

THE HIGH COURT

[2015 No. 266 EXT]

BETWEEN

MINISTER FOR JUSTICE & EQUALITY

APPLICANT

AND

TOMAS LISAIKAS

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 5th day of March, 2020

1. By these proceedings the applicant seeks, on behalf of the Republic of Lithuania, an order for the surrender of the respondent to that country pursuant to a European arrest warrant dated 18th April, 2014, ("the EAW"). The EAW was issued by a Mr. Darius Valys whose position is described as Prosecutor General, who issued the EAW on behalf of the Prosecutor General's Office of the Republic of Lithuania, which is named as the judicial authority which issued the warrant.
2. The EAW was endorsed by the High Court on 21st December, 2015. The respondent was arrested and brought before the Court on 21st April, 2016.
3. Points of objection were delivered on behalf of the respondent on 27th May, 2016. The first objection states that the EAW is not validly issued because the Prosecutor General, who issued the EAW, is not a valid issuing judicial authority. It is also pleaded that there was no proper judicial oversight of the issuing of the EAW.
4. Four other points of objection were also raised on behalf of the respondent. However, this objection – that the Prosecutor General is not a valid issuing judicial authority – was the only objection pursued at hearing. That hearing took place on 29th January, 2020, by which time the proceedings had given rise to judgments of the High Court (on 27th February, 2017), the Court of Appeal (on 3rd November, 2017), the Supreme Court (on 31st July, 2018) and the Court of Justice of the European Union ("CJEU") (on 27th May, 2019). The issue with which all of the judgments of all of those courts is concerned is whether or not, as a matter of law, a public prosecutor may be considered an issuing judicial authority for the purposes of issuing a European arrest warrant.
5. Before addressing that question, I will address the remaining issues, of a routine nature, about which the Court must be satisfied when considering an application under s. 16 of the European Arrest Warrant Act 2003 (as amended) (the "Act of 2003"). Firstly, I was satisfied that the person before the Court is the person to whom the EAW refers, and this was not disputed by the respondent.
6. I was further satisfied that none of the matters referred to ss. 21A, 22, 23 and 24 of the Act of 2003 arise for consideration on this application, and that the surrender of the respondent is not prohibited for any of the reasons set forth in any of those sections.
7. At para. (B) of the EAW, it is stated that the EAW is based upon an arrest warrant described as a "*ruling dated 28th May 2013 of the District Court of Druskininkai Town*" to

"replace the measures of constraint – the written pledge not to leave and the obligation to periodically register at a police station – with arrest (criminal case number 1-18-182/2014)."

8. At para. (C) of the EAW it is stated that the maximum length of the custodial sentence or detention order which may be imposed for the offence to which the warrant relates is imprisonment for a term of between two and seven years. Accordingly, minimum gravity is established for the purpose of the Act of 2003.

9. At para. (E), on p. 5 of the EAW it is stated that the warrant relates to one offence, described in the following terms:

"On 22 August 2012, at approximately 11:30pm on a cycle track between Druskininkai Bus Station and Druskininkai Tourism Centre, in Gardino Street, Druskininkai Town, Tomas Lisauskas put a knife to the left side of the neck of victim Mindaugas Salciunas, thus depriving the victim of a possibility of resistance, and seized a metal chain of white colour worth LTL 250 from the victim's neck.

Tomas Lisauskas is charged with a criminal act provided for in paragraph 2 of Article 180 of the Criminal Code of the Republic of Lithuania."

10. Article 180(2) of the Criminal Code of the Republic of Lithuania is then set out, and it provides:

"A person who commits the robbery by breaking into premises or using a weapon other than a firearm, a knife or another item specially designed to injure a person shall be punished by imprisonment for a term of up to seven years."

11. At para. (E)(I) the issuing judicial authority has ticked the offence of "organised or armed robbery". Accordingly, it is not necessary to examine the acts of the respondent described in the EAW, as comprising the offence, for correspondence with an equivalent offence in this jurisdiction.

12. On 31st July, 2018, the Supreme Court made a request to the CJEU for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union. The following questions were referred by the Supreme Court to the CJEU:

- i. Are the criteria according to which to decide whether a public prosecutor designated as an issuing judicial authority for the purposes of Art. 6(1) is a judicial authority within the autonomous meaning of that phrase in Art. 6(1) of the Framework Decision of 2002 on European arrest warrant and surrender proceedings between Member States that (1) the public prosecutor is independent from the executive and (2) considered in his own legal system to administer justice or participate in the administration of justice?
- ii. If not, what are the criteria according to which a national court should determine whether a public prosecutor who is designated as an issuing judicial authority for

the purposes of Art. 6(1) of the Framework Decision is a judicial authority for the purposes of Art. 6(1)?

- iii. Insofar as the criteria include a requirement that the public prosecutor administer justice or participate in the administration of justice is that to be determined in accordance with the status he holds in his own legal system or in accordance with certain objective criteria? If, objective criteria what are those criteria?
 - iv. Is the Public Prosecutor of the Republic of Lithuania a judicial authority within the autonomous meaning of that phrase in Art. 6(1) of the Framework Decision of 2002 on European arrest warrant and surrender proceedings between Member States?
13. The CJEU answered these questions in its decision handed down on 27th May, 2019, under the title of PF, case C-509/18. It concluded that the concept of a "*judicial authority*" within the meaning of Article 6(1) of the Framework Decision is capable of including authorities of a Member State which, although not necessarily judges or courts, participate in the administration of criminal justice in that Member State. It further concluded that an authority such as a Public Prosecutor's Office, which is competent, in criminal proceedings, to prosecute a person suspected of having committed a criminal offence so that that person may be brought before court must be regarded as participating in the administration of justice of the relevant Member State. It also held that having regard to the importance of the role of the issuing judicial authority in the issue of European arrest warrants, that authority must act independently of the Executive in arriving at that decision. In turn, that independence requires that there are statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, *inter alia*, to an instruction in a specific case from the Executive [see para. 52 of the judgment in PF].
14. In answer to the specific question as to whether the Public Prosecutor of the Republic of Lithuania is a judicial authority within the autonomous meaning of that phrase in Article 6(1) of the Framework Decision, the CJEU answered the question in the affirmative, finding in the particular circumstances that Public Prosecutors in Lithuania enjoy the benefit of independence conferred by the Constitution of the Republic of Lithuania which allow them to act free of any external influence, *inter alia* from the Executive, in exercising their functions in particular in relation to the issue of European arrest warrants.
15. However, the CJEU also determined that in circumstances where the issuing judicial authority is not a court "*the decision to issue such an arrest warrant and, inter alia, the proportionality of such a decision, must be capable of being the subject, in the Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection*". The CJEU held that this could not be ascertained from the information in the case before the court, and so stated that this was a matter for the referring court to determine.

16. Arising out of the decision of the CJEU, the Supreme Court allowed the appeal of the appellant (the respondent) and set aside the order of the High Court for the surrender of the respondent, and remitted the matter back to this Court to consider the matter afresh in the light of the judgment of the CJEU.
17. Thereafter, on 9th July, 2019, the Central Authority here sent the following request for information to the Prosecutor General's Office of the Republic of Lithuania:

"Further to the judgment of the Court of Justice in PF (Case C-509/18) of 27th May, 2019, please provide information as to whether a decision of the Prosecutor General of Lithuania to issue a European arrest warrant and the proportionality of such a decision may be the subject of court proceedings within Lithuania which meet in full the requirements inherent in effective judicial protection?"
18. The Prosecutor General responded by letter dated 23rd July, 2019, stating:

"According to Article 69 of the Code of Criminal Procedure of the Republic of Lithuania (CCP) the Prosecutor General's Office issues the European arrest warrant only upon receipt of the court's order on arrest of the person in question. The coercive measure – arrest shall be imposed only by order of pre-trial investigation judge or court (Article 121 CCP). This order may be appealed to the higher court. (Article 130)

It is stipulated by Article 63 of the CCP, persons participating in the proceedings may appeal actions or decisions taken by prosecutor (sic) to the higher prosecutor. Where the higher prosecutor declines to grant the appeal rendering an order, this order may be appealed to the pre-trial investigation judge.

Therefore the requirements inherent in effective judicial protection in the procedure of issuing European Arrest Warrant are met in full and the protection of persons procedural rights and fundamental rights is guaranteed (sic) on both levels."
19. This reply was made available to the legal representatives of the respondent. They in turn requested a lawyer in Lithuania to comment upon the statement that there is a mechanism in the Lithuanian legal system to review the decision of the Prosecutor General to issue a European arrest warrant. That lawyer, a Mr. Simas Tokarcakas provided an affidavit dated 25th September, 2019, by which he exhibited a short report on four questions referred to him for consideration. In this report he states that Lithuanian legislation governing the procedure for the issue of European arrest warrants does not provide a mechanism for the decision of the Prosecutor General to be reviewed by a court. He says he is not aware of any such procedure.
20. He goes on to explain that Article 63 of the CCP, to which the Prosecutor General referred, provides that persons participating in the proceedings may appeal actions or decisions taken by a prosecutor to a higher prosecutor. Where the higher prosecutor

declines to grant the appeal, that decision in turn may be appealed to the pre-trial investigation judge.

21. However, in the case of the respondent, the EAW was issued by the Prosecutor General so it cannot be appealed to a higher prosecutor and there is no other prosecutor who has the jurisdiction to review the decision of the Prosecutor General. He further states that a person participating in the proceedings cannot appeal directly to the pre-trial investigation judge.
22. In answer to another question, Mr. Tokarcakas confirms that the Prosecutor General's Office must review the conditions necessary for the issuing of a European arrest warrant (prior to its issue) and examine whether in the light of the particular circumstances of the case, it is proportionate to issue the European arrest warrant. He also stated that if there was a mechanism whereby a court in Lithuania could review the decision to issue a European arrest warrant, it would be open to the court to enquire into the proportionality of the decision to issue a European arrest warrant.
23. The proceedings were next before this Court on 8th October, 2019, and this Court directed that, pursuant to s. 20 of the Act of 2003, the Prosecutor General should be invited to comment upon the report of Mr. Tokarcakas. The Prosecutor General responded by letter dated 21st October, 2019, reiterating that the legal framework of the Republic of Lithuania provides a procedure to appeal against the issue of a European arrest warrant. In this letter it stated:

"First of all, there is a possibility to appeal against the ruling on imposing arrest on the suspect/defendant to the higher instance court, because a European arrest warrant can be issued only on the basis of such ruling.

Secondly, according to Article 63 of the Criminal Procedure Code of the Republic of Lithuania, parties of the proceedings can appeal against any procedural actions and decisions of a prosecutor to a higher ranking prosecutor or pre-trial judge. Issue of European arrest warrant is considered to be an action performed by a prosecutor. Where European arrest warrant is issued (signed) by Prosecutor General, it is not possible to appeal against such action to a higher ranking prosecutor, because Prosecutor General is the highest rank; however, in such a case the appeal can be filed to a pre-trial judge. In addition, a suspect/defendant who is the subject of the European arrest warrant is a party of criminal proceedings having the rights established by laws including the right to appeal against the prosecutor's actions."

24. The matter was next before this Court in October and again on 9th December 2019. On these occasions, the Court was informed that further decisions of the Court of Justice of the European Union, that were likely to have a direct relevance to the issues before this Court were due to be handed down on 12th December, 2019. Accordingly, the Court adjourned these proceedings to 20th January 2020, in order to afford the parties the opportunity to address the Court in relation to those decisions, prior to concluding these proceedings. In the meantime, the legal advisors to the respondent obtained a further

report from Mr. Tokarcakas, on the information received from the Prosecutor General dated 21st October, 2019. Noting that the Prosecutor General had stated that, since the EAW in this case had been issued by the Prosecutor General himself, and, therefore, that any appeal from that decision would be directly to the pre-trial investigation judge, Mr. Tokarcakas states that:

"there are strictly regulated procedures of appeal. Neither Article 63, neither any other article of the CCP does not grant persons participating in the proceedings the right to appeal EAW directly to the pre-trial investigation judge. It should be emphasized that the Prosecutor's general's office does not provide a legal basis for its allegations." He goes on to say: "It should also be noted that the appeal against the ruling on imposing arrest on suspect, cannot be treated as an appeal against the EAW."

25. When the matter next came before this Court on 24th January, 2020, translations of the judgments of the CJEU (delivered on 12th December, 2019) were not available. While a press release summarising the decisions was available, the Court could not proceed to receive submissions on the basis of a press release only. Eventually, following a further adjournment, the applicant obtained unofficial translations, and on 29th January, 2020, the Court received submissions in the light of the decisions of the CJEU in the cases of YC (case C-626/19 PPU), XD (case C-625/19 PPU) and ZB (case C-627/19 PPU). In each of these cases, the CJEU was required to consider whether or not the appeal procedures (against decisions of a public prosecutor to issue an EAW) relied upon by the requesting states in those cases fully met the requirements inherent in the effective judicial protection required as regards the issue of a European arrest warrant.
26. The case of YC concerned a request for a preliminary ruling as to whether the procedures available under French law in relation to the issue of a European arrest warrant were sufficient to afford effective judicial protection. The court noted that the decision to issue a European arrest warrant in the French system is usually concomitant to the issue of the national arrest warrant, and the court issuing that warrant will therefore assess, at that time, the conditions required for and the proportionality of issuing the European arrest warrant, although he/she does not issue it him/herself. It is issued by the public prosecutor. Moreover, the court noted that under French law, it is open to the requested person to seek judicial review of the validity of the European arrest warrant, even after his surrender to France.
27. At para. 59 of its decision, the CJEU reiterated the often quoted passage regarding the dual level of protection of procedural rights and fundamental rights that is central to the European arrest warrant system. Where the second level of protection is concerned i.e. assessment of the conditions required for the issue of a European arrest warrant, and in particular, the proportionality of doing so, the court noted that this may be achieved by means of procedural rules which differ from one system to another. However, where the decision to issue a European arrest warrant is taken by an authority that is not itself a court, the decision to issue such an arrest warrant, and in particular the proportionality of

such a decision, must be capable of being submitted, in that Member State, to a judicial remedy which fully meets the requirements inherent in effective judicial protection (para. 62 of the decision). At para. 65, the CJEU held that the establishment of a separate right of appeal against the decision to issue a European arrest warrant taken by a judicial authority other than a court is just one possible mechanism for achieving the second level of judicial protection. The court noted that in the system under review, the court that issues the national arrest warrant also assesses the necessary conditions for the issue of a European arrest warrant, and, in particular, the proportionality of the issue of the same; and on being satisfied to do so, at the same time then requests a public prosecutor to issue a European arrest warrant.

28. The CJEU noted that in the French legal system, the decision to issue a European arrest warrant may be the subject of an action for a declaration of invalidity on the basis of Article 170 of the French criminal code. The CJEU considered that the combined procedure whereby the issue of the EAW was subject to prior judicial review, that was almost "*concomitant with its issue*" and the availability of judicial review proceedings after the issue of the European arrest warrant, whether before or after the effective surrender of the person concerned, satisfied the requirements of effective judicial protection.
29. In the case of XD, the CJEU examined the processes in Sweden whereby the issue of a European arrest warrant may be subject to judicial review. The CJEU noted that in the Swedish legal system, the issue of a European arrest warrant follows from a decision ordering the pre-trial detention of the person concerned. That decision is made by a court or a tribunal. The CJEU accepted the submissions of the Swedish Government that, when examining the need to order a measure of pre-trial detention in respect of a person suspected of having infringed criminal law, the court must always make an assessment of the proportionality of such a measure. Moreover, if the person suspected of having committed an offence flees or does not reside in the territory of the issuing Member State, the only reason why the prosecutor would bring a case before a court for the purpose of issuing an arrest warrant against that person would be the need to issue a European arrest warrant. Therefore, in the submission of the Swedish Government, the proportionality review that the court carries out in the context of the issue of an order of pre-trial detention, also covered the issuance of a European arrest warrant.
30. Under the Swedish legal system, there is no entitlement to appeal an order for the issue of a European arrest warrant, or otherwise to subject that order to judicial review. However, a person who is the subject of a European arrest warrant has the right to appeal against the decision ordering his or her pre-trial detention without any time limit, even after the issue of the European arrest warrant and after his or her arrest in the executing Member State. The CJEU, at para. 50 of its judgment, noted that: "*If the contested decision ordering the pre-trial detention is annulled, the European arrest warrant is automatically invalid, since its issue is based on the existence of that decision.*" It was further established that any higher court hearing an appeal against the decision ordering pre-trial detention also assesses the proportionality of the issue of the European arrest warrant (para. 51).

31. The CJEU then concluded, at paras. 52 and 53 as follows:

"The presence, in the Swedish legal system of such procedural rules make it possible to establish that, even in the absence of a separate legal remedy against the prosecutor's decision to issue a European arrest warrant, its conditions of issue and, in particular, its proportionality may be subject to judicial review in the issuing Member State, before or at the same time as its adoption, but also subsequently.

53. Such a system therefore meets the requirements of effective judicial protection."

Further information

32. It is apparent from the decisions of the CJEU in YC and XD, and the information provided by the Prosecutor General in these proceedings as to the availability of mechanisms of appeal against the issue of both the national arrest warrant and the European arrest warrant that there is the possibility that these mechanisms may meet the requirements inherent in effective judicial protection as referred to in both those decisions of the CJEU and also the decision of the CJEU in these proceedings (under the title PF). However, two matters remained unclear from the information provided:

- i. In relation to an appeal against the issue of a European arrest warrant, whether or not the appellate court is entitled to consider whether the requirements for the issuing of the European arrest warrant had been met, in particular the proportionality of issuing the same?
- ii. In relation to the appeal against the decision to issue the national arrest warrant, it seems clear that the respondent is out of time for the filing of such an appeal, but is entitled to apply to court to extend the time to file such appeal. What is not clear however is whether or not the success of such an application is assured, and while it appears implicit from the information provided, as referred to above, that such an application (to extend time) is at the discretion of the court, having regards to the importance of the issue absolute clarity is required.

33. In addition, in order to be able to exercise effectively such rights of appeal as are available to him, it is the view of this Court that the respondent must have an entitlement to legal aid for the purposes of exercising such rights. Accordingly, this Court considered it appropriate to enquire as to whether or not legal aid is available to the respondent for the purposes of such appeals.

34. This Court therefore made a further order, pursuant to s. 20 of the Act of 2003 seeking answers to the questions above. This order was made on 27th February, 2020 and the Court ordered that the request for such further information be made forthwith.

35. A reply to these questions was received on 3rd March, 2020. In this reply, the Chief Prosecutor confirms that, when examining an appeal against the issuance of a European arrest warrant, the competent court of the Republic of Lithuania is entitled to consider whether the requirements for the issuing of the warrant had been met, including the

requirement as to proportionality. He also confirmed that legal aid is available for the purposes of advancing such an appeal.

36. As regards an application to extend the time limit within which to appeal the national arrest warrant (i.e. the order of the Druskininkai District Court), the Chief Prosecutor states that it is not possible to forecast how a court would treat such an application. He confirms that legal aid is also available for the purposes of such an appeal. He also observes that the provisions of EU Council Directive 2013/48/EU of 22nd October, 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings apply in Lithuania, and to the respondent in particular.
37. The respondent obtained further advice from Mr. Tokarcakas in response to the further information received from the Chief Prosecutor (of 3rd March). He continues to dispute the availability of an appeal against the issue of a European arrest warrant, and, for the first time, says that such appeals as are available under Article 63 of the Code of Criminal Procedure, are only available during the pre-trial phase. He says that this case has moved beyond the pre-trial phase, and therefore such an appeal is not available to the respondent, even if it were otherwise available. He repeats that neither Article 63 nor any other Article of the Code of Criminal Procedure afford a right of appeal against the issue of a European arrest warrant. As regards an appeal from the issue of the national arrest warrant, the time for doing so has passed, and he opines that the respondent could not be sure he would be granted an extension of time to do so.
38. Dealing with this latter point first, there is no dispute between the parties as to the law in Lithuania. In my opinion, the availability of an appeal against the national arrest warrant does not meet the requirements inherent in effective judicial protection as determined by the CJEU, because it is clear from the information provided that the time within which to file such an appeal has long since passed, and while the respondent may file an application to extend the time to appeal that decision, the outcome of that application cannot be assured.
39. As to the availability of an appeal against the issue of a European arrest warrant, it is clear from the information provided by the Chief Prosecutor that it remains open to the respondent to appeal the issue of the EAW, and that he is entitled to legal aid for that purpose and that he has freedom of choice as regards the appointment of a lawyer to represent him in any such appeal. While Mr. Tokarcakas takes issue with the availability of such an appeal, this court has been informed twice by the issuing state that such an appeal is available. It is possible that Mr. Tokarcakas' opinion may be in some way influenced by the fact that this question has not been addressed before, or that such appeals have never been brought previously, but whatever the explanation, this court has no way of reconciling such a difference of opinion, and can only decide the issue on the basis of the trust and confidence that it is bound to accord to the issuing state, and to accept what it has stated both in the first instance and in response to the opinion of Mr. Tokarcakas.

40. It is apparent from the decision of the CJEU in *YC* that the establishment of a separate right of appeal against the decision to issue a European arrest warrant taken by a judicial authority other than a court offers a sufficient guarantee of the level of judicial protection required by the Framework Decision, provided that the appellate court may carry out an assessment of compliance as to the conditions for the issue of a European arrest warrant, including the proportionality of the same. The issuing state has confirmed the availability of such an appeal. Accordingly, it follows that the system in Lithuania whereby a European arrest warrant is issued by the Prosecutor General's Office meets the requirements inherent in effective judicial protection, at both the first level (the point at which the national arrest warrant is issued) and, at the second level, at which a European arrest warrant is issued, as determined by the CJEU in the authorities above. That being the case, this point of objection must be rejected, and since that is the only surviving objection to his surrender, this Court will make an order for the surrender of the respondent pursuant to the EAW, in accordance with s. 16 of the Act of 2003.