Neutral Citation Number: [2019] EWHC 1849 (Admin)

Case No: CO/650/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 July 2019

Before:

LORD JUSTICE LEGGATT
and
MR JUSTICE POPPLEWELL

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Between:

THE QUEEN ON THE APPLICATION OF VIJAY MALLYA	**Applicant**
- and -	
(1) GOVERNMENT OF INDIA **(2) THE SECRETARY OF STATE**	**Respondents**

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Ms Claire Montgomery QC and **Mr Ben Watson** (instructed by **Boutique Law**) for the **Applicant**
The respondents did not attend and were not represented

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Approved Judgment

Lord Justice Leggatt (giving the judgment of the court):

1. This is a renewed application for permission to appeal against, first of all, a decision of the senior district judge on 10 December 2018 to send the applicant's case to the Secretary of State and, secondly, the Secretary of State's decision on 3 February 2019 to order the applicant's extradition to India. Permission to appeal was refused after consideration of the papers by William Davis J on 5 April 2019, but the applicant has exercised his right to renew the applications at an oral hearing, which has taken place today. He is represented at this hearing by Ms Claire Montgomery QC, and Mr Ben Watson. The respondents, who are the Government of India and the Secretary of State, have made written representations, but have elected not to make oral submissions today.

2. The applicant is Dr Vijay Mallya, an Indian businessman who was formerly the Chief Executive Officer of Kingfisher Airlines Limited and Chairman of the United Breweries Group which owned Kingfisher. Kingfisher collapsed in 2012 with very substantial debts. In these proceedings the Government of India has requested the applicant's extradition to face criminal charges in India of criminal conspiracy, contrary to section 120B of the Indian Penal Code, and of cheating, contrary to sections 24(1)(5) and 420 of the Penal Code. The allegations relate to three loans which were made to Kingfisher by the IDBI Bank, of respectively: 150 crores, which equates to 1,500 million Indian rupees, on 7 October 2009; 200 crores on 4 November 2009; and 750 crores, which included the 200 crores already advanced, on 27 November 2009.

3. The thrust of the Government's case against the applicant as originally set out in the extradition request was that he was allegedly involved with other senior executives of Kingfisher and senior officials of the bank in a conspiracy to defraud the bank by procuring the making of the loans that we have mentioned to Kingfisher, knowing that Kingfisher was in a parlous financial condition and with the intention that the loans would never be repaid. As these proceedings developed, however, a somewhat different case was added, alleging that the applicant was a party to representations made by executives of Kingfisher to the bank which falsely and fraudulently represented its financial situation to be better than was in fact the case.

4. In accordance with good practice, in order to seek to satisfy the requirement of showing that the conduct in respect of which extradition is sought would give rise to offences under the law of the United Kingdom if the conduct had occurred in this country, the Government prepared a schedule of notional charges. This schedule contains three notional counts. The first count is a charge of conspiracy – the relevant offence under English law being that of conspiracy to defraud, an offence at common law preserved by sections 5 and 12 of the Criminal Justice Act 1987. It is alleged on that count that the applicant conspired with other named individuals, who include both executives of Kingfisher and officials of the bank, to defraud the bank by dishonestly causing and permitting the bank to sanction and disburse the three loans to which we have referred with the intention not to repay those loans: in particular, by (a) supplying to the bank and/or permitting reliance by the bank on false information in respect of Kingfisher's profitability, and (b) supplying to the bank and/or permitting reliance by the bank on false information in respect of the value and/or availability of securities to be relied on by the bank.

5. The second notional charge alleges offences of fraud by misrepresentation, contrary to sections 1(2)(a) and 2 of the Fraud Act 2006, by dishonestly making representations to the bank which, allegedly, the applicant knew were or might be untrue or misleading. Again, the particulars allege that the applicant supplied false information to the bank in respect of Kingfisher's profitability and in respect of the value and/or availability of securities, and further allege that he intended thereby to make a gain for himself or another or to cause loss to the bank or to expose the bank to a risk of loss by causing and permitting the bank to sanction and disburse the three loans.

6. The third count alleges various money laundering offences. It is common ground that those offences are parasitic on the first two counts in that the prosecution would need to succeed on one of the first two counts in order for the offences under count 3 to arise.

7. India has been designated as a category 2 country for the purposes of Part 2 of the Extradition Act 2003, but has not been designated for the purpose of section 84(7) of the Act. The result is that the district judge, after deciding certain preliminary matters, was required by section 84(1) of the Act to decide whether there was evidence:

> "which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him."

That requirement is often referred to, as a convenient shorthand, as the requirement to show a *prima facie* case.

8. In these proceedings, after a very lengthy extradition hearing which took place before the senior district judge on various dates between December 2017 and September 2018, at which a very substantial volume of evidence was adduced and detailed submissions were made, the senior district judge found that the requirement to show a *prima facie* case was satisfied. She also rejected a number of arguments advanced on the applicant's behalf as reasons why it was contended that his extradition is barred under particular provisions of the Act.

9. Five grounds of appeal are advanced on the applicant's behalf against the decision of the senior district judge. The first and by far the most substantial ground in terms of the nature and complexity of the material which the court is asked to grapple with is a contention that the senior district judge was wrong to conclude that the Government had established a *prima facie* case for the purpose of section 84(1) of the Act. In making that argument, the applicant faces the potential difficulty that it is, of course, not the function of an appellate court in an extradition case, any more than in any other type of case, to repeat the fact-finding exercise undertaken by the lower court. In order to persuade an appellate court to interfere with findings of fact made by a lower court after hearing and receiving evidence, particularly in a case such as this involving a very substantial volume of evidence, it is necessary to identify a material error of law or other demonstrable error in the lower court's process of reasoning, or to persuade the appellate court that the lower court has made findings for which there was no reasonable evidential basis or otherwise reached a conclusion which no reasonable judge could have reached.

10. Despite that high hurdle, we have been persuaded that the applicant's first ground of appeal is at least reasonably arguable. In those circumstances, it is neither necessary nor appropriate to say a great deal about the basis on which the applicant's case has been advanced on that ground today by Ms Montgomery, other than to give a bare summary of her submissions.

11. The approach which the senior district judge adopted in dealing with the question of whether a *prima facie* case had been shown was to begin by considering the notional charge of fraud by misrepresentation. We have been taken today through each of the main misrepresentations for which the senior district judge found that a *prima facie* case of fraudulent misrepresentation has been made out. In the case of many of those alleged representations it is argued that the representation is not one which is included in the extradition request, nor for that matter was it the subject of an allegation made by the Government of India at the extradition hearing. In those circumstances, it was not part of the case which the applicant had to meet or was given notice that he had to meet at that hearing.

12. In addition to those procedural objections, it is argued that many of the findings which the district judge made on that part of the case are based on a misunderstanding or misreading of the documentary evidence or that they have no reasonable foundation in that evidence or that they are inconsistent with evidence adduced at the extradition hearing.

13. In addition, submissions have been made that the district judge wrongly relied on material which was not admissible as evidence because it did not satisfy the admissibility requirements of sections 84(2) and (3) of the Act.

14. In relation to the conspiracy charge, the central complaint made is that, so it is said, the district judge did not give any proper consideration to the possibility that the bank's officials who approved the loans genuinely believed that the applicant and other executives of Kingfisher Airlines intended to ensure that the loans were repaid, and for that matter believed that there was a sufficient likelihood of repayment to justify the lending. It is further submitted that, if the judge had properly applied the test under section 84(1), she could not reasonably have concluded that, on the admissible evidence which was adduced at the extradition hearing, the test of showing a *prima facie* case against the applicant was made out.

15. Without prejudging in any way the ultimate merits of those arguments, we are, as I say, satisfied that they are arguments that can reasonably be advanced and which justify giving permission to appeal to this court on ground one.

16. The second ground of appeal is that the senior district judge was wrong to reject the applicant's argument that his extradition is barred under section 81(a) of the Act by reason of extraneous considerations, in that the request for his extradition has in fact been made, so it is alleged, for the purpose of prosecuting or punishing him on account of his political opinions. In the way that this ground of appeal is advanced on behalf of the applicant it in fact adds nothing to the first ground, because the starting point for the applicant's submissions on this second ground of appeal under section 81(a) is that there is no *prima facie* case against him. His case, as it is put at paragraph 87 of the skeleton argument for today's hearing, is that:

> "The proceedings against him in India have been brought to meet the political aim of assuaging public anger at the collapse of KFA and the loss of public funds which ensued in circumstances where there is no prima facie case of criminality by the applicant."

Those final words are underlined in the skeleton argument and it is said that that final rider founds the applicant's case under section 81(a).

17. In those circumstances, an appeal on ground two could only succeed if the appeal had already succeeded and the applicant was required to be discharged on the basis of the first ground of appeal. That said, we do not consider that there is a reasonably arguable basis for contending that the request for extradition in this case has in fact been made for the purpose of prosecuting or punishing the applicant on account of his political opinions. Even on the broadest interpretation of that language as it has been explained in the authority shown to us of *Gomez v Secretary of State for the Home Department* [2000] INLR 549, a decision of the Immigration Appeal Tribunal, it is necessary to adduce evidence to show that the individual may be being prosecuted or punished on account of, if not an actual political opinion that he holds, at least a political opinion that has been imputed to him by others.

18. Taking the material that we have been shown at its highest and assuming for the sake of argument that it is capable of supporting the suggestion that proceedings against the applicant have been motivated by the aim of assuaging public anger at the collapse of Kingfisher and loss of public funds, that still does not seem to us capable of amounting to a *prima facie* case that any imputed, let alone actual, political opinion of the applicant has formed the basis for his prosecution or intended prosecution.

19. In those circumstances we consider that ground two cannot succeed. In any event, as we have already indicated, it does not constitute a separate basis on which an appeal could succeed. Accordingly, we refuse permission to appeal on ground two.

20. Grounds three and four, which are taken together in the applicant's skeleton argument, amount to allegations that the applicant would not receive a fair trial in India either because of prejudice at his trial by reason of his political opinions — that is ground three — or because there would be a flagrant breach of article 6 of the European Convention on Human Rights which guarantees the right to a fair trial. Those grounds have not been developed orally today by Ms Montgomery, and suffice it to say that we are satisfied that the senior district judge was right to find that those grounds are not reasonably arguable. In particular, there is no evidence which has been drawn to our attention which begins to undermine her conclusion that the applicant had failed to show that he would not receive a fair trial in India.

21. In reaching that conclusion, the senior district judge took account of the fact that his trial will certainly attract media attention, but also of evidence which confirms the independence of the Indian judiciary, certainly at the level of the High Court and above; and nothing referred to in the applicant's skeleton argument for this hearing by way of proposed additional evidence, even if it were permitted to be introduced, in our view provides any reasonable basis for questioning the judge's finding on this point. Accordingly, we also refuse permission to appeal on grounds three and four.

22. Ground five asserts that the senior district judge was wrong to reject the applicant's contention that his extradition would be incompatible with his rights under article 3 of the Human Rights Convention because, so it was said, there is a real risk that he would be subject to inhuman or degrading treatment by reason of the conditions in the prison in which he would be held awaiting trial in India. The senior district judge rejected that contention, principally on the basis of assurances given by the Government of India as to the particular location in which the applicant will be held pending trial and with regard to the medical assistance that will be made available to him, and other relevant matters concerning the prison conditions.

23. As this court has made clear in the recent case of *Government of India v Chawla* [2018] EWHC 1050 (Admin) and [2018] EWHC 3096 (Admin), reliance on such assurances is in principle an entirely proper approach. Indeed, the court is bound, in accordance with the presumption of good faith, to accept such assurances at face value unless there is cogent evidence which calls them into question. In this case the senior district judge considered the assurances given to be clear, binding and sufficient, and on any appeal that assessment is entitled to great respect.

24. To seek to demonstrate that the district judge's conclusion was nevertheless at least arguably wrong, the applicant wishes to rely on fresh evidence in the form of a statement from an Indian lawyer called Mr Yadav, which was not adduced in the lower court. In that statement Mr Yadav gives a description of his experience of conditions in the Arthur Road Jail, which is the prison in which the applicant would be held, based on visits that he has made to see clients held in that prison. To succeed on an appeal relying on that evidence, however, the applicant would have to show that the evidence was not available at the time of the extradition hearing – that being the first condition which must be satisfied pursuant to section 104(4) of the 2003 Act. That requires it to be shown that the evidence could not with reasonable diligence have been obtained in time to adduce it at the hearing.

25. As we have mentioned, the proceedings before the senior district judge took place over almost a year and it appears that during that time, albeit after the evidence had formally been closed, the solicitors representing the applicant in this country became aware of Mr Yadav. No sufficient explanation has, however, been provided of exactly when and how Mr Yadav came into contact with the applicant's solicitors and why no evidence was obtained from him in time to apply to adduce it at the extradition hearing, which could support a conclusion that this evidence could not with reasonable diligence have been obtained for use in the lower court. It is not acceptable for parties seeking to appeal in extradition proceedings to try to bolster the evidence relied on in the lower court in circumstances where that evidence has failed to convince the judge to make findings in their favour with new evidence on appeal unless a proper foundation has been shown for establishing that the evidence was not available in the relevant sense at the time of the extradition hearing.

26. We do not consider it even reasonably arguable on the material placed before us that the requirement for admitting fresh evidence is satisfied in this case and, without it, there is nothing capable of undermining the basis on which the district judge was satisfied that the assurances given by the Government of India are sufficient to ensure that there is no real risk of mistreatment by reason of the conditions in which he will be detained awaiting trial.

27. We therefore refuse permission to appeal also on this ground. It follows that, in relation to the appeal against the decision of the senior district judge, we grant permission to appeal, but limited to ground one.

28. We turn to the second appeal, which is against the Secretary of State's decision to order extradition. This appeal is based on a contention that there are no effective speciality arrangements with India, that is to say arrangements made with the UK to ensure that, as required by section 95 of the Act, the applicant, if extradited to India, may only be dealt with for the offences for which he is extradited and for any extradition offence disclosed by the same facts as those offences, unless the Secretary of State consents to his being dealt with for any other extradition offences.

29. The starting point in considering speciality is that the Extradition Treaty made in 1992 between India and the UK obliges both states to comply with the speciality requirements. Furthermore, those requirements are incorporated in India's domestic law by section 21 of the India Extradition Act 1962, which makes it unlawful for a person accused or convicted of an offence which if committed in India would be an extradition offence and who is returned by a foreign state to be tried in India for any offence other than those permitted by the rules of speciality. In these circumstances strong reasons would be needed to displace the expectation which this court is entitled to have that Indian courts and prosecutors will comply not only with India's international obligations but with the Indian law in which those obligations are also enshrined.

30. To support the suggestion that there is reason to believe that the speciality requirements will not be complied with if the applicant is returned, counsel for the applicant rely on two matters. The first is the fact that there are, apparently, over 40 criminal cases currently extant which have been brought against the applicant in India, in some of which warrants have been issued for his arrest. Ms Montgomery submitted that the words "dealt with", where they appear in section 95 of the Extradition Act, must bear the same meaning as they do in section 151A, which deals with the reverse situation of persons who are extradited to this country. Section 151A(5) states that a person "is dealt with in the United Kingdom for an offence if (a) the person is tried there for it; (b) the person is detained with a view to trial there for it". Ms Montgomery submitted that, applying that definition in reverse, if the applicant is returned to India he will be, when detained pending his trial for the offences for which he is being extradited, also be being detained with a view to trial for other offences in respect of which he is being prosecuted. There would, therefore, on day one be a breach of the speciality requirements unless steps have already been taken, which there is no sign that they have, to ensure that those other criminal prosecutions, in so far as they relate to matters not encompassed by the offences for which he is being extradited, are discontinued.

31. We cannot accept that that that is a reasonably arguable contention. We think it clear that the position on return would simply be that there are outstanding warrants for the applicant's arrest in other cases. It would only be if and when attempts were made to execute those warrants, and if an order was made to remand him in custody with a view to trial in other cases, that there might be a breach of the speciality requirements. No evidence has been adduced which seems to us capable of supporting an inference that there is a real likelihood that such steps will be taken, given that they would on the face of it involve a breach of Indian law and of India's international obligations.

32. The other matter relied on on the applicant's behalf in his written argument is a case involving an individual called Abu Salem Ansari, who was extradited from Portugal to India some years ago. The Portuguese Supreme Court subsequently considered that speciality had not been complied with in that case. That particular case has been relied on by a number of individuals seeking to resist extradition from the United Kingdom to India as a reason for inferring that speciality requirements would not be complied with in their cases. On each occasion that argument has been rejected by the English courts. Most recently it was rejected by this court in the case of *Government of India v Chawla*, to which we have already referred.

33. It is said that there have been developments in the *Ansari* case which have not been previously considered by the courts here. In particular, in September 2017 he was convicted in a further set of proceedings in India. It is, however, stated by the Secretary of State in submissions made in response to this appeal that it does not appear that the offences of which Mr Ansari was convicted in those proceedings went beyond the legitimate scope of a prosecution for lesser offences based on the extradition request which had previously been sanctioned. It appears that Mr Ansari has also been sentenced to life imprisonment and there is an issue as to whether this was in breach of an assurance given by the Indian authorities that he would not be subjected to imprisonment for a term beyond 25 years. The Indian authorities apparently maintain that they are not in breach of that requirement because there is a legitimate expectation that his sentence will be commuted and it would only be if Mr Ansari was in fact subjected to imprisonment beyond 25 years that there would be a breach of the speciality requirement. That assurance, it may be noted, went beyond the requirements of Indian law and it was, therefore, not part of the Indian law which is directly enforceable by, or falls to be applied by, the Indian courts.

34. Whatever the rights and wrongs of the particular case of Mr Ansari, we do not consider that they provide any reasonably arguable basis for challenging the efficacy of the speciality arrangements between India and the United Kingdom which are applicable in this case. The applicant has not been able to point to any previous case in which there has been any alleged breach by the Indian authorities of its extradition treaty with this country and we see no grounds for believing that such a breach can reasonably be anticipated in the present case.

35. For those reasons, we refuse permission to appeal against the decision of the Secretary of State to order extradition, but the validity of that decision will of course be dependent on the outcome of the appeal for which permission is given.