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Ruling

Title:	The Minister for Justice & Equality -v- Dunauskis
Neutral Citation:	[2018] IESC 43
Supreme Court Record Number:	149/17
Court of Appeal Record Number:	2017 180
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: 2017/000149]

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

Between/

In the Matter of the European Arrest Warrant Act 2003 (as amended)

Between/

The Minister for Justice and Equality

Applicant/Respondent

and

Vytautas Dunauskis

Respondent/Appellant

Interim Ruling of the Supreme Court referring questions to the Court of Justice of the European Union for preliminary ruling delivered by Ms. Justice Finlay Geoghegan on 31 July, 2018.

1. The Supreme Court heard the appeal in this matter with the appeal by Mr. Lisauskas (2017 No. 148). The issue in this appeal is similarly whether the issuing judicial authority is a judicial authority within the meaning of Article 6(1) of the Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (the "Framework Decision").

1.1 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 to enable it decide the appeal in this matter. It requests that this reference might be linked with the reference in the appeal in the case of Mr. Lisauskas and it is not proposed to repeat all that it said in that appeal in relation to the legal framework at EU or national level.

2. Subject Matter of the Dispute

2.1 The surrender of Mr. Dunauskis is sought pursuant to a European Arrest Warrant (EAW) issued by the Public Prosecutor's Office, at the Regional Court (*Landgericht*) of LÃ¼beck (the "LÃ¼beck Public Prosecutor") on the 13th May, 2016. The surrender is sought for the prosecution of an offence allegedly committed in 1995 which the Public Prosecutor identifies as "murder, grievous bodily injury". Mr. Dunauskis is stated to be a Lithuanian citizen who is residing at an address in Ireland.

2.2 Mr. Dunauskis objected to his surrender in the High Court on a number of grounds all of which were rejected. The ground of objection relevant to the dispute in the appeal before the Supreme Court is that the LÃ¼beck Public Prosecutor 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 that contention two affidavits of Prof. Dr. Hans-Walter Forkel, a qualified German lawyer with a legal doctorate in criminal law and a master of laws in European law from the University of London were filed. One of these included an expert's report from Prof. Dr. Forkel which*inter alia*considered the validity of the issuing judicial authority, the LÃ¼beck Public Prosecutor. In addition, he certified as accurate an English translation of a number of paragraphs of Title X of the German Courts Constitution Act, the*Gerichtsverfassungsgesetz*(the "GVG"). Prof. Dr. Forkel explained his view of the position of the Public Prosecutor as follows:

> *"(a) The validity of the issuing authority for the warrant*
>
> *This question is a matter of European Union law to be applied by national courts.*
>
> *"The public prosecutor in LÃ¼beck, by German law, is not considered part of the judicial corps in Germany in that sense that he enjoys the autonomous or independent status of a court of law.*
>
> *The public prosecutor is an officer under the order of the chief public prosecutor who reports to and is subject to orders by the minister of justice, a political office (Â§Â§ 146, 147 GVG). This position within an administrative hierarchy with a political master at the top opens the possibility of political involvement to the surrender proceedings.*
>
> *Under German law, the public prosecutor is not a judicial authority*

with competence to order detention or arrest of any person in Germany but in cases of exigent circumstances. To order detention or arrest is a prerogative of judges. The public prosecutor must apply to the respective court or judge for an arrest warrant in Germany.

The public prosecutor cannot in his own right issue an arrest warrant in Germany. Yet, it is his responsibility to execute an arrest warrant issued by a judge, and it is within his discretion whether, when and how to do so.

A domestic arrest warrant having been issued, the Public Prosecutor was not required to refer the matter to any court for approval or oversight in the issue of the European Arrest Warrant.

In the issuing of the EAW concerning our client, no German court of law or judge was involved.

So one might well say that no judicial authority within the meaning of the Council Framework Decision of 13 June, 2002 on the European Arrest Warrant and the [surrender] procedures between member states was involved.

The EAW refers to the German arrest warrant, issued by a judge, and claims to derive its powers from it."

2.4 The sections of the GVG referred to by Prof. Dr. Forkel and relied upon by Mr. Dunauskis in his submissions include:

"Section 146

The officials of the public prosecution office must comply with the official instructions of their superiors.

Section 147

The right of supervision and direction shall lie with:

1. the Federal Minister of Justice in respect of the Federal Prosecutor General and the federal prosecutors;

2. the Land agency for the administration of justice in respect of all the officials of the public prosecution office the Land concerned;

3. the highest-ranking official of the public prosecution office at the Higher Regional Courts and the Regional Courts in respect of all the officials of the public prosecution office of the given court's district.

…

Section 150

The public prosecution office shall be independent of the courts in the performance of its official tasks.

Section 151

The public prosecutors may not perform judicial functions. They also may not be assigned responsibility for supervising the service of judges."

2.5 The High Court sought, pursuant to s. 20 of the European Arrest Warrant Act, 2003 via the Central Authority for Ireland, further information from the Public Prosecutor in LÃ¼beck in relation to the evidence of Prof. Dr. Forkel and stated:

"Evidence has been presented on behalf of the requested person, Mr. Vytautas Dunauskis, in which it is asserted that the Public Prosecutor in Lubeck is not independent of the Minister of Justice and cannot be seen as a judicial authority for the purposes of Council Framework Decision 2002/584/JHA. Please provide your views on this assertion. This information is requested in the context of the recent ECJ case law on the criteria that distinguishes a judicial authority (Case C-452/16 (PPU) Poltorak and case C-453/16 (PPU) Ã–zÃ§elik)."

2.6 A comprehensive reply (and translation) dated the 8th December, 2006, was received from the Public Prosecutor's Office in LÃ¼beck. It made reference to the decision in Cases C-452/16 PPU*Poltorak*and C-453/16 PPU*Ã–zÃ§elik*and then considered the status of the German Public Prosecutor's Office in response to the opinion provided by Dr. Forkel:

"According to this opinion, the question to which public authority the institution 'public prosecutor's office' belongs can only play a tangential role. The Basic Law of the Federal Republic of Germany does not make a regulation concerning public prosecutor's offices. In Article 92 of the Basic Law it is only decreed that the judges are entrusted with the judicial power; it is executed by the Federal Constitutional Court, by the federal courts provided for in the Basic Law and by the courts of the states. The public prosecutor's office is recognised as an institution sui generis and acts as connective link between the executive branch and the jurisdiction. The German public prosecutor's offices do not 'administer' and do not only 'execute' federal and state laws without an own decision-making power in terms of a pure executive function but they work towards the jurisdiction of the courts; therefore, they belong to the functional area of jurisdiction. They are an organ of criminal justice at the same level as a court (judgment of the Federal Court of Justice of 14 July 1971 – 3 StR 73/71) upon which the prosecution and the participation in criminal proceedings are incumbent. The public prosecutor's offices bear the responsibility for the lawfulness and regularity but also carefulness of the investigation proceedings as well as its quick execution. With regard to the criminal courts, the public prosecutor's offices create the preconditions for the execution of the judicial power (investigation proceedings, indictment), they promote the judicial power of the courts and execute judicial decisions. In Germany, the monopoly of indictment is conferred upon the public prosecutor's offices. They have the right of initiative to start investigation proceedings which lacks the judges in Germany. In its judgment of 05 May, 2015 (2 BvL 17/09 ua) the Federal Constitutional Court explains with regard to the role of public prosecutor's offices in Germany among others; 'the public prosecutor's office is part of the civil service and at the same time a necessary organ of criminal justice […]. With its obligation to objectivity (Â§ 160 II of the German Code of Criminal Procedure) it is a guarantor of the rule of law and lawful procedural processes; as

representative of the indictment it ensures an efficient criminal justice. The importance of the public prosecutor's office is not limited to the main hearing of the first instance but continues in its tasks in appeal procedures […]. In its functions as 'guardian of the law', the protection of constitutional provisions to criminal proceedings is incumbent upon it […].' By means of this a 'special position of the public prosecutor's office in the constitutional structure' was given to the public prosecutor's office according to the Federal Constitutional Court. The fact that the public prosecutor's office was given an own section in the German Court Constitution Act with the paragraphs 141 to 152 about its responsibilities, complies with this. According to the judgment of the Federal Constitutional Court of 19 March 1959 (1 BvR 295/58), the public prosecutor's office is on the basis of its tasks integrated into the judiciary 'from which it is an integral part, especially in constitutional state. Public prosecutor's office and court fulfil together the task of "granting of justice" […].'

Concerning the question which relationship exists between LÃ¼beck Public Prosecutor's Office and the Ministry of Justice of Schleswig-Holstein it is specifically pointed out that the Ministry is not authorised to issue instructions towards LÃ¼beck Public Prosecutor's Office. According to paragraph 146 of the German Court Constitution Act, the officers of the public prosecutor's office must certainly adhere to the service instructions of their supervisor. Therefore, the Director of Public Prosecutions (the public prosecutor's office at the Higher Regional Court of Schleswig-Holstein) presiding over the public prosecutor's offices in Schleswig-Holstein would be authorised to issue instructions towards the Senior Public Prosecutor of LÃ¼beck Public Prosecutor's Office and not the Ministry of Justice. With regard to the content, the power of giving instructions has its borders at 'law and right' according to Article 20, section 3 of the Basic Law for the Federal Republic of Germany; therefore an instruction must not require something that breaks the law. Furthermore it results from the rule of law that the principle of legality (paragraph 152, section 2 of the German Code of Criminal Procedure) applying to the public prosecutor must be complied with. Certainly, the Ministry of Justice could execute a so-called external right of instruction towards the Director of Public Prosecutions; however, the Ministry would be bound to the abovementioned borders of the right of instruction. In order to secure the borders, the Ministry of Justice is, according to the 'Law on the creation of transparency of political instructions towards officers of the public prosecutor's office of 14 October, 2014' in Schleswig-Holstein obliged to inform the President of the state parliament (Landtag), thus the legislative branch, in case of the issuance of an instruction to the Director of Public Prosecutions.

Notwithstanding the above, it must be emphasised concerning the present proceedings against the person concerned Dunauskis that in these proceedings at no point an instruction, neither by means of the Ministry of Justice to the Director of Public Prosecutions nor by means of the Director of Public Prosecutions to the Senior Public Prosecutor of Lubeck Public Prosecutor's Office was given"

2.7 The notification by Germany under Article 34(2) of the Framework Decision was also in evidence in the High Court. The notification contains the following statement:

"Re Article 6(3) of the Framework Decision: Under Article 6 the

> *competent judicial authorities are the Ministries of Justice of the Federal Republic and of the LÃ¤nder. As a rule, these have transferred the execution of the powers resulting from the Framework Decision for the submission of outgoing requests (Article 6(1)) to the public prosecutor's offices of the LÃ¤nder and to the regional courts, and the powers to meet incoming requests (Article 6(2)) to the chief public prosecutor's offices of the LÃ¤nder."*

2.8 The primary submission made in the High Court on behalf of Mr. Dunauskis was based upon the alleged lack of independence of the LÃ¼beck Public Prosecutor from the executive. It was contended that he was not part of the judicial corps but was an officer under the order of the Chief Public Prosecutor who reports to and is subject to orders by the Minister of Justice. It was also contended that the LÃ¼beck Public Prosecutor does not administer justice or participate in the administration of justice in the sense required to be a judicial authority for the purposes of Article 6(1) of the Framework Decision. It was submitted that the evidence was sufficient to displace the presumption that the Public Prosecutor in LÃ¼beck was a valid judicial authority in accordance with the Supreme Court decision in*Minister for Justice and Equality v. McArdle; Minister for Justice and Equality v. Brunnell*[2015] IESC 56.

2.9 The High Court, in its judgment of 20th March, 2017 [2017] IEHC 231 rejected the submission that the presumption that the Public Prosecutor of LÃ¼beck is a judicial authority within the meaning of Article 6(1) of the Framework Decision had been rebutted by the evidence adduced. On the question of independence, the High Court relied upon the fact that there had been no instruction given either by the Ministry of Justice to the Director of Public Prosecutions nor by the Director of Public Prosecutions to the Senior Public Prosecutor of the LÃ¼beck Public Prosecutor's Office in relation to this case. The trial judge was satisfied that German law provides for the independence of public prosecutors and that it is only in exceptional circumstances, for which a system of checks and balances has been provided, that the executive branch can interfere with a decision of a public prosecutor.

2.10 In rejecting the objection made on behalf of Mr. Dunauskis the High Court accepted as the test to be applied that the prosecuting authority be independent from the executive and participate in the administration of justice. It granted liberty to appeal in relation to the correctness or otherwise of the decision that the LÃ¼beck Public Prosecutor is an issuing judicial authority within the meaning of the Framework Decision and the European Arrest Warrant Act 2003 as amended.

2.11 The Court of Appeal heard this appeal with the appeal in*Minister for Justice and Equality v. Tomas Lisauskas*. In its judgment [2017] IECA 266 it upheld the decision of the High Court. On the question of independence it applied a test of "functional independence" and "operating*de facto*independently" in reliance upon the approach of Lord Dyson in*Assange v. Swedish Prosecution Authority (Nos. 1 and 2)*[2012] 2 AC 471, where at para. 153 he commented:

> *". . . I am inclined to think that the essential characteristic of an issuing judicial authority are that it should be functionally (but not necessarily institutionally) independent of the executive. As we have seen, the fundamental objective of the Framework Decision was to replace a political process with a non-political process. This could only be achieved if the new 'judicialised' system was operated by persons who de facto operated independently of the executive . . ."*

3. Relevant National Legal Provisions

3.1 The same national legal provisions and case law apply to this reference as apply in

the reference in the case of*Minister for Justice and Equality v. Tomas Lisauskas*and are not repeated.

4. Assessment of Evidence
4.1 The Supreme Court considers that the High Court sought and obtained the relevant additional information from the issuing judicial authority in this case and the decision on surrender must be made on the basis of the expert evidence of Prof. Dr. Forkel and the additional information supplied by the Public Prosecutor's Office in LÃ¼beck. Such evidence may be sufficient to displace reliance by the Irish courts on a presumption that the Public Prosecutor in LÃ¼beck is a judicial authority within the meaning of Article 6(1) of the Framework Decision and that issue must be decided by the Irish courts prior to the surrender of Mr. Dunauskis.

4.2 On the issue of independence, the Supreme Court considers that the evidence indicates that in the German legal system the LÃ¼beck Public Prosecutor's Office may be the subject of a direction or instruction from the Director of Public Prosecutions (the public prosecutors at the Higher Regional Court of Schleswig-Holstein) which in turn may be the subject of an instruction or direction from the Ministry of Justice of Schleswig-Holstein. Any such direction must be lawful and requires notification to the President of the State Parliament of Schleswig-Holstein. There is no evidence that any such direction was issued in respect of the EAW for the surrender of Mr. Dunauskis.

4.3 There is some difficulty in reaching conclusions in relation to the role of the LÃ¼beck Public Prosecutor in relation to the administration of justice in Germany in part by reason of the difference in terminology in English used by Prof. Dr. Forkel and the English translation of the information provided by the LÃ¼beck Public Prosecutor's Office. Subject to that it appears to the Supreme Court that the role of the LÃ¼beck Public Prosecutor is confined to initiating and conducting investigations and assuring that such investigations are conducted lawfully, the issuing of indictments, executing judicial decisions and conducting the prosecution of criminal offences at a trial court and appearing in relation to appeals. It also appears that the Public Prosecutor has an obligation of objectivity. The Supreme Court notes that the Public Prosecutor does not issue national arrest warrants which are issued by a court in Germany. The Supreme Court has noted that, in accordance with ss. 150 and 151 of the GVG, the Public Prosecutor's Office is independent of the courts and may not perform judicial functions.

5. Grounds for Reference
5.1 The Supreme Court relies upon what is stated in the reference in Lisauskas in relation to the judgments of the Court of Justice in Case C-452/16 PPU*Poltorak*, C-453/16 PPU*Ã–zÃ§elik*, C-477/16 PPU*Kovalkovas*and C-486/14*Kossowski*and the Advocate Generals' opinions therein and the principles which emerge.

5.2 The Supreme Court is uncertain whether, on the evidence and information herein, the Public Prosecutor in LÃ¼beck meets either the test of independence or administers criminal justice in the sense required by those decisions to be considered a judicial authority.

5.3 The Supreme Court has noted in particular what has been stated by the Court of Justice in*Poltorak*that a judicial authority must be an authority that is independent of the executive. This stems from the well established separation of powers between the legislature, executive and judiciary. The Supreme Court has further noted the Court's consideration of independence of courts in Case C-216/18 PPU LM at paras 63-64. The institutional structure of the Public Prosecutor's Office in Germany appears to be such that the LÃ¼beck Public Prosecutor is institutionally subject ultimately albeit indirectly to a direction or instruction of the executive. The Supreme Court doubts that the principles stated by the Court of Justice in*Poltorak*and the other decisions can be met by such a public prosecutor or that independence can be determined by reason of the absence of

any direction or instruction given by the executive in relation to the particular EAW issued in this case. It appears to the Supreme Court that the question as to whether or not the LÃ¼beck Public Prosecutor is or is not a judicial authority must be determined by reference to its position in the German legal system rather than the individual facts of the case.

5.4 On the question of the Public Prosecutor's role in relation to the administration of justice it appears to the Supreme Court that the Public Prosecutor in Germany has an essential role in relation to the administration of justice but that it is a role which is distinct from that of the courts or judges. It is unclear whether such a role, if the independence test is met, is such that it meets the relevant test of administering justice or participating in the administration of justice so as to constitute a judicial authority within Article 6(1) of the Framework Decision. This is so particularly having regard to the underlying principles of the Framework Decision of mutual trust and mutual recognition between judicial authorities.

5.5 The essential question as to whether the LÃ¼beck Public Prosecutor or a public prosecutor with its characteristics is or is not a judicial authority for the purposes of Article 6(1) of the Framework Decision appears to the Supreme Court to be a question of interpretation of European Union law the answer to which is not clear. Hence this Court as a court of final appeal has determined it must make this reference.

6. Questions

6.1 The Supreme Court accordingly pursuant to Art. 267 TFEU refers the following questions to the Court of Justice of the European Union:

> 1. Is the independence from the executive of a public prosecutor to be decided in accordance with his position under the relevant national legal system? If not what are the criteria according to which independence from the executive is to be decided?
>
> 2. Is a public prosecutor who, in accordance with national law, is subject to a possible direction or instruction either directly or indirectly from a Ministry of Justice, sufficiently independent of the executive to be considered a judicial authority within the meaning of Article 6(1) of the Framework Decision?
>
> 3 If so, must the public prosecutor also be functionally independent of the executive and what are the criteria according to which functional independence is to be decided?
>
> 4. If independent of the executive, is a public prosecutor who is confined to initiating and conducting investigations and assuring that such investigations are conducted objectively and lawfully, the issuing of indictments, executing judicial decisions and conducting the prosecution of criminal offences, and does not issue national warrants and may not perform judicial functions a "judicial authority" for the purposes of Article 6(1) of the Framework Decision?
>
> 5. Is the Public Prosecutor in LÃ¼beck a judicial authority within the meaning of Article 6(1) of the Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States?

7. Expedited procedure or priority

7.1 This reference relates to a matter covered by Title V of Part III of the TFEU. Mr. Dunauskis was taken into custody in Ireland but is now released on bail and hence the Supreme Court has decided that it should not request the urgent preliminary ruling procedure pursuant to Article 107 of the Rules of Procedures.

7.2 Nevertheless the Supreme Court requests the President to decide that this reference be linked with the reference in the case of Mr. Lisauskas and both be determined either by the expedited procedure in Article 105 of the Rules of Procedure or to grant them priority in accordance with Article 53(3). This is an EAW matter. The surrender of Mr. Dunauskis is sought in order to prosecute a serious offence alleged to have been committed in 1995. The terms of Mr. Dunauskis's bail in Ireland require him to present himself each day to his local police station which significantly restricts his freedom even within Ireland and he is not permitted to leave the State. This reference may raise a doubt about the status of public prosecutors in Germany as issuing judicial authorities with consequences for many EAWs from Germany. The Court may consider by reason of potential consequences for other EAWs from Germany and Lithuania in relation to persons in custody that it should grant PPU to these references. 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.

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