Neutral Citation Number: [2021] EWHC 3333 (Admin)

Case No: CO/431/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/12/2021

Before :

LADY JUSTICE NICOLA DAVIES
MR JUSTICE SAINI

- -

Between :

THE GOVERNMENT OF INDIA	**Applicant**
- and -	
KULDEEP SINGH	**Respondent**

- -
- -

Helen Malcolm QC and Nicholas Hearn (instructed by **Crown Prosecution Service**) for the **Applicant**
Joel Smith and Daniel Sternberg (instructed by **Dalton Holmes Gray Solicitors**) for the **Respondent**

Hearing date: 16 November 2021

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Approved Judgment

Lady Justice Nicola Davies :

1. The extradition of Mr Kuldeep Singh (the respondent) is requested by the Government of India (the applicant) pursuant to an extradition request certified by the Secretary of State on 5 July 2019.

2. The allegations contained in the extradition request are based on the primary allegation that the respondent is a senior member of the Khalistan Zindabad Force ("KZF"), a banned terrorist organisation under Indian law. He is accused of conspiring with others to commit terrorist atrocities in the Punjab area of India which involved assassinations of leaders within that region. He is alleged to have acted as liaison between the head of the KZF in Pakistan and other members of the organisation in the Punjab as well as in India and Belgium and is said to be the designated point of contact for the organisation in the Punjab.

3. The respondent is charged with four offences, namely:

   i) funding terrorism contrary to section 17 of the Unlawful Activities (Prevention) Act 1967 ("1967 Act");

   ii) conspiracy to commit a terrorist act or any act preparatory to commission of a terrorist act contrary to section 18 of the 1967 Act;

   iii) membership of a proscribed organisation contrary to section 20 of the 1967 Act;

   iv) conspiracy to supply firearms contrary to section 25 of the Arms Act 1959.

4. A warrant for the arrest of the respondent was issued by a designated judge pursuant to section 71 of the Extradition Act 2003 ("2003 Act"). He was arrested pursuant to the extradition request on 15 October 2019.

5. India is a category 2 territory, part 2 of the 2003 Act applies as amended.

6. The substantive extradition hearing commenced on 13 July 2020 before District Judge Branston ("the District Judge"). In opposing his extradition it was contended on behalf of the respondent that: (i) the alleged conduct did not amount to "extradition offences" (sections 76 and 137 of the 2003 Act); (ii) no *prima facie* case was disclosed against the respondent (section 84 of the 2003 Act); (iii) he is at risk of a breach of his rights pursuant to article 3 ECHR on two bases - he faces an irreducible life sentence and prison conditions in India (section 87 of the 2003 Act).

7. On 10 September 2020 the District Judge handed down a draft judgment which stated that he intended to discharge the respondent on all charges. The respondent was not formally discharged as the court was required to deal with further issues, consequently the case was adjourned for the continuation of the extradition hearing on 1 December 2020.

8. On 25 January 2020 judgment was handed down and the respondent was discharged on the following bases:

i) Charge 3. The offence did not amount to an extradition offence (section 78(6));

ii) Charges 1, 2 and 4. The out of court statements of the jointly indicted co-accused were not admissible within the extradition proceedings and consequently there was insufficient evidence to establish a *prima facie* case in respect of any of the charges (section 84(5));

iii) Charges 1 and 2. The respondent was at risk of an irreducible life sentence which would not be compatible with his article 3 rights (section 87(2)). The respondent's argument in respect of prison conditions was rejected by the District Judge.

9. The applicant seeks permission to appeal the following issues:

i) The District Judge erred in determining that the extradition request and further information does not disclose a *prima facie* case in respect of charges 1, 2, and 4 pursuant to section 84(5) of the 2003 Act;

ii) Section 87 of the 2003 Act – the District Judge erred in concluding that the respondent would face an irreducible life sentence upon conviction and that extradition would therefore involve a real risk of a breach of the respondent's rights pursuant to article 3 ECHR.

10. On 5 July 2021 Murray J ordered that the matter be listed for a rolled-up hearing. On 16 November 2021 the hearing took place, at the conclusion of which the court determined that permission for leave to appeal on ground 1 was refused. It was accepted by the applicant that in the event of such refusal, the court was not required to determine permission in respect of the second ground of appeal. Judgment was reserved.

11. The relevant powers of the appellate court are contained in section 106 of the 2003 Act. The court may allow the appeal if it is satisfied that the judge ought to have decided the relevant question differently and if he had decided the question in the way he ought to have done, he would not have been required to order the person's discharge (section 106(3) to (4)).

A *prima facie* case – Section 84 of the 2003 Act

12. Section 84 of the 2003 Act provides, so far as is relevant:

> "84 Case where person has not been convicted
>
> (1) If the judge is required to proceed under this section he must decide whether there is evidence which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him.
>
> (2) In deciding the question in subsection (1) the judge may treat a statement made by a person in a document as admissible evidence of a fact if—

> (a) the statement is made by the person to a police officer or another person charged with the duty of investigating offences or charging offenders, and
>
> (b) direct oral evidence by the person of the fact would be admissible.
>
> (3) In deciding whether to treat a statement made by a person in a document as admissible evidence of a fact, the judge must in particular have regard—
>
> (a) to the nature and source of the document;
>
> (b) to whether or not, having regard to the nature and source of the document and to any other circumstances that appear to the judge to be relevant, it is likely that the document is authentic;
>
> (c) to the extent to which the statement appears to supply evidence which would not be readily available if the statement were not treated as being admissible evidence of the fact;
>
> (d) to the relevance of the evidence that the statement appears to supply to any issue likely to have to be determined by the judge in deciding the question in subsection (1);
>
> (e) to any risk that the admission or exclusion of the statement will result in unfairness to the person whose extradition is sought, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings.
>
> (4) A summary in a document of a statement made by a person must be treated as a statement made by the person in the document for the purposes of subsection (2).
>
> (5) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.
>
> (6) If the judge decides that question in the affirmative he must proceed under section 87."

The evidence provided by the applicant

13. The evidence is substantially contained in the accounts given by two co-accused, Gurpal Singh and Major Singh, who were arrested in the Punjab during the course of the police investigation. In the event that the respondent is extradited, the two co-accused are to be tried in the same proceedings as the respondent. Quantities of arms

and ammunition were also recovered. Before the District Judge, and before this court, the applicant accepted that without the evidence of the co-accused, no *prima facie* case could be made out against the respondent. The respondent concedes that if the interview summaries are admissible and admitted that they establish a *prima facie* case. The evidence is contained in two interrogation reports. The documents are not a record of the interviews with either co-accused but a summary drawn up by a police officer. A record of specific questions and answers is not included. No lawyer is mentioned as being present. The evidence of the two co-accused was summarised by the District Judge at [43] and [44] of the judgment:

> "43. **A2's evidence (Gurpal Singh):** … A2 states that he was involved in a dispute with another person separate to the accused in this case. A2 decided that he would kill that individual and sought assistance with procuring a firearm from the RP and A13, to whom he spoke over Facebook or WhatsApp, via the name Keepa Sidhu. They agreed to provide him a firearm but said that he would have to work for the Sikh Pranth. A2 agreed to do so. The RP/A13 told him that A10 had plans to revive the terrorist movement in the Punjab and wanted to recruit individuals to assist. The RP provided a mobile number (9878103545) and said that A2 was to contact A3 directly on that number as the arms and ammunition had been delivered to him. A2 subsequently made contact with A3 and met with him on 26th July 2016. A3 received a phone call from A4 and A11. A11 told them that the arms and ammunition had been sent through by A10 in order to assassinate those who disrespect Guru Granth Sahib, namely Singh Badal, Bikram Singh Majithia, Manjinder Singh Sirsa (member of Delhi gurudwara prabandhak committee), RSS activists and a person who had a kerosene oil depot in Patiala, those on the hit list of A10 and an individual named Gurmeet Singh. They further planned to carry out serial bomb blasts in the Punjab. A4 then gave A2 and A3 10,000 rupees each and said that they were from the KZFG organization. A2 was in phone contact with the RP and received a call from the RP on 9th August 2016 telling A2 to go to Umranangal near Amritsar-Jalandhar GT road and that a person called Wadde Babba G would meet him there, who was a member of KZF and '*bomb blast will be stated as pressure cooker whilst also directed me not to talk on phone. We are planning for serial bomb blasts in Punjab, I said ok and disconnected the call. A2 attended on 10th August 2016 and was apprehended by police.*'
>
> 44. **A3's evidence (Major Singh):** … A3 had had a parcel delivered to him which contained arms and ammunition. He subsequently spoke to the RP who informed him that the parcel in his possession had been provided by A10 who was trying to create Khalistan in Punjab. In the second week of July 2016, A3 got a phone call from the RP in which he directed A3 to provide one pistol and six pounds of ammunition to A2. He

> met with both A2 and A4 on 26th July 2016. They discussed the individuals that they were to assassinate and that a series of bomb blasts were to be carried out in Punjab. A4 have A2 and A3 10,000 rupees each and A3 gave A2 and A4 a pistol each and ammunition."

14. At [46] and [47] of his judgment the District Judge summarised the evidence of two other persons, Nishan Singh and Gurpreet Singh. Within this evidence, any reference to the respondent is hearsay and it is not contended that such evidence would be admissible for the purposes of these proceedings.

Admissibility of the evidence of the co-accused

15. By virtue of sections 53(4) and (5) of the Youth Justice and Criminal Evidence Act 1999 ("1999 Act") a person charged in proceedings is not competent to give evidence in the proceedings for the prosecution. This does not include a person who is not, or is no longer, liable to be convicted of any offence in the proceedings (whether as a result of pleading guilty or for any other reason).

16. As a matter of law in England and Wales, the police interview of a co-defendant would ordinarily be inadmissible against another defendant in the same criminal proceedings. The rule required qualification by reason of the hearsay provisions contained in section 114 of the Criminal Justice Act 2003 ("CJA 2003"). Within these proceedings, the following provisions of section 114 are relevant:

> "(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if—
>
> …
>
> (d) the court is satisfied that it is in the interests of justice for it to be admissible."

17. In *R v Y* [2008] 1 WLR 1683 Hughes LJ acknowledged that the existence of section 114 does not make police interviews of co-defendants routinely admissible in the case of persons other than the interviewee. At [57] he stated:

> "It emerged in the course of argument that in some quarters the decision of this court in *R v McLean* [2008] 1 Cr App R 155 is being cited, on behalf of the Crown or co-defendants, as authority for the proposition that the inhibition upon the police interviews of one defendant being relied upon against another has simply been 'abrogated'. If that means that it is thought that such material is routinely to be admitted under section 114(1)(d), it both proceeds upon a misreading of the case and misstates the law. … For present purposes it is enough to say that the existence of section 114(1)(d) does not make police interviews routinely admissible in the case of persons other than the interviewee, and that the reasons why they are ordinarily not admissible except in the case of the interviewee

> are likely to continue to mean that in the great majority of cases it will not be in the interests of justice to admit them in the case of any other person."

18. The "usual course" was summarised by the Court of Appeal in *R v Bhagchandka* [2016] EWCA Crim 700 at [23]:

> "The usual course in a case where such material gets before a jury at a joint trial is for the judge to tell the jury that the interview answers of one accused, implicating a co-accused, are not evidence against that co-accused."

19. Under section 27 of the Indian Evidence Act 1972 confessions made by an accused to a police officer are not admissible in evidence. If the confession leads to discovery of any material object, that portion of the evidence in respect of the object alone is admissible in evidence. The evidence is admissible only in respect of the accused who made the confession and not the other co-accused. If a co-accused "turns approval" his statements are admissible against the other accused.

The determinations of the District Judge

20. In considering section 84 of the 2003 Act, the District Judge stated that his focus had to be on what he described as English law (the *lex fori*) rather than Indian law. He identified the question which he had to decide as being whether the evidence "according to the law of England and Wales, would make a case requiring an answer" [98].

21. In considering the issue of the competence of Gurpal Singh and Major Singh to give evidence, at [102] the District Judge treated the interrogation reports as if they are authenticated documents setting out what the co-accused would say if they were to give oral evidence in the extradition proceedings. At [103] he identified his task as being to consider whether there was a *prima facie* case and further stated that:

> "103. … the fact is that, as of today, both Gurpal Singh (A2) and Major Singh (A3) are co-accused of the requested person, Kuldeep Singh. They are co-defendants. They are currently jointly indicted. All three are charged in the same criminal proceedings. They all remain liable to be convicted in the same criminal proceedings.
>
> 104. As such, neither Gurpal Singh (A2) nor Major Singh (A3) is competent to give evidence in summary proceedings for the prosecution. Their evidence, therefore, is inadmissible against Kuldeep Singh."

22. At [105] the District Judge noted the Divisional Court's decisions in *Patel v India* [2013] EWHC 819 (Admin), *R v Pentonville Prison Governor Ex parte Schneider* (1981) 73 Cr App R 200 and *Tudor v United Arab Emirates* [2021] EWHC 1098 (Admin) but observed that in none of the cases did the evidence emanate from jointly indicted co-defendants.

23. Notwithstanding his finding that the interrogation reports of Gurpal Singh and Major Singh were inadmissible against the respondent in the extradition proceedings, the District Judge went on to consider the provisions of sections 84(2) and (3) of the 2003 Act. He noted at [107] that section 84(2) appears to allow the court a discretion and 84(3) identifies particular factors to which the court should have regard in deciding whether or not to treat a statement as admissible. The District Judge considered each of the subsections of 84(3) as follows:

> "109. Section 84(3)(a): I have regard to the nature and source of these documents. They are reports/summaries of out-of-court accusations made by co-accused against this requested person. They were made in the absence of Mr. Singh and have not been adopted by him. They have not been adopted on oath by either co-accused. They do not appear to have been signed by the co-accused themselves. For all of the reasons set out in *Hayter* and in *Y*, and expanded upon below, these would not ordinarily form part of the admissible evidence in a case against this requested person. …
>
> 110. Section 84(3)(b): The question of authenticity is not in issue. It is a neutral factor.
>
> 111. Section 84(3)(c): The material contained within the interrogation reports would not be readily available if they are not treated as admissible. No help is given in the EA 2003 as to whether the lack of other evidence is a factor supporting or militating against admission. Is it a positive that the material may be bolstering a weak case? Or is the court encouraged to ignore such material if there is plenty of other evidence? In the circumstances, I agree with Mr. Smith and Mr. Sternberg when they submit that the lack of other evidence should not excuse the use of unreliable, inadmissible evidence to plug gaps in the prosecution case.
>
> 112. Section 84(3)(d): The material is of straightforward relevance to the question of whether there is a prima facie case against Mr. Kuldeep Singh.
>
> 113. Section 84(3)(e): I agree with the submissions made on behalf of Mr. Singh that it is unfair to rely on untested, unsworn evidence which would only, in exceptional circumstances, be admissible in domestic proceedings.
>
> 114. Applying the factors contained in section 84(3), my judgment is that none of those factors provides any, or any substantial, reason for such material to be admitted. In conducting a balancing exercise between factors for and against admission, the balance comes down firmly against admission. I determine that the statements contained in the interrogation reports of Gurpal Singh (A2) and Major Singh (A3) should not be admissible in this hearing."

24. Finally, the District Judge considered the hearsay provisions of section 114 of the CJA 2003 and concluded at [125] to [128] that:

> "125. In my judgment, the Government of India has failed to satisfy me that it is in the interests of justice for this material to be admissible. Assuming it is true, the material may be said to have significant probative value in relation to some or all of the charges. It may be the key evidence in the case and so important in the context of the case as a whole. In theory, Mr. Singh might be entitled to challenge the statements, as he is allowed to adduce evidence in these proceedings. But other factors far outweigh these positives for the Government of India. This material appears to have been made during the course of police interviews. I have insufficient detail to know whether the co-accused were furnished with the opportunity to have lawyers present. In any event, the material was generated in the absence of Kuldeep Singh. I am unable to make any fair assessment as to the reliability of A2 or A3. Indeed, I am unable to attest to the reliability of the evidence itself and whether it is an accurate record of what A2 or A3 had to say. Given that this is material provided by a co-accused against the requested person, it is difficult to know whether its probative value is actually outweighed by its prejudicial effect, given that there may be all sorts of reasons for a co-accused to cast blame upon Mr. Singh.
>
> 126. As observed in *Y* and in *Hayter*, this sort of evidence is clearly second best evidence. I am unable to see either Gurpal Singh (A2) or Major Singh (A3) and assess their reliability. They cannot be challenged. Their reliability is obviously open to question and their motives for casting blame on Kuldeep Singh cannot be explored. It is, as Hughes LJ hinted at, impossible to know whether such an ulterior motive exists or not. Furthermore, the possibility of mistake cannot be examined. It will be very rare indeed for the accusation of a co-accused to be found sufficiently reliable without testing. This is not one of those rare cases.
>
> 127. Furthermore, the factor in section 114(2)(g) may again be a trump card for Kuldeep Singh. I must consider whether oral evidence of the matters stated in the material could be given and, if not, why not. Gurpal Singh (A2) and Major Singh (A3) remain jointly indicted co-defendants. Neither could give oral evidence for the prosecution against Mr. Singh as neither is competent to do so.
>
> 128. The usual rule of evidence is that the out-of-court accusation of a co-accused against a defendant is inadmissible against that defendant. Any exception to that usual rule would have properly to be justified by the prosecution. There are no

> factors in this case which begin to suggest that the evidence of the co-accused could support the prosecution case."

25. His conclusions are set out at [134] to [138] as follows:

> "134. I determine that the material consisting of accusations by co-accused A2, A3, A7 and A8 is inadmissible because each co-accused is not competent to give evidence on behalf of the prosecution and so direct oral evidence by them would not be admissible under section 84(2)(b).
>
> 135. Alternatively, I determine that this material should not be admitted having regard to the factors contained in section 84(3).
>
> 136. Alternatively, I determine that the material consists of statements made by police officers which are not admissible in these proceedings, applying English domestic law on hearsay.
>
> 137. I determine that the material contained in statements taken from non-accused persons by police under section 161 of the Indian Code of Criminal Procedure has no weight in these proceedings.
>
> 138. I therefore decide that there is insufficient evidence to make a case requiring an answer by Kuldeep Singh."

The applicant's case

26. The 2003 Act is intended to create a complete code of admissibility and receivability of evidence. Explicit statutory provisions prevail over the common law.

27. The 2003 Act makes no distinction between a witness who is competent or compellable. Section 84 is drafted to minimise formal requirements while providing safeguards in the overarching interests of justice to the requested person. It requires the court to consider "whether there is evidence which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him." The test is not intended to require the judge to undertake a summary trial, nor to enter into consideration of how the trial may be conducted in the requesting state. In considering the test at section 84(1) the District Judge takes the evidence as at its highest, subject only to the defendant putting in evidence to undermine the same, and asks does it establish a *prima facie* case.

28. The extradition proceedings are separate proceedings to any trial in India, a co-accused in India cannot properly be said to be jointly accused in the same proceedings at the time of extradition.

29. The nature of extradition proceedings is that every statement relied upon in a part 2 country is untested and made in the absence of the requested person. Many statements relied upon are unsworn as a matter of their domestic law but nonetheless are admissible: *Mallya v Government of India* [2020] EWCA 294 (Admin).

30. The admissibility of out of court statements made by the co-accused to police is not the subject of a rule of law. Such statements have been admitted pursuant to section 84, for example *Schneider*, *Tudor* and *R (USA) v Bow Street Magistrates' Court, Lemieux v Governor of Belmarsh Prison* [2002] EWHC 1144 (Admin). It is accepted that in none of the authorities was the out-of-court statement made by a co-accused currently jointly indicted in the same criminal proceedings.

31. The admissibility of statements and the competency of witnesses as a matter of law in the requesting state is not relevant to the court's consideration under section 84 of the 2003 Act: *Patel* at [44].

32. The District Judge's approach to section 84(3) was flawed. He conflated the issues of admissibility of the interrogation reports within the extradition proceedings and questions regarding the weight that should be given to such documents in his determination of the *prima facie* test. He was wrong to consider section 84(3)(c) favoured exclusion of the interrogation reports. There was no other viable way of presenting the evidence before the court in the UK and as such the factor favoured the requesting state. The District Judge was wrong to consider that the fact that the interrogation reports were unsworn and untested favoured exclusion. In Indian criminal proceedings witnesses do not give sworn evidence until they appear at trial. The purpose of this section is to avoid the need for witnesses to be brought to the UK to give evidence.

33. Once the court is satisfied the account was given to a police officer or other individual charged with investigating the crime, all the court is required to consider pursuant to section 84 is whether direct oral evidence from the witness would be admissible and when doing so the court must consider the matters contained at section 84(3)(a) to (e).

34. Under section 114 a judge may admit hearsay evidence if it is in the interests of justice to do so. Whether such a statement is in fact admitted at trial will depend upon a multiplicity of factors which can only be considered at the time of trial.

35. Alternatively, the records of interview are admissible by virtue of sections 202 and 205 of the 2003 Act.

The respondent's case

36. The ground of appeal raises two issues:

    i) Whether it is permissible for the applicant to rely on summaries of interviews of the co-accused in the same trial as the respondent for the purposes of establishing a *prima facie* case against him; and

    ii) Whether the District Judge was wrong to exercise his discretion when refusing to admit the interviews in evidence.

37. The respondent contends that the District Judge was correct in deciding that the interviews of the co-accused were inadmissible for the purposes of section 84 or alternatively that they should not be admitted in the exercise of his discretion.

38. The approach of the applicant to admissibility is not only contrary to the terms of the 2003 Act and to case law, it would lead to the position in which evidence which is inadmissible in both the requesting state and the requested state should be considered admissible for the purposes of extradition. It would permit the prosecuting authority to rely on evidence at a summary trial from a witness who is incompetent and could not be called for the prosecution.

39. No court would admit the summarised evidence of jointly indicted co-accused contained in statements which are not theirs under the provisions of section 114 CJA 2003.

40. Section 202 of the 2003 Act governs receivability not the admissibility of evidence.

41. Alternatively, the District Judge was entitled to exercise his discretion not to admit the evidence. The court should be slow to interfere with the legitimate exercise of judicial discretion which was, in fact, unimpeachable.

Discussion and conclusion

42. The only evidence upon which the requesting state relies are the summaries of interviews of two co-accused. The summaries are made by police officers. Neither is signed by either co-accused. There is no record of a lawyer being present to represent either co-accused at the interviews. In reality, the only evidence before this court, as was before the District Judge, is a summary of an untested account made by a jointly indicted co-accused. It is this evidence which the applicant contends is sufficient to satisfy the requirements of section 84 of the 2003 Act.

43. Pursuant to section 84(1) the District Judge must consider whether there is evidence that would "make a case requiring an answer by [the respondent] if the proceedings were the summary trial of an information against him." This means a putative summary trial applying the law of England and Wales, at which it would be determined whether the evidence would be sufficient to provide a sound basis of a case to answer against the person in the criminal proceedings.

44. In considering the sufficiency of the evidence pursuant to section 84(1), a district judge has the same powers (as nearly may be) as if the proceedings were a summary trial of an information against the person whose extradition is sought (section 77 of the 2003 Act). Those powers include procedure and evidence: *R (B and Others) v Westminster Magistrates' Court and Others* [2015] AC 119.

45. Section 84(2) provides the District Judge with a discretion to treat a statement made by a person in a document as admissible evidence of a fact, subject to the satisfaction of two preconditions. The first (section 84(2)(a)) is met in this case, namely that the statement must have been made to a police officer or investigating official. As to the second (section 84(2)(b)), the statement is admissible only if direct oral evidence by the person of the fact would be admissible.

46. In my judgment the effect of sections 84(1) and (2)(b) and section 77 is a requirement that the District Judge considers the competence of an individual as a witness at a putative trial. Further, this was the construction placed upon the 2003 Act by the Divisional Courts in *Tudor* and *Patel*. It is of note that the District Judge at [103(c)]

observed that the rulings in *Patel* and *Tudor* make little sense unless the court is required to consider the competence of witnesses in undertaking the *prima facie* case assessment.

47. The statements to the police of co-accused have been considered admissible for the purposes of assessing a *prima facie* case under section 84 (*Patel* and *Tudor*). In *Patel* at [38] the Divisional Court noted that in such cases "the correct characterisation of the co-defendants' statements is not as out-of-court hearsay evidence but as statements of evidence which the witnesses would give on oath if they were called to do so". The critical distinction is that the statements of co-accused in *Tudor* and *Patel* came from co-accused who had already been convicted and thus were competent and compellable witnesses for the prosecution. In *Tudor*, Kenneth Parker J at [19] and [20] stated that:

> "19. … If it had been the case that [the co-accused witness] was simply an incompetent witness, I can see that an argument could properly be advanced under Section 84(2) that direct evidence from [him] would not have been admissible at a summary trial.
>
> 20. That, in my judgment, is the only criterion that needs to be satisfied. … The only matter that has to be considered is whether [the co-accused witness] would have been a competent witness."

48. In exercising his jurisdiction pursuant to section 84(1) the District Judge had no power to hear evidence from an incompetent witness. For the purpose of section 84(2)(b) the "person" to be considered is a jointly indicted co-accused and as such, pursuant to the provisions of section 53(4) of the 1999 Act, is not a competent witness for the prosecution at a summary trial. It follows, and I so find, that subsection 84(2)(b) is not met.

Section 114 of the CJA 2003

49. Given the nature of the evidence, namely summaries produced by a police officer of jointly indicted co-accused who appear to have been interviewed in the absence of a lawyer and who have not signed the statements, I regard the probative value of the same as being extremely limited and the prejudice considerable. It is unsurprising that the District Judge correctly refused to admit such evidence under section 114.

Section 202 of the 2003 Act

50. The relevant provisions in section 202 state:

> "Receivable documents
>
> …
>
> (3) A document issued in a category 2 territory may be received in evidence in proceedings under this Act if it is duly authenticated.

> (4) A document issued in a category 1 or category 2 territory is duly authenticated if (and only if) one of these applies—
>
> > (a) it purports to be signed by a judge, magistrate or officer of the territory;
> >
> > (aa) it purports to be certified, whether by seal or otherwise, by the Ministry or Department of the territory responsible for justice or for foreign affairs;
> >
> > (b) it purports to be authenticated by the oath or affirmation of a witness.
>
> (5) Subsections (2) and (3) do not prevent a document that is not duly authenticated from being received in evidence in proceedings under this Act."

51. The issue of section 202 was not raised before the District Judge. Section 202 governs the issue of the receivability of evidence, it does not purport to nor could it govern admissibility for the purposes of section 84. The section is headed "Receivable documents". By virtue of section 202(3) a duly authenticated document can be "received in evidence" in proceedings under the 2003 Act. Of note is the difference in statutory language between section 202(3) and section 84 where the issue is whether to treat the document as "admissible evidence of a fact". Section 84 is directed to statements made to police officers. It is the provision that must govern the summaries in this case. Any protections for the respondent contained in section 84 would be lost if the effect of section 202 was to circumvent the provisions of section 84. Further, if section 202 governed admissibility, it would render the provisions of section 84 otiose.

52. The District Judge gave detailed and informed consideration to the issues raised in this application. For the reasons given, I am satisfied that his approach to and the determinations as to the admissibility of the evidence sought to be adduced pursuant to section 84(1) and (2) are sound.

53. In the event that a judge considers the evidence admissible, in that the preconditions in section 84(2) are satisfied, the judge can then consider whether they should be admitted by reference to the non-exhaustive list of factors set out in section 84(3). Notwithstanding my finding as to the admissibility of the evidence of the co-accused, I will consider the issue of discretion as this was also dealt with by the District Judge.

Section 84(3) – The discretion to admit the evidence

54. In my view the District Judge's careful and detailed exercise of his discretion is not susceptible to criticism. By reference to the factors set out in 84(3):

    a) The nature and source of the document – The documents are summaries of police interviews, the statements were made in the absence of the respondent, and were not adopted on oath. There is no record of any of the accused having access to a lawyer. The questions put, and precise answers given are not

recorded. As a matter of law the documents are inadmissible in India and in England and Wales.

b) Whether or not the document is likely to be authentic – No issue is taken with authenticity. I do not regard the fact that the summaries are authentic as adding any real weight to an admissibility argument.

c) The extent to which the statement supplies evidence which would not otherwise be available – There is no other sufficient evidence to establish a *prima facie* case. This cannot elevate or excuse the use of inadmissible hearsay evidence in order to attempt to bolster the prosecution case. If the applicant's submission as to 84(3)(c) was correct, it would follow in this and other cases that the weaker the evidence the more likely it is to be admitted.

d) The relevance of the evidence – It is the only evidence relied upon against the respondent.

e) Any risk that the admission or exclusion of the statement will result in unfairness to the person whose extradition is sought having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings – I accept the respondent's contention that it is manifestly unfair to rely on untested unsworn, inadmissible hearsay evidence, particularly so when such evidence is the sole evidence relied upon against the respondent. The 2003 Act requires the judge to consider unfairness to the person whose extradition is sought. The submission of the applicant that, without this evidence it has no case, would mean that taken to its logical conclusion, inadmissible or unreliable evidence would be more likely to be admitted if it were the only evidence in the case.

55. There are no grounds upon which it would be appropriate for this court to interfere with the discretion exercised by the District Judge.

56. Accordingly, and for the reasons given, permission to appeal on ground 1 is refused. As a result, ground 2 does not require determination by this court.

Mr Justice Saini :

57. I agree that permission to appeal should be refused for the reasons given by Nicola Davies LJ. The District Judge's comprehensive and clearly reasoned judgment cannot be faulted.