Neutral Citation Number: [2016] EWHC 2737 (Admin)

Case No: CO/2700/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/11/2016

Before:

LORD JUSTICE GROSS
and
MR JUSTICE NICOL

- -

Between:

NAVINDER SINGH SARAO	**Applicant**
- and -	
THE GOVERNMENT OF THE UNITED STATES OF AMERICA	**Respondent**

- -
- -

James Lewis QC and Joel Smith (instructed by **Tuckers Solicitors**) for the **Applicant**
Mark Summers QC and Aaron Watkins (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing dates: 14 October, 2016

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Approved Judgment

Lord Justice Gross:

INTRODUCTION

1. The Applicant, a British national, born on the 14th November, 1978, renews his application for permission to appeal, after refusal by Irwin J (as he then was) on the papers, against the decision of DJ Purdy, made on the 23rd March, 2016 ("the judgment"), to send his case to the Secretary of State ("the SSHD") for his extradition to the United States of America ("the US") to be considered.

2. On the 14th May, 2016, the SSHD ordered the Applicant's extradition. No challenge is made to the SSHD's decision, so we are solely concerned with the appeal from the Judge.

3. The Applicant's extradition is sought, pursuant to extradition requests dated 20th March, 2015 and 18th September, 2015 (for convenience, "the Request"), in relation to 22 allegations of wire fraud, commodities fraud, commodities manipulation and "spoofing" between 2009 and 2014, including conduct which is alleged to have caused or contributed to a crash in the US stock market on 6th May, 2010 ("the flash crash").

4. The alleged conduct took place while the Applicant was working as a futures trader, primarily through his company Nav Sarao Futures Limited, operating from his home in the United Kingdom.

5. Three grounds of appeal ("the Grounds") are advanced:

   i) The alleged conduct does not amount to an extradition offence within the meaning of s.137 of the *Extradition Act 2003* ("the Act") ("Ground I: Dual Criminality");

   ii) The Judge should have stayed proceedings as an abuse of process as the request did not contain a fair, proper and accurate description of the alleged conduct ("Ground II: Abuse of Process");

   iii) Extradition is forum-barred under s.83A(1) of the Act as it is not in the interests of justice ("Ground III: Forum Bar").

6. At the conclusion of the hearing on Friday 14th October, we indicated that permission to appeal was refused and that the reasons for our decision would follow. We now give our reasons.

7. An overview of the conduct alleged against the Applicant is set out in the Supplemental Affidavit of Mr. Wible, a prosecutor of the US Department of Justice, sworn on the 18th September, 2015 ("the September Affidavit"), as follows:

> " On numerous occasions between April 2010 and April 2014, SARAO spoofed the market and manipulated the intra-day price for near month E-minis on the Chicago Mercantile Exchange (CME), including on or about May 6, 2010, when the United States stock markets plunged dramatically in a matter of minutes in an event that came to be known as the 'Flash Crash'.

> SARAO sought to manipulate the market for E-Minis by placing multiple large-volume sell orders on the CME (to create the appearance of substantial supply and thus drive prices down) and modifying and ultimately cancelling the orders before they were executed. SARAO then exploited his manipulation for his personal profit. SARAO obtained substantial trading profits through this activity. SARAO also misrepresented and lied about his use of computer automation to effectuate the massive split-second modification and cancellation of orders that facilitated his market manipulation."

8. "E-Minis" are stock market index futures contracts, based on the Standard & Poor 500 Index ("S&P 500 Index") – an index of 500 stocks designed to be a leading indicator of US equities. E-Minis are said to be one of the most popular and liquid equity index futures contracts in the world.

9. In the Indictment, filed on 2nd September, 2015, the matter is put this way:

> " 8. 'Layering' (a type of 'spoofing') is a form of manipulative, high-speed activity in the financial markets. In a layering scheme, a trader places multiple, bogus orders that the trader does not intend to have executed – for example, multiple orders to sell a financial product at different price points – and then quickly modifies or cancels those orders before they are executed. The purpose of these bogus orders is to trick other market participants and manipulate the product's market price (in the foregoing example of bogus sell orders, by creating a false appearance of increased supply in the product and thereby depressing its market price). The trader seeks to mislead and deceive investors by communicating false pricing signals to the market, to create a false impression of how market participants value a financial product, and thus to prevent legitimate forces of supply and demand from operating properly. The trader does so by creating a false appearance of market depth, with intent to create artificial price movements. The trader could then exploit this layering activity by simultaneously executing other, real trades that the trader does intend to have executed, in an attempt to profit from the artificial price movements that the trader had created. Such layering and trading activity occurs over the course of seconds, in multiple cycles that the trader repeats throughout the trading day. Given the speed and near simultaneity of market activity in a successful layering scheme, such schemes are aided by custom-programmed, automated trading software.
>
> 9. Beginning in or about January 2009, …SARAO…sought to enrich himself through manipulation of the market for E-Minis. By placing multiple large-volume orders on the CME at different price points, SARAO created the false appearance of substantial supply in order to fraudulently induce other market participants to react to his deceptive market information.

> SARAO thus artificially depressed E-Mini prices. With the aid of an automated trading program, SARAO was able to all but eliminate his risk of unintentionally executing these orders by modifying and ultimately cancelling them before execution. Meanwhile, he exploited his manipulation to reap large trading profits by executing other, real orders."

10. According to the September Affidavit, the Applicant's "dynamic layering technique" harmed other market participants; the Applicant's counterparties were most directly harmed and most of those affected by his conduct are said to be investors based in the US.

11. I add this. Although there has been much publicity relating to the Applicant's alleged contributory role to the so-called "flash crash" of 6th May, 2010, it is right to underline that the US case concerns some five years of alleged offending; it is thus much broader than the events surrounding the "flash crash" on a single day. Before us, the US maintained that the Applicant was spoofing on that day, whether or not he caused or contributed to the flash crash. It must further be noted that the 22 counts to which reference has already been made are sample or specimen counts.

12. So far as the Applicant's intentions were concerned, the Indictment included reference to a number of e-mails between the Applicant and various computer programmers in 2009, which, to put it no higher, make uncomfortable reading for him – even recognising that he will at some stage have an opportunity of explaining them. It is only necessary to refer to three. On or about the 1st February, 2009, the Applicant said this as to the functionality of the trading programme he was using: "If I am short I want to spoof it [i.e., the market] down, so I will place joint offer orders….at the 1st offer and 2nd offer and an order….into the 1st bid. These will not be seen." On or about the 24th February, 2009, the Applicant explained to a computer programmer that the trading programme functionality should be designed so that "it is very easy for me to enter orders of varying different amounts. That's what I need. If I keep entering the same clip sizes, people will become aware of what I am doing, rendering my spoofing pointless." On or about the 27th February, 2009, a further e-mail from the Applicant to the same programmer, complained that he needed to know whether the programmer could do what the Applicant needed "….because at the moment I'm getting hit on my spoofs all the time and it's costing me a lot of money."

THE JUDGMENT UNDER APPEAL

13. Turning to the judgment, the Judge underlined that the ultimate question of the Applicant's guilt or innocence was for a trial court and not for the court dealing with extradition. With regard to the flash crash, the Judge remarked that complaint "…of involvement in this emotively named event is but a small part of the conduct alleged here."

14. Having carefully outlined the complaint and the evidence (including that of Prof. Harris for the Applicant), the Judge set out his "Factual Findings", at [15], as follows:

> " (i) Navinder Sarao set up and adapted, with the active assistance of 4 separate programmers, altered software system very different from the basic programme.

(ii) Navinder Sarao actively traded on the C.M.E. during the alleged illegal activity 2009 – 2014, all from his base in London.

(iii) Altering software is not *per se* illegal either against C.M.E. rules or U.S. Federal law and is not uncommon.

(iv) A very high percentage of contracts on the C.M.E. are routinely cancelled by traders large and small, perhaps 99%. Altering contracts is commonplace and legitimate.

(v) Navinder Sarao for instant purposes traded, albeit with some losses, making a very substantial profit of approximately $40 m and on the sample counts $8.1 m.

(vi) Emails sent by Navinder Sarao to his various programmers provide a powerful basis for concluding, absent any contradiction, that active market manipulation, including that known as spoofing, was expressly intended and was clearly known by him to be illegal.

(vii) While all of Navinder Sarao's contracts may have been at potential risk of execution, to his fiscal detriment, which is how the market operates, Navinder Sarao had adapted his software to minimise the risk way beyond ordinary market custom and practice.

(viii) Navinder Sarao was seemingly untruthful to Regulators in answering formal enquiries as to how he was operating on the C.M.E.

(ix) The Defence expert, Prof Harris, has not undertaken any examination of Navinder Sarao's market activity from any of the data potentially available to him. The Prosecutor's expert, Prof Hendershot, has formed a view based on an analysis of all that data.

(x) The causes of the Flash Crash (on 6/5/10) are not a single action and cannot on any view be laid wholly or mostly at Navinder Sarao's door, although he was active on the day. In any event, this is only a single trading day in over 400 relied upon by the prosecution.

(xi) Prof Harris accepts, while he disagrees with the conclusions of the U.S. Prosecutors, he is not saying the complaint of illegal market manipulation is not a genuine belief of both the U.S. Prosecution authorities and the U.S. Judge who issued the warrant or the grand jury and its 22 count indictment."

The language used here needs to be adjusted to fit within English contract law concepts. The "contracts" to which the Judge referred would be categorised as "offers" in our terminology and "execution" would be regarded as "acceptance".

15. The Judge next turned to the principal issues before him, which I have now termed the Grounds. The Judge dealt with Dual Criminality (Ground I) at [17] – [22], summarising the legislation and reviewing the rival arguments. The Judge rejected the Dual Criminality challenge. His consideration of the matter could only be based on the conduct as set out in the Request. As he put it:

> " Essentially, has the USA established that the same actions in this jurisdiction at the same time would be capable of being prosecuted for one or more offences known to the criminal law? This is not the forum for testing the evidence as in a trial. To my mind when all is said and done the USA are correct in arguing they have shown dual criminality. ….In my judgment '**representations**' are made by making orders/contracts, the prosecution can show the motivation for this fact given the heavily modified software and the reasons for that (see the email exchanges with the four software programmers) which is intended to dishonestly create a gain for Navinder Sarao (and loss for other market users). "

The Judge held that, if it took place in the United Kingdom, such conduct would amount to an offence under s.2 of the *Fraud Act 2006* ("the Fraud Act"). For Dual Criminality purposes, the Judge further held that financial market offences under s.397 of the *Financial Services and Markets Act 2000* ("the FSMA 2000") and s.90 of the *Financial Services Act 2012* ("the FSA 2012") were also made out.

> "A '**false**' impression as to price is clearly intended and created by the conduct alleged and that is dishonest, again by reference to the conduct outlined in clear and unambiguous terms by this USA Request."

16. As to Abuse of Process (Ground II), the Applicant's case was that the Request suggested that only the Applicant was engaged in cancellations when such conduct was the norm. The Judge ruled (at [23]) that the challenge was "…a bad one and must factually and legally be rejected."

17. The Judge considered the question of Forum Bar (Ground III) at [26] – [27]. S.83A provides as follows:

> " (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 witnesses, 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. "

18. The Judge had regard to authority and the statutory test, namely, whether extradition would not be in the interests of justice. Having concluded that a substantial measure of the Applicant's activity was performed in the United Kingdom, the Judge then turned to each of the specified matters listed in sub-section (3). As to these:

    i) The better view was that most of the "harm" occurred in the US, bearing in mind that harm "can include damage to the integrity of that particular trading market".

    ii) With regard to the interests of any victims, the balance was neutral or slightly in favour of the US.

    iii) There was no view from any United Kingdom prosecutor.

iv) All the evidence could be made available in the United Kingdom.

v) So far as concerned delay, the Judge pointed out that the US authorities were ready to try the matter but any delay in this country would not be significant.

vi) With regard to the desirability and practicability of all prosecutions taking place in one jurisdiction, the Judge came "down firmly" in favour of the US.

vii) There was no dispute as to the Applicant's connections with the United Kingdom.

19. Summarising, the Judge said this:

> " …[The Applicant] self-evidently and understandably does not wish or desire to be extradited, few do, or face trial in any jurisdiction, this one included. That is not the test in law. To my mind the '**interests of justice**' make trial in the USA both the desirable and practicable venue and I reject the challenge advanced of the forum bar…."

20. As already recorded, Irwin J refused permission to appeal on the papers. He found no basis for a claim of Abuse of Process (Ground II). As to Dual Criminality (Ground I), the Applicant's position was "hopeless". It was immaterial that sometimes the spoofs resulted in genuine, if unwanted, transactions. Further, Irwin J drew attention to the e-mails (referred to above), which he regarded as, in context, representing direct evidence of dishonesty. With regard to the Forum Bar (Ground III), the District Judge had addressed this "properly and lawfully"; this was trading through a US based exchange, with significant US losses.

21. As is clear from *Polish Judicial Authority v Celinski* [2015] EWHC 1274 (Admin); [2016] 1 WLR 551, at [24], the question for this Court on appeal is whether or not the Judge made the right decision. In terms of permission to appeal, the question is whether it is reasonably arguable that the Judge made the wrong decision under any of Grounds I, II or III.

GROUND I: DUAL CRIMINALITY

22. For the Applicant, Mr Lewis QC submitted that the Judge and Irwin J erred in confusing *representation* and *intention.* The material before the Court, which must be confined within the four corners of the Request, did not disclose, let alone to the criminal standard, a false representation within s.2 of the Fraud Act, or a misleading impression within s.397 of the FSMA 2000 or s.90 of the FSA 2012. This did not matter in the US, where there was a specific statutory offence of "spoofing" but it did matter here and resulted in the requirement of Dual Criminality under s.137 of the Act not being satisfied. Realistically, Mr Lewis steered clear of any criticism of the Request so far as "intention" was concerned, a course made inevitable by the Applicant's e-mails set out above.

23. The point is a short one and despite Mr Lewis's attractively presented submissions, I am not persuaded that it is reasonably arguable.

24. I readily accept that in this market many offers appear on the trading screens which are thereafter cancelled prior to acceptance – for a variety of unexceptionable reasons. To my mind, however, a clear distinction is capable of being drawn between the conduct involved: (1) in placing an offer which at the time it is placed is intended by the offeror to be open for acceptance, though it might subsequently be cancelled prior to acceptance; and (2) in placing an offer which, at the time it is placed, the offeror does not genuinely intend should be accepted . The allegation against the Applicant in the Request is that his conduct fell squarely within category (2) and involved deceiving (or spoofing) market participants, so creating a false market picture with the intention of creating artificial price movements. Such conduct, if proven here, would constitute an offence under all of the Fraud Act, the FSMA 2000 and the FSA 2012. It thus amply satisfies the test of Dual Criminality.

25. So far as concerns a representation, to my mind the Request conveys and plainly conveys that, by placing an offer, the offeror is impliedly representing that, at the time of placing, it is intended to be open for acceptance – even though that intention might subsequently change. As the Applicant was well aware, the existence of such offers was made available to subscribers. The market, or, at the least, some traders in it, attributed significance to the fact that offers were being made at particular prices. It is essential for the integrity of the CME, that there is a genuine foundation for trading data circulated electronically; a representation in the terms described goes to that foundation. Conversely, it is the lack of such genuineness which underlies the Applicant's conduct of which complaint is made.

26. That the Request did not put the matter of the representation in the precise terminology of English Law is neither here nor there; the conduct specified in the Request, to which alone we must have regard (s.137 of the Act) is clear in this regard; as Mr Summers QC for the Respondent correctly observed, it is unnecessary to go beyond paras. 8 and 9 of the Indictment, set out above. That there is expert evidence on which the Applicant may seek to rely which challenges this analysis, is for another day.

27. Approached in this way:

    i) First, it is irrelevant that the Applicant was at risk of having some of his offers accepted before cancellation – though it may be noted that the material before us suggests he sought software which would minimise the risk of such an eventuality.

    ii) Secondly, it is likewise immaterial that many, perhaps even most, traders frequently cancel offers prior to acceptance.

28. Accordingly, as it seems to me, the Dual Criminality challenge to extradition has no reasonable prospect of success. After his extradition the Applicant will be tried on the US indictment (not, of course, for its English equivalents). As the Judge rightly observed, the outcome at the conclusion of any such trial is another matter and not for this Court.

GROUND II: ABUSE OF PROCESS

29. I deal summarily with this Ground as, in the course of the hearing, Mr Lewis very properly accepted that he could not realistically press it. The complaint was that the Request did not present a full, accurate and fair picture of the Applicant's conduct because it did not mention that offers may be cancelled perfectly lawfully. Assuming without deciding that the relevant time is the time of the Request (here, both requests referred to above), the submission faced an insuperable difficulty. In Mr Wible's Affidavit, sworn on the 18th March, 2015 ("the March Affidavit"), he said this (at para. 40):

> " Under United States law, 'spoofing' includes, among other activity: (a) submitting or cancelling multiple bids or offers to create an appearance of false market depth; and (b) submitting or cancelling bids or offers with intent to create artificial price movements upwards or downwards. The legitimate, good-faith cancellation or modification of orders……does not violate the anti-spoofing provision. To distinguish between legitimate trading and spoofing, the finder of fact should evaluate the market context, the defendant's trading practices and patterns, and other relevant facts and circumstances…."

It follows that the Abuse of Process challenge was doomed to fail; the Request drew attention to the lawful cancelling of offers and, in terms, distinguished between them and spoofing.

GROUND III: FORUM BAR

30. For the Applicant, Mr Smith submitted that the Judge had erred in law in dealing with s.83A(3)(f) of the Act, going to the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction. As already recorded, the Judge had come down firmly in favour of the US. There was, however, no foundation for doing so; that factor was neutral and there was indeed only one prosecution. Mr Smith submitted that this error invalidated the Judge's "value judgment" and this Court would have to re-perform the statutory exercise to reach its own value judgment: *Shaw v Government of the United States of America* [2014] EWHC 4654. In conducting this exercise, Mr Smith urged that the flash crash should be put to one side; it had neither been caused, or materially contributed to, by the Applicant. Although the integrity of the market would be damaged by market manipulation, the CME was a worldwide rather than a US domestic exchange. Mr Smith accepted that harm had been suffered by some counterparties but the weight attached to such harm paled in comparison to the facts that the Applicant was of British nationality, had never been to the US and that all his conduct had taken place here.

31. For the Respondent, Mr Summers submitted that there had been no error of law on the part of the Judge. This was a case about spoofing on a US market for a period of about five years. Considerations of harm pointed obviously in favour of the matter proceeding in the US – harm to individuals and companies and damage to market integrity. Moreover, the US authorities had compiled evidence and were ready to proceed to trial.

32. In my judgment, the straightforward answer to this Ground lies in the wording of the statutory test. The test (set out above) does not inquire as to which forum is the most convenient. Instead, s.83A provides a forum bar if and only if "…the extradition would *not* be in the interests of justice" (italics added). As Aikens LJ observed, in *Shaw (supra)*, at [41]:

> " …the test is not, as …[counsel]…appeared to suggest at one point in his submissions, whether the appellant should be tried in the requesting state or in the United Kingdom. The question is whether, in the interests of justice, there should not be an extradition to the requesting state. That is an entirely different test."

33. It was not in dispute that the threshold test for the application of s.83A was satisfied, namely "…that a substantial measure of D's relevant activity was performed in the United Kingdom…" (s.83A(2)(a)). I also agree with Mr Smith that the Judge erred with regard to s.83A(3)(f), as that factor was neutral rather than a pointer in favour of trial in the US. Further still, I am prepared to proceed on the basis that the Judge having erred in this respect, it is incumbent on this Court to re-perform the statutory exercise and reach its own overall value judgment: *Shaw (supra)*. Thereafter, with respect, I part company with Mr Smith's submissions.

34. Having regard to the specified matters (and only those matters) set out in s.83A(3), the highest the Applicant's case could reasonably be put was that a trial could take place either in this jurisdiction or in the US. It was not, however, reasonably arguable that the extradition of the Applicant to the US would not be in the interests of justice.

35. There are in this case powerful US connecting factors. The Applicant was trading internationally on, or through, a US market, even if that market was itself worldwide in scope. The integrity of the CME is a matter of importance, self-evidently put at risk by market manipulation. Material in the Request strongly supports the conclusion that most of the loss or harm took place in the US; as will be recollected, the September Affidavit singled out the direct harm to the Applicant's counterparties and the harm suffered by investors, trading firms and individuals based in the US. In the circumstances, s. 83A(3)(a) tells powerfully against any suggestion that extradition would not be in the interests of justice. On the facts of this case, it overwhelmingly outweighs any reliance which the Applicant could place on s.83A(3)(g), namely the Applicant's connections with the United Kingdom. As, on the material before us, the US authorities are ready to proceed to trial, s.83A(3)(e) provides additional support for trial in the US – but this is a more minor consideration and I do not rest my decision upon it.

36. Pulling the threads together, even though the Judge erred with regard to s.83A(3)(f), his overall value judgment was unimpeachable. In any event, having re-performed the exercise, I am satisfied that it is not reasonably arguable that the extradition of the Applicant to the US is not in the interests of justice. Indeed, in my view and notwithstanding Mr Smith's able submissions, the Applicant does not come close to satisfying the statutory test. The Forum Bar challenge to extradition accordingly has no reasonable prospect of success.

OVERALL CONCLUSION

37. For the reasons now given, I was of the view that permission to appeal must be refused.

Mr Justice Nicol:

38. I agree.