

THE HIGH COURT

[2021] IEHC 90
[2020 No. 200 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

MINDAUGAS MARKAUSKAS

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 8th day of February, 2021

1. By an application pursuant to the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), the applicant seeks an order for the surrender of the respondent to the Republic of Lithuania ("Lithuania") on foot of a European arrest warrant dated 10th September, 2019 ("the EAW"), issued by Mr. Tomas Krušna, Chief Prosecutor of the Office of the Prosecutor General of the Republic of Lithuania ("the Prosecutor General's Office") as the issuing judicial authority. The surrender of the respondent is sought to prosecute him in respect of two alleged theft-type offences in 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 8th September, 2020.
3. I am satisfied that the person before the Court is the person in respect of whom the EAW was issued and no issue was taken in respect of this.
4. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the Act of 2003 arise and that the surrender of the respondent is not prohibited for the reasons set forth therein. No issue was taken in respect of those sections.
5. I am satisfied that the minimum gravity requirements as set out in the Act of 2003 are met as the offences in question carry maximum terms of imprisonment of 6 years and 3 years, respectively.
6. At part E of the EAW, details of the alleged offences, including the extent of the respondent's involvement in same, are set out. I am satisfied correspondence has been established between the offences referred to in the EAW and the offence under the law of the State of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. No issue was taken in respect of correspondence.
7. The respondent delivered a notice of objection to surrender dated 21st September, 2020, and an amended notice dated 7th November, 2020. At hearing, counsel for the respondent indicated that only one point of objection was being pursued, viz. that surrender is precluded by reason of s. 37 of the Act of 2003, as it would be in breach of the State's obligations under the European Convention on Human Rights ("the ECHR"), and in particular article 3 thereof due to prison conditions in Lithuania.
8. The respondent's solicitor, Mr. Tony Hughes, swore an affidavit dated 7th November, 2020, setting out the respondent's past and present circumstances and that the

respondent had spent much time in prison in Lithuania and found the conditions to be very poor. It was stated that the respondent had contracted HIV while in Alytus prison in Lithuania in the early 2000s and that when last detained in that prison in 2019, he had to share a cell of approximately 40m² with up to 15 other inmates. It was also alleged that the respondent's medication and personal hygiene needs had not been adequately met. The respondent alleged that he had experienced a lot of violence in the Lithuanian prison system. Mr. Hughes' affidavit exhibited a report dated 25th June, 2019 from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT"), based on a visit to Lithuania from 20th April, 2018 to 27th April, 2018. The report was critical of conditions in the Lithuanian prison system and particularly critical of Alytus prison regarding personal space, inter-prisoner violence and use of excessive force in dealing with such violence. The CPT did however acknowledge the reconstruction and refurbishment of prisons programme undertaken by Lithuania and an improvement in mental healthcare provision. The Court was also provided with the response of the Lithuanian Government to the report which emphasised, *inter alia*, the ongoing programme of construction and reconstruction of prisons (including Alytus) with higher standards of living space, additional training for staff as regards the treatment of inmates and measures for dealing with inter-prisoner violence.

9. In *Minister for Justice and Equality v. Pal* [2020] IEHC 143, McDermott J. carried out a review of the relevant authorities from which the following non-exhaustive list of principles emerges:-
- (a) the cornerstone of the Framework Decision is that Member States, save in exceptional circumstances, are required to execute any European arrest warrant on the basis of the principles of mutual recognition and mutual trust;
 - (b) a refusal to execute a European arrest warrant is intended to be an exception;
 - (c) one of the exceptions arises when there is a real or substantial risk of inhuman or degrading treatment contrary to article 3 ECHR or article 4 of the Charter of Fundamental Rights of the European Union ("the Charter");
 - (d) the prohibition of surrender where there is a real or substantial risk of inhuman or degrading treatment is mandatory. The objectives of the Council Framework Decision dated 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States ("the Framework Decision") cannot defeat an established risk of ill-treatment;
 - (e) the burden rests upon a respondent to adduce evidence capable of proving that there are substantial/reasonable grounds for believing that if he or she were returned to the requesting country, he or she will be exposed to a real risk of being subjected to treatment contrary to article 3 ECHR;
 - (f) the threshold which a respondent must meet in order to prevent extradition is not a low one. There is a default presumption that the requesting country will act in good

faith and will respect the requested person's fundamental rights. Whilst the presumption can be rebutted, such a conclusion will not be reached lightly;

- (g) in examining whether there is a real risk, the Court should consider all of the material before it and, if necessary, material obtained of its own motion;
- (h) the Court may attach importance to reports of independent international human rights organisations or reports from government sources;
- (i) the relevant time to consider the conditions in the requesting state is at the time of the hearing;
- (j) when the personal space available to a detainee falls below 3m² of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of article 3 ECHR arises. The burden of proof is then on the issuing state to rebut the presumption by demonstrating that there are factors capable of adequately compensating for the scarce allocation of personal space, and this presumption will normally be capable of being rebutted only if the following factors are cumulatively met:-
 - (i) the reductions in the required minimum personal space of 3m² are short, occasional and minor;
 - (ii) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities; and
 - (iii) the detainee is confined to what is, when viewed generally, an appropriate detention facility, and there are no aggravating aspects of the conditions of his or her detention;
- (k) a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of confinement in the issuing Member State cannot lead, in itself, to a refusal to execute a European arrest warrant. Whenever the existence of such a risk is identified, it is then necessary for the executing judicial authority to make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk. The executing judicial authority should request of the issuing Member State all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained;
- (l) an assurance provided by the competent authorities of the issuing state that, irrespective of where he is detained, the person will not suffer inhuman or degrading treatment is something which the executing state cannot disregard and the executing judicial authority, in view of the mutual trust which must exist between the judicial authorities of the Member States on which the European arrest warrant system is based, must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of article 3 ECHR or article 4 of the Charter; and

- (m) it is only in exceptional circumstances, and on the basis of precise information, that the executing judicial authority can find that, notwithstanding such an assurance, there is a real risk of the person concerned being subjected to inhuman or degrading treatment because of the conditions of that person's detention in the issuing member states.
10. The Court sought additional information from the issuing judicial authority as regards the conditions that the respondent would face if detained pending trial or subsequent to trial. By cover of letter dated 4th December, 2020, the issuing judicial authority enclosed a letter from the Lithuanian Prison Department dated 1st December, 2020. It was indicated that it was not possible to say precisely where the respondent would be held if detained. It pointed out that a law passed in 2020 required remand prisoners to have a minimum area per person of 3.6m² and the letter set out the relevant standards for other aspects of conditions such as cell conditions, sanitary facilities, food, healthcare, etc. The letter also set out in detail the system for dealing with violence in prisons. The letter concluded:-
- "The Prison Department would like to note that in all facilities of deprivation of liberty, the provisions of Article 3 of the Convention are followed, thus ensuring that no inmate is tortured or subjected to inhuman or degrading treatment or punishment."*
11. In order to clarify any ambiguity, the Court sought, *inter alia*, an assurance from the issuing judicial authority that during any period of detention, the respondent would be provided with a minimum living space of 3m². By reply dated 11th December, 2020, it was confirmed that, if detained, the respondent would be afforded a minimum personal space of 3m².
12. Applying the relevant principles and taking all of the information before the Court into account, I find that the respondent has failed to establish by way of cogent evidence a real risk that, if surrendered, he will be subjected to inhuman or degrading treatment so as to constitute a breach of article 3 ECHR, justifying a refusal of surrender. I note the additional information furnished by the issuing state as to the minimum individual floor space of 3m² to be afforded to the respondent if detained. However, I do not reach my finding on this simple mathematical calculation of floor space alone, but rather I have also considered the other circumstances and conditions pertaining to any likely detention of the respondent as set out in the various pieces of additional information provided. I accept the information provided by the issuing state on the basis of the mutual trust and confidence between Member States which underpins the Framework Decision and also because it is more up to date. I dismiss the respondent's objection to surrender based on s. 37 of the Act of 2003.
13. I am satisfied that surrender of the respondent is not precluded by part 3 of the Act of 2003.

14. Having dismissed the respondent's sole objection, 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.