Neutral Citation Number: [2019] EWHC 732 (Admin)

Case No: CO/5505/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/03/2019

Before :

LORD JUSTICE GREEN

- -

Between :

DANIEL BARRS	**Appellant**
- and -	
THE FINANCIAL PROSECUTOR OF THE REPUBLIC	**Respondent**
AT THE HGHER INSTANCE COURT OF PARIS	
(A FRENCH JUDICIAL AUTHORITY)	

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- -

Brandon Kelly QC (instructed by **Forbes solicitors**) for the **Appellant**
Ben Lloyd (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 14th February 2019

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Approved Judgment

Lord Justice Green and Mrs Justice Simler

A. Introduction

1. This is an appeal pursuant to section 26 of the Extradition Act 2003 ("the 2003 Act") against the decision of District Judge Baraitser of 21st November 2017 ordering the Appellant's extradition to France pursuant to an accusation European Arrest Warrant ("EAW") issued by the respondent French Judicial Authority (the "Judicial Authority") on 19th June 2017 and certified by the National Crime Agency in the UK on 1st August 2017. The Appellant's surrender was ordered for a single offence of *"premeditated conspiracy to commit VAT fraud"*. The Appellant was discharged for a second defence of *"premeditated conspiracy to launder"* on the basis that the offence was barred because of double jeopardy. The Respondent has not sought to appeal against the discharge decision.

2. France is a category 1 territory, and accordingly Part 1 of the 2003 Act applies. All statutory references in this judgment are to the 2003 Act.

3. The Appellant was initially granted permission to appeal by order of Ouseley J on a single ground namely: that, pursuant to section 12 the District Judge should have decided the question of whether extradition for the fraud offence was barred by reason of the rule against double jeopardy differently, and had she done so she would have been required to order the Appellant's discharge pursuant to that section.

4. Subsequently the Appellant was granted permission to amend the notice of appeal to include two additional grounds, namely:
   (i) the Appellant's extradition would not be compatible with Article 3 of the European Convention on Human Rights ('the ECHR') in that he would face a real risk of inhumane and degrading treatment, by virtue of the lack of mental health support in the French prison system; and/or
   (ii) his mental health condition was such that it would be unjust or oppressive to extradite him (section 25 of the 2003 Act).

5. We decided to grant permission to appeal on the outstanding matters so as to allow the merits of all points to be raised. We have been addressed on the substantive merits of all three grounds. The issues for resolution by this court are as follows:
   (i) whether the District Judge was wrong to decide that the offence of premeditated conspiracy to commit VAT fraud was not barred by reason of the rule against double jeopardy (Ground one);
   (ii) whether in light of the judgment in *Shumba and others* [2018] EWHC 3130 (Admin) *("Shumba No.2")* it is arguable that the Appellant's extradition would not be compatible with Article 3 of the Convention (Ground two);
   (iii) whether his mental health and/or suicide risks are such that it would be unjust or oppressive to extradite the Appellant (Ground three).

B. The Facts

6. The Appellant was born in France on 26th July 1985. Having attended school in Luxembourg and University in the UK he returned to Luxembourg in 2007 to work with his father, returning to the UK in 2012. At the time of the hearing before the District Judge he was living in Suffolk with his wife and young daughter and was a self-employed car valet.

7. He has suffered with mental health problems since his mid-teens following cannabis and alcohol misuse. While in custody in the UK he did not receive appropriate psychiatric treatment and the provision of his medication was haphazard. He became unwell, distressed and disorientated. His condition was aggravated by repeated transfers between prisons which led to self-harm and self-destructive behaviour. Eventually he was transferred to a prison with a psychiatric wing. On his release from custody he was placed under the care of the early intervention service.

8. In 2015, the Appellant stood trial at Southwark Crown Court on an indictment containing six counts. The Appellant and his father, Daniel Andrew Barrs (referred to as Mr Barrs senior) were named in five of the six counts (they were not named in count one) relating to money laundering. The indictment period in relation to all six counts was 1st November 2008 to 31st July 2009. We shall return in due course in a little more detail to the substance of the counts with which the Appellant was charged. The Appellant was acquitted on counts two and three and convicted of three offences, counts four, five and six. He was sentenced on 21st April 2015 to 3 years' imprisonment and released in June 2016. His father was convicted of the same offences and was released from prison in September 2018.

9. The EAW indicates that the Appellant was first summoned by the French Judicial Authority investigators in July 2014 but replied that he would not submit to the summons because of ill-health. There was a request for mutual assistance dated 8th March 2016 seeking to interview the Appellant while he was in prison serving part of the sentence to which we have referred. The Appellant implicitly refused to attend any interview. On his release from custody the Appellant was summoned by letter dated 23rd February 2017 to attend with a view to French investigators conducting a first police interview but refused to do so.

10. The Appellant was arrested and brought before Westminster Magistrates Court on 1st August 2017. Proceedings were opened and the case adjourned for final hearing on 14th September 2017. The Appellant was initially remanded in custody but was granted conditional bail on 8th August 2017 and remained on bail throughout the proceedings.

11. On 21st November 2017, the District Judge gave judgment as indicated, ordering the Appellant's surrender in relation to the VAT fraud offence. In relation to the double jeopardy argument, the District Judge was referred to *Fofana v. Deputy Prosecutor Thubin Tribunal de Grande Instance de Meaux, France* [2006] EWHC 744 (Admin) *("Fofana").* It was common ground that *Fofana* established that there are two circumstances in which section 12 of the 2003 Act is engaged: first, where the

subsequent prosecution follows an acquittal or conviction for an offence (or offences) which are the same in fact and law as those previously prosecuted; and secondly, where the subsequent prosecution follows a trial for any offence which was founded on *"the same or substantially the same facts"* as an earlier prosecution, and the court would normally consider it right to stay the prosecution as an abuse of process absent special circumstances being demonstrated as to why another trial should take place.

12. The Appellant relied on the second of these circumstances. It was his case, in summary, that the gravamen of the illegal activity alleged against him in the French fraud was very similar to that alleged in the UK trial. In the French fraud, he argued, he is alleged to have provided company structures used by his co-conspirators to divert VAT. In the English prosecution, he was alleged to have provided payment platforms to his co-conspirators to enable them to launder the proceeds of the VAT fraud. In neither case is he accused of participating in the fraudulent trading itself. Moreover, he contended (and contends) that there is evidence of significant overlap between the individuals involved in the French VAT fraud and those named in count two on the UK indictment; and further, evidence about the French companies named in the EAW as featuring in the French fraud, formed a substantial part of the case against him in relation to the money laundering offences in the UK prosecution.

13. The District Judge concluded in relation to the fraud allegation (but not the money laundering allegation), that the facts of the UK offences were not the same or substantially the same as those said to give rise to the French fraud allegation. She gave six reasons:

    (i) In the UK proceedings the Appellant was not indicted for the offence of fraud. His involvement in the VAT fraud against HMRC was limited to involvement in the money laundering arrangements set up to deal with the proceeds (paragraph 50 of the judgment).
    (ii) The companies used to perpetrate the fraud against HMRC are numerous and periodically changed their names. They included C&T Environmental Services Ltd ("C&T"), Black Bamboo Ltd, Heathrow Services Ltd and universal management UK. None of those companies are referred to in the EAW or appear to feature in the French investigation (paragraph 51 of the judgment).
    (iii) There are six named individuals in the UK indictment. However, the EAW only refers to two of these individuals, the Appellant and Mr Barrs Senior (paragraph 52 of the judgment).
    (iv) The French authority itself states *"it is necessary to observe that the investigation hearing does not relate to the same facts [as the UK offences]"*. This statement carries significant weight. It is made by a member state of the Council of Europe. In addition, it is made by an authority with detailed knowledge of its own investigation and best placed to make a comparison between the two sets of proceedings (paragraph 53 of the judgment).
    (v) The further information dated 27th October 2017 confirms that the focus in the French allegation is on the companies, ACSYS (said to have caused a loss to the French Treasury of approximately €32 million) and Kappa Distribution (said to have caused a loss to the French treasury of approximately €82

million). In the UK proceedings references to these companies show they were peripheral to the case against the Appellant (paragraph 54 of the judgment).

(vi) Conversely there is no evidence that companies such as Universal Boissons and Finance Carbone, which featured in the UK proceedings, have an important role in the French allegation. They are not referred to in the EAW (paragraph 55 of the judgment).

For these reasons the District Judge was satisfied that the UK proceedings were not founded on the same or substantially the same facts as the French fraud allegation and, accordingly, she held that extradition was not barred by reasons of double jeopardy.

15. As we have already indicated, the District Judge reached a different view in relation to the money laundering allegation. Here she was satisfied that there was considerable overlap in the criminal behaviour investigated by the French authorities and that prosecuted in the UK indictment. The behaviour which underpinned both investigations (and the subsequent convictions in the UK proceedings) was in her judgment the same. Extradition was accordingly barred in relation to this allegation.

16. Further, the District Judge rejected the arguments advanced on the Appellant's behalf that his extradition would not be compatible with his Convention rights. In relation to section 21A of the 2003 Act she held that the high threshold required for Article 3 had not been reached in relation to his mental ill-health and risk of suicide. She held that the offence was serious and would attract a lengthy custodial sentence if the Appellant was convicted. No less coercive measures had been identified. Accordingly, the District Judge was satisfied that extradition would not be disproportionate, having regard to the factors in section 21A(3). Finally, she concluded that the high threshold required to satisfy section 25 of the 2003 Act (ill-health) was not met so that it was neither unjust nor oppressive to extradite him.

C. The Law

17. The focus of the first ground of appeal is section 12 of the 2003 Act which is headed *"rule against double jeopardy"*. It provides:

> "A person's extradition to a category 1 territory is barred by reason of the rule against double jeopardy if (and only if) it appears that he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction on the assumption—
>
> (a) that the conduct constituting the extradition offence constituted an offence in the part of the United Kingdom where the judge exercises jurisdiction;
>
> (b) that the person were charged with the extradition offence in that part of the United Kingdom."

18. Section 12 gives effect to Article 3(2) of the European Council Framework Decision of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) ("*the EAW Framework Decision*"). This provides:

> "The judicial authority of the Member State of execution (hereinafter 'executing judicial authority') shall refuse to execute the European arrest warrant in the following cases:
>
> …
>
> 2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State …"

19. Section 12 can plainly be relied on in circumstances where, if a person were charged in the UK with the conduct for which extradition is sought, he could plead *autrefois acquit* or *autrefois convict.* In other words, where precisely the same offence is charged in the later proceedings. Section 12 is also engaged in a broader context where the requesting state seeks to prosecute for an offence founded on *"the same or substantially the same facts"* as an offence for which the defendant has already been prosecuted, such that it would be an abuse of process to prosecute again for a second time.

20. So far as grounds two and three are concerned, section 21A provides under the heading "Person not convicted: human rights and proportionality",

> "(1) If the judge is required to proceed under this section…, 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.
>
> (5) The judge must order D to be extradited to the category 1 territory in which the warrant was issued if the judge makes both of these decisions—
>
> (a) that the extradition would be compatible with the Convention rights;
>
> (b) that the extradition would not be disproportionate…".

D. Ground 1 - double jeopardy

21. Before addressing the arguments advanced by the parties on this ground, it is necessary to consider the substance of the offences prosecuted in the UK and the French fraud allegation in greater detail.

The UK offences

22. The trial at Southwark in 2015 (based on the six-count indictment to which we have already referred, and referred to below as the *"2015 Indictment"*) followed two separate investigations, known as Operation Carp and Operation Tulipbox. It centred on a UK-based VAT fraud, known as a Missing Trader Intra- Community ("MTIC" or "carousel") fraud involving dishonest manipulation of internet-based trading in carbon credits by four co-defendants together with a number of other named individuals, including Mr Angelo Vincent. Neither the Appellant nor Mr Barrs Senior were charged with this fraud which was the subject of count one on the 2015 Indictment.

23. At the material time carbon credits were treated for VAT purposes as a supply of services and VAT was charged at 15% during the period under consideration on the indictment. That meant that a UK company or business registered for VAT was required to charge VAT on supplies of carbon credits to its customers and account for the VAT so charged to HMRC, after deducting any VAT it had paid to suppliers

(input tax) from whom it had bought the carbon credits. The acquisition of carbon credits from companies based abroad was treated as zero rated, giving rise to the possibility of dishonest exploitation. The fraud was executed through the use of a chain of companies which started, in the UK in the Operation Carp fraud, with C&T Environmental Services Ltd ("C&T"). This company defaulted on millions of pounds worth of VAT and as a consequence, the carbon credits could be sold cheaply but profitably through the rest of each chain of UK companies. The missing VAT was retained by the criminal group because the other companies involved in the chain were able to reclaim the VAT paid out on their purchases in accordance with VAT rules and/or to exploit the zero rating. C&T and other companies like it in the chain, were simply devices for raising and defaulting on VAT invoices. The loss resulting from the fraud was a loss to the UK Treasury of £11m in VAT in relation to Operation Carp and £38m in relation to Operation Tulipbox.

24. The working capital from the fraud was sent abroad to companies with New Zealand bank accounts from where it was recycled to fund further dishonest transactions. The banking arrangements in New Zealand were opaque and convoluted.

25. The proceeds of the fraud covered by Operation Carp were sent abroad to a company called Techno Cash Pty Ltd, which held a bank account with the Bank of New Zealand on the instructions of another company called First Commodity Finance Corporation. It was alleged (on count two of the 2015 Indictment) that Business Consultancy Services (referred to as "BCS"), the Luxembourg-based company run by Mr Barrs Senior, with the Appellant, was responsible for setting up the foreign corporate structure through which the money obtained in the operation Carp fraud was laundered using the offshore banking facilities in New Zealand. The prosecution case was that the Appellant and his father played the predominant role in devising and setting up the money laundering system. However, for reasons it is unnecessary to develop, the Appellant (and his father) were found not guilty on count two upon the direction of the judge. The Appellant was found not guilty by the jury on count three, and he was convicted on counts four, five and six.

26. In Operation Carp, which involved the later of the two conspiracies, there was one chain involving four UK companies and £11 million of VAT was lost to the UK Treasury in consequence of this fraud which occurred over 23 trading days between 1 and 31st July 2009. The two companies inserted in this chain in order to default on the payment of VAT to the UK Treasury were two UK companies, C&T (already referred to above) and Black Bamboo Ltd. C&T was the principal defaulting company. The defaulting trader transferred the carbon credits to another VAT registered company in the UK (a buffer company – here, Black Bamboo Ltd) and the buffer sold to a second buffer, and then onwards.

27. A separate but almost identical conspiracy to defraud took place earlier than that investigated as part of Operation Carp and involved two separate chains of companies. The earlier fraud conspiracy was tried at Southwark in 2012 and resulted in convictions of three of the four co-conspirators subsequently named in count one of the 2015 Indictment. It was investigated as part of Operation Tulipbox.

28. Counts three, four and five of the 2015 Indictment related to the money laundering arrangements set up by the Appellant and his father (again through BCS) to transfer

abroad the proceeds of the earlier Tulipbox fraud. It was alleged that the Appellant and Mr Barrs Senior provided corporate structures through which the various accounts were held, together with access to the accounts and payment platforms including software required for their operation, in circumstances in which they must have known or suspected that the ultimate intention of the purchasers was to use the companies to facilitate the obtaining, transfer or concealment of criminal property. There were three structures involved: Trade Alliance Finance Group Ltd (count three); Prime Savings and Trust (count four); and Ultimate Financial Services LP (count five). As already indicated, both were convicted on these three counts. According to the sentencing remarks of HH Judge Testar, the structures in count four were created in the early part of 2008 and employed for the purposes of the Tulipbox fraud when the time came. The structures in counts five and six were brought into existence at the end of 2008 and the beginning of 2009 when the frauds in Tulipbox and Carp were being devised (Transcript page 15D-G).

29. In Operation Tulipbox, the co-conspirators operated between them, seven companies used in the two separate trading chains to which we have referred. £38 million of VAT was lost to the UK Treasury in consequence of this fraud.

30. Although, as the Prosecution acknowledged in its Opening Note, there is an international flavour to criminal activity of this type, the prosecution case at Southwark Crown Court focused on what went on in the UK and the loss incurred by the UK Treasury as a consequence of these frauds and the linked money laundering arrangements.

The French fraud allegation

31. The District Judge summarised the French fraud allegation at paragraph 45 of her judgment. She characterised the offence alleged as one of conspiracy to cheat the French revenue using companies trading in carbon credits to default on VAT due to the French Treasury. The Appellant (with his father) is alleged to have set up and managed three companies with the focus of the allegation being on two particular companies, ACSYS and Kappa Distribution. The broad period over which the alleged fraud took place is April 2008 – July 2009 (originally stated in the EAW as July 2008 – January 2009 but later corrected in the Further Information dated 27th October 2017). On each occasion the company was set-up for trading by the Appellant and his father then sold to another before the fraudulent activity took place; but it is alleged that the Appellant (at least) maintained control of each company during the relevant period. It is not alleged that the Appellant participated directly in trading using these companies, but that he created these companies knowing they would be used to commit fraud. In fact, the fraud perpetrated by ACSYS resulted in a loss to the French Treasury of approximately €32 million and the fraud perpetrated by Kappa Distribution a loss of approximately €82 million, again to the French Treasury.

32. The District Judge summarised the additional information from the Respondent relating to double jeopardy (provided in documents dated 27th October and 2nd November 2017) as follows (see paragraph 14 of the judgment):

> "General

The time period within which the allegations take place is amended to April 2008 to July 2009

Mr Barrs is being prosecuted for conspiracy to commit VAT fraud. He is alleged to have created the conditions which have allowed his co-conspirators to carry out the fraud and to have been aware his actions enabled the fraud.

The investigation shows that Mr Barrs was involved in a "very large scheme of VAT fraud" relating to greenhouse gas emission trading. The total loss to the French Treasury is more than €118 million.

Each company involved in this fraud is a French company. Each breached their fiscal obligations to the French State.

Mr Barrs is suspected of providing companies to named individuals, knowing that they would be used to commit the VAT fraud. The named individuals are Angelo Vincent and Martin Thiasen. The companies identified are ACSYS and KAPPA Distribution.

It should not matter that these companies were supplied by a network of non-French companies trading in carbon such as Omega and Blue Sources. Nor should it matter that these non-French companies were involved in the Tulip Box fraud for which Mr Barrs was convicted in the UK.

Business Consultancy Services (BCS)

Mr Barrs, together with his father, managed Business Consultancy Services (BCS) between 2007 and 2010.

The company was based in Luxembourg. It specialised in advising clients on acquisitions and providing them with onshore and offshore business structures.

BCS received €150,000 from ACSYS and €115,000 from Omega Commodities in relation to services provided to these companies.

ACSYS

This company was launched in 2001 by Daniel Andrew Barrs (the Requested Person's father) and incorporated in France. It provided and maintained IT equipment.

On 25 June 2008 Mr Barrs sent an email to Mr Vincent in which he stated ACSYS was "ready for action". He offered to help him make "a lot of money" at a cost to Mr Vincent of €20,000.

In July 2008 Daniel Andrew Barrs sold his shares in the company to Patrick Biezske, described as "a polish carpenter who lived in Denmark". Mr Barrs senior and junior retained control of the company. Mr Barrs (junior) was involved in the daily management of the company.

The company was involved in trading on the greenhouse gas emissions certificates market. All sales made by the company were subject to VAT. It was the responsibility of the company to collect VAT from their clients in order to return it to the French treasury. The company failed to make this return and kept the money which was then laundered from offshore bank accounts.

The total amount this company should have paid to the French treasury is €32,256,777.75.

Kappa

This company was launched by Mr Barrs (junior) in September 2008. It traded in goods and services of all kinds.

A month after it was launched, Mr Barrs sold his shares to Alim Karakas. The company was incorporated in France, Mr Karakas lived in Poland. He is said to appear to suffer from psychiatric disorders.

This company was also involved in trading on the greenhouse gas emission trading market. The relevant period was January 2009 to June 2009. The total amount this company should have paid to the French treasure was €82,434,255.

Although this company was officially opened and managed by Mr Karakas, Mr Barrs appears to have retained control. For example the company's accountant continued to discuss financial matters with Mr Barrs. Documentation relating to the company was found in Mr Vincent's house following a search in May 2010.

Ultimate Financial Services (UFS)

This company was incorporated in New Zealand.

The holding company for UFS is Ultimate Financial Holdings S.A., located in Panama. This company is registered at the same address as that of another company, Epsilon Group SA also managed by the Barrs family. Epsilon Group SA is the auditor of BCS. It is a financial platform. It is alleged it was used by some of the companies involved in the VAT fraud, to launder the money from the fraud."

33. The Appellant submits (as he did below) that the second limb of the double jeopardy rule as formulated in *Fofana*, is engaged; in other words, the prosecution which the Appellant now faces in France on the first charge set out in the EAW, arises out of the same or substantially the same facts which led to his conviction in 2015 in Southwark Crown Court. Mr Kelly QC on his behalf, criticises the six reasons (set out at paragraphs [50] to [55] of the judgment, and summarised at paragraph [13] above) advanced by the District Judge for reaching the contrary conclusion as either immaterial or irrelevant to the issue she was deciding, or in some cases as simply wrong.

34. First, he submits (contrary to the first reason given by the District Judge) that it is immaterial that the Appellant was not indicted for the offence of fraud in the UK prosecution: the nomenclature of the count is irrelevant, and the focus should, instead, be on the facts underlying the offences. Further, Mr Kelly submits that a system as corrupt and contrived as that involved in count one is reliant on being able to dispose of the proceeds very quickly and the inevitable proximity of those involved in the money laundering suggests that fraud *could have been* charged.

35. Mr Kelly criticises the District Judge's second reason on the basis that the companies to which she referred are not relevant to the double jeopardy argument as the Appellant was not charged with fraud in the UK proceedings and can only rely on the facts underlying the money laundering offences with which he was charged. That seems to us to contradict the submission made by Mr Kelly that it is the facts underlying the offences that must be considered, rather than their legal classification. He also submits that the District Judge took too narrow a view of the facts when concluding that none of the companies used to perpetrate the UK frauds appear to feature in the French investigation.

36. So far as the third reason is concerned, the District Judge relied on the fact that six individuals were named in the 2015 Indictment whereas only the Appellant and his father were named in the EAW. Mr Kelly contests this. First, he submits correctly that the EAW does not name the conspirators involved. Secondly, and in any event, he makes the point that there is considerable overlap in the individuals involved in both the UK and the French schemes: for example, the first ILAR dated 22nd March 2012 states that *"some members of the Dosanjh British family seem connected with the French fraud"* and mention is specifically made of Gurmail Dosanjh, also named in the second ILAR dated 8th March 2016. Further, he relies on the fact that evidence was led in Southwark about Angelo Vincent (named as a co-conspirator in the 2015 Indictment) acting as an intermediary in the transfer of Kappa Distribution, the company used in the French VAT fraud, from the Appellant to a third person, Alim Karakas; and evidence of communications between the Appellant and Angelo Vincent in relation to the sale of this company and its VAT registration number was deployed to demonstrate *mens rea* in the UK offences by reference to the fact the Appellant was involved in the setup and sale of the company subsequently used in fraudulent activity.

37. The District Judge's reliance, fourthly, on the Respondent's own statement that the French investigation did not relate to the same facts as the UK offences, as carrying

great weight is also criticised. Mr Kelly points to the fact that the same statement was made in respect of the allegation the District Judge concluded did arise out of the same or similar facts. Furthermore, he points to the fact that the French Authority asked for Operation Carp material only; whereas the UK trial covered Operation Tulipbox as well and, for example, Omega Commodities featured in the Tulipbox investigation as a company created by BCS and used in one of the UK fraud chains.

38. So far as concerns the fifth reason (that the focus of the French allegation is on ACSYS and Kappa Distribution, but both were peripheral to the UK prosecution) Mr Kelly challenges this as simply wrong. He relies on references to Kappa Distribution in the Prosecution's Opening Note at trial on the 2015 Indictment and contends they formed an important component of the UK prosecution. He points to evidence (led by the Prosecution) about the original formation and transfer of Kappa Distribution (see above). Similarly, there was evidence about the Appellant's involvement in the setup and sale of ACSYS.

39. Criticism of the sixth reason is linked: the companies, including Omega Commodities, Universal Boissons and Finance Carbone (all relevant to the French fraud allegation) featured in Operation Tulipbox as companies involved in the chain of carbon credit trading or companies which moved money into offshore bank accounts. Further, Ultimate Financial Services LP is the payment platform the Appellant (and Mr Barrs Senior) are alleged to have supplied to launder the proceeds of the French VAT frauds and was also the payment platform used to launder criminal property particularised in count five of the 2015 Indictment. Evidence was led in the UK trial about the creation, management and use of Ultimate Financial Services LP by the Appellant (and his father) and reference was made to their correspondence with a New Zealand company formation agency run by Garth and Caroline Melville, two of the co-conspirators named in count two of the 2015 Indictment. The Appellant contends that the same evidence would clearly be relied on in the French proceedings.

40. Mr Kelly accepts in relation to each individual feature relied on above that it is not dispositive. However, he relies on the cumulative effect of all these points as demonstrating that the French fraud allegation involves a conspiracy with the same or similar people to commit a very similar fraud using the same companies and structures, and based on much the same evidence. He submits the gravamen of the illegal activity alleged is the same as that in the 2015 Indictment, namely, the Appellant provided company structures and payment platforms used by criminals to facilitate fraud and transfer the proceeds abroad. The French VAT fraud is in essence the same and is based on substantially the same facts as the UK money laundering offences for which the Appellant has already been tried in 2015. The double jeopardy bar accordingly applies, the Appellant should have been discharged and the District Judge was wrong to order his surrender.

41. On behalf of the Respondent Mr Lloyd resists the appeal. He submits in summary that the District Judge carefully considered all the evidence before her and made findings about the two sets of proceedings and the corporate entities involved at paragraphs [14] to [17]. Those were findings she was entitled to make and they must be respected. Further, the District Judge carefully considered the double jeopardy argument advanced by the Appellant. She properly directed herself as to the relevant

law and applied the correct test, as is common ground. He submits the District Judge was correct for broadly the reasons she gave, to reject the double jeopardy bar. In any event, he contends that her conclusion was obviously correct. His essential submission is that there is no basis to conclude that the French fraud allegation is based on the *"same or substantially the same facts"* as the offences for which the Appellant was tried at Southwark in 2015. To put it another way, the Appellant was not prosecuted at Southwark for the essential conduct underpinning the French fraud allegation; namely a VAT fraud in France committed against the French State.

42. We accept the force of some of the criticisms advanced by Mr Kelly of the District Judge's reasoning. Her approach in some respects may have been to paint with too broad a brush; and in some particular respects we accept that she was wrong. For example, the French fraud allegation does involve the same group of people committing the same type of fraud over a similar period as that tried in Southwark.

43. However, the question for us is whether the District Judge's conclusion (rather than her reasoning) is correct or not, and on this question we have come to the firm conclusion that she was correct to conclude that the Appellant's prosecution for the fraud offence on the EAW is not barred by section 12 of the 2003 Act. Our reasons for that conclusion follow.

44. The focus of the application of section 12 of the 2003 Act must be on the facts said to give rise to the double jeopardy bar. The critical question is whether the facts of the French fraud allegation are *"the same or substantially the same"* as the facts which gave rise to the 2015 Indictment. That is a question of substance and not a question of form. It is therefore necessary to look closely at the detailed facts.

Differences between the French and domestic proceedings

45. It seems to us that there are some highly significant differences of substance between the facts underlying the French allegation and those of the earlier offences.

46. First, although a similar *modus operandi* was used in both sets of frauds, and there are a number of areas of overlap (particularly in relation to people involved) the actual *"apparatus"* used was different because different vehicles were used to effect the frauds. Two French registered companies were the tax defaulting companies principally used to conduct the VAT fraud in France: ACSYS and Kappa Distribution. Neither was used to conduct the VAT fraud prosecuted in the UK or for the UK money laundering offences (although there was reference to these companies in the UK prosecution as the Appellant correctly contends).

47. In relation to ACSYS, as the District Judge observed, it was registered much earlier in France by Mr Barrs Senior, but in June 2008 the Appellant sent an email to Mr Vincent in which he stated ACSYS was "*ready for action*". The Appellant offered to help Mr Vincent make *"a lot of money"* at a cost of €20,000. Although shares in

ACSYS were sold, the Respondent relies on evidence that the Appellant and his father retained control of ACSYS and the Appellant was involved in the day to day management and control of this company throughout the relevant period. There is also evidence relied on of payments of around €150,000 from ACSYS to BCS. ACSYS traded in carbon credits subject to VAT due in France, from 30th July 2008 to 18th December 2008, selling to ELSA Technologie before defaulting on its VAT liabilities to the French Treasury.

48. In relation to Kappa Distribution, it was registered in France and launched by the Appellant in September 2008. It started trading in carbon credits to Finance Carbone from January 2009 to June 2009, ultimately defaulting on its VAT liabilities in France. Although Kappa Distribution was sold to Alim Karakas by the Appellant (a fact relied on in the UK prosecution as evidence of the Appellant's involvement in the wider UK scheme), the Respondent relies on evidence that he retained involvement in Kappa Distribution, and in particular, Grant Thornton continued to discuss all its financial affairs with the Appellant.

49. Accordingly, while the UK proceedings did refer to evidence of the Appellant's involvement in setting up ACSYS and Kappa Distribution, these were peripheral references in context: for example, a Kappa Distribution invoice was used as a template and adapted for use by other companies, and articles of association for Kappa Distribution were recovered from Angelo Vincent's computer in a flat in Copenhagen, and contained the Appellant's signature. There was no suggestion, nor any evidence, in the UK prosecution that either company was itself used to conduct VAT fraud against the French State; and neither featured in the UK chains of carbon credit trading that were the subject of the 2015 Indictment.

50. ACSYS and Kappa Distribution are undoubtedly the focus of the French fraud allegation, but it is also the case that other companies higher up in the chain of carbon credit trading used in the French fraud (for example Omega Commodities, Finance Carbone and there may be others) were also used in the UK trading chains to which we have referred in describing the 2015 Indictment. We do not regard this as detracting from our conclusion that the apparatus alleged to have been used by the Appellant in the two jurisdictions was separate and different. These were separate frauds starting with different companies that owed their own separate VAT liabilities to the French Treasury. The insertion of some of the same companies higher up the supply chain of companies engaging in the onward carbon credit trading does not alter that.

51. Second, the broad time-frame for the alleged French fraud offence is April 2008 to July 2009 (see further information dated 27th October 2017). That is broken down further by reference to evidence that Kappa Distribution's first invoice for carbon credit trading is dated 18th December 2008 and continued until June 2009. For ACSYS the period is 30th July to 18th December 2008 (according to information provided by the Respondent). By contrast, the UK fraud in Operation Carp took place over a limited period of 23 trading days between 1st July and 31st July 2009; and as HH Judge Testar observed, the structures in count four were created in the early part

of 2008 and employed for the purposes of the Tulipbox fraud when the time came. The structures in counts five and six were brought into existence at the end of 2008 and the beginning of 2009 when the frauds in Tulipbox and Carp were being devised.

52. Third, the victim of the two VAT frauds is entirely different and stems from different VAT obligations. In the 2015 Indictment the British Treasury was the victim of the fraud and money laundering charges stemming from VAT obligations owed in the UK principally by C&T (and by other UK incorporated companies which defaulted on the VAT due). In the French EAW the victim is the French Treasury said to have been defrauded by transactions effected by ACSYS in the sum of €32 million (odd) and Kappa Distribution in the sum of €82 million (odd), each by virtue of French VAT obligations owed by these companies in France.

53. There is no evidence that the 2015 Indictment encompassed the French fraud in any sense; nor was the Appellant sentenced in 2015 by reference to the loss to the French State. In other words, the value of the French tax fraud was not part of the UK prosecution.

54. During the hearing we sought to test the limits of the arguments on both sides by reference to a number of hypothetical scenarios. For example, a malware apparatus created once by a person in the Appellant's shoes, which is then sold and used repeatedly by others in different jurisdictions without his involvement. We can see that in this scenario, it might prove too much to contend that once the supplier of the malware had been convicted for the sale and its use, further prosecutions could reasonably follow in respect of *each* subsequent use. However, that scenario is far removed from the facts alleged in this case. This is not a case where it can be said that a single system for effecting the alleged VAT frauds (the apparatus) was developed once by the Appellant, and then simply used repeatedly on a number of occasions across different jurisdictions by others without further separate involvement of the Appellant. Here, the allegation is that he set up the apparatus, which included ACSYS and Kappa Distribution (different companies to those used in the UK chains to default on their VAT obligations) and retained control of these two companies, knowing they were being or would be used to default on their ongoing VAT obligations and thereby defraud the French Treasury. This apparatus was not used in the UK frauds. The apparatus set up for use in the frauds prosecuted in the 2015 Indictment was separate albeit the structures created were very similar. The facts here are much closer to a hypothetical internet fraud involving a website set up by a person in the Appellant's shoes, to offer modelling agency services for a fee, but having taken the fee from prospective customers, offering no service at all. Following a prosecution in the UK involving UK victims of this hypothetical fraud, there could be no prohibition based on double jeopardy in respect of a prosecution in France in respect of the French victims.

Conclusion

55. In our judgment, it follows from the points made above that the substance of the French fraud allegation is distinct from the allegations in the 2015 Indictment and the

UK prosecution. The VAT fraud alleged by the Respondent concerns companies registered in France – ACSYS and Kappa Distribution – making transactions that defrauded the French government, diverting approximately €115 million of VAT that ought to have been paid. The UK proceedings, on the other hand, were concerned only with the defrauding of the UK government together with money laundering. The two are not founded on "*the same or substantially the same facts*" for the reasons we have given. The District Judge was entitled so to conclude, and it cannot be said she ought to have decided this question differently.

56. In reaching these conclusions, we have considered, albeit without formally granting permission to introduce as additional evidence, the additional material sought to be relied upon by the appellant that was not before the district judge. The Respondent opposes the application to admit this material on the basis that the material was available and could have been adduced. It seems to us that even if admitted, the documents do not provide a basis for allowing the appeal under this ground. Nothing in the documents demonstrates that the French fraud allegation is based on the same or substantially the same facts as the offences for which the Appellant was tried in 2015.

57. In our judgment, therefore, the District Judge was right to reject the double jeopardy bar and we dismiss this ground of appeal

E. Ground 2: Detention in conditions which are not Article 3 compliant

58. Initially the Appellant argued that (i) his mental state was so fragile that extradition and the attendant stresses and strains would create a real risk of suicide and/or significant self-harm and that accordingly, extradition would be oppressive and unjust but also (ii) that the conditions in French prisons were violative of Article 3 ECHR which was a bar to extradition but, moreover, would materially contribute to the risk of suicide and/or significant self-harm. With regard to argument based upon the conditions of French prisons it is now accepted that such an argument cannot be sustained. The Appellant initially raised this following the decision of the Divisional Court on 12th July 2018 in *Shumba & Others v France* [2018] EWHC 1762 (Admin) ('*Shumba No.1*'). The Court ruled in relation to Article 3 (at paragraph [87]) that:

> *"*…the crucial evidence in the present case relates to overcrowding in the four prisons with which we are concerned. In relation to those four prisons, we are satisfied on the evidence that there may be substantial grounds for believing that the Appellants face a real risk of inhuman or degrading treatment if they are extradited."

59. In those circumstances, the Court requested further information from the French authorities to address the issues. The French authorities responded and there was then a further judgment in the case of *Shumba No.2 (ibid)* which found that the French authorities had answered the concerns that had previously been expressed. The

Appellant was extradited to France. There is no outstanding issue that can be taken in relation to conditions in French courts. The Court (at paragraph [23]) stated

> "In conclusion, the MoJ has responded directly to the questions raised in relation to the Appellants in our last judgment. Our central concern about a possible breach of Article 3 based on overcrowding has been answered. Ancillary concerns raised by the Appellants relating to other conditions of detainment do not persuade us, either individually or cumulatively, that there is a real risk of a breach of Article 3 based on other grounds. In the light of the further information provided, there are no substantial grounds for believing that, if extradited, the Appellants would face a real risk of being subject to inhuman or degrading treatment in breach of Article 3. The appeals will be dismissed accordingly."

60. Mr Kelly for the Appellant realistically accepted that before us it was no longer open to him to maintain this Ground and it was not pursued. This means that Ground 3, on the risk of suicide / self-harm, to which we now turn, stands alone and is unaffected by an argument based upon the exacerbating effect of conditions in French prisons.

F. Ground 3: The risk of suicide

Appellant's case

61. The Appellant's case is that extradition would give rise to an acute risk of suicide or self-harm and that, accordingly, it would amount to a breach of Section 25 of the 2003 Act as "*unjust or oppressive*". The Judge rejected that claim. She had before her a detailed report from a Dr Koen dated 5th August 2017 and an addendum report dated 31st August 2017. The Judge summarised the reports accurately. The Judge dealt with the issue of suicide risk in the context of her analysis of the argument that prison conditions in France were violative of the requirements of Article 3 ECHR and also in the context of Section 25. At paragraph [76] the District Judge held that there was no present risk of suicide. In paragraphs [75] and [77] the District Judge also held that there was no evidence that the Appellant's illness, including his emotional unstable personality disorder and his psychotic illness, could not continue to be treated both in the Community and if detained within the French prison estate should it remerge. Dr Koen suggested that the Appellant, should he be detained in France, be held in an individual cell space with the support of an experienced consultant psychiatrist for the management of his medication and the monitoring of his mental state.

62. The Judge did not accept that the risk amounted to an obstacle to extradition and held that it should be presumed that the judicial authority in France would "… *discharge its responsibilities to prevent Mr Barrs harming himself or committing suicide*".

63. In the light of the judgment the Appellant argues that there are new developments of relevance which, in effect, materially alter the situation and in particular updated

medical evidence which concludes that the Appellant's mental state could deteriorate to the point where he would be a real self-harm and acute suicide risk, were he to be extradited. Two new pieces of evidence from Dr Koen have been placed before the Court. First there is a report dated 14th July 2018. Second there is a two-page letter dated 11th February 2019. The 2018 report observes that the Appellant was at the time undergoing a "*fragile recovery*" in his condition but remained at risk of self-harm and suicide. He was suffering from a "*possible psychotic illness and, possible schizophrenia in combination with emotional unstable personality disorder*" and that "*this combination of disorders has high risk of relapse and deterioration of the mental state*". The two-page letter report follows from a review of the Appellant's mental state on 4th February 2019 and is in similar vein to the earlier report and expresses the view that the Appellant's mental state would deteriorate if extradited. It says that the Appellant has self-reported feelings of anger towards himself and others. He has said that if he were extradited, he has formulated plans to take his own life.

64. In light of this it is argued: that the Appellant has a history of self-harm and has been assessed as a high risk of suicide; that he did not receive appropriate support whilst serving his sentence in the UK and that his mental health deteriorated leading to self-harm and one suicide attempt; and that there are clinically expressed "*grave"* concerns about the consequences of a further period of incarceration.

The relevant framework for analysis

65. It is necessary to identify the framework of analysis for this issue. Case law makes clear that before a risk of suicide can be taken into account as part of a decision whether to extradite, there must be real evidence (i) that the risk is sufficiently serious; (ii) that the physical process of transfer will itself give rise to an unmanageable risk, and/or (iii), that the conditions upon arrival in the Requesting State will create such a risk; and (iv), that in any event the authorities in both the Requesting and Requested states are unable satisfactorily to treat and address the medical concerns arising. The issue was recently considered by the Divisional Court in *Janusz Bobbe v Regional Court in Bydgszcz Poland* [2017] EWHC 3161 (Admin) (*Bobbe*) which addressed recent jurisprudence of the CJEU on point. That case raised a series of issues about the obligations owed by transferring states to requested persons suffering from mental health issues including: fitness to stand trial in the requesting state; risks to health caused by the physical process of transfer, and, the approach to be taken to those presenting as a suicide risk. These issues had been considered by the CJEU in Case C-578/16 PPU, *CK and others v Slovenia* (16th February 2017) ("*CK*"). In *Bobbe* the Court summarised the position in the light of *CK*:

> "60. Second, *CK* makes clear that national authorities and their courts must apply a rigorous yet pragmatic and circumspect approach to the evaluation of evidence. It is not authority for the proposition that the authorities or the courts must accept without question or challenge the evidence of a requested person that his or her condition is so serious that any act of transfer to enable that person to face justice in a state

where he or she has committed or allegedly committed a crime should suffice to prevent transfer. The ruling in *CK* is consistent with the approach adopted by the Judge below.

61. Third, it is evident (cf paragraph [74]) that the Court acknowledged that a transfer could, itself, amount to inhuman and degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights (which reflects Article 3 ECHR). For those fundamental rights to be violated there had to be: "*… the transfer of an asylum seeker with a particularly serious mental or physical illness [which] would result in a real and proven risk of a significant and permanent deterioration in his health".* The word "*would*" may, however be contrasted with the formulation in paragraph [73] which identifies the situation where "*transfer ... may .... result in a real risk of inhuman or degrading treatment*"). There may be a difference of emphasis between "*may*" in paragraph [73] and "*would"* in paragraph [74] (but that is not an issue that needs to be resolved on the facts of this case).

62. Fourth, the judgment provides guidance as to the burden and standard of proof. The initial burden is on the appellant to raise proper evidence. Then the burden switches to the State to rebut that evidence. The asylum seeker must (paragraph [75]) adduce evidence of an "*objective character*" which is capable of showing "*…the particular seriousness of his mental health and the significant and irreversible consequences to which his transfer might lead*". If that burden is met it does not impose an obligation upon the authorities of a Member State to accept that evidence. The duty on the authority is then to "*…assess the risk that such consequences could occur*". The authorities must "*eliminate any serious doubts concerning the impact of the transfer*" to the transferred person (ibid paragraph [76]). The assessment is not limited to transfer itself but to all the significant and "*permanent*" consequences that "*might arise*" (ibid).

63. Fifth, a Member State is entitled to remove a person even where transfer poses a risk to health provided "*appropriate measures*" are identified and taken (ibid paragraphs [77] and [78], citing *Karim v Sweden* CE: ECHR 2006:0704DEC002417105)1 at paragraph [2]) and *Kochieva et ors v Sweden* CE:ECHR:2013:0430DEC00752312 paragraph [35]). The appropriate measures will focus upon cooperation between the transferring and receiving states, the accompanying of the transferred person, the making available of proper medical care to prevent the "*worsening"* of that person's health and remove the risk of violence by that person during and after transfer, and the ensuring that the transferred person receives adequate medical care upon arrival (ibid *CK*

> paragraphs [80] – [83]). An important starting point is the principle of mutual trust pursuant to which there is a "*strong presumption*" that another EU Member State will provide all necessary medical conditions (ibid paragraph [70]). The Court was influenced in its analysis by the fact that the applicant had not challenged the adequacy of the provision of medical care in Croatia (e.g. paragraph [71]).
>
> 64. Sixth, the Court was conscious that those opposing removal might exaggerate their condition or make statements to medical experts designed to generate the evidence needed to defeat the threatened removal. The Court referred to the Member State having to decide whether the evidence and the postulated risks were "*particularly serious*", "*serious*", "*real*", "*proven*" and "*substantial"* (see e.g. paragraphs [55], [65], [74], [76], [84], [85], [90] and [92]). The authorities (and the courts) are bound to form their own considered judgment not only of the quality of the evidence before but also as to the risk that it has been exaggerated for forensic ends.
>
> 65. Seventh, if a Member State does transfer an asylum seeker to a third state in circumstances where the transfer itself is or might be causative, upon the basis of proper evidence, of a worsening or exacerbation of the transferee's condition to a level which renders the transfer degrading and inhuman then responsibility for the violation of fundamental rights lies with the transferring state and not, directly or indirectly, with the transferee state. This explains why the analysis does not turn upon questions of mutual trust and respect between states (ibid paragraph [95]).”

Conclusion

66. Applying the test summarised in *Bobbe* we reject this Ground of appeal. We consider that there are weaknesses and lacuna in the medical evidence submitted by the Appellant. However, we propose nonetheless to take it at its highest and consider whether, that being so, it amounts to an obstacle to extradition. As to this we observe that the Appellant has not argued that the NCA could not so manage the physical act of transfer from the United Kingdom to the French authorities that his mental state could not be protected. Further, it is not argued that once extradited the French Judicial Autority are incapable of addressing his mental health and/or that *within* the French prison system appropriate care is not provided to prisoners with mental health difficulties. In this regard the Judicial Authority has indicated that it would not seek to remand the Appellant in custody pending trial and that he could, subject to conditions, be permitted to return to the United Kingdom, albeit we accept that the ultimate decision on bail is for the Court and not the prosecuting authority.

67. This Court must take as a starting point that in the absence of some credible evidence to the contrary, France, as a signatory to the ECHR, will discharge its responsibilities

to prevent the Appellant committing suicide or self-harming. There is no such contrary evidence.

68. In *Vilionis v Vilnius County Court Lithuania, Prosecutor General's Office Republic of Lithuania* [2017] EWHC 336 (Admin) Burnett LJ (as he then was) observed (at paragraph [25]):

> "It is now well established that upon surrendering a requested person with medical problems, physical or mental, and particularly if there is a risk of self-harm, information relating to those problems should accompany him. In that way, the authorities in the receiving state will be able to ensure continuity of treatment and, where appropriate, take proper steps to mitigate against the risk of self-harm — just as the relevant authorities do here."'

69. In this case the French authorities have been sent the medical reports in relation to the Appellant. In a document dated 15 October 2018, the First Deputy Financial Prosecutor (on behalf of the Issuing Judicial Authority) stated:

> "I confirm that I have received and taken knowledge of the report authored by Dr Koen and a discharge report by Dr Dunn provided by those representing Mr Barrs
>
> I confirm that any necessary medication / treatment and care will be provided to Mr Danny Barrs if he is remanded in custody in France under the supervision of Mr Clement Herbo, acting as the investigating judge"'

70. There is no basis for this Court doubting the information thus provided. As was made clear in *Bobbe* the simple fact that an Appellant is at risk of self-harm or suicide it not *per se* a reason not to extradite. If such a risk exists, then the critical next step in the analysis is to assess the ability of the Requested and Requesting states, individually and collectively, to take steps to obviate that risk. In our judgment the authorities in this jurisdiction and in France are both ready, willing and able to respond appropriately.

71. Although it is not necessary for our judgment to form a conclusion on the risk of incarceration, we observe that the warrant in issue is an accusation warrant and that there is therefore no certainty that the Appellant will be convicted or, if convicted, sentenced to custody. We accept the argument for the Respondent that, in principle, the risk posed to an Appellant of suicide and/or self-harm may be affected by the prospect of what lies in store upon extradition and that this is a highly fact and context sensitive matter. As matters stand however, we do not attach much weight to the Respondent's argument because, judged from the vantage point of *this* Appellant, the risk of custody cannot be discounted and it is perfectly understandable that his

mental health will be affected by him fearing the worst, even if the worst is not inevitable.

72. In all of the circumstances set out above we reject this Ground of appeal.

G. Conclusion

1. In conclusion we dismiss this appeal. The parties are to endeavour to agree an order. They should consider whether there are any directions that this Court should give to the NCA or to any one else to ensure that the medical position of the Appellant is properly addressed.