

THE HIGH COURT

Record Number: 2006 No. 50 Ext.

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
GEDIMINAS DUBIKATLIS

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 31st day of October 2006

1. The surrender of the respondent is sought by the Lithuanian authorities pursuant to a European arrest warrant issued there on the 5th April 2006. The domestic warrant on foot of which that warrant issued was issued on the 9th February 2006 and is in the nature of a warrant of arrest. The offence for which the surrender of the respondent is sought for the purpose of prosecution is described in the European arrest warrant as "extortion". The circumstances of the alleged offence as described in the warrant would be such as to amount to an offence here of demanding money with menaces, but no issue arises as to correspondence, and in any event the Lithuanian authorities have chosen to mark the offence of "extortion" in the appropriate portion of the warrant, and as such the said offence is one in which verification of double criminality does not have to be made out, in accordance with Article 2.2 of the Framework Decision on the European arrest warrant of the 13th June 2002.

2. This European arrest warrant was endorsed for execution in this State by order of this Court dated 31st May 2006, and the respondent was duly arrested on foot of same on the 8th June 2006. No issue is raised by him either as to his identity or as to the manner in which his arrest was effected. He was brought before the High Court on the same date as his arrest, and was thereafter remanded in custody to await the hearing of the application for an order for surrender under s. 16 of the European Arrest Warrant Act, 2003, as amended.

3. Ronan Kennedy BL, appearing on behalf of the applicant, has dealt with the matters to be satisfied before the Court can make the order sought under s. 16 of the Act. Subject to dealing with the point of objection urged by Dr Forde, I am satisfied that the person before the Court is the person in respect of which the warrant has been issued; that same was duly endorsed in accordance with s. 13 of the Act; that no undertaking is required under s. 45 of the Act since this is not a case in which any trial has taken place *in absentia*; that there is no reason why this Court is not required under ss. 21A, 22, 23, or 24 of the Act to refuse surrender; and that the surrender is not prohibited by anything referred to in the Framework Decision or Part III of the Act. As already stated, the double criminality of the alleged offence does not have to be verified, and I am satisfied that the minimum gravity requirement of the offence in question is satisfied.

4. A number of issues were raised in Points of Objection filed herein, but Dr Michael Forde SC appearing for the respondent has helpfully informed the Court that only one point of objection is being pursued on the present application.

5. That point is simply that the seeking of an order for surrender of the respondent would amount to an abuse of process in the circumstances of this case, namely where the person against whom the act of extortion is alleged to have been committed has withdrawn his complaint to the Lithuanian authorities and will not be giving evidence in any trial which may ensue following surrender. Dr Forde submits that in such a circumstance, there can be no prospect of a conviction and therefore for the Lithuanian authorities to continue to seek his surrender to try him for that offence amounts to an abuse of process. He submits that in spite of anything appearing in the Framework Decision or the 2003 Act, as amended, by which it is given effect, this Court has an inherent jurisdiction to protect an abuse of its process, and that in this case the Court should exercise its inherent jurisdiction.

6. By letter dated 18th October 2006, the respondent's solicitor wrote to the Chief State Solicitor in which he stated, *inter alia*, the following:

"It is my understanding from my client that the alleged complainant and victim in the Lithuanian State's case is so concerned about my client's situation that he is coming to Dublin to be available in whatever capacity to assist my client including making himself available to the Court and the State authorities here towards this end.

If the situation is that the Lithuanian State's prosecution cannot proceed or succeed in Lithuania for reasons that might be clear at present and before a hand-over of my client after approval of procedures by the court, it is my contention that no such hand-over should take place."

7. The complainant, Mr Bagdonavicius has provided a document purports to be a certificate, and not an affidavit, albeit that it has been signed in the presence of a notary in Lithuania. For what it is worth, Mr Bagdonavicius certifies that he has no claims concerning what is called "the ransom" sought for his lost car, and that the respondent "made no demand for money". He also says that he is a friend of the respondent's and that they know each other well. It is not explained in any way in this document how it was that the complainant made a complaint to the police in the first place, thereby initiating the prosecution process in Lithuania, and how it has come about that he is no longer anxious to participate in that prosecution, and is denying that any demand for money was made of him by the respondent.

8. Dr Forde submits that without the co-operation of Mr Bagdonavicius, there can be no prospect of the respondent being convicted and that accordingly the Lithuanian authority should not be seeking his surrender, and that it amounts to abuse of process. He also submits that the view of the Lithuanian authority has not been obtained.

9. By letter of the same date the same solicitor wrote directly to the Prosecutor General's office in Vilnius, Lithuania in which a large number of questions are asked. The Court has been informed that no response was received to these letters. On the other hand, the applicant has produced to the Court a letter from the said Prosecutor General's office dated 27th October 2006 (the date of the hearing before me). Dr Forde objects to the admission of this letter. Given the sui generis nature of these proceedings, and especially given the capacity of the Court itself to seek the sort of information contained in the letter directly from the requesting authority in appropriate cases under s. 20 of the Act, I can see no reason why this court should not be aware of the requesting authority's view on the issue arising. That letter states that the judicial authority in Lithuania continues to wish to seek the surrender of the respondent, and that in the event that surrender is ordered the prosecution of him will be continued. It does not specifically address the question as to how without the complainant's co-operation the prosecution of the respondent can have any chance of success. This letter is not determinative of the issue raised by Dr Forde. Even without sight of this letter, the Court would be satisfied that the point of objection must fail for the reasons appearing.

10. Mr Kennedy, on the applicant's behalf responds to these submissions by stating, *inter alia*, that this court in dealing with an application under s. 16 for an order for surrender is not concerned with any 'strength of case' arguments. He submits that it is not for this court to assume that this is a prosecution in which the evidence of Mr Bagdonavicius would be the only available evidence. He refers to the judgment of Denham J. in the case of *Minister for Justice, Equality and Law Reform v. Dundon*, unreported, Supreme Court, 15th March 2005. In that case it had been submitted as part of the respondent's case, that there was only one possible witness against the respondent, namely his wife, and that not only had his wife resiled from her statement, but that his wife was not a compellable witness. In answer to this argument, the learned judge stated:

"I would first of all note on the facts that there is no basis to find that this is a one witness case. However, on the law, I am satisfied that the adequacy of the evidence against the person sought is not a matter for consideration on these proceedings under the Act. Further, there is no requirement that the requesting state establish a prima facie case."

11. In my view that statement is sufficient to determine this objection by the respondent. One could well foresee the potential for difficulty if Mr Bagdonavicius is not prepared to give evidence against the respondent. But that cannot be a reason for this Court to refuse to order his surrender when same is sought as in the present case. It is not open to this Court to determine or even consider whether or not the prosecution can or cannot succeed at trial, either because of the strength of the evidence, the non-availability of any witness, or the unwillingness of an available witness to testify. These are matters for the Court in the requesting state. That state is a sovereign state. Its entitlement to prosecute alleged offenders for crimes committed in that state must be respected. It is worth noting Article 4.3 of the Framework Decision which anticipates that there could be a situation arising where following the issue of a European arrest warrant the requesting state makes a decision not to prosecute, or to halt proceedings. That article provides that even in such a situation, it is merely one of the *optional* grounds for refusal of surrender by the requested state. It follows in the present case that even if this court was satisfied that the prosecution of the respondent would never take place because of the action of Mr Bagdonavicius, there would be no obligation under the Framework Decision to refuse surrender. The Court would have a discretion in that regard. It is impossible to see how the possibility of the exercise of that discretion in favour of ordering surrender, even in those circumstances, could be seen as amounting to an abuse of process by the requesting state. All the more so, there cannot be any question of an abuse of process arising where, as in this case, the requesting state continues to seek the surrender of a person, even in a situation where this Court is made aware of some difficulty (to put it no stronger than that) in obtaining the evidence of an important witness.

12. This Court, as the judicial authority in the requested state, must continue to attach primary importance to the high level of confidence between Member States on which the Framework Decision is based. That high level of confidence on which the principal of mutual co-operation and mutual recognition are founded is the basis on which the European arrest warrant arrangements were put in place. It would only be in a truly exceptional case, which this case is not, that one Member State would feel unable to comply with the requirement to surrender, as provided in s. 10 of the Act, and Article 1.2 of the Framework Decision.

13. The Framework Decision of 12th June 2002 makes it clear in recital (12) thereof that the arrangements will respect the fundamental rights of persons requested. as well as the requested state's constitutional rules relating to due process. It is also stated in that recital that the implementation of the Framework Decision "*may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of that Treaty with the consequences set out in Article 7(2) thereof.*"

14. What is submitted in the present case comes nowhere near coming within this concept. There is no abuse of process, and the respondent's objection in that regard must be rejected. Being satisfied as to all the matters referred to in s. 16(1) of the Act, I therefore grant the order sought for the surrender to such person as is duly authorised by the issuing state to receive him.