THE HIGH COURT

Record No. 2018/247 EXT

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ARMANDAS KACEVICIUS

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 24th day of May, 2019

1. By these proceedings, the applicant seeks an order for the surrender of the respondent to the Republic of Lithuania pursuant to a European Arrest Warrant ("EAW") dated 15th December, 2017. The EAW was endorsed by this Court, in accordance with s. 13(2) of the European Arrest Warrant Act 2003 (as amended) ("the Act of 2003") on 30th July, 2018. It was issued by a judicial authority, namely Kaunas Regional Court, and was signed on its behalf by Judge Evaldas Gražys. I am satisfied that the EAW contains all the information required by the Act of 2013.

2. At the hearing of these proceedings on 14th May, 2019, I was satisfied that the respondent is the person in respect of whom the EAW was issued. Furthermore, the respondent did not place his identity in issue at the hearing of this application.

3. Additional information was sought by the applicant from Kaunas Regional Court by letter dated 29th June, 2018. A reply issued in the name of Kaunas Regional Court by letter dated 3rd July, 2018.

4. The respondent was arrested and brought before this Court on 6th April, 2019. Points of objection were delivered on behalf of the applicant on 1st May, 2019, grounded upon an affidavit of the respondent (although this was not sworn until 18th May). The hearing of this application took place on 14th May, 2019.

5. At para. B of the EAW, it is stated that the warrant is based on a decision of the District Court of Marijampolë region of 4th September, 2017. This was the third of three court decisions concerning the respondent. The first of these decisions was handed down by the same District Court on 14th June, 2016, at which the respondent appeared in person and at which he was sentenced to six months' imprisonment for theft offences. That sentence was suspended for a period of one year.

6. The second court order was handed down by the same court on 21st February, 2017. He was sentenced to a further six months' imprisonment, again in relation to theft offences. This sentence was combined with the earlier sentence of six months so that the respondent was given a combined sentence of imprisonment for a term of one year, which was suspended for a period of two years, subject to certain conditions that are set out in the EAW.

7. The EAW then states that the respondent failed to comply with the requirements as to the suspension of his sentence, and so on 4th September, 2017, the District Court at Marijampolë reversed the suspension of penalty and activated the sentence of one year. The EAW states that the respondent appeared in person at the trials resulting in conviction and imposition of penalty. It further states that he appealed the decision of 4th September, 2017, but that appeal was dismissed by the Kaunas Regional Court on 6th October, 2017. The respondent was not in Court on 4th September, 2017 when the suspension of sentence was revoked, but he was aware of that decision because he appealed it, albeit unsuccessfully.

8. In para. C of the EAW, it is stated that the maximum custodial sentence or detention order which may be imposed for the offences with which the EAW is concerned, is punishment by way of imprisonment for a term of up to three years. It is apparent from the foregoing therefore that the requirement as to minimum gravity for the purposes of the Act of 2003 and the Framework Decision is established.

9. The EAW relates to two offences set out at para. E of the same. In the following terms:-

> "Pursuant to the judgment of the District Court of Marijampolë region of 14 June 2016:
>
> (1) Armandas Kacevicius has committed theft acting with an accomplice, namely: on 16 September 2015, at around 10.00 p.m. in the house belonging to J. Z. at Sodu Str. 2 in Kazlu Ruda, acting together they seized from the room the red telephone belonging to R.K., valued at EUR 10, also they seized from the pocket of the jacket belonging to R.K. the black telephone NOKIA, valued at EUR 20, also from the house they seized various things belonging to J.Z. for the total value of EUR 160,5. Total damage caused to the victims during this criminal act amounted to EUR 190,5. The described acts of Armandas Kacevicius conformed the attributes of the criminal offences provided for in Art. 178 (2) of the Criminal Code of the Republic of Lithuania.
>
> Pursuant to the judgment of the District Court of Marijampolë region of 21 February 2017:
>
> (3) Armandas Kacevicius seized another's property, namely: on 30 October 2016, at around 4.00 a.m., from the homestead belonging to V.M. at Silo Str. 19, village Bagotosios, Kazlu, Ruda Municipality, he seized 26 planted thujas, valued at EUR 8 each, thereby causing property damage to V.M., valued at EUR 208.
>
> The described acts of Armandas Kacevicius conformed the attributes of the criminal offences provided for in Art. 178 (2) of the Criminal Code of the Republic of Lithuania."

10. At the hearing of this application it was agreed that the number 3 opposite the second paragraph was an error, and this should have been numbered 2.

11. However, there is what appears on the face of it to be a more substantive error in the EAW, in the reference therein to Article 178(2) of the Criminal Code for the Republic of Lithuania. In other parts of the EAW reference is made, in the context of the offences

of which the respondent was convicted, to Article 178 (1) of the Criminal code of Lithuania.

Arising out of this apparent contradiction, the applicant sought from the issuing authority the text of Article 178(2) of the Criminal Code, which was provided with the response to the request for information. The discrepancy in the EAW between Articles 178(1) and (2) forms the basis for one of the objections advanced on behalf of the respondent, and I address this below.

12. The respondent made four objections to his surrender as follows:-

> (1) It is not established that the offences of which the respondent was convicted correspond to offences in this jurisdiction, and specifically that they fail to meet the constituent elements of the offence of theft under Irish law as set out in s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001. There are two elements to this objection, which I will explain and address below as objections 1(A) and 1(B);
>
> (2) The surrender of the respondent would constitute a disproportionate interference with his right to respect for his private and family life as protected by Article 41 of the Constitution and/or Article 8 of the European Convention on Human Rights, having regard to the nature of the offences, the length of the custodial sentence and the personal and family connections of the respondent in the State;
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> (3) The EAW is ambiguous and unclear. In particular:-
>
> > (i) The EAW refers to two different offences, one pursuant to Article 178(1) of the Criminal Code of the Republic of Lithuania and the other referring to Article 178(2) of that Code. Accordingly, the precise offence to which the EAW relates is unclear.
> >
> > (ii) The EAW is unclear about the domestic court order which it purports to be based on and which is said to be enforceable as against the respondent. In particular, it is unclear if it is intended to enforce the order of Marijampolë region of 4th September, 2017, or the order of the appellate court made on 6th October, 2017.
> >
> > (iii) The warrant does not specify the nature of the breaches that lead to the respondent's suspended sentence being revoked.
>
> (4) If surrendered, the respondent would be exposed to prison conditions and/or the risk of violence from other prisoners such as would breach his right to freedom from inhumane or degrading treatment under Article 40.3.1 of the Constitution and/or Article 3 of the European Convention on Human Rights.

I turn now to address each of these objections in the order appearing above.

Objection No. 1(A): Lack of Correspondence

13. The applicant submits that the offences of which the respondent was convicted correspond to the offence of theft provided for in s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 (the "Act of 2001"), which provides as follows:-

> "(1) Subject to section 5, a person is guilty of theft if he or she dishonestly appropriates property without the consent of its owner and with the intention of depriving its owner of it."

14. Counsel for the respondent submitted that in circumstances where a combined sentence has been imposed for two offences, it is necessary for the applicant to establish correspondence in relation to both offences, and in this regard, the respondent relied upon the decision of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Ferenca* [2008] 4 I.R. 480. In that case, there were three offences in respect of which the respondent had been sentenced to a combined sentence of two years and nine months. The Court concluded that surrender was not possible in respect of the first offence, and then went on to consider whether or not it remained possible to surrender the respondent in respect of the second and third offences. However, Murray C.J. stated, as p. 499:-

> "There is obviously no basis on which this Court can apportion part of the sentence of two years and nine months among the three offences so that he could be surrendered for the purpose of serving the amount of the sentence which related to the second and third offence.
>
> Since that cannot be done, and he cannot be surrendered to serve any sentence in respect of the first offence, the request for his surrender must be refused."

15. It was submitted on behalf of the respondent in this case that there are four elements to the offence of theft as set out in s. 4(1) of the Act of 2001, having regard to the definitions in the interpretation section of that Act:-

> (1) There must be an appropriation of property belonging to another. The word 'appropriate' is defined in s. 4(5), in relation to property, as meaning usurps or adversely interferes with the proprietary rights of the owner of the property;
>
> (2) The appropriation must be done dishonestly. 'Dishonestly' is defined in s. 2(1) as meaning without a claim of right made in good faith;
>
> (3) The appropriation must be without the consent of the owner, and there is no offence if the respondent believed he had the consent of the owner.
>
> (4) The appropriation must be with the intention of depriving the owner of the property concerned, whether temporarily or permanently.

16. Counsel for the respondent relied on a number of authorities in support of the argument that all not all of these ingredients were present in relation to either of the offences, the subject of the EAW. In particular, he relied upon the authorities of *Minister for Justice v. Dunkova* [2008] IEHC 156, and *Minister for Justice v. Wroblewski* [2008] IEHC 263.

17. In *Dunkova*, the facts as described in the warrant were as follows:-

> "On February 1995, circa 22.30 o'clock at the flat of the aggrieved Jiri Rimovsky, born on 23rd August 1923 at [address] (after the aggrieved fell asleep) she took away from his flat the financial mount of 2,590 - CZK (cash) [and other property as set forth] whereby she brought about to the aggrieved Jiri Rimovsky damage amounting to 12,799,-CZK."

18. In that case it was also submitted that there was nothing contained in the facts as set out above that alleged either that the respondent "dishonestly appropriated" the goods without the consent of the owner, or with the intention of depriving either temporarily or permanently of the property. Accordingly, it was submitted in that case that the facts as disclosed would not, even if proven, cause an offence to be committed in this State. At p. 14 of his judgment, Peart J. held:-

> "I am of the view that for the offence alleged in the warrant to correspond to the offence here under s. 4 of the 2001 Act, this Court would have to read into the facts words which are absent from the certified translation of the warrant provided. The Court cannot do that. I imagine that the Czech prosecutor intends to prove that the goods in question were stolen in the broad sense of that word and that the respondent took the goods without the consent of the owner with the intention of depriving the owner thereof. But that is not contained in the warrant, and it is an essential ingredient of the Irish offence that such be alleged. It may well be that the difficulty which is encountered in this regard with this warrant is something which has occurred through the translation of the warrant, though even that is unclear. But it cannot be appropriate for this Court to read other words into this warrant for the purpose of being satisfied as to correspondence. I am satisfied, as Fennelly J. was in the Dyer case, that the description of the charge in the warrant is not sufficient to demonstrate correspondence with the Irish offence with which it is said to correspond."

19. In the *Wroblewski* case, the Court was concerned with the following offences at pp. 5-6:-

> "in the period from September 2004 to November 2004 ……, acting jointly in accord with other persons.....took for the purpose of unlawful taking a pipe from heavy walled steel .... of the value of 1000 zloty to the detriment of the Manufacturing and Trading Company Gromatex…
>
> …
>
> in April 2001 at the water region Otok in Pakosc - Mielna acting jointly and in accord with ...., took with intent of unlawful taking 7 pieces of fishing nets 'wanton' type and a net for fish 'luzgan' type of the total value of 890 Pln to the detriment of Fishing Farm in Kysinino."

20. In relation to the facts as stated in the warrant in this case, Peart J. held at p.8:-

> "There are no facts stated in the warrant which suffice to meet the requirements for the s. 4 offence. It may well be that under Polish law the offence is committed in the bare circumstances which appear in the warrant. Alternatively it may simply be that the issuing judicial authority simply did not consider it necessary to include in the warrant more detail that it has done. But when an issuing state is preparing a European arrest warrant for execution in another state, and where under the law of that state correspondence/double criminality must be established, it is essential that the all available relevant facts relating to the offences in question be set forth to enable the judicial authority in the requested state to perform its task… It is not simply a question of repeating in the European arrest warrant the statement of the offence from whatever document constitutes the domestic warrant, charge sheet or indictment, as fewer facts may be necessary for stating those facts for the purpose of the domestic offence than are needed here for correspondence. This matter has been adverted to by Fennelly J. in his judgment in the Supreme Court in *The Attorney General v. Dyer* [2004] 1 IR. 40, and I had reason to quote from that judgment in my own judgment in *Minister for Justice, Equality and Law Reform v. Dunkova …*
>
> This conclusion means that on the facts as currently set forth in the warrant this Court is not in a position to conclude that there is correspondence in respect of these theft offences."

21. The respondent also relies upon the decisions of the High Court (*The Minister for Justice, Equality and Law Reform v. Nowakowski* [2008] IEHC 439) and the subsequent decision of Supreme Court in the same case (Murray J.) (Unreported, *Ex Tempore*, Supreme Court, 12th October, 2011), respectively. In that case, the respondent was charged with eight offences. Seven of the charges alleged that the appellant took certain property in order to appropriate that property to the detriment of another. Peart J took the view that the phrase "taking with a view to appropriate" was sufficient to meet the requirement that the respondent in that case had usurped or adversely interfered with the proprietary rights of the owner of the property, and that this occurred in the absence of the consent of the owner. Further, he stated that the use of the phrase "to the detriment" in all the offences was sufficient to indicate an intention to deprive the owner of the goods in question. Peart J. stated that "To find the contrary would be absurd in my view".

22. The Supreme Court agreed with Peart J., but as it transpired there was one offence in which the wording of the charge was not set out in identical terms to the others. In that offence, it was stated simply that the respondent "took" a mobile phone – the words "in order to appropriate" were omitted. In the case of that offence, Murray J. considered that the omission of these words was a critical difference stating at p. 4:-

> "The distinction that is made, and properly made between this offence and the other offences is that it is simply a statement that somebody took a mobile phone from somebody's backpack albeit to the detriment of the owner. It does not contain the phrase 'took in order to appropriate' which has been pointed out may be interpreted as appropriating for one's own use and denotes an element of dishonesty. In this instance there is a mere statement of taking and, unlike every other offence in that group of offences, does not allege that it was taken in order to appropriate…
>
> To allege merely that a person has taken someone else's property is, in law, a rather neutral statement and is not in itself sufficient to constitute the offence of theft in s. 4 of the Theft Act 2001. The mere taking of an object has never been suggested as in itself an offence of theft within the meaning of the Theft Act. Something more is required. To add that the taking was to the detriment of the owner without more does not cure this lacuna in the Court's view, since detriment may take many forms such as even mere inconvenience or in any event a form which would not necessarily involve dishonesty which is an essential element in the offence of theft as contained in the act of 2001."

23. Accordingly, the Court concluded that in relation to this offence correspondence with the offence of theft pursuant to s. 4 of the Act of 2001 was not established.

24. In response to this argument, counsel for the State argued that it is clear from the facts set out in the EAW that specific

financial loss was occasioned to the owners of the various items of property. Accordingly, this is more than a statement of detriment; particulars of actual loss are provided. Furthermore, the intention of depriving the owner of property may be inferred from this loss. And the fact that it was taken without the consent of the owner is established by the use of the word "seized".

Decision on Objection No. 1(A)
25. At the outset in the consideration of this issue, I think it is important to bear in mind that the Court was not concerned with the manner in which a particular charge is framed against a respondent in his/her home country. Rather, the Court is concerned to establish that the facts as set out in the warrant would, if proven, amount to an offence in this jurisdiction. This is clear from s. 5 of the Act of 2003 which provides:-

> "For the purposes of this Act, an offence specified in a European arrest warrant corresponds to an offence under the law of the State, where the act or omission that constitutes the offence so specified would, if committed in the State on the date in which the European arrest warrant is issued, constitute an offence under the law of the State."

26. This interpretation of the Act of 2003 was endorsed by the Supreme Court in the case *Minister for Justice Equality and Law Reform v. Dolny* [2009] IESC 48, wherein Denham J. stated at para. 14:-

> "In addressing the issue of correspondence it is necessary to consider the particulars on the warrant, the acts, to decide if they would constitute an offence in the State. In considering the issue it is appropriate to read the warrant as a whole. In so reading the particulars it is a question of determining whether there is a corresponding offence. It is a question of determining if the acts alleged were such that if committed in this jurisdiction they would constitute an offence. It is not a helpful analogy to consider whether the words would equate with the terms of an indictment in this jurisdiction. Rather it is a matter of considering the acts described and deciding whether they would constitute an offence if committed in this jurisdiction."

27. It follows that it is not necessary for an issuing judicial authority to present the facts in the same way that they might appear on a summons or charge sheet. What matters is that the facts presented on the warrant would, if proven, constitute an offence in this jurisdiction. That said, the words used in describing the acts concerned are obviously of importance when the court has to consider whether or not those acts constitute an offence in this jurisdiction.

28. Perhaps unsurprisingly, the precise formulation of words used in this case have not fallen for a consideration here previously, or at least in any of the cases referred to me. There is, in my view at least one feature to the manner in which the acts are described that distinguish them from the manner in which the acts are described in the other cases to which I have referred above, and that is the use of the word "seized". The use of this word suggests the use of force. While there is nothing to indicate that actual force was used in the instances concerned in this case, it is not unreasonable to infer from the use of this word that in each case the goods in question were taken without the consent of the owner. Furthermore, the use of the word "seized" is consistent with and indicative of the usurpation of proprietary rights of another. In considering the significance of the word "seized", I am also having regard to the definition of "depriving" set out in the Act of 2001 in which it is stated to mean "temporarily or permanently depriving". When a person seizes the good of another, that person at least temporarily deprives the other of the goods concerned.

29. The EAW then proceeds to state, in each case, that the seizure of the goods caused a specific financial loss to the victim or owner of the property. Taken together with the use of the word "seized", the statement that specific financial damage was caused to "victims" makes it clear that all of this was done "dishonestly" within the meaning of that word as defined in s. 2(1) of the Act of 2001, and, moreover, that the victim was permanently deprived of the goods. All of this is in the context that the respondent was charged with the offence of theft under Lithuanian law. For all of these reasons, and viewing the warrant as a whole, I am satisfied that objection No. 1(A) should be rejected.

Objection No. 1(B)

30. A second objection was made as regards correspondence, in relation to the second offence of which the respondent was convicted on 21st February, 2017. It is submitted that this offence may not correspond to an offence in this jurisdiction by reason of the exception provided in the Act of 2001, at s.5(2). This section provides that:-

> "a person cannot steal land, or things forming part of land and severed from it under his or her directions, except where the person—
>
> (a) [not relevant]
>
> (b) not being in possession of the land, appropriates anything forming part of the land by severing it or causing it to be severed, or after it has been severed …"

31. It is submitted that it is not clear from the EAW, whether or not the respondent might have any connection with the land such as to avail him of a defence provided for by s. 5(2)(b) of the Act of 2001. Further information was sought by the applicant from the issuing judicial authority in relation to this offence, but that further information is of little assistance insofar as it simply repeats the description of the offence as set out in the EAW.

32. However, in the description of this offence, it is clearly stated that the respondent "seized *another's* [my emphasis] property… from the homestead belonging to V.M. …he seized 26 planted thujas valued at EUR 8 each, thereby causing property damage to V.M., valued at EUR 208".

33. It could hardly be more clear that the plants or shrubs in question belonged to V.M. and were planted at his homestead. It seems inconceivable that the respondent could have been in possession of the homestead of V.M., and it seems certain that he must have severed the shrubbery, since it is stated to have been planted.

34. It follows from all of the above that the applicant has established correspondence between the offences committed by the respondent in Lithuania, and s. 4(1) of the Act of 2001. Accordingly, I reject the arguments advanced in pursuant to s. 5(1)(b) of the Act of 2001.

Objection No. 2: Interference with Private and Family Life
35. The respondent deposes that he has lived in Ireland since in or about February, 2018 and considers this State to be his home. He lives with his wife, to whom he has been married for three years in Mullingar. They have two young children, one aged two years old

and the other aged one year old. His wife is currently five months pregnant and is expected to give birth in September, 2019. His mother and two sisters have lived in Mullingar for a significant period of time.

36. It is submitted that the offences of which the respondent was convicted are at the lower end of the scale, and that the penalty imposed on him in respect of these offences is not such as to give rise as to a very weighty public interest in his surrender. As against that, his surrender will give rise to extensive interference in his private and family life which, it is submitted is disproportionate in the circumstances, such as to constitute a violation of his rights under Article 8 of the European Convention on Human Rights, which is prohibited pursuant to s. 37(1)(a)(i) of the Act of 2003.

37. The respondent acknowledges that it is only in rare cases that surrender will be refused on this basis. The respondent fairly draws attention to the judgment of O'Donnell J. in the Supreme Court in *Minister for Justice and Equality v. J.A.T. (No. 2)* [2016] IESC 17, in which he said, inter alia, at para. 11:-

> "[11] …it would not, in my view, be necessary to carry out any elaborate factual analysis or weighing of matters unless it is clear that the facts come at least close to a case which can be said to be truly exceptional in its features. Even in such cases, which must be rare, it is important that the considerations raised are scrutinised rigorously."

38. In the same judgment, O'Donnell J. noted that it is an inevitable consequence of imprisonment and, in extradition cases, surrender, that there will be an interference with family life. There is nothing out of the ordinary about the respondent's circumstances such as to elevate his rights under Article 8 of the Convention, over and above the public interest in his surrender, the public interest in which extends way beyond the respondent himself and is more broadly concerned with the need to ensure that, as much as possible, persons residing in one State who are accused of or convicted of offences in another State are surrendered to that other State for the purposes of facing trial or serving sentence. While I agree with the submissions of counsel for the respondent that the offences of which he has been convicted are at the lower end of the scale as is the sentence imposed upon him, that is not in itself sufficient to displace the public interest in his surrender, because the consequences of his surrender are no greater than the inevitable consequences that will flow from the same in very many cases, or, for that matter imprisonment in this or any other jurisdiction.

Objection No. 3: Lack of Clarity in the EAW

39. It is submitted on behalf of the respondent that the EAW in this case is ambiguous and lacks sufficient clarity and detail in respect of three essential matters which are required to be stated in accordance with s. 11(1A) of the Act of 2003. In section E of the warrant, where the acts describing the offences are set out, it is stated, in relation to each offence that:-

> "The described acts of Armandas Kacevicius conformed the attributes of the criminal offences provided for in Art. 178(2) of the Criminal Code of the Republic of Lithuania."

40. However, just two paragraphs down from the description of the second offence, the full text of Article 178(1) of the Criminal Code is set out as follows:-

> "Article 178 of the Criminal Code of the Republic of Lithuania. Theft. Par. 1. A person who seizes another's property shall be punished by community service or by a fine or by restriction of liberty or by imprisonment for a term of up to three years."

41. This paragraph is repeated at the end of section E of the EAW where the form requires a full description of the offences to be set out.

42. There was a further reference to Article 178(1) of the Criminal Code at section C.1 of the EAW where there is a requirement to state the maximum length of the custodial sentence which may be imposed for the offence. So, therefore, there are three references to Article 178(1) of the Criminal Code, but where the acts constituting the offences are set out, there is a reference to Article 178(2) of the Criminal Code.

43. In the Lithuanian language version, it is clear that the reference throughout that document is to Article 178(1) of the Criminal Code, and there is no confusion. Moreover. in the request for additional information, the applicant requested the text of Article 178(2) of the Criminal Code. The text of the same was provided in the reply given by the issuing judicial authority as follows:-

> "Article 178 of the Criminal Code of the Republic of Lithuania. Theft. Par. 2. A person who seizes another's property in an open manner or seizes another's property by breaking into premises, a communications cable system, a storage facility or a guarded territory or seizes another's property publicly from a person's clothes, handbag or other carried item (pickpocketing) or a vehicle or seizes property comprising infrastructure or a part thereof of legal entities having an important significance on national security shall be punished by a fine or by arrest or by restriction of liberty or by imprisonment for a term of up to six years."

44. A comparison between Article 178(1) and Article 178(2) reinforces the view that the reference to Article 178(2) in the EAW is a typographical error for two reasons. Firstly, the nature of the theft described in Article 178(2) is somewhat different to the actions of the respondent that gave rise to his conviction, although there is arguably an overlap insofar as the first sentence of Article 178(2) could well encapsulate the actions of the respondent as regards both offences. Secondly and more significantly, the term of imprisonment is stated to be for a term of up to six years, whereas in the EAW, the term of imprisonment applicable to the offences in this case is stated to be a term of up to three years, which is the sentence applicable to an offence under Article 178(1) of the Criminal Code.

45. For all of these reasons, therefore, I am satisfied that the reference to Article 178(2) in the EAW is in the nature of a typographical error which has no bearing upon the substantive merits of this application.

46. It is further submitted that there is a lack of clarity in the EAW as regards the judicial decision upon which it is based. It is argued that it is unclear whether it is based upon the decision of the District Court of Marijampolë of 4th September, 2017, or the decision of the appellate court of 6th October, 2017. I do not accept that this gives rise to any ambiguity. The respondent's appeal was unsuccessful, leaving the decision of the District Court of 4th September, 2017, intact and the EAW correctly states that that is the decision on which the EAW is based.

47. The final argument made on behalf of the respondent under this heading is that the EAW fails to establish clearly that a sentence is immediately enforceable against the respondent. This argument is based on the activation of the suspended sentence. It is submitted that since there is no detail contained as to the conditions which are said to have been breached, or the violations of law

which are said to have been committed by the respondent to give rise to the activation of the sentence, it is unclear that the sentence, which had been suspended is immediately enforceable.

48. It is unnecessary for an issuing judicial authority to set out the background or reasons as to why a suspended sentence has been activated. The executing authority needs to be satisfied only that there has been a conviction and a sentence which has not been served. Obviously, for as long as a sentence is suspended, it is not required to be served, and it could not give rise to the issue of an EAW, but once the suspension is revoked the convicted person is then required to serve the sentence, and the executing authority is not obliged to undertake an investigation into the circumstances in which the sentence was activated. If a convicted person wishes to challenge the circumstances in which a suspended sentence has become activated, that is a challenge that must be brought in the jurisdiction of the issuing State.

Objection No. 4: Breach of Article 3 ECHR Rights/Rights under Article 40.3.1 of the Constitution

49. In his affidavit, the respondent avers that he spent approximately three years in custody in prisons in Lithuania between 2012 and 2015, and that during that time, he was subjected to prison conditions involving inhumane or degrading treatment. He says that for approximately the first seven months of his sentence, he was detained at Lukiðkës Prison in Vilnius. He says that he was detained in severely overcrowded cells, measuring eight metres squared, which he was obliged to share with five or six other prisoners at a time. He was subjected to 23 hour lockup and only got out of the cell for approximately one hour a day. He says that there was inadequate lighting and ventilation in the cell, and the material conditions in the prison as a whole were extremely sub-par. Prisons were provided with very limited amounts of clothes and low-quality food.

50. He says that he was subsequently transferred to a prison in Kaunas. He says that here he was again subjected to extreme overcrowding and very poor material conditions within the prison. He expresses the fear that if surrendered to Lithuania, he would again be exposed to similar prison conditions as those described above. He goes on to describe how he was attacked on three separate occasions by other prisoners during his time in custody in Lithuania. He says that he sustained severe personal injuries, and was knocked out during one assault and suffered a serious concussion. He says that he is aware that a number of these prisoners and their associates are still detained in Lithuanian prisons, and that as a result, he remains very much at risk to violence if surrendered. Even if he is placed on a protection regime, he fears that this will not be adequate protection against violence at the hands of other prisoners.

51. In support of his claim that surrender to Lithuania would result in violation of his Article 3 rights, the applicant relies upon the report to the Lithuanian government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT"), relating to the period of 5th - 15th September, 2016, and dated 1st February, 2018.

52. The following extracts from this report are of interest in the context of the objection raised by the respondent:-

(i) At para. 35 of the report it is stated:-

> "From the outset, the CPT wishes to acknowledge the efforts of the Lithuanian authorities to reduce prison population. At the time of the visit, the prison population stood at 7,004 (compared to 9,754 at the time of the 2012 visit)."

(ii) In the section dealing with ill treatment in prisons, it is noted that there were no allegations of physical ill treatment by staff at Kaunas, Lukiðkës and Panevezys Prisons. However, the delegation received a number of allegations of deliberate physical ill treatment and excessive use of force by prison staff at Alytus and Marijampolë Prisons. These complaints were, to an extent, at least, supported by medical evidence gathered at those prisons. There were also allegations that at Marijampolë, custodial staff provoked conflicts and then beat prisoners. It is stated that:-

> "The delegation was again struck by the extent of inter-prisoner violence at Alytus and Marijampolë Prisons and gained the impression that, regrettably, the situation in this respect had become even worse as compared with previous CPT visits to these establishments…. At Alytus Prison, the delegation also received a few accounts of prisoners being sexually exploited; reportedly, staff were aware of the situation and did nothing to stop it. If true, this is extremely alarming.
>
> The above-mentioned situation led to a large number of inmates (approximately 50 at Marijampolë Prison and 120 at Alytus Prison) refusing to be accommodated in the sections they considered as dangerous and choosing placement in a disciplinary isolation unit instead. The delegation was also very concerned to note that prisoners at Alytus Prison perceived self-injuring as one of the most effective ways to attract the attention of the prison's management to their problems."

53. Further on in the report, it is noted that the entire premises of Marijampolë Prison were decrepit, rundown and in a poor stated of cleanliness. The vast majority of prisoners were accommodated in very cramped conditions in large capacity dormitories, which inevitably meant a lack of privacy.

54. On the positive side, it is noted that at Kaunas Prison, conditions for all inmates were generally acceptable as regard the state of cleanliness, access to natural light, artificial lighting and ventilation, although some cells were overcrowded. At Lukiðkës Prison, it was noted that material conditions were, in general, better than during the 2012 visit due to continuous efforts of the management to renovate parts of the prison, although a number of renovated cells were still dilapidated, humid and lacking adequate ventilation.

55. I was also provided with a report of the Human Rights Committee of the United Nations, dated 29th August, 2018. In this report, in the section dealing with persons deprived of liberty and detention conditions, it is stated that the committee: "remains concerned about multiple reports of overcrowding and poor living conditions in places of deprivation of liberty, in particular with respect to substandard hygiene, poor nutrition, poor health services, limited time outside cells and substandard accommodation. The committee is also concerned about allegations of ill treatment and excessive use of force in certain facilities, including police detention centres, prisons and psychiatric institutions …."

56. In her decision in the case of *Minister for Justice and Equality v. Tagijevas* [2015] IEHC 455, Donnelly J. summarised the principles to be applied when surrender is opposed on the grounds of a breach of Article 3 of the ECHR, as follows:-

> "14. There was little dispute on the major principles of law applicable in this case. Under the provisions of section 37(1)(c)(iii)(II) of the Act of 2003, a person shall not be surrendered if there are reasonable grounds for believing that 'he or she would be tortured or subjected to other inhuman or degrading treatment.' That is treatment prohibited in absolute terms by Article 3 of the ECHR. The courts must proceed on an assumption that the issuing member state will respect human rights and fundamental freedoms. That assumption is capable of being rebutted. The Supreme Court in *Minister for*

Justice, Equality and Law Reform v. Rettinger [2010] IESC 45 set out the applicable legal principles when considering a claim of apprehended prohibited treatment. For surrender to be prohibited, it is not necessary to establish that there will be a probability of ill-treatment, a real risk is sufficient. A mere possibility of ill-treatment is insufficient. There is an evidential burden on a respondent to adduce cogent evidence of proving that there are substantial grounds for believing that he or she would be exposed to a real risk of being subjected to treatment prohibited by Article 3 ECHR.

15. The court may attach importance to reports of independent human rights organisations and to governmental sources. It is open to an issuing state to dispel doubts raised by evidence but that does not mean that the burden has shifted. By the nature of the test, the court is required to be forward-looking in its approach. The court engages in a rigorous examination of the information placed before it."

57. In this case, the information placed before the Court comprises the affidavit of the respondent himself in which he sets out particulars of ill-treatment he allegedly suffered previously while incarcerated in Lithuania. He says that he spent three years in custody, the first seven months of which he spent in Lukiðkës Prison, where the said prison conditions were unbearable.

58. He then relates how he was transferred to a prison in Kaunas and while he could not recall the name of the prison, he thought it might have been the Kaunas Juvenile Remand Prison. Again, he complains about extreme overcrowding and very poor material conditions.

59. He relates how he was attacked while in prison but he does not say where this attack took place and nor does he name the assailants who he says are still detained in Lithuanian prisons and who he fears would pose a risk to him if he is surrender to custody in Lithuania.

60. According to his affidavit, the respondent was in prison in Lithuania between 2012 and 2015. In the CPT report of 2014, it is recorded that Lukiðkës Prison had an official capacity of 954 places, but was holding 1,068 inmates. In the CPT report of 2018, which was prepared pursuant to an inspection that took place in September, 2016, the official capacity remains at 954, but at the time of the visit, the prison was accommodating 651 inmates. This is a very significant improvement and the same report, as noted above, states that material conditions in this prison were, in general, better than during the 2012 visit.

61. It is also apparent from the extract noted above that conditions at Kaunas Prison are generally acceptable. It is unclear if this is the same prison where the respondent was previously detained.

62. It is apparent from the reports considered that while prison conditions in Lithuania are far from ideal, efforts are being made to improve prison conditions in that country, with some success. In particular, it appears from the reports presented to the Court that conditions in the very prisons about which the respondent has expressed concern have improved since his time in prison in Lithuania. That said, the Court must be very concerned about the management of and conditions at Alytus and Marijampolë Prisons. Based on the information made available to the Court, it seems that there is indeed a very real risk that a person incarcerated in either of those prisons will be subjected to inhuman or degrading treatment. Accordingly, while I have otherwise been satisfied to make an order for the surrender of the respondent, I am not prepared to do so unless the Lithuanian authorities can address to my satisfaction the concerns raised by the CPT about the conditions in and management of Alytus and Marijampolë Prisons or alternatively, confirm that the respondent will not be required to serve his sentence in either of those prisons. I will adjourn the matter to allow the applicant to liaise with the issuing judicial authority in this regard. Further, if the respondent wishes to name those who he claims assaulted him previously, I will consider seeking assurances that he will not be incarcerated in the same facility as those individuals.