THE HIGH COURT

Record No. 2016/75 EXT

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

VYTAUTAS DUNAUSKIS

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered this 20th day of March, 2017.

1. The surrender of the respondent is sought by the Federal Republic of Germany to face trial for murder pursuant to a European Arrest Warrant ("EAW") dated 13th May 2016. A central issue in these proceedings is whether the Public Prosecutor, who issued this warrant, can be considered a judicial authority within the meaning of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"). The respondent also objected to his surrender on the basis that it is prohibited by s.21A of the Act of 2003 as no decision had been made to charge and try him with the offence. Other points of objection were also raised by the respondent to his surrender.

Uncontroversial Issues

A Member State that has given effect to the Framework Decision
2. The surrender provisions of the Act of 2003 apply to those Member States of the European Union that the Minister for Foreign Affairs has designated as having, under their national law, given effect to the Council (EC) Framework Decision of 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. 6) Order 2004 (S.I. No. 532 of 2004), the Minister for Foreign Affairs has designated Germany as a Member State for the purposes of the Act of 2003.

Identity
3. I am satisfied on the basis of the affidavit Seán Fallon, a member of An Garda Síochána, the affidavit of the respondent, and the details set out in the EAW, that the respondent, Vytautas Dunauskis, 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 the respondent's 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 murder in the ticked box in point E.I of the European arrest warrant. He is liable to a sentence of life imprisonment. This exceeds the minimum gravity requirement in respect of length of sentence. 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 and the respondent's surrender is not prohibited thereunder.

Section 45 of the Act of 2003
8. This respondent has been sought for the purpose of prosecution. The EAW is not required to state the matters required by s. 45 of the Act of 2003 as the respondent is not sought for the purpose of executing a custodial sentence or order of detention.

Points of Objection

Section 21A of the Act of 2003
9. The respondent claimed that his surrender was prohibited by s. 21A of the Act of 2003 in that there was no decision to place him on trial. Section 21A of the Act requires the High Court to refuse to surrender a person, if the High Court is satisfied that a decision has not been made to charge the person with, and try him or her for, the offence for which he or she is sought in the issuing state. Section 21A (2) of the Act of 2003 states that:-

> "[…] it shall be presumed that a decision has been made to charge the person with, and try him or her for, that offence in the issuing state, unless the contrary is proved."

10. Unusually, the issuing judicial authority sent with the EAW, a document headed "confirmation undertaking". This document was dated the same day as the EAW had issued, namely 13th May, 2016. The document stated as follows:-

> "The responsible representative of the Public Prosecutor's Office, Public Prosecutor Ms. Sondag, who also issued the enclosed European Arrest Warrant dated 13th May, 2016 – file number: 703 AR 610/16 RH – concerning the [respondent] […] hereby confirms that the [respondent] is to be charged for the crime specified in the European Arrest Warrant and that the decision has been made to try the [respondent]."

The undertaking is signed and sealed by the Public Prosecutor, i.e. by the issuing judicial authority.

11. The respondent relied on the affidavit evidence of Prof. Dr. Hans-Walter Forkel who stated his belief that "a formal decision has not been made by the public prosecutor to charge the Respondent with murder, and to try him for that offence." Prof. Dr. Forkel said that according to the documents he had seen, in particular the Public Prosecutor's letter dated 29th August, 2016, it was not settled "that the above person is to be charged for the crime specified in the EAW, here murder, and that the decision has been made to try the above person". The Prosecutor's letter stated that:-

> "According to your requested inspection of records I would like to inform you that the records are still at the State Office of Criminal Investigations where the Memorandum which concludes the police investigation is made. A contemporary return of the files is expected. Copies will be prompted thereupon and you will be allowed to examine the files."

12. Prof. Dr. Forkel went on to state that at the present time, there was a preliminary investigation by the Public Prosecution authorities. He said that the Public Prosecution Office must formally end this preliminary investigation with the final report, part of which is a recommendation whether to formally charge the suspect with the supposed crime. He said that "then a decision is taken within the public prosecution office whether or not to indict the suspect, then a formal indictment must be worked out and presented to the respective court of law which has to decide whether to accept the indictment for public trial". He went on to say that none of those steps with the respective documents has yet been shown by the Lubeck Prosecution Office. He referred to a telephone confirmation of 12th September, 2016 (the same date as his expert report) by the prosecutor in charge that these documents have not yet been produced. He concluded that the proceedings were still in the investigative phase and the formal and formally required determination whether to charge a client with murder would be made at a later stage.

13. The central authority sent a request seeking the approximate date on which the respondent became a suspect in relation to the murder referred to in the European arrest warrant. The issuing judicial authority replied saying that he was identified as a suspect on 22nd January, 2016 on the basis of the comprehensive investigations of the Lithuanian authorities in the framework of legal assistance and was moved to the status of an accused person on 25th January, 2016.

Submissions

14. Counsel for the respondent recognised that in light of the presumption under s. 21A(2) of the Act of 2003 and by virtue of the information provided by the issuing judicial authority, he had a "steep hill to climb". He referred the Court to the documentation which had accompanied the EAW, namely the letter of request. He said that that letter referred to the Public Prosecutor's Office of Lubeck "conducting preliminary investigation proceedings for the purpose of solving a murder case of the year 1995". The letter had also referred to the fact that there was a strong suspicion against this respondent. Counsel accepted that the legal position as outlined in *Minister for Justice v. Olsson* [2011] 1 I.R. 384 was that it was not a difficulty that investigative steps may continue but the problem was where a matter is still under investigation. That is what had been stated here. Counsel also referred to the letter of 17th May, 2016, post dating the EAW, in which the issuing judicial authority stated that the German and Lithuanian prosecuting authorities do not have any finger prints and photographs of the respondent "obtained by means of an identification procedure". It was stated that one of the things requested in the letter of request for international mutual legal assistance dated 27th April, 2016 to the Irish authorities "was to identify finger print and photograph [the respondent] following his arrest". The DNA report also appears to post date the issue of the European arrest warrant.

15. Counsel for the respondent submitted that this situation could be contrasted with the Swedish system as set out in Olsson. That case disclosed the formalities in Swedish law that prevented the person being sent forward for trial. In counsel's submission, notwithstanding what is stated in the undertaking, the language used in the documentation by the German authorities, demonstrates that their system is not the same as in Sweden.

16. Counsel submitted that the court is obliged to engage with the procedures in another member state and for that the court was required to have a rudimentary understanding of how the procedures work in another state. It was submitted that Prof. Dr. Forkel's evidence provided such an explanation. In light of all the evidence, counsel submitted that the Prosecutor in Lubeck was required to provide a better basis for his assertion that a decision had been made to charge and try this respondent. Counsel submitted that there was cogent evidence that the decision had not been made before 13th May, 2016, if it was ever made at all. Counsel urged on the Court in particular that the evidence was sufficient to put the court on its enquiry as to whether the presumption under s. 21A(2) of the Act of 2003 had been rebutted.

17. Counsel for the minister submitted that the starting point was the presumption in s. 21A(2); that presumption had not been rebutted in this case. Counsel submitted there was no half way house for the court "to be put on enquiry", either the presumption was rebutted or not. Counsel quoted from Olsson and submitted that that decision to charge and try had to be understood in light of the intention to prosecute. He submitted that there was no need for a formal decision in accordance with the case law. He highlighted that Prof. Dr. Forkel referred to a formal decision, but a formal decision is not relevant.

18. Counsel submitted that the undertaking was a volunteered undertaking by the issuing judicial authority; it had not been requested by the central authority. He further submitted that it was not for this Court to weigh the evidence. Counsel did not take issue with the fact that the DNA report was apparently compiled after the issue of the European arrest warrant. Nonetheless, the court has to accept that the authorities in Germany had made the decision to charge and try him.

19. In reliance on the decision in *Minister for Justice and Equality v. McArdle and Brunnell* [2015] IESC 56, counsel for the minister submitted that something in the nature of mala fides would have to be shown as there was a clear statement from the issuing judicial authority that there was a decision to charge and try. At a minimum, the court would have to enquire whether there was a mistake in providing the undertaking.

20. Counsel for the respondent replied that even the Olsson judgment recognised that a decision had to be made to charge and try. He again submitted that the court was required to be on enquiry. In this case, there was evidence that there was no formal decision, but there was no evidence that an informal decision had even been made.

Analysis and Determination on the Section 21A Objection

21. In any decision to execute an EAW, the court must operate under the principles of mutual recognition and mutual trust and confidence in the judicial authorities of other member states. In this case, the issuing judicial authority has given a direct confirmation that the respondent is to be charged for the alleged offence of murder and that a decision has been made to try him. That confirmation/undertaking was unsolicited by the central authority. Indeed, it may well be that the German issuing judicial authority was aware of the details of Irish law, which, as Hardiman J. indicated at para. 299 of *Minister for Justice v. Bailey* [2012] 4 I.R. 1, had been notified during the course of the negotiations regarding the 2002 Framework Decision. The "Corrigendum to the Outcome of Proceedings" (6/7th December, 2001) contains the following recital;

> "Ireland shall, in the implementation into domestic legislation of this Framework Decision, provide that the European Arrest Warrant shall only be executed for the purpose of bringing that person to trial or for the purpose of executing a custodial sentence or a detention order."

22. In light of the clear declaration of the issuing judicial authority, there is no necessity to reach for the presumption in s. 21A of the Act of 2003 that a decision has been made to charge and try the respondent. Contrary to the respondent's submissions, the references in the letter of 13th May, 2016 which accompanied the EAW to Ireland, do not undermine the clear statement that a decision has been made to charge him with and try him for the offence contained in the European arrest warrant. While preliminary investigation proceedings may be in the process of being conducted, this does not negative the statement that a decision has been made to try him. Furthermore, the use of the words "strongly suspected" does not undermine the statement in this case that a decision has been made to charge and try him for the offence of murder alleged against him (or the presumption provided for this in s.21A(2) of the Act of 2003). Indeed, as this Court has observed before, Public Prosecutors and courts and tribunals must be very careful not to give an impression that an accused person's presumption of innocence is being undermined. .

23. The Court has carefully considered the evidence of Prof. Dr. Forkel. The height of his evidence is that, as the documentation is still in the State Office of Criminal Investigations, there has been no formal decision taken to charge him with murder or to try him for that alleged offence. Section 21A of the Act of 2003 does not require a particular formality to the decision-making. Thus, even if no formal decision was made in Germany that is insufficient. As O'Donnell J. clearly stated at para. 33 of his judgment in Olsson:-

> *"The Act of 2003 does not require any particular formality as to the decision; in fact, s. 21 focuses on (and requires proof of) the absence of one."*

24. The respondent was required to prove that the statement of the issuing judicial authority that he was to be charged with the offence and that there was a decision to try him, is incorrect and that no such decision has been made. The respondent has not proven that a Prosecutor in Germany is not entitled by law to make an "informal" decision, or that no decision either was made, or could have been made, in the respondent's case. In those circumstances, the Court must accept the clear statement by the German authorities that a decision has been made to charge and try him with this offence of murder.

25. Furthermore, the Court does not accept that there is a half way house between accepting a clear statement from an issuing judicial authority as to its decision and the Court being put on its enquiry. The purpose of both the clear statement from the issuing judicial authority and the presumption in s. 21A of the Act of 2003 is that it is a matter for the respondent to show that the contrary proposition is, in fact, correct. In these circumstances where there is no evidence to show that either the confirmation or the presumption cannot be relied upon, the Court must act on the clear statement or on the presumption that a decision to charge and try the respondent has been made.

26. For the reasons set out above, the Court is satisfied that his surrender is not prohibited under s. 21A of the Act of 2003.

Section 37 of the Act of 2003

27. The respondent objected to his surrender on the basis that it constituted (a) a breach of his constitutional rights to fair procedures and liberty inter alia because of the cumulative inordinate and unjustified delay of over 20 years in issuing, endorsing and executing the within EAW, and (b) an impermissible interference with his right to respect for his family and private life under Article 40.3.1 and 41.1 of the Constitution and Article 8 of the ECHR, particularly in light of the considerable period of delay involved. He also claimed that the surrender amounted to an abuse of process due to the delay.

28. The respondent stated on affidavit that he had come to work in Ireland about 10 years ago. He has lived in Ballinasloe, Co. Galway for the last 4 years. He has worked in Ireland from time to time, apparently mostly part-time but also full-time. He received an injury in September 2015 and has not worked since. He lives with his partner of nine years. He said he did not flee Germany and was innocent of the offence alleged. He said that the delay was unexplained.

29. This Court recently dealt with a case which coincidentally concerned the request for surrender of another person to face trial for murder in Germany. In *Minister for Justice and Equality v. Corry* [2016] IEHC 678, there was significant culpable delay on the part of the German authorities in seeking the surrender of Mr. Corry in circumstances where a request for extradition by Germany under the Extradition Act, 1965 had been halted because extradition of the respondent, as an Irish citizen, was barred. Despite that delay, the Court was of the view that in light of the high public interest in his surrender for an offence of attempted murder through the use of explosives, it was not disproportionate to surrender him.

30. The respondent complains that there is no explanation for the delay in seeking his surrender. However, delay is a factor that has to be assessed in the context of the public interest in the surrender of a requested person.

31. Each case must be assessed on a case by case basis. However, as this Court observed at para. 65 in Corry:

> "*O'Donnell J. in his concurring judgment in* Minister for Justice and Equality v. J.A.T. (No. 2) *[2016] IESC 17, stated at para. 10 that the factors in that case* –'repeat application, lapse of time, delay, impact on the appellant's son, and knowledge on the part of the requesting and executing authorities of those factors - when weighed cumulatively, are powerful.*' Yet even considering those factors, the learned Supreme Court judge opined at para. 12 that it was* 'open to doubt that these matters would be sufficient to prevent surrender for serious crimes of violence.*' The dicta of O'Donnell J. in* J.A.T. (No. 2) *is an observation on the relative weight to be given to each side of the balance. When analysed, the dicta demonstrates the undoubtedly high public interest in surrendering people accused (or convicted) of serious crimes of violence, despite culpable delay or lapse of time due to the activity or inactivity of the relevant authorities in the requesting state or in this State."*

32. The present case concerns an extremely serious alleged crime of violence, namely murder. This allegation is an older allegation than that in Corry (by about 2 years). In light of the seriousness of this offence, that difference in time frame does not affect the public interest in his surrender in any material fashion.

33. In the circumstances, there is a high public interest in surrendering this respondent to Germany to face trial for the offence of murder. It may not be necessary, strictly speaking, to seek an explanation for the delay which has occurred. However, in this case, the Court is satisfied that there is such an explanation. The respondent was only identified as a suspect on 22nd January, 2016 on the basis of the comprehensive investigations of the Lithuanian authorities in the framework of legal assistance. Very quickly thereafter he was moved to the status of an accused person and within four months, the EAW had issued. Unlike the situation in Corry, there is no culpable delay here.

34. On the other side of the scales, when the Court looks at the matters that the respondent has put in the balance in respect of his private or family rights, the Court is satisfied that these are no more than the inevitable consequences on a person who is being sought for surrender after such a long period. There is nothing remarkable or especially notable about his family or private circumstances. This is so even when talking into account the lapse of time since the alleged commission of the offence.

35. The respondent is sought for trial for an alleged serious crime of violence, namely murder. On the facts of the case, it is not disproportionate or unjust to surrender him.

36. As regards the point of objection that it is unfair to surrender him because of the delay, the Court also rejects that objection. It is not open to the Court to prohibit surrender simply on the ground that there has been a delay. The Court has taken into account the delay as part of the issue with regard to his rights under Article 8 ECHR and related constitutional rights. In so far as he makes a case regarding fair procedures, the Court is satisfied that he has not met the test to establish that there is an egregious defect in the system of justice in Germany that requires his surrender to be prohibited because he is at risk of not having a fair trial. The Court also considers that nothing in the facts of this case establish an abuse of process with regard to his surrender.

Is the Public Prosecutor a Judicial Authority within the meaning of the Act of 2003 and the 2002 Framework Decision?
37. This Court has given a decision in the case of *Minister for Justice and Equality v. Lisauskas* (Record No. 2015/266 EXT), in which the court accepted that the Prosecutor General of Lithuania was a judicial authority for the purposes of the Act of 2003 and the 2002 Framework Decision. The within proceedings were argued at the same time as the proceedings in *Lisauskas*. The *Lisauskas* decision considered and applied the decisions of the Supreme Court in McArdle and of the CJEU in *Poltorak* (Case C-452/16 PPU, Fourth Chamber, 10th November 2016), *Ozcelik* (Case C-453/16 PPU, Fourth Chamber, 10th November 2016) and *Kovalkovas* (Case C-477/16 PPU, Fourth Chamber, 10th November 2016).

38. In the present case, the main concentration by the respondent was on a submission that the relevant Public Prosecutor in Germany was not part of the judicial corps but was an officer under an order of the Chief Public Prosecutor who reports to and is subject to orders by the Minister of Justice. Accordingly, it was submitted the spectre of political involvement in decisions to issue EAWs could not be ruled out.

The Evidence
39. In this case, the warrant was issued by a Public Prosecutor at the Public Prosecutor's Office at the Regional Court of Lubeck. The respondent relied upon the evidence of Prof. Dr. Hans-Walter Forkel who is a fully qualified German lawyer with a legal doctorate in criminal law. He has a Master of Laws in European law from the University of London. In his report, dated 12th September, 2016, Prof. Dr. Forkel states that:-

> "The public prosecutor in Lubeck, by German law, is not considered part of the judicial corps in Germany in that sense that he enjoys the autonomous or independent status of a court of law.
>
> The public prosecutor is an officer under the order of the chief public prosecutor who reports to and is subject to orders by the minister of justice, a political office (§§. 146, 147 GVG). This position within an administrative hierarchy with a political master at the top opens the possibility of political involvement to the surrender proceedings.
>
> Under German law, the public prosecutor is not a judicial authority with competence to order detention or arrest of any person in Germany but in cases of exigent circumstances. To order detention or arrest is a prerogative of judges. The public prosecutor must apply to the respective court or judge for an arrest warrant in Germany.
>
> The public prosecutor cannot in his own right issue an arrest warrant in Germany. Yet, it is his responsibility to execute an arrest warrant issued by a judge, and it is within his discretion whether, when and how to do so.
>
> A domestic arrest warrant having been issued, the Public Prosecutor was not required to refer the matter to any court for approval or oversight in the issue of the European Arrest Warrant.
>
> In the issuing of the EAW concerning our client, no German court of law or judge was involved.
>
> So one might well say that no judicial authority within the meaning of the Council Framework Decision of 13 June, 2002 on the European Arrest Warrant and the [surrender] procedures between member states was involved.
>
> The EAW refers to the German arrest warrant, issued by a judge, and claims to derive its powers from it."

40. The central authority sent a request dated 6th December, 2016 to the issuing judicial authority requesting the following information:-

> "1. Evidence has been presented on behalf of the requested person, Mr. Vytautas Dunauskis, in which it is asserted that the Public Prosecutor in Lubeck is not independent of the Minister of Justice and cannot be seen as a judicial authority for the purposes of Council Framework Decision 2002/584/JHA. Please provide your views on this assertion. This information is requested in the context of the recent ECJ case law on the criteria that distinguishes a judicial authority (Case C-452/16 (PPU) *Poltorak* and case C-453/16 (PPU) *Ozcelik*)."

41. The issuing judicial authority, the Chief Public Prosecutor in Lubeck replied on 8th December, 2016. The issuing judicial authority stated that the EAW was a judicial decision which was made by a German judicial authority, "whereby the decision of Lubeck Public Prosecutor's Office also complies with the requirements of the notions of 'judicial decision' within the meaning of Article 1, section 1 and 'judicial authority' within the meaning of Article 6, section 1 of the Framework Decision 2002/584/JHA, which must be defined according to the Union rules." The issuing judicial authority rather unnecessarily repeated large tranches from the decisions in both *Poltorak* and *Ozcelik*. With reference to the particular circumstances that applied to the Public Prosecutor in this case, the issuing judicial authority stated:-

> "Since the public prosecutor's offices in Germany are authorities entrusted with the (sic) criminal justice, they must be considered as 'judicial authority' within the meaning of Article 6, section 1 of the Framework Decision according to the above mentioned jurisdiction, which can take 'judicial decisions' within the meaning of Article 1, section 1 of the Framework Decision.
>
> The fact that the issuance of the European Arrest Warrant of Lubeck public prosecutor's office against the person

concerned DUNAUSKIS is a 'judicial decision' (Article 1, section 1 of the Framework Decision) by means of a 'judicial authority' within the meaning of Article 6, section 1 of the Framework Decision is also not opposed to the fact that the legal matter C-453/16 PPU (*Ozcelik*) was based on the decision of a Hungarian public prosecutor's office which is, according to the Hungarian Government, in dependent of the executive branch."

42. Having referred again to the terms of the decisions of the CJEU, the issuing judicial authority went on to state:-

"According to this opinion, the question to which public authority the institution 'public prosecutor's office' belongs can only play a tangential role. The Basic Law of the Federal Republic of Germany does not make a regulation concerning public prosecutor's offices. In Article 92 of the Basic Law it is only decreed that the judges are entrusted with the judicial power; it is executed by the Federal Constitutional Court, by the federal courts provided for in the Basic Law and by the courts of the states. The public prosecutor's office is recognised as an institution sui generis and acts as connective link between the executive branch and the jurisdiction. The German public prosecutor's offices do not 'administer' and do not only 'execute' federal and state laws without an own decision-making power in terms of a pure executive function but they work towards the jurisdiction of the courts; therefore, they belong to the functional area of jurisdiction. They are an organ of criminal justice at the same level as a court (judgment of the Federal Court of Justice of 14 July 1971 – 3 StR 73/71) upon which the prosecution and the participation in criminal proceedings are incumbent. The public prosecutor's offices bear the responsibility for the lawfulness and regularity but also carefulness of the investigation proceedings as well as its quick execution. With regard to the criminal courts, the public prosecutor's offices create the preconditions for the execution of the judicial power (investigation proceedings, indictment), they promote the judicial power of the courts and execute judicial decisions. In Germany, the monopoly of indictment is conferred upon the public prosecutor's offices. They have the right of initiative to start investigation proceedings which lacks the judge's in Germany. In its judgment of 05 May, 2015 (2 BvL 17/09 ua) the Federal Constitutional Court explains with regard to the role of public prosecutor's offices in Germany amongst others; *'the public prosecutor's office is part of the civil service and at the same time a necessary organ of criminal justice […]. With its obligation to objectivity (§ 160 II of the German Code of Criminal Procedure) it is a guarantor of the rule of law and lawful procedural processes; as representative of the indictment it ensures an efficient criminal justice. The importance of the public prosecutor's office is not limited to the main hearing of the first instance but continues in its tasks in appeal procedures […]. In its functions as 'guardian of the law', the protection of constitutional provisions to criminal proceedings in incumbent upon it […].'* By means of this a 'special position of the public prosecutor's office in the constitutional structure' was given to the public prosecutor's office according to the Federal Constitutional Court. The fact that the public prosecutor's office was given an own section in the German Court Constitution Act with the paragraphs 141 to 152 about its responsibilities, complies with this. According to the judgment of the Federal Constitutional Court of 19 March 1959 (1 BvR 295/58), the public prosecutor's office is on the basis of its tasks integrated into the judiciary 'from which it is an integral part, especially in constitutional state. Public prosecutor's office and court fulfil together the task of "granting of justice" […].'

Concerning the question which relationship exists between Lubeck Public Prosecutor's Office and the Ministry of Justice of Schleswig-Holstein it is specifically pointed out that the Ministry is not authorised to issue instructions towards Lubeck Public Prosecutor's Office. According to para. 146 of the German Court Constitution Act, the officers of the public prosecutor's office must certainly adhere to the service instructions of their supervisor. Therefore, the Director of Public Prosecutions (the public prosecutor's office at the Higher Regional Court of Schleswig-Holstein) presiding over the public prosecutor's offices in Schleswig-Holstein would be authorised to issue instructions towards the Senior Public Prosecutor of Lubeck Public Prosecutor's Office and not the Ministry of Justice. With regard to the content, the power of giving instructions has its borders at 'law and right' according to Article 20, section 3 of the Basic Law for the Federal Republic of Germany; therefore an instruction must not require something that breaks the law. Furthermore it results from the rule of law that the principle of legality (paragraph 152, section 2 of the German Code of Criminal Procedure) applying to the public prosecutor must be complied with. Certainly, the Ministry of Justice could execute a so-called external right of instruction towards the Director of Public Prosecutions; however, the Ministry would be bound to the abovementioned borders of the right of instruction. In order to secure the borders, the Ministry of Justice is, according to the 'Law on the creation of transparency of political instructions towards officers of the public prosecutor's office of 14 October, 2014' in Schleswig-Holstein obliged to inform the President of the state parliament (Landtag), thus the legislative branch, in case of the issuance of an instruction to the Director of Public Prosecutions.

Notwithstanding the above, it must be emphasised concerning the present proceedings against the person concerned DUNAUSKIS that in these proceedings at no point in instruction, neither by means of the Ministry of Justice to the Director of Public Prosecutions nor by means of the Director of Public Prosecutions to the Senior Public Prosecutor of Lubeck Public Prosecutor's Office was given.

Furthermore it must be noted that the European Arrest Warrant issued by Lubeck Public Prosecutor's Office is based on a decision of a national court in the form of the national arrest warrant issued on 29 March 2016.

Finally it must, therefore, determined that the principle of trust between the member states, which is essential for the acknowledgement of judicial decisions, is satisfied by the decisions of German public prosecutor's offices since they – as authorities entrusted with the criminal justice in Germany – take founded 'judicial decisions' as 'judicial authorities' within the meaning of the Framework Decision."

43. The respondent also relied upon an English translation, verified by Prof. Dr. Forkel of Title X of the German Courts Constitution Act (GVG). The respondent relied in particular upon s. 146 of same which said that officials of the Public Prosecution Office must comply with the official instructions of their superiors. Section 147 reads:-

"The right of supervision and direction shall lie with;

a. the Federal Minister of Justice in respect of the Federal Prosecutor General and the federal prosecutors;

b. the Land agency for the administration of justice in respect of all the officials of the public prosecution office of the Land concerned;

c. the highest-ranking official of the public prosecution office at the higher regional courts and the regional courts in respect of all the officials of the public prosecution office of the given court's district."

Section 151 states that:-

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

The final piece of evidence was the notification by Germany under Article 34(2) of the 2002 Framework Decision concerning incorporation of the 2002 Framework Decision into domestic law. That notification contains the following statement:-

> "Re Article 6(3) of the Framework Decision: Under Article 6 the competent judicial authorities are the Ministries of Justice of the Federal Republic and of the Länder. As a rule, these have transferred the execution of the powers resulting from the Framework Decision for the submission of outgoing requests (Article 6(1)) to the public prosecutor's offices of the Länder and to the regional courts, and the powers to meet incoming requests (Article 6(2)) to the chief public prosecutor's offices of the Länder."

The Submissions

44. Counsel for the respondent adopted the submissions that had been made by Counsel representing the Lithuanian respondents in *Lisauskas*, *Minister for Justice and Equality v. Veresovas* (Record No. 2016/43 EXT) and *Minister for Justice and Equality v. Firantas* (Record No. 2016/70 EXT). It was clear, however, that his greatest emphasis was on the question of independence. He referred in particular to the issues of independence that had been emphasised in *Minister for Justice and Equality v. M.V.* [2015] IEHC 524 and also by the references to the separation of powers and that the judiciary should stand apart from political interference. Counsel also referred to the *Poltorak* decision and in particular to para. 45 thereof in which it was held that the specific organisation of police services within the executive and the degree of autonomy they might have was irrelevant to whether they could be considered judicial authorities.

45. Counsel also sought to distinguish the decision of the High Court of Justice in England and Wales in *Binder v. Public Prosecutor's Office Memmingen, Germany* [2014] EWHC 133 (Admin). He submitted that Binder had so concluded because the court had felt bound by the decision in *Assange v. Swedish Prosecution Authority* [2012] UKSC 22 and *Ministry of Justice,Lithuania v. Bucnys and Ors* [2013] 3 WLR 1485. Counsel submitted in this jurisdiction there was no rule that a Public Prosecutor was a judicial authority but instead there was a presumption.

46. Counsel referred to the evidence in the case and relied upon what was stated by Prof. Dr. Forkel above. He particularly referred to the reply of the issuing judicial authority, in which he submitted it was accepted that the Ministry of Justice could instruct the superior of this Public Prosecutor and therefore could instruct the issuing judicial authority. He said that this confirmed what Prof. Dr. Forkel had stated that the Public Prosecutor was an officer under the order of the Chief Public Prosecutor who reports to and is subject to orders by the Minister of Justice a political officer. He submitted that this opens the possibility of political involvement in the surrender proceedings. The Minister was in a position to exercise control.

47. Counsel referred to the commission staff working document 2007 which was referred to at para. 38 of the Supreme Court decision in *Minister for Justice v. McArdle*. In that document it is stated:-

> *"The Framework Decision does not define what a judicial authority is, this question being left to the national law of Member States. Whilst it is understood that the Minister of Justice is designated by national Danish law as being a judicial authority, it is difficult to view such a designation as being in the spirit of the Framework Decision. Similarly DE has designated the Federal Ministry of Justice and the Ministries of Justice in the Länder as the competent judicial authority. The latter have very often transferred the exercising of their powers to submit outgoing requests to public prosecutors offices in the Länder as well as the regional courts while the powers to allow incoming requests have generally been transferred to regional public prosecuting authorities in the Länder. One of the main advances of the European Arrest Warrant system is the removal of the possibility of political involvement from the surrender proceedings. The commission therefore considers that the designation of an organ of the executive as a judicial body will adversely impact on fundamental principles upon which mutual recognition and mutual trust are based."*

48. Counsel for the minister relied upon the decision in McArdle and the CJEU decisions in the cases Poltorak, Ozcelik and Kovalkovas, aforesaid. With respect to evidence before the Court, he submitted that Prof. Dr. Forkel had never referred to s. 151 of the German Courts Constitutional Act. This is the section which said that Public Prosecutors may not perform judicial functions. In that regard, he suggested that Prof. Dr. Forkel may not have seen this as relevant. This may be because the question of whether a Prosecutor carries out judicial functions or makes a judicial decision has an autonomous meaning in European Union law.

49. Counsel submitted that the respondent has not provided cogent reasons to rebut the presumption that the Public Prosecutor in Lubeck is an issuing judicial authority within the meaning of the Act of 2003 and the 2002 Framework Decision. He referred to Prof. Dr. Forkel's view as stated in his affidavit that the public prosecutor who issued the EAW is not part of the judicial branch of the State with its independence and is ultimately answerable to the Minister for Justice. He submitted that with respect to the first part the decisions of the CJEU and of the Supreme Court in McArdle it is clear that an issuing judicial authority does not have to be part of the judicial branch, i.e. the courts or tribunals of a member state. With respect to the issue that the Public Prosecutor is answerable to the Minister for Justice, he submitted that this is highly speculative. Counsel submitted that while in theory direction could be given to the Chief Public Prosecutor who in turn could give a direction to the Public Prosecutor, this cannot be done easily. The State Parliament has to be notified. It is acceptable and not something that in reality takes from independence. He refers to the decision of Murray J., as he then was, in *T.D. and Ors. v. Minister for Education and Ors*. [2001] 4 I.R. 259 as quoted in the decision in *Minister for Justice v. M.V.*. In that particular quote, Murray J. held that there was "*no pure or perfect model of the separation of powers it is found in different forms in different countries according to the differing structures of constitutional government such as in France, the United Kingdom, Germany, the United States and this country*".

50. He submitted that this is a sui generis position with regard to the concept of judicial authorities. He referred to the fact that in this case, it has been stated that the Prosecutors "are an organ of criminal justice at the same level as a court". That was a finding of the Federal Court of Justice. The Federal Constitutional Court had also found the Public Prosecutor to be a necessary organ of criminal justice with an obligation to objectivity. Counsel also referred to the fact that any instruction that might be given had to be lawful and therefore could not impinge upon independence. He submitted that the German authorities are bound by the principle of legality. In reality, in this case, contrary to what the respondent was submitting, there was no possibility of political involvement.

51. Counsel also relied upon the Binder decision and stated that the court in that case had held that the evidence had shown that the risk of executive influence upon a decision to issue an EAW was utterly remote on the evidence available to the judge.

Court's Analysis and Determination on the Objection to the Public Prosecutor as a Judicial Authority

52. This Court has already made a determination in *Minister for Justice v. Lisauskas*. The concept of a judicial authority is an autonomous one within the meaning of European Union law and the 2002 Framework Decision in particular. The Court is bound to apply the principles of mutual trust and confidence in the other member states requires the court to consider that those states are in compliance with European Union law save in exceptional circumstances. There is a presumption that a designation of an institution or person as an issuing judicial authority is in compliance with both the Act of 2003 and the 2002 Framework Decision. It is only where the respondent adduces cogent evidence that the Public Prosecutor is not independent of the executive or does not participate in the administration of criminal justice that a prosecuting authority will not be considered an issuing judicial authority for the purpose of the 2002 Framework Decision and the Act of 2003.

Participation in the Administration of Justice
53. The Court has set out in detail the evidence from Prof. Dr. Forkel to the effect that the Public Prosecutor in Lubeck is not considered part of the judicial corps in Germany. His evidence was not sufficient to displace the presumption that the Public Prosecutor is participating in the administrating of criminal justice in Germany. Moreover, the Court has now received ample evidence from the German judicial authority establishing beyond doubt that the prosecuting authority is a body which participates in the administration of criminal justice and it is viewed as an organ at the same level as a court. The evidence establishes that the Public Prosecutor is viewed as a necessary organ of criminal justice. In light of the presumption and the specific evidence before the Court, this part of the respondent's objection is rejected.

Independence
54. The declaration that was made by the German State to the European Commission as regards the designation of the Ministry of Justice as the issuing judicial authority raises an issue of independence. However, that designation states that as a rule the execution of these powers have been transferred to the Public Prosecutor's Offices of the Länder. In this case, that transfer has taken place as the issuing judicial authority was the Public Prosecutor.

55. While a Ministry of Justice cannot be an issuing judicial authority (Kovalkovas) that is not the position that obtains here. What has occurred is that the Ministry of Justice has, in accordance with German law, transferred the execution of those powers to Public Prosecutors. In the view of the Court, that is an internal procedural mechanism within German law for designating judicial authorities. In this jurisdiction, for example, the State has chosen by way of legislation to designate the High Court as the issuing judicial authority for the purpose of issuing European arrest warrants. The Oireachtas could change that designation to another court, for example, the Circuit Court. It may have been possible for the Oireachtas to designate or indeed delegate the power of determining which court is the most appropriate for the issuance of EAWs to the Minister for Justice. In any event, the Court is quite satisfied that the process of designation by the German authorities does not of itself amount to a lack of independence for the actual judicial authority that has been ultimately designated.

56. The respondent's arguments concerning the exercise of control by the Minister for Justice over the Chief Prosecutor and consequently the actual prosecutor who issued the EAW, is, in some respects, superficially attractive. Independence from the executive branch is a *sine qua non* - an essential condition - of judicial independence. Police services could not be considered independent of the executive no matter what their formal independence was according to the CJEU in Poltorak. The position as regards the Public Prosecutor is not in any way comparable to the police services. In one sense, Public Prosecutors across the member states are in a sui generis or unique position. Although not members of the judiciary, they play vital roles in criminal justice proceedings. Those roles may, however, vary from member state to member state.

57. In Germany, it appears that Public Prosecutors are part of the civil service (not necessarily unusual as they are, at a minimum, public servants) and are a necessary organ of criminal justice at the same time. It appears that they have an obligation to objectivity and that they are the guarantor of the rule of law and lawful procedural processes. The Public Prosecutor's Office has its own section in the German Court Constitution Act and the German court has stated that the public prosecutor's office and the court fulfil together the task of granting justice.

58. It is in that context that the role of the German Minister of Justice must be seen. The Ministry of Justice may not issue instructions towards Lubeck Public Prosecutor's Office and in accordance with the German Court Constitution Act, the offices of the Public Prosecutor's Office must adhere to the service instructions of their supervisor. Only the Director of Public Prosecutions in Germany could issue that instruction. While it does appear that there is a power for the Ministry of Justice to execute a so-called external right of instruction towards the Director of Public Prosecutions, that right of instruction is only operable under strict conditions. The Public Prosecutor is bound by the principle of legality which also binds the Ministry of Justice. Furthermore, if there is an instruction given to a State Prosecutor, the legislative branch must be informed of that instruction. These are the checks and balances which apply within the German system. Those checks and balances ultimately ensure that the rule of law is complied with.

59. Furthermore, there has been an explicit assurance in this case that no instruction has been given either by the Ministry of Justice to the Director of Public Prosecutions nor by the Director of Public Prosecutions to the Senior Public Prosecutor of Lubeck Public Prosecutor's office.

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

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

Conclusion
62. For the reasons set out in this judgment, the Court rejects all of the points of objection filed on behalf of the respondent. The Court, being otherwise satisfied that the requirements of s. 16 (1) of the Act of 2003 have been met, may make an Order for his surrender to such other person as is required by Germany to receive him.