

## THE HIGH COURT

[2016 No. 196 EXT]

[2017 No. 341 EXT]

[2017 No. 356 EXT]

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

LASZLO KRISZTIAN KUTAS

RESPONDENT

(No. 2)

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 18<sup>th</sup> day of April, 2019**

1. The respondent was the subject of four European Arrest Warrants, the three warrants referred to in the title of the proceedings, and a fourth in separate proceedings [2016 No. 195 EXT] which were withdrawn. An amended warrant in relation to the same subject matter became subject of one of the present proceedings [2017 No. 341 EXT].
2. The respondent was born in 1980, and it is alleged by the Hungarian authorities that on and after 24th July, 2012, he engaged in a form of procurement fraud whereby registration fees were obtained from a wide variety of applicants for a bogus procurement competition. He appears to have been in custody in Hungary between 7th May, 2013 and 18th December, 2013, and two of the European Arrest Warrants in question [2016 No. 196 EXT] and [2017 No. 357 EXT] are accusation warrants. The other warrant [2017 No. 341 EXT] seeks to enforce a conviction and sentence to two years' imprisonment imposed on 5th January, 2017.
3. The warrants in this case duly came before Donnelly J. in the High Court, who on 2nd November, 2018, decided to request additional information from the issuing state under s. 20(1) of the European Arrest Warrant Act 2003. That was replied to on 14th and 15th November, 2018. A further letter seeking additional information was sent on 23rd November, 2018, which was replied to on 26th November, 2018. A third letter seeking further information was sent on 14th February, 2019, which was replied to on 28th February, 2019.
4. Matters then culminated in a written judgment of Donnelly J., *Minister for Justice and Equality v. Kutas* [(No. 1)] [2019] IEHC 249 (Unreported, High Court, 29th March, 2019), in which she made an order for the respondent's surrender to the issuing State under s. 16(1) of the 2003 Act. Section 16(3) provides that such an order comes into effect fifteen days after it is made and sub-s. (3)(a) provides that surrender should take place within ten days after the order comes into effect, so therefore within 25 days after the order is made. By virtue of sub-s. (4)(c)(ii), the court when making the order for surrender must direct a number of things, but in particular: "*that the person be again brought before the High Court . . . if it appears to the Central Authority in the State that, because of circumstances beyond the control of the State or the issuing state concerned, that person will not be surrendered on the expiration referred to in sub-paragraph (i), before that expiration*". The expiration referred to there is in effect the 25-day period for surrender just referred to.
5. Sub-section (5) provides that where a person is brought back to the court pursuant to s. 16(4)(c), the court can extend the time for surrender "*if satisfied that, because of circumstances beyond the control of the State or the issuing state concerned, the person was not surrendered within the time for surrender under subsection (3A) or, as the case may be, will not be so surrendered*", or in any other case order that the person be discharged. The Minister now applies pursuant to s. 16(5) for an order extending the time for surrender in circumstances that will become apparent when I come to deal with the oral evidence. In that regard, I have been assisted by Mr. Laurence Masterson B.L. for the applicant Minister, and by Ms. Colleen Gildernew, solicitor for the respondent.
- Evidence of Garda Terry Lawlor**
6. Garda Lawlor, a member of the Garda Síochána extradition unit, gave evidence. As soon as the High Court order for surrender was made on 29th March, 2019, the Garda authorities notified Interpol straight away, who notified their counterparts in Hungary. Generally, the travel arrangements are proposed by the requesting country, and on 3rd April, 2019, the Hungarian authorities proposed such arrangements whereby officers would travel from Budapest to Dublin on 15th April, 2019 and return on 16th April, 2019, escorting the respondent. That was immediately accepted by the Irish side within about an hour of the proposal being received.
7. The Garda authorities then proceeded on the basis that that arrangement would be carried out until a somewhat strange email was received from the Hungarian authorities dated 15th April, 2019, which stated "*please be informed that we were not able to book the tickets at the date 16/04/2019 without your confirmation and this is way, we are not able to arrange the handover until 22/04/2019 due to the Easter holiday in Hungary between 19 and 22 April the fullness of the flights, so you are kindly requested to extend the deadline until 02/05/2019*". In response to that development, the Hungarian side were informed that a request for an extension of time would have to come from a judicial authority and on 17th April, 2019, a letter was transmitted from Dr. Erika Gál-Nagy, Law Enforcement Judge, Law Enforcement Department of Kecskemét Regional Court, which stated as follows "*According to information from International Law Enforcement Cooperation Centre, it is not possible already to book tickets for an airline flight which would be suitable for surrender of the convict, with regard to shortage of the time left, and to the Easter holiday. (There is no direct flight from Ireland to Hungary)*".
8. Garda Lawlor's interpretation of that last sentence was that the Hungarian authorities meant that there were no direct flights with an appropriate carrier. He certainly appeared to accept that there were direct flights, apparently with low-cost carriers. Under cross-examination by Ms. Gildernew, he accepted essentially that the Irish authorities had acted very promptly, both in informing the Hungarians when the order was made and in accepting the proposed arrangement. When the statement by the Hungarians that the Irish had not confirmed the travel arrangements was put to him, he said that "*we accepted the proposal*". He also said "*I can't attest to that*", by which it was clear that he meant that he could not account for the reasons why the Hungarians were claiming that there was a lack of agreement. Ultimately he accepted under cross-examination that it was most likely down to an oversight on the Hungarian side. He also accepted that the Hungarian authorities had not raised any issues with whether this particular respondent would be refused carriage by the low-cost airlines, inferentially being the airlines that had direct flights to Hungary. He accepted that it was plausible to say that the failure to implement the original proposal was due to oversight by the Hungarians, and that certainly is

the inference I draw from the evidence. He also accepted that no other arrangements within the existing time-limits had been discussed with the Hungarian authorities, although he noted that they would have to request permission from any third country if there was a non-direct flight route to be utilised.

### **Interpretation of s. 16(5) of the 2003 Act**

9. The discussion at the hearing essentially identified what might be three possible interpretations for the innocently compact phrase used in s. 16(5)(a), namely "*circumstances beyond the control of the State, or the issuing state concerned*". The troubling word here of course is "*or*", and the three possible interpretations that might be adopted could be summarised as follows:

- (i). To get an extension of time the Minister would have to show *force majeure* in both Ireland and the issuing State;
- (ii). All the Minister would have to show is *force majeure* in either Ireland or the issuing State, or;
- (iii). *Force majeure* in either country would be sufficient provided that it was genuinely independent of any default in the other State concerned.

10. While Mr. Masterson perhaps naturally majored on a literal interpretation of the provision, literal interpretation should not be overrated. Even a literal interpretation has to take into account not just the language used but also both the context and the purpose of the piece of legislation being interpreted. All three dimensions are inter-related. In this particular case, as appears from the long title to the 2003 Act, the object of the legislation is to give effect to Framework Decision 2002/584/JHA, and accordingly the legislation should be given a reading which upholds that purpose. That is a general principle of interpretation in any event, but one which has a particular resonance in the European context, as noted by McKechnie J. in *Minister for Justice and Equality v. Vilkas* [2018] IESC 69 (Unreported, Supreme Court, 5th December, 2018) at para. 69 onwards. At para. 74, McKechnie J., noted that there were limits to this doctrine in the sense that it should not be applied *contra legem* (see *Minister for Justice, Equality and Law Reform v. Altaravicius* [2006] 3 I.R. 148 per Murray C.J.), that is where the national legislation "*conflicts directly*" with the framework decision, per Fennelly J. in *Dundon v. Governor of Cloverhill* [2005] IESC 83 [2006] 1 I.R. 518. At para. 79 McKechnie J. indicated that the *contra legem* doctrine would arise if "*it is not reasonably possible to construe a national measure in conformity with its EU counterpart*" and at para. 80 endorsed the analysis of Advocate General Bobek in Case C-220/15 *European Commission v. Federal Republic of Germany* and Case C-441/14 *Dansk Industri, acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen* to the effect that this applies if "*the clear, unequivocal wording of a provision of a national law appears to be irreconcilable with the wording of a directive*".

11. While Mr. Masterson, naturally given the position which he found himself in this case, spent some time on the *contra legem* argument, it is clear that from those authorities and from general principles of interpretation that a *contra legem* situation would only arise if a court was unable to construe the national legislation in a European-compatible manner. That is very much an unusual situation, and certainly in the present case it is perfectly possible to interpret the 2003 Act in a manner that is compatible with the Framework Decision.

12. The particular part of the Framework Decision relevant to the present issue is art. 23(3), which provides that "*If the surrender of the requested person within the period laid down in paragraph 2 is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed*". The requirement in the Framework Decision that the *force majeure* situation is beyond the control of "*any*" of the Member States supports an interpretation that it is insufficient that one Member State is unable to effect a surrender, if the other Member State has options and choices in that regard.

13. That brings us essentially to the third of the three possible interpretations to which I referred. As regards the interpretation that it is sufficient that either Member State have a problem, that would not be an interpretation that conforms with art. 23(3). As regards the argument that both Member States have to suffer from *force majeure*, the situation is slightly subtler because of the fact that if one Member State genuinely has a *force majeure* problem, that in and of itself creates a *force majeure* problem for the other Member State. Therefore, the interpretation of s. 16(5) that is most compatible with art. 23(3) and which makes sense in any event is that the concept of circumstances beyond the control of the State or the issuing State means that one or other of those States has a genuine *force majeure* problem that is independent of any default by the other State concerned. If either State has such a problem then that *ipso facto* creates a *force majeure* situation for the other Member State, but that situation could not be satisfied if one Member State has a problem which is essentially down to its own default or oversight. While that in a sense creates a *force majeure* problem for the other State, it is not a *force majeure* problem that is independent of any default by the first State.

14. An interpretation along those lines is consistent with what the CJEU said in its judgment in Case C-640/15 *Minister for Justice and Equality v. Tomas Vilkas*, 25th January, 2017, at para. 52 where the court said, having regard to the text of the Framework Decision in a number of different languages, that "*These various factors contribute to demonstrating that the use in various language versions of that... concept does not indicate that the EU legislature intended to make the rule set out in the first sentence of Article 23(3) of the Framework Decision applicable to situations other than those where the surrender of the requested person proves impossible by reason of a case of force majeure in on or other of the Member States*".

15. While Mr. Masterson interprets that as meaning that *force majeure* in any one country is concerned, it is clear to me that in context what that means is *force majeure* in one country that is independent of default in the other relevant Member State. It certainly would not be in accordance with the purpose and object of the Framework Decision or indeed the language of art. 23(3) to say that if the issuing state was in default, the necessary consequence of *force majeure* for the receiving state was a sufficient basis for an extension of time.

### **Application of the law to the facts of the present case**

16. Based on the evidence of Garda Lawlor, I accept that the Irish authorities have acted properly and promptly at all times, and indeed Ms. Gildernew accepted in submissions that the Irish side did everything possible to give effect to the legislation.

17. As regards whether the Hungarian side found themselves in a situation that complied with the requirements of *force majeure*, there are a number of difficulties in that regard:

- (i). First of all, the original basis for not giving effect to the agreed arrangements was a statement or inference, depending on how one wants to read it, that the Irish authorities had not confirmed the travel arrangements, and I find as a fact that that is simply incorrect.
- (ii). Secondly, the statement in the request from the relevant judicial authority in Hungary to the effect that there are no

direct flights is problematic, and again having regard to Garda Lawlor's very helpful evidence, which had to be both diplomatic and candid, I find as a fact that that statement is also incorrect.

(iii). Indeed in fairness to Mr. Masterson he was also quite candid in saying that the excuses by the Hungarian authorities were "scant" and "bare", particularly when put against the definition of *force majeure* as set out in para. 45 of McKechnie J.'s judgment in *Minister for Justice v. Skiba* [2018] IESC 68 (Unreported, Supreme Court, 5th December, 2018), which requires the circumstances to be abnormal, unforeseeable and extraneous to the party by whom they are pleaded and that it must not have been possible to avoid the consequences of the *force majeure* in spite of the exercise of all due care. That is not the case here.

18. While the current situation does amount to *force majeure* from the Irish perspective, that is insufficient and I find on the facts here that the circumstances are not such as to comply with that definition as far as the Hungarian authorities are concerned. The fact that the relevant Hungarian judicial authority has issued a document which on its face asserts factors outside the control of the authorities of that country, while naturally relied on by Mr. Masterson, is not in itself sufficient, and the court must assess whether the definition is complied with in the evidence that arises in any given case. I am far from saying that further information from the Hungarians might have given rise to a different result. That does not seem very likely, but as it happens there was no suggestion that I should exercise the power under s. 20 of the 2003 Act to seek such further information, so I do not need to consider that.

#### **Order**

19. While, as I say, I have been greatly assisted by Garda Lawlor's evidence, which very skilfully walked the tightrope between diplomacy given the international context on one hand and a candid exposition of all relevant matters on the other, while Mr. Masterson on behalf of the Minister put forward every argument that possibly could have been put forward, and indeed while the Minister very properly has made the application on foot of the request from the Hungarian judicial authorities, it appears that the only possible order here is pursuant to s. 16(5)(b) of the 2003 Act for discharge of the respondent.

20. The only question arising in relation to that order is the question of timing. Essentially, I am not satisfied that because of circumstances beyond the control of the State or the issuing state concerned in the sense in which that expression is used in s. 16(5)(a) that the respondent will not be surrendered within the time already fixed. The statute then requires me to make an order under s. 16(5)(b) that the respondent be discharged. On the face of it, one would assume that that discharge would occur at the end of the ten-day period, but subject to hearing the parties' legal representatives on that point, I will refuse the application.

#### **Postscript – date of discharge and s. 20**

21. On the issue of the date of discharge it is agreed that the order will state that the respondent be discharged at midnight on 22nd April, 2019 and obviously that only applies if he is not duly surrendered in the meantime.

22. Mr. Masterson also now (for the first time) suggests that I could apply s. 20 of my own motion at this stage. Even leaving aside for a moment the somewhat late stage in the process at which that question has been put forward, there is not really anything to suggest that a request for further information would provide any fundamentally different picture, so I am not inclined to operate that section anyway simply because it does not appear very likely from what I have at the moment that it would really change anything, and generally it doesn't appear too much to ask the issuing state to organise a flight in the time remaining. So for those reasons I am not going to take up the suggestion of operating s. 20.