

THE HIGH COURT

[2022] IEHC 144
[2021 No. 235 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

BRENDAN EMMET CASEY

RESPONDENT

JUDGMENT of Ms. Justice Caroline Biggs delivered on the 25th day of January, 2022

1. By this application, the applicant seeks an order for the surrender of the respondent to Northern Ireland pursuant to a Trade and Cooperation Agreement warrant dated the 2nd of July 2021 “the TCA warrant”). District Judge Conner sitting at Laganside Magistrate’s Court, Belfast was the judicial authority who issued the TCA Warrant.
2. The TCA Warrant seeks the surrender of the respondent in order to prosecute him in respect of six alleged offences:
 - (i) That he, between the 11th day of August 2014 and the 11th day of November 2014, belonged to a proscribed organisation, namely the Irish Republican Army contrary to Section 11 (1) of the Terrorism Act 2000.
 - (ii) That he, between the 11th day of August 2014 and the 11th day of November 2014, conspired together and with persons unknown to possess explosives with intent by means thereof to endanger life or cause serious injury to property in the United Kingdom or the Republic of Ireland, or to enable some other person to do so, contrary to Article 9 (1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and Section (1) (b) of the Explosive Substances Act 1883.
 - (iii) That he, between the 11th day of August 2014 and the 11th day of November 2014, conspired together and with persons unknown to possess firearms with intent by means thereof to endanger life or cause serious injury to property or to enable some other person by means thereof to endanger life or cause serious injury to property contrary to Article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and Article 58(1) of the Firearms (Northern Ireland) Order 2004.
 - (iv) That he on the 18th say of September 2014 with the intention of committing acts of terrorism, engaged in conduct in preparation for giving effect to his intention, namely attending a meeting at 15 Ardcar Park, Newry, contrary to Section 15(1) of the Terrorism Act 2006.
 - (v) That he, on the 18th day of September 2014 attended at a place used for terrorist training, namely 15 Ardcar Park Newry, knowing or believing that instructions or training was being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or convention offences, or that he would not reasonably have failed to understand that instruction or training was

being provided there wholly or partly for such purposes, contrary to Section 8 of the Terrorism Act 2006.

- (vi) That he, on the 18th day of September 2014, received instruction or training in the making or use of explosives for the purposes of assisting, preparing for or participating in terrorism contrary to Section 54(2) of the Terrorism Act 2000.
3. The TCA Warrant was endorsed by the High Court on the 6th day of September 2021 and the respondent was arrested and brought before the High Court on the 10th day of September 2021 on foot of same.
4. By way of additional information sought on the 20th of August 2021, the issuing judicial authority confirmed on the 31st of August 2021 that the date of the TCA Warrant was the 2nd of July 2021.
5. I am satisfied that the person before the Court, the respondent, is the person in respect of whom the TCA Warrant was issued. No issue was raised in that regard.
6. I am satisfied that none of the matters referred to in ss.21A, 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), arise for consideration in this application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections.
7. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met and that each of the offences in respect of which surrender of the respondent is sought carries a maximum penalty in excess of twelve months' imprisonment.
8. As surrender is sought to prosecute the respondent, no issue arises under s.45 of the Act of 2003.
9. In relation to the offences and in the order that they appear in the TCA Warrant, I am satisfied that correspondence can be established between the offences referred to in the TCA Warrant and offences under the law of this State, viz;

(i). Membership of a proscribed organisation

Section 21(1) of the Offences Against the State Act 1939 provides that it shall not be lawful for any person to be a member of an unlawful organisation. S.I. 162/1939 Unlawful Organisation (Suppression) Order 1939 declared that the organisation styling itself the Irish Republican Army (also the I.R.A and Óglaigh na hÉireann) was an unlawful organisation for the purpose of and within the meaning of the 1939 Act.

(ii). Conspiracy to possess explosives with intent to endanger life

Section 3 of the Explosive Substances Act, 1883 provides that "a person who is in the State or (being an Irish citizen) outside the state unlawfully and maliciously;

- (a.) Does any act with intent to cause, or conspires to cause by an explosive substance an explosion of a nature likely to endanger life, or cause serious injury to property, whether in the State or elsewhere, or
- (b.) Makes or has in his possession or under this control an explosive substance with intent by means thereof to endanger life, or cause serious injury to property, whether in the State or elsewhere, or to enable any other person to do, shall, whether an explosion does or does not take place, and whether any injury to person or property is actually caused or not shall be guilty of an offence."

Section 4(1) of the Explosive Substances Act 1883 as amended provides that "any person who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object" be guilty of an offence.

(iii). Conspiracy to possess firearms with intent to endanger life

Section 15 Firearms Act, 1925 provides: "any person who possesses or controls any firearm or ammunition

- a. with intent to endanger life or cause serious injury to property or
- b. with intent to enable any other person by means of the firearm or ammunition to endanger life or cause serious injury to property, shall whether any injury to person has or has not been caused thereby be guilty of an offence"

Section 27A of the Firearms Act 1964 as amended provides that "it is an offence to possess or control firearms or ammunition in circumstances that give rise to a reasonable inference that the person does not possess or control it for a lawful purpose, unless the person possesses or controls it for such a purpose."

Section 27A(10) of the Firearms Act 1964 as amended further provides that "in the application of Section 2 of the Criminal Law (Jurisdiction Act) 1976 to this section, it shall be presumed unless the contrary is shown that a purpose that is unlawful in the state is unlawful in Northern Ireland."

(iv). Engaging in conduct in the preparation of acts of terrorism

Section 7 of the Offences Against the State (Amendment) Act 1998 provides that "a person shall be guilty of an offence if he or she has any article in his or her possession or under his or her control in circumstances giving rise to a reasonable suspicion that the article in his or her possession or under his or her control is for a purpose connected with the commission preparation or instigation of an offence under the Explosive Substances Act 1883, or the Firearms Acts, 1925 to 1990, which is for the time being a scheduled offence for the purposes of Part V of the Act of 1939."

Section 6 (1) of the Criminal Justice (Terrorist Offences) Act 2005 as amended, entitled "terrorist offences" provides that a person is guilty of an offence if the person:

"(a) in or outside the State –

- (i) Engages in a terrorist activity or a terrorist linked activity.
- (ii) Attempts to engage in a terrorist activity or a terrorist linked activity (other than public provocation to commit a terrorist offence,) or
- (iii) Makes a threat to engage in a terrorist activity.

No issue arises in relation to the offences (i) to (iv) on the part of the respondent in relation to correspondence. However, the respondent submits that there are no corresponding offences in relation to offences (v) and (vi):

10. Offence (v) - Is surrender prohibited by Section 38 of the 2003 Act?

In relation to offence (v), the TCA warrant reads as follows:

That the respondent, "on the 18th day of September 2014 attended at a place used for terrorist training, namely 15 Ardcarne Park Newry, knowing or believing that instructions or training was being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or convention offences, or that he would not reasonably have failed to understand that instruction or training was being provided there wholly or partly for such purposes, contrary to section 8 of the Terrorism Act 2006."

The applicant submits that this offence corresponds with the offence of unauthorised military exercise contrary to Section 15(1) of the Offences Against the State Act, 1939 as amended, which provides "that it shall not be lawful for any assembly of persons to practice or to train or drill themselves in or be trained or drilled in the use of arms or the performance of military exercises, evolutions or manoeuvres or for any persons to meet together or assemble for the purpose of so practicing or training or drilling or being trained or drilled".

The respondent suggests that offence (v) of attending at a place used for terrorist training does not correspond with the offence contrary to Section 15 of the Offences Against the State Act 1939.

Section 8 (1) of the UK Terrorism Act 2006 states: "a person commits an offence if:

- (a) He attends at any place, whether in the United Kingdom or elsewhere;
- (b) While he is at that place, instruction or training of the type mentioned in section (6)(1) of this Act or Section 54(1) of the Terrorism Act 2000 (c.11) (weapons training) is provided there;

- (c) That instruction or training is provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or Convention offences; and
- (d) The requirements of subsection (2) are satisfied in relation to that person.

Subsection (2) states "the requirements of this subsection are satisfied in relation to a person if:

- (a) He knows or believes that instruction or training is being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or Convention offences; or
 - (b) A person attending at that place throughout the period of that person's attendance could not reasonably have failed to understand that instruction or training was being provided there wholly or partly for such purpose."
11. In the Court's view, Section 8 involves attending at a place used for terrorist training and prohibits attendance in circumstances where the person attending must know or effectively ought to have known that instruction or training was being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism. No further element is required. It would seem that a person can be prosecuted where he attends a place, initially for an innocent reason, but while at the place, training of the prohibited type takes place, and he remains at the place while the training goes on, but he takes no active part. The section does not seem to require him to take part in the training, intend to take part in the training or assist/encourage/counsel/aid or abet those training in any way.
12. The question raised by the respondent is whether Section 15(1) of the Offences Against the State Act 1939 prohibits the same acts with the same knowledge as required in offence (v). Of note in this regard is Section 15(3) which states:
- "If any person is present at or takes part in or gives instruction to or trains or drills an assembly of persons who without or otherwise than in accordance with an authorisation granted by a Minister of State under this section practise, or train or drill themselves in or are trained or drilled in the use of arms or the performance of any military exercise evolution or manoeuvre or who without or otherwise than in accordance with such authorisation have assembled or met together for the purpose of so practising or training or drilling or being trained or drilled such persons shall be guilty of a misdemeanour and shall be liable on conviction thereof to imprisonment for a term not exceeding 15 years."
13. The State relies upon Section 15(1). In the Courts view Section 15(1) must be read in conjunction with Section 15(3). The intention of the legislature in Section 15 appears to prohibit the assembly of persons in a particular set of circumstances, namely where the purpose of that assembly is to practise, train, be trained etc. in the use of arms. Section

15(1) appears to prohibit this assembly of persons actually taking place and so carrying out these activities.

14. Section 15(3) addresses the situation where an individual is present at or takes part in an assembly of persons who have met together for the purpose of so practising. This, in the ordinary meaning of the words, implies that that while the assembly may have met together for their illicit purpose, they may not have commenced their illicit purpose. The section appears to prohibit both the active taking part, and the attempt to do so. Clearly the intention and purpose of the assembly is a relevant consideration but so too is the person's intention at the time of participating in the assembly.
15. The offence therefore under Section 15 is made out in the Courts view if:
 - (a) the person is part of an assembly of persons that practises or trains for the purposes outlined,
 - or,
 - (b) that the person is part of an assembly who meet together for the purposes of training.

Such an interpretation would be in accordance with established jurisprudence in this jurisdiction that relates to test for participation in criminal offences. I refer in that regard to an extract from the 2nd edition of Charleton & McDermott's Criminal Law and Evidence wherein the learned authors state at paragraph 8.32 as follows:

"[8.32] It must be proved that the accused participated in the offence committed, mere knowledge that such a crime was about to be committed is insufficient."

The authors continue at paragraph 8.36:

"[8.36] Where a person is actually present when the crime is committed by the actor, whether his mere present will amount to aiding and abetting depends upon the circumstances but as a general proposition some act of aiding and abetting must occur over mere presence."

At paragraph 8.39 it is stated:

"[8.39] Participation thus can be a matter of fine degree, as to whether a person is present merely or is present as encouragement".

The authors refer to the case of *Re ACS* (1969) 7 CRNS 42, as an example of a situation whereby being present was regarded as an act of encouragement. In that case, a group of university students were present during the occupation of a university computer centre and on that basis they were charged with mischief in obstructing lawful use of the centre. Although they did not actually take part in erecting the barricades, they were convicted of aiding and abetting. Since the accused gave the occupation the strength of numbers that

it required to succeed such presence in those circumstances amounted to aiding and abetting. However, the accused must have intended to aid. If the effect is that the perpetrator is aided without the accused having the intent to aid, then the crime is incomplete as regards the accused (*Mewett and Manning, Mewett and Manning on Criminal Law* 3rd edn 1994).

16. It seems to me that the Irish legislation does not prohibit the scenario mentioned above namely: that a person can be prosecuted where he attends a place, initially for an innocent reason, but while at the place, training of the prohibited type takes place, and he remains at the place while the training goes on, but he takes no active part. In the circumstances the Court finds that there is no corresponding offence for offence (v).
17. The applicant further submits that pursuant to Article 599(3)(b) of the Trade and Cooperation Agreement, dual criminality does not have to be proved for the offences falling within the definition of terrorism as set out in Annex 45 to the Trade and Cooperation Agreement.
18. Article 599(3) of the Trade and Cooperation Agreement provides that a State shall not refuse to execute an arrest warrant issued in relation to the following behaviour where such behaviour is punishable by deprivation of liberty or a detention order of a maximum period of at least 12 months: (b) terrorism as defined in Annex 45. Annex 45 in turn defines terrorism as including, inter alia, 3.1(f) possession of explosives or weapons, 6. recruitment for terrorism, 7. providing training for terrorism 8. receiving training for terrorism and 9.2(b) preparatory acts undertaken by a person. The definition does not appear to include being present at a place where the person knew or ought to have known terrorist training was being carried out, i.e. an offence that would be captured by Section 8 of the Terrorism Act.
19. It seems to me that Section 8 of the UK Terrorism Act 2000 is not covered by Annex 45 of the Trade and Cooperation Agreement, and that the respondent should not be surrendered on offence (v) namely, an offence contrary to Section 8 of the Terrorism Act 2000.

20. Offence (vi) – Is surrender prohibited by Section 38 of the Act of 2003?

In relation to offence (vi), the TCA Warrant reads as follows:

That the respondent, "on the 18th day of September 2014, received instruction or training in the making or use of explosives for the purposes of assisting, preparing for or participating in terrorism contrary to Section 54 (2) of the Terrorism Act 2000." The applicant suggests that the corresponding offences in this jurisdiction are Section 6 of the Terrorist Offences Act 2005 & Section 12(1) of the Offences Against the State (Amendment) Act, 1998.

Section 6 of the Criminal Justice (Terrorist Offences) Act 2005 as amended, entitled "terrorist offences," provides that a person is guilty of an offence if the person—

"(a) in or outside the State—

- (i) engages in a terrorist activity or a terrorist-linked activity,
- (ii) attempts to engage in a terrorist activity or a terrorist-linked activity, other than public provocation to commit a terrorist offence, or
- (iii) makes a threat to engage in a terrorist activity,

Or,

- (b) commits outside the State an act that, if committed in the State, would constitute—
 - (i) an offence under Section 21 or 21A of the Act of 1939, or
 - (ii) an offence under Section 6 of the Act of 1998.”

Terrorist linked activity is defined in Section 4 of the 2005 Act as including, inter alia, training for terrorism. Training for terrorism is further defined in s.4C of the 2005 Act as meaning “intentionally providing instruction or training in the skills of —

- (a) making or using, for the purpose of committing, or contributing to the commission of, a terrorist activity —
 - (i) firearms or explosives,
 - (ii) nuclear material,
 - (iii) biological weapons, chemical weapons or prohibited weapons, or
 - (iv) such other weapons, or noxious or hazardous substances, that may be used in a terrorist activity as the Minister may prescribe,

Or,

- (b) such other techniques or methods for the purpose of committing, or contributing to the commission of, a terrorist activity as the Minister may prescribe, knowing that the skills provided are intended to be used by a person receiving the instruction or training for the purpose of committing, or contributing to the commission of, a terrorist activity.”

The Court agrees with the respondent in that the Court does not accept the submission that Section 6 of the Terrorist Act Offences Act 2005 corresponds with offence (vi) set out above. While “terrorist linked activity” is defined as including, *inter alia*, training for terrorism, and “training for terrorism” is defined as meaning “intentionally providing instruction or training”, in this case the respondent received training. He did not provide it. However, as noted above the applicant also relies on Section 12 of the Offences Against the State Act 1998. Section 12 (1) provides that “a person who instructs or trains another or receives instruction or training in the making or use of firearms or explosives shall be guilty of an offence”.

21. In this regard, the Court has considered Section 54 (2) of the UK Terrorism Offences Act 2000 which states:

“A person commits offences if he received instruction or training in the making or use of —

- a. Firearms

- b. Explosives
- c. Chemical biological or nuclear weapons"

Section 54(5) of the Act provides:

"It is a defence for a person charged with an offence under this section in relation to instruction or training to prove that his action or involvement was wholly for a purpose other than assisting, preparing or participating in terrorism."

22. The respondent submits that offence (vi) contains an additional element that is not required in Section 12 of the Offences Against the State Act 1998, which is that the receiving of instruction or training in the making of firearms or *explosives is for use in terrorism*, therefore he submits correspondence cannot be shown. On the issue of correspondence, the applicant relies on the dicta of the Supreme Court in *Minister for Justice v. Dolny* [2009] IESC 48, which emphasised that when considering correspondence, the question should be asked in general terms as to whether the conduct set out in the warrant is contrary to the criminal law of the State. Denham J. outlined the following at para. 38 thereof:

"In addressing the issue of correspondence, it is necessary to consider then on the warrant, the acts, to decide if they would constitute an offence in the State. In considering the issue it is appropriate to read the warrant as a whole. In so reading the particulars it is a question of determining whether there is a corresponding offence. It is a question of determining if the acts alleged were such that if committed in this jurisdiction they would constitute an offence. It is not a helpful analogy to consider whether the words would equate with the terms of an indictment in this jurisdiction. Rather it is a matter of considering the acts described and deciding whether they would constitute an offence if committed in this jurisdiction."

23. Section 5 of the European Arrest Warrant Act 2003 as amended provides for the process of correspondence as follows:

"For the purposes of this Act, an offence specified in a European arrest warrant corresponds to an offence under the law of the State, where the act or omission that constitutes the offence so specified would, if committed in the State on the date on which the European arrest warrant is issued constitute an offence under the law of the State"

24. In this regard it is alleged on the warrant under part (e) that *"during a meeting two of the attendees provided training and instruction to Casey in making a pipe bomb. They instructed him on where to drill the hole, where to put the wires and how to keep the bomb dry. Casey asked about making an improvised mortar. It was pointed out to Casey that he hadn't made a bomb and that he should stick to the basics. Casey was given instruction on making up a basic device."*

25. Having considered the warrant as a whole this Court does not accept the submission on the part of the respondent. It seems to the Court that Section 12(1) of the Offences Against the State (Amendment Act) 1939 does correspond with offence (vi). If offence (vi) contains an additional element which is that the receiving instruction or training in the making of firearms or explosives is for use in terrorism, it is not fatal to the issue of correspondence. If the offence were to be tried in this jurisdiction the fact of training in the use of the explosives would be enough, the extra element, namely that the training in the use of firearms or explosives for use in terrorism, is simply a superfluous element. The test elucidated by Ms. Justice Denham is whether the offence in question would be an offence in this jurisdiction. The answer to that question is yes.
26. In addition to the issue of correspondence the respondent objected to surrender on grounds of both the lack of proportionality and on the lack of capacity on the part of the commission to bind Ireland to the Trade and Cooperation Agreement. This question was considered by the Supreme Court in *Saqlain v. The Governor of Cloverhill Prison* ("*Saqlain*") [2021] IESC 45. The matter was the subject of a referral to the CJEU bearing case number C-479/21. In light of the Supreme Court's ruling on the 10th of November 2021, the respondent confirmed he would not be relying upon the points of objection previously raised. The respondent thereafter formally consented to his surrender on the 25th of January 2022. It, therefore follows and this Court is satisfied to make an order pursuant to s.15(1) of the Act of 2003 for the surrender of the respondent to the Kingdom of Great Britain and Northern Ireland.