Neutral Citation Number: [2021] EWHC 1776 (Admin)

Case No: CO/2374/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/06/2021

Before :

LORD JUSTICE SINGH
and
MRS JUSTICE STEYN

- -

Between :

PAUL WILLIAM DONALD BLANCHARD	**Applicant**
- v -	
THE JUZGADO DE INSTRUCCION No. 5 DE LA AUDIENCA NACIONAL, SPAIN	**Respondent**

- -
- -

Mr Mark Summers QC and Mr George Hepburne Scott (instructed by **Lewis Nedas Law**) for the **Applicant**
Mr Daniel Sternberg (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 20 May 2021

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Approved Judgment

Lord Justice Singh:

Introduction

1. This is a "rolled up" hearing of an application for permission to appeal from the Westminster Magistrates' Court, with the appeal to follow immediately if permission is granted. The rolled up hearing was ordered by Julian Knowles J on 14 September 2020.

2. The case arises from the proposed extradition of the Applicant to Spain on an accusation European Arrest Warrant ("EAW"). The proceedings are governed by Part 1 of the Extradition Act 2003 ("the 2003 Act").

3. There are no fewer than nine grounds of appeal. As will become apparent, the first of those grounds, which raises an argument based on abuse of process, is properly to be determined after the other grounds, since it is a residual ground.

4. At the hearing before us we heard submissions from Mr Mark Summers QC, who appeared with Mr George Hepburne Scott for the Applicant; and from Mr Daniel Sternberg, who appeared for the Respondent and the Interested Party. I express the Court's gratitude to them all for their written and oral submissions.

Factual Background

5. The Applicant was an accountant working in Spain for Mohamed Derbah. In 2001, he brought to the attention of the Spanish police a timeshare fraud that was allegedly being committed by Mr Derbah. In July 2001, the Applicant provided witness statements to the police which led to the arrest of Mr Derbah.

6. There is evidence before the Court that the Applicant actively co-operated with Spanish investigators for the next three years. The Applicant states that in 2003 he became a participating undercover state agent for the Spanish police, providing them with information in connection with other cases. The Applicant submits that his cover was accidentally blown in April 2004 and blame for this was attributed to him.

7. The Applicant was then arrested in the UK in relation to other criminal matters. At this time, he says that he spoke to Special Branch and MI5, but the Spanish police refused to confirm his status as an informant. After this, the Applicant says he ceased co-operating with the Spanish police.

8. In April 2007, the Applicant's status in the Spanish investigation was changed from a prosecution witness to a co-defendant by the examining judge, Judge Garzon.

9. On 29 January 2008 the Applicant was indicted in Spain. He challenged that indictment by way of appeal to the Spanish High Court.

10. On 22 December 2009, the indictment of the Applicant was overturned by the Spanish High Court in Madrid. The judgment of the Spanish High Court, comprising three judges, concerned a number of appellants, one of whom was this Applicant. There is

before this Court a translation of that judgment, which is comprehensible if not always easy to follow.

11. In relation to him, the judgment said that:

> "A person who is a witness in the course of proceedings should not be quasi-surprisingly changed to the accused, without the prior unavailable precaution mentioned in the article, leaving situations given in that which we are not dealing with safe."

12. Later the judgment said that:

> "He must be heard or at least given that possibility, for which reason it is appropriate to declare the proceedings null in that pertaining to this appellant so that will be done in accordance with that set out."

13. At the end of the relevant part of the judgment, it was said:

> "The petition relating to that which gives the appellant protected witness status cannot be dealt with in this ruling, as it is not the object of this appeal according to the reading of the same."

In Spanish law there is a particular status of being a "protected witness". There was a long-running dispute between the Applicant and the Spanish police about whether he was, or should have been, given that status but, as is apparent from the above passage, that issue was not the subject of the decision of the Spanish High Court.

14. Finally, I would note that the formal ruling of the Court stated that it upheld the appeal filed on behalf of this Applicant against the ruling of 29 January 2008, "leaving the indictment of him ineffective …"

15. In the meantime, in February 2008, the Applicant had pleaded guilty in England and Wales to four offences of dishonesty and asked for two others to be taken into consideration. He was sentenced to 6½ years imprisonment. He was released on licence in 2010.

16. Between 2010 and 2016 attempts were made by the Spanish authorities to elicit information from the Applicant by way of requests for mutual assistance to the UK authorities. I will return to the details of this later, when I address Ground 7.

17. The EAW for the Applicant was issued on 13 April 2018 and certified by the National Crime Authority on 17 April 2018. The Applicant was arrested on 2 May 2018. On the next day he appeared at an initial hearing at Westminster Magistrates' Court and was released on conditional bail.

18. The substantive hearing, with oral evidence, took place before the Deputy Chief Magistrate, Deputy Senior District Judge Ikram, on 3-5 December 2019. Closing

arguments were heard by him on 4 February 2020. The Judge found that there were no bars to the Applicant's extradition and, further, that the request for it was not an abuse of process. His decision, ordering the Applicant's extradition, was delivered on 29 June 2020.

The jurisdiction of this Court in extradition appeals

19. Section 26 of the 2003 Act concerns appeals against extradition orders and, so far as material, provides:

> "(1) If the appropriate judge orders a person's extradition under this Part, the person may appeal to the High Court against the order.
>
> …
>
> (3) An appeal under this section—
>
> (a) may be brought on a question of law or fact, but
>
> (b) lies only with the leave of the High Court.
>
> …"

20. Section 27 deals with this Court's powers on an appeal under section 26 as follows:

> "(1) On an appeal under section 26 the High Court may—
>
> (a) allow the appeal;
>
> (b) dismiss the appeal.
>
> (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 appropriate 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—
>
> (a) order the person's discharge;

(b) quash the order for his extradition."

21. In *Love v Government of the USA* [2018] EWHC 172 (Admin); [2018] 1 WLR 2889, this Court comprised Lord Burnett of Maldon CJ and Ouseley J. At paras. 25-26 the Court said:

> "25. The statutory appeal power in section 104(3) [which is in the same terms as section 27(3) but applies to Category 2 territories] permits an appeal to be allowed only if the district judge ought to have decided a question before him differently and if, had he decided it as he ought to have done, he would have had to discharge the appellant. The words '*ought* to have decided a question … differently' (emphasis added) give a clear indication of the degree of error which has to be shown. The appeal must focus on error: what the judge *ought* to have decided differently, so as to mean that the appeal should be allowed. Extradition appeals are not re-hearings of evidence or mere repeats of submissions as to how factors should be weighed; courts normally have to respect the findings of fact made by the district judge, especially if he has heard oral evidence. The true focus is not on establishing a judicial review type of error, as a key to opening up a decision so that the appellate court can undertake the whole evaluation afresh. This can lead to a misplaced focus on omissions from judgments or on points not expressly dealt with in order to invite the court to start afresh, an approach which risks detracting from the proper appellate function. That is not what *Shaw's* case or *Belbin's* case was aiming at. Both cases intended to place firm limits on the scope for re-argument at the appellate hearing, while recognising that the appellate court is not obliged to find a judicial review type error before it can say that the judge's decision was wrong, and the appeal should be allowed.
>
> 26. The true approach is more simply expressed by requiring the appellate court to decide whether the decision of the district judge was wrong. What was said in the *Celinski* case and *In re B (A Child)* are apposite, even if decided in the context of article 8. In effect, the test is the same here. The appellate court 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."

22. As I have mentioned, I will address Ground 1, which raises an argument based on abuse of process, after I have considered the other grounds. This is because, as will become apparent later, the jurisdiction of the court to prevent an extradition on the ground that

it is an abuse of process is a residual one, to be exercised only if, and to the extent that, the arguments which provide its foundation have not already been addressed in considering the express statutory bars to extradition set out in the 2003 Act.

Ground 2: Sections 2(3) and 12A of the 2003 Act

23. The terms of section 2(3)(b) of the 2003 Act are clear. The Part 1 warrant must be issued with a view to the arrest and extradition of a person to the category 1 territory "for the purpose of being prosecuted for the offence."

24. Under Ground 2 Mr Summers first emphasises that extradition must be for the purpose of prosecution: mere investigation is not enough. He submits that, on the facts of this case, although a decision to charge the Applicant was made in April 2007 and a decision to try him was made in January 2008, these were both quashed in December 2009 by the Spanish High Court. Mr Summers submits that the Judge was incorrect to find that these still had force.

25. I do not accept that argument. Both the EAW and the further information which has been provided by the Spanish authorities make it clear that the Applicant's extradition is requested on the basis that he is an "accused" person. The purpose of extradition is to prosecute him in Spain. The Respondent stated, at the beginning of the EAW, that the request was made "for the purposes of conducting a criminal prosecution …".

26. The fact that the original indictment of 2008 was quashed on appeal by the Spanish High Court in 2009 does not mean that the Applicant cannot be prosecuted if extradited to Spain or that the purpose of the request is for the purposes of an investigation and not prosecution.

27. There is no particular formality required of a decision to prosecute or try. In *Puceviciene v Prosecutor General's Office of the Republic of Lithuania* [2016] EWHC 1862 (Admin); [2016] 1 WLR 4937, the judgment of the Court was given by Lord Thomas CJ, who sat with Burnett LJ and Ouseley J. At para. 56 he said:

> "A decision to try is simply a decision where the relevant decision maker (who may be a police authority, prosecutor or judge under the relevant procedural system) has decided to go ahead with the process of taking to trial the defendant against whom the allegation is made. In some systems, it may be the case that the decision to make the allegation that the person has committed a criminal offence will also be a decision that the matter will proceed to trial, subject to hearing what the defendant has to say or to subsequent review. In England and Wales, the decision to charge will almost always be the decision to try. In other systems it may not be and a separate decision to try has to be made, even though that decision may be conditional or contingent upon other matters. Again for the reasons we have given a decision is a decision even if informal."

28. I would therefore reject the first limb of Ground 2.

29. Mr Summers also submits, still under Ground 2 although this is really a distinct limb, that the Judge was wrong to reject the argument based on section 12A of the 2003 Act.

30. Section 12A provides:

> "(1) A person's extradition to a category 1 territory is barred by reason of absence of prosecution decision if (and only if)—
>
> (a) it appears to the appropriate judge that there are reasonable grounds for believing that—
>
> (i) the competent authorities in the category 1 territory have not made a decision to charge or have not made a decision to try (or have made neither of those decisions), and
>
> (ii) the person's absence from the category 1 territory is not the sole reason for that failure,
>
> and
>
> (b) those representing the category 1 territory do not prove that—
>
> (i) the competent authorities in the category 1 territory have made a decision to charge and a decision to try, or
>
> (ii) in a case where one of those decisions has not been made (or neither of them has been made), the person's absence from the category 1 territory is the sole reason for that failure.
>
> …"

31. Section 12A of the 2003 Act was inserted by section 156(2) of the Anti-Social Behaviour, Crime and Policing Act 2014. In *Kandola v Generalstaatwaltschaft Frankfurt, Germany* [2015] EWHC 619 (Admin); [2015] 1 WLR 5097, that provision was considered by this Court (comprising Aikens LJ and Nicol J). Aikens LJ observed that, in *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin), it became clear that, in some European legal systems, it is possible for a person whose surrender is requested under an accusation warrant to be required for the "purpose of being prosecuted" for the offence as identified in the warrant and therefore to be an accused, but still not to be the subject of a decision by the relevant judicial authority to charge him or try him. Section 12A was therefore introduced to ensure that a case is sufficiently advanced in the issuing state before extradition can occur, so that people do not spend potentially long periods in pre-trial detention while the issuing state continues to investigate the case.

32. At para. 28, Aikens LJ said that the application of section 12A in practice is not easy because it involves two distinct stages. At the first stage, the appropriate judge is

concerned with whether there are reasonable grounds for believing that at least one of the two decisions has not been taken, i.e. the decision to charge or the decision to try the requested person; and then, furthermore, if one of those two decisions has not been made, that a state of affairs (the absence of the requested person from the category 1 territory) is not the sole reason for the failure to make one or other or both of those two decisions. Both these negatives have to be established to the requisite level of proof by the requested person.

33. At para. 29, Aikens LJ said that the appropriate judge will only have to consider stage 2 if stage 1 is passed. At stage 2, it is for those representing the category 1 territory to prove to the criminal standard that it has made a decision to charge and has made a decision to try the requested person. If those two matters are proved, that is the end of the section 12A challenge. However, if those representing the category 1 territory cannot prove those two matters, then they can prove that the sole reason for whichever of those decisions has not been taken is the requested person's absence from their territory. If they do not prove either of the matters identified to the criminal standard, then that person's extradition will be barred.

34. At para. 30, Aikens LJ said that "reasonable grounds for believing" involves something less than proof on a balance of probabilities but more than simple assertion or a fanciful view or "feeling".

35. Turning to the present case, it appears that it is a requirement of Spanish law that the accused must be present before the decision can be taken to try him. It is only for that reason that the present case is still in formal terms at the "investigation" stage.

36. In *Arranz v 5th Section of the National High Court of Madrid, Spain* [2016] EWHC 3029 (Admin), in a judgment by Leggatt J, sitting with Sir Brian Leveson P, at paras. 28-29, it was said that the Court saw no reason to reject the explanation given by the Spanish authorities that, under Spanish law, the *instrucción* phase of the proceedings cannot be completed and a decision to try cannot be taken unless the defendant is physically present.

37. Furthermore, if the second stage of the issue under section 12A were reached, it is clear on the facts of this case that the sole reason why the decision to try the Applicant has not yet been taken is because of his absence from Spain. If he were willing to co-operate with the Spanish authorities, that decision would have been taken by now.

38. I would therefore refuse permission to appeal on Ground 2.

Ground 3: Sections 2(4)(c) and 10 of the 2003 Act

39. Under Ground 3 Mr Summers submits that the EAW does not contain adequate particulars of the Applicant's alleged involvement in the criminal activities for which his extradition is requested.

40. Under section 10(2) of the 2003 Act, the judge must decide whether the offence specified in the Part 1 warrant is an extradition offence. In the present case, the Judge was satisfied that it was.

41. Section 2(4) of the 2003 Act sets out the information which the warrant must contain and, so far as material, provides:

> "(4) The information is—
>
> …
>
> (c) particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the category 1 territory under which the conduct is alleged to constitute an offence;
>
> …"

42. In *Dhar v National Office of the Public Prosecution Service of the Netherlands* [2012] EWHC 697 (Admin), King J gave the judgment of the Court, which also included Moore-Bick LJ. At para. 63, he said that section 2(4)(c) of the 2003 Act does not demand the specificity of a count on an indictment or of an allegation in a civil pleading. He continued:

> "The court must be alive to the purpose of the legislation namely that of simplifying extradition procedures so as not to put too onerous a burden on the requesting judicial authorities. The court must have regard to the object that the conduct be expressed concisely and simply. There is no requirement that it be described in legal language."

On the other hand, he continued at para. 64, it is equally established that the use of the word "particulars" means that "a broad omnibus description of the alleged criminal conduct", such as "obtaining property by deception" will not suffice: see Dyson LJ in *Von der Pahlen v Government of Austria* [2006] EWHC 1672 (Admin), at para. 21. King J continued:

> "… The particulars required must at the very least … enable the person sought by the warrant to know what offence he is said to have committed under the law of the requesting state and to have 'an idea' of 'the nature and extent of the allegations against him in relation to that offence', citing Cranston J in *Ektor v National Prosecutor of Holland* [2007] EWHC 3106 (Admin), at para. 7."

As King J said, "the amount of detail required may turn on the nature of the offence."

43. At para. 70, King J adopted the approach of Lloyd Jones J in *Owens v Court of First Instance Marbella, Spain* [2009] EWHC 1243 (Admin), at para. 17:

> "… A balance must be struck between the requirement of particularity and the requirement that the conduct be stated concisely and simply. In determining the degree of particularity

> required in the description of the offence in the warrant, it is necessary to balance these competing considerations while at all times being mindful of the need to avoid unfair prejudice to the person whose extradition is sought."

44. In *King v Public Prosecutors Villefranche Sur Saone, France* [2015] EWHC 3670 (Admin) this Court comprised Lloyd Jones LJ and Collins J. In giving the judgment of the Court, at para. 22, Collins J said:

> "I do not believe that the particulars required whether for an accusation or a conviction warrant need great detail. As I have said, provided they give sufficient information to enable any available point on a bar to be taken and the ability to judge whether the offence is properly listed in the framework list and dual criminality can be shown if that should be needed, they will suffice whether for accusation or conviction cases."

45. Mr Summers submits that the EAW in the present case is not valid. It does not set out the particulars of the alleged offences. No attempt was made to articulate what conduct would constitute UK offences, as required for dual criminality. The judge below did not identify in the decision what the fraud was.

46. Mr Summers submits that it is also not made clear what the alleged role of the Applicant was in any offences. The decision of the Judge does not adequately detail the role of the Applicant in the alleged frauds. There are no details given in terms of his actual offending, for example the amount he allegedly laundered.

47. Mr Summers submits that the Applicant is unable even to determine where the crime took place.

48. I do not accept those submissions. Reasonably clear particulars of the Applicant's alleged involvement can be found in the EAW and further information which has been provided by the Spanish authorities.

49. In the EAW, box (e) gave a description of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation by the requested person, as follows:

> "The subject of the investigation within these proceedings is a criminal organisation functioning in accordance with typical Mafia techniques (structure and internal distribution of tasks, permanence through time, with the purpose of enriching its members) led hierarchically by Mohamed Jamil DERBAH and which have acted for years in Spain, with its main seat being the South of the island of Tenerife."

50. There was then set out at some length the historical development of that "criminal organisation". It was stated that the organisation led by Mr Derbah was formed by the following persons "against whom there are enough evidence" (sic): this included "7 – Paul WILLIAM BLANCHARD, of British citizenship, financial advisor of the organisation until 2001 and, as such, author of the business and money-laundering scheme of the organisation."

51. In the response by the Judicial Authority dated 15 June 2018 to the first request for further information, further details were provided of the alleged criminal conduct by this Applicant.

52. At para. 1 it was stated that:

> "The accused provided the organisation led by the co-accused Mohamed DERBAH with the corporate structure needed to perpetrate frauds by means of the fraudulent holiday packages or cash back systems. This appears in his statements dated 5 June 2001. Furthermore, he provided or managed the following companies owned by Mohamed DERBAH with the purpose of laundering the proceeds of the unlawful activity: [five companies were then specified]"

It was also said that the Applicant:

> "took part during the years before the arrest of DERBAH in the management of the aforementioned companies, managing under his administration the product of the described frauds and transferring the funds so obtained to tax havens."

53. In my judgement, it is reasonably clear what the Applicant is accused of, namely involvement in a criminal enterprise, which was engaged in fraud and money laundering, in which he played a part as the financial advisor until 2001. The location is alleged to be Tenerife and anywhere else where the money laundering took place. The time of the alleged offence is 1999-2001.

54. I would therefore refuse permission to appeal on Ground 3.

Ground 4: Section 2(4)(c) of the 2003 Act

55. I have already set out the requirements of section 2(4)(c) of the 2003 Act above.

56. Under Ground 4 Mr Summers submits that the EAW does not specify the provision of the law under which the Applicant's conduct is alleged to constitute an offence.

57. In opposing this ground Mr Sternberg submits that the EAW states that the Applicant is sought for one offence but that this one offence may contravene a number of provisions of Spanish law. The Applicant cites no authority to suggest that this is

objectionable. The Judge was therefore correct to conclude that the EAW was not defective.

58. Mr Sternberg placed particular reliance in this context on the decision of Ouseley J in *Gilun v Circuit Court in Olsztyn, Poland* [2011] EWHC 3123 (Admin). At para. 11, Ouseley J found that the particulars in that case were adequate. He said that it was "neither here nor there" whether the Polish Court treated the 19 instances as three offences or as 19 offences. He said:

> "The particulars of conduct of which the appellant has been convicted are amply clear for him to know what he is going back to and for him to be able to deal with any issues that may arise in Poland, including any specialty issues."

59. It is important to note that that case concerned a conviction warrant and not an accusation one.

60. In contrast, in the present case, it is essential for the Applicant (and others) to know precisely what offence(s) he will be prosecuted for if he is extradited to Spain.

61. In order to assess these rival contentions, it is now necessary to set out in more detail what is said in the EAW and in subsequent responses to further information which have been provided by the Spanish authorities. In doing so I will, for convenience, set out again some of the content of the EAW which I have already quoted above.

The European Arrest Warrant

62. In box (e) it was stated:

> "This Warrant relates to in total ONE offence."

63. Box (e) went on to give a description of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation by the requested person, as follows:

> "The subject of the investigation within these proceedings is a criminal organisation functioning in accordance with typical Mafia techniques (structure and internal distribution of tasks, permanence through time, with the purpose of enriching its members) led hierarchically by Mohamed Jamil DERBAH and which has acted for years in Spain, with its main seat being the South of the island of Tenerife."

64. There was then set out at some length the historical development of that "criminal organisation". It was stated that the organisation led by Mr Derbah was formed by the following persons "against whom there are enough evidence" (sic): this included "7 – Paul WILLIAM BLANCHARD, of British citizenship, financial advisor of the organisation until 2001 and, as such, author of the business and money-laundering scheme of the organisation."

65. The same box then describes the nature and legal classification of the offence(s) and the applicable statutory provision/code as follows:

> "A continuous crime of fraud of articles 248 and 249 of the Criminal Code, a crime of money-laundering of article 301 of the Criminal Code, forgery of credit cards and its fraudulent use of articles 386 and 389, in connection with article 248 of the Criminal Code; threats and coercion of article 169, 170 and 172; perverting the course of justice of article 404 of the Criminal Code, of all of which Paul William BLANCHARD is accused and which are punished with prison sentences of up to fifteen years."

66. In a separate box immediately following box (e), there was set out the framework list, so that one or more of the following offences punishable in the issuing Member State by a custodial sentence of a maximum of at least three years could be set out. The following boxes were ticked: "Participation in a criminal organisation"; "fraud, …"; "counterfeiting of currency …"; "swindling".

67. In box (c) there was required an indication of the length of the sentence. The maximum length of the custodial sentence was said to be:

> "A continuous crime of fraud of articles 248 and 249 of the Criminal Code, a crime of money-laundering of article 301 of the Criminal Code, forgery of credit cards and its fraudulent use of articles 386 and 389, in connection with article 248 of the Criminal Code; threats and coercion of article 169, 170 and 172; perverting the course of justice of article 404 of the Criminal Code, of all of which Paul William BLANCHARD is accused and which are punished with prison sentences of up to fifteen years."

Subsequent requests for further information

68. In the response by the Judicial Authority dated 15 June 2018 to the first request for further information, further details were provided of the alleged criminal conduct by this Applicant.

69. At para. 1 it was stated that:

> "The accused provided the organisation led by the co-accused Mohamed DERBAH with the corporate structure needed to perpetrate frauds by means of the fraudulent holiday packages or cash back systems. This appears in his statements dated 5 June 2001. Furthermore, he provided or managed the following companies owned by Mohamed DERBAH with the purpose of laundering the proceeds of the unlawful activity: [five companies were then specified]"

It was also said that the Applicant:

> "took part during the years before the arrest of DERBAH in the management of the aforementioned companies, managing under his administration the product of the described frauds and transferring the funds so obtained to tax havens."

70. It was further said:

> "In the statements given before the National Police he said that the accused Mohamed DERBAH perpetrated crimes of swindling, money laundering, fiscal evasion, forgery of credit cards, blackmail and weapon trafficking. He described the defrauding activity perpetrated by the companies controlled by Mohamed DERBAH through the system of sale of holiday packages called 'timeshare' and the investment system called 'cashback'."

71. At para. 12 of the same document, it was said that police inspectors of the National Police could give a statement "in connection with the statement given by the accused where he admits taking part in the facts of which he is accused."

72. In the fifth request for further information, question 6 asked for the number of offences for which the Applicant was wanted and the maximum sentence for each offence. The answer given, in a document dated 6 August 2019, was:

> "A major offence of continued fraud, in accordance with art. 248 249 and 250 and art. 74 of the Spanish Penal Code, punishable by imprisonment of up to 12 years.
>
> A major offence of belonging to a criminal organisation, pursuant art. 570 bis of the Spanish Criminal Code, punishable by imprisonment of up to 5 years.
>
> A major offence of money-laundering according to art. 301 Spanish Penal Code punishable by imprisonment of up to 6 years."

73. It will be apparent that, as a matter of arithmetic, the total of 12 years plus 5 years plus 6 years comes to 23 years.

74. I have reached the conclusion that the EAW is incoherent and fundamentally defective. It purports to refer to only one offence but in fact sets out five and possibly six separate offences, namely, (i) fraud, contrary to articles 248 and 249 of the Criminal Code, (ii) money-laundering, contrary to article 301; (iii) forgery of, and fraudulent use of, credit cards, contrary to articles 386 and 389; (iv) threats and coercion, contrary to articles 169, 170 and 172; (v) perverting the course of justice, contrary to article 404; and (vi) participation in a criminal organisation. The Judge held that the "one" offence was a continuous fraud but Mr Sternberg submitted to us that it was participation in a criminal organisation. It is impossible for the reasonable reader to know for what offence or offences the Applicant is to be extradited.

75. The confusion is compounded by the fact that it is impossible to work out how the maximum sentence of 15 years specified in the EAW was calculated. This is only made worse by the further information provided later.

76. I would therefore grant permission to appeal on Ground 4; and would allow the appeal on this ground.

Ground 5: Section 2(3) of the 2003 Act

77. Under Ground 5 Mr Summers submits that the approach of the Judge has resulted in extradition of the Applicant being ordered in respect of offences of which he is not accused and for which extradition has not been sought. He submits that the information provided in response to requests for further information, which I have quoted above, abandoned at least three of the alleged offences which were mentioned in the EAW.

78. I accept that submission. As I have already said, the EAW is fundamentally incoherent and defective because it is impossible for the reasonable reader to know for what offence or offences the Applicant's extradition is requested (or even how many offences).

79. I would therefore grant permission and allow the appeal on Ground 5.

Ground 6: Section 2(4)(d) of the 2003 Act

80. Section 2(4)(d) of the 2003 Act requires the EAW to contain "particulars of the sentence which may be imposed under the law of the category 1 territory in respect of the offence if the person is convicted of it."

81. Under Ground 6 Mr Summers submits that the sentence available in Spanish law is not properly specified in the EAW. Responses to requests for further information have given possible sentences of 12, 5 and 6 years. No combination of these figures results in the maximum of 15 years which was mentioned in the EAW.

82. I accept that submission. The EAW refers to a maximum sentence of 15 years but it is impossible to work out how that figure was arrived at. The maximum sentence for an offence of fraud is 12 years. If the offence is participation in a criminal organisation, the maximum sentence is 5 years.

83. This ground is closely related to Ground 4 and succeeds for similar reasons. The fundamentally incoherent nature of the EAW means that the maximum sentence is not properly set out as it must be.

84. I would grant permission and allow the appeal on Ground 6.

Ground 7: section 14 of the 2003 Act

85. Section 14 of the 2003 Act, so far as material, provides that:

> "A person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have—
>
> (a) committed the extradition offence (where he is accused of its commission) …"

86. Under Ground 7 Mr Summers submits that it would now be oppressive or unjust for the defendant to face extradition due to the passage of time. The Applicant provided his prosecution witness statement detailing the alleged crimes of others in 2001 and yet no decision was taken to charge him until 2007. The indictment was then quashed in 2009, over ten years ago. Mr Summers submits that the culpability for the delay rests with the Respondent, which made failed attempts to seek mutual assistance from the UK authorities from 2010 to 2016.

87. It is now necessary to set out some of the chronology in more detail. A request for further information was made on 13 April 2018. The response is dated 15 June 2018. At para. 6, it was said that the main cause of the delay were the numerous attempts to take the statement of the Applicant in accordance with the decision of the Criminal Division of the High Court.

88. On 19 January 2010 it was decided to take the statement of the Applicant and this was notified to his legal representatives. On 26 January 2010 his lawyer requested the suspension of his statement set for 28 January because of health problems. He also stated that the Applicant's whereabouts were unknown. On 28 January 2010 the Police Intelligence Service was asked to ascertain the whereabouts of the Applicant. On 23 February 2010 his address in the UK was ascertained. On 8 April 2010 the prosecutor requested the issue of an international letter of request addressed to the UK authorities to summons the Applicant. On 11 June 2010 it was decided to issue an international letter of request and the statement of the Applicant was set for 15 February 2011. The

letter of request was sent back without being executed because the time was insufficient to execute it.

89. On 23 February 2011 the Applicant's lawyer delivered several recordings of meetings with the police in charge of the investigation. On 1 December 2011 the Central Investigative Court decided to get in touch with the liaison magistrate of the UK so that the judicial commission could travel to the UK and take the Applicant's statement, either directly or by means of video conference or in Spain. On 20 December 2011 the UK authorities informed the Spanish authorities about the address of the Applicant and his penal situation.

90. On 30 July 2012 it was decided to issue a new international letter of request to take the Applicant's statement. On 11 October 2012 the UK authorities said that it was not possible to take the statement by means of video conference and suggested three possibilities: to summons the Applicant before a court in Spain; to send a list of questions to be put to him before an English Court; or to request that he appeared before a court in England in the presence of a judicial commission from Spain.

91. On 20 November 2013 it was decided to issue a new international letter of request to take the Applicant's statement in accordance with the list of questions provided by the prosecutor's office.

92. The letter of request was sent again on 23 December 2015.

93. On 21 April 2017 the UK authorities informed the Spanish authorities that the Applicant refused to answer the list of questions, stating that he had worked as an undercover agent for the Spanish police.

94. The Judge addressed this issue at paras. 27-39 of his judgment.

95. At para. 30, he noted that the allegations were 20 years old but said that the allegations were complex and would inevitably take some time and resources to investigate. The Judge accepted that there has been delay in this case but considered that it had been substantially explained. The requested person exercised his right of appeal and the indictment was quashed in 2009. The Spanish authorities sought mutual legal assistance but the requested person was unco-operative.

96. The Judge observed that delay alone is insufficient as a bar under section 14 of the 2003 Act. He acknowledged that there would be emotional distress if extradition were ordered. The Applicant was 75 years old (he is now 76, as he was born in January 1945) and has medical conditions but the Judge could assume that they would be treated in Spain. The Judge reminded himself that oppression requires something more than mere hardship.

97. At para. 36, the Judge again noted the age of the allegations but observed that the Applicant had submitted a great deal of detail on the history of the case and a proof of evidence running to 55 pages, including an extremely detailed chronology of events. He clearly has papers and recordings of his dealings with Mr Derbah and the Spanish police from the relevant period. Accordingly, at para. 38, the Judge concluded that it would not be unfair to order his extradition.

98. Bearing in mind the role of this Court on an appeal of this kind, I am not persuaded that the conclusion of the Judge on this issue was wrong.

99. Mr Summers placed reliance on decisions of this Court in other cases, in particular *Obert v Public Prosecutor's Office of Appeal of Ioannina, Greece* [2017] EWHC 303 (Admin), at paras. 31-42 (Nicol J, sitting with Treacy LJ); and *Eason v Government of the USA* [2020] EWHC 604 (Admin), at paras. 34-51 (Leggatt LJ, sitting with Jay J). In those cases, it was found that the passage of time meant that there would be either oppression (in *Obert* the appellant had been given a false sense of security) or injustice (in *Eason* the appellant would be prejudiced in the preparation of his defence). But each case turns on its own facts.

100. In the present case, the Judge was entitled to find that there would not be oppression: there was no false sense of security created by the Spanish authorities. To the contrary, they have sought to charge the Applicant since 2007 and, since 2010, have sought his co-operation while he has been in the UK. He has been unwilling to help (which was his right) but he cannot then complain that the delay has resulted in a false sense of security. Further, on the facts of this case, the Judge was entitled to find that there would be no prejudice to the Applicant's ability to prepare his defence if extradited, as he clearly has kept a detailed dossier of information.

101. Accordingly I would refuse permission to appeal on Ground 7.

Ground 8: Article 6 ECHR

102. Ground 8 is that there is a risk of a flagrant denial of the right to a fair trial in Article 6 of the European Convention on Human Rights ("ECHR").

103. Mr Summers submits that the Judge was wrong to hold that the Applicant's extradition would not result in a breach of the right to a fair trial in Article 6. He submits that the basis of the Respondent's case against the Applicant is the statements he gave as a prosecution witness. Material within the Spanish Court file has shown that the Applicant was a suspect in the crimes at that time. He was not afforded the legal safeguards that should be afforded to someone who is being interviewed as a suspect in a criminal investigation. Further, he submits that the Judge erred in holding that these matters can only be determined by the trial court in Spain.

104. I do not accept this argument. The Applicant can expect to receive a fair trial in Spain, which is a party to the ECHR and has its own constitution and criminal justice system, which guarantee fair procedures. The fact that he was not warned that he might be a suspect when he gave his initial statement to the police and volunteered documents in 2001 does not mean that there would be a flagrant denial of a fair trial. If the arguments are good ones, the Applicant will succeed in the Spanish Court. If they are not good ones, they are rightly to be rejected.

105. I would therefore refuse permission to appeal on Ground 8.

Ground 9: Section 21A(1)(b)

106. Section 21A concerns the human rights and proportionality of the extradition of a person who has not been convicted and provides:

> "(1) If the judge is required to proceed under this section (by virtue of section 11), the judge must decide both of the following questions in respect of the extradition of the person ('D')—
>
> (a) whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998;
>
> (b) whether the extradition would be disproportionate.
>
> (2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); but the judge must not take any other matters into account.
>
> (3) These are the specified matters relating to proportionality—
>
> (a) the seriousness of the conduct alleged to constitute the extradition offence;
>
> (b) the likely penalty that would be imposed if D was found guilty of the extradition offence;
>
> (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D.
>
> (4) The judge must order D's discharge if the judge makes one or both of these decisions—
>
> (a) that the extradition would not be compatible with the Convention rights;
>
> (b) that the extradition would be disproportionate."

107. Under Ground 9 Mr Summers submits that, even if not disproportionate previously, extradition would now be manifestly disproportionate. The likely penalty imposed on the Applicant, if he is found guilty in Spain, would be imprisonment, whereas no UK court would sensibly imprison the Applicant now on the basis of the case and his current circumstances.

108. I do not accept this argument. It is important to appreciate that this is not a general proportionality ground of appeal. The Court is confined to considering the three matters

which are expressly set out in section 21A(3) of the 2003 Act. In my view, the Judge was entitled to reach the conclusion, having considered those three matters, that extradition would not be disproportionate. He was not arguably wrong in his conclusion.

109. I would therefore refuse permission to appeal on Ground 9.

Ground 1: Abuse of process

110. In advancing Ground 1, a vast amount of material was placed before the Judge and again before this Court. Mr Summers submits that the Respondent acted in a way which was manifestly abusive in changing the Applicant's status from a prosecution witness into a defendant, so as to guarantee his co-operation and to secure continued reliance on his evidence against others. This was then made worse by lying to the UK court about this.

111. He submits that the Judge erred in ruling that the matter of the Applicant being treated as a witness or a suspect/defendant was a matter for the trial court in Spain to determine. If there are reasonable grounds for believing that abusive conduct may have occurred, the answer is not to determine that the issues may be determined by the requesting state.

112. Mr Summers submits that the Judge erred in the findings on the facts by determining that he could put little weight on the evidence of the Applicant in light of his conviction of fraud. The evidence supporting the Applicant's case does not only come from the Applicant, but also from independent sources. This fact was not addressed by the Judge.

113. The Applicant's overriding case is that this is a bad faith prosecution and extradition. It is designed to manipulate a prosecution witness/undercover state agent (the Applicant) into providing evidence against co-accused. The judge (Judge Garzon) who orchestrated it has himself been disbarred for dishonesty.

114. There can be no doubt that this Court does have a residual jurisdiction to prevent an extradition on the ground of abuse of process but it is a limited jurisdiction.

115. In *R (Bermingham and Others) v Director of The Serious Fraud Office* [2006] EWHC 200 (Admin); [2007] QB 727, this Court (comprising Laws LJ and Ouseley J) held that the courts have a "residual abuse jurisdiction" in the context of the 2003 Act. At para. 97, Laws LJ said that this jurisdiction arises from an implied power and "is justified by the imperative that the regime's integrity must not be usurped."

116. At para. 100, he continued:

> "… The prosecutor must act in good faith. Thus if he knew he had no real case, but was pressing the extradition request for some collateral motive and accordingly tailored the choice of documents accompanying the request, there might be a good submission of abuse of process. …"

117. In *Symeou v Public Prosecutor's Office at the Court of Appeals, Patras, Greece* [2009] EWHC 897 (Admin); [2009] 1 WLR 2384, Ouseley J gave the judgment of the Court, which also included Laws LJ. At para. 33, he said that the focus of the implied jurisdiction "is the abuse of the requested state's duty to extradite those who are properly requested, and who are unable to raise any of the statutory bars to extradition." He continued that:

> "It is the good faith of the requesting authorities which is at issue because it is their request coupled with their perverted intent and purpose which constitutes the abuse. If the authorities of the requesting state seek the extradition of someone for a collateral purpose, or when they know that the trial cannot succeed, they abuse the extradition processes of the requested state."

118. Importantly, at para. 34, he said:

> "The abuse jurisdiction of the requested state does not extend to considering misconduct or bad faith by the police of the requesting state in the investigation of the case or the preparation of evidence for trial."

119. At para. 35, he explained that the reason for that distinction lies in the respective functions of the courts of the requested and requesting states in the EAW framework. The former are entitled to ensure that their duties under the 2003 Act are not being abused. In contrast, it is for the latter and in particular the trial court to decide whether its own procedures have been breached. This includes such questions as the admissibility of evidence which may have been improperly procured by the police.

120. In *Belbin v Regional Court of Lille, France* [2015] EWHC 149 (Admin), this Court comprised Aikens LJ and Edis J. In giving the judgment of the Court, at para. 44, Aikens LJ said that the implied abuse jurisdiction of the courts requires that there must be a usurpation of the statutory regime for extradition. He said, following earlier authority, that this usurpation has to result in the extradition being unfair and unjust to the requested person. It also has to be shown that the requested person will be unfairly prejudiced in his subsequent challenge to extradition in this country or unfairly prejudiced in the proceedings in the requesting country if surrendered there.

121. At para. 59, Aikens LJ emphasised that the circumstances in which the court will consider exercising its implied abuse jurisdiction in extradition cases are very limited. It will not do so if, first, other bars to extradition are available, because it is a residual jurisdiction. Secondly, the court will only exercise the jurisdiction if it is satisfied, on cogent evidence, that the judicial authority concerned has acted in such a way as to "usurp" the statutory regime of the Extradition Act or its integrity has been impugned. Thirdly, the court has to be satisfied that the abuse of process will cause prejudice to the requested person either in the extradition process in this country or in the requesting state if surrendered.

122. Turning to the present case, I do not accept Mr Summers' submissions. The investigation both pre-dated and post-dated the involvement of Judge Garzon. The fact that that judge was later disbarred in connection with another case is not material to this case.

123. The allegation that the police have been guilty of abuse is not sufficient to conclude that the Applicant's extradition would be an abuse of process. If the Applicant has evidence that the police were guilty of misconduct in 2001-2004 or at another time, he will be able to make those arguments at his trial in Spain and, if they are accepted and are relevant to the issues in the trial, that will be a matter for the Spanish courts.

124. It is also noteworthy in this context that the Spanish courts have already proved themselves able and willing to remedy an earlier defect in the process, when in 2009 the Spanish High Court quashed the indictment against the Applicant.

125. I would therefore refuse permission to appeal on Ground 1.

Conclusion

126. For the reasons I have given, I would:

(1) grant permission to appeal on Grounds 4, 5 and 6;

(2) refuse permission on Grounds 1, 2, 3, 7, 8 and 9;

(3) allow the appeal on Grounds 4, 5 and 6.

Mrs Justice Steyn:

127. I agree.