

THE HIGH COURT

[2019 No. 282 EXT]

BETWEEN

MINISTER FOR JUSTICE & EQUALITY

APPLICANT

AND

TOMAS ZIZNEVSKIS

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 16th day of June, 2020

1. By this application the applicant seeks an order for the surrender of the respondent to the Republic of Lithuania pursuant to a European Arrest Warrant dated 12th January, 2012 (“the EAW”). The EAW was endorsed by the High Court on 18th September, 2019 and the respondent was arrested and brought before this Court on 19th December, 2019.
2. The EAW was issued by a Deputy Prosecutor General of the Prosecutor General’s Office of the Republic of Lithuania, the latter being the issuing judicial authority (the “IJA”). This gave rise to an objection, in the notice of objection filed on behalf of the respondent on 16th February, 2020, that the EAW had not been issued by a judicial authority in accordance with the Council Framework Decision of 13th June, 2002, on the European arrest warrant and the surrender procedure between Member States (2002/584/JHA) (the “Framework Decision”). However, by the time of the hearing of this application, this Court had handed down its decision in the matter of *Minister for Justice and Equality v. Lisauskas* [2020] IEHC 121, by which decision this Court determined that the Prosecutor General’s Office of the Republic of Lithuania fulfilled the requirements of an issuing judicial authority, for the purposes of the Framework Decision, as so interpreted by the Court of Justice of the European Union in its decisions in the cases of PF (case C-509/18), YC (case C-626/19 PPU) and XD (case C-625/19 PPU).
3. At the hearing of the application, I was satisfied that the person before the Court is the person in respect of whom the EAW was issued, and no issue was raised in this regard in opposition to this application. I was further satisfied that the surrender of the respondent is not prohibited by reason of any of the matters referred to in ss. 22, 23 and 24 of the European Arrest Warrant Act 2003 (as amended) (hereinafter “the Act of 2003”).
4. At para. B.1 of the EAW, it is stated that it is based upon three orders of the Kaunas city District Court, the first being an order of 15th March, 2011, the second being an order of 9th May, 2011, and the third being an order of 3rd January, 2012. The first and third of these orders relate to the same matter and comprise an order to impose a provisional arrest measure on the respondent in connection with criminal case reference number: 20-9-00020-11. The second order is also an order to impose a provisional measure of arrest in a criminal case reference number: 20-2-00477-10.
5. At para. C of the EAW, particulars of the maximum length of sentence that may be imposed in respect of the offences for which the surrender of the respondent is sought are provided. These range from a maximum period of three years to a maximum period of

eight years and accordingly minimum gravity is established in relation to each of the offences.

6. At the very beginning of the EAW, it is stated that the surrender of the respondent is required for the purposes of conducting a criminal prosecution. Accordingly, para. D of the EAW is not relevant in this application.
7. At para. E of the EAW, it is stated that the warrant relates to a total of eleven offences. These events are broken down into two groups under the reference numbers refers to in paragraph 4 above. There are eight offences within the first of these reference numbers (i.e. reference number: 20-9-00020-11) and three offences within the second reference number (i.e. 20-2-00477-10). The boxes relating to fraud and extortion have been ticked at para. E.I of the EAW, in relation to the eight offences dealt with under the first of these reference numbers, and so it is not necessary to prove correspondence in relation to the same. However, it is necessary to prove correspondence in relation to the remaining three offences.
8. There were two requests for additional information made of the IJA. The first of these was sent by letter of 21st August, 2019, by which confirmation was sought that the eleven offences were being dealt with by way of two separate criminal cases under the above reference numbers, and this was confirmed. The second request for information was by way of letter dated 24th February, 2020, after the filing of the notice of objection on behalf of the respondent, on 16th February, 2020. Three questions were asked in this second request:-
 1. The IJA was asked to confirm that the respondent was sought for prosecution, in circumstances where para. F of the EAW refers to pre-trial investigation. In its reply of 26th February, 2020, the IJA stated as follows:

"1. In the Republic of Lithuania the criminal procedure is defined by the Criminal Procedure Code. It was approved by 14 March 2002 Law No. IX-785 and went into force on 1 May 2003. The said Code specifies the following procedural stages of the criminal prosecution: 1) pre-trial investigation; 2) trial procedure at the courts of first instance; 3) procedure of appeal; 4) enforcement of rulings and judgements; 5) procedure of cassation.

The criminal matters No. 20-2-00477-10 and No. 20-9-00020-11, in which the request for the surrender under EAW of Tomas Ziznevskis is made, are currently in the first stage of criminal procedure. In the Republic of Lithuania the said stage is referred to as the pre-trial investigation."
 2. Clarification was sought in relation to an offence described as "mental coercion" and the date or dates on which that offence was alleged to have been committed. The reply stated that the offence was alleged to have been committed on two separate occasions, one on 15th May 2010, when it is alleged that the respondent forced a person to sign a promissory note, and secondly, in June 2010, when the respondent

used physical and mental coercion in the purported exercise of the right of another person in relation to the recovery of a debt. It is stated that one offence is charged, but it is made up of two dates when "*different criminal elements of the same crime were committed*".

3. The IJA was asked to clarify why the EAW, which issued in January 2012, was not transmitted to Ireland until July 2019. This query was raised in light of one of the objections of the respondent, by which the respondent claims that his surrender is prohibited by reason of the culpable and blameworthy prosecutorial delay on the part of the authorities in Lithuania. In reply to this enquiry it is stated that the EAW was placed on the Schengen Information System on the same date that it was issued. However, it was not until 18th June, 2019 that the IJA became aware that the respondent resided in Ireland, and the EAW was sent here soon thereafter.

Points of Objection

9. As I mentioned above, points of objection were filed on behalf of the respondent on 16th February, 2020. Nine points of objection were raised. The objections, as pursued at the hearing of this application, were as follows:-
 1. Throughout the EAW, the respondent is described as being a "*suspect*" in relation to the offences to which the EAW relates. In para. F of the EAW it is stated that the respondent "*hid from pre-trial investigation*". In its letter of 24th February, 2020, the central authority here asked a direct question of the IJA (see para. 8(1) above) and a direct answer was not provided. It is submitted that it is not clear that a decision has been made to charge and try the respondent with the offences described in the EAW, and that, accordingly, the presumption to this effect contained in s. 21A(2) of the Act of 2003 does not apply, and the Court is on enquiry as to whether or not there was, at the date of issue of the EAW, an intention to charge and try the respondent. It is submitted that the facts of this case are identical to the facts in the case of *Minister for Justice & Equality v. Angelina Jociene* [2013] IEHC 290, in which case this Court (Edwards J.) rejected an application brought on behalf of the Republic of Lithuania on the grounds that, in spite of exhaustive enquiries by the Court, it could not be established that there was an intention to charge and try the respondent - in fact the evidence seemed to establish the contrary.
 2. In relation to those offences described in the EAW in respect of which ticked box offences are not invoked, there is not correspondence with offences in this jurisdiction. In order to address the arguments made (by each of the parties) in relation to each offence, it will be necessary to set out in some detail the description of the offences in the EAW. I will therefore address these arguments later in this judgement.
 3. It is pleaded that there has been a failure to guard the due process rights of the respondent arising from "*culpable and blameworthy prosecutorial delay*" in circumstances where the original allegations date back to a period between 2008

and 2010. There was a delay of more than seven years in sending the EAW to Ireland. The respondent has been denied his right to an expeditious trial as guaranteed both by Article 38.1 of the Constitution and Article 5 of the European Convention on Human Rights (the "Convention").

4. It is further pleaded that the surrender of the respondent would be contrary to s. 37 of the Act of 2003, in that it would interfere with his right to respect for his private and family life as guaranteed by Article 8 of the Convention, because since the alleged offences the respondent has formed a family in this jurisdiction and has a six-year-old child. The respondent has been living and working in Ireland since 2011.
5. It is also pleaded that in the event of his surrender the respondent will be exposed to a risk of serious violence or death and as such this would violate his right to freedom from inhuman or degrading treatment as guaranteed by Article 3 of the Convention and/or Article 40.3.1 of the Constitution.

Affidavit of the Respondent

10. In his affidavit grounding his points of objection, the respondent avers that he left Lithuania in the summer of 2010 and has lived here ever since. The respondent was born on 31st January, 1992. He provides details of where he has resided in Ireland since he arrived here. He describes how he formed a relationship with a woman with whom he has a son, who was born on 19th December, 2013. Although that relationship is over, he remains active in the life of his child and he pays maintenance to support the upbringing of his child. He has been in another relationship for four or more years and plans to buy a house and start a family.
11. He says that apart from his maternal grandmother, his entire family now resides in Ireland, and he enjoys a good relationship with all of his family. As well as that he has built up many social relationships in Ireland. He says that he travelled here openly, has lived here openly, and has a PPS number. He provides details of his various employments since he came to live here. He describes how he has come to the attention of the Gardaí, in respect of road traffic offences in around 2011. He claims that having regard to his strong personal and family ties in this country, his surrender would constitute a very significant interference with his private and family life.
12. Without admitting to being involved in committing crime, he describes his involvement in the activities to which the EAW relates. He points out that he was only 18 years of age and he was eager to start work. Eight of the offences described in the EAW (in respect of which the ticked boxes have been invoked) concern a form of credit fraud, but he claims he was unaware of the fraudulent nature of the activities and he was merely working for a company. When he heard about complaints relating to the company, he realised it was a "scam" and he stopped working for the company, but he was then effectively hounded by the person for whom he was working and was eventually assaulted and stabbed with a screwdriver by this individual. He claims that this person was arrested in connection with the affairs of the company at the same time that he himself was arrested and this person

put him under pressure to take responsibility for the matters the police were investigating. He says that soon afterwards this person assaulted him, beating him violently and breaking his nose. He says that this person made serious threats to kill members of his (the respondent's) family, and he believed these threats. It was then that his family, who were already living in Ireland, helped him to leave Lithuania to escape from this environment. For these reasons he has serious concerns about his safety if surrendered. He says that he believes he will be at risk of serious personal violence and without protection, if surrendered to the authorities in Lithuania.

Discussion and Decision

Objection under s. 21A of the Act of 2003

13. Section 21A (1) of the Act of 2003 requires the High Court to refuse an application for the surrender of a person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, the offences to which the European arrest warrant relates. Section 21A (2) provides a statutory presumption that a decision has been made to so charge and try the person whose surrender is sought, unless the contrary is proved.

14. It is well established that, in order to prove the "contrary", i.e. that no decision to charge and try has been made, it is necessary for a respondent in applications such as these to adduce cogent evidence to that effect. In the concluding paragraph of his judgement in the case of *Minister for Justice, Equality and Law Reform v. Thomas Olsson* [2011] IR 384, O'Donnell J. stated:-

"Once a Court finds the European arrest warrant to be in order (and therefore on its face a request made for the purpose of prosecution or trial), then before a Court can refuse to surrender a person requested under such a warrant, it must be satisfied by cogent evidence to the contrary that a decision has not been made to charge the particular person with, and try him or her for, the offence."

15. The opening paragraph of the EAW requests that the respondent be arrested and surrendered for the purposes of conducting a criminal prosecution. The full text of this paragraph in the standard form of European arrest warrant, as prescribed by the Framework Decision, contains additional text stating, after "a criminal prosecution", "or executing a custodial sentence or detention order". These are alternatives requiring the issuing judicial authority to select whichever is appropriate, or to indicate if both apply. In very many cases, issuing judicial authorities fail to identify whether the person concerned is sought for prosecution, sentence or detention, but in this case, the IJA has clearly done so. In my view this affirms in a very positive way that the respondent is sought for the purposes of prosecution.

16. It is, of course, true that this Court sought confirmation that the respondent was sought for the purposes of prosecution, in light of the statement in the EAW that the respondent is wanted for the purposes of the pre-trial investigation. It is also true that in its reply of 26th February, 2020, the IJA does not directly answer the question posed, but instead describes the various stages of the criminal prosecution in Lithuania. The first stage,

which is the stage immediately before trial, is the pre-trial investigation stage. As a matter of logic, the proceedings against the respondent must be at this stage because they are not at the trial stage. The reply does not prove, one way or another, whether or not a decision has been taken to charge and try the respondent, and is not sufficient to display the statutory presumption set forth in s. 21A (2) of the Act of 2003 and to put the Court on an enquiry in this regard.

17. The respondent relies upon the decision of Edwards J. in *Jociene* (also a case involving the Republic of Lithuania) and submits that it is "on all fours" with the circumstances of this case. I cannot agree with this submission however, because in that case there had been numerous requests for information made of the IJA, and in one of its answers to a specific question, the IJA had stated:-

"If A. Jociene was surrendered to Lithuania on the grounds of the EAW and there was sufficient information gathered in evidence of her committing the crime specified in Section e) of the EAW, then she would be put on trial (for the first offence) and recognised as an accused."

At page 27 of his judgement, Edwards J. held that this statement made it clear that no decision had been taken to try the respondent in that case.

18. There is no equivalent evidence in this case. Nor is there anything in the EAW to suggest that a decision to charge and try the respondent is dependent upon further investigation or the gathering of further information. In fact, a great deal of information regarding the offences is provided in the EAW. In my view there is no cogent evidence to displace the statutory presumption of an intention to charge and try the respondent. This objection must therefore be dismissed.

Correspondence with Offences

19. The objection based on non-correspondence with offences in this jurisdiction relates to 3 out of the 11 offences with which the EAW is concerned. These are the offences described at paras. E. 1, 2 and 5 of the EAW. It is necessary to deal with each of these offences individually, and repeat verbatim the text of the EAW in relation to each offence.
20. Offence number one is described as follows:-

"During the period of time from 2:00 p.m. on 7 March 2008 till 11:00 a.m. on 8 March 2008 11:00 o'clock, while acting together with Paulius Smilgys,, Paulius Vilimas and Renaldas Linskis, Tomas Ziznevskis broke into the unlocked car parked near the house No. 48 in Grazinos street in Kaunas, and having used the car key found inside the glove compartment of the car, seized Andriejus Miknys's car "Renault Clio", license plate No. ANO 708, the value thereof amounted to 1700 LTL, and Juozas Becialis's articles that were inside the said car, the total value whereof amounted to 200 LTL."

Tomas Ziznevskis is suspected of having committed the criminal offence defined by Article 178 paragraph 2 of the Criminal Code of the Republic of Lithuania."

21. Counsel for the applicant submits that the actions of the respondent as described in this paragraph constitute a number of offences in this jurisdiction. It is submitted that the breaking into the car would amount to criminal damage under s. 2 of the Criminal Damage Act, 1991, the taking of the car constitutes an offence under s. 112 of the Road Traffic Act, 1961, and the taking of the articles in the car would be an offence under s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 (the "Act of 2001").
22. Counsel for the respondent, on the other hand, submits that the offence of criminal damage is not made out, because the actions of the respondent as described merely disclose entry into the vehicle and that the actions of the respondent do not constitute the offence of theft under s. 4 of the Act of 2001, and in this regard relies upon the decision of Peart J. in *Minister for Justice and Equality v. Vera Dunkova* [2008] IEHC 156. In that case, Peart J. concluded that the description of the actions of the respondent in that case did not constitute an offence under s. 4 of the Act of 2001 because there was nothing to indicate that the respondent in that case took the property (referred to in that case) without the consent of the owner and with the intention of depriving the owner thereof. Peart J. concluded that these were not facts that he could read into the warrant for the purpose of being satisfied as to correspondence.
23. I agree with the submissions on behalf of the respondent that there is nothing in the actions of the respondent as described in offence number one to indicate that the damage was caused to the property of the owner thereof. While it is stated that the respondent broke into the vehicle, it is not stated that he caused any damage in doing so, and moreover, it is also stated that the vehicle was unlocked. So it may well be that no damage was caused at all, but in any case the Court cannot infer that any damage was occasioned to the vehicle referred to in the EAW.
24. I also agree that there is not enough information to draw the conclusion that the respondent on this occasion committed an offence under s. 4 of the Act of 2001. All that is said is that the respondent seized a car and goods belonging to others, and particulars of the value of the car and the goods are provided. It is not stated however that, in seizing the car and goods, the respondent had an intention to appropriate the same, and nor is it stated that in doing so he caused the owners thereof a loss. Counsel for the respondent very fairly drew to my attention my own decision in the case of *Minister for Justice and Equality v. Kacevicius* [2019] IEHC 434, in which case I concluded that the facts described in the warrant in that case would constitute an offence under s. 4 of the Act of 2001. I arrived at that conclusion not just on the basis of the use of the word "seized", but also on the basis that the EAW in that case specifically stated that a loss had been caused to the owner of the goods in that case. In this case, this ingredient is missing, and there is simply not enough information provided to conclude that the actions of the respondent, as described in the EAW, would constitute an offence under s. 4 of the Act of 2001.

25. However, there can scarcely be any doubt but that the acts described as constituting the first offence in the EAW would, if committed in the State, constitute an offence under s. 112 of the Road Traffic Act, 1961 which provides:-

"(1)(a) A person shall not use or take possession of a mechanically propelled vehicle without the consent of the owner thereof or other lawful authority."

The ordinary English meaning of the word "seized" means the taking of an object by force, which necessarily means the taking of it without the consent of the owner. It is abundantly clear that in this case, the respondent is accused of taking a vehicle without the consent of the owner, and if the acts as described in the EAW in this regard were committed in this jurisdiction, they would amount to an offence under s. 112 of the Road Traffic Act, 1961. Correspondence is therefore established in relation to offence number one.

26. Offence number two is described as follows:-

"Besides, on 23 June 2010, at approximately 10:45 p.m., in Kaunas, while being under the influence of alcohol and having no right to drive a vehicle, Tomas Ziznevskis drove the car "VW Golf", license plate No. DHH 614, which did not comply with the applicable technical requirements (with different tires on the front axis of the car, the protector worn down), and while driving towards T. Mausiulio street, near the house No. 91 situated in R. Kalantos street, he did not take into account the meteorological conditions and the state of the road, failed to get the vehicle under his control and while at the two-way street consisting of a four-lane traffic road with a double continuous centre line he crossed the line, drove into the lane intended for the traffic going in the opposite direction and crashed into the car "BMW 524", license plate No. OKV 395, which was driven by Raimundas Treciokas along the lane intended for the traffic in the opposite direction. As a result of the traffic accident Raimundas Treciokas, the driver of the car "BMW 524", suffered non-severe health impairment, while Rasa Andriuskaite, the passenger of the car "VW Golf", suffered negligible health impairment.

Tomas Ziznevskis is suspected of having committed the criminal offence defined by Article 281 paragraph 2 of the Criminal Code of the Republic of Lithuania."

27. The actions of the respondent described in this part of the EAW would, if committed in this jurisdiction, constitute several offences:-

1. An offence contrary to s. 4(1) of the Road Traffic Act 2010 which provides that a person shall not drive or attempt to drive a mechanically propelled vehicle in a public place where he or she is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle. It is expressly alleged that the respondent was under the influence of alcohol. It is clearly stated that he did not take account of weather conditions, that he crossed a continuous line and thereafter caused a head-on collision by driving on the incorrect side of the

road. So on the facts as presented, he must have been incapable of having proper control of the vehicle.

2. By crossing a continuous white line and driving on the incorrect side of the road, and causing an accident, he commits the offence of either careless or dangerous driving contrary to s. 53 of the Road Traffic Act, 1961.
3. By driving having no right to do so, he commits an offence of driving without a licence, contrary to s. 38 of the Road Traffic Act, 1961.
4. By driving with tyres or a tyre on which the protector was worn, he drove a vehicle with defective tyres contrary to s. 11 of the Road Traffic Act, 1961 (as amended).

28. Offence number five is described as follows:-

"In addition to this, after T. Ziznevskis's accomplice A. Andriuskevicius had lent 350 LTL to E. Paksys and had misleadingly persuaded him to sign three bills of exchange for the amounts of 530 LTL, 850 LTL and 2500 LTL at some time between 7 April 2010 and 9 April 2010, on 15 May 2010, in the garden community "Lokomotyvas" situated in Paparciai village of Uzliedziai neighborhood in Kaunas region, while acting together with A. Andriuskevicius and Z. Jezeris, by disregarding the procedure established by the law and by wilfully exercising a disputed right of A. Andriuskevicius related with the repayment of the debt, by using mental coercion T. Ziznevskis forced E. Paksys to sign a bill of exchange in the amount of 4000 LTL and also forced E. Paksys to record a vehicle owned by E. Paksys into the bill of exchange as a security of repayment of the debt, and by the joint acts, while Z. Jezeris was wilfully exercising the disputed right of A. Andriuskevicius related with the repayment of the debt and seized a car radio "Panasonic" from the vehicle owned by E. Paksys for the benefit of the persons acting jointly with him, T. Ziznevskis wilfully exercised the disputed right of A. Andriuskevicius related with the repayment of the debt. Later, while continuing the criminal acts and while acting in a group of accomplices together with Z. Jezeris and A. Andriuskevicius, by wilfully exercising the disputed right of A. Andriuskevicius related with the repayment of the debt, in June 2010, the exact time not established, in the garden community "Lokomotyvas" situated in Paparciai village of Uzliedziai neighborhood in Kaunas region, after A. Andriuskevicius had used physical violence by hitting E. Paksys several times, T. Ziznevskis used mental coercion by threatening to destroy the property belonging to E. Paksys by breaking down the windows and by taking away the vehicle, and by such acts forced E. Paksys to give 4000 LTL.

Tomas Ziznevskis is suspected of having committed the criminal offence defined by Article 294 paragraph 2 of the Criminal Code of the Republic of Lithuania."

29. The narrative of events comprising offence number five is very difficult to follow, most likely for reasons of translation. In the first part of this paragraph, there is a reference to events in April and May 2010 in which the respondent is alleged to have acted in concert

with another by "exercising a disputed right" in relation to repayment of a debt and then by "using mental coercion" he forced Mr/Ms Paksys to provide a vehicle as security for repayment of a debt. Counsel for the applicant acknowledged that there might be some difficulty in establishing that these actions constitute an offence in this jurisdiction, but suggested that they might amount to the offense of blackmail, extortion and demanding money with menaces contrary to s. 17 of the Criminal Justice (Public Order) Act, 1994. However, there is not enough information in this part of the EAW to match the actions of the respondent with this offence. I am not satisfied that correspondence is established as between the alleged actions of the respondent in April/May 2010 and any offence in this jurisdiction. Accordingly he may not be surrendered in respect of these actions.

30. However, as regards the actions of the respondent relating to the period of June 2010, it is stated that the respondent used mental coercion by threatening to destroy property belonging to Mr/Ms Paksys, by breaking down the windows and taking away the vehicle, and by such acts forced Mr/Ms Paksys to pay 4000 LTL. Such a threat, if made in this jurisdiction, would constitute an offence under s. 3 of the Criminal Damage Act, 1991. Accordingly correspondence is established in relation to this part of offence number five.
31. Although it was not pleaded in the points of objection, at the hearing of this application it was argued that in relation to offence number three in the EAW, in respect of which reliance is placed upon the ticked box offence of extortion, that minimum gravity is not met in relation to that offence, which is stated to be an offence contrary to Article 181 of the Criminal Code of the Republic of Lithuania. However, it is clearly stated at para. C of the EAW that an offence contrary to Article 181 of the Criminal Code of the Republic of Lithuania is punishable by imprisonment for a term of up to six years which meets the requirements of minimum gravity.
32. The Court was also invited at the hearing of this application to enter upon a consideration as to whether or not the issue of the EAW was proportionate, having regard to the apparently minor sums of money referred to in the EAW, in respect of which it appears the respondent is to be charged with serious offences. So, for example, Article 182 of the Lithuanian Criminal Code which deals with fraud and swindling, provides at Article 182 (2) that:-

"A person who, by deceit and for his own benefit or for the benefit of other persons, acquires another's property of a high value or a property right or the valuables of a considerable scientific, historical or cultural significance or avoids a property obligation of a high value or annuls it or swindles by participating in an organised group shall be punished by imprisonment for a term of up to eight years."

33. In the description of the various offences of fraud in the EAW, it is stated that the respondent and others caused damage to third parties ranging from 1050 LTL to 6570 LTL. It appears, however, that the damages allegedly caused to third parties were greater than the gains made, allegedly, by the respondent which in one case is alleged to have been as little as 70 LTL. Counsel for the respondent asked the Court to contrast this with

the amount involved in the case of Jociene, which was of the order of 135,000 LTL. In 2010, the exchange rate of LTL to Euro was approximately .289.

34. While it is not difficult to see the point being made by counsel for the respondent, the fact is that consideration of proportionality as regards the issue of a European arrest warrant, is a matter for the issuing judicial authority, and is not open for review by this Court. As it happens, the question as to whether or not the issue of a European arrest warrant by the Prosecutor General's Office of the Republic of Lithuania may be reviewed for its proportionality was considered by this Court in the case of *Minister for Justice and Equality v. Lisauskas* [2020] IEHC 121. This Court was informed, in those proceedings, that it is open to a person, in respect of whom a European arrest warrant has been issued by the Prosecutor General's Office of Lithuania, to appeal that decision, at any time; and that in the consideration of that appeal the court will be entitled to review and consider whether or not all the conditions required for the issue of a European arrest warrant have been met, including the proportionality of the decision to issue the same. This, therefore, is the route by which the respondent should raise this objection.

Section 37 Objection

35. This objection is raised on grounds of delay, and interference with the private and family life of the respondent, as assured by Article 8 of the Convention. The objection grounded on delay was not pursued seriously at the hearing of this application, since it was acknowledged that the authorities in Lithuania did not know where the respondent was until June 2019. However, it was nonetheless argued that the authorities in Lithuania should have sent the EAW here sooner, and that it is no answer to this complaint to say that they had posted it on the Schengen Information System as far back as 2012.
36. While there may be some merit in this argument, in so far as the respondent might well have been located much sooner had the authorities in Lithuania adopted this approach, nonetheless it is well established that mere delay on the part of a requesting state does not, by itself, constitute grounds to refuse an application for the surrender of a requested person. In this case, the respondent is also arguing that the delay in advancing the application has contributed to what will be a violation of his rights under Article 8 of the Convention, if he is surrendered. Before moving to consider that however, it must be observed that it is the respondent himself who is responsible for the delay of which he complains, as he left Lithuania knowing that he was under investigation for the offences for which he is wanted for prosecution. He claims that he did so out of fear for his own safety, but that would not have prevented him from informing the authorities as to his whereabouts.
37. The argument that his surrender will give rise to a violation of his rights under Article 8 of the Convention must also be rejected. It is clear that the surrender of the respondent to Lithuania will cause him and his family all the hardship, distress and inconvenience that inevitably follows from this process, but that falls considerably short of establishing a violation of his rights under Article 8 of the Convention. That this is so is clear from a consideration of the decision of the Supreme Court in *Minister for Justice and Equality v. J.A.T. No. 2* [2016] IESC 17, in which O'Donnell J. held, at paras. 4, 10 and 11:-

- "4. ... I think it is fair to say that it is only if some quite compelling feature, or combination of features, is present that it would be appropriate to refuse surrender on grounds of due process or interference with rights. It is important that courts should also rigorously scrutinise the factual basis for any such claims against that background.
10. ... These factors - repeat application, lapse of time, delay, impact on the appellant's son, and knowledge on the part of the requesting and executing authorities of those factors - when weighed cumulatively, are powerful. Even then, and without undervaluing the offences alleged here, it is open to doubt that these matters would be sufficient to prevent surrender for very serious crimes of violence. This illustrates that the decision in this case is exceptional, and even then close to the margin.
11. ... In any future case, where all or any of the above factors may be relied on, it would not, in my view, be necessary to carry out any elaborate factual analysis or weighing of matters unless it is clear that the facts come at least close to a case which can be said to be truly exceptional in its features. Even in such cases, which must be rare, it is important that the considerations raised are scrutinised rigorously."

Risk of inhuman/degrading treatment - Article 40.3.1 of the Constitution/Article 3 of the Convention

38. Finally, it is argued on behalf of the respondent that his surrender to Lithuania will expose him to a risk of serious violence or death and as such would violate his right to freedom from inhuman or degrading treatment under Article 40.3.1 of the Constitution and/or Article 3 of the Convention. This objection is grounded on averments of the respondent as regards his possible treatment by a person with whom he was involved in the activities described in the EAW, to which I have referred above. There are a number of difficulties with this objection.
39. Firstly, they are grounded solely on the affidavit of the respondent. While it is not hard to understand that the respondent might have difficulty in obtaining any evidence supporting these fears, they could hardly, by themselves, be sufficient to justify a refusal of surrender. If they were, it is not difficult to envisage the consequences for the entire scheme of the European arrest warrant.
40. Moreover, even if there was merit in these fears at the time that he left Lithuania, that is now more than 10 years ago, and it seems highly unlikely, even on his own account of events, that the matters that might have placed him at risk in 2010, continue to place him at risk in 2020. He simply asserts that he would be at the same risk now as he would have been in 2010, and this falls far short of establishing substantial grounds that he would be at real risk of inhuman and degrading treatment such as to justify a refusal of surrender, as required by, inter alia, *Minister for Justice, Equality & Law Reform v. Rettinger* [2010] IESC 45.

41. Finally, under this heading, the potential treatment about which he expresses concern is not treatment at the hands of the authorities in Lithuania, but by third parties, and it is far from clear that the possibility of such treatment by third parties could constitute grounds for refusal of an application for surrender, even if substantial grounds of a real risk of such treatment, by such third parties, were established. No authorities were opened to this Court in support of the argument that this could constitute a basis for refusal of surrender.

Conclusion

42. Having carefully considered all the grounds of objection pleaded and argued for on behalf of the respondent, it will be apparent from the above that I have rejected all bar one of the arguments made on his behalf. The argument that I have upheld is that concerning the lack of correspondence as regards one of the incidents described in offence number five with any offence in this jurisdiction. Accordingly, I will order, pursuant to s. 16 of the Act of 2003, that the respondent is surrendered to the Republic of Lithuania for prosecution of all offences described in the EAW, save those activities referred to at para. E.5 of the EAW that are alleged to have occurred between 7th April and 9th April, 2010, and 15th May 2010, in the garden community Lokomotyvas.