

SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2017] SC EDIN 69

E80A/17

JUDGMENT OF SHERIFF FRANK RICHARD CROWE

under the Extradition Act 2003, Part 2

Application for warrant under section 71 of the 2003 Act

LORD ADVOCATE FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Pursuer

Against

S N

Defender

**Pursuer: H Knipe for the Lord Advocate on behalf of the Government of  
the United States of America**

**Defender: P A Reid; Messrs Fleming & Reid, Solicitors, Glasgow**

EDINBURGH, 23 October 2017

**Introduction**

[1] On 25 September 2017 at Edinburgh Sheriff Court this case called before me in the absence of SN to consider whether a warrant should be granted to arrest him in connection with an extradition request from the United States of America to face serious charges. I was alerted by the Crown that the case was not straightforward and I granted a first order on 8 September to hear parties at the outset-*c.f. Clyde and Co (Scotland) LLP v Procurator Fiscal Edinburgh* [2016] HCJAC 93; Lord Brodie at para [16] and *Bill of Suspension by Holman Fenwick Willan LLP and Duff & Phelps Ltd* [2017] HCJAC 38; Lord Justice General Carloway at para [7]. The Crown had been in touch with SN's solicitor in relation to earlier proceedings.

**Background**

[2] I was advised that SN had been extradited from Ireland under a European Arrest Warrant in 2015 in respect of contraventions of the Anti-terrorism, Crime and Security Act 2001 section 114(2)(hoaxes involving noxious substances or things) and Criminal Law Act 1977 section 51(2) and (4) (bomb hoaxes) but subsequently was considered to be unfit to stand trial here by reference to Part VI of the Criminal Procedure (Scotland) Act 1995 which deals with the criminal responsibility of mentally disturbed persons and Crown Counsel took the decision to abandon that case. From medical reports submitted to me along with this extradition request it would appear that having been remanded in custody on his return from Ireland, SN went on a 90 day hunger strike which led to him being admitted to hospital. SN had been diagnosed with multiple sclerosis in 2009 and in August 2015 was pronounced by psychiatrists to be unfit for trial.

[3] A CT scan revealed frontal dementia with cognitive impairment due to Korsakoff's psychosis. He was 67 when examined in 2015 and presented as elderly, confused and disorientated as to time and place (he still believed he was in Ireland and said he had been born in 1792). SN was bed-bound, doubly incontinent and required assistance with all activities of daily living, including personal hygiene, dressing, eating and drinking. SN did not understand the charges and could not name his lawyer. He was being administered 9 different medications each day. SN was assessed as not being able to cope within a prison environment and a medium security psychiatric placement was not thought appropriate as he showed no signs of dangerous behaviour.

[4] The extradition request had been signed by the Attorney General of the United States on 7 October 2015 following upon a request by the Assistant United States Attorney, Western District of Pennsylvania on 24 September 2015. The attached summary alleged that

SN had, between March and June 2012, made more than 40 bomb threats to various institutions in Pittsburgh, Pennsylvania, including the University of Pittsburgh and the Federal Court House Pittsburgh.

[5] This request was forwarded to Her Majesty's Government by the Embassy of the United States of America in London on 9 November 2015. A certificate under section 70(1) of the Extradition Act 2003 (hereinafter "the 2003 Act") was issued by the Cabinet Secretary for Justice and a Scottish Minister in the Scottish Government on 6 January 2016. In the circumstances I did not enquire into the intervening timeline but I understood there was a delay while the domestic proceedings referred to above were considered, before Crown Counsel decided no court proceedings could be undertaken. Since the issue of the Ministerial certificate, discussions had been ongoing with SN's solicitor, Mr Reid, who obtained sanction from the Scottish Legal Aid Board for an up-to-date report on SN's condition and prognosis.

[6] I am grateful to Mr Reid for obtaining a report on SN's condition as at 20 September 2017 from a consultant psychiatrist in General Adult Psychiatry. SN resides in a care home where he is described as being the most dependent patient. He is now aged 71 and remains bed-bound for the entire time save for once a week when his mattress is cleaned. He continues to be doubly incontinent and requires full nursing care and assistance for all activities of daily living. He understood that he had a lawyer and there were charges against him but he appeared unclear what these related to. Since being assessed 2 years ago his speech is no longer fluent and it is difficult to understand what he says. Previously he was able to speak fluently albeit that much of what he said was delusional. He was unable to retain information during the interview. He has had spells in the care home of going on hunger strike but the staff usually have tempted SN into eating again. He said he went on

hunger strike from time to time as he was bored and wanted to die because of the problems secondary to his multiple sclerosis.

[7] The 2015 reports suggested that if SN could be prevented from going on a hunger strike his condition might improve to some extent. SN has had significant cognitive impairment probably relating to his MS which although not particularly progressive did impair his functioning to a significant level. SN was unfit for trial in 2015 and this remains the case now. SN's multiple sclerosis is at an advanced stage and he has required nursing home care since 2012; he is not fit to travel to the United States of America nor is he fit to engage in a criminal trial. While the doctor could give no clear assessment of SN's life expectancy there would be significant risks associated with him being moved outwith his environment and having to travel; and he would need considerable medical support to undertake such a journey. SN's condition is not temporary, his health has deteriorated over the last 2 years and is likely to do further but it was impossible for the doctor to say over what time frame this would be.

[8] The Lord Advocate was content to rely on the reports which had been produced for the abortive prosecution of SN for domestic offences in 2015 and was content to accept the defence report produced by a qualified psychiatrist which confirmed the views of 3 psychiatrists in 2015.

[9] Ms Knipe had obtained assurances through the diplomatic channel from the United States Government that should SN be extradited but found to be unfit to stand trial on the charges underlying his extradition SN would be returned to the United Kingdom provided that the following conditions were met:

- 1) A court has determined that he is incompetent or unfit to stand trial;

- 2) A court or the prosecutor has determined that the criminal charges will never be disposed of;
- 3) A court has determined that SN must be released from custody in connection with the criminal case;
- 4) Relevant US Government authorities have confirmed that SN is not eligible to remain in the United States (eligible grounds could include, for example, the filing and processing of an asylum claim).

## Discussion

[10] Neither party was able to produce any authority dealing with the court's discretion under section 71(2) of the Extradition Act 2003. I have however located the case of *John Michael Edwards v Government of the United States of America* [2012] EWHC 3771 (Admin) which is of assistance in this context.

[11] It is quite clear that under Part 2 of the 2003 Act extradition proceedings begin when the Minister issues a certificate confirming that a valid request has been received. In the normal case, court proceedings follow the grant of an arrest warrant and the judge decides whether there are any bars to extradition and if there are none the Minister has to decide whether extradition should take place; if the decision is for extradition an appeal may be marked under section 118 of the 2003 Act – *Edwards (supra)* para 2, *c.f.* *McMillan v Procurator Fiscal, Paisley* [2017] SAC (Crim) 2 Sheriff Principal Stephen QC at para [8] re the commencement of summary criminal proceedings.

[12] In the present case it would be possible in the absence of SN to fix the usual diets under section 75 and follow the usual statutory steps at a Full Hearing but it seems clear from the terms of the reports before, which were undisputed, that SN's solicitor would have

grounds for asserting that extradition would be oppressive under sections 79(1)(c) and 82 and certainly under section 87 (human rights) and 91 (physical and mental condition such that it would be unjust or oppressive to extradite).

[13] Section 71(2) of the 2003 Act states that “the judge may issue a warrant for the arrest of the person whose extradition is requested” subject to the provisions of subsection (3) and that is the normal precursor to extradition proceedings taking place in court. Certainly in this jurisdiction the grant of an arrest warrant does not necessarily mean that an individual so sought will be arrested and it may be that the Lord Advocate’s representatives decide in a particular case to contact an accused person either directly or through a known legal representative if it is thought that arrest would be disproportionate or unnecessary in the particular facts of the case or the personal circumstances of the accused – see *Spowart v Burr* (1895) 1 Adam 539.

[14] Section 77(2) of the 2003 Act grants the judge the same powers as if the proceedings were in the summary criminal court. Under section 135 of the Criminal Procedure (Scotland) Act 1995 the prosecutor may seek to institute summary criminal proceedings by requesting a so-called initiating warrant for arrest of the accused. Most of these applications are granted by the sheriff or justice of the peace in chambers. It may be self-evident why a warrant is sought – for example the accused may be designated as “present whereabouts unknown” but in other cases a brief written submission accompanies the complaint giving reasons for seeking to proceed in this way. Such warrants

“will normally be granted on the basis of the...complaint itself, and without the need for any independent application, but the justice may refuse to grant the warrant without an explanation from the fiscal of its necessity, just as he has the right to refuse to grant any kind of warrant.”

*Renton & Brown’s Criminal Procedure* (6<sup>th</sup> Edition) para 5-03.

[15] In certain circumstances at common law the issue of an arrest warrant may be oppressive – *Renton & Brown* para 5-03 and *H v Donnelly* 2013 SCCR 160. In relation to applications for warrants to search, it may be prudent in certain circumstances for intimation of the application for warrant to be served upon parties interested to afford an opportunity to be heard before the court decides to grant warrant or refuse same – *Renton & Brown* para 19-03.

### **Decision**

[16] While section 77(2) of the 2003 Act, granting the sheriff the same powers as if the proceedings were summary criminal proceedings involving the requested person, is helpful in the ordinary run of extradition cases, this provision appears to engage after an arrest warrant has been granted and the individual appears in court at an extradition hearing. Proceedings of this type are governed principally by the 2003 Act and it is to that legislation I must first look here.

[17] The circumstances are exceptional and the proposed proceedings relate to an individual who has been well known to the criminal authorities in this jurisdiction for many years. SN suffers from a degenerative condition for which there is no cure. He was diagnosed with the condition in 2009, was assessed as being unfit for court proceedings by various medical practitioners in 2015 since when there has been a further deterioration in SN's condition and powers of communication.

[18] To have granted the warrant would simply have been to authorise a charade, paying lip service to the procedural provisions of the 2003 Act, in the absence of SN, well knowing in light of the unchallenged reports produced to me that his condition is such that it would be unjust and oppressive to extradite him in view of his physical and mental condition in

terms of section 91 of the 2003 Act but as alluded to above there are other challenges which could be made under the legislation to the same effect.

[19] Accordingly I have exercised my discretion under section 71(2) of the 2003 Act and at common law not to issue a warrant for the arrest of SN. It is quite clear that seeking to issue a warrant in the present circumstances, given SN's poor and precarious health, would place those seeking to enforce such a warrant under section 71(5) in an invidious, impractical and frankly impossible position. The assurances given by the Requesting Authority are quite proper in the circumstances but it is seems clear a similar finding of unfitness inevitably would be made, were it possible and practicable to arrange the transfer of SN to the United States of America. It follows that SN is discharged from this process.

[20] It only remains for me to thank parties for the professional way in which they have approached this difficult situation and I am grateful to them for providing me with the fullest information to reach my decision.