Neutral Citation Number: [2014] EWHC 2324 (Admin)

CO/1038/2014

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

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 2 July 2014

B e f o r e:

MR JUSTICE OUSELEY

Between:
THE QUEEN ON THE APPLICATION OF COUSINS

Claimant

v

THE PUBLIC PROSECUTION OF THE GRANDE INSTANCE TRIBUNAL OF BOULOOGNE SUR MER, FRANCE

Defendant

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(Official Shorthand Writers to the Court)

Mr B Newton (instructed by Hodge Jones & Allan) appeared on behalf of the **Claimant**
Mr N Hearn (instructed by the CPS) appeared on behalf of the **Defendant**

J U D G M E N T
(as approved by the court)

1. MR JUSTICE OUSELEY: There are some unusual and to some extent troubling features to this case. The appellant is 63 years old. She has no previous convictions. She is not, it appears, a businesswoman in any sense. Yet she faces, if the District Judge's decision is upheld, extradition to France to serve a one year sentence on a conviction warrant in relation to an offence which she provides an explanation for, but following a trial of which she received no notice, although the French prosecutor or court could have notified her.

2. District Judge Coleman at the City of Westminster Magistrates' Court on 3 March 2014 ordered her extradition. The circumstances are set out in the EAW. She was convicted of an offence of fraudulently evading the assessment or payment of VAT in a sum exceeding 700,000 Euros and of tax evasion by failing to make compulsory accounting entries between the period of September 2008 to May 2009.

3. It was said that a company called Patco Enterprise Sarl, which traded in the supply of alcohol as a cash and carry establishment in the Pas Des Calais had the appellant as the manager in the name of Patricia Whitford, although her married name is Patricia Cousins. It was said that the company had failed to file any VAT returns for that period although it had traded and had evaded the payment of VAT in the sum to which I have referred.

4. When this alleged offence came to light the French made, according to the warrant, a request for international mutual assistance.

5. The British police questioned Mrs Cousins, or Miss Whitford, on 29 November 2009 in the United Kingdom at her home. She admitted that she had gone to France with a lorry driver who was a colleague of her husband, also a long distance lorry driver. He had not been able to go so she had gone in his stead. She had been taken to various places and had signed various documents, not appreciating that they were what it is said by the French authorities they turned out to be. That was her explanation as to how her name came to be on documents found by the French authorities during the course of their investigations. That was the last that Mrs Cousins had heard of it until on 9 September 2013 she was arrested on the European arrest warrant. The warrant showed that there had been a trial in her absence following the lodging of a complaint by the Departmental tax department on 29 July 2011. That had led to the conviction in her absence on 17 January 2013 and the imposition of the one year prison sentence. Thereafter the EAW was issued and arrest took place.

6. The warrant makes clear that the appellant was not summoned to the trial or informed that it was taking place. Accordingly the warrant makes clear that she has the right to apply to set aside the judgment and would be entitled to a new trial with legal representation, interpretation and so on in France.

7. Mr Newton on behalf of the appellant contends that the warrant should be quashed because it constitutes an abuse of process. He submits that he is not able to raise issues under section 14 of the Extradition Act 2003 in circumstances to which I will come but

submits that the factors which would have applied under section 14 fall to be considered pursuant to section 21 and Article 8 of the ECHR.

8. I propose to consider the section 14 argument first. Section 14 precludes extradition where it would be unjust or oppressive by reason of the passage of time to extradite a person. But there are qualifications which matter. The relevant passage of time is the passage of time:

> "Since he is alleged to have (a) committed the extradition offence (where he is accused of its commission) or (b) become unlawfully at large where he is alleged to have been convicted of it."

9. In this case it is not contended that there has been any period of time where the appellant has been unlawfully at large, although she is alleged by the warrant to have been convicted of the offence. So if limb (b) is the only provision that applies in relation to a conviction she cannot pray in aid injustice or oppression at all.

10. Mr Newton submits -- and Mr Hearn from the requesting authority did not really dissent from this -- that limb (a) cannot apply because the passage of time since the commission of the offence is only available to ground a section 14 injustice or oppression claim where the appellant is accused of its commission. The fact that the appellant would be entitled to a retrial and thus be treated not long after arrival in France as an accused rather than as a convicted person, and that her extradition could only be ordered on that basis, does not bring her within limb (a).

11. It is contended that a number of authorities have decided or assumed that a person who is entitled to a retrial should be regarded as convicted rather than accused. Such an approach was assumed to be correct by Keith J in Campbell v the Public Prosecutor of the Grand Instance Tribunal of Saint-Malo, France [2013] EWHC 1288 (Admin); see paragraph 25.

12. The upshot is that the provisions of section 14 could never apply, or apply to the full extent, that might be expected in view of the fact that the appellant would be entitled to a retrial, where the requesting authority has never told the requested person of the trial. It is undoubtedly a curiosity, and more than that it is a matter of some concern, which Mr Newton presses, that a requesting judicial authority can seek to proceed with a trial, securing in absentia a conviction, and then prevent section 14 being argued. Even if it is not a deliberate ploy it nonetheless as a consequence may be unfair. In my judgment it would be an unfair and prejudicial outcome if there is no other means whereby the section 14 factors can be given full reign. It may be that the authorities which deal with the point at which someone is to be regarded as accused as opposed to convicted, in particular under section 14, merit some further examination where there is an entitlement to a retrial if a person is extradited.

13. Mr Hearn for the requesting authority has emphasised the breadth of the jurisdiction under section 21 and Article 8 so that all factors relevant to injustice and oppression, as might have been deployed were this an accusation warrant under section 14, should be

fully available for consideration and does not contend that they should be given any less weight than they would have been given in a section 14 case.

14. Although I have some reservations about the way in which Article 8 and proportionality could be used as some kind of kitchen sink for all aspects of extradition that cannot properly be considered under other headings, I propose to deal with the matter on the basis that there would be no injustice to Mrs Cousins through consideration of injustice and oppression to the full extent, using the Article 8 framework. Indeed although a finding of injustice and oppression under section 14 operates as a bar to extradition, the test becomes for that reason a difficult one for the requested person to satisfy.

15. Taking first injustice. It is said that the period between May 2009, the commission of the offence, and now inevitably means that witnesses will be unavailable, untraceable and memories will have faded. I am told that Mr Cousins or Mrs Cousins gave evidence to the District Judge that Mr Dines was no longer in contact with them. The District Judge made no findings at all in relation to injustice; it appears not to have been the focus of the arguments. There was nothing placed before me to say what had transpired before the District Judge but which he had failed to record or reach a conclusion about. But I am prepared for the purposes of the argument to suppose that Mr Dines is not now in contact with the Cousins. If he has wind of what has happened then there may be good reason for him to steer well clear of them.

16. I am not prepared to conclude that there is any injustice to Mrs Cousins as a result of a loss of contact over time with somebody whose presence at the trial on the face of it is not likely to be of assistance to her, if her case is that she was duped into signing a document to the effect that she was a manager of a business he wished to set up, and she did not appreciate she was doing. Mr Newton says it is speculative whether Mr Dines' evidence it would be a benefit to her or whether she would face a cut throat defence from him.

17. It is my judgment that this is a long way from showing that there is any injustice. I am not satisfied that general assertions as to delay and difficulties in tracing witnesses or in fading of memories suffices in cases of this sort, which depends upon what the documents show as much as on what she herself is able to say about those documents. Indeed there is very little that she appears to have to say apart from that she had no idea that she was doing what it is said she was doing. I am satisfied that there is no injustice in the extradition.

18. I turn then to oppression. There are really two factors that arise in relation to oppression here. The first is that she would return pursuant to this warrant as a convicted person and the second is that she would suffer an interference with her family life to a greater extent than might have been the case had the trial proceeded five years ago.

19. Taking the latter point first, I accept that for somebody who is not in good health and is in her early 60s as opposed to late 50s, and indeed for her husband, the experience of extradition and trial will be harsher than would have been the case a few years ago. Her children rely upon her also to some extent for child care of their grandchildren and

that will be made more difficult. I will consider those points further more explicitly under Article 8. Just dealing with them as oppression to test whether there is any problem through the lack of formal availability of a section 14 argument, I am not persuaded at all that the effect on her family life and health amount to oppression in this case.

20. It is said that had she been told of the trial she would have had the opportunity of attending voluntarily. Attending voluntarily might well have meant that she would have been granted bail throughout the trial and pre-trial investigation, enabling her to stay in England. Now, she would go to France as a serving prisoner until first the conviction had been set aside and secondly until a bail application could be made. But that bail application, says Mr Newton, is less likely to be successful now because in her impecunious state, absence of French accommodation, not speaking French, the problem arises of where she could be bailed, which he says would be unlikely to be England.

21. I accept that there is a higher probability of a refusal of bail, by how much I cannot tell, and certainly she would for some days, possibly a couple of weeks or so, suffer the indignity, stress and unpleasantness of being extradited as a serving prisoner, a state of affairs which might have been avoided. But I face the section 14 argument. I would not have regarded those factors as coming close to satisfying section 14.

22. It is said by Mr Newton in reliance on the sequence of events to which I have referred that the French judicial or prosecuting authorities are abusing the process of this court. They could have notified the appellant of the trial. I accept that. They chose not to. I accept that as well. They thereby seek her extradition on a conviction and not on an accusation warrant.

23. However, in my judgment for the facts to give rise to a possible basis of abuse there has to be shown something rather more than that sequence of events. In my judgment there has to be bad faith; a deliberate exploitation of the procedures in order to create prejudice or unfairness and to take advantage of a procedure to bring about disadvantage unfairly to others. Insofar as there are suggestions that a greater degree of breadth is to be given to the concept in extradition of abuse of process, I am not satisfied that that would assist here either. A mere disadvantage arising out of decisions of a prosecutor which might have gone another way cannot be an abuse of process.

24. This case bears no similarities to the decision of the Divisional Court in Federal Public Prosecutor, Brussels v Bartlett [2012] EWHC 2480 (Admin) in which extradition on an accusation warrant was postponed. A conviction warrant then followed which appears to have had the specific purpose of preventing the person on arrival in Belgium contesting a conviction or enabling him at least to face trial for an offence upon which he had been discharged on an EAW in the United Kingdom. The references to the bail problems he faced are akin to those which Mr Newton raised here, save there was much wider concern about the behaviour of a public prosecutor in that case, involving it appeared a not wholly frank approach at times with English courts.

25. That is not the position here. Although I regard the approach of the French prosecutor or courts as distinctly odd and it is a surprise that they chose to do it that way, I accept Mr Hearn's submission, as did the District Judge, that that behaviour not merely does not show bad faith but reflects what is a French process which includes as part of its justification what may be the disposal of a case without there being a need to trouble the defendant. I confess to finding it surprising but I am not able to conclude that it was oppressive.

26. Once one recognises that the question under Article 8 is whether extradition would be disproportionate, it is plain that this case cannot succeed. The appellant is a person of good character. She has a number of health problems, which the District Judge accepted. She suffers from arthritis, type two diabetes, high blood pressure, obesity and high cholesterol. She is described as a large lady with mobility problems. She is understandably anxious and depressed and on significant levels of medication. Her husband is also getting on in years; he is 67, and not in the best of health. He says he relies upon her in many respects. He gave an instance of it. I have already referred to the way in which Mrs Cousins looks after her grandchildren with child care.

27. The circumstances of the alleged offence include consideration of the amount of public money which has been allegedly evaded, so it is a serious allegation. I do not consider that the circumstances which have been deployed before me by Mr Newton, who has said all that can be said, can persuade me that the District Judge's decision was wrong and that extradition would be disproportionate. Accordingly this appeal is dismissed.