

<p>Neutral Citation No: [2021] NIQB 42</p> <p><i>Judgment: approved by the Court for handing down (subject to editorial corrections)*</i></p>	<p>Ref: McC11430</p> <p>ICOS: 17/056305/A01 & 19/118423/A01</p> <p>Delivered: 19/03/2021</p>
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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN’S BENCH DIVISION (DIVISIONAL COURT)

ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF BELFAST
IN THE MATTER OF THE EXTRADITION ACT 2003

BETWEEN:

GINTARIS DUSECIVIUS
and
VIKTORAS MICHAILOVAS

Appellants

-v-

THE REPUBLIC OF LITHUANIA

Respondent

Before: McCloskey LJ and McFarland J

Representation

First Appellant: Mr Donal Sayers QC and Ms Bobbie-Leigh Herdman, of counsel, instructed by John J Rice Solicitors

Second Appellant: Mr Barry MacDonald QC and Mr Sean Devine, of counsel, instructed by Wilson Nesbitt Solicitors

Respondent (first appeal): Mr Tony McGleenan QC and Mr Stephen Ritchie, of counsel

Respondent (second appeal): Mr Tony McGleenan QC and Ms Marie-Claire McDermott, of counsel,

all instructed by the Crown Solicitor’s Office

McCLOSKEY LJ (giving the judgment of the Court)

The hearing of this appeal on 17 February and 12 & 19 March 2021 was conducted mainly by remote means. All three parties and their respective three-member legal teams were in attendance by this mechanism on the first of these dates.

Overview

[1] This is the court's determination of whether it should seek further information of the Lithuanian authorities and, if so, in what terms.

[2] By these appeals, the appellants challenge the decision and orders of the County Court for the Division of Belfast dated 27 and 30 November 2020 respectively ordering their extradition to Lithuania. Leave to appeal to this court was refused by the decision of the single judge dated 6 January 2021. The appellants renew their applications for leave. In the court below these two cases eventually formed part of a larger group of 11 cases, all involving Lithuanian nationals and the Lithuanian state. This number grew progressively with the passage of time. As they had certain issues in common these cases were managed and progressed together. The case of Mr D emerged as the lead one, followed by that of Mr M.

[3] The litigation history of these two appeals is of particular importance having regard to the consideration that much material evidence has been generated since their inception. This history can be traced by reference to the five successive judgments of Belfast County Court during the period January 2018 to November 2020. Four of these decisions were made in the case of Mr D. The fifth was in the case of Mr M. As already noted, it is common case that the Article 3 ECHR issue applies without distinction to both appeals and, in principle, all other Article 3 ECHR members of the larger group.

[4] While the proceedings have become somewhat protracted, it is clear that the several individual segments of delay and related complexities, coupled with the progressively large number of cases, combined to pose challenges with which the first instance judge has dealt admirably.

[5] At this stage, judgement at first instance has been given in these two cases only. The generic issue linking all 11 cases is whether their extradition to Lithuania would violate the requested persons' rights under Article 3 ECHR by exposing them to a real risk of inhumane treatment by reason of prison conditions in Lithuania, in contravention of section 21 of the Extradition Act 2003 (the "2003 Act") and also, it would seem, section 6 of the Human Rights Act 1998. Her Honour Judge Smyth resolved this issue in favour of the Lithuanian state. This court is, in substance, invited to conclude that the judge erred in law in doing so.

[6] The generic issue outlined above is to be distinguished from other issues

specific to individual cases. Thus, as the present appeals demonstrate and by illustration only, any Article 8 ECHR ground of appeal will inevitably be fact specific in nature. Such an issue arises in the case of Mr M only.

The Eleven Cases

[7] It is convenient to note here a useful table, provided by the respondent state at the court's request. It details, as regards each of the requested persons concerned, the date of the EAW, the date of their arrest, the nature of the EAW and, finally, the offence/s of which each requested person has been convicted or is suspected. The cases of Mr D and Mr M belong to this group. It is understood by this court that Belfast County Court has deferred final determination of the other nine cases pending the decision of this court in these conjoined appeals.

[8] As appears from the table, some of these warrants are of disturbing vintage. Almost half are of more than four years vintage. In every case, the requested person has been arrested. The oldest arrests occurred in September 2016 and the more recent (that of Mr M) in September 2019. These observations take their colour from one of the principles underpinning the Framework Decision, namely the principle of expedition.

The Decisions under Appeal

[9] **Mr D.** By the decision and order of the County Court for the Division of Belfast dated 30 November 2020, the court acceded to the request of the Lithuanian state for the surrender of Mr D pursuant to a EAW dated 27 October 2015 in respect of charges of eight alleged offences of theft and criminal damage said to have been committed in 2013. This case, therefore, involves a so-called "accusation warrant". While Mr D had also been the subject of an earlier "conviction warrant" dated 28 February 2014, following execution he served his sentence and this is of no enduring relevance, a formal discharge order of Belfast County Court having been ultimately made. Both EAWs were executed on the same date, 12 June 2017, following which Mr D served his "Lithuanian sentence" in respect of the first EAW.

[10] **Mr M.** By the decision and order of the District Judge of the City of Westminster Magistrates' Court, dated 13 February 2013, Mr M was discharged in respect of the first EAW in his case. This was based on the judge's assessment that the EAW was invalid as it had not been issued by a judicial authority, contrary to section 2(2) of the 2003 Act. An ensuing out of time appeal by the Lithuanian state was dismissed by order of the High Court dated 22 April 2013. A phase of apparent inertia during the period April 2013 to September 2016 then intervened. Next, the second (operative) EAW materialised, on 30 September 2016. Pursuant thereto, Mr M was arrested over three years later, on 12 December 2019. Mr M has been in custody ever since.

[11] The request of the state of Lithuania for the surrender of Mr M pursuant to

the second EAW is in respect of a sentence of 3½ years' imprisonment imposed on 15 January 2010 following his conviction of the offence of possession of narcotic substances for the purpose of supply, committed on 05 May 2008. The operative warrant is of some 4 ½ years vintage.

[12] For the purposes of this ruling, it is unnecessary to dilate on the familiar principles underpinning the aims and operation of the EU Framework Decision. In *Varga v Romania* [2019] EWHC 890 (Admin), the court highlighted the strong public interest in the effective operation of the extradition system, stating at [24]:

“Where ambiguity or uncertainty arises the proper course is to seek clarification or further assurance, at least until it becomes clear that such clarification or assurance cannot be obtained within a reasonable time.

In *Greco v Cornetu Court (Romania); Bagarea v Caras Severin Tribunal Romania* [2017] EWHC 14, cases concerning minimum cell space for detained persons, the court afforded the Romanian authorities the opportunity to supply a further undertaking about prison conditions, emphasising the imperative of fostering the extradition system.

“49. Mr Knowles makes an ancillary submission. He says that, if the conclusion would otherwise go against the Respondents, the Court should permit a further opportunity to them to remedy the situation by giving a different undertaking: in effect to comply with a minimum requirement of space for these individuals, even if such a guarantee cannot be given generally. This is consistent with the approach taken in Florea I and, for example, in Giese v Government of the USA [2015] EWHC 2733 (Admin) (paragraph 69). This is opposed by Mr Hall, who says that the Respondent's position is of long standing, and they have had every opportunity to change it if they so desired.

50. For myself, I would grant a final opportunity for varied undertakings. There is the greatest incentive to foster the extradition system. It will be very highly undesirable if extradition to Romania stalls, in respect of these requested persons and no doubt others to follow. There are precedents for specific provisions in custody conditions (and indeed trial arrangements) to secure continuing extradition. Any undertaking will have to satisfy the Court that prisoners extradited will, save for short periods, and to a minor extent (meaning a minor reduction below 3m²), be guaranteed at least 3m² of personal space. Moreover the guarantee would need to be in clear terms, and terms which cover the whole of the anticipated terms of detention. In other words, the assurance would have to be in compliance with the test in Muršić.

51. *I would not be prepared to leave an open-ended period, or indeed a long period, for decision by the Respondents. There has been a considerable passage of time already. I recognise that the Romanian authorities will now be faced with a stark choice and will need to consider their position. For myself, I would consider submissions from the Respondents as to whether the period for decisions should exceed four weeks from the date of this judgment, if so desired. The Appellants must have the opportunity to respond in writing, if desired. I would allow 14 days from the date when the Respondents' submissions are filed and served. I would suspend making an Order in this case to permit that avenue to be explored, within such time limits."*

This court adopts the central themes in the passages quoted above.

[13] One of the fundamental human rights is in play. This court's duty as a public authority under section 6 of the Human Rights Act is engaged. This is an *Aranyosi* stage two case. Thus the fundamental question for this court is whether the earlier identified risk that this appellant will in the event of his surrender to Lithuania be exposed to inhuman or degrading treatment proscribed by Article 3 ECHR has been dispelled by the totality of the communications from the Lithuanian government to the various UK agencies post-dating January 2018, when the *Aranyosi* stage 1 assessment, which this court adopts, was made.

[14] Article 15(2) of the Framework Decision is in two parts. The first part requires the court to make an assessment of whether the information provided by the Lithuanian government, considered in its totality, is sufficient to allow this court to make a decision on the surrender of Mr D pursuant to the EAW. Where the court makes an assessment of insufficiency, the effect of the second part of Article 15(2) is to subject the court to a duty to request of the requesting state the "*necessary supplementary information*".

[15] We are satisfied about this court's competence, as an appellate court, to take the course of seeking further information from the Lithuanian authorities. This in our view arises from the language of Article 15(2) construed purposively in the light of the overarching aims and principles. Alternatively, there is no bar to this course in either the Extradition Act or the Framework Decision and this court has available its inherent jurisdiction. This has been the preferred approach in a number of decided cases, which include *FK v Stuttgart State Prosecutor's Office Germany* [2017] EWHC 2160, *Omylski v Poland* [2020] EWHC 836 and *Straszewski v District Court in Bydgoszcz, Poland* [2017] EWHC 844 (Admin).

[16] This court has considered carefully all communications from Lithuanian agencies assembled in the evidence. These are a mixture of responses to requests for specific information and the unsolicited. The quality and coherence of these communications have been variable. Some have been evasive and opaque.

Furthermore, viewed panoramically, one can identify gaps and inconsistencies. This court has further taken into account the vintage of the last such communication, now approaching its first anniversary, the so-called "Covid caveat". This was the subject of lively debate at the main hearing. Both the meaning and currency of this communication are matters of obvious importance. It falls to this court to construe the document, an exercise complicated by the fact that it is a translation from its original language.

[17] However, this court entertains real reservations concerning the available evidence. This arises particularly out of the successive communications of 28 May 2020 and 9 June 2020 from the Lithuanian Ministry of Justice to the CPS. Each of these communications contains detailed information relating to Siauliai Remand prison. This is the prison in which, it is said, Mr D would be detained in the event of his surrender, as he would initially have the status of remand prisoner. The first issue arising out of these two communications is that while they make a distinction between "*detainees*" and "*inmates*", this is not explained. This is puzzling, given the unequivocal representations that only remand prisoners are detained here. Furthermore, a consideration of the full suite of communications emanating from the Lithuanian Government indicates that "*detainees*" are the cohort of remand prisoners, while "*inmates*" are convicted prisoners.

[18] Secondly, the two aforementioned communications make no mention of dormitory accommodation. We raise this discrete question only because of our next query, which arises out of the statement that whereas this prison has a total of 109 cells, it has a total of 452 "*places*" and was, at the time of writing, accommodating 283 persons. The reconciliation between these last two figures and the total number of cells, which must also take into account the statement that certain cells are closed for refurbishment, is far from clear.

[19] Having regard to the foregoing, our conclusion is that the information to determine these appeals with confidence is insufficient. The court has determined to formulate a series of questions/requests addressed to the requesting state. Having considered the parties' representations, these are set out in the Appendix to this judgment.

[20] Further directions will follow at a later stage.

APPENDIX

Mr Dusevicius ("Mr D")

- Issuing Judicial Authority: Prosecutor General's Office of the Republic of Lithuania
 - Requested Person: Gintaras Dusevičius
 - Date of Birth of the Requested Person: 8 January 1979
 - EAW was issued by: Darius Raulušaitis, Deputy Prosecutor General, Prosecutor General at interim.s
 - EAW Issued on: 27 October 2015
 - Reference: Criminal Case file no 65-1-00125-13
 - Lithuania EAW File reference: 14.3.-357/15
 - Northern Ireland case reference: 17/056300
- (i) (a) *Is there a pending prosecution of Mr D?*
- (b) *If yes, when is his trial expected to begin and be completed?*
- (c) *If yes, and he is convicted, when is he expected to be sentenced?*
- (d) *If yes to all of the foregoing questions, when is he expected to be accommodated as a convicted prisoner and in which prison?*
- (ii) (a) *Alternatively, is there an uncompleted investigation into possible criminality on the part of Mr D, as described in the EAW?*
- (b) *If yes, when is his trial expected to begin and be completed?*
- (c) *If yes, and he is convicted, when is he expected to be sentenced?*
- (d) *If yes to all of the foregoing questions, when is he expected to be accommodated as a convicted prisoner and in which prison?*
- (iii) (a) *While detained as a remand prisoner, will Mr D be accommodated in a single cell?*
- (b) *If yes, what is the minimum personal space allocation of such cell?*
- (c) *If no, in what conditions will he be accommodated?*
- (d) *And with what minimum personal space allocation?*
- (e) *How many persons are currently accommodated in the remand prison*

in which Mr D will be detained if extradited?

- (f) *How many of such remand prisoners are accommodated in single cells?*
- (g) *If all remand prisoners are not accommodated in single cells, in what conditions are they accommodated?*
- (iv) *Will Mr D, if extradited, be accommodated in a refurbished cell?*
- (v) *If 'yes', for how long/until completion of what event?*

Mr Michailovas ("Mr M")

- Issuing Judicial Authority: Klaipeda Circuit Court Lithuania
- Requested Person: Mr Viktoras Michailovas
- Date of Birth of the Requested Person: 16 February 1960
- EAW was issued by: Mrs. Edita Lapinskiene Judge of the Klaipeda Circuit Court Lithuania
- EAW Issued on: 30th September 2016
- Reference: Criminal Case file no 1-196606/2010
- Lithuania EAW File reference: ES1-19-606/2016
- Northern Ireland case reference: 19/118423/01

- (i) *In the letter dated 03 April 2020 from the Prison Department under the Ministry of Justice Republic Lithuania to the Crown Prosecution Service London (ref No 15-815)¹ it is stated:*

*"In order to ensure resultative process of surrender cases in the judicial institutions of the United Kingdom, please find a new guarantee, prescribing specific conditions which will be applied for the persons surrendered to the Republic of Lithuania from the United Kingdom on the ground of the EAW for the **purpose of a criminal prosecution**. Please be noted, that this guarantee will not be revoked (if necessary) without informing the Crown Prosecution Service in written form."*

¹ By email from generaline@prokuratura@prokuraturos.lt

(Emphasis added)

*Does this letter mean that the undertaking attached to it applies ONLY to persons surrendered from the United Kingdom to Lithuania for the purpose of a criminal prosecution? **YES/NO***

- (ii) If "No", to which surrendered persons does this undertaking apply?*
- (iii) Mr M has now served some 21 months of his sentence. If Mr M is surrendered to Lithuania, at what stage of his sentence will he be released?*
- (iv) If surrendered to Lithuania, in what prison will he be detained?*
- (v) Will Mr M be accommodated in a single cell?*
- (vi) If yes, what is the minimum personal space allocation of such cell?*
- (vii) If no, in what conditions will he be accommodated?*
- (viii) And with what minimum personal space allocation?*
- (ix) How many persons are currently accommodated in the prison in which Mr M will be detained if extradited?*
- (x) How many of such prisoners are accommodated in single cells?*
- (xi) If all prisoners are not accommodated in single cells, in what conditions are they accommodated?*
- (xii) Will Mr M, if extradited, be accommodated in a refurbished cell?*
- (xiii) If 'yes', for how long/until completion of what event?*