Neutral Citation Number: [2013] IEHC 415

THE HIGH COURT

Record No. 2013/198 EXT

BETWEEN:

ATTORNEY GENERAL

Applicant

-and-

ERIC EOIN MARQUES

Respondent

JUDGMENT of Mr Justice Edwards delivered the 12th day of September, 2013

Introduction:
In this judgment references to "applicant" will refer to the moving party in respect of the bail motion before the Court, who is in fact the respondent named in the title to these proceedings. References to "respondent" refer to respondent to the motion, who is in fact the applicant in the proceedings.

This judgment contains my ruling concerning whether or not, in the particular circumstances of the case, the applicant can proceed with a proposed bail application before this Court, in circumstances where that is objected to by the respondent; and the reasons therefor.

Background to the issue:
The applicant has been charged in the United States of America with a number of charges that, for the purposes of this judgment, can be broadly described as involving (i) aiding and abetting, and conspiracy in relation to, the advertisement of child pornography; (ii) conspiracy to distribute child pornography; (iii) advertising child pornography and (iv) distributing child pornography. Without getting into specifics, these matters involve various alleged contraventions of the provisions of Title 18 of the United States Criminal Code. Arising from these charges the United States District Court in Maryland has issued a domestic warrant for his arrest. However, it has not been possible for the U.S. authorities to arrest the applicant on foot of that domestic warrant because at the time at which it was issued, and at all material times since then, he has been resident in Ireland. In the circumstances the United States of America is requesting that Ireland should extradite the applicant to their jurisdiction pursuant to a request in that regard made to this State under the extradition treaty that exists between Ireland and the United States of America.

The applicant was arrested in this jurisdiction on the 1st of August 2013 on foot of a provisional extradition warrant issued by this Court (Gilligan J) pursuant to s. 27(1) of the Extradition Act 1965 as amended (hereinafter referred to as the Act of 1965). He was brought before the High Court (once again, Gilligan J) on the same day in accordance with s.27 (6) of the Act of 1965, and was remanded in custody pending (a) the receipt by him of a certificate of the Minister for Justice and Equality under s. 26(1) (a) of the Act of 1965 stating that a request for his extradition had been duly made, or (b) his release under s.35 of the Act of 1965.

A provisional warrant issued under s.27 of the Act of 1965 remains effective for a maximum of 18 days from the date of the person's arrest. Under s. 27(7) of the Act of 1965 if, within the period of 18 days after such person's arrest, no certificate of the Minister under s. 26(1)(a) of the Act of 1965 stating that a request for his extradition had been duly made is produced, he is required to be released.

On the day following the applicant's arrest and remand in custody, i.e., on the 2nd of August 2013, he applied to the High Court (Gilligan J.) for bail. Following a hearing lasting approximately two hours, bail was refused on the grounds that the applicant represents a flight risk, and also on the basis that if admitted to bail he is likely to interfere with evidence, and in particular computer evidence, that may be adduced against him.

A certificate of the Minister under s. 26(1)(a) of the Act of 1965 stating that a request for his extradition had been duly made was in fact presented within the required 18 day period. Accordingly, the applicant was produced before the High Court (Kearns P) and he was further remanded in custody to await a hearing under s. 29 of the Act of 1965 to determine whether he is to be committed to await the order of the Minister for his extradition, or be discharged. On this occasion counsel for the applicant indicated to Kearns P that it was his client's intention to bring a further bail application in circumstances where there had been an alteration in the circumstances in which he was being detained in as much as he had originally been detained on foot of a provisional arrest warrant issued under s.27 of the Act of 1965, and he was now being detained on a different basis i.e., on foot of a formal extradition request. The President apparently expressed some doubts as to whether a fresh bail application could in fact be made in such circumstances, but ultimately made no formal ruling or determination in that regard.

As had been flagged, the applicant in due course issued a fresh motion before the High Court seeking to be admitted to bail, and that motion is now before this Court. However, the respondent has sought to raise a preliminary objection to the effect that the application is misconceived and ought not to be allowed to proceed in the absence of a substantive change in the applicant's circumstances. The respondent acknowledges that there has been a procedural change in the applicant's case but contends that there has been no substantive change in the applicant's circumstances. It has been submitted that in that situation it would be inappropriate for this Court to re-visit a recent judicial determination that the applicant should be denied bail by a Court at the same level as this Court. It was urged that if the applicant is unhappy with the ruling of Gilligan J his remedy is to appeal to the Supreme Court. However, in asking the High Court to revisit the matter in the absence of a substantive change in circumstances the respondent is, in effect, refusing to accept this Court's previous ruling and adopting an argumentative posture that is disrespectful and abusive of the Court's process. As the Court has an inherent jurisdiction to protect its own process it has jurisdiction to refuse to entertain the fresh bail application.

The basis for the respondent's contention that there has been no substantive change in the applicant's circumstances, and that at most there has been a procedural change in his case, was elaborated upon by counsel for the respondent. Counsel made the point

that the purpose of a provisional warrant is to enable a person in respect of whom a requesting State intends to make an extradition request but has not yet done so, and in respect of whom there is an apprehension that he or she may planning to leave the jurisdiction, to be arrested detained for a defined period pending the submission of a formal extradition request to this State by the requesting State. It is manifest that at the time that the provisional warrant in this case was applied for, and the applicant was arrested, there was a clear intention on the part of the United States Authorities to submit a formal request to this State for his extradition. Indeed, one of the proofs that is required to be demonstrated upon any application for a provisional warrant is that the request for a provisional warrant should be accompanied by a statement "*that it is intended to send a request for his*" (i.e., the intended subject of the provisional warrant) "*extradition*" – s. 27(2)(a). Such a statement was duly presented to Gilligan J. on the application for the provisional warrant in this case and, in those circumstances, the applicant could have had no grounds for any confidence that a formal request would not in fact be submitted within the required 18 days, and to expect release within that period. It would have been patently obvious, both to the High Court from the time of the application for the provisional warrant, and to the applicant from the time that he was arrested on foot of that warrant, that there was every prospect of a request being received within the required 18 days and of the proceedings being transformed, procedurally but not substantively, from emergency proceedings based upon a s.27 provisional warrant to the more usual and ordinary type of extradition proceedings based upon a formal extradition request certified by the Minister for Justice under s. 26(1)(a) of the Act of 1965 as having been made. The procedural change is seamless. There is no new arrest. Once the formal request has been received the proceedings automatically continue as though he had been arrested on foot of an s.26 warrant rather than on foot of an s. 27 provisional warrant. It was submitted that in those circumstances the applicant cannot credibly contend that his situation has changed in any meaningful sense, or that there is a basis for revisiting the issue of bail at this point. The bail hearing on the 2nd of August 2013 was conducted on the understanding by all concerned that the United States intended to formally request the extradition of the applicant and that the wheels were already in motion, so to speak, in regard to that.

In response, counsel for the applicant says that at the time of the previous bail application there was no certainty that the matter would proceed to a full extradition hearing. One of the factors that Gilligan J was obliged to take account of was the likely length of the applicant's detention. He could not presume that an extradition request would in fact be made within the required 18 day period. There was indeed evidence before him of an intention on the part of the U.S. authorities to make a formal extradition request, but he could have had no way of knowing, and had no basis for inferring, that they would be able to assemble the necessary paperwork and supporting documentation within the 18 day period. They might or might not be in a position to meet the deadline. The Court had simply no way of knowing. In the circumstances, this Court has to proceed on the basis that to the extent that Gilligan J can be presumed to have taken account of the likely length of the applicant's detention as a relevant consideration, he could only have done so on the basis that, at that point in time, the maximum period for which the respondent could be detained was eighteen days.

It is appropriate for the Court to digress at this point to remark that the ruling of Gilligan J, as reflected in the transcript placed before this Court, does not expressly allude to the likely length of the applicant's detention in the event of bail being denied. However, he was urged in the course of submissions made by the applicant's counsel to have regard, *inter alia*, to the fact that no ministerial certificate was in place, and that his client was detained under a provisional warrant, which was an emergency procedure availed of "*in circumstances where there is not sufficient information to actually ground a full request that is being made*" (transcript, pp. 74 - 75). In the course of his ruling the learned judge stated:

> *"I accept the submission of Mr. Farrell in relation to the fact that this application for bail comes pursuant to a provisional warrant that was issued pursuant to an emergency procedure, and I take that into account." (transcript, p. 85, lines 3 – 7.)*

On this basis it is accepted by both sides that it can be presumed that Gilligan J took into account in some fashion the likely length of detention in the event of bail being refused. It is unclear, however, whether Gilligan J viewed that issue from the narrower perspective of 18 days being the maximum possible length of detention at that point in time, or from the perspective that there was a strong prospect that the proceedings would be seamlessly transformed into a normal extradition case with the consequence that the respondent was likely to be detained for some months at least if bail was refused.

Returning to the submissions made by counsel for the applicant, it was further contended that the applicant's situation is analogous to that of somebody who has been refused bail in the District Court, is returned for trial to the Circuit Court, and in those circumstances in entitled to make a fresh application for bail to the Circuit Court. There has been no change in material circumstances as such but procedurally there has been a novus actus interveniens.

Decision
The Court has considerable sympathy with the notion that barring a meaningful change in circumstances an applicant for bail who has been previously refused bail cannot ask a Court at the same level to revisit the matter. To do places the judge asked to deal with the matter afresh in an invidious situation. Moreover, there has to be finality and certainty in the law. When a Court makes a ruling it has to be accepted. If a party is dissatisfied with the ruling his or her remedy is to appeal to a Court at a higher level. He or she is not entitled to refuse to accept the Court's ruling and to seek to have it revisited by another judge at the same level. To attempt to do so would amount to being argumentative and disrespectful of the Court, and could rightly be characterised as attempting to abuse the process of the Court.

It is a different situation, however, where the applicant seeking a re-visitation of the bail issue can point to a material change in his situation on the basis that there now exists some new and material circumstance that did not exist at the time that a previous application for bail was refused.

The issue for this Court to determine is whether or not there has been a material change of circumstances in the applicant's case. Counsel for the applicant has been at pains to avoid using the expression "change of circumstances", because he asserts that it is in fact a term of art when used in the context of the Bail Act 1997 which does not apply in this case. He makes a valid point but, as he rightly points out, the Bail Act 1997 does not apply and this Court is fully alive to that. Accordingly, when the Court speak of a "change in circumstances" it is to be understood as not being constrained by the meaning given to that expression when used elsewhere as a term of art, and specifically in the context of cases to which the Bail Act, 1997 does apply.

The law on bail in extradition cases in which the applicant for bail is wanted for prosecution is well settled, and is as stated by the Supreme Court in *The People (Attorney General) v Gilliland* [1985] I.R. 643. It was held in Gilliland that the principles set down in *The People (Attorney General) v. O'Callaghan* [1966] I.R. 501 apply. In *O'Callaghan's* case Walsh J. specifically alluded to the potential length of time that a person might be detained, were bail to be refused, as being a relevant factor. He stated (at p. 518):

> "The possibility of a speedy trial is relevant to the extent that if there is no prospect of a speedy trial a Court may very well allow bail where it might not otherwise have allowed it. It cannot be too strongly emphasised, however, that the

prospect of a speedy trial is not a ground for refusing bail where it ought otherwise be granted."

After much reflection, and with not without considerable hesitation, I have concluded that the interests of justice require that the applicant be allowed to proceed with his fresh bail application. I have arrived at that conclusion in circumstances where I am persuaded by counsel for the applicant that, in the absence of an express statement within the ruling of my colleague Gilligan J that he was taking into account the possibility that the applicant could be detained for some some considerable time beyond the 18 days provided for by the provisional warrant, that it cannot be assumed that he did so. While it is technically correct to say the change in procedure that occurs when an formal extradition request is presented within 18 days of a person being arrested on foot of a provisional warrant is seamless, it cannot be taken for granted by a judge hearing a bail application in the context of a provisional detention that a formal extradition request will in fact be presented, and this Court has no basis for inferring that Gilligan J approached the matter other than on the basis that at that point in time the maximum period for which the applicant could be detained was 18 days. Indeed the somewhat oblique reference within his ruling to taking into account the fact that the respondent was detained on foot of a provisional warrant suggests the contrary.

The fact that a formal request has now been presented with the result that the respondent is now likely to be detained for some months pending the s.29 hearing in the event of bail being refused is a relevant factor and can legitimately be regarded as a change in the applicant's circumstances. Erring therefore on the side of caution, I consider that it is appropriate in the interests of justice to allow the fresh application to proceed before me.