Neutral Citation Number: [2022] EWHC 1438 (Admin)

Case No: CO/3960/202

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/06/2022

**Before** :

**MR JUSTICE CAVANAGH**

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**Between :**

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| **EVERS GONZALEZ LAZO** | **Appellant** |
| **- and –** | |
| **GOVERNMENT OF THE UNITED STATES OF AMERICA** | **Respondent** |

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**Edward Fitzgerald QC and David Ball** (instructed by **H.P. Gower Solicitors**) for the **Appellant**
**Richard Evans** (instructed by **Extradition Unit, Crown Prosecution Service**) for the **Respondent**

Hearing date: 25 May 2022

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# Approved Judgment

**Mr Justice Cavanagh:**

1. This is the Appellant's appeal against the decision of District Judge (Magistrates' Court) Tempia, dated 2 September 2020, to send the Appellant's case to the Secretary of State for a decision whether the Appellant should be extradited to the United States, pursuant to section 87 of the Extradition Act 2003. Following the District Judge's decision, the Secretary of State ordered the Appellant's extradition to the United States on 13 October 2020.

2. Permission to appeal was refused on the papers by Saini J on 9 February 2021, but was granted at a renewal hearing on 21 April 2021 by Lane J, limited to one ground of appeal.

3. The sole ground of appeal now pursued is that the District Judge was wrong to send the Appellant's case to the Secretary of State because the arrest warrant issued by the United States District Court for the Middle District of Florida was defective as it was issued by a court clerk, rather than a judge, as is required by the Federal Rules of Criminal Procedure ("the Rules"). The Appellant submits that the District Judge was required to satisfy herself to the criminal standard that the arrest warrant was valid and that, on the basis of the material before her, she was wrong to be so satisfied. Even if, contrary to the Appellant's primary case, the burden rested with the Appellant to show, on the basis of facts that are clear beyond legitimate dispute, that the arrest warrant was satisfied, the Appellant submits that this test is satisfied.

4. The Respondent accepts that, in order to be valid, an arrest warrant issued by a U.S. District Court must have been issued by a judge, but contends that the District Judge was right to find that the Appellant's arrest warrant was valid. The Respondent also contends that it was not necessary for the District Judge to satisfy herself to the criminal standard, or to any standard of proof, that the arrest warrant was valid: all the District Judge had to do was to satisfy herself that there was an arrest warrant. The Respondent submits that it is for a Requested Person to advance an argument, if so advised, that the arrest warrant is invalid, and that the Requested Person should do so by challenging the arrest warrant under the abuse of process jurisdiction. The Respondent further submits that the District Judge should only find an arrest warrant to be invalid, and so that extradition is an abuse of process, if the true facts that demonstrate that the warrant is invalid are clear beyond legitimate dispute. The Respondent contends, however, that even if the District Judge needs to be satisfied to the criminal standard that the arrest warrant was satisfied, that requirement was met in the present case.

5. In an application notice dated 23 November 2021, the Respondent applied to rely upon additional evidence in the form of a letter, dated 8 November 2021, from Randall Leonard, Assistant U.S. Attorney, acting on behalf of Karin Hoppmann, Acting U.S. Attorney for the Middle District of Florida, and a very short law report in the case of **United States v Light**, United States District Court, MD Florida, Tampa Division, dated 3 December 2012. This application was based upon the power of the court to admit fresh evidence under its inherent jurisdiction. The Appellant does not oppose the admission of this fresh evidence, but contends that, when considering the weight to be given to this evidence, the Court should bear in mind that Mr Leonard is not an independent expert, but an attorney in the employ of the prosecuting authority. The Appellant also says that, if the evidence is admitted, the court should also admit

as fresh evidence a Second Supplemental Report dated 26 April 2022, prepared by the Appellant's expert in U.S. law, Peter Goldberger Esq, an attorney based in Ardmore, Pennsylvania, which comments on the contents of Mr Leonard's letter.

6. I am satisfied that I should admit and take account of the fresh evidence, both in the form of the letter from Mr Leonard dated 8 November 2021, and Mr Goldberger's Second Supplementary Report. The requirements that must be complied with in order for fresh evidence to be relied upon by a Requested Person on appeal, namely that the evidence was not available at the extradition hearing and would have resulted in a question being decided differently by the District Judge (see Extradition Act 2003, section 27, and **Szombathely City Court v Fenyvesi** [2009] EWHC 231 (Admin)), do not apply where it is the Respondent which seeks to rely on fresh evidence. In such cases, the Court has a wide power, under the inherent jurisdiction of the High Court, to admit such evidence, though this does not mean that there is carte blanche to admit fresh evidence on behalf of the Respondent in all circumstances (**FK v Germany**, [2017] EWHC 2160 (Admin), paragraph 31). This power is a broad one and the central question is whether it is in the interests of justice to admit the evidence. |It is plainly in the interests of justice to admit Mr Leonard's letter, especially as it is not opposed by the Appellant. Given that Mr Goldberger's Second Supplementary Report addresses Mr Leonard's fresh evidence, it in in the interests of justice also to admit and take account of this report.

7. It follows that I must determine the following issues:

   (1) How should a District Judge approach the validity of an arrest warrant?: is it for the District Judge to satisfy herself to the criminal standard in each case that the arrest warrant is valid, or must the requested party persuade the District Judge that, on the basis of clear facts which are beyond legitimate dispute, the arrest warrant is defective and so that it would be an abuse of process to continue with the extradition proceedings?; and

   (2) Applying the correct approach, was the District Judge wrong to decide that the arrest warrant was not defective and so to send the Appellant's case to the Secretary of State for a decision?

8. The Appellant has been represented before me by Mr Edward Fitzgerald QC and Mr David Ball, and the Respondent by Mr Richard Evans. I am very grateful for counsel's submissions, both oral and in writing, which have been of a very high standard.

9. I will first summarise the relevant facts and will set out the relevant statutory provisions. I will then summarise the reasoning of District Judge Tempia on this issue, before dealing with the two issues in turn.

## The facts

10. The Appellant is a Honduran national. The Respondent alleges that from June 2016 to August 2016 the Appellant participated in drug trafficking activities that included "a conspiracy to transport large quantities of narcotics, specifically methamphetamine and cocaine, from the State of Texas to the State of Florida".

11. On 13 March 2018 a grand jury in Tampa, Florida, returned a 5-count indictment charging 3 co-conspirators with drug distribution-related offences. 6. On 15 August 2018 a grand jury in Tampa returned a 5-count superseding indictment which added the Appellant as a defendant to the charges in the original indictment.

12. On the same day, 15 August 2018, a warrant was issued for the Appellant's arrest. The warrant took the form of a pro forma document, with spaces for information and a signature to be added to the document at appropriate places. The warrant was headed "United States District Court for the Middle District of Florida." The warrant said, "To: any authorised law enforcement officer. YOU ARE COMMANDED to bring before a United States magistrates judge without unnecessary delay EVER GONZALEZ LAZO". The warrant was signed in manuscript by a person named Lisa Silvia, above a line stating "Issuing Officer's Signature". Beneath that were printed the words "ELIZABETH WARREN, Clerk, United States District Court", above a line stating "Printed name and title".

13. It is undisputed, on the evidence, that Ms Silvia is the supervisory deputy clerk of the U.S. District Court for the Middle District of Florida and that Elizabeth Warren is the Clerk of the District Court. The arrest warrant did not state in terms that it was issued by order of a federal judge or give the name of an issuing judge.

14. The letter of Mr Leonard dated 8 November 2021 explained the process which is followed in the U.S. District Court when indictments are laid and arrest warrants are issued. He said:

> "Prosecutors present cases to the grand jury. The grand jurors vote in secret on whether to indict the defendant, to return what is known as a "true bill". At the conclusion of the last case presented to the grand jury on any given day, a prosecutor will escort the grand jury foreperson to meet a federal magistrate judge. The judge will swear in the foreperson; review the indictments; and upon finding no technical or other errors, order the issuance of arrest warrants, unless some other court process is requested by the prosecutor. In the Middle District of Florida, where Lazo was indicted, this process occurs daily, three times per week. Lazo was indicated as part of this process, which has gone on largely unchanged for decades."

15. In his Second Supplementary Report, Mr Goldberger said that the description of this process was "entirely credible as a general matter." It follows that no issue arises as to whether I should place less weight on this part of Mr Leonard's evidence than I would if he were not an Assistant U.S. Attorney.

16. The Respondent did not provide any direct evidence, either to the District Judge or on appeal, of what happened specifically on 15 August 2020, beyond saying that the Appellant was indicted as part of this process. The Respondent did not provide the name of the federal magistrate judge who, it is said, issued the arrest warrant for the Appellant on that date. The Respondent did not provide any written record of the involvement of a federal magistrate judge in the process of the issuance of the warrant.

17. On 15 July 2019, District Judge Goldspring issued a provisional warrant for the Appellant's arrest, pursuant to section 73(1) of the Extradition Act 2003 ("The 2003 Act"). The Appellant was arrested on this provisional warrant in London on 19 July 2019. He has been in custody ever since.

18. The extradition hearing took place on 14 July 2020. As I have said, judgment was given on 2 September 2020. Extradition was ordered on 13 October 2020 and the Secretary of State informed the Appellant that an extradition order had been made on 16 October 2020. The appeal was lodged in time on 28 October 2020.

## The relevant legislation

## The appropriate test to be applied by the High Court on an appeal

19. Section 103(1) of the 2003 Act provides that if the judge sends a case to the Secretary of State for a decision whether a person is to be extradited, the person may appeal to the High Court against the relevant decision. On an appeal under s103, the High Court may (1) allow the appeal; (2) direct the judge to decide a question again; or (3) dismiss the appeal (s104(1)).

20. The High Court may only allow an appeal if the first instance judge, "ought to have decided a question before him…differently" and this would have required him to discharge the extradition order (104(3)).

21. The decision of a District Judge "can only be successfully challenged if it is demonstrated that it is 'wrong'" (**USA v Giese (No 1)** [2015] EWHC 2733 (Admin), at paragraph 15; **Love v USA** [2018] EWHC 172 (Admin), at paragraph 26; and **Surico v Italy** [2018] EWHC 401 (Admin), at paragraph 27).

## Extradition Act 2003, section 78

22. In a case such as this where extradition is sought to a category 2 territory, the requirements of section 78 of the 2003 Act apply.

23. Section 78 of the 2003 Act provides:

"**Initial stages of extradition hearing**

> (1) This section applies if a person alleged to be the person whose extradition is requested appears or is brought before the appropriate judge for the extradition hearing.
>
> (2) The judge must decide whether the documents sent to him by the Secretary of State consist of (or include)—
>
> (a) the documents referred to in section 70(9) [the extradition request and a certificate by the Secretary of State which states that the request was made in the approved way and identifies the order by which the territory in question is designated a category 2 territory];
>
> (b) particulars of the person whose extradition is requested;

> (c) particulars of the offence specified in the request;
>
> (d) in the case of a person accused of an offence, a warrant for his arrest issued in the category 2 territory;
>
> (e) in the case of a person alleged to be unlawfully at large after conviction of an offence, a certificate issued in the category 2 territory of the conviction and (if he has been sentenced) of the sentence.
>
> (3) If the judge decides the question in subsection (2) in the negative he must order the person's discharge.
>
> (4) If the judge decides that question in the affirmative he must decide whether—
>
> (a) the person appearing or brought before him is the person whose extradition is requested;
>
> (b) the offence specified in the request is an extradition offence;
>
> (c) copies of the documents sent to the judge by the Secretary of State have been served on the person.
>
> (5) The judge must decide the question in subsection (4)(a) on a balance of probabilities.
>
> (6) If the judge decides any of the questions in subsection (4) in the negative he must order the person's discharge.
>
> (7) If the judge decides those questions in the affirmative he must proceed under section 79.
>
> (8) The reference in subsection (2)(d) to a warrant for a person's arrest includes a reference to a judicial document authorising his arrest."

24. The relevant requirement for present purposes is set out in section 78(2)(d): in the case of a person accused of an offence (as here), the judge must decide whether the documents sent to him by the Secretary of State include a warrant for his arrest issued in the category 2 territory.

25. As regards burden and standard of proof in extradition cases, section 206 provides:

> "206. **Burden and standard of proof**
>
> (1)This section applies if, in proceedings under this Act, a question arises as to burden or standard of proof.
>
> (2)The question must be decided by applying any enactment or rule of law that would apply if the proceedings were proceedings for an offence."

## The relevant US procedural rules

26. The parties agree that procedural requirements for arrest warrants issued by the federal courts are to be found in the Rules.

27. Rule 9 deals with arrest warrants.

28. Rule 9(a) provides, in relevant part:

> "**Rule 9. Arrest Warrant or Summons on an Indictment or Information**
>
> > "(a) ISSUANCE. The court must issue a warrant….for each defendant named in an indictment …. The court must issue the arrest warrant to an officer authorized to execute it or the summons to a person authorized to serve it.
> >
> > (b) FORM. The warrant must conform to rule 4(b)(1), except that it must be signed by the clerk and must describe the offence charged in the indictment or information."

29. Rule 4(b)(1) specifies the particulars which a warrant must contain. The Appellant does not suggest that the particulars of the warrant in his case were deficient. Rule 4(b)(1)(d) states that a warrant must be signed by a judge, but, in the case of an arrest warrant, this is superseded by rule 9(b) which provides that an arrest warrant must be signed by the clerk.

30. The "court" is defined, for the purposes of the Rules, in rule 1(2), as meaning "a federal judge performing functions authorized by law." A "federal judge" is defined in rule 1(3) to include a magistrate judge.

31. There is no disagreement between the parties as regards the meaning and effect of these Rules, namely that:

(1) An arrest warrant must be issued by the court, which means that it must be issued by a federal judge, including a magistrate judge; and

(2) It must be signed by the clerk.

32. It follows that a federal court clerk does not have the power to issue an arrest warrant.

## The ruling of the District Judge

33. Before District Judge Tempia, counsel for the Appellant argued that the warrant was defective because the evidence suggested that it was issued by the clerk, not by a federal judge. The District Judge rejected this argument. She said, at paragraph 57 of her judgment:

> "In my assessment of the evidence, the pro forma document states it is a warrant of the "United States District Court". Mr Goldberger said that this may be an error in the form but

> wanted to see evidence that a judge had issued the warrant. I find that I can properly make that assumption and, in doing so, satisfy myself to the criminal standard, that the arrest warrant had been issued by a judge, because a clerk has to sign it and can only sanction this if the arrest warrant has been properly issued by a judge. I further base this conclusion on the comments made in the in [sic] the case of **Giese v Government of the United States of America** [2018] 4 WLR 103 which, although dealing with assurances, states that this court should remind itself that the United States of America "is a mature democracy governed by the rule of law" and the USA and the UK are "friendly states who have long enjoyed mutual trust and recognition" (para 47). On this basis I am satisfied the arrest warrant had been issued by [a] judge and this challenge fails."

## Issue 1: what approach should the court take in relation to the validity of a warrant?

### The submissions on behalf of the Appellant

34. On behalf of the Appellant, Mr Fitzgerald QC submitted that it is incumbent upon a District Judge to satisfy himself or herself not only that the documents provided by the Secretary of State include a document that purports to be the arrest warrant, but that the District Judge must go further and satisfy himself or herself, to the criminal standard, that the warrant is a valid arrest warrant.

35. Mr Fitzgerald said that the requirement that the judge be provided with an arrest warrant was meaningless and pointless unless the requirement was that the judge be provided with a valid arrest warrant. Although the language of section 78(2)(c) does not specifically state that the document must be a valid arrest warrant, this requirement is imported by necessary implication. Therefore, pursuant to section 78(2)(c) and section 78(3), unless the judge is satisfied that the documents sent by the Secretary of State include a valid arrest warrant, s/he must order the Requested Person's discharge.

36. As for the burden and standard of proof, Mr Fitzgerald QC said that this was made clear by sections 206(2) and 78(5). Section 206(2) provides that the burden and standard of proof is the same as if these were proceedings for an offence. It follows that the burden of proof rests with the body that seeks extradition, and the standard of proof is the criminal standard. Mr Fitzgerald QC said that this was made all the clearer by section 78(5), which makes an exception for establishing identity, which is to be decided on the balance of probabilities: this shows, he says, that all of the other requirements must be satisfied to the criminal standard. Accordingly, a judge must discharge the Requested Person unless the judge is satisfied so that s/he is sure that the documents sent by the Secretary of State include a valid arrest warrant.

37. Mr Fitzgerald QC further submitted that the requirement of strict compliance with the necessary formalities is particularly important here given that the Requesting State, the US, does not even have to provide a prima facie case that the Requested Person might be guilty of the offence (see the 2003 Act, section 84(7) and the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003, SI 2003/3334). The importance in such circumstances of ensuring that the essential requirements for extradition are

complied with was emphasised by the Divisional Court (Sedley LJ and Beatson J) in **Bentley v USA** [2005] EWHC 1078 (Admin). This was a case in which there was an issue as to whether the substance which the Appellant was accused of importing into the United States, MDMA, was a banned substance in the United States at the relevant time. At paragraphs 16 and 17, the Court said:

> "16…. From the specific requirement in section 78(5) that identity is to be determined on the balance of probability, it is apparent that the other essentials of extradition are to be decided, as before, on the criminal standard of proof.
>
> This is common ground before us. Foreign law is a question of fact. I do not think that any court could be satisfied to the appropriate standard on the materials before the district judge or those before this court that the conduct laid against Mr Bentley was punishable at the time of its commission under United States law.
>
> 17. That this conclusion is (as the judge was plainly well aware) heavily counter−intuitive is a comment not on the law or on judicial reasoning but on the simple failure of the Requesting State to prove something which, in this new and simplified but rigorously prescribed jurisdiction, is still essential. The United States is not the only state to which paragraph 3 of the 2003 Order in Council grants the right to seek extradition on a bare assertion that the acts alleged constituted crimes at the material time in the Requesting State. Since Parliament has delegated to the executive the power to include any states it thinks fit − a power it has exercised generously − the need for rigour at this elementary level is far more than merely technical."

38. Mr Fitzgerald QC submits, in the alternative, that if he is wrong about the burden and standard of proof, and he has to show that it is clear and beyond legitimate dispute that the arrest warrant was not valid, then this has been established and so the appeal should still succeed.

**The submissions on behalf of the Respondent**

39. On behalf of the Respondent, Mr Evans submitted that there is nothing in the language of section 87 to impose a requirement that the judge be satisfied not only that the Secretary of State had provided him or her with an arrest warrant from the Requesting State, but also that the warrant was valid under the laws of the Requesting State. There is no authority to support the proposition put forward on behalf of the Appellant. Rather, the safeguard for an Appellant is to be found in the abuse of process jurisdiction.

40. Mr Evans submitted that the correct approach to be taken was that set out by the Supreme Court in **Zakrzewski v Regional Court in Lodz, Poland** [2013] UKSC 2; [2013] 1 WLR 324. **Zakrzewski** was a case concerning an extradition request by a Part 1 territory, rather than, as here, a Part 2 territory. It was not concerned with the

challenge to the procedural validity of an arrest warrant. Rather, it was concerned with a challenge to accuracy of the information in the warrant.

41. In that case, the Supreme Court said that in general it can be assumed, pursuant to the Council Framework Decision of 13 June 2002, that statements and information in a European Arrest Warrant are true, but that in some cases it may be necessary to question statements made in the EAW. The correct mechanism for this was to make use of the inherent power of the court to prevent an abuse of its process. Even then, extradition should only be refused if the true facts required to correct the error or omission in the warrant are "clear and beyond legitimate dispute".

42. Mr Evans submitted that the relevant part of the judgment in **Zakrzewski** is to be found at paragraphs 8-13 of the judgment of Lord Sumption JSC (with whose judgment all of the other Justices agreed), which are worth setting out in their entirety. Lord Sumption JSC said:

> "8. It follows that the scheme of the Framework Decision and of Part 1 of the 2003 Act is that as a general rule the court of the executing state is bound to take the statements and information in the warrant at face value. The validity of the warrant depends on whether the prescribed particulars are to be found in it, and not on whether they are correct. It cannot be open to a defendant to challenge the validity of a warrant which contains the prescribed particulars by reference to extraneous evidence tending to show that those statements and information are wrong. If this is true of statements and information in a warrant which were wrong at the time of issue, it must necessarily be true of statements which were correct at the time of issue but ceased to be correct as a result of subsequent events. Validity is not a transient state. A warrant is either valid or not. It cannot change from one to the other over time.
>
> 9. It does not, however, follow from this that there is nothing to be done about it if the prescribed particulars in the warrant are or have become incorrect. It only means that the remedy must be found at the stage when the court is considering whether to extradite. Neither the Framework Decision nor Part 1of the Act provides in terms for non-extradition on the ground of a factual error in the warrant. There are, however, two safeguards against an unjustified extradition in those circumstances.
>
> 10. The first and main one is the mutual trust between states party to the Framework Decision that informs the entire scheme. The requesting judicial authority has a right, recognised by article 15.3 of the Framework Decision, to forward additional information at any time. These are receivable in evidence by an English court under section 202 of the Act on the same basis as the warrant itself. If necessary, further information may be requested by the executing court under article 15.2. The Framework Decision proceeds on the assumption that Requesting States can be trusted to ensure that

statements and information in a European arrest warrant are true. By the same token, if they subsequently cease to be true, either the warrant will be withdrawn or the statements and information in it will be corrected by the provision of further information, with or without a request for it.

11. The second safeguard lies in the inherent right of an English court, as the executing court, to ensure that its process is not abused. One form of abuse of process is the fortunately rare case in which the prosecutor has manipulated the process of the executing court for a collateral and improper purpose: see **R (Government of the United States of America) v Bow Street Magistrates' Court** [2007] 1 WLR 1157. We are not concerned with anything of that kind on this appeal. Another category comprises cases, rather less rare, in which the prescribed particulars are given in the warrant but they are wrong. In **Caldarelli v Judge for Preliminary Investigations of the Court of Naples, Italy** [2008] 1 WLR 1724 , para 24, Lord Bingham observed that "it might in some circumstances be necessary to question statements made in the EAW", notwithstanding the general rule. The question is in what circumstances is the power envisaged by Lord Bingham exercisable.

12. The clearest statement of the principle is to be found in the decision of Sir Anthony May, President of the Queen's Bench Division of the High Court, in **Criminal Court at the National High Court, First Division v Murua** [2010] EWHC 2609 (Admin), which has been followed by the High Court on a number of occasions. **Murua** was an accusation case. The warrant alleged serious terrorist offences involving danger to life and concealment of identity. Both of these were significant aggravating factors under Spanish law, warranting imprisonment upon conviction for up to 48 years. The particulars of the offence specified the aggravating factors, and the maximum sentence associated with them. However, at the trial in Spain of seven other defendants for the same conduct, the prosecution had accepted that these aggravating factors could not be proved. The charges were reformulated, and the co-defendants convicted of lesser offences carrying a maximum term of imprisonment of three years. Sir Anthony May said, at paras 58-59:

> "58. The court's task — jurisdiction, if you like — is to determine whether the particulars required by section 2(4) have been properly given. It is a task to be undertaken with firm regard to mutual cooperation, recognition and respect. It does not extend to a debatable analysis of arguably discrepant evidence, nor to a detailed critique of the law of the Requesting State as given by the issuing

> judicial authority. It may, however, occasionally be necessary to ask, on appropriately clear facts, whether the description of the conduct alleged to constitute the alleged extradition offence is fair, proper and accurate. I understood Ms Cumberland to accept this, agreeing that it was in the end a matter of fact and degree. She stressed, however, a variety of floodgates arguments with which in general I agree, that this kind of inquiry should not be entertained in any case where to do so would undermine the principles to be found in the introductory preambles to the Council Framework Decision of 13 June 2002.
>
> 59. Ms Cumberland submitted that an argument of the kind which succeeded before the District Judge can be raised, but not with reference to section 2 of the 2003 Act. She said that the proper approach was to deal with it as an abuse argument, and this ties in with the appellant's third ground of appeal, to which I shall come in a few moments. I do not agree that the respondent's case could only be advanced as an abuse argument. It can properly be advanced, as it was, as a contention that the description in the warrant of the conduct alleged did not sufficiently conform with the requirements set out in section 2 for the reasons advanced by Mr Summers with reference to **Dabas v High Court of Justice in Madrid, Spain** [2007] 2 AC 31 and **Pilecki v Circuit Court of Legnica, Poland** [2008] 1 WLR 325. If that is shown, it is not a valid Part 1 warrant."

15. I agree with this statement, subject to four observations. The first is that the jurisdiction is exceptional. The statements in the warrant must comprise statutory particulars which are wrong or incomplete in some respect which is misleading (though not necessarily intentionally). Secondly, the true facts required to correct the error or omission must be clear and beyond legitimate dispute. The power of the court to prevent abuse of its process must be exercised in the light of the purposes of that process. In extradition cases, it must have regard, as Sir Anthony May observed, to the scheme and purpose of the legislation. It is not therefore to be used as an indirect way of mounting a contentious challenge to the factual or evidential basis for the conduct alleged in the warrant, this being a matter for the requesting court. Third, the error or omission must be material to the operation of the statutory scheme. No doubt errors in some particulars (such as the identity of the defendant or the offence charged) would by their very nature be material. In other cases, the materiality of the error will depend on its impact on the decision whether or not to order extradition. The fourth observation follows from the third. In my view, Ms Cumberland was right to submit to Sir

> Anthony May in **Murua** that the sole juridical basis for the inquiry into the accuracy of the particulars in the warrant is abuse of process. I do not think that it goes to the validity of the warrant. This is because in considering whether to refuse extradition on the ground of abuse of process, the materiality of the error in the warrant will be of critical importance, whereas if the error goes to the validity of the warrant, no question of materiality can arise. An invalid warrant is incapable of initiating extradition proceedings. I do not think that it is consistent with the scheme of the Framework Decision to refuse to act on a warrant in which the prescribed particulars were included, merely because those particulars contain immaterial errors."

43. Mr Evans pointed out that the Divisional Court has held in two cases the that the principles identified in **Zakrzewski** apply to Part 2 cases (to which the Framework Decision does not apply), just as they apply to Part 1 cases. The relevant cases were concerned with the fairness and accuracy of the description of the extradition offence in the request, as in **Zakrzewski**. The cases are **United States v Shlesinger** [2013] EWHC 2671 (Admin) (President of the Queen's Bench Division and Thirlwall J), and **Scott v United States of America** [2018] EWHC 2021 (Admin); [2019] 1 WLR 774 (Lord Burnett of Maldon CJ and Males J), at paragraph 16. In **Schlesinger**, at paragraph 15, having referred to **Zakrzewski** and **Murua**, the Divisional Court said,

> "Although these decisions are all concerned either with the European Convention or the European Arrest Warrant, the principle must be of more general application in relation to the operation of the 2003 Act and in particular to the fairness and accuracy of the description of the extradition offence."

**Discussion**

44. In my judgment, Mr Evans's submissions are correct. I accept that the judge must be satisfied, to the criminal standard, that the requirements of section 78 of the 2003 Act have been met (apart from identification). However, the relevant requirement, in section 78(2)(d), is that the judge is satisfied that the documents sent to him or her by the Secretary of State include a warrant for the Requested Person's arrest issued in the category 2 territory. In other words, the judge must be satisfied, to the criminal standard, that the Requesting State has forwarded to the Secretary of State, for onward transmission, a document which the Requesting State says is an arrest warrant.

45. Section 78 does not say in terms that the judge must also be satisfied, to the criminal standard, that the arrest warrant is valid under the laws and procedures of the Requesting State. There is no basis for inferring such a requirement. Indeed, there are several reasons why no such requirement should be inferred.

46. First, such a requirement would be extraordinarily onerous. It would mean that a District Judge would be required, in every Part 2 case, to carry out investigations into the law and procedures of the Requesting State which would enable the judge to be satisfied that the document which the Requesting State claims to be a valid arrest warrant is actually a valid arrest warrant. Mr Fitzgerald QC did not shirk from

accepting that this is the logical consequence of his argument. The present case is concerned with an extradition request by the United States, a country whose national language is English and whose legal system is, in many ways, similar to our own, being based on the common law tradition. In many other Part 2 countries, however, the national language is not English, and the legal system is not based on the common law. How on earth, I ask rhetorically, is a busy District Judge supposed to satisfy himself or herself, to the criminal standard, that arrest warrants forwarded by these countries are valid under the laws and procedures of that country? In my judgment, if Parliament had intended to impose such an onerous obligation on District Judges, it would have said so expressly.

47. Second, to hold that District Judges have an obligation to satisfy themselves, to the criminal standard, that the document which the Requesting State has provided is indeed a valid arrest warrant would be inconsistent with the guidance given by the Supreme Court in **Zakrzewski.** Just as, as a general rule, the court of the executing state is bound to take the statements and information in the warrant at face value, so it is appropriate to assume that a document that has been forwarded by the Requesting State on the basis that it is a valid arrest warrant is indeed what the Requesting State says it is. As the Divisional Court said in **Murua**, the task of deciding whether to order a Requested Person's extradition should be undertaken with firm regard to mutual cooperation, recognition, and respect. This applies just as much to Part 2 countries as it does to Part 1 countries, as **Shlesinger** and **Scott** make clear. It is true that the issue in each of **Zakrzewski, Murua, Shlesinger,** and **Scott** was whether the particulars of the offence were accurate, whereas the present case is concerned with the different question of whether the arrest warrant is valid. But the principle is the same. In extradition cases, as a result of mutual respect between nations, the starting point should be that the Requesting State has behaved properly. This applies equally to the question whether the particulars of the offence are accurate and to the question whether the document which the Requesting State has claimed to be a valid arrest warrant, is indeed a valid arrest warrant.

48. I should also add that Mr Evans also relied upon another strand of authorities, relating to assurances in category 2 extradition cases, in which the courts have relied upon the principle of mutual trust that exists between this country and friendly foreign states with whom this country has entered into multi-lateral or bilateral treaty obligations, see, for example, **Giese v. United States of America** [2018] EWHC 1480 (Admin); [2018] 4 WLR 103 (Lord Burnett of Maldon LCJ and Dingemans J) at paragraph 47:

> "We start by reminding ourselves that the United States of America, and its constituent states including California, is a mature democracy governed by the rule of law. The assurance given by the District Attorney has been transmitted by the Department of Justice as a solemn promise between friendly states who have long enjoyed mutual trust and recognition. Assurances have been accepted routinely from the Government and the promises made have been honoured."

49. This was, as I have said, a case about assurances made by the Requesting State, but the approach taken by the Divisional Court in **Giese** is, as one would expect, entirely consistent with the approach in the other cases I have mentioned: the starting point in extradition cases, both Part 1 and Part 2 cases, is that unless the contrary is

established, things said and done by the Requesting State are to be taken at face value and are to be trusted. This explains why section 78(2)(d) requires the District Judge to be satisfied that an arrest warrant has been forwarded to the Secretary of State, and thence to the court, but not to be satisfied that the arrest warrant complies with the laws and practices of the Requesting State.

50. Third, this does not mean that a Requested Person is left high and dry. Even if 78(2)(d) has been satisfied, because the judge is satisfied the Requesting State has provided the Secretary of State with a document purporting to be the arrest warrant, which the Secretary of State has then forwarded to the judge, this does not mean that there is no mechanism by which the Requested Person can challenge the validity of the arrest warrant. The Requested Person can make use of the abuse of process procedure, in accordance with the **Zakrzewski** principles. However, as Lord Sumption JSC made clear in **Zakrzewski,** in order to succeed with an abuse of process challenge, the Requested Person must be able to establish that the arrest warrant is invalid on the basis of facts that are clear and beyond legitimate dispute.

51. The above analysis means that challenges on the basis that the arrest warrant is invalid are dealt with in exactly the same way as challenges on the basis that the particulars of the offence are inaccurate. In my judgment, this is as it should be. For this purpose, of course, foreign law is a matter of fact, and so if the Requested Person can prove beyond legitimate dispute by expert evidence or by any other means that, under the law of the Requesting State, the arrest warrant is invalid, this will result in an order for their discharge. As Lord Sumption JSC said at paragraph 15 of **Zakrzewski**, "An invalid warrant is incapable of initiating extradition proceedings."

52. I do not accept that the case of **Bentley v United States**, relied upon by Mr Fitzgerald QC, compels a different conclusion. **Bentley** is authority for the propositions that the judge must be satisfied, to the criminal standard, that specific requirements of section 78 have been complied with, and (as in implicit in the first proposition) that the judge should consider the matter rigorously. But, as I have said, the relevant specific requirements are that the Requesting State has provided the Secretary of State with a document which the Requesting State says is an arrest warrant, and the Secretary of State has then forwarded this document to the judge. Section 78 does not impose a duty on the judge to be satisfied that what the Requesting State says is a valid arrest warrant is, indeed, a valid arrest warrant under the laws of the Requesting State.

53. There is a final reason why I take the view that Mr Evans's submission is correct. If Mr Fitzgerald QC were right, it would mean that, under the legislative framework applying to extradition, the job of checking that an arrest warrant was valid would be given to the English judge, not to someone who is familiar with the law and procedures of the Requesting State. On the basis of Mr Evans's suggested approach, primary responsibility for checking that the arrest warrant is valid is placed with the Requesting State itself, which is familiar with its own law and procedures, but subject to the safeguard of the abuse of process procedure if something has plainly gone wrong. Mr Evans's suggested approach is the one that makes sense, in my view. Otherwise, responsibility for checking the validity of the arrest warrant would be vested in the person who is, on the face of it, least well suited to perform that task.

54. Accordingly, in order for the Appellant to succeed in the appeal, the court must be satisfied that the arrest warrant is invalid on the basis of facts that are clear and

beyond legitimate dispute. As I have said, Mr Fitzgerald QC submitted that, even if this is the test, the court should find that the arrest warrant was invalid.

**Was the arrest warrant invalid on the basis of facts that are clear and beyond legitimate dispute?**

55. At the heart of Mr Fitzgerald QC's argument is the fact that the arrest warrant in the present case, contains, on its face, the signature of Ms Silvia, the deputy supervising clerk, above the words "issuing officer's signature". Mr Fitzgerald QC said that this means that there is no escape for the Respondent: the document states, expressly and in terms, that it was issued by a clerk. It is common ground that, in order to be valid, a federal arrest warrant must be issued by a federal judge, not a clerk. It follows inexorably, submitted Mr Fitzgerald QC, that, on clear and simple facts, the arrest warrant was invalid.

56. I do not accept this submission. It places far too much reliance upon, and vests far too much significance in, the words "issuing officer's signature" that appear under Ms Silvia's signature. In my judgment, the inclusion of these words in the warrant does not establish, clearly and beyond legitimate dispute, that it was Ms Silvia who issued the arrest warrant, thereby rendering it invalid. There are a number of cumulative reasons why I reach this conclusion.

57. First, the question for this court is whether, as a matter of U.S. law, the arrest warrant was invalid. For these purposes, U.S. law is a question of fact. The Appellant's own expert on U.S. law, Peter Goldberger, said at page 4 of his Second Supplemental Report, that where official records are silent or ambiguous, U.S. law applies a rebuttable "presumption of regularity". It follows that, when an English Court seeks to identify whether, as a matter of U.S. law, the warrant was invalid, the court should apply the presumption of regularity, such that a document which is ambiguous shall be presumed to be compliant with the governing law unless this presumption is rebutted.

58. In my judgment, the wording used in the arrest warrant does not make it unambiguously clear that the warrant was issued by a clerk, rather than a judge, in breach of Rule 9(a) of the Rules. There is another, obvious, explanation as to why the warrant was signed by a clerk. This is because Rule 9(b) states expressly that the warrant must be signed by the clerk. When this is understood, it becomes clear, in my view, that the reason why the warrant was signed by Ms Silvia was so that the warrant would comply with the requirement in Rule 9(b). In those circumstances, the words "issuing officer's signature" do not connote that the clerk who signed the document was the person who "issued" it for the purposes of Rule 9(a). It is obvious, in my judgment, that the words "issuing officer's signature" is just a somewhat inelegant form of words to refer to the signature of the person who is required under the Rules to sign the warrant, i.e. the clerk. A further point in favour of this conclusion is that the phrase refers to an "issuing officer". It would be odd to refer to a judge as an "officer" in a context such as this.

59. As there is, at the very least, an ambiguity on the face of the document, the presumption of regularity applies. This means that, as a matter of U.S. law, the warrant is valid.

60. I go further, however. In my judgment, it has been proved, to the criminal standard, that the warrant is valid. It follows that, even if I am wrong about the approach to be taken to this issue, the District Judge was right to reject the Appellant's argument that the warrant was invalid (and I note that the District Judge decided the matter on the basis that she had to be satisfied to the criminal standard that the warrant was valid).

61. The reasons why I have concluded that it has been proved, to the criminal standard, that the warrant is valid, are as follows (in addition to the reasons I have already set out):

(1) The evidence in Mr Leonard's letter of 8 November 2021, set out at paragraph 14 above, is to the effect that the normal procedure in the Middle District of Florida, and elsewhere in the federal courts system, is that a federal magistrate judge issues the indictment or superseding indictment, following the grand jury's decision. Mr Goldberger accepted that this is right;

(2) Mr Leonard also said that the Appellant was indicted in this way on 15 August 2018;

(3) It follows that a federal magistrate judge was seised of the Appellant's case on 15 August 2018;

(4) On the same day, the arrest warrant was issued. It is an obvious, and legitimate, inference, that the same federal magistrate judge who issued the superseding indictment in the Appellant's case also issued the arrest warrant, on the same day (and no doubt at the same time);

(5) The words "issuing officer's signature" are part of the standard form wording that is used for arrest warrants in the Middle District of Florida. It is not a bespoke form of wording that was created for the Appellant's case. It is part of the pro forma document. It follows that the appearance of these words on the arrest warrant does not suggest that something has gone wrong, or that there has been a departure from the normal procedure. Rather, the fact that the wording forms part of the pro forma document strongly supports the inference that all it means is that the clerk is signing the warrant – a necessary part of the issuing process as required by Rule 9(b) of the Rules – not that a clerk has decided to usurp a judge's power to issue the warrant;

(6) It is inconceivable that a clerk would take it upon themselves to sign and circulate a warrant that had not been validly and properly issued by a federal magistrate judge. It is common ground that the clerk is an administrator. There is no suggestion in this case of any corruption or improper practices at the Tampa court. There is no suggestion that Ms Silvia had any grudge or animosity towards the Appellant, or that she would have had any reason to issue a warrant against him of her own volition. She would simply have had no reason to do, and would have risked her career (and worse) if she had done so;

(7) For the reasons I have already given, the obvious conclusion, which is that the warrant was issued by a federal magistrate judge, is not displaced by the wording of the warrant. There is a perfectly obvious explanation for why it was signed by Ms Silvia and that her signature was described as the "issuing officer's signature";

(8) This conclusion is supported by the, admittedly very brief, ruling of Susan C. Bucklew, District Judge of the United States District Court, Middle District of Florida, in **United States v Light** 2012 WL 6015612, 3 December 2012. In **Light**, exactly the same challenge to the validity of an arrest warrant was made as in the present case. This was given short shrift by the U.S. District Judge, who said:

> "While Defendant takes issue with the fact that the warrant was signed by the Clerk of the Court, as opposed to being signed by a judge, such does not affect the validity of the warrant."

It is true, as Mr Fitzgerald QC emphasised, that this was an application to set aside the applicant's conviction pursuant to the writ of *error coram nobis*, which is an extraordinary remedy that is only granted only under circumstances compelling such action to achieve justice. However, the fact remains that it is relevant that a U.S. District Judge took the same view as I have taken in relation to this issue. Moreover, the high hurdle that an applicant in the U.S. District Court must surmount to obtain the writ of *error coram nobis* is not very different, if it is different at all, from the hurdle that the Appellant must surmount in the present case in order to show that the arrest warrant is invalid on the basis of facts that are clear and beyond legitimate dispute; and

(9) It is also true that the Respondent could have put the position beyond any doubt by providing further information about what exactly happened on 15 August 2018, such as the name of the judge who issued the warrant, and the circumstances in which s/he did so, but the fact remains that, whether the "abuse of process" or the "criminal standard" test is applied, there is no basis for doubting that the arrest warrant in the present case was validly issued. I have rejected the Appellant's contention that the inclusion of the words "issuing officer's signature" underneath the clerk's signature in the pro forma arrest warrant means that even a prima facie case has been established to the effect that the warrant was defective.

## Conclusion

62. For these reasons, the appeal is dismissed.