Neutral Citation [2015] IEHC 524

THE HIGH COURT

[2011 No. 197 EXT]

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

M.V.

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 28th day of July, 2015

1. The Republic of Lithuania seeks the surrender of the respondent to serve a custodial sentence of five years and six months imprisonment imposed upon him. The warrant is dated 17th September, 2007, and is signed by Petras Baguska who, at that time, was the Minister for Justice in Lithuania. The main point of objection in this case is that the European arrest warrant ("EAW") was not issued by a competent judicial authority as required by Article 1 and Article 6 of the Council Framework Decision 2002/584/JHA of 13th June, 2002 on the European arrest warrant and the surrender procedures between Member States ("the Framework Decision"). The points of objection go on to say that as the warrant was issued by the Minister of Justice, it is not therefore a judicial decision issued by a Member State as required by Article 1 of the Framework Decision.

2. This main point of objection was contained in an amended point of objection which the Court permitted to be filed in this case on hearing that the respondent now wished to rely upon a decision from the United Kingdom ("U.K.") Supreme Court given on 20th November, 2013, in three separate cases. The judgment, referable to all three cases, is cited as *Bucnys v. Ministry of Justice, Lithuania* [2013] UKSC 71. In the intervening time between the amendment of the points of objection and the s. 16 hearing, the Supreme Court in this jurisdiction gave its decision in *Minister for Justice and Equality v. McArdle and Brunnell* [2015] IESC 56. Both of these judgments will be discussed below.

The Grounds upon which the Main Objections are Based

3. The respondent sought and received a legal opinion from an attorney-at-law in Lithuania. This legal opinion was proffered to the Court in the form of a letter to the respondent's solicitors, headed "Legal Opinion" and signed by the attorney-at-law. There is no affidavit verifying the document. Edwards J. in *Minister for Justice and Equality v. P.G.* [2013] IEHC 54 has stated that verification of the contents of a document is necessary where the contents are being relied upon as constituting testimonial evidence. Murray C.J. stated in *Minister for Justice, Equality and Law Reform v. Sliczynski* [2008] IESC 73 that counsel for the appellant properly acknowledged that extradition proceedings are neither strictly criminal nor civil in nature but the ordinary rules of evidence apply. In this case, it is quite unsatisfactory that a document was simply placed before the Court and the Court was being asked to treat this as admissible evidence. Indeed, when the matter was raised by the Court, there was no explanation for the absence of the affidavit and no attempt to seek time to put one before the Court.

4. The Minister sought further information from the Lithuanian authorities having received the legal opinion mentioned above. The Lithuanian authorities stated that the EAW had "been issued on the basis of the application of Prison Department under the Ministry of Justice of the Republic of Lithuania." In light of the fact that the Minister did not seek to object to the proffering of the document in evidence but more particularly on the basis of the additional information received from the issuing state which forms part of the information that the Court must consider, it is necessary and appropriate to address the issue raised in the amended points of objection.

5. The legal opinion confirms that in accordance with:-

> "Article 69 of the Criminal Procedure Code of Lithuania, which was in force in September 2007, European arrest warrants regarding … persons who have been sentenced to imprisonment by enforceable judgments in the Republic of Lithuania and who have absconded from serving the sentence in another Member State of the European Union shall be issued and competent authorities of that state shall be contacted by the Ministry of Justice of the Republic of Lithuania. In these cases EAW has to be signed by the representative of the Ministry of Justice. Back then Mr. Petras Ragauskas was the head (the minister) of the Ministry of Justice of Lithuania, so the procedure of issuing EAW was carried out correctly."

This is clear confirmation that the Ministry of Lithuania was the designated issuing judicial authority under Lithuanian law for the purpose of issuing EAWs.

6. The legal opinion then states that having sent an official request to the Ministry of Justice of the Republic of Lithuania, the law firm was informed that the warrant was issued by the Ministry of Justice at the request of the Prison Department. The lawyer confirms that the applicable rules in the Republic of Lithuania are that if a convicted person, who has not been arrested until the court judgment becomes enforceable, absconds from the execution of the custodial sentence imposed upon him by the court's judgment, or if the convicted person while serving his custodial sentence runs away from the correctional institution or fails to return there, the request to issue the EAW shall be submitted to the Ministry of Justice by the institution executing the sentence after taking into consideration the criteria for issuing an EAW laid down in the rules.

7. The legal opinion further states that the Prison Department is an executive agency charged with the execution of the sentence. It is not a judicial body considering and ruling upon the question of whether the person wanted has absconded. It is stated that the Prison Department has discretion as to whether to apply to the Minister to issue the warrant. The attorney then says "…the evident oddity in the context of a European arrest warrant of such a discretion being entrusted to a Prison Department merely underlines the fact that it cannot be regarded as a judicial authority." The Ministry of Justice having received the request also has to consider for itself whether formal preconditions have been met but also has to take into consideration the severity and type of the offence and the convicted person's personality. The legal opinion continues:-

> "assuming again that this connotes an element of discretion, even in the case of a conviction, as to whether it issues a warrant, the mere fact that the Ministry of Justice is given a discretion does not make it a judicial body."

8. Those parts of the legal opinion referring to the evident oddity of the discretion being entrusted to a prison department underlying the fact that it cannot be regarded as a judicial authority and to the "mere fact that the Ministry of Justice is given a discretion does not make it a judicial body" are taken word for word from the judgment of Lord Mance in *Bucnys*. The legal opinion establishes that the Prison Department is an executive agency, the Prison Department makes the request to the Minister for the issue of an EAW, the

Minister has a discretion but he cannot be regarded as a judicial body by that fact. On the other hand, the Lithuanian authorities accept the request came from the Prison authorities. The Minister for Justice in Lithuania is, self-evidently, a member of the executive branch of government.

9. The legal opinion then goes on to refer to the courts of the U.K. having made certain determinations. The lawyer does not give any indication as to her expertise in the law of the U.K. and, therefore, even if the opinion had been verified by affidavit, it would, in the absence of an expertise in U.K. law, be inadmissible as evidence of the law of the U.K.. The Lithuanian lawyer concludes as follows:-

> "to sum up it is necessary to mention that European arrest warrant, which was issued by the request of the Prison Department should not be treated as legitimate and issued by the judicial authority."

She finally states that her firm is not entitled to interpret the law so the information which is mentioned above is only guidance provided as legal opinion.

The Relevant Law

Statutory Provisions
10. In his written submissions, the respondent relied wholly on the judgment in Bucnys. As the Supreme Court has stated on a number of occasions, and most recently in *McArdle and Brunnell*, the UK legislation which implements the Framework Decision is different from the European Arrest Warrant Act 2003, as amended ("the Act of 2003"). The starting point, therefore, for any consideration of this issue must the Act of 2003 and relevant decisions from the courts in this jurisdiction.

11. The Act of 2003 implements the Framework Decision. Article 1 of the Framework Decision provides at para. 1 that:-

> "The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order."

Member States are required, pursuant to Article 1, para. 2, to "execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of the Framework Decision." Article 6 of the Framework Decision provides at para. 1:-

> "The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State."

12. In accordance with s. 2(1) of the Act of 2003, a European arrest warrant in Part 1 of the said Act, means "a warrant, order or decision of a judicial authority of a Member State, issued under such laws as give effect to the Framework Decision in that Member State…." The issuing judicial authority is defined as "the judicial authority in the issuing state that issued the European arrest warrant concerned." Judicial authority is then further defined in the Act as meaning "the judge, magistrate or other person authorised under the law of the Member State concerned to perform functions the same as or similar to those performed under section 33 by a court in the State."

13. Section 33 provides that a court may upon the application made by or on behalf of the Director of Public Prosecutions issue an EAW in relation to a person who has satisfied the criteria set out therein. However, the EAW referred to in s. 33 has a different definition than that contained in s. 2(1) and is defined in s. 31 as:-

> "a warrant to which the Framework Decision applies issued by a court, in accordance with this Chapter and for the purposes of—
>
> (a) the arrest, in a Member State, of that person, and
>
> (b) the surrender of that person to the State by the Member State concerned."

That section, therefore, refers back to the definition of an EAW under Article 1 of the Framework Decision wherein an EAW is stated to be "a judicial decision".

The Relevant Case Law of the High Court
14. The High Court in the case of *Minister for Justice Equality and Law Reform v. Ferenca* [2007] IEHC 199 considered the question of whether the Minister for Justice in the Republic of Lithuania was a judicial authority for the purposes of the Act of 2003. The respondent in that case had raised a point of objection that the fact that the Minister for Justice was a judicial authority flew in the face of the rationale underlying the EAW system and did not trigger the principle of mutual recognition which is the cornerstone of judicial cooperation. Peart J. held that it was not for the respondent to raise the question of whether the Minister for Justice should or should not be a judicial authority for the purpose of issuing an EAW. He held that the country had been designated by the Minister for Foreign Affairs, for the purpose of s. 3 of the Act, as a Member State that had under its national law given effect to the Framework Decision. Peart J. stated, therefore, if an EAW has been issued by a Minister for Justice in the issuing state in his capacity as the judicial authority, the court respects that warrant as one properly issued in the issuing state for the purpose of the Framework Decision and the Act of 2003. In *Ferenca*, as in the present case, the EAW had been issued for the purpose of executing a custodial sentence. It is unclear, however, if the warrant was issued by the Minister at the request of the Prison Department or of the courts of Lithuania.

15. In the case of *Minister for Justice, Equality and Law Reform v. Altaravicius (No. 2)* [2006] IEHC 270, [2007] 2 I.R. 265, the High Court rejected the objection to surrender in that case which had been made on the basis that there was no evidence before the court that the Prosecutor General of Lithuania was the judicial authority competent to issue the EAW. McMenamin J. stated as follows at para. 40:

> "This court concludes, therefore, that the fact that the warrant in suit has been issued by the prosecuting authority in Lithuania in no way raises sufficient doubt as to the compliance by that state with the provisions of the framework decision. Judicial notice must be taken of the fact that most European member states operate within a civil law system. Direct comparisons between functions and roles of institutions within the administration of justice may not be apposite. No evidential material has been placed before this court which displaces the presumption that the prosecutor general in Lithuania is a competent judicial authority for the purposes of the framework decision and Act of 2003. This is so

particularly in the context of the adjournments which have taken place in this case, to which the court must have regard. Ample opportunity was granted to the respondent to make whatever case he might in relation to this point and, if necessary to consult with legal advisors in Lithuania. Nor has any sufficient evidence been adduced such as would prompt the court to seek information as to the relevant provisions of Lithuanian law in the light of the presumptions which are applicable. While one would not go so far as to say that it must be "something overwhelming" in order to rebut such presumption, the evidence adduced would have to be clear, cogent and material. The evidence adduced before this court, relied on by the respondent, does not fall into any of those categories."

16. In the case of *Minister for Justice and Equality v. McArdle* [2014] IEHC 132, the High Court addressed this issue again in relation to the function of a Dutch Public Prosecutor. The respondent in that case had relied upon a judgment of Lord Phillips of the U.K. Supreme Court in *Assange v. Swedish Prosecution Authority* [2012] 2 AC 471. Edwards J., in resolving the issue before him within the context of the evidence, stated, at para. 155, that the court was not to be taken as having arrived at a definitive view as to whether:

> "it is possible at all, having regard to the trust and confidence that underpins the European arrest warrant system, and the principle of mutual recognition, for an executing judicial authority to seek to look behind the designation of an issuing judicial authority by another member state. It is very much an open question."

Such was the state of the law in the High Court prior to the decision of the Supreme Court on appeal in *McArdle* and a related case of *Brunnell*.

The Supreme Court: Minister for Justice and Equality v. McArdle and Brunnell

17. The questions certified by the High Court in the above case did not concern the role of a Dutch Public Prosecutor in the issuing of an EAW. Rather, they concerned the Public Prosecutor's role in the issuing of the domestic arrest warrant which formed the basis for the issue of the EAW. The questions referred to "independent judicial oversight or scrutiny" and were premised, therefore, on a challenge to the ability of the Public Prosecutor to constitute such independent judicial oversight. The difference in the role played by the Public Prosecutor in that particular case does not take from the general principles set out in the Supreme Court judgment which are applicable to any consideration of "judicial authority" within the meaning of the Act of 2003 and the Framework Decision.

18. The Supreme Court, in dismissing the appeal by the respondents, referred to the provisions of the Act of 2003 and the Framework Decision set out above. Having referred to the provisions of s. 33 of the Act of 2003, the Chief Justice, nem. dis., noted that the Act of 2003 defined the judicial authority by reference to the functions that person carried out in issuing an EAW. She stated that this reflects Article 6 of the Framework Decision. She further stated at para. 35 that "[t]hus, the question of whether a person is an issuing 'judicial authority' is to be defined by reference to the issuing State, under the executing State's domestic law."

19. The Supreme Court in *McArdle and Brunnell* went on to state that it was anticipated that there may be differences of approach in relation to the judicial authority chosen in different states. The court then referred to a Commission Staff Working Document 2007, Annex to the Report from the Commission on the implementation since 2005 of the Framework Decision. That working document noted that the Framework Decision does not define what a judicial authority is and that this question was being left to the national law of Member States. The document stated at p. 17 that whilst it was understood that Ministries of Justice were designated by national laws as being a judicial authority, "it is difficult to view such a designation as being in the spirit of the Framework Decision." Immediately after quoting from that document, the Supreme Court again stated that different bodies had been designated as judicial authorities in different Member States. Thereafter, having referred to the U.K. Supreme Court decision of *Assange*, Denham C.J. stated that jurisprudence from the U.K. may be of comparative assistance as it is a common law jurisdiction but that, in introducing the EAW, the U.K. law was significantly different to the statute in this State.

20. According to Denham C.J., the issue falls to be determined according to the Act of 2003 which implements the Framework Decision in this jurisdiction. It must be interpreted, as Fennelly J. stated in *Dundon v. Governor of Cloverhill Prison* [2006] 1 IR 518 at para. 62, "as far as possible in light of the wording of the purpose of the framework decision in order to attain the result which it pursues." Immediately thereafter, Denham C.J. recited that the Framework Decision provides at Article 1, para.1 that the EAW is "a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order."

21. In the section of the judgment headed conclusion, Denham C.J. stated at para. 49 that:-

> "[t]he definition of 'judicial authority' in the Act of 2003, as amended, is broad. I interpret this definition in the Act of 2003, as amended, as far as possible in light of the wording and purpose of the Framework Decision to achieve the result it pursues."

She went on to say that:-

> "[i]n accordance with the jurisprudence of this Court, and the principles of mutual respect and co-operation, there is a burden on the appellants to address issues which they wish to raise as to the ***nature*** of the 'judicial authority'. I agree with the learned trial judge that they have not met the burden in this case." (emphasis added).

22. In reaching her conclusions, Denham C.J. stated at para. 51:-

> "The structure and composition of judicial systems in the Member States of the E.U. are varied. In many countries the public prosecutor is an integral part of the judicial structure or judicial corps. This is related to the complete independence of such a prosecutor and the position of that function in a particular national judicial structure. That, of course, has long been the case since it derives from an objective knowledge or examination of such systems. Indeed, it is a common experience in the E.U for European arrest warrants to be issued by national public prosecutors on foot of an underlying warrant, where they are the designated judicial authority for doing so. Article 6 of the Framework Decision requires a Member State to designate a judicial authority in their country for the purpose of issuing European arrest warrants. In this case, the Netherlands has designated the public prosecutor as the judicial authority. As the preamble and terms of the Framework Decision make clear, the process of surrender on foot of a European arrest warrant is based on mutual recognition of judicial acts within the E.U. ***There is a presumption that when a European arrest warrant is issued, and stated to be issued, by a public prosecutor or judge of a Member State acting as the judicial authority designated by the Member State, he or she is the judicial authority within the meaning of the Framework Decision and the Act implementing it. If there are cogent grounds established in a particular case which could lead the Court to concluding that the issuing authority was not a judicial authority that would be a different***

matter. No such grounds have been established in this case. What is clear is that a public prosecutor who is designated as a judicial authority by a Member State for the purposes of surrender on foot of European arrest warrants cannot, by reason only of the fact that he or she is a public prosecutor, as opposed to a judge of a court, be considered not to be a person who may issue a European arrest warrant within the meaning of the Framework Decision.

The status of a public prosecutor in this context, as already pointed out, is a function of national legal systems. It is not unique to the system of surrender under the Framework Decision and is also relevant to extradition generally. For example, the European Convention on Extradition, 1957, refers in Article 1 (on the obligation to extradite) in its English version to the *'competent authorities'* in the requesting state. The corresponding French version refers to *'autorités judiciaires'*. The official explanatory memorandum points out *'The term 'competent authorities' in the English text corresponds to 'autorités judiciaries' in the French text. These expressions cover judiciary and the office of public prosecutor, but exclude the police authorities.'* Thus, absent reasons to conclude otherwise, the public prosecutor in this case must be treated as being the judicial authority concerned for the purposes of the European arrest warrant." (emphasis added).

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23. The respondent in the present case set out his core argument as follows:- "the basis for the issue of a European arrest warrant is that there has been judicial involvement in the decision to issue or to request the issue of the warrant." That argument derives from the *dictum* of Lord Phillips in *Assange* and applied in the Bucnys decision. In the judgment of the Supreme Court in *Minister for Justice and Equality v. McArdle and Brunnell*, there is no reference to the case of *Bucnys*. I have been informed that it was mentioned in oral argument in the Supreme Court. There is also no reference to *Ferenca* or *Altaravicius* but it is clear that they were before the court as they are mentioned in the High Court decisions which were under appeal.

24. In *Bucnys*, the U.K. Supreme Court had before it three different EAWs in which a Minister for Justice (of either Lithuania or Estonia) had issued the EAW. In only one case did the U.K. Supreme Court hold that the warrant had not been issued by a judicial authority. The concluding principles set out in the judgment at para. 66 are that an EAW issued by a Ministry in respect of a convicted person can only be regarded as issued by a judicial authority for the purpose of the Framework Decision if the Ministry only issues the warrant at the request of, and by way of endorsement of a decision that the issue of such a warrant is appropriate made by: (a) the court responsible for the sentence; or (b) some other person or body properly regarded as a judicial authority responsible for its execution. If that condition is met, a discretion on the part of the Ministry not to issue a European arrest warrant which the responsible court (or other judicial authority) has decided appropriate and requested it to issue does not affect this. A Ministry issuing on its own behalf or on behalf of an executive agency such as a prison department cannot be regarded as a judicial authority for the above purposes.

25. Within the judgment, a question was raised about whether there may be a situation where individual decision-makers within the Ministry may be regarded as functionally independent even if not institutionally so. An observation was made that "[o]n no view, in any event, would the Minister of Justice signing on behalf of the Ministry of Justice of Lithuania appear to satisfy any such test." In the final analysis, the U.K. Supreme Court made a distinction between the occasion when a Minister may be regarded as a judicial authority based upon the status of the party, judicial or otherwise, who made the initial decision that an EAW should issue in the particular case.

26. It is the rationale in *Bucnys* which is of particular interest. The court rejected the fact that the practice of the Member States could affect the question of whether a Ministry is capable of being designated a judicial authority for the purpose of issuing EAWs (rejecting what Lord Phillips had suggested in *Assange*). From the case law of the Court of Justice of the European Union ("the CJEU"), referred to in *Bucnys*, there is support for the view that the practices of the institutions of the European Union "cannot derogate from the rules laid down in the Treaty and cannot, therefore, create a precedent binding on Community institutions with regard to the correct legal basis" (as per the CJEU in *United Kingdom of Great Britain and Northern Ireland v. Council of the European Communities (Case 68/86)* [1988] E.C.R. 855, para. 24, with particular reference to the Council). Although there is no clear statement with similar effect as to the practice of Member States, I would agree with Lord Mance that such practice cannot create a binding interpretation as to European law. The principles set out in the case law are strong indicators that subsequent practice by Member States could not later or influence the meaning of Community measures derived from the Treaties.

27. In *Bucnys*, the U.K. Supreme Court held that the concept of "judicial" had an autonomous meaning within the Framework Decision and the concept of "judicial authority" fell to be interpreted in a teleological and contextual manner. In so finding, Lord Mance at paras. 23 and 24 of the judgment stated as follows:-

> "23. The Framework Decision must be viewed in the light of Title VI under which it was made. The pre-Lisbon Treaty on European Union operated largely on a traditional, inter-governmental basis. But it provided a structure of objectives, principles, powers and procedures within which individual measures such as the Framework Decision fell to be agreed and operated. The Framework Decision is a subsidiary measure, which must be interpreted subject to the general objectives and principles of and powers conferred by that Treaty: see Edward & Lane, *European Union Law*, 3rd ed (2013), paras 6.23–6.24. It is relevant that Title VI not only provides for judicial cooperation, but that the language of article 31(1)(a) - one of the express jurisdictional bases of the Framework Decision (see para 9 above) - expressly distinguishes between competent 'ministries' and 'judicial or equivalent authorities'. It is in my view implausible to suggest that, under the law of the European Union, the concept 'judicial' in Title VI has no autonomous content whatever. If that is so, then the concept in the Framework Decision cannot give member states carte blanche to agree that each of them could put whatever meaning they chose upon the concept for the purposes of that measure.
>
> 24. Further, even if the boundaries of 'judicial' are under Title VI to be regarded as potentially limitless according to the nature and context of the powers being exercised, it by no means follows that the concept has equal width in the context of a specific measure like the Framework Decision . In this context, it does not to my mind advance the argument far to say that member states must be taken to trust each other, or that the Framework Decision was designed (as it clearly was) to eliminate 'delay and complexity' (*Dabas v High Court of Justice in Madrid*, *Spain* [2007] UKHL 6, [2007] 2 AC 31 , para 53, per Lord Hope of Craighead. The Framework Decision was agreed between member states. But, in a sensitive area which could involve the surrender of a member state's own citizens, it was only agreed on the fundamental premise that the relevant decisions would be taken by and the relevant trust existed between judicial authorities. As Sir John Thomas observed, public confidence would not be advanced if this meant whatever individual member states chose it to mean. In a measure designed to do away with executive involvement, it is also unlikely that European law would leave it to the executive to identify whatever authority it chose as 'judicial'. Even Lord Phillips' sens vague interpretation of 'judicial authority' distinguishes between an authority belonging to the system of justice, as opposed to the legislature

or administration; and the distinction cannot be elided by accepting that any authority given the function of issuing a European arrest warrant must ex hypothesi be 'judicial'."

Lord Mance identified that, in the context of the Framework Decision, the most obvious purpose of insisting on the concept of "judicial authority" was to ensure objectivity (including freedom from political or executive influence) in decision-making and to enhance confidence in a system which was going to lead to a new level of mutual co-operation. He discussed the features which a judicial authority must have for the purpose of being regarded as an issuing judicial authority for the purpose of the Framework Decision. Overall, a precondition where there had been a conviction by a court and a court request for the issue of an EAW reduced, if not eliminated, the scope for executive interference.

Submissions

28. Counsel for the respondent submitted that, in this case, there were cogent grounds for concluding the Minister for Justice was not a judicial body. As stated above, he relied upon the decision in *McArdle* and *Brunnell* and the logic of the decision in *Bucnys*.

29. Counsel for the applicant urged the Court to follow the decision in *Ferenca* and to hold that this issue was already decided. Counsel submitted that the Court could only hold the findings in *Ferenca* do not represent the current state of the law if there was persuasive argument to that extent or if the decision could otherwise be distinguished. It was submitted, in the alternative, that if this Court were to take the position that the decision in *McArdle* meant that the position in *Ferenca* had been refined, and thereby permitted the Court to look behind the statement in the warrant and to inquire into the legitimacy of the decision at issue, the Court should have regard to the decision in *Altaravicus (No. 2)* with regard to the presumption in favour of the issuing authority. Alternatively, the Court must be persuaded by cogent evidence that the presumption which favours the issuing of the judicial authority has in the circumstances been rebutted. Counsel submitted that it had not been rebutted in this case.

30. Insofar as counsel for the applicant submitted that it assisted the case he was making, he relied upon the statements as to Lithuanian law set out in *Bucnys*. These statements were also relied upon by the respondent. A statement as to foreign law of one country contained in the judgment of a separate foreign court is not evidence of the law of the first country. Indeed the judgment of the second foreign country is not evidence of the law in that country but it is received by the court as evidence of legal decisions in that jurisdiction for the purpose of being considered a persuasive authority.

31. However, as stated above, the Court can be satisfied on the further information of the Lithuanian authorities that the Minister for Justice acted upon the Prison Department's request. Counsel for the applicant further relied upon the fact that the Ministry in Lithuania has to bring independence to bear on the issue. Counsel for the applicant submitted that the only reason advanced to impugn the decision is that the request comes from the Prison Department. Counsel submitted that this is an insufficient reason to distinguish the case from *Ferenca*. Counsel also distinguished this case from *McArdle and Brunnell* in so far as that was a prosecution case and this was a conviction case.

The Court's Analysis and Determination

32. The decision by the High Court in *Ferenca* that it was not for the respondent to raise the issue of whether the Minister for Justice should or should not be a judicial authority for the purpose of issuing an EAW no longer represents the law in this jurisdiction having regard to the decision of the Supreme Court in *McArdle and Brunnell*. It is now possible in a particular case for cogent grounds to be established which could lead the court to conclude that the issuing authority was not a judicial authority. A question arises as to whether this means that the court is not limited to simply considering whether the named judicial authority on the EAW has in fact been so designated but instead can consider if the designated authority truly is a "judicial authority within the meaning of the Act of 2003 and the Framework Decision.

33. It is acknowledged that in *McArdle* the Supreme Court was dealing with the position of public prosecutors and did not address the position of a Ministry of Justice issuing a warrant. Furthermore, the Supreme Court, having quoted from the Commission Working Document which was critical of the practice of Member States designating Ministries as judicial authorities, stated it was clear that different bodies had designated different Member States. There is no express approval, disapproval or critique of the sentiments expressed in the quoted passage. What is clear is that the document refers to the designation as not being within the spirit of the Framework Decision. In that regard, it is important to note that the recitals to the Framework Decision, which are indicative of the purpose of the Framework Decision, refer to "abolishing extradition between Members States and replacing it by a system of surrender between judicial authorities" (Recital 5), "a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice" (Recital 5) and that the EAW "is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the 'cornerstone' of judicial cooperation" (Recital 6).

34. From the Supreme Court decision in *McArdle and Brunnell*, it is of particular note that the presumption contained in para. 51 of the judgment and set out above, is limited to a warrant issued by a public prosecutor or judge of a Member State acting as the judicial authority designated by the Member State. The Supreme Court could have, but did not, widen the presumption to include a "person" or "body" stated in the EAW to be the judicial authority designated by the Member State. Counsel for the applicant has submitted that the statement of principle made by the Supreme Court in *McArdle and Brunnell* applies with equal force to a situation where the Ministry of Justice has been designated as the judicial authority for the purpose of issuing EAWs. I do not consider that the Supreme Court statement of principle is capable of being applied with equal force. The Supreme Court's statement as regards the presumption has been bookended, within that very paragraph, by particular reference to the fact that in many countries the public prosecutor forms a part of the judicial structure or judicial corps. Therefore, the presumption on its face is limited to those entities to whom the designation "judicial" customarily and commonly applies.

35. Perhaps more importantly, even if the presumption did apply to any other body or person designated a judicial authority, the presumption is to the extent that they are "***the*** judicial authority" within the meaning of the Framework Decision and the Act of 2003. Thereafter, the Supreme Court refers to cogent grounds being required to set aside the presumption that the issuing authority is "***a*** judicial authority". Paragraph 51 of the judgment then states that a public prosecutor who is a designated judicial authority cannot ***by the fact only of being a public prosecutor*** be impugned as a person who may issue EAWs. In other words, he or she could be impugned as a judicial authority on other grounds. An example might be that of another country operating a similar criminal justice system to Ireland deciding to designate its Director of Public Prosecutions as the issuing judicial authority. The Director of Public Prosecutions in Ireland is not part of the judiciary or the judicial corps, and, if the same situation pertained in that other jurisdiction, the Public Prosecutor could be impugned as a "judicial authority" under the Framework Decision and the Act of 2003.

36. The judgment of the Supreme Court, therefore, is to be understood as confirming that in so far as it is possible the Act of 2003 is to be interpreted in accordance with the Framework Decision. The Framework Decision clearly places the EAW system within the sphere of judicial co-operation. A respondent is entitled to raise issues as to the nature of the "judicial authority" but bears the

burden on the issue. Judges and public prosecutors are to be presumed a judicial authority and the mere fact of being a public prosecutor is not sufficient to establish that he or she is not an issuing judicial authority within the meaning of the Act of 2003 and the Framework Decision. Cogent grounds may be produced to show that the issuing authority was not ***a*** judicial authority.

37. The determination for this Court is not limited to the sole question of whether the issuing authority has been designated by the issuing Member State as an issuing judicial authority. The inexorable logic of the decision in *McArdle and Brunnell* is that the Court may be provided with cogent grounds for concluding that an issuing judicial authority as designated by a Member State is not in fact a "judicial authority" within the meaning of the Act of 2003 and the Framework Decision. The Supreme Court in *McArdle and Brunnell*, by reference to the process of surrender being based upon mutual recognition of judicial acts, by reference to the interpretation of our legislation in light of the objectives and purpose of the Framework Decision and by an acceptance that there could be cogent grounds for concluding that a particular authority is not a judicial authority has, in my view, implicitly held that "judicial authority" has an autonomous meaning within the Framework Decision. The question arising in this case, therefore, is whether there are cogent grounds for concluding that the Ministry of Justice in Lithuania on the facts herein is not "a judicial authority" within the meaning of the Act of 2003 and the Framework Decision.

38. The Framework Decision was adopted pursuant to the provisions of Title VI of the Treaty on European Union (since superceded by the provisions of the Lisbon Treaty). These provisions concerned police and judicial cooperation in criminal matters and had as an objective to provide citizens with a high level of safety within an area of freedom, security and justice. The Charter of Fundamental Rights of the European Union puts the citizen living in an area of freedom, security and justice as the *raison d'être* of the Union. The preamble to the said Charter states:-

> "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice."

39. In a Union based on the principles of democracy and the rule of law, separation of powers necessarily follows. To borrow the words of Kennedy C.J. in *Lynham v. Butler (No. 2)* [1933] I.R. 74 at p. 96:-

> "We are not concerned with the advancement of any theory of government or any philosophy of politics. The analysis of sovereignty under three departments of government, legislative, executive and judicial, goes back to ancient times."

Murray J., as he then was, said in *T.D. & Ors. v. Minister for Education & Ors*. [2001] 4 I.R. 259 at p. 329:-

> "Whether the concept be considered as a distribution of the powers mentioned among different branches of government, executive legislative judicial, or a balancing of powers among those branches or a form of 'checks and balances', the separation of powers, in one form or another, is today regarded as an essential and inherent part of the modern liberal democracy founded on the rule of law. Although the basic objective is the same, to avoid an excessive concentration of these powers, or a combination of them, in one authority, there is no 'pure' or 'perfect' model of the separation of powers. It is found in different forms in different countries according to the differing structures of constitutional government such as in France, the United Kingdom, Germany, the United States and this country."

40. The words of Kennedy C.J., at p. 99, in that case are also apposite in considering what the judicial power of a state entails:-

> "In the first place, the Judicial Power of the State is, like the Legislative Power and the Executive Power, one of the attributes of sovereignty, and a function of government. (See Article 2 of the Constitution.) It is one of the activities of the government of a civilised state by which it fulfils its purpose of social order and peace by determining in accordance with the laws of the State all controversies of a justiciable nature arising within the territory of the State, and for that purpose exercising the authority of the State over person and property. The controversies which fall to it for determination may be divided into two classes, criminal and civil."

41. That the separation of powers must involve an independent judiciary is so self-evident as to really require no reference to support that statement. Having said that it may be useful to highlight the reason why such independence is necessary by citing the *dictum* of Hardiman J. in T.D.:-

> "The judiciary's independence of the political branches of government is essential if impartial justice is to be done between citizen and citizen and between the citizen and the State, and if laws are to be kept within constitutional bounds."

The UK Court of Appeal has linked the independence of the judiciary to the rule of law when dealing with the general principle of a judicial body having an inherent jurisdiction to establish its own procedures for dealing with cases justly:-

> "This general principle is part of the wider principle of judicial independence, which is an important aspect of the rule of law." (*R. (McGetrick) v. Parole Board & Anor.* [2013] 1 W.L.R. 2064 at para. 46).

42. Although there is no decision from the CJEU on the meaning of "judicial" in the Framework Decision, the CJEU has addressed the meaning of Court or tribunal for the purpose of Article 267 of the Treaty on the Functioning of the European Union (TFEU). In *Belov v. CHEZ Elektro Balgaria AD (Case C-394/11)*, the CJEU stated at para 38:-

> "In that regard, it should be recalled, as a preliminary point, that, according to settled case-law, in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, in particular, [*Miles v. Écoles européennes (Case C-196/09)]* [2011] E.C.R. I-5105, paragraph 37 and the case-law cited)."

43. Addressing the factor of independence, the CJEU stated in *Synetairismos Farmakopoion Aitolias & Akarnania (SYFAIT) v. GlaxoSmith Kline PLC (C-53/03)* [2005] ECR I-4609 as follows:

> *"30 It should be noted, first of all, in this regard, that the Epitropi Antagonismou is subject to the supervision of the Minister for Development. Such supervision implies that that minister is empowered, within certain limits, to review the*

lawfulness of the decisions adopted by the Epitropi Antagonismou.

31 Next, whilst it is true that the members of the Epitropi Antagonismou enjoy personal and operational independence and are bound in the exercise of their duties only by the law and their conscience within the meaning of Law No 703/1977, it nevertheless remains that there are no particular safeguards in respect of their dismissal or the termination of their appointment. That system does not appear to constitute an effective safeguard against undue intervention or pressure from the executive on the members of the Epitropi Antagonismou.

In that case, the CJEU held that it followed from the above and other factors, including the fact that the proceedings may not necessarily lead to a decision of a judicial nature, considered as a whole, that the particular body was not a court or tribunal within the meaning of Article 234 of the EU (the immediately forerunner to Article 267).

44. From all of the foregoing, it can be seen that the Union is based on principles of democracy and the rule of law. An important element of these principles is a separation of powers among legislative, executive and judicial branches of government. Judicial independence is a vital aspect of that. The Framework Decision has as an objective the "free movement of judicial decisions in criminal matters" and replacing extradition with a free movement of surrender between judicial authorities. The EAW is defined as a judicial decision issued by a Member State for the particular purposes set out in the Framework Decision.

45. It is within this context that the definition of "judicial authority" contained in the Act of 2003 is to be interpreted. In that regard, the definition of judicial authority as set out in s. 2 of the Act of 2003 and which points to a person performing the same or similar functions as those performed under s. 33 of the Act, are referable to the function of issuing an EAW. That EAW is defined in s. 31 as "a warrant to which the Framework Decision applies issued by a court, in accordance with this Chapter and for the purposes" of arrest and surrender of a requested person. As has been set out, an EAW under the Framework Decision is defined as "a judicial decision". The thread which runs through the Act and the Framework Decision is that of "judicial decision".

46. In this case, the decision of the Minister for Justice to issue the EAW is not based upon a prior decision by a judicial authority to issue one or at the very least a prior judicial decision to request the issue of an EAW. On the contrary, the request is from an executive agency within the Lithuanian state.

47. Counsel for the applicant, whose primary submission was that this Court should accept the designation of the Minister under Lithuanian law as the determinative factor, made a further submission should this Court reject that argument. Counsel pointed to certain criteria under which it was said that the Minister carried out the same functions as are carried out by the High Court in issuing an EAW. Counsel pointed out (by reference to what was in the *Bucnys* decision about Lithuanian law) that the Minister for Justice has to satisfy himself that basic and fundamental requirements are met. He then went on to say that the Minister acts independently of the Prison Department and is expressly required to bring his independent assessment and analysis to bear before he makes a decision to issue the EAW.

48. A Minister for Justice may of course have independence from the Prison Department but a Minister for Justice does not have independence from the executive as she or he is by definition a member of the executive. It is undoubtedly the case that a Minister for Justice would not be held to be a court or tribunal for the purpose of Article 267. Within a democracy applying the rule of law, a member of the executive could not be said to be have sufficient independence to be considered a part of the judiciary. Public prosecutors are, as the Supreme Court has stated, considered in many countries as an integral part of the judicial core or judicial structure. That does not apply to a Minister for Justice. By virtue of his or her role as a member of the executive, he or she is not a part of the judiciary.

49. In *Assange*, Lord Dyson was "inclined to think that the essential characteristics of an issuing judicial authority are that it should be functionally (but not necessarily institutionally) independent of the executive" (para. 153). In the Administrative Court in *Bucnys,* Aikens L.J. considered that a Ministry of Justice could be an issuing judicial authority if the person in the ministry making the decision was sufficiently independent of the executive for the purposes of making that "judicial decision". These sentiments perhaps echo the "personal and operational independence" referred to by the CJEU in *Synetairismos*. Such personal and operational independence from the executive could scarcely apply to a Minister for Justice. However, in *Bucnys* the U.K. Supreme Court held that where the warrant had issued from the court, it was a judicial decision by a judicial authority. In those circumstances, the Minister, in issuing the warrant, was effectively endorsing the prior judicial decision.

50. That particular issue does not fall for determination in this case, although it may have much to commend itself within the terms of our own definition of judicial authority. The Minister could possibly be understood as a person who is a judicial authority within the meaning of the Act of 2003, as his function is to issue a warrant which is in fact an EAW having resulted from the prior judicial decision to request same.

51. In the present case, the Minister is not carrying out a function of issuing a judicial decision, or endorsing a prior judicial decision, when he purports to issue a warrant for the arrest of this respondent. There has been no prior judicial decision to request or to issue an EAW. The only agency requesting the warrant was an executive agency. The Minister is, by definition, part of the executive branch and not the judicial branch of government. Therefore, we have a situation where one part of the executive branch made the initial determination that the EAW should issue and then asked a member of the executive branch of government to endorse that decision. There has been no judicial involvement in the process seeking the issue of a European arrest warrant. Judicial involvement in the issuing of a European arrest warrant is a prerequisite if a person is to be considered an "issuing judicial authority" within the meaning of the Act of 2003 as amended.

52. In conclusion, therefore, the Lithuanian Minister for Justice, when acting on a request by the Prison Department for the issue of an EAW cannot be considered a judicial authority within the meaning of the Act of 2003 when interpreted in light of the wording and the purpose of the Framework Decision.

The Determination of the Remaining Issues under Section 16(1)

A Member State that has given effect to the Framework Decision

53. The surrender provisions of the Act of 2003 apply to those Member States of the European Union that the Minister for Foreign Affairs has designated as having, under their national law, given effect to the Framework Decision. I am satisfied that by European Arrest Warrant Act 2003 (Designated Member States) (No. 3) Order 2004 (S.I. No. 206 of 2004), the Minister for Foreign Affairs has designated Lithuania (more correctly the Republic of Lithuania) as a Member State for the purposes of the Act of 2003.

Identity

54. I am satisfied on the basis of the affidavit of Gerard Fahy, member of An Garda Síochána, the affidavit of the respondent, and the details set out in the EAW that the respondent, M.V., who appears before me, is the person in respect of whom the EAW has issued.

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

Sections 21A, 22, 23 and 24 of the Act of 2003
56. Having scrutinised the documentation before me, I am satisfied that I am not required to refuse his surrender under the above provisions of the Act of 2003.

Part 3 of the Act of 2003 as amended
57. Subject to further consideration of ss. 37, 38 and 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.

The Provisions of S. 38
58. The issuing judicial authority has indicated that the offence for which the respondent is sought is an offence of rape and they have marked the relevant box to indicate that this is an offence to which Article 2, para. 2 of the Framework Decision applies. There is a clear statement of the offence for which he has been convicted and it is an offence of appropriate minimum gravity for inclusion as a list offence under Article 2 para 2. Surrender is not prohibited under this section.

Section 45
59. The warrant indicates that this was not a conviction *in absentia*. No issue has been raised on this and I am satisfied that his surrender is not prohibited under section 45.

Section 37
60. The respondent raised a number of grounds under this sub-heading. This will be dealt with in turn.

Article 3
61. His objection under this heading was that if surrendered there are reasonable grounds for believing that he will be exposed to inhuman and degrading treatment due to the prison conditions in Lithuania. He made written submissions on this point and was content to ask the Court to rule on the matter in light of the written submissions.

62. The respondent filed his own affidavit detailing his own person experience of conditions in prisons in Lithuania. He was last in prison in Lithuania in November 2002. He makes a particular complaint about having contracted TB while in prison. He also complained that he was beaten and threatened with having to perform sexual acts in prison when he shared a small cell with six other men. He says he complained and was transferred to another cell.

63. The respondent also relies upon a report of Professor Morgan. Professor Morgan's credentials are well-known and are set out in full in the decision of *Minister for Justice, Equality and Law Reform v. McGuigan* [2013] IEHC 216. In essence, Professor Morgan states that it is not known to which prison the respondent will be sent, that it is possibly Pravieniskes but not necessarily so. Ultimately, Professor Morgan says he is unable to judge the extent to which the respondent will be more or less vulnerable to inter-prisoner violence compared to other prisons. He says that what is clear is that prisons in Lithuania for sentenced prisoners generally suffer high level of inter-prisoner violence which is the product of insufficient staffing and staff supervision, substantial prisoner freedom to move about the prison during the better part of the day combined with a relative absence of constructive activity. He said that at Alytus, there is also recent evidence of staff violence against prisoners. He said further that were the respondent to find he was vulnerable to harm from his fellow prisoners, he might seek the protection of segregated accommodation in which case that accommodation might be as inhuman and degrading as the accommodation found at Lukiskes and Siauliai prisons for remand prisoners.

64. The respondent also relies upon an affidavit of Arturas Andriukaitis, a qualified lawyer in Lithuania. His information appears mainly based upon European Court of Human Rights ("the ECtHR") judgments, Amnesty International reports and certain internet sources, the most immediately obvious of which is data from The Lithuanian Department of Prisons. He confirms that there is under-employment of prisoners in prisons and that funding has been a problem. He confirms there is a subculture within the prisons whereby a person accused of a sexual offence will be treated as the lowest class of prisoner. They will be treated as not having rights, be beaten and be subject to sexual abuse. However, he does say that although the Prison Department does not formally admit the existence of the subculture phenomenon, when dividing people into cells it does so on the basis of this classification.

65. The Lithuanian authorities responded to these criticisms. Professor Morgan then filed a further affidavit exhibiting a report. This report in particular rejected the statement that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") had never made statements that the Lithuanian authorities were in breach of Article 3. He referred to the 2009 report on Lukiskes (CPT, *Report to the Lithuanian Government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 30 April 2008* (2009)). He also said that the ECtHR in 2008 had found those conditions inhuman and degrading. Professor Morgan points out that, in any event, the CPT is a preventative and not a judicial body. Ultimately, it is for the Court to assess whether the information amounts to a breach.

66. The respondent's written submissions relate to the prison conditions such as prisoner overcrowding, inter-prisoner violence and poor sanitary and/or unhygienic conditions. In *Minister for Justice and Equality v. Tagijevas* [2015] IEHC 455, I held that on the evidence before me there were no substantial grounds for believing that the respondent was at real risk of being exposed to inhuman and degrading treatment due to the prison conditions. In this case, the evidence is almost identical. It is clear that he is more likely to be vulnerable prisoner due to his status as a convicted sex offender but I do note that there is a tension in what has been submitted. Professor Morgan, an expert in Lithuanian prisons, did not appear to consider the respondent an automatically vulnerable prisoner despite his conviction for rape. The respondent did not refer to that either despite his own experiences in the prisons. The lawyer refers to the subculture but he also acknowledges that there is a reaction to this problem by a dispersal into particular cells.

67. For the reasons set out in *Tagijevas*, I am satisfied that there is no evidence before me in relation to the specific issues as to segregation as a vulnerable prisoner such that he has established substantial grounds to believe there is a real risk of an Article 3 violation.

68. In so far as there is a general complaint about overcrowding, I am quite satisfied that the evidence does not establish that there are substantial grounds for believing that this on its own amounts to a real risk of a violation of Article 3 rights. The Lithuanian

authorities have been systematically reducing overcrowding, not just by releasing prisoners but by introducing fundamental changes to criminal law and procedure, including electronic monitoring since 1st January, 2015. It is also significant that Professor Morgan does not posit overcrowding on its own as an issue that amounts to inhuman and degrading treatment but places it in the context of contributing to increased inter-prisoner violence. I also have regard to the fact that the respondent's own experience of overcrowding is almost 13 years out of date and little weight can be given to that. I am quite satisfied, in so far as the issue relates solely to overcrowding, that substantial grounds for believing he is at real risk of being subjected to treatment that violates Article 3 have not been made out.

69. I also reject the poor sanitary and/or unhygienic conditions complaints. I refer to my judgment in *Tagijevas* and the judgment of Edwards J. in *Minister for Justice and Equality v. Savikis (Ex tempore*, 31st July, 2014, High Court). Most of the evidence put forward in this regard is out of date, *e.g.* the reference to his own experience of TB. There has been a huge improvement in conditions in these prisons. There are simply no substantial grounds for believing that he is at real risk of being exposed to inhuman and degrading sanitary conditions.

70. Finally, the issue of inter-prisoner violence is raised. In *Tagijevas*, that was not put forward as a separate ground for a breach of Article 3 rights. In this case, it is put forward in the form of a written submission than in any more particularised way than existed in Tagijevas. In other words, Professor Morgan's conclusion referred to inhuman and degrading treatment in the context of the administrative segregation rather than in the form of inter-prisoner violence. I do accept that it is for the Court to assess the entirety of the evidence and to form its own conclusions as to whether it establishes inhuman and degrading treatment.

71. I accept that for the purpose of the protection of rights a state may be under a duty to take positive steps to ensure that an individual is protected from inhuman and degrading treatment by non-state actors. That, of course, does not mean that a state must prevent all possible ill-treatment by those actors. Such a commitment is factually impossible and legally not required. Children and other vulnerable people, in particular, are entitled to state protection, in the form of effective deterrence, against such serious breaches of personal integrity (See *A v. United Kingdom* (1999) 27 E.H.R.R. 611). A vulnerable prisoner is entitled to such protection in the form of effective deterrence. It is a question of considering whether effective deterrence operates.

72. In this case, it is Alytus prison where the major complaint arises. In that regard, it is clear that the Lithuanian authorities responded immediately to the complaints of the CPT. By letter of 25th March, 2013, the authorities indicated that some measures had been taken to reduce inter-prisoner violence at Alytus, including installation of observation rooms and CCTV cameras in local sectors two and three, review of the security plans, and an anger management programme for inmates (See para. 46 of CPT, *Report to the Lithuanian Government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 November to 4 December 2012* (2014). The CPT's specific concerns were that an effective strategy must be in place to tackle inter-prisoner violence, which involved ensuring that prison staff are placed in a position to exercise their authority in an appropriate manner. Consequently, the level of staffing must be sufficient, including at night-time, to enable prison officers to supervise adequately the activities of prisoners and support each other effectively in the performance of their tasks. The CPT were of the view that this will inevitably be difficult in dormitory-type accommodation aggravated by being open 24 hours a day, with the risk of violence and intimidation between prisoner will always be high in such facilities.

73. In their response to that report, entitled *"Response of the Lithuanian Government to the Report of the CPT on its visit to Lithuania from 27th November to 4 December 2012"*, which appears to have been drafted and published at some point in 2014, the Lithuanian authorities emphasised the many changes they had made to their criminal code for the purpose of reducing the numbers to be held in custody. They also emphasised specific reduction in the number of prisoners in Alytus. That report also indicated that apart from the measures referred to in 2013, an extra eight positions for junior guards were created in Alytus correction house and an extra seven positions for supervisors were added on 5th July, 2013. There was also an increase in the budget for Alytus.

74. The response by the Lithuanian prison authorities in this case dated 4th February, 2015, also shows that since 2012, the total number of inmates in penitentiaries has declined by 10%. As stated above, this is an ongoing process of reduction with new reductions anticipated by virtue of what had just come on stream in January 2015. Their response does indicate that there are still open dormitories being used in Alytus. The authorities go on to say in response to doubts on sufficient employment of inmates, that currently the Government is revising existing practices of the inmates involvement in labour activity and is considering increasing the number of workplaces. They also pointed to the right to study for inmates, to be engaged in individual work or creative activities. They also pointed to well-equipped sports grounds.

75. The Lithuanian response also sets out in detail the process of investigation required when any bodily injury is inflicted on an inmate, which includes a report to a prosecutor. It is also to be noted that the Seimas Ombudsman acts as a National Preventative Mechanism since 1st January, 2014.

76. The Lithuanian authorities state that the majority of recommendations of the CPT and the Ombudsman have been followed as much as was possible under financial constraints. For the purpose of considering whether there is a risk of inhuman and degrading treatment, the Court clearly has to be forward-looking in its assessment. That does not mean that the Court has regard to changes promised at some time in the future. It is at the point of surrender that the Court must consider if there are substantial grounds for believing that there is a real risk of inhuman and degrading treatment.

77. The situation with regard to inter-prisoner violence is perhaps less well-documented in the evidence compared to that which occurred in the case of *Attorney General v. O'Gara* [2012] IEHC 179. Extensive material was placed before the Court in that case in terms of statistics relating to serious violence. However, at issue here is the CPT's clear concern about the situation they found in Alytus in November/December 2012. That is a body established under international Treaty with a clear mandate and with access to the facilities. The Court must give careful consideration to and accord due weight to its observations and conclusions. There was, however, an immediate reaction to the report of the CPT in 2013 by the Lithuanian authorities in terms of increased security measures. By 2014, there was an increase in staffing levels at both junior and supervisory level. There has been the establishment of a National Preventative Mechanism in the form of an Ombudsman. There have been systemic changes to the criminal code which has lead to a significant reduction in the number of prisoners in the penitentiaries (and an even greater reduction in the remand prisons). Those reductions in numbers can only increase with the most recent implementation of further changes. Furthermore, there is evidence in the case from the respondent that vulnerable prisoners, such as those imprisoned for sexual crimes, will be placed in particular cells apart from other prisoners.

78. On the basis of the foregoing, I am satisfied that there are no substantial grounds for believing that the respondent is at real risk of being subjected to inhuman and degrading treatment.

Delay

79. The respondent made a general claim about a breach of his right to fair procedures because of the cumulative, inordinate and unjustified delay in issuing, endorsing and executing the warrant. This is not particularised any further and not addressed in the written submissions. In light of the decision of the Supreme Court in the case of *Minister for Justice, Equality and Law Reform v. Stapleton* [2007] IESC 30, [2008] 1 I.R. 669 with regard to the treatment of an issue such as delay, I reject this as a ground that might prohibit his surrender.

Article 8
80. The respondent relies upon his affidavit to ground this claim. He made no written or oral submissions in relation to this point. In his affidavit, he asserts his innocence despite his conviction. He says that he was interviewed in 1999 and that case was closed as there was no evidence against him. A new witness came forward and the matter was reopened. He says that he served two years and three months of this sentence and was released from prison on 4th November, 2002. He says that his lawyers appealed his conviction and this appeal was unsuccessful.

81. The respondent says that he struggled to find employment following his release from prison. He was married to his wife since 1999 and they have a daughter born in 2000. He travelled to Ireland in late 2003 in search of work and worked in construction for a number of years. His wife and child joined him. They have three daughters, aged 14, 7 and 2 at the time of swearing of the affidavit. He is without work in recent years. His wife works while he cares for the family.

82. He says that it will cause hardship if he is to be sent back to Lithuania. He says that it is disproportionate to send him back after 12 years.

83. The respondent is sought for surrender to serve the remaining two years, three months and 18 days of a five year and six months sentence of imprisonment imposed. He was present at his hearing and the delivery of judgment. He was present when the County Court rejected his appeal on 25th September, 2003. A later cassation appeal to the Supreme Court was dismissed *in absentia*. He was given a conditional release from the correctional house on 29th October, 2002. A full explanation of the process by which the sentence was imposed is given by way of letter from Panevzys City Local Court and no issue has been taken with, or arising from, the contents thereof. It is clear that his surrender is sought to serve a sentence relating to this offence of rape.

84. No further information was sought from the Lithuanian authorities dealing with the issue of delay. The warrant was issued on 17th September, 2007, and it stated a possible address in Galway. The warrant was endorsed for execution by the High Court on 25th May, 2011. The address at which he was arrested was different to that stated on the warrant. On the day of his arrest, his wife denied he resided there. The Garda searched the house nonetheless and found him hiding in the attic.

85. The Court has regard to the principles of law set out in the decisions of Edwards J. in P.G. mentioned earlier and *Minister for Justice and Equality v. T.E.* [2013] IEHC 323. It is clear that the issue is one of proportionality. It is for the Court to assess the public interest in the surrender and to assess whether surrender would involve a disproportionate interference with the rights of the requested person.

86. This was a serious offence for which a substantial period of imprisonment was imposed. Any initial delay in the EAW may be explained by the reference to the potential address for him in Galway. There was another longer delay before the endorsement by this State and while that may reduce the apparent public interest in his surrender, it is not sufficient to displace it. The delay in his arrest here is not a matter that affects the public interest in his surrender. There is an obligation on the authorities of the executing state to seek out the person and any delays in doing so cannot affect the public interest in his surrender. In any event, there are no grounds placed before me to suggest that there was any inexcusable delay by the Gardaí. Indeed the inference from the evidence is that he was determined to remain in hiding in this jurisdiction.

87. In this case, it is perfectly plain that the respondent left Lithuania in the midst of a process that he acknowledged in his affidavit was one of which he had full knowledge. He clearly did not accept his conviction and he left in 2003 and I am of the view that this must have been shortly after his sentence was confirmed, in his presence, in the County Court in 2003. The fact that there was a prior delay in his prosecution is explained even in his own affidavit by the lack of available evidence until some later stage when a new witness came forward.

88. It is also clear that his precise address was unknown to the Lithuanian authorities. By his decision to evade his sentence and to flee from Lithuania, he is responsible for the delay up to the issue of the European arrest warrant. There is an unexplained delay between the issue of the warrant and its endorsement in this jurisdiction. In my view, that unexplained delay does reduce the public interest in his extradition somewhat but it does not reduce it in the circumstances where he is wanted to serve the remainder of a significant sentence for a serious offence for which to avoid having to serve it he deliberately left Lithuania. In my view, the public interest in his extradition is at moderately high level.

89. His private interest grounds are that he has young children here, that he has lived peacefully in Ireland and it will cause hardship for the family for him to be sent back to Lithuania. The respondent refers to what he says are considerable delays since the offence and since conviction. He says that in light of all of the foregoing and the fact that he has served time in prison in Lithuania means that it is disproportionate to send him to Lithuania.

90. I must have regard and I do have regard to the best interests of the children in this case. Having said that their private interests must be balanced against the countervailing public interest in extradition.

91. The fact that he has partially served a sentence does not go towards his private interests. It may possibly be capable of going towards an assessment of the public interest in the extradition. However, a fugitive is not entitled to define how much of a sentence he serves. Therefore, generally pointing to a part-served sentence will not be a relevant factor in diminishing the public interest in his extradition.

92. In all the circumstances, I am of the view that the particular aspects of the respondent's private and family life to which he points are insufficient to outweigh the public interest in his extradition. The consequences of surrender to which he points are not in any way severe or greater than those consequences which are a normal effect of being surrendered. There is no disproportionate interference with his right to respect for his private and family rights nor with that of his wife or daughters. His surrender is not prohibited on this ground.

Section 10(d) of the Act of 2003
93. As this warrant was issued prior to the amendment of the Act of 2003 by the provisions of the Criminal Justice (Miscellaneous Provisions) Act 2009, the respondent could not be surrendered if he had not fled from the issuing state. In the recent decision of

Minister for Justice and Equality v. Szall [2015] IEHC 374, McDermott J. stated as follows, at para. 13, with respect to the judgment of Macken J. in *Sliczynski*:-

> "Macken J. also stated that all the factors germane to whether a person could be said to have fled must be taken into account. This includes the person's subjective motivation for leaving the requesting Member State. However the other material factors relating to the respondent's dealings and engagement with the criminal proceedings referred to in the Warrant must also be considered. Macken J stated:-
>
> > *'The court then must determine whether, objectively speaking, bearing in mind all of these factors, it can be reasonably concluded that the appellant 'fled' within the meaning of the sub-section. If it were the case that the subjective motivation, as averred to on affidavit, had to be accepted as being conclusive of the question whether a person fled within the meaning of the section, it seems to me that this would always or almost always 'trump' any information or material factor presented to the Court and upon which it could be objectively found that a person had fled the requesting state.'*
>
> The learned judge stated that if it were objectively established that there was a deliberate decision to leave Poland in breach of terms as to residence and notification imposed in respect of a suspended sentence which were known to the appellant, it was reasonable for a trial judge to conclude that the appellant left in circumstances which made it impossible for him to serve the sentence imposed, even if his subjective motivation for leaving was for some other personal reason. The appellant was found to have left the requesting state in circumstances in which he breached the terms and conditions of his suspended sentence. Therefore, it followed that the appellant on an objective assessment of the evidence had 'fled' the issuing Member State because he left in circumstances which made it impossible for the sentence to be executed (see also Fennelly J. in *Gheorge* to the same effect)."

94. On an objective assessment of the evidence, the relevant parts of which are set out in dealing with the respondents Article 8 points, it is abundantly clear that he fled the jurisdiction of Lithuania for the purpose of avoiding serving the remaining part of the prison sentence which was imposed upon him in his presence on the 25th September, 2003.

Conclusion

95. The surrender of the respondent to Lithuania is prohibited on the sole ground that the person who issued the EAW cannot, in the particular circumstances of this case set out above, be considered a judicial authority for the purposes of the Act of 2003 when interpreted in light of the wording, and the purposes, of the Framework Decision on the EAW and the surrender procedures between Member States.

96. For the reasons set out above, I reject the respondent's other objections to his surrender.