Neutral Citation Number: [2009] IEHC 303

THE HIGH COURT

2009 50 JR

BETWEEN:

JOHN BRENNAN

APPLICANT

AND

DISTRICT JUDGE FLANNAN BRENNAN AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of Mr Justice Michael Peart delivered on the 18th day of June 2009:

On the 9th January, 2009 the applicant was before the District Court at Drogheda having been charged with three offences, namely assault contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997, robbery of one box of cigarettes contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001, and lastly an offence contrary to s. 11 of the Firearms and Offensive Weapons Act 1990 whereby it is charged that de did "while committing the offences of robbery and assault in the course of a fight produce in a manner likely unlawfully to intimidate another person an article capable of inflicting serious injury, to wit, an iron bar".

The applicant pleaded not guilty to these offences on the 9th January, 2009, whereupon his solicitor applied for a legal aid certificate, a statements order, and made an application for bail. By this time the DPP had already given directions that the matters be tried on indictment.

It is of some relevance to say that on the 9th January, 2009 the applicant was already on bail in relation to other matters before the Circuit Court, and that the three charges on foot of which the applicant was before the District Court on that date were alleged to have been committed while the applicant was on bail in relation to the charges before the Circuit Court.

At any rate, the applicant's solicitor made an application for bail to the first named respondent on the 9th January, 2009. Prosecuting Garda Paul Sweeney told the first named respondent that there was no problem about the applicant's address, confirmed that he lived there, and accepted in answer to the applicant's solicitor's question, that he had complied with the terms of his bail in the Circuit Court matter. His solicitor referred also to the presumption of innocence which the applicant enjoys in relation to these charges pending a conviction after trial. According to the affidavits filed to ground the present application, the first named respondent expressed his concern that the applicant was charged with serious offences which were committed while on bail on other charges. Garda Sweeney apparently indicated at this point that if bail was to be granted it should be subject to a strict daily signing on condition. In his own affidavit sworn by way of reply on this application, he has also stated that he believes that the District Judge would have known the applicant from other appearances before him on other public order matters for which he has previous convictions. There was no evidence put forward in relation to those matters, but he believes that this would have been the case.

It appears to be accepted that the first named respondent stated following the Garda objection to bail that he would place the applicant under 'house arrest' and indicated that the applicant had a choice, he could stay in his own house or he could go to a bigger house (i.e. prison). He remanded him subject to certain bail terms until 16th January, 2009 with an indication that he would review the situation on that date. The terms of bail permitted the applicant to attend the Circuit Court on the 13th January, 2009 but otherwise required him to remain in his house 24 hours a day. Bail was fixed in his own bond of €500, and subject to the usual conditions which are set out in the recognizance, and to one written on the recognizance as follows:

> *"That he leave his home at 27, Rathmullen Park only to attend Court ('House Arrest')*

It was understood by all concerned that the applicant was permitted to leave his home on the 13th January, 2009 in order to attend at the Circuit Court, and to come back to the District Court on the 16th January, 2009, being the date to which he was remanded. According to the affidavit of Paul Moore, the applicant's solicitor, who was in Court on the 9th January, 2009 when this matter was dealt with, and who represented the applicant on that occasion, the first named respondent having granted bail in this manner then spoke to the Garda Inspector in court and said that he wanted the gardaí to tell the Circuit Court judge on the 13th January, 2009 that the applicant was under house arrest by his order of the 9th January, 2009.

The applicant attended again at the District Court on the 16th January, 2009 and was again represented by Mr Moore, his solicitor. Mr Moore informed the first named respondent that in fact the applicant had been informed that he was not required to be in the Circuit Court on the 13th January, 2009, and instead, was required to be there on the 30th January, 2009. In these circumstances, Mr Moore submitted that the house arrest bail to which he was subject was unduly onerous given that the applicant now did not have to be in the Circuit Court until the 30th January, 2009, and he applied for a variation of the bail terms. The first named respondent inquired if there was any need for the applicant to leave his house and whether he was working. He was informed that the applicant was unemployed. The first named respondent refused to vary the bail conditions.

Mr Moore, according to his affidavit, submitted that a house arrest bail order was wrong in principle, and also that the imposition of a house arrest order did not address any of the usual bail objections, such as the possibility that the applicant might interfere with witnesses or the likelihood of the applicant turning up for his trial. He states that in response to these submissions the first named respondent stated that "there were too many people on the street", and that the applicant could attend the Circuit Court on the 30th January, 2009 and could go to Mass if he wished to do so. Again, the first named respondent asked the Garda Inspector to inform the Circuit Court Judge on the 30th January, 2009 that he had imposed a house arrest order, and also that if the applicant was dissatisfied he could go to the High Court. The applicant was remanded until the 3rd February, 2009.

Mr Moore has stated also on the afternoon of the 16th January, 2009 he again attended before the first named respondent and let him know that it was possible that the applicant may have to attend the probation service in the interim period, and asked that he be permitted to do so. The first named respondent asked the gardaí if there was any objection to that, and when he was told that there was none, he stated that this was in order.

Mr Moore has also stated that the representative of the second named respondent, the Director of Public Prosecutions made no submissions to the District Judge in relation to the imposition of the house arrest condition, and that no objection to bail was raised by him under s. 2 of the Bail Act 1997, and it is submitted that he acquiesced to the order made.

Finally, it has been averred by Mr Moore that a house arrest bail order is one which the first named respondent has made in respect of other persons appearing before him, though mainly it is stated in relation to 'minors'. This latter averment has been made, according to Counsel, because it may serve to justify the seeking of a declaration by this Court that such an order is bad in law, invalid and of no legal effect.

Three replying affidavits have been filed by members of An Garda Síochána who are involved in the applicant's case, but there is nothing in those affidavits which puts in dispute any of the essential facts which have been deposed to either by the applicant or his solicitor.

On this application the applicants seeks an order of *certiorari* in respect of the order of the first named respondent made on the 9th January, 2009, as varied by the later orders of the 16th January, 2009, or alternatively an order of *certiorari* of so much of the said order as varied which made it a condition of bail that the applicant be confined to his house at all times, save for the limited purposes stated already. In addition an order is sought prohibiting the second named respondent from relying on that part of the order which made it a condition of bail that the applicant be confined to his house save for those limited purpose, and in particular from seeking to revoke bail on foot of any, or any alleged, non compliance with the said condition. Certain declaratory reliefs are also sought.

Leave was granted by me to seek these reliefs by order made on the 19th January, 2009, and pending the hearing of the present application I allowed the applicant to be on bail subject to his own bond of €500, that he keep the peace and be of good behaviour, that he reside at his house, that he sign on at Drogheda Garda Station each day between the hours of 9am and 5pm, and finally that he observe a curfew between the hours of 6pm and 8am.

Micheál P. O'Higgins SC for the applicant has submitted firstly that the first named respondent has no jurisdiction to impose a condition of house arrest when granting bail; and secondly, that if there is such a jurisdiction there was no evidential basis in this case for exercising that jurisdiction.

At the outset Mr O'Higgins has submitted that the applicant is entitled in the circumstances of this case to bring proceedings by way of Judicial Review to quash the order, rather than simply appeal that order to the High Court, since the order is in his submission bad in law. It is submitted that in so far as the bail hearing was an unfair one, and/or an order was made which was bad in law, the applicant is entitled to have a fair hearing of his first instance application for bail, and/or to have a decision that is good in law, before being expected to avail of his right to appeal such an order to the High Court.

It is submitted on the applicant's behalf that the house arrest order is a disproportionate and unnecessary and unjust interference with the applicant's social life, his ability to carry out normal daily tasks such as seeking work or collecting his social welfare entitlements, and in addition that there was no evidence adduced before the District Court which could justify such interference with the applicant's rights and his life. It has been submitted that the respondent could have decided to refuse bail, in which case the applicant could have applied to the High Court, but that where he decided to grant bail, he was not entitled to impose the house arrest condition, and there was no evidence in any event which could have justified such a condition being imposed.

Mr O'Higgins has referred to s. 6 of the Bail Act 1997 which provides:

> *"6.—(1) Where an accused person is admitted to bail on his or her entering into a recognisance –*
>
> *(a) the recognisance shall, in addition to the condition requiring his or her attendance before the court at the end of the period of the remand of the accused person, be subject to the following conditions –*
>
> *(i) that the accused shall not commit any offence, and*
>
> *(ii) that the accused shall be otherwise of good behaviour,*
>
> *and*
>
> *(b) the recognisance may be subject to such conditions as the court considers appropriate having regard to the circumstances of the case, including but without prejudice to the generality of the foregoing, any one or more of the following conditions:*
>
> > *(i) that the accused person resides or remains in a particular district or place in the State,*
> >
> > *(ii) that the accused person reports to a specified Garda Siochána Station at specified intervals,*

(iii) that the accused person surrenders any passport or travel document in his or her possession or, if he or she is not in possession of a passport or travel document, that he or she refrains from applying for a passport or travel document,

(iv) that the accused person refrains from attending at such premises or other place as the court may specify,

(v) that the accused person refrains from having any contact with such person or persons as the court may specify." (my emphasis)

It is the meaning and scope of the possible condition specified in sub-section (1)(b)(i) above which is at the heart of the present application.

Mr O'Higgins submits that the use of the word "place" in s. 6(1)(b) is insufficient to confer jurisdiction on the first named respondent to confine the applicant to a particular house on a 24 hour basis, and submits also that if such a literal meaning was to be given to the word, a District Judge would be entitled to impose a condition that a person remain not only in a particular house on a 24 hour basis but also to a particular room in a particular house, and that this was not the intention of the Oireachtas when enacting this section. He submits that it is significant that the word "place" occurs alongside the word "district", and that what is intended is that a judge may impose a condition that a person reside or remain in a district or a place such as a town or village, but that it is not intended that a person's activities would be so confined that he or she could not go outside the front door of his or her home. He submits that such a literal interpretation would amount to an unlawful deprivation of liberty albeit within the confines of his own home, or indeed a refusal of bail.

In addition to that submission, Mr O'Higgins has pointed to the fact that the only evidence before the first named respondent on the 9th January, 2009 was that the applicant had some previous convictions for some public order offences, and that he was before the Circuit Court on the 13th January, 2009 in relation to some other matter from which it appeared that the three offences charged in the District Court were alleged to have been committed while the applicant was on bail in relation to the Circuit Court matter. He points, as Mr Moore did in the District Court on the 9th January, 2009, to the obvious situation whereby the applicant must be presumed innocent of the matters charged in the District Court, and that the first named respondent was not entitled to regard him as having committed those offences for which he yet had to be tried, and that he had pleaded not guilty in respect of same. He refers also to the remark by the first named respondent when imposing the house arrest condition that "there are too many people on the streets". None of the replying affidavits have denied that this remark was made.

Mr O'Higgins has submitted that at no time was any objection to bail mounted by the prosecution on the basis of s. 2 of the Bail Act 1997, even though the first named respondent referred to the fact that the applicant faced 'serious' charges. In any event he has submitted that house arrest could not have been imposed to meet any s. 2 objection such as that there was a risk of interfering with witnesses or failing to appear, since no such evidence was adduced or submissions made in that regard.

Mr O'Higgins has referred to the judgment of Quirke J. in *Ronan v. District Judge Coughlan* [2005] 4 I.R. 274. In that case the respondent had granted bail subject to a number of conditions, two of which were, firstly, that the applicant remain within his home in Ballyfermot, Dublin 10 and observe a curfew between the hours of 3pm and 7am daily; and secondly, that the applicant remain at all times within the area of Ballyfermot, Dublin 10. That applicant had been charged with an offence contrary to the provisions of s. 4 of the Criminal Justice (Public Order) Act 1994. When that applicant came before the District Court there had been no objection to bail put forward by the prosecution, and there was no application that any conditions should be imposed in respect of any bail granted. An application for bail was made but no evidence was adduced by the applicant in respect of that application. But the respondent having looked at the charge sheet remarked that the applicant "*was getting drunk in O'Connell Street*" and proceeded immediately to remand the applicant on his own bail of €100 and imposed the two conditions referred to. Quirke J. was of the view that the application had not been considered by the respondent in the light of the principles in *The People (Attorney General) v. O'Callaghan* [1966] I.R. 501, or any provisions of the Bail Act 1997. He expressed the view that the granting of bail subject to the two conditions referred to came close to refusing bail "*and did in fact comprise an unwarranted, unlawful and unnecessary restriction upon and interference with the applicant's constitutional right to liberty"*. He concluded that there was no evidence which could have justified these restrictions on the liberty of the applicant, since there was no evidence of any apprehension that the applicant might interfere with witnesses. Neither was there any evidence to suggest that the applicant would not turn up for his trial. He concluded that the order made was one made unlawfully and in breach of principles of natural justice as the applicant's advisers had not been afforded an opportunity to make adequate representations. Mr O'Higgins submits that in the present case there was no justification by reference to any evidence before the Court which could justify a house arrest order, and also that principles of natural justice were not observed since the order was made in the absence of any objections based upon s. 2 of the Bail Act 1997.

It has been submitted that in the present case there was not even any sufficient evidence from which the respondent might have concluded that even a night-time curfew was justified, let alone a 24 hour confinement to his house under house arrest.

In addition to these submissions, Mr O'Higgins has referred to the judgment of the European Court of Human Rights in *Nikolova v Bulgaria* (No. 2) ECHR. But that case is not really relevant since the ratio of the decision appears to have been that there was no effective remedy available under the laws of Bulgaria by which the lawfulness of the applicant's house arrest could be reviewed. But the Court did comment that the house arrest order in question amounted to a deprivation of liberty within the meaning of Article 5 of the Convention.

It is relevant to comment at this point that the house arrest imposed in *Nikolova* was a 24 hour house arrest requiring the applicant not to leave her house "*without the permission of the respective organs"*. The law of Bulgaria did not at the relevant time permit any possibility for a judicial review of that house arrest. This latter finding led to a finding that there was a violation of Article 5.4 of the Convention.

The facts of that case reveal also that as a matter of fact this house arrest lasted from February 1996 until she was eventually granted bail on health grounds in April 1998. The Court determined also that some seventeen months of that period constituted a period during which the applicant's case lay dormant. The Court was satisfied that there were "*no*

relevant and sufficient grounds on which the authorities relied to keep the applicant under house arrest" and that "*the authorities failed to justify the applicant's deprivation of liberty for the period of two years and nearly six months*" (paragraphs 66-67). She had prior to the date of the house arrest order been in custody in prison. The Court concluded that there was a violation of the applicant's rights under Article 5.3 of the Convention "*to a trial within a reasonable time or to release pending trial".*

Mr O'Higgins has referred also to the House of Lords decision in *Secretary of State for the Home Department v. JJ and others* [2008] 1 A.C. 385, as well as in *Secretary of State for the Home Department v. E and another* [2008] 1 A.C. 499. I do not find it necessary to rely to any extent on these decisions in part of my conclusions.

Kieran Kelly BL for the respondent has submitted that in this case the respondent did not deny the applicant an opportunity to make submissions in relation to the bail application, in contradistinction to the situation which prevailed in the case of *Ronan v. District Judge Coughlan* referred to. He has submitted that he had evidence that the applicant was not working and reached the conclusion that a house arrest order was appropriate. He submits that the respondent would have been justified in refusing bail altogether, but decided against that in ease of the applicant and permitted him to remain on bail subject to the condition that he did not leave his home, save for the occasions permitted by the order, and as varied later.

Mr Kelly accepted that if the objections to bail were being made on the basis of s. 2 of the Bail Act 1997 he would be entitled to have been put on notice of such objections in advance of the application.

Mr Kelly submits that under the provisions of s. 6 of the Bail Act 1997 the District Judge may impose a condition by which the applicant must remain in a particular place. As far as jurisdiction is concerned, he submits that this provision empowers the respondent to make the house arrest condition that he did. He submits that having heard the evidence and having permitted an opportunity for legal submissions to be made on the applicant's behalf, the respondent made an order that was which he had power to make, and was entitled to have regard to the fact that the applicant was shortly thereafter due to be dealt with in the Circuit Court in relation to another serious matter.

Mr Kelly has also submitted that the applicant ought not to be entitled to the reliefs sought given that he "acquiesced" in the order impugned by entering into the recognisance thereby submitting to the condition. He refers also to the fact that the applicant engaged with the process by making applications to vary the conditions. He submits in these circumstances that the appropriate course for the applicant to have pursued was to make application for bail to the High Court by way of appeal from the order made.

I am satisfied that the applicant is not precluded from seeking to quash the order made on the 9th January, 2009, as varied, simply because he decided to sign the bail bond which contained the house arrest condition. If he did not do so, he would have remained in prison, and it would be utterly unreasonable to deny him relief by way of judicial review because he decided to observe the house arrest condition. He should not be taken to have acquiesced in the condition by reason of having signed the recognisance. I am of the view that before the applicant seeks to vary the order by application to the High Court, the order must first be one which was made in accordance with law. In that regard I agree with the reliance placed by Mr O'Higgins on the judgment of O'Higgins CJ in *State (Abenglen Properties Ltd) v. Dublin Corporation* [1984] I.R. 381 at p. 393.

I am satisfied that there was no lawful basis for the respondent to make the order he did in this case. There was no objection to bail mounted by the prosecution, albeit that the prosecuting Garda stated that if bail was to be granted it should be subject to strict conditions. The only evidence before the respondent was that the applicant was before the Circuit Court in relation to another offence and that the offences before the District Court were alleged to have been committed while the applicant was on bail in relation to the Circuit Court charges. The applicant enjoyed the presumption of innocence in relation to the District Court charges. There was no evidence that the applicant had previous convictions for failing to appear. There was no evidence that he would not turn up for his trial or that if remanded on bail he might interfere with witnesses. It would appear reasonable to conclude that the respondent, from his previous knowledge of the applicant, was of the view that he should not be permitted "*to be on the streets*" since he made the remark that "*there are too many people on the streets*". There was no evidence adduced in this regard and it was not a view which he was entitled to hold against the applicant so as to justify a house arrest order, even if such an order can be seen as one which could be made in some other case in which there was appropriate evidence.

The order made in this case must be seen as an extreme order amounting to a total and unreasonable restriction upon the liberty of the applicant. It seems to me that even a condition imposing a curfew during night-time hours may not have been one for which there was any relevant evidence. There was no evidence offered to suggest that the applicant was a person in the habit of committing offences at night. Perhaps there could have been some such evidence, but the fact is that no such evidence was offered to the respondent by the prosecution. I am satisfied that the restriction of house arrest is not one for which in this case there was any lawful basis on general principles arising from *The People (at the suit of the Attorney General) v. O'Callaghan*. The order was made in excess of jurisdiction and must be quashed. I should perhaps add that the fact that the applicant was permitted to attend court, attend Mass or attend his probation officer does not relevantly or materially alter the essential character of the 24 hour house arrest imposed.

Mr O'Higgins has submitted that this Court should declare, in the interest of other future cases in which such an order might be made by the respondent as he has done in the past, that a house arrest order is bad in law in any circumstances, that condition not being one coming within the conditions referred to in s. 6 of the Bail Act 1997 to which a granting of bail may be subject. It has been averred by Mr Moore that he has been present in court when the respondent has made similar orders of house arrest, although to the best of his recollection, such orders have been made in respect of minors.

As already set forth, s. 6 (1) (b) of the Bail Act 1997 provides:

> *" (b) the recognisance may be subject to such conditions as the court considers appropriate having regard to the circumstances of the case, including but without prejudice to the generality of the foregoing, any one or more of the following conditions:*
>
> *(i) that the accused person resides or remains in a particular district or place in the State,*

…….".

This provision provides a general discretion to impose such conditions as the court considers appropriate, but goes on, without prejudice to the generality of that power to provide for certain particular conditions. I agree with Mr O'Higgins that the broad interpretation of the word "place" in (i) above contended for by Mr Kelly cannot be correct. If it were to be construed to mean that a court could require in a particular case make it a condition of bail that a person remain in a house on a 24 hour basis, it could equally mean that an even more restrictive condition could be imposed, such as remaining in a particular part of a house, amounting to solitary confinement in a particular room. I do not believe that this is what the Oireachtas intended, as it would indeed permit a disproportionate, unreasonable and unlawful interference with the liberty of the citizen, amounting to detention. Where the Oireachtas has provided that a condition may be imposed that a person reside or remain in a particular District or place, this must be interpreted as meaning a particular area, be that a district or other place, such as a town or village, or even an estate of houses in a district. The confinement of a person to a particular house or even a part of a particular house amounts to such a draconian limitation on the freedom of movement and liberty of the citizen that it would require a very specific and clear legislative provision to confer such a power. None such is provided.

Mr O'Higgins has referred to case-law of the European Court of Human Rights in *Nikolova v Bulgaria* [supra]. I am required by s. 2 of the European Convention on Human Rights Act 2003 to interpret any statutory provision or rule of law in a manner compatible with the State's obligations under the Convention, and under s. 4 of that Act when interpreting and applying the Convention provisions to take due account of the principles laid down by, *inter alia*, judgments of the European Court of Human Rights. I have already referred to the fact that reliance has been placed on the *Nikolova* case. That case demonstrates that the European Court of Human Rights considers a house arrest as constituting a deprivation of liberty and therefore requiring justification if it is not to fall foul of Article 5.3 of the Convention. It follows in my view that interpreting s. 6 of the Bail Act 1997 in a manner compatible with the obligations under the Convention requires me to conclude that the word "place" as used in s. 6(1)(b) of the Act cannot be given the broad meaning contended for by Mr Kelly, since house arrest has been found to amount to a deprivation of liberty by the European Court of Human Rights. It seems to be clear from that judgment that the granting of a house arrest order does not constitute a "release pending trial" for the purpose of Article 5.3 of the Convention, even if the ratio of the judgment was that the deprivation of liberty had not been justified.

It follows in my view that s. 6, whether as interpreted by me without reference to the Convention, or interpreted by reference to the jurisprudence of the European Court of Human Rights, does not provide a lawful basis for the imposition of a 24 house arrest order as imposed in this case. I am not to be taken as concluding that a curfew order or even an order requiring a person to remain in his house for even a substantial number of hours in a given day would offend in the same way. It will be a matter of considering the degree of restriction, and for each case to be decided on its own facts and circumstances, and the evidence adduced in order to justify any such restrictions imposed.

I will therefore grant the reliefs at paragraph 1 and paragraph 4 of the Notice of Motion dated 23rd January, 2009.