Neutral Citation Number: [2012] EWHC 22 (Admin)

Case No: CO/3482/2011

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/01/2012

Before :

LORD JUSTICE HOOPER
MR JUSTICE CRANSTON

- -

Between :

Christopher Tappin	**Appellant**
- and -	
The Government of the United States of America	**Defendant**

- -
- -

Edward Fitzgerald QC and Ben Cooper (instructed by **Kaim Todner**) for the **Appellant**
Aaron Watkins (instructed by **CPS**) for the **Defendant**

Hearing dates: 20 December 2011

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Approved Judgment

Mr Justice Cranston :

Introduction

1. This is an appeal against a decision of District Judge Zani of 11th February 2011 in which he sent the appellant's case to the Secretary of State for her decision as to whether to order his extradition to the United States. The appellant made representations to the Secretary of State opposing an order but those representations were rejected on 6th April 2011 and she ordered the appellant's extradition. No point is now taken about the Secretary of State's order and the focus of this appeal is on the District Judge's decision which led to it.

Background

2. The background is that on 26th January 2007, the United States Department of Homeland Security, Immigration and Customs Enforcement ('ICE') filed a criminal complaint before a United States magistrate in the Western District of Texas. It charged the appellant and others with offences arising out of a conspiracy to export controlled defence articles to Iran without the required export license. Those articles were Eagle Picher Brand Batteries, which are a special component of the United States Hawk air defence missile. On 7th February 2007, a Grand Jury sitting in El Paso, Texas, returned an indictment charging the appellant and others with three offences: (i) conspiracy to export the batteries, (ii) attempting to export, and aiding and abetting the attempted export of, the batteries, and (iii) conspiring to conduct illegal financial transactions in transferring funds to pay for the batteries. A warrant was issued for the appellant's arrest.

3. Almost three years later the Government of the United States submitted an extradition request for the surrender of the appellant to stand trial for the offences in the United States District Court for the Western District of Texas. On 12th February 2010 the Secretary of State issued a certificate pursuant to section 70 of the Extradition Act 2003 certifying that the request had been validly made and on 5th May 2010 a warrant was issued by the City of Westminster Magistrates' Court for the appellant's arrest. That was executed a week later.

4. The detail of the offending of which the appellant is accused is outlined in an affidavit, forming the basis of the extradition request. That affidavit was sworn on 2nd December 2009 by Gregory E. McDonald, who is an assistant United States Attorney for the Western District of Texas ("the McDonald affidavit"). In broad outline the allegation against the appellant is that he participated in a conspiracy with Robert Gibson, another citizen of this country, who operated an export business in Cyprus, Robert Caldwell, an American citizen, and others who are not named. That was investigated by way of a shell company, Mercury Global Enterprises ("MGE"), established by the ICE, and staffed by its agents pretending to be members of the business. MGE monitored and investigated suspicious activities of companies and individuals seeking to export licensable technology.

5. In December 2005 a potential buyer of licensable technology approached MGE to buy a piece of licensable technology (a type of surveillance equipment) avoiding the licence controls. In one recorded conversation in March 2006, that person said

that Gibson, who was "the money man" for all of his transactions, would contact the company. Shortly after Gibson did so. He too indicated that he wished to avoid the license requirements. In the course of the negotiations Gibson also enquired about other licensable items, including Hawk missile batteries. Then on 9 August 2006 Gibson met an MGE agent in New York to see the technology and the Hawk batteries.

6. It was at this point that the appellant's name was introduced into the conspiracy. Gibson told the MGE agent that the appellant would arrange for someone to collect the products. Unbeknown to the appellant Gibson was then arrested, although later the appellant was told that he had been involved in a serious motor car accident. Gibson agreed to cooperate and informed the authorities that he was buying the technology and the Hawk batteries for a long time Iranian customer in Teheran. He handed the authorities emails between the appellant and him detailing the negotiations for the purchase of Hawk Missile batteries and other licensable technology, and the problems of ordering the batteries in the United States. Gibson said that he was to purchase the batteries and the appellant was to arrange the shipping. The appellant was to receive 50 per cent of the profits from the sale of the batteries. Gibson said that the batteries were supposed to be shipped from the United States to the Netherlands and then on to Iran, and that he and the appellant had used that route for prior illegal exports of United States technology to Iran. The reason for this route through The Netherlands was that if sent through the United Kingdom there would be a problem with military components being exported to Iran.

7. On 22 August 2006 a man identifying himself as Ian Pullen telephoned an MGE agent. The call was recorded and the voice was later identified by Gibson as the appellant's. (The appellant concedes that he and Gibson had known each other for many years.) In the conversation "Pullen" asked if Gibson had discussed the batteries. When told that he had, the appellant said that he wanted to order them and requested a quotation for the price of five batteries. He gave a telephone contact number in this country which was the same as that which Gibson had said was the appellant's. A quotation was sent in early October.

8. On 10 October Gibson agreed with the authorities to make a telephone call to the Iranian customer. He told the Iranian customer that he was having problems in the United States and needed to keep a low profile. The Iranian customer told Gibson that that was not a problem since he was dealing directly with the appellant for the purchase of both the licensable technology and the batteries.

9. The next day, the 11 October, the appellant contacted MGE, enquired about the batteries, negotiated a price and said it was a "done deal". The MGE agent explained that the batteries should be repackaged to make sure there would not be any military markings. The appellant said that the batteries would be a recurring order. He said that he would rush payment and it arrived two days later, on the 13 October. Five days later the appellant contacted the company and gave shipping details. The items were to be sent by MGE's freight forwarder, the batteries to Senator International BV, Schipol Airport, The Netherlands ("Senator"), the licensable technology to him in the United Kingdom. The appellant agreed with the suggestion that he submit a purchase order describing the batteries in a manner

of his choosing, and that an invoice should be drawn up reflecting that, but with a true invoice describing the batteries correctly for the end user.

10. The appellant then sought to reverse the payment because he became concerned that he had not received the airway bills for the two items. In another recorded telephone conversation with one of the MGE's agents about this on 19 October the appellant was asked if he wanted to continue with the transaction with the batteries. He said that he did, that he would be placing more orders for this type of battery once these batteries were shipped, that future orders too should be shipped to The Netherlands, and that he wanted 35 batteries in all.

11. MGE received a purchase order for the batteries on 19 October, albeit dated 22nd September 2006 and purportedly signed by Gibson, who had of course been arrested in August. On 26 October the MGE's freight forwarder sent the appellant a shippers' export declaration. The same day the appellant was informed that a United States Customs and Borders Protection officer had detained the licensable technology. Senator was also told the batteries had been detained. One of MGE's agents told the appellant not to worry and that if Customs contacted him to tell them that what he ordered was what was indicated on the shippers' export declaration.

12. In a conversation with the United States customs officer on the 1 November the appellant explained that the licensable technology was destined for an oil company in Norway. He did not know whether it was licensable or not, that being a decision for the exporter. The following day the appellant emailed that the Norwegian company was Kvaerner, a name which appeared in emails and facsimiles between Gibson and the appellant as a cover for Iranian exports.

13. On the 7 November the appellant contacted MGE as to what explanation he could give to the United States customs' officer detaining the batteries about their use. The appellant was told that their only use was for the Hawk Missile system. The appellant suggested a possible automotive use but asked MGE's agent about describing the batteries for use in electroplating. He told the agent that he wanted their stories to match. That same day the appellant informed Senator that the batteries were destined for a Dutch chemicals company, that they were for electroplating, and that he did not know of any licensing restrictions in Europe which applied to them.

14. It was at this point that Caldwell enters the story. In an effort to overcome the shipping problems, the appellant told MGE that Caldwell would contact them. Caldwell did and explained that he was an agent of the appellant in the United States. Caldwell agreed that the company should sell the batteries to him in a domestic sale. He and the appellant wanted to complete the battery purchase so that they could be exported by January 2007.

15. At the beginning of January 2007, the appellant contacted MGE to enquire if the difficulties with United States customs had been overcome. The appellant undertook to reimburse the MGE agent $5000 for the fine customs had imposed for the detention of the batteries. The appellant had discussions about future orders of batteries in batches of five and negotiated about prices. On 10 January, when Caldwell told an MGE agent that he had problems with the pro-forma

invoice, warning about the export of the batteries without a license, the agent told him that this would not be an issue.

16. As I have said about a fortnight later an ICE agent charged the appellant and the others with criminal offences. Having pleaded guilty Gibson was sentenced to two year's imprisonment in February 2007. A jury convicted Caldwell of aiding and abetting the illegal export of Hawk missile batteries in June 2007, and later that year he was sentenced to 20 months imprisonment. Nothing happened in relation to the appellant until December 2009. Throughout the process since then the appellant has denied the allegations. He contends that he was the victim of the unlawful conduct of United States agents working for MGE who, he asserts, acted deceitfully in order to ensnare and entrap him.

Oppression: extradition barred by passage of time

17. Mr Fitzgerald QC began his submissions before us with the long established statutory defence to extradition, that the appellant's extradition would be oppressive because of the passage of time. Mr Fitzgerald contended that the District Judge had erred in law in not considering oppression, that there was an unexplained delay of some three years on the part of the United States authorities in pursuing the appellant, and that the extradition would be oppressive because of that delay, having regard to the medical condition of the appellant's wife.

18. In his judgment the judge concluded that there was no explanation forthcoming as to why the United States authorities did not seek to commence the extradition process until early 2010 and that there was no suggestion that the appellant was responsible for any of the delay. However, submitted Mr Fitzgerald QC, there was an error of law in that when discussing delay the judge did not address the question of oppression. Instead he focused exclusively on the risk of prejudice, concluding that the trial process in the United States would be able to deal adequately with any injustice claimed by reason, for example, of the appellant's co-conspirators having been dealt with already. Mr Fitzgerald QC submitted that the submissions on oppression constituted a separate basis on which discharge was sought. The judge merely recited the legal test and noted that the threshold was high, without addressing the facts of the appellant's case in relation to whether this test was met. We should either discharge the appellant or remit the case to the judge so that the matter of oppression through passage of time is properly considered: Da An Chen [2006] EWHC 1752, [26]-[28].

19. In any event, submitted Mr Fitzgerald QC, the starting point was in early 2007, the request was in late 2009 and the process was still continuing. The appellant's precise whereabouts had been known to the United States prosecutors at all times. It was unsatisfactory to indict someone and then keep them in the dark as to such a serious step over such a substantial period. There had been no explanation. Importantly, in the appellant's case there was the impact of delay on the appellant and his wife. As explained in her statement she was diagnosed in 2004 as suffering from a debilitating illness called Churg-Strauss syndrome, which has become complicated by Mononeuritis Multiplex. A letter from her GP, Dr Lewis Bailey on 18 June 2010, described her condition and the appellant's important role in caring for her. Since his retirement he does that full time at home. As he explains in his statements he assists with her treatment and takes her to hospital

regularly for the monitoring of her blood. Her dependency on him has increased after the hearing before the District Judge. Their daughter, who is a single mother since her divorce at the end of 2009 and works full time, has now moved from the parental home. In Mr Fitzgerald QC's submission it would clearly be oppressive to both the appellant and his wife to remove him when he is essential to her with her serious health problems.

20. The oppression defence is contained in section 82 of the Extradition Act 2003.

> "Passage of time
>
> 82. A person's extradition to a category 2 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have—
>
> (a) committed the extradition offence (where he is accused of its commission)…

Authoritative as to concept of oppression is the passage in Lord Diplock's speech in Kakis v Government of Cyprus [1978] 1 WLR 779, that oppression is directed to the hardship to persons resulting from changes in their circumstances during the period to be taken into consideration, but that oppression and injustice (directed primarily to the risk of prejudice to persons in the conduct of the trial) may overlap: 782 H-783A. Lord Diplock added that where the responsibility lies with delay is not generally relevant, since what matters is the effect of those events which would not have happened if the trial had being conducted with ordinary promptitude: 783C. Kakis was being pursued for involvement in a murder with political implications. The delay was three years and three months. It is clear that the court's decision in that case to discharge turned both on injustice and oppression; the passage of time meant that Kakis was no longer able to obtain alibi evidence.

21. In Gomes v. Government of the Republic of Trinidad and Tobago [2009] UKHL 21; [2009] 1 WLR 1038 the Privy Council made clear that the test of oppression will not easily be satisfied and requires hardship greater than that inevitably inherent in the act of extradition: [31]. Giving the judgment of this court in Ashley-Riddle, unreported, 22 November 1993, Sedley J held that the delay in pursuing fraud and deception charges between the offending in August 1988, the extradition request in December 1990, and the Australian authorities producing the requisite evidence in August 1992 meant that it was arguably oppressive to extradite. In that time the applicant's sister-in-law had died – in the circumstance she was a potential source of evidence about his honesty in effecting the relevant transaction - and both he and his school aged son had settled here. Roch LJ agreed.

22. In Cookeson v Government of Australia [2001] EWHC 149 the applicant was arrested some 12 years after the offence and some eight years after the extradition request had finally resulted in a warrant. The offence was the theft of a considerable quantity of gold and the applicant had clearly indicated that if caught he would plead guilty. In those circumstances Latham LJ said in this court that he would otherwise have concluded that the passage of time would not have resulted

in oppression: [26]. However, the applicant's son was extremely ill with schizophrenia and the passage of time from when the alleged offending had occurred meant a significantly increased need for his care, which on the consultant's medical evidence only the applicant could provide: [29]. With reservations he concluded that extradition would result in oppression to son, and through him, the applicant: [31]. Potts J agreed.

23. Despite Mr Fitzgerald QC's characteristically attractive advocacy I am not persuaded that this ground of appeal succeeds. There is no doubt that the District Judge's otherwise clear and proficient reasons are elliptical as regards oppression. The judge analyses the key authorities and reaches a conclusion. However, the crucial issue of the wife's health and its consequences are canvassed not under this, but under the Article 8, head. An experienced extradition judge, he was clearly aware that the challenge on delay engaged both the oppression and injustice limbs. Unfortunately he failed to address the appellant's submissions as fully as he could have.

24. In my view, however, there is only one conclusion on the circumstances of this appellant's case, that it would not be oppressive to extradite him. As I have said the authorities establish that the threshold for oppression is high. Despite the salutary caution of Henry LJ in R v. Secretary of State for the Home Department (1994) 7 Admin LR 56, 72A, that lawyers can become inured to delay, the passage of time in this case has been comparatively short. The delay in Kakis was comparable but the facts in that case were special and the delay was both oppressive and unjust. Ashley-Riddle is in my view at the outer boundary but is reconcilable with the authorities in that the delay there deprived the applicant of a key witness. The delay in Cookeson was substantially greater than here, the decision to discharge turning on strong medical evidence. So the authorities do not require the appellant' discharge.

25. Furthermore, the conduct alleged against the appellant is serious in nature, involving the evasion of controls on the export of defence related items to a unfriendly regime. That seriousness raises the burden on the appellant to demonstrate oppression. For sake of completeness I add that although the delay is unexplained, as Mr Fitzgerald QC highlighted, there is no evidence that it is in any way culpable. Thus the issue is principally the effect of the passage of time: La Torre v The Government of Italy [20078] EWHC 1370, [37] per Laws LJ; Government of Croatia v Spanovic [2007] EWHC 1770, [16], per Hughes LJ.

26. That issue of the impact of the passage of time revolves around the wife's health. I need only make three, relatively brief points. First, her condition was diagnosed in 2004, so the reality is that the appellant embarked on the conspiracy at a time when he knew his wife to be ill. Secondly, there is an unfortunate economy in the evidence before us in respect of the wife's ill health. Apart from the evidence of the appellant and his wife, all we have is the brief letter from the GP, but nothing from the consultant mentioned in that letter. In particular, there is no clear analysis of any serious deterioration of her condition, within the relevant period, although at one point there was a relapse. Thirdly, and crucially, there is no detailed assessment of the impact of the appellant's extradition upon his wife's health and of the alternative sources of support available to her should he be unavailable to

provide daily care and take her to the hospital for her regular blood tests. My conclusion is that the statutory test for oppression is far from being met.

Article 8

27. Mr Fitzgerald conceded that in extradition cases applicants advancing an Article 8 challenge face a particularly difficult task in demonstrating that it is disproportionate to remove them. There must be some "exceptionally compelling" feature about the effect of the extradition on the family unit to render it disproportionate, as Lord Phillips expressed it in Norris v United States of America [2010] UKSC 9; [2010] 2 AC 487, [56] . The seriousness of the offence may feature in the proportionality exercise to be undertaken: [62]; R (Bermingham) v Director of the SFO [2007] 2 WLR 635,[118], per Laws LJ.

28. It will be evident from what I have said in relation to the oppression challenge that in my view the circumstances of this case, including the delay and the ill health of the appellant's wife, fall short of those envisaged in Norris [2010] UKSC 9; [2010] 2 AC 487. There is no way that the appellant's Article 8 rights, and those of his wife, could outweigh the strong interest in his extradition. For the reasons I have given serious offending is alleged against the appellant. This is not the type of situation contemplated at one point in Lord Phillips' judgment in Norris, where he suggested that discharge may be appropriate where the offence is of no great gravity and the person has sole responsibility for an incapacitated family member: see [64].

Extradition Offence

29. Section 137 of the 2003 Act provides as follows:

> "137. Extradition offences: person not sentenced for offence
>
> (1)This section applies in relation to conduct of a person if—
>
> (a) he is accused in a category 2 territory of the commission of an offence constituted by the conduct…
>
> (2)The conduct constitutes an extradition offence in relation to the category 2 territory if these conditions are satisfied—
>
> (a) the conduct occurs in the category 2 territory;
>
> (b)the conduct would constitute an offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment if it occurred in that part of the United Kingdom;

> (c)the conduct is so punishable under the law of the category 2 territory (however it is described in that law)."

30. In order to determine whether the United States has satisfied the dual criminality test for the offences alleged, the conduct test requires the court to look at the conduct alleged against the appellant and then to analyze whether it constitutes an offence in the United Kingdom: Norris v Government of the United States of America [2008] UKHL 16; [2008] 1 A.C. 920. In the court below it was accepted that the offence in relation to all three counts in the Grand Jury indictment was conspiracy to defraud the customs authorities.

31. Mr Fitzgerald QC submitted that the District Judge was in error in finding that section 137(2)(b) had been satisfied. He submitted, firstly, that the conduct specified in the extradition request did not constitute an extradition offence. The offence of conspiracy to defraud requires that the accusation against the appellant include an element of dishonesty. That does not form part of the accusation against the appellant in the United States, because there is no requirement for the importer to obtain an export license from the American authorities. It is the United States exporter who carries the responsibility to obtain an export license. The appellant's role was distinct from that of the exporter. The attempt made in the extradition request to seek to transfer the responsibilities of the exporter to the appellant amounts to an artificial attempt to implicate him in the conduct of the agents operating in the fictitious shell company, MGE.

32. Quite apart from there being no evidence before the court on United States export law our task, consistently with Norris, is simply to assess whether the conduct described in the request constitutes an offence in the United Kingdom, not to consider the constituent elements of United States export law. Thus the argument that the exporter bears the responsibility for obtaining the licenses is not to the point when our concern is whether the conduct would constitute an offence or offences here. The request alleges a conspiracy, or that the appellant aided and abetted the offending of others, not that he acted on his own as an importer. The request does not assert that his role was distinct from the others in the conspiracy.

33. The second argument advanced by Mr Fitzgerald QC under this head was that the conduct alleged does not demonstrate the requisite dishonesty to establish conspiracy to defraud in English law. Thus the requirement of double criminality is not met. Albeit that the McDonald affidavit implicitly alleges dishonesty, none of the overt acts set out in the Grand Jury indictment suggests dishonesty. Even in the affidavit there is no allegation of material dishonesty on the appellant's part. He was personally not responsible for any specific misrepresentation to deceive the United States authorities so as to evade the licensing requirements. The only misrepresentation directed at the United States customs, submitted Mr Fitzgerald QC, was in the shippers' export declaration, and that was completed by an MGE agent.

34. In my view allegations of the appellant's dishonesty run through the United State's request. There is no need to recapitulate what has been referred to earlier. A few examples suffice. Thus Gibson asserted that he and the appellant had previously conducted illegal exports to Iran and it is said that he handed over emails about the appellant's involvement. According to the request the appellant

was involved in the conspiracy from August 2006 and was due to receive half of its profits. The appellant agreed to submit a purchase order falsely describing the batteries. When the batteries were detained by United States customs the appellant discussed with MGE's agents what explanation he could give regarding their use, was told that their only use was for the Hawk Missile system and then offered alternative explanations, including electroplating. At this point he emailed his shipper in The Netherlands, Senator, telling it that the end user for the batteries was electroplating at a Dutch chemical company. Mr Fitzgerald QC's submission in this regard fails.

35. Mr Fitzgerald QC's third submission was that the relevant conduct was all the direct product of entrapment by the United States authorities. It is impossible to understand the appellant's conduct without reference to the conduct of the American authorities, and a proper understanding of their role leads to the conclusion that no offence under English law has been committed. Alternatively the evident entrapment rendered any prosecution an abuse of process, thus preventing the appellant's punishment. Mr Fitzgerald QC continued that there were a number of examples of entrapment but perhaps the strongest was when, in late October, the batteries were seized by Customs, the MGE agent told the appellant not to worry and that he should tell them that what he ordered was what was indicated on the shippers' export declaration. Another strong example was that Caldwell was told that it was not a problem that the pro-forma invoice contained a warning about the unlicensed export of the batteries.

36. Entrapment, as far as I can see, is simply unsustainable on the facts as alleged in the request. It appears that in the United States entrapment is an affirmative defence in that the government agents must induce the crime and there must be a lack of predisposition on the part of the person to engage in the criminal conduct: Khan v. Government of the United States [2010] EWHC 1127. There is no need to repeat the account set out in the request but from the outset it is evident that there was no lack of predisposition on the appellant's part to engage in the criminal conduct. Gibson, the appellant's co-conspirator, approached MGE officers, not the other way around, and said that he had already conducted illegal export activities with the appellant. After Gibson dropped out, the appellant pursued the order and made clear that ultimately he wanted 35 batteries. The appellant devised the cover that the batteries were for electroplating by a Dutch chemical company. MGE's agents gave the appellant an opportunity to withdraw from the transaction on 19 October, after he had stopped payment, but the appellant persisted. None of the points made about the invoices and Caldwell, even if demonstrating any sort of inducement by MGE's agents, go near to establishing entrapment of the appellant.

Abuse of process

37. The appellant's submission here is that the United States' prosecution of the appellant follows from an abuse of power and the courts here should not lend themselves to that above. By complying with the extradition request the English courts would be participating in a process which breaches the principle identified by Lords Nicholls and Hoffmann in R v. Looseley [2001] UKHL 53; [2001] 1 WLR 2060, that it is an abuse of the process of the court where the state, through its agents, lures its citizens into committing acts legally forbidden and then seeks to prosecute them for doing so: [1], [39]. The United States prosecutors have

abused their power by bringing a prosecution based on entrapment. It was an offence which the United States agents themselves created; they did not merely offer an "unexceptional opportunity" for its commission: Looseley, at [23], [50]-[54]. Their role was not passive, the appellant had no predisposition to offend and it was the agents who encouraged, incited and facilitated the crime. All this is underlined by the appellant's own account, which explains that Gibson was simply a client, that the appellant's intentions were innocent throughout and that he was duped by the MGE and United States customs' agents.

38. As I have said entrapment is not arguable in the light of the evidence set out in the extradition request. The issue is whether what the appellant says in his statements should be taken to undermine that conclusion. The authorities make clear that the court must assume that the United States government is acting in good faith in the account it has provided: e.g., Ahmad and Aswat v Government of the United States [2006] EWHC 2927; [2007] HRLR 8, [101]. That assumption may be contradicted by evidence, but in this type of case the evidence to displace good faith will need to possess a special force. To the extent that the appellant seeks to dispute the account provided by the United States Government in his statements, there is nothing in my view to displace the presumption of good faith. Of course what the appellant says in his statements may form the evidence he will rely on in any trial but it does not support his abuse of process application.

Extradition for which counts?

39. As a result of an inquiry from my Lord, Hooper LJ, in the course of oral argument the parties were invited to consider whether the appellant was susceptible to extradition on all three counts in the Grand Jury's indictment. It will be recalled that they were conspiracy to export the batteries, attempting (and aiding and abetting the attempt) to export them, and conspiring in attempting to pay for them. Hooper LJ's concern was that the conduct alleged in counts 2 and 3 might not constitute the offence of conspiracy to defraud in this jurisdiction, which was the basis on which the Government contended that section 137(2)(b) was satisfied. The parties made written submissions on the issue to supplement their responses at the hearing.

40. Invoking Islam v Pathos District Council of Cyprus [2009] EWHC 2786 (Admin), [15] the appellant submitted, first, that he should not be extradited on counts 2 and 3 because the conduct alleged in those counts would not constitute offences equivalent to those charged under the law of England and Wales. Conspiracy to defraud cannot be the equivalent English offence to substantiate the criminality alleged in those counts, which is distinct from the criminality alleged in count 1. In count 2, an attempt is alleged, which goes further than a mere conspiracy, yet there is no evidence of an act sufficiently proximate to importation to constitute an attempt. Moreover, the export of these specific batteries would not be an offence under English law.

41. In the case of count 3 the allegation is of a conspiracy to engage in financial transactions to promote some form of unlawful activity, but the act of exporting these specific batteries is not of itself unlawful activity under English law. While the financial transactions may be evidence of participation in a conspiracy to defraud, they are not of themselves sufficient to constitute a conspiracy to defraud.

There is no equivalent offence in this jurisdiction of engaging in a financial transaction with a view to a crime. The offence of money laundering requires a precedent criminal activity: R v Montilla [2004] 1 WLR 3141.

42. Moreover, the appellant submits, it would be wrong to extradite on counts 2 and 3, as separate offences carrying separate penalties, if they merely duplicated count 1 and the same conduct were to be relied on in respect of all three counts. That there is no equivalent offence under English law of exporting these specific batteries without a licence is the complete answer to the reliance on count 2 as disclosing a separate extradition offence based on the evasion of export controls. The provision of funds with a view to exporting such batteries, count 3, would not constitute an offence contrary to English law governing import and export.

43. The starting point in considering these submissions must be the House of Lords' decision in Norris v. Government of the United States [2008] UKHL 16; [2008] 1 AC 920. As I have said that case adopted the conduct test and it is quite clear that we need not be concerned with the elements of the United States' offences in the Grand Jury indictment and whether there is a match with the equivalent offences here:[65],[89],[91]. In Norris the House of Lords found that at the time the conduct alleged in count 1, simple price fixing, was not a criminal offence in England and did not amount to conspiracy to defraud in English law. As to counts 2-4, these alleged conspiracy to obstruct justice, witness tampering and causing a person to alter, destroy, mutilate or conceal an object to impair its availability for use in an official proceeding. The House of Lords held that these offences could be translated into an offence of conspiracy to obstruct justice or obstructing justice: [99],[101].

44. Three principles emerge from Norris [2008] UKHL 16; [2008] 1 AC 920 relevant to this case. First, each offence in a request needs to be considered separately; secondly, each offence in a request need not be assigned a reciprocal offence under English law; and thirdly, where the alleged conduct relevant to a number of the offences in a request is closely interconnected, it matters not that it would not be charged here in the same manner as in the requesting state. Thus in Norris count 1, price fixing, was considered separately from counts 2-4. However – the second principle - the conduct regarding counts 2-4 did not have to translate into three reciprocal offences in English law. It was sufficient that it would have constituted obstructing justice. As to the third principle, the conduct leading to counts 2-4 was closely interconnected. It related to obstructing the investigation into price fixing in the carbon products industry and it was not fatal to the request that in English law that conduct would not be charged in the same manner it was under United States law.

45. That to my mind is the essence of the decision in Islam v Paphos District Court of Cyprus [2009] EWHC 2786, although the appellant submitted that it supported his case. There the European Arrest Warrant contained seven accusations. The offences listed were conspiracy to commit a felony, stealing, attempt of stealing, credit card forgery, uttering a false document, offences against the Act on personal data and money laundering. In a later section of the warrant, the definition of each of those offences was set out. Under the Cypriot law the definition of the money laundering offences was very broad. While the warrant specified seven different offences under the law of Cyprus, the appellant in that case submitted that it did

not set out which of those offences related to each of the 20 individual incidents. Particulars had to be supplied, it was said, in relation to each of the incidents as to which offence had been committed. This court held that it was sufficient that the conduct would constitute an offence of conspiracy in our law: [15], [19]-[20]. On my reading this court adopted the same approach in the earlier decision, Boudhiba v Central Examining Court No.5 of the National Court of Justice Madrid, Spain [2006] EWHC 167 Admin.

46. Here all the behaviour behind the three counts alleged in the request concerns the same criminal enterprise, the conspiracy to export the Hawk missile batteries. As a whole that conduct is closely interconnected. The three counts in the Grand Jury indictment relate to the one overall allegation. Therefore it matters not that count 2 in that indictment focuses on a substantive offence of attempt and count 3, on the financial aspects of the conspiracy. In considering double criminality we are not limited to the elements of the United States offences or the wording of the indictment. Nor are we concerned with whether, as well as conspiracy, the conduct could be charged here as an attempt and as a money laundering offence. If it be the case, it is also irrelevant that the export of these specific Hawk missile batteries to Iran (as opposed to controlled single use military equipment) would not be an offence under our law. In this jurisdiction the conduct would found an offence or offences of conspiracy to defraud and that is sufficient for the purposes of section 137(2)(b) of the Extradition Act 2003.

47. I would dismiss the appeal.

Lord Justice Hooper:

48. I agree.