

THE HIGH COURT

[RECORD NO. 2017 51 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUILITY

APPLICANT

AND

ZANAS DZIUGAS (NUMBER 2)

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 23rd day of February, 2018

1. The respondent's surrender to Lithuania has been ordered by this Court pursuant to a European Arrest Warrant ("EAW") dated 20th December, 2016 in a judgment of this Court dated 2nd February, 2018. In that judgment, the primary point at issue was whether the facts proved against this respondent concerning an offence of "high-handedness", as it was termed in Lithuanian law, amounted to an offence of theft in this jurisdiction.

2. The relevant part of the judgment states:

"34. The EAW clarifies that in Lithuania, the respondent has committed either an "unlawful" act or a "criminal" act by taking the television. In the context of seeking to rely on correspondence, a description of an act as being either unlawful or criminal may not assist this jurisdiction in reaching a conclusion as to the act. It is not the fact that an act is criminal or unlawful in Lithuania that is relevant; it is whether that act (especially when combined with a particular intention on the part of the respondent) is criminal or unlawful in this jurisdiction. On the other hand however, the fact that a person knows that an act is criminal or unlawful is relevant to the question of whether that person can be said to be acting honestly. For the avoidance of doubt, it must be clarified that this question of the respondent's subjective dishonesty is separate from the issue of objective dishonesty.

35. In my view, the references to good morale, common rules of life, principles of honesty and justice are references to objective criteria from which the conduct of the respondent may be viewed. In that sense, in an objective fashion, it is quite clear that taking an item of property from one person in lieu of another item of property which they have taken from you, would violate community standards of honesty, justice, and behavioural norms. As has been stated however, for the offence of theft in this jurisdiction to be committed, there must be subjective dishonesty on the part of an accused person. Those references are not therefore on their own sufficient to show that this act by the respondent was carried out in a subjectively dishonest fashion.

36. It is therefore of considerable significance that in answer to a direct question from this Court on whether in doing the act the respondent acted "without a claim of right made in good faith", the issuing judicial authority replied that he "was acting unfairly, i.e., by acting this way without any faith that this is fair, [the respondent] understood that he was behaving in a criminal way". The answer did not directly reflect the wording of the question asked and the respondent relies upon the absence of a direct statement that it was made without a claim of right made in good faith. In my view, it is important that this Court analyse the reply so that the Court can assess whether the facts found against him in Lithuania include such a claim of dishonesty. In my view, the Lithuanian issuing judicial authority answered in a manner which reflected the situation that was found in Lithuania, rather than using a phrase which comes from the Irish legal provisions. In doing so, the Lithuanian issuing judicial authority have made it perfectly clear that this respondent knew he was behaving in a criminal way.

37. Although I have already stated that in considering correspondence, the word "criminal" is not to be directly translated back into a concept of criminality in Irish law, and that the Court must be careful in interpreting a statement where there is a reference to criminality, this is nonetheless relevant in the context of this case. It is relevant not as a statement of law in Lithuania but as a statement of the factual situation. In other words, this is directly relevant to the issue of his state of mind when conducting this matter and also to the question of whether he could have made a claim of right in good faith. If a person knows that they are carrying something out in a manner which is "unfair" and "criminal", by definition, there cannot be a claim of right made in good faith. It is not necessary that this Court be satisfied about the type of criminality alleged in the context of a theft offence, because the factual allegation against him is that he did not have a claim of right made in good faith at the time he took that property. The precise nature of the criminality is not relevant in this context. The fact of acting contrary to the applicable criminal laws is simply a confirming statement that he had no claim or right made in good faith i.e. that he acted dishonestly."

38. In those circumstances, even though this is an offence which has no word-for-word statutory equivalent in Ireland, and even though the offence incorporates a subjective claim to a right to particular property, there is, on the facts, correspondence with the offence of theft in this jurisdiction. Although there is a difference between the offence of theft and this offence of high handedness in Lithuanian law, the actual ingredients of the offence of high handedness as proven against this respondent, amount to an offence of theft in this jurisdiction. While the Lithuanian offence may take into account that the victim of this particular appropriation of property may have appropriated other property from a perpetrator, which may have granted him certain subjective rights, the respondent had nonetheless dishonestly taken a different item from that person. That is theft in this jurisdiction. It may be that in this jurisdiction the sentence of such a perpetrator would be mitigated by virtue of the earlier theft of the perpetrator's property; in Lithuanian law, the legislature has chosen an alternative path by way of creating a separate offence. That fact is immaterial to this Court's decision, because as has been stated already, it is correspondence with the acts alleged that is required and not with the manner in which the offence is classified under statute."

3. Arising from that judgment, the respondent seeks leave to appeal under s. 16(11) of the European Arrest Warrant Act 2003, as amended ("the Act of 2003"). He has asked for a certificate of appeal based on the following:

"When considering correspondence in the context of s. 5 and 38 of the European Arrest Warrant Acts 2003 and 2012 generally, and/or in the specific context of a comparison between "theft" in this jurisdiction and "high-handedness" as

defined in a requesting state: -

(1) Is it possible that even when a requested person is deemed to know that he is performing an act in a manner that is unfair and criminal, that he nonetheless may still have "a claim of right made in good faith".

(2) If the person subjectively believes that he is entitled to take someone else's property as a set off against his own property,

(a) Is he nonetheless to be deemed to have acted without claim of right made in good faith, such that the offence of "theft" in this jurisdiction is established,

and

(b) if so, does the foregoing apply even if the conduct falls short of "theft" in the requesting state?"

4. There were no issues raised at the hearing of this application as to the law applying in cases concerning leave to appeal. When the High Court is requested to consider whether to certify an appeal, the court must consider whether the order or decision involves a point of law of exceptional public importance, and that it is desirable in the public interest that an appeal should be taken. The decision of the High Court in *Glancre Teoranta v. An Bord Pleanála* [2006] IEHC 250, the comments of Murray J. in *Minister for Justice and Equality v. Tokarski* [2012] IEHC 148 to the effect that a broad approach to the interpretation of s. 16 should be given in the context of an application for leave, and the judgment of this Court in *Minister for Justice and Equality v. A.M. and Donovan* [2016] IEHC 798 are all relevant to this issue.

5. Counsel for the respondent also brought to the Court's attention the decision of Humphreys J. in *Y.Y. v. Minister for Justice and Equality (Number 2)* [2017] IEHC 185. In the view of the Court, the latter judgment seeks to pull together strands of the tests set out in the relevant case law. However, in the context of the present case, it is unnecessary to examine in detail how that summary compares with the summary set out in the case of *Minister for Justice and Equality v. A.M.*

6. Counsel for the respondent accepts that there is settled jurisprudence on the law relating to correspondence of offences, but he submits that the issue in the present case is whether that test had been met. This arises because there is, in his submission, a real question as to whether the facts of this case would amount to theft in this jurisdiction. He also submits that the case raises issues concerning the definition of theft within this jurisdiction and to that extent it is also desirable in the public interest that an appeal be given. In his submission, this would assist in the understanding in this jurisdiction of the offence of theft and in particular the meaning of dishonesty i.e. the claim of right made in good faith.

7. Counsel for the respondent strongly relied upon the distinction in Lithuanian law between theft and high-handedness. In his submission, a person such as the respondent who had certain subjective claims of right about their property may not in fact be acting dishonestly if the level of knowledge about the criminality is criminality at a level less than that required for theft. In other words, while the respondent may have known he was acting in a high-handed manner which is criminal in Lithuania, he may not have known or intended to act in a manner that amounted to theft. Thus, although acting "criminally" or "unfairly", this was insufficient to show dishonesty as required in Irish law.

8. Counsel for the minister submitted that there was simply no point of law of exceptional public importance in this case. In his submission, this Court had simply applied the law on correspondence to the facts in this case. Counsel also submitted that it was not relevant to this Court's decision that the law on theft might be clarified as this was a matter concerning correspondence. On that latter submission, I disagree. In my view, a determination as to correspondence of offences requires consideration of whether the facts of the offence in the issuing state would amount to an offence in this jurisdiction, which of course requires consideration of the relevant legal boundaries of that offence in our law. If, in an appropriate case, a real issue arises as to the meaning or extent of the legal boundaries to criminal offence at issue, then by definition, a point of law will have arisen, which will then require adjudication as to whether the other requirements of the section have been met.

9. In essence, the respondent's case is that a point of law of exceptional public importance arises from the extent of the subjective claim to the property in this case. His main contention is that an issue of law arises as to whether the Court's statement that "[i]f a person knows that they are carrying something out in a manner in which is unfair and criminal, by definition there cannot be a claim of right made in good faith" is correct. This passage, while viewed as self-explanatory by this Court, in the submission of the respondent, raises considerable issues of law.

Conclusion

10. This Court cannot embark upon a consideration or a reconsideration of its own judgment. Furthermore, it cannot embark upon a strength of the appeal argument. The test to apply is whether the case raises a point of law of exceptional public importance which is desirable in the public interest to resolve in an appellate court. That is what this Court will address.

11. It is important to look at the questions that the respondent has raised. The respondent has sought to preface his questions, thereby putting them in context. The context, in the respondent's submission, is a comparison between "theft" in this jurisdiction and "high-handedness" in the requesting state. On its face, this signals a misreading of the law on correspondence of offences. It is never a comparison of the statutory provisions that is at issue, it is a question of considering the facts alleged, or proven, and ascertaining whether on those facts a criminal offence would be committed in this jurisdiction. Despite this contextual misreading of the law, I will however consider both questions actually raised by the respondent to see if they involve points of law of exceptional public importance.

12. To take the second question first, the respondent's question does not arise from the facts of this case. There is no evidence on the EAW or in the additional information that the respondent believed that he had a right of "set-off". At most, there is a statement that in order to regain his mobile phone he "disregarded the procedure established by the law and wilfully exercised an existing right of his own, which is disputed, though not exercised yet ... and this way seized unlawfully the victims TV set...". There is no indication that he had a belief that he had an entitlement to take the property as a "set off".

13. The second major problem is that the second question does not recognise the important point that the respondent knew he was acting in an unfair manner and that he understood it was criminal. It is not a question of "deeming" him to have acted without a claim of right made in good faith in circumstances where there is a direct statement as to his knowledge of the offence he is alleged to have committed.

14. Finally, the reference to his conduct falling short of "theft" in the requesting state, is not the yardstick by which correspondence of offences must be judged. The law on correspondence is well trodden: it is the acts of the offence alleged (which includes the intention of the accused at the time of the offence) that must be considered to see if the same acts would, if carried out in this jurisdiction, amount to the commission of a criminal offence.

15. In my view, the second question does not arise from the decision as it does not arise on the facts of this case.

16. In relation to the first question, the respondent has also phrased the question in a manner which does not arise on the facts presented by the issuing judicial authority. This respondent was not "deemed to know that he was performing an act in a manner that is "unfair" and "criminal"" (emphasis added). The issuing judicial authority stated authoritatively that this man acted unfairly. They also stated that by acting this way without any faith that this is fair, that the respondent "understood that he was behaving in a criminal way".

17. There is a significant difficulty in the argument that the respondent makes. He is asserting that he had a subjective claim to a "set-off" or an entitlement to take the television because his own mobile phone had been taken. The respondent in his submission has failed to take into account that the issuing judicial authority is stating that in fact he took the television without the consent of the owner and more particularly that he was acting unfairly i.e. he acted without any faith that what he was doing was fair and that he understood he was behaving in a criminal way. The respondent's real case as reflected in the use of language such as "deemed" and "set-off" is that he continues to assert that he had a subjective right to take the television. This approach does not accord with the actual facts as presented by the issuing judicial authority, which is that he acted criminally and unfairly in taking the television instead of his telephone. In short, the factual claim is that the respondent wilfully participated in a wrongful act.

18. There may be occasions when the meaning and interpretation of "dishonesty" in the Criminal Justice (Theft and Fraud Offences) Act, 2001 ("the Act of 2001") arises for interpretation in an extradition case. It does not arise in this case. The respondent has not identified any case law which directly or indirectly raises any doubt about whether a person who is found to have acted "unfairly" or "criminally" in the sense of understanding that they are behaving in a criminal manner, could also be said to have a claim of right made in good faith. No authority to support the suggestion that a person could be acting honestly (i.e. not dishonestly) and wilfully criminally at the same time was opened to the Court. There was no indication as to any doubt or uncertainty in the law that a person who wilfully participated in a wrongful act acted dishonestly as defined by the Act of 2001. No principled reason or argument of substance was presented to the Court as to why or how such a radical interpretation of the concept of "dishonesty", as posited by the respondent, could arguably be said to represent the law in this jurisdiction. There is therefore nothing to support the contention that there is a real doubt that the state of the law in this regard is uncertain.¹⁹ I am therefore satisfied that neither of the questions raised by this respondent amount to points of law of exceptional public importance, and on this basis the Court refuses to certify leave to appeal.