

THE HIGH COURT

[2021] IEHC 580
[2021 No. 104 EXT]

BETWEEN

THE MINISTER FOR JUSTICE

APPLICANT

AND

GINTAUTAS MACIULSKAS

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 6th day of September, 2021

1. By this application, the applicant seeks an order for the surrender of the respondent to the Republic of Lithuania ("Lithuania") pursuant to a European arrest warrant dated 3rd December, 2020 ("the EAW"). The EAW was issued by Judge Darius Kantaravicius, of the Kaunas Regional Court, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to enforce a sentence of one year and three months' imprisonment, of which one year, two months and 28 days remains to be served.
3. The respondent was arrested on 25th April, 2021 on foot of a Schengen Information System II alert ("the SIS alert") and brought before the High Court on 26th April, 2021. The EAW was produced to the High Court on the same day.
4. I am satisfied that the person before the Court, the respondent, is the person in respect of whom the EAW was issued. No issue was raised in that regard.
5. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), arise for consideration in this application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections.
6. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. The sentence in respect of which surrender is sought is in excess of four months' imprisonment.
7. Counsel on behalf of the respondent submitted that, as the sentence in question was a cumulative sentence aggregating three separate sentences of nine months' imprisonment, seven months' imprisonment and one-year imprisonment respectively, a sentence of three months or less must have been imposed in respect of at least one of the sentences in order to arrive at the cumulative sentence of one year and three months' imprisonment. I do not find any basis for this submission. As pointed out at para. 11-18 in Farrell and Hanrahan, *The European Arrest Warrant in Ireland*, 1st Ed. (Clarus Press, Dublin, 2011), the issue of minimum gravity in composite sentences was dealt with definitively by the Supreme Court in *Minister for Justice v. Sas* [2010] IESC 16, which made it clear that it is the composite sentence that is relevant for determining whether the minimum gravity requirements have been met in respect of a sentence. I dismiss the respondent's objection based upon perceived lack of minimum gravity.

8. I am satisfied that correspondence can be established between the offences referred to in the EAW and offences under the law of this State, viz. assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997, making a threat to kill contrary to s. 5 of the Non-Fatal Offences Against the Person Act, 1997 and criminal damage contrary to s. 2 of the Criminal Damage Act, 1991, respectively. No issue was raised in respect of correspondence.
9. At part D of the EAW, it is indicated that the respondent appeared at the hearing which resulted in the decision which is sought to be enforced.
10. In addition to the objection based upon the minimum gravity requirements of the Act of 2003, the respondent also objected to surrender on the following grounds:-
 - (i) that the arrest of the respondent on foot of the SIS alert was unlawful and the respondent was unlawfully before the Court;
 - (ii) that surrender is precluded by reason of s. 37 of the Act of 2003 as the trial of the respondent was conducted in breach of his fair trial rights as protected by s. 6 of the European Convention on Human Rights ("the ECHR") and/or the Constitution; and
 - (iii) that surrender is precluded by reason of s. 37 of the Act of 2003 due to prison conditions in Lithuania and, in particular, the level of inter-prisoner violence therein.
11. The respondent's solicitor, Mr. Niall Fox, swore an affidavit dated 10th June, 2021 in which he exhibited a report from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT"), dated 25th June, 2019, based upon a visit to Lithuania in 2018.

Section 14 of the Act of 2003

12. Counsel on behalf of the respondent submitted that the respondent had been unlawfully arrested and brought before the High Court in circumstances where the respondent had been arrested on foot of SIS alert when, in fact, the High Court had already endorsed the EAW in this matter on 19th April, 2021. He submitted that if the EAW had already been endorsed by the High Court, then he ought to have been arrested pursuant to s. 13(1) of the Act of 2003.
13. I am satisfied that the Act of 2003 provides for two alternative means of bringing a requested person before the High Court. Section 13 of the Act of 2003 provides a mechanism whereby a European arrest warrant may be presented to the High Court for endorsement for execution of the warrant. If so endorsed, then the warrant may be executed by any member of An Garda Síochána whether or not he/she has physical possession of the warrant. The person arrested in such a fashion shall, as soon as may be after their arrest, be brought before the High Court. Alternatively, s. 14 of the Act of 2003 provides that a member of An Garda Síochána may arrest a person without a warrant where he/she believes, on reasonable grounds, that the person is a person named in a

SIS alert and the person so arrested shall, as soon as may be after his arrest, be brought before the High Court which then sets a date for production of the European arrest warrant on foot of which the alert was entered. Section 14 of the Act of 2003 does not make any reference to whether or not the warrant has or has not already been endorsed by the High Court. The power to arrest pursuant to s. 14 of the Act of 2003 is not in any way circumscribed by a requirement that such power may only be exercised where a European arrest warrant has not been already endorsed by the High Court. It is clear that, provided a member of An Garda Síochána has reasonable grounds for believing a person to be a person named in an alert, he/she is entitled to arrest such person whether or not the European arrest warrant in respect of that person has or has not already been endorsed by the High Court. The fact that the warrant subsequently produced to the Court is a warrant which has already been endorsed by the High Court does not in any way impugn the validity of the arrest or render the respondent unlawfully before the Court. I dismiss the respondent's objection in that regard.

Section 37 of the Act of 2003 – Unfair Trial

14. Counsel for the respondent submitted that the description of the circumstances in which offence 2 was committed, as referred to in part E of the EAW, included reference to previous wrongdoing on the part of the respondent as follows: -

"Gintautas Mačiulskas threatened to kill a person: on 22/10/2019, from 2:11 p.m. until 3:07 p.m., he called [L.C.] and threatened to kill her, saying 'you'll end up in a coffin', 'I'll burn you alive', 'You'll burn alive', and 'I'll pour kerosene on you and burn you alive'. There were sufficient grounds to believe that the threat could be carried out, as he had previously used physical violence against the victim [L.C]."

15. Counsel submitted that in making reference to the previous use of physical violence by the respondent against the particular victim, this indicated that such evidence had been adduced at the trial. He submitted that such evidence of previous wrongdoing would be inadmissible under the rules of evidence in this country. He submitted that the admission of such evidence rendered the respondent's trial unfair and in breach of his fair trial rights under the ECHR and/or the Constitution.
16. Counsel was unable to refer the Court to any authority supporting this submission. Leaving aside the issue as to whether or not such evidence would, in all cases, be inadmissible in this jurisdiction, it is inherent in the European arrest warrant system that there will be differences in rules and procedures before the courts of the various Member States. The fact that the issuing state operates different rules and procedures from the executing state, including different rules as to the admissibility of evidence, does not of itself justify a refusal of surrender.
17. In *Minister for Justice, Equality and Law Reform v. John Paul Brennan* [2007] 3 I.R. 732, the respondent argued that a sentencing regime which provided for the imposition of a minimum sentence for a particular offence without leaving the trial judge discretion would be contrary to the Constitution and therefore surrender was precluded by reason of s. 37

of the Act of 2003. This was emphatically rejected by Murray C.J. in delivering the judgment of the Supreme Court, at paras. 36-40:-

- "36. *However the argument of the respondent goes much further. He has contended that the sentencing provisions of the issuing state, in this case the United Kingdom, did not conform to the principles of Irish law, as constitutionally guaranteed, governing the sentencing of persons to imprisonment on conviction before our courts for a criminal offence.*
37. *The effect of such an argument is that an order for surrender under the Act of 2003, and indeed any order for extradition, ought to be refused if the manner in which a trial in the requesting state including the manner in which a penal sanction is imposed, does not conform to the exigencies of our Constitution as if such a trial or sentence were to take place in this country. That can hardly have been the intention of the Oireachtas when it adopted s. 37(1) of the Act of 2003 since it would inevitably have the effect of ensuring that most requests for surrender or extradition would have to be refused. And indeed if that were the intent of the Framework Decision, which the Act of 2003 implements, and other countries applied such a test from their own perspective, few, if any, would extradite to this country.*
38. *Indeed it may be said that generally extradition has always been subject to a proviso that an order for extradition, as with any order, should not be made if it would constitute a contravention of a provision of the Constitution. I am not aware of any authority for the principle that the extradition or surrender of a person to a foreign country would contravene the Constitution simply because their legal system and system of trial differed from ours as envisaged by the Constitution.*
39. *The manner, procedure and mechanisms according to which fundamental rights are protected in different countries will vary according to national laws and constitutional traditions. The checks and balances in national systems may vary even though they may have the same objective, such as ensuring a fair trial. There may be few, if any, legal systems which wholly comply with the precise exigencies of our Constitution with regard to these matters. Not all for example will provide a right to trial by jury in exactly the same circumstances as our Constitution does in respect of a trial for a non-minor offence. Rules of evidence may differ. The fact that a person would be tried before a judge and jury in this country for a particular offence could not in my view, be a basis for refusing to make an order for surrender solely on the grounds that in the requesting State he or she would not be tried before a jury. The exceptions which we have to the jury requirement, as in trials before the Special Criminal Court, acknowledges that a fair trial can take place without a jury even though it is constitutionally guaranteed for most trials in this country.*
40. *That is not by any means to say that a court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established*

that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting state, where a refusal of an application for surrender may be necessary to protect such rights. It would not be appropriate in this case to examine further possible or hypothetical situations where this might arise. The sole matter which I wish to make clear here is that the mere fact that a trial or sentence may take place in a requesting state according to procedures or principles which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that an application for surrender should be refused pursuant to s. 37(2) of the Act."

18. As O'Donnell J. stated at para. 208 in *Nottinghamshire County Council v. B* [2011] 4 I.R. 662, "... it is clear that the Constitution expects the legal systems of friendly nations will differ from that of Ireland" and at para. 207, "... the Constitution requires the courts to refuse return only when the foreign procedure is so contrary to the scheme and order envisaged by the Constitution, and so proximately connected to the order of the court, that the court would be justified, and indeed required, to refuse return".
19. I am not satisfied that the trial of the respondent was conducted in breach of his fair trial rights as guaranteed under the ECHR or the Constitution. It is inherent in the European arrest warrant system that procedures and rules governing trials, including rules as to admissibility of evidence, will vary from state to state. I do not regard the admission of evidence concerning previous acts of violence perpetrated by the respondent upon the victim as so egregious a flaw in the process to justify refusal of surrender, particularly where such admission was relevant in order to demonstrate grounds for believing his threats would be carried out. Furthermore, I am not satisfied that such evidence would be inadmissible in all circumstances in this jurisdiction. Ultimately, bearing in mind the wording of s. 37 of the Act of 2003, this Court has to determine if surrender of the respondent is incompatible with the State's obligations under the ECHR, the protocols thereto or would contravene the Constitution. I am satisfied that surrender is not so incompatible and nor would it contravene the Constitution. I dismiss the respondent's objections in this regard.

Section 37 of the Act of 2003 – Prison Conditions

20. Counsel on behalf of the respondent submitted that, as the sentencing court in relation to the offences referred to in the EAW was a court in Marijampole, it was likely that the respondent would be required to serve his sentence in Marijampole Prison. He referred the court to the report of the CPT, dated 25th June, 2019, in respect of a visit to Lithuania from 20th to 27th April, 2018 and, in particular, to the finding of the CPT that, as regards Alytus, Marijampole and Pravienskės Prisons, there were truly extraordinary levels of inter-prisoner violence, intimidation and exploitation. The delegation had the strong impression that the main detention areas of these three prisons were unsafe for inmates, and that the only parts of the establishments under the full control of the administration were the punishment blocks which were frequently used and constantly filled to capacity, mostly by inmates seeking protection from other prisoners and being punished for

refusing to stay in their ordinary units. Counsel for the respondent submitted that to subject the respondent to detention in such conditions would amount to a breach of his right not to be subject to inhuman or degrading treatment or punishment as recognised in Article 3 ECHR. On consideration of the CPT report and submissions of counsel, the Court sought additional information.

21. By letter dated 28th July, 2021 from the Ministry of Justice of the Republic of Lithuania, it is indicated that it is not possible to state in which particular correctional institution the respondent will be required to serve his sentence, if surrendered. The letter sets out details of the efforts that have been made to reduce the level of inter-prisoner violence in Lithuanian prisons. It is indicated that in order to reduce the influence of informal prison hierarchies and strengthen prisoners' security and supervision, the Minister of Justice of the Republic of Lithuania has approved an Action Plan which prescribes extra measures for isolation of persons making negative influence on other prisoners and to deter them from breaking prison rules. In 2018, all inmates making a negative influence on other inmates (leaders of informal prison hierarchy and its handymen, drug dealers) were re-settled to other places of detention and kept there isolated in cell-type premises (approximately 200 persons) and this practice has been continuously used since then. In addition, due to the optimisation of administrative structures of the prisons department and places of detention (including the closure of a particular institution in Vilnius), extra shifts of prison wardens have been established to enhance prisoners' security and supervision. It is stated that all measures planned in order to increase the security of places of detention and staff have been implemented and the risks identified by the CPT have been successfully minimised. It is stated that there is now no potential risk of inmates accommodated in dormitory-type premises being in contact with leaders of informal prison hierarchies or their handymen or other inmates making a negative influence. It is further stated that the heads of correctional institutions are constantly reminded of their duty to ensure that officers are reminded of the need for proper, humane and lawful treatment of prisoners and liability for abuse of authority and ill-treatment. New training plans for officers have been put in place including topics on the legal basis and limits for the use of force and special means, as well as liability for overstepping these limits by using force. Related topics are also included in the training plan for officer vocational training and career development. It is now mandatory for all prison guards to use portable video recorders while interacting with inmates.
22. It is confirmed that prison conditions in Lithuanian correctional institutions meet the standards of hygiene set by the law of Lithuania and this means that all inmates are provided with a single bed and other supplementary furniture, their living premises are heated and ventilated and have access to natural and artificial lighting. Each inmate has full access to drinking water and toilet facilities 24 hours per day. It is confirmed that no Lithuanian correctional institute is now overcrowded and:-

"the actual minimum living space (excluding premises which, in particular, inmates are sharing together, i.e. kitchenette, restroom etc.) for each inmate is close to or exceeds 4 sq. m."

23. It is confirmed that all inmates are provided with sufficient food of quality and quantity which fully meets their physiological needs. Inmates can purchase additional commodities in prison shops. Full medical care is guaranteed. The services of a GP and psychiatry and odontology doctors are ensured in each correctional institution. If necessary, inmates can get other medical services in the Central Prison Hospital or in public healthcare institutions. It is indicated that inmates are able to walk outside their cells/living rooms every day for two to four hours per day and that other outdoor activities are also proposed. The letter concludes:-

"In accordance with the above-mentioned, the Ministry of Justice of the Republic of Lithuania would like to assure you that the conditions of all Lithuanian prisons meet at least minimal international standards and Gintautas Mačiulskas, if transferred to Lithuania, will be guaranteed the protection of the European Convention on Human Rights."

24. Having evaluated all of information before the Court, I am not satisfied that there are substantial reasons for believing that there is a real risk that, if surrendered, the respondent will be exposed to inhuman or degrading treatment in breach of Article 3 ECHR. I note that the CPT report, based on a visit in 2018, welcomed the action plan that had been put in place but felt that there was still a lot to do. On the basis of the information provided, it would appear that the Lithuanian authorities have taken further steps to implement the action plan and to ensure compliance with international standards as regards prison conditions. I am satisfied that the respondent will be afforded a minimum personal living space in excess of three square metres including furniture but excluding sanitary facilities. I am satisfied that the general conditions of detention do not amount to a breach of Article 3 ECHR. I note that the policy whereby the victims of inter-prisoner violence were held in punishment blocks for their safety has now been replaced with a policy whereby those prisoners posing a threat to the safety of others are moved. While the additional information furnished does not come directly from the issuing judicial authority, I am satisfied to give significant weight to same as it comes from an emanation of the Lithuanian State with responsibility for the justice system including the running of prisons. It would seem that the information in relation to prison conditions comes from a body which is ideally placed to provide such information. There is nothing before the Court to put in question the knowledge, competence or *bona fides* of the person providing the information on behalf of the Ministry of Justice. While the additional information does not deal directly with some of the questions raised by the Court, I am nevertheless satisfied that the Court's concerns as regards the level of inter-prisoner violence have been allayed by the information furnished.
25. Section 4A of the Act of 2003 provides that it shall be presumed that an issuing state will comply with the requirements of Framework Decision unless the contrary is shown. The Framework Decision incorporates respect for fundamental human rights. I am satisfied that the presumption provided for in s. 4A of the Act of 2003 has not been rebutted in this case.

26. Bearing in mind the wording of s. 37 of the Act of 2003, this Court must determine whether the surrender of the respondent would be incompatible with the State's obligations under the ECHR, the protocols thereto or would contravene the Constitution. I am satisfied that the surrender of the respondent would not be incompatible with the obligations of the State in that regard and nor would it contravene any provision of the Constitution.
27. I reject the respondent's objection to surrender based on prison conditions in Lithuania.

Conclusion

28. I am satisfied that surrender of the respondent is not precluded by reason of Part 3 of the Act of 2003 or any other provision of that Act.
29. Having rejected the respondent's objections to surrender, it follows that this Court will make an order pursuant to s. 16 of the Act of 2003 for the surrender of the respondent to Lithuania.