

THE HIGH COURT

[2020 No. 194 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

DEIVIDAS JAROKOVAS

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 16th day of April, 2021

1. In this application the applicant seeks an order for the surrender of the respondent to the Republic of Lithuania ("Lithuania") pursuant to a European arrest warrant dated 10th March, 2020 ("the EAW"). The EAW was issued by Judge Darius Kantaravičius, of the Kaunas Regional Court, as the issuing judicial authority. The EAW seeks the surrender of the respondent to enforce a sentence of 1 year and 4 months' imprisonment imposed on 7th December, 2017, of which 1 year, 3 months and 29 days' remains to be served. The sentence was initially suspended but was subsequently activated on 23rd August, 2019.
2. The EAW was endorsed by the High Court on 18th August, 2020 and the respondent was arrested and brought before the High Court on 6th October, 2020.
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 and that the surrender of the respondent is not prohibited for the reasons set forth therein.
5. I am satisfied that the offences referred to in the EAW correspond with offences under the law of the State, namely attempted theft, criminal damage and assault/engaging in threatening abusive behaviour in a public place. No issue was taken in respect of correspondence.
6. At hearing, the respondent objected to surrender on the following grounds:-
 - (i) minimum gravity could not be established in respect of the first offence referred to in the EAW;
 - (ii) there was an unacceptable lack of clarity as to when and in what circumstances the sentence was imposed, the length of imprisonment which the respondent was required to serve and whether s. 45 of the Act of 2003 had been complied with; and
 - (iii) if surrendered, there was a real risk that the respondent's human rights would be breached by reason of prison conditions in Lithuania.
7. The solicitor for the respondent, Mr. Michael French, swore an affidavit dated 8th October, 2020 in respect of a bail hearing, in which he avers that the respondent came to Ireland

around September 2019, suffers from alcoholism and has been homeless for much of his time in this jurisdiction. He outlines his efforts to obtain an expert report from a lawyer in Lithuania. He concedes on behalf of the respondent that the respondent did receive notice of the date and place of trial in 2016 and attended same, declining the services of a lawyer. He avers that it is the respondent's understanding that he received a non-custodial sentence in respect of the offences referred to in the EAW and in so far as he was required to carry out community work, he carried out all such work. He avers that the respondent instructed him that he always attended court proceedings in response to summonses and he believed he was present on all the court dates set out in the EAW, other than the proceedings at the District Court of Kaunas on 23rd August, 2019. He avers that the respondent instructs he received no notice of that court date and that he believes the level of imprisonment was changed at that hearing. The respondent complains that it is not clear from the EAW which penalties relate to which offences. He also complains of a lack of a mechanism to appeal and the possible unavailability of legal aid to pursue an appeal.

8. In a supplemental affidavit dated 12th February, 2021, Mr. French indicates that an expert report from a lawyer in Lithuania was being finalised. In a 'second supplemental' affidavit dated 22nd February, 2021, Mr. French exhibited a report from Ms. Ingrida Botyriene dated 16th February, 2021 and a report from the European Council Committee for the Prevention of Torture ("the CPT") dated 25th June, 2019, based on a visit to Lithuania in 2018.
9. The report of Ms. Botyriene indicates that there is a system of legal aid in Lithuania, although it might be difficult to access same to challenge the issue of the EAW while remaining outside Lithuania. She indicates there is no mechanism to review or appeal the issuing of the EAW, but it is possible to submit an application to revoke the EAW. In her opinion, all possibilities of getting an alternative to imprisonment had been exhausted. The term of imprisonment had been suspended and the Court had dismissed petitions to revoke the suspension before acceding to same. In her opinion, the respondent was likely to serve his sentence at Pravieniškių Correction House. It is noteworthy that Ms. Botyriene makes no reference to conditions in that institution or in Lithuanian prisons in general.
10. The CPT report was critical of the level of inter-prisoner violence, intimidation and exploitation in Lithuanian prisons, particularly in Pravieniškės Prison and that parts of the prison were not under the full control of the administration. In many instances, prisoners had to be placed in punishment blocks for protection where conditions were generally filled to capacity.

Minimum Gravity

11. The sentence imposed is an aggregate or composite sentence in respect of three offences. Counsel for the respondent submitted that initially, a penalty of only 3 months' imprisonment had been imposed in respect of the first offence referred to in the EAW and this did not meet the minimum gravity requirement as set out in s. 38(1)(a)(ii) of the Act of 2003, in that the term of imprisonment imposed in respect of the offence must be not

less than 4 months. In this instance, the respective penalties imposed for each of the offences have been merged into a single composite sentence and so the composite penalty of 1 year and 4 months' imprisonment applies to all of the offences and it is no longer possible to unmerge the composite penalty into separate constituent elements for each offence. Thus, the first offence, and indeed every offence, referred to in the EAW is an offence in respect of which a term of imprisonment of not less than 4 months has been imposed upon the respondent. In *Minister for Justice Equality and Law Reform v. Dus* [2009] IESC 67, the Supreme Court emphasised that the minimum gravity thresholds set out in s. 38(1)(a)(i) and (ii) are to be read disjunctively. The remaining sentence to be served is in excess of 4 months' imprisonment. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. I dismiss the respondent's objection based upon minimum gravity.

Lack of Clarity

12. Counsel on behalf of the respondent submitted that there was an unacceptable lack of clarity as to when and in what circumstances the sentence was imposed and the length of imprisonment which the respondent was required to serve. He submitted that it was not possible to ascertain if s. 45 of the Act of 2003 had been complied with.
13. It should be borne in mind that the respondent accepts that he was present at every court hearing referred to in the EAW, save for the hearing on 23rd August, 2019. As regards that hearing, the Court must determine if that was a hearing resulting in a decision or sentence for the purposes of article 4a of the Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, as amended ("the Framework Decision"), or s. 45 of the Act of 2003, so that the requirements of those provisions must be met before surrender may be ordered.
14. From a perusal of the documents before the Court, I am satisfied as to the following:-
 - (a) on 7th December, 2017, the respondent was sentenced, in respect of the three offences referred to in the EAW, to a composite or aggregate term of imprisonment of 1 year and 4 months suspended for 2 years upon certain conditions;
 - (b) a number of applications to revoke the suspension of the sentence of imprisonment were brought by the probation service which were unsuccessful but additional terms were added to the conditions of suspension;
 - (c) the respondent was present for the hearings referred to above;
 - (d) eventually on 23rd August, 2019, the suspension was revoked and the term of imprisonment was activated and enforceable;
 - (e) the revocation of suspension of sentence was due to the failure of the respondent to comply with the terms and conditions of suspension and did not involve any change in the nature or length of the sentence of imprisonment initially imposed; and

- (f) the respondent was not present at the revocation hearing on 23rd August, 2019.
15. In *Ardic* (Case C-571/17 PPU), the Court of Justice of the European Union (“the CJEU”) gave a ruling in the following terms:-
- “Where a party has appeared in person in criminal proceedings that result in a judicial decision which definitively finds him guilty of an offence and, as a consequence, imposes a custodial sentence the execution of which is subsequently suspended in part, subject to certain conditions, the concept of ‘trial resulting in the decision’, as referred to in Article 4a(1) of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as not including subsequent proceedings in which that suspension is revoked on grounds of infringement of those conditions during the probationary period, provided that the revocation decision adopted at the end of those proceedings does not change the nature or the level of the sentence initially imposed.”*
16. In *Minister for Justice and Equality v. Lipinski* [2018] IESC 8, the Supreme Court had to consider whether the absence of the respondent at the hearing which led to the revocation of suspension of a sentence of imprisonment engaged the in absentia requirements of the Framework Decision. While the Supreme Court initially made a reference to the CJEU on the point, it transpired that such reference was unnecessary by virtue of the decision of the CJEU in *Ardic*. Clarke C.J., at para. 3.7 of the Supreme Court decision, held:-
- “3.7. It is clear, therefore, that a hearing at which a suspension of sentence is revoked on grounds of infringement of conditions attaching to that suspension is not considered to be part of a ‘trial resulting in the decision’ for the purposes of the Framework Decision unless the revocation decision changes ‘the nature of the level of the sentence initially imposed’. If the consequence of the revocation is to alter the sentence originally imposed then different considerations may apply.”*
17. In this instance, the suspended sentence was simply activated due to a failure to comply with the conditions of suspension of sentence, without any change to the nature or level of the sentence initially imposed. In such circumstances, the hearing on 23rd August, 2019 was not a ‘trial resulting in the decision’ for the purposes of article 4a of the Framework Decision, or s. 45 of the Act of 2003, and the requirements of those provisions do not have to be met as a pre-condition to surrender.
18. Furthermore, I am satisfied that the defence rights of the respondent were respected and were not breached.
19. I am satisfied that there is no lack of clarity as regards any relevant facts in respect of issues which this Court has to determine. I am satisfied that no injustice or prejudice has

been or will be caused to the respondent as a result of any alleged lack of clarity or particulars in the EAW.

Prison Conditions

20. By letter dated 1st March, 2021, the Court furnished the Lithuanian authority with a copy of the CPT report relied upon by the respondent and requested the name of the prison in which the respondent would be detained, information as to what improvements had been made as regards inter-prisoner violence and what steps would be taken to protect the respondent.
21. By reply from the Ministry of Justice of Lithuania dated 16th March, 2021, it is indicated that it is not possible to state the particular correctional institution where the respondent would serve his sentence. The reply sets out how the Lithuanian authorities approved an Action Plan to deal with violence in prisons. In 2018, inmates having a negative influence on other inmates, including leaders of informal prison hierarchy, their 'handymen' and drug dealers, were removed to other places of detention and isolated, which is now a continuous practice. Extra prison warders have been deployed to increase security and the risks identified by the CPT were successfully minimised. New training plans for staff have been adopted and it is now mandatory for prison guards to use portable video recorders while interacting with inmates. The reply also sets out details in respect of general prison conditions such as personal space, toilet and hygiene facilities, medical services, time out of cells and outdoor activities. The reply assured the Court that the conditions in Lithuanian prisons meet the minimal international standards and stated that the respondent will be guaranteed the protection of the European Convention on Human Rights ("the ECHR").
22. I am not satisfied that there are substantial grounds for believing that, if surrendered, there is a real risk that the respondent's fundamental rights will be breached. On foot of the said reply, I am satisfied that the Lithuanian authorities have taken significant steps to deal with the issue of inter-prisoner violence and that the respondent's right, under article 3 ECHR, not to be subjected to inhuman or degrading treatment will be respected and given effect to.
23. Further, by virtue of s. 4A of the Act of 2003, it is presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown. The Framework Decision incorporates respect for fundamental rights. I find that the presumption in s. 4A of the Act of 2003 has not been rebutted.
24. Ultimately, bearing in mind the terms of s. 37 of the Act of 2003, this Court must determine whether the respondent's surrender is incompatible with the State's obligations under the ECHR, the protocols thereto or the Constitution. I find surrender would not be incompatible with those obligations.
25. I dismiss the respondent's objection to surrender based upon conditions in Lithuanian prisons.

Conclusion

26. I am satisfied that the surrender of the respondent is not precluded by part 3 of the Act of 2003 or any provision of that Act.

27. Having dismissed the respondent's objections to surrender, it follows that this Court will make an order pursuant to s. 16(1) of the Act of 2003 for the surrender of the respondent to Lithuania.