

THE HIGH COURT

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

Applicant

AND

GIEDRIUS GUSTAS

Respondent

Request of the High Court for Preliminary Ruling Pursuant to Article 267 TFEU dated the 25th day of June, 2019

The following is the substantive text of the Request for Preliminary Ruling pursuant to Article 267 TFEU made by the High Court (Donnelly J.) on 25th June, 2019:

Subject Matter of the Dispute:

1. The surrender of the respondent is sought by the Republic of Lithuania ("Lithuania") pursuant to a European Arrest Warrant ("EAW"). The particulars of the EAW are as follows:

- ☐ An EAW dated 24th May, 2018 in proceedings 2018/225 EXT issued for the purpose of executing a sentence of imprisonment for a single offence of unlawfully storing, transporting, forwarding, selling or otherwise distributing "a very large narcotic or psychotropic substance". The EAW is accompanied by additional information dated 16th October, 2018; additional information dated 14th March, 2019; and additional information dated 18th March, 2018.
- ☐ The respondent is a Lithuanian national. He was detected in the Kingdom of Norway ("Norway") with around 4.6kg of methamphetamine, hidden in the exhaust pipe of the car he was driving. In Lithuania he had agreed to the proposal to deliver the drugs to Norway for a reward of €570. He transported the drug from Lithuania by driving across a number of international borders and eventually crossing into Norway from the Kingdom of Sweden. He was stopped at a fuel station five kilometres from the border.
- ☐ He was convicted and sentenced for "unlawful delivery of a very large quantity of narcotic substances" in Norway. He was sentenced to four years and six months imprisonment.
- ☐ The conviction and sentence were recognised by Lithuania. Following this, the respondent was transferred as a sentenced person from Norway to serve the remainder of his sentence of imprisonment in Lithuania. Whilst released on conditional parole subject to conditions of intense supervision, the respondent fled the issuing state. He was arrested in Ireland, the executing member state, on foot of the within European Arrest Warrant. An immediately enforceable sentence of imprisonment of one year seven months and twenty-four days remains to be served.

2. The respondent objects to his surrender on an assertion that a) only the judicial authority of the member state where he was convicted is entitled to request his surrender (his conviction being in Norway, which is a non-member state) and b) the offence of which he was convicted is an extraterritorial offence, under s. 44 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), which gives effect to Article 4.7(a) and (b) of the Framework Decision of the 13th June, 2002 on the European arrest warrant and the surrender procedures between Member States ("the Framework Decision").

3. The applicant submitted that the respondent's surrender is sought in reliance on a sentence of imprisonment recognised and duly ordered by the issuing member state, by virtue of a valid bilateral agreement. The applicant submitted that this was sufficient to bring the request for surrender within the terms of the Framework Decision. In the circumstances, the applicant submitted that an extraterritoriality prohibition on surrender does not arise on the face of the issuing state's immediately enforceable order for a sentence of imprisonment.

4. In the alternative, the applicant submitted that the description of the facts stated on the EAW demonstrate that the respondent could hypothetically be prosecuted in Ireland for the domestic offence of conspiracy to possess controlled drugs for the purpose of sale or supply. Thus, surrender is not prohibited on the basis of extraterritoriality.

5. It is within this peculiar context that the within request for a preliminary ruling is required to enable the referring Court to deliver final judgment.

Chronology:

6. The following is the chronology of relevant events:

- ☐ January, 2014: The respondent agreed with a familiar person in Lithuania to deliver drugs to Norway for a reward of €570. The respondent received methamphetamine and concealed it in the exhaust pipe of the car he was driving for this purpose.
- ☐ Proceedings in the Third State (Norway):
 - ☐ 19th January, 2014: The respondent was detected in Norway with approximately 4.6kg of methamphetamine concealed in the exhaust pipe of the car he was driving with the Lithuanian registration: "GZH699".
 - ☐ 28th November, 2014: The respondent was convicted and sentenced at Heggen and Froland District Court, Norway for the offence of "unlawful delivery of a very large quantity of narcotic substances" contrary to Article 162 of the Criminal Code of Norway.
 - ☐ 25th March, 2015: The Court of Appeal at Borgarting, Norway dismissed an appeal.

Proceedings in the Issuing State (Lithuania):

- ☐ 18th June, 2015: The judgment of the District Court of Jurbarkas Region, Lithuania recognised the 28th November, 2014 Norwegian judgment in the Republic of Lithuania, so that it was to be enforced according to the laws of Lithuania. As per the additional information received from the issuing judicial authority:
- ☐ "It was decided to enforce [the Norwegian judgment] according to the law of the Republic of Lithuania following the Agreement on recognition and enforcement of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty between the Government of the Kingdom of Norway and the Government of the Republic of Lithuania of 5 April 2011" – ratified by: "the Law of the Republic of Lithuania No. XII-800 of 20th March 2014 'On ratification of the Agreement on recognition and enforcement of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty between the Government of the Kingdom of Norway and the Government of the Republic of Lithuania'. – Regulations of Art. 2 (11) of the Law on Ratification and Art. 365 (2) of the Code of Criminal Procedure of the Republic of Lithuania."
- ☐ 19th August, 2015: An appeal of the 18th June, 2015 Jurbarkas District Court decision was dismissed at Kaunas Regional Court, Lithuania.
- ☐ 7th April, 2016: The respondent is delivered to Lithuania by the Norwegian authorities.
- ☐ 15th November, 2016: the District Court at Kaišiadorys Region, Lithuania ordered that the respondent be "released on parole from the House of Correction by placing under intensive supervision".
- ☐ 17th March, 2017: The District Court at Jurbarkas Region, Lithuania imposed an injunction on the respondent to "to continue work or register at a labour exchange and the injunction not to leave the confines of his living place without the permit of the authorities supervising the stay of penalty."
- ☐ 5th February, 2018: The District Court at Marijampolė, Chamber of Jurbarkas, Lithuania referred the respondent to serve the remaining portion of his sentence, one year seven months and twenty-four days. This was so since he had failed to fulfil the injunctions/parole conditions imposed by the 17th March, 2017 decision.
- ☐ 24th May, 2018: The EAW was issued.

Proceedings in the Executing State (Ireland):

- ☐ 16th October, 2018: Additional information provided by the issuing judicial authority.
- ☐ 5th November, 2018: The executing judicial authority makes an order for the endorsement of the EAW for execution.
- ☐ 21st January, 2019: The respondent is arrested.
- ☐ 7th February, 2019: Surrender hearing commences.
- ☐ 14th March, 2019: Additional information provided by the issuing judicial authority.
- ☐ 18th March, 2019: Additional information provided by the issuing judicial authority.
- ☐ 29th March 2019: Surrender hearing continues. Article 267 Reference for a preliminary ruling is deemed necessary.

Domestic Criminal Proceedings:

- ☐ 21st October, 2019: Anticipated expiration date for the respondent's sentence of imprisonment for domestic Misuse of Drugs Act offences in the Executing State.

The Relevant Legal Provisions:

7. Framework Decision 2002/584:

The following articles of the Framework Decision are also relevant:

Article 1:

"Definition of the European arrest warrant and obligation to execute it

- 1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.*
- 2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision."*

Article 4.7:

"Grounds for optional non-execution of the European arrest warrant

The executing judicial authority may refuse to execute the European arrest warrant: where the European arrest warrant relates to offences which:

(a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or

(b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory."

8. European Arrest Warrant Act, 2003:

The Act of 2003, which implemented the Framework Decision, provides for a prohibition on surrender on account of extraterritoriality in certain circumstances:

Section 5 provides:

"For the purposes of this Act, an offence specified in a European arrest warrant corresponds to an offence under the law of the State, where the act or omission that constitutes the offence so specified would, if committed in the State on the date on which the European arrest warrant is issued, constitute an offence under the law of the State."

Section 10(d) provides:

"Where a judicial authority in an issuing state issues a European Arrest Warrant in respect of a person –

...

(d) on whom a sentence of imprisonment or detention has been imposed in that state in respect of an offence to which the European arrest warrant relates, that person shall, subject to and in accordance with the provisions of this Act be arrested and surrendered to the issuing state."

Section 44 provides:

"A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State."

9. Convention on the Transfer of Sentenced Persons – Council of Europe, 21 March 1983.

The issuing state (Lithuania), third state (Norway) and the executing state (Ireland) are all signatories to the Convention on the Transfer of Sentenced Persons. The EAW did not expressly refer to this Convention.

The following articles are of particular relevance:

Article 2:

"General Principles:

(1) The Parties undertake to afford each other the widest measure of co-operation in respect of the transfer of sentenced persons in accordance with the provisions of this Convention.

(2) A person sentenced in the territory of a Party may be transferred to the territory of another Party, in accordance with the provisions of this Convention, in order to serve the sentence imposed on him. To that end, he may express his interest to the sentencing State or to the administering State in being transferred under this Convention.

(3) Transfer may be requested by either the sentencing State or the administering State."

Article 8:

"Effect of transfer for sentencing State

(1) The taking into charge of the sentenced person by the authorities of the administering State

shall have the effect of suspending the enforcement of the sentence in the sentencing State.

(2) The sentencing State may no longer enforce the sentence if the administering State considers enforcement of the sentence to have been completed."

Article 9:

"Effect of transfer for administering State

(1) The competent authorities of the administering State shall:

(a) continue the enforcement of the sentence immediately or through a court or administrative order, under the conditions set out in Article 10, or

(b) convert the sentence, through a judicial or administrative procedure, into a decision of that State, thereby substituting for the sanction imposed in the sentencing State a sanction prescribed by the law of the administering State for the same offence, under the conditions set out in Article 11.

(2) The administering State, if requested, shall inform the sentencing State before the transfer of the sentenced person as to which of these procedures it will follow.

(3) The enforcement of the sentence shall be governed by the law of the administering State and that State alone shall be competent to take all appropriate decisions.

(4) Any State which, according to its national law, cannot avail itself of one of the procedures referred to in paragraph 1 to enforce measures imposed in the territory of another Party on persons who for reasons of mental condition have been held not criminally responsible for the commission of the offence, and which is prepared to receive such persons for further treatment may, by way of a declaration addressed to the Secretary General of the Council of Europe, indicate the procedures it will follow in such cases."

10. Domestic Provisions Relating to the International Transfer of Sentenced Persons.

☐ Transfer of Sentenced Persons (Amendment) Act, 1997;

☐ Transfer of Execution of Sentences Act, 2005;

☐ Prisons Act, 2015;

☐ S.I. No. 659/2007 - Transfer of Execution of Sentences Act, 2005 (Designated Countries) Order, 2007.

11. The National Offence:

Section 71(1)(b) & Section 71(2)(d) of the Criminal Justice Act, 2006 as amended by Section 4(a) of the Criminal Justice (Amendment) Act, 2009:

"Offence of Conspiracy –

71(1) ... a person who conspires, whether in the State or elsewhere, with one or more persons to do an act— (a) in the State that constitutes a serious offence ... is guilty of an offence irrespective of whether such act actually takes place or not.

(2) Subsection (1) applies to a conspiracy committed outside the State if—

...

(d) the conspiracy is committed by an Irish citizen or a person ordinarily resident in the State.

..."

The Misuse of Drugs Act, 1977, as amended.

Section 15(1):

"Any person who has in his possession, whether lawfully or not, a controlled drug for the purpose of selling or otherwise supplying it to another in contravention of regulations under section 5 of this Act, shall be guilty of an offence."

Section 20(1):

"Any person who aids, abets, counsels or induces the commission in a place outside the State of an offence punishable under a corresponding law in force in that place shall be guilty of an offence."

The Criminal Justice Act, 1994, as substituted by s. 28 of the Criminal Justice (Illicit Traffic by Sea) Act, 2003.

Section 33(1):

"A person is guilty of a drug trafficking offence if the person does, on an Irish ship, a ship registered in a Convention State or a ship not registered in any country or territory, any act which, if done in the State, would constitute such an offence."

12. Relevant National Case Law:

In *Minister for Justice -v- Bailey* [2012] 4 I.R. 1 the Supreme Court of Ireland held that the interpretation of s. 44 of the Act of 2003 is guided by Article 4.7 of the Framework Decision. Fennelly J. held that Art. 4.7(b) *"applies where the offence specified in the*

warrant was committed outside the issuing member state and, under its law, the executing member state does not prosecute for the same offences." (para. 435)

Accordingly, that Court held that the second part of s. 44 of the 2003 Act, as amended, means:-

"the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State". ([2012] 4 I.R. 1 at 112 para 457, Fennelly J. and also see [2012] 4 I.R. 1 at 18 -19, para 45, Denham C.J. and 78 para 318, Hardiman J.)

Also where the offence is alleged to have been committed outside the territory of Ireland, that Court held that s. 44 must be applied on the basis of "reciprocity" and a "counter-factual" hypothesis. ([2012] 4 I.R. 1 at 18, para 45, Denham C.J., 106 para 436, Fennelly J. and 79 para 324, Hardiman J.) Fennelly J. at para 82 approved the following quotation from 'The European Arrest Warrant in Ireland' by Farrell and Hanrahan (para. 12-16, page 182, 2011) as follows:-

"In essence s. 44 prohibits surrender in circumstances where the State would not be entitled to prosecute the same offence on an extra-territorial basis. This necessarily requires the court to engage in a hypothetical exercise of considering whether, if the respondent committed the offence in a third country, he could be prosecuted for that offence within the State on the basis of his nationality or some other feature of the offence which gives rise to an extra-territorial jurisdiction. It is immediately obvious that such an exercise is far from straightforward and it will require the court to consider first whether or not the offence is in fact an extraterritorial one and second, on the assumption that it is, on what basis it might be hypothetically prosecuted in this jurisdiction."

Grounds for a Reference:

13. These proceedings present a novel point where the original sentence and conviction were ordered in a third state, but by bilateral agreement between a member state and that third state, there was recognition given to the judgment of the third state and it was decided to enforce the sentence of imprisonment in the issuing member state.

14. No relevant guiding judgment from the Court of Justice of the European Union, nor a relevant decision from any other member state on this point, has been submitted to the referring court.

15. The questions posed concern a question of interpretation of European Union law the answer to which is not clear. The request relates only to the requirements of European Union law and not to national legislation. A preliminary reference is required by the referring court.

Questions Referred for Preliminary Ruling:

A. Does the Framework Decision apply to the situation where the requested person was convicted and sentenced in a third state but by virtue of a bilateral treaty between that third state and the issuing state, the judgment in the third state was recognised in the issuing state and enforced according to the laws of the issuing state?

B. If so, in circumstances where the executing member state has applied in its national legislation the optional grounds for non-execution of the European arrest warrant set out in Article 4.1 and Article 4.7(b) of the Framework Decision, how is the executing judicial authority to make its determination as regards an offence stated to be committed in the third state, but where the surrounding circumstances of that offence display preparatory acts that took place in the issuing state?

Request to Avail of the Urgent Procedure or the Expedited Procedure:

16. This reference raises questions in an area covered by Title V of Part Three of the Treaty on the Functioning of the European Union (TFEU), i.e. judicial cooperation in criminal matters (Chapter 4).

17. The respondent is in custody in respect of these EAW proceedings. He is also in custody serving a sentence which will expire, in ordinary course, in or about 21st October, 2019. In accordance with para 33 of the Court of Justice's Recommendations in respect of the preliminary reference procedure (25th November, 2016), it can be confirmed that the answers to the questions raised herein will "be decisive as to the assessment of the respondent's legal status", and in particular it will impact on whether the respondent will be surrendered to Lithuania or released from custody at the point when a domestic sentence of imprisonment against him expires: in or around 21st October, 2019.

18. Use of the ordinary, or even the expedited, preliminary reference procedure would significantly add to the period that the respondent will spend in custody.

19. It can be noted that the respondent is in receipt of legal aid, in respect of the EAW proceedings, and that such legal aid applies also to the reference proceedings before the Court of Justice.

20. The referring Court acknowledges that it is a matter for the designated Chamber of the Court of Justice to decide on the Urgent Procedure. That decision may take into account the parties entitled to participate in the hearing conducted under the Urgent Procedure. The facts set out above demonstrate the urgent need for an early decision of the Court of Justice in this reference.

Preliminary Views of the Referring Court on the Questions Referred:

A. It is the preliminary view of the referring Court that, in a situation where the requested person was convicted and sentenced in a third state but by virtue of a bilateral treaty between that third state and the issuing state, the judgment in the third state was recognised in the issuing state and enforced according to the laws of the issuing state, an EAW may be issued by the issuing state for the execution of the custodial sentence in the issuing state in accordance with Article 1 of the Framework Decision.

B. The provisions of the Framework Decision apply in all respects to the execution of a custodial sentence, even where the original conviction and sentence was in a third state but was recognised in the issuing state and enforced according to the law of the issuing state. Where the executing member state has provided in its national legislation that surrender must be refused if the conditions set out in Article 4.1 and Article 4.7(b) are not met, the executing judicial authority is obliged to consider whether the conditions for surrender have been met. It is necessary therefore to demonstrate double criminality/correspondence of offences (where the issuing state has not indicated that this is an offence to which Article 2 paragraph 2 of the Framework Decision applies). It is also necessary to establish whether the offence is an extraterritorial offence and if so, whether the law of the executing member state permits prosecution for the same offences when committed outside its territory. For the purpose of establishing double criminality, it is

appropriate to consider whether a person transporting the particular amount of the drug described in the executing member state would be committing an offence. In respect of assessing whether an extraterritorial offence has been committed, the executing member state must also engage in a counter-factual hypothetical exercise. In this case, the act for which the sentence was imposed was committed outside the issuing state and in a third state. A counter-factual consideration would require the executing state to consider the offence as one which was committed outside the executing state in a third state. If that act by virtue of having been committed in a place other than the executing member state, does not constitute an offence in the law of the executing member state then surrender must be refused. If however, the information provided by the issuing state also establishes that preparatory acts for the commission of the offence were committed in the issuing state, a counter-factual scenario requires the executing judicial authority to consider the position as if the preparatory acts were committed in the executing member state. In those circumstances, if the executing member state does not consider the offence extraterritorial as part of the act has been committed in its jurisdiction (amounting to an offence of conspiracy under the relevant statutory provisions), the opt out provided for in Article 4.7(b) does not apply and surrender may be ordered.