THE HIGH COURT

[2017/218 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

NELIJUS JEFISOVAS

RESPONDENT

JUDGMENT of Ms Justice Donnelly delivered on the 8th day of April, 2019

1. Pursuant to a European Arrest Warrant ("EAW") dated 22nd August, 2017, an issuing judicial authority of the Republic of Lithuania ("Lithuania") seeks the surrender of this respondent to serve a sentence of eight years and three months' imprisonment imposed upon him for an offence of illicit trafficking in narcotic drugs and psychotropic substances. Although the respondent has made a number of points of objection to his surrender, the most substantive one is his claim that his surrender is prohibited under the provisions of the Framework Decision of the 13th June, 2002 on the European arrest warrant and the surrender procedures between Member States ("the Framework Decision") and the European Arrest Warrant Act 2003 as amended ("the Act of 2003"), because a cassation appeal was heard in his, and his lawyer's, absence,.

2. The application for his surrender was heard over a number of dates. There has been a considerable lapse of time but this was necessitated by the obtaining of further information from the issuing judicial authority, the obtaining of information through the offices of Eurojust concerning cassation appeals throughout the European Union ("EU") and to allow counsel time to consider the materials and to make submissions. This has not affected the respondent's liberty or the date on which his physical surrender to Lithuania could have taken place on foot of any order for surrender that may have been made, as he has been serving a sentence in this state during this period.

3. Prior to dealing with the contested matters, this Court must consider the uncontested matters in order to establish whether the conditions under the Act of 2003 for surrender have been met.

A Member State that has given effect to the Framework Decision
4. The surrender provisions of the Act of 2003 apply to the member states of the EU that the Minister for Foreign Affairs have designated as member states having, under their national law, given effect to the 2002 Framework Decision. I am satisfied that the Minister for Foreign Affairs has designated Lithuania as a member state for the purpose of the Act of 2003.

Section 16 (1) of the Act of 2003
5. Under the provisions of s.16(1) of the Act of 2003, the High Court may make an order directing that the person be surrendered to the issuing state provided that:

(a) The High Court is satisfied that the person before it is the person in respect of whom the EAW was issued,

(b) the EAW has been endorsed in accordance with s.13 for execution in this jurisdiction,

(c) the EAW states, where appropriate, the matters required by s.45,

(d) the High Court is not required under s.21(a), s.22, s.23 or s.24 of the Act of 2003 to refuse surrender,

(e) the surrender is not prohibited by part 3 of the Act of 2003.

Identity
6. I am satisfied on the basis of the affidavit of Sergeant James Kirwan, member of An Garda Síochána, the affidavit of the respondent and the details set out in the EAW, that the respondent, Nelijus Jefisovas who appears before me, is the person in respect of whom the EAW has issued.

Endorsement
7. 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 21(a), 22, 23 & 24 of the Act of 2003
8. 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.

Part 3 of the Act of 2003
9. Subject to further considerations of s.37, s.38, and s.45 of the Act of 2003 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.

Section 38 of the Act of 2003
10. Section 38 of the Act of 2003 provides for two situations in which surrender may be ordered for specific offences. If the offence in the EAW is an offence referred to in Article 2 para 2 of the Framework Decision then, provided the requirements of minimum gravity in terms of available sentencing powers have been met, there is no requirement to find correspondence/double criminality of the offence with an offence in this jurisdiction.

11. In the present case, the issuing judicial authority has ticked the box of illicit trafficking in narcotic drugs and psychotropic substances under point (e) of the European Arrest Warrant. In so doing they rely on Article 2 para. 2 of the Framework Decision. The respondent has been given an eight years and three month sentence for this offence. The facts set out that he transported and sold

large quantities of a narcotic substance. In those circumstances, there is no manifestly incorrect designation of the box in point (e). His surrender is therefore not prohibited under the provisions of s.38 of the Act of 2003.

Section 11 of the Act of 2003
12. The respondent claimed that there was a lack of clarity in the warrant; in particular, he submitted as to the number of offences for which his surrender was sought. In those circumstances, he submitted that surrender was prohibited.

13. The submission can only be understood by reference to an earlier EAW that had issued for this respondent. That earlier EAW issued on the 22nd July, 2014. It stated the respondent was sought in respect of two offences for which he had been sentenced by Klaipėda Regional Court. The main difference between the present EAW and the original EAW was a reference to a subsequent ruling by the Supreme Court of Lithuania. What is stated in the present EAW is that the ruling of Klaipėda District Court and the ruling of Klaipėda Regional Court were changed by the ruling of the Supreme Court of Lithuania on the 9th December, 2014. This decision of the Supreme Court post-dated the issuance of the earlier warrant.

14. After the respondent's points of objection were received, the central authority made further requests of the issuing judicial authority. The letter queried the sentences he had received in the various courts. Confirmation was also sought that the facts set out at point (e) of the warrant were the same facts which the Supreme Court took into account when making its decision on the 9th of December, 2014.

15. The issuing judicial authority replied on the 30th January, 2018, stating that the Klaipėda City District Court had imposed "*a punishment of imprisonment of eight years and three months in respect of part 2 of Article 260 of the Criminal Code of the Republic of Lithuania and a punishment of imprisonment for two years six months pursuant to part one of Article 265 of the Criminal Code of the Republic of Lithuania. These penalties were cumulated by adding them partially and a final penalty of imprisonment for eight years and six months was imposed on N. Jefisovas. By its ruling of 20th March, 2014 Klaipėda regional court did not change the punishment to N. Jefisovas. On the 9th of December 2014, the Supreme Court of Lithuania annulled the sentence of N. Jefisovas pursuant to part 1 of Article 265 of the Criminal Code of the Republic of Lithuania; therefore, he stayed sentenced for eight years three months imprisonment, pursuant to part 2 of Article 260 of the Criminal Code of the Republic of Lithuania*". The issuing judicial authority also stated that the facts set out at point (e) were the same facts which the Supreme Court of Lithuania took into account when taking its decision on the 9th of December, 2014.

16. I am satisfied in all the circumstances that there is no lack of clarity in respect of the nature and number of the offences for which the respondent has been sentenced. It is clear that the Supreme Court, in making its decision on the cassation appeal, dealt with the same facts that were on the original European arrest warrant. Ultimately, this respondent was only convicted and sentenced in respect of a single offence. That is the offence set out in the present EAW pursuant to part 2 of Article 260 of the Criminal Code of the Republic of Lithuania. In those circumstances, I reject the respondent's objection under s.11 of the Act of 2003.

Section 37 of the Act of 2003
17. The respondent has claimed that the delay in issuing and executing this EAW is a breach of fair procedures for which his surrender should be refused. He has relied upon a case of *Casey v. Governor of Cork Prison* [2000] IEHC 64 which concerned delay in the execution of warrants for committal. He referred to the fact that the first EAW, and also, this EAW had mentioned that he was in Ireland.

18. The first EAW dated 22nd July, 2014, was endorsed on the 9th May, 2016 and the respondent was arrested in this jurisdiction on the 10th July, 2017. The first EAW was then withdrawn because the present EAW, dated 22nd August, 2017, had been issued. The respondent was arrested on the present EAW on the day it was endorsed, i.e. the 31st August, 2017. As stated above, this respondent has been serving a sentence in this jurisdiction in the meantime and his surrender could not have been enforced even if ordered by this Court at an earlier date.

19. In the view of the Court, the respondent's reliance upon delay is without merit. In *Minister for Justice and Equality v. Stapleton* [2007] IESC 30, and subsequent cases, it has been established that delay of itself will not prohibit surrender. Pursuant to the Act of 2003 and s. 37 thereof in particular, a claim of delay must be related to a breach of a specific right under the Constitution of the European Convention on Human Rights (the "ECHR"). This would also incorporate rights under the EU Charter on Fundamental Rights ("the Charter"). In *Stapleton* what was at issue was the effect of delay on a fair trial in the issuing state. The claim was rejected on the basis it would only be where circumstances, such as an egregious defect in the system of justice in the issuing state could be established that surrender should be refused. No claim in respect of delay and fair trial have been made in the present case.

20. Delay may play a role in a claim that surrender would breach rights to respect for family and personal rights under Article 8 ECHR or under the Constitution. The respondent has made such a claim in the present case. In circumstances such as the present, where the respondent is facing a very lengthy for a serious offence relating to the possession for supply of controlled drugs, where he deliberately fled from the issuing state to avoid serving a sentence and where the lapse of time is not gross, his case does not come near to the threshold where any significant enquiry would have to be undertaking by the High Court into whether surrender would breach his rights (per *Minister for Justice v JAT (No. 2)* [2016] IESC 17) . His own affidavit presents little, if anything, of note in his personal or family circumstances that would demonstrate any possibility of disproportionality in ordering his surrender. I therefore reject his point of objection in so far as it relates to his personal and family rights.

21. In this case in making a complaint about delay, the respondent mainly sought to rely upon a right to fair procedures. The respondent has referred to the delay in the issuing state. On the basis of the decision in *Stapleton*, it is clear that this is a matter that the respondent can only rely upon if he can demonstrate an egregious breach in the system of justice in the issuing state. He has not done that. I therefore reject his this point of objection in so far as it relates to delay in the issuing state.

22. Even if it can be said that the right to fair procedures incorporates fair procedures in the executing state as regards delay in the execution of an EAW, there is no lack of fairness in the present case. While there may have been some lapse of time in the execution of the first EAW in this jurisdiction, nothing on the papers before me demonstrate that there have been any failures on the part of the authorities in executing either this EAW or the previous European Arrest Warrant. There is no indication from the respondent that he had made his presence known to An Garda Síochána. There is no reason to believe that there has in fact been any blameworthy delay.

23. Furthermore, the length of the sentence for which he is being sought is very significant. It relates to a sentence for an offence committed in 2011 and for which he was initially convicted in 2013. From the information before the Court, the respondent knew of this offence, he also was present at the original trials and was represented by a lawyer. It is undoubtedly the case that he was well aware of this matter. He chose to flee and given his action in the present case, the respondent is responsible for the vast majority of

the delay and there is no unfairness.

24. In all the circumstances, I reject all claims that the respondent makes that his surrender must be prohibited because of the delay in the issuance and the execution of this European arrest warrant.

Section 45 of the Act of 2003
25. The above section concerns the issue of trial *in absentia*. Surrender can only be ordered for execution of a sentence of imprisonment, where the requested person was present at his or her trial, or, if not so present, certain conditions, have been met. This is an unusual case; s.45 rights at the Court of First Instance and the Court of Second Instance were not at issue, but he was not present at the Supreme Court of Lithuania, which was acting as a court of cassation. An issue arose as to whether, in those circumstances, his surrender can be ordered.

26. This Court has delivered a recent judgment in *Minister for Justice v Iacabuta*, delivered on 20th day of March 2019. The Court repeats its observations therein on relevant aspects of s.45 of the Act of 2003:

> "80. In its amended form, s.45 of the Act of 2003, implements the amendments made by the 2009 Framework Decision to that part of the 2002 Framework Decision dealing the optional ground for refusal to surrender where there has been a trial *in absentia*. A person may not be surrendered under s. 45 if he or she did not appear in person at the proceedings resulting in the sentence or detention order in respect of which the EAW was issued, unless the EAW indicates the matters required to be set out at points 2, 3 and 4 of point (d) in the new form EAW required by the 2009 Framework Decision. In essence, if a person was not present at trial but a) had actually received official notification of the trial, or b) with knowledge of the trial was represented by their own lawyer, or c) was served with the decision and did not appeal, or d) has been given a guarantee of a retrial, surrender is not prohibited.
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> 81. There have been a number of decisions from the CJEU concerning the interpretation of Article 4a(1) of the 2009 Framework Decision. The cases of *Openbaar Ministerie v Tadas Tupikas* (C-270/17), *Openbaar Ministerie v Slawomir Andrzej Zdziaszek* (Case C-271/17) and *Openbaar Ministerie v Pawel Dworzecki* (C-108/16 PPU, 25th May 2016), are most pertinent. In *Tupikas*, the CJEU ruled that that Article 4a(1) applied "*to the instance at the end of which the decision is handed down which finally rules on the guilt of the person concerned and imposes a penalty on him, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case.*"
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> 82. In *Zdziaszek*, the court ruled that the concept of "*trial resulting in the decision*" not only applied to the proceedings which finally determined the guilt of the person but also to certain subsequent proceedings. These were proceedings such as those leading to a cumulative sentence, "*at the end of which the decision that finally amended the level of the initial sentence was handed down in as much as the authority, which adopted the latter decision enjoyed a certain discretion in that regard*" (para 96).
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> 83. In the *Dworzecki* decision, the CJEU held that the expressions "*summoned in person*" and "*by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial*" have an autonomous meaning in EU law. Where a summons is not served directly on the person but handed over to an adult belonging to that household who undertook to pass it on and it cannot be ascertained from the EAW whether and if so when it was actually passed on, this does not in itself satisfy the condition. The CJEU stated in the course of its decision, that as the scenarios in Article 4a(1) were conceived as optional grounds for non-recognition of national judgments, the executing judicial authority may in any event, even after having found that they did not cover the situation at issue, take into account other circumstances that enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence.
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> 84. In *Dworzecki*, the CJEU confirmed that "*[i]n order to exercise [fair trial rights], the person concerned needs to be aware of the scheduled trial.*" (para 8). Further, the CJEU confirmed that "[*u]nder the Framework Decision, the person's awareness of the trial should be ensured by each Member State in accordance with its national law, it being understood that this must comply with the requirements of that [European] Convention.*" (para 8). The CJEU went on to state that "*particular attention could, where appropriate, also be paid to the diligence exercised by the person concerned in order to receive information addressed to him or her*." (para 8).
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> 85. In *Minister for Justice and Equality v Skwierczynzki* [2016] IEHC 802, this Court applied the *Dworzecki* decision to a situation where although the requested person had not been validly notified of the trial date, the notification of conviction and subsequent failed appeal was sufficient to comply with s. 45 as his rights of defence had therefore been met. In the particular circumstances of that case, the Court of Appeal (*Minister for Justice and Equality v Skwierczynzki* [2018] IECA 204) upheld that decision."

The information at point (d)
27. The present EAW contains a statement: "*Yes, the person appeared in person at the trial resulting in the decision*". Having heard submissions at the original hearing of this case and having considered both the original EAW and the present EAW, this Court had a concern as to whether the point (d) covered the Supreme Court hearing. As a result of that concern, the Court issued a request under s.20 of the Act of 2003 (Article 15(2) of the Framework Decision) in light of the recent decisions of the CJEU ("the CJEU") in *Tupikas* (Case C-270/17 PPU) and *Zdziaszek* (Case C-271/17 PPU) as follows:-

> *"Please state whether the respondent was present in the Supreme Court of Lithuania on 9th December, 2014. If the respondent was not present in the Supreme Court of Lithuania on 9th December, 2014 please complete the table at para. D of the European Arrest Warrant".*

A reply was received from the issuing judicial authority which stated that:-

> *"The cassation appeal of Nelijus Jefisovas was examined in the order of written procedure in the Supreme Court of Lithuania on the 9th December, 2014, therefore neither N. Jefisovas, nor defenders, nor prosecutors were invited to this court sitting".*

28. Having considered the matter further, this Court sought further additional information arising out of that reply:

(a) An explanation of the practice and procedures which generally apply to cassation appeals before the Supreme Court of Lithuania and how they applied in this case.

(b) Whether the Supreme Court consideration involved fresh assessment of the substance or merits of the case.

(c) Whether the Supreme Court hears cassation appeals in public, whether lawyers generally participate in them and whether appellants generally participate in them.

(d) A query as to the notification requirements to an appellant in a cassation appeal was also asked.

(e) Specific questions were asked about whether the Supreme Court had made a final ruling on his guilt and imposed a penalty upon him.

(f) Information as to whether the Court, assessed, in law and in fact, the incriminating and exculpatory evidence such as the individual situation of the respondent.

(g) Whether notwithstanding the respondent did not attend, did he have the right to attend and participate in the hearing.

(h) Information as to whether he had a right to make written submissions and whether he or his lawyer had made written submissions.

(i) The precise interaction the Supreme Court of Lithuania had with the respondent in his cassation appeal was queried.

(j) Information as to whether he had instigated the appeal or if the appeal was automatic in accordance with Lithuania law. Furthermore, a written copy of the judgment was sought.

29. The issuing judicial authority replied by letter dated the 11th July, 2018 setting out the procedure applicable to cassation appeals in general and to this appeal in particular. It stated that:

> *"Cases are examined in cassation procedure, when rules of the general part of the Criminal Code of the Republic of Lithuania are applied inappropriately, when offences are qualified not pursuant to articles, parts and paragraphs of the Criminal Code of the Republic of Lithuania, pursuant to which they had to be qualified. Cases are examined in cassation procedure, when violations of criminal procedure had been made during their examination in the court of first instance or appeal court, as a result of which the rights of the accused person, guaranteed by law, had been restricted or which prevented the case from being examined in a detailed and impartial manner, and prevented from delivering a correct judgment or ruling".*

30. The issuing judicial authority went on to state that:

> *"The Supreme Court of Lithuania examines cassation cases in a written procedure, except cases, when the appeal is brought by the convicted person, the acquitted person or the person, to whom the case has been closed on the grounds worsening the situation, or when a judicial panel formed for the case examination decides that it is necessary to hear oral explanations of the members of the process. The case, according to the cassation appeal of N. Jefisovas, was examined, in written procedure. This means that, after the cassation appeal of N. Jefisovas was accepted, the date of its examination was appointed, N. Jefisovas and prosecutor were informed that the case would be examined in written procedure, they were informed of the composition of the judicial panel, which would examine the case, the right to submit removals and applications was explained, it was suggested to submit written response on cassation appeal of N. Jefisovas. Only a response of the prosecutor of the general prosecutor's office of the Republic of Lithuania to the cassation appeal of N. Jefisovas was received in the court".*

31. The issuing judicial authority also stated that after the cassation case was examined, the procedural decision of the court was sent to the respondent to the address indicated by him to the court. The ruling of the Supreme Court of Lithuania is final and no appeal shall lie from it. They indicated that all answers to the questions would be found in the ruling of the Supreme Court, a copy of which they enclosed.

32. The ruling of the Supreme Court indicated that the appeal was filed by the respondent in this case. It recorded the facts of his conviction and how he was asking for a reversal of the parts of the judgment of the Klaipėda District Court and the ruling of the panel of judges of the criminal division of Klaipėda Regional Court concerning the convict and to file this part of the case for repeat hearing in the appellate procedure. Apart from some of the more relevant passages, it is unnecessary to quote in great detail from the ruling of the Supreme Court.

33. In respect of the offence of unlawful growing of cannabis, the Supreme Court found as follows having reviewed the evidence that:

> *"As the courts have not established (and did not try to establish) the exact number of plants grown by the convict N. Jefisovas, when analysing this argument of the appeal, the appellate court had to establish the said factual circumstance and to decide, if the criminal liability for unlawful growing of cannabis was applied reasonably. In this regard, it should be concluded that as the appellate court did not analyse the said argument of the appeal, the court violated the CCP substantially, i.e. the court did not comply with the requirements provided for in CCP Article 320 para. 3".*

34. The Supreme Court of Lithuania rejected other arguments in the appeal. Finally, it should be noted that the Supreme Court ruled as follows:

> *"The judgment of 25th April of 2013 of Klaipėda District Court in the ruling of 20th March, 2014 of the panel of judges of criminal division of Klaipėda Regional Court should be modified as follows:*
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> > *The parts of the judgment and of the ruling, whereby Nelijus Jefisovas was sentenced under C.C. Article 265 para. 1, should be reversed and this part of the case should be terminated, as no action has been committed containing features of an offence or misdemeanour; in parts of the judgment and of the ruling whereby the punishments*

imposed on Nelijus Jefisovas under C.C. Article 260 para. 2 and Article 265 para. 1 where combined according to C.C. Article 63 paras 1 and 4, should be reversed. The remaining parts of the judgement of 25th April, 2013 of Klaipėda District and the ruling of 20th March, 2014 of the panel of judges of the criminal division of Klaipėda Regional Court should be left unmodified".

35. The central authority sought further information following the receipt of that reply. They sought information as to:

(i) Why the written procedure was followed for the cassation appeal,

(ii) Whether the respondent entitled to attend the cassation appeal,

(iii) Whether he provided an address or contact details when he filed the cassation appeal,

(iv) What steps were taken to notify him that it would take place and,

(v) What steps were taken to notify him of the results.

36. The issuing judicial authority replied on the 12th of September, 2018. They said that the appeal was heard in written procedure because there were no grounds for hearing it in the order of oral procedure. They said that when cassation cases are heard in written procedure participants of the process are not invited to the court hearing and do not take part in it. They said that when he had submitted his cassation appeal he had indicated the address of his place of residence. They said it should be noted at that time, he was searched by police for enforcement of the judgment so in fact he did not live at the address identified. They said that a notification was sent about the hearing of the cassation case which indicated when and what composition of panel of judges would hear his case and which explained his right to submit applications and removals. Finally, the issuing judicial authority stated that a copy of the ruling was sent to him at the address specified. That was returned as it had not been served and he did not arrive at the post office to get it. Finally, and of particular note, it is stated therein that:

"It is obvious that the convicted person familiarised himself with the ruling of 09.12.2014, because already in 26.01.2015 a defender of the sentenced person on his behalf made a written application to the Supreme Court of Lithuania for renewal of the criminal case, in which he sought the annulment of court decisions including the ruling of the Supreme Court of Lithuania of 09.12.2014".

Information from Eurojust

37. On further consideration of the above information, this Court deemed it appropriate to request Eurojust to assist in providing information about cassation appeals in the domestic criminal law of member states. This Court is grateful for the assistance of Eurojust. A total of eighteen national desks [The following countries replied: Austria, Belgium, Bulgaria, Czech Republic, Denmark, Finland, Germany, Greece, Hungary, Italy, Latvia, Netherlands, Poland, Portugal, Romania, Slovak Republic, Sweden and the United Kingdom] at Eurojust replied. Not all countries appear to have a cassation appeal but of those that do, at least some of them may hear the case without the presence of the defendant. It appears to be a matter for the law of each jurisdiction as to when it may be necessary or appropriate for defendants to be entitled to attend.

38. The Court also sought information from the minister and the respondent, concerning case law of the European Court of Human Rights ("the ECtHR") which would touch or concern the right to be present before a court of final appeal and the right to fair trial under Article 6 of the European Convention on Human Rights. Finally, in light of the decision in *Tupikas*, the Court asked counsel to consider whether the facts of the instant case engaged an interpretation of European law and whether a preliminary ruling from the CJEU was required.

39. Written submissions were also received from counsel for each of the parties before the Court. The Court is grateful for those written and oral submissions.

40. From the information provided by the eighteen member states, it seems that five member states have cassation appeals which permit the cassation appeal to proceed without the attendance of the accused. These are Austria (where the decision is that the law has not been followed), Germany (in limited circumstances), Hungary, Italy and Portugal. Six member states have procedures for cassation appeals which appear to envisage attendance of the accused person. Five member states do not have cassation appeals as part of their domestic criminal law. In relation to one member state, the information provided was unclear. In relation to another member state, the information was provided in a form which was inaccessible to this Court. The Court should also record its gratitude to the issuing judicial authority in Lithuania for the very detailed and prompt provision of information throughout the course of these proceedings.

The legal submissions

41. Counsel for the minister relied on the case of *Hermi v. Italy* [2005] ECHR 428, a decision of the European Court of Human Rights ("the ECtHR"). In that case, the applicant had been sentenced to six years' imprisonment for a drug trafficking offence, having opted for a summary trial. While in prison he received notification that his appeal was due to be heard before Rome Court of Appeal and he had a right to attend. No arrangements were made for him to attend and the appeal proceeded in his absence. He then pursued a cassation appeal and argued that he should have been permitted to attend the proceedings before the Court of Appeal. The court of cassation ruled against him,

42. In finding that there was no violation of Article 6, the ECtHR held from para. 60 onwards that: -

"60. However, the personal attendance of the defendant does not take on the same crucial significance for an appeal hearing as it does for the trial hearing (see Kamasinski, cited above, p. 44, § 106). The manner of application of Article 6 to proceedings before courts of appeal depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein (see Ekbatani v. Sweden, judgment of 26 May 1988, Series A no. 134, p. 13, § 27, and Monnell and Morris v. the United Kingdom, judgment of 2 March 1987, Series A no. 115, p. 22, § 56).

61. Leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6, although the appellant was not given an opportunity of being heard in person by the appeal or cassation court, provided that a public hearing was held at first instance (see, among other authorities, Monnell and Morris, cited above, p. 22, § 58, as regards the issue of leave to appeal, and Sutter v. Switzerland,

judgment of 22 February 1984, Series A no. 74, p. 13, § 30, as regards the court of cassation). However, in the latter case, the underlying reason was that the courts concerned did not have the task of establishing the facts of the case, but only of interpreting the legal rules involved (see Ekbatani, cited above, p. 14, § 31).

62. However, even where the court of appeal has jurisdiction to review the case both as to facts and as to law, Article 6 does not always require a right to a public hearing, still less a right to appear in person (see Fejde v. Sweden, judgment of 29 October 1991, Series A no. 212 C, p. 68, § 31). In order to decide this question, regard must be had, among other considerations, to the specific features of the proceedings in question and to the manner in which the applicant's interests were actually presented and protected before the appellate court, particularly in the light of the nature of the issues to be decided by it (see Helmers v. Sweden, judgment of 29 October 1991, Series A no. 212 A, p. 15, §§ 31-32) and of their importance to the appellant (see Kremzow, cited above, p. 43, § 59; Kamasinski, cited above, pp. 44-45, § 106 in fine; and Ekbatani, cited above, p. 13, §§ 27-28).”

43. The ECtHR noted that the situation would be different if the appellant court were required to make a full assessment on the issue of guilt or innocence:-

“64. However, where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence (see Dondarini v. San Marino, no. 50545/99, § 27, 6 July 2004).

65. Applying these principles in the Ekbatani case (cited above, p. 14, § 32), the Court took the view that the presence of the defendant at the appeal hearing was required, as the case could not be properly determined without a direct assessment of the evidence given in person by the applicant and by the complainant, since the defendant's guilt or innocence was the main issue for determination before the appellate court. That finding was not altered by the fact that the appeal court could not increase the sentence imposed at first instance (see, mutatis mutandis, Dondarini, cited above, § 28, and De Biagi v. San Marino, no. 36451/97, § 23, 15 July 2003).”

44. In an earlier case of *Fejde v. Sweden* [1991] ECHR 43, the ECtHR had held that an appeal which the appellant was not permitted to attend did not violate Article 6. In that case, the Court of Appeal in Sweden had refused to hold an open hearing and proceeded to decide the case based on written submissions. The ECtHR noted that: -

“26. The manner of application of Article 6 (art. 6) to proceedings before courts of appeal depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein (see, as the most recent authority, the Ekbatani judgment of 26 May 1988, Series A no. 134, p. 13, para. 27).

27. The Court notes at the outset that a public hearing was held at first instance. As in several earlier cases, the question before the Court is whether a departure from the principle that there should be such a hearing could, in the circumstances of the case, be justified at the appeal stage by the special features of the domestic proceedings viewed as a whole (see, inter alia, the same judgment, p. 13, para. 28). In order to decide this question, regard must be had to the nature of the Swedish appeal system, to the scope of the Court of Appeal's powers and to the manner in which the applicant's interests were actually presented and protected before the Court of Appeal, particularly in the light of the nature of the issues to be decided by it (ibid., p. 14, para. 33). There was, however, disagreement between those appearing before the Court as to how this test should be applied in the circumstances of the present case.

31. The Court fully recognises the value attaching to the publicity of legal proceedings for reasons such as those indicated by the Commission (see, inter alia, the Axen judgment of 8 December 1983, Series A no. 72, p. 12, para. 25). However, even where the court of appeal has jurisdiction to review the case both as to facts and as to law, the Court cannot find that Article 6 (art. 6) always requires a right to a public hearing irrespective of the nature of the issue to be decided. The publicity requirement is certainly one of the means whereby confidence in the courts is maintained. However, there are other considerations, including the right to trial within a reasonable time and the related need for expeditious handling of the courts' case-load, which must be taken into account in determining the need for a public hearing at stages in the proceedings subsequent to the trial at first instance. Provided a public hearing has been held at first instance, the absence of such hearing before a second or third instance may accordingly be justified by the special features of the proceedings at issue. Thus, leave-to-appeal proceeedings (sic) and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 (art. 6), although the appellant was not given an opportunity of being heard in person by the appeal or cassation court (see, inter alia, the above-mentioned Ekbatani judgment, Series A no. 134, p. 14, para. 31).”

45. Counsel for the minister relied upon what he submitted was the ratio of the *Tupikas* decision, in which it was stated at para. 100 as follows: -

“…..Where the issuing Member State has provided for a criminal procedure involving several degrees of jurisdiction which may thus give rise to successive judicial decisions, at least one of which has been handed down in absentia*, the concept of ‘trial resulting in the decision’, within the meaning of Article 4a(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as relating only to the instance at the end of which the decision is handed down which finally rules on the guilt of the person concerned and imposes a penalty on him, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case.*

An appeal proceeding, such as that at issue in the main proceedings, in principle falls within that concept. It is nonetheless up to the referring court to satisfy itself that it has the characteristics set out above.”

46. Counsel also relied on para. 74 of the decision, in which the CJEU held that the concept of “*trial resulting in the decision*” within the meaning of Article 4a(1) of Framework Decision 2002/584 must be understood as referring to the proceeding that led to the judicial decision which finally sentenced the person whose surrender is sought in connection with the execution of a European Arrest Warrant. Counsel submitted that the sentence had been initially imposed by the District Court. This was cumulated with another sentence and was the subject of an appeal to the Regional Court. The Supreme Court annulled the other sentence resulting in the original sentence of eight years and three months standing alone and remaining enforceable. Counsel submitted it was not the Supreme Court which finally sentenced the respondent. It merely affirmed the sentence of the lower court.

47. Counsel for the minister specifically relied on para. 81 which deals with the concept of the examination of the merits of the case. Para. 81 of *Tupikas* provides: -

> *"Consequently, in the event that proceedings have taken place at several instances which have given rise to successive decisions, at least one of which was given* in absentia*, it is appropriate to understand by 'trial resulting in the decision', within the meaning of Article 4a(1) of Framework Decision 2002/584, the instance which led to the last of those decisions, provided that the court at issue made a final ruling on the guilt of the person concerned and imposed a penalty on him, such as a custodial sentence, following an assessment, in fact and in law, of the incriminating and exculpatory evidence, including, where appropriate, the taking account of the individual situation of the person concerned".*

48. Counsel referred to the information provided by the issuing judicial authority. Proceedings before the Supreme Court are not an assessment in fact and in law. He referred to the additional information dated the 11th July, 2018 which described that cases are examined in cassation procedure when rules of the general part of the criminal code are applied inappropriately by reference to incorrect aspects of the criminal code. Counsel submitted that the appeal was on legal issues only and did not involve the fresh assessment of evidence.

49. Counsel referred to para 83 in respect of the reference to ordinary appeals. At para. 83, the CJEU stated: -

> *"It is the judicial decision finally disposing of the case on the merits, in the sense that there are no further avenues of ordinary appeal available, which is decisive for the person concerned, since it directly affects his personal situation with regard to the finding of guilt and, where appropriate, the determination of the custodial sentence to be served".*

50. The general thrust of the submission on behalf of the minister was that this was not an ordinary appeal; it was a final review of whether the law had been correctly applied. Counsel referred to para. 96 of *Tupikas*. Counsel also submitted that the appeal was examined in a written procedure because it was not deemed necessary to hear oral explanations. There was no basis therefore for an argument that the lack of a right to be present had interfered with the respondent's defence rights. Counsel submitted that there was therefore no need to refer this matter for a preliminary ruling. *Tupikas* provides sufficient guidance for the Court to conclude that the appeal in cassation did not form part of the trial resulting in the decision.

51. Counsel for the respondent agreed that cassation appeals were a relatively common feature of certain criminal justice systems in Europe. His focus was on the fact that most of the courts appeared to permit attendance of an accused subject to certain conditions being met.

52. In relation to the decision in *Hermi*, counsel submitted that the ECtHR had emphasised the importance of attendance at trial. Counsel accepted that the court had observed that different considerations can apply when the proceedings involve an oral hearing. Counsel submitted however that in *Hermi* it was clear that it was a decision on its own facts. Counsel submitted that the ECHR had not determined that in each and every appeal the non-attendance of the accused was not a breach of Article 6. In particular, he relied upon para. 60 above to the effect that the manner of application of Article 6 to proceedings before courts of appeal was fact specific.

53. Counsel also relied on para. 64 of the said judgment in which it was held that *"where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence".*

54. Counsel for the respondent strongly urged on this Court that the cassation appeal in the present proceedings involved an examination of the facts and of the law and in those circumstances the accused ought to have been present. He submitted that his absence amounted to an interference with his Article 6 rights. Counsel referred to the decision of the Supreme Court itself in contending that there had been a re-examination of the facts.

55. In relation to the decision in *Tupikus*, counsel again emphasised that in para. 100 the reference was to re-examination and in fact and in law of the merits of the case. Counsel referred to the ruling of the Supreme Court wherein it states that *"no action has been committed containing features of an offence or misdemeanour".* It was his submission that this conclusion naturally required an assessment or re-examination in fact and in law of the merits of the case.

56. Counsel submitted that the Supreme Court ruling was the judicial decision finally disposing of the case on the merits in a sense that there were no further avenues or ordinary appeal available. Counsel submitted that this was a matter of ordinary appeal. The respondent contended that the decision in *Tupikas* took precedence over the European Court of Human Rights. The respondent contended that the cassation appeal was the instant at the end of which a decision is handed down which finally rules on the guilt of the person concerned and opposes a penalty on him, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case

Analysis and decision on section 45 of the Act of 2003

57. This Court is concerned with a matter of interpretation of Article 4a(1) of the Framework Decision as amended. It is concerned also with the issue of Article 6 ECHR and Article 47 and 48 of the EU Charter on Fundamental Rights. It is appropriate to consider whether the circumstances demonstrate that the respondent's right to a fair trial has been breached.

58. In the respondent's criminal proceedings in Lithuania, it has not been disputed that the respondent's fair trial rights, including the right to be present at trial unless the right is knowingly waived, were met at the Court of First Instance and the Court of Second Instance. The only matter of concern at issue in these proceedings was his right to appear before the Supreme Court, acting as a court of cassation.

59. The Supreme Court in Lithuania only permits a criminal defendant to be present in exceptional circumstances. None of those exceptions were present in this case. The respondent had appealed to the Supreme Court, but neither he nor his lawyer chose to make further written submissions other than having made the appeal. The respondent has not made any complaint in these proceedings about his lawyer's actions or inactions.

60. In terms of a breach of Article 6 ECHR, the High Court has dealt with the position where a person claims that they have had a breach of fair trial rights in the issuing state and that surrender should be refused as a result. In the case of *Minister for Justice and Equality v. Rostas,* [2014] IEHC 391 Edwards J. stated as follows at para. 87:-

> *"87. In* Minister for Justice, Equality and Law Reform v. Marjasz *[2012] IEHC 233, (unreported, High Court, Edwards J., 24th of April, 2012) this Court acknowledged that, notwithstanding the principle of mutual recognition, it might be possible, in an exceptional case, for a respondent to resist surrender on foot of a European arrest warrant seeking his or her surrender for the purpose of executing a sentence, on the basis that the underlying conviction was the result of an unfair trial. However, I went on to state: "The Court would add, however, that this jurisdiction is likely to be exercised very sparingly indeed, and only in cases where it has been established by the clearest and most cogent evidence that there was a truly egregious unfairness in the circumstances of the underlying trial, and where there is also evidence that all possible remedies / avenues of review / appeals in the issuing state have been tried without success and have been exhausted.*
>
> *It follows from what the Court has just said that in a conviction case the Court will, in general, be most reluctant to engage in any review of the trial process leading to the conviction on foot of which the warrant is based to determine whether it was fair and lawful. The default and starting position in all cases will be that the Court must proceed upon a presumption that the trial leading to the conviction in question was fair and respected the respondent's fundamental rights, and that in the event of him having some complaint in regard to the fairness of the trial that led to his conviction that it was incumbent upon him, at the material time, to seek an effective remedy in regard to that before the courts of the issuing state."*

61. In the present case, based upon the law in *Hermi*, the respondent has not established that his absence from the hearing before the court of cassation was a breach of his fair trial rights within the meaning of Article 6 of the European Convention on Human Rights. The lack of an entitlement to be present at a court of cassation hearing, where his rights to fair trial were fully respected at his trials at first and second instance, does not amount to a breach of those fair trial rights. He has not made any evidential case that the cassation appeal was unfair because his lawyer failed to follow instructions or anything of that nature. In fact, he has failed to engage with the information from the issuing judicial authority at all about his actions in the cassation appeal or his subsequent knowledge of the outcome of those proceedings. While a respondent may not have to engage with the facts where he makes a claim of a breach of s. 45 rights (see the Court of Appeal decision in *Minister for Justice v Palonka* [2015] IECA 69), he must actively provide cogent evidence to the High Court where he seeks to sustain a point that surrender is prohibited because of a breach of fundamental rights.

62. Moreover, any such argument on fundamental rights may more properly be dealt with in the issuing state. The respondent has not demonstrated that he could not pursue a claim to vindicate fair trial rights in Lithuania. In those circumstances, I am satisfied that the respondent has not demonstrated that there has been a breach of his right to a fair trial under the European Convention on Human Rights. Furthermore, it cannot be said that there is a breach of Article 47 and 48 of the Charter. The respondent has not made any submission that fair trial rights under the Charter, would differ in a material manner from the case law of the European Court of Human Rights. In short, there is no evidence that his defence rights have been breached either because of what has occurred in Lithuania or because he will have no remedy there.

63. The real issue therefore, is whether the provisions of Article 4a(1) of the Framework Decision requires his presence at the hearing which took place before the Supreme Court acting as a court of cassation. It is necessary to consider the decision in *Tupikas*. This Court agrees with counsel for the minister that the ratio of that decision is set out in para. 100 thereof (see para 45 of this judgment above). In the view of the Court, that necessitates an examination of whether an assessment in fact and in law of the incriminating and exculpatory evidence including, where appropriate, the taking account of the individual situation of the person concerned, has actually been made by the Supreme Court of Lithuania.

64. The respondent submitted that the judgment itself demonstrated that there has been an assessment of the facts. In the view of the Court, that is not an accurate assessment of what has transpired. The findings of fact had been made in the lower court, the Supreme Court in its decision was applying the law to those facts. The ruling of the Supreme Court of Lithuania was based upon the factual findings already made by the lower court in the proceedings. This is demonstrated by the statement in the Supreme Court's ruling that "*no action has been committed containing features of an offence or misdemeanour*." What the Supreme Court was doing, was assessing whether the facts found amounted to a particular crime. The Supreme Court was not assessing what those facts actually were.

65. The appeal was, as the Lithuanian judicial authority have informed this Court, an appeal about whether the rules have been applied correctly in the course of the proceedings. From the additional information provided by the issuing judicial authority, the Supreme Court in the cassation appeal was considering legal matters only. That did not involve a fresh assessment of the facts of the case.

66. Although the Court has not been able to find a single commonly accepted definition of a "cassation appeal", it appears to be accepted that it is an appeal in which there is no fresh assessment as to the facts, instead there is a consideration of whether the law has been applied to the facts as found in the court or courts below. The nature of the appeal in this case was described by the issuing judicial authority as a cassation appeal. It was certainly an appeal in the nature of an appeal in cassation as generally understood. It appears that at least five EU member states have a process whereby cassation appeals may be dealt with without an accused person having the right to attend the hearing. It appears however where, exceptionally, a new assessment of facts is to be made, this results in an exception to the non-attendance practice before courts of cassation.

67. In the present case, the Lithuanian Supreme Court did not make an assessment of the facts. The Supreme Court made an assessment of whether the law had been correctly applied to the facts as found in the lower courts. This was what was meant by the indication of the issuing judicial authority that what had taken place in the Supreme Court was a cassation appeal. It was not an ordinary appeal in Lithuania.

68. I am satisfied that the reference in *Tupikas* to the judicial decision finally disposing of the case on the merits in the sense that there are no further avenues of ordinary appeal available, is to be understood as meaning that Article 4(a)(1) of the Framework Decision only applies to an appeal which does not have the status of a cassation appeal such as that in the present case. I am satisfied that the CJEU in *Tupikas* has interpreted Article 4a(1) in a manner which clearly indicated that these type of cassation appeals are not included in the concept of "*trial resulting in the decision*" that requires a completed point (d). There is no need to make a preliminary reference to the CJEU pursuant to the provision of Article 267 of the Treaty on Functioning of the European Union.

69. Furthermore, I am also satisfied that even if I were to be wrong in my understanding of the decision in *Tupikas*, the CJEU would follow its findings in both *Tupikas* at para. 96 (following on from its decision in *Dworzecki*), to the effect that it is a matter for an executing judicial authority to take into account other circumstances that enable it to ensure that the surrender of the person concerned does not entail a breach of his rights of defence. In those circumstances, where no defence rights have been breached in

this particular case, there is also no further reason to seek the preliminary reference.

70. In those circumstances, I reject the respondent's objections to his surrender.

Conclusion
71. For the reasons set out in the judgment above I reject each of the respondent's point of objection. In those circumstances, I make an order under s. 16(1) of the Act of 2003 for the surrender of the respondent to such other person as is duly authorised by the issuing state to receive him.