Neutral Citation Number: [2007] IEHC 34

THE HIGH COURT

Record Number: 2006 No. 156 Ext.

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
EDVINAS BALCIUNAS

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 6th day of February 2007

1. The surrender of the respondent is sought by the Lithuanian authority on foot of a European arrest warrant which issued there on the 8th August 2006. It was endorsed for execution by order of the High Court on the 21st November 2006, and the respondent was duly arrested on foot of same on the 6th December 2006, and brought before the High Court on the same day pursuant to the requirements of s. 13 of the European Arrest Warrant Act, 2003, as amended, when he was remanded from time to time until the present application for an order of surrender was made.

2. There is no issue raised as to the identity of the respondent, and it is not contested that he is one and the same person in respect of whom the European arrest warrant has been issued. Neither is any issue raised as to correspondence. The offence in the warrant is in any event one of those offences referred to in Article 2.2 of the Framework Decision and in respect of which double criminality does not need to be verified. The minimum gravity requirement is also met.

3. Very fairly, Patrick McCarthy SC has indicated to the Court that only one issue is raised against the making of the order sought, and it is one arising under s. 21A of the Act and the Framework Decision, namely that it is unclear from the European arrest warrant that a decision has been made to prosecute the respondent for the offence and that his surrender in all likelihood, from what appears in the warrant, is being sought so that investigations into the alleged offence can be continued. He submits that as was found to be the case in a previous application for surrender to Lithuania, namely *LG v. The Minister for Justice, Equality and Law Reform*, unreported, High Court, 7th October 2005 there is an ambiguity appearing from the way in which this warrant has been completed by the requesting state, and that this Court cannot be certain that the provisions of s. 21A are met, and that surrender should therefore be refused. That section provides:

> "21A.-(1) Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicted of an offence specified therein, the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state.
>
> (2) Where a European arrest warrant is issued in respect of a person who has not been convicted of an offence specified therein, it shall be presumed that a decision has been made to charge the person with, and try him or her for, that offence in the issuing state, unless the contrary is proved."

4. In the present case the warrant itself states on page one that the Prosecutor General, who is named, requests that the respondent be arrested and surrendered "for the purposes of conducting a criminal prosecution". This occurred also in warrant in the *LG* case to which Counsel has referred. On page 3 of the present warrant in paragraph (d) the following text appears at the end thereof:

> "Under Article 123 of the Code of Criminal Procedure of the Republic of Lithuania, within 48 hours after surrender to Lithuania the person shall be brought before the pre-trial judge to ascertain whether there are grounds for his arrest".

5. A very similar text had appeared in the warrant in the *LG* case, and in that case I found, even though in a paragraph relevant only to a conviction in absentia (which that case was not), that it was information which the Court could have regard to in determining whether or not the presumption that a decision had already been made to prosecute had been sufficiently rebutted. I found that the presumption was rebutted. I have subsequently stated in the case of *Minister for Justice, Equality and Law Reform v. Butenas*, unreported, High Court, 24th November 2006, that I am not sure that I would now reach the same conclusion, and I state that again now with more certainty. Given the clear statement at the head of the warrant that a decision has been made to prosecute, it requires much more than an apparent ambiguity created by the inclusion of some text translated from the Lithuanian language into English in order to rebut the presumption. In my view the respondent at the least would need to support the submission by evidence from a Lithuanian lawyer as to the precise procedure referred to, and proof that at the stage that the warrant has been issued, as a matter of Lithuanian law no decision has been taken to prosecute the respondent, especially given the opening lines of the warrant.

6. In the present case, this text appears also, but the Court cannot overlook either the fact that in paragraph (d) of the warrant, the words "not relevant" appear. That of course is because this is not an in absentia case, and these words are inserted to indicate that this paragraph (d) can be disregarded in this case. It is as if that paragraph is deleted as not relevant. It follows that the authority issuing the warrant is indicating that anything in that paragraph does not apply to the present case.

7. But even if the words "not relevant" had not been inserted in this paragraph of the warrant, I am by now satisfied, given the number of such warrants which have come before the Court from Lithuania, that what this paragraph means in any event is that where a person has absconded to this State and his/her conviction/sentence has occurred in absentia, and where this Court then orders surrender, then upon return to Lithuania the respondent must be brought back to the Lithuanian Court which will then decide whether it is necessary to keep the person in custody pending his re-trial. I believe that the ambiguity occurs only by virtue of differences or difficulties in translation, as I pointed out in *Butenas*. In *Butenas* the words "whether there are grounds for his *detention*" appeared instead of "whether there are grounds for his *arrest*". (my emphasis). It would seem, since the text in the Lithuanian language is the same in each warrant, that the difference is only in the translation into English, and the word "detention" conveys the intended meaning better for our purposes that the word "arrest".

8. In that case also, I stated that the rebuttal of the presumption in s. 21A requires evidence from a Lithuanian lawyer so that the clear presumption that a decision has been made is shown not to be so. To permit rebuttal to be achieved merely by the existence of some potential ambiguity arising from the manner in which some text has been either accidentally inserted, and without it being either deleted or described as "not relevant", is to in effect turn the presumption into one the other way.

9. I make these comments in the hope that the same point will not be raised in the same way in future cases from the Republic of Lithuania, many of which seem to contain this or similar text in paragraph (d) of the warrant. In some cases the paragraph is marked

"not relevant" or in some other way it is indicated that it is not applicable. But even where it is left in by the issuing state, I am at this stage completely satisfied by the presence of the clear statement at the beginning of the warrant that the appropriate decision to prosecute has been made and that the process of prosecution has commenced, and it will require in future very clear evidence to shift the onus to the applicant in this regard. In addition to the case of *Butenas*, I have made similar remarks in my judgment in the case of *Minister for Justice, Equality and Law Reform v. Ostrovskij*, unreported, High Court, 26th June 2006. It is time now that this point ceases to be raised in Points of Objection unless there is going to be very clear evidence to show that what the prosecutor General states to the position is not the case. There is a heavy onus upon any respondent in that regard.

10. I am satisfied that there is nothing in sections 21A, 22, 23 or 24 of the Act which requires that surrender be refused, and I am satisfied also that there is nothing in Part III of the Act, or the Framework Decision which prohibits surrender. I am therefore required to make the order sought. I so order.