Neutral Citation Number: [2021] EWHC 3436 (Admin)

Case No: CO/4233/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

17th December 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

SPANISH JUDICIAL AUTHORITY	**Appellant**
- and -	
KEITH ANTHONY DUFF	**Respondent**

- -
- -

Stuart Allen (instructed by CPS) for the **Appellant**
Abigail Bright (instructed by Eshegian & Co Solicitors) for the **Respondent**

Hearing date: 17.12.21

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 in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

Introduction

1. This is an appeal in relation to bail in the context of extradition proceedings. The appeal is brought by the prosecutor – the Appellant – pursuant to section 11A of the Bail Amendment Act 1993, against the grant of bail in the magistrates' court. The Respondent is aged 51 and is a British citizen. He is wanted for extradition to Spain in conjunction with an accusation European Arrest Warrant (EAW) on which he was arrested on 27 November 2020. Consent has not yet been put in this case.

2. The District Judge granted bail after what, I entirely accept, was a lengthy (nearly one hour) hearing, in a careful and considered ruling giving reasons which I have seen summarised. This was two days ago on Wednesday 15 December 2021. There is no dispute that she had a full and clear picture. She described the decision on bail as "finely balanced". She granted bail on 11 bail conditions. Those bail conditions are familiar in many respects: there is requirement to live and sleep at an identified family home; and an electronically monitored curfew between midnight and 6am; identity documents that had been seized being retained; a daily reporting requirement at the police station; and the usual prohibitions on travel to an international travel hub or applying for or possessing an international travel document. There are bail conditions tailored to attendance at future hearings; and, in particular, attendance at an interview scheduled for Monday 10 January 2022 to which I will need to come back. In addition to those, there is a pre-release security of £7,000. Finally, there is a prohibition on obtaining or possessing an identity document in any other person's name.

3. A key feature of this case, on which considerable reliance has been placed on behalf of the Respondent, and of which the District Judge was fully informed, is this. The Respondent had made a request in June 2021 for a section 21B interview by the Spanish prosecuting authorities taking place with him here in the UK. That was his initiative. The request needed careful consideration by the Appellant and the request was in due course granted on 6 October 2021. It is that interview which is scheduled for 10 January 2022. The District Judge, alongside granting bail on the conditions that I have summarised, directed a case management hearing for Friday 14 January 2022. That was obviously intended to enable the magistrates' court to have this case back, under close supervisory control and on an informed basis, in the light of whatever ensues from the section 21B interview.

4. It is common ground that my function on this appeal is to consider "afresh" the merits of the case for and against bail. The statutory scheme, by section 1(9) of the 1993 Act, spells out in mandatory terms that this appeal is a "rehearing". Having said that, it is also common ground that it is entirely appropriate, and right, for me to have in mind the way in which the matter has been approached, the decision that was made, and the reasons for it, when this case was before the District Judge two days ago.

5. The case on behalf of the Appellant is that I should overturn the District Judge's conclusion as to the appropriateness of bail, by reference to one or both of two bases. One is the risk of failure to surrender, and the other is the risk of the committing of further offences; in each case, by reference to the relevant legal test reflected in the statutory scheme. Against that, the case for bail has been attractively, realistically and

transparently put by Ms Bright on behalf of the Respondent. She emphasises the realism which she says the Respondent has about the circumstances of the case.

6. The index offending, to which the accusation warrant relates, concers allegations that the Respondents was a participant in a cross-border conspiracy to traffic drugs (1.335 metric tonnes of cannabis) in Spain in November 2018, aged 48.

The case for bail

7. The features in favour of bail, as I see them, in assessing the circumstances of the case afresh, include in particular the following points. First, the important starting point under the statutory scheme is this. There is a presumption in favour of the grant of bail. That is by virtue of the fact that this is an accusation EAW rather than a conviction EAW. Next there are the considerations relating to the feature to which I have already referred: that the Respondent has been taken proactive steps to resolve this matter; that the section 21B interview was a request that came from his him and his representatives; that this is because of his wish to have these matters resolved; that he has every reason to continue to engage with that process and to comply; that the interview now is imminent, being due to take place on 10 January 2022; and that there is a real prospect that it will result in concluding the extradition proceedings. The realism and transparency extend further. As part of his June 2021 section 21B request, the Respondent has stated – in terms – that the purpose is to have the interview: with a view to pleading guilty to the alleged offending which is the subject of the EAW; with a view, as a consequence, to then having a Spanish sentence transferred so that he would be able to serve custody here; that being a less coercive measure than serving time in Spain, in circumstances where his British citizen wife is here in the UK as is their home. Next, the point is made that the Respondent is utterly realistic about what he faces and about his past conduct to which I will need to come. Ms Bright submits that, although it is for me to consider the bail merits afresh, this was a proper and a correct conclusion by the District Judge on those bail merits, following a considered and careful evaluation. She emphasises the stringency of the bail conditions and their appropriateness to allay any concerns. In addition to these features, it is relevant to have in mind all the circumstances. For example, there is the fact that the Respondent has already (as at today) served more than six months of what would be qualifying remand towards any sentence wherever it might be served if one is imposed.

My assessment

8. I have come to a different conclusion from the one at which the District Judge arrived. My evaluation of the facts and circumstances of this case is that there are here substantial grounds for believing that, if released on bail and notwithstanding these bail conditions, the Respondent would fail to surrender. That is the ground, in my assessment, on which it is inappropriate on the merits, in all the circumstances of the case, to grant bail to the Respondent. I would not have reached that conclusion by reference to the other basis on which Mr Allen has relied (risk of offending). Had I been of the view that there were no substantial grounds for believing that, if released on bail on the conditions, the Respondent would fail to surrender then I would have left this grant of bail by the District Judge undisturbed. In my assessment, to the extent that a relevant risk of offending arises it is an offending parasitic on (or bound up with) the failure to surrender and adds nothing. It is the absconding risk which is at the heart of this case. In explaining the features that have led me to my conclusion, I need to start

by repeating my acknowledgement that there is a statutory presumption in this case in favour of the grant of bail. However, I have reached the conclusion that that presumption is decisively displaced.

9. The starting point is the seriousness of the index offending. The EAW does not spell out anything beyond what might in our criminal courts be characterised as a "lesser role". There is at this stage simply no detail. I am prepared to assume in the Respondent's favour that there was no basis for attributing any alleged higher role. But this is nevertheless clearly, on its face, very serious index offending. In my assessment, the Respondent can clearly anticipate, if convicted, a substantial custodial sentence. That is a weighty feature so far as concerns incentives and the risk of action on his part.

10. The next point relates to other features in his previous conduct:

    i) He has a conviction in the French criminal court in March 2012, for what the papers described variously as drug smuggling or the improper possession and importation of drugs. The clear inference is that this was action 'across borders'. Indeed, that it more than an inference. In my assessment, based on what I have been told and shown, that was the nature of the criminal offending. And so, 9½ years ago, the Respondent was sentenced to 30 months custody (served in a French prison) for that criminal conduct, the length of that sentence itself reflecting that the matter was of some real seriousness.

    ii) Much more recently, 11 months ago (in January 2021) the Respondent is known to have committed criminal offences involving the fraudulent possession of a fraudulently obtained genuine passport and the use of that passport. That offending came to light as a consequence of his arrest on 27 November 2020. What were uncovered were matters of real seriousness, to the point that the extradition proceedings were interrupted to enable the public interest considerations in support of domestic prosecution here to take their course. The Respondent was convicted and sentenced to two concurrent 15-month sentences which he served (interrupting his qualifying remand in the extradition proceedings) between 14 January 2021 and 13 July 2021. The sentencing remarks, which I have seen reference to, reflect the nature of the conduct which was uncovered.

    iii) The Respondent's conduct, I am satisfied for the purposes of today's assessment of risk, is conduct which has included the following. He was travelling, on a 'fraudulently obtained genuine passport' bearing another person's name and details, 15 months ago in August 2020. That travel included Bangkok, Doha and Dublin. He has been using the fraudulently obtained genuine passport to transfer funds across borders and overseas. The sentencing Judge described the "highly skilled" nature of the manipulation which had created the passport in another name which the Respondent was using in those ways. There was also evidence that he was using that passport to obtain a driving licence in that alternative identity. And there was evidence of other pending applications for passports. All of this was alongside the situation of being a British citizen where he had his own genuine identity documents in his own real name.

    iv) In my assessment, the themes that arise from that picture include the following. (a) There is a very clear international and cross-border element, including

presence in many foreign countries. (b) There are apparent connections with others in other countries and there are apparent transfers of resources suggestive of access to resources overseas. (c) There was the ability to evade the authorities by using deception in the context of travel and dealing with funds. (d) There was the ability to create that situation or to engage with others to be able to create that situation. (e) There was the motive to act in that way rather than use the genuine identity and genuine identity documents. Whatever precisely that motive was, it is very difficult to see how it could be other than criminally evasive. (f) Another clear feature of this picture is that this conduct is recent. (g) The final feature is that this is conduct which is persistent and involves something of a pattern. That picture in my assessment is one of considerable concern when I approach the bail merits and the question of the abscond risk.

v) To that is to be added the Respondent's criminal record much of which I have already referenced. But, in my assessment, Mr Allen is right to emphasise that amid the picture of past conduct there was a recognised Bail Act offence for which the Respondent was convicted and fined in September 2015, just over six years ago. That conduct was a failure to surrender.

11. The real question in my assessment is whether, in the light of all this, the section 21B initiative serves to reflect a resolve, borne out of realism and transparency, from which I can (and should) properly assess that there is no sufficient degree of risk of failing to surrender. I entirely understand the emphasis this is being placed on that aspect of the case. There are important questions in this case, about what the section 21B request, the grant of that request, and the imminent interview show me from the perspective of incentives and risk. As I have explained, the section 21B interview request has expressly been linked to the Respondent's intention to plead guilty to be able to serve a sentence in this jurisdiction by means of transfer. I accept that that indicates clarity and candour and that nothing has been concealed so far as that purpose is concerned. I can see that that feature may serve to have been part of the attraction from the perspective of the Spanish authorities.

i) But what this means is this. When the point is made that there is an imminent and real prospect that "the extradition proceedings will be at an end", what that prospect amounts to involves a situation involving then serving a custodial sentence – which is likely to be a substantial one – in prison in the United Kingdom. In other words, the incentive to cooperate and resolve matters is a pathway to the lesser of two custodial alternatives. The other is the prospect of custody in Spain, were the Respondent to be convicted there.

ii) A grant of bail serves to produce a third option for the Respondent. It is true that the current picture gives him the opportunity to secure being able to serve substantial custody in this country through the section 21B route. But what bail would allow, for a person in his position, is the opportunity to try and avoid both of those two alternative custodial options, which may from his perspective now loom large. And it is that question which directly engages the question of compliance with bail conditions and the risk of failing to surrender.

iii) In my assessment, it is also at least relevant to have this in mind. The continuation of ongoing custody on remand – from today – would serve as further 'qualifying remand' reducing the time left to be served, from the

perspective of either of the two custodial alternatives which I have described: a sentence to be served in Spain (if convicted); or a sentence served in prison in the UK (following a guilty plea, in conjunction with the s.23B interview, if that is achieved). It is a feature of this case that the Respondent, who has opened up an avenue to lead to the serving of custody in prison in this jurisdiction – as the lesser of two custodial alternatives faced – is seeking to be released on bail, and for what may be a short interim period.

12. When these features of the section 21B situation are put alongside the other very serious features of the Respondent's previous conduct, and the clear themes to which I have referred, it is my assessment that there are substantial grounds for believing that – notwithstanding conditions and the conditions that have been identified and notwithstanding any other conditions that I could realistically impose in relation to bail – the Respondent will fail to surrender. The bail conditions do not allay the concerns that I have, in the light of the features that I have described. For obvious reasons, in light of what I have described, the fact that identity documents previously used, found and seized are retained by the authorities does not allay the concerns that arise out of the proven ability of the Respondent (with whatever associates have been involved) to generate and then use a false identity and false documents, evasively, travelling across borders. The bail condition that the Respondent must not obtain or possess any document in another person's name would simply, in my assessment, mean this. If he were to take that action, he would not only have breached his bail by seeking to abscond, but he would have breached that bail condition. I entirely understand why that bail condition was important. But, in my assessment, it cannot of itself constitute a 'brake' on the sort of activity which I have described, if the Respondent is incentivised to try and avoid both of the two custodial alternatives which now loom large for him. Nothing I have read or heard has led me to conclude that there are sufficient 'anchoring' ties in this case to stay in the United Kingdom, rather than to travel, but of course I have taken into account what I have been told about the wife and family home being here.

Conclusion

13. The features of this case to which I have referred, in my assessment, do decisively displace the presumption in favour of the grant of bail. I am acutely conscious that what this means is that I have seen the bail merits of this case differently from the way that the District Judge did. But, for all the reasons I have given, I am going to allow this appeal and overturn the grant of bail in this case.

Mode of hearing

14. By way of an endnote, I record that this was a remote hearing by Microsoft Teams. On this occasion the initiative for that came from me. Conducting a Teams hearing in this case enabled me to be able to do a hearing, which has necessarily come before the Court as a matter of urgency, given the current circumstances relating to the pandemic and guidance as to action. I take responsibility for that initiative. But I would not have imposed it at had either Counsel been concerned that the mode of hearing placed their client at any risk of disadvantage. They were satisfied, as was I, that it did not. The open justice principle was secured in all the usual ways with the publication of the case and its start time on the cause list, and the publication on the cause list of an email address which any member of the press or public could use if they wished to observe this public hearing.

THE HON. MR JUSTICE FORDHAM
Approved Judgment

17.12.21