Neutral Citation Number: [2023] EWHC 1740 (Admin)

Case No: CO/2751/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 July 2023

Before :

LORD JUSTICE WILLIAM DAVIS
and
MR JUSTICE LANE

- -

Between :

BIRBECK	**Appellant**
- and -	
PRINCIPALITY OF ANDORRA	**Defendant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

- -
- -

Mr Graeme Hall (instructed by **Tuckers Solicitors**) for the **Appellant**
Ms Catherine Brown (instructed by **CPS Extradition Unit**) for the **Respondent**
Ms Rebecca Hill (instructed by **GLD**) for the **Interested Party**

Hearing dates: 14 June 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 11 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE WILLIAM DAVIS:

1. Rory Birbeck ("the appellant") appeals against the decision on 3 June 2022 of District Judge (Magistrates' Courts) Tempia ("the judge") to send the appellant's case to the Secretary of State for the Home Department ("SSHD") pursuant to section 92 of the Extradition Act 2003 ("the Act"). On 19 July 2022 the SSHD ordered the appellant's extradition to the Principality of Andorra pursuant to section 93(4) of the Act.

2. The single ground of appeal which the appellant has permission to argue is that the extradition request did not comply with the requirements of section 70(4) of the Act, namely it did not state that the appellant was accused of the offence specified and it was not made for the purpose of the appellant being prosecuted for the offence. The judge concluded that she had no jurisdiction to determine the issue because the SSHD had certified the request as valid. There was no right of appeal against the certificate issued by the SSHD pursuant to section 70. Rather, any challenge should be by way of judicial review.

3. The appellant argues that the judge was wrong when she found that she had no jurisdiction to hear the challenge. Had she assumed jurisdiction, she would have been bound to conclude that the extradition request was deficient.

4. The appellant was represented by Mr Graeme Hall who also appeared before the judge. The judicial authority was represented by Ms Catherine Brown. The SSHD as interested party was represented by Ms Rebecca Hill. Their written and oral submissions were of great assistance.

Factual background

5. On the night of 21/22 December 2015 a man named David Alves was at a nightclub in Andorra. A fight started outside the club. Mr Alves went towards the fight. His intention was to separate those involved. The appellant was a doorman at the club. As Mr Alves approached the fighting, the appellant kicked him hard in the genitals from behind. Mr Alves could not walk unassisted after being kicked. The next day, 22 December 2015, Mr Alves attended A & E at his local hospital. A traumatic rupture of the left testicle was diagnosed. The left testicle was removed. Mr Alves was detained in hospital for some days.

6. Mr Alves complained to the police about what had happened to him. The police began an investigation. At the same time Mr Alves filed a complaint against the appellant as a private accusation. The criminal justice system in Andorra provides for a combined punitive system. An investigating judge will follow a process called "criminal ordinance" by reference to the police investigation. The court also will consider the private accusation of the complainant in relation to compensation. Within the process, there will be lawyers both for the complainant and for the public prosecution service. In this case the investigating judge began the proceedings on 26 February 2016. It was said that the appellant had breached Article 116 of the Andorran Criminal Code i.e. caused a specified injury. An offence under Article 116 was punishable with a prison sentence of between 3 and 10 years. Depending on the mental element in a particular case, it was equivalent to offences under section 20 or section 18 of the Offences Against the Person Act 1861.

7. By this time the available evidence showed that the person who had kicked Mr Alves was the appellant. The appellant had left Andorra very shortly after the events outside the nightclub. The court made attempts to trace the appellant but these were unsuccessful. International letters of request and inquiries via Interpol yielded no results. In 2019 the appellant was traced to an address in Lancashire. On 9 September 2019 the court issued an international arrest warrant. This stated as follows:

> "….from the proceedings carried out during the preliminary investigation period there is sufficient evidence of commission of the alleged offence of specified injury….in Article 116 of the Criminal Code against Rory Swan BIRBECK and that his arrest…is required to be able to take a statement from him about the facts on file and issue any appropriate decisions".
>
> The warrant stated that it was issued "due to the seriousness of the acts and the sound evidence of criminality against Rory Swan BIRBECK…" Elsewhere in the warrant he was referred to as "the accused".

8. On 20 July 2021 the court issued an extradition order in which it was said that extradition was necessary "to be able to continue the current preliminary proceedings with due process carrying out any proceedings that need to be carried out in his presence both at the pre-trial stage and the trial stage before the competent Court so that he can be questioned and judged in the Principality of Andorra…"

   Both the warrant and the order were enclosed with the extradition request sent to the UK government on 27 August 2021.

9. The appellant was arrested on 6 January 2022. He appeared at the Westminster Magistrates' Court on the following day. He did not consent to his extradition. The full hearing was fixed for 12 May 2022. The appellant was bailed. The day before the final hearing those representing the appellant served a statement of issues. This raised for the first time the submission that no valid statement as defined in section 70(4) of the Act was contained in the request for extradition. Hitherto, the challenge to extradition had been based solely on the Article 8 rights of the appellant. The hearing proceeded with evidence from the appellant in respect of his private life. The judge also received statements from the appellant's mother and father in relation to the same issue. Oral submissions were made in respect of the Article 8 challenge. The judge ordered that the parties should provide written submissions on the challenge under section 70 of the Act.

10. As well as the warrant, the order and the request to which we have already referred, the judge had further information from the Andorran court. On 3 March 2022, the court purported to answer a question as to whether a decision to prosecute the appellant had been made. The court said that the appellant "will be questioned in due time taking into account that the arrest warrant…states that the arrest of (the appellant) is for him to declare as a defendant. Therefore, as requested, once arrested, he should be informed of his procedural rights and his right to legal assistance."

11. On 27 April 2022 the Andorran court, in response to a request for confirmation that the appellant had the status of an accused person and that his extradition was sought for the purposes of prosecution, said as follows:

> "As previously mentioned and is stated in the extradition resolution issued by this Preliminary Investigations Division 2 of the Principality of Andorra, the main purpose of the extradition is to be able to receive declaration of Mr BIRBECK as alleged perpetrator of the facts with the respective reading of his rights. In this case, Mr BIRBECK left the Principality of Andorra before his statement could be taken and therefore the request for Extradition, however, it is obvious that he has the status of an accused person, but not entirely as Mr BIRBECK should appear before the court to testify for the events that occurred in 2016 as the alleged perpetrator and, depending on his declaration and the outcome of the court procedure, he will be prosecuted as the accused person for the purpose of prosecution or not.
>
> From this case it is ascertained that the perpetrator of the events is Mr BIRBECK, however, before being prosecuted and therefore accused for the facts that occurred during the aforementioned year, we will take his statement as an alleged perpetrator with the corresponding reading of his rights."

The judgment of Judge Tempia

12. I shall deal only with those parts of the judgment relevant to the issue in this appeal. The judge identified the extradition request dated 27 August 2021. She noted that the SSHD on 16 September 2021 had issued a certificate under section 70 of the Act. She set out in some detail the material contained in the further information.

13. The judge then considered the submissions of the parties. On behalf of the appellant it was said that there was no authority in relation to section 70(4) but that in principle the same approach should be taken to a certificate issued by the SSHD under section 70 of the Act as is taken to a certificate issued by the designated authority under section 2 of the Act. In a case to which section 2 applied a requested person would be entitled to challenge the validity of the certificate. There was no reason why a different approach should be adopted in a case under Part 2 of the Act to the approach taken in a Part 1 case.

14. The judge noted that the parties' written submissions had not referred to *Akaroglu v Romania* [2007] EWHC 367 (Admin). She invited submissions on the effect of this case. The judicial authority argued that it was binding authority for the proposition that the judge had no power to go behind the certification of an extradition request by the SSHD. Any challenge would have to be by way of judicial review of the decision on ordinary public law grounds. On behalf of the appellant it was submitted that authority since *Akaroglu* demonstrated that the judge did have jurisdiction to rule on the challenge to the SSHD's certificate. It was said that the further information undermined the SSHD's decision. Yet the further information would not be relevant to any application for judicial review of the original decision.

15. The judge's conclusion was expressed shortly. She said this:

> "It is accepted by Mr Hall that *Akaroglu* was not referred to in either *Dewani* or *Pesut*. This is crucial to my decision irrespective of the persuasive arguments advanced by Mr Hall. The decision in *Akaroglu* was made by a Divisional Court before Lord Justice Scott Baker and Mr Justice David Clarke. It

> is exactly on point and I consider myself bound by that authority. Therefore, this challenge fails but I accept will no doubt be argued in a higher court."

Dewani and *Pesut* were the authorities post *Akaroglu* relied on by Mr Hall.

Legal framework

16. Although the appellant's case falls to be determined under Part 2 of the Act, it is necessary to consider the procedure in Part 1 of the Act in the light of the judicial authority's argument that there is a distinction to be drawn between the two procedures. The submission is that a different approach must be taken in a Part 2 case because the statutory structure is not the same as in relation to Part 1.

17. Where extradition is sought pursuant to Part 1 of the Act, the warrant issued by the judicial authority will be certified by "the designated authority". Currently this is the National Crime Agency. Section 2 of the Act deals with the warrant and the certificate. Previously the warrant would have been a European Arrest Warrant. The same scheme now operates pursuant to the Trade and Co-operation Agreement in force from 1 May 2021.

18. The parts of section 2 which are relevant for the purposes of these proceedings are:

> *(1) This section applies if the designated authority receives a Part 1 warrant in respect of a person.*
>
> *(2) A Part 1 warrant is an arrest warrant which is issued by a judicial authority of a category 1 territory and which contains—*
> *(a) the statement referred to in subsection (3) and the information referred to in subsection (4)…*
>
> *(3) The statement is one that—*
> *(a) the person in respect of whom the Part 1 warrant is issued is accused in the category 1 territory of the commission of an offence specified in the warrant, and*
> *(b) the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being prosecuted for the offence.*
>
> *(4) The information is—*
> *(a) particulars of the person's identity;*
> *(b) particulars of any other warrant issued in the category 1 territory for the person's arrest in respect of the offence;*
> *(c) particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the category 1 territory under which the conduct is alleged to constitute an offence;*
> *(d) particulars of the sentence which may be imposed under the law of the category 1 territory in respect of the offence if the person is convicted of it…..*

(7) The designated authority may issue a certificate under this section if it believes that the authority which issued the Part 1 warrant has the function of issuing arrest warrants in the category 1 territory.

(7A) But in the case of a Part 1 warrant containing the statement referred to in subsection (3), the designated authority must not issue a certificate under this section if it is clear to the designated authority that a judge proceeding under section 21A would be required to order the person's discharge on the basis that extradition would be disproportionate. In deciding that question, the designated authority must apply any general guidance issued for the purposes of this subsection…..

(8) A certificate under this section must certify that the authority which issued the Part 1 warrant has the function of issuing arrest warrants in the category 1 territory….

Section 2 gives the designated authority the power to issue a certificate albeit that section 2(7) refers to that power solely by reference to a belief that the authority which issued the warrant had the function of issuing arrest warrants in the requesting state. Section 2(7A) (added by amendment in 2014) prohibits certification if it is clear to the designated authority that a judge would find extradition to be disproportionate in the particular case. Section 2(8) obliges the designated authority to certify that the authority which issued the warrant had the function of issuing arrest warrants in the requesting state. Beyond this slightly incoherent set of provisions, there is no reference to the requirements placed on the designated authority prior to certification. Nothing is said about the extent to which the authority must consider the statement and information referred to in sections 2(3) and 2(4) of the Act.

19. As I have said, the appellant's extradition was sought pursuant to Part 2 of the Act. The equivalent provision to section 2 is section 70. The relevant parts are:

(1) The Secretary of State must subject to subsection (2) issue a certificate under this section if he receives a valid request for the extradition of a person to a category 2 territory…..

(3) A request for a person's extradition is valid if—
(a) it contains the statement referred to in subsection (4)….and
(b) it is made in the approved way.

(4) The statement is one that—
(a) the person is accused in the category 2 territory of the commission of an offence specified in the request, and
(b) the request is made with a view to his arrest and extradition to the category 2 territory for the purpose of being prosecuted for the offence….

(7) A request for extradition to any other category 2 territory is made in the approved way if it is made—

> *(a)by an authority of the territory which the Secretary of State believes has the function of making requests for extradition in that territory, or*
> *(b)by a person recognised by the Secretary of State as a diplomatic or consular representative of the territory.*
>
> *(8) A certificate under this section must*
> *(a) certify that the request is made in the approved way and*
> *(b) identify the order by which the territory in question is designated as a category 2 territory.*
>
> *(9) If a certificate is issued under this section the Secretary of State must send the request and the certificate to the appropriate judge……..*
>
> *(11) The Secretary of State is not to consider whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998.*

Subject to limited exceptions in section 70(2) which are irrelevant to the facts of this case, the SSHD has a duty to issue a certificate if she receives a valid request for extradition. A valid request is defined in section 70(3). In relation to the requested person's status, there must be a statement that the person is accused of the offence specified in the request and that extradition is for the purpose of the person being prosecuted for the offence. In the absence of such a statement, the request will be invalid. There is no requirement for the SSHD in terms to certify that the request contains the statement, whereas the SSHD is required to certify the other limb in relation to validity, namely that the request is made in the approved way. The SSHD is not to consider the compatibility of extradition with the requested person's Convention rights. This is in contrast to the duty imposed on the designated authority pursuant to section 2(7A) of the Act. Whilst proportionality under section 21A of the Act is not synonymous with Convention rights, it requires an assessment of similar issues relating to the alleged offending.

20. Where a warrant is received from a judicial authority pursuant to section 2 of the Act, the District Judge in the Westminster Magistrates' Court will consider the statement that the requested person is accused of an offence in the requesting state and that the warrant was issued with a view to extradition for the purpose of being prosecuted for that offence. This is not something the judge is required by the Act to do as part of the initial hearing. The judge will consider the statement because the validity of the warrant is what provides the court with jurisdiction. Thus, the absence of any statutory provision for such consideration is irrelevant. Often, the exercise conducted by the judge will be non-controversial. Equally, there will be cases where the issue is raised by the requested person. The judge then will have to determine the question of jurisdiction before any other step in the proceedings. These propositions are derived from *Boudhiba v National Court of Justice, Madrid* [2006] EWHC 167 (Admin). Whatever may have been the understanding of the law prior to *Boudhiba*, the position thereafter was clear.

21. Section 11 of the 2003 Act identifies the bars to extradition in a Part 1 case. Section 11(1)(aa) provides that a person's extradition may be barred by "absence of

prosecution decision". This bar was added by amendment in 2014. The bar is defined in section 12A of the Act. So far as is relevant this is as follows:

> *(1)A person's extradition to a category 1 territory is barred by reason of absence of prosecution decision if (and only if)—*
>
> *(a)it appears to the appropriate judge that there are reasonable grounds for believing that—*
>
> *(i) the competent authorities in the category 1 territory have not made a decision to charge or have not made a decision to try (or have made neither of those decisions), and*
>
> *(ii) the person's absence from the category 1 territory is not the sole reason for that failure,*
>
> *and*
>
> *(b) those representing the category 1 territory do not prove that—*
>
> *(i) the competent authorities in the category 1 territory have made a decision to charge and a decision to try, or*
>
> *(ii) in a case where one of those decisions has not been made (or neither of them has been made), the person's absence from the category 1 territory is the sole reason for that failure….*

This section overlaps substantially with the consideration of the statement under section 2 of the Act by the District Judge. The language of section 12A is different. It does not remove the power of the Westminster Magistrates' Court to consider the question of jurisdiction.

22. There is no provision equivalent to section 12A in relation to extradition proceedings under Part 2 of the Act. When the 2003 Act was amended in 2014 to make specific provision in a Part 1 case for judicial consideration of whether the requesting authority had made a decision to charge and/or to try the requested person, no such provision was made in relation to Part 2 cases.

23. As I have indicated, in a Part 1 case the warrant for arrest will have been issued before the case comes before the Westminster Magistrates' Court. In a Part 2 case, the court will receive the extradition request and the certificate issued by the SSHD pursuant to section 70 of the Act. It is then for the court to issue a warrant for the arrest of the requested person pursuant to section 71, the relevant part of which is as follows:

> *….(2) The judge may issue a warrant for the arrest of the person whose extradition is requested if the judge has reasonable grounds for believing that—*
>
> *(a) the offence in respect of which extradition is requested is an extradition offence, and*
>
> *(b)there is evidence falling within subsection (3).*
>
> *(3) The evidence is—*
>
> *(a) evidence that would justify the issue of a warrant for the arrest of a person accused of the offence within the judge's jurisdiction, if the person whose extradition is requested is accused of the commission of the offence;*
>
> *(b) evidence that would justify the issue of a warrant for the arrest of a person unlawfully at large after conviction of the offence within the judge's jurisdiction, if the person whose extradition is requested is alleged to be unlawfully at large after conviction of the offence….*

This does not involve any requirement on the part of the judge to assess whether extradition is being sought for the purpose of the requested person being prosecuted for the offence.

24. Once a warrant issued pursuant to section 71 has been executed and the requested person is before the court, the judge must engage in the exercise set out in Section 78 of the Act. The relevant provisions are as follows:

> *(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);*
> *(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….*

These detailed provisions do not contain any reference to the judge being required to consider the validity of the request for extradition or whether the SSHD was justified in issuing the certificate.

25. The judge referred to *Akaroglu* in her ruling. Romania at that time was a category 2 territory. Akaroglu was alleged to have committed offences of fraud in Romania. At the relevant time section 70(4) was not in the same terms as now appears in the Act. Rather, the statement in the request simply had to say that the requested person was

accused of an offence or was unlawfully at large following conviction. But the duty on the SSHD to issue a certificate was the same then as it is now. In *Akaroglu* it was argued that the request did not make it clear whether the requested person was accused or had been convicted. It was said that the SSHD had been wrong to certify the request under section 70 because it was not known whether Akaroglu was an accused or a convicted person. On the facts this argument failed. The court concluded that the request made it clear that Akaroglu was accused of an offence.

26. The court went on to consider the submission that the District Judge should have engaged in the exercise of determining whether the requested person's status was properly set out in the request. The court accepted the proposition that the District Judge was not entitled to review the decision of the SSHD to certify. On the other hand, the judge did have to make his own decision about whether the requested person was accused or convicted in the requesting state. It was not for the judge to go behind the SSHD's certificate. However, that only certified that the Romanian request was valid. It said nothing about the status of the requested person in the requesting state. Therefore, the judge had to make up his own mind about that. He was required to do so by looking at the documents i.e. an arrest warrant or a certificate of conviction.

27. The court concluded that a challenge to the SSHD's certificate under section 70 could only be by judicial review. There was no right of appeal against the issue of the certificate within the 2003 Act. However, a District Judge had to make their own decision about the documents set out in section 78(2). In practical terms this amounted to a review of the statement contained in the request for extradition.

Discussion re jurisdiction

28. On behalf of the requesting state Ms Brown argued that *Akaroglu* is binding authority for the proposition that the judge in this case was right in concluding that she had no jurisdiction to go behind the SSHD's certificate. Thus, it was not for her to determine whether the appellant was accused of an offence or whether the extradition request was made for the purpose of prosecuting the appellant. A challenge to the certificate could be made by way of judicial review in the appropriate case. Alternatively, where the evidence before the judge demonstrated that extradition was not being requested for the purpose of prosecution, a requested person would be able to argue that the proceedings amounted to an abuse of process.

29. On behalf of the appellant Mr Hall submitted that *Akaroglu* post dated *Boudhiba* yet *Boudhiba* was not cited in *Akaroglu*. *Boudhiba* was clear authority for the proposition that, despite the absence of any statutory reference to a judge being required to consider whether a Part 1 warrant complies with section 2 of the Act, such a requirement was imposed on the judge at the initial hearing. In principle, there was no reason to distinguish in this respect between cases under Part 1 and those under Part 2. Mr Hall relied on *Pesut v Croatia* [2015] EWHC 46 (Admin) as an example of this court entertaining a challenge to a request on the basis that the requested person was wanted for investigation rather than prosecution. The court in *Pesut* did not consider the jurisdictional issue because it was not asked to do so. Equally, the constitution included Lord Justice Aikens, the judge then in charge of the extradition list. It might reasonably be thought that he would have identified a jurisdictional issue had it arisen.

30. The SSHD took a neutral stance on the issue of jurisdiction. However, Ms Hill observed that the meaning of "accused" is a question of fact in each case which frequently requires consideration of the evidence. That is a function best carried out by a court.

31. The difficulty with *Akaroglu* is that it related to a version of section 70(4) of the Act which was in very different terms to the version now applicable. The matters to which the certificate of the SSHD related – the warrant for arrest in the category 2 territory or the certificate of conviction – were also matters the judge was required to consider pursuant to section 78(2). Thus, the court in *Akaroglu* did not remove judicial consideration of the factual issues dealt with in the SSHD's certificate. That consideration arose by a different statutory route. I do not consider that what was said in *Akaroglu* necessarily carries over to the current terms of section 70(4). More to the point, I do not consider that the ratio of *Akaroglu* goes beyond what was said about section 70(4) as it was in 2006.

32. It is true that section 78(2) has not been amended to take account of the changes to section 70(4) which came into effect in 2007. I do not consider that this must be viewed as removing the issue of whether a requested person's extradition is sought for the purpose of being prosecuted from any judicial scrutiny. There would have to be a clear indication in the legislation that this was the intention of Parliament for the lack of amendment of section 78(2) to be determinative.

33. More significant is the analysis in *Boudhiba* in relation to the equivalent provisions in Part 1 of the Act. Part 1 of the Act does not make any provision for judicial consideration of the adequacy of the warrant or compliance with the provisions of section 2 of the Act. However, the validity of the warrant is what founds the jurisdiction of the court to continue with the extradition proceedings. Therefore, the judge is obliged to investigate whether there had been compliance with section 2 of the Act notwithstanding the fact that the warrant will have been certified by the designated authority.

34. In my view the same analysis must apply to the issue of whether the extradition of the requested person is requested for the purpose of being prosecuted for the offence as set out in section 70(4)(b) of the Act. The fact that the SSHD has certified that the request is valid does no more than confirm that a statement to that effect has been made. A judge would not be entitled to investigate whether the statement had been made. That is the limit of the restriction on the powers of the judge. It is to be noted that all that is certified by the certificate is that the request has been made in the approved way as defined in section 70(7) of the Act. That definition refers to the belief of the SSHD. It would not be appropriate for the District Judge to investigate the SSHD's belief and whether it was properly held. That would be a matter for judicial review. However, the purpose of the extradition request is a purely factual issue to be determined from the content of the request and any relevant extraneous material. Judicial review would not be an appropriate route to determine that issue. Whilst abuse of process notionally would be an alternative route to a challenge to the purpose of the extradition request, I do not consider that its existence provides any bar to a challenge at the initial stage of the extradition hearing in a Part 2 case.

Discussion re the facts

35. The judge did not consider the issue of whether the appellant was an accused and/or the extradition request was for the purposes of prosecution. I consider that it is appropriate for this court to determine that issue. There is no evidence to be called. All of the relevant material is in documentary form. The parties did not suggest that this court should take any other course.

36. I have already set out the relevant parts of the request and the further information provided to the judge. The issue is whether that material taken as a whole satisfies the test in *Asztaslos v Hungary* [2011] 1 WLR 252 at [38]:

> *....the court will look at the wording of the warrant as a whole to decide whether the warrant indicates, unequivocally, that the purpose of the warrant is for the purpose of the requested person being prosecuted for the offences identified….*

Though *Asztaslos* concerned a Part 1 warrant, the same principles apply to a Part 2 warrant. Whether the case involves a category 1 or a category 2 territory, the English court must take what may be termed a cosmopolitan approach. This was explained in *Re Ismail* [1999] A.C. 320 at 327:

> *It is not always easy for an English court to decide when in a civil law jurisdiction a suspect becomes an "accused" person. All one can say with confidence is that a purposive interpretation of "accused" ought to be adopted in order to accommodate the differences between legal systems. In other words, it is necessary for our courts to adopt a cosmopolitan approach to the question whether as a matter of substance rather than form the requirement of there being an "accused" person is satisfied. That such a broad approach to the interpretation of section 1 of the Act of 1989 is permissible is reinforced by the provisions of section 20. This provision deals with the reverse position of an extradition of a person "accused" in the United Kingdom and contemplates that "proceedings" against him may not be commenced ("begun") for six months after his return. This provides contextual support a correspondingly broad approach to "accused" in section 1. For my part I am satisfied that the Divisional Court in this case posed the right test by addressing the broad question whether the competent authorities in the foreign jurisdiction had taken a step which can fairly be described as the commencement of a prosecution. But in the light of the diversity of cases which may come before the courts it is right to emphasize that ultimately the question whether a person is "accused" within the meaning of section 1 of the Act of 1989 will require an intense focus on the particular facts of each case.*

Though the House of Lords in *Ismail* referred to the proper interpretation of "accused", it is apparent that the principles apply to the question of whether the extradition request was made for the purpose of the requested person being prosecuted.

37. Mr Hall argued that the terms of the request taken together with the other material demonstrates that there is real equivocality about the purpose of the extradition request. He relied on the reference in the warrant to the arrest being required "to be able to take a statement from (the appellant) about the facts on file and issue any

appropriate decisions". He said that the further material provided by the requesting state further undermined the proposition that extradition was being sought for the purposes of prosecution. He pointed to the reference to the appellant as someone with "the status of an accused person but not entirely…" The material indicated that, depending on what the appellant said before the court, he would be prosecuted or not.

38. Ms Brown submitted that, on taking a cosmopolitan approach to the process in the requesting state, it was clear that the criminal process had got to the point where the appellant was an accused person and that, subject to what the appellant said to the court, he would be prosecuted. The material provided by the requesting state made it clear that the appellant had been identified as the perpetrator of the assault on Mr Alves. Part of the prosecution process involved the appellant being given the opportunity to provide a "declaration" but that did not remove him from the status of being an accused. Nor did it mean that the request for extradition was no more than a step in the investigative process.

39. I am satisfied that, looking at the evidence in the round, the appellant is an accused person and the extradition request is for the purpose of prosecuting the appellant. The extradition order which accompanied the extradition request said that extradition was required to allow proceedings to be carried out "in his (the appellant's) presence both at the pre-trial stage and the trial stage before the competent Court so that he can be questioned and judged in the Principality of Andorra…" References to "the trial stage" and to the appellant being "judged" indicate that prosecution was the purpose to be achieved.

40. The later material could only undermine the clear meaning of the extradition request if it was clearly contrary to that meaning. It is apparent that the criminal process in the requesting state requires an accused person to testify prior to the commencement of proceedings as it would be understood in this jurisdiction. The concluding passage of the material provided in April 2022 establishes that this is an inherent part of the process. The fact that it must occur before the appellant is prosecuted does not mean that the extradition request is for some purpose other than prosecuting the appellant. For that to be the interpretation of the material provided by the requesting state would be to impose English criminal procedure on a civil law jurisdiction. Mr Hall argued that the requesting state could have said that a decision has been made to prosecute though we will listen to what the appellant has to say. That argument ignores the nature of the civil law jurisdiction. It requires the requesting state to view its procedure through the prism of English criminal procedure. That is not a cosmopolitan approach.

Conclusion

41. I conclude that the judge was wrong to find that she had no jurisdiction to consider the issues of whether the appellant was an accused and whether extradition was being sought for the purposes of prosecution. However, I am satisfied that, if she had considered those issues on their merits, she would have found against the appellant. Thus, her decision to send the case to the SSHD would have been the same. Subject to the views of my Lord, I dismiss the appeal.

MR JUSTICE LANE

42. I respectfully agree with William Davis LJ that this appeal must be dismissed. In order to succeed in the appeal under section 103 (and in order to obtain any relief in respect of the judicial review against the Secretary of State's certification decision), the appellant must persuade this court that he is correct on both the "jurisdictional" issue and the "evidential" issue. As my Lord has found, the appellant succeeds on the first issue but fails of the second. I would briefly add the following remarks regarding the jurisdictional issue.

43. Paragraph 29 of the judgment of Scott Baker LJ in *Akaroglu* shows that the Divisional Court was concerned with whether the District Judge was entitled to review the Secretary of State's decision to certify. That led the court to examine whether the provisions of Part 2 of the 2003 Act entitled the District Judge and/or the Divisional Court to review any decision taken at a preliminary stage to the extradition hearing.

44. That is a different exercise to the one which the Divisional Court undertook in *Boudhiba.* As paragraph 15 of her judgment in that case makes plain, Smith LJ's approach was based squarely on the concept of validity: if the requirements for an arrest warrant to be valid are not met, then the warrant is not valid. What this means is the District Judge does not have jurisdiction to make a decision leading to the extradition of the requested person.

45. This approach is in accord with authority at Divisional Court level: see *Pinto v Governor of Brixton Prison* [2004] EWHC 2986 (Admin)*,* [16], [18]; *Vey v France* [2006] EWHC 760 (Admin), [35]. It is also consistent with authority at the highest level: *Dabas v High Court of Justice in Madrid, Spain* [2007] UKHL 6, [15]: Lord Hope.

46. The fact that *Boudhiba* was not cited by the court in *Akaroglu* is thus highly significant. It means one should be cautious before holding that *Akaroglu* is authority for any wider proposition than is specifically stated in the judgments; in particular, for the proposition that there can be no jurisdictional challenge of the kind raised by the present appellant.

47. The failure of the court in *Akaroglu* to consider *Boudhiba* etc means that the respondent is compelled to try to "retro-fit" into *Akaroglu* a proposition which finds no expression in the judgment of Scott Baker LJ. This is the proposition that there are differences between the systems created by Parliament in Part 1 and Part 2 of the 2003 Act; and these differences explain why a jurisdictional issue as to the validity of the warrant in a Part 2 case can be addressed only by judicial review.

48. I do not consider that any of the differences relied upon by Ms Brown constitute such an explanation, whether individually or collectively. In particular, I am unpersuaded that the fact the Secretary of State is the certifying body under section 70, and that she has a duty to certify (subject to certain exceptions) sheds meaningful light on the matter. Indeed, it is difficult to see why the power/duty distinction should affect the way in which a challenge can be brought in respect of the legal basis upon which certification has taken place.

49. In my view, far more important are the similarities between Parts 1 and 2. The ability of the Secretary of State to issue a certificate under section 70 arises only where she receives a "valid certificate". An accusation request will be valid only if it includes "the statement" that the person is an "accused" who is sought "for the purpose of being prosecuted": section 70(4).

50. In the case of Part 1 the NCA's certification rests upon there being a statement that the person concerned "is accused in the category 1 territory" of the commission of the offence in question and that the warrant is being issued "with a view to his arrest and extradition... for the purpose of being prosecuted for the offence": section 2(3)(a) and (b).

51. I believe that these are the relevant provisions, for the purpose of making a comparison between Parts 1 and 2. They are strikingly similar. Applying the principle of *in pari materia*, I do not consider it is correct to construe Parts 1 and 2 in order to produce such a starkly different outcome as that for which the respondent contends. I also observe that the respondent's contention is not supported by Ms Hill, on behalf of the Secretary of State.

52. At the hearing, it was common ground between all three parties that, once the Secretary of State has issued a certificate under section 70, she is *functus officio*. This leads to the question of how judicial review can operate so as to provide a requested person in a Part 2 case with an effective way of challenging whether he or she is, in truth, sought for prosecution as an accused person.

53. Where the evidence which is now before the District Judge is considered by the requested person to show that he or she is not, in fact, an accused who is sought for prosecution, but that evidence was not before the Secretary of State at the time of certification, the proceedings before the District Judge would need to be stayed, whilst the requested person pursues a judicial review. But it is by no means clear how, in such a scenario, a successful challenge could be mounted to the certification decision.

54. At the hearing, mention was made of the judgment of Carnwath LJ in *E & R v SSHD* 2014 EWCA 49. Ms Hill, however, rightly questioned whether the principle of error of fact giving rise to unfairness could be invoked in the above scenario, in order to ground a judicial review, bearing in mind that, save in exceptional circumstances, the admission of new evidence for this purpose is subject to *Ladd v Marshall* [1954] 1 WLR 1489 principles: [91(iii)].

55. Against this background, it is unsurprising that, as William Davis LJ has observed, other constitutions of the Divisional Court, to whose attention *Akaroglu* has apparently not been drawn, have reached the conclusion that Parts 1 and 2 are, for this purpose, "closely analogous" and that "the principles developed for section 2(3) "are broadly applicable to the requirement under s. 70(4)": Nicol J at [5] of *Pesut.*

56. Faced with all of this, Ms Brown, in her oral submissions, suggested for the first time that the District Judge would, in fact, have jurisdiction to deal with such new evidence under the abuse of process principle.

57. In my view, the fact that the respondent raised the abuse of process principle is an acknowledgment of the difficulties inherent in its invocation of *Akaroglu.*

Unsurprisingly, the principle formed no part of the Divisional Court's reasoning in that case, given that the court was not asked to consider the relationship between Parts 1 and 2 of the 2003 Act. Accordingly, like my Lord, I do not consider that the availability of the abuse of process principle in Part 2 cases is a reason to prevent someone in the position of the present appellant from invoking the jurisdictional issue. As articulated by Smith LJ in *Boudhiba,* that principle holds good for Part 2. The true role of judicial review in this context is that described by William Davis LJ. To the extent that *Akaroglu* might be said to be authority to the contrary, it should not be followed.