Neutral Citation no. [2012] NIQB 110

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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Coney's (Gavin) Application [2012] NIQB 110

IN THE MATTER OF AN APPLICATION BY GAVIN CONEY FOR BAIL

MAGUIRE J

Introduction

[1] The applicant is aged 35 and is married with two children under ten years of age. He lives in his own house in Omagh with his family. He has a good employment record and his wife is a District Nurse. The applicant does not have a criminal record.

[2] The circumstances giving rise to this application for bail are that the applicant was arrested on 12 May 2012 as part of an on-going police investigation into acts of terrorism. As a result of his arrest the applicant was interviewed over a lengthy period as will be referred to below. On 19 May 2012 the applicant was charged with three offences. These were:

(i) Between 1 March 2012 and 12 May 2012 in the County Court Division of Fermanagh and Tyrone, with the intention of committing acts of terrorism, he engaged in conduct in preparation for giving effect to his intention *viz* weapons training at an improvised firing range, contrary to Section 5(1) of the Terrorism Act 2006.

(ii) That on 30 March 2012 in the County Court Division of Fermanagh and Tyrone he had in his possession a firearm namely a .22 Walther rifle and ammunition with intent to endanger life or cause injury to property or to enable some other person by means thereof to endanger life or cause serious injury to property, contrary to Article 17 of the Firearms (Northern Ireland) Order 1981.

(iii) That on 30 March 2012 in the County Court Division of Fermanagh and Tyrone he attended at a place used for terrorism training, namely Formil Wood, Gorticashel Road, Omagh, contrary to Section 8 of the Terrorism Act 2006.

[3] The applicant appeared before Omagh Magistrates' Court on 19 May 2012. He was remanded in custody to Her Majesty's Prison, Maghaberry.

[4] On 1 June 2012 the applicant made an application for bail in the High Court. At the applicant's request when the application came on for hearing on 6 June 2012 the application was adjourned. The application was later moved before this court on 21 September 2012. In the light of certain legal points which arose in the course of the hearing of the application and in order to give the applicant and the prosecution the opportunity to serve skeleton arguments on these points, the application was adjourned for further argument to 16 October 2012.

[5] The applicant was represented before the court by Mark Mulholland QC and Fiona Doherty BL. The prosecution were represented by the Director of Public Prosecutions, Barra McGrory QC and Conor Maguire BL. The court is grateful to both legal teams for their well marshalled skeleton arguments and for their interesting and informed oral submissions.

<u>The circumstances giving rise to the charges</u>

[6] In respect of the charges set out above, the applicant stands charged with three co-accused. The co-accused are his brother, Aidan Coney, Sean Kelly and Sharon Rafferty. The court is in no doubt that the charges were the outcome of a substantial anti-terrorist operation. The court is in a position to say this because it is clear that two of the co-accused, Sean Kelly and Sharon Rafferty, had been the subject of monitoring and that certain conversations between them had been recorded by security agencies. Transcripts of recorded conversations between them were disclosed by the prosecution to the applicant for the purpose of this bail application. In addition, from the description of the events which the prosecution has provided in relation to what occurred at Formil Wood on 30 March 2012 it is clear that there was on-going surveillance by security agencies of what was occurring there on that day.

[7] In essence the prosecution case against the applicant was that on 30 March 2012 at Formil Wood outside Omagh the four accused were involved in a terrorist training exercise in support of a dissident Republican paramilitary group. The training going on on that day was in relation to firearms. The object was to enable later terrorist attacks, probably directed at the police, to take place.

[8] In support of these claims the prosecution relied on a range of material. This material, as presented to the court, may be summarised as follows:

(i) Police had gathered extensive evidence by way of recording and surveillance of conversations between Sean Kelly and Sharon Rafferty at locations in County Tyrone between November 2011 and April 2012. During these conversations the following, inter alia, were discussed:

(a) Training in the context of firearms.

(b) The penetrative power of a .22 rifle against humans.

(c) Walking up to people and putting nine rounds in them.

(d) Army business.

(e) Accepting resignations.

(f) Attending leadership meetings.

(g) Recruiting for their organisation.

(h) Acquisition of arms.

(i) Mobile police stations.

(j) Providing finance for the organisation.

(ii) In the course of the conversations above, the applicant and his co-accused brother (Aidan Coney) were referred to. While neither brother was referred to by his full name, each was mentioned by their first name and they were mentioned as a collective ("Gavin and Aidan"). In addition there was reference to a black Saab motor car. The court was told that Aidan Coney owned a black Saab motor car. Reference was also made in the conversations to the brothers having access to legally held firearms. This reference accords with the position of the present applicant who has a firearms licence for a number of firearms. In the course of the conversations the brothers were described as "clean". This is taken to be a reference to the absence of convictions in relation to the brothers. As noted above, the applicant has no criminal record. In addition the conversations contained references to events of a terrorist nature in which dissident Republicans had been involved. One of the co-accused is reported to have said to the other "Heffron went like a dream". This seems clearly to be a reference to a murderous attack upon a police officer, committed in the name of a dissident terrorist group, in which an under car explosive device went off as a result of which the officer lost a leg and was fortunate to survive. In respect of a similar incident in which a police officer, Constable Ronan Kerr, was murdered one of the co-accused is reported to have said to the other "targeting of police officers was no longer a

challenge". In another conversation one of the co-accused is recorded as saying "what I want to know is if I walk up to a piece of tin sheeting at ten feet can I put a hole through?" and "I want to see on Friday now if I was to fucking walk up to ten people or something and start fucking pumping in rounds into them what sort of damage it will do".

(iii) On 30 March 2012 the following was reported. The applicant drove Sean Kelly, Sharon Rafferty and his brother Aidan to Formil Wood, Gorticashel Road, Omagh. All four were witnessed entering and exiting the forest in a green Nissan Terrano vehicle. This vehicle did not belong to any of the occupants but was a vehicle lent to the applicant on this occasion. During their time in the forest and while within the hearing of the officers carrying out surveillance, approximately 200 rounds of ammunition were fired. Following the departure of the four suspects, officers entered the wood and recovered a cigarette butt, a number of coloured burst balloons pinned to trees and 15 bullet casings. A piece of tin and balloons had been attached to trees and police observed numerous strike marks on the trees. Five of the bullets casings recovered were in the vicinity of where the Nissan car had been parked. This was some distance from the alleged firing point used. This led police to believe that there had been an attempt to cleanse the area of spent cases.

(iv) Further monitoring of Sharon Rafferty and Sean Kellys' conversations on dates after 30 March revealed conversational references to the training on 30 March and to the penetrative power of a .22.

(v) On the day of the applicant's arrest (12 May 2012) police carried out a search of his home in Omagh. Photographs of the property show spent casings in his driveway. The Walther .22 rifle was recovered together with a telescopic sight and silencer. A search of the attic area revealed the following items contained in black bin bags:

(a) Four full faced balaclavas.

(b) Four identical dark jackets.

(c) Four identical dark bottoms.

(d) Two pairs of Marigold gloves.

(e) Four pairs of white trainers of various sizes.

All of the items were new and had not been worn. Later police established that the trainers were purchased by the applicant and his brother at Tesco's in Cookstown on 6 April 2012. Aidan Coney selected the items and Gavin Coney paid for them in cash. Police also have established from records at

Tesco's that four pairs of dark bottoms were purchased in one transaction on the previous day.

(vi) A forensic scientist tested fired the Walther .22 rifle recovered from the applicant's home. He has confirmed that the cases recovered at Formil Wood match test fired cartridge cases.

(vii) The sound moderator recovered from the applicant's home comes within the definition of a firearm and the applicant has no licence for it.

(viii) DNA extracted from the cigarette butt recovered at Formil Wood yielded a full DNA profile matching the applicant. The applicant's DNA was also found on one of the balloons seized at Formil Wood.

(ix) The applicant was interviewed on 18 occasions following his arrest. This generated some 30 tapes over a period of 17 hours and 31 minutes. During this time the applicant did not answer questions put to him by the police. After charge he indicated that he wished to refer to a statement given to his solicitor. In the statement the applicant denied the charges. He said that he often fired his legally held rifle in Formil Wood for sporting and recreational purposes using balloons and tin as targets. He stated the clothing in the attic of his house was purely for work purposes. He said that Canadian co-workers in the mining company he worked for had asked him to buy full face balaclavas to protect them against the elements.

(x) Police obtained subsequently statements from seven of the applicant's co-workers. Each confirmed that they did not ask the applicant to purchase any items of clothing and that this would not be the means by which works clothing would be purchased. Police also confirmed with the applicant's employer, a company, that its equipment suppliers did not sell balaclavas.

The existence of reasonable suspicion as a protection against arbitrary detention

[9] It is agreed between the parties to this application that a *sine qua non* to the lawful detention of an applicant seeking pre-trial bail is that there exists against him/her reasonable grounds to suspect he/she may be guilty of the offences charged.

[10] If no such reasonable suspicion exists then the applicant for bail should be released as otherwise the detention will be arbitrary and the prevention of arbitrary detention has been for long seen as the principal purpose of Article 5 of the Convention: see, for examples, Engel v Netherlands (1976) 1 EHRR 647 at paragraph 58 and Brogan v United Kingdom (1988) 11 EHRR 117 at paragraph 58.

[11] Authority in favour of this approach may be gleaned from the terms in which Article 5(1)(c) of the Convention is cast and from both Strasbourg and domestic case law.

[12] As to the terms of the Convention, Article 5(1) establishes the right to liberty and security of the person. As it is put, as a general rule, "no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law".

[13] However, one of the cases in which liberty can be lost is in the context of "(c) the lawful detention of a person arrested for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".

[14] In Strasbourg jurisprudence the importance of proof of reasonable suspicion as aforesaid in order to demonstrate the non-arbitrary nature of any detention is established.

[15] As it is put by the Grand Chamber in the Northern Ireland case of McKay v United Kingdom (2007) 44 EHRR 41 the court before whom the suspect is brought must, in accordance with Article 5(3), have the power to review the lawfulness of his/her detention and the court must possess the power to release after reviewing the lawfulness of and justification for detention. The review, at least in the early stages of detention, will be focused on whether there exists reasonable suspicion "that the person arrested has committed an offence" (see paragraph 44). As the Grand Chamber goes on to state at paragraph 45:

> "In sum, the domestic courts are under an obligation to review the continued detention of persons pending trial with a view to ensuring release when circumstances no longer justify continued deprivation of liberty. For at least an initial period, the existence of reasonable suspicion may justify detention but there comes a moment when this is no longer enough."

[16] In domestic law this position has been accepted. Thus, as McCollum LJ put it in Re Maguaid's Application [2000] NIJB 282 at 286 – a bail application case:

> "At this stage the prosecution does not have to prove the guilt of the accused. Its duty is to establish sufficient facts to show the existence of reasonable suspicion that the applicant has committed the offence in question together with such circumstances which would provide justification for his/her being detained in custody."

[17] More recently a Divisional Court in Northern Ireland has followed the same approach: see Re Ward's Application [2011] NIQB 88 at [14] citing the Strasbourg case of Labita v Italy [2000] ECHR 161 at paragraph 153.

[18] A helpful feature of the Ward case is that it explains what is meant by the requirement of reasonable suspicion. In the first place reasonable suspicion is not to be equated with the test for prosecution *viz* that it would be more likely than not that the accused would be convicted (*ibid* at paragraph [12]). But, secondly, for there to be reasonable suspicion what is necessary is that "there must be factual information which would satisfy an objective observer that the person concerned may have committed an offence": see the quotation from Erdagoz v Turkey Application number 127/1996 at paragraph 51 contained within paragraph [13] of the Divisional Court's judgement in Ward. The exact same language is used in the more accessible case of Fox and others v United Kingdom (1991) 14 EHRR 108 at paragraph 32.

[19] In the present case there is no dispute that as matters stand there is reasonable suspicion that the applicant may be guilty of the offences with which he is charged. In other words, there exists factual information that would satisfy an objective observer that the applicant may have committed the offences. The point was expressly conceded by Mr Mulholland QC and, in the court's view, this was a correct and inevitable concession in view of the various matters which had been set out at paragraph [8] above.

The grounds for refusing bail

[20] The starting point in a case where the court has concluded that the applicant for bail's detention is not arbitrary and where reasonable suspicion exists, will be what is often described as the presumption in favour of bail. This is not a statutory presumption but is one recognised both in common law and by the Strasbourg court. This, however, can be displaced in appropriate cases. It will be for the prosecution to justify a refusal of bail in the pre-trial situation. Continued detention may only be justified where there are specific indications of a genuine requirement of public interest, which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention (see McKay *supra* at paragraph 42; Labita at paragraph 152 *supra*; and Kudla v Poland (2002) 35 EHRR 198 at paragraph 110).

[21] In the present case the prosecution object to bail on two grounds. These are that it is contended that there are substantial grounds for believing that if granted bail the applicant:

(a) will commit offences, here serious offences; and/or

(b) will not surrender to custody, that is, will not turn up for his trial.

[22] The parties to the application accept that both (a) and (b) in the last paragraph are independent grounds recognised both in the Strasbourg and domestic jurisprudence for refusing bail. In what follows the court will look at each ground in this case in turn.

Prevention of Offences

[23] The approach to this ground for refusing bail is that the prevention of crime may justify detention where there are substantial reasons to believe that the accused, if released, would be likely to commit offences. However, the danger must be a plausible one and it must be considered in the light of all the circumstances of the case (see, for example, Clooth v Belgium (1992) 14 EHRR 717 at paragraph 40).

[24] In respect of the disposition of this application the court will first consider whether it can be said that a refusal of bail on this ground in this case would necessarily be legally wrong on the basis that it would breach the applicant's enjoyment of the presumption of innocence.

[25] This issue is said to arise in this case because it is argued that where, as here, the applicant for bail has no criminal record, any risk of the commission of offences in the future can only be derived by a process of looking back at the circumstances surrounding the offences with which the applicant is charged and presuming that the applicant is guilty of those offences. This, if it occurs, the argument continues, breaches Article 6(2) of the Convention which, as is well known, reads "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

[26] The court does not accept that refusal of bail in a case like the present on a "prevention of offences" ground necessarily will breach Article 6(2).

[27] To breach Article 6(2), as is clear from such authorities as Kazmierczak v Poland [2009] ECHR Application number 4317/04 at paragraph 51 and Del Latte v Netherlands (2005) 41 EHRR 12 at paragraphs 30-34, requires a statement by the court or a public official which reflects a view that the applicant is guilty before guilt is proved in accordance with law. A breach might also occur where there is reasoning suggesting that a court or official regards the accused as guilty.

[28] As noted earlier, the bail court will essentially be concerned with the existence or otherwise of a reasonable suspicion that the applicant for bail has committed an offence or offences. This is, as explained above, so that there will be no question of arbitrary detention, but this exercise will not normally involve the court adopting any view as to the guilt or innocence of the accused of the charges in question. That issue is one for the court of trial and is not one for the bail court.

[29] The existence of reasonable suspicion involves the court looking at the evidence and information available at the date of the bail application to see whether

an objective observer would be satisfied that the applicant may have committed an offence or offences. As put by Morgan LCJ in the case of Ward (*supra*) at [13]:

> "The existence of reasonable suspicion merely raises the possibility that the offender has committed the offence".

This is an entirely different exercise than one which determines guilt and it is one which does not contradict the presumption of innocence.

[30] The bail court also is involved in an evaluative process of assessing possible future risks including risks to the public interest in the prevention of crime. The nature of this as a predictive exercise was accepted by Mr Mulholland for the applicant in this case. It involves the court taking into account the totality of relevant factors but is not about the court adopting a view that the applicant for bail is guilty of the offence or offences charged.

[31] While there could be a case where a bail court declared or assumed guilt of the bail applicant improperly, the case of Kazmierczak, *supra*, being an example, this could only arise from the court misleading itself as to the nature of the function it is performing or some special circumstance. Certainly, in the great majority of cases this will not arise and the court will know and often will expressly acknowledge that it is not involved at all at the pre-trial stage in the determination or attribution of guilt.

[32] For the avoidance of doubt, this court makes it quite clear that, in so far as it has considered the issue of whether there exists reasonable suspicion against the applicant in the way discussed above, it has not in any way reached any view about the applicant's guilt of the charges which have been preferred against him, and in so far as it will below make an evaluative judgement as to future risk of the applicant committing offences, it equally is making no statement that the applicant is, or is presumed or believed to be, guilty of the offences with which he stands charged.

The evaluation of risk of offending

[33] As already noted, the court in considering whether to grant or refuse bail must evaluate the risk that if granted bail the applicant may commit offences.

[34] As in any judgment of this type, the court must have regard to all relevant factors and seek to arrive at a balanced conclusion taking into account the facts and circumstances as put before it relating to the offences alleged to have been committed by the applicant; the applicant's stance in relation to these matters; his personal circumstances and situation; and submissions made both on the part of the prosecution and on his behalf. The reference to the above factors is of course not intended to be exhaustive. None of this will involve, as indicated above, any decision by the court about the guilt of the applicant in respect of the offences with which he is charged.

[35] In the course of argument, Mr Mulholland stressed the need for each case to be determined on its own merits and the need, for example, in a case like the present, where there are allegations of a terrorist nature, to avoid stereotyping or acting on the basis of prejudice. Mr McGrory, for the prosecution, did not dispute this submission and, for its part, the court accepts it. This, however, does not mean that the nature of the offence becomes irrelevant or that the court leaves out of account information about the circumstances surrounding it which may assist in the formation of a judgment about future risk. Rather, as the court sees it, it must seek to make an informed assessment based on the concrete circumstances of the case. The court is of the view that in each bail case there should be a tailor made assessment and evaluation taking into account those matters which are germane to the individual case before it.

[36] The information which according to the prosecution pertains to this case has in substance already been described at paragraphs [7] and [8] above. The court does not set it out again. It is not pitched at an abstract level but seems to the court to relate to the contextual framework relevant to what allegedly was occurring. The prosecution has submitted that the following key points justify a refusal of bail on the prevention of crime ground in this case. These are:

(i) The offences with which the applicant stands charged, it is alleged, are serious offences of a terrorist character.

(ii) The applicant in this case appears to be inextricably linked to his co-accused and, in turn, all are, it is suggested, linked to potential dissident terrorist activity.

(iii) The court, it is submitted, can take judicial notice of the fact that the threat posed by dissident terrorists in Northern Ireland is a serious one and has in recent years produced a substantial volume of attacks on persons and property, particularly attacks on members of the security forces, as appears to be evidenced in some of the monitored conversations above.

(iv) Those said to be involved in dissident groups will be likely to have strong motivations of a political character which drives them towards seeking to realise their goals by violent means. It is not, on the information before the court unreasonable to suspect that the applicant may himself be so motivated.

(v) The nature of the activity alleged in this case was training in firearms which points to a sinister and potentially lethal end purpose.

(vi) The seizure of items alleged to have been found in the applicant's house, together with his involvement as alleged at the forest, and the apparent use of his legally held Walther rifle suggest potential commitment to a dissident terrorist cause.

[37] The applicant, on the other hand, has emphasised that:

(i) He is to be presumed innocent which, as noted above, the court accepts.

(ii) He denies the charges.

(iii) He says that what went on at Formil Wood bears an innocent explanation. It involved the use of a legally held firearm for sporting and leisure purposes.

(iv) He says that the clothing found in his house was connected to his work. It was in the nature of specialised workwear to protect his co-workers from the effects of adverse weather conditions.

(v) He comes before the court with a clear record.

(vi) He has a good employment record.

(vii) He has family roots, a family house and children all of whom live in the local community in County Tyrone.

(viii) His wife is a respectable district nurse working in the community.

(ix) He has presented to the court a substantial volume of character references (all of which the court has considered). These demonstrate that he is held in high esteem by a range of figures in the community.

[38] In reaching a conclusion on this objection to bail the court has considered all of the above together with all of the submissions put by counsel orally and in their skeleton arguments. The application spanned two hearing days. While much of what has been said has been summarised above, the court wishes to indicate that it has had regard to all points which have been made whether summarised above or not.

[39] The court acknowledges that it is for the prosecution to establish the ground of their objection, as has been indicated already.

[40] In the result the court concludes that on the information before it is satisfied that the prosecution has shown that there are substantial grounds for believing that if admitted to bail the applicant may commit a serious offence or offences. In the court's mind the factors relied on by the prosecution which have been summarised at paragraph [36] above are factors of considerable importance not just in a general sense but in the evaluation of the applicant's particular circumstances. Taken together, they, in the court's view, outweigh the factors in favour of bail referred to at [37] above and displace the presumption of bail to which reference has been made.

[41] In the court's view, to use the language of the Strasbourg court, there are relevant, sufficient and plausible reasons for refusing bail in the particular circumstances of this case. As a result, continued detention of the applicant is justified and outweighs other factors.

Conditions of bail in connection with the prevention of offending

[42] In reaching the above conclusion the court has given anxious scrutiny to whether it could grant bail subject to stringent bail conditions as an alternative to a refusal of bail. It has, therefore, considered the use of conditions which might attach to the grant of bail such as reporting requirements, the use of curfews, the use of electronic tagging and so on. In other words, the court has considered the use of conditions which might be imposed with the object of removing or lessening any risk of the commission of offences.

[43] However, in the particular circumstances of this case, where the risk is of the potential commission of serious offences, and where this risk arises within the context of the alleged operations of a dissident terrorist organisation, believed currently to be active in its pursuit of its purposes, it is difficult to see how bail conditions effectively would limit or obviate the risk – at least to the extent that would enable the court to grant bail. In reaching this conclusion the court takes into account the sophistication of dissident terrorist groups and the roles which an individual may play in advancing the goals of such a group. It reminds itself of what allegedly was going on in this case as described by the prosecution as summarised above. Set against that picture, which may or may not ultimately at trial prove to be correct, the court lacks confidence that individual conditions of bail, or a series of conditions, taken together, would be a sufficient form of protection of the public in respect of the identified risk.

The second objection to bail – failing to turn up for trial

[44] Necessarily, as with the first ground, the issue is one of evaluation and the court must look at the individual circumstances of a case. While bail cannot be withheld simply on the ground of the seriousness of the charges an applicant may face, this is not to say that a court cannot bear this factor in mind and consider it when assessing this issue. There will usually be a relationship between the gravity of the alleged offending and the potential sentence which may be imposed if there is a finding of guilt at trial and where a substantial sentence may be in prospect, this may be an incentive to a bail applicant to decide not to surrender to bail in due course.

[45] The court in this case will look to factors beyond the gravity of the charges which the applicant faces. In the present context, Mr McGrory has argued that the factor of the applicant being alleged to be connected to a paramilitary group which operates on either side of the border is one which the court should give substantial weight to. He has also argued that geographically the applicant lives close to the

border which may make absconding both more attractive to the applicant and easier to do.

[46] On the other hand, the court acknowledges that Mr Mulholland is able to say, as he has said with force in this case, that the applicant has been demonstrated to be a man with roots, home and family within the community in County Tyrone.

[47] The court's conclusion on this objection to bail is that there is insufficient material before the court which would cause it conclude that the prosecution has shown that there are substantial grounds for believing that the applicant if granted bail would not turn up for his trial.

Conclusion

[48] In the light of the conclusions of the court as expressed above, the court refuses the applicant's application for bail.