



THE COURT OF APPEAL

Record No: CA 2016/318

Sheehan J J.
Mahon J.
Edwards J.

THE MINISTER FOR JUSTICE & EQUALITY

Respondent

V

VYTAUTAS DUNAUSKIS

Respondent

Judgment delivered on the 28th day of July, 2016 by Mr. Justice Edwards

Introduction

1. This appeal is against the judgment and order of the High Court (Donnelly J.) dated the 24th of June 2016 refusing to admit the appellant to bail, and remanding him in custody pending his surrender hearing, following the appellant's arrest on foot of a European Arrest Warrant issued by a judicial authority in Würzburg in the Federal Republic of Germany for the purpose of securing his rendition to Germany so that he might be prosecuted for the crime of murder.

2. Bail had been objected to on *O'Callaghan* grounds and specifically on the basis of a concern that the appellant would fail to turn up for his surrender hearing, which was expressed by a witness from the extradition unit of An Garda Síochána (Detective Sergeant James Kirwan), who gave evidence on behalf of the respondent.

3. Following an appeal hearing before this Court on the 19th of July 2016 we decided that the applicant could be admitted to bail in principle, subject to conditions, notwithstanding the objection raised by the respondent. We determined that any bail to be afforded to the appellant should be subject to the following conditions:

- The appellant should enter into his own bond in the sum of €10,000 alternatively provide two independent sureties of €5,000 each; and in either case the full sum of €10,000 to be lodged.
- The appellant should reside during the currency of his bail at a nominated address to be approved by An Garda Síochána;
- The appellant should sign on daily at a nominated Garda Station;
- The appellant should surrender his passport and National Identity Card (if any) and undertake not to apply for any new or replacement passport, or for any travel documents (to include tickets and electronic boarding passes), during the currency of his bail;
- The appellant should remain within the jurisdiction during the currency of his bail;
- The appellant should engage with the European arrest warrant proceedings and diligently prosecute with due expedition any defence to his surrender that he intends raising, and further turn up in court on all occasions on which he is required to do so;
- The appellant should equip himself with a mobile phone which he should keep switched on and charged at all times, and provide the phone number to An Garda Síochána so that he can be checked up on as to his whereabouts;
- The appellant should keep the peace and be of good behaviour.

4. Having determined that the appellant might be admitted to bail on those terms, we stated we would give our reasons later in a written judgment. We now give our reasons.

The European Arrest Warrant

5. The Federal Republic of Germany seeks the rendition of the appellant, a Lithuanian citizen, on foot of a European Arrest Warrant dated the 13th of May 2016 in respect of a homicide offence allegedly committed by him on 02/03 July 1995. The issuing state has invoked paragraph 2 of Article 2 of the Council Framework Decision of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/J.H.A.), O.J. L190/1 of 18.7.2002 ("the Framework Decision") and has ticked the box in Part (e). I of the warrant relating to "murder, grievous bodily injury". Accordingly correspondence will not have to be demonstrated in the surrender proceedings.

6. The circumstances of the alleged offence as described in Part (e) of the warrant are that: "[A named person] and Vytautas Dunauskis are strongly suspected of having jointly killed another person out of greed. At the time of commission of the crime [the named person] and Vytautas Dunauskis went in the apartment of Hamadi Khalladi in Schützenstraße 61 in Lübeck and consciously and intentionally killed him by means of multiple stabs, with one of the suspects using a knife and the other one a screwdriver, in order to subsequently search the clothes and the apartment of the victim for goods worth stealing."

7. According to Part (c) of the warrant the offence of murder carries a potential sentence of up to life imprisonment in Germany.

8. The European Arrest Warrant was based on a German domestic arrest warrant ordering his detention pending trial. Part (b) of the European Arrest Warrant states that the grounds for detention were "danger of absconding" and "gravity of the crime".

9. The warrant was accompanied by an undertaking from the issuing authority dated the 13th of May 2016 that if the appellant was surrendered to Germany he would be placed on trial. It seems reasonable to infer that this undertaking was proffered in anticipation that the appellant might seek to rely on s.21A of the European Arrest Warrant Act 2003 (the Act of 2003) to resist his surrender.

10. It requires to be noted that at the time that the German domestic warrant issued the appellant was already out of that jurisdiction, and in Ireland. There is no information before this Court to suggest that the appellant knew that he was a suspect in the context of the police investigation into the death of Mr Khalladi at the time that he left Germany, or that his liberty was in any way restricted, or that he was under any travel restrictions, at that time. Seemingly he has not lived in Germany since some time in the 1990's and subsequently has lived both in Lithuania and in Ireland. There is no evidence that he came here as a fugitive in the sense of a person who knew he was being actively and specifically sought by police and who was seeking to avoid apprehension.

11. Both the Court below, and this Court, have been made aware that the prosecuting authorities in Germany "strongly suspect" the appellant of being involved in the killing of Mr Khalladi. Seemingly, this is based, at least in part, upon a DNA match between the appellant's DNA profile and the DNA profile extracted from traces of saliva on a cigarette butt found at the scene of the crime. At the very least, the forensic evidence would seem to place the appellant at the scene of the crime at some point. We are not aware of what other evidence, if any, there is linking the appellant to the crime.

12. We have also been made aware, as was the Court below, that the issuing state made simultaneous requests to this state, and to the Lithuanian state, for mutual legal assistance, which we understand have been acted upon.

13. Moreover, at the time of the proceedings before the domestic German Courts at which the domestic warrant was applied for, following which the European Arrest Warrant was issued, and the mutual assistance requests were made, it was decided not to add the appellant's name to the "wanted persons database" in order to keep his impending arrest in Ireland a secret and also to facilitate the arrest of [the named person].

14. The European Arrest Warrant was transmitted to this State without delay once it has been issued and was endorsed by the High Court short thereafter. The appellant was then arrested by Detective Sergeant Kirwan on the 24th of May 2016, was brought before the High Court as required by the Act of 2003, and his bail application was heard immediately thereafter.

What is known about the appellant

15. The High Court heard that the appellant is a Lithuanian citizen who was born in 1964. He was convicted of attempted murder in Lithuania in circa 1997 and received an 11 year prison sentence. He was released from prison there in 2004 and then left to come to Ireland more or less immediately afterwards. It will be recalled that Lithuania joined the E.U in 2004. In the absence of evidence to the contrary, it seems reasonable to infer that the appellant came to Ireland to look for work, in common with many other Lithuanians who immediately sought to avail of their free movement rights as citizens of a newly minted E.U. state.

16. Since arriving in Ireland the appellant has been living openly in Ballinasloe, and has been working there in a number of jobs, and his primary employment has been as a bus driver for the last seven years or so. He is in a long term relationship with his partner, a Ms Natalja Braciulyte. He has acquired no convictions in this jurisdiction and has not come to adverse Garda notice.

The objection to bail

17. The objection to bail was advanced on the basis that the offence with which the appellant is charged is extremely serious, the potential penalty is one of up to life imprisonment, the appellant is said to be "strongly suspected", there is forensic evidence linking him to the crime scene, and the domestic warrant underlying the European arrest warrant had issued in part because of a perceived "danger of absconding".

18. The parties were in agreement as to the applicable legal principles. They are as set out in the judgment of the High Court in *Minister for Justice, Equality and Law Reform v. Fu'tiac* [2011] IEHC 134 (unreported, High Court, Edwards J, 6th April 2011). In that case the High Court determined that the approach to bail in the case of an unconvicted person who is the subject of a rendition request on foot of a European Arrest Warrant should mirror that adopted by the Supreme Court in *The People (Attorney General) v Gilliland* [1985] I.R. 643 as applicable to the case of an unconvicted person who is the subject of a traditional extradition request. The Supreme had held in the *Gilliland* case that the principles expounded in *The People (Attorney General) v. O'Callaghan* [1966] I.R 501 should apply, albeit with necessary modifications appropriate to the extradition context.

The High Court Judge's Ruling

19. In deciding not to admit the appellant to bail the judge at first instance ruled (*inter alia*):

"So in this case there is very clear indication from the German issuing authority and the German authorities themselves, from both of the European Arrest Warrant proper and the accompanying letter that there is a danger of absconding and that certain matters had to be put in place to ensure in effect that he wasn't tipped off. The Court has to have regard to that fact.

The Court also has to have regard to the fact that he is now being sought for clearly an offence of considerable gravity, of itself that fact and the fact that there must be seen or to be considered as strong evidence against him, are factors which this Court has to take into account in considering the O'Callaghan criteria and in particular in considering whether there is a likelihood of this man attempting to evade justice.

Now, I have to look at the factors in his favour and one of the factors of course is that he doesn't have a history of bench warrants. The other factor is that he has employment, he is working here and he has a partner here. However, his links to this jurisdiction, while of some substance and I have regard to them, are not particularly strong. He apparently, it has been said to me he does not have children in this jurisdiction, he has a partner in this jurisdiction, he has been here for it would seem approximately seven years, the Court not having been told any more matters. His ties then, this is a man who clearly has come from Lithuania to this jurisdiction, so to a certain extent he has shown that he is willing to uproot himself, if I may say that, from one country to another. Of course in the ordinary scheme of things that is insignificant as many people do that and are entitled to do that for perfectly legitimate reasons no matter what their nationality and it is a recognised fact that the globalised world that we find ourselves people move from country to country and are quite entitled to.

However, I do have to take into account the fact that he has, in effect moved, in the not too distant past in "the sense" of it. In the last seven years, he has limited family in this jurisdiction. I am also, one can contrast the facts and the Fu'tiac case, where it doesn't

appear that this man or certainly isn't being put forward that he knew about these allegations and to that extent, living openly is not as necessarily conclusive or significant as it was in the Fu'tiac case but over all the consideration here is whether there is a likelihood that he will attempt to evade justice.

The answer to that question is, on the basis of the evidence that I have before me, which is that the German authorities viewed it as a danger of absconding and took particular steps to prevent that, that he is wanted for an extremely serious offence, alleged offence, of which there is apparently strong evidence 15:3 and that would amount to an incentive to leave. In my view there is a likelihood of this man evading justice and on that basis I am refusing bail."

Discussion and Analysis

20. In *The People (Attorney General) v. O'Callaghan* [1966] I.R. 501 the test, where potential flight was being relied upon as a ground for possibly denying bail, was stated to be "is there a likelihood of the prisoner attempting to evade justice?" There is an effective presumption in favour of granting bail in the case of an accused, or in this instance a requested person, who enjoys the presumption of innocence. Before bail can be justifiably denied the party opposing bail must establish as a matter of probability that the person concerned will not turn up for their trial / surrender hearing if admitted to bail on any basis. As Henchy J put it in *The People (Attorney General) v Gilliland* [1985] I.R. 643:

"Apart from the inherent unfairness in requiring proof of a negative, it is plain that in many cases it would be grossly unfair to expect a prisoner awaiting extradition in a jail in a foreign country to be in a position to adduce evidence to rebut the likelihood of his absconding. Where an application for bail is made by a prisoner, it is for the party resisting that application to put forward such evidence as will enable the court to hold that there is a probability that the prisoner will abscond if granted bail. The discretion of the court hearing the application must necessarily be wide."

21. In his judgment in O'Callaghan's case Walsh J was at pains to point out (at p.517/518) that objections "must be related to the grounds upon which bail may validly be refused. Furthermore they cannot be simply made in vacuo but when made must be supported by sufficient evidence to enable the Court to arrive at a conclusion of probability and the objections made must be open to questioning on the part of the accused or his counsel. It is not sufficient for the objecting authority or witness to have a belief nor can the Court act simply upon the belief of someone else. It must itself be satisfied that the objection made is sufficient to enable the Court to arrive at the necessary conclusion of probability."

22. While the offence charged against the appellant is serious, and carries a substantial penalty, and he has a previous conviction for attempted murder, and there is clearly enough evidence against him, including some forensic evidence, to cause the authorities in the issuing state to say that they "strongly suspect" him of involvement in the murder of Mr Khalladi, these factors in and of themselves do no more than establish a degree of incentive to flight and in consequence raise the possibility of flight in the event that the appellant is admitted to bail. However, there was nothing more concrete offered in evidence before either the High Court, or this Court, in support of the objection to bail. Frequently in such matters a court might also be offered evidence of factors such as resistance to apprehension, previous breach(es) of bail, evidence that the person concerned arrived in Ireland as a fugitive and knowing that he was wanted, evidence of living under a false identity or alias, evidence of actual steps taken in preparation for flight, expressed intentions not to turn up either for the surrender hearing or ultimate trial, being in possession of false identity or travel documents, and other such matters. There was nothing of that sort put forward in this case.

23. On the contrary, there was evidence that the appellant has been living openly in Ireland since c 2004, and that he put down certain roots here in the sense that he has lived in the same place for a considerable time, has set up home here (admittedly in rented accommodation), is in a romantic relationship with and resides with a partner, is in reasonably long standing and responsible employment and has not come to adverse Garda notice during his time here. The roots that he has put down may not be particularly deep roots, but they are roots nonetheless.

24. Mere possibility of flight is not enough to justify denial of bail, though it may require that any bail allowed should be subject to stringent conditions. In our view the evidence offered by the respondent in support of the objection to bail, while establishing a reasonably significant risk of flight at the level of possibility, did not go so far as to establish that that risk existed at the level of probability. Bail should not therefore have been denied absolutely, and in doing so the judge in the court below was in error. On the contrary, it would have been appropriate on the evidence to grant bail in principle subject to stringent conditions designed both to disincentivise and deter flight, and to place obstacles in the way of possible flight.

25. For these reasons we have allowed the appeal and have approved in principle a regime of bail, subject to the conditions that we have indicated. It is a matter for the appellant whether he in fact takes up that bail.