Neutral Citation Number: [2022] EWHC 1294 (Admin)

Case No: CO/1847/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

25th May 2022

Before :

MR JUSTICE FORDHAM

- -

Between :

THE GOVERNMENT OF THE UNITED STATES OF AMERICA	**Appellant**
- and -	
MOHAMMAD ZAID AL-SARBEL	**Respondent**

- -
- -

Tom Davies (instructed by the CPS) for the **Appellant**
Stefan Hyman (instructed by Hecht Montgomery Solicitors) for the **Respondent**

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Hearing date: 25.5.22
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 and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM:

1. This is an appeal by the Government of the United States against a decision by the District Judge who, two days ago, granted conditional bail in this extradition case. The Respondent ("the Requested Person") is aged 37. He was born in Kuwait and is a Kuwaiti national. He is wanted for extradition to the United States in conjunction with an "accusation" warrant. The domestic US arrest warrant was issued in October 2012 and accuses him of five charges to which I will need to return. The alleged offending took place between December 2010 and June 2012. An Interpol Red Notice was issued on 16 April 2013. It was certified by the NCA pursuant to section 74B(2) of the Extradition Act 2003 on 23 February 2021.

2. Mr Hyman for the Requested Person submits, and I accept for the purposes of today, that although an interception and arrest at an earlier stage may have necessitated some intervening step, it was on the face of it open to the authorities of the United States and the United Kingdom (or any other country) to be undertaking such steps. I also accept on the evidence that the Requested Person had travelled freely to a number of countries, including the United Kingdom, on a number of occasions. He had a passport issued in December 2014 and a visa in July 2015. That passport had expired in December 2019. There was a replacement passport which was seized from him, and has been retained, when he was arrested on 8 May 2022 at Heathrow airport.

3. I also say at the outset that I agree with the District Judge so far as various English spellings of the Requested Person's name are concerned. There is a Police National Computer (PNC) print out and also the Interpol Red Notice making reference to what are described as "aliases". There is a dispute as to whether the various versions of the name that can be found listed there can be characterised as no more than "transliteration". But I accept, on the Requesting Person's behalf and in his favour, that there is on the face of it no evidence in this case of "evasive action" to avoid legal accountability, such as through the changing of a name. The bottom line position is that the Requested Person is "Mohammad ZZAS Alsarbal" in the English spelling of his name in his passport (and other official documents), and "Mohammad Zaid Al-Sarbel" in the English spelling on the Interpol Red Notice. That means "Alsarbal" and "Al-Sarbel" have one English vowel different and a difference in hyphenated structure. In the event, he was picked up in conjunction with the Red Notice (with its spelling), travelling on his passport (with its spelling).

4. The Judge granted bail on conditions which included a pre-release security to be provided in the sum of £250,000. That was an increase from an amount that had been offered (in a skeleton argument dated 12 May 2022) in the sum of £150,000. That skeleton argument had said that the family could make "enquiries within the community" if the court regarded a higher sum as being required. I am told, and for the purposes of today I accept, that what happened was that a telephone call was made to family members (one family member is present in Court today), and a discussion ensued about additional monies being able to be found. There were bail conditions for living and sleeping at an address. That is the address which is the subject of an assured shorthold tenancy which the Requested Person's brother, who has come over to the United Kingdom I am told, has lined up. Other bail conditions included: a curfew between 8pm and 8am every night, electronically monitored; reporting at a police station three times a week; the retention of the seized passport; and prohibitions on

applying for an international travel document or being in the vicinity of an international travel hub.

5. One of the features of this case is an undertaking and assurance which has been given by the Kuwait Embassy here (a representative from which is in Court today). That undertaking is that no international travel documents would be issued to the Requested Person were he to be released on bail conditions. Mr Davies for the US Government, rightly, accepts that there is no basis for doubting or going behind that assurance. I accept that I can rely on it.

6. It is common ground that this is a "rehearing" of the question of bail. That is so pursuant to section 1(1A) and (9) of the Bail (Amendment) Act 1993. That means that Parliament has given me the function of considering "afresh", with the benefit of submissions from both parties and the materials put before me, the question of risk. The central question is whether there are substantial grounds for believing that, if released on conditional bail, the Requested Person would fail to surrender. Although I would have the power to vary, or impose different, bail conditions and although the curfew could be longer and the reporting at a police station could be daily, it is not realistic to suggest that the bail conditions could be more comprehensive or stringent than they are. The real question is the risk question and whether those bail conditions are sufficient to allay any concerns that arise. In assessing the question of risk, I am not making findings of fact, but I have to evaluate the various considerations on the evidence before me. Insofar as there are matters which are secure and can be accepted at face value then it is appropriate for me to do so.

7. The underlying charges against the Requested Person are strenuously denied by him. He accepts that it is his photograph that appears on the April 2013 Interpol Red Notice. It is also, without doubt, on the face of it his name that is intended to be used (I have already referred to modifications of English spelling and structure). The Requested Person is, undoubtedly, the accused person. But the question of whether he committed any crime would of course be a question to be decided at any trial, were any trial to take place.

8. Mr Hyman for the Requested Person described as "trite" the point that in an "accusation" case there is a presumption in favour of the grant of bail. What he means by "trite" is that it is a familiar point to courts which deal with questions of bail. But, as he rightly submits, the point is an important one. Parliament, through statutory provision in section 4(2A) of the Bail Act 1976, has provided for that presumption in favour of the grant of bail. Mr Hyman also, understandably, emphasises and wants the Court to have well in mind the implications so far as the potential length of time that custody could involve, in an extradition case which may be very protracted; and the realities which may arise so far as concerns any subsequent attempt in the magistrates' court to secure bail, if this Court were to allow the appeal.

9. On the central issue of whether there are substantial grounds for believing that the Appellant would fail to surrender to custody if released on conditional bail, the case in favour of the Requested Person is as follows. It starts by emphasising the statutory presumption in his favour. It is then submitted that, as the District Judge found, he is an appropriate candidate for bail. Although the index offences are matters of some seriousness which, in the case of the most serious offence charged, carries a maximum prison sentence of 10 years the Court should not be distracted by maximum prison

sentences, still less the aggregated 28 year maximum (for the five charges) that has been referenced in this case. Reference to the hacking of Government cyber-infrastructure should not be overstated. Nor should references to national security. No "value" – in terms of alleged loss or alleged gain – has been attributed to the alleged offending, notwithstanding that the Requested Person has been in detention for 17 days and information could have been provided, and notwithstanding that the District Judge specifically emphasised the absence of such information. The different spellings of names are readily explicable and should not be held against the Requested Person. He is of evidenced good character in the United Kingdom, having been here on some six occasions. He also has an official certificate, from the Kuwaiti authorities (10 May 2022), of his good conduct: so he is also of good character in Kuwait. This is not a case in which there is evidence of any acts done to evade any pursuit by criminal enforcement authorities. There is nothing in that slight difference in the English spellings and structure that would indicate such 'evasion' action, added to which there is the evidenced international travel. The Requested Person has, on the face of it, employment with his own licensed business. He is a graphic designer. There is, on the face of it, no evidence that the US authorities took any steps to escalate or update or prioritise the pursuit of the Interpol Red Notice that had been issued in April 2013. They could, on the face of it, have been doing more had these matters truly been of great seriousness. As it is, the Requested Person has been able to continue frequently to travel, unimpeded. Next, he has two young children and a spouse, living in Kuwait. He has a supportive family, and he has every incentive to work and earn money, to be able to instruct lawyers here – and if possible, in the United States – so as to seek to exercise his legal rights within the legal processes of extradition which are available to protect him in this country. In that regard, emphasis is placed on the serious extradition issues which he would be in a position to raise to resist extradition, including what are said to be issues as to double criminality; Article 3 ECHR (prison conditions); Article 6 ECHR (fair trial); and Article 8 (delay and family life). Viewed overall, this is a case in which the presumption in his favour has not been rebutted. He should be allowed to be released on conditional bail rather than remanded for what may be an extended period of custody.

10. I have reached a different view from that which the District Judge reached in this case, on the central question of risk. I have had careful regard to the matters to which I have just referred, including the important presumption which provides the starting point. I have reached the conclusion, in the assessment of risk on the materials in this case, that the presumption has been rebutted by the United States authorities. In my assessment, there are substantial grounds for believing that the Requested Person would – if released on bail conditions – fail to surrender to custody. In my assessment, the concerns are such that the bail conditions that have been identified and designed – and for that matter any further conditions that I could design – would not be sufficient to address and allay those concerns.

11. In assessing risk, the starting point in this case is the nature of the matters in respect of which the Requested Person is sought by the United States authorities. There are these five charges: (1) computer hacking; (2) trafficking in passwords; (3) access device fraud; (4) identity theft; and (5) aggravated identity theft. I accept Mr Hyman's submission that those matters do not involve, on the face of it, additional aggravated factors such as: organised crime, money laundering, violence or drugs, nor any specific threats to national security. I also accept, for the purposes of today, that they could have

been differently charged had they those characteristics. But the matters are, nevertheless, matters of seriousness. The summary in the Interpol Red Notice is that:

> ***From December 2010 to June 2012, in New York and elsewhere [the Requested Person] engaged in numerous computer hacking activities; … illegally accessed more than 200 websites which included protected US Government databases; … fraudulently obtained victims' credit card information, as well as usernames and passwords for various online accounts; … possessed 15 or more counterfeit and unauthorised credit card numbers obtained from hacking into computer systems; … operated his own website which sold the illegally obtained personal identification information and private online account information to others [and] throughout the entirety of the scheme … possessed and transferred victims' personal credit card information, usernames, addresses, dates of birth and password information to those who visited his website.***

When I put the description of those alleged offences alongside the five charges the starting point, in my assessment, is that were he to be convicted the Requested Person could expect to face a substantial period of imprisonment in the United States.

12. The relevance of that for the question of risk is as to what it poses from the perspective of an incentive on the Requested Person to seek to avoid that position, if he is able to do so. I emphasise that I am making (and assuming) no finding of fact in relation to guilt or innocence. I am assessing risk in the circumstances of what is alleged and its implications. And I am assessing risk in the circumstances of what sort of sentence the Requested Person can be expected to contemplate that he would face, were he to be extradited and were he to be convicted.

13. There is a further point arising out of those alleged offences and it is this. The individual described in that pattern of offending is one who would have a high degree of skill, resourcefulness and connections, and could be expected also to have or be able to access significant means. I repeat that I am not making (or assuming) any fact-finding. Again, however, I have to assess risk in the circumstances of the nature of the case. The fact that the US authorities could have done more after April 2013 does not, in my assessment, undermine these points which arise from the nature of what is alleged.

14. The next key feature in the case, in my assessment, concerns the nature of the Requested Person's connections: to Kuwait on the one hand; and to the United Kingdom on the other. The Requested Person clearly has his family life and his personal and private life rooted strongly in Kuwait. That is where his partner and their two young children are and can be expected to be. As Mr Davies for the United States authorities powerfully submits, the prospect of the Requested Person being able – by one means or another – to get himself back to Kuwait would mean that he would, on the face of it, secure a "safe haven" so far as extradition is concerned. That is because of the absence of any extradition treaty between Kuwait and the United States.

15. When I look at the connections between the Requested Person and the United Kingdom, this is a case in which there are – on the face of it – no substantial ties of any 'anchoring' effect in the United Kingdom. The shorthold tenancy which has been arranged by the brother has been set up, understandably, as accommodation which would be available were the Requested Person to be released. But it is not, in my assessment, the case that there is any particular 'anchoring' feature which links the Requested Person to the United Kingdom or to staying in the United Kingdom. A relevant feature in the assessment of risk is that the Requested Person was arrested at Heathrow airport on 8 May 2022, following what I am told was a holiday here with his wife and one of their

two young children. That reinforces the fact that there is no pre-existing more powerful anchoring factor to the United Kingdom

16. I accept that the Requested Person has the legal right to fight, with his legal representatives, extradition and raise any points that can be raised in resisting extradition. And, again, it is no part of my role today to assess the strength or otherwise of the grounds on which extradition could be resisted. I have in mind what I have been told about the protracted length of extradition proceedings to the United States, where extradition is resisted. In assessing the question of risk, in my judgment, there are important considerations as to how the Requested Person is likely to perceive his position, so far as seeking through the legal process to resist his extradition to the United States is concerned. If he were released and able to achieve it, he would – for all the reasons I have given – have a very strong incentive to seek to rejoin his family in the near future, as an alternative to remaining in the UK and resisting extradition.

17. I accept of course that the £250,000 is a very substantial pre-release security that has been identified as one of the possible bail conditions. I also accept that the 'uplift' from the £150,000 which had previously been offered was a response to a concern raised by the District Judge. But in my assessment, it is a fair observation for Mr Davies, on behalf of the United States authorities, to make that these are very substantial sums which it was possible for the Requested Person to be able to be putting forward; and there is no real evidence before me as to the source of these funds. The question of access to substantial resources is one which links to other underlying concerns which arise in the present case. And this contrasts sharply with the modest assessment that is recorded in the licence document relating to the capital held by the "one person company" that the Requested Person is said to have been operating, at least since 2019. In my assessment it is a fair submission for the United States authorities to have made that in this case these substantial sums raise at least as many questions as they answer, particularly in light of the absence of such underlying evidence. In the end, the question in relation to pre-release security that I think I have to ask is this: whether it assists me as constituting an 'anchor' in the sense of being an amount that could not be 'afforded to be lost' by whoever it is who is putting it forward. I do not accept that the pre-release security in the circumstances, and on the evidence, in this case does constitute an 'anchor' of that kind .

18. Finally, I have already recorded that I accept the assurance that has been given by the Embassy in relation to no further international travel document being issued to the Requested Person. However, as Mr Davies submits, that eliminates "legitimate exit" from the United Kingdom. It does not and cannot of itself eliminate the prospect of "illegitimate exit" from the United Kingdom. As to that, in my judgment in all the circumstances and given the underlying contours of this case there are substantial reasons for fearing that the Requested Person would find the means, skill, resourcefulness, and contacts to be able to find a way to exit the United Kingdom, notwithstanding bail conditions which are designed to be comprehensive and stringent.

19. In the light of these concerns, and all of those matters, and notwithstanding the various features relied on on behalf of the Requested Person, my conclusion is that the United States authorities in this case have convincingly displaced the presumption in favour of the grant of bail. My assessment is that that there are substantial grounds for believing that, if released on bail and notwithstanding these bail conditions, the Requested Person would fail to surrender to custody. In the light of that conclusion – and recognising as

I do that it involves taking a different view from the view that was arrived at by the District Judge – this appeal is allowed and the grant of bail in this case will therefore be overturned.

25.5.22