Neutral Citation Number: [2019] EWHC 2978 (Admin)

Case No: CO/1327/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2019

Before:

THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES

and

THE HONOURABLE MRS JUSTICE MAY

- -

Between:

NATHAN WYATT	**Appellant**
- and -	
GOVERNMENT OF UNITED STATES OF AMERICA	**Respondent**

- -
- -

Ms K O'Raghallaigh (instructed by **Tuckers Solicitors**) for the **Claimant**
Mr D Sternberg (instructed by **CPS Extradition Unit**) for the **Defendant**

Hearing dates: 22 October 2019

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Approved Judgment

The Lord Burnett of Maldon CJ:

1. The Government of the United States seeks the extradition of the appellant on charges relating to computer hacking with associated demands for money and the dissemination on the internet of personal medical records. On 25 January 2019 District Judge Tempia sent the appellant's case to the Secretary of State who subsequently ordered his extradition. The sole issue before the judge was whether the forum bar to extradition found in section 83A of the Extradition Act 2003 ["the 2003 Act"] should operate to prevent extradition on the basis that the interests of justice, as defined in that section, favoured prosecution in this jurisdiction.

2. The judge examined each of the statutory factors that inform that question. She concluded that it was in the interests of justice for the appellant to be extradited for trial in the United States. This is his appeal against the decision to send the case to the Secretary of State.

The Forum Bar

3. Section 83A of the 2003 Act provides:

> "83A Forum
>
> (1) The extradition of a person ("D") to a category 2 territory is barred by reason of forum if the extradition would not be in the interests of justice.
>
> (2) For the purposes of this section, the extradition would not be in the interests of justice if the judge –
>
> (a) Decides that a substantial measure of D's relevant activity was performed in the United Kingdom; and
>
> (b) Decides, having regard to the specified matters relating to the interests of justice (and only those matters), that the extradition should not take place.
>
> (3) These are the specified matters relating to the interests of justice –
>
> (a) The place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur;
>
> (b) The interests of any victims of the extradition offence;
>
> (c) Any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence;

(d) Were D to be prosecuted in a part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence necessary to prove the offence is or could be made available in the United Kingdom;

(e) Any delay that might result from proceeding in one jurisdiction rather than another;

(f) The desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard (in particular) to –

(i) The jurisdictions in which witness, co-defendants and other suspects are located, and

(ii) The practicability of the evidence of such persons being given in the United Kingdom or in jurisdictions outside the United Kingdom;

(g) D's connections with the United Kingdom.

(4) In deciding whether the extradition would not be in the interests of justice, the judge must have regard to the desirability of not requiring the disclosure of material which is subject to restrictions on disclosure in the category 2 territory concerned.

(5) If, on an application by a prosecutor, it appears to the judge that the prosecutor has considered the offences for which D could be prosecuted in the United Kingdom, or a part of the United Kingdom, in respect of the conduct constituting the extradition offence, the judge must make that prosecutor a party to the proceedings on the question of whether D's extradition is barred by reason of forum.

(6) In this section "*D's relevant activity"* means activity which is material to the commission of the extradition offence and is alleged to have been performed by D."

4. The application of the forum bar has been considered in a series of appeals in this court, most recently: *Love v USA* [2018] EWHC 172 (Admin) [2018], 1 WLR 2889; *Scott v USA* [2018] EWHC 2021 (Admin), [2019] 1 WLR 774 and *Ejinyere v USA* [2018] EWHC 2841 (Admin).

5. As was explained at [14] in *Ejinyere,* echoing *Love* at [22], the aim of the forum bar is to prevent extradition where the offences in question can be fairly and effectively tried in the United Kingdom and it is not in the interests of justice, as narrowly

defined in section 83A, that the requested person should be extradited. Close attention must be paid to the wording of the statute.

> "The matters relevant to an evaluation of the "interests of justice" are found in section 83A(2)(b) and (3). They do not leave the court the task of some vague or broader evaluation of what is just. Nor is the bar a general provision requiring the court to form a view directly on which is the more suitable forum …" *Love* at [22].

6. The question for this court on an appeal is whether or not the judge was wrong: *Love* at [23] to [26]. It is not to unpick the reasoning with a view then to inviting this court to make a primary decision.

The Background

7. The appellant became the subject of a police investigation in the United Kingdom in 2016 which led to his prosecution on a 22 count indictment. There were 20 counts of fraud which involved using stolen credit card details, one count of possession of an identity document with an improper intention and one count of blackmail. That last count arose from hacking a computer and demanding money from its owners to avoid harm. On 22 September 2017 at Southwark Crown Court the appellant pleaded guilty to all counts and on 17 November was sentenced to 42 months' imprisonment. The domestic prosecuting authorities were aware that a criminal investigation was underway in the United States which centred on a computer hacker or hackers who were self-styled as "the dark overlord". In the context of the prosecution proceeding in this jurisdiction, the Crown Prosecution Service considered whether it should take over the investigation of the United States matters with a view to prosecuting additional counts. There was no doubt that the conduct of the appellant subject to investigation in America had taken place here, albeit that the alleged damage all occurred in the United States and both the corporate and individual complainants were located there.

8. Mr Andrew Hadik, of the Complex Casework Unit of the Crown Prosecution Service, reviewed the matter on 12 September 2017. He explained in a contemporaneous note that the appellant was believed by the United States prosecuting authorities to be responsible for the criminal conduct under investigation there, although there were other suspects in America. Nearly all the witnesses were in the United States where the alleged victims were also located and the losses and harm sustained. At the time of his review the investigation was continuing and there was no evidence then available in this jurisdiction to charge the appellant with the American offences. Evidence of the unlawful demands relied upon by the United States authorities had not been found on the computers seized by the police here. The prosecution proceeding in England was not into the same allegations, although the method of offending was the same as underlay the single blackmail count here. There was no connection between the alleged victims. Mr Hadik concluded that there was no good reason to begin to investigate and prosecute the United States matters here. He decided to inform the appellant about the United States investigation (of which he was likely to be aware anyway) to avoid any argument that he might enter guilty pleas on a misapprehension about the possibility of future prosecutions. The case summary

produced at Southwark Crown Court for the sentencing hearing confirmed that the appellant remained under investigation by the authorities in the United States.

9. The extradition request relates to those investigations. There is a single conspiracy charge, two counts of aggravated identity theft and three counts of threatening damage to a computer. The "dark overlord" remotely accessed computer networks of healthcare and accountancy companies, obtained sensitive data, and then threatened to release it unless a ransom was paid. It is alleged that the appellant created email and telephone accounts which were used to send threatening and extortionate demands. The first victim was a healthcare provider which was contacted and told that its systems had been hacked. Samples of hacked material were provided together with details of the company owner's family. Threatening messages were sent directly to his daughter. The second victim was another healthcare provider. Money was stolen via its Paypal account and it was later threatened with exposure as having compromised its clients' records with consequent responsibility for their suffering. The third victim was also a healthcare company. $75,000 was demanded from it to be paid using bitcoin. Confidential information was posted on a Twitter account and it was told information would be pasted on another website if it did not pay. The fourth victim was a public accounting firm whose owner received an email that contained personal information about his family and business, with a threat to publish unless 250 bitcoin were paid. Threats were made to publish confidential client information. The fifth victim was another healthcare provider which was told that its database would be published unless it paid 500 bitcoin. This company involved its lawyer. It said that bitcoin was difficult to deal in. That provoked a response that the Chief Executive Officer would be reported to various Government agencies. Hundreds of the company's clients' records were leaked into the public domain. The demand was changed to £400,000 in four payments of £100,000 by bank transfer. The bank account details provided are alleged to be those of the appellant.

10. For the purposes of the extradition hearing, Mr Hadik produced a prosecutor's statement of belief pursuant to section 83A(3)(c) of the 2003 Act which concluded:

> "that the UK is not the most appropriate jurisdiction in which to prosecute Mr Wyatt for the extradition offences. The factors in favour of the USA being appropriate when taken together are in my view very strong and outweigh any factors in favour of the UK. In particular, it appears to me that the USA is a more appropriate jurisdiction because the gravamen of the case was in the USA."

Before stating that conclusion, Mr Hadik had explained the view he had taken in the previous year and continued:

> "I have not received any information or material subsequently which has caused me to reconsider my decision
>
> I have considered the SUMMARY OF FACTS OF THE CASE set out in the AFFIDAVIT IN SUPPORT OF REQUEST FOR EXTRADITION OF NATHAN WYATT sworn by Laura K. Bernstein, on 24th January 2018, as I am now being asked to state my belief at this time.

I have not read anything that causes me to change my earlier review decision.

In summary (and incorporating my earlier review decision);

i) All of the harm occurred in the USA;

ii) All other parties including the injured parties were at the time and remain with the USA;

iii) This case involves alleged conduct that resulted in very serious harm to residents and corporations in the USA. Other suspects remain under investigation by the United States Authorities;

iv) Extradition would make it possible for all prosecutions to take place in one jurisdiction;

v) The vast majority of the evidence appears to me to be held in the USA.

I have considered what factors favour the United Kingdom being the appropriate jurisdiction, including that Mr Wyatt was apparently physically within the UK at all material times, remains in the UK, has ties to the UK and that there could in theory be a UK investigation."

The Decision of the District Judge

11. The judge was satisfied that the threshold requirement in section 83A(a) was satisfied because there was no doubt that a substantial measure of the appellant's relevant activity was performed in the United Kingdom. She then dealt with the matters identified in section 83A(3). As to (a), most of the harm and loss was suffered in the United States. Threats were made to both companies and individuals in the United States. Private information of the clients of American companies were disclosed. Considerable time, energy and expense was incurred in the United States dealing with the breaches of the computer systems. She also considered that the interests of the victims of the alleged offending, factor (b), favoured proceedings in the United States, including their giving evidence there. As to (c), the belief of the prosecutor, that too favoured extradition. She considered that factor (d), the availability of evidence in the United Kingdom, did not favour extradition as the United States authorities had indicated that the evidence could be made available for use in this jurisdiction. (They had also said that it might not be easy and that all of the evidence might not be capable of being adduced in an English court.) She concluded that the question of delay, factor (e), favoured extradition because the investigation was far advanced in the United States, an indictment had been issued and the appellant would be entitled to a trial within 70 days of surrender. Factor (f) concerns the desirability of all prosecutions taking place in one place. Although there was a suggestion in Mr Hadik's note that others were under investigation for the same offences, the judge recognised that there were no co-defendants in the American proceedings and that the evidence in the United States could be shared with the English prosecuting authorities. Nonetheless, the judge brought this factor into account because all the witnesses were located in the United States. There was no issue but that the

appellant's connections were with the United Kingdom for the purposes of factor (g). He was born in 1989, had lived here all his life, had a partner here and had a child from a former relationship. In summary the judge considered that only two factors, namely personal connections and the availability of evidence told against extradition. She balanced all those factors and concluded that the interests of justice, as defined in section 83A of the 2003 Act, favoured extradition.

The Ground of Appeal

12. The appellant's grounds of appeal are that:

> "The District Judge erred in conducting the balancing exercise.
> In particular:
>
> i. She failed to accord adequate weight to the fact that the U.S. has said, in terms that the evidence can be provided to the UK;
>
> ii. Moreover, her conclusion that up to fifteen people may have to give evidence weighs in favour of extradition is unsustainable. It is not out of the ordinary scheme of English criminal trials that up to fifteen people may give evidence;
>
> iii. Her conclusion that the interests of justice were met by "all prosecutions taking place in one jurisdiction" ignores the fact that there is only one prosecution. It is submitted that factor (f) cannot be construed so as to refer to cases involving a single prosecution: if such a construction is adopted, that would enable the appropriate judge to 'double count' the fact that the witnesses are in the United States, which is already catered for in factor (b) (interests of the victims). The District Judge had already dealt with the 'inconvenience' factor under this heading. Thus, she has, overall, accorded too great a weight to the location of the victims in this case.
>
> iv. The statement of the UK prosecutor established very little. Much of the statement was concerned with the Southwark proceedings. What observations related to the extradition request did no more that restate the statutory criteria."

13. Miss O'Raghallaigh submitted that there was nothing persuasive in the material before the judge to lead to the conclusion that the offences should be tried in the United States. Many of her submissions were directed towards the proposition that the judge gave too much, or too little, weight to various of the statutory factors. She submitted that this is a straightforward case of computer hacking, with associated threats and demands for money. Much of the evidence would be documentary.

14. She developed a submission that the judge conflated questions of the interests of the victims with the number of witnesses that might need to be called. Her argument was that any evidence could be given by video link, that the corporate and individual victims could thus take part in the trial and so the weight to be attached to their interests in proceedings in the United States was low. She submitted that the prosecutor's statement of belief merely repeated the statutory factors and for that

reason was of little value. She submitted that while it was proper for the judge to take his belief into account, it "was not a strong factor". Miss O'Raghallaigh was critical of the judge's reliance on delay. It was inevitable, submitted Miss O' Raghallaigh, that the requesting state would be ahead of the authorities in the United Kingdom if, as here, there had decided not to pursue a prosecution here. The evidence was that if extradited the appellant would be able to insist on a trial within 70 days of surrender. Finally, Miss O'Raghallaigh submitted that the judge was wrong to make any reference to all proceedings being conducted in one jurisdiction because there were no co-accused in the United States.

Discussion

15. The interests of the victims of an alleged extradition offence include the convenience of giving evidence but are not limited to that, as the judge recognised. It is commonplace for the evidence of witnesses located abroad to be taken by video link to avoid the inconvenience and expense of having to travel long distances. In a case such as this one would expect there to be a range of written evidence which, in the ordinary course, would be agreed for trial. Yet the victims of a crime have an interest in the legal proceedings beyond the narrow compass of being a witness and giving evidence. They should, if they wish, be able to attend a trial. They should be in a position to have continuing contact with the prosecuting authorities. They are likely to wish a prosecution to take place in the jurisdiction where they suffered the harm relied upon, subject to their domestic legal order culminating, if there is a conviction, in an appropriate local sentence. This case involves corporate victims, although acting through individuals and owners who are alleged to have been threatened, their families and hundreds of individuals whose personal medical data were disclosed. The judge cannot be faulted for having considered this to be a statutory factor which weighed in favour of extradition, nor for thinking it an important matter.

16. There is no substance in the criticism that the judge failed to appreciate that the evidence could be made available to the Crown Prosecution Service, if necessary or to give it weight. She referred to this factor as one that told against extradition.

17. Miss O' Raghallaigh's main argument focussed on the prosecutor's statement of belief, submitting that it added little or nothing because it was founded on a number of the other statutory factors.

18. The judge deciding an issue under section 83A of the 2003 Act is obliged to have regard exclusively to the statutory lexicon when determining where the interests of justice lie. One of those factors is a belief of the prosecutor that the United Kingdom is <u>not</u> the most appropriate place in which a prosecution should proceed. The statute requires her to have regard to such a statement of belief but the weight to be attached to it is a matter for the judge. The more reasoned or explained the belief, the more likely it is to carry substantial weight. It is almost inevitable that a prosecutor will take into account the statutory factors found in section 83A(3) in forming a belief. It would be very odd not to do so. Factors such as the interests of the victims, the availability of evidence, the location of harm, delay, the defendant's connections with the United Kingdom and the prospect of multiple prosecutions could be influential in forming a belief. The prosecutor is not, however, limited by the statutory factors in the same way that the judge is. He may take anything that rationally bears on the question into account. Obvious examples would include the dynamics of a trial and

the practical implications of having to investigate alleged offences and prosecute them here, including resource implications. There may also be differences between the legal regimes in the requesting state and England and Wales which could have an impact on admissibility of evidence or raise other legal issues.

19. Thus, the judge is required to have regard to the prosecutor's belief; and that may be based largely on the statutory factors or may extend well beyond them. Yet the prosecutor's belief is an independent factor that weights in the balance. It may be, for example, that the judge's provisional view having regard to all factors except the prosecutor's belief would be not to favour extradition. Then, taking into account the prosecutor's belief the balance may tip the other way. Whether or not that is the case, the belief must weigh in the balance, but weight is for the judge.

20. The prosecutor's belief is not diminished or undermined for the purposes of the 2003 Act simply because it takes into account factors found in section 83A. Mr Hadik's belief was explained in some detail. The strength of his belief was undoubtedly of significance.

21. When considering the factor identified in section 83A(3)(f) the judge recognised that there were no co-accused or co-defendants referred to in the papers from the United States. She did not advert to the fact that others were under investigation, a feature that would squarely engage this provision, although she recorded Mr Sternberg, who appeared before her and before us for the Government of the United States, as submitting that it was desirable for all prosecutions to proceed in one jurisdiction. His submission then referred to the location of all the witnesses. Miss O'Raghallaigh was critical of the judge for making any reference to this factor, having recognised that there were no co-defendants. It is perhaps fair to observe that in the course of a careful and exemplary judgment the judge did not explain her approach to this factor fully. That said, a textual criticism of the reasoning cannot carry the appellant to the destination at which he needs to arrive, namely that the overall conclusion of the judge was wrong.

22. Over the course of a detailed and clear judgment, the judge explained her approach to each of the statutory factors, identified those which weighed either way in the balance, weighed them and determined that extradition was not barred by virtue of section 83A. The individual criticisms of her reasoning are not established. Of more moment, her decision cannot be stigmatised as wrong.

23. For these reasons, I would dismiss this appeal.

The Hon Mrs Justice May

24. I agree.