THE HIGH COURT

[RECORD NO. 2017 51 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUAILTY

APPLICANT

AND

ZANAS DZIUGAS

RESPONDENT

Judgment of Ms. Justice Donnelly delivered on the 2nd day of February, 2018

1. The surrender of the respondent is sought by an issuing judicial authority of the Republic of Lithuania pursuant to a European Arrest Warrant ("EAW") dated 20th December, 2016. He is sought to serve a custodial sentence of one year and three months imposed upon him in respect of two separate sentences. This sentence was initially imposed on 3rd October, 2006 but it was suspended on certain conditions. The EAW states that he did not comply with the obligations imposed upon him which included a condition of residence, and on 2nd May, 2007, the suspension of the sentence was revoked.

2. The respondent has raised two substantive points of objection in the course of the proceedings. The first point of objection is that one of the offences for which surrender is sought does not correspond with an offence in this jurisdiction. The second point of objection is that he was not present when the suspended sentence was revoked and therefore it would either be a breach of s. 45 or a breach of his rights to surrender him in those circumstances.

3. The Court must ensure that all conditions are met before it can order the surrender of any person whose surrender is sought. The Court will therefore rule on all issues, even those not disputed by the respondent.

A Member State that has given effect to the framework decision
4. I am satisfied that the Minister for Foreign Affairs has designated the Republic of Lithuania as a Member State for the purposes of the European Arrest Warrant Act of 2003, as amended, ("the Act of 2003").

Section 16 (1) of the Act of 2003

Identity
5. I am satisfied on the basis of the evidence of Garda Eoin Kane, member of An Garda Siochána, and the details set out in the EAW, that the respondent, Zanas Dziugas, who appears before me, is the person in respect of whom the EAW has issued.

Endorsement
6. I am satisfied that the EAW has been indorsed in accordance with s. 13 for execution.

Sections 21A, 22, 23 and 24 of the Act of 2003
7. 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
8. Subject to further consideration of s. 37, s. 38 and s. 45, of the Act of 2003, as amended and having scrutinised the documentation before me, I am satisfied that I am not required to refuse the surrender of the respondent under any other section contained in part 3 of the said Act.

The provisions of Section 38
9. The surrender of the respondent is sought for two offences. One of those offences poses no difficulty with correspondence. It is stated that the respondent, with other people, "in order to commit a theft" went to the home of a named person where they removed the window frame of the house, smashed the pane and broke inside where they seized various items of property. Those acts, if committed in this jurisdiction, would correspond with an offence of burglary contrary to s. 12 of the Criminal Justice (Theft and Fraud) Act, 2001, ("the Act of 2001") and the offence of theft contrary to s. 4 of the said Act of 2001. In circumstances where theft in Lithuania is punishable by imprisonment for a term of up to 6 years and he received an aggregated sentence of one year and three months of imprisonment, the provisions of minimum gravity have also been met.

10. The objection regarding lack of correspondence arises in respect of the second offence. If there is no correspondence of that offence with an offence in this jurisdiction, then, in accordance with the principles of the decision of *Minister for Justice and Equality* v. *Ferenca* [2008] IESC 52, the respondent cannot be surrendered on this European Arrest Warrant. This is because an aggregate sentence has been imposed in respect of both offences set out in the European Arrest Warrant.

11. In Part (e) of the EAW, the details of the second offence are as follows:

> "On 8 January, 2005, at about 5 p.m., Z.D. arrived at the house of V.K. in (location), in order to regain the mobile phone "Nokia 3310" that belonged to him, disregarded the procedure established by the law and wilfully exercised an existing right of his own, which is disputed, though not exercised yet, and took from home of V.K. and this way seized unlawfully the victims' TV set "Becko 20 B9M07" worth LTL400, thereby causing the property damage in the amount of LTL400 to V.K.."

12. According to the EAW, that offence is described in the Criminal Code of Lithuania as "self-willed conduct". The relevant law defines such an offence as follows:

> "A person who, by disregarding the procedure established by the law, wilfully exercises an existing or alleged right of his own or another person which is disputed or recognised, though not exercised yet, and incurs major damage to the persons' rights or legitimate interests shall be punished by a fine or by arrest or by imprisonment for a term of up to three years."

By contrast, the offence of theft relates to the open seizure of another's property and has a penalty of fine or loss of liberty for up to six years.

13. Counsel for the respondent submitted that the details in the EAW suggested that the respondent had a claim of right. For the act to amount to theft, it had to have been carried out dishonestly and there was no dishonesty in the facts as stated in the European Arrest Warrant. On the face of the EAW, he was wilfully exercising an existing right of his own, which was disputed, though not exercised yet. Although this was wrong in the context of the law in Lithuania, it was submitted that this was not an act which would amount to a theft in this jurisdiction.

14. Counsel for the minister submitted that the facts as outlined could never be honest; there was dishonesty inherent in what the respondent had done. It could never be otherwise than dishonest to go to another person's home and take their property, even when the taker of the property asserts that the second person owes them a separate item of property. Counsel submitted that there could not be a claim made in good faith in those circumstances.

15. Having heard submissions on the issue, the Court decided it was an appropriate case in which to seek further information from the issuing judicial authority by utilising the s. 20 procedure under the Act of 2003. A letter of request was submitted to the issuing judicial authority. That letter set out the particulars of the Irish legal provisions and the reason for the request. The Court asked that four specific issues be addressed as follows:

> "(1) Please provide full details and information about the first offence on the warrant and the respondent's state of mind in committing that offence.
>
> (2) Please clarify the phrase "disregarded the procedure established by the law and wilfully exercised an existing right of his own which is disputed or recognised, though not exercised yet" and whether that means that the respondent exercised a right that he held but did so contrary to the established procedure.
>
> (3) Please explain in detail whether the facts in which the conviction is based, he acted "dishonestly" as defined under Irish law that is in doing the act he acted "without a claim of right made in good faith".
>
> (4) Please provide any other information on the matter which would be useful to the High Court to understand the factual circumstances of the offence and the respondent's state of mind in committing the offence in order to assist it in deciding whether the act or omission constituting the offence would, if committed in Ireland, qualify as a theft offence contrary to s. 4 of the Criminal Justice (Theft and fraud offences) Act, 2001".

16. By letter dated 9th January, 2018, the issuing judicial authority replied as follows:

> "Article 294 of the Criminal Code of the Republic of Lithuania, which describes the criminal act- high handedness, is established in s. XLII of the Code 'Offences and Misdemeanours in the Code of Conduct'. This criminal act is performed when some certain subjective rights are implemented by unlawful means. The fact that the dangerous act is performed due to these subjective rights, changes the content of the Act and what it (sic) is usually treated as extortion, theft and etcetera receives another crime status – high handedness.
>
> We are informing you by your questions: -
>
> > (1) According to the civil case data, Z.D. was found guilty by the decision of the court on 3rd October 2006 according to the Part 1 Article 294 of the Criminal Code of the Republic of Lithuania because as he was trying to retrieve his own mobile phone from V.K. on 8th January, 2005, he went to V.K.'s home and when he did not find him he took the television set that belonged to V.K.. This means that Z.D. has abused his right as he wanted to get his mobile phone back; he chose such a way to implement the law, which does not comply with good morale, common rules of life, principles of honesty and justice. In this case Z.D. should have contacted the responsible institutions regarding the return of the mobile phone from V.K. Z.D. has performed this act in direct attempt i.e. he understood that he is acting against the will of the owner; he has anticipated the consequences of the criminal act and sought them.
> >
> > (2) The case states that the mobile phone of Z.D. was with V.K. Z.D. had the right to retrieve the mobile phone from V.K. but he behaved contrary to the established procedure, i.e. not being able to get back the mobile phone, he made a criminal act – took the television set from V.K. home without him knowing.
> >
> > (3) Z.D. was acting unfairly, i.e. by acting this way without any faith that this is fair, Z.D. understood that he was behaving in a criminal way.
> >
> > (4) Instead of meeting with V.K. and demanding his phone, he obtained and took over the property that belongs to V.K. – his television set without the owner V.K. being at home. The television set that was taken arbitrarily was immediately sold to another person and Z.D. has spent the money on alcohol. The amount of property damage of V.K. was 400 Litas. From the case material, at the time of committing a criminal offence, the addiction related illness of Z.D. was not recorded or received by a psychiatrist. During the pre-trial investigation on 15/12/2005, he was appointed a psychiatric counselling and during it Z.D. had this diagnosed personality disorder type of emotional instability. There is no more information on his health condition in the case. There is data that Z.D. has already been convicted three times for misconducts before the courts' decision on 3/10/2006. The criminal act on 8th January 2005 was done still under a criminal record and on 03/10/2006 he was recognised as a recidivist."

17. The information on his psychiatric health appears to have been given to this Court by virtue of a misunderstanding of what was being asked in paragraph number 4 of the request. It was not his psychiatric health that was being questioned but the respondent's intention or the "*mens rea*" of the respondent while he carried out this act. In hindsight, this Court should have phrased its request more carefully. The Court is of the view that his mental health or psychiatric issues, his addiction, or indeed his recidivism, are not relevant to the issue of correspondence.

18. Each counsel submitted that the response of the issuing judicial authority supported the case that each was making. Counsel for the minister said it was sufficiently established that he had acted dishonestly and that he had acted without a claim of right made in good faith. In particular, the minister referred to the statement that he had chosen such a way to implement the law which does not

comply with good morale, common rules of life, principles of honesty and justice. The response stated that the respondent should have contacted the responsible institutions regarding the return of the mobile phone. Counsel for the respondent submitted that this was in effect an offence of high handedness and not theft. The respondent had a belief in his rights and while he may have been wrong in that belief, there was no evidence that he had acted dishonestly.

Analysis and determination of the court

19. The law concerning proof of correspondence of offences is well established. The starting point is s. 5 of the Act of 2003 which provides:

"For the purposes of this Act—

> (a) an offence under the law of the issuing state corresponds to an offence under the law of the State, where the act or omission that constitutes the offence under the law of the issuing state would, if committed in the State, on the date on which the European Arrest Warrant is issued, constitute an offence under the law of the State."

20. In the case of the *Minister for Justice, Equality and Law Reform v. Szall* [2013] 1 IR 470, the Supreme Court (Clarke J. as he then was) stated at para. 38:

> "In *Attorney General v. Dyer* [2004] IESC 1, [2004] 1 I.R. 40, Fennelly J. re-emphasised the principle, which can be traced back to *State (Furlong) v. Kelly* [1971] I.R. 132, to the effect that the comparison which requires to be conducted in order to determine correspondence is to be based on the acts or omissions which are said to constitute the offence."

After discussing the provisions of s. 5 of the Act of 2003, the Supreme Court in *Szall* also held: "There is not, therefore any material difference, so far as correspondence is concerned, between the law as it stood under the Act of 1965 and the law as it now stands under the Act of 2003."

21. The Supreme Court in *Attorney General v. Dyer* [2004] 1 IR 40 had clarified that the allegation (or the proved offence) must contain, either expressly or to be implied, the ingredients of the offence, including *mens rea* requirements in this jurisdiction. At the final paragraph of *Dyer*, Fennelly J. stated:

> "However, in the absence of any allegation, either express or to be implied, of intent to defraud, I do not believe the warrants in the present case satisfy the requirements of Part III of the Extradition Act 1965 in respect of correspondence of offences. I would, therefore, allow the appeal and substitute an order dismissing the application of the applicant."

22. In the present case, counsel for the respondent made a tentative submission that his client's version of events, which were not then on affidavit, could be accepted by the Court for the purpose of considering whether correspondence had been reached. Counsel did not seek to advance any authority for the proposition that correspondence of offences may be challenged by a respondent who puts forward a different version of the facts alleged or proven against him.

23. It is implicit within s. 5 of the Act of 2003, that it is the detail in the EAW that must be considered for the purposes of assessing correspondence. The reference in s. 5 to the "offence specified in a European Arrest Warrant" can only mean the details of the offence as provided in the European Arrest Warrant. The *dictum* of Walsh J. in the Supreme Court in *Wyatt v. McLoughlin* [1974] IR 378 provides some guidance on this question:

> "Part III of the Act of 1965, which applies to the present case, is based upon the principle of double criminality without any categorisation or enumeration or specification of the offences for which extradition will be granted*. Under such arrangements it is not the legal qualification of the offence according to the foreign law concerned or the name it has in that law which is of importance but it is the facts underlying the offence as ascertainable from the warrant or conviction, as the case may be, or as may be ascertained from such other documents as may accompany the warrant.* Therefore, the Courts of this State, when dealing with warrants endorsed for execution in accordance with Part III of the Act of 1965, must be satisfied that the acts constituting the particular offence for which extradition is sought are acts which, if committed within this jurisdiction, would constitute a criminal offence. For the reasons stated in *Furlong's* case, it is necessary that either the warrant or some other document accompanying it should set out sufficient information as to these acts to enable the courts of the State to identify the corresponding offence, if any, in our law. It cannot be sufficient simply to use the name by which the crime is known, or alleged to be known, in the requesting country even though that same name may be used in this country as the name of a crime, because the acts complained of, although having identical names, may constitute quite different criminal offences in different countries or, indeed, no offence at all in one of them." (emphasis added)

24. Walsh J. also dealt with the question of "dressing up" an extradition warrant. This refers to the situation where an offence was described in the extradition warrant in a manner which made it clearly understood that it came within the parameters of a corresponding Irish offence. Walsh J. stated that:

> "Until there is some reason to believe the contrary, it is to be assumed that a statement of facts such as the one appearing on the warrant executed in this case, or any warrant sent here for execution, is a truthful statement of the facts of the case in respect of which the arrest is sought. If it should transpire in any case that the statements of fact set out in the charge were not supported by any evidence then, of course, a very serious situation would arise and the Courts would be obliged to examine such warrants in a completely different light because to set out statements of fact on a warrant for the purpose of giving the charge the appearance of corresponding to an offence under Irish law, when those factual statements are not capable of being borne out by evidence, would be to practise a fraud upon the Courts of this country."

25. That statement of Walsh J. must also now be read in the context of the principles of mutual trust and confidence that underlie the mechanism of the European Arrest Warrant. In circumstances where a respondent is putting forward nothing more than a mere assertion in an affidavit that the facts of his conviction are incorrect, the High Court would be under an obligation pursuant to the principles of mutual trust and confidence to reject such mere assertion in the absence of any supporting evidence as to its truthfulness. In those circumstances, I am quite satisfied that this Court must proceed on the basis that, even if the respondent were to put such mere averments on affidavit, the Court would have to reject the contents of same and proceed on the basis that the facts are as stated in the EAW and the additional information received.

26. Therefore, this Court will proceed to examine whether the facts set out by the Lithuanian judicial authority correspond to the

offence of theft in this jurisdiction. The starting point is the provisions of s. 4 of the Act of 2001. Section 4(1) provides:

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

The word appropriates means: "usurps or adversely interferes with the proprietary rights of the owner of the property." The concept of dishonesty means: "without a claim of right made in good faith".

27. It is not in issue that the respondent has been convicted of usurping or adversely interfering with the proprietary rights of the owner and that he did so with the intention of depriving the owner of the property. The central issue is whether the act that he committed in Lithuania was done without a claim of right made in good faith and would therefore be an offence of theft if those acts had been committed in Ireland.

28. In my view, counsel for the minister has correctly submitted that if a person in this jurisdiction sought to take from another person an item which had been previously taken from that person, there may be no dishonesty. There may also be no interference with proprietary rights. Counsel for the minister submitted that if the same person were to take another item in lieu of their own item, this would amount to dishonesty. Counsel for the minister may be correct in that submission, but the facts of this case include an extra statement. The factual ingredients of the offence as set out in the EAW expressly state that he "disregarded the procedure established by the law and wilfully exercised an existing right of his own which is disputed, though not exercised yet" and took the TV from V.K. Those words must be considered in the context of the acts that this Court must take into account for the purpose of considering whether correspondence has been established. They must also be considered in the context of the additional information received.

29. Counsel for the minister has understandably referred to the response from the issuing judicial authority set out above. He made particular reference to the statement that the respondent chose such a way to implement the law "which does not comply with good morale, common rules of life, principles of honesty and justice". The references to principles of honesty and justice must however also be seen in the context that it is being stated that the respondent has abused his right; that is, he had abused his right to get his mobile phone back. It is repeatedly stated in the EAW and in the additional information that the respondent was either "wilfully exercising an existing right" or abusing his rights.

30. It is this emphasis on his exercise of a right of his own that differentiates the factual statement of the offence from a straightforward recital of theft. The requirement of dishonesty in the offence of theft is a requirement that there be a subjective element of dishonesty. Where there is a claim of right i.e. a claim to be entitled at law to deprive the other person of the property which is made in good faith, a defendant in this jurisdiction will not be guilty of the offence of theft even if there is no legal basis for that claim of right. It is therefore necessary to address what the state of mind of the respondent was at the time he carried out the act as found by the Lithuanian court.

31. In my view, the explanation of the facts that have been given by the issuing judicial authority in the reply of 9th January, 2018 must be taken into account in understanding the foundation for the finding of guilt against this respondent. In doing so, I am comparing the law in Lithuania to the law of theft in this jurisdiction. Such comparison is prohibited by s. 5 of the Act of 2003. It is only the acts or omissions proven against this respondent which are to be compared.

32. In the additional information, the issuing judicial authority has given an explanation of the basis of the conviction and it is important that this Court would not disregard that explanation. Moreover, as the Supreme Court (Denham J. as she then was) stated in *Minister for Justice and Equality v. Dolny* [2009] IESC 48, in considering the issue of correspondence, "it is appropriate to read the warrant as a whole". The issuing judicial authority has set out that the criminal act of which this respondent has been convicted "is performed when some certain subjective rights are implemented by unlawful means". They go on to explain that the fact that the act is performed due to those subjective right changes the content of the act. In other words, the fact that subjective rights exist changes the act from one of theft to an offence of high handedness. In passing, it is noted that the description of the offence in Lithuania went from "self-willed conduct" in the EAW to "high handedness" in the additional information. In my view this may be a translation issue, but it is not relevant to the issue I have to decide, namely whether the acts correspond with the offence of theft in this jurisdiction.

33. It is also noted that an offence which by virtue of attracting half the maximum sentence applicable to theft, is one which is clearly seen as less serious than the offence of theft. That of course is not directly relevant to the issue of correspondence but it does give an indication that the criminality (in Lithuania) of the respondent's behaviour is not viewed as seriously as that of a person who commits a straightforward theft.

34. The EAW clarifies that in Lithuania, the respondent has committed either an "unlawful" act or a "criminal" act by taking the television. In the context of seeking to rely on correspondence, a description of an act as being either unlawful or criminal may not assist this jurisdiction in reaching a conclusion as to the act. It is not the fact that an act is criminal or unlawful in Lithuania that is relevant; it is whether that act (especially when combined with a particular intention on the part of the respondent) is criminal or unlawful in this jurisdiction. On the other hand however, the fact that a person knows that an act is criminal or unlawful is relevant to the question of whether that person can be said to be acting honestly. For the avoidance of doubt, it must be clarified that this question of the respondent's subjective dishonesty is separate from the issue of objective dishonesty.

35. In my view, the references to good morale, common rules of life, principles of honesty and justice are references to objective criteria from which the conduct of the respondent may be viewed. In that sense, in an objective fashion, it is quite clear that taking an item of property from one person in lieu of another item of property which they have taken from you, would violate community standards of honesty, justice, and behavioural norms. As has been stated however, for the offence of theft in this jurisdiction to be committed, there must be subjective dishonesty on the part of an accused person. Those references are not therefore on their own sufficient to show that this act by the respondent was carried out in a subjectively dishonest fashion.

36. It is therefore of considerable significance that in answer to a direct question from this Court on whether in doing the act the respondent acted "without a claim of right made in good faith", the issuing judicial authority replied that he "was acting unfairly, i.e., by acting this way without any faith that this is fair, [the respondent] understood that he was behaving in a criminal way". The answer did not directly reflect the wording of the question asked and the respondent relies upon the absence of a direct statement that it was made without a claim of right made in good faith. In my view, it is important that this Court analyse the reply so that the Court can assess whether the facts found against him in Lithuania include such a claim of dishonesty. In my view, the Lithuanian issuing judicial authority answered in a manner which reflected the situation that was found in Lithuania, rather than using a phrase which comes from the Irish legal provisions. In doing so, the Lithuanian issuing judicial authority have made it perfectly clear that this

respondent knew he was behaving in a criminal way.

37. Although I have already stated that in considering correspondence, the word "criminal" is not to be directly translated back into a concept of criminality in Irish law, and that the Court must be careful in interpreting a statement where there is a reference to criminality, this is nonetheless relevant in the context of this case. It is relevant not as a statement of law in Lithuania but as a statement of the factual situation. In other words, this is directly relevant to the issue of his state of mind when conducting this matter and also to the question of whether he could have made a claim of right in good faith. If a person knows that they are carrying something out in a manner which is "unfair" and "criminal", by definition, there cannot be a claim of right made in good faith. It is not necessary that this Court be satisfied about the type of criminality alleged in the context of a theft offence, because the factual allegation against him is that he did not have a claim of right made in good faith at the time he took that property. The precise nature of the criminality is not relevant in this context. The fact of acting contrary to the applicable criminal laws is simply a confirming statement that he had no claim or right made in good faith i.e. that he acted dishonestly.

38. In those circumstances, even though this is an offence which has no word-for-word statutory equivalent in Ireland, and even though the offence incorporates a subjective claim to a right to particular property, there is, on the facts, correspondence with the offence of theft in this jurisdiction. Although there is a difference between the offence of theft and this offence of high handedness in Lithuanian law, the actual ingredients of the offence of high handedness as proven against this respondent, amount to an offence of theft in this jurisdiction. While the Lithuanian offence may take into account that the victim of this particular appropriation of property may have appropriated other property from a perpetrator, which may have granted him certain subjective rights, the respondent had nonetheless dishonestly taken a different item from that person. That is theft in this jurisdiction. It may be that in this jurisdiction the sentence of such a perpetrator would be mitigated by virtue of the earlier theft of the perpetrator's property; in Lithuanian law, the legislature has chosen an alternative path by way of creating a separate offence. That fact is immaterial to this Court's decision, because as has been stated already, it is correspondence with the acts alleged that is required and not with the manner in which the offence is classified under statute.

39. For the reasons set out above, the acts for which he has been convicted correspond with the offence of theft in this jurisdiction. The provisions of minimum gravity have also been met. Therefore, his surrender is not prohibited under the provisions of s. 38 of the Act of 2003.

Section 45
40. The position in this case is that the respondent had a single trial in relation to these matters which was held on 3rd October, 2006 (an incorrect date appears in the EAW but was subsequently corrected by the issuing judicial authority). It has not been disputed that he appeared at the date of the trial and sentence. Section 45 has therefore been complied with insofar as his trial and original sentence are concerned.

41. The issue arises because Part D of the EAW also records that the respondent did not appear in person at the trial resulting in the ruling of 2nd May, 2007 to revoke the suspension of his sentence. In respect of the revocation of the suspension of his sentence, the Lithuanian judicial authority has indicated reliance upon Part D(3.4) as set out in Article 4A of the Council (EC) Framework Decision of 13th June, 2002 (2002/584/JHA) on the European Arrest Warrant and the surrender procedures between member states, ("the 2002 Framework Decision") as amended by the Council (EC) Framework Decision of 26th February, 2009 (2009/299/JHA) , and s. 45 of the Act of 2003. In doing so, the judicial authority certify that he will be served with the decision after surrender and will have the right to request a retrial or appeal which will be within seven days.

42. The respondent raised an issue as to whether this is a matter which is covered by the case of *Minister for Justice and Equality v. Lipinski* [2017] IESC 26, which said judgment is awaited from the Supreme Court. The Supreme Court judgment has in turn been delayed by the judgment of the Court of Justice of the European Union in the reference concerning Case C-571/17 *Openbaar Ministerie v Samet Ardic* [2017] ECLI 1026. The judgment in that case has been delivered but at the time of the hearing of this application for surrender had not been available in the English language. I am not going to take that decision into account as there was no opportunity for the parties to make submissions based upon an official translation.

43. In the present case, counsel for the respondent accepts that on the face of the EAW, s. 45 has been complied with. He submits however, that it would be unfair to surrender the respondent in circumstances where he will have to remain in custody or be sent back in custody in circumstances where he was not present at the hearing. In my view, there is no substance to that argument. In all cases where there has been a sentence imposed after a trial *in absentia* held without due notification to the respondent, the Court is obliged under the provision of the 2002 Framework Directive to surrender a person to serve that sentence where an appropriate guarantee of a retrial has been granted. A retrial will only take place if requested by the respondent. The respondent would therefore be returned to serve a sentence in a trial in which he was not present. It is of particular note that the respondent has not relied upon any case law from the European Convention on Human Rights or any other judicial body that would lean towards the view that such a process would be a fundamental violation of rights in the sense as set out in *Minister for Justice and Equality v. Brennan* [2006] IEHC 94 by the Supreme Court. Therefore, there is no violation of the right to fair trial or to liberty by surrendering a person who is sought to serve a sentence imposed in their absence but which is reviewable/appealable by them on return to the issuing state.

44. I am satisfied that this is not a case which is covered directly by the *Lipinski* decision. This is a case where, as has been stated, on its face, s. 45 has been complied with. The issuing state has perhaps gone further than it was required to with respect to Part D, but in doing so has given this Court all of the information required. He had a trial and was given a sentence in proceedings in which he was present. The suspended nature of that sentence was revoked in his absence but he will be entitled to appeal it on his return in accordance with the uncontested guarantee provided by the issuing judicial authority at Part D(3.4) of the European Arrest Warrant.

45. I am satisfied that the provisions of s. 45 have been complied with in this case. He was present at his trial and sentence. He was not present at the revocation of his suspended sentence but he will be guaranteed a retrial on his return if he so requests.

Section 37
46. For the sake of completeness, I also state that I am satisfied that, for the reasons set out in the paragraphs under the heading "Section 45", there would be no breach of the respondent's fundamental rights should he be surrendered because of the fact that he was not present for the revocation of his sentence. Although he also claimed in his points of objection that his fundamental rights under Article 3 and Article 8 of the Convention would be violated, I am satisfied there is no evidence before me that gives rise to a real risk that his rights will be violated under Article 3 or upon which the courts could be satisfied that it would be a disproportionate interference with his private and family rights to surrender him to Lithuania.

Conclusion
47. For reasons set out above, I am satisfied that the points of objection of the respondent must be rejected and that the provisions

of s. 16(1) of the Act of 2003 have been complied with. In the circumstances I may make an order for his surrender to such other person as is duly authorised by Lithuania to receive him.