Neutral Citation Number: [2021] EWHC 3233 (Admin)

Case No: CO/1974/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

30th November 2021

Before:

MR JUSTICE FORDHAM

- -

Between:

PIOTR JOZEF KOWALSKI	**Applicant**
- and -	
POLISH JUDICIAL AUTHORITY	**Respondent**

- -
- -

George Hepburne Scott (instructed by Bark & Co Solicitors) for the **Applicant**
James Onalaja (instructed by Crown Prosecution Service) for the **Respondent**

Hearing date: 30/11/21

Judgment as delivered in open court at the hearing

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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 to the High Court for bail in an extradition case. The hearing was in-person. The Applicant is aged 39 and is wanted for extradition to Poland. That is in conjunction with a conviction European Arrest Warrant (EAW1) issued on 8 August 2018 and certified on 30 August 2018. There is a hot controversy between the parties as to whether the Respondent is able in law to rely on EAW1 for the Applicant's extradition. EAW1 refers to a sentence of 3 years 10 months as having been the combined effect of separate sentences which the Polish criminal courts had imposed for a series of five offences: they being fraud, theft, forgery and perverting the course of justice (x2), committed between July 2012 and December 2016 when the Applicant was between the ages of 30 and 34. The Applicant came to the United Kingdom in October or November 2016 with his partner and their oldest child (then aged 6 months and now aged 5½ years). They have had two more children, both born in the UK (now aged 4½ and 3 years). Extradition was ordered by DJ Brennan on 4 June 2021 after an oral hearing on 4 May 2021.

2. A second conviction EAW (EAW2) had been issued on 28 August 2019. However, EAW2 has recently been withdrawn, on 15 October 2021, and by order of this Court (on 28 October 2021) the Applicant has been discharged pursuant to section 42 of the Extradition Act 2003 in relation to EAW2. EAW2 related to an offence of fraud committed in March and April 2014 for which the Applicant had received a distinct 12 month custodial sentence in Poland. It meant that the overall term, faced on the two EAWs on which DJ Brennan ordered the Applicant's extradition, was 4 years 10 months. That was also the period of imprisonment under the EAWs on which he had been arrested, which was faced by the Applicant when McGowan J refused his application for bail on 16 December 2020, some 6 weeks before his extradition hearing (then listed for 3 February 2021). Bail has most recently been refused in the magistrates' court by DJ Callaway on 3 November 2021, who concluded that the withdrawal of EAW2 did not constitute a 'change in circumstances'. Bail had been refused in the magistrates' court on four previous occasions.

3. The backcloth to the withdrawal on EAW2, and to various contested points of law, is a decision of the Polish criminal courts said to have been taken on 24 March 2021, and said not to have come to light until July 2021. That decision was pursuant to an application which the Applicant himself had made, for amalgamation (or aggregation) of various Polish custodial sentences outstanding against him, including those which were the subject of EAW1 and EAW2. That amalgamation decision is said to have produced an overall custodial sentence of 6 years 3 months. Against that backcloth, EAW2 was withdrawn. The Polish court refused on 8 September 2021 to withdraw EAW1, which is maintained by the Respondent as at today. A new European Arrest Warrant (EAW3) issued on 27 October 2021 refers to the amalgamation sentence, but refers only to the EAW1 matters. The Applicant has not been arrested on EAW3. There is, as I understand it, at present no EAW which has been issued and which relates to the amalgamated sentence of 6 years 3 months and which describes all of the index criminal offending relevant to that amalgamated sentence; still less has the Applicant been informed of or arrested on such an EAW.

The Applicant's 'apparently unassailable' appeal

4. The case for bail advanced by Mr Hepburne Scott on behalf of the Applicant puts at its forefront circumstances which change the legal landscape and which he says not only constitute a relevant change of circumstances – were one necessary – but put the Applicant in an apparently 'unassailable' position so far as concerns grounds to appeal to this Court from DJ Brennan's order. The procedural position, so far as concerns that appeal, is as follows. An application for permission to appeal was made on 7 June 2021. On 15 September 2021 an application was made (i) to adduce fresh evidence updating the Court and (ii) to introduce a new ground of appeal based on section 2(6) of the 2003 Act. On 5 October 2021 Eady J made a direction in the appeal that the Respondent have an opportunity to respond to the new ground of appeal. In fact, as I understand it, a response had been filed already which, while accepting that the fresh updating evidence was properly adduced before the Court, strongly submitted that the new ground of appeal was not viable in law. The application for permission to appeal has yet to be dealt with by a Judge in this Court. That application is not before me. Further information dated 24 September 2021 describes the position in Poland, so far as concerns the sentences which are the subject of EAW1, as follows: those sentences remain "valid" but they are not "enforceable". It is these circumstances which have given rise to a number of the contested questions of law raised by the parties in the context of bail. As I have indicated, Mr Hepburne Scott submits that he has an apparently 'unassailable' appeal point. He says the amalgamation decision of 24 March 2021 has rendered EAW1 legally deficient, because the offences particularised in EAW1 do not include the other matters which became the subject of the amalgamated sentence. He says that EAW1 cannot be relied on. He says that, as is tacitly accepted by the fact that EAW3 has been issued (on which the Applicant has not been arrested), the change of circumstances has fatally undermined the Respondent's ability to sustain extradition on EAW1.

The Respondent's 'sword' and 'shield'

5. In response to this bail application, Mr Onalaja for the Respondent advances two lines of legal argument. The first is by way of a 'sword'; the second is by way of a 'shield'. Each ultimately leads to the same legal submission. Mr Onalaja submits, ultimately, that there is no legal substance in the ground said by the Applicant to be apparently 'unassailable'. He says that the point is legally misconceived and involves a misappreciation of the relevant case law. The legally correct position, says Mr Onalaja, is that EAW1 remains legally intact, with the relevant criminal conduct correctly particularised, and with the Applicant facing extradition to serve the 3 years 10 months sentence. That submission provides him with the 'shield' against the point which (as I have explained) Mr Hepburne Scott has put at the forefront of the application for bail. The same ultimate submission also serves as Mr Onalaja's 'sword'. The 'sword' submission involves a legal premise, namely that this Court has no jurisdiction – or alternatively should in principle decline jurisdiction – in the absence of a 'change in circumstances'. On that premise, Mr Onalaja then submits that there is no relevant 'change in circumstances'. Rather, he says, the circumstances are materially identical to those which arose on 16 December 2020 when McGowan J refused bail in this Court. The reason why there is no material "change of circumstances" is because (a) the withdrawal and discharge on EAW2 reducing the sentence for which extradition is sought by 12 months is not a material change and (b) the points arising from the amalgamation decision are legally unsound so as to make no difference. Mr Onalaja emphasises that extradition is sought only for the sentence of 3 years 10 months. In his submissions, Mr Onalaja explains that there would be "specialty" protection in relation to other matters including the extent to which the amalgamated

sentence of 6 years 3 months exceeds the sentence of 3 years 10 months described in EAW1.

Determining disputed points of law

6. In my judgment, it is inappropriate – in the circumstances of the present case – for either of the parties to seek to use the Court's bail jurisdiction to secure the Court's determination resolving disputed points of law between them as to the legal effect of the amalgamation and of the withdrawal of EAW2 for the viability of the extant appeal. The Applicant's position is that he is entitled in law now to be discharged on EAW1. That is by reference to the same legal arguments on which permission to appeal is currently being sought in this Court. The Respondent's position is that in law the Applicant is and remains straightforwardly extraditable on EAW1, and that nothing has changed so far as EAW1 is concerned. What will emerge from the extant appeal process are the legal rights and wrongs of those positions, and the legal viability of the arguments relied on on both sides. There has been no attempt by either party to link this 30-minute bail hearing to the consideration of the legal merits of the extant application for permission to appeal, whether by means of directions or an appropriate time estimate. None of the authorities cited in the submissions on both sides relating to the disputed questions of law linked to the amalgamation and withdrawal were supplied to the Court for this hearing. I gave each Counsel the opportunity to identify an authority said to contain a passage which demonstrated, beyond argument, that the position they each adopt is plainly legally correct. I was, in particular, anxious to know whether either of them could make good the contention that there is a passage in a judgment of this Court or a higher court which has addressed the implications of the following situation. The situation is where a distinct sentence which is the subject of an EAW has been followed by an amalgamated sentence which has the effect of 'homogenising' and mixing previously distinct sentences together, in a manner which leaves the constituent sentences indiscernible, arrived at from a series of criminal sentences, including the one that was previously identifiable and distinct and is still the distinct subject of the EAW on which extradition is still sought. Having given that opportunity, I have not been placed in a position – by the submissions on either Counsel – of being confident that there is such a case which is on all fours with that very specific scenario. The appropriate course in my judgment is to recognise the nature of the arguments that are being raised in the appeal, and in particular to consider the position of the Applicant – and the way in which he is likely to or may perceive the substantive legal merits of his position – in the exercise of assessing relevant risk.

Change in circumstances

7. So far as concerns the legal premise adopted in Mr Onalaja's 'sword' argument, I am not persuaded that the jurisdiction of this Court requires a change in circumstances; nor that, as a matter of principle or a matter of judgment and discretion in the present case, the Court should decline its bail jurisdiction in the absence of a change in circumstances. Mr Onalaja submitted that his premise was borne out by paragraph 3 of Part IIA of Schedule 1 to the Bail Act 1976. That source was also one which had not been provided in the materials for the Court. But when we took time to consider what that provision says, we found this: the Court "need not" hear the same arguments as to fact or law that have been made on a previous bail application. There is an obvious difference between Parliament saying "need not" and Parliament saying "shall not". I was shown no authority which supports the proposition that a change in circumstances is a jurisdictional prerequisite in this Court. I am quite satisfied in all the circumstances that it is appropriate for me to

approach the question of bail on its merits, including recognition of the circumstances, so far as relevant to the perception and risk. I am quite sure that if I were satisfied today on the bail merits, that there are no substantial grounds for believing that the Applicant – if released by me on bail on conditions – would fail to surrender, bail would in those circumstances in this particular case be appropriate. In any event, I turn to whether there is a change of circumstances since this Court last refused bail on 16 December 2020. The recent withdrawal on 15 October 2021 of EAW2 – at least where put alongside the underlying amalgamation of the sentence, together with its generation of new and distinct basis for resisting extradition being raised on an extant appeal – do, in my judgment, constitute a sufficient change of circumstances. On the face of it, the withdrawal of EAW2 reduces by 12 months the period of custody which the Applicant stands to serve following extradition. On the face of it, the amalgamation is now being relied on to provide him a distinct basis, in extant appeal proceedings, to seek discharge on EAW1. That distinct basis did not exist prior to the amalgamation.

The bail merits

8. I have had to give that detailed consideration to legal points that both Counsel had put at the forefront of their submissions, in order to grapple with what has been said in this case on both sides. Having done so, I can now turn to the central topic which, in my judgment, needed always to be the true heart of today's bail application. Counsel have each been able to assist me, in writing and orally, with the question to which I now turn. The question is this: on the material before this Court, are there substantial grounds for believing that, if released on bail on conditions, the Applicant would fail to surrender?

9. Mr Hepburne Scott submits that the 'changed landscape' is highly material to the Applicant's perception of the position and his incentive in compliantly acting to seek to resist his extradition through the extant appeal. Alongside that feature of the case, Mr Hepburne Scott emphasises the Applicant's strong ties to the community in the United Kingdom, and his strong family life here since coming here at the end of 2016. Mr Hepburne Scott emphasises that the family is now very well established here; that the three small children are all interwoven into the fabric of the community, including their attendance at school, and in the case of one of them the obtaining of support with learning difficulties. He emphasises that the Applicant was working, and providing for his young family, until his arrest. He submits that it is plain that the Applicant's "overriding concern" is and will continue to be for his family: his three small children, together with his partner, who moreover suffers with anxiety. Mr Hepburne Scott submits that the Applicant's "sole motivation" in this case is for the family to stay together, here in the United Kingdom; and that the only other place with which they have a connection, namely Poland, is the last place that the Applicant can be expected to seek to go. As pointed out in his written submissions, the family are strongly dependent on the Applicant, and are currently struggling on universal credit. Mr Hepburne Scott submits that the proposed bail conditions, moreover, allay any concerns that arise. These are: a £1,000 pre-release security; a requirement to live and sleep at the family's rented home; an electronically-monitored curfew between 11pm and 4am; the continued seizure of the Applicant's passport; no doubt together with the usual conditions relating to application for international travel documents or attendance at international travel hubs. So far as the bail merits are concerned, the Respondent opposes bail on the basis that there are substantial grounds for believing that the Applicant would fail to surrender, notwithstanding the bail conditions.

10. I am not prepared to grant bail in this case. In my judgment, there are substantial grounds for believing that, if released on bail, and notwithstanding the proposed bail conditions, the Applicant would fail to surrender. I will explain the reasons why I have reached that conclusion. This is a conviction EAW case and therefore there is no presumption in favour of the grant of bail. Although reduced by 12 months through the withdrawal of EAW2, there remains on the face of it a term of custody of 3 years 10 months so far as EAW1 is concerned. That is a substantial custodial period and stands as a strong incentive to avoid serving it, if possible. Next, I take into account that the Applicant may perceive that recent developments have given him a strong or (he may be being told) 'unassailable' position so far as discharge on EAW1 is concerned. But on the other hand, he is at the permission to appeal stage and may perceive himself as facing the very real prospect of his challenge by way of appeal in this Court being determined in a manner adverse to him, and in the near future, whether that is a disposal on a point of law, which could be at the permission stage or possibly at a rolled-up hearing. The current position is that his extradition has been ordered by a judge, after an oral hearing, with his other grounds for resisting extradition having all been dismissed.

11. There is then, in my judgment, the following problem. It is a feature of the present case that the circumstances that are relied on as standing to put the Applicant in an 'unassailable' position so far as EAW1 is concerned involve an amalgamation of custodial sentences against him by the Polish courts, actioned recently. That amalgamation itself confirms that he has, outstanding against him in Poland, a sentence of 6 years 3 months. One feature of the present circumstances is the issuing of the new EAW3 on which he has not yet been arrested. One obvious possibility – looking at the position as a matter of practical reality and common sense – which the Applicant is likely to fear is that even discharge on EAW1 would be very unlikely to be 'the end of the road' so far as extradition to Poland is concerned. One possibility would be arrest on EAW3. Another possibility would be extradition proceedings by reference to the entirety of the 6 years 3 months, without the "specialty protection" which the Respondent says the additional custodial period would currently attract. I am satisfied that it could not be right to ignore these practical realities from the perspective of considering risk and dealing with bail. Mr Hepburne Scott submitted that, as a matter of principle, it would be wrong to evaluate risks in relation to bail by reference to possibilities that a requested person is not currently facing. He submits that the Court's approach to bail should, in principle, involve looking only at extradition warrants that are currently extant and have been issued and on which the individual has been arrested. He submits that it is wrong in principle to posit some different future action being taken. I cannot accept that submission. It would, in my judgment, be inappropriate for the Court to exclude considerations which are likely as a matter of practicality and common sense to feature in the mind of the relevant individual.

12. Next, there is the fact - emphasised by Mr Onalaja – that the District Judge has found that the Applicant left Poland as a fugitive from Polish justice. As I have explained, he came to the United Kingdom in October or November 2016. That was against the backcloth of the matters which were the subject of EAW1 (except for the forgery offence in December 2016), as well as the matter which was the subject of EAW2. Those matters included a suspended sentence of 20 months for the fraud offence in 2012 which had been imposed on 14 April 2015 and had been suspended for four years. There is no basis, for the purposes of this application for bail, for treating the Applicant as having come to the United Kingdom other than as a fugitive from Polish justice. Fugitivity means he has

already failed to adhere to court-imposed responsibilities, and has crossed borders, in conjunction with the very matters for which his extradition is being sought. That, in my assessment, is a powerful factor when considering risk and the prospect of failing to surrender. It remains a powerful factor even when put alongside the point emphasised by Mr Hepburne Scott concerning the Applicant's lack of any criminal convictions in the five years in which he has been in the United Kingdom, including the four years up to the time of his arrest in October 2020.

13. Next, although the children are in school in this country, they are very young. The partner, who has described her strong reliance on the Applicant, is not in work. The family lives in rented accommodation and is currently supported by universal credit. There is, on the face of it, a real potential mobility on the part of this family, notwithstanding the current difficulties relating to the pandemic and travel. In that regard, I bear in mind that the partner came to the United Kingdom with the Applicant in 2016, when he came here as a fugitive. They were already accompanied by their first child and the partner was pregnant with the second child. The Applicant may very well perceive that the only realistic prospect of avoiding the family being ruptured for a substantial period, if he were to face the substantial period of custody imposed on him by the Polish court, would be for them to seek to relocate. They would, in substance, be doing now what three of them did at the end of 2016.

14. Finally, it is relevant to have in mind that in addition to the various index criminal offences which are the subject of EAW1 (and the offence which had been the subject of EAW2), the Applicant has a criminal past involving a series of other convictions for offending in Poland. Many of those other offences were offences of dishonesty. They included handling stolen goods, fraudulent alteration of a document, false tax declarations and dishonest bookkeeping, threats and destruction of property. As I have explained, the index offences to which EAW1 relates include theft, fraud and forgery. They also include two offences, on separate occasions, of perverting the course of justice. That is another feature of this case which adds to the concerns about whether the Applicant can be trusted, and expected, to adhere to conditions and to surrender in conjunction with his extradition proceedings.

15. I have considered bail afresh on its merits, assessing risk on all the material before me. But, as with several judges who have considered bail in this case on previous occasions, including McGowan J who refused it in December 2020, I have concluded that – notwithstanding the proposed bail conditions – there are substantial grounds for believing that the Applicant if released on bail would fail to surrender. Bail is refused.

30.11.21