

## THE HIGH COURT

Record Number: 2005 No: 37 Ext

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND  
LG

RESPONDENT

**Judgment of Mr Justice Michael Peart delivered on the 7th day of October 2005**

1. This is an application which came before me yesterday under Section 16(1) of the European Arrest Warrant Act, 2003, as amended ("the Act"), for an order for the surrender of the respondent to the Lithuanian authorities in relation to two charges described in the European Arrest Warrant (as translated into the English language) ("the warrant") issued by a judicial authority in Lithuania on the 28th February 2005 as "misappropriation of property" and "Forgery of an Official Document or Use or Sale of a Forged Document".

2. The warrant issued herein by the said judicial authority is dated the 28th February 2005, but was not ordered by this Court to be endorsed in accordance with Section 11 of the Act until an application in that regard was made to the Court on the 5th day of August 2005. There is no information before this Court as to why that delay of five months in bringing that application occurred.

3. Following that endorsement for execution, the respondent was arrested in this State on foot of same on the 10th August 2005, and brought before this Court on the following day, the 11th August 2005, when he was remanded to await the hearing of this application.

4. Under s. 16(1) of the Act, this Court may make the order sought in this case provided it is satisfied as to a number of matters set out in that section, namely:

(a) that the person before the Court is the person in respect of whom the warrant was issued;

(b) the warrant has been endorsed in accordance with section 13 of the Act for execution;

(c) where appropriate (i.e. in cases of a conviction/sentence imposed in absentia) an undertaking as required by section 45 of the Act;

(d) that the Court is not required to refuse to surrender the respondent under sections 21A, 22, 23 or 24 of the Act;

(e) that the surrender of the respondent is not prohibited by Part III of the Act, or the Framework Decision annexed thereto.

5. In addition the Court must be satisfied in relation to correspondence of the offences charged, and that the offences referred to in the warrant would carry in Lithuania a penalty of the required minimum gravity, namely a maximum term of imprisonment of not less than twelve months, and also, as required by section 21A of the Act (as inserted), that a decision has been made by the Lithuanian authorities to charge and try the respondent with the offences specified in the warrant.

6. Ms. Melanie Greally BL on behalf of the applicant has, in presenting this application, submitted that all of these requirements are met in this case. Mr Kieran Kelly BL for the respondent has conceded that no issue is raised in relation to the arrest or identification of the respondent, and further that no issue is taken regarding the question of correspondence of the first offence stated in the warrant, namely the misappropriation of property. He rightly and fairly accepts, and the Court agrees, that the act as appearing in the warrant in this regard would if committed in this State give rise to an offence under s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. He raises no point either in relation to the undertaking referred to above at (c) above, since this is not a case in which there has been any conviction or sentence in absentia.

7. Mr Kelly raises four points of objection.

8. Firstly, he submits that the requirements of the Act have not been complied with regarding the endorsement of the warrant by order of this Court on the 5th August 2005, and that before this Court can grant the order sought it must be so satisfied. He points to the fact that the warrant is dated 28th February 2005, and that no application for its endorsement was made until the 5th August 2005, and that accordingly, and in the absence of no explanation for the delay in so doing since the 28th February 2005, it has not been endorsed as soon as practicable, as required. In this regard he also refers to the fact that in the Framework Decision annexed to the Act, reference is made to the objective of removing delays from the extradition process – for example paragraph 5 of the Preamble to the Framework Decision. He submits that the gap of five months which elapsed has not been explained and therefore, in spite of the fact that the Court on the 5th August 2005 may appear to have been satisfied to order the endorsement of the warrant in spite of the delay of five months, since it so ordered, the Court on this present application under s. 16 of the Act cannot be satisfied that the warrant was endorsed "in accordance with section 13".

9. Section 13(1) of the Act provides:

*"13.—(1) The Central Authority in the State shall, as soon as may be after it receives a European Arrest Warrant transmitted to it in accordance with section 12, apply, or cause an application to be made, to the High Court for the endorsement by it of the European arrest warrant....."*

10. Ms. Greally on the other hand has submitted that the Court on the 5th August 2005 must have been so satisfied, and that in any event the period of five months is not so excessive as to go outside a concept of "as soon as may be". In relation to this first point of objection, it happens in this case to be the fact that on the 5th August 2005 I heard the application under s. 13 of the Act for the endorsement of the warrant. As far as I am aware the question of any delay in the making of that application did not arise on the application. But nevertheless I am of the view that the requirement contained in section 16(1) of the Act that the Court be satisfied that the warrant was endorsed in accordance with section 13 of the Act means that this Court must ensure that the warrant was endorsed for execution prior to the arrest and bringing before the Court of the respondent. While that section states that the application should be made as soon as may be, I am not satisfied that the Court prior to endorsing the warrant must at all times

enquire as to whether the application might not have been made earlier, except in very clear cases of what I will loosely term significant or extreme delay. No strict time limit has been inserted in the Act or in the Framework Decision itself. The phrase "as soon as may be" permits of some passage of time clearly. In the present case I am satisfied that the warrant has been endorsed for execution in accordance with section 13 of the Act.

11. Secondly, Mr Kelly submits that the terms of the Act and the Framework Decision are not complied with in relation to the question of minimum gravity of the offences stated in the warrant. It is necessary that the offences referred to carry a maximum penalty of a term of imprisonment of not less than twelve months. He refers to the fact that in the warrant at paragraph (c) thereof the maximum length of custodial sentence applicable is stated to be "Imprisonment for a term of up to 3 years". He submits that the meaning of this phrase is unclear and could easily be read as meaning that the maximum term of imprisonment could be anything from one day to three years. I do not agree with this submission. It is perfectly reasonable in my view to read this as meaning that the offences stated in the warrant carry a maximum penalty which exceeds twelve months i.e. three years. In this way I am satisfied that the minimum gravity requirement is met.

12. Thirdly, Mr Kelly submits that correspondence has not been made out in relation to the charge of forgery set forth in the warrant. Ms. Greally has suggested to the Court that the facts set forth in the warrant in relation to forgery would if done in this country amount to an offence under section 25 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 which provides as follows:

*"25.-- (1) A person is guilty of forgery if he or she makes a false instrument with the intention that it shall be used to induce another person to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, to the prejudice of that person or any other person."*

13. Such an offence carries a penalty on conviction of a fine, or imprisonment for a term not exceeding 10 years or both.

14. Ms. Greally submits that all the ingredients of an offence under section 25 of that Act are present in the facts set forth in the body of the warrant and that correspondence is therefore made out. I should set forth the relevant facts so appearing in the warrant. They appear in the following way:

*"...during the period of time from 22 November 2001 until 21 September 2002, [LG], while working as a salesperson in the shop 'Giedra' ..... made alterations to the conducted cash transactions by several analogous actions, scissoring off the bottom part of the cash receipts that were given to the buyers. By these acts, [LG] forged genuine documents - receipts of the electronic cash register."*

15. Mr Kelly on behalf of the respondent has submitted that contrary to what is submitted by Ms. Greally, the act of "scissoring off the bottom of the cash receipts" as described in the warrant would not be sufficient to ground an offence of forgery in this jurisdiction given way in which section 30 of the said Act defines what is meant by a false instrument for the purpose of the offence under section 25 thereof. Section 30, sub-section (1) contains an exhaustive list of what can constitute a false instrument for the purpose of the charge, and in his submission that sub-section does not permit of any further categories since it does not include a phrase such as "shall include the following". In this regard he has referred to my own judgment in Attorney General v. Fay, High Court, 22nd July 2003. Since the concept of altering the document by "scissoring off the bottom of the cash receipts" is not one of the methods stated by section 30 to constitute a false instrument for the purpose of the offence of forgery in this jurisdiction, he has submitted that correspondence has not been made out. In this regard, Mr Kelly has been referring to section 30, subsection (1) of that Act. I have however considered the terms of section 30, subsection (2) of that Act which provides as follows:

*"30.--(2) A person shall be treated for the purposes of this Part as making a false instrument if he or she alters an instrument so as to make it false in any respect (whether or not it is false in some other respect apart from that alteration)."*

16. It seems to me that what is alleged against the respondent in this charge is that he altered "conducted cash transactions, and cut off the ends of cash receipts thereby altering them so as to create a false instrument. I accept that the way in which the translation has been expressed leaves something to be desired as far as absolute clarity is concerned, but I believe that sufficient is stated to enable the facts as set forth in the warrant to come within what is stated in s. 30, subsection 2 of that Act.

17. The final point raised by Mr Kelly arises from requirement under the Act that this Court must be satisfied before making an order for the surrender of the respondent that a decision has been made in the requesting country to charge and try the respondent for the offences set forth in the warrant. This arises from the fact that one of the matters referred to in section 16(1)(d) of the Act is that before the Court can order the surrender of the respondent, it must be satisfied that the Court is not required to refuse to surrender him by virtue of section 21A (as inserted by section 79 of the 2005 Act. Section 21A, as inserted, 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."*

18. Section 21A(2) goes on to provide that it shall be presumed until the contrary is proved, that such a decision has been made. Ms. Greally has relied upon this presumption in the present case and has referred the Court to the fact that at the very commencement of the warrant itself at the top of page 1 thereof, the District Prosecutor General requests "that the person mentioned below be arrested and surrendered for the purposes of conducting criminal prosecution" (my emphasis).

19. But Mr Kelly has drawn the Court's attention to an unusual feature of the warrant in this case, appearing in paragraph (d) thereof. Paragraph (d) is a paragraph which needs to be completed by the requesting judicial authority in cases where the respondent has been convicted in absentia - a situation which does not arise in this case. Nevertheless the requesting authority has completed an answer in the space provided and it reads as follows:

*"Pursuant to the provisions of the Code of Criminal Procedure of the Republic of Lithuania, the person arrested must, within 48 hours after his surrender to Lithuania, be brought before the judge for the purpose of ascertaining whether there are grounds for his arrest."*

20. Mr Kelly submits that this indicates that under the Lithuanian Code of Criminal Procedure, the decision as to whether there are grounds to arrest the respondent will not be made until after he is surrendered, and that therefore the decision to charge and try him for these offences cannot be regarded as having been made already, in spite of the presumption in that regard contained in Section 21A(2) of the Act, as amended, and in spite of the statement appearing at the very commencement of the warrant to the effect that

the authority wants the surrender of the applicant so that he can be prosecuted for the offences.

21. Ms. Greally submits that what has been inserted in this paragraph has simply been completed in error since paragraph (d) relates to in absentia cases, which the present case is not, and that what is stated therein is superfluous and irrelevant, and should be disregarded completely. Mr Kelly on the other hand submits that the presumption created by section 21A as inserted is one which may be rebutted, and that in this case it is clearly rebutted by the requesting state's own document, namely paragraph (d) of the warrant, in which it is stated that under the Code of Criminal Procedure in Lithuania, the decision as to whether or not there are grounds to arrest the respondent must be made within 48 hours of his surrender to that country. He submits that what this must be regarded as meaning is that if the respondent is ordered to be surrendered by this Court, he will within 48 hours of his surrender be brought before a Lithuanian judge who will only at that stage make a decision as to whether there are any grounds to arrest him for these offences, and that it is of course a possibility that there will be no such grounds found to exist, and he will not be arrested, charged and tried. In a situation where such a situation is clearly possible, this Court, he submits, must regard the presumption as rebutted, and must refuse to order his surrender under Section 16(1) of the Act.

22. In my view there is no doubt that paragraph (d) has been completed in error. Nevertheless, what is contained therein is information which is before this Court, and which has been provided by the Lithuanian judicial authority itself as to what the law of Lithuania is in this regard. It does not seem to me to make sense to say that what is stated in that paragraph applies only to an in absentia case, since in such a case clearly the respondent has long since been arrested, charged, tried, convicted and possibly sentenced in his absence, and there would therefore be no sense in a decision being arrived at after his surrender to serve his sentence, as to whether "there are grounds for his arrest".

23. It seems to make more sense to me that its meaning is that under Lithuanian Code of Criminal Procedure, the respondent in this case, if surrendered, must then within 48 hours of surrender, be brought before the judge, who will then decide whether there are sufficient grounds for proceeding with the arrest and prosecution of the respondent for the offences set out in this warrant. It appears to me not to be applicable in an in absentia case, but rather to a case such as the present one.

24. At best a serious ambiguity appears in the warrant in this respect such that I cannot be satisfied that a decision has already been made in the requesting state to try this respondent for the offences appearing, and to this extent I am entitled to regard the presumption as rebutted.

25. In deciding as I have done that the ambiguity created by the contents of paragraph (d) is sufficient to rebut the presumption, I have had regard to the stated objective in the Framework Decision of mutual trust and co-operation between signatory states. But that objective cannot override the requirement to comply with a level of reasonable strictness with the requirements of the Framework Decision as brought into effect by the Act of 2003, given the implications of the Court's decision for the liberty of the respondent.

26. Accordingly, I am not satisfied that the order sought can be made in this case and I refuse the application.

27. I want to add one other matter which arises in this case, and in others which have come before me. The Rules of Procedure for dealing with these applications has provided that Points of Objection must be filed by a respondent who wishes to raise objections on an application under Section 16 of the Act. What was filed in this regard in the present case, and in some others which have come before me, really serves no useful purpose, since it is brief to the point of being simply a traverse, containing absolutely no information as to the basis upon which objection will be made. That renders pointless the requirement to file such Points of Objection and serve same on the applicant. In my view there is no reason why the Points of Objection should not state in meaningful detail exactly what points of objection are going to be argued. The Points of Objection in the present case state as follows:

1. The surrender of the respondent is prohibited under the provisions of the European Arrest Warrant Act, 2003.
2. The lack of correspondence between the alleged offences in Lithuania and Irish Law.
3. The rights of the respondent including his constitutional rights would be infringed by his extradition.
4. Such other grounds as may be permitted to be argued by this Honourable Court.

28. With all due respect, the Court, and no doubt the applicant, is absolutely none the wiser, having read this document, as to what precisely these objections are.

29. In proceedings of a civil nature, such a document would bring forth a Notice for Particulars, so that the applicant might attempt to discover what points are being made, given the generality of the language used. That is not appropriate in applications such as those under section 16 of the Act. The purpose of the Points of Objection document is so that the applicant and the Court may know in advance of the hearing the reasons why the respondent is contending that the order should not be made. In applications of this kind, the Court conducts its own enquiry as to whether the provisions of the Act have been complied with, and it is entitled to be assisted by the arguments and submissions made by Counsel for the applicant and Counsel for the respondent. Counsel for the applicant is in my view unfairly disadvantaged in meeting the objections being made if the detail of them becomes apparent only at the time that they are expressed in Court at the hearing of the application. Since it is clearly inappropriate that following the delivery of Points of Objection a Notice for Particulars be served, given the tight timeframe in which these applications must be heard, it follows that Points of Objection should contain sufficient detail of the objection so as to serve the intended purpose, namely to indicate in advance of the hearing the nature of the objections being submitted to the Court. In future, I would urge practitioners to adopt this more fulsome approach to the drafting of their Points of Objection in order to avoid the possibility that the Points of Objection might be regarded as not sufficient.