

THE HIGH COURT

Record Number: 2007 No. 67 Ext.

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
ARTURAS RAUSTYS

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 31st day of October 2007

1. The surrender of the respondent is sought by the Lithuanian authorities on foot of a European arrest warrant dated 6th March 2007, which, having been endorsed by the High Court was executed by the arrest of the respondent on the 17th April 2007.

2. The respondent's surrender is sought on foot of that warrant so that he can be returned in order to face prosecution there on charges of robbery and of simple possession of drugs. I am satisfied that the facts giving rise to these alleged offences as set forth in the warrant would give rise to corresponding offences in this State under the Criminal Justice (Theft and Fraud Offences) Act, 2001 and the Misuse of Drugs Acts respectively. No issue is raised as to correspondence. Each offence referred to in the warrant satisfies the minimum gravity requirement, namely that it is punishable in the issuing state by a maximum period of imprisonment of not less than twelve months.

3. I am satisfied that the respondent is the person in respect of whom this European arrest warrant has been issued, and, again, no issue has been raised by the respondent as to his identity.

4. No undertaking is required under s. 45 of the European Arrest Warrant Act, 2003, as amended since this is not a case in which there has been any trial or sentence in absentia.

5. I am satisfied that there is no reason to refuse to order his surrender by virtue of anything in sections 21A, 22, 23 or 24 of the Act, and, subject to dealing with the point of objection raised by the respondent as to the treatment which he says that he can expect if surrendered to the issuing state, I am satisfied that his surrender is not prohibited by any provision of Part III of the Act, or the Framework decision itself.

The Point of Objection:

6. The possession of drugs offence is said to have been committed by the respondent in June 2001. The other stealing charge is said to have been committed at 7pm on the 31st December 2001. On that occasion he and another man are said to have entered a general store, where after his companion violently assaulted a woman working there, the respondent then stole money and cigarettes. By way of Point of Objection, the respondent pleads that his surrender would constitute a breach of Article 40.3 of the Constitution, Article 3 of the European Convention on Human Rights, section 2 of the European Convention on Human Rights Act, 2003, and section 37 of the European Arrest Warrant Act, 2003, as amended, in that the respondent if surrendered would be subjected to torture or to inhuman or degrading treatment or punishment.

7. In this regard he believes that his previous experiences at the hands of the Lithuanian police in the immediate aftermath of his arrest following the alleged theft offence on the 31st December 2001 makes it sufficiently probable that, if surrendered he will again be in the hands of the same police officers who, he says, beat him up on that occasion and for which he was hospitalised. The details of this background are set forth in his affidavit. He says therein that he came to this State in April 2002 and that he has lived in Dublin since that date. He has been employed in a number of different jobs during this time, and has not been convicted of any offences while in this country.

8. At paragraph 8 of his affidavit he states that he was arrested by the Lithuanian police on the 31st December 2001 in relation to the allegations contained in the warrant. He says that he was detained in Mazeikiai police station until the evening of the 1st January 2002 during which time he says he was beaten severely and repeatedly to the head and body by two police officers, including with police batons. He goes on to say that the store from which he is alleged to have stolen the cash and cigarettes is one that was owned by the mother of one of these police officers, and that he was brought by him to that store on the 1st January 2002 where he was beaten outside the store and was told that if he paid up a sum of \$10,000 no charges would be brought against him.

9. He states also that as a result of these beatings he admitted himself to a hospital on the 1st January 2002 and that he remained there until the 5th January 2002. He was treated for an abrasion to his head measuring four centimetres by a half a centimetre, and for bruising to his neck, shoulder, chest, thigh and shin. He has exhibited what purports to be a record from the hospital of his stay there from the 1st to the 5th January 2002, and a translation of that document. I will return to this document in due course.

10. He goes on in his first affidavit to state that upon his discharge from hospital he made a written complaint about the treatment which he had received at the hands of the police, but says that he received no response to that letter of complaint. He cannot produce any copy of that letter written by him.

11. In his second supplemental affidavit he has exhibited an extract from his medical history which he has obtained from the head of the public hospital where he was treated for these injuries. His solicitor requested this report for him, as well as an opinion from that person as to whether these injuries were consistent with a physical assault. That report/extract states at the outset that having been brought to the hospital by ambulance at 12.10pm on the 1st January 2001 "on arrival the patient told that on the night of 31.12.2001 and around 4am on 01.01.2002 he was assaulted by several men". This report makes no mention of the respondent reporting that he had been beaten by policemen. However it states at the end of the report that the assault on the respondent is being investigated by the police. It is not clear from that document how the author of this document has been made aware of that fact, though he states that "after the patient was brought to Mazeikiai hospital the police in Mazeikiai was notified of the alleged incident". He does not state who made that report to the police. He goes on in the document to confirm that these injuries could have been sustained during an assault, and that the wound to the respondent's head referred to therein "was most likely caused by an assault".

12. The Prosecutor General's office in Lithuania has, in answer to a letter from the applicant in this case, written a letter dated 13th August 2007 in which she states that there is a provision in the Lithuanian Constitution and the Criminal Procedure Law and other legal instruments whereby a person has the right to make a complaint against police officers in respect of ill-treatment or abuse of their official position as police officers. She states also that there is no record of any complaint made by the respondent in this case

and she cannot comment on them accordingly. She then refers to Chapter 5 of the Code of Criminal Procedure which regulates complaints in relation to pre-trial investigations. She describes in some detail how that complaints' procedure works.

13. The fact that the Prosecutor General's office has stated that there is no record of a complaint having been made in this case tends to contradict what is stated by the respondent that he made a written complaint to the police about ten days following what is stated in the affidavit to be his release from custody. It also contrary to what is stated in the report from the hospital, but, as I have stated already, it is unclear whether the head of the hospital is saying that the hospital itself notified the police of the alleged incident or whether it means that the hospital was told by the respondent that he was reporting the incident to the police.

14. At any rate, the respondent believes that if he is returned to Lithuania he will be returned to the custody of the same officers who he says inflicted the injuries upon him on the last occasion and who are investigating these offences, and that there is what he calls a significant and real risk that he will be subjected to further unlawful and arbitrary violence. He has exhibited in his first supplemental affidavit a Report carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in relation to Lithuania following a visit by that Committee to Lithuania between 14th February 2000 and 23rd February 2000. He has also exhibited a second such report made following a later visit to Lithuania between 17th February 2004 and 24th February 2004, together with a document which contains the Lithuanian government's response to the latter report. I have had the opportunity to read consider and comment upon these documents in some previous cases.

15. Aileen Donnelly SC for the respondent submits that unlike the basis of the point of objection made on behalf of the respondent in the case of *Minister for Justice, Equality and Law Reform v. Busjeva*, unreported, High Court, 27th March 2007, the complaint made by the respondent in the present case is not simply a general one based on the general state of Lithuanian prisons, but rather is based on a fear derived from a specific assault inflicted upon him by a named police officer at a particular place and on a particular date and from which, he claims, he received medical treatment at a hospital. Ms. Donnelly submits that none of that is contradicted by the applicant and that this Court must accept therefore the respondent's evidence in this regard and view the objection as being one firmly based on established historical fact. She likens the case in this respect to the well-known case of *Finucane v. McMahon* [1990] IR 165, where the Supreme Court was satisfied that on established and incontrovertible facts there was "a real danger of ill-treatment" if extradition was ordered.

16. Ms. Donnelly has submitted also that what the respondent has stated happened to him is not inconsistent with the contents of the Reports referred to in as much as parts of these reports expressed dissatisfaction with the treatment of persons detained by police and made recommendations for improvement in this and other respects.

17. Ms. Donnelly has referred to the Framework Decision and to s. 37 of the European Arrest Warrant Act, 2003 as amended and submits that the Court is not required to order surrender thereunder if there is as a matter of probability a real risk that the respondent will suffer a breach of his fundamental rights protected under Article 3 of the European Convention on Human Rights. She emphasises that s. 37(1)(c)(iii) provides that surrender is prohibited where there are reasonable grounds for believing that the respondent would be subjected to torture or other inhuman or degrading treatment. She submits that the respondent has established such reasonable grounds based on his past experiences, and submits also that the fact that the Lithuanian Prosecutor General's office has failed to find any record of the respondent's written complaint to the police about the assault only compounds his fears that upon his surrender he will once again be subjected to the same treatment by the same investigating officers.

18. She submits also that the fact that the Lithuanian authorities have put in place a police complaints procedure as stated by them is insufficient as a protection against a breach of human rights, even though it may provide some form of redress and she refers in this regard to passage from the judgment of Finlay CJ in *Finucane v. McMahon* [supra] at pp. 205-206 where the learned Chief Justice stated:

"It was submitted by the respondents that the very fact that so many of the prisoners have now successfully brought their claims before the courts in Northern Ireland indicated that there was no ground for the applicant's fear of invasion of his constitutional rights. I have no difficulty in accepting that if ill-treatment of any of the prisoners in the Maze Prison is brought to the notice of the courts in Northern Ireland it will be condemned and remedied. The very forthright and unequivocal language of the judgment of Hutton J. in the judgment which was before this Court in Pettigrew's case amply supports such a belief. This Court has, however, as its primary obligation, the duty to prevent such invasions of the applicant's rights and it is not a sufficient discharge of that duty for it to rely upon the vindication of those rights by compensation after they have been invaded."

19. Patrick McGrath BL for the applicant submits first of all that the respondent has failed to sufficiently establish the facts upon which he must primarily rely, namely the assault by the police officers to which he has referred. He points to the fact that in the medical report exhibited by the respondent the assault is said to have been at the hands of "several men" and there is no reference to the assault having been perpetrated by the police. He also points to what appears to have been an alteration to the hand-written medical record exhibited by the respondent in his first affidavit where a word has been written in different handwriting and which has been translated as "police". This is the only reference to the assault being by the police apart from the respondent's own assertion in his affidavit and Mr McGrath submits that this Court should be slow to accept the evidence that the assault was by the police at all.

20. However, he goes on to submit that even if this Court has been satisfied as to the fact that the assault was perpetrated by the police as stated by the respondent, the surrender of the respondent is not prohibited by the Framework Decision or Part III of the Act since not only does the Response by the Lithuanian Government to the Reports referred to indicate that many reforms and safeguards have now been put in place to ensure that ill-treatment of persons detained does not occur, but the Republic of Lithuania has become a Member State of the European Union, and has undertaken all the obligations which accompany such membership, such as those under Article 6 TEU to respect fundamental rights. Mr McGrath points furthermore to the fact that the Minister for Foreign Affairs in this country has designated the Republic of Lithuania for the purpose of s. 3 of the Act. He submits that even if the assault did occur in December 2001, the position now is so altered in Lithuania in the ways referred to that this Court cannot be satisfied that if the respondent is surrendered now to that country there is a real risk that his fundamental rights will be breached in the manner suggested.

21. Mr McGrath has referred to the fact that the Framework Decision giving rise to the European arrest warrant has been adopted by participating Member States of the European Union on the basis of a high level of mutual trust and confidence, and has referred to what has been stated in this regard by Fennelly J. in his judgment in the Supreme Court in *Minister for Justice, Equality and Law Reform v. Stapleton*,

"The principle of mutual recognition applies to the judicial decision of the judicial authority of the issuing Member State in issuing the Arrest Warrant. The principle of mutual confidence is broader. It encompasses the system of trial in the issuing

Member State. The Court of Justice has ruled, in its recent decision in Case C-303/05 *Advocaten voor de Wereld v Leden van de Ministerrad*, delivered in 3rd May 2007 (since the hearing of this appeal) that the issuing Member State, as is "stated in Article 1(3) of the Framework Decision, must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU....."

It follows, in my view, that the courts of the executing Member State, when deciding whether to make an order for surrender must proceed on the assumption that the courts of the issuing Member State will, as is required by Article 6.1 of the Treaty on European Union, "respect ... human rights and fundamental freedoms." Article 6.2 provides that the Union is itself to "respect fundamental rights, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms.....and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

Article 1.3 of the Framework Decision, read with the recitals to the Framework Decision and, as further explained by the Court of Justice in the decision in *Advocaten voor de Wereld*, imposes these obligations, which in turn impose the obligations found in Article 6 of the Convention on each issuing Member State when seeking the surrender of a person and, necessarily in any subsequent trial process."

Conclusions

22. Section 37 of the Act, as already stated, provides that the respondent must show that there are reasonable grounds for believing that if surrendered he will be subjected to torture, or ill-treatment. That is correct as far as it goes. That is the onus upon the respondent. But the question which then arises is to what standard of proof does the respondent need to establish the facts said to constitute a threat to his fundamental rights if surrendered. In *Finucane v. McMahon* the underlying historical factual basis for the contention that the applicant in that case would be ill-treated if surrendered were indisputable. It was of course a matter for the Court to be satisfied that those facts amounted to a probability that such treatment would be meted out to the applicant if returned.

23. In the present case the respondent must first of all establish the facts on which he relies, namely the assault by police officers on the 31st December 2001. If he has done that, then this Court must consider whether those facts, duly established to the required degree of probability, amount to reasonable grounds for believing that he will if surrendered be subjected to torture, ill-treatment or other forms of degrading or inhuman treatment or punishment. The fact that he was assaulted at that date by police officers, if established, does not of itself amount to reasonable grounds for believing that it will as a matter of probability happen again in 2007. That is something upon which the Court must decide in the light of established facts, and in the light of evidence adduced on this application and in the light of the accession of Lithuania as a member of the European Union. But that consideration does not come into play until such time as a firmly established factual basis for that consideration has been laid by the evidence adduced by the respondent. Those facts must be established at least to the level of a probability, and not simply as a possibility.

24. I will first of all therefore consider what evidence exists for the establishment of the assault by the police officers. First of all there is the factual statement in the respondent's first affidavit in which he states that on that night he was assaulted first of all by two police officers in the police station at Mazeikiai and later at the general store referred to. Without more than this bald assertion this averment would be insufficient to establish facts to the necessary degree, so the Court must see what corroboration there is for an assault by police officers. He has exhibited a copy of a document which the Court has been told arrived by fax to his solicitor's office but the sender of the document is unknown. That information was given to the Court during the hearing once the integrity of the document came under scrutiny. It was exhibited by the respondent as being "the medical records from the Traumatology Unit of Mazeikiai Hospital". As I mentioned earlier there is but a partial translation – not officially certified – of this purported record. The translation is clearly not even a translation of the complete record. But, very significantly, and I attach great importance to this feature of the document, there has been what certainly appears clearly to be an amendment to the document by the writing in different handwriting of the Lithuanian word 'policininkā' which the Court has been informed by an interpreter present in court means 'police'. It is by reference to this word that the translation proffered states in the first sentence: "According to the words of the patient, at night from 12 31 2001 to 01 01 2002 he was beaten up by the police....". There has been no attempt made by the respondent, or opportunity sought by him, to explain to the Court how the Lithuanian version of the medical record came to be faxed anonymously on his behalf without covering note or otherwise to the office of the respondent's solicitor. That is an unsatisfactory provenance for a document sought to be relied upon for corroboration of the respondent's sworn assertions. But neither has there been any attempt to explain or seek explanation from any source for what is quite evidently an over-writing or insertion of the word meaning 'police'. In my view this change to the document fundamentally undermines its integrity, and the Court cannot place any weight on its purported contents in order to help establish to the necessary degree the fact that this was an assault by two police officers. In addition an unexplained alteration to the document in the manner which I have indicated undermines the overall credibility of the respondent, as does the lack of information as to where it emanated from. It is a document to be looked upon with some suspicion to put it no higher.

25. In the face of that finding there exists also a medical report to which I have referred and which is on the face of it quite clearly written to the respondent's solicitor by the Head of the Public Hospital in response to a request to him by that solicitor for a medical report. Interestingly, the solicitor sent with that request a copy of the respondent's medical record, being the document just referred to. It is interesting for the reason that when the head of that hospital replied sending a report there is no mention at all of the patient reporting that he was beaten by the police. As I have already set forth he states that the patient on arrival stated that he had been assaulted by "several men". Of the two documents offered by way of substantiation of the respondent's assertion that he was assaulted I prefer to place no reliance on the first document for the reasons stated, and place reliance on the second document. While the fact that he reported an assault by "several men" does not exclude that assault being by two police officers, I feel it is safe to conclude that if he reported that he had been assaulted by the police the head of the hospital would have said so. Certainly I accept that the injuries which he presented with are consistent with an assault but that is not sufficient to dispose of the issue. Therefore, this letter from the head of the hospital cannot be taken as any corroboration of the assertion by the respondent that he was assaulted by the police.

26. The result is that this Court has only the respondent's own averments as evidence from which to conclude, not that he was assaulted but that he was assaulted by the police. The fact that such an event is not inconsistent with or is even consistent with some of the material contained in the Reports from the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment does not bring the matter further on for the respondent in the absence of some corroboration of his own assertions.

27. It must follow from these conclusions that the respondent has failed to establish facts to the necessary degree upon which to make his submission that he has shown to exist reasonable grounds for this Court to consider as a matter of probability that if surrendered the respondent's rights will be infringed in the way suggested.

28. I should go further at this point and say that even if I was satisfied that the respondent had in 2001/2002 been assaulted by two police officers as he has stated, there are a number of factors which would still have to be taken into account and which would satisfy me that the order should be made. These include the by now well accepted mutual trust and confidence between Member States which exists in relation to the operation of arrangements for the European arrest warrant. In spite of the matters pointed to by Ms. Donnelly in the Reports on Lithuania to which the Court has been referred and in spite of the Response document which clearly shows that there was a problem identified in a number of areas, including assaults by police officers, and that to an extent these matters are being or have been addressed, it is not evidence that such a situation still exists in Lithuania that Lithuania is failing to meet its international obligations under Article 6 TEU, for example, or that this State ought no longer to have the necessary mutual trust and confidence in the police, the prosecution and/or the judicial systems in that country. That mutual trust and confidence is not to be taken as meaning that this State believes that there will never be an incident in another Member State whereby somebody taken into police custody is treated in a manner which fails to meet the standards to which protection attaches under the European Convention or the Irish Constitution. It is unrealistic to believe that there will not be instances where behaviour of persons in a position of power falls short of the standard expected. No country, including Ireland, would be exempt from that statement. But it is entirely another matter to conclude that to surrender a person, even one who has suffered many years ago in that way at the hands of the police, would be likely again to have such treatment inflicted upon him or her.

29. The Framework Decision itself anticipates that there may be shown to exist a situation in some participating Member State where there may be a less than perfect adherence to fundamental right. Nevertheless it is specifically provided that only in the event of a serious and persistent breach of Article 6 TEU may the mechanism of the European arrest warrant be suspended. Paragraph 10 of the Recital to the Framework Decision itself states in this regard:

(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principle set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.

30. However, as I have already stated, I am satisfied that the respondent has not established the facts necessary ground his submission that there are reasonable grounds for believing that his fundamental rights will be breached if he is surrendered to Lithuania.

31. This Court is required to make the order for the surrender sought by the applicant, and will so order.