

THE HIGH COURT

[2022] IEHC 314

[2022 No. 29 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ANDRIUS KONDRATOV

RESPONDENT

JUDGMENT of Ms. Justice Caroline Biggs delivered on the 1st day of April, 2022

1. By this application, the applicant seeks an order for the surrender of the respondent to the Republic of Lithuania pursuant to a European Arrest Warrant dated the 21st of December 2021 (“the EAW”). The EAW was issued by Arunas Meska Chief Prosecutor of the Department for Criminal Prosecution, as the issuing judicial authority.

2. The EAW seeks the surrender of the respondent in order to prosecute him in respect of alleged assault and robbery-type offences.

3. The respondent was arrested on the 4th of February 2022, on foot of a Schengen Information System II alert, and brought before the High Court on that date. The EAW was produced to the High Court on 17th of February 2022.

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. Each of the offences in respect of which surrender of the respondent is sought carries a maximum penalty in excess of twelve months' imprisonment.

7. I am satisfied that correspondence can be established between the offences referred to in the EAW and offences under the law of this State; assault contrary to s. 3 of the Non-Fatal Offences Against the Person Act and Robbery contrary to Section 14 of the Theft and Fraud Offences Act 2001.

8. As surrender is sought to prosecute the respondent, no issue arises under s. 45 of the Act of 2003.

9. The respondent objected to surrender on the following grounds:

- The respondent requires the applicant to demonstrate to the satisfaction of this Honourable Court that the EAW complies with the requirements of the Framework Decision and the Act of 2003, as amended.
- The respondent contends that the criminal complaint made by his partner was withdrawn. As a result, the pre-trial investigation was not concluded. No decision has been made to put him on trial for the offences contained on the warrant. In the circumstances, the surrender of the respondent is prohibited by virtue of s. 21A of the Act of 2003 as amended.

10. In light of these objections, this Court raised a number of questions by way of s. 20 request, and in additional information dated the 25th of February 2022, the issuing judicial authority stated:

“1 a. At the time the European Arrest Warrant issued was it the intention of the competent prosecution authority, subject to any additional information that may come to light and any other procedure that may be necessary, to put Andrius Kondratov on trial for the offence the subject matter the European Arrest Warrant?”

In the pre-trial investigation No. 01-1-04532-21 all necessary procedural steps have been carried out and sufficient evidence gathered to pass the criminal case to the court with the indictment.

b. Is it now the intention of the competent prosecuting authority, subject to any additional information that may come to light any formal steps to be taken, to put Andrius Kondratov on trial for the offence the subject matter of the European Arrest Warrant?

By decision of the prosecutor in charge of the case, the case will be passed to the court, regardless of additional information that may come to light.

c. In the opinion of the competent prosecuting authority does there currently exist sufficient evidence on which Andrius Kondratov can be tried for the offence the subject matter of the European Arrest Warrant?

In the opinion of the prosecutor in charge of the pre-trial investigation against Mr. Kondratov, there is currently sufficient evidence on the basis of which Andrius Kondratov will be tried for the crimes specified in the European Arrest Warrant.

2. What formal steps must be taken after the surrender (if it is ordered) before Andrius Kondratov can be indicted before the court in respect of the offence the subject matter of the European Arrest Warrant?

Andrius Kondratovas will be served with a notice on the suspicion of the crimes, he will be questioned as a suspect and the pre-trial investigation will be declared completed and then the case will be passed to the court with indictment for trial.

3. Can you please confirm that, once Andrius Kondratov has been interviewed, regardless of his answers in interview, that an indictment will be drawn up and the case will be transferred to the court for judicial inquiry?

The prosecutor controlling the pre-trial investigation confirms that regardless of Andrius Kondratov's answers during his interview, the case will be passed to the Court for trial.

4. In particular, can you confirm that if Andrius Kondratov accepts responsibility for the offence during his interview that an indictment will be drawn up and the case will be transferred to the court for judicial inquiry?

The prosecutor in charge of the pre-trial investigation confirms that if Andrius Kondratov when interviewed as a suspect will accept responsibility for the offences listed in the EAW the indictment will still be written and the case will be passed to the Court for trial. A. Kondratov has been previously sentenced for 6 times for robberies, thefts breaches of public order and other criminal offences. A. Kondratov cannot reconcile with the victim, nor can he be released from criminal liability on any of the grounds provided for the Criminal Code of the Republic of Lithuania.

5. In particular, can you confirm that if Andrius Kondratov makes no comment during his interview that an indictment will be drawn up and the case will be transferred to the court for judicial inquiry?

The prosecutor in charge of the pre-trial investigation confirms that if Andrius Kondratov makes no comments during this interview, the indictment will still be drawn up and the case will be passed to court for trial because sufficient data has been collected providing that Andrius Kondratov committed the offences referred to in the EAW.

6. Alternatively, can you confirm that if Andrius Kondratov protests his innocence during his interview that an indictment will be drawn up and the case will be transferred to the court for judicial inquiry?

The prosecutor in charge of the pre-trial investigation confirms that if Andrius Kondratov protests his innocence during his interview, the indictment still will be drawn up and the case will be transferred to the court for trial.

7. Did the complainant, Viktorija Daraskevic, indicate a willingness to withdraw the criminal complaint against Andrius Kondratov and/or did she actually withdraw the complaint?

The complainant Viktorija Daraskevic, who was recognised as a victim, during her interview on 03-03-2021 had stated that she had no claims against Mr. Kondratov that he used physical violence against her, as she did not see a doctor to determine the extent of the health disorder.

However, the criminal act committed by A. Kondratov is criminally qualified according to Article 140 (2) of the Criminal Code of the Republic of Lithuania, which does not require the complainant's statement to initiate the pre-trial investigation, because the crime was committed in the domestic environment. The criminal law of the Republic of Lithuania stipulates that criminal proceedings shall be continued even if the complainant withdraws his/her statement.

There is sufficient data collected in the pre-trial investigation to support A.

Kondratov committed a criminal offence provided for in Article 140(2) of the Criminal Code of the Republic of Lithuania and the case will be referred to the court for trial.

On September 15, 2021, the victim Viktorija Daraskevic, during her supplement interview, stated that due to A. Kondratov's committed criminal offence, specified under Art. 178 (2) of the Criminal Code of the Republic of Lithuania (Theft), she suffered severe stress and harmful spiritual experiences.

8. If so, does her withdrawal of the complaint necessarily bring an end to the intended prosecution?

The withdrawal of the complaint is withdrawn does not stop the criminal prosecution and the criminal case will be transferred to the court.”

11. The principles applying to this issue are set out in the case of *The Minister for Justice Equality and Law Reform -v- Olsson* [2011] IESC 1 (hereinafter “*Olsson*”). In *Olsson*, the Swedish Police were required to interview the respondent in order to formally conclude their criminal investigation, after which the final decision on whether or not to prosecute him would be taken. In those specific circumstances, the High Court ordered his surrender, and, indeed, the Supreme Court dismissed his appeal from same on this and other points. In doing so, the court noted at para. 26;-

“[26] The issue here, however, is not merely one of the evidence before the court. As is apparent, s. 21A(2) of the Act of 2003, as inserted by s. 25 of the Act of 2005, contains a presumption that a decision has been made to charge the person and try him or her for the offence. Furthermore, the opening lines of the European Arrest Warrant itself, request that the person mentioned below “be arrested and surrendered for the purposes of conducting a criminal prosecution ...” That statement, and the further statements made in Ms. Maderud’s affidavit in relation to the practice of the Kingdom of Sweden, must also be read in the light of recital 10 of the Framework Decision which describes “[t]he mechanism of the European Arrest Warrant [as being] based on a high level of confidence between Member States.”

Further at para. 33, O’Donnell J. indicated that;-

“[33] When s. 21A speaks of “a decision” it does not describe such decision as final or irrevocable, nor can it be so interpreted in the light of the Framework Decision. The fact that a further decision might be made eventually not to proceed, would not therefore mean that the statute had not been complied with, once the

relevant intention to do so existed at the time the warrant was issued. The Act of 2003 does not require any particular formality as to the decision; in fact, s. 21 focuses on (and requires proof of) the absence of one. The issuing state does not have to demonstrate a decision. A court is only to refuse to surrender a requested person when it is satisfied that no decision has been made to charge or try that person. This would be so where there is no intention to try the requested person on the charges at the time the warrant is issued. In such circumstances, the warrant could not be for the purposes of conducting a criminal prosecution.”

At para. 36, O’Donnell J. concluded that;-

“[33] [...] In short the intention of the Swedish prosecution authority to bring the respondent before the Swedish Court for the purpose of being charged is but a step in the prosecution process. For the reasons set out above the High Court was correct to conclude that the respondent was not being sought only to be questioned as part of the investigation and that there was a decision to charge the respondent within the meaning of the Act of 2003. Certainly even without the presumption contained in s. 21A(2), the section requires clear proof. Once a court finds the European Arrest Warrant to be in order (and therefore on its face a request made for the purpose of prosecution or trial), then before a court can refuse to surrender a person requested under such a warrant, it must be satisfied by cogent evidence to the contrary that a decision has not been made to charge the particular person with, and try him or her for, the offence.”

12. Having regard to the words of Mr. Justice O’ Donnell, and in deciding this issue therefore the Court must have regard to the following:

- a. s. 21A(2) of the Act of 2003, as inserted by s. 25 of the Act of 2005, contains a presumption that a decision has been made to charge the person and try him or her for the offence.
- b. The opening lines of the EAW itself, request that the person mentioned below “be arrested and surrendered for the purposes of conducting a criminal prosecution ...”
- c. Recital 10 of the Framework Decision which describes “[t]he mechanism of the European Arrest Warrant [as being] based on a high level of confidence between Member States.”
- d. A court is only to refuse to surrender a requested person when it is satisfied that no decision has been made to charge or try that person. This would be so where there is no intention to try the requested person on the charges at the time the warrant is issued. In such circumstances, the warrant could not be for the purposes of conducting a criminal prosecution.
- e. There must be strong and cogent evidence to rebut the presumption in s. 21A of the Act of 2003, in this case there is none.
- f. The issuing judicial authority has confirmed, by way of additional information that while a further step must be taken prior to charge i.e. the interview of the respondent, regardless of his answers in interview, which is a mandatory process, the indictment will be drawn up and the case will be referred to a court of trial.

13. In light of the foregoing and in all of the circumstances, I am satisfied that surrender of the respondent is not precluded by reason of s. 21A of the Act of 2003 or another provision of that Act.

14. 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.

15. It therefore follows that this Court will make an order pursuant to s. 16 of the Act of 2003 for the surrender of the respondent to the Republic of Lithuania.