Neutral Citation: [2016] IEHC 46

THE HIGH COURT

2014 No. 225 EXT

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

MARIUS VIPLENTAS

RESPONDENT

JUDGMENT of Mr. Justice Hunt delivered on the 22nd day of January, 2016

Background

1. This is an application for the surrender of the respondent to Lithuania pursuant to the provisions of s.16 of the European Arrest Warrant Act 2003 ("the Act"). The warrant in question was issued by the Prosecutor Generals Office of the Republic of Lithuania on the 11th February, 2014. This warrant was endorsed for execution by the High Court on the 11th November, 2014 and was executed on the 11th June, 2015, when the respondent was arrested by Garda Sean Fallon at the West Pier, Howth, Co. Dublin. The respondent was brought before the High Court on the following day. On the 13th July, 2015, the respondent lodged points of objection to the requested surrender, which came on for hearing on the 19th November and the 21st December 2015.

2. At that hearing the principal objection argued by the respondent was that the surrender of the respondent was prohibited by s.21A of the Act in that no decision had been made to charge and try the respondent with any particular allegation or offence. Without prejudice to that objection, it was suggested that any such decision may have been made in respect of the respondent's alleged flight from the pre-trial investigation phase relating to the allegations set out in the warrant, and was not made with respect to that incident itself. Therefore, if that was the case, the applicant had failed to demonstrate that the relevant decision related to an offence of sufficient gravity so as to permit the surrender of the respondent on foot of this warrant. In addition to these matters, counsel for the respondent objected to the substance and form of certain material submitted by the applicant in support of the application.

Objection to admissibility of information

3. The latter objection related in particular to the submission of material on behalf of the Central Authority in the requesting state which was not placed on affidavit. In this respect, counsel relied upon the provisions of Ord.40, R.1 of the Rules of the Superior Courts, which provides that upon any petition, motion, or other application, evidence may be given by affidavit. Counsel also referred to Article 14 of the Framework Decision on the European arrest warrant and the surrender procedures between member states, which provides that a hearing of an arrested person who does not consent to their surrender is to be held in accordance with the law of the executing member state. I was also referred to the judgement of Murray C.J. in *Minister for Justice, Equality and Law Reform v Piotr Sliczynski*, delivered on the 19th December, 2008.

4. In so far as Ord.40, R.1 may be applicable to this application, having regard to the use of the word "may" therein, I do not find that this provision imposes a mandatory requirement that information submitted in connection with an application for surrender must necessarily be placed on affidavit in order to render it admissible as evidence. The decision of the Supreme Court referred to above appears to make it clear that the process invoked in this case is an example of the simplified system of surrender of sentenced or suspected persons provided for in Recital 5 of the Framework Decision, which is based on mutual trust and recognition of the judicial authorities of the member states. It also seems clear that the material ordinarily considered by a court engaged in this process consists of the basic and essential arrest warrant document, together with any further information supplied by the issuing judicial authority to the executing judicial authority. The following quotation from page 7 of the judgement of Murray C.J. is of particular relevance:-

> *"In my view s.20(1) and (2) of the Act of 2003, (as amended), are provisions by which the Oireachtas sought to give effect to the system of surrender envisaged by the Framework Decision so as to ensure that information could be furnished by the requesting judicial authority to the executing judicial authority, the High Court. If further information is transmitted by the requesting judicial authority either on its own initiative or following a request it is the function of the Central Authority to transmit it to the Executing Judicial Authority in this country, the High Court. Section 20 must be interpreted in the light of the objectives of the Framework Decision and its provisions. In my view it specifically gives effect to Article 15(2) and (3) of the Directive. In so providing I am satisfied that the Oireachtas intended, consistent with the obligations of the State pursuant to the Framework Decision, that the High Court would have available to it the information provided by the issuing Judicial Authority and would have full regard to that information, in addition to information provided in the European Arrest Warrant itself, for the purpose of decision whether a person should be surrendered on foot of European Arrest Warrant. Moreover to interpret the provisions of the Act otherwise would render them meaningless since if direct evidence had to be giving of the information concerned every Judge or member of the issuing Judicial Authority providing information would either have to give evidence personally or swear an affidavit of matters within their own knowledge. If that were the case the provisions referred to would serve no purpose. Clearly in my view they were intended to ensure that the High Court would have, where required, information from the Judicial Authority concerned in addition to that already contained in the arrest warrant itself."*

The following quotation from p. 11 of the judgment of Macken J. is also of assistance:-

> *"In the relationship which may exist between the High Court and/or the respondent pursuant to s.20 of the Act of 2003 and the issuing judicial authority, these exchanges are, in my view, to be considered as operating on the same high level of confidence and mutual trust since these exchanges between the judicial authorities constitute an integral part of the overall scheme of the European Arrest Warrant. This must have as a consequence that when an issuing judicial authority is asked for additional information pursuant to either of the aforesaid subsections of s.20, the exchanges must be*

accorded the appropriate mutual respect. In consequence, it may be assumed that a reply furnished by the judicial authority of the requesting Member State has been fully and properly prepared by an appropriate responsible person, and will include true and accurate responses to the information or documentation sought.

If therefore there were nothing further in s.20 than subsections (1) and (2), no difficulties could arise in my opinion in the High Court having admitted into evidence the information exhibited in Mr. Doyle's affidavit and having accepted the veracity of the contents of that information, transmitted from the Warsaw District Court as the issuing judicial authority in the present case."

Macken J. went on to draw a distinction between information furnished pursuant to the provisions of s. 20(1) and (2) and the different but related issues that may arise under subs. (3) and (4) of section 20. She held that these matters specifically dealt with the question of the admission of "evidence" in proceedings under the Act, but expressly noted that such matters were separate and distinct and in no way affected the matters covered by subs. (1) and (2). Macken J. also noted that subs. (3) and (4) could have been drafted as a separate stand alone section altogether. Consequently, she held that s. 20 of the Act drew a clear distinction between the "information or documentation" referred to in s. 20(1) and (2), and "evidence" covered by in s. 20(3) and (4). Macken J. also noted that no distinction was drawn in s.20(1) and (2) between the status of additional information sought by the High Court as part of its own inquiry and that sought by the applicant under the respective subsections set out above. The intention of each subsection was to enable the competent authorities to fulfil their statutory functions, and in turn to comply with the provisions of the Framework Decision. She concluded that the statutory implementation of obligations flowing from the Framework Decision had the result that only documentation or information coming within s.20(1) or (2) enjoyed the particular status of being admissible without being proved in the usual way, as opposed to "evidence" furnished by either party pursuant to s.20(3).

5. I am therefore satisfied that these observations by the Supreme Court confirm that the High Court is not precluded from considering material submitted in connection with a surrender application unless such material is entered in evidence by way of affidavit. Murray C.J. went on to specify that before the High Court can receive and take into account such information, it must be established that the information communicated emanates from the judicial authority of the requesting state. So far as the present case is concerned, I am satisfied that any material submitted purporting to emanate from the Prosecutor General's Office of the Republic of Lithuania does, in fact, originate from that source and the contents of all such communications therefore can be considered as part of the body of information relevant to deciding whether or not to order the surrender of the respondent. In these circumstances, in order to consider the substance of such information, the court needs to be satisfied only of the provenance of such information, rather than focusing on whether it has been submitted in any particular form, whether by affidavit or otherwise.

6. Under this general heading, the respondent made a further specific objection based on what counsel characterised as the tone adopted by the solicitor for the applicant in a request for additional information made on behalf of the applicant in the course of the proceedings. In essence, it was argued that in seeking further information as to the purpose for which the warrant was issued, the correspondence in question suggested a particular response which was said to be desired by the applicant. The relevant portion of the letter in question reads as follows:-

"Please confirm that at the time the warrant was issued the Prosecutor General's Office of the Republic of Lithuania intended to charge Marius Viplentas with the offence and to put him on trial for the offence and their existed sufficient evidence for that to happen notwithstanding that the investigation was continuing which could uncover evidence which could cause the intention to charge and try the respondent to be reversed."

7. Counsel submitted that this was, in effect, a loaded question and that in such circumstances the applicant was entitled only to pose such questions in a neutral manner. I was not referred to any authority in support of this proposition and I am not satisfied that any such general proposition exists. There may well be circumstances where a request is couched in terms which are so extremely leading or suggestive that any information submitted in response should be disregarded for the purpose of an application. In this case, I am satisfied that the clarification sought by the applicant in this case was open to a range of possible responses. In fact, the response to the said request addressed neither intention or evidence, but indicated that the code of criminal procedure of the Republic of Lithuania:-

"…. specifies the following stages of criminal procedure: pre-trial investigation of the case; trial of the case in the first instance court; proceedings in the Court of Appeal; enforcement of a court judgment or ruling; proceedings in the Court of Cassation (final appeal).

The criminal case number 40-9-0C32-12 is currently in the stage of pre-trial investigation when the criminal prosecution against the person who is considered as a suspect in this stage is commenced. The status of the suspect is given to the person in cases where there is sufficient factual data in the case which allow assuming that the criminal case has been committed and that it has been committed by a particular person."

The letter also supplied information from the prosecutor of the Siauliai District Prosecutor's Office in charge of the pre-trial investigation, by way of a letter dated 6 November 2015, which will be referred to later.

8. Recital 9 of the Framework Decision defines the role of a central authority such as the applicant in the execution of a European arrest warrant to "practical and administrative assistance". I am satisfied that there was nothing improper or untoward that either the form of request made by the central authority or the reply by the requesting authority in this case. Clarification of the purpose of or background to a request for surrender falls squarely within the concept of "practical assistance" referred to in the said recital. In fact, I did not regard the information contained in this reply to be sufficiently conclusive so as to enable me to determine the matter without recourse to a further request for information. Accordingly, the objection to admissibility of the factual information placed before the Court is not made out.

The warrant and associated documents

9. There was a defect in the English translation of the arrest warrant originally provided for the court. Following my request for further information from the issuing authority, I am satisfied that the full translation of the part of the warrant in the Lithuanian language which sets out the purpose thereof is, as follows:-

"This warrant has been issued by the Prosecutor Generals Office of the Republic of Lithuania. I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution."

By reference to the contents of para.(e) of the warrant, I am satisfied that if the allegations set out therein were proved, they would correspond with the offences of assault causing harm and/or false imprisonment in this jurisdiction. I am also satisfied that the

requirement of minimum gravity is satisfied by the expression in the warrant that a conviction for the offence in question in Lithuania can attract a maximum penalty of imprisonment for a term of up to five years pursuant to the relevant provisions of the Lithuanian Criminal Code. Paragraph (f) of the warrant provides information that it is alleged that the respondent hid from the pre-trial investigation from 19th March, 2012. The warrant is signed by Darius Raulusaitis, who is expressed to hold the post of Deputy Prosecutor General, and is dated 11th February, 2014. Paragraph (b) of the warrant further records that the decision upon which the warrant is based is an order rendered on 3rd May, 2012, by Siauliai District Court to impose detention as the measure of coercion in criminal case number, 40-9-032-12.

10. It appears from an affidavit of Tanya Moeller, the solicitor on behalf of the respondent, that the respondent sought and was provided a copy of the decision of the Siauliai District Court of 3rd May, 2012. This affidavit exhibited copies of the decision and a translation thereof. This decision was issued by Judge Astra Karpyte, who is described therein as a pre-trial investigation Judge of that Court. It recites that the hearing upon which the decision is based was conducted in the presence of Prosecutor Ernestas Armalas and Defendant Lawyer Edmundas Jankaitis, but in the absence of the suspect Marius Viplentas. It also recites that the application of the Prosecutor was for the imposition of a remand measure of arrest in pre-trial investigation in the aforesaid proceedings. The body of the decision expresses that it was established in these pre-trial investigation proceedings that the respondent was suspected of being involved in the events alleged to have occurred as set out in para. (e) of the arrest warrant. This part of the decision continues as follows:-

> *"Evidence collected during pre-trial investigation – by protocol of evidence verification at the scene, by statements of the victim as well as other information collected during investigation it allows to reasonably believe that the victim Marius Viplentas caused him the alleged criminal offence. The Prosecutor requests to impose a remand measure – arrest on the suspect Marius Viplentas. The suspect's defender requests not to impose arrest.*
>
> *The Court believes that the prosecutor's request is reasonable. Marius Viplentas is suspected of committing one semi-serious offence which incurs more severe sentence of imprisonment than a term of one year. Marius Viplentas is previously convicted and the conviction is not revoked. He is single, unemployed, does not have legal source of income and permanent place of residence, he hid himself from pre-trial investigation officers, on 19.03.2012 his search was announced. Taking into consideration the circumstances there is ground to reasonably believe that Marius Viplentas being in freedom will run away (hide) from pre-trial investigation officers, prosecutor or court and less severe measure than arrest will not allow to reach goals ensuring the suspects involvement in proceedings in accordance with Article 119 of the Criminal Procedure Code of the Republic of Lithuania. Therefore the prosecutor's request shall be satisfied and a remand measure – arrest shall be imposed on the suspect Marius Viplentas."*

The end of the document goes on to record the formal decision of the judge to satisfy the prosecutor's request and to impose the remand measure of arrest on the respondent, and notes that the decision could be appealed to the Siauliai Regional Court during the period of 20 days from its adoption.

11. Upon considering this document in the course of the hearing, I considered that it was necessary that further information be obtained from the issuing authority with respect to the nature of the process referred to in these documents. Specifically, I requested a translation of the provisions of Article 119 of the Criminal Procedure Code of the Republic of Lithuania. This was obtained through correspondence on my behalf by the solicitor for the applicant, and it reads as follows:-

> *"Article 119. Purpose of Coercive Measures*
>
> *Coercive measures can be imposed with the view to ensure participation of the suspected person, accused person (defendant) or the convicted person in the proceedings, to ensure unhindered pre-trial investigation, case hearing in the court and execution of the judgment as well as in order to prevent commission of new criminal offences."*

Objections to surrender based on these documents

12. The first objection expressed at the hearing based on s. 21A of the Act was that the warrant in question was in breach of the requirement set out in s. 11(1) of the Act, whereby a European arrest warrant shall, in so far as practicable, be in the form set out in the Annex to the Framework Decision. There is no breach of this provision on the facts of this case. The form used by the Lithuanian authorities is in compliance with that prescribed in that Annex. The objection raised appears to me to relate to the substance of the warrant rather than the form. Section 11 of the 2003 Act (as amended) goes on to deal with matters to substance required in an arrest warrant, having prescribed the form thereof as set out above.

In relation to the alleged defect in substance, it was argued on behalf of the respondent that it was impermissible to fill out the contents of the warrant by reference to another part of the Act or by additional information. In this case, this objection is not operative, because there was no defect or omission in the form or substance of the original arrest warrant as assembled in Lithuania. The further information obtained for me in this case established that the relevant omission or defect was in the English translation of the original document. In my view, this is precisely the kind of clerical or human error that ought to be clarified by means of a request for practical or administrative assistance under the relevant statutory provisions. Therefore, there is no valid objection to the form or content of the warrant in this case. The original warrant is clearly expressed in Lithuanian as being for the purposes of prosecution, with the consequence that the request in the warrant attracts the operation of the presumption contained in s.21A of the Act.

13. The respondent also objected to the substance of the warrant on the basis that it did not clearly specify that the purpose of the warrant was to require the respondent for the purposes of prosecution, or alternatively that the real purpose of the warrant is the requirement of surrender of the respondent for investigation of the alleged offence, as opposed to charge and trial. In this respect, reliance was placed by the respondent upon the decision of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Ian Bailey* [2012] IESC 16 and in *Minister for Justice, Equality and Law Reform v. Thomas Olsson* [2011] 1 I.R. 384. This objection is also based upon the provisions of s. 21A of the Act which provides as follows:-

> *""(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."*

In essence, the submission of the respondent was that the circumstances disclosed by the face of the warrant and associated documents entitle the respondent to a refusal to surrender having regard to the provisions of section 21A. Further, or in the alternative, it was argued on behalf of the respondent that the warrant ought to be construed as meaning that the respondent was required by the Lithuanian authorities not in respect of the earlier events set out in that warrant but rather in respect of an alleged decision by the respondent to flee from the pre-trial investigation being conducted into those events. Consequently, it was submitted that the presence of the respondent is now required on foot of the decision made by the Siauliai District Court in respect of his absconding from Lithuania in the midst of the investigation. It was suggested that there cannot be surrender in the absence of a decision to prosecute, charge or try the respondent on the facts as presented.

14. The judgment of O'Donnell J. in *Olsson* makes clear that a "decision" for the purposes of s. 21A of the Act must be understood in the light of the requirement in s. 10 of the Act that surrender shall occur when a warrant is issued in respect of a person *"against whom that state intends to bring proceeding for an offence to which the European arrest warrant relates",* together with the purpose of conducting a criminal prosecution referred to in Article 1 of the Framework Decision. A number of other principles emerge from the two cases mentioned above. An intention to proceed against an accused as of the date of the warrant is required, and such a decision does not have to be final or irrevocable, in the sense that there may be a further decision not to proceed. No particular formality is required in relation to the decision and, in the light of the fact that the section in question sets up a presumption, it is for the respondent to demonstrate that no decision has been made to charge and try him. It is also established that cogent evidence is required to raise a genuine issue as to the purpose for which a warrant such as this has been issued and surrender sought: see the judgment of Murray C.J. in *Minister for Justice, Equality and Law Reform v. Michael McArdle* [2005] 4 I.R. 260. The presumption in favour of charge and trial is not displaced by the fact that procedures in the requesting state contain an element of further investigation, or require the respondent to be present for the purposes of those procedures. It is also clear from the *Bailey* decision that the intention to charge and try is to be interpreted disjunctively. A warrant issued for the purposes of investigation alone will never be sufficient to require surrender. The *Bailey* decision also illustrates, especially by the judgment of Murray J., that the threshold is passed where the object of the surrender request may be characterised as being accused rather than suspected of having committed the relevant offence.

In my view, it is unfortunate that s.21A uses the terminology "try and charge". These concepts are well known in this jurisdiction, and the status of an individual as either a suspect or an accused may be readily ascertained by reference to such specific steps in the domestic legal system. These concepts are less readily applicable to much of the wide variety of legal systems of various jurisdictions subscribing to the European arrest warrant arrangement and generating arrest warrants to be dealt with under the provisions of the Act. This leaves the High Court with the task of assessing the status of any particular respondent by reference to what is known about any particular legal system and the position of the respondent in that system. In making this assessment, it is necessary to analyse the substance of any given situation, rather than being diverted by form or terminology.

15. In the light of the statutory presumption in favour of charge and trial, it is therefore for the respondent to prove the contrary proposition, in the light of the terms of the second paragraph of section 21A. There has been no expert evidence as to Lithuanian criminal procedure proffered by either party to this application, and, therefore, the status of the respondent and the intentions of the requesting authority must be discerned from the evidence and admissible information supplied by each party. In my view, the respondent in this case has not discharged the onus of displacing this presumption by proving that the Lithuanian authorities had made no decision to charge and try him as of the date of the issue of the warrant. It is abundantly clear from those materials that the respondent is suspected of having committed the offence for which he is now sought. I am also satisfied that the decision of the Siauliai Regional Prosecutors Office to engage the first stage of criminal proceedings in Lithuania, namely pre-trial investigation of the case, constitutes sufficient evidence of a decision to charge and try the respondent such as to entitle the relevant authorities to request his surrender.

It seems to me to follow that even if the respondent is not regarded as actually on trial at this stage, having regard to the possibility of further investigation, by reference to the suspicions and items of evidence to in the letter of the regional prosecutor dated 6th November, 2015, it is evident that the process of trial is likely to follow unless something further emerges from the pre-trial investigation phase of the criminal prosecution process which has already commenced against the respondent. His position is closely analogous to that of a person charged with an offence and brought before a court in the initial stages of prosecution in this jurisdiction. That letter also emphasises another relevant feature of the process, which is that the departure of the respondent from Lithuania has the result that *"there was no possibility to complete the pre-trial investigation and to refer the criminal case to the court".* In my view, this represents clear evidence that the status of the respondent has moved beyond that of simply being a person suspected of having committed an offence into a situation where he is now effectively charged with having committed that offence and is in the process of being put on trial for that offence. As already stated, the fact that there is a possibility of further investigation or a decision not to proceed does not affect the position that the evidence in the case supports the presumption in favour of charge and trial rather than tending to rebut it. Each case is decided by reference to the individual facts. The presumption was rebutted in Bailey by express evidence indicting that there was no intention to try on the part of the applicant at the date of issue of the warrant. The position in this case is far removed from that situation. *Olsson* appears to me to present a much closer factual analogy.

16. It also follows from this conclusion that I cannot uphold the final objection to surrender based on the warrant, which was that the warrant was effectively directed towards the respondent's conduct in fleeing from the pre-trial investigation, rather than the allegations underlying that investigation. In my opinion, the evidence discloses that a decision has already been made to prosecute the respondent in respect of that underlying conduct, and that the first concrete step in that process has been taken by the Lithuanian authorities. It appears from the correspondence already noted that the presence of the accused is required in order that this step can be completed and the case be forwarded for actual trial, if this is appropriate. The coercive measure ordered by the Siauliai District Court appears to be in aid of or ancillary to this process, and is not, as is argued, the underlying cause of the request for surrender. The clear purpose of the warrant and the associated coercive measure is to enable the continuance of the prosecution already initiated, rather than to address any legal consequences of the respondent's departure from Lithuania in the course of that process. The presumption mentioned in s.21A has been strengthened rather than set aside by the evidence and information offered on this application.

17. As I am otherwise satisfied of the matters set out in s. 16 of the Act, there will be an order pursuant to the provisions of s. 16(1) of the Act for the surrender of the respondent to the Republic of Lithuania, or such person as may be duly authorised by that State to receive him.

Appearances

For the applicant: Jim Benson, (instructed by the Chief State Solicitor).

For the respondent: John Kenny, (instructed by MS Solicitors).