THE HIGH COURT

Record Number: 2006 No. 98 Ext.

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
NERIJUS KONDRATEVAS

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 14th day of December 2006

1. The applicant seeks an order for the surrender of the respondent to the Lithuanian authorities pursuant to a European arrest warrant which issued there on the 2nd August 2006.

2. The purpose of the surrender is not so that the respondent can be prosecuted and tried for the offences set forth in the warrant, but rather so that he might serve out the remainder of a sentence of imprisonment already imposed upon him there on the 27th August 2003. He received a sentence for these offences of two years and six months, and taking into account a period of pre-trial detention, the balance remaining to be served is said to be two years, four months and fifteen days.

3. According to the European arrest warrant this sentence was imposed after the respondent had absconded, although he had been present during his trial. The respondent's affidavit states that he had not been notified of the date of his trial and he was unaware that he was to be prosecuted on that date.

4. No issue is raised in relation to identification or in relation to the arrest of the respondent here on the 20th September 2006. He was duly brought before the High Court following his arrest and he was remanded on bail pending the present application.

5. Before the Court may order surrender under s. 16(l) of the Act, the Court must be satisfied about the matters set forth therein, and also, in order to comply with the provisions of s. 38(1) of the Act, that the offences for which surrender is sought, whether for the purpose of prosecution or serving a sentence imposed, correspond to offences in this jurisdiction. An issue arises in this regard from the particular facts of this case.

6. For the sake of completeness, s. 38 (1) of the Act provides as follows:

> "38. (1) Subject to subsection (2), a person shall not be surrendered to an issuing state under this Act in respect of an offence unless-
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> (a) the offence corresponds to an offence under the law of the State, and-
>
> (i) under the law of the issuing state the offence is punishable by imprisonment or detention for a maximum period of not less than 12 months, or
>
> (ii) a term of imprisonment or detention of not less than 4 months has been imposed on the person in respect of the offence in the issuing state, and the person is required under the law of the issuing state to serve all or part of that term of imprisonment,
>
> Or
>
> (b) the offence is an offence to which paragraph 2 of Article 2 of the Framework Decision applies or is an offence that consists of conduct specified in that paragraph, and under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than 3 years. "

The offences:

7. There are two offences set forth in paragraph (e) of the warrant. The second offence referred to therein is one which is ticked in the box provided in paragraph (e) as being "racketeering and extortion" and as such is one in which correspondence does not have to be verified. But the first offence is described as follows:

> "On 11 April 2000 at about 4pm in the Aleksotas' market in Kaunas [the respondent] acquired from the person identified during the investigation and, without any authority, brought home to Sparnu Street 1, Kaunas, and kept in the garage 24.6 litre of denatured ethyl alcohol, which was taken during the search on the 12 April 2000. "

8. This is stated to give rise to a misdemeanour under paragraph 3 of Article 201 of the Criminal Code of the Republic of Lithuania. Mr Naidoo on behalf of the applicant concedes that there is no offence in this jurisdiction which would be committed if the act alleged in the warrant in respect of this offence was committed in this State. I am satisfied that this is the case.

The sentence imposed on the respondent:

9. The warrant discloses that in the absence of the respondent the sentence of two years and six months was imposed together with a fine of LTL 3,750 on the 27th August 2003 and that this punishment is "the combined sentence of imprisonment imposed on him for both crimes". This phrase is underlined and highlighted in the text of the warrant. In the warrant there is no indication of any division of the period of the sentence as between the two offences. It would be normal in this State that a sentence would be imposed on each offence individually, and that the Court would indicate whether the sentences are to run concurrently or consecutively. Alternatively, one of the offences, usually the less serious one, may be "taken into account", as it is called, leaving it unpunished as such.

Clarification sought:

10. Upon receipt of the European arrest warrant by the Central Authority here, further information was sought from the Lithuanian authority as to the meaning of the sentence imposed and its relation to the two offences. That letter states in response to this request as follows:

> "Regarding the minimum gravity sentence requirements, the Ministry of Justice of the Republic of Lithuania would like to clarify that [the respondent] is requested to be transferred on the grounds of the EAW issued by the Ministry of Justice in

> order to execute the combined sentence of imprisonment imposed on him for both crimes for which he has been convicted by the judgment by the judgment of Kaunas District Court dated 8 November 2000 and by the judgment of the Jonava Region District Court of 27 August 2003. In the opinion of the Ministry of Justice of the Republic of Lithuania, the sentence of imprisonment of 2 years and 6 months imposed on [the respondent] meets the requirements of Para 1 of Article 2 of the Framework Decision. "

11. This clarification in my view, although addressing specifically minimum gravity reiterates and makes clear that a single sentence has been imposed for these two offences, and that there is no division of time in respect of each, either by reference to concurrent sentence or consecutive sentence. As pointed out by the Chief Justice, the time for clarification is before the application comes before the Court under s. 16 of the Act. The Central Authority quite properly and for the assistance of the Court has sought and obtained clarification, and the Court is satisfied that no useful purpose would be served by asking the Lithuanian authority to clarify the clarification.

12. That being so, the surrender of the respondent is sought so that he can serve one sentence of which two years and four months or thereabouts remains to be served, imposed in respect of one offence for which there is no corresponding offence in this State. This Court is not permitted to surrender a person for an offence unless satisfied that it corresponds to an offence here. This is clear from the clear meaning of s. 38 of the Act which I have set forth.

13. Since it is not possible to sever the offences by reference to a period of the sentence imposed which is applicable to the non-corresponding offence, so that surrender could be ordered so that the respondent would return to serve only a sentence for the offence in respect of which correspondence does not require verification, the Court must refuse to order surrender on this ground. The Court has made no determination in respect of any argument which may have been made by the respondent in relation to the imposition of the sentence in absentia, and the absence of an undertaking from the Lithuanian authority under s. 45 of the Act. The Lithuanian authority is of the view that in circumstances where the respondent was aware of the date on which he was required to be in Court on the 27th August 2003, non undertaking would be required, but the respondent intended to raise an issue against that contention. As I have found in the way I have, I make no finding in this regard.

14. I refuse the order sought.