Neutral Citation Number [2006] IEHC 242

THE HIGH COURT

Record Number: 2005 No. 58 Ext

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
ROBERT OSTROVSKIJ

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 26th day of June 2006

1. The surrender of the respondent is sought by the Lithuanian Central Authority so that he can face one charge of "rape" as set forth in the European arrest warrant issued in Vilnius on the 17th July 2005. It was endorsed by the High Court for execution on the 4th November 2005. The offence referred to is alleged to have taken place on the 29th May 2005 in Vilnius. Following that endorsement of the warrant for execution, the respondent was arrested here on the 13th December 2005 and brought before the Court as required s. 13 of the European Arrest Warrant Act, 2003, as amended ("the Act"). Thereafter he was remanded from time to time until this matter came on for hearing before this Court. During the period of remand the respondent brought an unsuccessful application for discovery of certain documentation.

2. The respondent has filed Points of Objection which consist of a number of points, several of which were not argued on this application. But those which were pursued can be dealt with under the following headings:

1. The surrender procedures set forth in the Framework Decision are incompatible with Article 34(2)(b) of the Treaty on European Union under which Framework Decisions may be adopted only for the purposes of approximation of the laws and regulations of the Member States

There is no need to spend much time on this ground of objection. It is in my view barely stateable. The argument has been that Article 34(2)(b) TEU enables the Council to adopt framework decisions "for the purpose of approximation of the laws and regulations of the Member States", leaving it to those Member States the choice of form and methods by which the intended result is achieved. Counsel has argued that Framework Decision of 13th June 2002 (2002/584/JHA) has gone further than an approximation of laws, and has introduced an entirely new procedure for the transfer of persons between member states, going so far as to set forth and prescribe the precise form of European arrest warrant to be used by member states. This for some reason still not clear to me is submitted to be *ultra vires* the Treaty on European Union, resulting in the legislation introduced here to give effect to the Framework Decision being of no effect.

Anthony Collins SC has responded to this point in perhaps more detail than it deserved, by stating that Article 34(2) TEU has clearly given the Council power to adopt framework decisions which, *inter alia*, facilitate extradition between member states. The Framework Decision at issue in this case was adopted, as is clearly stated in its opening paragraph, on the basis of Article 31(a) and (b), and Article 34(2)(b) TEU. Article 31(a) and (b) provide as follows:

> "31. Common action on judicial cooperation in criminal matters shall include:
>
> (a) facilitating and accelerating cooperation between competent ministries and judicial and equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions,
>
> (b) facilitating extradition between member states."

Article 34(2) TEU provides:

> "The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this Title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any member state or the Commission, the Council may:
>
> (a) …
>
> (b) adopt framework decisions for the purpose of approximation of the laws and regulations of the member states. Framework Decisions shall be binding upon the member states as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect."

One of the objectives of the Union as set forth in Article 29 TEU is "to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among member states in the fields of police and judicial cooperation in criminal matters……"

The adoption of the Framework Decision (2002/584/JHA) clearly comes within this objective, and within Article 34 TEU.

Recital (6) of the Framework Decision itself states:

> "(6) The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the 'cornerstone' pf judicial cooperation."

In answer to the submission by Mr McGarry that the Framework Decision goes beyond an approximation of laws, Mr Collins has referred the Court to a judgment of the Court of Justice in *United Kingdom v. Parliament & Council* [Case C-217/04]. In that case the United Kingdom had sought the annulment of a Regulation of the European Parliament and of the Council which established the European Network and Information Security Agency. The U.K argued that

Article 95 TEU under which the regulation in question was made did not extend to setting up a Community body and conferring tasks upon it, but was confined to harmonising national laws. The U.K. also argued that it was necessary to analyse whether the regulation adopted under Article 95 achieves a result which could be achieved by the simultaneous enactment of identical legislation in each member state, and if so, the regulation harmonises national law. The Court held that the establishment of a new agency came within the scope of the concept of 'approximation'. Even though the regulation in question was made under powers in Article 95 TEU, and not Article 34 TEU, it does not appear to me that any different meaning should be attached to the concept of 'approximation'. The argument of the respondent must fail. There is no need for me to go further and deal with other submissions made by Mr Collins, including that this Court has in any event no jurisdiction to declare the surrender procedures incompatible with Article 34(2) TEU on the basis asserted.

2. The application herein is not in conformity with various articles in the Framework Decision, namely Article 2(1) (as to minimum gravity of offence), Article 6 (that the issuing authority shall be the judicial authority of the issuing member state which is competent to issue a European arrest warrant by virtue of the law of that State), and Article 8 (1) (the contents of a European arrest warrant).

No argument was pursued that the offence for which the respondent is sought is not one of the required minimum gravity for the purpose of Article 2 of the Framework Decision and the Act, namely one for which the penalty is not less than 12 months imprisonment. Neither has any argument been made in relation to non-compliance with Article 8. In relation to Article 6 the point made is that while the European arrest warrant states that the judicial authority issuing the warrant is "the Prosecutor General's Office of the Republic of Lithuania, its representative who has signed the warrant is described as being the "Acting Prosecutor General" rather than the Prosecutor General. In some way it is submitted that this is a fatal flaw, since it is not signed by the Prosecutor General, but rather the "acting prosecutor general". There is nothing of merit in this argument. The acting prosecutor general is still the prosecutor general for the time during which he or she is so acting. Furthermore it is not the Prosecutor General himself/herself which is the judicial authority, but rather "the Prosecutor General's Office". This is an attempt to put forward a purely technical point, and of a type which is not open in these cases. As is frequently pointed out in these cases, the procedures under the Act and the Framework Decision are carried out on the basis of a high level of confidence between Member States, even though there are of course necessary safeguards in place so that fundamental rights are respected and observed. This Court could not for one moment, in the absence of something very concrete being put forward in that regard, consider that an Acting Prosecutor General who has signed and issued a European arrest warrant has not the entitlement to do so on behalf of the Office of the prosecutor General, under Lithuanian law. In addition of course the seal of that office is affixed to the warrant.

While not strictly coming under this point of objection, another point was made on behalf of the respondent, namely that the endorsed warrant was not the original warrant, but a faxed copy thereof. Again, there is no possible merit in such an argument given the express terms of s. 13(1) and (2) of the Act.

3. The applicant has been "guilty of delay in the performance of its legal obligations".

This point relates to the fact that a period of in excess of 90 days has passed since the respondent was arrested. It will be recalled that Article 17 (7) of the Framework Decision provides:

> *"(7) where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay. In addition, a member state which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants shall inform the Council with a view to evaluating the implementation of this Framework Decision at Member State level."*

It is submitted on behalf of the respondent that there is no evidence that the applicant has complied with this obligation, given that the 90 days expired in early March. This is put forward as a reason why this Court should not make the order under s. 16 for the surrender of the respondent.

Firstly, it is not necessary to set forth here the conclusions of the Supreme Court in the Dundon case in relation to the impact of the expiration of these time limits for the making of such an order, except to say that it is clear that the expiry does not give rise to an obligation to release the respondent. Furthermore, Denham J. in her judgment in that case referred to the role of Eurojust as follows:

> *"…The requirement that the Member State should inform Eurojust is clearly a mechanism to encourage compliance with the aspired time limits. Also, the terms of the mandatory requirement of notice to Eurojust anticipate a method of evaluation of the implementation of the Council Framework Decision."*

As referred to by Geoghegan J. in his judgment in Dundon, Eurojust is defined in the Act as meaning "*the body established ……with a view to reinforcing the fight against serious crime*".

Counsel for the respondent has submitted also that where reasons for delay are given to Eurojust, a respondent would be entitled to challenge those reasons. In my view that cannot be so, and I reject such an interpretation. The requirement placed upon the High Court in s. 16(10) and s.16(11) of the Act to direct the Central Authority to inform the issuing judicial authority and, where appropriate Eurojust in relation to delay beyond the 60 and 90 day limits and the reasons for the delay, is for reasons of supervision so that some monitoring can take place at European level of how the new arrangements for surrender are working out in different Member States. The time limits and these procedures are not such as give rise to individual rights to persons whose surrender is sought. There are other provisions within the Framework Decision and the Act which are designed to safeguard the individual rights of such persons. In this regard Geoghegan J. stated in his judgment in Dundon that "*the 60 day and 90 day time limits are with a view to internal discipline within the member states and not with a view to conferring individual rights in individual cases.*"

This ground of objection fails.

4. The warrant has not been issued for either of the purposes permitted by s. 10 of the Act and the purposes permitted by Article 1.1 of the Framework Decision, namely the arrest of a person for the purposes of "conducting a criminal prosecution or executing a custodial sentence or detention order".

The respondent submits that in this case it is clear that the purpose of seeking his surrender is not to prosecute him or execute a custodial sentence, but to question him prior to any decision being made to prosecute him. In that regard he submits that his surrender is prohibited. Counsel relies in part upon a judgment of mine in the case of Minister for Justice, Equality and Law Reform v. LG, unreported, 7th October 2005 in which, dealing with a European arrest warrant from Lithuania I noted an ambiguity in the way that the European arrest warrant in that case had been completed and that it was not clear that there was an intention to prosecute that respondent.

The respondent submits that since I had cause to doubt in that case whether there was an intention to prosecute that respondent, as opposed to simply question him and continue the investigation into the crime, the same should apply in the present case given that the same local criminal procedures are applicable.

However, each case must be dealt with on its own facts and the evidence adduced. The Court is obliged to order surrender save in exceptional circumstances, and for the most part those circumstances are clearly set forth in the Framework Decision and the Act.

In the present case there is no infelicity or ambiguity in the manner in the text of the European arrest warrant. There is no ambiguity appearing on the face of the warrant as I felt there was in the LG case referred to. Firstly it is stated clearly at the very commencement of the warrant:

> *"I, Acting Prosecutor General…… request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution."*

That paragraph cannot simply be ignored on the basis that it is merely formulaic and part of the standard text provided in the Framework Decision. To so regard it would be to cast doubt on the *bona fides* of the requesting state and that would fly in the face of the basis on which the member states have signed up to the Framework Decision, namely one of mutual trust and confidence.

At paragraph (f) of the warrant it states:

> *"[Respondent] hid from pre-trial investigation; on 21 June 2005 he was declared wanted; since then calculation of the statutory time beyond which judgment of conviction may not be brought was suspended…"*

A domestic arrest warrant was issued on the 22nd June 2005.

Section 10 of the Act requires that a decision has been made to seek the surrender of the respondent for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. In my view, given the stated aims and objectives of the Framework Decision, a wide and purposive meaning must be attributed to the term "criminal prosecution" for the purpose of s. 10 of the Act – one which nevertheless does not do violence to the plain and ordinary meaning of the words used. Criminal prosecution procedures will inevitably differ as between Member States. After all it was those very differences between the systems of criminal procedures in the various member states, and the difficulties which these differences were perceived to give rise to in the area of extradition, which gave rise in the first place to the introduction of the European arrest warrant – a mechanism which aspires to remove these difficulties and simplify and expedite the process of surrender between member states of persons wanted to face prosecution for offences alleged against them.

It will not be possible to examine minutely the procedures applicable in each requesting State. It may well be that differences in such procedures will mean that, as understood in this State, a prosecution may not have actually commenced by the time the respondent has fled the jurisdiction of the requesting state, but that the requesting state will regard the prosecution process as having commenced under its own procedures. That could have a relevance in the present case where the respondent appears to have fled prior to being arrested and actually charged. Nevertheless the prosecution process can be seen to have got under way by the investigations having been carried out subsequent to the alleged events giving rise to the alleged offence, by the prosecutor's office determining that there is among the material examined sufficient to regard the respondent as having committed a criminal offence, and by the prosecutor obtaining a warrant from the District Court in Vilnius for the arrest of the respondent who was known to have fled. It has to be borne in mind that in many Member States the relationship of the Prosecutor to the criminal court is of a different nature to that which pertains in this State. Again, that is something which the new European arrest procedures are designed to overcome.

In my view the facts as disclosed in the European arrest warrant and the accompanying documentation make it manifestly and abundantly clear that the respondent is wanted in Lithuania so that he can be prosecuted for the crime of rape, and that his return is sought so that the criminal prosecution for that offence can be conducted. It is clear for example from the "Resolution to acknowledge as suspect" dated 21st June 2005 from the District Prosecutor's Office in Vilnius City that sufficient evidence is considered to exist for that prosecution to be conducted. That document states, *inter alia*, that:

> *"Prosecutor, having examined material of the pre-trial investigation…has established the following: the case ……contains sufficient evidence that [the respondent] has committed the criminal offence…… By these acts he committed the crime under Paragraph 2 Article 150 of the Criminal Code of the Republic of Lithuania."*

On the following day the domestic arrest warrant was issued by the District Court.

It cannot be argued with any force that the requirements of s. 10 are not met in this case.

Further Issue under s. 21A – the presumption:

3. At a very late stage – in fact as this application was proceeding – a further issue was raised by the respondent, which was not specifically raised in the Points of Objection or the Further Points of Objection filed, unless one was to consider it raised in a purely general way, the latter being contrary to the purpose of ensuring that prior to the hearing of the application the applicant is aware in a meaningful way of what points of objection are being raised.

4. The issue raised is set forth in a further Point of Objection dated 31st May 2006 as follows:

> *"That the application is not brought in accordance with and/or is inconsistent with the provisions of Section 21A of the European Arrest Warrant Act 2003 (as amended by the Criminal Justice (Terrorist Offences) Act 2005)".*

5. Put more clearly the respondent contends that the presumption created by s. 21A(2) of the Act, namely that a decision has been made to prosecute the respondent for the offence specified in the European arrest warrant, is rebutted in this case given the information which is available as to the steps taken against the respondent thus far in the requesting state, and that the Court should therefore refuse surrender. It is a point linked to an extent with the earlier point under s. 10 of the Act, though not identical, and certainly not raised specifically in earlier Points of Objection.

6. Section 21A of the Act, (as inserted by section 79 of the 2005 Act) 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."*

7. Section 21A(2) of the Act provides that it shall be presumed until the contrary is proved that such a decision has been made.

8. The respondent submits that the possibility of raising the rebuttal of the presumption as a point of objection became available to him only during this hearing when certain documentation emanating from the requesting authority was disclosed to him by the Central Authority here, namely some correspondence. That may or may not be so, but nevertheless it is highly undesirable that issues should be raised at the last minute. The Court should be reluctant to permit the introduction of issues beyond those raised within the permitted time under the applicable rules, since to do so can defeat the very purpose for which rules were introduced, namely to put the applicant on notice in good time of what issues will be raised by way of objection to an order being made.

9. However in this particular case the final issue raised touches upon one of the matters about which this Court must in any event be satisfied about before making an order under s. 16 of the Act, namely that the Court is not required to refuse surrender by virtue of s. 21A of the Act. The respondent's last point touches upon this, and out of an abundance of caution I have allowed the point to be argued, particularly since Mr Collins has indicated in any event that he was in a position to respond to the point and was not therefore unreasonably prejudiced.

10. If a respondent seeks to rebut the presumption, he/she is of course free to attempt to do so by adducing the necessary evidence in that regard. But given the overall scheme and stated objectives of the Framework Decision, and therefore the Act, there is a heavy onus upon the respondent in that regard. It is insufficient to simply assert some doubt or ambiguity in this regard. Conclusive evidence is required to rebut the presumption, and to hold otherwise is to in effect reduce the presumption to a level where it can be rebutted as a matter of possibility.

11. The respondent in the present case has relied on the facts as appearing in the documentation produced to him. He has not sought to introduce expert evidence of Lithuanian law in his attempt to prove that a decision has not yet been made to charge and try the respondent with the offence referred to. No attempt has been made to demonstrate by reference to the Lithuanian Code of Criminal Procedure that procedure against the respondent is not part of the procedure of prosecution in that State. The respondent simply asserts that one interpretation of the available information is that the respondent is simply wanted for questioning in relation to what is referred to on several occasions in the translated documents as "pre-trial investigations". Mr Keane suggests that this phrase suggests that investigations are still on-going and that the respondent is sought to assist in these investigations, rather than to face charge and trial. He also refers to a copy of an e-mail communication between the Central Authority to the Lithuanian authority dated 23rd May 2006 in which a letter is sought stating that a decision has been made to charge the respondent. He refers to the fact that in spite of such a direct request being made, no such confirmation has been provided in specific terms, but rather a letter dated 26th May 2006 was sent which sets out what steps have been taken since the commission of the crime. Mr Collins on the other hand submits that nothing which has been asserted by the respondent amounts to a rebuttal of the presumption that a decision to charge and try the respondent has been made.

12. I have already referred to the contents of the Resolution dated 21st June 2005 from the District Prosecutor's Office which states that sufficient evidence is contained in the material, which has been examined, in order to establish that the respondent has committed the crime. I have read all the correspondence and documentation carefully, and am satisfied that the presumption has not been rebutted. As I have already stated, the onus on the respondent in this regard is a heavy onus, and very clear proof would be required to rebut such a presumption. To hold otherwise would be to dilute the presumption, or indeed turn it into a presumption the other way. The respondent has simply drawn attention to a possible ambiguity or lack of clarity in exactly what the position is in the requesting state. That is not proof of anything. One must also bear in mind the inevitable difficulties caused by translation into English from the Lithuanian language. Sometimes these translations are not as clear as they might be, but it is quite another thing to conclude that any lack of clarity is to result in a refusal of surrender in the face of the presumption.

13. No issue was raised by the respondent in his Points of Objection, including the Further Points of Objection, that the offence referred to in the warrant did not correspond to an offence in this State. In fact rape is one of the offences referred to in Article 2.2 of the Framework Decision which "give rise to surrender". In other words correspondence does not have to be made out. In effect it is to be presumed. Counsel did however submit that it was not clear that what is alleged against the respondent in the facts narrated in the warrant would give rise to an offence in this State. I cannot agree.

14. 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.

15. In addition the Court must be satisfied in relation to correspondence, and that the offence charged is of the required minimum gravity, namely a maximum term of imprisonment of not less than twelve months, and also as required by s. 10 of the Act that a decision has been made by the requesting authority to charge and try the respondent for the offence in question.

16. I am satisfied as to all these matters, and having considered all the points of objection raised, I am satisfied that the Court should make the order sought, and I order therefore that the respondent be committed to prison until the necessary arrangements are put in place to surrender him to a person in the requesting state who is authorised to receive him.