

## THE HIGH COURT

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

Record No. 2017/ 331 EXT.

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

- AND -

RUSTAM RIABOV

RESPONDENT

**Request of the High Court for Preliminary Ruling Pursuant to Article 267 TFEU dated the 6th day of November, 2018**

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 6th November, 2018:

**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") to enable it to decide whether to surrender the respondent to the Republic of Lithuania pursuant to a European Arrest Warrant ("EAW") issued by the Prosecutor General's Office of the Republic of Lithuania (the "Prosecutor General") on the 13th February, 2017.

1.2 It is to be noted that in the *Minister for Justice and Equality v. Lisauskas* [2018] IESC 42 (*Minister for Justice and Equality v. PF* (C-509/18)), 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 issue. The Court of Justice by Order made on the 20th September, 2018, in *Minister for Justice and Equality v. PF* (C-509/18) 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-508/18 *Minister for Justice and Equality v. OG*). In the *Minister for Justice and Equality v. PF*, 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 *PF* (and indeed *OG*) the respondent in the instant case is in custody and will remain in custody until the determination of this application. The respondent's case came on for hearing on the 16th March, 2018 when all issues in the case other than the issue relating to the Prosecutor General being a valid issuing judicial authority were the subject of legal submissions. The High Court adjourned delivering judgment on that date as at that stage the aforesaid issue was the subject matter of the appeal in *Minister for Justice and Equality v. Lisauskas* before the Supreme Court, which appeal remains outstanding pending clarification of the issue by the CJEU.

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 *Lisauskas* case since the resolution of same is necessary to enable the court to deliver a judgment in this case.

1.3 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 pending such determination, the High Court has decided to refer the below questions 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 Republic of Lithuania on foot of two European Arrest Warrants. The first EAW was issued on 1st February, 2017 and was endorsed by the High Court for execution on 13th February, 2017. The respondent was arrested on foot of this first EAW on 4th August, 2017 and was remanded in custody. At that time, he was required to serve a domestic sentence which has since expired. He has remained in custody since this date. This first EAW sought the surrender of the respondent for the purposes of executing a custodial sentence of two years and two months imprisonment in respect of three offences (robbery, theft and violation of public order). No issue arises in respect of this first EAW which requires any determination by the Court of Justice.

2.2 A second European Arrest Warrant was issued by the Republic of Lithuania in respect of the respondent on 13th February, 2017. Following the receipt of additional information, this EAW was endorsed by the High Court on the 27th November, 2017 and the respondent was arrested on foot of this second European Arrest Warrant on the same date and was remanded in custody. The European Arrest Warrant sought the surrender of the respondent for the purposes of conducting a criminal prosecution in respect of nine offences which include offences of swindling, theft, and robbery. The potential maximum penalty for these offence ranges from three to seven years.

2.3 Amended Points of objection were filed on behalf of the respondent on the 1st November, 2018, in respect of this second EAW which included the following:-

*- The judicial authority specified within the warrant, being the 'Prosecutor General's Office of the Republic of Lithuania', is not a "judicial authority" within the meaning of Article 6(1) of the Framework Decision of 13 June 2002 on the European Arrest Warrant, and for the same reasons, the Irish European Arrest Warrant Act 2003.*

- The judicial authority specified within the warrant, being the 'Prosecutor General's Office of the Republic of Lithuania', is not independent of the Executive of that country to a sufficient extent to properly qualify as a "judicial authority" within the meaning of Article 6(1) of the Framework Decision of 13 June 2002.

- The judicial authority specified within the warrant, being the 'Prosecutor General's Office of the Republic of Lithuania', is not an authority which administers justice in Lithuania and/or is not an authority which is required to participate in administering justice in the legal system of that State.

2.4 In support of his contention that the Prosecutor General is not a judicial authority within the meaning of Art. 6(1) of the Framework Decision. Mr. Riabov has adduced evidence from Mr. Simas Tokarcakas (a practising lawyer in Lithuania holding a Masters degree in law from Vilnius University). In his report which is referred to in the affidavit of Roisin Courtney, Mr. Tokarcakas sets out in summary the following to be the position of the Prosecutor General in the legal system of the Republic of Lithuania. The Republic of Lithuania has a written Constitution which is a living constitution with a Constitutional Court which gives decisions in relation thereto. In accordance with Article 109 of the Constitution the administration of justice is solely the function of the courts and this function determines the special place of the judiciary in the government system. The Prosecutor General is the most senior prosecutor in Lithuania and has the status of a prosecutor. He is independent of the executive and is also independent of the judiciary. Section IX [called "The Court"] of the Constitution of the Republic of Lithuania enshrines the fundamental legal norms governing the judicial power of the Republic of Lithuania. Article 118 of this Section regulates the exclusive constitutional competence of the prosecutor.

2.5 In accordance with Article 118 of the Constitution the function of the prosecutor is to organise and direct pre-trial investigation and prosecute criminal cases. Mr. Tokarcakas explained at para. 8 of the said report:

*"The Constitutional Court in its rulings of 13th May 2004, 16th January 2006, 28th May 2008 and 7th April 2011 has stated that according to the Constitution a prosecutor does not administer justice. Justice is also not being administered during the pre-trial investigation which is organised by a prosecutor. According to the Constitution, the administration of justice is solely the function of the courts (i.e. the judiciary)..."*

2.6 Following receipt of the said report, further information was sought from the office of the Prosecutor General by the central authority for Ireland, the Department of Justice and Equality, on the 26th October, 2018 to confirm that the additional information dated 12th December 2016 received from the Office of the Prosecutor General in relation to European Arrest Warrant proceedings in respect of *Mindaugas Veresovas* and also that of the 15th December 2016 [note this is misdated as 2015] received from the Office of the Prosecutor General in relation to European Arrest Warrant proceedings in respect of *Lisauskas* and *Gerchardas Firantas* applied equally to the European Arrest Warrant in respect of *Rustam Riabov*. It is to be noted that a virtually identical affidavit and report had been filed in those aforementioned proceedings concerning the issue as to whether the Prosecutor General was a "judicial authority" within the meaning of the Framework Decision and detailed additional information had been sought from the Office of the Prosecutor General in Lithuania and had provided in connection therewith at an earlier stage.

2.7 In both the *Lisauskas* and *Veresovas*, EAW proceedings requests had been made for additional information by the High Court which were transmitted by the central authority to the Prosecutor General's Office of the Republic of Lithuania regarding the role of the Prosecutor General in the Republic of Lithuania. A response dated the 12th December 2016 was received in respect of the *Veresovas* proceedings which was confirmed by letter of the 15th December, 2015 to apply equally to the EAW in respect of *Lisauskas*. This request and response were as follows:

Request dated 7/12/2016 from Ireland:

*"Please advise if the Office of the Prosecutor General is independent of the executive, including the Ministry of Justice, in Lithuania and please indicate if that office is an authority in Lithuania that administers criminal justice. This information is being sought to ensure that the criteria for a judicial authority as determined by the European Court of Justice in the cases of *Poltorak* (Case C-452/16 PPU) and *Ozcelik* (Case C-453/16 PPU) is met."*

Response from Prosecutor General's office:

*Prosecutor General's Office of the Republic of Lithuania is independent of the executive power as well as the Ministry of Justice.*

*Prosecution Service of the Republic of Lithuania is comprised of the Prosecutor General's Office and territorial prosecutor's offices; the Lithuanian Prosecution Service organizes and directs pre-trial investigation and prosecutes criminal cases on behalf of the State. These provisions are established in Article 118 of the Constitution of the Republic of Lithuania."*

2.8 The High Court concluded in its judgment of 27th February, 2017 in *Minister for Justice v Lisauskas (PF)* [2017] IEHC 232 that the Prosecutor General was a judicial authority within the meaning of Article 6(1) of the Framework Decision and hence the European Arrest Warrant Act 2003. At para 108 the High Court stated:

*"On the evidence of Mr. Tokarcakas, it is apparent that the Lithuanian Prosecutor General is a national authority which participates in the administration of justice in the sense required by the 2002 Framework Decision. The Prosecutor is independent of both the judiciary and executive. The Public Prosecutor has a clear constitutional position within Lithuanian law. The Prosecutor General is the only authority which can "organise and direct a pre-trial investigation."*

2.9 The High Court ordered that *Lisauskas (PF)* be surrendered to the Republic of Lithuania but granted leave to appeal on points of law. The Court of Appeal in a judgment of 20th October, 2017, [2017] IECA 267 dismissed the appeal and upheld the conclusions and reasoning of the trial judge that the Prosecutor General is a judicial authority within the meaning of Article 6(1) of the Framework Decision.

2.10 The Supreme Court granted leave to appeal pursuant to Article 34.5.3 of the Constitution. The sole issue in that appeal is whether the Prosecutor General is a judicial authority within the meaning of Article 6(1) of the Framework Decision and hence of the European Arrest Warrant Act 2003. By interim ruling of the 31st July, 2018, the Supreme Court decided that it was obliged pursuant to Article 267 of the Treaty on the functioning of the European Union to refer questions to the Court of Justice of the European Union in relation to the autonomous meaning of an issuing judicial authority in Article 6(1) of the Framework Decision to enable it to decide the appeal. That reference has been refused the expedited procedure provided for in Article 105 of the Rules of Procedure of the Court of Justice.

2.11 In the instant case, the High Court has heard submissions in respect of all points of objection raised on the second EAW, other than this remaining issue of whether the Prosecutor General is an issuing judicial authority within the meaning of Article 6(1) of the Framework Decision. The High Court cannot now determine this remaining issue in the absence of an answer to the Reference made herein. It is to be noted that the first EAW was issued by a Judge of the Regional Court in the Republic of Lithuania and no issue in relation to this first EAW arises for the consideration of the CJEU. However, the High Court has deferred delivery of judgment in this case which was heard along with the second EAW pending determination by the CJEU of the issue which does arise for determination in respect of the second EAW.

### **3. Relevant Legal Provisions**

3.1 The Law in Ireland is governed by the European Arrest Warrant, 2003 as amended. 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 MV* [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."*

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. The Grounds for the Reference**

##### **4. Assessment of Evidence**

4.1 The Supreme Court having considered the evidence before the High Court in *Lisauskas (PF)*, both in the form of the affidavit evidence of Mr. Tokarcakas and the correspondence received from the Prosecutor General in response to the requests for additional information made by the High Court under section 20 of the European Arrest Warrant Act 2003, concluded as follows:

1. The High Court has taken all reasonable steps to seek the relevant additional information from the issuing judicial authority and the decision on surrender must be made on the basis of the evidence from Mr. Tokarcakas and the further limited information supplied by the Prosecutor General.
2. The evidence of Mr. Tokarcakas when considered in the context of the additional information received may be sufficient to displace reliance on the presumption that the Prosecutor General is a judicial authority within the meaning of Article 6(1) of the Framework Decision such that the Irish Courts must, prior to any decision to surrender decide that issue.
3. Article 109 of the Constitution of the Republic of Lithuania provides that the courts have the exclusive right to administer justice.
4. The Prosecutor General of the Republic of Lithuania appears to have the status of prosecutor (the most senior prosecutor), and in its legal system to be a public authority and independent of the executive and of the judiciary.
5. The role of the Prosecutor General in relation to the administration of criminal justice appears to be confined to conducting pre-trial investigations and the prosecution of criminal offences.
6. The Constitutional Court of Lithuania is stated to have ruled that a prosecutor does not administer justice and that according to the Constitution of Lithuania the administration of justice is solely the function of the courts.

4.2 In order for the High Court to deliver a judgement in this case and based on those conclusions of the Supreme Court, it is now necessary to determine whether the EAW in question has been issued by an issuing judicial within the meaning of Article 6(1) of the Framework Decision.

4.3 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). The judicial authority must also be an authority that is independent of the executive: *Poltorak* (see para. 35).

4.4 A public prosecutor may be a judicial authority within the meaning of Art. 6(1) of the Framework Decision: *Ozcelik*. However, this would appear to depend upon whether the public prosecutor's office in question "constitutes a member state authority responsible for administering criminal justice" *Ozcelik* (see para. 34) and *Kossowski* (see para. 39).

4.5 The High Court understands from the foregoing that the term 'judicial authority' requires throughout the Union an autonomous and uniform interpretation. Further that a public prosecutor may be a judicial authority where it is independent of the executive and administers justice or participates in the administration of justice in the relevant legal system. However, 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.

4.6 Whilst it appears to the Supreme Court in their Preliminary Reference in *Lisauskas (PF)* that the question may fall to be determined

by deciding whether in accordance with the relevant national legal system, in this instance the Lithuanian 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. In *Ozcelik*, the Court of Justice held that the Public Prosecutor's Office in Hungary was a judicial authority such that a confirmation by it of a national warrant was a 'judicial decision' for the purposes of Article 8(1) (c) of the Framework Decision. Advocate General Campos Sánchez-Bordona, at paras. 49 to 52 of his opinion, highlighted the express reference to public prosecutors in Article 2 of Directive 2014/41/EU in identifying authorities competent to issue a European investigation order. At para. 40 of his opinion, the Advocate General also observed that the initial proposal for the Framework Decision expressly included public prosecutors within the definition of judicial authority. The Advocate General, at para. 52, also identified a public prosecutor's "capacity – if this is provided for in the constitutional or legal rules of each Member State – to participate in the administration of justice." This suggests that while the role of a public prosecutor in a member state may be consistent with that of a judicial authority, this will not necessarily be so in every case.

4.7 The judgment of the Court in *Ozcelik*, that the public prosecutor's office was a judicial authority within the meaning of Art. 6(1) appears from para. 34 dependent upon its determination that the public prosecutor's office in the Hungarian legal system, "constitutes a member state authority responsible for administering criminal justice".

4.8 If, however, the issue is not to be decided by determining whether the public prosecutor's office in Lithuania constitutes a public authority responsible for administering criminal justice in Lithuania in accordance with the Lithuanian legal system, then 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 conducting pre-trial investigations and prosecuting criminal offences is sufficiently linked to the administration of justice that a prosecutor who does this but is independent of the judiciary in his own legal system 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.

4.9 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 Questions Referred for Preliminary Ruling**

5.1 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. PF* (C-509/18) :-

1. Are the criteria according to which to decide whether a public prosecutor designated as an issuing judicial authority for the purposes of Art. 6(1) is a judicial authority within the autonomous meaning of that phrase in Art. 6(1) of the Framework Decision of 2002 on European arrest warrant and surrender proceedings between Member States that (1) the public prosecutor is independent from the executive and (2) considered in his own legal system to administer justice or participate in the administration of justice?
2. If not, what are the criteria according to which a national court should determine whether a public prosecutor who is designated as an issuing judicial authority for the purposes of Art. 6(1) of the Framework Decision is a judicial authority for the purposes of Art. 6(1)?
3. Insofar as the criteria include a requirement that the public prosecutor administer justice or participate in the administration of justice is that to be determined in accordance with the status he holds in his own legal system or in accordance with certain objective criteria? If, objective criteria what are those criteria?
4. Is the Public Prosecutor of the Republic of Lithuania a judicial authority within the autonomous meaning of that phrase in Art. 6(1) of the Framework Decision of 2002 on European arrest warrant and surrender proceedings between Member States?

## **6 Request to Avail of the Urgent Preliminary Ruling Procedure**

6.1 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.

6.2 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).

6.3 The respondent is currently in custody solely on foot of the European Arrest Warrants issued by the Republic of Lithuania 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.

6.4 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 Republic of Lithuania 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 these EAWs, the second of which was issued for the purpose of conducting a criminal prosecution and in respect of which he has a presumption of innocence.

6.5 The High Court is desirous of ensuring the uniform application of European Union law both for the benefit of this case and another five cases in which persons remain in custody in Ireland solely on foot of European Arrest warrants issued by 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 other persons are 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 a number of other persons who have been arrested on foot on 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 have been a significant number of European Arrest Warrants received in Ireland from the Republic of Lithuania 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 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.

## **7 Proposed answers to the questions identified above**

7.1 The High Court proposes the following answers to the above questions:-

**1. Are the criteria according to which to decide whether a public prosecutor designated as an issuing judicial authority for the purposes of Art. 6(1) is a judicial authority within the autonomous meaning of that phrase in Art. 6(1) of the Framework Decision of 2002 on European Arrest Warrant and surrender proceedings between Member States that (1) the public prosecutor is independent from the executive and (2) considered in his own legal system to administer justice or participate in the administration of justice?**

7.2 There is no doubt or controversy as to the first criterion; independence from the executive. As regards the second criterion, the High Court is of the view that the determining factor is whether the prosecutor has a role in the administration of justice or participates in the administration of justice. It must be recalled that the Constitutional Court of Lithuania have reportedly stated that a prosecutor does not administer justice and that according to the Constitution of Lithuania the administration of justice is solely the functions of the courts. In that respect, an autonomous meaning of judicial authority may not depend on the designation of the prosecutor within their own legal system per se, rather it is whether the prosecutor in the role they carry out in their own legal system, is administering justice or participating in the administration of justice such that they are a judicial authority within the meaning of the Framework Decision.

**2. If not, what are the criteria according to which a national court should determine whether a public prosecutor who is designated as an issuing judicial authority for the purposes of Art. 6(1) of the Framework Decision is a judicial authority for the purposes of Art. 6(1)?**

7.3 See previous answer. The relevant criteria are those identified above.

**3. Insofar as the criteria include a requirement that the public prosecutor administer justice or participate in the administration of justice is that to be determined in accordance with the status he holds in his own legal system or in accordance with certain objective criteria? If, objective criteria what are those criteria?**

7.4 See answer to question 1. The Supreme Court in its reference in *Minister for Justice and Equality v. Lisauskas (PF)* was of the view that it was 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.

This Court, the High Court, placed reliance in its decision in *Minister for Justice and Equality v. Lisauskas (PF)* on the role of the Prosecutor General as the only authority which can organise and direct the pre-trial investigation procedure in Lithuania, and in applying the principle of mutual trust and confidence the High Court must presume (in the absence of cogent evidence to the contrary), that such a role in the pre-trial investigation procedure amounts to participation in the administration of justice such to satisfy the Court that the prosecutor is a judicial authority within the meaning of the Framework Decision. It seems to the High Court, that for the purpose of clarity it may be necessary issue to determine what is meant by the "administration of justice" or "participation in the administration of justice". Is it sufficient that an independent prosecutor plays a role within the criminal legal system as to the conduct of pre-trial investigations or otherwise, or must there be a more formal recognition within the national legal system of a judicial role of the prosecutor (other than the issuing of European arrest warrants)? To that end, must a public prosecutor, to be a judicial authority for the purposes of Art. 6(1), play a role in the issuing of domestic warrants for either arrest or search?

**4. Is the Prosecutor General of the Republic of Lithuania a judicial authority within the autonomous meaning of that phrase in Art. 6(1) of the Framework Decision of 2002 on European arrest warrant and surrender proceedings between Member States?**

7.5 In light of the application of the above criteria and on the basis of the evidence before the High Court, the High Court is of the view that the Prosecutor General of the Republic of Lithuania is a judicial authority within the autonomous meaning of that phrase in the said Article 6(1) of the Framework Decision. The High Court acknowledges that the Supreme Court, as indicated in the Supreme Court's referral in *Minister for Justice and Equality v Lisauskas (PF)*, is unclear that if the issue is not to be determined by the Prosecutor General's role within Lithuania in accordance with Lithuanian legal system, what are the criteria for determining whether such a prosecutor is a judicial authority for the purposes of Art.6(1). The Supreme Court views the underlying principles of mutual trust and mutual recognition between judicial authorities as contributing to the uncertainty.