

THE HIGH COURT

[2012 No. 211 EXT.]

IN THE MATTER OF AN APPLICATION FOR BAIL PURSUANT TO S. 16(12) OF THE EUROPEAN ARREST WARRANT ACT 2003, AS AMENDED BY THE EUROPEAN ARREST WARRANT (APPLICATION TO THIRD COUNTRIES AND AMENDMENT) AND EXTRADITION (AMENDMENT) ACT 2012

Between/

ADAM STUART BUSBY

Applicant

-AND-

THE MINISTER FOR JUSTICE & EQUALITY

Respondent

JUDGMENT of Mr Justice Edwards delivered on the 4th day of March, 2014.

Introduction

The applicant is the subject of a European arrest warrant issued by Sheriff Alistair Noble, the Sheriff of Lothian and Borders at Edinburgh, on the 13th of July, 2012. The United Kingdom of Great Britain and Northern Ireland is seeking the rendition of the applicant on foot of this warrant for the purposes of prosecuting him for the seven offences particularised therein. On the 30th of July, 2013 this Court made an order pursuant to s. 16(1) of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003") surrendering the applicant. Subsequently, the applicant applied to this Court pursuant to s. 16(11) of the Act of 2003 for a certificate that this Court's decision involved a point of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken to the Supreme Court. The Court granted the said certificate and the applicant duly lodged an appeal against this Court's said surrender order.

The applicant now seeks to be admitted to bail pending the hearing of his said Supreme Court appeal, and requests this Court to grant him such bail in the exercise of its jurisdiction to do so under s. 16(12) of the Act of 2003.

The Grounding Affidavit

The application for bail is grounded in the first instance by the affidavit of applicant's solicitor, Ms. Jane O'Neill, sworn on the 13th of February, 2014, which is in turn verified by a short affidavit of verification sworn by the applicant himself on the 28th of February, 2014.

Ms. O'Neill deposes to the following matters (*inter alia*):

"6. I say that the Applicant has been in custody on foot of this European Arrest Warrant since 18th July 2012. I say that I am instructed that the Applicant is desirous that he be admitted to bail pending the determination of the said appeal to the Supreme Court.

7. I say that I am instructed that if granted bail the Applicant will reside at accommodation provided by the Homeless Placement Service of Dublin City Council which at present is envisaged to be the Granby Centre, 9-10 Granby Row, Dublin 1 or in the alternative at an address to be approved by the Respondent herein.

8. I say that I am instructed that the Applicant suffers from multiple sclerosis necessitating confinement to a wheelchair and is of very limited mobility, and I beg to refer to a true copy of the letter of Dr Deirdre Hegarty upon which marked with the letters "JON1" I have signed my name prior to the swearing hereof.

9. I say and am instructed that a bench warrant may have issued for the Applicant while he was in custody in the 1980s and that to the best of my knowledge no other bench warrants have issued for the Applicant in the past.

10. I say that I am instructed that the Applicant is of very limited means and prays this Honourable Court to fix bail in his own bond without the requirement of a cash lodgment.

11. I say that I am instructed that the Applicant is a Scottish national who has resided in Ireland for more than thirty years.

12. I say that that I am instructed that the Applicant will undertake to surrender any documents which might allow him to travel from the jurisdiction, and will undertake not to apply for any new travel documents.

13. I say that I am instructed that the Applicant's date of birth is 1st August 1948.

14. I say that I am instructed that the Applicant will abide by any bail conditions that this Honourable Court may see fit to impose upon him.

15. I say that an application will be made for a recommendation for payment under the Legal Aid (Custody Issues) Scheme in respect of this application.

16. I therefore pray this Honourable Court to grant bail, and I am instructed to say that if the Applicant is granted bail pending the determination of the aforesaid proceedings he will undertake to this Honourable Court that he will attend at each and every occasion required of him and will abide by any conditions that this Honourable Court may see fit to impose

upon him.”

The Applicable Law

The respondent does not consent to bail. It is accepted by all concerned that in circumstances where the applicant is wanted for prosecution, and is not a person who has been convicted of the offences to which the European Arrest Warrant relates, the applicable legal principles are those set out in this Court’s judgment in *Minister for Justice, Equality and Law Reform v. Fustiaç* [2011] IEHC 134, (Unreported, High Court, Edwards J., 6th of April, 2011). In summary, the principles set forth in *The People (Attorney General) v. O’Callaghan* [1966] I.R. 501 apply and such a person has the benefit of an effective presumption in favour of the granting of bail. That presumption may be rebutted and, in a case where bail is objected to, the criterion to be applied by the Court in considering whether the presumption is rebutted in the circumstances of the particular case is that set out in *O’Callaghan*, namely “*is there a likelihood of the prisoner attempting to evade justice?*” Moreover in applying that criterion, the Court should have regard to those factors identified in *O’Callaghan* as being of potential relevance, and consider them to the extent that they are in fact relevant in all the circumstances of the case, as well as any special circumstances tending to magnify the risk of the prisoner absconding or otherwise attempting to evade justice.

Clearly, where bail is being sought pending an appeal against an order for surrender, the fact that the High Court has made an order for surrender would be an additional circumstance to be taken into account where the concern related to the possibility of the applicant for bail failing to turn up to prosecute his appeal.

The Objection to Bail

In the present case, however, the concern expressed is not that the applicant will fail to turn up to prosecute his appeal, but rather that he may seek to evade justice by committing other crimes in this jurisdiction that would, in the event that his appeal is unsuccessful, result in his ultimate surrender having to be postponed.

Counsel for the respondent accepts that s. 2 of the Bail Act 1997 does not apply. As this Court explained in its judgment in *Minister for Justice, Equality and Law Reform v. Zieliński* [2011] IEHC 45, (Unreported, High Court, Edwards J., 10th of February, 2011) the provisions of the Bail Act 1997, and in particular s.2 thereof, have no application because s. 1 of the Bail Act 1997 provides that a reference to “court” within that Act “means any court exercising criminal jurisdiction but does not include court martial”. The High Court is not exercising criminal jurisdiction when dealing with cases under the European Arrest Warrant Act 2003.

The objection put forward by the respondent is not based upon the concern that the applicant will commit further offences *per se*, but upon the more nuanced concern that the applicant will deliberately commit further offences in pursuit of a specific objective, *i.e.*, to delay his surrender, possibly for a lengthy period, thereby frustrating the surrender process and interfering with justice.

The Evidence in Support of the Objection

The offences alleged against the applicant in the European arrest warrant consist of one instance of “Threats” (a common law crime under Scottish law), one instance of “Hoaxes involving noxious substances or things”, contrary to s. 114(2) of the Anti-terrorism, Crime and Security Act 2001, and five instances of “Bomb Hoaxes”, contrary to s. 51(2) and (4) of the Criminal Law Act 1977.

The offences are particularised within the warrant as follows:

“Adam Busby is the self-proclaimed leader of an extremist group called the Scottish Liberation Army. His conduct giving rise to the offences is that:

1) On 27 November 2009 at the Scottish Sun Newspaper, the Guild Hall, 57 Queen Street, Glasgow he did, by means of telephone communication sent to Nicholas Sharp, an employee of the Scottish Sun Newspaper, Guild Hall, 57 Queen Street, Glasgow utter threats to said Nicholas Sharpe, did purport to represent an organisation called the Scottish National Liberation Army, and did threaten to contaminate the drinking water supplies of major English towns and cities with a noxious substance, with the intention of inducing in said Nicholas Sharpe, and others, a belief that there would be danger to human life and a serious risk to human health.

2) On 20 December 2009 at the Scottish Sun Newspaper, Guild Hall, 57 Queen Street, Glasgow he did by means of telephone communication send to the Scottish Sun Newspaper, Guild Hall, 57 Queen Street, Glasgow a text message, the content of which he knew or believed to be false, with the intention of inducing in employees of said Scottish Sun Newspaper a belief that various packages containing caustic, poisonous or other noxious substance had been sent to a number of political figures, including the then Prime Minister of the United Kingdom, Gordon Brown, which was capable of endangering human life or of creating a serious risk to human health: Contrary to the Anti-terrorism, Crime and Security Act 2001, Section 114(2).

3) On 15 April 2010 at the Press Association, 1 Central Quay, Glasgow he did communicate, by telephone, information to Victoria Mitchell, Deputy Editor of the Glasgow branch of the Press Association with the Intent of inducing in her the false belief that a bomb, or other thing liable to explode or ignite, was present at the bridge at the Argyle Arcade in Glasgow.

Contrary to The Criminal Law Act 1977, Section 51(2) and (4).

4) On 15 April 2010 at the Glasgow branch of the Samaritans, 210 West George Street, Glasgow, he did communicate, by telephone, information to another person namely Margaret Foley, with the intent of inducing in her the false belief that a bomb, or other thing liable to explode or ignite, was present at The Hilton Hotel, Glasgow.

Contrary to The Criminal Law Act 1977, Section 51(2) and (4).

5) On 9 June 2010 at the Edinburgh Evening News, Edinburgh he did communicate, by telephone, information to another person namely Simon Lyle, a Reporter there, with the intent of inducing in him the false belief that a bomb, or other thing liable to explode or ignite, was present at the Forth Road Bridge.

Contrary to The Criminal Law Act 1977, Section 51(2) and (4).

6) On 9 June 2010 at the Scottish Daily Express Newspaper, Glasgow, he did communicate, by telephone, information to another person namely Tom Martin, Executive News Editor, with the intent of inducing in him the false belief that a bomb,

or other thing liable to explode or ignite, was present at the Erskine Bridge, Glasgow.

Contrary to The Criminal Law Act 1977, Section 51(2) and (4).

7) On 9 June 2010 at the Scottish Sun, Guild Hall, 57 Queen Street Glasgow he did communicate, by telephone, information to another person, namely Gail Cameron, a News Reporter there, with the intent of inducing in her the false belief that a bomb, or other thing liable to explode or ignite, was present at the Erskine Road Bridge, Glasgow.

Contrary to The Criminal Law Act 1977, Section 51(2) and (4)."

It is clear from the European arrest warrant that the "Threats" offence carries up to life imprisonment, the offence characterised as "Hoaxes involving noxious substances or things" carries a term of imprisonment of up to seven years, and the five offences characterised as "Bomb Hoaxes" carry a term of imprisonment of up to seven years in each instance.

The Court heard evidence at the bail hearing from Detective Garda Ciaran O'Neill. Detective Garda O'Neill testified that he had a concern that if the applicant was granted bail he might attempt to frustrate the ongoing European arrest warrant process on foot of which the Scottish authorities still hope to secure his surrender. A number of circumstances gave rise to his concern.

He testified that on the 23rd of July, 2010 the applicant was convicted before the Circuit Court of a number of offences under Section 13(1)(a) of the Post Office (Amendment) Act 1951 and he was sentenced to four years imprisonment, two of which were suspended. The offending conduct had involved the communication by email of bomb threats to airline flights in 2007 and 2008. Moreover, prior to his conviction in the Circuit Court the applicant had been on bail, and the alleged offences that are now the subject matter of the European arrest warrant are believed to have been committed during the currency of his said bail.

Furthermore, some years prior to the applicant's Circuit Court conviction, he also pleaded guilty before the Special Criminal Court to a charge involving the sending of a menacing communication by fax, for which he had received a sentence of two years imprisonment. Counsel for the applicant subsequently stated, in the course of submissions to the Court, that this conviction was recorded in 1997.

Detective Garda O'Neill also testified that he had learned from the applicant himself that he believed that he had also been indicted before a court in the United States of America for similar conduct. Mr. Busby had told the witness that he had become aware of it from newspaper articles. The Detective Garda testified that in an attempt to verify this information he (Detective Garda O'Neill) had checked open source information on the internet. His searches in that regard had revealed that between 30th March, 2012 and the 21st of April, 2012, forty email threats in respect of bombs and bomb threats were received at Pittsburgh University and that Mr. Busby has been indicted on 30 counts in respect of same. The applicant had been released from prison in Ireland in January 2012.

The Court notes from its judgment in the substantive proceedings that the applicant was arrested on foot of the European arrest warrant on the 18th of July, 2012 – *Minister for Justice and Equality v. Busby* [2013] IEHC 455, (Unreported, High Court, Edwards J., 30th July, 2013).

Detective Garda O'Neill testified that the recent alleged offences were said to have been committed by means of emails sent from a mobile phone. He stated that he had a genuine fear that if the applicant was released on bail there was a likelihood of Mr. Busby committing similar offences, and that it would be impossible to police his use of a mobile phone, or the internet, particularly having regard to the amount of free wifi in Dublin city.

Detective Garda O'Neill accepted that the applicant has limited mobility, and is wheelchair bound, due to multiple sclerosis. Moreover, although Detective Garda O'Neill's information from Dublin City Council was that the applicant had not applied for housing, he was prepared to accept on the basis of correspondence tendered to him in cross-examination that the applicant's solicitor had been in contact with the Granby Row centre and had made representations on the applicant's behalf.

The Applicant's Oral Testimony

The applicant gave oral testimony in response to the evidence of Detective Garda O'Neill, and was then cross-examined by counsel on behalf of the respondent.

The applicant testified that he has chronic progressive multiple sclerosis which was diagnosed in 2009, and stated that he is progressively getting worse without having periods of remission. He states that he cannot walk, some days he cannot speak, and he can barely move his hands. He gets painful muscle spasms lasting for about four hours at a time and has difficulty using a phone. Sometimes he can hold a phone, but other times not. When he uses a phone other people key the number in. He could use one key dialling to contact the emergency services if that was set up for him.

He was asked by his counsel how he found out about the supposed United States indictment, and he stated that there had been something about it on the radio. It had been on the radio in the middle of August 2012 and he had mentioned it to Detective Garda O'Neill in October 2012. He said: "I should say that the Pittsburgh indictment received huge publicity. It was on the radio, it was in all the Irish newspapers. There was very few people who wouldn't know about it. So I mean, it wasn't a secret, it wasn't some sort of sealed indictment in the United States. They held a special news conference. It was in The Times, The Independent, in all these newspapers. The Sun, The Star." He was asked if he had known anything about those matters or those allegations prior to hearing about them on the radio, and he said that he had not. He was asked by his counsel if he had had anything to do with them, and he replied "No, none".

The applicant confirmed that he had been trying to get a place at the Granby Row centre. He again stated his mobility was very limited. He stated he would agree not to access the internet, but that because of his limited mobility he would have to have a phone so that he could dial 999 if he needed to. He would agree to limit his use of a phone to that. He was also willing to agree to keep the peace and be of good behaviour and not engage in criminal activity. He stated that he does not have a passport, and in fact has been refused one.

When asked by the Court how it could be assured he would keep his word in circumstances where he had a track record of being a recidivist criminal with respect to communicating threats of a menacing nature, he responded "I have never lied under oath so I won't commit them, I won't commit them."

Under cross-examination by counsel for the respondent, the applicant admitted that a number of mobile phones belonging to him had been seized by An Garda Síochána in the two months prior to his arrest on foot of the European arrest warrant, and that the internet was capable of being accessed from these phones. He further acknowledged that he had had internet access at the Granby Row

centre when he had lived there previously, and that he knew how to access it through the phone. It was put to him that if he were to be granted bail the Gardaí would have no means of effectively policing his undertaking not to access the internet, that he could easily go out and buy a mobile phone with internet capability if he chose to do so. In response he stated "Well, I'm not mobile, I can't travel." When it was put to him that he had been able to procure internet capable phones in the past notwithstanding that he was wheelchair bound, he replied "I was but I wasn't quite as bad." Moreover, he stated, there was no reason why he shouldn't obtain one.

It was put to him that if he could key in one number, he could key in ten. He stated that it would be very difficult for him to do so, but agreed that it was not impossible. He said that "if I was really to set my mind to it I could access it, I am not fluid in movement or anything of that nature."

Analysis and Decision

The first issue for the Court is whether the effective presumption in favour of bail has been rebutted on the evidence. If the presumption is not rebutted, that is the end of the matter. The applicant must be admitted to bail subject only to routine conditions.

The second issue arises only in the event that the presumption is to be regarded as having been rebutted. In that event, the Court must then consider whether a regime of special conditions can be designed that sufficiently addresses the risk or concern giving rise to the rebuttal of the presumption so as to allow the applicant to be admitted to bail notwithstanding the said risk or concern; or whether bail must be denied absolutely.

In this case, the applicant enjoys the presumption of innocence. The charges are nevertheless serious and carry potentially very significant penalties. The strength of the evidence against him however cannot be gauged from the European arrest warrant and there is no other information with regard to that. Be that as it may, it is expressly acknowledged by the respondent that there is no reason to believe that the applicant represents a flight risk. He has no passport, is acknowledged to be wheelchair bound and to have very limited mobility by reason of multiple sclerosis, and to be of very limited means.

He is offering an address for bail purposes. Although there is apparently internet access at the Granby Row centre, the proposed address is otherwise suitable and unobjectionable.

It is accepted that it is likely to be some months before his appeal comes on for hearing in the Supreme Court, and that even if he is granted a hearing date next term it is probably unlikely, given the complexity of the issues raised in the appeal, that the parties will receive a judgment in the matter before the long vacation.

The concern in this case is that the applicant has a demonstrated track record of communicating menacing threats, whether hoaxes or intended to be real, by means of telecommunications apparatus or using information technology. He has two significant convictions for such activity in this jurisdiction, for which he has twice received, and has served, prison sentences.

The matters that are the subject matter of the European arrest warrant, if true, represent a third and relatively recent incidence of this behavior. Moreover, it is noted that these are alleged to have been perpetrated while he was on bail in this jurisdiction in respect of the matters for which he was ultimately convicted in the Circuit Court. While these are matters to which the Court could attach significant weight if there was substantive evidence in support of them, there is no evidence in support of them. The evidence in so far as it goes is merely to the effect that the applicant is alleged to have done these things, and of course he is presumed innocent of them.

The same is true of the matters in respect of which he has been allegedly indicted in the United States of America. The only evidence before the Court is that there are media reports, of which the applicant and his solicitor are aware, suggesting that he has been indicted in the United States. There is no evidence that he has been actually so indicted, nor is there any substantive evidence in support of the suggested indictment. The Court notes the applicant's express disavowal of any knowledge of any of the matters supposedly being attributed to him, and, of course, I must respect his presumption of innocence.

It therefore comes down to this: does the fact that he has two convictions in this jurisdiction for communicating menacing threats by means of telecommunications apparatus, or using information technology, create a reasonable concern that he may engage in similar activity again with a view to frustrating the desire of the Scottish authorities to secure his surrender as soon as possible on foot of their European arrest warrant? Putting it slightly differently, does the evidence establish that there is there a real risk that if he is admitted to bail he will deliberately commit further such offences for the express purpose of securing a postponement of any surrender to Scotland in case he is unsuccessful in his Supreme Court appeal?

In the Court's view these questions must be answered in the negative. While the applicant certainly has a demonstrated propensity for communicating menacing threats, there is nothing in his record to suggest that this was ever done to frustrate a Court process or to pervert the course of justice. It is certainly the case that committing further offences of this type could have the effect of frustrating or interfering with a surrender process that may still yet happen if the applicant is unsuccessful in his appeal, but there is simply no cogent evidence that the applicant plans to commit further offences, much less do so to that end. He has never threatened to do so, nor even hinted that he might do so. In the circumstances, the concern expressed is entirely speculative.

That being the position the Court does not regard the effective presumption in favour of bail as having been rebutted. The Court is therefore disposed in principle to grant bail to the applicant upon routine conditions, such as the applicant's own bond in a nominal sum with no requirement for a lodgment, a residence condition, a signing on requirement, an undertaking not to leave the jurisdiction, an undertaking to prosecute his appeal with due diligence, an undertaking to turn up in court on all occasions that he is required to do so, and an undertaking to keep the peace and be of good behavior. In addition, having regard to his record of previous offending, the Court considers it prudent, as an aid to assisting him in complying with the last requirement, to impose three further conditions. The first is that he should not access the internet during the currency of his bail by any means whatsoever. The second is that he should not acquire, own or use any phone with internet capability during the currency of his bail. Thus he will not be precluded from owning or using a basic mobile phone with no internet capability, or a landline, for the purpose of making routine calls such as to the doctor, or for a taxi, or to the grocery shop, or for the purpose of accessing the emergency services numbers should he need to do so. The third condition is that he must inform the Gardaí as to the telephone number of any mobile phone that he does acquire, and be prepared when signing on at the Garda station to provide that mobile phone to the Gardaí so that they may check his call history should they wish to do so.

The State will also be granted liberty to apply should they have concerns at any stage in relation to compliance by applicant with his bail conditions.

The Court will discuss with counsel the final form of the order it intends to make.