

THE HIGH COURT

[2022] IEHC 57
[2016 No. 97 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

DANAS KAIRYS

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 31st day of January, 2022

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 2nd May, 2016 ("the EAW"). The EAW was issued by Sigitas Bagdonavicius, of the Panevezys Regional Court, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to enforce a sentence of 3 years and 7 months' imprisonment imposed upon the respondent on 16th April, 2015 and upheld on appeal on 23rd June, 2015, of which 3 years, 6 months and 28 days remain to be served.
3. The EAW was endorsed by the High Court on 13th June, 2016 and the respondent was arrested and brought before the High Court on 30th March, 2021 on foot of same.
4. I am satisfied that the person before the Court, the respondent, is the person in respect of whom the EAW was issued.
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 4 months' imprisonment.
7. It is clear from the EAW that the sentence of 3 years and 7 months' imprisonment imposed upon the respondent incorporates a number of previous sentences imposed on the respondent into a single sentence. At part D of the EAW, it is indicated that the respondent appeared in person at the trial resulting in the decision which is sought to be enforced. By way of additional information dated 24th May, 2016, the issuing judicial authority confirms that the respondent appeared in each trial that resulted in a sentence which was consequently combined with another sentence to constitute the sentence, the balance of which the respondent is sought to serve. In such circumstances, I am satisfied that no issue arises under s. 45 of the Act of 2003 and this was conceded by the respondent.

8. The EAW refers to 13 offences. As regards one of the offences, being an offence of unlawful possession of drugs supplied to another, the issuing judicial authority has certified that the offence is an offence to which Article 2.2. of the European Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, as amended ("the Framework Decision"), applies, that same is punishable by a maximum penalty of at least 3 years' imprisonment and has indicated the appropriate box for "*illicit trafficking in narcotic drugs and psychotropic substances*". There is no manifest error or ambiguity in respect of the aforesaid certification such as would justify this Court in looking beyond same. In any event, I am satisfied that, if necessary, correspondence could be established between that offence and the offence in this State of unlawful possession of drugs for supply contrary to s. 15 of the Misuse of Drugs Act, 1977.
9. As regards the other 12 offences to which the EAW refers, I am satisfied that correspondence can be established between such offences and offences under the law of this State as follows:-
- (i) Theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001;
 - (ii) Theft;
 - (iii) This offence is covered by Article 2.2. of the Framework Decision as indicated above;
 - (iv) Theft;
 - (v) Theft;
 - (vi) Theft;
 - (vii) Theft;
 - (viii) Criminal damage contrary to s. 2 of the Criminal Damage Act, 1991;
 - (ix) Perjury and/or perverting the course of justice contrary to common law;
 - (x) Theft;
 - (xi) Theft;
 - (xii) Criminal damage; and
 - (xiii) Assault contrary to s. 2 of the Non-Fatal Offences Against the Person Act, 1997 and/or assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997.

Correspondence was not contested.

10. The respondent initially objected to surrender on the grounds that same was precluded by reason of s. 37 of the Act of 2003 insofar as it would amount to exposing the respondent to a real risk of a breach of his fundamental rights and, in particular, his right pursuant to Article 3 of the European Convention on Human Rights ("the ECHR") not to be subjected to inhuman or degrading treatment or punishment and his right to a private and family life pursuant to Article 8 ECHR.
11. The respondent swore an affidavit in which he acknowledges having committed the offences to which the EAW refers and admits that he fled Lithuania in 2014 to avoid imprisonment due to a fear on his part that he would be subjected to sexual and physical assault while in prison. He exhibits a number of reports from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the Ombudsman's Office of Lithuania as well as the European Prison Rules. As regards his personal circumstances, he avers that in or about September 2016, he entered into a "*marital type relationship*" in the State with his partner, they have formed a family unit in the State and have two young children. He avers it is their intention to continue to live on a permanent basis as a family unit within the State. He avers that if he is surrendered to Lithuania, the family unit would be under severe pressure to survive and that his prospects of social rehabilitation would be greatly harmed by the break-up of the family unit.
12. The respondent's partner, Samata Beinarauskite, swore an affidavit on similar lines to that of the respondent as regards the family's circumstances. She says that if the respondent is required to serve a prison sentence in Lithuania, it would be difficult to arrange family visits. She suggests that the respondent should be allowed to serve his outstanding prison sentence in this State.

Prison Conditions

13. The High Court has considered prison conditions in Lithuania in a number of recent decisions including *Minister for Justice and Equality v. Jarokovas* [2021] IEHC 270, *Minister for Justice and Equality v. Markauskas* [2021] IEHC 90, *Minister for Justice and Equality v. Valeska* [2020] IEHC 692 and *Minister for Justice and Equality v. Ziznevskis* [2020] IEHC 415. In each of those cases, the Court was satisfied by the assurances given by the Lithuanian authorities as regards prison conditions in Lithuania and surrender of the respondent was ordered in respect of each case. The reports relied upon by the respondent herein were considered by the Court and raise no new issues to that considered by the Court in respect of those previous cases.
14. I find that the respondent has failed to satisfy the Court that general deficiencies in the Lithuanian prison system are such that this Court should conduct an enquiry into the conditions in which the respondent will be held if surrendered.
15. I am not satisfied that there are substantial grounds for believing that, if surrendered, the respondent will face a real risk of a breach of any of his fundamental rights and, in particular, his right not to be subjected to inhuman or degrading treatment or punishment.

16. Section 4A of the Act of 2003 provides that it shall be presumed that an issuing state will comply with the requirements of the 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 instance.
17. Bearing in mind the wording of s. 37 of the Act of 2003, I am satisfied that surrender of the respondent to Lithuania is not incompatible with the State's obligations under the European Convention on Human Rights ("the ECHR"), the protocols thereto and nor would it constitute a breach of any provision of the Constitution.
18. I reject the respondent's objection to surrender based on prison conditions in Lithuania.

Private and Family Life

19. I accept that the respondent has established a family unit within this jurisdiction. However, the personal and family circumstances of the respondent fall far short of being exceptional so as to justify a refusal of surrender on grounds of same.
20. As regards the respondent's right to a private and family life and/or the delay in this matter, in *Minister for Justice & Equality v. Vestartas* [2020] IESC 12, the Supreme Court considered Article 8 ECHR in the context of European arrest warrant proceedings. MacMenamin J., delivering the judgment of the court, stated at para. 23:-

"23. Article 8(1) ECHR guarantees the right to respect for an individual's private and family life, home and correspondence. But that guarantee is subject to the proviso that public authorities shall not interfere with the exercise of that right, except such as in accordance with law, and is necessary in a democratic society in the interests of national security, public safety, the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (Article 8(2)). The terms of Article 8(2) are, therefore, sufficiently broad to encompass orders for extradition, or in this case, surrender. But as will be seen, these Article 8 considerations arise within a statutory framework which it is now necessary to consider."

MacMenamin J. went on to state later in his judgment at para. 94:-

"94. The contrast with the exceptional facts in J.A.T. is plain. For an Article 8 defence to succeed, it can only be on clear facts based and cogent evidence. The evidence must be sufficient to rebut the presumption contained in s.4A of the Act (see, para. 41 above). The circumstances must be shown to be well outside the norm; that is, truly exceptional. In the words of s.37(1), they must be such as would render an order for surrender 'incompatible' with the State's obligations under Article 8 of the ECHR. This would necessitate that the incursion into the private and family rights referred to in Article 8(1) was such as to supervene the

limitations on the right contained in Article 8(2), and over the significant public interest thresholds set by the 2003 Act itself."

21. Again, bearing in mind the wording of s. 37 of the Act of 2003, I am satisfied that the surrender of the respondent to Lithuania is not incompatible with the State's obligations under the ECHR, the protocols thereto and nor would it constitute a breach of any provision of the Constitution.
22. I dismiss the respondent's objection to surrender based upon his personal and family circumstances.

Framework Decision 2008/909/JHA

23. Counsel on behalf of the respondent introduced a further ground of objection to surrender to the effect that, as Ireland had not given legislative effect to European Council Framework Decision 2008/909/JHA, this amounted to a breach of the respondent's fundamental rights. European Council Framework Decision 2008/909/JHA makes provision for persons sought pursuant to a European arrest warrant to serve a sentence in the issuing state to serve the sentence in the executing state.
24. In *Campbell v. Ireland and Anor* [2021] IEHC 162, the High Court rejected a submission that the State was obliged to implement European Council Framework Decision 2008/909/JHA.
25. Moreover, in *X* (Case C-665/20 PPU), the Court of Justice of the European Union ("the CJEU") confirmed that Article 4 of the European Council Framework Decision 2008/909/JHA is optional in nature. While that case dealt with Article 4(5) of the European Council Framework Decision 2008/909/JHA, the CJEU held at para. 41:-

"41.As regards the grounds for optional non-execution listed in Article 4 of the Framework Decision, it is clear from the case-law of the Court that, when transposing the Framework Decision, the Member States have a margin of discretion. Therefore, they are free to transpose those grounds into their domestic law or not to do so. They may also choose to limit the situations in which the executing judicial authority may refuse to execute a European arrest warrant, thereby facilitating the surrender of requested persons, in accordance with the principle of mutual recognition set out in Article 1(2) of that Framework Decision (see, to that effect, judgment of 6 October 2009, Wolzenburg, C 123/08, EU:C:2009:616, paragraphs 58, 59 and 61)."

26. It is clear from the above that the State was under no obligation to opt in to or give effect to the relevant European Council Framework Decision 2008/909/JHA in question. Moreover, to refuse surrender on the basis of the State's failure to opt into a particular Framework Decision would be to introduce a new ground for refusal of surrender which is not provided for under the Framework Decision governing the EAW process and would be a contravention of same. This Court has already given a judgment to that effect in *Minister for Justice and Equality v. Schweissing* [2021] IEHC 641.

27. Counsel on behalf of the respondent submits that the Court should make a preliminary reference to the Court of Justice of the European Union ("the CJEU") in respect of the question: "*Is the implementation into Member State's domestic law of Article 4(6) of the Framework Decision obligatory on all Member States?*". I am satisfied that such issue has already been determined and no ambiguity arises in respect thereof. As regards a reference to the CJEU, I am satisfied that there is no ambiguity or uncertainty in respect of the applicable law and I, therefore, decline to make such a reference.
28. He also submits that the failure of the State to opt into and give effect to para. 4(6) of the European Council Framework Decision 2008/909/JHA amounted to a breach of Article 1 of the Charter of Fundamental Rights of the European Union and, in particular, would amount to a failure on the part of the State to respect and protect the respondent's human dignity. Counsel for the respondent was unable to point to any authority supporting the proposition that a failure to allow the respondent to serve his prison sentence in this State would amount to a violation of his human dignity and was unable to put forward any plausible argument as to why this should be so. I reject the said argument.
29. 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.
30. Having rejected the respondent's objections to surrender, it follows that this Court will make an order for the surrender of the respondent to the Lithuania.