THE HIGH COURT

Record No. 2015/266 EXT

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

TOMAS LISAUSKAS

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered this 27th day of February, 2017.

1. The surrender of the respondent is sought by the Republic of Lithuania to face trial for armed robbery pursuant to a European arrest warrant ("EAW") dated 18th April 2014. A central issue in these proceedings is whether the Prosecutor General's Office of the Republic of Lithuania, who issued the EAW, can be considered a judicial authority within the meaning of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003").

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 ("E.U.") that the Minister for Foreign Affairs has designated as having, under their national law, given effect to the Council (EC) Framework Decision of 13th June, 2002 (2002/584/JHA) on the European arrest warrant and the surrender procedures between Member States ("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 James Kirwan, member of An Garda Síochána, and the details set out in the EAW, that the respondent, Tomas Lisauskas, 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 his surrender 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, as amended, 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.

The provisions of s. 38 of the Act of 2003
7. The issuing judicial authority has indicated that this is an offence to which Article 2 para. 2 of the 2002 Framework Decision applies. This is an offence which has been indicated as "armed robbery" in the ticked box in point E.I of the European arrest warrant. He is liable to imprisonment "for a term of two up to seven years." This complies with the requirement of minimum gravity in respect of sentencing provisions. From the details provided in point (e) of the EAW, I am satisfied there is no manifest irregularity with the designation of this offence as a list offence. Therefore, the terms of s. 38 of the Act of 2003 have been satisfied.

Section 45 of the Act of 2003
8. This respondent has been sought for the purpose of prosecution. The EAW is therefore not required to state the matters required by s. 45 of the Act of 2003.

Points of Objection
9. This respondent objected to his surrender on a number of grounds. The main objection was the alleged invalidity of the EAW as it had not been issued by a judicial authority. It was also claimed that there had been no decision to charge and try the respondent in respect of the offence and that his surrender was prohibited under the terms of s. 21A of the Act of 2003. He also submitted that the prison conditions in Lithuania were such that to surrender him would amount to a violation of his right not to be subjected to inhuman and degrading conditions.

Section 21A of the Act of 2003
10. The respondent claimed that his proposed surrender would constitute a breach of s. 21A of the Act of 2003, as there had been no decision to charge and try him in respect of the offence for which his surrender is sought. The respondent did not present any evidence in relation to this matter nor did he make submissions at the hearing.

11. Section 21A(1) of the Act of 2003 prohibits 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. The Supreme Court (O'Donnell J.) in *Minister for Justice, Equality and Law Reform v. Olsson* [2011] 1 I.R. 384 (and approved in *Minister for Justice, Equality and Law Reform v. Bailey* [2012] 4 I.R. 1) stated at pp. 399-400 that *"[…] the concept of the 'decision' in s. 21A should be understood in the light of the 'intention' referred to in s. 10 of the Act of 2003 and the 'purpose' referred to in art. 1 of the Framework Decision. […] Here it is clear that the requested person is required for the purposes of conducting a criminal prosecution (in the words of the Framework Decision) and that the Kingdom of Sweden intends to bring proceedings against him, (in the words of s. 10 of the Act of 2003). Consequently it follows that the existence of any such intention is virtually coterminous with a decision to bring proceedings sufficient for the purposes of s. 21A".*

12. In the present case, the EAW states that the respondent's arrest and surrender is for the "purposes of conducting a criminal prosecution." The EAW refers to him being charged with a criminal offence. In those circumstances, and relying on Bailey, the Court

can be satisfied that a decision has been made to charge and try him with this offence.

13. 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. 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.

14. 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
15. The respondent claimed that his surrender was prohibited as surrender would violate his right to bodily integrity and freedom from inhuman and degrading treatment as guaranteed by Article 40.3.1 of the Constitution and Article 3 of the European Convention on Human Rights ("ECHR") owing to the current prison conditions in Lithuania for both remand and convicted prisoners (which inter alia create a substantial risk of inter-prisoner violence) and the conditions of police detention in Lithuania.

16. Although the respondent did not place any evidence before the Court or make submissions on this aspect of the case, he nonetheless requested that the Court rule upon this matter. The approach the Court must adopt to a claim such as this is set out by the Supreme Court in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] 3 I.R. 783. The respondent bears an evidential burden of adducing cogent evidence capable of proving that there are substantial grounds for believing that if he were returned to the issuing state, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the European Convention on Human Rights. That evidence can be supplied in a number of ways, including relevant material from international treaty bodies, courts and non-governmental organisations. The Court of Justice of the European Union ("CJEU") in *Aranyosi and Caldararu v. Generalstaatsanwaltschaft Bremen* (C-404/15 and C-659/15 PPU, Grand Chamber, 5th April 2016) has recently adopted an approach which is broadly similar.

17. This Court has already ruled on a fully argued case in respect of prison conditions in Lithuania (See *Minister for Justice and Equality v. Tagijevas* [2015] IEHC 455). The Court rejected the point of objection in that case. Nothing has been placed before the Court that requires this Court to reconsider its findings in that case.

18. In light of the foregoing, the Court rejects this point of objection of the respondent.

19. The respondent also objected to his surrender on the basis that his right to respect for his personal and family rights would be breached by his return. The respondent placed nothing before the Court in connection with his personal or family situation. This was not argued. The Court is quite satisfied that it can dismiss this objection *in limine* – there is no disproportionate interference with any of his personal or family rights.

Is the Prosecutor General a Judicial Authority within the meaning of the Act of 2003 and the 2002 Framework Decision?
20. This point of objection was also raised in two other cases concerning EAWs issued by the Office of the Prosecutor General of the Republic of Lithuania. The Court directed that these cases be heard at the same time. A further case involving a Public Prosecutor in Germany was also heard at that time. The respondent in each of the Lithuanian cases relied upon the same expert witness to ground the argument that the Prosecutor General in Lithuania cannot be considered a judicial authority within the meaning of the Act of 2003 and the 2002 Framework Decision. The respondent does not dispute that Lithuanian law grants to the Prosecutor General the right to issue a European arrest warrant; the issue is whether that is a valid designation under the terms of the 2002 Framework Decision and the Act of 2003.

21. In hearing the cases together, the Court noted that each of the counsel involved adopted the submissions of counsel in the other cases in so far as the law was involved. Each counsel then referred the Court to specific aspects of his own case. In the case of *Minister for Justice v. Firantas* (Record No. 2016/70 EXT), additional evidence was put forward to support the contention that, relying on decisions of the European Court of Human Rights ("ECtHR") concerning the nature of the authority who can make a decision regarding the liberty of the person under Article 5 of the ECHR, the Prosecutor General could not be viewed as sufficiently independent to be a judicial authority.

The evidence
22. The domestic warrant upon which this EAW is based is an arrest warrant issued by a District Court in Lithuania. The Lithuanian Prosecutor General issued the European arrest warrant.

23. The respondent relied upon the evidence of Simas Tokarcakas, who holds a Master's Degree in Law from Vilnius University, and is also a practising lawyer in Lithuania and a member of the Lithuanian Bar Association. The Court accepts that he is an expert on Lithuanian law.

24. In his first affidavit sworn on 9th June, 2016, Mr. Tokarcakas stated that the Prosecutor General, according to the laws of Lithuania, does not constitute a part of the judiciary. He said the EAW was issued exclusively by the prosecutor and none of the judiciary either approved or carried out any control or review of the issue of the European arrest warrant. He said that when a court makes an order for the arrest of a person suspected of having committed a criminal offence and the person is hiding or cannot be found, the Prosecutor General's Office, upon the receipt of the court order to arrest the person, issues a European arrest warrant. He also said that there is no court judgment in respect of this respondent's "fault" as he is only charged with a criminal offence.

25. Mr. Tokarcakas swore a second affidavit on 14th June, 2016, verifying the information contained in a supplemental report. He said that the Constitution of the Republic of Lithuania was an integral and directly applicable piece of legislation – a supreme law providing the essential mechanism of the state organisation and legislation enforcement guidelines. It regulates the three branches of government – legislative, executive and judicial. The Constitutional Court of Lithuanian interprets the norms of the Constitution and thereby creates a "living Constitution" which is considered to be an integral part of the Constitution.

26. Section IX of the Constitution is called "The Court" and this Article regulates the exclusive constitutional competence of the prosecutor. Mr. Tokarcakas stated that, at first glance, it may seem that the prosecutor is part of the judiciary, however, an in-depth analysis of the legislation and the doctrine formed in the rulings of the Constitutional Court reject such an erroneous conclusion.

27. The 'Law on the Prosecutor's Office' sets out that a Prosecutor is appointed to their post in accordance with the Law on the Prosecutor's Office. Mr. Tokarcakas concluded, upon systematic analysis of the Lithuanian regulatory legislation, that in the constitutional sense, the Prosecutor is any state official of the Republic of Lithuania appointed to the prosecutor's office and assigned the special powers of the prosecutor. Mr. Tokarcakas stated that all prosecutors have to be classified "as part of the same system of

the Prosecutor's Office which, as it has been discussed above, is independent and cannot be equated to the judicial or let alone be considered as part of the judicial."

28. The Constitutional Court has repeatedly held that the constitutional principle of the separation of powers means that the legislative, executive and judicial powers are to be separated and sufficiently independent from one another. There has to be a balance between the three branches of government. The judiciary (or the Courts as it is referred to in the Lithuanian Constitution) is one of the branches of the government provided for in the Constitution. The constitutional purpose and competence of the judiciary is to administer justice. In accordance with Article 109 para. 1 of the Lithuanian Constitution, justice in Lithuania shall only be administered by the courts.

29. 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) and this function determines the special place of the judiciary in the government system. The Constitutional Court in its rulings has repeatedly stated that no other institution or public authority other than the courts may perform this function, i.e. administer justice. Mr. Tokarcakas then deals with the Constitutional Court's case-law referring to a court's duty in criminal proceedings to be an impartial arbiter objectively evaluating the data.

30. Under Article 118, para. 1 of the Lithuanian Constitution, the pre-trial investigation is organised and directed by a prosecutor. The fundamental constitutional function of the prosecutor is to accuse. In Mr. Tokarcakas' view, "this subject of the criminal proceedings is per se biased because its main task and purpose is to prove the guilt of the suspected/accused person(s)". He says that the court's constitutional function of administering justice is fundamentally different from that of leading and controlling a pre-trial investigation, pressing charges, etc.. In administering justice, courts examine an already prepared criminal case and decide on the question of culpability of the accused and then sentence or acquit the accused.

31. He states that the Office of the Prosecutor of the Republic of Lithuania is a centralised public authority with specific authoritative powers but it does not constitute part of the executive or the judiciary. The prosecutor is a state official with a specific mandate whose function is different from the administration of justice – no one else but the prosecutor can organise and direct a pre-trial investigation. Similarly, justice may be administered by none other than the courts.

32. Mr. Tokarcakas summarised that a Prosecutor is part of an independent Prosecutor's Office. In spite of the fact that the Prosecutor's competence is enshrined in the Constitution under section IX called "the Courts", systemic analysis of the Constitution of the Republic of Lithuania and other regulatory provision rejects the hypothesis than any prosecutor of the Republic of Lithuania, including the Prosecutor General, could be identified as a judicial authority or be regarded as an element of the judiciary. He stated in light of his arguments, that the EAW issued by the Prosecutor General cannot be considered to be issued by a judicial authority.

33. By letter dated 30th June, 2016, the central authority sent a request for comments on this affidavit. The issuing judicial authority (Deputy Chief Prosecutor) replied by saying that:

> "When considering whether Prosecutor General's Office may be classified as a judicial authority, it is not sufficient to identify how prosecution service is defined and positioned in the national law system. It is necessary to assess how the term 'judicial authority' is perceived and interpreted in the context of the Framework Decision. It should be noted that the Framework Decision does not directly provide the definition of a judicial authority. Therefore, the content and the so-called internal spirits of the term may be revealed only by analysing alternative sources, such as Report of the European Union Council on implementation of the Framework Decision in Lithuania (report document No 12399/02/07REV2), implementation of the Framework Decision in other Member States and precedential case-law in analogous cases.

Furthermore, having in mind the long-standing practice of interstate cooperation between the Republic of Lithuania and Ireland in both issuing and executing European arrest warrants for the purpose of criminal prosecution, Prosecutor General's Office of the Republic of Lithuania shall not make any details comments regarding this particular question."

34. There was an initial hearing before the Court on 27th July, 2016, during the course of which this Court indicated that it would make a further s. 20 request regarding the information provided. A letter was sent by the central authority dated 3rd August, 2016, at the request of the High Court. The Public Prosecutor was asked to address the following issues:

- The Affidavit of laws of Simas Tokarcakas contends in essence that the Prosecutor General is 1) independent of the judiciary, 2) does not perform judicial functions and 3) is simply tasked with pre-trial investigation. Can you please comment on these specific assertions by reference to the Laws of Lithuania?

- The said Affidavit further outlined that "The Constitutional Court in its rulings [of specified dates] has stated that according to the Constitution a prosecutor does not administer justice". Can you please comment on these specific assertions by reference to the Laws of Lithuania and/or legal precedent to include the rulings referred to in the said Affidavit?

- Please furnish any other relevant statement of the legal position of the Prosecutor General in Lithuania as part of the Judicial System of (sic) Judicial Corps.

35. The Chief Prosecutor (Tomas Krusna), by letter dated 7th September, 2016, replied stating that the right of the Prosecutor General's Office to issue EAWs is established in the Criminal Procedure Code of the Republic of Lithuania which regulates the criminal proceedings taking place in the Republic of Lithuania and he provided an extract from the relevant code. This states that "seeking to intercept […] a person against whom criminal prosecution has been initiated in the Republic of Lithuania, from the European Union Member State, Prosecutor General's Office of the Republic of Lithuania, having received the court's order on arrest of the person in question, shall issue the European arrest warrant […]". The reply also stated that "[…] your questions have already been answered in 11 July 2016 letter […]. Thus, we shall not make any detailed commented (sic) regarding the issued raised in the statement of lawyer's assistant Simas Tokarcakas."

36. After this reply was received, the CJEU gave judgments in three separate cases concerning the meaning of "judicial decision" or "judicial authority" in the 2002 Framework Decision. Those cases - *Poltorak* (Case C-452/16 PPU, Fourth Chamber, 10th November 2016), *Kovalkovas* (Case C-477/16 PPU, Fourth Chamber, 10th November 2016) and *Ozcelik* (Case C-453/16 PPU, Fourth Chamber, 10th November 2016) - will be discussed in detail later in this judgment.

37. Arising from those decisions, the central authority wrote to the Deputy Prosecutor General in respect of the EAW issued in one of

the cases that was joined with this case (*Minister for Justice and Equality v. Veresovas*, Record No. 2016/43 EXT). The central authority asked the following: "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 was sought to ensure that the criteria for a judicial authority as determined by the CJEU in the cases of *Poltorak* and *Ozcelik* was met.

38. The same Chief Prosecutor (Tomas Krusna) as had replied in this case, replied to the letter sent in the *Veresovas* proceedings. He stated that "Prosecutor General's Office of the Republic of Lithuania is independent of the executive power as well as the Ministry of Justice. Prosecutor 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."

39. It was surprising that the central authority did not take a co-ordinated approach to seeking information in each of the cases, especially where they sought to rely upon that information in each of the cases. Ultimately, however, following legal argument and a ruling of the Court, the central authority decided to transmit a request under s. 20 of the Act of 2003, asking the issuing judicial authority to confirm if the same information was applicable in this case. The issuing judicial authority responded immediately with that confirmation. Therefore, the information obtained in the *Veresovas* proceedings applies in this particular case.

The Legal Submissions

The respondent's submissions

40. Senior counsel for this respondent submitted that the decisions of the CJEU, and of the Supreme Court and High Court in this jurisdiction, established that the issue of who can be considered a judicial authority must be assessed on a case by case basis. He referred to the decision of the Supreme Court in *Minister for Justice and Equality v. McArdle and Brunnell* [2015] IESC 56 and the decision of the High Court in *Minister for Justice and Equality v. M.V.* [2015] IEHC 524. The Irish cases established that there is a presumption that the stated issuing judicial authority is an issuing judicial authority in accordance with the 2002 Framework Decision, but that this can be rebutted by cogent evidence.

41. Counsel submitted that the recent judgments of the CJEU did not change the legal position to any real extent, save that the CJEU did not provide for the presumption that an issuing judicial authority is a valid judicial authority. He focused on the phrase "may extend" in the finding by the CJEU that the definition of judicial authority "may extend" to authorities other than courts and judges. In his submission, relying in particular on para. 39 of Poltorak, the aim of the 2002 Framework Decision surrender procedure between Member States is that it be carried out under judicial supervision. A public prosecutor who issued an EAW did not provide that automatic assurance. Senior counsel for the respondent Lisauskas, accepted, as he had to on the basis of the CJEU decisions, that "judicial authority" has a wider meaning than a court or tribunal, but submitted that some prosecutors have a wider role than mere investigation and prosecution which permitted the designation of them as "judicial authorities".

42. A significant submission on behalf of the respondent was that "judicial authority" in the 2002 Framework Decision has three different meanings depending on the context. Those contexts are a) the issue of the national warrant or decision, b) the issue of the EAW and c) the execution of the European arrest warrant. In the respondent's submission, the issue of the national arrest warrant permits the widest interpretation of "judicial authority". When considered in that light there is a rationale for distinguishing the case of Ozcelik, from the present case.

43. In the case of Ozcelik, the CJEU was dealing with an EAW issued by a District Court in Hungary. The domestic warrant on which the EAW was based was an arrest warrant of the Police Department which had been confirmed by a decision of the Public Prosecutor. Counsel distinguished Ozcelik from the present case on the basis that:

a) It related to Article 8 of the 2002 Framework Decision and the issue of the national arrest warrant;

b) The Hungarian Public Prosecutor allows an accused person to exercise his or her rights;

c) The decision relates to the information provided to the CJEU by the Hungarian authorities and the content of that information is unknown.

44. Counsel referred to the opinion of the Advocate General in the case of Ozcelik which sets out the nature of the information provided. Counsel submitted it would defeat the purpose of the 2002 Framework Decision if all Public Prosecutors were to be treated the same. Counsel also referred back to the case of Kossowski (Case C-486/16, Grand Chamber, 29th June 2016), to which the CJEU in Ozcelik had referred. He submitted that paras. 50 and 51 of Kossowski made clear that the principle of mutual trust only went so far and that information had to be provided to ensure that the Court was in a position to decide the issue for itself. This was a case by case analysis and this Court had to be sure that this respondent had been judicially protected in the decision to issue this European arrest warrant.

45. Senior counsel submitted that the level of protection provided to a wanted or accused person was progressively greater and became more intense. In his submissions, he outlined that Poltorak stated expressly that police were not entitled to issue an EAW and that Ozcelik must be understood as saying that a national police arrest warrant was also insufficient. His submission was that this meant that there had to be judicial approval of the issue of an EAW as well as the issue of a national arrest warrant. Thus, there had to be judicial scrutiny at each step. The meaning of "judicial" was context specific and an EAW required even greater scrutiny. He asked rhetorically could the Director of Public Prosecutions here in Ireland be an executing authority and stated that this showed the different level of judicial scrutiny required at each stage. His client, the respondent, was entitled to a high level of judicial protection when a decision was being made to seek an EAW as it was a matter of guaranteeing his fundamental rights.

46. Counsel submitted that the test was not simply one of independence from the executive. Part of the test is administering criminal justice and this is different to being involved in the administration of criminal justice. He referred to para. 33 of Ozcelik which referred to "authorities that administer criminal justice". He submitted that his expert witness had stated emphatically that the Prosecutor General of Lithuania was not involved in administering justice. He submitted that the response from the issuing judicial authority did not address the issues required to be addressed. He referred to the third decision of the CJEU in Kovalkovas and submitted that this decision precluded an organ of the executive from being a judicial authority.

Submissions in the cases of Veresovas and Firantas

47. As the cases were heard together and submissions cross-over, I will refer briefly to the submissions made in the other cases in so far as they differed. In Veresovas, it was emphasised that it was the information provided to the court that permitted the CJEU to

make the decision it did. Counsel submitted that the reply of the issuing judicial authority did not provide any evidence to rebut the clear evidence from their expert that the Prosecutor General of Lithuania was not involved in the administration of justice. He pointed out that their expert evidence had been forwarded prior to the decision of the CJEU which focussed on the issue of administering criminal justice. The issuing judicial authority had never responded in a direct manner to the question asked, namely "if that office is an authority in Lithuania that administers criminal justice."

48. Counsel for the respondent in Firantas had an additional focus to his objection. He specifically questioned issues of independence and in particular, issues that arise under Article 5 of the European Convention on Human Rights. For that purpose, he had asked specific questions of the expert Mr. Tokarcakas regarding the role of the Deputy Prosecutor General (who had been the representative of the issuing judicial authority) in any subsequent prosecution. The answers demonstrate that if a public prosecutor initiates or carries out any procedural step in a case, he becomes a party to the process or proceedings. It would be unlikely that the Deputy Prosecutor General would personally attend the hearings but a unit in the office would be involved.

49. Counsel submitted that the case law of the ECtHR was developing in this area. He referred to Article 5(1)(c) and Article 5(3) of the ECHR which referred to "competent legal authority" and "judge or other officer authorised by law to exercise judicial power" respectively. He referred to the *Schiesser v. Switzerland* (App. No. 7710/76, 4th December 1979), to *Huber v. Switzerland* (App. No. 12794/87, 23rd October 1990) and in particular to *Assenov and others v. Bulgaria* (App. No. 90/1997/874/1086, 28th October 1998). Counsel submitted that these cases demonstrate that there is a movement towards impartiality before an authority can be considered a judicial authority.

50. In the *Huber* case, it was decided that if the proposed officer was involved in the indicating and prosecuting of the defendant then they cannot be regarded as a judicial officer for the purpose of Article 5(3) of the European Convention on Human Rights. In *Assenov*, it was held that if it appears that the officer may later intervene in subsequent criminal proceedings on behalf of the prosecuting authority, his independence and impartiality may be open to doubt.

51. Counsel submitted that these particular issues were not raised in *Ozcelik*. He also submitted that, while these issues had been raised before the United Kingdom ("U.K.") Supreme Court in the case of *Assange v. The Swedish Prosecution Authority* [2012] UKSC 22, that case was not authoritative. There was only limited guidance to be obtained from the decision. He submitted that when issuing an EAW in the issuing state, Article 5 will come into play as soon as the person is arrested. He submitted that the Prosecutor General or any of the prosecutors cannot be impartial as they draw up the indictment. He submitted that these were diametrically opposed functions. Counsel conceded that the argument had been made in *McArdle and Brunnell* that there was an issue of impartiality.

52. A fourth case was also heard by the Court on the same dates. That case involved a Public Prosecutor in Germany who had issued the European arrest warrant. Particular issues were raised in that case about the independence of the prosecutor from the executive. The submissions raised in that case will not be addressed in this judgment.

The minister's submissions

53. In this case, counsel for the minister submitted that the CJEU had decided that a judicial authority did not have to be a court or tribunal, instead it was a body which is independent and administers justice. He took issue with the submission that there was cogent evidence, he submitted that the evidence did not deal with how judicial authority to be defined – the height of the respondent's evidence was that "according to the [Lithuanian] Constitution a prosecutor does not administer justice".

54. Counsel for the minister also submitted that by virtue of the fact that a public prosecutor issues a national arrest warrant (as in Ozcelik) or an EAW (as here), it is a judicial authority. He relied upon para. 33 of Ozcelik, applying the decision in Poltorak (concerning Article 6(1) of the 2002 Framework Decision, the issue of an EAW) to a national arrest warrant under Article 8(1)(c) of the 2002 Framework Decision, in which the CJEU held "That provision must, therefore, be interpreted as meaning that the term 'judicial decision' covers decisions of the Member State authorities that administer criminal justice, but not the police services." He refers to the Lithuanian Code of Criminal Procedure and the fact that they are involved in directing pre-trial investigations.

55. Counsel referred to the decision of the CJEU in the joined cases of Gozutok and Brugge (Cases C-187/01 and C-385/01, 11th February 2003). Those cases concerned decisions by the prosecution to discontinue criminal proceedings. The CJEU stated at para. 28 that in such procedures "*[…] the prosecution is discontinued by the decision of an authority required to play a part in the administration of criminal justice in the national legal system concerned.*" Counsel submitted that the information provided to the Court was similar to that at issue in those cases. The Prosecutor General in Lithuania was playing a part in the administration of justice.

56. In reply to counsel for the respondent's reference to the Advocate General's opinion in Poltorak, counsel referred the Court to para. 39 of that opinion and in particular that "The adjective 'judicial' brings to the noun it accompanies the connotation that that authority has to belong to the administration of justice, as opposed, in accordance with the traditional separation of powers, to the legislative and executive powers." Counsel also relied upon paras, 31-34 of the decision of the CJEU in Ozcelik.

57. Counsel relied on the role in the issuing of the EAW as indicative of the fact that the Prosecutor General was exercising the administration of criminal justice. He also submitted that the Prosecutor General could discontinue proceedings and therefore must be considered to be taking judicial decisions. He accepted that there was no specific evidence to demonstrate that, but submitted that he was relying on the reference to the fact that the Prosecutor General directs the pre-trial investigation.

Minister's submissions in Firantas and Veresovas

58. In the case of *Firantas*, counsel for the minister submitted that the concept of judicial authority under the 2002 Framework Decision is a key issue. He referred to the fact that there is a variety of authentic versions of the 2002 Framework Decision and the French word "*judiciaire*" is capable of a wide variety of meanings and he referred to the judgment of Lord Phillips in the U.K. Supreme Court decision in *Assange* at paragraph 18. He submitted that it is necessary to look at the 2002 Framework Decision from a wider prism than that of the Irish or English version.

59. He relied upon the three recent cases from the CJEU and in particular para. 32 of *Poltorak* which states that "*the term 'judicial authority' contained in Article 6(1) of the Framework Decision, requires, throughout the Union, an autonomous and uniform interpretation, which, in accordance with the settled case-law of the Court, must take into account the terms of that provision, its context and the objection of the Framework Decision* […]". The ratio of the decision is that judicial authority is not limited to designated judges or courts of a member state but may extend more broadly "*to the authorities required to participate in administering justice in the legal system concerned.*" (para. 33 *Poltorak*). He placed emphasis on the word "participating" in submitting that while it was not used in *Ozcelik*, the decision in *Ozcelik* referred back to *Poltorak*, therefore *Poltorak* is the basis for all

of the decisions.

60. He also relied on the decision in *McArdle* and the presumption which can be rebutted by cogent evidence. He submitted that this was a test by the Irish Supreme Court, not endorsed by the CJEU, but nonetheless it is a test that the respondent must meet, i.e. is there cogent evidence that the Prosecutor General was not a participant in the administration of criminal justice. Counsel submitted that even on its own there was no cogent evidence to rebut the presumption but that when one looked at the evidence provided, it certainly did not rebut it. The prosecutor had issued the European arrest warrant. Furthermore, the evidence of Mr. Tokarcakas stated that only the courts administered justice in Lithuania, but counsel submitted that was not the test, it was whether it was an authority that participates in the administration of criminal justice.

61. In relation to Article 5 of the 2002 Framework Decision, counsel submitted that to the extent that the respondent relied upon case law of the ECtHR, the decisions of the CJEU took precedence. The import of those CJEU decisions was that public prosecutors could be judicial authorities within the meaning of Article 6(1) of the 2002 Framework Decision. Furthermore, the reference to ECHR case-law on Article 5(3) of the 2002 Framework Decision is a different concern. Those are matters concerning the right to a judicial decision after arrest or detention. He relied upon Lord Dyson in Assange who stated that there was no principle of ECHR law which requires a decision to arrest be made by an impartial judge. Arrests may be ordered and effected by persons (such as police officers) who are not judges and who are not impartial.

62. In the case of the respondent *Veresovas*, counsel for the minister also referred to the case law from the Court of Justice of the European Union. She emphasised it was an "authority" required to participate in the administration of justice and the Prosecutor General was such an authority. She also referred to the decision in Kossowski which concerned Article 54 of the Convention Implementing the Schengen Agreement ("CISA"). This involved an arrest and intended prosecution in Germany of an individual in a situation where the Polish prosecutor had already made a decision not to prosecute. She relied upon para. 39 of that decision to the effect that Article 54 is applicable where "*[…] an authority responsible for administering criminal justice in the national legal system concerned, such as the Kolobrzeg District Public Prosecutor's Office, issues decisions definitively discontinuing criminal proceedings in a Member State, although such decisions are adopted with the involvement of a court and do not take the form of a judicial decision […]*".

63. She submitted that the *Ozcelik* case is the reverse situation to that at issue for the Court, but it is binding authority as to "judicial authority" and "judicial decision". She referred to para. 13 of *Ozcelik* and the description thereof of the role of the Hungarian prosecutor, namely to be independent and tasked with ensuring, during the whole of the investigative stage, that the police comply with the law and that the suspect can exercise his rights. She submitted that these are decisions that affect the proceedings and that there are parallels between the prosecutor in Hungary and the prosecutor in Lithuania. She referred to evidence in the case of Veresovas that dealt with the referral of the case to the prosecutor to complete the investigation. Even the respondent's expert in this case accepted that no one but the prosecutor can organise and direct a pre-trial investigation.

Submissions in reply
64. In reply, counsel for this respondent submitted that in relying on mutual trust and confidence, it was nonetheless necessary to justify that trust. He relied upon the CJEU decision in *Kossowski* at para. 52 where the CJEU went on to say that "*[…] mutual trust can prosper only if the second Contracting State is in a position to satisfy itself, on the basis of the documents provided by the first Contracting State, that the decision of the competent authorities of that first State does indeed constitute a final decision including a determination as to the merits of the case.*". There is no documentation here that satisfies such mutual trust.

65. In *Firantas*, counsel relied upon para. 192 of Baroness Hale's judgment in *Assange* who said that "*[…] the word judicial [is used] in a sense which is clearly only compatible with a court, tribunal, judge or magistrate who is independent of the parties. It could not include the prosecutor who is conducting the case*."

66. In the case of *Veresovas*, counsel for the respondent referred to the opinion the Advocate General in *Ozcelik* concerning the functions of the prosecutor. These were not present in these cases.

The Court's analysis on the issue of "judicial authority"

The 2002 Framework Decision and the Act of 2003
67. The process of surrender on the basis of an EAW is based upon the legislative implementation of the goals set in the recitals to the 2002 Framework Decision. Of particular relevance to this case is Recital 5, which states that "[t]he objective set for the [European] Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities." Recital 5 goes on to state that "[t]raditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions."

68. Article 1, para 1 of the 2002 Framework Decision defines the EAW as "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." Under Article 6, para. 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."

69. The Act of 2003 states that in relation to an EAW, an issuing judicial authority means "the judicial authority in the issuing state that issued the European arrest warrant concerned." Judicial authority is thereafter defined as "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 [by the High Court issuing an EAW]".

70. The Supreme Court in *McArdle* , upheld the High Court finding that the Dutch prosecutor was an issuing judicial authority within the meaning of the Act of 2003. Although the interpretation of "judicial authority" was a matter of Irish law, the Supreme Court held at para. 49 that the Act of 2003 should be interpreted "*as far as possible in the light of the wording and purpose of the Framework Decision to achieve the result which it pursues*" (thereby applying the decision of the CJEU in Criminal proceedings against Pupino (Case C-105/03) [2005] E.C.R. I-05285 on the interpretation of Framework Decisions).

71. The Supreme Court noted that the structure and composition of judicial systems in the member states of the E.U. are varied. In many E.U. countries, the public prosecutor is an integral part of the judicial structure or judicial corps. The nature of such prosecutors is related to the complete independence of such a prosecutor and the position of that function in a particular national judicial structure. The Supreme Court decided at para. 51 of *McArdle* that "*absent reasons to conclude otherwise, the public prosecutor in this case must be treated as being the judicial authority concerned for the purposes of the European arrest warrant*.".

72. In the case of *Minister for Justice and Equality v. M.V.*, the High Court, applying the principles in *McArdle*, held that the respondent had provided cogent evidence to demonstrate that the Lithuanian Ministry of Justice could not be considered an issuing judicial authority for the purposes of the Act of 2003.

73. Those decisions of the Supreme Court and High Court were delivered before the CJEU delivered its judgments in the cases of *Poltorak, Ozcelik* and *Kovalkovas*. In vital respects, the ratio of those decisions is the same as the ratio for the decisions in *McArdle* and *M.V.*. The CJEU decided that the concept of "judicial authority" is an autonomous European concept (and therefore not solely decided by the designation of the member state) and that public prosecutors may be considered "judicial authorities" for (at least) certain purposes of the 2002 Framework Decision.

74. None of the respondents sought to argue that the CJEU decisions had no relevance to the decision this Court has to make. That was for good reason; although an Irish Court must apply Irish law, the rule of conforming interpretation requires that particular regard be had to decisions of the CJEU on the interpretation of the 2002 Framework Decision. In *McArdle*, the Supreme Court took into account the wording and purpose of the 2002 Framework Decision in interpreting the phrase "judicial authority" in the Act of 2003. The Supreme Court gave the phrase an interpretation which was Europe wide in inclusivity, so that the interpretation had to encompass the civil law traditions in many of the European member states.

75. The CJEU has now given definitions of the phrases "judicial decision" and "judicial authority" in particular Articles in the 2002 Framework Decision. The CJEU has decided these are concepts which have autonomous meanings in E.U. law and in the 2002 Framework Decision in particular. The Supreme Court decision in *McArdle*, does not stand in conflict with the supremacy of that interpretation; on the contrary, the Supreme Court confirmed that "judicial authority" is to be defined using the principle of conforming interpretation. Thus, the decisions of the CJEU as to the interpretation of the concept of judicial authority and judicial decision are vital authorities for the interpretation of similar concepts in the Act of 2003. This Court will return to issues of process, such as presumptions, at a later stage in this judgment.

The decisions of the CJEU in Poltorak, Kovalkovas and Ozcelik

76. It is necessary to refer in a little detail to the three recent judgments of the CJEU in the above cases. The first judgment is that of Poltorak. This concerned an EAW which had been issued by the Swedish Police Board and the issue was whether that EAW constituted a "judicial decision" within the meaning of Article 1(1) of the 2002 Framework Decision. The CJEU confirmed that the meaning and scope of the term "judicial authority" throughout the E.U. required "*an autonomous and uniform interpretation, which in accordance with settled case-law of the Court, must take into account the terms of that provision, its context and the objective of the Framework Decision*" (para. 32).

77. At para. 33 of Poltorak, the CJEU stated with respect to the wording of Article 6(1) of the 2002 Framework Decision, "*[…] it should be noted that the words 'judicial authority' contained in that provision, are not limited to designating only the judges or courts of a Member State, but may extend, more broadly, to the authorities required* ***to participate in administering justice*** *in the legal system concerned*" (emphasis added).

78. The CJEU went onto say that "*[…] the term 'judiciary' does not cover police services. That term refers to the judiciary, which must, as the Advocate General observed in point 39 of his Opinion, be distinguished, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, from the executive. Thus, judicial authorities are traditionally construed as the authorities that administer justice, unlike, inter alia, administrative authorities or police authorities, which are within the province of the executive.*." (para. 35). At para. 38, the CJEU stated "*On the other hand, it is necessary to interpret the term 'judicial authority' in the context of the Framework Decision, as covering the Member State authorities that administer criminal justice, but not police services*.".

79. Counsel for the respondent relied upon Poltorak to advance the case that mutual recognition is founded on the premise that a judicial authority has intervened prior to the execution of the EAW for the purpose of exercising its review. This Court is satisfied that in so stating at para. 44 and 45 of its judgment, the CJEU was not altering its interpretation of judicial or "judicial authority", rather it was emphasising that a non-judicial authority such as a police service does not provide the executing judicial authority with an assurance that the EAW had undergone such judicial approval. The Court agrees with counsel for the minister that para. 39 of the opinion of the Advocate General provides a good basis for understanding just what the concepts "judicial" and "authority" actually mean. The Advocate General stated "*[w]ith regard to the interpretation of Article 6 and, firstly,* to the usual meaning of the words *'authority' and 'judicial', it should be pointed out that the former of those terms refers to an entity which exercises control in some sphere of public life, because it has been allocated powers and has the legal capacity to do so. The adjective 'judicial' brings to the noun it accompanies the connotation that the authority has to belong to the administration of justice, as opposed, in accordance with the traditional separation of powers, to the legislative and executive powers."* (emphasis in original).

80. The *Kovalkovas* case concerned an EAW which had been issued by the Lithuanian Ministry of Justice and the executing judicial authority in the Netherlands made a reference to the CJEU asking whether the designation of the Ministry of Justice was a judicial authority in conformity with E.U. law. In finding that a ministry of a member state may not be a judicial authority the CJEU held:

> "*36 In the first place, it is generally accepted that the term 'judiciary' does not cover the ministries of Member States. That term refers to the judiciary, which must, as the Advocate General observed in point 34 of his Opinion, be distinguished, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, from the executive. Thus, judicial authorities are traditionally construed as the authorities that administer justice, unlike, inter alia, ministries or other government organs, which are within the province of the executive.*
>
> *37 In the second place, the Framework Decision is founded on the principle that decisions relating to European arrest warrants are attended by all the guarantees appropriate for decisions of such a kind, inter alia those resulting from the fundamental rights and fundamental legal principles referred to in Article 1(3) of the Framework Decision. This means that not only the decision on executing European arrest warrants, but also the decision on issuing such a warrant, must be taken by a judicial authority, such that the entire surrender procedure between Member States provided for by the Framework Decision is carried out under judicial supervision (see, to that effect, judgment of 30 May 2013, F., C-168/13 PPU, EU:C:2013:358, paragraphs 39, 45 and 46).*"

81. In the final of the three cases before the CJEU, that of Ozcelik, an EAW had been issued by a Hungarian Court and was before a Dutch Court for a decision on the execution of it. The domestic Hungarian warrant upon which the EAW was based, was an arrest warrant of a police department, confirmed by a decision of the public prosecutor. The Hungarian authorities had responded to a request of the Dutch court by stating that the public prosecutor's office was independent from the executive and that it was tasked with ensuring, during the whole of the investigation stage, that the police comply with the law and that the suspect can exercise his

rights. The Hungarian authorities also stated that, as part of that task, the public prosecutor's office can amend or revoke a decision taken by the police acting as an investigating authority if it comes to the conclusion that the decision is contrary to the law or to the object of the investigation. Moreover, the Hungarian authorities indicated that the member of the public prosecutor's office who confirmed a national arrest warrant issued by the police may act as a representative of the public prosecutor's office during the relevant criminal proceedings. The issue for the CJEU was whether the national arrest warrant may be classified as a "judicial decision" within the meaning of Article 8(1)(c) of the 2002 Framework Decision.

82. The CJEU held that, where the national arrest warrant was confirmed by the public prosecutor that was the "decision" which constituted the basis for the EAW. The confirmation was the legal act by which the public prosecutor's office verified and validated the national arrest warrant. Thereafter, the question arose as to whether the decision of a public prosecutor's office is covered by the term "judicial decision" within the meaning of Article 8(1)(c) of the 2002 Framework Decision. In addressing that question, the CJEU referred back to its decision in Poltorak (referencing paras. 33 and 38) and stated that the term "judicial authority" must be interpreted as referring to the member state authorities that administer criminal justice, but excludes police services.

83. In my view, the reference back to *Poltorak* was asserting the relevance of the findings in *Poltorak* to the decision in *Ozcelik*. In those circumstances, it must have been intended by the CJEU that the reference in para. 33 of *Poltorak* to the authorities "required to participate in administering justice in the legal system concerned", applies to both Article 6(1) and Article 8(1)(c) determinations of "judicial authority" and "judicial decisions". From these decisions it is apparent that the correct test is whether the Prosecutor General of Lithuania is an authority required to participate in administering justice.

84. The CJEU went on to state in *Ozcelik* that:

> *"36 In that regard, it is apparent from the information provided to the Court by the Hungarian Government that the confirmation of the national arrest warrant by the public prosecutor's office provides the executing judicial authority with an assurance that the European arrest warrant is based on a decision that had undergone judicial approval. Such confirmation, therefore, justifies the high level of confidence between the Member States, mentioned in the previous paragraph.*
>
> *37 It follows that a decision of a public prosecutor's office, such as that at issue in the main proceedings, is covered by the term 'judicial decision', within the meaning of Article 8(1)(c) of the Framework Decision.*
>
> *38 Accordingly, in view of all the foregoing considerations, the answer to the questions asked is that Article 8(1)(c) of the Framework Decision must be interpreted as meaning that a confirmation, such as that at issue in the main proceedings, by the public prosecutor's office, of a national arrest warrant issued previously by a police service in connection with criminal proceedings constitutes a 'judicial decision', within the meaning of that provision."*

85. It is also appropriate to consider the case of *Kossowski* as this is referred by the CJEU in its decision in *Ozcelik*. At issue in *Kossowski* were Articles 54 and 55(1)(a) of the CISA and "*whether the* ne bis in idem *principle… must be interpreted as meaning that a decision of the public prosecutor terminating criminal proceedings and finally closing the investigation procedure against a person – albeit with the possibility of its being reopened or annulled, without any penalties having been imposed, may be characterised as a final decision for the purposes of those articles, when that procedure was closed without a detailed investigation having been carried out*." (para. 32 *Kossowski*)

86. Article 54 of the CISA does not permit prosecution in another Contracting State for the same acts as those in respect of which his trial has been "finally disposed of" in another Contracting State. The CJEU held that Article 54 of the CISA was applicable where an authority responsible for administering criminal justice in the national legal system concerned, such as the Polish district's public prosecutor's office, issues decisions definitely discontinuing criminal proceedings in a member state, although such decisions are adopted without the involvement of a court and do not take the form of a judicial decision. The CJEU referred to its earlier judgment in the joined cases of *Gozutok and Brugge* concerning decisions made by German and Belgium public prosecutors. In those cases, the CJEU held that the *ne bis in idem* principle applied to procedures whereby further prosecution is barred, such as procedures in which the public prosecutor in a member state discontinues, without the involvement of a court, a prosecution brought in that State once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor. In those procedures, the CJEU in *Gozutok and Brugge* observed at para. 28 that *"[…] the prosecution is discontinued by the decision of an authority required to play a part in the administration of criminal justice in the national legal system concerned*."

87. A major difference between the decisions in *Gozutok* and *Brugge* and *Kossowski* was that in the former, the procedure at issue meant that the prosecutor was definitively barred, while in the latter case, the decision to terminate a prosecution had been taken without a detailed investigation having been carried out and was not therefore a decision on the merits of the case. The principle stated above with regard to the assessment of when a decision amounts to a final disposal of a case, remained the same. However, in *Kossowski*, where there had been no detailed investigation and the case did not proceed because the accused refused to make a statement and the witnesses and victim were living in another country, it did not constitute a decision given after a determination had been made as to the merits of the case.

The Court's determination on the issue of "judicial authority"

88. From the foregoing analysis, this Court is satisfied that for the purposes of Article 6(1) of the 2002 Framework Decision (and for the purposes of s. 10 of the Act of 2003), the words "judicial authority" do not limit member states to designate only judges or courts as such authorities. The phrase may extend, more broadly, to authorities required to participate in administering justice in the legal system concerned (see Poltorak). Those authorities may not be police services and may not be a ministry which is by definition a member of the executive branch of government (see Poltorak and Kovalkovas). A decision of a public prosecutor has been accepted as being a judicial decision for the purpose of the existence of a national arrest warrant under Article 8(1)(c) of the 2002 Framework Decision (Ozcelik). This Court is satisfied that the reasoning of the CJEU in the Ozcelik case, which relied upon the decisions in Poltorak and in Kossowski, must be understood as meaning that public prosecutors may be regarded "as authorities required to participate in administering justice" and therefore as authorities which conform to an E.U. meaning of a judicial authority entitled to issue a European arrest warrant.

89. It is unnecessary for the purpose of this judgment to consider whether a public prosecutor could be an executing judicial authority as this is not an issue before this Court; such an issue cannot arise in this jurisdiction in light of the Act of 2003 which provides for the High Court to be the executing judicial authority. Furthermore, it did not arise in any of the cases that were before the Court of Justice of the European Union. It is important to acknowledge, however, that the respondent's argument that "judicial authority" may mean one thing in one context and another in another context, carries some weight as the CJEU has stated in Poltorak that its meaning within Article 6(1) of the 2002 Framework Decision must take into account the terms of that provision*, its context* and the

objective of the 2002 Framework Decision. That may provide the starting point for a successful argument that no public prosecutor can be considered an executing judicial authority should the need ever arise in another jurisdiction.

90. The Court is satisfied, however, that the respondent's argument that the context changes between Article 6(1) and Article 8(1)(c) must fail. The CJEU, in rejecting a ministry as a judicial authority entitled to issue an EAW under Article 6(1) (see *Kovalkovas*), used the same reasoning as had applied in *Poltorak* to define the nature of judicial authority that may issue such a warrant. In accepting that a national arrest warrant, which forms the basis of the judicial decision upon which the EAW is based, may be confirmed by public prosecutor, the CJEU in *Ozcelik,* also referred back to the definition provided in *Poltorak* and the cases under the CISA referred to above. Indeed, the CJEU expressly stated at para. 33 in *Ozcelik* that given the need to ensure consistency between the interpretation of the various provisions of the 2002 Framework Decision, the interpretation of judicial authority in Article 6(1) was, in principle, transposable to Article 8(1)(c) of the 2002 Framework Decision. In those circumstances, this Court is quite satisfied that the finding that a public prosecutor in issuing a national arrest warrant makes a judicial decision under Article 8(1)(c), also means that a public prosecutor is also capable of issuing an EAW under Article 6(1) of the 2002 Framework decision. As stated above, this interpretation of "judicial authority" in the 2002 Framework Decision also applies to the concept of "judicial authority" as set out in s. 1 and s. 10 of the Act of 2003.

Independence

91. Not every public body that participates in the administration of justice will be accepted as a judicial authority capable of giving judicial decisions within the meaning of E.U. law and the 2002 Framework Decision in particular. It is only those that are independent of the executive and not those who are either police services or part of the executive. In the present case, it is not contested by this respondent (see the affidavit of Mr. Tokarcakas) that the public prosecutor is independent of the executive. Indeed, if any confirmation of that fact were needed, the issuing judicial authority has given it.

92. Paragraph 13 of the *Ozcelik* decision refers to the information provided by the Hungarian authorities which indicated that the member of the public prosecutor who confirmed the national arrest warrant issued by the police may act as a representative of the public prosecutor's office during the relevant criminal proceedings. This fact did not deter the CJEU from holding that the public prosecutor gave a judicial decision within the meaning of Article 8(1)(c) of the 2002 Framework Decision. It was clear that this had been an argument in the proceedings as the Advocate General in his opinion specifically rejected a lack of compliance with the European Convention on Human Rights.

93. As Advocate General Sanchez-Bordona stated in that case, the ECtHR has interpreted the expressions "competent judicial authority" and "judge or other officer authorised by law to exercise judicial power" (both contained in Article 5 of the ECHR, dedicated to the right to liberty and security) in terms which permit them to cover the members of the Public Prosecutor's Office, if they provide the safeguards inherent to those concepts. The Advocate General specifically rejected the view that the recognition of the public prosecutor as a judicial authority was hampered by the fact that it was issued by a person who later represents the prosecution in court. The warnings of the ECtHR *in Schiesser v. Switzerland* and *Medvedyev and Others v. France* (App. No. 3394/03, Grand Chamber, 29th March 2010) are explained in the context of Article 5(1)(c) of the ECHR, that is, for situations in which the Public Prosecutor's Office offers an alternative to the court for deciding on whether the detainee shall remain in custody or be released. That type of situation was not at issue in *Ozcelik* nor indeed is it at issue here.

94. In holding that the public prosecutor was independent, the CJEU in *Ozcelik* have implicitly accepted the reasoning of the Advocate General on this issue. This type of argument has also been expressly rejected by the U.K. Supreme Court in the case of *Assange v. The Swedish Prosecution Authority*. Lord Phillips, giving the judgment of the majority, also stated that the ECtHR decisions do not apply to the stage at which a request is made by an issuing state for surrender. In his view, this was because, at that time, there was not an adversarial process between the parties and it was an appropriate step for the prosecutor to take. The reference by Baroness Hale in her dissenting decision in *Assange* does not take into account that the particular view of the requirement of *inter partes* independence of a prosecutor being accepted as a judicial authority was made in the specific context of issues arising under Article 5(1)(c) of the European Convention on Human Rights.

95. It is also of importance that the independence of the Dutch prosecutor/issuing judicial authority, who was personally involved in the investigation, was central to the argument that was made in *McArdle and Brunnell*. The decision in *Assange* was considered by the Supreme Court. Although not referring specifically to the decisions on the ECtHR, the Supreme Court rejected the argument on independence in holding that the Dutch prosecutor was an issuing judicial authority for the purpose of the Act of 2003.

96. In light of the foregoing, the Court has no hesitation in rejecting the argument that this public prosecutor may not be a judicial authority because he may have involvement in the prosecution at a later date. Public prosecutors who are independent of the executive, may be considered judicial authorities for the purpose of issuing EAWs even though they personally, or the office of which they are part, will be prosecuting the offence in court. It is independence from the executive and not independence from the prosecutorial process that must be considered in the context of Article 6 and Article 8 of the 2002 Framework Decision.

The evidential burden

97. A major contention of the respondent was that the information which had been before the Court in *Ozcelik* concerning the duties of that public prosecutor was not present in this case. It was submitted that the information contained in para. 13 of the decision (and referred to in this judgment above) demonstrating that the Hungarian prosecutor was tasked to ensure that the police comply with the law and that the suspect can exercise his rights, was an important feature leading to the decision of the CJEU. The respondent submitted that this information was not present in this case and relied on *Kossowski* to submit that such information was necessary before an executing judicial authority could accept the purported issuing judicial authority as such an authority.

98. This Court rejects the submission of the respondent that *Kossowski* requires an issuing judicial authority to put before the executing judicial authority information that will permit the executing judicial authority to decide if the purported issuing judicial authority is, in fact, a judicial authority in accordance with the provisions of the 2002 Framework Decision. The CJEU in *Kossowski* both emphasised the important of mutual trust in accepting at face value a final decision communicated to them, but also indicated that mutual trust can prosper only if the competent authorities of one state can satisfy itself on the basis of documentation provided that the decision of the competent authorities of the first State does indeed constitute a final decision including a determination as to the merits of the case. Any apparent contradiction in those two statements has to be viewed in the context of the subject matter of the proceedings.

99. The judgment in *Kossowski* concerned a prosecution decision to close an investigation. Such a decision has, by its very nature, the potential to be somewhat opaque as it can be based upon any number of reasons. It requires detailed consideration before a conclusion can be reached that the decision is really a final decision within the meaning of the Convention Implementing the Schengen Agreement. It is not insignificant that the CJEU did not require information about the entitlement of the body to make the decision in

the first member state. It was only details as to whether a final determination had been made that was required. The CJEU stated that to find that a final decision had been made where there had been no detailed assessment whatsoever of the unlawful conduct alleged, would run counter to the very purpose of Article 3(2) of the Treaty on the European Union ("TEU"), which states that the E.U. is to offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of people is ensured in conjunction with appropriate measures with regard to, amongst other matters, the prevention and combating of crime. Therefore, in those particular circumstances, it was necessary to provide the particular information concerning the decision regarding prosecution.

100. Recital 5 to the 2002 Framework Decision, which introduces the concept of the simplified system of surrender brought about by the 2002 Framework Decision, states that the objective set for the E.U. to become an area of freedom, security and justice leads to abolishing extradition between member states and replacing it by a system of surrender between judicial authorities. The CJEU specifically stated in *Ozcelik* at para. 24 that the principles of mutual trust and mutual recognition are of fundamental importance in E.U. law given that they allow an area without internal borders to be created and maintained. The CJEU held at para. 24 that "[m]ore specifically, the principle of mutual trust requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law […].".

101. In the view of this Court, to hold that a purported issuing judicial authority, in particular a public prosecutor, must provide information to an executing judicial authority so that the executing judicial authority may satisfy itself as to the correct designation of the public authority as a judicial authority, would run counter to the objective of the TEU and the 2002 Framework Decision, in particular that the E.U. becomes an area of freedom, security and justice. That is not to say that there will not be occasions where an executing judicial authority may, or indeed must, seek such information. Those occasions may arise, for example, where information contained on the face of the EAW or cogent evidence provided by the respondent gives rise to the necessity for information to be obtained as to the true role of the purported judicial authority.

102. In light of the foregoing, this Court is satisfied that the three recent decisions of the CJEU regarding judicial authorities under the EAW system, do not require issuing judicial authorities automatically to forward information as to their right to be considered such authorities. Furthermore, the decision of the Supreme Court in *McArdle* also found that the principles of mutual respect and co-operation, place a burden on a respondent when raising issues as to the nature of the judicial authority. In its judgment, the Supreme Court held that when an EAW 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, there is a presumption that the stated issuing judicial authority is a judicial authority within the meaning of the 2002 Framework Decision and the Act of 2003 which implements it.

103. The Supreme Court also referred to the possibility of cogent grounds leading the Court to conclude that the issuing authority was not a judicial authority. In the case of *Minister for Justice and Equality v. M.V.*, this Court held that such cogent grounds had been established. It is unnecessary for this Court to consider what the status of *McArdle* as a precedent would be if the CJEU had stated that it was for an issuing judicial authority to provide the proof of its own status. This is because for the reasons set out above, the Court is satisfied that the principles of mutual trust and co-operation that apply in the context of the 2002 Framework Decision require the High Court, as an executing judicial authority, to accept at face value the designation contained in the EAW of the authority issuing the EAW as an issuing judicial authority within the meaning of the 2002 Framework Decision and the Act of 2003. That designation could only be set aside on cogent grounds.

The Duties of a Prosecutor acting as a Judicial Authority

104. Counsel for this respondent, and indeed counsel for the respondents in the other cases, placed great emphasis on the information that the Hungarian authorities had provided to the Court in *Ozcelik* about the role of the prosecutor in the national legal system. In my view, that information must be seen against the background that what was at issue was a national arrest warrant that had been issued by the police and only confirmed by the public prosecutor. It was the public prosecutor's role in the confirmation of the warrant that was of particular concern to the CJEU in its decision. In para. 30 of *Ozcelik*, the CJEU stated that from the information provided by Hungary, the confirmation by the public prosecutor's office of the arrest warrant issued by the police was a legal act by which the public prosecutor's office verifies and validates that arrest warrant. It was owing to that confirmation that the public prosecutor could be regarded as responsible for the issue of the national arrest warrant. The CJEU also referred in para. 36 to the information from the Hungarian authorities in the context of the confirmation of the national arrest warrant that provides the assurance that it was a decision that had undergone judicial approval. The judicial approval was approval by the public prosecutor who could overrule the police authorities and who had to obey the law. That statement is specific to the facts of that case which had concerned a national arrest warrant issued by the police and only subsequently confirmed by the public prosecutor.

105. In light of the foregoing, the Court must approach this matter on the basis that what is required is that the Prosecutor General is independent of the executive and participates in the administration of criminal justice. The Court must assess that issue on the basis that the Lithuanian Public Prosecutor has been properly designated as an issuing judicial authority within the meaning of E.U. law. It is for the respondent to produce cogent evidence that such a designation is incorrect. In this case, the respondent relies upon an affidavit of Mr. Tokarcakas and having obtained that affidavit the minister sought further information as set out above.

Assessment of the evidence

106. The initial evidence of Mr. Tokarcakas was obtained prior to the decisions of the CJEU in respect of judicial authorities within the meaning of the 2002 Framework Decision. The respondent submitted that this adds to the cogency of his evidence. In the view of the Court however, Mr. Tokarcakas has not addressed the issue of crucial importance, which is whether the Public Prosecutor is a judicial authority within the meaning of the 2002 Framework Decision. This is not a criticism of him or of his expertise as a Lithuanian lawyer, but his concentration is on the designation within the Lithuanian legal system of the public prosecutor, rather than as a judicial authority within the meaning of the 2002 Framework Decision.

107. As has been demonstrated above, E.U. law rejects the concept that only courts or tribunals may be considered judicial authorities. The CJEU, in finding that a public prosecutor may be held to be a judicial authority, was not concerned with considering issues such as that raised by Mr. Tokarcakas, namely whether the prosecutor acting like a court "in administering justice examined an already prepared criminal case and decide[d] on the question of culpability of the accused and then sentence[d] or acquit[ted] the accused." Instead, unlike Mr. Tokarcakas, the CJEU's concern is with whether this is an authority "required to participate in administering justice in the legal system concerned."

108. 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."

109. Counsel for the respondent has complained that there is no evidence as to what such a pre-trial investigation entails and whether it encompasses protecting the rights of a suspect as in the *Ozcelik* case. I have commented on this interpretation of Ozcelik in previous paragraphs, but it is also appropriate to note that the principles of mutual trust and confidence require this Court to presume that Lithuania acts in compliance with E.U. law and in particular with the fundamental rights recognised by E.U. law (see para. 24 Ozcelik). Therefore, in presuming that the Lithuanian Prosecutor General is a judicial authority within the meaning of the 2002 Framework Decision, it must encompass a presumption that he is a public authority who participates in the administration of criminal justice in Lithuania. That means there is a presumption that his role in the pre-trial investigation procedure amounts to such participation. No evidence has been put before this Court to demonstrate that the position is otherwise. The onus was on the respondent so to do.

110. The final observation that the Court will make is that the concept of "pre-trial investigations" carried out by Public Prosecutors in civil law countries is not a concept that readily translates to the concept of pre-trial investigation as it may be understood in this jurisdiction. Indeed, in this jurisdiction, the Director of Public Prosecution's Guidelines for Prosecutors (October 2016, 4th edition, para. 2.13) clearly state "[t]he Director of Public Prosecutions has no investigative function." A formal concept such as "organiz[ing] and direct[ing] pre-trial investigation" is particular to the Lithuanian legal system. Indeed the Court has acquired familiarity with other pre-trial investigation procedures in some other civil law jurisdictions of Member States. Sometimes it appears that these pre-trial investigations are overseen by a judge, but sometimes it is the prosecutors who have control. Most of these pre-trial investigations appear to involve processes that are unknown to the common law jurisdictions, e.g. the carrying out of an examination of an accused/suspect by a prosecutor/judge. It would take cogent evidence to prove that pre-trial investigations when conducted by a prosecutor do not amount, at a minimum, to participation in the administration of justice, as they are understood in E.U. law and in the 2002 Framework Decision in particular. The evidence in this case does not attempt to address that issue.

111. Finally, the Court was urged on behalf of the minister in at least one of the cases heard on the same day, to accept that the fact that the prosecutor issued the EAW was sufficient to show he was involved in the administration of justice. If that argument was meant to convey that the principles of mutual trust and confidence require a presumption that the designation is in accordance with E.U. law and the 2002 Framework Decision in particular, then the Court accepts it. If it was meant to convey that it was sufficient to rebut all or any evidence that is presented to the contrary, the Court rejects such circular reasoning. The CJEU did not accept that the designation of a police service or a ministry was a judicial authority, similarly it is open to a Court to conclude that a prosecutor is not a judicial authority within the meaning of E.U. law. It is not appropriate to speculate on the circumstances as to when or how that might occur, simply to say that there is no such evidence here to show that the Prosecutor General is not a judicial authority within the meaning of Article 6(1) of the 2002 Framework Decision as implemented by s. 1 and s. 10 of the Act of 2003.

112. For the reasons set out above, the Court rejects this point of objection. The Court is satisfied that the Prosecutor General of Lithuania is a judicial authority for the purposes of the 2002 Framework Decision and is an issuing judicial authority for the purposes of the Act of 2003. The Court must, therefore, execute the EAW in accordance with the provisions of the Act of 2003.

Conclusion

113. 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.