Neutral Citation Number: [2024] EWHC 1959 (Admin)

Case No: AC-2023-LON-002605

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2024

Before :

MR JUSTICE JULIAN KNOWLES

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Between :

AHSAN ALI SYED — **Applicant**

- and –

(1) GOVERNMENT OF SWITZERLAND
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT — **Respondents**

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Alun Jones KC and Martin Henley (instructed by **Freemans**) for the **Applicant**
Nicholas Hearn and Hannah Burton (instructed by **CPS**) for the **First Respondent**
Catherine Brown (instructed by **GLD**) for the **Second Respondent**

Hearing dates: **23 July 2024**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 31 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Julian Knowles:

Introduction

1. The Applicant's extradition has been requested by the Government of Switzerland for offences of fraud. Following a contested extradition hearing before District Judge McGarva, on 4 July 2023 he sent the Applicant's case to the Secretary of State under s 87(3) of the Extradition Act 2003 (EA 2003). The Secretary of State subsequently ordered extradition on 24 August 2023 under s 95.

2. On 23 July 2024 I heard an oral renewal application for permission to appeal under Part 2 of the EA 2003 following refusal on the papers by the single judge. The Applicant seeks permission to appeal against both the district judge's and the Secretary of State's decisions, under ss 103 and 108 of the EA 2003 respectively. I reserved my decision and said I would put my reasons into writing. This I now do.

3. For the reasons that follow I am not persuaded that any of the grounds of appeal are arguable, and I therefore refuse permission to appeal.

Factual background

4. The Applicant is accused in Switzerland of what is known in this country as advanced fee fraud. He is accused of having obtained a total of CHF 28.6 million from 23 parties between September 2010 and May 2011 by misusing the companies Western Gulf Advisory AG and Western Gulf Assets Limited, which were managed by him.

5. The Applicant is said to have pretended to be able to grant large loans to companies (amounts between USD 30 - 80 million), but demanded advance payments ('up-front fees') from the interested companies, allegedly for the costs of the credit assessment ('due diligence fee'), the effort in setting up the contract ('registration fee') and insurance costs ('insurance fee'). This took place in the aftermath of the 2008/9 financial crisis when many companies faced difficulties in raising capital.

6. In fact, the Applicant was neither willing nor able to pay out the promised loans as agreed, and he did not fulfil any of his loan obligations. The sums of money that the companies paid with regard to the granting of the agreed loan were for the most part paid directly into bank accounts in Switzerland, but partly also into bank accounts in the Kingdom of Bahrain. In addition, sums of money amounting to millions were moved between Switzerland and Bahrain.

7. It is alleged that the Applicant subsequently used the money obtained from the injured parties not for business but for his own private purposes, such as: the purchase of an expensive flat on Lake Lucerne in Switzerland (CHF 3 million); leasing and operation of a private aircraft (approximately CHF 4 million); and the purchase and maintenance of the Racing Santander football club in Spain (approximately CHF 2.2 million).

8. There is a table in Appendix 1 to the statement of the Swiss prosecutor of 12 January 2023 which sets out the victim companies and shows what they were allegedly defrauded of, and where that money was paid. In all but two cases it was paid into bank accounts in Switzerland.

Grounds of appeal

9. As now presented, there are four grounds of appeal, plus an additional ground of appeal based upon recent developments concerning the Applicant's statelessness. Griffiths J granted permission to amend the grounds of appeal to include this ground.

10. In respect of the district judge's decision, it is said he erred in failing to rule that:

    a. the extradition request is inadequately particularised so that it is impossible to apply the dual criminality test (Ground 1);

    b. the Applicant's extradition is barred on the ground of double jeopardy (s 80, EA 2003) (Ground 2);

    c. the Applicant's extradition is barred by the passage of time (s 82, EA 2003) (Ground 3).

11. In relation to the Secretary of State's decision, it is said that he wrongly held that there were specialty arrangements with Switzerland, and thus that he was wrong not to conclude that extradition is prohibited by the absence of speciality arrangements (ss 93 and 95, EA 2003) (Ground 4).

12. The additional ground relating to the Appellant's statelessness arises out of the decision of the Turkish Government in May 2024 to revoke his Turkish citizenship. At present it is not known what it was which led to this decision being taken. The ground of appeal said to arise out of it is that extradition would be incompatible with the Applicant's rights under Article 8 of the European Convention on Human Rights (ECHR) and so is barred by s 87 of the EA 2003 (Ground 5).

Discussion

13. In relation to Ground 1, it is common ground that an extradition request must contain sufficient particulars of the alleged foreign offending so that the defendant knows clearly what s/he is accused of, so that any bars to extradition can be raised, or arguments made that the alleged offending does not satisfy the relevant dual criminality test in Part 2 of the EA 2003.

14. Mr Jones said that the particulars of the Applicant's alleged criminal conduct in the extradition request (properly so called) dated 12 December 2022 and sent to the UK under the seal of the relevant Swiss Ministry was sparse and obviously inadequate as it did not, for example, provide details of those who were allegedly defrauded nor did it clearly set out where the alleged conduct took place. The request was then supplemented by statements and enclosures sent by the Zurich prosecutor to which the district judge had regard when he concluded that the Appellant's offending had been sufficiently particularised, for example, Appendix 1, to which I referred earlier.

15. Mr Jones said the district judge had been wrong to have regard to this supplementary material, and should have limited his inquiry to what was in the request (properly so

called), and that had he done so, he would have been bound to have discharged the Applicant.

16. Mr Jones relied on *Government of the United States v Shlesinger* [2013] EWHC 2671 (Admin), [12], in support of his submission that the district judge was limited to considering only the request:

> "… It is clear that the scheme of the Act, and such authority as there is, lead to the very clear conclusion that in determining the issue of dual criminality the court examines the documents constituting the extradition request. It determines on the basis of that material whether the conduct alleged in the documents constitutes an offence under the law of England and Wales."

17. I do not agree that the district judge erred in his approach in the way suggested by Mr Jones (or at all). The point in *Shlesinger* was that the defendant had tried to adduce evidence to undermine what was in the request. The Divisional Court said this was not permissible, and that the district judge was only able to consider material emanating from the requesting state in determining whether the request contained extradition offences. This is made clear by the two sentences after the passage in [12], which Mr Jones relied on and I set out earlier. Those sentences are:

> "It is not permissible for a requested person to put in evidence contradicting what is set out in the extradition request, unless he can bring himself within the very narrow exception to which we refer at paragraphs 14 and following below [ie, abuse of process]. The court must proceed to determine the issue of dual criminality on what is set out in the extradition request alone."

18. This was an unsurprising conclusion. Since at least *In re Evans* [1994] 1 WLR 1006, a case under the Extradition Act 1989, it has been clear that a defendant cannot call evidence or put in material to undermine what is in an extradition request for the purposes of trying to show that it does not disclose an extradition offence.

19. The decision in *Mauro v Government of the United States of America* [2009] EWHC 150 (Admin), [20], is directly against Mr Jones' submission. Even if he is right that the relevant paragraph was *obiter* (and so not strictly binding upon me), it is plainly correct. In that case a letter from the American prosecutor had been used to supplement the request in relation to whether the offences alleged were extradition offences, and the Divisional Court said this was permissible:

> "20. Moreover, when requiring the District Judge to decide in a Part 2 case whether the offence specified in the request is an extradition offence, section 78(4)(b) does not limit him to the information contained in the originating request."

20. In the present case, the information supplied by the Swiss prosecutor was properly authenticated as required by s 202(4) of the EA 2003. The fact it was not sent first to the Secretary of State is neither here nor there. That is not required by s 78. The material plainly showed that the Applicant is accused of extradition offences. In equivalent circumstances, his conduct would amount to fraud by false representation contrary to s 1 of the Fraud Act 2006. Whilst some conduct occurred outside Switzerland (eg in Bahrain), and so must be taken to have occurred outside England and Wales for the purposes of the dual criminality exercise required by s 137(3) of the EA 2003, those companies who were defrauded and who paid money into Swiss bank accounts (as the overwhelming majority did), must be taken for that purpose to have paid money in English bank accounts. This is a relevant event for the purposes of the extra-territoriality provisions in ss 1 and 2 of the Criminal Justice Act 1993, and the courts of England and Wales would accordingly have jurisdiction to try such offending. The district judge correctly so found. He excluded two companies from the list in Appendix 1 and did not send the case to the Secretary of State in relation to them, because they paid into accounts in Bahrain (and so in equivalent circumstances, ss 1 and 2 of the 1993 Act would not apply).

21. Turning to Ground 2, s 80 applies where, if the defendant were charged in the UK with the conduct for which his extradition is being sought, he could plead *autrefois convict* or *autrefois acquit* in the narrow sense in which pleas were stated by the House of Lords in *Connelly v Director of Public Prosecutions* [1964] AC 125 and *Director of Public Prosecutions v Humphreys* [1977] AC 1, that is, where precisely the same offending is charged in the later proceedings. It is also engaged where the requesting state seeks to prosecute the defendant for an offence, the facts of which are so closely related to an offence for which he has already been prosecuted that it would be an abuse of process to prosecute him a second time (a species of abuse identified in *Beedie* [1998] QB 356). I reviewed the law in this area relatively recently in *Prejoinau v Deputy General Prosecutor of Messina (Italy)* [2023] EWHC 2378 (Admin).

22. Mr Jones founded his submissions on Ground 2 on the basis that there had been an investigation in Bahrain into the same offending with which the Applicant was now charged in Switzerland during which he had been interrogated, which had not led to a prosecution. He therefore said it was an abuse of process to prosecute the Applicant in Switzerland.

23. I disagree.

24. The district judge correctly found that the Applicant had neither been acquitted or convicted in Bahrain (judgment, [83], [85]). He said at [84]:

> "The matters never came before a court as such, but it appears the prosecutor was acting in a judicial capacity which is common in countries which use an inquisitorial justice system. The Prosecutor examined detailed evidence before him and questioned witnesses. The requested person was interrogated in the process. The Bahraini prosecutor has given reasons why the prosecution should not proceed, essentially, he says that there is insufficient

> evidence to show that the case involves a fraudulent misrepresentation rather than a civil breach of contract."

25. The judge therefore found that a plea in bar had not been established, meaning he had to go on to consider whether in light of the process that had taken place in Bahrain, the Applicant could not have a fair trial in Switzerland, or whether it otherwise be unfair to proceed: 'a situation akin to abuse of process' (at [86]).

26. Mr Jones criticised the judge's approach but I consider overall that his decision is unimpeachable. There is no conceivable basis to suggest it would be an abuse of process in this country to prosecute the Applicant of the conduct in Switzerland (hypothetically transposed here), given the inconclusive investigation in Bahrain.

27. I quite understand the principle that repeated prosecutions in the same country can be an abuse of process. But whilst not absolutely inapplicable to a second set of proceedings in a country when there has been an investigation or prosecution in a first country, there would have to be fairly extreme facts for an abuse of process to arise. *Fofana v Deputy Prosecutor Thubin Tribunal de Grande Instance de Meaux, France* [2006] EWHC 744 (Admin) was such a case. Why should a second country not be able prosecute a defendant according to its law in the exercise of its own sovereign authority, in particular where a first country has not done so, despite having investigated, for reasons to do with *its* legal system? Generally speaking, it should be able to.

28. There was no agreement between the Swiss Prosecutor and the Bahraini authorities that any trial should be conducted in Bahrain. It is clear that at no stage did the Swiss prosecution cede the matter to Bahrain, nor was a decision taken to await the outcome of the Bahraini proceedings. The reality is that the Swiss prosecutor did not give up his jurisdiction at any stage, but he was merely unable to progress the case in Switzerland because the Applicant had broken off contact with his Swiss lawyer and was out of the jurisdiction.

29. In his letter of 26 May 2023 the Swiss prosecutor said:

> "The Zurich Public Prosecutor's Office therefore clearly and unequivocally denies that a formal 'trial process' which ended in a dismissal charges was ever conducted in Bahrain regarding the accused SYED. Any such assertion is false. Any activity by the authorities in Bahrain was conducted independently and without coordination or consultation with the Swiss prosecution authorities. The same applies vice versa: The Swiss criminal authorities, i.e. the Zurich Public Prosecutor's Office, conducted the proceedings completely independently of the proceedings in Bahrain.
>
> The Zurich Public Prosecutor's Office has concluded that, according to Swiss law, the criminal decision in Bahrain does not constitute an obstacle to prosecution in Switzerland, i.e. that the principles of "ne bis in idem" or

> "double jeopardy" do not apply. If the Zurich Public Prosecutor's Office had taken a different view, it would not have issued an arrest warrant for the accused SYED and would have closed the present proceedings."

30. An English court here would be bound to reach the same conclusion if the Swiss conduct were hypothetically prosecuted here and the defendant argued the prosecution was an abuse of process. I therefore reject Ground 2.

31. In relation to Ground 3, and the argument that it would be unjust or oppressive to extradite the Applicant within the meaning of s 82, the test is well known and well-established. In *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779, 782–783, Lord Diplock said:

> "'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair."

32. Although the alleged offending took place some time ago, there is no automatic 'cut-off' point after which extradition will become presumptively unjust or oppressive.

33. I was taken through the timeline of the investigation supplied by the Swiss prosecutor. It is clear this was a complex multi-jurisdictional investigation. There were periods of inactivity, but these were largely caused by the Applicant's non-cooperation with the investigation (although it is right to note he was not found to be a fugitive).

34. The district judge, having heard the Applicant give evidence, said he had not an impressive witness, had been hard to contact, and had lost touch with his lawyer while being well-aware of the proceedings in Switzerland and without making a reasonable effort to establish the status of those proceedings. The passage of time should be viewed in this context. The Swiss authorities attempted to obtain formal statements from the Applicant in Bahrain, but this was unsuccessful.

35. So far as alleged injustice is concerned, Switzerland is bound by the ECHR and the Applicant is guaranteed a fair trial by virtue of Article 6. This is complete answer to this limb of s 82: see *Gomes and Goodyer v Government of the Republic of Trinidad and Tobago* [2009] 1 WLR 1038, [35] ('… Council of Europe countries in our view present no problem. All are subject to article 6 of the Convention and should readily be assumed capable of protecting an accused against an unjust trial—whether by an abuse of process jurisdiction like ours or in some other way …'). In any event, the Applicant has known for a very long time about the case against him, he was questioned about it in Bahrain, and it is fanciful to suggest that so much time has passed that he cannot receive a fair trial.

36. In relation to oppression, this is a high bar which is not easily overcome: *Gomes*, [36]. It means more than hardship. The Applicant is accused of very serious fraudulent offending. I accept that his extradition will impact on his family – as no doubt his current remand in custody has done - but I remain unpersuaded there is any arguable oppression in this case.

37. Moving to Ground 4 and the challenge to the Secretary of State's decision, the question is whether the Secretary of State was wrong to conclude that there are specialty arrangements with Switzerland, as defined in s 95(3) of the EA 2003. If that question should have been answered in the negative then the Secretary of State was required to refuse extradition: see s 93(3).

38. For the reasons set out in Ms Brown's Skeleton Argument, there are specialty arrangements with Switzerland. They are to be found in Article 14 of the European Convention on Extradition, which provides the international law framework for extradition between the UK and other Council of Europe nations, including Switzerland.

39. Mr Jones raised the argument that although Article 14 exists as a matter of 'black letter' law, it does not provide practical specialty protection, or would not do so in this case, because, for example, the Swiss might not understand that the district judge did not send the case to the Secretary of State in respect of the two companies who paid their money to the Applicant's companies in Bahrain rather than Switzerland (see above), and so the Applicant might end up being dealt with for these companies in breach of specialty. He pointed to what he said were ambiguities in the Secretary of State's order of extradition which did not make matters clear.

40. In my judgment these objections are more fanciful than real. The Applicant has proactive English and Swiss lawyers and they can be relied upon to ensure that the Swiss prosecutor and the Swiss court understands the restriction on extradition arising from the district judge's judgment. That restriction is not hard to understand; the judge simply excised two companies from the list of alleged victims. The alleged conduct for which the Applicant's extradition *was* ordered is therefore clear. Switzerland is a long-standing extradition partner and understands its speciality obligations and can be relied upon to observe them.

41. Finally, turning to the additional statelessness ground, in June 2024 the Applicant and his legal advisers discovered that in May 2024 as the result of a Decree by the President of Turkey issued in May 2024, the Applicant and his family have been deprived of their Turkish nationality. Hence, the ground of appeal now advanced arising from this is per [60] of the Applicant's Skeleton Argument:

> "It would be a breach of the Applicant's ECHR Article 8 rights to extradite him to Switzerland by reason of the revocation of his Turkish nationality, and the Turkish nationality of his wife and three daughters. (This revocation also strengthens the passage of time argument, above.)"

42. This ground is not arguable. Whilst I accept that a requested person's immigration position may be considered as part of Article 8 balancing exercise, if a person wishes to

raise this as an issue, it must be properly developed taking into account the relevant immigration laws and regulations: see *Hojden v Polish Judicial Authority* [2022] EWHC 2725 (Admin), [59]-[61].

43. I accept the First Respondent's submission that the evidential picture here is too unclear to give rise to any arguable issue in these extradition proceedings. In short, his Turkish nationality may have been revoked, but that may not render him stateless as the picture is complicated by the fact he can make a statelessness application to the Secretary of State under the Immigration Rules, and that he was formerly an Indian citizen (see First Respondent's Skeleton Argument, [45]-[47]). Any ECHR rights which may be affected will be protected in Switzerland.

44. Further and in any event, to the extent Article 8 may be in play, extradition would plainly be a proportionate interference with the Applicant's rights under it, notwithstanding any immigration uncertainty, given the very serious nature of his alleged offending and this country's international extradition obligations.

Conclusion

45. For these reasons, I refuse this renewed application for permission to appeal.