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Ruling

Title: The Minister for Justice and Equality -v- Lisauskas

Neutral Citation: [2018] IESC 42

Supreme Court Record Number: 148/17

Court of Appeal Record Number: 2017 106

Date of Delivery: 31/07/2018

Court: Supreme Court

Composition of Court: Clarke C.J., McKechnie J., MacMenamin J., Charleton J., Finlay Geoghegan J.

Rulingby: Finlay Geoghegan J.

Status: Approved

Result: Referral to the Court of Justice of the EU

THE SUPREME COURT

[Appeal No: 2017/148]

**Clarke C.J.
 McKechnie J.
 MacMenamin J.
 Charleton J.
 Finlay Geoghegan J.**

Between/

The Minister for Justice and Equality

Applicant/Respondents

and

Thomas Lisauskas

Respondent/Appellant

The Interim ruling of the Supreme Court referring questions to the Court of

Justice of the European Union for a preliminary ruling delivered by Ms. Justice Finlay Geoghegan on 31st July, 2018.

1. The Supreme Court has decided that it is obliged pursuant to Article 267 of the Treaty on the functioning of the European Union to refer questions to the Court of Justice of the European Union in relation to the autonomous meaning of an issuing judicial authority in Art. 6(1) of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States ("the Framework Decision") to enable it decide the appeal of Mr. Lisauskas against the decision of the Court of Appeal that he be surrendered to the Republic of Lithuania pursuant to a European Arrest Warrant (EAW) issued by the Prosecutor General's Office of the Republic of Lithuania (the "Prosecutor General").

2. Subject Matter of the Dispute

2.1 The surrender of Mr. Lisauskas is sought pursuant to an EAW issued on 18th April 2014 by the Prosecutor General. The surrender is sought for the prosecution of an offence allegedly committed in 2012 which the Prosecutor General certifies as falling within Article 2.2 of the Framework Decision and is categorised as "armed robbery."

2.2 Mr. Lisauskas objected to his surrender in the High Court, the executing judicial authority in Ireland, on a number of grounds, all of which were rejected. The only ground of objection relevant to the dispute in the appeal before the Supreme Court is that the Prosecutor General is not a "judicial authority" within the meaning of Article 6(1) of the Framework Decision and hence the Irish European Arrest Warrant Act 2003.

2.3 In support of his contention that the Prosecutor General is not a judicial authority within the meaning of Art. 6(1) of the Framework Decision. Mr. Lisauskas adduced evidence from Mr. Simas Tokarcakas a practising lawyer in Lithuania holding a masters degree in law from Vilnius University. Mr. Tokarcakas provided two affidavits sworn on the 9th June, 2016 and 14th June, 2016 which exhibited two reports. The second report of the 14th June stated, in summary the following to be the position of the Prosecutor General in the legal system of the Republic of Lithuania. The Republic of Lithuania has a written Constitution which is a living constitution with a Constitutional Court which gives decisions in relation thereto. In accordance with Art. 109 of the Constitution the administration of justice is solely a matter for the courts. The Prosecutor General is the most senior prosecutor in Lithuania and has the status of a prosecutor. He is independent of the executive and is also independent of the judiciary. In accordance with Art. 118 of the Constitution the function of the prosecutor is to organise and direct pre-trial investigation and prosecute criminal cases. Mr. Tokarcakas further explained:

"The Constitutional Court in its rulings of 13th May 2004, 16th January 2006, 28th May 2008 and 7th April 2011 has stated that according to the Constitution a prosecutor does not administer justice. Justice is also not being administered during the pre-trial investigation which is organised by a prosecutor. According to the Constitution, the administration of justice is solely the function of the courts (i.e. the judiciary)..."

2.4 The High Court in exercise of its jurisdiction under s.20 of the European Arrest Warrant Act, 2003 sought further information from the office of the Prosecutor General through the central authority for Ireland, the Department of Justice and Equality. On the 30th June, 2016 the affidavits of Mr. Tokarcakas were sent to the office of the Prosecutor General with a request for comments thereon. The response of the 11th July referred to the need to assess the term "judicial authority" in the context of the Framework Decision and made the point that it is not sufficient "to identify how prosecution services is defined and positioned in the national law system". He noted the absence of a definition of a judicial authority in the Framework Decision.

2.5 This was followed by a more specific request from the High Court transmitted by the central authority in a letter the 3rd August, 2016. The substantive request made by the High Court is as follows:

"The High Court requested under section 20 of the European Arrest Warrant Act 2003, as amended, and Article 15.2 of the Framework Decision, to be provided with the following additional information.

In the context of the structure and composition of the Lithuanian Judicial System is the Prosecutor General considered an integral part of the judicial structure or judicial corps?

In answering this question the High Court would appreciate if you could address the following issues:

The Affidavit of Laws of Simas Tokarcakas sworn June 14th 2016, provided to your office under cover of letter dated 30th June 2016, in essence contends that the Prosecutor General is (1) independent of the judiciary, (2) does not perform judicial functions, and (3) is simply tasked with pre-trial investigation. Can you please comment on these specific assertions by reference to the Laws of Lithuania?

The said Affidavit further outlines that "The Constitutional Court in its rulings of 13th May 2004, 16th January 2006, 28th May 2008 and 7th April 2011 has stated that according to the Constitution a prosecutor does not administer Justice". Can you please comment on these specific assertions by reference to the Laws of Lithuania and/or legal precedent to include rulings referred to in the said Affidavit?

Please furnish any other relevant statement of the legal position of the Prosecutor General in Lithuania as part of the Judicial System of Judicial Corps."

2.6 The response from the Prosecutor's office dated the 7th September, 2016 referred to the right of the Prosecutor General's office to issue European Arrest Warrants pursuant to Art. 69(1) of the Criminal Procedure Code of the Republic of Lithuania an extract of which was set out. The letter then stated:

"In addition, please be informed that your questions have already been answered in 11 July 2016 letter ref. No. 14.2.-3498 (14.3.-16/14) of the Prosecutor General's Office of the Republic of Lithuania. Thus, we shall not make any detailed commented [sic] regarding the issues raised in the statement of lawyer's assistant Simas Tokarcakas."

2.7 There was then a further exchange between the Irish central authority and the Prosecutor General's office in the context of an EAW in relation to another individual which the Prosecutor General confirmed by a letter of the 15th December, 2015 applied equally to the EAW in respect of Mr. Lisauskas. This request and response were as follows:

Request dated 7/12/2016 from Ireland

"Please advise if the Office of the Prosecutor General is independent

of the executive, including the Ministry of Justice, in Lithuania and please indicate if that office is an authority in Lithuania that administers criminal justice. This information is being sought to ensure that the criteria for a judicial authority as determined by the European Court of Justice in the cases of Poltorak (Case C-452/16 PPU) and Ozcelik (Case C-453/16 PPU) is met."

Response from Prosecutor General's office

Prosecutor General's Office of the Republic of Lithuania is independent of the executive power as well as the Ministry of Justice.

Prosecution Service of the Republic of Lithuania is comprised is comprised of the Prosecutor General's Office and territorial prosecutor's offices; the Lithuanian Prosecution Service organizes and directs pre-trial investigation and prosecutes criminal cases on behalf of the State. These provisions are established in Article 118 of the Constitution of the Republic of Lithuania."

2.8 The High Court concluded in its judgment of 27th February, 2017, [\[2017\] IEHC 232](#) that the Prosecutor General was a judicial authority within the meaning of Article 6(1) of the Framework Decision and hence the European Arrest Warrant Act 2003. At para 108 the High Court stated:

"On the evidence of Mr. Tokarcakas, it is apparent that the Lithuanian Prosecutor General is a national authority which participates in the administration of justice in the sense required by the 2002 Framework Decision. The Prosecutor is independent of both the judiciary and executive. The Public Prosecutor has a clear constitutional position within Lithuanian law. The Prosecutor General is the only authority which can "organise and direct a pre-trial investigation."

2.9 The High Court ordered that Mr. Lisauskas be surrendered to the Republic of Lithuania but granted leave to appeal on points of law. The Court of Appeal in a judgment of 20th October, 2017, [\[2017\] IECA 267](#) dismissed the appeal and upheld the conclusions and reasoning of the trial judge that the Prosecutor General is a judicial authority.

2.10 The Supreme Court granted leave to appeal pursuant to Article 34.5.3 of the Constitution. The sole issue in the appeal is whether the Prosecutor General is a judicial authority within the meaning of Article 6(1) of the Framework Decision and hence of the European Arrest Warrant Act 2003.

3. Relevant national legal provisions

3.1 The European Arrest Warrant Act 2003 gives effect to the Framework Decision and s.2(1) provides that:

"'judicial authority' means the judge, magistrate or other person authorised under the law of the Member State concerned to perform functions the same as or similar to those performed under section 33 by a court in the State;"

3.2 The Supreme Court in *Minister for Justice and Equality v McArdle; Minister for Justice and Equality v Brunnell* [\[2015\] IESC 56](#) referring to the definition of "judicial authority" as quoted above, determined at [49] that it would:

"interpret this definition in the Act of 2003, as amended, as far as possible in light of the wording and purpose of the Framework

Decision to achieve the result it pursues"

3.3 The Supreme Court went on to hold, at [51], as follows:

"There is a presumption that when a European arrest warrant is issued, and stated to be issued, by a public prosecutor or judge of a Member State acting as the judicial authority designated by the Member State, he or she is the judicial authority within the meaning of the Framework Decision and the Act implementing it. If there are cogent grounds established in a particular case which could lead the Court to concluding that the issuing authority was not a judicial authority that would be a different matter. No such grounds have been established in this case. What is clear is that a public prosecutor who is designated as a judicial authority by a Member State for the purposes of surrender on foot of European arrest warrants cannot, by reason only of the fact that he or she is a public prosecutor, as opposed to a judge of a court, be considered not to be a person who may issue a European arrest warrant within the meaning of the Framework Decision."

3.4 The High Court in a judgment given on 28th July 2015 in *Minister for Justice and Equality v MV* [2015] IEHC 524 subsequently interpreted the Supreme Court's decision as follows:

"The inexorable logic of the decision in McArdle and Brunnell is that the Court may be provided with cogent grounds for concluding that an issuing judicial authority as designated by a Member State is not in fact a 'judicial authority' within the meaning of the Act of 2003 and the Framework Decision. The Supreme Court in McArdle and Brunnell, by reference to the process of surrender being based upon mutual recognition of judicial acts, by reference to the interpretation of our legislation in light of the objectives and purpose of the Framework Decision and by an acceptance that there could be cogent grounds for concluding that a particular authority is not a judicial authority has, in my view, implicitly held that 'judicial authority' has an autonomous meaning within the Framework Decision. The question arising in this case, therefore, is whether there are cogent grounds for concluding that the Ministry of Justice in Lithuania on the facts herein is not 'a judicial authority' within the meaning of the Act of 2003 and the Framework Decision."

3.5 The High Court concluded in that case that the Ministry of Justice of Lithuania was not a "judicial authority" within the meaning of the Framework Decision.

3.6 Section 20 of the European Arrest Warrant Act 2003 (as amended) provides:

"(1) In proceedings to which this Act applies the High Court may, if of the opinion that the documentation or information provided to it is not sufficient to enable it to perform its functions under this Act, require the issuing judicial authority or the issuing state, as may be appropriate, to provide it with such additional documentation or information as it may specify, within such period as it may specify,

(2) The Central Authority in the State may, if of the opinion that the documentation or information provided to it under this Act is not sufficient to enable it or the High Court to perform functions under this Act, require the issuing judicial authority or the issuing state, as may be appropriate, to provide it with such additional documentation or information as

it may specify, within such period as it may specify.”

4. Assessment of Evidence

4.1 Having considered the evidence before the High Court, both in the form of the affidavit evidence of Mr. Tokarcakas and the correspondence received from the Prosecutor General in response to the requests for additional information made by the High Court under section 20 of the European Arrest Warrant Act 2003, the Supreme Court has concluded:

1. The High Court has taken all reasonable steps to seek the relevant additional information from the issuing judicial authority and the decision on surrender must be made on the basis of the evidence from Mr. Tokarcakas and the further limited information supplied by the Prosecutor General.
2. The evidence of Mr. Tokarcakas when considered in the context of the additional information received may be sufficient to displace reliance on the presumption that the Prosecutor General is a judicial authority within the meaning of Article 6(1) of the Framework Decision such that the Irish Courts must, prior to any decision to surrender decide that issue.
3. Article 109 of the Constitution of the Republic of Lithuania provides that the courts have the exclusive right to administer justice.
4. The Prosecutor General of the Republic of Lithuania appears to have the status of prosecutor (the most senior prosecutor), and in its legal system to be a public authority and independent of the executive and of the judiciary.
5. The role of the Prosecutor General in relation to the administration of criminal justice appears to be confined to conducting pre-trial investigations and the prosecution of criminal offences.
6. The Constitutional Court of Lithuania is stated to have ruled that a prosecutor does not administer justice and that according to the Constitution of Lithuania the administration of justice is solely the function of the courts.

5. Grounds for Reference

5.1 The Supreme Court has considered the judgments of the CJEU in cases C-452/16 PPU *Poltorak*, C-453/16 PPU *Ozcelik*, C-477/16 PPU *Kovalkovas* and C-486/14 *Kossowski* and the Advocate Generals' opinions therein amongst other judgments. The following principles appear to emerge. The term 'judicial authority' in Art. 6(1) of the Framework Decision requires throughout the Union an autonomous and uniform interpretation which must take into account the terms of that provision, its context and the objective of the Framework Decision: *Poltorak*[32]. The term 'judicial authority' in Art. 6(1) is not limited to designating only the judges or courts of a member state: *Poltorak*[33]. It may extend more broadly to the authorities required to participate in administering justice in the legal system concerned: *Poltorak*[33]. The judicial authority must also be an authority that is independent of the executive: *Poltorak*[35].

5.2 A public prosecutor may be a judicial authority within the meaning of Art. 6(1) of the Framework Decision: *Ozcelik*. However, this would appear to depend upon whether the public prosecutor's office in question "constitutes a member state authority responsible for administering criminal justice" *Ozcelik*[34] and *Kossowski*[39].

5.3 The Supreme Court understands from the foregoing that the term 'judicial authority' requires throughout the Union an autonomous and uniform interpretation. Further that a public prosecutor may be a judicial authority where it is independent of the executive and administers justice or participates in the administration of justice in the relevant legal system. However, it is uncertain as to exactly how a national court is to determine whether a public prosecutor is an authority which administers justice or is required to participate in administering justice in the legal system concerned as indicated by *Poltorak* para. 33, *Ozcelik* para. 34, *Kovalkovas* para. 34 and *Kossowski* para. 39.

5.4 Whilst it appears to the Supreme Court that the question may fall to be determined by deciding whether in accordance with the relevant national legal system, in this instance the Lithuanian legal system, the public prosecutor is considered in that legal system to administer justice, the matter is not beyond doubt by reason of the requirement for an autonomous meaning throughout the Union. In *Ozcelik*, the Court of Justice held that the Public Prosecutor's Office in Hungary was a judicial authority such that a confirmation by it of a national warrant was a 'judicial decision' for the purposes of Article 8(1) (c) of the Framework Decision. Advocate General Campos Sanchez-Bordona, at [49]-[52] of his opinion, highlighted the express reference to public prosecutors in Article 2 of Directive 2014/41/EU in identifying authorities competent to issue a European investigation order. At [40] of his opinion, the Advocate General also observed that the initial proposal for the Framework Decision expressly included public prosecutors within the definition of judicial authority. The Advocate General, at [52], also identified a public prosecutor's "capacity – if this is provided for in the constitutional or legal rules of each Member State – to participate in the administration of justice." This suggests that while the role of a public prosecutor in a member state may be consistent with that of a judicial authority, this will not necessarily be so in every case.

5.5 The judgment of the Court in *Ozcelik*, that the public prosecutor's office was a judicial authority within the meaning of Art. 6(1) appears from [34] dependant upon its determination that the public prosecutor's office in the Hungarian legal system, "constitutes a member state authority responsible for administering criminal justice".

5.6 If, however, the issue is not to be decided by determining whether the public prosecutor's office in Lithuania constitutes a public authority responsible for administering criminal justice in Lithuania in accordance with the Lithuanian legal system then the Supreme Court is unclear as to the criteria according to which, in addition to independence from the executive the national court is to determine whether or not a public prosecutor is a judicial authority for the purposes of Art. 6(1) of the Framework Decision. In particular, whether or not conducting pre-trial investigations and prosecuting criminal offences is sufficiently linked to the administration of justice that a prosecutor who does this but is independent of the judiciary in his own legal system may be considered a judicial authority for the purposes of Article 6(1) of the Framework Decision. The underlying principles of mutual trust and mutual recognition between judicial authorities contribute to the uncertainty.

5.7 The Supreme Court observes that this difference between "participation in the administration of justice" and "administering justice" which was a source of controversy in the High Court and Court of Appeal may be a peculiarity of the English translations of these judgments as a significant number of other languages use only the "participation" formula, notably the French text and the Dutch text, the latter of these being the language of the case in each of these decisions. Irrespective of the specific phrasing used, it is respectfully observed that while it remains clear that to be a judicial authority a public prosecutor must have a role in the administration of justice, the extent and nature of the role that satisfies this test is more uncertain.

6. Questions

6.1 The Supreme Court accordingly refers the questions pursuant to Art. 267 TFEU:

1. 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?
2. 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)?
3. 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?
4. 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?

7. Request for Expedited Procedure or Priority

7.1 This reference relates to a matter covered by Title V of Part Three of TFEU. However, Mr. Lisauskas is not now in custody and hence the Supreme Court has decided that it should not request the urgent preliminary ruling procedure pursuant to Art. 107 of the Rules of Procedure.

7.2 Nevertheless the Supreme Court requests the President to decide that the reference be linked with the reference of today's date in relation to the similar appeal of Mr. Dunauskis and be determined pursuant either by the expedited procedure provided for in Art. 105 of the Rules of Procedure or to grant it priority in accordance with Art. 53(3). The reason for this request is that this is an EAW matter. The surrender of Mr. Lisauskas is sought to prosecute an offence alleged to have been committed in 2012. This reference may raise a doubt about the status of the Prosecutor General of Lithuania as an issuing judicial authority with consequences for many EAWs from Lithuania. The Court may, however, consider by reason of the potential consequences for other EAWs from Lithuania and Germany where persons may be in custody that it should grant PPU to this and the reference in the appeal of Mr. Dunauskis. The Supreme Court has been informed by the solicitor for the Minister that there are in Ireland a number of EAW requests adjourned before the High Court awaiting the outcome of these appeals and that in 5 such cases the respondents are detained in custody.