Judgment Title: MJELR -v- Zielinski

Neutral Citation: [2011] IEHC 45

High Court Record Number: 2010 383 EXT

Date of Delivery: 02/10/2011

Court: High Court

Composition of Court:

Judgment by: Edwards J.

Status of Judgment: Approved

Neutral Citation Number: [2011] IEHC 45

THE HIGH COURT

Record No 2010 / 383 EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT, 2003 (AS AMENDED), AND IN THE MATTER OF A BAIL APPLICATION

BETWEEN/

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

- AND -

ARTUR ZIELIÑSKI

RESPONDENT

JUDGMENT of Mr Justice John Edwards delivered on the 10th day of February, 2011.

Introduction

The applicant is a Polish national and he is the subject of an European Arrest Warrant issued by the Republic of Poland on the 18th of August 2009. That warrant was received in this jurisdiction on the 12th of October 2009 and was endorsed for execution by the High Court on the 20th of October 2010. The applicant was duly arrested on foot of this warrant on the 9th of November 2010 and was then brought before the High Court in accordance with s. 13 of the European Arrest Warrant Act, 2003 (as amended) (hereinafter "the 2003 Act") whereupon the Court, having fixed a date for the purposes

of s.16 of the 2003 Act, remanded him in custody to Cloverhill Prison pending the s.16 hearing in the matter. The applicant now seeks to be released on bail pending that hearing, and the respondent has indicated that he has an objection to bail being granted.

The nature of the European Arrest Warrant in this case

The European Arrest Warrant in question is a conviction warrant on foot of which the applicant is sought for the purpose of having him serve out the balance of sentences imposed upon him by the District Court in Gdynia on the 17th of February, 2006, the 5th of May 2004 and the 24th of February 2005, respectively, in respect of three offences contrary to Art 280.1 of the Polish Penal Code (these are robbery with violence type offences) and one offence of contrary to Art 226.1 of the Polish Penal Code (being the offence of insulting a police officer on duty). The balance of the sentences to be served may be particularised as follows:

> (1) The applicant is required to serve 3 years in prison in respect of the first two robberies in time, both of which were perpetrated on the same day, namely the 8th of December, 2004, and which it is understood were prosecuted together under case reference II K 168/05. This sentence was imposed on the 17th of February, 2006.
>
> (The warrant does not make clear whether, in respect of these crimes, the applicant received two three year sentences to run concurrently, or whether the three year sentence imposed related only to one offence with the other matter being taken into account. This can be clarified in due course by the seeking of additional information from the issuing judicial authority and it is not a matter which need concern the court in its consideration of this bail application.);
>
> (2) The applicant is also required to serve 1 year, 10 months and 25 days in prison for a further robbery, which was perpetrated on the 28th of June 2003. This sentence was imposed on the 5th of May 2004, and the case was prosecuted under case reference II K 1460/03; and
>
> (3) The applicant is also required to serve 10 months in prison for the offence of insulting a police officer on duty at Gdynia on the 12th of September 2004. This sentence was imposed on the 24th of February 2005 and was prosecuted under case reference II K 131/05.

The affidavit grounding the application

The grounding affidavit was sworn herein by the applicant's solicitor, a Ms Tracy Horan, who deposes that she is a partner in the firm of D'Arcy Horan, Solicitors, of Kingsbridge House, Parkgate St, Dublin 8. Strictly speaking the affidavit should have been sworn by the applicant personally, but the court will overlook the irregularity, and the hearsay nature of the evidence, having regard to the fact that English is not the applicant's first language and it may therefore have been logistically easier for the solicitor to swear the affidavit based on instructions received.

Ms Horan deposes, *inter alia*, to the fact that her client has not previously applied for bail in these proceedings. However, it is conceded that the applicant is the subject of domestic proceedings and that on the 18th of September 2010 he was granted bail by

the High Court in those proceedings in terms requiring (a) a cash lodgement of €100 in respect of his own bond, and (b) a further cash lodgement of €400 by an independent surety. Ms Horan states that the applicant was not in a position to take up bail and that on the 27th of September 2010 he made an application to the High Court to have his bail reduced. The matter came on for hearing before Mr Justice Hanna on the 6th Of October 2010, and the application was refused.

Ms Horan further deposes that the applicant's father, Mireck Zieliñski and mother, Mariola Zieliñski, came to Ireland eight years ago. It is asserted that all of the applicant's close family reside here including his brother, his brother's partner and their son, his uncle and his five first cousins.

She further deposes that until early January 2010 the applicant had a job in a factory in Waterford and prior to that he had worked with Roadstone. She asserts that the applicant has no real ties to the Republic of Poland.

Ms Horan further deposes that the applicant is of limited means but that his father and/or mother are willing to stand as an independent surety for him. She states that if granted bail pending the determination of these *extradition proceedings* (the court's emphasis) the applicant will reside with his father and mother at 12 Clodack Road, Avandale Road, County Waterford and will comply with whatever conditions are ordained by this honourable Court. (This Court would remark that, strictly speaking, Ms Horan is incorrect in characterising proceedings under the European Arrest Warrant Act, 2003 as "extradition" proceedings. They are more correctly to be characterised as rendition proceedings, alternatively surrender proceedings, as was made clear by Denham J in *Minister for Justice, Equality & Law Reform v Altaravicius* [2006] 3 I.R. 148, at 171, and by McKechnie J in *O'Sullivan v Chief Executive of the Irish Prison Service & Ors* [2010] IEHC 301).

She further states that the applicant undertakes to surrender his passport and / or his identity card and that he will undertake not to apply for any travel documentation or replacement passport/identity card. Further, she states that the applicant is prepared to sign on at Waterford Garda station on three days each week between 9 am and 9 pm.

Finally, Ms Horan deposes that the applicant has not taken warrants in the past.

The objection to bail

The nature of the respondent's objection to bail is that the applicant is perceived to represent a significant flight risk. The respondent called evidence from two witnesses in support of the objection.

The first witness was Sgt Martin O'Neill of the Garda Siochána Extradition Unit. He told the court that the European Arrest Warrant was executed in the Courts of Criminal Justice building in Dublin on the 9th of November 2010. The applicant was in fact already in custody having been previously arrested, and subsequently remanded in custody by the District Court, in respect of his alleged involvement in a domestic robbery and false imprisonment matter. He was due before the District Court on that date for the purpose of being further remanded, and while he was in the Criminal Courts building the opportunity was availed of to execute the European Arrest Warrant and to bring him immediately before the High Court which sits in the same building when dealing with extradition and rendition matters.

Sgt O'Neill confirmed to the court that on the 18th of September, 2010 the applicant had successfully obtained High Court bail in the robbery and false imprisonment matter

referred to above on the terms indicated by Ms Horan; that the applicant had unsuccessfully tried to have those bail terms reduced, and that he had not in fact taken up his bail and that he was still on remand awaiting trial.

Sgt O'Neill was then asked if there were any other domestic matters outstanding against the applicant, and he informed the court that the applicant had been arrested on the 27th of August 2010 in the Bridewell area of Dublin in relation to yet another alleged robbery. He told the court no charges have yet been preferred against the applicant in respect of that matter as a file has been forwarded to the Director of Public Prosecutions from whom directions are awaited. However, Sgt O'Neill stated that his reason for referring to this matter was that it was his understanding that the applicant, upon being arrested on the 27th of August 2010, had given a false name, stating that he was Artur Kalinski rather than Artur Zieliñski which is his real name. This was later confirmed to the court by the arresting officer, Garda David Morris, who also gave evidence.

Sgt O'Neill concluded his evidence in chief by stating his reasons for regarding the applicant as representing a significant flight risk. First, he pointed to the fact that the applicant is a person who has been convicted of various offences in Poland. Secondly, the applicant had fled from Poland to Ireland. Thirdly, when arrested in respect of a domestic matter the applicant had given a false name.

Counsel for the applicant suggested to Sgt O'Neill that as the applicant had already surrendered his passport and identity card to An Garda Siochána it would not be possible for him to flee the country. The witness strongly disagreed with this, pointing out that in his experience many people awaiting extradition go missing while on bail.

Garda David Morris subsequently gave evidence and told the court that he arrested the applicant at Church St, Dublin 7 in relation to a robbery on the 27th of August, 2010. He stated that when he arrested the applicant he asked him his name and the applicant said that he was Artur Kalinski. The applicant spelled out the name K-A-L-I-N-S-K-I- for Garda Morris and the Garda wrote it in his notebook. He then proffered the notebook to the applicant for confirmation that he had recorded the name correctly and the applicant confirmed that he had. Garda Morris said that he then brought the applicant to the Bridewell Garda Station where he was detained. As is usual in such cases a custody record was opened by the member in charge in relation to the prisoner's detention. Garda Morris told the court that the applicant also provided the name Artur Kalinski to the member in charge and this was duly recorded. He was given a notice of his rights and was asked to sign the custody record in acknowledgment of having received this notice. He did so, and signed as "Kalinski". The custody record was exhibited for the court's inspection and the court noted that it is clearly signed "Kalinski". Finally, Garda Morris confirmed that on the first occasion when he interviewed the applicant while he was in custody the applicant also gave his name, and signed the interview notes, as "Kalinski." However, in a second interview the applicant stated that his name was in fact "Zielnski". He then spelled out "Z-I-E-L-N-S K I" for Garda Morris, and at the end of this interview he signed the notes as "Artur Zielnski". In answer to the Court Garda Morris expressed the belief that the applicant's real name is as recorded on the European Arrest Warrant. The spelling of the applicant's name in the original European Arrest Warrant in Polish is recorded as Z-I-E-L-I-Ñ-S-K-I, which the Court infers, in the absence of any challenge in relation to identity, is how his name is correctly spelt. This is also the spelling used by Ms Horan in her affidavit when referring to her client's mother and father.

Garda Morris also told the court that following the first interview he attempted to verify the applicant's name by various means. In the course of checking local hostels he spoke to a man by the name of Rory Farrell who was working in the reception at a hostel on Blessington St. He asked Mr Farrell if he had anybody staying there by the name of Artur Kalinski. Mr Farrell produced the register and the Garda noted that a person of that

name was recorded in it. When questioned further about it Mr Farrell told Garda Morris that he saw this person's passport when he originally checked in and the name Kalinski was recorded from the passport.

Garda Morris was only briefly cross-examined and confirmed in answer to the applicant's counsel that the applicant did eventually give his real name (although perhaps mis-spelled it) after some ten hours in detention. He further confirmed that he has never seen the applicant's passport.

The Law

The Court accepts the submission made by Counsel for the applicant that it is appropriate for this Court to entertain a bail application on behalf of the applicant. In that regard Article 12 of the Framework Decision clearly envisages the granting of bail in appropriate cases. It provides:

> *"When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State. The person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding."*

The Court further accepts that its jurisdiction to grant bail in both extradition and rendition matters is an inherent jurisdiction. The provisions of the Bail Act, 1997, and in particular s.2 thereof, have no application. This is for two reasons. First, 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. Secondly, the Bail Act 1997 was specifically enacted to give effect to Art 40.4.7 of the Constitution, which was inserted by the 16th amendment to the Constitution. That amendment provided in turn for the refusal to bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence. In the present case the Court is not dealing with a person charged with a serious offence. On the contrary, it is dealing with a convicted person facing rendition to serve a sentence already imposed.

Although bail is routinely granted by the High Court in this jurisdiction in rendition cases coming before it under the European Arrest Warrant Act 2003, and it does so more often than not in the absence of a State objection, there is as yet no decided case specifically addressing the criterion or criteria to be applied in bail applications in the second of two distinct species of such cases that may arise for consideration in that context. The first species relates to the cases of persons who are not convicted persons, who enjoy the presumption of innocence, and whose rendition is sought so that they may be put on trial for an alleged offence before a court in the requesting state. The second species concerns the cases of persons who have already been convicted before a court in the requesting state and who, on that account, no longer enjoy the presumption of innocence and whose rendition is sought for one or more of several possible purposes i.e., so that they may be sentenced if not already sentenced and then be made to serve their sentence; alternatively, if they have already been sentenced, so that they may be made to serve out the sentence, alternatively the balance of the sentence, that was imposed upon them.

While it is true to say that in many respects extradition proceedings under the Extradition Acts 1965 – 2001 are not to be equated to rendition proceedings under the European Arrest Warrant Act, 2003 they share certain similarities at least at a superficial level, and one similarity is that the two distinct species of case that are to be found in rendition proceedings are also to be found in extradition proceedings.

The Supreme Court has previously considered the issue as to what criterion, or criteria, ought to govern a court seized of an application for bail in one species of extradition proceedings arising under the Extradition Acts 1965 – 2001, namely in a case involving a person who has not been convicted and is required to face trial in the requesting state. It did so in the case of *The People (Attorney General) v James Hildage Gilliland* [1985] I.R. 643.

In the *Gilliland* case the prisoner was in custody in Mountjoy Prison awaiting extradition to the United States on fraud charges. The District Court had earlier ordered his extradition. Having then successfully obtained a conditional order of *habeas corpus* from the High Court, he sought bail pending the determination of the *habeas corpus* proceedings. The Attorney General opposed bail, but bail was granted notwithstanding that objection, the learned High Court judge (Barrington J) being of the view that the *O'Callaghan* principles applied, and not being satisfied that the prisoner, if granted bail, would abscond and not be available for his extradition. The Attorney General then appealed to the Supreme Court where he argued that the absconding test should be applied differently in an extradition case. In dismissing the appeal in that case, Henchy J., (with whom Finlay C.J., Griffin, Hederman and McCarthy JJ., unanimously agreed) said (at p. 645 *et seq*):

> "Counsel for the Attorney General has sought to show that that particular test should be applied differently in an extradition case. He points out that in a case such as this the prisoner is being detained so that he will be surrendered to the requesting State, that is to say, so that this State will fulfil its obligations under the extradition treaty. The courts should therefore, it is urged, adopt a stricter approach than is appropriate when bail is applied for by a person in custody while awaiting a trial in this State. More specifically, it is submitted that when a prisoner is detained for extradition he should not be granted bail under what I may call the absconding test unless he discharges the onus of satisfying the court that there is "no real or reasonable possibility" that if granted bail he will not be available for extradition.
>
> I am unable to accept this submission. I fail to see any reason why the absconding test should be applied differently in extradition cases. It is true that in such cases the prisoner is being held so that the State will comply with its obligations under the extradition treaty."

He added:

> "For my part I consider that there is no reason for applying the absconding test any differently in extradition cases as compared with ordinary criminal cases. In an extradition case the State's duty is to take all reasonable steps to ensure that the prisoner will ultimately be available for extradition. In an ordinary criminal case the State's duty is to ensure that the prisoner will be available for his trial. In either case the State's duty must operate in a way that will not conflict with the fundamental right to personal liberty of a person who stands unconvicted of an offence under the law of the State. That right to personal liberty should not be lost save where the loss is necessary for the effectuation of the duty of the State as

> the guardian of the common good - in the extradition cases the duty normally being to fulfil treaty obligations and in ordinary criminal cases normally to enable the criminal process to advance to a proper trial. If in either case a court is satisfied that there is no real likelihood that the prisoner if granted bail would frustrate the State's duty by absconding, I do not consider that bail should be refused on the absconding test. If it should appear in an extradition case that special circumstances exist which magnify the risk of absconding, such matters go to the onus of proof, but they do not vary the test. The test, in my view, in both types of cases is whether the party resisting the application for bail has satisfied the court that there is a likelihood that, if the prisoner is granted bail, he will defeat the ultimate purpose of the imprisonment by absconding. And it has to be borne in mind that in many cases some of the risks of release on bail may be obviated by attaching to the bail appropriately restrictive conditions.
>
> I would particularly reject the submission that the onus in regard to this test should rest on the prisoner. 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."

I am satisfied that, at least in cases where the prisoner has not been convicted, this case may be regarded as clear authority for the proposition that the fundamental criterion to be applied to bail applications in extradition matters is that set out in *The People (Attorney General) v O'Callaghan* [1966] I.R. 501, namely "is there a likelihood of the prisoner attempting to evade justice?". Moreover in applying that criterion, the Court seized of the issue should have regard to those factors identified in *O'Callaghan* as 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.

Moreover, for my part, I see no reason why the same principles should not apply to bail applications in rendition proceedings under the European Arrest Warrant Act, 2003 in cases where the prisoner has not been convicted. However, Peart J appears to suggest the contrary in *Minister for Justice, Equality and Law Reform v Ostrovskij* [2005] IEHC 427.

In the course of his judgment in the *Ostrovskij* case Peart J states:

> "The Court's duty and obligation is to ensure as far as is reasonably possible that in accordance with the State's obligations under the Framework Decision dated 13th June 2002 to which the 2003 Act, as amended by the 2005 Act gives effect, that in the event that the Court grants an application for the applicant's surrender, the State will be in a position to so surrender the applicant on foot thereof. The Court would have to be satisfied as a matter of probability, having regard to all the circumstances of the case, that the terms and conditions of any bail which may be granted will be sufficient to ensure that the applicant will appear in Court for the application under s. 16 of the Act."

I have not been called upon in the course of this case to determine if *Ostrovskij* ought

not to be followed as having been wrongly decided in the light of the pre-existing decision in *Gilliland*, and it is not necessary for me to do so. In the circumstances I will simply comment that I find *Ostrovskij* to be a troubling decision. While *Gilliland* did not strictly speaking constitute a binding precedent in the *Ostrovskij* case because it concerned bail in the context of extradition proceedings under the Extradition Acts 1965 – 2001 whereas *Ostrovskij* concerned bail in the context of rendition proceedings under the European Arrest Warrant Act 2003, the two procedures do, as I have already stated, have much in common. Peart J was clearly influenced by the fact that the State has signed up to specific obligations in the Framework decision, to which effect is given by the 2003 Act, and considered that it is the court's duty in turn to ensure in so far as is reasonably possible that those obligations are discharged, particularly in circumstances where the European Arrest Warrant system is based upon the principle of mutual trust and confidence. However, it is relevant in that regard that the obligations contained in Article 12 of the Framework Decision are subject "to the law of the executing member state" and so they cannot of themselves justify a deviation from well established domestic jurisprudence. In addition, it is important to acknowledge that the principle of mutual trust and confidence also applies, though perhaps less emphasis is placed upon it, in conventional extradition arrangements based upon bi-lateral treaties. In regard to that, the decision in *Gilliland* expressly acknowledges that in an extradition case the State is under a duty to take all reasonable steps to ensure that the prisoner will ultimately be available for extradition. It is equally clear, however, from the *Gilliland* case that Henchy J considered that inter state obligations ought not to trump the fundamental personal right that an unconvicted person has to be at liberty unless the deprivation of that right is absolutely unavoidable. This is clear from Henchy J's endorsement of the *O'Callaghan* principles and his strong remarks rejecting the idea that the prisoner should bear an onus of proving that he was not likely to attempt to evade justice. The *Ostrovskij* case makes no reference whatever to the *Gilliland* case and it is unclear whether the Court's attention was drawn to *Gilliland* in the course of legal argument.

Be all of that as it may, the present case involves a convicted person rather than a person who has not been convicted, and that begs the question whether *Gilliland* approach is to be regarded as apposite to such cases or whether a different approach, such as that in *Ostrovskij*, or some other, is required.

It seems to me that in the circumstances it is necessary to examine the rationale for the decision in the *O'Callaghan* case and to see if it is applicable to the circumstances of rendition proceedings under the European Arrest Warrant Act, 2003 in a case where the prisoner is already a convicted person.

The applicant in the *O'Callaghan* case was an untried prisoner detained in Mountjoy Prison awaiting trial in the Central Criminal Court. He applied to the High Court for bail. The Attorney General opposed the granting of bail on various grounds and Murnaghan J refused the bail application. In doing so he gave the following three reasons for refusing to grant the applicant bail: (i) the Superintendent in charge of the case (Superintendent Costello) had told him the applicant was an aggressive type, and he (the Superintendent) was of opinion that the applicant would interfere with witnesses if he were admitted to bail; (ii) the offences were committed while the applicant was on bail on remand in respect of earlier charges and there was a serious risk that the applicant would commit further offences if he were granted bail; (iii) the applicant's background was not good, and he would have to look forward to a substantial sentence. The applicant then appealed to the Supreme Court where again the Attorney General opposed the granting of bail. Counsel for the Attorney General told the Supreme Court that he was not alleging that the applicant would abscond, and that the sum total of the Attorney General's opposition was that the applicant might interfere with the witnesses for the prosecution. He also submitted that the Court should take into account that the

offences in respect of which the applicant was seeking bail were alleged to have been committed while he was on bail on remand in respect of certain earlier charges

The Supreme Court was not satisfied on the evidence before it that the ground based upon possible interference with witnesses was made out. It then went on to consider the Attorney General's second objection. In response to this Ó Dálaigh C.J. said (at pp 508/509):

> "Counsel for the Attorney General, however, went on to support the view that the applicant, whom he concedes is likely to stand his trial, should nevertheless be refused bail because the offences in respect of which he was seeking bail were alleged to have been committed while he was on bail in respect of earlier charges. I understood him to submit that the applicant should be held as a preventive measure. This I take to mean that he should be detained in custody because, if granted bail, it is feared he may commit other offences.
>
> The reasoning underlying this submission is, in my opinion, a denial of the whole basis of our system of law. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty and seeks to punish him in respect of offences neither completed nor attempted. I say "punish," for deprivation of liberty must be considered a punishment unless it can be required to ensure that an accused person will stand his trial when called upon.
>
> It is necessary to repeat what was said in the judgment of this Court in *The People v. Crosbie and Others* [1966] I.R. 426 . Leaving aside such matters as the likelihood of an accused interfering with witnesses or attempting to destroy evidence if granted bail, it must be borne in mind that the single question in all bail applications is:—Is the applicant likely to stand his trial? If yes, then he should be granted bail and set at liberty. The several tests indicated in *Purcell's Case* [1926] I.R. 207 are not separate and additional tests. They are merely matters to which regard may be had in endeavouring to answer the single fundamental question. This Court has granted bail to applicants charged with non-capital murder when it was likely that they would stand their trial. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until tried and duly found guilty."

It is abundantly clear from this quotation that a major consideration influencing Ó Dálaigh C.J's approach was the individual's fundamental right to personal liberty in circumstances where he is merely charged, but not convicted, of an offence and consequently enjoys a presumption of innocence. Of course, the right to personal liberty, which in the case of citizens is an enumerated constitutional right to be found in Article 40.4.1 of the Constitution, is not wholly uncircumscribed. A person may be deprived of their liberty in accordance with law. However Ó Dálaigh C.J. considered that in the case of an unconvicted person "deprivation of liberty must be considered a punishment unless it can be required to ensure that an accused person will stand his trial."

The judgment of Walsh J in the same case expresses similar views. However, at the very outset (at pp 517/518) he notes that:

> "While there is a distinction between applications for bail in the cases of prisoners who are on remand and those who have already been committed for trial and in the cases of persons who have already been convicted and

> in respect of which an appeal is pending, there are certain underlying principles common to all three forms of bail motion."

This is a very important statement in this Court's view because it acknowledges that, while all three forms of bail motion to which Walsh J refers share certain underlying principles, they are not identical and it is implicit that it is not necessarily the case that they must all be approached in the same way.

Walsh J was in full agreement with then Chief Justice that where a Court has to consider the question of bail in the case of an unconvicted person the fundamental matter to which regard must be had is the likelihood of the prisoner attempting to evade justice. While the greater part of Walsh J's judgment is devoted to a critical analysis of a list of factors set out by Murnaghan J in the High Court as being potentially relevant to any judicial consideration of this issue, following which a number of those suggested factors were in fact rejected as being unsound or inappropriate, he clearly and unequivocally endorses the core principle which is that bail should be granted unless there is a likelihood that the prisoner will attempt to evade justice. In that regard Walsh J stated (at p.513 *et seq*):

> "As recently as 1965 in *The People v. Crosbie and Others* [1966] I.R. 426 this Court reiterated that the fundamental test in deciding whether to allow bail or not is the probability of the applicant evading justice. It follows, therefore, that the object of fixing terms of bail is to make it reasonably assured that the applicant will surrender at his trial."

The rationale unpinning this view can be found in two further passages from Walsh J's judgment in the *O'Callaghan* case. He states (at p.513) that:

> "In bail applications generally it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by a reasonable amount of bail. The object of bail is neither punitive nor preventative. From the earliest times it was appreciated that detention in custody pending trial could be a cause of great hardship and it is as true now as it was in ancient times that it is desirable to release on bail as large a number of accused persons as possible who may safely be released pending trial. From time to time necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases "necessity" is the operative test. The presumption of innocence until conviction is a very real thing and is not simply a procedural rule taking effect only at the trial. In the modern complex society in which we live the effect of imprisonment upon the private life of the accused and of his family may be disastrous in its severe economic consequences to him and his family dependent upon his earnings from day to day or even hour to hour. It must also be recognised that imprisonment before trial will usually have an adverse effect upon the prisoner's prospects of acquittal because of the difficulty, if not the impossibility in many cases, of adequately investigating the case and preparing the defence."

Then, later in the judgment he adds (at pp. 516/517):

> "In this country it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted or that in any circumstances he should be deprived of his liberty upon only the belief that he will commit offences if left at liberty, save in the most

> extraordinary circumstances carefully spelled out by the Oireachtas and then only to secure the preservation of public peace and order or the public safety and the preservation of the State in a time of national emergency or in some situation akin to that."

I am satisfied from my review of the judgments in *O'Callaghan* that the principles enunciated therein were not designed or intended to be of universal application and that they only cover applications for bail in cases where the prisoner has not yet been convicted of an offence. However, in so far as such cases are concerned the judgments in the *O'Callaghan* case make it clear that, in effect, there is a presumption that such a prisoner should be admitted to bail and that bail should only be refused where the State is in a position to rebut that presumption by evidence sufficient to establish a likelihood that the prisoner will attempt to evade justice. There are, of course, many means by which a prisoner might attempt to evade justice, but the main ones are absconding and interfering with witnesses and/or jurors. The rationale for this position is respect for the notion that liberty is a personal right which must be vindicated where possible, particularly in the case of an unconvicted person who is presumed to be innocent. Coupled to this is the notion that a person should not be punished in respect of any matter in respect of which he has not been convicted. It therefore follows that deprivation of liberty must be considered a punishment unless it is necessary to ensure that an accused person will stand his trial.

All of this begs the question whether the effective presumption in favour of the granting of bail has any application in cases where the applicant prisoner has been convicted and no longer enjoys the presumption of innocence, and in particular, having regard to the circumstances of the instant case, whether it should apply in an application for bail by a convicted person where the rendition of that person is being sought by another state in proceedings under European Arrest Warrant Act, 2003.

The position with respect to an application for bail in the case of a convicted person who has an appeal pending in the Court of Criminal Appeal was considered by the Supreme Court in *The People (D.P.P.) v Corbally*. The Supreme Court (Keane C.J., Denham, Murphy, Hardiman and Geoghegan JJ.), held that bail should be granted where, notwithstanding that the applicant came before the court as a convicted person, the interests of justice required it, either because of the apparent strength of the applicant's grounds of appeal or the impending expiry of the sentence or some other special circumstance. Geoghegan J who delivered the sole judgment and with whom the other judges were in agreement, added that it must always be borne in mind that the applicant for bail in this situation was a convicted person and that the Court of Criminal Appeal should therefore exercise its discretion sparingly. Moreover, he referred with approval to the following statement of principle from an ex tempore judgment of the Court of Criminal Appeal (Barron J.) in *The People (Director of Public Prosecutions) v. Connaughton* (Unreported, Court of Criminal Appeal, 17th December, 1999) wherein it is stated:

> "In this case the applicant ……comes before this court seeking bail pending his appeal. The first consideration for any court in such circumstances is to realise that the applicant has been convicted by a jury and therefore there must be strong reasons why bail should be granted."

It is clear from the judgment in *Corbally* that on an application for bail in the case of a convicted person who has an appeal pending, the Court of Criminal Appeal ought not to approach the matter on the basis that there is an effective presumption in favour of the granting of bail, but rather should only grant bail where there are strong reasons for doing so. It should therefore consider whether the interests of justice required that it

should exercise its discretion to grant bail in all the circumstances of the particular case.

This Court recognises that the circumstances of the applicant in *Corbally* were significantly different from the circumstances of the applicant in the present case, not least because of the existence of an on-going criminal process before the courts of this jurisdiction. There are obvious reasons why the *Corbally* principles may have little or no application to the case of a convicted person facing rendition on foot of a European Arrest Warrant. Clearly, the requested return of the prisoner may not be in the context of a pending appeal. Indeed the possibility of an appeal may not exist, *e.g.* where all possible appeals have already been exhausted; alternatively the prisoner is out of time. Further, the prisoner may not wish to appeal. Even if his return is sought in circumstances where an appeal is possible an Irish Judge could not possibly evaluate the respondent's prospects of success on any such appeal. Accordingly, I consider that the principles enunciated in *Corbally* are not binding on this Court in terms of the issue that it is required to determine in this case. However, in this Court's view *Corbally* does assist to this extent. It demonstrates that the effective presumption in favour of the granting of bail, that unquestionably obtains in the case of an unconvicted applicant whose faces a trial in this jurisdiction, and that also obtains in at least some cases where such a person faces a trial abroad, does not automatically apply in the case of other applicants. That it should be so is logical, because the rationale underpinning the effective presumption in favour of the granting of bail which is predicated upon the notions of liberty as a personal right, no punishment without conviction, and the presumption of innocence, will in most cases not exist in the case of a person who is already convicted. Such a person will usually have forfeited his right to liberty for the duration of a sentence imposed upon him, and pending the serving out of that sentence. Moreover, there is no question of him being punished without conviction, and he no longer has the benefit of any presumption of innocence.

So what then are the principles to be applied by the High Court in considering an application for bail in the context of proceedings under the European Arrest Warrant Act, 2003 by a convicted person whose rendition is sought by another E.U. member state for the purpose of having him serve a sentence, alternatively the balance of a sentence, imposed upon him by the courts of that member state?

First, this Court is satisfied that there can be no presumption in favour of the granting of bail.

Secondly, and as was made clear by Peart J in *Minister for Justice, Equality and Law Reform v Ostrovskij,* regard must be had to the fact that the Court's duty and obligation is to ensure as far as is reasonably possible that in accordance with the State's obligations under the Framework Decision dated 13th June 2002 to which the 2003 Act, as amended by the 2005 Act gives effect, that in the event that the Court grants an application for the applicant's surrender, the State will be in a position to so surrender the applicant on foot thereof. In that regard, what Article 12 of the Framework Decision in fact says is that "*the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State*", and that such a person "*may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding".*

It seems to me that this requires the High Court to undertake, in the first instance, an assessment of the risk of the prisoner absconding to determine if there is a real and significant risk in that regard. This risk assessment should be a precursor to the taking of any decision on whether the requested person should remain in detention and, if not,

concerning what conditions, if any, might attach to his release.

Thirdly, the Court must then decide whether the requested person should remain in detention and, if not, subject to what conditions he might be released. The Court has an absolute discretion as to whether or not to release a prisoner on bail, but such discretion must be exercised judicially, and it will inevitably be influenced by the risk assessment that has been carried out.

There will, of course, be a theoretical risk of absconding in every case but the existence of a mere theoretical risk alone and without more should not inhibit a Court from releasing a prisoner. More than that will be required to justify a decision not to release. The Court would be justified in deciding not to release the prisoner on bail if, having considered all relevant circumstances including evidence adduced by the applicant and any objector, it perceived the existence of a real and significant risk that the prisoner might abscond notwithstanding any restrictions or conditions that might be placed upon him. However, it is not necessary for the Court to be satisfied that as a matter of likelihood the prisoner will abscond before it would be justified in denying him bail.

The Court's assessment of the risk of the applicant absconding
It seems to this Court that in the present case the following circumstances are relevant to the issue as to whether, in the applicant's case, there exists a real and significant risk that he might abscond if admitted to bail. There are positive factors that must be weighed in the balance in favour of granting bail, but there are also negative factors in favour of a denial of bail that must be weighed against those positive factors.

Positive Factors

• Although he was not in a position to take it up, the applicant was granted bail by the High Court in relation to the domestic charges that he presently faces;

• The applicant has a family network in Ireland in that his father, mother, brother, his brother's partner and their son all reside here, as well as his uncle and his five first cousins;

• He was in employment in Ireland until recently;

• He is of limited means;

• He claims to have no real ties to Poland any more;

• There is no evidence that he has previous convictions;

• He is presumed innocent in respect of the domestic charges he faces;

• He is prepared to surrender his passport and identity card;

• His father and/or mother are in a position to stand as an independent surety for him;

• He intends, if granted bail, to live with his parents in Waterford;

• He is prepared to abide with a signing on condition and will give the usual undertakings as to residence, that he will not apply for another passport/ID; that he will not seek to acquire or procure travel documents; that he will turn up in court and so forth;

• He has not taken warrants in the past.

Negative Factors

• The applicant is a convicted person;

• The risk of absconding is higher in the case of a convicted person, he has an incentive to abscond;

• The offences of which he has been convicted are moderately serious;

• A significant term of imprisonment, i.e., three years, has been imposed upon him in respect of one conviction, with somewhat lesser terms in respect of the other convictions;

• The applicant has already absconded from the requesting State to avoid serving the sentences imposed upon him;

• As a foreign national he is likely to have fewer ties to Ireland than an Irish national would have;

• There is a guarantee that a person surrendered on foot of an EAW will get credit for time served in Ireland – see Article 26 of the Framework Decision;

• The State is objecting to bail being granted on the grounds of risk that the applicant may abscond.

• The applicant, when arrested in respect of a domestic matter gave a false name

• There is slight and admittedly hearsay evidence to suggest that the applicant may have booked into the Blessington Street hostel under a false name, and using a false passport. However, the Court attachs relatively little weight to this evidence having regard to the hearsay nature of it, the absence of confirmation that the applicant was in fact resident at some point at the said hostel, and the fact that the Gardaí have not had sight of the passport in question.

• The court has not been appraised of any grounds of objection on foot of which it is likely, or even possible, that he would not be surrendered to the requesting state.

The Court's decision

Having carefully considered all of the circumstances of the case, including the evidence

adduced on the applicant's behalf and on behalf of the objector, I have concluded that a real and significant risk exists that this particular applicant may abscond and be unavailable for surrender to the requesting state pursuant to s.16 of the European Arrest Warrant Act 2003, should this Court decide in due course that it is appropriate to surrender him. I have carefully considered whether a regime of restrictions/conditions could be put in place sufficient to allay the courts concerns in that regard and I have concluded that in the particular circumstances of this case it could not.

In all the circumstances of the case I must therefore refuse the application for bail.