

THE HIGH COURT

RECORD NUMBER 2016/66 EXT

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

MARIUS CIVINSKAS

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 11th day of June, 2020.

1. By this application the Applicant seeks an order for the surrender of the Respondent to the Republic of Lithuania pursuant to a European arrest warrant dated 28th September, 2006 ("the EAW"). The EAW was issued by Mr. Vytautas Barkauskas, Deputy Prosecutor General of the Republic of Lithuania. The EAW seeks the surrender of the Respondent to face prosecution in respect of a single offence of murder alleged to have been carried out on 3rd April, 2006, in Palanga City, Lithuania.
2. The EAW was endorsed by the High Court on 29th April, 2016, was executed by An Garda Síochána, and the Respondent was brought before the High Court on 17th May, 2019. The Respondent has been in custody since that date.
3. I am satisfied that the person before the Court is the person in respect of whom the EAW was issued. No issue was raised in this respect.
4. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the European Arrest Warrant Act 2003, as amended ("the Act of 2003"), arise for consideration in this application and the surrender of the Respondent is not prohibited for any of the reasons set forth in any of those sections.
5. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. The offence in respect of which the surrender of the Respondent is sought carries a maximum penalty of 15 years imprisonment.
6. The Respondent delivered points of objection dated 27th May, 2019, and following a change in solicitor delivered amended points of objection dated 5th July, 2019.
7. The hearing of this matter was adjourned pending the outcome of *Minister for Justice and Equality v. LISAUSKAS* [2020] IEHC 121 and was further adjourned as a result of the Covid-19 pandemic.
8. When the matter came on for hearing before the Court on 28th May, 2020, Counsel on behalf of the Respondent indicated to the Court that he had only one net issue to argue. He submitted that on foot of a report before the Court from Ms. Jelena Smirnova, a Lithuanian lawyer, that the Court could not be satisfied that the Deputy Prosecutor General was to be regarded as an issuing judicial authority for the purposes of the Act of 2003, in particular by reason of a doubt as to whether the Respondent had a right of appeal in respect of the issuing of the EAW. He submitted that on that basis an order for

surrender ought not to be made but rather the Court should seek further additional information from the Lithuanian authorities.

9. Counsel on behalf of the Applicant took the Court through the formal proofs in the matter and submitted that in light of the *Lisauskas* decision and the additional information furnished by the Lithuanian authorities in this particular case, no further request for additional information was necessary and the Court could proceed to make an order for the surrender of the Respondent.
10. By virtue of article 6 of the Council Framework Decision on the European Arrest Warrant and Surrender Procedures between Member States of 13th June, 2002, as amended ("the Framework Decision"), "*the issuing judicial 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*". Following a request for a preliminary ruling from the Irish Supreme Court, the Court of Justice of the European Union ("the CJEU") in *PF* (Case C-509/18) dated 27th May, 2019 held at para. 56 that the public prosecutor of the Republic of Lithuania is a judicial authority within the autonomous meaning of that phrase in article 6(1) of the Framework Decision, finding that public prosecutors in Lithuania enjoy the benefit of independence conferred by the constitution of the Republic of Lithuania which allows them to act free of any external influence, *inter alia*, from the executive, in exercising their functions in particular in relation to the issue of European arrest warrants. (para. 56) However, the CJEU also determined at para. 53 that in circumstances where the issuing judicial authority is not a court, "*the decision to issue such an arrest warrant and, inter alia, the proportionality of such a decision, must be capable of being the subject, in the member state, of court proceedings which meet in full the requirements inherent in effective judicial protection*". The CJEU held this could not be ascertained from the information in the case before it and stated that this was a matter for the referring court to determine.
11. In *Lisauskas*, Binchy J. had to determine whether the decision of the Prosecutor General of the Republic of Lithuania to issue a European arrest warrant and, *inter alia*, the proportionality of such a decision, was capable of being the subject, in Lithuania, of court proceedings which meet the full requirements inherent in effective judicial protection so as to render the public prosecutor as a judicial authority within the meaning of the Framework Decision. In that case, Binchy J. requested further information from the Lithuanian authorities which was duly replied to indicating that the Prosecutor General's Office only issued the European arrest warrant upon receipt of a court order for the arrest of the person in question from a pre-trial investigation judge or court. That order could be appealed to a higher court. It was further stated that by article 63 of the Code of Criminal Practice ("the CCP") of the Republic of Lithuania, actions or decisions taken by a prosecutor could be appealed to a higher prosecutor and if the higher prosecutor declined to grant the appeal that could be appealed to the pre-trial investigation judge. A report from a Lithuanian lawyer was obtained on behalf of Mr. Lisauskas, who took issue with the reply furnished by the Lithuanian authorities and stated that as the warrant had been issued by the Prosecutor General, there was no higher prosecutor to whom an appeal

could be brought and a person could not appeal directly to the pre-trial investigation judge in such circumstances. Binchy J. directed a further request for additional information from the Lithuanian authorities. In reply to that further request, the Lithuanian authorities indicated firstly that it was possible to appeal against the national arrest ruling to a higher court, and secondly that it was possible to appeal the decision of the Prosecutor General to issue a European arrest warrant to a pre-trial judge. It was further stated that as the issuing of a European arrest warrant was considered to be an action performed by a prosecutor it was open to a suspect/defendant who is the subject of the European arrest warrant, and thus a party to criminal proceedings, to appeal against the prosecutor's actions.

12. Mr. Lisauskas obtained a further report from the expert which once again took issue with the reply furnished by the Lithuanian authorities. Binchy J. requested further information from the Lithuanian authorities:-

- (i) as to whether or not the appellate court was entitled to consider whether the requirements for issuance of the European arrest warrant had been met and in particular the proportionality of issuing same;
- (ii) as the respondent was out of time for filing an appeal against the national arrest warrant, whether he was entitled to apply to the court to extend the time to file such appeal and was the success of such an application to extend the time assured; and
- (iii) whether legal aid would be available to the Respondent for the purposes of appeals.

In reply to that request the Chief Prosecutor confirmed that when examining an appeal against the issuance of a European arrest warrant, the competent court would be entitled to consider whether the requirements for issuing the warrant had been met including the requirement as to proportionality. He also confirmed that legal aid would be available for the purposes of advancing such an appeal. As regards the application to extend the time limit in which to appeal the national arrest warrant, it was not possible to forecast how a court would treat such an application and that legal aid would also be available for that appeal. The Respondent produced a further report from the Lithuanian legal expert which once again took issue with the assertion that the Respondent had the appeals open to him as set out in the reply from the Lithuanian authorities.

13. Binchy J. held that as regards the national arrest warrant, the available appeal procedures in respect of same did not meet the requirements inherent in effective judicial protection as determined by the CJEU because it was clear that the time within which to file such an appeal had long since passed and while the Respondent may apply to extend the time to appeal that decision, the outcome of that application could not be assured. However, he further held that it was clear on the information furnished by the Chief Prosecutor that it remained open to the Respondent to appeal the issuance of the EAW and that he was entitled to legal aid for that purpose and his freedom of choice as to a lawyer to represent him in any such appeal. While the Respondent's legal expert had taken issue with the

availability of such an appeal, Binchy J. pointed out that the Court had no way of reconciling such a difference of opinion and noted that it had been informed twice by the issuing state that such an appeal is available. In such circumstances, Binchy J. held that the Court could only decide the issue on the basis of the trust and confidence that it is bound to accord to the issuing state and accept what had been stated by the issuing state. He held that the decision of the CJEU in YC C-626/19, to the effect that the establishment of a separate appeal against the decision to issue a European arrest warrant taken by judicial authority other than a court, offers a sufficient guarantee of the level of judicial protection required by the Framework Decision, provided that the appellant court may carry out an assessment of compliance as to the conditions for the issue of a European arrest warrant, including the proportionality of same. As the issuing state had confirmed the availability of such an appeal, it followed that the system in Lithuania whereby a European arrest warrant issued by the Prosecutor General's Office meets the requirements inherent in effective judicial protection, at both the first level, the point at which the national arrest warrant was issued, and at the second level at which a European arrest warrant was issued, as determined by the CJEU.

14. In the present case, the same issue arises for determination. By a request for additional information pursuant to s. 20 of the Act of 2003 and dated 13th March, 2020, a copy of the *Liskauskas* case was furnished to the Prosecutor General's Office of Lithuania and it was pointed out that the Respondent's legal representatives had made the point that it was unclear whether an appeal procedure was available under s. 63 of the CCP because the EAW in question was issued eight years earlier than the European arrest warrant in the *Liskauskas* case. The additional information sought was as follows:-

1. *Accordingly, please advise if there is now an appeal available to Mr Civinskas against the issue of the EAW dated 28th September 2006.*
2. *If so, please advise as to whether there is a time limit as to the exercise of that appeal.*
3. *If there is any time limit for that appeal, may it be exercised at any time before or after surrender, if surrender is ordered.*
4. *Please advise if legal aid is available to Mr Civinskas for the purposes of such an appeal."*

The request ended by seeking information as to whether the right of appeal that is provided for by article 63 of the CCP, in so far as it entitled a person to appeal against the issue of a European arrest warrant, is exercisable in all cases regardless of the date when the European arrest warrant was issued.

15. By reply dated 18th March, 2020, the Prosecutor General's Office responded as follows:-

1. *Marius Civinskas has the right to appeal against both decisions, i.e. The Palanga District Court Ruling on his arrest dated 7 June 2006 which had substantiated the*

issue of the EAW, as well as the very EAW issue by relying on the same Articles of the Criminal Procedure Code (CPC) of the Republic of Lithuania which we had already specified in our letters in respect to Tomas Lisauskas because the Criminal Procedure Code norms entered into power as from 1 May 2003.

2 – 3. If Marius Civinskas intends to appeal against The Palanga District Court Ruling which substantiated the issue of the EAW, he ought to present his motivated "Request to Renew the Missed Term" to court by specifically indicating the reasons why the term had been missed. As for the appeal against the issue of the EAW, Article 63 of the CPC does not provide any time limits.

4. Definitely, the requested person will be provided with legal aid (defence) in both cases, no matter whether he appeals against the EAW or the Ruling. We would like to highlight that provisions of the European Parliament and Council Directive 2013/48/ES of 22/10/2013 shall also be applicable in respect to Marius Civinskas.

The right of defence concerning the suspects, the accused or the convicted persons has been embedded in Article 31 of the Constitution of the Republic of Lithuania, as well as in Article 10 of CPC. A defence-lawyer may be called up by a person himself, or may be appointed."

16. Counsel on behalf of the Respondent relied upon a report from a Lithuanian lawyer, Ms. Smirnova, dated 30th March, 2020. Ms. Smirnova disagreed with the Prosecutor's answers to questions 1, 2 and 3. In essence, she advised at para. 5.9 that the Prosecutor's decision to issue the EAW was "*close to the decision of the public prosecutor established in article 63 (4) of the CCP regarding the obligation to carry out separate pre-trial investigative actions in a different location, which in accordance to the CCP is not subject to appeal*". She was thus drawing an analogy between the issuing of the EAW and another entirely different step in the pre-trial investigative stage in order to come to the conclusion that no appeal was possible in respect of the issuing of the EAW. Counsel for the Respondent accepted that this was not a particularly strong opinion but argued that it had raised a sufficient doubt so that this Court should seek further information from the issuing state.
17. I am satisfied that the Court does not require any further additional information from the issuing judicial authority in order to determine the issue as to whether the Respondent should be surrendered pursuant to the EAW. The information provided by the Office of the Prosecutor General dated 18th March, 2020 is unambiguous as regards the Respondent's right to appeal the decision to issue the EAW and that this is not subject to any time limits. On the basis of the mutual trust and confidence underpinning the Framework Decision and the European arrest warrant procedures, I accept what is stated in the additional information dated 18th March, 2020 that the Respondent has a right to appeal against the decision to issue the EAW and that this is not subject to any time limit.
18. Accordingly, it follows that the system in Lithuania whereby this EAW was issued by the Deputy Prosecutor General meets the requirements inherent in effective judicial

protection as determined by the CJEU. That being the case, I reject the Respondent's sole objection to his surrender.

19. I am satisfied that the Respondent's surrender is not prohibited by part 3 of the Act of 2003.
20. It follows that this Court will make an order pursuant to s. 16 of the Act of 2003 for the surrender of the Respondent to the Republic of Lithuania.