

THE HIGH COURT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003 AS AMENDED

Record No. 2018/ 261 EXT.

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

- AND -

BOGDAN CORNEA

RESPONDENT

Request of the High Court for Preliminary Ruling Pursuant to Article 267 TFEU dated the 4th day of February, 2019

The following is the substantive text of the Request for Preliminary Ruling pursuant to Article 267 TFEU made by the High Court (Donnelly J) on 4th February, 2019:

1. Introduction

1.1 The High Court has decided to refer to the Court of Justice questions in relation to the autonomous meaning of an issuing judicial authority in Article 6(1) of the Council Framework Decision of 13 June, 2002 on the European Arrest Warrant and Surrender Procedures between Member States ("the Framework Decision") and questions in relation to the requisite independence of the Zwickau Public Prosecutor, to enable the High Court to decide whether to surrender the respondent to the Federal Republic of Germany pursuant to a European Arrest Warrant ("EAW") issued by the Public Prosecution Office of Zwickau (the "Public Prosecutor") on the 15th March, 2018.

1.2 It is to be noted that in the *Minister for Justice and Equality v. Dunauskis* [2018] IESC 43 (*Minister for Justice and Equality v. OG* (C-508/18)), the Supreme Court of Ireland made a Preliminary Reference to the Court of Justice pursuant to Article 267 of the Treaty on the Functioning of the European Union ("TFEU") on 31st July, 2018 on the same issues. The Court of Justice by Order made on the 20th September, 2018, in *Minister for Justice and Equality v. OG* (C-508/18) rejected the request by the Supreme Court of Ireland to apply the expedited procedure provided for in Article 105(1). (It is noted that the case was cojoined with C-509/18 *Minister for Justice and Equality v. PF*). In the *Minister for Justice and Equality v. OG*, the Court of Justice noted that the respondent was on bail and at para. 16 of the Order of the 20th September, 2018 noted:

"Moreover, the fact, as noted by the Supreme Court, that cases similar to that in the main proceedings, involving, as it may, persons in custody, is not relevant for the purposes of assessing whether the present cases warrant an urgent reply, without prejudice to a decision which may be taken in that regard, if one of those similar cases were to be the subject of a reference to the Court for a preliminary ruling."

1.3 In contrast to *OG* (and indeed *PF*) the respondent in the instant case is in custody and will remain in custody until the determination of this application. The respondent is not a candidate for bail. The respondent's case came on for hearing on the 21st January, 2019, when all issues in the case other than the issues relating to the Zwickau Public Prosecutor being a valid issuing judicial authority and having the requisite independence from the executive were disposed of.

1.4 Therefore, notwithstanding the existing preliminary reference from the Supreme Court, the High Court has decided to refer essentially the same questions in this case as in the *Dunauskis* case since the resolution of same is necessary to enable the court to deliver a judgment in this case.

1.5 In light of the fact that the High Court is unable to deliver a final judgment in the case pending a ruling by the Court of Justice and the fact that the respondent remains in custody solely pending such determination, the High Court has decided to refer the questions below to the European Court of Justice to facilitate a ruling on the issues identified with the minimum of delay in accordance with the provisions of Article 267 of the TEU and Rule 107 of the Rules of Procedure of the Court of Justice.

2. The Facts

2.1 The surrender of the respondent is sought by the Federal Republic of Germany on foot of a single European Arrest Warrant. The EAW was issued on 15th March, 2018, and was endorsed by the High Court for execution on 12th September, 2018. The respondent was arrested on foot of the EAW on 15th October, 2018 and was remanded in custody. He has remained in custody since this date. This EAW sought the surrender of the respondent for the purposes of conducting a criminal prosecution in respect of seven offences (of organised or armed robbery). The potential maximum penalty for these offence ranges from is 10 years.

2.2 Amended Points of objection were filed on behalf of the respondent on the 14th January, 2019, which included the following:-

"The warrant has been issued by the "Public Prosecution Office Zwickau" and has not been issued by a judicial body within the meaning of Section 2 of the European Arrest Warrant Act, 2003. The said public prosecutor is not a "Judicial Authority" within the meaning of the Act of 2003 and the 2002 Framework Decision

The warrant has not been signed by an appropriate judicial authority for the reasons aforesaid and in circumstances where the public prosecution office is not an appropriate judicial authority as required by the terms of the Framework Decision. The Public Prosecutor office Zwickau is not a "judicial authority" in the meaning of Article 6(1) of the Framework Decision and that therefore the warrant is not a "judicial decision" within the meaning of Article 1(1) of the Framework Decision

The Zwickau Public Prosecutor is not part of the judicial corps but is an officer under an Order of the Chief Prosecutor in Germany, who reports to and is subject to the orders of the Minister of Justice, in this regard the respondent therefor pleads that political involvement in the decision to issue EAWs by that body cannot be ruled out

There was no or no proper and sufficient judicial oversight in the issuing of the EAW and that the public prosecutor's

office which issued the warrant is not independent of the executive branch of government in the issuing member state."

2.3 In support of his contention that the Public Prosecutor is not a judicial authority within the meaning of Art. 6(1) of the Framework Decision and does not possess the requisite independence from the executive, the respondent has adduced evidence from Professor Dr. Hans-Walter Forkel (a qualified lawyer in Germany holding a legal doctorate in criminal law, and a Masters degree in European Union law from the University of London).

2.4 Professor Dr. Forkel had previously provided two affidavits and an expert report for the respondent in the aforementioned case of *Minister for Justice and Equality v. Dunauskis* [2018] IESC 43 (*Minister for Justice and Equality v. OG* (C-508/18)). By agreement Dr. Forkel's affidavits and report from *Dunauskis* were admitted in evidence in the instant case.

2.5 In his report (dated 12th September, 2016) Dr. Forkel states following to be the position of the Public Prosecutor (in Lübeck) in the legal system of Germany:-

"The public prosecutor in Lübeck, by German law, is not considered part of the judicial corps in Germany in that sense that he enjoys the autonomous or independent status of a court of law.

The public prosecutor is an officer under the order of the chief public prosecutor who reports to and is subject to orders by the minister of justice, a political office (§§ 146, 147 GVG). This position within an administrative hierarchy with a political master at the top opens the possibility of political involvement to the surrender proceedings.

Under German law, the public prosecutor is not a judicial authority with competence to order detention or arrest of any person in Germany but in cases of exigent circumstances. To order detention or arrest is a prerogative of judges. The public prosecutor must apply to the respective court or judge for an arrest warrant in Germany.

The public prosecutor cannot in his own right issue an arrest warrant in Germany. Yet, it is his responsibility to execute an arrest warrant issued by a judge, and it is within his discretion whether, when and how to do so.

A domestic arrest warrant having been issued, the Public Prosecutor was not required to refer the matter to any court for approval or oversight in the issue of the European Arrest Warrant.

In the issuing of the EAW concerning our client, no German court of law or judge was involved.

So one might well say that no judicial authority within the meaning of the Council Framework Decision of 13 June, 2002 on the European Arrest Warrant and the [surrender] procedures between member states was involved.

The EAW refers to the German arrest warrant, issued by a judge, and claims to derive its powers from it."

2.6 The sections of the GVG referred to by Prof. Dr. Forkel include:

"Section 146

The officials of the public prosecution office must comply with the official instructions of their superiors.

Section 147

The right of supervision and direction shall lie with:

- 1. the Federal Minister of Justice in respect of the Federal Prosecutor General and the federal prosecutors;*
- 2. the Land agency for the administration of justice in respect of all the officials of the public prosecution office the Land concerned;*
- 3. the highest-ranking official of the public prosecution office at the Higher Regional Courts and the Regional Courts in respect of all the officials of the public prosecution office of the given court's district. ...*

Section 150

The public prosecution office shall be independent of the courts in the performance of its official tasks.

Section 151

The public prosecutors may not perform judicial functions. They also may not be assigned responsibility for supervising the service of judges."

2.7 In addition to the above material from *Minister for Justice and Equality v. Dunauskis* [2018] IESC 43 (*Minister for Justice and Equality v. OG* (C-508/18)) Prof. Dr. Forkel provided a further amended report prepared for the instant case of Mr Cornea which was in the exact same terms as the above quoted report but referenced Zwickau in place of Lübeck.

2.8 The said Amended Points of Objection and affidavits and reports of Prof. Dr. Forkel were furnished to the Office of the Public Prosecutor in Zwickau, Germany by the central authority for Ireland, the Department of Justice and Equality, on the 23rd January, 2019 requesting comment on the matters therein.

2.9 A response dated 24th January, 2019 was received from the Office of the Public Prosecutor. This stated as follows:

" With reference to your letter dated 23 January 2019 I first send you the Arrest Warrant issued by the County Court Zwickau on 12 March 2018, file no. 13 Gs 261/18, on which the European Arrest Warrant issued by the Zwickau Public Prosecution Office on 15 March 2018 is based. The national Arrest Warrant was issued by the County Court Judge Peters as permanent proxy of the Director. The Judge issuing the national Arrest Warrant is independent and is not subject to

instructions. On this matter, the Constitution of the Federal Republic of Germany states in article 97 section 1 of the Basic Law:

"Judges shall be independent and subject only to the law."

The enclosed national arrest warrant further states all offences in detail with their times, places and modalities.

As far as the persecuted person raises the objection that the Zwickau Public Prosecution Office is not an authority which is competent to issue a European Arrest Warrant, this is incorrect. The Federal Republic of Germany has declared as follows with regard to article 6 of the framework decision of the Council dated 13 June 2002 on the European Arrest Warrant and the transfer procedures between the member states (2002/584/JI):

"Competent Authorities in accordance with article 6 are the Federal Department of Justice and the Departments of Justice of the individual Länder. These have usually transferred the execution of their competences resulting from the framework decision with regards to issuing requests (article 6 section 1) to the Chief Public Prosecutors of the Länder."

In the Free State of Saxony there is a competence regulation for legal assistance which has been published in the Saxon Law and Regulation Gazette (Sächsisches Gesetz- und Verordnungsblatt) 2004, page 580. In §5 section 2 this states:

"The locally responsible Public Prosecution Office further decides on the issuing of requests for legal assistance and requests for delivery and surrender of objects related to them, if they are based on a European Arrest Warrant in accordance with Part 8 of the Law on International Legal Assistance in Criminal Matters (IRG)."

The competence of the Zwickau Public Prosecution Office for issuing re-requests for extradition on the basis of the framework decision of the Council dated 13 June 2002 on the European Arrest Warrant and the transfer procedures between the member states (2002/584/JI) is therefore given".

2.10 A further request was sent to the Office of the Public Prosecutor in Zwickau, Germany asking whether the Zwickau Public Prosecutor was adopting the same stance of that of the Lubeck Public Prosecutor set out in the correspondence of 8th December, 2016. The Zwickau Public Prosecutor replied on the 31st January, 2019 as follows:

"I refer to your message of 28 January 2019 and the enclosed documents of the Lubeck Public Prosecutor's Office. With regard to the position of the public prosecutor within the legal system of the Federal Republic of Germany, I share the opinion of the Lubeck Public Prosecutor's Office. I would like to add that the investigations by the Zwickau Public Prosecutor's Office versus the persecuted person are carried out independently and without any political interference. Neither the General Public Prosecutor in Dresden nor the Ministry of Justice of the Free State of Saxony have issued any instructions at any time."

2.11 The High Court ruled on 21st January, 2019, that there was no bar or impediment to the surrender of Mr Comea other than the resolution of the issues raised as to whether the Zwickau Public Prosecutor was a judicial authority within the meaning of Article 6(1) of the Framework Decision and hence the European Arrest Warrant Act 2003, including the issue whether the Zwickau Public Prosecutor had the requisite independence from the executive. The High Court cannot now determine this remaining issue in the absence of an answer to the Reference made herein.

3. Relevant Legal Provisions

3.1 The Law in Ireland is governed by the European Arrest Warrant Act, 2003 as amended ("2003 Act"). The relevant legislative provisions of the Act, as amended are included herewith.

3.2 Section 2(1) of the European Arrest Warrant Act, 2003 provides, *inter alia*, as follows:

"'issuing judicial authority' means, in relation to a European Arrest Warrant, the judicial authority in the issuing state that issued the European arrest warrant concerned";

"'judicial authority' means the judge, magistrate or other person authorised under the law of the Member State concerned to perform functions the same as or similar to those performed under section 33 by a court in the State;"

3.3 The procedure for the surrender of an individual sought on foot of an EAW, other than a situation where that person consents to their surrender, is dealt with under Section 16 of the 2003 Act, as amended by the Criminal Justice (Terrorist Offences) Act, 2005, the Criminal Justice (Miscellaneous Provisions) Act, 2009 and the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act, 2012.

"16(1) Where a person does not consent to his or her surrender to the issuing state the High Court may, upon such date as is fixed under section 13 or such later date as it considers appropriate, make an order directing that the person be surrendered to such other person as is duly authorised by the issuing state to receive him or her, provided that—

(a) the High Court is satisfied that the person before it is the person in respect of whom the European arrest warrant was issued,

(b) the European arrest warrant, or a true copy thereof, has been endorsed in accordance with section 13 for execution of the warrant,

(c) the European arrest warrant states, where appropriate, the matters required by section 45 (inserted by section 23 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012),

(d) the High Court is not required, under section 21A, 22, 23 or 24 (inserted by sections 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the person under this Act, and

(e) the surrender of the person is not prohibited by Part 3”

3.4 The Council Framework Decision 2002/584 on the European Arrest Warrant and the Surrender Procedures between Member States provides at Recital (10):

“The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof”.

3.5 The Framework Decision provides, inter alia, as follows:-

"Article 1

Definition of the European arrest warrant and obligation to execute it

1. *The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.*
2. *Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.*
3. *This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.*

....

Article 6

Determination of the competent judicial authorities

1. *The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.”*

3.6 The Supreme Court in *Minister for Justice and Equality v McArdle; Minister for Justice and Equality v Brunnell* [2015] IESC 56 referring to the definition of “judicial authority” as quoted above, determined at para. 49 that it would:

“interpret this definition in the Act of 2003, as amended, as far as possible in light of the wording and purpose of the Framework Decision to achieve the result it pursues”

3.7 The Supreme Court went on to hold, at para. 51, as follows:-

“There is a presumption that when a European Arrest Warrant is issued, and stated to be issued, by a public prosecutor or judge of a Member State acting as the judicial authority designated by the Member State, he or she is the judicial authority within the meaning of the Framework Decision and the Act implementing it. If there are cogent grounds established in a particular case which could lead the Court to concluding that the issuing authority was not a judicial authority that would be a different matter. No such grounds have been established in this case. What is clear is that a public prosecutor who is designated as a judicial authority by a Member State for the purposes of surrender on foot of European arrest warrants cannot, by reason only of the fact that he or she is a public prosecutor, as opposed to a judge of a court, be considered not to be a person who may issue a European arrest warrant within the meaning of the Framework Decision.”

3.8 The High Court in a judgment given on 28th July 2015 in *Minister for Justice and Equality v M.V.* [2015] IEHC 524 subsequently interpreted the Supreme Court’s decision as follows:

“The inexorable logic of the decision in McArdle and Brunnell is that the Court may be provided with cogent grounds for concluding that an issuing judicial authority as designated by a Member State is not in fact a ‘judicial authority’ within the meaning of the Act of 2003 and the Framework Decision. The Supreme Court in McArdle and Brunnell, by reference to the process of surrender being based upon mutual recognition of judicial acts, by reference to the interpretation of our legislation in light of the objectives and purpose of the Framework Decision and by an acceptance that there could be cogent grounds for concluding that a particular authority is not a judicial authority has, in my view, implicitly held that ‘judicial authority’ has an autonomous meaning within the Framework Decision. The question arising in this case, therefore, is whether there are cogent grounds for concluding that the Ministry of Justice in Lithuania on the facts herein is not ‘a judicial authority’ within the meaning of the Act of 2003 and the Framework Decision.”

3.9 The High Court concluded in that case that the Ministry of Justice of Lithuania was not a “judicial authority” within the meaning of the Framework Decision.

4. Assessment of Evidence

4.1 The Supreme Court in its reference pursuant to Art. 267 to the Court of Justice in *Minister for Justice and Equality v. Dunauskis* [2018] IESC 43 (*Minister for Justice and Equality v. OG (C-508/18)*), having considered the evidence of Prof. Dr Forkel as regards the position of the Public Prosecutor’s Office in Lubeck, and additional information supplied by the Public Prosecutor, gave its assessment as follows:

1. *The Supreme Court considers that the High Court sought and obtained the relevant additional information from the issuing judicial authority in this case and the decision on surrender must be made on the basis of the expert evidence of Prof. Dr. Forkel and the additional information supplied by the Public Prosecutor’s Office in Lübeck. Such evidence may be*

sufficient to displace reliance by the Irish courts on a presumption that the Public Prosecutor in Lübeck is a judicial authority within the meaning of Article 6(1) of the Framework Decision and that issue must be decided by the Irish courts prior to the surrender of Mr. Dunauskis.

2. On the issue of independence, the Supreme Court considers that the evidence indicates that in the German legal system the Lübeck Public Prosecutor's Office may be the subject of a direction or instruction from the Director of Public Prosecutions (the public prosecutors at the Higher Regional Court of Schleswig-Holstein) which in turn may be the subject of an instruction or direction from the Ministry of Justice of Schleswig-Holstein. Any such direction must be lawful and requires notification to the President of the State Parliament of Schleswig-Holstein. There is no evidence that any such direction was issued in respect of the EAW for the surrender of Mr. Dunauskis.

3. There is some difficulty in reaching conclusions in relation to the role of the Lübeck Public Prosecutor in relation to the administration of justice in Germany in part by reason of the difference in terminology in English used by Prof. Dr. Forkel and the English translation of the information provided by the Lübeck Public Prosecutor's Office. Subject to that it appears to the Supreme Court that the role of the Lübeck Public Prosecutor is confined to initiating and conducting investigations and assuring that such investigations are conducted lawfully, the issuing of indictments, executing judicial decisions and conducting the prosecution of criminal offences at a trial court and appearing in relation to appeals. It also appears that the Public Prosecutor has an obligation of objectivity. The Supreme Court notes that the Public Prosecutor does not issue national arrest warrants which are issued by a court in Germany. The Supreme Court has noted that, in accordance with ss. 150 and 151 of the GVG, the Public Prosecutor's Office is independent of the courts and may not perform judicial functions."

4.2 In circumstances where the same expert evidence of Prof. Dr. Forkel is relied upon in this case, where the response of the German authorities is identical in all material respect, this assessment of the evidence by the Supreme Court, is followed by the High Court.

5. Grounds for Reference

5.1 It is appropriate that the High Court considers the Grounds for Reference provided in the Supreme Court's reference pursuant to Art. 267 to the Court of Justice in *Minister for Justice and Equality v. Dunauskis* [2018] IESC 43 (*Minister for Justice and Equality v. OG* (C-508/18)).

The Supreme Court stated the following as the Grounds for Reference:-

"1. The Supreme Court relies upon what is stated in the reference in *Lisauskas* in relation to the judgments of the Court of Justice in Case C-452/16 PPU *Poltorak*, C-453/16 PPU *Özçelik*, C-477/16 PPU *Kovalkovas* and C-486/14 *Kossowski* and the Advocate Generals' opinions therein and the principles which emerge.

2. The Supreme Court is uncertain whether, on the evidence and information herein, the Public Prosecutor in Lübeck meets either the test of independence or administers criminal justice in the sense required by those decisions to be considered a judicial authority.

3. The Supreme Court has noted in particular what has been stated by the Court of Justice in *Poltorak* that a judicial authority must be an authority that is independent of the executive. This stems from the well-established separation of powers between the legislature, executive and judiciary. The Supreme Court has further noted the Court's consideration of independence of courts in Case C-216/18 PPU *LM* at paras 63-64. The institutional structure of the Public Prosecutor's Office in Germany appears to be such that the Lübeck Public Prosecutor is institutionally subject ultimately albeit indirectly to a direction or instruction of the executive. The Supreme Court doubts that the principles stated by the Court of Justice in *Poltorak* and the other decisions can be met by such a public prosecutor or that independence can be determined by reason of the absence of any direction or instruction given by the executive in relation to the particular EAW issued in this case. It appears to the Supreme Court that the question as to whether or not the Lübeck Public Prosecutor is or is not a judicial authority must be determined by reference to its position in the German legal system rather than the individual facts of the case.

4. On the question of the Public Prosecutor's role in relation to the administration of justice it appears to the Supreme Court that the Public Prosecutor in Germany has an essential role in relation to the administration of justice but that it is a role which is distinct from that of the courts or judges. It is unclear whether such a role, if the independence test is met, is such that it meets the relevant test of administering justice or participating in the administration of justice so as to constitute a judicial authority within Article 6(1) of the Framework Decision. This is so particularly having regard to the underlying principles of the Framework Decision of mutual trust and mutual recognition between judicial authorities.

5. The essential question as to whether the Lübeck Public Prosecutor or a public prosecutor with its characteristics is or is not a judicial authority for the purposes of Article 6(1) of the Framework Decision appears to the Supreme Court to be a question of interpretation of European Union law the answer to which is not clear. Hence this Court as a court of final appeal has determined it must make this reference."

5.2 Based on the above opinion of the Supreme Court in relation to the Public Prosecutor in Lübeck, the High Court considers there must now be a similar concern as to whether, on the evidence and information herein, the Public Prosecutor in Zwickau also meets either the test of independence or administers criminal justice in the sense required by the decisions of the Court of Justice to be considered a judicial authority.

5.3 The High Court has considered the judgment of the CJEU in the case C-452/16 PPU *Poltorak*, (see para. 35) and the requirement that a judicial authority must be an authority that is independent of the executive.

5.4 The High Court [2017] IEHC 231 in the case of *Minister for Justice and Equality v. Dunauskis* [2018] IESC 43 (*Minister for Justice and Equality v. OG* (C-508/18)) in relation to the independence of the Public Prosecutor of Lübeck held as follows:-

"The Court is satisfied that German law provides for the independence of Public Prosecutors. It is only in exceptional circumstances, for which a system of checks and balances has been provided, that the executive branch can interfere with a decision. In this case, there has been no interference with the independence of the Prosecutor. Furthermore, the respondent has failed to provide any evidence that would show that instructions have been given in any other case in Schleswig-Holstein to public prosecutors in respect of the issue of EAWs or otherwise. Since 14th October, 2014, when the law on the creation of transparency of political instructions towards officers of the Public Prosecution Office came

into effect, this would be a matter of public record and information could have been provided if cases of such instructions had occurred.

In all the circumstances, the Court is quite satisfied that the respondent has not rebutted the presumption that the Public Prosecutor of Lubeck is a judicial authority within the meaning of the 2002 Framework Decision and the Act of 2003. The Court therefore rejects this point of objection."

5.5 As a result of the Supreme Court decision to make a reference to the Court of Justice in the case of *Minister for Justice and Equality v. Dunauskis* [2018] IESC 43 (*Minister for Justice and Equality v. OG* (C-508/18)) the High Court in this case cannot proceed on the same basis as it held in *Dunauskis* and, accordingly, the High Court is unclear as to the test for independence from the executive that must be satisfied by a public prosecutor.

5.7 Further, the High Court, following upon the Supreme Court's decision to refer, is unclear as to the criteria according to which, in addition to independence from the executive, the national court is to determine whether or not a public prosecutor is a judicial authority for the purposes of Art. 6(1) of the Framework Decision. In particular, whether or not "*initiating and conducting investigations and assuring that such investigations are conducted lawfully, the issuing of indictments, executing judicial decisions and conducting the prosecution of criminal offences at a trial court and appearing in relation to appeals*" is sufficiently linked to the administration of justice that a prosecutor who does this may be considered a judicial authority for the purposes of Article 6(1) of the Framework Decision. The underlying principles of mutual trust and mutual recognition between judicial authorities contribute to the uncertainty.

5.8 Whilst it appears to the Supreme Court in their Preliminary Reference in *Dunauskis* (OG) that the question may fall to be determined by deciding whether in accordance with the relevant national legal system, in this instance the German legal system, the public prosecutor is considered in that legal system to administer justice or is required to participate in administering justice, the matter may not be beyond doubt by reason of the requirement for an autonomous meaning throughout the Union.

5.9 The High Court has considered the judgments of the CJEU in cases C-452/16 PPU *Poltorak*, C-453/16 PPU *Ozcelik*, C-477/16 PPU *Kovalkovas* and C-486/14 *Kossowski* and the Advocate Generals' opinions therein amongst other judgments. The following principles appear to emerge. The term 'judicial authority' in Art. 6(1) of the Framework Decision requires throughout the Union an autonomous and uniform interpretation which must take into account the terms of that provision, its context and the objective of the Framework Decision: *Poltorak* (See para. 32). The term 'judicial authority' in Art. 6(1) is not limited to designating only the judges or courts of a member state: *Poltorak* (see para.33). It may extend more broadly to the authorities required to participate in administering justice in the legal system concerned: *Poltorak* (see para. 33).

5.10 The High Court observes that this difference between "participation in the administration of justice" and "administering justice" which has been a source of controversy in the High Court and Court of Appeal judgments in the earlier cases referred to above, may be a peculiarity of the English translations of these judgments as a significant number of other languages use only the "participation" formula, notably the French text and the Dutch text, the latter of these being the language of the case in each of these decisions. Irrespective of the specific phrasing used, it is respectfully observed that while it remains clear that to be a judicial authority a public prosecutor must have a role in the administration of justice, the extent and nature of the role that satisfies this test is more uncertain.

5.11 It is uncertain as to exactly how a national court is to determine whether a public prosecutor is an authority which administers justice or is required to participate in administering justice in the legal system concerned as indicated by *Poltorak* para. 33, *Ozcelik* para. 34, *Kovalkovas* para. 34 and *Kossowski* para. 39.

6. Questions Referred for Preliminary Ruling

6.1 Against that background, the High Court proposes to refer the following questions to the Court of Justice (which effectively mirror the reference by the Supreme Court of Ireland in *Minister for Justice and Equality v. Dunauskis* [2018] IESC 43 (*Minister for Justice and Equality v. OG* (C-508/18))) :-

- 1. Is the independence from the executive of a public prosecutor to be decided in accordance with his position under the relevant national legal system? If not what are the criteria according to which independence from the executive is to be decided?*
- 2. Is a public prosecutor who, in accordance with national law, is subject to a possible direction or instruction either directly or indirectly from a Ministry of Justice, sufficiently independent of the executive to be considered a judicial authority within the meaning of Article 6(1) of the Framework Decision?*
- 3. If so, must the public prosecutor also be functionally independent of the executive and what are the criteria according to which functional independence is to be decided?*
- 4. If independent of the executive, is a public prosecutor who is confined to initiating and conducting investigations and assuring that such investigations are conducted objectively and lawfully, the issuing of indictments, executing judicial decisions and conducting the prosecution of criminal offences, and does not issue national warrants and may not perform judicial functions a "judicial authority" for the purposes of Article 6(1) of the Framework Decision?*
- 5. Is the Public Prosecutor in Zwickau a judicial authority within the meaning of Article 6(1) of the Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States?*

7. Request to Avail of the Urgent Preliminary Ruling Procedure

7.1 The High Court requests that the Court of Justice consider determining the present case pursuant to the urgent preliminary ruling procedure set out in Article 107 of the Rules of Procedure of the Court of Justice.

7.2 This reference raises questions in an area covered by Title V of Part Three of the Treaty on the Functioning of the European Union (TFEU) i.e. judicial cooperation in criminal matters (Chapter 4).

7.3 The respondent is currently in custody solely on foot of the European Arrest Warrant issued by the Federal Republic of Germany and a ruling on the question identified above is necessary to enable the High Court to give final judgment in his case. In support of

the request to avail of the urgent preliminary ruling procedure, the High Court relies on para 4 of Article 267 TFEU which refers to the obligation to “act with the minimum of delay” in respect of a person in custody who is the subject matter of a preliminary reference.

7.4 Use of the ordinary, or even the expedited, preliminary reference procedure would significantly add to the period that the respondent will spend in custody. Given that the Court of Justice may rule at the conclusion of this preliminary reference that further engagement by the High Court with the Federal Republic of Germany is required, the EAW proceedings may not be concluded for some time. It is therefore highly desirable that the urgent procedure would be permitted in this case. Urgency is especially highly desirable where the respondent is in custody solely on this EAW, which was issued for the purpose of conducting a criminal prosecution and in respect of which he has a presumption of innocence.

7.5 The High Court is desirous of ensuring the uniform application of European Union law both for the benefit of this case and another 4 cases in which persons remain in custody in Ireland solely on foot of European Arrest warrants issued by the Federal Republic of Germany or the Republic of Lithuania and where a question is raised as to whether the Public Prosecutor is an issuing judicial authority as a basis for suggesting that the Court should not order surrender. The High Court also notes that there are 2 other persons in custody serving domestic sentences which will expire shortly and who could thereafter be remanded in custody pending surrender to the Republic of Lithuania but whose cases must be adjourned pending the determination of the Public Prosecutor point. There are also 8 other persons who have been arrested on foot of European arrest warrants from the Republic of Lithuania but who are on bail pending a determination on surrender and who have also raised this point. There are also 2 other persons who have been arrested on foot of European arrest warrant from the Federal Republic of Germany, who are on bail, but whose cases have been adjourned pending the determination of the Public Prosecutor point.

7.6 There are a significant number of European Arrest Warrants received in Ireland from the Republic of Lithuania and from the Federal Republic of Germany which remain to be executed. Further arrests of requested persons are therefore extremely likely. Given that the Supreme Court, and now the High Court, has considered it necessary to refer the questions set out above to the Court of Justice, it may readily be inferred that many, if not most, persons whose surrender is sought to the Federal Republic of Germany or the Republic of Lithuania will raise this same point. Once raised, the High Court will be required to defer a final decision on surrender pending the outcome of this reference.

8. Proposed answers to the questions identified above

8.1 In light of the different approaches taken by the High Court in *Dunauskis* and the Supreme Court in its decision to refer *Dunauskis* to the CJEU pursuant to Article 267, the High Court is of the view that it is not possible for the High Court to indicate the proposed answers to the questions identified above. The High Court respectfully awaits the guidance of the Court of Justice on these issues.