THE HIGH COURT

[RECORD NO. 2017 51 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUAILTY

APPLICANT

AND

ZANAS DZIUGAS

RESPONDENT

AND

[RECORD NO. 2018 594 SS]

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN

ZANAS DZUIGAS

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 10th day of May, 2018

1. In a judgment delivered on 2nd February 2018, I rejected the respondent's objections to his surrender to Lithuania. I adjourned the case to hear the respondent's application for a certificate for leave to appeal to the Court of Appeal. I also rejected that application. I heard an application for a stay on the Order I had made under s. 16(1) of the European Arrest Warrant Act, 2003 as amended ("the Act of 2003") so as to permit the respondent seek leave to appeal to the Supreme Court. I granted that stay for a period of 15 days pending lodgment of the notice for leave to appeal, and if that notice was lodged within that period, until the application or appeal was finally determined by the Supreme Court. The 15-day period was less than the period of time for appeal to the Supreme Court (28 days) but was deliberately chosen because of the need for expedition in surrender cases. It was considered a just and equitable period for the stay and indeed was suggested to the Court by counsel for the respondent.

2. The precise terms of the perfected Order are as follows:

> "**AND IT IS ORDERED** pursuant to Section 16(1) of the European Arrest Warrant Act 2003 (as amended) that the said Zanas Dzuigas the Respondent be surrendered to such person duly authorised to receive him on behalf of the Republic of Lithuania
>
> And said Counsel on behalf of the Respondent making application before the Court for a stay on the Order made pursuant to Section 16(1) of the European Arrest Warrant Act 2003 (as amended) by the foregoing paragraph pending the lodgment of an application for leave to appeal herein directly with the Supreme Court
>
> **AND IT IS ORDERED** that the said Order by this Order made pursuant to Section 16(1) of the European Arrest Warrant Act 2003 (as amended) be
>
> (i) stayed for a period of fifteen (15) days from the date hereof pending the lodgment by the Solicitor on behalf of the Respondent of an application for leave to appeal herein with the Supreme Court
>
> and in the event of an application for leave to appeal being so lodged within the time as aforesaid
>
> (ii) further stayed pending the determination by the Supreme Court of the application made by the Respondent for leave to appeal to that Court and in the event that leave to appeal is granted by the Supreme Court until the final determination of such appeal
>
> **AND IT IS ORDERED** that the said Zanas Dzuigas the Respondent be remanded in custody for a period of not less than fifteen (15) days from the date that the said Order by this Order made pursuant to Section 16(1) of the European Arrest Warrant Act 2003 (as amended) takes effect and a further period not exceeding ten (10) days until the date of his delivery as aforesaid"

3. On 4th May 2018, the Supreme Court refused to grant leave to appeal. If the lodgment of the application for leave to appeal had been made in time, the stay ceased on that day.

4. The minister requested that the surrender proceedings be re-entered before the High Court and I issued a production order for the respondent to appear on 9th May 2018.

5. The minister sought an Order pursuant to s.16(5) fixing a new date for the surrender of the respondent to Lithuania. According to the minister, there were two reasons necessitating this application. In the first place, this respondent had informed the minister that he was afraid of flying and arrangements had to be made to transport him by sea and land and that this involved transit permission from four other countries, as well as making appropriate ferry arrangements. Secondly, the minister contended that these arrangements could not be put in place prior to the expiry of the time for his surrender pursuant to subsection 3A of s. 16 of the Act of 2003 i.e. within 10 days from 4th May 2018.

6. If the Order of 23rd February 2018 stayed the taking effect of the Order which had been made under s. 16(1), then no order for

extension was required by this Court. This is because his surrender could be effected within 25 days from the determination of the Supreme Court on 4th May 2018. However, the minister submitted that it appeared that the stay was only on that part of the surrender pursuant to s. 3A of the Act of 2003 rather than the taking effect of the Order pursuant to s.16(3) of the said Act.

7. In the course of counsel's submissions, a significant legal issue arose as to whether the application for leave to appeal had been lodged within the 15 days. If there had been no lodgment within the 15 days, the stay on surrender lapsed. In those circumstances, it would appear that the respondent was in unlawful custody as he had not been surrendered within 25 days of the date that the stay had ceased to be effective. In a number of cases involving the non-adherence to time limits for surrender as set out in the Act of 2003 in the absence of a stay on orders of surrenders, the Supreme Court released persons from custody pursuant to applications under Article 40.4.2 of the Constitution. These are *Ó Fallúin v The Governor of Cloverhill* [2007] IESC 20, *Rimsa v The Governor of Cloverhill* [2010] IESC 47, and *Voznuka v Governor of Dochas Centre Mountjoy Prison* [2013] IESC 33. While none of those cases deal with the precise question arising in this case, namely when the stay lapsed, the cases are good authority for the principle that unless there is clear authority permitting the continued detention of a requested person, that person must be released from custody.

8. Although s. 16(4)(c)(i) permits an application to fix a new date for surrender, even if surrender has not been made within 25 days, the subsection clearly envisages that such an application be made "as soon as practicable after that expiration." The minister, quite correctly, did not pursue an argument that this should be deemed to be an application made as soon as practicable. Therefore, if the stay came to an end on 9th March 2018, there being no other legal authority to keep him in custody, the respondent has to be released from custody if an application is made pursuant to Article 40.4.2 of the Constitution.

9. During the course of the hearing pursuant to s.16(5) of the Act of 2003, the respondent made such an application under Article 40.4.2 of the Constitution for his release on the ground that he was in unlawful custody. He argued that the time for surrender had long since expired and that he should now be released. Counsel for the minister did not object to such an application being made and I believe the minister was right not to so object. The High Court has specific duties under the Constitution and is under a duty to make an enquiry. I do not make any comment about the effect that an abuse of process might have on the duty of the High Court since it is entirely unnecessary. In the present case, even if there had been a misunderstanding as to the legal position, there was no abuse of process. I therefore made the enquiry and order that the respondent be produced before me later in the day and that the Governor of Cloverhill certify in writing the grounds of his detention. Ultimately, the same counsel for the minister was instructed to appear for the Governor and he adopted the arguments that the minister had made. I will hereafter refer to the submissions of counsel for the minister but where relevant these encompass the submissions of the Governor. In light of the urgency of the matter, a combined judgment is given in respect of both applications before me. Some of the following submissions were made prior to the formal order directing the enquiry, but I will deal with these as a single set.

10. Initially, counsel for the minister appeared to urge the Court that the fact that the Supreme Court had heard the appeal meant that he came within the second section of this Court's Order which had granted the stay. That part of the stay was clearly predicated on the lodgment of the application for leave to appeal being made on time. I am quite satisfied that unless the application for leave to appeal was lodged on or before 9th March 2018 then the stay lapsed.

11. Mr. Tony Hughes, solicitor for the respondent, gave evidence. He stated that on 9th March 2018 he went to the Supreme Court office with 4 copies of the application for leave to appeal. He said that the Registrar read the papers and said the form was wrong; that some paragraphs were missing. The Registrar did not accept the notice. Mr. Hughes left the office with the papers. He spoke to his counsel who said that no paragraphs were missing. He then explained this to the Office of the Supreme Court and told them that he would file an electronic copy of the document that he had already presented. He said he would file the documents on Monday (12th March). He said that when he went to file the documents on Monday he asked them to stamp it 9th March, but they refused and instead stamped it 12th March. In cross-examination he said that he emailed the documents on Friday and that he thought that the office emailed him to say that they received it on 9th March.

12. The "Application for Leave and Notice of Appeal" is stamped by the Office of the Supreme Court as having been received on 12th March 2018. It is clear from the determination of the Supreme Court that they record that the application for leave to appeal was made on 12th March and that it was in time. There is no doubt that the application was made in time to the Supreme Court as there were 28 days in which to make it. This Court had however only given a stay of 15 days for this respondent to lodge it if he wished not to be surrendered while his appeal was in being. Therefore, the fact that the application was in time for the purpose of the Supreme Court rules is not determinative of the issue of whether the stay had lapsed.

13. The minister wrote a letter on 9th March 2018 to the solicitor for the respondent as follows:

> "We refer to the above matter and acknowledge receipt of an unfiled copy of Application for Leave and Notice of Appeal, by email on today's date.
>
> As discussed in telephone conversation it is the Ministers view that the stay granted on the 23rd February last expires today and accordingly an application to continue the stay will be required.
>
> We note your intention to apply to extend the stay on Monday 12th March 2018 and that you will make the necessary arrangements to put the Court on Notice and ensure your clients attendance."

14. It is unusual and indeed unsatisfactory that despite this letter, which appears to record an acceptance by both parties that no effective application for leave had been made and that an application for another stay was required, no further effort was made by either party to regularise the position. Despite apparently agreeing to seek a stay, the respondent never did so. Moreover, despite the argument that the respondent now makes, he never sought to be released at an earlier stage and only raises his Article 40 application after this court queried the basis for the continuation of the stay. By the same token, the minister never sought to a) enforce the order for surrender b) ask the Supreme Court to determine if the lodgment of the notice of appeal had been made in time c) ask the Supreme Court for a further stay or d) come back to the High Court under s.16(4) to seek a further extension under s. 16(5) of the Act of 2003. I am satisfied however that neither party is estopped from arguing a contrary position to that which they adopted previously. Indeed, neither party made any such argument in this case.

15. It appears that both parties simply proceeded as if the notice of application for leave to appeal being accepted by the Supreme Court office on 12th March regularised the situation; both parties seemed to be accepting that the document was lodged on 9th March. It is common case between the parties that the application for leave to appeal stamped as received on 12th March 2018, was the same document that was rejected by the office of the registrar of the Supreme Court on 9th March 2018. In that sense, it can be seen that the document was wrongly rejected. It is also clear that the respondent had a clear intention to lodge and file on 9th March 2018 and that he took steps to file the correct documentation on that date. Through no fault of his own, that was rejected by

the Registrar of the office of the Supreme Court. I have also been handed a letter dated 12th March 2018 from the Courts Service which begins "further to the filing by you of an application for leave to appeal on 12 March 2018…"

16. Counsel for the minister has explained his position by submitting that the position had been considered fully at the time as to whether anything further needed to be done and concluded that it did not. Counsel referred to a number of factors which had to be considered, including s.16(6) which refers to a stay where a person lodges an appeal pursuant to subsection (11). On further enquiry from the Court, counsel accepted that this section could not be relied upon as a lodgment of a notice of appeal to the Supreme Court was not such an appeal. Ultimately, counsel submitted that the State took the position that the attendance of Mr. Hughes at the office on 9th March together with his email of that date as meaning that the application for leave to appeal had been lodged on 9th March 2018.

17. In support of that contention, counsel relied upon Order 58 and Order 117A RSC and Practice Direction SC16 NO. 3(1)(a), (g), (h), (i), and (j). In particular, counsel referred to the filing of an electronic copy and submitted that it was sufficient in the context of what had occurred. Most forcefully, counsel relied upon the definition of "lodge" as set out in Order 117A Rule 1 which provides that ""lodge", in relation to any document, means lodge, file, leave with or at, deliver or transmit, or any analogous word or expression, and cognate words and expressions shall be construed accordingly".

18. Counsel also relied upon the decisions of *Hegarty v Labour Court* [1990] 10 ELR 198 and *People (DPP) v McKenna* [2002] 1 IR 347. In the *Hegarty* case, the meaning of the expression "shall be lodged in Court" in s. 8(1) of the Anti-Discrimination (Pay) Act 1974 was held by the High Court to "mean that the document actually reached the Labour Court in the ordinary course of its everyday business". In the *McKenna* case, the Court of Criminal Appeal interpreted s. 2(2) of the Criminal Procedure Act 1993 that "an application under this section shall be made, on notice given to the convicted person, within 28 days from the day on which the sentence was imposed" as including a situation where a solicitor had attempted to lodge the necessary application but that there was an objection by the office as to the paperwork. The Court of Criminal Appeal held that "delivery of the notice to the proper officer at the office of the Court of Criminal Appeal should be regarded as the initiation of the application. The court considers that this is what the witness was doing on the 18th December 2000." The solicitor's evidence had been *prima facie* evidence that the application was made on 18th December and it was for the respondent to satisfy the court that that was not so.

19. Counsel for the respondent rejected the relevance of those decisions, stating that what had been in issue in *Hegarty* was postal service and that in *McKenna* an important factor was that there were no rules of court in play. Counsel also relied upon Order 117A rule 2 and the reference to "non-personal delivery". He submitted that there was no lodgment either through non-personal delivery or by personal delivery on 9th March. He also relied upon Order 58 rule 14 which refers to the right of the Registrar to refuse to issue any notice of appeal or other document which does not comply with the requirements of this Order or the requirements of any statutory practice direction which applies to the application or appeal in question.

20. During the course of the proceedings it became clear that a decision of the High Court in *MH v MH* [2015] IEHC 771 (Abbott J.) appeared relevant. That case concerned Council Regulation EU 2201/2003 ("Brussels II bis"). At issue was whether the High Court of Ireland or the courts of England and Wales were seised of jurisdiction. In Ireland, the husband's solicitor had lodged an initiating document in the Central office at 2.15pm on 7th September. The wife's solicitors had posted an initiating document by DX and the evidence showed that it was received in the relevant unit of the English court on 7th September in the morning and that in the usual course, these would all have been opened, divided into categories, and attended to by 10.30am that morning. Only urgent matters were processed that day. The Court found that as a matter of probability, the pretention was received on 7th September and was stamped and stored at least by 10.30am. The petition was only issued on 11th September 2015 when it had been processed.

21. In *MH*, the issue was complicated by the fact that Article 16 Brussels II bis also provided for the situation where a document had to be served before being lodged. However, the High Court stated that "the meaning of the phrase "document is lodged with the Court" poses a question as to whether the word "lodge" means the receipt by the Court of the document or the formal issuing of the document by the Court in such a way as it may be served as a document requiring by law a response from the party against whom the complaint has been made, by way of defence, and which forms the basis of the plaintiffs or the petitioners claim respectively." A more important restriction on the applicability of this case is that the High Court was dealing with EU law and it was a requirement of the Regulation that "time should be defined autonomously".

22. Abbott J. went through Order 117A RSC in so far as it concerns the issue of lodgment. He noted that in respect of a posted document (as had occurred in England in the case before him) the situation was that the relevant court office issues that document in accordance with its stated purpose after receipt of the document in accordance with the Rules. He referred to a decision of the General Court of the European Union in case of *Yuanping Chang Yuan Chemicals Co. Ltd. v Council of the European Union* (Case T-310/12 unreported 20th May, 2015) in which it was stated that the date upon which the original document had been lodged with the court as being the date upon which the document had been received by the court.

23. According to Abbott J., two possibilities arose: the first is that lodged means the time and the date in which the document is received and noted by the court, and the second is that date upon which it is issued so as to have the force of a court document potentially binding the person on whom it is served. He held that it was necessary to adopt an autonomous definition of the time of lodging "as meaning not the time of issue but the time of receipt of the document in court, as in "lodging" within the meaning of Irish order 117A."

24. The judgment dealt with the situation where a court was only seised of a matter when service was affected. For the purpose of Brussels II bis it is the date of lodgment and not the date of service or of issue. Abbott J. quoted from a relevant textbook which states that "since an initiating document will always be stamped upon lodgment at the court office, it will usually be easier to say when the court was seized." In the view of Abbot J., this reinforced his conclusions.

Determination of the Court

25. The simple issue in the application under Article 40.4.2 of the Constitution is whether the application for leave to appeal was lodged/filed on 9th March 2018. The right to make an application for leave to appeal to the Supreme Court is set out in the Constitution. The manner in which that may be exercised is to be prescribed by law. The rules relating to appeal are set out in the Rules of the Superior Courts. The best place to start is Order 58. It is accepted that Order 58 rule 10 states that the application for leave to appeal or an appeal to the Supreme Court does not operate as a stay of execution. Therefore, it is only if the stay was continued by the filing/lodging of the notice of the appeal on the 9th March that the respondent could be said to be in lawful custody.

26. Order 58 rule 5 refers to service of documents. In my view, this appears to be service on another party (or notice party) rather than service on the Registrar or Office of the Supreme Court. This has to be inferred from the difference between Rule 5 concerning

service of documents and rule 7 concerning lodgment of documents. It is also apparent that rule 16 deals with the lodgment of the application for leave to appeal while rule 17 deals with service of the application for leave to appeal. It is clear that there is a distinction and that this Court is concerned with the rules as to lodgment rather than the rules as to service.

27. Order 58 rule 14(1) permits the Registrar to refuse to issue any notice of appeal (which is the term given by Order 58 rule 15 to form for application for leave to appeal) or other document which does not comply with the requirements of Order 58 or of any statutory practice direction which applies to the application or appeal in question. Rule 14(2) provides for an aggrieved person to appeal that refusal to the Supreme Court to authorise the issue of the notice of appeal or other document.

28. Order 58 rule 15 provides that all applications for leave to appeal shall be brought by the lodgment for issue of a notice in the Form No. 1. Form 1 is addressed to the Office of the Registrar of the Supreme Court.

29. Order 58 rule 16(1) provides for the time limit of 28 days from the perfecting of the Order. Rule 16(2) includes the requirement to lodge with the Registrar an attested copy of the written judgment approved by the court below when the notice of appeal is lodged or otherwise promptly after it becomes available. This is the only provision concerning lodgment which states that lodgment must be with the Registrar.

30. Order 58 Rule 7 permits documents to be lodged by any of the following methods:

> "(a) any method permitted by Order 117A (and where any such method is used, the provisions of Order 117A apply)
>
> (b) where permitted by a statutory practice direction, by electronic means in accordance with that direction."

31. Order 117A provides at rule 1 that "court documents" includes any pleading, notice etc required by these rules to be lodged with any officer or in any office in or connection with any proceeding. Lodge has the meaning set out above. Non-personal service is extensively defined. Rule 2 and 3 set out the rules regarding non-personal delivery. Rule 4 provides a list of circumstances where it is stated that the provisions of rules 2 and 3 do not apply. At Rule 4(e) it is stated that they do not apply to "any court document required under these rules to be handed to a registrar or handed into court."

32. As stated above, it does not appear from the rules that the lodgment of the notice of appeal has to be handed directly to a registrar; Form 1 says it must be addressed to the Office of the Registrar of the Supreme Court i.e. not the Registrar. Therefore in the absence of a statement that it must be handed to the Registrar, it seems to me that Order 117A permits non-personal delivery in respect of a notice of appeal. However, this does not advance the position very much as I do not consider that non-personal delivery of the document took place in this case. That is because Order 117A rule 1 defines non-personal delivery as (a) delivery at the office or to the officer by i) pre-paid registered post ii) pre-paid ordinary post or iii) through a document exchange service accepted by the officer for the time being managing the central office or b) deposit of that document in a box or at a facility maintained for that purpose by the office or officer so specified. None of that occurred in this case.

33. Personal delivery, as per Order 117A rule 1, on the other hand means "lodgment of a court document, together with any copy required and proof of payment of any court fee required (where necessary endorsed on the court document) at an office, with the officer concerned or with a member of the staff of the officer or office who is authorised to accept it". Lodgment and personal delivery are linked (see also Order 117A rule 2(3).

34. Pursuant to s. 7(7) of the Courts Supplemental Provisions Act 1961 inserted by paragraph (a)(iv) of section 44 of the Court of Appeal Act 2014, the Chief Justice has issued a practice direction as regards conduct of proceedings in the Supreme Court. SC 16 repeats Order 58 rule 15 as regards the requirement for lodgment in the office for issue of a notice in the Form No 1. SC 16 also repeats Order 58 rule 14 that the Registrar may refuse to issue any notice of appeal or other document that does not comply with the requirement of that Order or the requirement of any statutory practice direction. It states at no. 3(i) that "an electronic copy should be transmitted to the court on the day of filing" to a particular email address.

35. One issue is whether the words "lodge, file, leave with or at, deliver or transmit" include the filing by electronic means and/or the attempted filing of the notice of appeal. It my view, it is clear that electronic filing may only take place when it is specifically permitted by a statutory practise direction (see O58 r7(b)). The practice direction at SC 16 does not permit electronic filing, rather it is a requirement that an electronic copy be sent on the day of filing. That issue having been disposed of, the question remains whether the attendance at the office by the solicitor, and the presentation of the Form 1 amounted to a lodgment itself. The mere fact that the electronic copy was sent on 9th March is not determinative of the issue of whether the application was lodged that day.

36. I have considered the case of *McKenna* which was strongly relied upon by the minister. The Court of Criminal Appeal held that the activity of "attempting to" lodge the notice of application amounted to the making of an application within the meaning of the section at issue. One can immediately see the difference. The wording of the statute simply required the making of an application. An application was made but was not accepted on that date. The Court itself described the Solicitor's activity as attending at the office of the Court of Appeal and that "the purpose of her visit was to lodge the necessary notice of application by the prosecutor for review of the sentence. She attempted to do this….". Thus all she had done was attempt to lodge the papers. In my view, that judgment does not conclusively assist in determining whether a similar attempt to lodge or file a notice of appeal amounts to a lodgment or a filing of such an appeal.

37. In my view, the case of *Hegarty*, while of some assistance, is again not conclusive as to what lodgment in this context means. In that case, it was clear that the appeal papers had been posted and did not reach the Labour Court until after the period for appealing had lapsed. Postal service of the notice of appeal was apparently permissible in that case and it was in that context that the expression "shall be lodged in court" can, in the words of the court, only have one meaning i.e. actually reaching the Labour Court in the ordinary course of its everyday business. In the present case, we are dealing with personal delivery at the office and the question of whether a notice of appeal can have been lodged when in fact the office refused to accept it. However, *Hegarty* does assist in the general statement that lodgment, unless otherwise defined, means the reaching of the court in the ordinary course of its everyday business.

38. The minister has stated that the fact that the document was delivered to the office on 9th March, and a copy was emailed later on that date with an acknowledgement of receipt of the email from the Office of the Supreme Court was sufficient to establish that the document had been filed. Counsel relies upon the Supreme Court determination which reads "made on the 12th March" but does not state "lodged".

39. The words lodge, file, leave with or at, deliver or transmit have to be given their ordinary meaning, but they have to be given that ordinary meaning in the context in which they appear in Order 117A. That Order refers at rule 1 to lodgment "with any officer or in any office in or in connection with any proceeding." Similarly, personal delivery also talks about lodgment with the officer concerned or a member of the staff of the officer or office. In those circumstances, it is not therefore a passive act on the part of an appellant that will complete the lodgment but requires it to be done with or to the officer or office. It is a transactional process requiring communication between two. Lodgment or filing would not usually be understood as having taken place by the unilateral action of one party.

40. I have carefully considered the judgment of Abbott J. in *MH*. The respondent submitted that at the last page of the judgment quoting Singer J. in *LK v K (No. 3)* [2006] EWHC 3281, the Court had indicated that English law relating to lodgment meant that it was not simple delivery of the document, but a process in which it must be "filed" and proceeded with in a manner accepted by the court. I do not accept this. Abbott J. accepted that the process adopted in England meant that the English court was the first court seised of the matter. In my view, it is of importance that he has identified the concept of "lodgment" as one with two possibilities; a) as being completed with the date (or time if relevant) and noted by the court or b) when it is issued so as to have the force of a court document potentially binding the person on whom it is served. He rejected the latter interpretation in favour of the first. Although Abbott J. was dealing with the question of English law, he was clear that Article 117A incorporated the actual practice of what occurred in a lodgment.

41. If that is the case, Order 58 rule 14(1), which refers to the ability of the Registrar to refuse to issue a notice of appeal, does not necessarily mean that an application for leave to appeal has not been lodged. Indeed, the right of an aggrieved party to appeal that refusal and to request the Supreme Court to authorise the issue of that notice or other document would tend to demonstrate that the date of lodgment and date of issue are two different things. If they were not, then a lodgment would only have been made from the date of the Supreme Court order authorising the issue of the notice. If that was the case, the application for appeal might be out of time through no fault of the applicant. Apart from affecting whether leave should be granted, it might have knock on effects in terms of stays. There must be certainty in the law and any other interpretation would lead to uncertainty.

42. The position is the present case is not precisely on all fours with the *MH* case. In that case, there was evidence from the UK registrar as to the date and time it was probably received. The DX receipt had been time and date stamped but it appears that the document was not so stamped as to time. The High Court accepted as a matter of probability that it had been received by at least 10.30am when it was date stamped (but not apparently time stamped). It was on the basis of the facts there that the High Court posed its questions as to the meaning of lodgment as set out above.

43. In the present case, there is no stamp on the document as having been received on 9th March, and indeed the evidence is that the Application for Leave to Appeal and Notice of Appeal was stamped as being received on 12th March. However, there is nothing in the rules to say that the date of receipt where personal delivery is at issue is conclusive proof of the date of lodgment. Indeed, unlike Order 117A rule 3(d) concerning non-personal delivery there is no rule as to the date stamp being presumed to be the date of receipt. In my view however, Abbott J. recognised that the issue was when the lodgment was actually received (and noted) by the court (i.e. the office). In *MH,* Abbott J. had to determine the time of receipt, as distinct from the date of receipt, as there was no time stamp. In my view therefore, *MH* is authority for the proposition that a court, may be entitled make a determination as to time of receipt in the absence of a time stamp, albeit in the context of Brussels II bis and the situation in the courts of another jurisdiction. If that is the case, there is no reason in principle why a court cannot make a determination as to date of receipt of a notice of appeal in this jurisdiction even in the absence of date stamp (or in the face of a date stamp indicating receipt on another date).

44. Furthermore, the logic of the principles in both *Hegarty* and *McKenna* is that the courts are entitled to hear evidence and make decisions as to when in fact a lodgment of documents was received, or when in fact an application or an appeal was made. In the present case, there is nothing in the rules that prohibits such an approach by this court. There is also nothing in the rules that expressly deems a document which is personally presented to the Office of the Supreme Court to only be received when it is date stamped or recorded as being received. It is a matter for this Court to decide this issue. For the avoidance of doubt, I am not of the view that either the stamp "received 12th March" on the Notice of Appeal, the letter dating 12th March saying it was filed on 12th March, or the reference by the Supreme Court to the application being made on 12th March are determinative of whether this was in fact an application made on 9th March.

45. In the present case, the evidence before me points conclusively to this Notice of Appeal, in its final and appropriate form, being received by the office of the Registrar of the Supreme Court on 9th March. It was received in the sense that it was presented by the solicitor for the respondent at the office of Registrar of the Supreme Court in its appropriate form with all the relevant copy documentation. It was taken into the possession of a member of staff in that office and then read. In that sense, it was considered by a member of staff. It was thereafter (wrongly) rejected as an improperly completed form. The papers were taken back by the solicitor but later that day he sent an electronic copy of precisely the same application to the office. That was in fulfilment of the requirement under SC 16 of an electronic copy to be sent on the same day as filing. That email was, I accept on the balance of probabilities, accepted by the office of the Supreme Court. There is no evidence that any other electronic version was sent.

46. I am of the view that there was lodgment in compliance with my Order of 23rd February in the circumstances of this case. This is because where there was a correct handing in of an application for leave to appeal with the office of the Registrar, together with a follow up electronic service of a copy of that application by email, service of which was accepted by the office, a consideration by the Registrar followed by a wrongful rejection of that notice of appeal and a failure therefore to stamp the lodgment as having been received is nevertheless sufficient to amount to lodgment for the purposes of the order that I made on 23rd February. Indeed, if this had not been accepted as having been lodged in time and if an attempt had been made to remove the respondent within 10 days, I have no doubt that a Court would have prevented such a surrender on the grounds that the stay had persisted.

47. I wish to add two things about the email receipt in this case:

> a) I accept that it amounts to notice in the context of this particular case, but in the absence of all the other factors, such an email may not do so and,
>
> b) there has been no evidence in this case to cast doubt on whether this presentation of the Notice of Appeal was "received" in the sense that I have outlined above.

Undoubtedly, any litigant who seeks to rely upon having presented a document to a court official as proof of lodgment runs a grave risk of not being able to prove that the document was actually received or indeed that the document presented was the precise document that they later seek to rely upon. For the avoidance of doubt, a litigant should ensure that a document is stamped by the office when personally presented to the office. If not, the litigant must ensure that all steps are taken to ensure that there is a

lodgement within the meaning of the rules. The respondent's solicitor did that in this case by his email of that document on that day (of presentation) and by having a receipt by way of email from the office of the Supreme Court.

48. Furthermore, while it is not for this Court to dictate how the office of the Supreme Court should conduct its business, I would like to make some comments about the nature of a "receipt". For the avoidance of any future doubt, it might be good practice that when all documents are presented to the Courts' offices, they should be noted down as having been received. The indication of "received" is simply that, it is not an indication that a particular order has been issued. If necessary, an entry "received but not issued" could be indicated.

49. If I had accepted the submission of the respondent in this case, there would be a gross inequality between those who filed by non-personal delivery and those who lodged a court document at an office. Those documents filed by non-personal delivery are deemed to be lodged on the date that receipt has been recorded. Moreover, Order 117A Rule 3(e) and (f) provides that court documents can only be deemed to have been lodged with an officer when it is in fact received, and can only be deemed to have been lodged within a period of time when it is in fact received within that period of time. If a court officer who has actually personally been handed a court document is entitled to refuse to "lodge" it because in their incorrect opinion it is incomplete, and if a court must hold that there has therefore been no receipt of the document, this could amount to a grave injustice and lead to an inequality that could not have been intended by the Rules of the Superior Courts.

50. In my view therefore, the Notice of Appeal was received on 9th March and therefore the stay continued as per my Order of 23rd February 2018. Accordingly, I am satisfied that the respondent is detained in accordance with law.

The Order of the 23rd February 2018

51. Both parties have urged upon the Court that the Order of 23rd February 2018 only placed a stay on the surrender aspect of that Order, i.e. that only the period of time set out in subsection 3A of s. 16 was stayed. In other words, the Order became effective after 15 days elapsed and the only period that is stayed is 10 days from 4th May 2018.

52. In the absence of a clear indication in the Order to the contrary, and in the face of the agreement between the parties that that is the correct interpretation of the Order I made on 23rd February 2018, I accept that the stay was only for the 10 day period in which surrender could be effected.

Request for the Order under s. 16(5) of the Act of 2003

53. As stated above, the reason this request has come about is because it is asserted it is not possible to effect the surrender by sea and land within the 10 day period.

54. Counsel for the respondent submits that both the Framework Decision and the Act of 2003 require surrender within 10 days and it is only if prevented by circumstances beyond the control of any of the Member States that a new date can be agreed. That is undoubtedly the legal position. Counsel for the respondent submits that the legal criteria have not been met. He submits that the letter does not state that it is beyond the control of the issuing state. He submits that the letter, which was redacted when sent to the respondent because of concerns about security expressed by the issuing state, only sets out a set of circumstances and "kindly asks for the extension of the time of surrender." What counsel is submitting is that the factual position has not been reached because in essence there is no statement to that effect and/or the facts do not support an objective assessment that this was beyond the control of the issuing state.

55. In my view, it is for the Court to assess the request and ascertain if the surrender is being prevented by circumstances beyond the control of any of the Member States. In the present case, the request from the Lithuanian authorities does not contain those specific words, however it is patently obvious from the contents of the letter that they are relying on that section. Following the context of the mutual trust provisions, this Court must operate on the basis that the reason for the request is that the Lithuanian judicial authority is asserting that it is beyond the control of Lithuania to effect surrender within the 10 day period. That of course is not the end of the matter, it is for this Court to assess the information and decide if it is satisfied that the circumstances are beyond the control of the issuing state.

56. The issuing judicial authority has set out in detail that the trip will be an 8 day total trip i.e. a round trip. This is clearly because they have to travel by ferry and return by ferry. It was suggested by counsel for the respondent that they could fly here but that is not a realistic proposition in circumstances where a secure means of transportation will have to be provided. The issuing judicial authority has suggested that the ferry does not run every day and it has been suggested by counsel for the respondent that they do. That is not necessarily the position with regard to ferries to each country with which we have links. Most importantly however, Lithuania has to get permission to transport this respondent from four foreign countries through their territories. That is self-evidently not a simple proposition and the obtaining of that permission in a particular time frame (which can only have started from 4th May) is clearly beyond the control of the issuing state. The Lithuanian judicial authority has indicated that they cannot do it within the timeframe of 10 days from the 4th May 2018 by setting out the time frame in which it can be done. In all the circumstance, it is clearly beyond the control of the issuing state to surrender him within the 10 day period.

57. I am therefore satisfied that I should agree to fix the date of surrender as 20th May 2018 as requested by the Lithuanian authorities.