THE COURT OF APPEAL

CIVIL

UNAPPROVED **NO REDACTION NEEDED**

Neutral Citation Number [2021] IECA 75

[2020 No. 157]

The President

McCarthy J

Kennedy J

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

AND

GERCHARD FIRANTAS

APPELLANT

JUDGMENT of the President delivered (*via* electronic delivery) on the 16th day of March 2021 by Birmingham P.

1. This is yet another case where what is in issue is the status of the Prosecutor General in Lithuania, and specifically, whether the Public Prosecutor who issued a European Arrest Warrant ("EAW") can be considered an issuing judicial authority within the meaning of the European Arrest Warrant Act 2003 (as amended).

Background

2. The surrender of the appellant is sought by the Republic of Lithuania in order that he may face trial for two offences of theft and criminal damage pursuant to the EAW dated 15th

April 2016. As commented on by the High Court judge (Donnelly J.) at paragraph 51 of her judgment, this question has a "very long litigation history". The question of what constitutes a judicial authority, and, in particular, whether the Prosecutor General was to be so considered, arose at an early stage in the present proceedings and continued to arise with some regularity. The present proceedings were initially linked with three other cases: The *Minister for Justice & Equality v. Lisauskas,* the *Minister for Justice & Equality v. Veresovas* (both of which also concerned Lithuanian warrants), and *the Minister for Justice & Equality v. Dunauskas* (which concerned a warrant issued by the Public Prosecutor in Lubeck, Germany).

3. The present proceedings were heard initially in the High Court on 14th and 15th December 2016, and on 19th January 2017. The proceedings were then adjourned initially until 27th February 2017, and subsequently adjourned generally pending the outcome of the *Lisauskas* appeal. The fact that it was adjourned generally pending the outcome of the *Lisauskas* appeal is a matter of some significance in the context of the present appeal, as is the appellate history of *Lisauskas*. In that case, the High Court delivered judgment and made an order for surrender (see judgment at [2017] IEHC 232), an approach that was affirmed by the Court of Appeal (see judgment at [2017] IECA 267). On further appeal to the Supreme Court (see judgment at [2018] IESC 42), there was a preliminary reference made to the CJEU and that court delivered its judgment in a case then known as *Minister for Justice and Equality v. PF* (C-509/18) on 27th May 2019. Following the judgment of the CJEU, the Supreme Court set aside the s. 16 order and remitted the matter back to the High Court. There, the appropriate test identified by the CJEU was applied. Binchy J., based in part on additional information received from Lithuania, held that there was effective judicial protection; that the Prosecutor General was an issuing judicial authority; and that Mr. Lisauskas should therefore be surrendered to Lithuania. In large measure, the case ultimately

came down to a resolution of the question of whether there was an appeal mechanism available which would allow for an appeal to a court against the issuing of the EAW. The CJEU had dealt with the matter in these terms at paragraph 56 of its judgment:

> "In the light of those factors, it is apparent that the Prosecutor General of Lithuania may be considered to be an 'issuing judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584, in so far as, in addition to the findings in paragraph 42 of the present judgment, his legal position in that Member State safeguards not only the objectivity of his role, but also affords him a guarantee of independence from the executive in connection with the issuing of a European arrest warrant. Nevertheless, it cannot be ascertained from the information in the case file before the Court whether a decision of the Prosecutor General of Lithuania to issue a European arrest warrant may be the subject of court proceedings which meet in full the requirements inherent in effective judicial protection, which it is for the referring court to determine."

4. Having sought and obtained further information, Binchy J concluded as follows:

> "39. As to the availability of an appeal against the issue of a European arrest warrant, it is clear from the information provided by the Chief Prosecutor that it remains open to the respondent to appeal the issue of the EAW, and that he is entitled to legal aid for that purpose and that he has freedom of choice as regards the appointment of a lawyer to represent him in any such appeal. While Mr. Tokarcakas takes issue with the availability of such an appeal, this court has been informed twice by the issuing state that such an appeal is available. It is possible that Mr. Tokarcakas' opinion may be in some way influenced by the fact that this question has not been addressed before, or that such appeals have never been brought previously, but whatever the explanation, this court has no way of

reconciling such a difference of opinion, and can only decide the issue on the basis of the trust and confidence that it is bound to accord to the issuing state, and to accept what it has stated both in the first instance and in response to the opinion of Mr. Tokarcakas.

40. It is apparent from the decision of the CJEU in YC that the establishment of a separate right of appeal against the decision to issue a European arrest warrant taken by a judicial authority other than a court offers a sufficient guarantee of the level of judicial protection required by the Framework Decision, provided that the appellate court may carry out an assessment of compliance as to the conditions for the issue of a European arrest warrant, including the proportionality of the same. The issuing state has confirmed the availability of such an appeal. Accordingly, it follows that the system in Lithuania whereby a European arrest warrant is issued by the Prosecutor General's Office meets the requirements inherent in effective judicial protection, at both the first level (the point at which the national arrest warrant is issued) and, at the second level, at which a European arrest warrant is issued, as determined by the CJEU in the authorities above. That being the case, this point of objection must be rejected, and since that is the only surviving objection to his surrender, this Court will make an order for the surrender of the respondent pursuant to the EAW, in accordance with s. 16 of the Act of 2003."

5. As Donnelly J. observed at paragraph 53 of her judgment, "one would have thought that might be the end of the matter". However, those who had that impression would have been very wrong indeed. As Donnelly J. points out, the then respondent, now appellant, contends not simply that Binchy J. was wrong in law, but that the legal information provided to him by the Lithuanian authorities was incorrect.

6. In addition, in the High Court, the appellant argued that as no specific information had been given in this particular case by the Lithuanian authorities, the Minister could not rely on information provided in another case. This contention was rejected by Donnelly J. who was of the view that the principle of mutual trust and confidence demanded that where the High Court, as executing judicial authority, received information from the authorities in the issuing State on a discrete legal provision concerning the laws of that State, it was appropriate and necessary to proceed on the basis that both the information provided and the judgment delivered were accepted as correct until the contrary was demonstrated. The judge felt it would be inconsistent with the principle of mutual trust and confidence, and the simplified process set out by the 2002 Framework Decision, if the issuing judicial authority was required to send over the same information in every case where a respondent raised the same objection.

7. Donnelly J. referred to the fact that the appellant's submissions were based upon the evidence of Mr. Simas Tokarčakas, a lawyer from Kaunas, Lithuania, who had provided evidence on behalf of Mr. Lisauskas in relation to Lithuanian law. Donnelly J. pointed out that his evidence in the present case was based upon actions taken by him in respect of Mr. Lisauskas and not on any steps that he took in relation to Mr. Firantas to challenge the EAW.

8. Mr. Tokarčakas reported to the High Court on the outcome of an application made by him to Alytus District Court, seeking the annulment of the EAW in the case of Mr. Lisauskas. Mr. Tokarčakas had summarised the position as being that Alytus District Court had stated that no appeal lay from the decision of the Prosecutor General to issue a EAW to a court. Counsel had submitted to the High Court that the translated ruling, a short section of which Mr. Tokarčakas had put in bold by way of emphasis, was self-evidently an indication that there was no appeal against a prosecutor's decision to issue a EAW. However, the High Court was firmly of the view that the matter was far from self-evident. Donnelly J. viewed

the starting point for an examination of the evidence as being that the Court had to bear in mind the principle of mutual trust and confidence and that it was for the respondent to satisfy the Court that the *prima facie* statement by the Lithuanian authorities as to their own law was incorrect. She pointed out that the affidavit of Mr. Tokarčakas in the proceedings before her did not include the written submissions that he had made to each District Court in Lithuania and she saw that as "a major evidential defect". She said it was not at all clear from the decisions of either District Court that his submissions included any reference to Article 63, or to the views of the prosecutor with respect to a right of appeal. The judge viewed this as a significant concern in a situation where it had always been the view of Mr. Tokarčakas that Article 63 did not apply. The judge concluded her consideration of that issue by indicating that she was satisfied that a Prosecutor General's decision to issue a EAW was subject to review, and so she rejected the point of objection and made an order providing for surrender. However, she subsequently certified the following question:

> "To what extent[,] if any, is the High Court, as executing judicial authority, in reliance on the principles of mutual trust and confidence, and in the exercise of its functions under section 16 of the European Arrest Warrant Act of 2003, entitled to have regard to information provided in separate proceedings under the said Act, against another requested person, by an issuing judicial authority (or the issuing state) as to the law of the issuing state?"

Submissions on Appeal

9. In written and oral submissions, the appellant places emphasis on two factual matters: (i) that the issuing State, the Republic of Lithuania, did not affirm the applicability to the appellant of the information provided in separate proceedings; and (ii) that it was the case

that new evidence had been adduced by the appellant and that new evidence was not contradicted.

10. The reference to new evidence is a reference to the fact that the decision of Alytus District Court, on which the appellant places reliance, issued on 12th March 2020, a week after Binchy J. gave his decision in Lisauskas. Therefore, it is said that the state of evidence before Donnelly J. was significantly different to the situation at the time that Binchy J. was called on to consider the matter.

11. Before this Court, the appellant has argued that Irish law requires a fresh determination in relation to foreign law in each case on the basis of information provided specific to the case. It is said that because foreign law is a matter of fact, it follows from this that it has to be determined anew in each case. While prepared to accept that there may be rare occasions when aspects of foreign law will become so well-known as to be "notorious", the appellant says that is very definitely not the situation here, where the question of what the foreign law is, is a matter of hot dispute.

12. The appellant argues that the situation in which the High Court was placed, where the only evidence specific to the case was that of Mr. Tokarčakas, meant that the High Court should have accepted the appellant's expert evidence. The appellant argues that it was a case where all the evidence went one way, and that the High Court should have found that effective judicial protection did not apply or, at a very minimum, should at least have sought additional information. In the case of oral argument, there appears to have been a greater emphasis on this question of, at a minimum, seeking additional information. It was pointed out that this is what happened in the case of *Minister for Justice & Equality v. Civinskas* [2020] IEHC 310. It is said that transposing information provided in other proceedings could give rise to all sorts of practical difficulties.

13. In summary, the position of the respondent is that the High Court judge was entitled to have regard to information received from the issuing judicial authority in what were related proceedings (the case of *MJE v. Lisauskas*) to the effect that, under Lithuanian law, a right of appeal exists in respect of a decision to issue a EAW. The respondent says that the judge was entitled to reject the evidence presented on behalf of the appellant in circumstances where, having conducted an analysis of same, she was not satisfied that it was the type of cogent evidence required to rebut the clear and unequivocal evidence that had been provided by the issuing judicial authority in *Lisauskas*, to the effect that a right of appeal exists in respect of a decision to issue a EAW. The information provided in *Lisauskas* was of general application and was not, in any sense, specific and exclusive to *Lisauskas*.

Discussion and Conclusion

14. I can say immediately that I find myself in complete agreement with the approach taken by the High Court judge. It seems to me that what Donnelly J. referred to as the "very long litigation history" is a significant, relevant consideration. This case and *Lisauskas* were related cases. The present case was adjourned to await the determination of *Lisauskas*. It seems to me that in those circumstances, to suggest that the High Court was precluded from having regard to the information supplied in the related case is a very remarkable proposition indeed. It seems to me that the context in which the information about the status of the Prosecutor General became available is highly significant. This was not a case of a judge seeking to transpose information in relation to foreign law that she had happened to come across in other proceedings. The information from the Lithuanian authorities as to the status of the Prosecutor General, and specifically, as to the existence of a right of appeal, came about in response to a request for information from the Irish High Court. In those circumstances, it seems to me that there is very great force indeed in the views of the High

Court judge that to insist on submitting a request for information in response to every request for surrender would be incompatible with the principles of mutual trust and confidence.

15. I do not believe that there is any basis for the suggestion that Donnelly J. exceeded her jurisdiction in preferring the views of the Lithuanian authorities to the views expressed by Mr. Tokarčakas. The appellant has made reference to the case of *Michael McNamara & Son v. The Owners of the Steamship Hataris* [1931] IR 337, a case where the Supreme Court disapproved of the fact that the High Court judge had become involved in determining the question of whether certain exemption clauses would be valid as a matter of American law. It does not seem to me that the present situation is at all comparable. Here, on the one hand, there was an unequivocal statement in which the judge was required to repose confidence. In relation to what was put in opposition to that, the judge felt there was a "major evidential defect". The judge also had concerns about the extent of information that was provided about the nature of the submissions that were made to the courts in Lithuania. In all, I am quite satisfied that the present case is very far removed indeed from the *Steamship Hataris* case, to the extent that I do not believe that that case has any real relevance to the present appeal.

16. Repetitive requests for the same information would, in my view, be disrespectful of the Lithuanian authorities and would be to call into question their *bona fides*.

17. The appellant seems to suggest that a request for further information could very readily be made and, it seems to me, suggests, in effect, that there should be a request, as of course, in every case. However, it is clear from the jurisprudence of the CJEU that recourse to the option of seeking further information should be the exception rather than the rule. In *Piotrowski* (Case 367/16), the CJEU observed at paragraph 61:

> "However, it should be noted that recourse may be had to that option only as a last resort in exceptional cases in which the executing judicial authority considers that it

does not have the official evidence necessary to adopt a decision on surrender as a matter of urgency."

18. In the circumstances, I am in agreement with the respondent Minister that the question posed by the High Court should be answered as follows:

"The High Court[,] as executing judicial authority, in reliance on the principles of trust and confidence and in the exercise of its functions under section 16 of the 2003 Act, is entitled to have regard to information provided in separate proceedings by an issuing judicial authority as to the law of the issuing state where the information has been previously accepted by the High Court as executing judicial authority, is of universal applicability and the High Court has no reason on the facts as presented to seek further clarification from the issuing judicial authority."