Neutral Citation Number: [2021] EWHC 3241 (Admin)

Case No: CO/4021/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

1st December 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

DAMIAN BOGUSZEWSKI	**Applicant**
- and -	
POLIWH JUDICIAL AUTHORITY	**Respondent**

- -
- -

George Hepburne Scott (instructed by Bark & Co Solicitors) for the **Applicant**
Tom Cockroft (instructed by CPS) for the **Respondent**

Hearing date: 1/12/21

Judgment as delivered in open court at the hearing

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM :

Introduction

1. This is an application for bail in an extradition case.

Why a remote hearing?

2. The hearing was originally listed in person at the Royal Courts of Justice. A request was subsequently made, which I granted, for a fully remote hearing by Microsoft Teams. Both Counsel were satisfied, as was and am I, that that mode of hearing involves no prejudice to the interests of their clients. The reason for the request, and the reason for granting it, was that both Counsel in this case also had in-person hearing commitments, listed in other courts, in other extradition and criminal proceedings. A remote hearing in this case ensured that Counsel would be able to continue to act for all of their clients in all of the cases. Counsel each accessed the hearing from the court buildings where they were scheduled to appear in their other cases. In my judgment, it can be in the interests of justice and in the public interest and it was in the present case to use the mode of a fully remote hearing to secure that consequence, at least in the context of the pandemic and the need to avoid (or deal with) court hearing backlogs, and where there can be difficulties in finding new Counsel to step into cases at short notice. The interests of justice have been promoted. The interests of open justice were secured. The case and its start time were published in the cause list, together with an email address usable by any member of the press or public who wished to observe this public hearing. Because I was agreeing to schedule remote hearings with an earlier start to the court day, I decided against a "hybrid" hearing with me sitting in open court. That would have had an avoidable knock-on effect for listing and for court staff. I conducted this hearing from my Judge's room at the RCJ. Anyone could observe it, as several did.

Evacuation

3. During the remote hearing, one of the Counsel found themselves being evacuated from the court building from which they were accessing the hearing. We adjourned part heard and I made an announcement ensuring that all observers had my clerk's email address and could express their wish to join the resumed hearing. The resumption time was communicated by email to all concerned.

Context

4. The Applicant is aged 28 and is wanted for extradition to Poland. Having been refused bail a number of occasions in the magistrates court, and having made a serious attempt at suicide in mid-October 2021, an application to this Court for bail came before Chamberlain J on 11 November 2021. His judgment [2021] EWHC 3143 (Admin) sets out the background in some detail and explains why he refused bail on the grounds of the risk of failure to surrender. In the course of his judgment, Chamberlain J referred to the issue of whether the Applicant's mental health condition was being exacerbated, or the risk of suicide significantly increased, by his continued detention. He added at paragraph 10: "if medical evidence were to emerge as to any link between his condition and continued detention – and, in particular, as to any link between the risk of suicide and continued detention – [the Applicant] could, of course, make a further application on the basis of that evidence. If such an application were made, it would have to be

considered alongside all the other material". The medical records were subsequently made available and an application for bail was made in the magistrates' court on 22 November 2021, which DJ Hamilton refused, saying this: "I have seen the medical documents re the suicide attempt on 11 October, the reasons are not particularly clear but appear to be mixed, but I do take into account that there have thankfully been no repetitions of that behaviour in the six or so weeks since then and also that he is receiving care and treatment from the prison". I am satisfied that it is appropriate for me to consider afresh, in the circumstances of this case, whether bail is appropriate in the light of the medical records alongside all the other material.

The mental health concerns

5. I accept Mr Hepburne Scott's submission that there is a link between exacerbation of the Applicant's psychiatric difficulties and his clinical depression on the one hand and his incarceration on the other; both inherently (as he puts it) and also as a link finding some reflection in what the Applicant is recorded in the medical records as having told clinicians. I proceed on the basis that there is some link between the Applicant's mental health and his incarceration; and that there was some link between incarceration and his serious suicide attempt. It took place a month into his detention on remand in these extradition proceedings, he having been arrested on 19 September 2021, at a time of hopelessness when he felt he had nothing to live for, and when he took an opportunity while his cellmate was in the shower. That has to be put alongside other features regarding his clinical depression and psychiatric difficulties. One feature is his description, reflected in his response recorded in the medical records, of the fact that he does not consider the prescribed antidepressants as materially helping him. Another is his expressed and understandable hope that if he were able to access 'talking therapy' in the community that would be of significant benefit. I accept Mr Hepburne Scott's submission on instructions that arrangements have been made through a friend for counselling in the community were he released today by me on bail. Another feature is the concern and support that has been expressed by friends, including the friend who has assisted in making those provisional arrangements and has also, I am told, put up the pre-release security relied on as a proposed bail condition. Having said that, the documents record that the Applicant has been receiving appropriate treatment and care for his mental health conditions while incarcerated, and there has been an appropriate response to the incident of 11 October 2021.

6. The mental health concerns, and the past suicide attempt, in this case are clearly matters of anxious concern. In my judgment, this Court must nevertheless focus on the question of whether there are, or are not, substantial grounds for believing that if released on bail, on the proposed conditions, the Applicant will fail to surrender. If not, he should be released on bail. But if so, bail would not in my judgment be appropriate. The anxious mental health considerations as arise in this case would not make it appropriate to grant bail, in those circumstances. Nor is this a case, in my judgment, in which the prospect of support mechanisms within the community in the UK compared with an attempt to relocate elsewhere, when put alongside the mental health considerations, is of itself a matter which decisively anchors the Applicant so as to be determinative on the question of risk of failure to surrender. Rather it is one of the features of the picture and one of the aspects needing to be taken into account in conducting an assessment alongside the other features of the case. The mental health considerations, and the availability of more effective support within the community than is available in

incarceration, form an important part of the case for bail advanced by Mr Hepburne Scott in writing and today orally.

Other features of the case

7. Mr Hepburne Scott emphasises a number of other features. There is the fact that the Applicant came to the United Kingdom six and half years ago in April 2015. There is the fact of the support, friendships and links which he has developed in this country since then. There is the fact that he was aged just 21 when he came here, and 6½ years are of considerable significance when they are between the ages of 21 and 28. There is the fact that the Applicant is said to have lived openly in the United Kingdom. Reliance is also placed on the fact that he strongly contests the suggestion that when he left Poland in April 2015 he did so as a "fugitive". His explanation is that although there was a suspended sentence and a duty to keep in touch with probation, he had become homeless and left Poland for the UK in order to find work, as he did.

8. Mr Hepburne Scott emphasises that it is wrong to hold against the Applicant the fact that he was arrested at Birmingham airport on 19 September 2021 attempting to leave for Portugal, with a one-way ticket, in circumstances where the Applicant has accepted that he was considering staying in Portugal. As Mr Hepburne Scott put it in oral submissions, the Court should not "over-extrapolate" from that, or allow it to "distort" the assessment of risk. The reason why it is wrong to hold that against the Applicant is this. First, because the Applicant attempted to leave the UK with his own passport using his own name and date of birth. Secondly, there is nothing to suggest that he was aware of the EAW issued in June 2019 in respect of which extradition is now sought. There was in those circumstances nothing 'evasive' in the attempted travel or travel plans. It does not begin to follow that the Applicant would now try to leave, knowing about the EAW and the extradition proceedings. The position has fundamentally changed. Moreover he doesn't even now have the passport with which he was attempting to go to Portugal.

9. Mr Hepburne Scott also emphasises that the Applicant has strongly asserted that he will comply with conditions if released on bail; and that he is vigorously defending extradition, the next stage in which will be his oral extradition hearing in the magistrates' court on 15 February 2022. Finally, Mr Hepburne Scott emphasises the proposed bail conditions: to live and sleep at an identified address; an electronically monitored curfew 10pm to 4am; a £1,000 pre-release security (put up by his friend); a daily obligation to report as a local police station; the continued seizure of the passport rendering it practically impossible for him to seek to travel aboard; and the usual prohibitions on approaching international travel hubs or seeking international travel documents.

My assessment

10. I have considered all the features of this case with anxious concern in the light of what I have said about the mental health concerns. I am however not prepared to grant bail in this case. in my assessment, there are substantial grounds for believing that the Applicant will – if released on bail, and notwithstanding the proposed bail conditions and any others which the court could devise – fail to surrender. The reasons why I have arrived at that assessment are as follows.

11. The starting point is this that this is a conviction EAW which attracts no presumption in favour of the grant of bail. Next, the sentences of custody in Poland for which the Applicant is wanted by way of extradition are 17 months 27 days, from which can now be deducted 2½ months since his arrest as qualifying remand. That does stand as a substantial period of custody which the Applicant can be expected to be very anxious to avoid if possible.

12. I accept Mr Hepburne Scott's submission that it is not appropriate to hold against the Applicant his attempt to travel to Portugal in September 2021, as evidencing an evasive action of attempted fugitivity from the matters in respect of which he is sought in Poland. There is nothing on the evidence to suggest that having been in the UK since spring 2015, he was suddenly in the autumn of 2021 going on the run as a result of perceived pursuit by the Polish authorities. However, having said that, the fact that the Applicant was at Birmingham airport on 19 September 2021 seeking to board a flight to Portugal with a one-way ticket, and that he acknowledges that he was considering staying in Portugal, is significant to the question of bail in another way. It serves in my assessment materially to undermine the suggestion that there are links and ties to the UK which 'anchor' the Applicant here. That he was, so recently, seeking to leave does serve in my assessment to undermine the suggestion that there were pre-existing anchoring effects. All of that is against the backcloth where he had previously worked here, as evidenced in relation to employment and earnings in the documents that are before the Court (work which, I accept, he could now resume). On the subject of anchoring, the Applicant has on the evidence limited ties to the UK, and in particular no family members with whom he has lived here. I accept that the circumstances have changed and that he is drawing on support from friends but what I cannot accept is that there is a sufficiently strong anchoring effect from the present circumstances that concerns of failure to surrender do not therefore arise. In my judgment they clearly do arise.

13. So far as concerns the Applicant's resistance of extradition through the legal process, plainly it is not my role to assess his prospects of success. He will seek to resist extradition, I am told, by reference to arguments which will rely on the relative lack of seriousness of the index offending in Poland and the passage of time. In that context, it is relevant to note that the index offending involved possession and supply of cannabis in October 2012 aged 19, for which he received a six-month custodial sentence suspended by the Polish court in May 2013; following which he then reoffended with further possession of cannabis and supply of amphetamines in August and September 2013, for which he received a 12 month custodial sentence itself suspended by the Polish court in July 2014. Those suspended sentences were activated for subsequent breach, which he accepts related to a failure to keep in touch with probation. The passage of time has to be seen against the backcloth where he came to the UK in April 2015. It is also relevant that he has committed two offences in this country albeit with non-custodial responses, most recently in March 2019. The extradition hearing is now 2½ months away. The Applicant may very well perceive real vulnerability as to whether he can expect to prevail in resisting extradition.

14. Finally, the circumstances relating to his leaving Poland involve clear indicia of fugitivity. That point is going to be controversial at the extradition hearing. I am not making any finding of fact. However, for the purposes of assessing risk, I note that the Applicant came to the United Kingdom having been made the subject of suspended

prison sentences and that action to activate the suspended sentence against him followed in March 2016 after he had failed to keep in touch with probation and come to the UK in April 2015. That apparent sequence of events indicates that the Applicant, albeit aged 21 and in Poland, did not adhere to court-imposed obligations which gave him an opportunity to be at liberty against the backcloth of his drug offending and the prospect of custody. That is a feature which weighs in the evaluation of risk so far as bail is now concerned.

15. Mr Hepburne Scott, in writing and orally, has said everything that can be said on behalf of the Applicant. I respect the fresh application for bail that has been made in this case and the way in which it has been advanced. However, looking at the picture overall, there are in this case, in my assessment, substantial grounds for believing that the Applicant would fail to surrender if released by me on bail, notwithstanding the conditions put forward. Bail is refused.