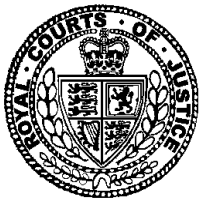

Neutral Citation Number: [2019] EWHC 569 (Admin)

Case No: CO/4544/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/03/2019

Before :

LADY JUSTICE THIRWALL
MRS JUSTICE ELISABETH LAING

- -

Between :

KRUPECKIENE	**Appellant**
- and -	
PUBLIC PROSECUTOR'S OFFICE LITHUANIA	**Respondent**

- -
- -

David Perry Q.C. and Saoirse Townshend (instructed by **Lloyds PR**) for the **Appellant**
James Stansfeld (instructed by **CPS**) for the **Respondent**

Hearing dates: 5/2/2019

- -

Approved Judgment

Mrs Justice Elisabeth Laing DBE:

Introduction

1. This is my decision after a 'rolled-up' hearing of the Appellant's application for permission to appeal, and, if permission to appeal is granted, of her appeal. This hearing was ordered by Wyn Williams J on 18 January 2018 after a renewed hearing of the Appellant's application for permission to appeal, Nicol J having refused permission to appeal on the papers on 4 December 2018.

2. The Appellant was represented by Mr Perry QC and Ms Townshend, and the Respondent by Mr Stansfeld. I am grateful to all counsel for their lucid written and oral submissions.

The main issue

3. The main issue on this appeal is whether or not the Prosecutor General's Office in Lithuania ('the PGO') is a 'judicial authority' for the purposes of section 2(2) of the Extradition Act 2003 ('the 2003 Act'), and for the purposes of the Council of the European Union Framework Decision on the European Arrest Warrant and Surrender Procedures between Member States of the European Union 2002/584/JHA ('the Framework Decision').

4. The Supreme Court of Ireland ('the SCI') has, in effect, referred that question to the Court of Justice of the European Union ('the CJEU'). That leads to a further issue, which is whether that reference affects the analysis. If it does, there is a further question, which is what the court should do in the light of that.

The facts

5. Because the issues on this hearing are narrow, I do not consider it necessary to say much about the facts. The Appellant's extradition is sought pursuant to an accusation European Arrest Warrant ('EAW') issued by Zydunas Radisuaskas, the Deputy Prosecutor of the PGO, on 28 April 2016. The EAW was certified by the National Crime Agency on 12 May 2016. She is sought in relation to an allegation that she committed four offences of fraud between 2008 and 2009. Lithuania has been designated a Category 1 territory pursuant to section 1 of the 2003 Act. Part 1 of the 2003 Act therefore applies.

6. On 14 June and 13 July 2017, there was an extradition hearing in front of District Judge Goldspring ('the DJ'). He handed down a written judgment on 27 September 2017, ordering the Appellant's extradition.

7. He held that part of the expert evidence (in a report from Arturas Gutauskas) on which the Appellant wished to rely was inadmissible, in short, because the issue it dealt with had been decided in *Assange v Swedish Prosecution Authority (Nos 1 and 2)* [2012] UKSC 22; [2012] 2 AC 471. That issue, in short, was whether a public prosecutor was a 'judicial authority' for the purposes of the Framework Decision. The Supreme Court had decided that a public prosecutor was a judicial authority. The DJ was bound by that decision. As a result, he would not be helped by the part of the expert's report which considered that issue (and came to a different conclusion). He considered the

only substantive issue which is relevant to this appeal very shortly. He decided, again, that he was bound by *Assange* to hold that the PGO was 'judicial authority' for the purposes of section 2(2) of the 2003 Act.

8. The sole ground of appeal, which I have already foreshadowed, is that the DJ erred in deciding that the PGO is a 'judicial authority' for the purposes of section 2(2) of the 2003 Act.

The Framework Decision

9. Recital (5) states that the European Union's objective of becoming an area of freedom, justice and security entails substituting for extradition between member states a system of surrender between judicial authorities. There should be a system of free movement of judicial decisions in criminal matters. Recital (6) states that the EAW is the first concrete measure in the field of criminal law. It implements the principle of mutual recognition which the Council of Europe has described as 'the cornerstone of judicial co-operation'. Recital (8) says that decisions on EAWs 'must be subject to sufficient controls, which means that a judicial authority of the member state where the requested person has been arrested will have to take a decision on his or her surrender'.

10. Article 1.1 of the Framework Decision provides that the EAW is a 'judicial decision…'. Article 6.1 is headed 'Determination of the Competent Judicial Authorities'. Article 6.1 provides that 'The issuing judicial authority shall be the judicial authority of the issuing member state which is competent to issue a [EAW] by virtue of the law of that state'. Article 6.3 requires each member state to tell the General Secretariat of the competent judicial authority under its law.

11. Article 8 makes provision about the content and form of the EAW. By article 8(1)(c) the EAW must contain 'evidence of an enforceable judgment, an arrest warrant, or any other enforceable judicial decision having the same effect, coming within the scope of articles 1 and 2'.

The approach of the Supreme Court to the Framework Decision

12. The question in *Assange* on the facts was whether the Swedish Prosecution Authority, which had issued an accusation warrant demanding the surrender of the Appellant, was a judicial authority for the purposes of the Framework Decision. But the point of law of general public importance which was certified, as Mr Stansfeld rightly points out, and as Mr Perry accepts, was a more general point about prosecutors. The Supreme Court held that the Framework Decision was not a 'treaty' as defined in section 1 of the European Communities Act 1972 ('the 1972 Act') and so outside the scope of sections 2 and 3 of the 1972 Act. Decisions of the CJEU were not binding and the only relevant principle was that there was a (strong) presumption that the 2003 Act was to be read consistently with the United Kingdom's obligations under the Framework Decision (see per Lord Mance at paragraphs 198-218, with whom the majority agreed on this issue).

13. I should say that that position has since changed, the parties agree, as a result of the United Kingdom's opt-in to Title VI of the Treaty on the Functioning of the European Union. The principle of conforming interpretation articulated in *Criminal Proceedings against Pupino* (Case C-105/03) [2006] QB 83, now applies to the courts of England and Wales when they interpret the Framework Decision. The court must interpret

'judicial authority' in section 2(2) of the 2003 Act, in so far as it is possible to do so, but not contra legem, in the light of the wording and purpose of the Framework Decision, in order to obtain the result which it pursues. I am bound by decisions of the CJEU which interpret the Framework Decision.

14. The appellant's argument in *Assange* was that a judicial authority had to be independent of the executive and of the parties. The prosecutor was and would continue to be a party in the criminal process, and so could not be a 'judicial authority'. That argument was rejected by the majority.

15. Lord Phillips gave the leading speech. He gave five reasons for holding that the Public Prosecutor was a judicial authority. The other members of the majority (Lords Walker, Brown, Kerr, and Dyson SCJ) all agreed with his fifth reason. The majority held (in short) that the role of state prosecutors in issuing (as opposed to executing) arrest warrants was traditional in many member states (see, for example per Lord Kerr at paragraphs 104 and 106) and that the Framework Decision was not intended to change that, and/or that it was legitimate to look at subsequent state practice as a guide the interpretation of 'judicial authority'. There was sufficient state practice to establish that member states had agreed that a prosecutor was a judicial authority for this purpose. It was to be presumed that 'judicial authority' in section 2(2) of the 2003 Act meant the same as 'judicial authority' in the Framework Decision. When the decision in *Assange* was made, it seems that the issuing authority for accusation EAWs was a public prosecutor in 11 member states, a judge in 17, and Ministry of Justice in two (see, for example, per Lord Dyson SCJ at paragraph 129).

16. The issue in *Bucnys v Ministry of Justice of Lithuania* [2013] UKSC 31 was whether the Ministries of Justice of Lithuania and Estonia were 'judicial authorities' for the purposes of the Framework Decision. The EAWs at issue in the three appeals were conviction warrants. Lord Mance said that the issue was whether 'judicial authority' included 'any category of persons beyond courts, judges, magistrates and (in the light of *Assange*) public prosecutors' (paragraph 34).

17. In paragraph 20, Lord Mance referred to paragraphs 208-217, 201 and 204-6 of *Assange* [2012] 2 AC 471. He acknowledged that the Framework Decision was not subject to section 3 of the 1972 Act, so that domestic courts are not obliged to treat any question about the meaning of any European instrument as a question of law to be decided in accordance with principles laid down by the CJEU. But, he said, obiter, as an international measure having direct effect at an international level, the United Kingdom must have anticipated that it would be interpreted uniformly and in accordance with European legal principles. In his view it was therefore 'appropriate to have regard to European legal principles in interpreting the Framework Decision'.

18. He did not accept, in paragraph 22, that the effect of article 6(3) of the Framework Decision was that the notification by a member state to the Secretariat of the 'competent authority under its law' was conclusive.

19. He said, in paragraph 45, that '"judicial authority" was to be interpreted in [a] teleological and contextual manner' (repeating a point he had made at paragraph 229 of *Assange*). In the context of the Framework Decision, 'the most obvious purpose of insisting on the concept was to ensure objectivity (including freedom from political or executive interference) in decision-making and to enhance confidence in a system

which was going to lead to a new level of mutual co-operation including the surrender of member states' own nationals to other member states'. He noted that there was a potential difference between the significance of the context depending on whether the judicial authority was issuing, or executing, the EAW.

20. He considered, in paragraph 46, the features which an authority must have as a minimum if it is to be seen as a judicial authority for the purposes of the Framework Decision. His conclusion was that if an EAW was issued by the Ministry of Justice, it was not issued by a judicial authority (paragraph 47). He then considered the evidence in each of the three appeals. He concluded that the EAW which had been issued by the Ministry of Justice at the instigation of the prison authorities had not been issued by a judicial authority, but that in two cases, the EAW had been issued by a judicial authority, because although it was nominally issued by Ministry of Justice, its issue had been instigated by the sentencing court (paragraphs 54, 55, and 63).

The CJEU authorities

21. In *Criminal Proceedings against Bob-Dogi* Case (C-241/15) [2016] 1 WLR 4583, paragraphs 46 and 58, the CJEU held that the phrase 'arrest warrant' in article 8(1)(c) of the Framework Decision refers to the national arrest warrant, which is to be understood as referring to a judicial decision that is distinct from the EAW.

22. The issue in *Criminal Proceedings against Kossowski* (Case C-486/18) [2016] 1 WLR 4393 was what constituted a decision finally disposing of a criminal case for the purposes of the ne bis in idem rule in article 54 of the Convention Implementing the Schengen Agreement ('CISA') read with article 50 of the Charter of Fundamental Rights. The CJEU decided that there were two facets of such a decision.

    i) Further prosecution must be definitively barred (paragraph 34) and

    ii) The decision was made after 'a determination had been made as to the merits of the case' (paragraph 42).

23. The CJEU held in that case that while a further prosecution was definitively barred under Polish law, no decision had been made on the merits, with the result that the applicant could be prosecuted in Germany. I note that in paragraph 39, the CJEU said that article 54 of CISA also applies 'where an authority responsible for administering criminal justice in the national legal system concerned, such as' the prosecutor's office (in that case) issues a decision definitively discontinuing criminal proceedings, although that decision was 'adopted without the involvement of a court and [did] not take the form of a judicial decision'. In paragraphs 48 and 49, the CJEU equated what the prosecutor had done with a 'decision to terminate proceedings adopted by the judicial authorities of a member state'.

24. *Criminal Proceedings against Poltorak* (Case C-452/16 PPU) [2017] 4 WLR 8 concerned an EAW issued by the Swedish police board with a view to executing a sentence imposed in Sweden. The Dutch court doubted whether a police board was a judicial authority for the purposes of article 6(1) of the Framework Decision. The view of the Dutch court was that a premise of the principle of mutual recognition pursuant to which the executing authority was required to execute the arrest warrant issued by the issuing judicial authority was that a judicial authority had intervened before the

execution of the EAW, for the purposes of exercising its review. The issue of an EAW by a non-judicial authority, such as a police board, did not give an assurance that there had been prior judicial approval and was not enough to justify the high level of confidence between member states. 'Judicial authority' did not include police services. The referring court in that case did, however, regard a prosecutor as a judicial authority (see paragraph 15).

25. The CJEU referred to the importance of mutual trust at paragraph 26. It held that the meaning of 'judicial authority' cannot be left to the assessment of each member state (paragraph 31). The phrase has an autonomous meaning and must be interpreted in a uniform way by member states (paragraph 32). The words are not limited to judges or courts. They may extend, more broadly, to authorities 'required to participate in administering justice in the legal system concerned' '(paragraph 33). They cannot be interpreted, however, as covering the police services of a member state (paragraph 34). The judiciary is distinct from the executive (paragraph 35). Judicial authorities 'are traditionally construed as the authorities that administer justice, unlike, inter alia, administrative authorities or police authorities, which are within the province of the executive' (paragraphs 35 and 38).

26. The CJEU observed that the surrender procedure is carried out under judicial supervision so that decisions are attended by judicial guarantees (paragraph 39). Recital (8) of the Framework Decision refers to 'sufficient controls', which means that 'a judicial authority of the member state where the requested person has been arrested has taken a decision on his surrender'. Article 6 also provides that not only that decision, but the decision on issuing the warrant must be taken by a judicial authority (paragraph 40). The principle of mutual recognition was 'founded on the premise that a judicial authority has intervened prior to the execution of the [EAW], for the purposes of exercising its review' (paragraph 44). The CJEU concluded that 'judicial authority' does not cover police services and that an EAW issued by a police service was not a 'judicial decision' (paragraph 46).

27. In *Criminal Proceedings against Őzçelik* (Case C-453/16/PPU) [2017] 4 WLR 9 an EAW was issued by a Hungarian court against a Turkish citizen who was in Holland. The EAW referred to a national arrest warrant issued by the Hungarian Police and confirmed by the public prosecutor's office (paragraph 28). The Dutch court asked the Hungarian court about the role of the public prosecutor's office, about its independence from the executive, and about the implications of a confirmation by the public prosecutor's office of a warrant issued by the police. In the light of that information, the Dutch court doubted whether the public prosecutor's office was a 'judicial authority' for the purposes of the Framework Decision and made a reference to the CJEU. At paragraph 13, the CJEU summarised the evidence from the Hungarian authorities about the role of the public prosecutor's office.

28. The CJEU reasoned that the 'arrest warrant' referred to in article 8(1)(c) is a national arrest warrant, 'which is to be understood as referring to a judicial decision that is distinct from the [EAW]' (paragraph 27). The CJEU decided, on the facts, that the decision by which the prosecutor confirmed the warrant 'must be held' to be the basis of the EAW (paragraphs 27- 29). It was apparent from the information provided by the Hungarian authorities that the confirmation of the warrant by the prosecutor was 'a legal act' by which the prosecutor verified and validated the warrant. This enabled the prosecutor 'to be assimilated with the issuer of the warrant' (paragraph 30). That led

to the question whether the decision of the prosecutor was a 'judicial decision' (paragraph 31).

29. The CJEU had held in *Poltorak* that 'judicial authority' in article 6(1) of the Framework Decision covered the authorities which administered criminal justice but not police services. That interpretation should be applied to article 8(1)(c), so as to ensure consistency (paragraph 33). The CJEU said, relying on paragraph 39 of *Kossowski*, that the public prosecutor's office was an authority in the member state responsible for administering criminal justice. That meant that its decision 'must be regarded as a judicial decision within the meaning of article 8(1)(c) of the Framework Decision' (paragraph 34). The confirmation of the national arrest warrant by the prosecutor 'provides the executing judicial authority with an assurance that the [EAW] is based on a decision which has undergone judicial approval' (paragraph 36).

30. The issue in *Criminal Proceedings against Kovalkovas* (Case C-477/16PPU) [2017] 4 WLR was whether an EAW issued by the Ministry of Justice in Lithuania against the defendant with a view to executing the remainder of a sentence imposed by a Lithuanian court was valid. The Dutch court doubted whether the warrant had been issued by a judicial authority and made a reference to the CJEU. The CJEU, referring to *Poltorak*, repeated that the words 'judicial authority' were not limited to judges and courts only. They could include authorities 'required to participate in administering justice in the legal system concerned'. But, the CJEU continued, 'judicial authority' cannot 'also be interpreted as covering an organ of the executive of a member state, such as a ministry' (paragraph 35). The judiciary must be distinguished from the executive. Judicial authorities are 'traditionally construed as the authorities that administer justice, unlike, inter alia, ministries or other government organs, which are within the province of the executive' (paragraph 36). An EAW issued by the Ministry of Justice could not be regarded as a 'judicial decision'. That reasoning was not affected by the fact that the Ministry of Justice was doing no more than to execute a judicial decision which had become legally binding (paragraph 46).

31. In *Minister of Justice and Equality v Lisauskas* [2018] IESC 42 the SCI referred four questions to CJEU. Question 1, in sum, is whether the criteria for deciding whether a public prosecutor is a judicial authority are that he is independent of the executive and is 'considered in his own legal system to administer justice'. The SCI has asked, in the alternative, what criteria apply to a decision whether a public prosecutor is a judicial authority, and whether if a criterion is that he should administer justice, or participate in administering justice, that is to be decided according to the domestic legal system, or in accordance with objective criteria, and if so, what criteria.

32. The questions were prompted by expert evidence from Mr Tokarcakas that the Lithuanian prosecutor, while independent of the executive and of the judiciary, does not, under the Constitution of the Republic of Lithuania, or according the Constitutional Court, 'administer justice'.

33. The SCI also referred questions to the CJEU about the Lűbeck Public Prosecutor's Office in *The Minister for Justice and Equality v Dunauskis* [2018] IESC 43.

The submissions

34. Mr Perry's primary position was that the court should grant permission to appeal and allow the appeal. He acknowledged that this was a bold submission when part of his argument recognised that the legal position was not clear. His fall-back position was that if the court was not persuaded that the position was clear, the court should make a reference to the CJEU, or, at the very least, stay the appeal pending the CJEU's decision on the reference in *Lisaukas*, which is due to be heard in June 2019. He accepted that if the court considered that the appeal was unarguable, the court should dismiss it.

35. He helpfully reviewed the authorities to which I have referred in some detail. It seems to me that his submissions involved, expressly, or by implication, five realistic concessions.

    i) The decision in *Assange* is not confined to the position of the Swedish the Public Prosecutor.

    ii) That decision is not undermined by the reasoning in *Bucnys*.

    iii) As a matter of domestic law, the Respondent's construction of section 2(2) is correct.

    iv) Were it not for the three recent decisions of the CJEU on which he relies (that is, *Poltorak*, *Özçelik*, and *Kovalkovas*), he would have no argument.

    v) Those cases show that a public prosecutor may be, but not necessarily is, a 'judicial authority' for the purposes of the Framework Decision.

36. His submissions had three parts.

    i) The court must be confident about the autonomous meaning of 'judicial authority'.

    ii) The three recent decisions had cast doubt on the approach of the Supreme Court in *Assange*. They suggested that a fact-specific analysis of the role of the public prosecutor is required in every case. A public prosecutor is not a judicial authority unless he is independent of the executive and 'administers justice' or 'participates in the administration of justice'.

    iii) That doubt is compounded by the reasoning of the SCI in *Lisauskas*, and, if the court were to admit it, by the evidence of Arturas Gutauskas. Both show that, under the constitution of Lithuania, and according to its Constitutional Court, the GPO, while wholly independent of the executive, does not 'administer justice'.

37. Mr Stansfeld also made three broad submissions.

    i) The question for the court was a question of domestic statutory interpretation. It was decided by *Assange*, which is still good law. He nevertheless accepted, by drawing attention to *Kirzan v Slovenská inšpekcia zivontného postredia* (Case C-416/10), that if (contrary to his argument) the court was persuaded that

what would otherwise be a binding domestic precedent was inconsistent with EU law, the court should not follow it.

ii) The domestic court has to follow the CJEU in interpreting the Framework Decision. In *Assange*, the Supreme Court considered what the CJEU would decide. It held that a public prosecutor was a judicial authority. No subsequent decision of the CJEU undermines that view. It followed that the decision of the Supreme Court was still good law. Indeed, it could be argued that, in *Őzçelik*, the CJEU held that a public prosecutor is involved in administering justice and is a judicial authority.

iii) If the DJ was wrong to exclude the expert evidence, it in fact supports the Respondent's argument that the GPO is independent, and administers justice (if that phrase is given an autonomous meaning).

Discussion

38. It seems to me, having listened to the arguments, that the dispute in this case is a narrow one. Its focus is what the CJEU has, or has not, decided, in the three recent cases. I have summarised the decisions above at some length. This enables me to consider the arguments briefly.

39. I do not consider that the decisions in *Poltorak* and *Kovalkovas* help. *Poltorak* concerned the police service, and *Kovalkovas*, a Ministry of Justice. The articulation of reasoning which prevents those bodies from being judicial authorities tells me little about the role of a public prosecutor.

40. The most important decision of the three is *Őzçelik*. The question is whether the terse reasoning of the CJEU in that case is intended to be confined to the position of the public prosecutor in Hungary, or whether the CJEU simply assumed that, as a public prosecutor, the prosecutor in that case did administer justice.

41. In my judgment the way in which the CJEU in *Őzçelik* relied on *Kossowski* is telling. There is no express reasoning in *Kossowski* which explains (other than descriptively) what the relevant part of that decision assumes, which is that the decision of the Polish prosecutor in that case was a decision by a judicial authority. It is simply asserted that the prosecutor was administering justice when he decided to terminate the criminal proceedings in that case. That suggests to me that, either, the CJEU applied no express test in *Kossowski* when it decided that the prosecutor was administering justice, or, that, if it did, the test is not a demanding one.

42. I consider that the approach in *Őzçelik* is similarly opaque, apart from the express statement, drawn from *Poltorak*, that a judicial authority cannot be a police service. It seems that the CJEU simply took *Kossowski* as authority for the proposition that a public prosecutor is a judicial authority, and that it thus applied no test in reaching the view that the public prosecutor in Hungary which had confirmed the arrest warrant was a judicial authority. That is clear to me, because the act done by the prosecutor in *Őzçelik* was different from the act done by the prosecutor in *Kossowski*.

43. My analysis is that the recent decisions of the CJEU, far from undermining the reasoning in *Assange*, support it. In short, the trend (having regard to purpose for which

the CJEU in *Őzçelik* used the reasoning in *Kossowski*) is to assume that any public prosecutor in a member state administers justice, or participates in the administration of justice, and is thus a judicial authority for the purposes of the Framework Decision.

44. I do not consider that the SCI's reference to the CJEU in *Lisauskas* casts any doubt on this analysis. In my respectful view, it is clear that 'judicial authority' has an autonomous meaning in European law. While the CJEU may well take into account what national law has to say about whether the Lithuanian prosecutor 'administers justice', I consider it vanishingly unlikely that the CJEU would treat that as decisive in its assessment. I consider it far more likely that, as hitherto, the CJEU will take a schematic approach, according to which it assumes that any public prosecutor does administer justice and/or (if different) participates in the administration of justice, and is, therefore, a judicial authority.

Conclusion

45. For these reasons, I consider that this appeal is not arguable. If my lady, Thirlwall LJ, agrees, I would therefore refuse permission to appeal. It follows that I would not consider it appropriate, either, to make a reference to the CJEU, or to stay this case pending the decision of the CJEU on the reference by the SCI in *Lisauskas*. It also follows that I would refuse any application to rely on the evidence of Mr Gutauskas. I agree with the DJ that his evidence is irrelevant, because it deals with issues which have already been decided by authorities by which this court is bound.

Thirlwall LJ: I agree.