

**THE HIGH COURT**

[2022] IEHC 118  
[2014 No. 123 EXT.]

**BETWEEN**

**MINISTER FOR JUSTICE AND EQUALITY**

**APPLICANT**

**AND**

**DARIUS MUSINSKAS**

**RESPONDENT**

**JUDGMENT of Ms. Justice Caroline Biggs delivered on the 21st day of February, 2022**

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 the 19th of May 2014 ("the EAW"). The EAW was issued by Darius Raulusaitis, Deputy Prosecutor General, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to prosecute him in respect of alleged human trafficking -type offences.
3. The EAW was endorsed by the High Court on the 24th of June 2014 and the respondent was arrested and brought before the High Court on the 25th of November 2021 on foot of same.
4. I am satisfied that the person before the court, the respondent, is the person in respect of whom the EAW was issued. No issue was raised in that regard.
5. I am satisfied that none of the matters referred to in ss.22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), arise for consideration in this application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections.
6. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. The offence in respect of which surrender of the respondent is sought carries a maximum penalty in excess of twelve months' imprisonment.
7. Section 38(1)(b) of the Act of 2003 provides that it is not necessary for the applicant to establish correspondence between the offences to which the EAW relates and offences under the law of the State. Where the offences referred to in the EAW are offences to which Article 2.2 of the 2002/584/JHA Council Framework Decision of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States as amended by Council Framework Decision 2009/299/JHA of 26th February 2009 ("the Framework Decision") applies and where the offences carry a maximum penalty in the issuing state of at least three years' imprisonment. In this instance, the issuing judicial authority has certified that the offences referred to in the EAW are offences to which Article 2.2 of the Framework Decision applies, that same are punishable by a maximum penalty of at least three years' imprisonment and has indicated the appropriate box for "human trafficking". There is no manifest error or ambiguity in respect of the aforesaid certification such as would justify this court in looking beyond same. In any case, the

court is satisfied that the candidate offence in this jurisdiction is the trafficking of persons other than children and contrary to s. 4 of the Criminal Law (Human Trafficking) Act 2008, as amended.

8. As surrender is sought to prosecute the respondent, no issue arises under s. 45 of the Act of 2003.
9. The respondent objected to surrender on the following grounds:
  1. He submits that his surrender is prohibited under the Act of 2003 by virtue of s. 37 on the grounds of the breach of his Constitutional and/or Convention and/or Charter rights, on the basis that he has been subjected to a punishment without trial and, although no conviction has been recorded against him, his surrender is requested in order to give effect to "an order to impose detention as the measure of coercion" and/or on the basis of the undue delay in the execution of the warrant and the cumulative effect upon the respondent's personal and family rights.
  2. The respondent's surrender is prohibited under s. 38 of the Act of 2003 due to the absence of corresponding offence in this jurisdiction and in circumstances where the "ticking of the box" or other demarcation of "trafficking in human beings" in the body of the warrant is either a manifest error or is in breach of the mutual trust and confidence that is to be expected, either in light of the fact the allegation appears to concern an alleged inchoate crime in the nature of either a conspiracy or an attempt, or otherwise.
  3. The surrender of the respondent is prohibited under s. 21A of the Act of 2003 in circumstances where the relevant EAW issued in the Republic of Lithuania in respect the respondent who has not been convicted of the offence specified therein and where a decision has not been made to charge and try him for that offence. He is merely suspected of the offence and it is contended that he has hidden from pre-trial investigation.
10. At an early stage of the proceedings, a number of s. 20 requests were sent to the issuing judicial authority and a number of responses were received. In light of same, and at the oral hearing of the 11th of February 2022, counsel for the respondent confirmed that points 1 & 2 of the notice of objection were no longer at issue. The only point of objection being relied upon by the respondent is that his surrender is precluded by s. 21A of the 2003 Act.
11. As regards the s.21A objection, the respondent's solicitor swore an affidavit dated the 24th of January 2022 and exhibited therein a report from a Lithuanian Lawyer, Austra Deluyte. In her report dated the 18th of January 2022, Ms Austra Deluyte stated as follows:
  - "1. The European Arrest Warrant for the surrender of Darius Musinskas to the Republic of Lithuania dated 19 May 2014 (further referred to as the 'EAW') was issued by

then Lithuanian Deputy Prosecutor General Darius Raulusaitis. In accordance the Lithuanian Republic Code of Criminal Procedure Article 69, in cases where a person is not convicted but the prosecution has started, an EAW for that person is issued by the Lithuanian Prosecutor General's Office. Thus, in the case of Mr Musinskas, the EAW was issued exclusively by the prosecutor and none of the judiciary of the Republic of Lithuania neither approved nor carried out any control or review of the issue of the EAW.

2. In cases when a court makes an order for the arrest of a person suspected of having committed a criminal offence and this person is hiding or cannot be found because of other reasons, Prosecutor General's Office of the Republic of Lithuania, upon the receipt of the court order to arrest the person, issues a European Arrest Warrant. In the current case, on 14th May 2014 District Court of Ignalina region made an order to arrest Mr Musinskas. On the basis of this order the EAW was issued.
3. Evaluating the information contained in the EAW, there is no court judgment in respect of Mr Musinskas fault. In the present case, Mr Musinskas is only suspected of having committed a crime listed in the EAW, however the Court has not yet found that Mr Musinskas committed the alleged offense. A decision to charge and try Mr Musinskas in Lithuania has not already been made, that decision depends on the outcome of a further pre-trial investigation.
4. It should be noted that in section B of the EAW there is an inaccurate information. Ruling of 14th May 2014 District Court of Ignalina region was not made in a "criminal case No. 50-9-00039-11". The Ruling of 14th May 2014 District Court of Ignalina region was made in a "pre-trial investigation case No. 50-9-00039-11". This formulation means that Mr Musinskas is only suspected of having committed these crimes. Mr Musinskas is not even charged with a criminal offence (Article 6 paragraph 2 of the European Convention on Human Rights; Article 31 of the Constitution of the Republic of Lithuania).
5. It should be noted that Article 31 of the Constitution of the Republic of Lithuania provides that a person shall be presumed innocent until proved guilty in accordance with law and recognised by a final judgment. Article 44 Part 6 of the Criminal Process Code provides that anyone suspected or accused of having committed a criminal offence shall be presumed innocent until proven guilty in accordance with the manner prescribed by the Criminal Procedure Code and recognised by the final judgment. Thus, in the Republic of Lithuania the guilt of a person is exclusively associated with a judgment of conviction and its coming into effect (i.e., the final judgment) and these actions have not been carried out in relation to Mr Musinskas.
6. As the case [of] Mr Musinskas is only in the stage of pre-trial investigation, we cannot talk about any Lithuania's court decision that would analyse questions of his guilt. The Ruling of 14th May 2014 District Court of Ignalina region could be associated only with the arrest (custody) of Mr Musinskas, which means that it is a

preventive measure. The aim of this ruling was only to prevent Mr Musinskas from escaping or hiding from the pre-trial investigation and possible (but not guaranteed) further criminal proceedings in the court.

7. The pre-trial investigation is the primary stage of criminal procedure – it means, that the Prosecutor believes that in the future there is a possibility to charge Mr Musinskas of committing the crime, listed in the EAW.
  8. It must be mentioned, that in accordance with the Criminal Procedure Code Article 188 Part 7 and Article 246 Part 1 if the suspected/accused cannot be at the place where the proceedings are taking place or is remanded in custody, detained or at a correctional institution, the participation of such person at the court hearing may be ensured by means of remote video and audio transmission (i.e. by a video link). Therefore, if the Honourable Court makes a decision not to surrender Mr Musinskas to the Republic of Lithuania, the prosecution of this person may be carried out by examining Mr Musinskas by means of remote transmission. So all the Criminal procedure could be carried out without Mr Musinskas extradition.”
12. In light of the above report, this court sent a s. 20 request to the issuing judicial authority on the 14th of December 2021 and asked *inter alia*:

“In his objections, Darius Musinskas has stated that it appears from this description that he is merely suspected of the offence and that a decision has not been made to charge and try him for the offence set out in the warrant.

Request 2: Please confirm whether a decision has been made to charge and to try Darius Musinskas for the offence described in the warrant.”

13. The issuing judicial authority indicated by way of a letter dated the 16th of December that the criminal procedure in Lithuania is set out as follows:

- “2. In the Republic of Lithuania the criminal procedure is defined by the Criminal Procedure Code. It was approved by the 14 March 2022 Law No. IX-785 and went into force on 1 May 2003. The said Code specifies the following procedural stages of the criminal prosecution: 1) pre-trial investigation; 2) trial procedure at the courts of first instance; 3) procedure of appeal; 4) enforcement of rulings and judgments; 5) procedure of cassation.

*Initiation and conduction of pre-trial investigation.*

A pre-trial investigation is initiated upon receipt of information about the committed criminal offence which is provided for in the Criminal Law of the Republic of Lithuania. During investigation, evidence is collected and Notification of Suspicions is served to the perpetrator. The proceedings is supervised by the prosecutor, and in certain cases the control of procedural coercive measures applied (e.g. arrest warrant) is sanctioned by the pre-trial judge. After the completion of the pre-trial investigation the case with indictment is passed to the court for trial.

*Hearing of the criminal case by the first instance court*

At this stage, the court examines all evidence collected and decides whether there are grounds to declare the person guilty of the crimes that he is charged with. Please note that the court judgment does not become valid and effective, if it is appealed against within 20 days following its passing.

*Hearing of the criminal case by the appeal instance court (it takes place only if the decision passed by the first instance court has been appealed against)*

The court examines the case considering the appeals received, and verifies whether the judgment passed by the first instance court is legitimate and grounded. Please note that as soon as the decision of the appeal court is announced, it becomes valid and effective immediately and its execution is started.

*Hearing of the criminal case following the cassation procedure in the Supreme Court of Lithuania*

Parties of the proceedings may appeal against the decisions passed by the low instance courts. However, the cassation court shall examine only the issue related to the application of law provisions, but not the merits of the case itself.

The criminal stage of the case of Mr Darius Musinskas is currently at the pre-trial stage.”

14. A further request for additional information was sent on the 14th of January 2022, in which this court requested the following information:

- “1. At the time of the issue of the European Arrest Warrant, was there a decision made to charge and try Mr Musinskas?
2. At the time the European arrest warrant issued was it the intention of the competent prosecution authority, subject to any additional information that may come to light and any other procedure that may be necessary, to put Darius Musinskas on trial for the offence the subject matter the European arrest warrant?
3. Is it now the intention of the competent prosecuting authority, subject to any additional information that may come to light any formal steps to be taken, to put Darius Musinskas on trial for the offence the subject matter of the European arrest warrant?
4. In the opinion of the competent prosecuting authority does there currently exist sufficient evidence on which Darius Musinskas can be tried for the offence the subject matter of the European arrest warrant?

5. What formal steps must be taken after the surrender (if it is ordered) before Darius Musinskas can be indicted before the Court in respect of the offence the subject matter of the European arrest warrant?

Under Irish law (Section 21A of the European Arrest Warrant Act 2003) it is not possible to surrender a person under a European Arrest Warrant if no decision has been made in the requesting state based on sufficient existing evidence to charge the person with the offences and also to put him/her on trial for the offences included in the EAW.

It is important to note that, notwithstanding that there may be at present intention to charge and try the respondent, the investigation into the commission of the offence can be continued and indeed the decision to charge and try the respondent could be changed.

However, what has been held by the Irish Supreme Court to be impermissible is for a person to be sought pursuant to an EAW for the purpose of securing sufficient evidence to charge and try the person once they are surrendered."

15. A reply was received on the 20th of January 2022 stating:

"In the Division of Pre-trial Investigation of Vilnius Frontier District of the State Border Guard Service at the Ministry of the Interior of the Republic of Lithuania it is being executed the pre-trial investigation in the criminal case no. 50-9-00039-11 under the signs of the criminal act provided for in the Article 147 Paragraph 2 of the Criminal Code of the Republic of Lithuania, i.e. for human trafficking against two victims while acting in an organized group.

The pre-trial investigation in criminal case no. 50-9-00039-11 was separated by the decision of public prosecutor on 27 October 2011 from the pre-trial investigation no. 05-1-2037-11 for an unidentified accomplice named Rimas.

Kestutis Laurynas was convicted and found guilty in the criminal case no. 05-1-2037-11 by the judgment of Siauliai Regional Court of 24 July 2013 according to the Article 147 Paragraph 2 of the Criminal Code of the Republic of Lithuania i. e. for human trafficking against two victims while acting in an organized group with Stanislovas Ruskus, whose criminal case was terminated on his death, and with an unidentified person in Ireland named Rimas.

During the execution of the pre-trial investigation in criminal case no. 50-9-00039-11 it has been established that the person named Rimas, who acted together with Kestutis Laurynas and Stanislovas Ruskus, is Darius Musinskas.

In answer to the following questions:

(To question 1) The criminal proceedings of the Republic of Lithuania do not provide for the completion of the pre-trial investigation stage and the submission of charges

(drawing up a bill of indictment) when the suspect is not participating in the proceedings and has not been personally questioned. We note that according to the laws in force in Lithuania, every person prosecuted for committing a crime must be questioned and given the opportunity to provide explanations (testimony) regarding the commission of the crimes with which he or she is suspected (accused), thus ensuring the procedural rights of the suspect.

We note that D. Musinskis was invited to come to the interrogations in Lithuania (in the status of a suspect), but did not come to them, informing through his lawyer that he did not intend to come voluntarily.

(To question 2) We confirm that during the issuance of the European Arrest Warrant sufficient substantiated data were collected to suggest that Darius Musinskis had committed a criminal offence for which he could be brought before a court to be convicted under the criminal law of the Republic of Lithuania. (To questions 3 and 4) We would like to point out that in the Republic of Lithuania the decision to issue an European Arrest Warrant is made only after a responsible assessment of the data in the case, and only if there is sufficient data and evidence.

According to the Lithuanian criminal proceedings, before issuing an EAW, the public prosecutor applies to the Lithuanian court for the arrest of a suspect, submitting the entire case material to the court.

Thus, the Lithuanian court also ruled in a specific case that sufficient data had been collected in the case prior to the issuance of the EAW to enable the person to be prosecuted for the crime for which he is being suspected.

We note that the suspect (Darius Musinskis) is currently being prosecuted in Lithuania under the laws of the Republic of Lithuania, sufficient evidence has been gathered that he has committed a criminal offence and may be tried under the laws of the Republic of Lithuania for the EAW.

We note that the prosecution of the suspect (Darius Musinskis) is currently taking place in Lithuania under the laws of the Republic of Lithuania, sufficient evidence has been gathered that he has committed a criminal offence for which he is being prosecuted and may be tried under the laws of the Republic of Lithuania for the offence specified in the EAW.

(To question 5) Please be informed that if a decision was made against D. Musinskis to transfer him to the Republic of Lithuania for the offence specified in the EAW, he would be served with the notification of suspicion of committing the offence specified in the EAW and questioned as a suspect in accordance with the Article 187 of the Code of Criminal Procedure of the Republic of Lithuania, pursuant to the Article 218 of the Code of Criminal Procedure of the Republic of Lithuania, he would be acquainted with all the material of the criminal case, and after drawing up

a bill of indictment accusing D. Musinskaskas of committing the crime specified in the EAW, the case will be transferred to the court for judicial inquiry.”

16. In light of these answers, a further letter was sent on the 27th of January 2022, indicating that this court was provided with the opinion of Ms Ausra Degulyte dated the 18th of January 2022 in which she states, *inter alia*, at para 7 that “[t]he pre-trial investigation is the primary stage of criminal procedure – it means that the Prosecutor believes that in the future there is a possibility to charge Mr Musinskaskas of committing the crime listed in the EAW “. Further information was sought in respect of the following:
  - “1. In relation to the heading of the translated European Arrest Warrant, it says, “I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal “. Can you please clarify if there are words missing?
  2. Can you please confirm that, once Darius Musinskaskas has been interviewed, regardless of his answers in interview, that an indictment will be drawn up and the case will be transferred to the court for judicial inquiry?
  3. In particular, can you confirm that if Darius Musinskaskas accepts responsibility for the offence during his interview that an indictment will be drawn up and the case will be transferred to the court for judicial inquiry?
  4. In particular, can you confirm that if Darius Musinskaskas makes no comment during his interview that an indictment will be drawn up and the case will be transferred to the court for judicial inquiry?
  5. Alternatively, can you confirm that if Darius Musinskaskas protests his innocence during his interview that an indictment will be drawn up and the case will be transferred to the court for judicial inquiry?
  6. Finally, we enclose a copy of the opinion of Ms Degulyte dated 18 January 2022 and would welcome your comment on her opinion and whether there are any aspects of it with which you disagree and, if so, why you disagree.”
17. A response was received on the 14th of February 2022 in which the issuing judicial authority stated:
  - “1. We clarify that the heading of the EAW translation into English do miss a word “prosecution”, which is indicated in the original of EAW in Lithuanian language. Apologies for that, but we believe it can be considered as a technical mistake.
  2. In reply to Questions 2, 3, 4 and 5 concerning Darius Musinskaskas position during the interview, we emphasize and confirm that regardless of what Musinskaskas answers will be during the interview, whether or not he accepts responsibility for the crime, or makes comments during the interview, or protests his innocence during the



interview, the indictment will be drawn up and the case will be referred to a court for trial.”

A further affidavit was received from Lithuanian lawyer Ausra Degulyte dated the 10th of February 2022. This response did not however in any meaningful way undermine the answers given by the issuing judicial authority.

18. The principles applying to this issue are set out in the case of *The Minister for Justice Equality and Law Reform -v- Olsson* [2011] IESC 1, [2011] 1 IR 384 (hereinafter “Olsson”), In *Olsson*, the Swedish Police were required to interview the respondent in order to formally conclude their criminal investigation, after which the final decision on whether or not to prosecute him would be taken. In those specific circumstances, the High Court ordered his surrender and indeed the Supreme Court dismissed his appeal on this and other points. In doing so, the court noted at para. 26:

*“[26] The issue here, however, is not merely one of the evidence before the court. As is apparent, s. 21A(2) of the Act of 2003, as inserted by s. 25 of the Act of 2005, contains a presumption that a decision has been made to charge the person and try him or her for the offence. Furthermore, the opening lines of the European arrest warrant itself, request that the person mentioned below “be arrested and surrendered for the purposes of conducting a criminal prosecution ...” That statement, and the further statements made in Ms. Maderud’s affidavit in relation to the practice of the Kingdom of Sweden, must also be read in the light of recital 10 of the Framework Decision which describes “[t]he mechanism of the European arrest warrant [as being] based on a high level of confidence between Member States”.*

Further at para. 33, O’Donnell J. indicated that:-

*“[33] When s. 21A speaks of “a decision” it does not describe such decision as final or irrevocable, nor can it be so interpreted in the light of the Framework Decision. The fact that a further decision might be made eventually not to proceed, would not therefore mean that the statute had not been complied with, once the relevant intention to do so existed at the time the warrant was issued. The Act of 2003 does not require any particular formality as to the decision; in fact, s. 21 focuses on (and requires proof of) the absence of one. The issuing state does not have to demonstrate a decision. A court is only to refuse to surrender a requested person when it is satisfied that no decision has been made to charge or try that person. This would be so where there is no intention to try the requested person on the charges at the time the warrant is issued. In such circumstances, the warrant could not be for the purposes of conducting a criminal prosecution.”*

At para. 36, O’Donnell J. concluded that:-

*“[33] [...] In short the intention of the Swedish prosecution authority to bring the respondent before the Swedish Court for the purpose of being charged is but a step*

*in the prosecution process. For the reasons set out above the High Court was correct to conclude that the respondent was not being sought only to be questioned as part of the investigation and that there was a decision to charge the respondent within the meaning of the Act of 2003. Certainly even without the presumption contained in s. 21A(2), the section requires clear proof. Once a court finds the European arrest warrant to be in order (and therefore on its face a request made for the purpose of prosecution or trial), then before a court can refuse to surrender a person requested under such a warrant, it must be satisfied by cogent evidence to the contrary that a decision has not been made to charge the particular person with, and try him or her for, the offence.”*

19. In deciding this issue, therefore, the court must have regard to the following
- a. S. 21A(2) of the Act of 2003 contains a presumption that a decision has been made to charge the person and try him for the offence.
  - b. The opening lines of the EAW itself, request that the person mentioned below “be arrested and surrendered for the purposes of conducting a criminal [prosecution]”. While the words “prosecution” had been omitted from the translated version of the warrant the word “prosecution” was clearly on the original warrant. Any error in this regard, in the court’s view, amounts to a typographical error of the translator and is capable of being dealt with pursuant to s. 45 ( c) of the 2003 Act.
  - c. Recital 10 of the Framework Decision which describes the mechanism of the European arrest warrant: “[It] is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.”
  - d. Part B of the EAW states that the decision on which the warrant is based is an order rendered on the 14th of May 2014 by Ignalia region District Court, i.e. an order to impose detention as the measure of coercion (criminal case No. 50-9-00039-11) and the requesting state has confirmed that the surrender is sought for a criminal prosecution.
  - e. A court is only to refuse to surrender a requested person when it is satisfied that no decision has been made to charge or try that person. This would be so where there is no intention to try the requested person on the charges at the time the warrant is issued. In such circumstances, the warrant could not be for the purposes of conducting a criminal prosecution.
  - f. There must be strong and cogent evidence to rebut the presumption in s.21A of the Act of 2003. The report from the respondent in this court’s view does not satisfy

such criteria and in fact the final report of attorney Ausra Degulyte is in agreement with the views expressed by the issuing judicial authority in all material respects.

- g. The issuing judicial authority has confirmed by way of additional information that, while a further step must be taken prior to charge, i.e. the interview of the respondent, regardless of his answers in interview, which is a mandatory process, the indictment will be drawn up and the case will be referred to a court of trial.
  - h. Counsel for the respondent in his oral submission accepts that this case is on all fours with *Olsson*.
20. I am satisfied that surrender of the respondent is not precluded by reason of s. 21A of the Act of 2003.
21. I am satisfied that surrender of the respondent is not precluded by reason of Part 3 of the Act of 2003 or another provision of that Act.
22. It, therefore, 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.