

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	No. 13 C 00328
)	
v.)	
)	Judge Edmond E. Chang
ABDELLA AHMAD TOUNISI,)	
)	
Defendant.)	

ORDER

Defendant Abdella Ahmad Tounisi has been charged in a complaint with knowingly attempting to provide material support (in the form of himself) to a foreign terrorist organization, Jabhat al-Nusrah, operating in Syria. 18 U.S.C. § 2339B(a)(1). Yesterday, the magistrate judge entered a release order, which the government now moves to revoke. 18 U.S.C. § 3145(a)(1).¹ Today, the Court held a hearing on the motion. The record comprises the Pretrial Services report, the defense proffer during today's and yesterday's hearing (which the Court listened to via digital-audio recording), the government's exhibits (an FBI interview report and transcripts of recorded calls), and the under-oath complaint affidavit. On this record, as explained during the hearing, the Court revokes the release order.

As an initial matter, the standard of review is *de novo*, that is, the Court makes an independent decision, and that independent look is required even though the assigned magistrate judge is a well-respected and careful jurist, and even though our

¹Under the Rules of our District Court, motions to review release orders are heard by the emergency district judge. Local Criminal Rule 50.4(a).

Pretrial Services Office did its usual thorough investigation. *United States v. Torres*, 929 F.2d 291, 292 (7th Cir. 1991); *United States v. Troup*, 2012 WL 1301244, at *1 (N.D. Ind. 2012) (citing 5th, 8th, 10th Circuits as dictating *de novo* review by district courts).

On this *de novo* review, the question is whether the government has met its burden of proving that there are no conditions of release that will “reasonably assure” Tounisi’s appearance in-court and the safety of the community. 18 U.S.C. § 3142(f). The relevant “community,” at least in a case where the charged crime has its effects in a foreign nation, does extend beyond the United States to other nations. *United States v. Hir*, 517 F.3d 1081, 1088 (9th Cir. 2008); *United States v. Choudhry*, – F. Supp.2d –, 2013 WL 1785392, at *10 (E.D.N.Y. April 26, 2013). But the facts supporting a finding of dangerousness must be based on “clear and convincing” evidence. § 3142(f)(2). That burden of proof and that quality of evidence is required, even though for the particular charged offense in this case, Congress also dictates that there is a rebuttable presumption that there are no conditions that can reasonably assure appearance and safety. § 3142(e)(3)(C) (the charged crime is listed in 18 U.S.C. § 2332b(g)(5)(B)). To rebut the presumption, a defendant must meet a burden of production, which is not a heavy burden. *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986). But even where the presumption is “rebutted,” it is “not erased. Instead it remains in the case as an evidentiary finding militating against release, to be weighed along with other evidence relevant to” the § 3142(g) factors. *Id.*; *United States v. Diaz*, 777 F.2d 1236, 1238 (7th Cir. 1985).

In trying to rebut the presumption, and ultimately to argue that the government has not met its burden of proof on the detention question, Tounisi offers his family and community support. That support is strong, as evidenced by defense counsel's proffer, and by the family's and community's appearance at yesterday's detention hearing and today's motion hearing. Indeed, even some of the *government's* evidence points to the strength of commitment that Tounisi's family and community has to him. During the September 2012 FBI interview of Tounisi, his parents' conduct and statements (his father was present for the entire interview, and his mother for some of it) were all directed at urging Tounisi to tell the truth and to give up any thoughts of violent jihad. And leaders in his community tried to dissuade him from that path. Even now, after the arrest, defense counsel proffered that the community has raised \$3000 in cash to post for security. All of that cuts in Tounisi's favor because there are family and community members who have a strong interest in holding Tounisi to a promise to follow pre-trial release conditions. Also on Tounisi's side of the balance is his lack of criminal history and the absence of a current substance abuse problem.

But even if the presumption is rebutted, which this Court is willing to assume, there is much too much on the other side weighing in favor of detention. Under the bail statute, the Court must take into account the nature and circumstances of the charged offense and the weight of the evidence. § 3142(g)(1), (2). Weighing those factors is *not* to say that the presumption of innocence falls away; to the contrary, the Constitution demands that the presumption of innocence applies throughout the entirety of the prosecution. *See also* 18 U.S.C. § 3142(j). It *is* to say that the Constitution does permit

pretrial detention where the record evidence, as viewed through the lens of the § 3142(g) factors, justifies detention. The weight of the evidence can be relevant both to the flight risk (if the evidence is strong, the more likely a conviction, and all the more reason to flee before trial) and to the danger to the community (which must be shown by clear and convincing evidence). *See Diaz*, 777 F.2d at 1238 (“The evidence of Diaz’s guilt is very strong, making it unlikely that if he stays and stands trial he will be acquitted”)

Here, Tounisi is alleged to have attempted to provide himself as personnel to a terrorist group, Jabhat al-Nusrah, operating in Syria. As detailed in the under-oath complaint affidavit, earlier this year Tounisi did online research into the violence committed by terrorist groups, including accessing articles and watching videos depicting armed combat and bombings. The affidavit quotes the searches he ran on how to travel to Syria via Turkey, and more specifically, on travel restrictions and the no-fly list. But most important of all is Tounisi’s back-and-forth with the online undercover employee, which is quoted in the affidavit, combined with his actual conduct that fit the planning in the back-and-forth: that Tounisi was traveling to Syria via Turkey in order to join Jabhat al-Nusrah on the “battlefields.” Of course Tounisi will have an opportunity to defend against this evidence at trial (and, indeed, as he and his counsel continue to investigate, he can renew his motion for release if facts come to light that he does not now know, § 3142(f)(2)). The fact remains, however, that right now the record evidence is strong, and that evidence meets the government’s burden

to show that no set of release conditions will reasonably assure his appearance or assure the community's safety.

It also needs saying that the record evidence undermines the idea that Tounisi's family and community ties will provide reasonable assurance. Yes, the family and community dedication to Tounisi shows that there would be those who are committed to keeping him compliant on pretrial release. But Tounisi did not, at least based on the evidence now presented, heed those family- and community-warnings, let alone heed the warning of what should have been the life-altering interview by the FBI in September 2012.

For completeness' sake, the Court notes that it did not consider the government's proffer on the not-yet-disclosed interview report with Tounisi's mother concerning the Turkey ticket, nor the not-yet-disclosed evidence that assertedly shows that Tounisi diverted college financial-aid funds toward the ticket.

For the reasons stated above, and explained during the hearing, it is ordered that Defendant Abdella Tounisi is detained pending trial and that he:

- ▶ be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;
- ▶ be afforded reasonable opportunity for private consultation with counsel; and

▶ on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver Defendant to a United States marshal for the purpose of an appearance in connection with a court proceeding.

ENTERED:

s/Edmond E. Chang
Honorable Edmond E. Chang
United States District Judge

DATE: May 3, 2013