Neutral Citation Number: [2024] EWHC 300 (Admin)

Case No: AC-2023-LON-000380

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 14th February 2024

Before:
FORDHAM J

- -

Between:

YUSUF MUHUMUD	**Appellant**
- and -	
GOVERNMENT OF NORWAY	**Respondent**

- -
- -

Mark Smith (instructed by Jung Solicitors) for the **Appellant**
Amanda Bostock (instructed by CPS) for the **Respondent**

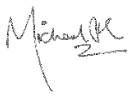
- -

Hearing date: 6.2.24
Draft judgment: 7.2.24

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



- -

FORDHAM J

FORDHAM J:

Introduction

1. This is an extradition case about dual criminality. The Appellant is wanted for extradition to Norway, on an accusation Extradition Request dated 22 April 2022. Extradition was ordered by DJ Tempia ("the Judge") on 14 November 2022. The case is governed by Part 2 of the Extradition Act 2003. I am grateful to both Counsel for their crisp and clear submissions.

Dual Criminality

2. Dual criminality is governed by s.78(4)(b) and s.137 of the 2003 Act. The Judge had to decide (s.78(4)(b)) whether each offence whose "particulars" were specified in the Request (s.78(2)(c)) is "an extradition offence". That turned on the statutory question (s.137(3)(b) and (4)(b)) whether the:

> ***conduct would constitute an offence under the law of the relevant part of the United Kingdom …***

The Judge held that this test was satisfied for all of the alleged offences.

The Uncontentious Alleged Offences

3. In relation to some of the alleged offences it is common ground that the Judge was correct and the Appellant stands to be extradited. The relevant particulars of conduct in the Warrant are as follows:

> ***December 2011 – July 2021 – Assault/Controlling and Coercive Behaviour. The Appellant regularly abused his wife including punching, kicking, pushing, bending her fingers backwards and pulling her hair. On one occasion, he pressed a duvet cover over her face so that she could not breathe. He said he was watching her, called her a whore and fat and threatened to throw her down the stairs, into the sea and/or kill her. He controlled her bank accounts and social media and threatened to take away their children and send them back to Somalia. After she left him, he contacted women's aid shelters and her family to find out where she was, and made threats to pick up the children and kill her.***
>
> ***January 2015 to January 2019 – Assault/Child Cruelty – In respect of his 4 children under the age of 16, he kicked, strangled and punched them including the use of wires and wooden boards. He locked them in their room for days and denied them access to food and their friends whilst threatening them not to tell anyone.***

That leaves five contentious alleged offences.

The Norwegian 'Specified Offence'

4. In the case of each of these five contentious alleged offences, the Request describes the specified "offence" (s.70(4)(a) of the 2003 Act) as being in contravention of section 263 of Norway's Penal Code, namely:

> ***Having in words or action threatened criminal conduct in such circumstances that the threat was suitable to induce serious fear.***

The Particulars of Conduct Supplied

5. The particulars of "conduct" supplied in the Request, in relation to the five contentious alleged offences, are as follows:

> ***a) On Friday 8 May 2020 at about 13:50, he called the Flom Crisis Centre and stated "I'm going to kill you all", and when asked what he meant by that he replied "you'll see tomorrow".***
>
> ***b) During June of 2020, he contacted [his wife]'s sister … by text message and asked her to tell him where [the wife] was staying and for the telephone number and e-mail address of [the wife]. He went on to write that "I had cut her ([the wife]) up into little pieces. I had cut both her breasts before I stab out her eyes", "she is a whore and is married to an infidel". "If I would have seen her, I'd burn her, and I'm not going to forgive her." "I promise to kill her and anyone who watches out for her" and the like.***
>
> ***c) On Wednesday 21 April 2021 at 13:58, he called the Flom Crisis Centre and stated "I'm going to kill you all", and when asked what he meant by it he replied "You'll see tomorrow".***
>
> ***d) On Friday 4 June 2021 at 15:05 he called the Crisis Centre in Midt-Troms in the Municipality of Senja and stated "I will come and see you tomorrow, I will kill [the wife], you will have to pay".***
>
> ***e) On Tuesday 13 July 2021 at 11:00 he called the Crisis Centre in Midt-Troms in the Municipality of Senja and stated that he would be flying to Northern Norway the next day, come to the crisis centre and kill everyone there before he went to find his three children. He stated that he is allowed by his god to kill them all since it is their fault that his wife no longer likes him, after which he said "Wait and see, the bomb is ticking", or contributed to this.***

Two UK Crimes

6. For the purposes of dual criminality and this appeal, Ms Bostock for Norway relies on two UK crimes under UK law, either of which she says suffices.

7. The first UK crime is found in section 1(1) of the Malicious Communications Act 1988 ("Offence of sending letters etc. with intent to cause distress or anxiety"), which provides:

> ***(1) Any person who sends to another person – (a) a letter, electronic communication or article of any description which conveys – (i) a message which is indecent or grossly offensive; (ii) a threat; or (iii) information which is false and known or believed to be false by the sender; or (b) any article or electronic communication which is, in whole or part, of an indecent or grossly offensive nature, is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should, so far as falling within paragraph (a) or (b) above, cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated.***

Sections 1(2), (2A) and (3) of the 1988 Act are as follows:

> ***(2) A person is not guilty of an offence by virtue of subsection (1)(a)(ii) above if he shows - (a) that the threat was used to reinforce a demand made by him on reasonable grounds; and (b) that he believed, and had reasonable grounds for believing, that the use of the threat was a proper means of reinforcing the demand. (2A) In this section "electronic communication" includes– (a) any oral or other communication by means of an electronic communications network); and (b) any communication (however sent) that is in electronic form. (3) In this section references to sending include references to delivering or transmitting and to causing to be sent, delivered or transmitted and "sender" shall be construed accordingly.***

8. The second UK crime is found in section 127(1) of the Communications Act 2003 ("Improper use of public electronic communications network"), which provides:

> ***(1) A person is guilty of an offence if he – (a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or (b) causes any such message or matter to be so sent.***

9. Mr Smith submits – and Ms Bostock does not dispute – that this section 127(1) offence has a "requisite mens rea" (see DPP v Bussetti [2021] EWHC 2140 (Admin) at §27), that the defendant:

> ***Intended his message to be grossly offensive [or of an indecent obscene or menacing character] to those to whom it related; or that he was aware at the time of sending it that it might be taken to be so by a reasonable member of the public who read or saw it.***

Norris: The 'Conduct Test'

10. Three principles from extradition case-law featured in the arguments. First, there is the "conduct test" as recognised in Norris v USA [2008] UKHL 16 [2008] 1 AC 920. For the purposes of satisfying s.137 dual criminality (§65):

> ***The court [is] required to make the comparison and to look for the necessary correspondence … between the conduct alleged against the accused abroad and an offence here.***

This is "the conduct test", with (§91):

> ***the conduct … being that described in the documents constituting the request …***

Assange: The 'Irresistible Inference' Test

11. Secondly, there is the "irresistible inference" test, recognised in Assange v Sweden [2011] EWHC 2849 (Admin) at §57. Where a necessary element (or ingredient) of the UK offence is being "inferred from the description of the conduct set out in the [Request]", it may be necessary for "the facts set out … to impel the inference", as "the only reasonable inference to be drawn from the facts alleged". The Court gave an example: a description in the particulars provided in the Request of a "use of force or coercion" would carry – as an irresistible inference – the absence of the defendant's reasonable belief in consent.

Cleveland: The 'Missing Ingredient' Test

12. Thirdly, there is the 'missing ingredient' test, to identify when the Assange "irresistible inference" test is applicable. This comes from Cleveland v United States [2019] EWHC 619 (Admin). Cleveland decided that the irresistible inference test is applicable only where "the argument is raised that the offence alleged in the foreign state lacks an ingredient essential to criminality in this jurisdiction" (§63), and "an essential ingredient under [UK] law is absent from the alleged foreign offence" (§61). Where that is not the case and the argument is simply that the "particulars of conduct supplied in the warrant or request do not address an ingredient of an equivalent English offence", the test is different: whether "an inference can properly be drawn" from information in the Request (§61); or whether that information is "incapable of supporting any such inference" (§64).

The Appellant's Case

13. Mr Smith's submissions for the Appellant came to this. First, applying the Cleveland Missing Ingredient Test, the Assange Irresistible Inference Test is applicable here and the Judge was wrong in law to find to the contrary. As to this:

    i) The 1988 Act s.1 offence (§7 above) has this as an essential ingredient: that a purpose of the accused was that sending the communication should cause distress or anxiety to the recipient or another person. The accused would need to intend or understand that the direct recipient, or a person to whom he intended there be onward communication, would be caused distress of anxiety. There would be no 1988 Act s.1 offence if the accused were joking or oblivious.

    ii) The 2003 Act s.127(1) offence (§8 above) has these as essential ingredients: (a) that the message is grossly offensive or of an indecent, obscene or menacing character; and (b) that the accused (i) intended the message to be grossly offensive or of an indecent, obscene or menacing character to those to whom it related or (ii) was aware at the time of sending it that it might be taken to be so by a reasonable member of the public who read or saw it. The accused would need to intend the message to be grossly offensive or of an indecent, obscene or menacing character to those to whom it related, or to be aware that it might be taken by a reasonable member of the public who read or saw it to be grossly offensive or of an indecent, obscene or menacing character. There would be no 2003 Act s.127(1) offence if the accused were joking or oblivious.

    iii) All of these are Cleveland Missing Ingredients from the Norwegian Specified Offence. That offence says nothing about any purpose, intention or awareness. The word "threat" does not – or may not – require any purpose, intention or awareness. The Penal Code provision refers – or may refer – to objective "circumstances", from which the "threat" was "suitable" to induce serious fear. The Norwegian offence can be – or may be able to be – committed by an accused who was joking or oblivious.

14. Secondly, the Assange Irresistible Inference Test is not satisfied here. As to this:

    i) As to the 1988 Act s.1 offence, there is no "irresistible inference" from the particulars supplied that the case against the Appellant is that he intended or understood that any direct recipient, or any person to whom he intended there be onward communication, would be caused distress of anxiety.

    ii) As to the 2003 Act s.127(1) offence, there is no "irresistible inference" from the particulars supplied that the case against the Appellant is that messages were grossly offensive or of an indecent, obscene or menacing character. Nor, in any event, is that any "irresistible inference" from the particulars supplied that the case against the Appellant is that he intended messages to be grossly offensive or of an indecent, obscene or menacing character to those to whom they related, or to be aware that they might be taken by a reasonable member of the public who read or saw them to be grossly offensive or of an indecent, obscene or menacing character.

    iii) There is no "irresistible inference" from the particulars supplied that the case against the Appellant is that he was not joking or oblivious.

Discussion: Missing Ingredient

15. This part of the analysis takes the specified offence (§4 above) and compares it to each relevant UK offence (§§7-9 above). I am unable to see any "missing ingredient".

    i) I cannot see how you can "threaten criminal conduct", and make that "threat" of criminal conduct in "circumstances" where it is "suitable to induce serious fear", without there being a message of – and which you are aware might reasonably be taken to be of – a "menacing character". That means no 2003 s.127(1) ingredient is missing. This conclusion is fatal to the appeal.

    ii) Nor can I see how you can "threaten criminal conduct", and make that "threat" of criminal conduct in "circumstances" where it is "suitable to induce serious fear", without conveying a "threat" and without having as a purpose that a person to whom the "threat" is made or directed would be caused distress or anxiety. That means no 1988 Act s.1 ingredient is missing. This conclusion is, independently, fatal to the appeal.

    iii) In short, I cannot see how you can "threaten criminal conduct", and make that "threat" of criminal conduct in "circumstances" where it is "suitable to induce serious fear", if you are joking or oblivious. That is the analysis based on the specified offence.

Discussion: Irresistible Inference

16. In light of my conclusions so far, and as the Judge found, no irresistible inference is needed. But, even if it were needed, I am satisfied that it is readily satisfied. This part of the analysis focuses on the particulars of each contentious allegation (§5 above), read alongside the specified offence (§4 above) and in the context of the other allegations in the Request (§3 above).

    i) It is clear – and at least an "irresistible inference" – from the particulars supplied in the Request, that the case against the Appellant is that his threatening messages were of a menacing character, that he intended each to be of a menacing character, and that he was perfectly well aware that they might be taken by a reader or listener to be of a menacing character. This conclusion would also be, independently, fatal to the appeal.

    ii) It is clear – and at least an "irresistible inference" – from the particulars supplied in the Request, that the case against the Appellant is that his threatening messages were conveying a "threat" and had, as a purpose, that a person to whom the "threat" was made or directed would be caused distress or anxiety. This conclusion would also be, independently, fatal to the appeal.

    iii) In short, it is an "irresistible inference" from the particulars supplied in the Request that the case against the Appellant is that he was neither joking nor oblivious. This is the analysis based on the particulars.

17. I add this footnote. It is also an "irresistible inference", from the particulars supplied in the Request, that these threats were sent as "electronic communications" by means of "an

electronic communications network". Those are certainly ingredients of each of the UK offences, missing from the Norwegian offence.

18. It follows, for all these reasons, that the appeal fails.

Norris Revisited

19. Before parting with this case, I want to return to the Norris Conduct Test. I do so, in light of the following phraseology, found in the discussion in Assange and Cleveland:

    i) First, in Assange (at §57) the Court spoke of dual criminality in terms of avoiding a situation where "a Defendant could be convicted on a basis which did not constitute an offence under the law of England and Wales". This was referenced in Cleveland (at §53), and echoed in the Court speaking (at §§59 and 61) of avoiding the risk that "a person could be convicted in a foreign court for something which would not be a criminal offence in this jurisdiction", and of ensuring that "the person requested could not be convicted of an offence overseas which would not amount to any crime in this country". In his submissions, Mr Smith referred to this as the rationale for dual criminality.

    ii) Second, in Cleveland the Court made references to 'missing ingredients' which were to be 'irresistibly inferred' from the description of alleged "conduct which will have to be established in that foreign jurisdiction" and "matters constituting the alleged foreign offence" (§§59 and 63).

20. In Norris, the argument for the requested person (at §76) was that the extradition court should "focus on that part of the conduct which constitutes the foreign offence" and on "such conduct as would prove the essential ingredients of the foreign offence". The argument was linked (§77) to this concern expressed in a previous case (§§70-71): if "ingredient D" is missing from the foreign offence, and yet if the extradition request makes an "allegation of conduct sufficient to constitute ingredient D", and if that sufficed, extradition would proceed even though no "proof" of ingredient D "will ever be required". So, "ingredient D" (for example, dishonesty) would be part of the particulars of alleged conduct but, in the event, if that ingredient were unproven or rejected a conviction would still follow. In Norris, the discussion was about price-fixing and ingredient D was dishonesty. If dishonesty was not an essential ingredient in the United States then, as long as the case alleged against the requested person were dishonest price-fixing, the requested person could be extradited. And yet, after extradition on trial in the United States, dishonesty was irrelevant and might never be proved, and yet the extradited defendant could be convicted. Dual criminality should protect against this. The focus should be on the conduct needed to prove the ingredients of the US offence. That, as I understand it, was the argument in Norris. But it was described as the 'offence test' (§76) and was rejected in favour of the 'conduct test' (§91).

21. In preferring the 'conduct test', the House of Lords in Norris was – as I see it – saying this. What matters is whether the 'case being made' against the requested person, formally identified in the extradition proceedings, matches the ingredients of a UK offence. If that is so, the requested person cannot resist extradition by arguing that there is room, after their extradition, for them to be convicted and sentenced without one of those ingredients being proved in the foreign criminal court.

22. As to the "rationale" of dual criminality, this was described in Norris as being that "a person's liberty is not to be restricted as a consequence of offences not recognised as criminal by the requested state" (§88). Given the argument which was rejected, this was presumably a reference to 'restricted liberty' in the extradition proceedings, in the context of the 'cases against' the requested person, rather than 'restricted liberty' after any post-extradition trial.

23. What about 'irresistible inference' and 'missing ingredients'? Norris held that it was not necessary to conduct an inquiry into the ingredients of the foreign offence. It was enough to compare the 'case being made' against the requested person in the particulars provided, to see if it matches the ingredients of the UK offence. Having said that, the position needs to be clear. Clarity can be provided in two ways. Either will do.

    i) One way of providing the necessary clarity is from the particulars supplied. An ingredient may be express in the particulars. Or it may be a necessary implication (irresistible inference) from the particulars. That is Assange §57 (including its example about force or coercion).

    ii) The second way of providing the necessary clarity is from the particulars, when read in light of the extradition request (or warrant) as a whole. The request or warrant is required to specify the offence. If the specified offence is known to include the relevant ingredient, you do not then need to look to the particulars for the necessary clarity, provided there is no inconsistency between the particulars provided and the offence specified. That means, logically, it is only where there is (or may be) a missing ingredient, that you would then need the clarity to come from the particulars. That is Cleveland §§59-64.

24. This is how I understand Norris and how, based on Norris remaining good law, I see the three cases fitting together. If it had mattered to the outcome of this case, I would have wanted to revisit whether it is right – without any refinement or qualification – to repeat certain phrases (§19 above). In the event, nothing turns on this and it is sufficient that I have recorded the essence of the position in law, based on Norris, as I see it.

Certification

25. With commendably promptness, having received this judgment circulated as a confidential draft, Mr Smith has filed submissions inviting certification of these as points of law of general public importance involved in my decision (s.114(4) of the 2003 Act):

> ***(1) When the particulars of conduct in an extradition request do not explicitly refer to an essential element of the relevant offence in England and Wales, is it sufficient that that element is capable of being inferred from the request read as a whole (per Zak [2008] EWHC 470 (Admin) §§15-17), or must it be an inevitable inference (per Assange §57)? (2) In light of Norris §§87-91, does the answer to (1) depend on whether or not that element is missing from the offence alleged in the requesting state (per Cleveland §§59-64)?***

26. I decline to certify. As Ms Bostock's submissions point out, these questions are not "involved in the decision". I have rejected the claimed 'missing elements' (§15 above). I have, in any event, found the "irresistible inference" test satisfied (§16 above). Cf. Konczos v Hungary [2022] EWHC 168 (Admin) §11; citing Fuzesi v National Crime Agency [2018] EWHC 3548 (Admin) at §13 (not "a point of law which arises on the

facts of the present case") and Celczynski v Poland [2020] EWHC 3450 (Admin) at §6 (points did "not, in truth, arise in the circumstances of the present case").