

**THE HIGH COURT****[2013 168 EXT]****BETWEEN****THE ATTORNEY GENERAL****APPLICANT****AND****EDWARD J. SNOWDEN****RESPONDENT****EX TEMPORE JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 6th day of July 2013**

This is an application pursuant to s. 27 of the Extradition Act 1965 for a provisional Arrest Warrant in respect of Edward J. Snowden, a citizen of the United States of America.

The request is one which contrasts with a request for a warrant where an extradition request has been made and where the Minister certifies the existence of that request.

Section 26(1)(a) of the 1965 Act provides that if the Minister receives a request for the extradition of any person, he shall, subject to the provisions of the section, certify that the request has been made.

In s. 26(1)(b) of the 1965 Act, the parameters of the High Court's jurisdiction in relation to arrests following an extradition request is set out. The sub-section provides that on production to a judge of the High Court of a certificate of the Minister under paragraph 1(a) stating that a request referred to in that paragraph has been made, the judge shall issue a warrant for the arrest of the person concerned.

That is in contrast with the power of the High Court under s. 27(1) which provides that a judge of the High Court may, without a certificate of the Minister under s. 26(1)(a), issue a warrant for the arrest of any person on the sworn information of a member of An Garda Síochána not below the rank of Inspector that a request for a provisional arrest of that person has been made on the ground of urgency. The key and obvious point of contrast is that under s. 27(1), the court has discretion whether or not to issue a provisional Arrest Warrant whereas an arrest warrant must issue if sought where the Minister certifies that an extradition request is extant.

The parameters of the court's discretion are set out in the section itself. The court is required to ensure that certain matters are contained in the request for a provisional Arrest Warrant from the foreign country.

Before I describe what the minimum content of a request for a provisional warrant is it is useful to recall that in s. 25 of the Act, there is also a minimum content requirement for an extradition request. Section 25 provides that:

"A request for extradition shall be supported by the following documents—

(a) the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or, as the case may be, of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting country;

(b) a statement of each offence for which extradition is requested specifying, as accurately as possible, the time and place of commission, its legal description and a reference to the relevant provisions of the law of the requesting country"  
[Emphasis added]

The contrast between that provision and its partner provision in s. 27 is something which I bear in mind. Clearly, an extradition request is required to state as accurately as possible the time and place of commission of the alleged offence or offences.

In respect of Mr. Snowden, it would appear that the American authorities made contact with Irish authorities on an informal basis to begin with on 4th July 2013. On 5th July 2013, the Embassy of the United States of America communicated a request for a provisional Arrest Warrant to the Department of Foreign Affairs and Trade. It is in respect of that request that I must exercise the powers given to me by s. 27 of the 1965 Act. In particular, because the United States of America is a Convention country, what is required to be contained within the request is set out in s. 27(2A) of the Act. That provides that a request for a provisional arrest warrant shall state that one of the documents mentioned in s. 25(1)(a) exists in respect of that person. The documents mentioned in s. 25(1)(a) are either the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or, as the case may be, of the warrant of arrest or other order of the same effect.

In this respect, what one is looking for in the request from the United States is a statement that one of the documents, in this case the warrant of arrest, exists. I am satisfied that at page 2 of the request, the Embassy of the United States, states that "on 14th June 2013, a warrant for the arrest of Mr. Snowden was issued by US Judge John F. Anderson for the offences charged in the complaint. This warrant remains valid and executable." I am satisfied that that is a statement that one of the documents set out in s. 25(1)(a) exists.

The provision then goes on to require that the request shall be accompanied by a statement of the offences to which the request relates, specifying the nature and description under the law of the requesting country of the offences concerned.

On the first page of the request from the Embassy of the United States of America, the legislative provisions creating the criminal offences which Mr. Snowden is alleged to have committed are set out. The following paragraph appears which says that Mr. Snowden is charged by complaint in Case No. 113CR265 filed on 14th June 2013 in the United States District Court for the Eastern District of

Virginia. Mr. Snowden is charged with violations of 18 USC s. 793(d) (Unauthorised Disclosure of National Defence Information); 18 USC s. 798(a)(3) (Unauthorised Disclosure of Classified Communication Intelligence) and 18 USC s. 641 (Theft of Government Property).

The question for the court is whether that is a statement of the offences to which the request relates which specifies the nature and description under the law of the requesting country of the offences concerned. I am satisfied that that statement of the offences and the description of them satisfies the requirement of s. 27(2A)(b) of the 1965 Act.

I should also say that counsel for the Attorney General in this case has submitted through witnesses tendered to the court a number of documents which were used to obtain the arrest warrant in the United States of America. In that context, an affidavit was sworn by a US Official under seal. That affidavit appears to have been sworn for the purposes of establishing probable cause that the offences were committed. Paragraph 3 of the affidavit says that the affidavit is submitted in support of a criminal complaint alleging breaches of 18 USC 793, 798 and 641. The deponent says that because the affidavit has been submitted for the limited purposes of establishing probable cause for the accompanying complaint, not every fact known concerning the investigation is included.

At paragraphs 11, 12 and 13 of the affidavit, the deponent sets out in full the provisions of 18 USC s. 793(d), 18 USC s. 798(a)(3) and 18 USC s. 641, those being the offences of unauthorised disclosure of national defence information and the unauthorised disclosure of classified communication intelligence and theft of government property, respectively. I am also satisfied that that statement in that affidavit constitutes compliance with the requirements of s. 27(2A)(b) being a statement of the offences to which the request relates specifying the nature and description under the law of the requesting country of the offences concerned.

Section 27(2A)(c) is the next sub-section of the provision, compliance with which I must ensure. It is complex and has a number of different elements in it. The section provides that the request shall specify:

- (i) the circumstances in which the offences are alleged to have been committed;
- (ii) the time the offences were alleged to have been committed;
- (iii) the place of the commission of the alleged offences; and
- (iv) the degree of involvement of the person in respect of whom the request is made in the commission of the alleged offences.

I must ensure that the request complies with that sub-section and that the four elements required to be in the request in respect of the offences are all there.

The first matter to be looked at is whether the circumstances in which offences were said to have been committed are set out in the request. In this respect, I refer to page 2 of the request delivered by the United States Embassy to the Department of Foreign Affairs which has the following text:

"Snowden, a US citizen and fugitive, unlawfully released classified information and documents to international media outlets. Since approximately March 2013, Snowden was employed by the US based strategy and technology consulting firm Booz Allen Hamilton (Booz Allen), a company which, among other roles, serves as a contractor for the United States Government including US agencies. As part of his employment and following a background investigation, Snowden was granted a United States Government security clearance which entitled him to access to classified national defence information. Additionally, Snowden acknowledged his responsibility and agreed to protect that classified defence information from disclosure to persons not entitled to receive it.

Between on or about 5 June 2013 and 9 June 2013, classified information was published on the Internet and in print by multiple newspapers including the 'Washington Post' and the 'Guardian'. The articles and Internet postings by the 'Washington Post' and the 'Guardian' included classified documents that were marked 'Top Secret'. The 'Washington Post' and the 'Guardian' later revealed that Snowden was the principal source for the classified information. Snowden, on or about 9 June 2013, in a videotaped interview with the 'Guardian' admitted that he was the person who illegally provided those documents to reporters. Evidence indicates that Snowden had access to the classified documents in question, accessed those documents and subsequently provided those documents to media outlets without authorisation and in violation of US law."

It is in those two paragraphs in particular that I look to for compliance with s. 27(2A)(c) of the 1965 Act.

I am satisfied that in respect of item one, which is the circumstances in which the offences were committed, and item four, the degree of involvement of Mr. Snowden in the commission of the alleged offences, are adequately set out. This is evident from the manner in which the request gives details about the connection between Mr. Snowden and a firm described as being a US based firm. The connection between Mr. Snowden and this firm is set out, the fact that there was access to the documentation and the fact that there was publication of the documents between 5th June and 9th June 2013.

The second matter of which I have to be satisfied, is whether the request specifies the time when the offences took place. Counsel for the Attorney General has urged upon me that there is adequate information in respect of the time when the offences took place by reference to the timeframes which are in the request and that is the beginning of Mr. Snowden's employment with Booz Allen Hamilton which is said to have been in March 2013 and the final publication and admission by Mr. Snowden of his involvement in the offences on 9th June 2013. Mr. Murphy S.C. urges upon me that that is an adequate expression of the time when the offences took place.

Not without some hesitation, and having considered the matter carefully, it appears to me that there is adequate information about the time within which the offences were said to have taken place set out by reference to that timeframe. I am aware that there is a difference between the degree of information required to ground an application for a provisional warrant and that which would be required in respect of an extradition request. Having regard to that difference between the provisions of s. 25(b) and s. 27(2A)(c), I say that there is adequate description of the time when the offence may have taken place.

The final matter which I must check by reference to the provisions under section 27(2A) is whether the request informs this court where the offences took place.

In this regard, I refer again to the affidavit sworn in support of the application for an Arrest Warrant in the United States of America. It is urged upon me that the content of this affidavit should fairly be considered to be comprised in the request for the provisional Arrest Warrant.

It is arguable that the only document extraneous to the request itself which may lawfully form part of the request and be checked for compliance with the rules in s. 27 is an accompanying statement of offences. I am not necessarily deciding whether such approach is lawful but I am willing to assume that I am permitted to have regard to the information that was sworn and available to the court in the United States of America when it issued the Arrest Warrant. In particular, I note the contents which start at paragraph 26 of the affidavit and which says that on or about 15th May 2013, based on badge access records, Mr. Snowden accessed an NSA facility in Hawaii for the last time.

This is the first indication in any of the documents before the court as to where these offences might have taken place. The request itself does not state where the offences actually took place. There is a reference to Mr. Snowden being employed by a US based company but the request does not say that the employment took place in the United States of America. I am willing to assume that the statement in the request that Booz Allen is based in the United States of America allows me to be satisfied that Mr. Snowden was employed in the United States and therefore there is a likelihood that the offences were committed in the United States. I might well be able to do that but I would have a concern. The concern would be that there is insufficient detail about where in the United States the employment might be based. However, that might not be completely fatal, it might be sufficient for the request to say that the offences were committed somewhere in the United States of America.

The affidavit to which I have been referring says that having accessed the NSA (which I understand refers to the National Security Agency) facility in Hawaii for the last time, on or about 19th May 2013, Mr. Snowden travelled from Hawaii to Japan. On or about 20th May 2013, Mr. Snowden arrived in Hong Kong. On 20th May 2013, Mr. Snowden posted on social media the words "I'm okay, it had to be done".

The publication of the material happened between 5th, 6th, 7th and 9th June 2013 and the interview which was videotaped where Mr. Snowden appears to admit to his dissemination of information was broadcast on the 'Guardian' website on 9th June 2013.

The difficulty with this is that we have a timeframe within which Mr. Snowden was definitely in the United States of America and that is between March 2013 and 19th May 2013. Thereafter, Mr. Snowden, on the information available to this court, was outside of the United States of America. I am told that he was in Japan and in Hong Kong.

It is of note that the offences with which Mr. Snowden is charged relate, not to the publication of the information, but to its unauthorised disclosure. The question for this court is whether the request for the provisional warrant tells this court where the unauthorised disclosure took place. It seems to me that there are a number of possibilities.

(i) That the information was disclosed in the United States of America;

(ii) That the disclosure took place in Japan some time on or after 19th May 2013 or in Hong Kong some time after 20th May 2013.

The question of where the offence took place is not a minor detail but is a matter which could have very serious consequences in any further stage that might be reached in an extradition process. That is because if it is the case that the offences took place outside of the territory of the United States of America, the question will arise as to whether there is extraterritorial effect in respect of the US offences, but more importantly, whether the Irish equivalent offences have an extraterritorial effect or aspect to them. There would need to be sufficient similarity between the two offences in order for there to be an extradition. That is a matter that is not before the court now and is of no concern. I am simply referring to that as to why I think it is important that the place where the commission of the offences be indicated.

My conclusion in this matter is that the request made on 5th July 2013 by the United States of America through its Embassy in Dublin fails to indicate the place where any of the offences took place.

Therefore, I am compelled to refuse the application by the United States of America for a provisional Arrest Warrant in respect of Mr Edward J. Snowden.

(Though the judgment as delivered referred to the failure of the request to state where the alleged unauthorised disclosures took place, the decision of the court was also based on the same failure in respect of the offence of theft of government property. The court could not discern what property had been allegedly stolen nor where the theft took place. The offence may relate to theft of information and its misuse rather than to physical property. In the absence of some information about this alleged offence it could not be assumed that the theft took place in Hawaii.)