 22, 23 and 24 of the Act of 2003**

5. Having scrutinised the documentation before me, I am satisfied that I am not required to refuse surrender of the respondent under the above provisions of the Act of 2003 as amended.

**Part 3 of the Act of 2003**

6. Subject to further consideration of s. 37, s. 38 and s. 45 of the Act of 2003 and having scrutinised the documentation before me, I am satisfied that I am not required to refuse the surrender of the respondent under any other section contained in Part 3 of the said Act.

**Points of Objection**

7. The respondent objected to his surrender on a number of grounds. At the hearing he only pursued the following points:
  - (a) that his surrender is prohibited on the grounds of s. 21A on the basis that no decision has been made to charge and try him with the offences;
  - (b) that his surrender is prohibited by s. 45 of the Act of 2003 as the matters required thereunder have not been set out in full in the warrant;
  - (c) that his surrender is prohibited by s. 37 of the Act of 2003 as his surrender would violate his right to respect for his family and personal life pursuant to Article 8 of the European Convention on Human Rights ("ECHR");
  - (d) that the Prosecutor General of the Republic of Lithuania and/or the Deputy Prosecutor General of the Republic of Lithuania is not a Judicial Authority within the meaning of the 2002 Framework Decision and/or the Act of 2003; and
  - (e) that his surrender should be conditional to Lithuania undertaking not to return the respondent to the State in order to serve any custodial sentence imposed on him in Lithuania in respect of offences outlined in the warrant.

**Section 45 of the Act of 2003/Abuse of Process**

8. Section 45 of the Act of 2003 only requires that certain matters be included in point (d) of the EAW if the person did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the EAW was issued. Under the provisions of s. 16(1)(c), surrender may not be ordered unless the EAW states, where appropriate, the matters required by s. 45 of the Act of 2003.
9. As the respondent has raised an issue about s. 45 (which deals with trial *in absentia*) it is necessary for this Court to state unequivocally that this respondent has been sought for the purpose of prosecution. That is clear from a reading of the European arrest warrant. It specifically states at the beginning of the EAW that he is sought for the "purposes of conducting a criminal prosecution". At point (b) of the EAW only that part of the warrant which refers to "Arrest warrant or judicial decision having the same effect" is completed. The EAW refers therein to a ruling replacing a former coercive measure not to leave the country. Completing that sub-section is usually an indication that this is an EAW issued for the purpose of prosecution.

10. Furthermore, and in particular, the EAW is blank after the heading "enforceable judgement". If it was a sentence to be enforced, this is the usual place in which to insert the judgment upon which his surrender is sought. Moreover, at point (c) only the maximum length of the custodial sentence or detention order which may be imposed has been inserted. The length of the custodial sentence imposed remains blank as does the remaining sentence to be served. Point (e) refers to the fact that he is "charged with". Point (f) refers to the fact that he hid from trial.
11. The respondent brought an objection that the matters required by s. 45 of the Act of 2003 were not complied with by the issuing judicial authority, and that insufficient information was given for the purposes of s. 16(1)(c) of the Act of 2003. Counsel accepted that this was an EAW which appears to have been brought for the purposes of prosecution and on the basis of this Court's decision in *Minister for Justice and Equality v. E.P.* [2015] IEHC 662, he accepted that the respondent was not on strong grounds on his s. 45 point of objection. For the avoidance of any doubt, I am satisfied that this EAW was not required to state the matters required by s. 45 of the Act of 2003 as he is not being sought for the purpose of executing a custodial sentence or order of detention. His surrender is not prohibited on the basis of a failure to comply with s. 45 of the Act of 2003.
12. However, counsel for the respondent submitted that there was a follow-on argument, in that part (d) of the original Lithuanian EAW was blank. However, on foot of the translation into English, the translator has included "not applicable" in part (d), which is not contained in the original Lithuanian language version of the European arrest warrant. Counsel therefore submitted that the English translation of the EAW is not a "version" of the European arrest warrant. The EAW is the Lithuanian EAW that has come in from the issuing judicial authority as per the definition of the EAW under s. 2 of Act of 2003 and also from s. 12(1)(a) of the Act of 2003, which deals with transmission of European arrest warrants. Counsel submitted that the EAW is the original warrant and the translation is nothing but a translation thereof.
13. Counsel submitted that as the court can conduct business in either the English or Irish language, a warrant in one of those languages was needed, but we did not have an original warrant in those languages, instead we had a translation. Counsel emphasised that the translator has taken it upon him or herself to insert something that was not in the actual warrant and to alter the warrant in a substantial way.
14. In making an abuse of process point in this regard, counsel for the Minister distinguished the case of *Minister for Justice and Equality v. Skwierczynski* [2016] IEHC 802. In *Skwierczynski*, counsel submitted it was a very different situation with regards to translation in that what was at issue was the form of the translation as opposed to the substance. In the present respondent's case however, there has been information put into a warrant by a translator that was not in the original warrant. This is the translation of the EAW on which this Court is being asked to either order or refuse surrender under the Act of 2003. It was submitted therefore, that this translation is an integral part of the

request for surrender and the translator inserting information that is not in a warrant goes against the mutual trust and confidence this Court can have in such a warrant. Counsel submitted that if this information is inserted and is wrong, it can be questioned what else the translator has inserted in the warrant issued by the issuing judicial authority. This, it was submitted, impinges on the mutual trust and confidence between Member States.

15. Counsel submitted that the issuing judicial authority and the issuing State should have given the court information that this insertion is a mistranslation and that it does not impinge in any way on the information in the rest of the warrant. It was submitted on behalf of the respondent that the issuing judicial authority failed to do this, notwithstanding an opportunity to do so. No further information was sought from the issuing judicial authority by the Central Authority and so counsel emphasised that this insertion had not been pointed out to them. Counsel submitted that, at the very least, this Court and the respondent can expect a translation that is accurate and that it is a serious matter to include information that is not in the original warrant. Counsel commented that a translator in this jurisdiction would not have the authority to make an interlineation or addition to a warrant that was not put there by either the DPP in draft form or finalised by this Court.
16. Counsel for the Minister submitted that the Central Authority sought no further information regarding the insertion of "not applicable" because it was its view that it was clear no abuse of process had taken place. I queried whether the translator got to make the decision that the blank portion in the original warrant meant "not applicable". Counsel for the Minister referred to paras. 40 – 43 of *Skwierczynski* in response to this query. In this regard, counsel submitted that the translator was doing his/her job and that he/she maintains a certain degree of flexibility in translating the document. In his submission, putting the term "N/A" in that part of the form which is not being answered is a perfectly reasonable thing to do and that is what the translator did in this instance. Counsel drew the analogy that one might say quite strictly that the full stop in a translation is required to be placed where the full stop is in an original document, but in this context putting "not applicable" where there has been a blank is effectively saying that there is in fact a blank, and so "not applicable" and a blank are the same thing in this context. The Minister submitted that it was excusable and far from an abuse of process. Counsel submitted that a clarification regarding the insertion is not required in light of *Skwierczynski* and as a matter of logic. The Minister submitted that if the Court had a concern however, further clarity could be sought.
17. In reply, counsel for the respondent submitted that there was a little bit more than a full stop at issue and stated that what was at stake was a legal test that was being applied in Ireland as to whether or not the requirements of the Act of 2003 have been complied with and, if so, whether or not the respondent should be delivered to the issuing judicial authority. In part (d) of the warrant, an indication is being given that there is compliance with s. 16(1)C and s. 45 of the Act of 2003 – the translator has inserted information that would allow this Court to determine that those two sections have in fact been complied

with. Counsel submitted that it is a lot more to insert “not applicable” than it is to move a full stop or a semi colon or to have a change in the form of the *pro forma* warrant.

### **The Court’s Analysis and Determination**

18. It is counsel for the respondent’s contention that this EAW is flawed as a result of the insertion in the translation of a term that is not contained within the original warrant. In terms of the actual information required for this case to make a decision under s. 45, it is undoubtedly the position that part (d) was not required to be filled in as this is an EAW issued for the purpose of prosecution. There has been no trial and no sentence in this case. The issue raised by the respondent is entirely irrelevant to the central feature which this Court must assess, i.e. whether the provisions of s. 45, where appropriate, have been complied with. This is not an appropriate EAW for those matters to be inserted as there has been no trial and no sentence.
19. The point raised by counsel for the respondent is technical and does not affect any substantive issue in this case. There is no injustice in ordering his surrender. Section 45C of the Act of 2003 sets out that “an application for surrender under section 16 shall not be refused if the Court is satisfied that no injustice would be caused to the person even if –
  - (a) there is a defect in, or an omission of, a non-substantial detail in the European arrest warrant or any accompanying document grounding the application.”
20. Even if the addition of the words “not applicable” is a defect in the accompanying documentation (and for reasons to which I will return, I am not satisfied it is), it is a non-substantial detail. It is clear that no injustice will be done to this respondent and I reject his objection on this ground.
21. I am also of the view that there must be some leeway given to a translator’s view of how to translate. The translator had indicated “not applicable” and in the particular circumstances of this case, that can be understood as the translator’s view as to how part (d) was “not applicable” as it had not been completed.
22. Furthermore, I find that the respondent’s particular argument regarding the translation to be unconvincing. I fail to see how the insertion of “not applicable” on the translation of the warrant in a section that is indeed blank in the original warrant due to its non-applicability, amounts to an abuse of process. I am therefore satisfied that the entire warrant should not be set aside; that there is no abuse of process.

### **Section 38 of the Act of 2003**

23. The issuing judicial authority has not ticked any box for the purposes of Article 2 para. 2 of 2002 Framework Decision. Therefore, correspondence is required to be established with an offence or offences in this State.
24. Under the description of the circumstances in which the offences outlined in part (e) of the EAW were committed, it is stated that “[...] while acting in a group of accomplices with [named persons] [...] aiming to steal another’s property, they were passing [a]

supermarket [...] KL broke the window of the central door [...], G. Firantas remained at the broken door to watch the surroundings, while KL, MJ and the third person entered through the broken window into the supermarket and stole”.

25. Under part (e)II of the EAW, a full description of the offences not covered by part (e)I is outlined by the issuing judicial authority as “seizure of property by breaking into premises” and “damage to property”. The respondent is liable to imprisonment for a term up to six years for the theft offence and up to two years for the criminal damage offence. This complies with the requirement of minimum gravity in respect of sentencing provisions.
26. Counsel for the Minister submitted that correspondence has been made out with the offences of theft and criminal damage in this jurisdiction. Counsel for the respondent accepted that there was no issue in terms of finding correspondence for the offence of theft. However, in relation to the criminal damage offence, counsel submitted that there was no evidence of a prior tacit agreement between the respondent and other named persons to do the actions alleged against the respondent in the European arrest warrant. It was submitted that what seems to have taken place is that the accused persons, including the respondent, were passing a supermarket and that this was capable of a benign interpretation, that it was a spur of the moment action and that the respondent was not involved in the activity prior to the door being broken. It was submitted therefore that the respondent was not involved in criminal enterprise between individuals with prior tacit agreement between them. However, counsel did submit that the Court may have reason to pause with reference to “aiming to steal”, and also that the door was broken before the respondent participated in the act.
27. Counsel for the Minister referred the Court to the UK decision of the Supreme Court in *R. v. Jogee* [2016] UKSC 8, which was cited with approval in this jurisdiction in *DPP v. Gibney* [2016] IESC 336 and which contains a useful summary of the law on joint enterprise from para. 88 onwards. At para. 90 of *Jogge*, it is stated:

*“However, as a matter of law, it is enough that D2 intended to assist D1 to act with the requisite intent. That may well be the situation if the assistance or encouragement is rendered some time before the crime is committed and at a time when it is not clear what D1 may or may not decide to do. Another example might be where D2 supplies a weapon to D1, who has no lawful purpose in having it, intending to help D1 by giving him the means to commit a crime (or one of a range of crimes), but having no further interest in what he does, or indeed whether he uses it at all.”*

Counsel for the Minister submitted that based on the details in the warrant and the details outlined at para. 93 and 94 in *Jogee*, there is correspondence with the offence of criminal damage based on the doctrine of joint enterprise.

28. In reply, counsel for the respondent made reference to para. 90 of *Jogee* and it was submitted that there was no allegation in this case that the respondent provided any

influence to break the door. Counsel submitted that there was also no evidence that there had been any agreement or encouragement on the part of the respondent to the named person to break the door in the first place. The respondent relied on the words "passing the supermarket" in submitting that this was sufficient information to give the Court pause to give this particular offence of criminal damage a benign interpretation.

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

29. What is required to be established under s. 38 of the Act of 2003 is whether there is correspondence with an offence/s in this jurisdiction with the offence/s alleged against the respondent and if so, whether minimum gravity has been met. The EAW demonstrates that a sentence of the required minimum gravity is applicable to these offences in Lithuania. I am satisfied that correspondence is found under s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 for the allegation of theft against the respondent, and no issue is raised by the respondent in this regard.
30. The issue lies with the allegation of criminal damage, which the respondent claims he did not commit. Counsel for the Minister has made the case that correspondence is found based on the doctrine of joint enterprise, that the respondent was present at the time of the offence and was therefore an accomplice to the crime. The respondent has claimed that "passing the supermarket" does not amount to him being an accomplice, since he did not engage in the alleged criminal damage, nor did he know that the co-accused would engage in the alleged criminal damage.
31. In *Attorney General v. Dyer* [2004] 1 IR 40 the Supreme Court (Fennelly J.) held that, for the purpose of correspondence of offences, the allegation of facts set out in an extradition warrant could be "either express, or to be implied."
32. In this case, it is an express statement that the respondent was acting in the group aiming to steal another's property. The facts set out indicate the manner in which that intent was put into action. A member of a group broke a window which was the means by which other members of the group entered the supermarket. The respondent kept "sketch" at the broken door. It is abundantly clear that the criminal damage was part and parcel of the plot to steal. The doctrine of joint enterprise is clear, and given the circumstances of the offences alleged, it is clear to me that correspondence with both offences are found. I am therefore satisfied that correspondence is found under s. 2(1) of the Criminal Damage Act, 1991 for the allegation of criminal damage against the respondent. I am therefore satisfied that the terms of s. 38 of the Act of 2003 have been fulfilled in respect of both offences.

### **Section 21A of the Act of 2003**

33. The respondent claimed that his proposed surrender would constitute a breach of s. 21A of the Act of 2003, as it is not clear from the warrant that a decision has been made by the issuing State to charge and try him in respect of the offence for which his surrender is sought.
34. Counsel for the respondent relies on a report dated the 27th September, 2016 prepared by a practicing Lithuanian lawyer. He refers to point 9 of the report, whereby it is stated

that "Gerchardas Firantas is only suspected or charged with a criminal offence but the Court has not yet found that Gerchardas Firantas committed the alleged offence".

35. Section 21A(1) of the Act of 2003 prohibits the surrender of a person in respect of an offence for which they have not been convicted, if the High Court is satisfied that a decision has not been made to charge the persons with, and try him or her for, that offence in the issuing State. Furthermore, there is a presumption in s. 21A(2) of the Act of 2003 that such a decision has been made, unless the contrary is proven.
36. The respondent has not proved that no decision has been made to charge him with and try him for the offence set out in the European arrest warrant. The EAW refers to him being charged with two criminal offences. Furthermore, the EAW expressly refers to him hiding from trial (as per (f) of the EAW).
37. In those circumstances, the evidence of the Lithuanian lawyer in this case does not amount to a rebuttal of the presumption. In any event, there is positive evidence within the EAW that a decision has been made to charge and try him with this offence.
38. For the above reasons, I am satisfied that his surrender is not prohibited under the provisions of s. 21A of the Act of 2003.

**Section 37 of the Act of 2003**

39. The respondent claimed that his surrender would amount to a breach of, or a disproportionate interference with, his rights and/or his family rights under Article 8 of the ECHR and under Article 7 and 24 of the Charter of Fundamental Rights of the European Union and would therefore be contrary to the provisions of s. 37 of the Act of 2003.
40. In his affidavit, the respondent outlined how he arrived in Ireland in 2013/2014 and began working from that time and how he now lives with his friend and helps contribute towards the cost of living. Counsel for the respondent indicated that he was not pressing this point to the Court but asked the Court to take into account the details outlined in the respondent's affidavit.
41. Counsel for the Minister submitted that there should not be much weight given to any breach of the respondent's rights under Article 8 as the respondent has limited ties to the jurisdiction.
42. On the basis of the respondent's details set out in the affidavit and applying these to the well-established jurisprudence in this area, such as *Minister for Justice and Equality v. T.E.* [2013] IEHC 323 and more recently in *Minister for Justice and Equality v. J.A.T.* (No. 2) [2016] IESC 17, I am satisfied that the information put forward by the respondent does not meet the high threshold required for this Court to find that the respondent's Article 8 rights would be violated on surrender.
43. I am therefore satisfied that the respondent's surrender is not prohibited by s. 37 of the Act of 2003.



### **Conditional surrender**

44. Counsel for the respondent submitted that should this respondent be surrendered to the issuing State, that there should be a condition attached to his surrender, namely that he be returned to this jurisdiction to serve any sentence that may or may not be imposed. In his submission, if the High Court cannot provide this condition because it is not provided for in law, there is a want of mutuality or a lack of reciprocity and he cannot be surrendered. In this regard, counsel referred to his written submissions and the opinion of Mr. Tokarčakas, dated 8th November, 2016.
45. Counsel submitted that the respondent lives in Ireland and pays taxes and works and therefore is a resident of Ireland. If the situation that pertained was involving an Irish warrant for a Lithuanian court, the Lithuanian court could attach a condition if requested by that person that he be sent back to Lithuania to serve any sentence that is imposed. It was submitted that should this Court decide to surrender the respondent to serve any sentence, a similar condition should be attached. Counsel submitted that conditions have been attached and information sought in the past, particularly with regard to prison conditions and that the Act of 2003 provides for such undertakings. Whether this Court has the power to require it, it was submitted that that was another matter, but counsel submitted that if the Court cannot do that, then there is a lack of reciprocity and mutuality.
46. Counsel submitted that the whole EAW system is predicated on mutuality between the different States. If there is a lack of mutuality, then according to counsel for the respondent, this is a possible basis upon which surrender could be refused. The whole surrender process is based on the idea of reciprocity and free movement of judicial decisions amongst the Member States. If there is a breakdown in reciprocity, if that State will not deliver to Ireland, counsel questioned why this State should deliver to them in the same circumstances. Counsel submitted that it is within the purview of the issuing State to refuse the State if a person is before a Lithuanian court on an Irish European arrest warrant.
47. Counsel for the Minister submitted that there is no basis upon which a conditional surrender could be made by this Court and viewed it as an unusual request by the respondent.

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

48. I am satisfied that there is currently no law, and indeed counsel for the respondent could not point to any law, that would permit me to attach such a condition upon surrender of this respondent. I am not in agreement with counsel for the respondent that if this Court finds that there is no legal basis to attach a condition, that there is a lack of mutuality and surrender must be refused. There are no grounds for refusal set out in either the Act of 2003 or the 2002 Framework Decision based merely upon lack of mutuality. Indeed, as an example, one can point to the grounds for refusing surrender set out in the 2002 Framework Decision. If one Member State has opted to enact in its domestic law a non-obligatory ground of refusal to surrender, this is not a basis for that State to refuse

surrender to those Member States which have not opted to refuse surrender on that basis.

49. The High Court may only refuse surrender based upon the provisions of the Act of 2003. Those provisions include a right to refuse surrender where there is a real risk of a breach of constitutional or Convention rights. It is on that basis that the Court is entitled to ask for guarantees on surrender so as to ensure that fundamental rights will not be breached. The type of condition in question in the present case is entirely different from the guarantee at issue in the prison conditions cases.
50. The respondent's suggestion that this Court could require conditions based upon a lack of mutuality in respect of returning a person to this jurisdiction to serve his sentence is not tenable. There is no law in place that would permit such a transfer back to Ireland and it would be legally incorrect for the Court to impose an obligation that has no basis in law. Furthermore, this Court cannot refuse the surrender of a respondent, because in the issuing State, the authorities have a different process. Nowhere in the Act of 2003, the 2002 Framework Decision, and the jurisprudence of the Irish and European courts does it say that this Court cannot surrender a respondent due to lack of mutuality because the Court cannot attach a similar condition to surrender as may be available to the judicial authorities in the issuing State. I therefore reject this point of objection.

**Is the Public Prosecutor a Judicial Authority within the meaning of the Act of 2003 and the 2002 Framework Decision?**

51. This question has a very long litigation history. *Lisauskas* was referred by the Supreme Court to the CJEU. In the Judgment of the CJEU in *Minister for Justice and Equality v. PF C-509/18 (Lisauskas)* the Court stated at para. 56 as follows;

*"In the light of those factors, it is apparent that the Prosecutor General of Lithuania may be considered to be an 'issuing judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584, in so far as, in addition to the findings in paragraph 42 of the present judgment, his legal position in that Member State safeguards not only the objectivity of his role, but also affords him a guarantee of independence from the executive in connection with the issuing of a European arrest warrant. Nevertheless, it cannot be ascertained from the information in the case file before the Court whether a decision of the Prosecutor General of Lithuania to issue a European arrest warrant may be the subject of court proceedings which meet in full the requirements inherent in effective judicial protection, which it is for the referring court to determine."*

52. The matter ultimately returned to the High Court where Binchy J. conducted the relevant enquiry having received further information. He held that the Lithuanian public prosecutor was a judicial authority for the purposes of the 2002 Framework Decision as follows:

*"39. As to the availability of an appeal against the issue of a European arrest warrant, it is clear from the information provided by the Chief Prosecutor that it remains open to the respondent to appeal the issue of the EAW, and that he is entitled to legal*

*aid for that purpose and that he has freedom of choice as regards the appointment of a lawyer to represent him in any such appeal. While Mr. Tokarcakas takes issue with the availability of such an appeal, this court has been informed twice by the issuing state that such an appeal is available. It is possible that Mr. Tokarcakas' opinion may be in some way influenced by the fact that this question has not been addressed before, or that such appeals have never been brought previously, but whatever the explanation, this court has no way of reconciling such a difference of opinion, and can only decide the issue on the basis of the trust and confidence that it is bound to accord to the issuing state, and to accept what it has stated both in the first instance and in response to the opinion of Mr. Tokarcakas.*

40. *It is apparent from the decision of the CJEU in YC that the establishment of a separate right of appeal against the decision to issue a European arrest warrant taken by a judicial authority other than a court offers a sufficient guarantee of the level of judicial protection required by the Framework Decision, provided that the appellate court may carry out an assessment of compliance as to the conditions for the issue of a European arrest warrant, including the proportionality of the same. The issuing state has confirmed the availability of such an appeal. Accordingly, it follows that the system in Lithuania whereby a European arrest warrant is issued by the Prosecutor General's Office meets the requirements inherent in effective judicial protection, at both the first level (the point at which the national arrest warrant is issued) and, at the second level, at which a European arrest warrant is issued, as determined by the CJEU in the authorities above. That being the case, this point of objection must be rejected, and since that is the only surviving objection to his surrender, this Court will make an order for the surrender of the respondent pursuant to the EAW, in accordance with s. 16 of the Act of 2003."*

53. One would have thought that might be the end of the matter, but this respondent has contended otherwise. He does so not simply on the basis that Binchy J. was wrong in law, but that the legal information provided by the Lithuanian authorities is incorrect. Moreover, in written submissions lodged prior to the resumed hearing on the 13th July in this matter, the respondent sought to argue that as no information had been given in this case by the Lithuanian authorities, the Minister could not rely on it and the EAW could not be regarded as being validly issued. I reject this contention on behalf of the respondent. The principle of mutual trust and confidence demands that where the High Court as executing judicial authority has received information from the authorities in the issuing State on a discrete legal provision concerning the law of that State and has given a reasoned judgment on the basis of that information, that both the information provided and the judgment rendered are accepted as correct until the contrary is demonstrated as both a matter of fact and of law. It would be inconsistent with mutual trust and confidence and the simplified process set out by the 2002 Framework Decision, that the issuing judicial authority was required to send over the same information in every case where a respondent simply raised objection. This is particularly so where it was the High Court to which this information was transmitted and it is the High Court which rules in all cases on the execution of EAW's in this jurisdiction. Quite separately, the law of

precedent in this jurisdiction does not permit one High Court to overturn another decision on the law unless the earlier decision is shown to be incorrectly decided in accordance with the strict rules allowing a departure from an earlier decision of a court of the same jurisdiction.

54. I am satisfied therefore that this Court must operate on the basis that the information provided in the previous case by the Lithuanian authorities as set out in the *Lisauskas* judgment is information to which the High Court must have regard in considering whether the Prosecutor General in Lithuania is a judicial authority for the purpose of issuing a European arrest warrant. Moreover, I am bound by the legal analysis of Binchy J. when he ruled upon the sufficiency of that information in establishing as a matter of law, that the Prosecutor General was a judicial authority.
55. It should be noted that the respondent has not sought to argue that Binchy J. made an incorrect legal analysis on the material before him. He has made no argument of the type that he accepts that the principle of *stare decisis* requires this Court to follow *Lisauskas* but that he wishes to preserve his right to argue this matter further if permitted on appeal in another court. Instead, he makes a different point. He submits that he has new evidence to show that the information on the legal situation provided by the Lithuanian authorities in *Lisauskas* is incorrect. In effect, he says that there is no appeal against a prosecutor's decision to issue an EAW and therefore there is an absence of effective judicial protection which is a requirement.
56. His entire submission is based upon the evidence of Mr. Tokarčakas, a lawyer in Kaunas, Lithuania. Mr. Tokarčakas also acted as the Lithuanian expert on law for Mr. Lisauskas in his proceedings. His evidence in the present case is based upon his action for Mr. Lisauskas and not on any steps he took in relation to Mr. Firantas to challenge the European arrest warrant.
57. Mr. Tokarčakas gave evidence on affidavit in the *Lisauskas* case. The nature of his evidence is set out in the judgment of Binchy J. and it is not necessary to repeat it here. Mr. Tokarčakas was firmly of the view that there was no appeal against the issuing of an EAW under Article 63 of the Criminal Procedure Code or otherwise. It is perhaps worth reciting the information put forward by the Lithuanian Prosecutor in *Lisauskas* as recited by Binchy J. at para. 23:

*"First of all, there is a possibility to appeal against the ruling on imposing arrest on the suspect/defendant to the higher instance court, because a European arrest warrant can be issued only on the basis of such ruling.*

*Secondly, according to Article 63 of the Criminal Procedure Code of the Republic of Lithuania, parties of the proceedings can appeal against any procedural actions and decisions of a prosecutor to a higher ranking prosecutor or pre-trial judge. Issue of European arrest warrant is considered to be an action performed by a prosecutor. Where European arrest warrant is issued (signed) by Prosecutor General, it is not possible to appeal against such action to a higher ranking prosecutor, because*

*Prosecutor General is the highest rank; however, in such a case the appeal can be filed to a pre-trial judge. In addition, a suspect/defendant who is the subject of the European arrest warrant is a party of criminal proceedings having the rights established by laws including the right to appeal against the prosecutor's actions."*

58. In the present proceedings, Mr. Tokarčakas swore an affidavit giving evidence about his attempts to appeal against the decision to issue the European arrest warrant for Mr. Lisauskas. What is striking is that his attempts commenced prior to the judgment of Binchy J. and appear to have continued. There is no evidence before me as to any attempt to make an application in the case of this respondent.
59. Mr. Tokarčakas makes a bold assertion at the outset that "Mr. Firantas has no legal remedy available to him in a court of law in Lithuania to set aside or review the issuing of the European Arrest Warrant herein dated 15th April 2016." On its own that would simply be a restatement of his legal view which has specifically been rejected by Binchy J. in *Lisauskas*. Mr Tokarčakas goes on to give further information for this opinion. He states that the purpose of lodging an appeal on behalf of Mr. Lisauskas in Vilnius City District Court "was to see if a Court in Lithuania, would actually agree with the legal view of the prosecutor in the Lisauskas case, i.e. agree that a court review existed (of the issue of an EAW by a prosecutor)". He states that the Court refused his appeal stating that "in any event, appeals from the decisions of prosecutor should be made to the pre-trial investigation judge where the pre-trial investigation took place i.e. at a place called Alytus". An English translation of that Decision has been provided and an examination of it does not reveal any reference to Article 63 of the Code. It does refer to Article 64 and Article 173 of the Code. The translated Decision states that an examination of the norms establishing the powers of a pre-trial investigation judge regulating the procedure for resolving complaints of the pre-trial investigation officer or prosecutor "leads to the conclusion that the pre-trial investigation judge's mandate covers only the pre-trial investigation and complaints in respect of the procedural actions or decisions of pre-trial investigating officers or prosecutor may be filed only during the pre-trial investigation." The translation of the foregoing sentence makes it difficult to follow.
60. Mr Tokarčakas then states that he applied to the Alytus District Court seeking the annulment of the European arrest warrant in the case of Mr Lisauskas. In his affidavit, he states that the Alytus District Court ruled "that no appeal lay from the decision of the prosecutor general to issue a European Arrest Warrant to a Court." He said that the court found that if an EAW is to be revoked, this must be done by the issuing authority.
61. The relevant part of the Alytus Decision is as follows
- "... Article 69 (1) of the Code of Criminal Procedure of the Republic of Lithuania (hereinafter CCP) provides that in order to take over a citizen of the Republic of Lithuania or another person prosecuted in the Republic of Lithuania from a Member State of the European Union, upon receipt of a court order to arrest a person, the Lithuanian Prosecutor General's office issued the European Arrest Warrant and applies directly or through the prosecutor of the Lithuanian Prosecutor General's

office, the Lithuanian national member for Eurojust (Lithuanian deputy national member of Eurojust), to the competent authority of a Member State of the European Union to forward the person named in the European Arrest Warrant. The procedure for issuing the European arrest warrant and for taking over a person under the European arrest warrant is established by the Prosecutor General of the Republic of Lithuania and the Minister of Justice of the Republic of Lithuania (Article 69 (4) CCP). In accordance with the Order no. 1R – 195/1 – 114 of 26th August 2004 of the Minister of Justice of the Republic of Lithuania and the Prosecutor General of the Republic of Lithuania approved for article 30 of the Rules on the issuance of a European Arrest Warrant and on the interception of a person under the European Arrest Warrant, if the conditions and grounds for the European arrest warrant issued cease to exist, the European arrest warrant shall be revoked by the issuing authority. When the circumstances referred to in article 30 arise requiring the revocation of the European arrest warrant, the authority which initiated the European arrest warrant shall immediately inform the authority which issued the European Arrest Warrant. In these circumstances, it is acknowledged that the law does not provide the possibility of provoking the European arrest warrant, and the warrant can only be revoked by the issuing authority, i.e. in the present case by the Prosecutor General's Office if the conditions and grounds for the European arrest warrant issued ceased to exist. The case material failed to prove that the conditions and grounds for the European arrest warrant issued cease to exist, so there is no basis to file an application with the Prosecutor General's Office. In light of the above, the appeal submitted by Simas Tokarčakas, the lawyer of the accused Tomas [Lisauskas], must be dismissed." (Emphasis in the original affidavit of Mr. Tokarčakas but not in the original translated judgment).

62. In the submission of counsel for the respondent, the above is a self-evident indication that there is no appeal against a prosecutor's decision to issue a European arrest warrant. On that basis, counsel submits that this Court must reject the designation of the Prosecutor General as a judicial authority or at the very least bring the above to the attention of the Lithuanian authorities and seek their response under the powers of s. 20 of the Act of 2003.
63. I do not consider that the matter is self-evident. The starting point for an examination of this evidence on behalf of the respondent is that this Court must bear in mind the principle of mutual trust and confidence. It is for the respondent to satisfy the Court that the *prima facie* statement by the Lithuanian authority as to their own law is incorrect. I will examine the affidavit of Mr. Tokarčakas in that light.
64. The judgment of Binchy J. in *Lisauskas* indicates that Lithuanian law, particularly Article 63, provides for an appeal against procedural actions or decisions of a prosecutor to a higher ranked prosecutor or pre-trial judge. It also states that a suspect/defendant who is the subject of an EAW is a party to criminal proceedings having the rights established by laws including the right to appeal against prosecutor's actions. He specifically rejects

the legal opinion of Mr. Tokarčakas and he states that he must accept what has been said on the basis of mutual trust and confidence.

65. The affidavit of Mr. Tokarčakas in these proceedings does not include the written submissions he made to each Lithuanian District Court. This is a major evidential defect in my view. It is not at all clear from the Decision of either District Court that his submissions included any reference to Article 63 or to the views of the prosecutor with respect to a right of appeal. That is a significant concern because it was always the view of Mr. Tokarčakas that Article 63 did not apply. I am not suggesting that he was misleading the Lithuanian Courts or indeed this Court by not so doing, but there is a real concern that his genuine belief that this was not a valid legal ground may have meant that he believed he could not make such a submission. Indeed, I have a great concern that the reference in the Alytus Decision to it being acknowledged that the law does not provide for the possibility of revoking the EAW may have been a reference to an acknowledgement by Mr. Tokarčakas that this was the law.
66. It is also the case that neither the Vilnius Decision nor the Alytus Decision make reference to any submission being made by the prosecutor. Indeed, the time frame for the decision-making by each court would seem to indicate that this was an *ex parte* appeal, which was dealt with on the "papers". The Alytus Court makes particular reference to the appeal being examined "by written procedure". For example, the Vilnius Decision records that the appeal was received by email on the 2nd March, 2020 and additionally signed on the 4th March, 2020 with original signature. The decision in the case was given the following date on the 5th March, 2020. Similarly, in the Alytus case, the Decision records that the appeal was received on the 10th March, 2020 and the written decision was given 2 days later on the 12th March. There is no reference to any prosecution submissions and the time frame would appear to make it impossible that such submissions were made.
67. The position in this case is also different to that of Mr. Lisauskas. In the present case, a deputy prosecutor issued the EAW and there is no contest that there is an appeal to the Prosecutor General. Naturally that is not sufficient in itself to satisfy the requirements as to effective judicial protection, but the fact that the entire procedure was specifically mentioned in the information provided in the *Lisauskas* proceedings demonstrates that even in this situation, a requested person had a "stepped" right of appeal, ultimately to the Court.
68. What is most significant in these decisions of the Lithuanian courts is that each decision actually refers to the factual matrix of the case. On their face, these are not decisions which simply dismiss the appeal on procedural grounds. Instead each court has engaged with the factual circumstances; that the respondent had concealed himself during criminal proceedings, a search was announced, that an EAW issued and there are ongoing proceedings in Ireland. In the Alytus Decision, it is specifically mentioned that the case material failed to prove that the conditions and grounds for the EAW issued ceased to exist. It was expressly stated that there was no basis to file the application with the

Prosecutor General's office. The decision goes on to say "in light of the above", i.e. including the lack of grounds, the appeal must be dismissed. In fairness to Mr. Tokarčakas, he appeared to accept by his use of the phrase "in any event" that a procedural ground was only partially the reason for the Vilnius refusal. In respect of Alytus, he said that the Court ruled that no appeal lay from the decision of the Prosecutor General to issue a European Arrest Warrant. I do not read that as being an express finding of the Court. That is not stated in those terms and again it is simply an opinion of Mr. Tokarčakas.

69. Having made the above observations, I have had particular regard to the phrase in the Alytus Decision which records "the authority which initiated the European Arrest Warrant shall immediately inform the authority which issued the European Arrest Warrant." The earlier part of the warrant indicated that it was the Court that had applied to the Prosecutor General's office for the issuance of the European arrest warrant. Mr. Tokarčakas does not address this fact in his affidavit. I consider that a concerning omission. It seems to me that the statement of the Alytus Court must be read in the context that the Court, who initiated the warrant, is obliged (*i.e.* shall) inform the issuing authority (the Prosecutor General) that the conditions no longer exist. The issuing authority only has the power to revoke but there is no suggestion or evidence put forward by Mr. Tokarčakas that the issuing authority would have the power to refuse the application by the Court to revoke the European arrest warrant. It seems this is more akin to a Court giving a direction to an inferior tribunal to make an order in accordance with law. As I have stated above, the Court concluded in the appeal that there were no grounds to revoke that EAW and so no application was made.
70. The conclusion I must reach, having regard the principle of mutual trust and confidence, is that despite the evidence of the belief of Mr. Tokarčakas, he has not placed before this Court, the type of cogent evidence required to overturn the clear and unequivocal evidence provided by the Lithuanian authorities in the *Lisauskas* case. Additionally, I am satisfied that a careful reading of the decisions of the Lithuanian Courts provided by Mr. Tokarčakas reveal that a Prosecutor General's decision to issue a European arrest warrant is subject to review.
71. I am satisfied therefore, that this point of objection must be rejected. Conclusion
72. For the reasons set out in this judgment, the Court is satisfied that the surrender of the respondent to Lithuania is not prohibited by the Act of 2003. The Court may therefore make an order for the surrender of this respondent to such other person as is duly authorised by Lithuania to receive him.