Neutral Citation Number: [2024] EWHC 1392 (Admin)

Case No: AC-2023-LON-002540

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 June 2024

Before :

THE HONOURABLE MR JUSTICE BOURNE

- -

Between :

ASANTE KWAKU BERKO	**Appellant**
- and -	
UNITED STATES OF AMERICA	**Respondent**

- -

Rachel Scott (instructed by **CJS Defence Ltd**) for the **Appellant**
Nicholas Hearn (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 9 May 2024

- -

Approved Judgment

This judgment was handed down remotely at 10am on 7 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

THE HONOURABLE MR JUSTICE BOURNE

The Honourable Mr Justice Bourne :

Introduction

1. This is an appeal against the decision of District Judge Tempia, sitting at the Westminster Magistrates' Court on 29 June 2023, to send the appellant's extradition case to the Secretary of State under section 87 of the Extradition Act 2003 ("the 2003 Act"). The appellant's extradition was ordered by the Secretary of State on 21 August 2023 under section 93. The extradition request is governed by Part 2 of the 2003 Act.

2. On 27 November 2023 Heather Williams J granted permission to appeal in respect of the first ground of appeal. She refused permission on a second ground, and that permission application is now renewed before me on a "rolled up" basis.

3. Extradition of the appellant is sought by the USA for the purpose of prosecution for six offences, arising out of an investigation by the US Attorney's Office for the Eastern District of New York and the Department of Justice into an alleged foreign bribery scheme involving Ghanaian officials.

4. The appellant is a citizen of the USA and of Ghana. From December 2014 until March 2017 he was employed as an Executive Director in the Investment Banking Division of Goldman Sachs International ("GSI"), a company incorporated in the United Kingdom. One of GSI's long-standing clients was a Turkish energy company, Aksa Enerji, which was looking to invest in the building of a power plant in Ghana. The respondent alleges that the appellant and others – none of whom were based in or worked in the United States – took part in a scheme to make corrupt payments to Ghanaian officials in connection with the proposed investment deal.

5. On 26 August 2020, a grand jury indictment was issued by the United States District Court for the Eastern District of New York (the Indictment), charging the appellant with six counts. It first came to his attention on 3 November 2022 when he was arrested under a provisional extradition request issued by the Department of Justice.

6. For the purposes of the grounds of appeal, the charges on the indictment may be divided into two groups.

7. Ground 1 concerns counts 4 to 6, which allege that the appellant wilfully failed to file reports of foreign bank accounts for the calendar years 2015, 2016 and 2017.

8. If ground 1 succeeds and the appellant cannot be extradited in respect of counts 4-6, ground 2 will still apply to counts 1 to 3 which respectively allege a conspiracy to violate the Foreign Corrupt Practices Act ("FCPA"), during the approximate period December 2014 to March 2017, a substantive violation of the FCPA on or about 4 September 2015 and a money laundering conspiracy, predicated upon the FCPA conspiracy allegation and spanning the approximate period December 2014 to March 2017. If ground 1 fails then I must consider ground 2 in relation to all six counts.

9. The extradition hearing took place on 7 and 15 June 2023. In her judgment dated 29 June 2023, deciding to send the case to the Secretary of State, District Judge Tempia rejected arguments that (1) counts 4-6 do not amount to extradition offences because they do not comply with the requirement of dual criminality and (2) extradition should not be ordered by reason of forum.

10. The appeal is brought under section 103 of the 2003 Act.

11. In any case where request for extradition is made in respect of more than one offence, as in this case, the 2003 Act is modified by the Extradition Act (Multiple Offences) Order 2003 (SI 2003/3150, "the Order"). Where I refer to relevant provisions below, I refer to them or quote them as so modified.

12. In relation to an appeal under section 103, section 104 provides:

> "(2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.
>
> (3) The conditions are that—
>
> > (a) the judge ought to have decided a question before him at the extradition hearing differently;
> >
> > (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.
>
> […]
>
> (5) If the court allows the appeal it must in relation to the relevant offence only —
>
> > (a) order the person's discharge;
> >
> > (b) quash the order for his extradition."

13. The appellant's case is that the District Judge ought to have decided each of the questions before her differently and that, had she done so, she would have been required to order his discharge in relation to the relevant offences.

14. It is agreed that the general approach of this Court on appeal is as explained by Lord Burnett CJ in *Love v Government of the United States of America* [2018] 1 WLR 2889 at [25]-[26]. Although respect is to be afforded to the findings of fact made by a district judge, especially having heard oral evidence, this court is not obliged to find a judicial review type error before it can say that the district judge's decision was wrong. Rather, it is entitled "to stand back and say that a question ought to have been decided differently because the overall evaluation was wrong: crucial factors should have been weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed".

15. Having said that, the parties also agree that ground 1 turns on a question of pure law. However well or badly the District Judge's decision was reasoned or expressed, counts 4-6 either were or were not extradition offences and therefore the decision was either right or wrong as a matter of law.

Ground 1

The applicable law

16. Section 78(4)(b) of the 2003 Act requires the District Judge to decide to the criminal standard, among other things, "whether … each offence specified in the request is an extradition offence".

17. In a case where the requested person is accused in a category 2 territory (such as the USA) or has been convicted there but not sentenced, an "extradition offence" is defined by section 137. The relevant subsections provide:

> "(2) The conduct constitutes an extradition offence in relation to the category 2 territory if the conditions in subsection (3), (4) or (5) are satisfied.
>
> (3) The conditions in this subsection are that—
>
> (a) the conduct occurs in the category 2 territory;
>
> (b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment if it occurred in that part of the United Kingdom;
>
> (c) the conduct is so punishable under the law of the category 2 territory.
>
> …
>
> (7A) References in this section to "conduct" (except in the expression "equivalent conduct") are to the conduct specified in the request for the person's extradition.
>
> (8) The relevant part of the United Kingdom is the part of the United Kingdom in which—
>
> (a) the extradition hearing took place, if the question of whether conduct constitutes an extradition offence is to be decided by the Secretary of State;
>
> … "

18. The District Judge ruled that the offending alleged in counts 4-6 occurred in the USA. Neither party challenges that conclusion. For present purposes I assume that to be a correct application of the law. Its consequence is that subsection (3) is the relevant provision of section 137, so I have not quoted subsections (4) and (5).

19. The key question under section 137(3)(b) was whether "the conduct would constitute an offence under the law of [England and Wales] punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment if it occurred in [England and Wales]".

20. The leading case on this subject is *Norris v Government of the USA* [2008] 1 AC 920 HL. Mr Norris faced four charges in the USA. Count 1 alleged that he

conspired with others to operate a price fixing or cartel agreement in a number of countries including the USA. In the USA this was a statutory offence of strict liability not requiring proof of fraud, deception or dishonesty. The charge was supported by an affidavit by a prosecutor who deposed that the conspirators "in effect … defrauded their customers", though that allegation did not appear in the indictment. For the extradition proceedings, in accordance with what was then the usual practice, the CPS prepared a charge sheet translating the counts in the indictment into particulars of English offences. Count 1 was translated into a charge of conspiracy to defraud buyers of products by dishonestly entering into an agreement to fix prices. Counts on the US indictment alleging a conspiracy to obstruct justice by witness tampering and causing a person to tamper with evidence were translated into charges of conspiracy to pervert the course of justice and, cutting a long story short, were found to be extradition offences. The main issue for present purposes was whether count 1 was an extradition offence.

21. The opinion of the House of Lords contains a detailed discussion of whether, at the relevant time, participation in a price fixing agreement was a criminal offence in England and Wales. At [19] it was noted that defendants had been successfully prosecuted for conspiracy to defraud in price fixing cases where aggravating elements such as misrepresentation and deception had been found. But as the House explained at [51], "in a case involving dishonest misstatement in connection with price fixing, it would be the punishment of the dishonesty not price fixing which would be the 'objective' of the criminal law". In the absence of such elements, price fixing was not an offence at common law. Nor was it a statutory offence until the introduction of the Enterprise Act 2002 which post-dated the activity of Mr Norris.

22. That conclusion was sufficient for Mr Norris to have his appeal against the extradition order allowed in relation to that charge. However, the opinion of the House continued:

> "4) The double criminality issue
>
> 63. As stated, Mr Norris's appeal with regard to count 1 falls to be allowed on the elementary basis that the conduct of which he is accused – mere undeclared participation in a cartel – was not at the material time, in the absence of aggravating features, a criminal offence in this country either at common law or under statute. It was therefore wrong to have characterised his conduct as being party to a conspiracy to defraud although it would have been otherwise had the allegation been, for example, that he and his co-conspirators, having entered into a price fixing agreement, agreed in addition to deceive their customers by making false representations to the contrary. That certainly would have been an aggravating feature. But no such conduct is alleged here. It is true that Ms McClain has deposed that the conspirators '[i]n effect . . . defrauded their customers by requiring that they pay higher prices than they might otherwise have paid had there been no conspiracy'. But that is no more than to assert an intrinsic unlawfulness and dishonesty merely in taking part in a secret cartel and under English law, until the enactment of section 188 of the Enterprise Act 2002, that was simply not so.

64. The issue raised for the House's decision under section 137 of the Extradition Act 2003 strictly, therefore, does not arise. It was discussed by the Divisional Court [2007] 1 WLR 1730, para 99, under the heading 'the double criminality issue' and posed thus:

> 'whether, if price fixing is capable of constituting the English offence of conspiracy to defraud, of which dishonesty is an essential ingredient, the absence of such ingredient in the United States offence of price fixing prevents the alleged conduct of Mr Norris from being an extradition offence within section 137.'

But it only arose because the Divisional Court found that the conduct alleged against Mr Norris did indeed constitute an offence under English law before the Enterprise Act 2002. Given, however, the obvious general importance of the issue and that it was fully argued before the House, we think it right to decide it."

23. The relevant part of section 137 as it stood at the time of the *Norris* case was in the same terms as section 137(3) is today.

24. The House reviewed the history of English extradition law with particular regard to the double criminality rule and concluded that the approach taken up to and in the 2003 Act is to apply a "conduct test" rather than an "offence test". This meant that, as it was expressed at [65], that the court will look for "the necessary correspondence … between the conduct alleged against the accused abroad and an offence here", rather than looking for a correspondence between the elements of the offence charged abroad and an equivalent offence here. As it was put at [87], the relevant conduct would consist not of "those acts or omissions necessary to establish the foreign offence" but of "the accused's conduct as it may have been more widely described in the request".

25. At [65] the judgment further stated:

> "If, however, the conduct test is adopted, it will be necessary to decide, as a subsidiary question, where, within the documents emanating from the requesting state, the description of the relevant conduct is to be found."

26. That question was answered at [91]:

> "… the conduct test should be applied consistently throughout the 2003 Act, the conduct relevant under Part 2 of the Act being that described in the documents constituting the request (the equivalent of the arrest warrant under Part 1), ignoring in both cases mere narrative background but taking account of such allegations as are relevant to the description of the corresponding United Kingdom offence."

27. The House of Lords then considered counts 2-4 which were said to correspond to charges of conspiracy to pervert the course of justice. Here too the issue, under section 137, was whether the conduct – conspiring to obstruct the US criminal investigation into price fixing – would have constituted an offence under English

law if it had occurred in England. The court considered to what extent the circumstances of the alleged conduct had to be "translated" into an English equivalent for the test to be applied. It approved the approach taken in the Canadian case of *In re Collins no.3* (1905) 10 CCC 80, where Duff J at 100-101 said:

> "… you are to fasten your attention not upon the adventitious circumstances connected with the conduct of the accused, but upon the essence of his acts, in their bearing upon the charge in question. And if you find that his acts so regarded furnish the component elements of the imputed offence according to the law of this country, then that requirement of the treaty is complied with.
> …
> If you are to conceive the accused as pursuing the conduct in question in this country, then along with him you are to transplant his environment; and that environment must, I apprehend, include, so far as relevant, the local institutions of the demanding country, the laws effecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned, always excepting, of course, the law supplying the definition of the crime which is charged."

28. The effect of that approach was that an allegation of perjury, consisting of lying to a tribunal or officer in California, satisfied the test even though perjury in Canada could not be committed by lying to a Californian, rather than a Canadian, tribunal or officer. The House also considered this approach to be supported by *Riley v The Commonwealth of Australia* (1985) 159 CLR 1, where importing narcotics into the USA was regarded for extradition purposes as equivalent to importing narcotics into Australia.

29. Counts 2-4 in *Norris* therefore were extradition offences. Obstructing a criminal investigation into price fixing by the US authorities in Pennsylvania was treated as equivalent to obstructing a criminal investigation into price fixing by the appropriate investigatory body in this country. For this purpose it did not matter that price fixing was not an offence in this country, because such an investigation could have led to charges such as fraud or conspiracy to defraud and its exact outcome could not be determined at the time it was interfered with, i.e. when it was still in progress. It therefore was properly regarded as a criminal investigation, and therefore interfering with it would be an offence in this country.

30. Rachel Scott, counsel for the appellant, submitted that the disclosure counts in the present case are not extradition offences because, by analogy with the allegation of price fixing in *Norris*, the essential conduct of failing to declare the holding of a foreign bank account is not an offence in England and Wales.

31. Nicholas Hearn, the respondent's counsel, contended that the failures to declare bank accounts were described in the request as part and parcel of the conspiracy and/or money laundering offences and therefore would have amounted to offences if they occurred in England, even if charges here would not have corresponded neatly to those on the US indictment.

32. In the alternative Mr Hearn contended that the conduct described, viewed as a whole and without regard to the boundaries of the elements of the American offences charged in counts 4-6, includes all the elements of offences under section 3 of the Fraud Act 1976 in this country, of dishonest failures to make declarations required by law with a view to gain.

33. Mr Hearn also relied on the decision of the Divisional Court (Hooper LJ and Cranston J) in *Tappin v Government of the USA* [2012] EWHC 22 (Admin) where Cranston J said at [44]:

> "Three principles emerge from *Norris* [2008] UKHL 16; [2008] 1 AC 920 relevant to this case. First, each offence in a request needs to be considered separately; secondly, each offence in a request need not be assigned a reciprocal offence under English law; and thirdly, where the alleged conduct relevant to a number of the offences in a request is closely interconnected, it matters not that it would not be charged here in the same manner as in the requesting state. Thus in Norris count 1, price fixing, was considered separately from counts 2-4. However – the second principle - the conduct regarding counts 2-4 did not have to translate into three reciprocal offences in English law. It was sufficient that it would have constituted obstructing justice. As to the third principle, the conduct leading to counts 2-4 was closely interconnected. It related to obstructing the investigation into price fixing in the carbon products industry and it was not fatal to the request that in English law that conduct would not be charged in the same manner it was under United States law."

34. The first half of that paragraph was only said to be a précis of *Norris* and obviously does not change the meaning of anything said in *Norris*. The first and third of the three principles do not appear controversial. As to the second, it seems that the point being made was simply that although counts 2-4 were charged as three distinct offences in the USA, it was not necessary to find three distinct English offences to match with them.

35. However, that should not obscure the fact that it was necessary for the conduct in each count, considered individually, to amount to a criminal offence in England.

36. Ms Scott relied on another Divisional Court decision, *Badre v Court of Florence, Italy* [2014] EWHC 614 (Admin). There the requested person ("RP") had operated an international payment services business. An EU Directive obliged member states to require undertakings to obtain authorisation from a relevant authority before providing such services, but with provision for this requirement to be waived in respect of undertakings with a turnover below a threshold figure so long as those undertakings complied with a requirement of registration. The UK had implemented those waiver provisions and the RP was duly registered. He could therefore provide the services in the UK without authorisation. However, he had also provided them in Italy where the waiver had not been implemented, and he was charged there with providing the services without authorisation. The Divisional Court ruled that this charge did not satisfy the requirement of dual criminality. It rejected a submission that he could have been charged with a failure to register under the Money Laundering Regulations 2007, because that was not the offence charged in Italy. McCombe LJ, with whom Hickinbottom J agreed, said:

> "31. I accept, of course, that it is not necessary that the foreign offence charged should be 'on all fours' with a comparable offence here (*Mauro v United States* [2009] EWHC 150 (Admin), paragraph 4, per Maurice Kay LJ). However, the question is whether the essence of the conduct would constitute an offence in this country. It seems to me that the essence of the conduct alleged in this case is entirely clear, it is trading as a 'financial intermediary' having failed to obtain 'authorisation', with all the prerequisites that that entails, under the legislative equivalent of our Payment Services Regulations.
>
> 32. On this aspect of the case, I would finally wish to refer briefly to a point raised by my Lord, Hickinbottom J, in the course of argument. He enquired of Miss Hinton whether the relevant conduct might not be formulated as trading in the relevant business without having complied with the national requirements of the Directive, i.e. in Italy authorisation or here authorisation/registration as appropriate. I did not detect that Miss Hinton espoused the suggestion with any great enthusiasm. In the end, I do not consider that this is the essence of the conduct alleged. As I have said above, I think the essence of the allegation is trading without going through the authorisation process. That is not necessarily an offence here and accordingly, as I have said, section 64(3)(b) is not satisfied to the relevant standard."

37. Ms Scott invites me to reach a similar conclusion in the present case.

38. I have also had regard to *Mauro v United States* [2009] EWHC 150 (Admin). There the requested person was charged with failing to file a tax return and attempting to evade income tax. Dishonesty was not an element of these offences in the USA but was a necessary element in the English equivalent offences. Maurice Kay LJ and Wyn Williams J found that the conduct described in the extradition request, including the repeated making of false statements, would, if proved, constitute one or more of the English offences because the essential facts being alleged would support the inference that the conduct was dishonest.

The facts

39. The indictment is not just a charge sheet but is a lengthy and discursive document. It appears in the extradition request as an exhibit to the affidavit of Assistant US Attorney Alixandra Smith, to which I return below.

40. After introductions to the relevant individuals and a summary of terms to be used at paragraphs 1-12 of the Indictment, detailed allegations under a heading "The Criminal Scheme" are set out at paragraphs 13-58, beginning with the heading "Overview" and:

> "13. In or about and between December 2014 and March 2017, the defendant ASANTE KWAKU BERKO, with the intent to benefit himself and, at least in part, U.S. Financial Institution, among others, conspired with others to make corrupt payments to government officials in Ghana to obtain and retain business from the Republic of Ghana that would benefit the business interests of BERKO, U.S. Financial Institution, Turkish Energy Company and others.

BERKO and others also conspired to launder money in and through financial systems in the United States and elsewhere to promote their unlawful bribery scheme. These laundered funds were used, among other ways, to pay bribes to obtain and retain business for BERKO, U.S. Financial Institution and Turkish Energy Company."

41. The allegations in this part of the indictment include the payment of sums into the appellant's bank accounts in Ghana but not the failure to declare the account balances to the US authorities.

42. Then, under a new heading "Failure to Report Foreign Bank Accounts", paragraphs 59-62 detail the statutory reporting obligations on the appellant and his failure to comply with them. Those paragraphs do not incorporate anything from paragraphs 13-58.

43. The next heading is "COUNT ONE (Conspiracy to Violate the Foreign Corrupt Practices Act)". The count is set out in detail in paragraphs 63-65 and does not include any of the conduct contained in counts 4-6. Paragraph 63 expressly incorporates the contents of paragraphs 1-58 but does not incorporate paragraphs 59-62. Counts 2 and 3 are addressed at, respectively, paragraphs 66-67 and 68-69, in the same way as count 1.

44. The conduct contained in counts 1-3 therefore is not said to include any of the conduct contained in counts 4-6.

45. There is then a new heading, "COUNTS FOUR THROUGH SIX (Willful Failure to File Reports of Foreign Bank and Financial Accounts)", followed by paragraph 70 which states that "the allegations in paragraphs one through 62 are repeated and realleged as if fully set forth herein".

46. It follows that, at least in broad terms, the conduct contained in counts 4-6 is said to include the conduct contained in counts 1-3.

47. As I have said, the extradition request is supported by the affidavit of Assistant US Attorney Alixandra Smith. She refers to an FBI investigation revealing the facts of the conspiracy. It included payments of bribes, and payments from the energy company reimbursing the bribes which were routed from bank accounts in Turkey through bank accounts in the US and finally to bank accounts in Ghana including two bank accounts in the appellant's name that he unlawfully failed to report to the US Department of Treasury's Financial Crimes Enforcement Network.

48. Ms Smith further explains at paragraphs 43-44 that, during this period, the Bank Secrecy Act required all US citizens and relevant aliens to report to the US Department of the Treasury's Financial Crimes Enforcement Network any financial or other interest in any and all bank or other financial accounts held in foreign countries, if their aggregate value exceeded $10,000 at any point during the calendar year, using a specified form. That form states that its principal purpose is for use in "criminal, tax or regulatory investigations or proceedings". There are penalties including imprisonment for failing to file the report or for filing a false and fraudulent report. At paragraphs 45-46 she states that the appellant filed a form

for calendar year 2014 listing two bank accounts in Great Britain but not disclosing his ownership of the two accounts in Ghana, and no form for the years 2015-17.

49. The affidavit also sets out the charges faced by the appellant. The first three counts state:

> "Count One: Conspiracy to Violate the Foreign Corrupt Practices Act, in violation of Title 18, U.S. Code, Section 371, which carries a maximum penalty of five years in prison.
>
> Count Two: Violation of the Foreign Corrupt Practices Act, in violation of Title 15, U.S. Code, Sections 78dd-2 and 78ff(a), along with aiding and abetting that crime in violation of Title 18, U.S. Code, Section 2, which carries a maximum penalty of five years in prison.
>
> Count Three: Conspiracy to Commit Money Laundering in violation of Title 18, U.S. Code, Sections I 956(h) and 1956(1), which carries a maximum penalty of twenty years in prison."

50. Each of counts four to six state:

> Willful Failure to File Reports of Foreign Bank and Financial Accounts in violation of Title 31, U.S. Code, Section 5314, which carries a maximum penalty of ten years if the defendant was either violating another law of the United States or the violation was part of a pattern of any illegal activity involving more than $100,000 in a 12-month period, and otherwise a maximum penalty of five years in prison."

51. Ms Smith then identifies the constituent elements of each of the offences charged, and the evidence on which reliance was anticipated to establish each element.

52. For count 1 Ms Smith sets out the evidence relied upon to establish an agreement "to violate the FCPA" and participation in it. For count 2 she addresses, among other things, corrupt and wilful activity in furtherance of a payment for one of four purposes such as influencing a foreign official or securing any improper advantage, to assist himself in obtaining or retaining or directing any business.

53. For count 3 Ms Smith addresses the existence of, and the appellant's intentional membership of, an agreement or understanding to violate US law, with the intent to promote the bribery of a foreign official in violation of the FCPA. She adds:

> "The object of the money laundering conspiracy charged in Count Three is the transportation, transmission or transfer of funds or monetary instruments to or from the United States, with an intent to promote certain other crimes, known as specified unlawful activity, in violation of 18 U.S.C. § 1956(a)(2)(A). The elements of a violation of that statute are as follows: (1) the defendant transported or transferred or transmitted, or attempted to transport or transfer or transmit, a monetary instrument or funds from a place in the United States to or

through a place outside the United States, or to a place in the United States from or through a place outside the United States; and (2) the defendant did so with the intent to promote the carrying on of a specified unlawful activity."

54. In paragraph 61 Ms Smith states that the authorities would show that the appellant knowingly became a member of the conspiracy "to transport, transmit or transfer money internationally" and that he "did so with the intent to promote the carrying on of violations of the FCPA 's anti-bribery provisions, the object of the conspiracy charged in Count One". Her summary of the anticipated evidence included:

> "Bank records establishing the flow of funds in furtherance of the conspiracy between Turkish Energy Company, Ghana Consulting Company I, Ghana Consulting Company 2, BERKO, Ghana Consulting Employee, and others, including funds that flowed to, from and through the United States."

55. In paragraph 63 Ms Smith identifies the elements of counts 4-6:

> "(1) during the relevant period, the defendant had a relationship or conducted transactions with a foreign financial agency; (2) the defendant failed to report this relationship or these transactions as required by law; and (3) the defendant wilfully failed to file the report concerning the relationship or transactions. A United States person with an interest in foreign financial accounts having an aggregate value of more than $10,000 is required each year to file an FBAR with the U.S. Department of the Treasury."

56. The relevant anticipated evidence in support was listed at paragraph 65:

> "a. U.S. Department of State records showing BERKO's U.S. citizenship;
> b. Bank records for Berko Ghana Account 1;
> c. Records from the U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") concerning BERKO;
> d. Testimony from a FinCEN representative concerning the aforementioned records; and
> e. Testimony from a FinCEN representative concerning, inter alia, the FBAR reporting requirements and filing instructions."

The hearing below

57. At the extradition hearing Mr Hearn provided "draft charges" to show how the US counts would translate into offences in this jurisdiction. That was in line with guidance given by Julian Knowles J in *Biri v High Court in Miskolc, Hungary* [2018] EWHC 50 (Admin) at [36] as to the value of reverting to this practice "which, until recent times, was almost invariably followed".

58. In that document, each of counts 4-6 was translated as follows:

> "That you between [date] and [date], being under a legal duty to disclose to the US Treasury any financial interest in or signatory or other authority over any and all bank or other financial accounts held in foreign countries if the aggregate value of all such accounts exceeded $10,000 at any point during the

calendar year 2015, failed to disclose such an interest namely your interest in "Berko Ghana Account 1", dishonestly intending to make a gain for yourself by concealing the account used in furtherance of the bribery scheme described in draft charges 1 + 2, from the US authorities.

Contrary to section 3 of the Fraud Act 2006."

59. However, the argument at the hearing was directed less towards the suggested correspondence with a Fraud Act offence and more towards the question of whether counts 4-6 should be viewed as part and parcel of the conspiracy and money laundering charged under counts 1-3.

60. The District Judge held at paragraph 55:

> "The conduct in Counts 4 - 6 in the Indictment is closely connected to and is derived from the RP's illegal activity as set out in counts 1 – 3. In respect of counts 4 -6, Alixandra Smith's Affidavit at paragraph 70, specifically relies on 'the allegations in paragraphs 1 through 62 are repeated and re alleged as if fully set forth herein'. The account that should have been revealed was 'Berko Ghana Account 1' into which the RP deposited money he received from the Turkish Energy Company. The money was derived and therefore has to be considered in the context of the underlying conspiracy which resulted in the RP receiving money which he deposited into the bank account which he omitted to declare as required."

61. Mr Hearn submits that what the District Judge determined was that "the conduct (underpinning all the offences) could amount to a single offence of conspiracy to bribe and/or conspiracy to launder money" (skeleton para 25), and that this approach was permitted by *Tappin* and thus by *Norris*.

62. In the alternative Mr Hearn submits at para 30 of his skeleton argument:

> "It would have been open to the judge to conclude that the essence of the conduct alleged was dishonestly failing to disclose information to tax authorities, which he was under a legal duty to disclose, intending to make a gain for himself by furthering the bribery scheme. Such conduct would amount to an offence contrary to section 3 of the Fraud Act 2006."

Discussion

63. In support of the appeal, Ms Scott submits that each count on the indictment must satisfy the dual criminality requirement and that, when the circumstances are "translated" into an English context for that purpose, the obligation under US law to declare foreign bank accounts must not be imported. That would be to import or translate "the law supplying the definition of the crime which is charged", contrary to the dictum of Duff J in *Collins* which was approved in *Norris*: see paragraph 27 above.

64. Although, for the reasons set out above, ground 1 does not ultimately turn on the quality of the District Judge's reasoning, Ms Scott nevertheless points to

shortcomings in that reasoning, in particular that her conclusion at paragraph 56 that "counts 4-6 are part of the conspiracy charge" does not sufficiently explain which are the relevant parts of counts 1-3 or what English offence is made out by them. Any overlap with counts 1-3 is not straightforward, e.g. because the conduct relevant to counts 5 and 6 post-dated the period of the conspiracy as charged, and also because it is not alleged that the non-disclosure in counts 4-6 was done in concert with any other conspirator. Nor does the District Judge deal with Ms Scott's reliance on *Badre* and explain how that case is to be distinguished. It is also to be noted that the District Judge did not adopt Mr Hearn's formulation of finding the US counts equivalent to English offences under the Fraud Act 2006.

65. Ms Scott's overarching submission is that, although the Court applies a "conduct test" rather than an "offence test", nevertheless each count must disclose an extradition offence. If the appellant is extradited on counts 4-6, it is possible that the US court might acquit him on counts 1-3 and not make any finding of dishonesty against him, but nevertheless convict him on the charges of non-disclosure which find no true equivalent in English law. That would not be prevented by the rule against specialty because, in that scenario, the UK would have made an extradition order permitting his prosecution on those counts. Thus the case is analogous to *Badre*, where the requested person was at risk of being convicted in Italy of conduct which was not an offence in England.

66. Ms Scott's approach, Mr Hearn contends, amounts to applying an "offence test" instead of a "conduct test", contrary to *Norris*. Applying a "conduct test", he submits, it does not matter that the US offences do not require proof of dishonesty. Dual criminality will be satisfied if the US authorities prove that the appellant wilfully failed to declare the bank accounts as part and parcel of a conspiracy and money laundering scheme. The Fraud Act 2006 offences provide a sufficient analogue, although Mr Hearn accepted that it would be necessary to identify an equivalent duty to disclose information under English law as an analogue to the US duty to disclose foreign bank accounts.

67. In my judgment, applying a "conduct test" means that this Court must identify the essence of what is alleged against the requested person in each count on the indictment and then consider whether that essential conduct would amount to a crime in this jurisdiction.

68. Case law confirms that one count on the indictment may be judged equivalent to more than one English offence, or that more than one count on the indictment may be judged equivalent to only one English offence. However, the essence of what is alleged against the requested person in each count on the indictment must correspond to one or more English offences.

69. The circumstances must be translated, so far as possible, from the US context to an English context. So, a failure to declare a bank account to the US authorities must be treated as if it were a failure to declare a bank account to the English authorities. But obligations under US law are not to be translated. The relevant obligation must exist in English law. Otherwise extradition will expose the requested person to the risk of conviction for conduct that is not a crime in this jurisdiction.

70. In this case, in my judgment, the essence of the conduct relevant to counts 4-6 is a failure to declare the balances of foreign bank accounts.

71. As I have explained, the indictment expressly does not allege that that failure was part of the conspiracy and money laundering. What, then, is the effect of paragraph 70 of the indictment which incorporates the acts of conspiring and money laundering into the description of counts 4-6?

72. In my judgment, the only conclusion which can be drawn from paragraph 70 is that the corruption and money laundering scheme are identified as the context of, but not part of the essence of, the failure to declare. The factual context of that failure is not part of its "essence", because it would not have to be proven in order for the offence to be made out under US law.

73. In translating counts 4-6 into one or more English equivalent charges, I nevertheless include that context. However, applying *Norris* and *Collins*, I do not include a legal obligation to declare foreign bank balances because no such obligation exists in English law. The case more closely resembles *Norris* and *Badre* where, at the relevant time, the relevant legal duty (in the former, not to conspire to fix prices, and in the latter, to obtain authorisation) existed in the law of the requesting state but not in English law.

74. For that reason I reject the suggested analogue with offences under section 3 of the Fraud Act 2006. That offence is committed by a failure to disclose information which the defendant has a "legal duty to disclose". Under the law of England and Wales there would be no duty to disclose the information in question.

75. I therefore allow the appeal on ground 1. If I did not, the appellant would be at a direct risk – if he were acquitted on counts 1-3 and if the US Court made no finding of dishonesty – of being convicted and imprisoned for conduct which would not amount to an offence in this country.

Ground 2

The applicable law

76. Where extradition is sought for the purpose of prosecution in a category 2 territory, section 79 of the 2003 Act states:

> "**79 Bars to extradition**
> (1) If the judge is required to proceed under this section he must decide whether the person's extradition to the category 2 territory is barred by reason of—
> …
> (e) forum.
>
> (2) Sections 80 to 83E apply for the interpretation of subsection (1).
>
> (3) If the judge decides any of the questions in subsection (1) in the affirmative he must order the person's discharge."

77. Section 83A provides, so far as material:

> "(1) The extradition of a person ("D") to a category 2 territory is barred by reason of forum if the extradition would not be in the interests of justice.
>
> (2) For the purposes of this section, the extradition would not be in the interests of justice if the judge—
>
> (a) decides that a substantial measure of D's relevant activity was performed in the United Kingdom; and
>
> (b) decides, having regard to the specified matters relating to the interests of justice (and only those matters), that the extradition should not take place.
>
> (3) These are the specified matters relating to the interests of justice—
>
> (a) the place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur;
>
> (b) the interests of any victims of the extradition offence;
>
> (c) any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence;
>
> (d) were D to be prosecuted in a part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence necessary to prove the offence is or could be made available in the United Kingdom;
>
> (e) any delay that might result from proceeding in one jurisdiction rather than another;
>
> (f) the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard (in particular) to—
> (i) the jurisdictions in which witnesses, co—defendants and other suspects are located, and
> (ii) the practicability of the evidence of such persons being given in the United Kingdom or in jurisdictions outside the United Kingdom;
>
> (g) D's connections with the United Kingdom.
>
> …
>
> (6) In this section "D's relevant activity" means activity which is material to the commission of the extradition offence and is alleged to have been performed by D."

78. The purpose of these provisions is to impose "a curb on claims to exorbitant jurisdiction": see *Patman and Safi v Specialist Criminal Court in Pezinok, Slovakia* [2020] EWHC 3512 per Swift J at [18].

79. Section 83A(2)(a) imposes a threshold condition for applying the forum bar that a substantial measure of the relevant activity occurred in the UK. The District Judge found that that condition was met in that case, and that is not in dispute.

80. As to the relative importance of each of the factors, Simon J said in *Dibden v Tribunal de Grande Instance de Lille, France* [2014] EWHC 3074 (Admin)at [18]:

> "The relative importance of each matter will vary from case to case, and the weight to be accorded to the specified matters may also vary. The court will be engaged in a fact-specific exercise in order to determine whether the particular extradition would not be in the interests of justice."

81. Ms Scott relied on a comparison with *Hamilton v United States of America* [2023] EWHC (Admin) 2893, a decision of the Divisional Court (Dame Victoria Sharp P and Johnson J) which post-dated the District Judge's decision in the present case. In that case, like this one, the requested person's extradition was sought by the USA to face charges of fraud and money laundering arising from an alleged international conspiracy. The Court ruled that a District Judge had erred in finding that extradition was in the interests of justice. The District Judge had found that most of the factors listed in section 83A(3) weighed in favour of extradition but the Divisional Court found some of his reasoning to be unclear. It also received fresh evidence. It therefore decided to analyse the section 83A(3) factors afresh. As to section 83A(3)(a), it noted that the analysis of harm is more difficult in cases of money laundering and conspiracy. Focusing on the role of the requested person, it found that the harm he directly caused and intended was the misuse of the UK banking system, because he transferred large amounts through UK bank accounts and he did not appear to have had control of any US accounts. On the facts of the case, most of the harm to those who lost money occurred in China, not the US. Their interests would be served equally by prosecution in the USA or in the UK, while the interests of such victims in the UK would be best served by prosecution here, it being practicable for a prosecution to take place in the UK. The Court rejected a view expressed by a CPS prosecutor that the UK was not the most appropriate forum, finding a number of flaws in her reasoning. It found that the evidence needed to prove the offences was or could be made available in the UK. As to community ties, the requested person was a UK national residing in the UK. On the facts, the Court found that any delay from a prosecution proceeding in the UK rather than the US would be limited. Any joint prosecution of the requested person and the individual who had faced joint charges with him in the US could only take place in the UK because the extradition order in respect of the other individual had been discharged. Meanwhile the Court agreed with the District Judge that the requested person's connections with the UK weighed heavily against extradition, he being a British national who had lived his entire life in the UK, who resided there with his wife and two children and who did not have "any real connection with the US". He was also receiving treatment for serious illnesses in the UK and had a "close and dependent relationship with his treating clinicians".

The facts

82. The appellant's wife, Ms Francisa Poku, made a witness statement dated 14 November 2022 for the purpose of his bail appeal. She has dual UK and Ghanaian citizenship. She stated that she met the appellant in 2013 when he was working in South Africa. He secured a job at GSI and they moved to London in 2014. He stopped working for GSI in 2017. He no longer had a UK visa and, as a dual Ghanaian/US national, returned to Ghana. Ms Poku became pregnant at the end of 2017 and remained in London to receive medical care. The appellant visited her at least twice during that period. In 2019 Ms Poku and their daughter, who is a British national, returned to Ghana to be with him. The appellant and Ms Poku started a restaurant in Ghana, where he also had other business projects. He was travelling to London for a business meeting when he was arrested on 3 November 2022. Ms Poku states that they had been considering moving to London permanently and enrolling their daughter into school from 2023. When he was arrested, she and her mother travelled to London where a close friend had offered accommodation for an indefinite period. Their daughter had remained in Ghana for the time being.

The hearing below

83. The District Judge ran through the factors specified in section 83A(3).

84. She heard evidence that the appellant at the relevant time was employed by GSI, which is a UK-based subsidiary of the US company Goldman Sachs Group Inc. ("GS Group"). She accepted that the subsidiary was wholly owned by the parent, which would stand to benefit from its subsidiary and which would sustain reputational damage because of the subsidiary's activities. She found that it would be artificial to draw a "corporate veil" between the two and that the relevant loss or harm occurred in the USA, this being a very weighty factor in favour of extradition.

85. Similarly the District Judge considered that identifiable victims of the conduct were GS Group because of the reputational damage, and the US financial system and business communities, though victims of the underlying corruption would be the Government of Ghana and whoever may have been a competitor to supply the power plant. This factor weighed in favour of extradition.

86. There was no relevant prosecutor's belief in this case so this was a neutral factor.

87. The District Judge found that evidence necessary to prove the offences was or could be made available in the UK and that this was a factor against extradition.

88. She also found that a significant delay would result from prosecution taking place in the UK where the CPS would have to review the evidence, make its own inquiries and interview the appellant, whilst the case was trial ready in the USA. The delay would not be in the interests of justice and this was a factor in favour of extradition.

89. The desirability and practicality of multiple prosecutions taking place in the same jurisdiction was said to be a neutral factor because no co-defendants were named in the extradition request.

90. The District Judge noted that there was no direct evidence from the appellant to show his connections to the UK. She rejected evidence from his lawyer because it was second-hand and the source of the information was not identified. She noted that his wife and child are UK citizens and that he worked for GSI in the UK at the relevant time. He was arrested on arrival at Heathrow Airport in 2022. He was a dual national of Ghana and the USA. She concluded that the lack of proven connections to the UK was an important factor in favour of extradition.

91. The District Judge directed herself to conduct a fact-specific evaluation, giving such weight to each factor as was merited according to the circumstances of the case. Having found several factors in favour of extradition, one against and two neutral, she was not satisfied that the appellant's extradition was not in the interests of justice.

Discussion

92. I agree with the District Judge that whilst it is not easy to identify a geographical location where harm occurs in a case such as this, nevertheless some harm from the alleged offending would have occurred in the USA. There was (or was alleged to be) misuse of the US banking system and there would be reputational damage to GS Group. That said, I consider that there was also some harm to the UK subsidiary GSI, and that the main harm from the conspiracy occurred in Ghana. It is arguable that the District Judge went too far in finding the place of harm to be a "very weighty" factor in favour of extradition.

93. It is not in dispute that no prosecutor has expressed a view relevant to section 83A(3)(c), that evidence for a prosecution is or could be made available in the UK and that there is no issue of multiple prosecutions in different jurisdictions.

94. I also agree with the District Judge that a significant factor in favour of extradition was the delay which would be caused by prosecuting in the UK rather than the USA.

95. Ms Scott submits that this "head start" factor will exist in most if not all extradition cases and therefore cannot have been intended by Parliament to carry great weight. I reject the second part of that proposition. Instead it seems to me that the weight to be given to such a delay, which is expressly made relevant by section 83A(3)(e), will vary from case to case. It will depend on the length of the delay and on any case-specific reasons making delay more or less important. In *Hamilton*, for example, the Court found that there probably would be some delay but that no "firm forecast" as to the date of a trial in either country could be made. That was why that factor did not carry great weight in that case.

96. The present case was said to be ready for trial in the USA. It was an entirely logical inference that there would be a substantial delay if the matter proceeded in this country instead, and that this would be contrary to the interests of justice.

97. Mr Hearn objected to the evidence about the appellant's community ties on the basis that if notice had been given that he wished to rely on the statements lodged

in support of bail, the US authorities would have required the witnesses to attend for cross-examination. Ms Scott, for her part, points out that hearsay evidence is often relied on in extradition hearings, in particular by the requesting state.

98. I need not resolve that issue because it is clear that although the appellant has some community ties in the UK, they are fairly limited. He is not a UK citizen but does have US citizenship. He lived in the UK for three years in order to work for GSI and then returned to Ghana when that job came to an end. At the time of his arrest, four years later, he was enjoying a family life in Ghana. The fact that the family may have been considering a return to the UK is of little if any importance. There is no evidence to show whether or how he would have obtained a visa for such a move. Nor is the case significantly affected by the fact that the appellant's wife and (I am told) his daughter have now come to the UK to await the outcome of the case.

99. That said, it is not quite clear why the District Judge found the lack of evidence of community ties to be an important factor in favour of extradition rather than merely the absence of a factor which would have supported a forum bar.

100. As I have departed from the District Judge's reasoning in some respects, I find this ground of appeal to have been arguable and so I grant permission for it.

101. However, having considered the relevant factors anew, I am not satisfied that, applying the wording of section 83A(1) and (2)(b), the extradition should not take place and so would not be in the interests of justice.

102. Although the question under the section is not whether prosecution should take place in the UK or the USA (*Shaw v Government of the USA* [2014] EWHC 4654 (Admin) at [41]), in this as in most cases the UK would be the alternative forum if extradition to the USA were found not to be in the interests of justice. The links between this case and the UK are not especially persuasive. Although the appellant was based in the UK at the time of the relevant conduct, the conspiracy was entirely international in nature. It has been investigated in the USA, of which he is a citizen. There is a focus on the GSI Group, which is American, and not just on its UK subsidiary. Prosecuting in the UK would give rise to a clear and important issue of delay. The appellant's community ties reveal no compelling family issues (by contrast with *Hamilton*).

103. Ground 2 therefore fails.

Conclusion

104. The appeal is allowed on ground 1 but dismissed on ground 2. The appellant remains subject to an extradition order in respect of counts 1-3 but is discharged in respect of counts 4-6.