Neutral Citation Number: [2021] EWHC 2257 (Admin)

Case No: CO/1537/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/08/2021

Before:

MR JUSTICE CHAMBERLAIN

- -

Between:

NIRAV DEEPAK MODI **Applicant**

- and –

(1) GOVERNMENT OF INDIA
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondents**

- -

Edward Fitzgerald QC & Ben Watson QC (instructed by **Boutique Law LLP**) for the **Applicant**
Helen Malcolm QC & Nicholas Hearn (instructed by **the Crown Prosecution Service**) for the **First Respondent**
Rosemary Davidson (instructed by **the Government Legal Department**) for the **Second Respondent**

Hearing dates: 21 July 2021

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Approved Judgment

Mr Justice Chamberlain:

Introduction

1 The appellant, Nirav Deepak Modi, is sought by the Government of India ("GoI"). There are three sets of criminal proceedings. The first, brought by the Central Bureau of Investigation ("the CBI"), relates to a fraud on the Punjab National Bank ("the Bank"), which caused losses equivalent to over £700 million. The second, brought by the Enforcement Directorate ("the ED"), relates to the laundering of the proceeds of that fraud.

2 The GoI submitted requests for the appellant's extradition on 27 July 2018 in relation to the CBI proceedings ("the first request") and 24 August 2018 in relation to the ED proceedings ("the second request"). The requests were certified by the Home Office on 28 February 2019 and the appellant was arrested on 19 March 2019. He appeared at Westminster Magistrates' Court on 20 March 2019 and has been in custody at HMP Wandsworth since then. On 11 February 2020, the GoI made a further extradition request ("the third request") in relation to additional offences involving interference with evidence and witnesses in the CBI proceedings. This request was certified on 20 February 2020.

3 The extradition hearing took place over two weeks (commencing 11 May 2020 and 7 September 2020) before District Judge Goozée ("the judge"), with closing submissions on 7-8 January 2021. On 25 February 2021, the judge handed down his decision. He found that there were no bars to extradition and sent the case to the Secretary of State. Detailed representations were made to her on 7 April 2021. On 15 April 2021, she ordered the appellant's extradition to India.

4 The appellant seeks permission to appeal pursuant to s. 103(4)(b) of the Extradition Act 2003 ("the 2003 Act") against the judge's decision. It is said that the judge erred in concluding that:

(a) the GoI had established a *prima facie* case in respect of each of the requests ("Ground 1");

(b) the GoI had established an extradition offence in respect of the first and third requests ("Ground 2");

(c) the appellant's extradition would be compatible with his rights under Article 3 of the European Convention on Human Rights ("ECHR") ("Ground 3");

(d) it would not be unjust or oppressive to extradite the appellant by virtue of his physical and mental condition (Ground 4");

(e) the appellant's extradition would be compatible with his rights under Article 6 ECHR ("Ground 5").

5 The appellant also seeks permission to appeal pursuant to s. 108 of the 2003 Act against the Secretary of State's decision of 15 April 2021 on the ground that she was prohibited from ordering the appellant's extradition due to the lack of specialty protection in India ("Ground 6").

Grounds 3 and 4: Article 3 ECHR and s. 91 of the 2003 Act

Overlapping grounds

6 The arguments made under grounds 3 and 4 overlap in that they both rely principally on the appellant's mental ill health. Mr Edward Fitzgerald QC, who presented the appellant's arguments on these grounds, accepts that there is a higher threshold for establishing a real risk of a breach of the appellant's Article 3 rights than for showing that his extradition would be oppressive for the purposes of s. 91. I therefore consider these grounds together, as the judge did in his judgment.

The judge's decision

7 The judge heard expert evidence about the appellant's mental health from a consultant forensic psychiatrist, Dr Forrester. His evidence was that:

(a) the appellant met the criteria for a diagnosis of "recurrent depressive disorder… severe, without psychotic symptoms";

(b) the appellant's condition had worsened, likely as a result of the prison conditions in HMP Wandsworth, which were particularly restrictive due to the Covid-19 pandemic;

(c) he should be considered "a substantial (meaning high) albeit not immediate, risk of suicide";

(d) he met the criteria for transfer to hospital under the Mental Health Act 1983;

(e) he "should be considered fit to plea[d] at the present time. However, …with further deterioration… there is a risk he could become unfit to plead in the future".

8 The judge also heard evidence from Dr Mitchell, the Chair of the Independent Prison Monitoring Advisory Group for HM Chief Inspector of Prisons in Scotland. His expert opinion was that the Indian prison estate struggles to provide proper psychological care for inmates and that the appellant would not be appropriately cared for in Arthur Road Jail, Mumbai, where he is due to be detained. Despite Dr Mitchell's evidence, the judge concluded that the appellant's extradition was not barred under s. 91 of the 2003 Act and would not be contrary to Article 3 ECHR.

9 In light of the undisputed diagnosis of severe depression, the question was whether the Indian authorities would be capable of meeting the appellant's current treatment needs and responding appropriately to any anticipated further deterioration of his mental health (see [191] of the judgment). The judge held that they would, relying on assurances provided by the GoI, dated 8 June 2019 and 11 September 2020. These explained that the appellant would be held in a specific part of the prison (Barrack No. 12), there was an on-site hospital as well as a public hospital within 3km and that the appellant "may receive any relevant and necessary treatment from a private doctor or mental health expert of his choice, including treatment or counselling from a psychiatrist, psychologist, as required and paid for him, including coming into prison/over video-link for consultations".

10 The judge made the following key findings:

(a) The appellant's condition is "far from unusual".

(b) A number of people with severe depression can be treated in the community.

(c) There was nothing in Dr Forrester's report to suggest that the appellant lacked capacity to resist the impulse to commit suicide. Whilst the appellant had suicidal ideas, the risk of suicide was not immediate. The high threshold set in *Turner v Government of the United States of America* [2012] EWHC 2426 (Admin) was therefore not met.

(d) Whilst the appellant's mental health had deteriorated, such deterioration had been significantly attributed by Dr Forrester to the restrictive regime in HMP Wandsworth. The regime in Barrack No. 12 would be an amelioration of his current conditions of detention.

(e) The appellant was, at the time of the extradition hearing, fit to plead. Whilst he could deteriorate and become unfit to plead in the future, that was not sufficient to satisfy the judge that he *would* be found unfit to plead, such that it would be oppressive to extradite him, applying *Republic of South Africa v Dewani (No. 2)* [2014] EWHC 153 (Admin), [2014] 1 WLR 3220.

(f) The GoI had provided a comprehensive account of measures taken to deal with the risks posed by Covid-19.

(g) Whilst medical staff resources would be stretched within the prison, there was an assurance in place allowing the appellant to avail himself of private medical treatment and there were hospitals very close to the prison should he require hospitalisation. There was no reason at all to think that the GoI would fail to uphold the assurances provided.

11 The appellant also submitted evidence from Professor Coker, an epidemiologist at the London School of Hygiene and Tropical Medicine about the high prevalence of the coronavirus in Mumbai and the increased risk of its transmission into and spread within prisons. The judge did not consider that these risks made it oppressive to extradite him or gave rise to a breach of his Article 3 rights, because the GoI had provided a comprehensive account of the protective measures in place.

Submissions for the appellant

12 The appellant relied on both s. 104(3) and 104(4) of the 2003 Act. Section 104(3) permits the Court to allow an appeal where "(a) the judge ought to have decided a question before him at the extradition hearing differently; (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge". Section 104(4) permits the Court to allow an appeal where "(a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing; (b) the issue or evidence would have resulted in the judge deciding a question before him at the extradition hearing differently; (c) if he had decided the question in that way, he would have been required to order the person's discharge".

13 The fresh evidence relied on under s. 104(4) is a witness statement from the appellant's solicitor, Mr Doobay, dated 12 May 2021, exhibiting newspaper articles describing the effects of the "second wave" of coronavirus in India, particularly in the State of Maharashtra, where the appellant would be detained. Mr Fitzgerald submitted that this fresh evidence merits reconsideration of the judge's decision on s. 91 and Article 3 and throws into doubt the judge's finding that the pandemic presents no barrier to extradition. The judge was wrong to dismiss the concerns raised and placed undue weight on the GoI's response to Professor Coker's report, particularly as that response was unsigned and its author not identified.

14 The resurgence of coronavirus in India also undermines the judge's conclusion that the Indian authorities will be able to provide adequate care for the appellant and that his conditions will be ameliorated by his transfer to India. The already stretched healthcare facilities will be stretched further by the pressures of the pandemic and the overall conditions in India will deteriorate.

15 Under s. 104(3), Mr Fitzgerald relied on six flaws in the judge's reasoning:

(a) The judge's finding that the appellant's condition was "far from unusual" was a gross minimisation of his serious condition. The unchallenged evidence is that the appellant has a serious depressive condition. He has a recurrent depressive disorder with psychomotor slowing, his condition is severe enough to warrant detention, there is a high risk of suicide and his condition has been deteriorating. The appellant's mental illness was not merely a reaction to the current proceedings; he has a history of mental ill health.

(b) The judge should have considered not just whether the appellant was currently unfit to plead, but whether he will be unfit to plead by the time he comes to enter his plea in India. It is enough to show that there is a real risk of unfitness to plead (*Love v United States* [2018] EWHC 172 (Admin), [2018] 1 WLR 2889, at [29]-[33]) and there is a real risk in this case.

(c) The judge was wrong to discount the high risk of suicide on the basis that it was not "immediate". The relevant test was set out in *Turner* and adopted in *Love.* It requires the court to ask what will happen if a person suffering from a mental disorder who might commit suicide is extradited.

(d) It was wrong in law to ask whether the appellant was unable to "resist the impulse" to commit suicide. Whilst the *Turner* test, which is formulated in these terms, has been applied in a number of authorities, it is unjustified as a matter of law and psychiatric science. The real test should be whether the requested person's mental illness would be the operative cause of any prospective suicidal act, rather than a rational decision to take his own life.

(e) The broader context (evidence of overcrowded and understaffed prisons; notoriously bad prison conditions, particularly in relation to healthcare) made it perverse to find that the appellant's condition would improve if he were extradited to India.

(f) The judge's conclusion on the critical question of whether suitable mental healthcare provision would be available in the prison was unsustainable on the evidence. This showed that the level of medical care afforded to prisoners had been completely inadequate for over 20 years, and the deficiencies are particularly acute in respect of experienced psychiatric staff. The problems will be exacerbated by the pandemic. The judge was wrong to rely on the GoI's assurances. They did not provide the level of detail required by *Magiera v Poland* [2017] EWHC 2757 (Admin), [32]-[35]. Further, there are considerable practical obstacles to the appellant accessing private healthcare, including the need for such to be approved by a judge in India. The appellant had provided evidence of another case in which such approval was withheld.

Submissions for the Government of India

16 For the GoI, Ms Helen Malcolm QC does not accept that the "second wave" of coronavirus infections in India warrants reconsideration of the judge's conclusions on the availability of adequate healthcare. A sovereign assurance was provided in relation to the provision of adequate medical treatment and it has not been withdrawn (as it would be if the pandemic meant that the GoI were unable to honour it).

17 Ms Malcolm submitted as follows:

(a) The judge did not minimise the seriousness of the appellant's mental health issues. His findings reflected the measured approach of Dr Forrester. This was that the appellant has a condition which is treatable and often treated in the community. This is consistent with the judge's finding that it is "far from unusual". The premise for the judge's approach was the existence of a serious condition which required management, which is why the judge had regard to the assurances.

(b) There was no error in the judge's approach to fitness to plead. He set out the relevant case law at [158] and [159] of his judgment, including a passage from *Dewani (No. 2)* noting that it is necessary to look at the matter "in the round", "taking into account the question as to whether ordering extradition would make the person's [condition] worse and whether there are sufficient safeguards in the requesting state". *Dewani (No. 2)* requires a "clear" finding that the requested person would be found by the court in the requesting state to be unfit to plead, and it was open to the judge to find that there was no such clarity in the appellant's case.

(c) The judge did not find that the suicide risk was irrelevant because it was not immediate. He quoted from Dr Forrester's expert report in his judgment, which linked the appellant's deterioration to the conditions in HMP Wandsworth and relied on the ameliorated conditions of detention in India. He was unarguably correct to consider the assurances provided and the evidence of the conditions in India when considering the risk of suicide.

(d) The language of "capacity to resist the impulse to commit suicide" does not have the effect that Mr Fitzgerald suggests. Regardless of the phrasing, in applying *Turner*, the court *was* looking at the operative cause of the suicide. The test is designed to sort charlatans from people with genuine mental illness. It has never been suggested that the appellant is a charlatan, but it does not follow that he therefore represents a

suicide risk such that it would be oppressive to extradite him. The expert evidence was that the appellant is rational, fit to plead, capable of improvement and expected to improve in better conditions.

(e) The judge was correct to find that the conditions would be better in India than they had been at HMP Wandsworth. The conditions in Indian prisons generally were irrelevant given assurances had been provided. There is no reason to believe that the GoI would breach the assurances, and the conditions guaranteed in those assurances are better than those in HMP Wandsworth.

(f) Similarly, in light of the assurances provided, it was wrong to raise concerns about the practical obstacles to the appellant accessing healthcare. The assurance was clear that the appellant will be able to see his own psychiatrist. Were that ability subject to approval by a judge, the assurance would be misleading. The judge was correct to assume that the assurance has been provided in good faith by the GoI and to rely on it in concluding that the appellant will have adequate access to healthcare.

Discussion

18 At this stage, the question for me is simply whether the appellant's case on these grounds is reasonably arguable. In my judgment, it is. I will grant permission to appeal on Grounds 3 and 4. I will not restrict the basis on which those grounds can be argued, though it seems to me that there should be a particular focus on whether the judge was wrong to reach the conclusion he did, given the evidence as to the severity of the appellant's depression, the high risk of suicide and the adequacy of any measures capable of preventing successful suicide attempts in Arthur Road prison. The application of the *Turner* test to a case of severe depression also seems to me to warrant consideration by the Divisional Court. The admissibility of the evidence of Mr Doobay will be a matter for the court considering the substantive appeal.

Ground 5: Art 6 ECHR

The judge's findings

19 The judge accepted that the appellant's case had attracted, and would be likely to continue to attract, a significant amount of media attention. He said that the appellant is alleged to have defrauded a State-owned bank of huge sums of money and it was also no surprise that the case had garnered political interest and commentary. However, this did not mean that the appellant would face a flagrant denial of justice in India.

20 The judge found that there was nothing in the evidence to suggest that politicians were trying to influence the outcome of the trial, nor that the judiciary were lacking in independence or incapable of holding a fair trial where it involves a high-profile defendant. Accordingly, the judge found that extradition would be compatible with Article 6 ECHR.

Submissions for the appellant

21 Mr Fitzgerald submitted that the judge was wrong in his approach to Article 6 because he failed to take adequate account of the wider political context. He did not grapple with the

relevant evidence before him. There is also fresh evidence which shows that there has been a further deterioration to the state of the rule of law in India since the judge's decision.

22 The materials before the judge included evidence that: the newspapers in India are controlled by a small number of powerful individuals, some of whom have strong political affiliations; the CBI and the ED have lost their independence and are increasingly used by the current political regime to target its opponents; another high-profile businessman, Christian Michel, who was extradited to India from Dubai, has been mistreated by the Indian authorities; the Indian courts' ability to independently and fairly consider politically-sensitive criminal cases is now regularly called into question; and the appellant's case has become a "political tool" for the GoI, with the appellant publicly portrayed as a national traitor by Indian politicians.

23 There was also fresh evidence which was not available at the time of the extradition hearing and would have caused the judge to reach a different decision on Article 6. This evidence therefore meets the test in *Hungary v Fenyvesi* [2009] EWHC 231 (Admin), [2009] 4 All ER 324. The fresh evidence refers to: a series of reports demonstrating the extent to which the rule of law has been undermined in India and the increasingly authoritarian political context; the withdrawal of Amnesty International from India on 29 September 2020 following "an onslaught of attacks, bullying and harassment by the government in a very systematic manner"; reports questioning the independence of the Indian judiciary; articles showing the ongoing high-profile nature of the appellant's case; and further statements from the GoI and the Indian courts which prejudge the appellant's guilt. On the basis of this evidence, Mr Fitzgerald submitted that the judge was wrong to conclude that: (i) there was no cogent evidence undermining the independence of the judiciary in India; and (ii) there was no evidence allowing him to conclude that, if extradited, the appellant is at a real risk of suffering a flagrant denial of justice.

24 In relation to the denunciations of the appellant by senior political figures in India, including the Law Minister, Mr Fitzgerald relies on *Allenet de Ribemont v France* (1995) 20 EHRR 557 and says that there has been a violation of the appellant's presumption of innocence, in breach of Article 6(2) ECHR. He also relies on *Brown v Rwanda* [2009] EWHC 770 (Admin), in which a flagrant denial of justice was found, in part because of the intimidation of witnesses and statements pre-judging the applicant's guilt.

Submissions for the Government of India

25 Ms Malcolm submitted that the judge dealt with the concerns raised by the appellant fully at first instance. The judge had the benefit of the recent decision of Senior District Judge Arbuthnot (as she then was) in *Mallya v Government of India*, where the GoI sought the extradition of another high-profile businessman who argued that he would not receive a fair trial in India for reasons similar to those relied on by the appellant. The argument was unsuccessful in *Mallya* and permission to appeal was refused by the Divisional Court (Leggatt LJ and Popplewell J): [2019] EWHC 1849 (Admin). Ms Malcolm submitted that the appellant's reliance on fresh evidence was an implicit acceptance that there was nothing arguably wrong with the judge's approach on the material before him.

26 The fresh evidence does not address matters which have occurred since the judge's decision and does not demonstrate any specific development which would bring into

question the ability of the Indian courts to provide the appellant with a fair trial. It therefore does not meet the admissibility criteria in *Fenyvesi*.

27 Finally, Ms Malcolm pointed out that there has never been a successful Article 6 claim relating to trials in India, which is not surprising given the long and proud legal tradition in that country. Mr Fitzgerald's reliance on *Brown* was misguided as that case concerned a Head of State who had created an environment of fear by threatening extra-judicial killing (and there was evidence that such killing had been carried out). That is a far cry from the present case, where the concerns raised by the appellant relate to no more than a few instances of hyperbole at a political rally.

Discussion

28 The threshold for a finding that extradition would breach Article 6 ECHR is high. As the judge said, it is necessary to show that there is a real risk of treatment that would constitute not only a violation of Article 6, but also a "flagrant denial of justice": *Othman v United Kingdom* (2012) 55 EHRR 1, [259]. This means showing that there is a real risk of a trial with procedural defects "so fundamental as to amount to a nullification or destruction of the very essence of the rights guaranteed": *Dudko v Russian Federation* [2010] EWHC 1125 (Admin), [36].

29 The material deployed before the judge included a number of statements by members of the executive branch of the GoI. The judge set out some of these statements at [118]. But the question whether there is a real risk of a flagrant denial of justice depends primarily on the likely response of the judicial, not the executive, branch. The judge heard oral evidence on this from Justice Katju. The judge explained in detail at [138]-[141] why he decided to give little weight to Justice Katju's evidence. He explained at [142] why he gave limited weight to the statements of Mr Guha and Mr Sharma, which were drawn from media articles and anonymous third-party sources. He set out at [143], by reference to his submissions on the question of *prima facie* case, why he considered that it could not be said that the appellant would be unable to call the witnesses he needs due to fear of repercussions. At [144], he made reference to a statement by the Solicitor General of India about the independence of the Indian judiciary. The judge said this:

> "There is no cogent or reliable evidence that the judiciary in India are no longer independent, or capable of managing a fair trial even where it is a high-profile fraud with significant media interest."

30 It is important to bear in mind the task of an appellate court in relation to findings of fact. In my judgment, having considered the evidence and submissions before him, the conclusions reached by the judge were properly open to him on the basis of the materials before him. It is relevant in this regard that similar conclusions were reached by the Senior District Judge in *Mallya* and that the Divisional Court refused permission to appeal those conclusions.

31 As to the observations made by judges in other cases, I would respectfully endorse the conclusions of Johnson J in refusing permission to appeal on the papers:

> "In *JM Financial Asset Reconstruction Co*… Manmohan Singh J described the Appellant's conduct in strong terms (see at [49]) but that was relevant to the

> decision he had to make. He made it clear that this would have no bearing in any proceedings initiated against the Appellant (see at [52]). Similarly in *UCO Bank* the judge suggested that '[p]rima facie' what had happened was 'deplorable' (and again described the Appellant's conduct in strong terms (see at [36])), but that was in the context of separate litigation and does not show that the Appellant will not receive a fair trial."

32 In my judgment it is not reasonably arguable that the judge was wrong to conclude that there was no real risk of a flagrant denial of justice in India.

33 That leaves the fresh evidence relied upon. Although the evidence itself post-dates the judge's findings, the matters to which it relates were almost all considered by the judge. The submission that the appellant's case was so politically sensitive that he would not receive a fair trial was specifically considered by the judge. Similarly, the withdrawal of Amnesty International was a matter considered in the evidence before the judge, as was the treatment of Christian Michel. Insofar as the fresh evidence includes new matters not specifically before the judge, they are not so significantly different from those which were before the judge, or sufficiently probative, as to satisfy the test in *Fenyvesi*.

34 Permission to appeal will therefore be refused in relation to ground 5.

Grounds 1 and 2: *Prima facie* case and extradition offence

35 Grounds 1 and 2 overlap. Ben Watson QC submits that the judge was wrong to conclude that there was a *prima facie* case of an extradition offence in each of the three requests before him.

Submissions for the appellant

36 Mr Watson made two preliminary points, and submitted that the judge was wrong to hold that the GoI had established a *prima facie* case against the appellant in relation to any of the three requests:

(a) The first point was that the judge erred in relation to the scope of the offending under the first CBI request. That request concerns the allegedly fraudulent use of Letters of Undertaking ("LOUs"), a form of bank guarantee. During the extradition hearing, the evidence before the judge related to 150 LOUs issued between February and May 2017. However, in its closing submissions the GoI filed draft charges which reflected offending that was far wider in scope (referring to 1,214 LOUs issued between 2008 and 2018). The judgment does not make clear whether the appellant's extradition has been ordered on the wider or narrower scope. That being the case, Mr Watson makes two alternative submissions. Either: (i) the appellant's extradition has been ordered in relation to the wider offending, in which case the judge erred in finding a *prima facie* case in the absence of any supporting evidence beyond the 150 LOUs in the narrower offending; or (ii) the appellant's extradition has been ordered in relation to the narrower offending, in which case the GoI must make that clear by amending the draft charges, so as to ensure that there is no breach of the appellant's specialty rights.

(b) The second point concerns the judge's approach to the admissibility of the materials relied on by the GoI to establish a *prima facie* case, particularly s. 161 statements.

These are statements prepared by investigating officers, do not contain a statement of truth from the witness and are admissible in Indian courts only in very limited circumstances. Accordingly, Mr Watson submits that the judge was wrong to find that there was a *prima facie* case on the first and third requests in circumstances where s. 161 statements formed the majority of the CBI's evidential case.

37 As to the first request, Mr Watson submitted that the judge's decision was vitiated by a series of findings which were not properly open to him on the evidence. The judge's findings were based on the GoI's reference to six alleged indicators of fraud. However, these indicators were not made out on the evidence:

(a) *The LOUs were not authorised and were issued in direct contravention of a circular from the bank, indicating that there had been a conspiracy involving bank officials:* This was contradicted by the GoI's opening note which said that the relevant LOUs had been sanctioned by a Branch Head. There was no evidence that they had been issued without the required authorisation and it was not clear on what basis the judge had determined that the LOUs had been issued in breach of the circular.

(b) *The bank staff failed to obtain/retain documents relating to the LOUs:* This was contradicted by several pieces of evidence including the CBI seizure memo, the evidence of the Chief Manager at the bank and that of a junior accountant at one of the appellant's businesses. The evidence of these witnesses was relied on by the GoI.

(c) *The LOUs had not been entered on to the bank's Core Banking System, the only explanation being that this was to prevent the fraud from being detected:* The evidence showed that there were times when LOUs were entered into the system, and times when they were not. There was an innocent explanation, namely problems with the bank's computer systems. The GoI accepted that there were honest LOUs which were not entered into the system but recorded in other ways. This was also the case with the 150 allegedly dishonest LOUs.

(d) *No appropriate commission was charged by the bank:* This was a central feature of the GoI's case but the judge did not make any finding on it one way or the other. Had the judge found that there had been appropriate commission, the conspiracy alleged would have operated for the bank's benefit, which would have materially weakened the case against the appellant. Further the fact that any commission whatsoever had been paid was inconsistent with the GoI's assertion that the existence of the LOUs had been concealed from the bank.

(e) *The LOUs were issued without any cash margin*: There was no authoritative evidence that the bank required a 100% margin prior to the release of funds under an LOU, which was the foundation of this aspect of the GoI's case. Indeed, the GoI's evidence included emails suggesting that a practice had developed between the appellant's businesses and the bank where a fixed deposit was paid only after the LOU had been issued. The judge ignored evidence going to the commercial rationale for such an arrangement. Further, the GoI accepted that 6 honest LOUs had been issued without a cash margin in 2017.

(f) *The LOUs were used to repay earlier LOUs in a Ponzi-like structure:* The GoI's evidence demonstrated that this was routinely not the case and showed that, between

2013 and 2014, the amount owed reduced, which was inconsistent with a Ponzi-like scheme. Further, the fact that there were occasions when later LOUs were being used to repay earlier ones ran contrary to the GoI's case that the bank was unaware of the transaction, as the bank would have known the destination of the funds.

38 The second request concerned allegations of money laundering the proceeds of the first CBI request. Accordingly, the second request stands or falls with the first.

39 As to the third request, the first allegation was of a conspiracy to conceal evidence by taking it to a well-known Indian law firm, Cyril Amarchand Mangaldas ("CAM"). CAM was formally retained by the appellant as of 24 January 2018. They were engaged to provide legal advice in relation to interaction with the bank and other lenders once the bank stopped issuing LOUs. CAM asked for all of the relevant documents and these were taken to CAM's offices to be scanned on or around 14 February 2018. The documents were due to be returned to the appellant's businesses, but that was not possible because the documents were seized by the CBI on 20 February 2018 from CAM's offices.

40 Mr Watson accepted that the correct approach for a judge, when deciding whether there is a *prima facie* case under s. 84(1) of the 2003 Act, is to determine "whether, on one possible view of the facts, he is satisfied that there is evidence upon which the requested person could be convicted at summary trial on an information against him, upon the basis of the notional English charges": *Devani v Kenya* [2015] EWHC 3535 (Admin) at [49]. However, he submits that the "one possible view" must be one which a reasonable jury could reach. It was inherently unlikely that the documents had been transferred to a reputable law firm in furtherance of a conspiracy to pervert the course of justice. The ordinary presumption was that the documents were transferred for the purpose of preserving them, and compelling evidence of a corrupt lawyer-client relationship was needed to displace that presumption. As there was no such evidence in the appellant's case, the judge was wrong to conclude that there was a *prima facie* case.

41 The second allegation under the third request was that directors of Dubai-based companies involved in the fraud against the bank were transported involuntarily by the appellant and his associates and placed under pressure to give false statements to the investigating authorities. This allegation was underpinned by contradictory witness evidence including a number of s. 161 statements which were word-for-word identical, indicating that they had been written by the investigators rather than the witnesses themselves. Similarly, there were alleged threats to kill, but the evidence underpinning these was made by a witness who was "demonstrably lying". The judge was wrong not to exclude this evidence as "worthless": *R v Governor of Pentonville Prison ex p. Osman* [1990] 1 WLR 277.

42 In relation to the first request, Mr Watson submitted that the judge was wrong to exclude the expert evidence of Justice Thipsay, a former Indian High Court judge. Justice Thipsay explained that the offence of "cheating", contrary to s. 420 of the Indian Penal Code, requires that there is a "victim" who has been "deceived". That victim must be an individual rather than a body corporate and there was no such allegation of deception in the present case. Similarly, in relation to the charge of "criminal breach of trust", the GoI's request did not allege that any property had been "entrusted", despite this being a required element of the offence under s. 409 of the Indian Penal Code. Had the judge accepted this

evidence, he would have been unable to find that there was a *prima facie* case under the first request.

43 Justice Thipsay's evidence consisted of both written reports and live evidence at the extradition hearing. On 14 May 2020, part way through the hearing and the day after he had begun giving evidence, the Indian Law Minister gave a press conference suggesting that his evidence was being given at the behest of the Congress Party. This was picked up in the media. Following an unsuccessful application to the judge for the rest of his evidence to be given in private or subject to reporting restrictions, Justice Thipsay declined to give further live evidence. On the basis that he had failed to disclose his party-political affiliations, courted media attention and refused to give further live evidence, the judge placed no weight on his evidence. Mr Watson submits that he was wrong to do so, particularly as the GoI had not challenged Justice Thipsay's expertise or credibility in cross-examination.

44 In relation to the third request, Mr Watson relied on *USA v Dempsey* [2018] EWHC 1724 (Admin), [2018] 4 WLR 110, at [28], for the proposition that conduct which disrupts a police investigation will not necessarily amount to the offence of perverting the course of justice. He submits that the only conduct which the GoI alleges is directed to the very early stages of a CBI investigation, which is incapable of amounting to the English common law offence.

Submissions for the Government of India

45 Ms Malcolm submitted that, in approaching this ground, the court should bear in mind the words of Lord Burnett CJ in *Love* at [25]:

> "Extradition appeals are not rehearings of evidence or mere repeats of submissions as to how factors should be weighed; courts normally have to respect the findings of fact made by the district judge, especially if he has heard oral evidence."

46 Following the approach set out in *Norris v USA* [2008] UKHL 16, [2008] 1 AC 920, the judge identified the notional English charges in relation to each of the requests. He was provided with a significant volume of evidence, both written and oral, and determined that there was evidence upon which the appellant could be convicted. In doing so, he dealt comprehensively with the appellant's challenges to admissibility of the GoI's evidence. His approach to the s. 161 statements was entirely consistent with the approach of the Divisional Court (Irwin LJ and Elisabeth Laing J) in the substantive appeal in *Mallya*: [2020] EWHC 924 (Admin). In any event, even if the appellant had succeeded on any of his admissibility challenges, that would have been insufficient to undermine the judge's overall conclusion, which was based on voluminous evidence after a two-week hearing.

47 The evidential threshold for establishing a *prima facie* case is a low one, and it is not arguably wrong for the judge to have found that that threshold had been met in relation to each of the requests.

48 In relation to the first request, the GoI needed to establish that the appellant: (i) formed or was party to an agreement; (ii) to defraud the bank; (iii) by dishonestly causing or permitting the issue of LOUs; (iv) by one or more of the indicted means; (v) thereby

causing loss to the bank. There was ample evidence within the GoI papers to satisfy the elements of the offence. The appellant had put forward an alternative narrative, characterising this request as a "commercial dispute". Ms Malcolm submitted that this was inherently implausible for the following reasons:

(a) LOUs are a specific type of credit used to allow an importer to obtain buyer's credit at a preferential rate. The only way for the bank to limit its exposure would be to require the borrower to lodge a cash margin. The appellant's account is premised on the bank knowingly exposing itself to the risk of unsecured debts of over USD 1 billion, which is "ludicrous".

(b) Similarly, the appellant's account required the court to accept that the bank would have knowingly extended credit of £729m to the appellant's businesses with no security in return for a commission of only £864,000.

(c) The appellant denies that the issuing of LOUs amounted to a Ponzi-like scheme but fails to explain why, upon discovery of the fraud, the effect created was a "cash crunch" – which would be expected on the collapse of such a scheme.

(d) The appellant's narrative does not account for the evidence of "dummy directors" who said they were appointed to companies to receive the proceeds of the fraud. Nor does it explain why he attempted to prevent those dummy directors from cooperating with the CBI.

(e) The appellant's narrative does not explain how large sums of money from the bank ended up in his personal pocket, or in the pockets of close family members.

49 In any event, the appellant will have an opportunity to place his narrative before a trial court in India. Section 84(1) of the 2003 Act did not require the judge to exclude all alternative theoretical narratives in order to find that a *prima facie* case had been established. To adopt such an approach would be to "truncate the test": see *Mallya* [2020] EWHC 924 (Admin) at [34].

50 As to the "indicators of fraud", the court is not required to embark upon an exhaustive review of every evidential issue that might arise at trial; the GoI has comprehensive responses to each of the points raised, but it is not for this court to adjudicate on these points.

51 In relation to the second request, the GoI needed to establish that the appellant: (i) formed or was party to an agreement; (ii) to conceal, disguise, convert, transfer or remove; (iii) criminal property (the direct or indirect proceeds of the fraud); (iv) knowing the proceedings to represent in who or in part the proceeds of criminal conduct. There was ample evidence to establish those ingredients, set out in the affidavits of the Deputy Director of ED and the supporting evidence.

52 In relation to the third request, the GoI needed to establish that the appellant: (i) formed or was party to an agreement; (ii) to commit acts; (iii) tending and intended to pervert the course of justice; (iv) by one or more of the indicted means.

53 The allegations relating to the depositing of documents with CAM was only one of the indicted means, only one strand of perverting the course of justice. There was evidence showing that the materials sent to CAM, at the time when the offices of the appellant's businesses were being searched by the CBI, included documents which should have been in the bank's possession. There was an email from CAM terminating their services due to the appellant's "treacherous conduct… contrary to… express instructions… to only send copies of relevant documents" which noted that the boxes sent "also had rubber stamps, seals and blank letter heads of [the appellant's] various companies, which apart from being highly unusual, was totally irrelevant" for CAM's purposes under the retainer. One possible view of the evidence was that the documents had been sent to CAM so that they would not be found by the CBI during the investigation.

54 The other strands of this offending, relating to interference with witnesses and threats to kill, are supported by witness statements, video recordings and transcripts of audio recordings. The admissibility arguments that the appellant put before the judge were similar to those dismissed by the Senior District Judge in *Mallya* and there was no reason to depart from the reasoning in that case.

55 The framework for determining whether the alleged offending amounts to an "extradition offence" is set out in s. 137 of the 2003 Act and that provision does not require a judge to adjudicate between competing submissions on foreign law. The case law on the corresponding provision for Part 1 territories (s. 64) shows that it is inappropriate for a judge to concern himself with the criminal law of the requesting state: *Office of the King's Prosecutor, Brussels v Cando Armas* [2006] 2 AC 1 at [30]; *Dabas v High Court of Justice in Madrid, Spain* [2007] UKHL 6 at [52]-[55]. The same is true under s. 137: *Sinani v Norway* [2010] EWHC 470 (Admin) at [14]-[15]. Accordingly, it would not have been appropriate for the judge to rely on Justice Thipsay's evidence for the purposes of determining whether the test in s. 137 was met. In any event, the judge gave clear and cogent reasons for placing no weight on Justice Thipsay's evidence at [106]-[111] of his judgment.

Discussion

56 On questions of admissibility, the judge took as his starting point the approach of the Divisional Court in the substantive appeal in *Mallya*. In my judgment, he was right to do so. The arguments advanced on the appellant's behalf, based on *Shankaran v India* [2014] EWHC 957 (Admin), had also been advanced and rejected in *Mallya*. The judgment in that case bound the judge and there is no public interest in permitting the appellant to reargue points determined by the Divisional Court so recently. Nor, in my judgment, is there any basis for distinguishing *Mallya*.

57 This means that the key question on appeal is whether it was open to the judge to reach the conclusion that the low threshold of a *prima facie* case had been surmounted. Many of the submissions made by Mr Watson depended on the submission that the judge had failed to grapple with the evidence and case of the appellant. But before descending to the detail, it is important to bear in mind that the judge's conclusions were reached after considering voluminous evidence and submissions at an unusually long hearing. The law did not require him to deal with each and every point made in the evidence or submissions. It did not require him to reject the appellant's explanations, merely to find that "a reasonable

jury, properly directed and considering the evidence, *could* exclude all realistic possibilities consistent with the defendant's innocence": *Mallya*, [34], emphasis added.

58 In my judgment it is not reasonably arguable that the judge erred in concluding that this test was met.

59 As to the specific points relied upon by the appellant in relation to the first request:

(a) It is true that the draft charges the subject of the first request related to a much larger number of LOUs than the 150 issued in 2017 (for payment in 2018) on which the GoI's evidence concentrated. But, as Ms Malcolm said, the 150 LOUs the subject of the GOI's evidence were the only ones in respect of which the bank suffered any loss. What was alleged was the creation of a Ponzi-type scheme where – at least in some cases – the earlier LOUs were repaid by later ones. It was only at the end, when the scheme unravelled, that the loss crystallised. In any event, as Johnson J said in refusing permission, it was not necessary to show that a *prima facie* case was made out in relation to each and every LOU. What was necessary was simply to show that the requisite elements were made out in relation to each request.

(b) In finding that the LOUs were issued in contravention of a circular from the bank, the judge appreciated and recorded the appellant's case that they were sanctioned by branch heads of the bank: see [71(vi)] of the decision. This was contrary to the evidence of Ms Sakhare. In any event, this point was far from the only plank in the *prima facie* case.

(c) In finding that there had been a failure to obtain/retain documents, the judge relied principally on the fact that some of the LOUs were not entered on the bank's CBS system and on the evidence of Mr Bhardwaj. He was well aware of the fact that software problems provided an explanation for the failure to record *some* of the LOUs: see [71(iv)]. But the failure to record others was a piece of evidence on which he could properly rely in answering the question whether the evidence as a whole disclosed a *prima facie* case.

(d) The judge was not required to make a finding about the lack of appropriate commission, even though this was one plank of the bank's case. The central feature of the bank's case was the issue of LOUs without security. As the judge found, it was "inherently implausible" that unsecured borrowing with a value equivalent to £729 million was "known about, tolerated or sanctioned" by bank officials who were not part of the conspiracy: see [71(x)].

(e) The fact that some LOUs which are not said to have been procured dishonestly were obtained without a 100% cash margin did not mean that a jury could not regard the absence of a cash margin generally as an indicator of fraud, particularly if the jury accepted the evidence recorded by the judge at [70(vii)]. As to the suggested commercial rationale for the arrangement by which LOUs were issued first, with deposits paid later, this was a matter for trial. It did not undermine the judge's conclusion that there was a *prima facie* case.

60 As to the third request, there are two allegations. In my judgment, it is not reasonably arguable that the judge erred in respect of either of them:

(a) The allegations in respect of the transfer of original documents and other items to CAM did not depend on CAM being complicit in the conspiracy to pervert the course of justice. The evidence recorded by the judge at [75]-[77] was in my judgment plainly sufficient to justify the judge's conclusion that there was a *prima facie* case, albeit there were answers to it which the appellant would be able to advance at trial.

(b) As to the allegations in relation to the requests to dummy directors, the judge recognised that there were "competing versions of events" and that the witness statements provided "an alternative narrative": [92(ii) and (iii)]. He also accepted that some of the directors' statements included verbatim passages: [92(iv)]. Nonetheless, the judge was entitled to conclude that there was a *prima facie* case based on witness statements, video recordings and transcripts of audio recordings. As he said at [93]:

> "I remind myself again that this Court does not have to exclude all of Nirav Modi's alternative narrative and possibilities or his personal interpretations of the evidence. These will be matters for the trial in India and not relevant to the ultimate task for this Court on these requests."

61 The judge's approach to the identification of a prima facie case was correct. Given the test he had to apply, and the volume of evidence relied upon against the appellant, he was entitled to conclude that each of the requests disclosed a *prima facie* case.

62 As to the question whether the offences were extradition offences, the judge also adopted the correct approach. As Johnson J said in refusing permission, the question whether there is a *prima facie* case fell to be considered applying the law of England and Wales. The only relevant question under s. 137(3)(c) was whether the offence was punishable under the law of India. It is not necessary or appropriate to consider foreign law to determine whether the elements of the offence under the law of India can be established. That is a matter for the courts of India. That being so, Justice Thipsay's evidence was irrelevant. In any event, there is no basis for disturbing the judge's decision to attach no weight to Justice Thipsay's oral evidence, which he chose not to complete.

63 Permission to appeal is refused in relation to grounds 1 and 2.

Specialty

64 After the judge sent the appellant's case to the Secretary of State for her decision on whether to order extradition, the appellant submitted representations urging her to decline to do so for want of effective specialty arrangements with India. On 15 April 2021, the Secretary of State ordered his extradition. The appellant seeks leave under s. 108 of the 2003 Act to appeal against her decision on two grounds, namely that the Secretary of State's decision: (i) was wholly inadequate in its reasoning; and (ii) was wrong.

Submissions for the appellant

65 In relation to the first ground, the appellant relies on *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409:

> "Permission to appeal will not normally be given unless the applicant can make out an arguable case that the judge was wrong. If the judgment does not make it clear why the judge has reached his decision, it may well be impossible within the summary procedure of an application for permission to appeal to form any view as to whether the judge was right or wrong. In that event permission to appeal may be given simply because justice requires that the decision be subjected to the full scrutiny of an appeal." (appellant's emphasis added).

66 The same logic applies in the context of extradition appeals when the district judge's reasoning is unclear (*Antonov & Baranauskas v Lithunnia* [2015] EWHC 1243 (Admin) at [12]) and should apply *a fortiori* to the Secretary of State's decision-making given the absence of any opportunity otherwise to test her decision.

67 In relation to the second ground, Mr Fitzgerald submitted that the Secretary of State erred in concluding that there is effective speciality protection available to the appellant. This ground raises some of the same points are raised under ground 5. Specifically, it was said that the high-profile nature of his case in India will put enormous pressure on the GoI to ignore any speciality protection which should be afforded to him, a concern which is underlined by concerns about the rule of law and lack of judicial independence in India. In addition, Mr Fitzgerald submitted that the lack of clarity about whether the judge found a *prima facie* case on a wider or narrower basis under the first request (see [30(i)] above) makes it difficult for the appellant to assert his speciality rights.

68 In addition, the appellant submitted that there is evidence that India has breached commitments to the UK and other countries. The relevance of breaches of commitments to third countries was recently affirmed by the Supreme Court in *Zabolotnyi v Hungary* [2021] UKSC 14. Following the approach in *Othman v UK* (2012) 55 EHRR 1, the Secretary of State ought to have had regard to the longstanding relationship between the Government of India and other states, concluding that India's breaches of specific assurances showed an indifference to international obligations, such that she ought not to rely on assurances given in respect of the appellant.

69 The representations submitted to the Secretary of State highlighted several breaches of international commitments which she failed to grapple with. In addition, the appellant relies on three recent cases which he says undermine the proposition that the GoI can be relied upon to abide by commitments given to the UK (Christian Michel, Princess Sheikha Latifa and Jagtar Johal). In oral submissions, Mr Fitzgerald focused on the case of Abu Salem, an individual extradited from Portugal who is currently serving a life sentence in India despite assurances that he would not receive imprisonment for a term beyond 25 years. The appellant submits that Mr Salem was convicted of offences which fell outside of the scope of his extradition, in breach of his specialty rights.

Submissions for the Secretary of State

70 For the Secretary of State, Ms Davidson submitted that the Secretary of State's only task in responding to the appellant's submissions was to consider whether there are effective speciality arrangements in place between the UK and India, not to determine any wider points about the rule of law in India. It is implicit in the statutory scheme of the 2003 Act that the Secretary of State is only required to make her decision once the district judge has

decided that extradition would be compatible with the requested person's ECHR rights, including under Article 6.

71 There are, in fact, specialty arrangements in place between the UK and India. Article 13(1) of the Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India, signed on 22 September 1992, provides:

> "Any person who is returned to the territory of the Requesting State under this Treaty shall not, during the period described in paragraph (2) of this Article, be dealt with in the territory of the Requesting State for or in respect of any offence committed before he was returned to that territory other than:
>
> (a) the offence in respect of which he was returned;
>
> (b) any lesser offence disclosed by the facts proved for the purposes of securing his return other than an offence in relation to which an order for his return could not lawfully be made; or
>
> (c) any other offence in respect of which the Requested Party may consent to his being dealt with other than an offence in relation to which an order for his return could not lawfully he made or would not in fact be made."

72 In light of these arrangements, the Secretary of State needed only to consider whether there was any compelling evidence that the GoI would act contrary to its Treaty obligations: *Patel v Government of India* [2013] EWHC 819 (Admin) at [71]. The courts have considered this question on a number of occasions and have repeatedly confirmed that there are effective speciality arrangements in place between the UK and India: *Patel*; *Shankaran v Government of India* [2014] EWHC 957 (Admin); *Chawla v Government of India* [2018] EWHC 3096 (Admin); *Mallya* (at the permission stage).

73 In *Mallya*, the Divisional Court noted that the case of Abu Salem had been relied on by a number of requested persons to argue that the GoI would not comply with speciality requirements. The argument had been rejected by the courts on each occasion and none of the developments in the case since merited a different conclusion. Giving judgment on 20 April 2020, the court also noted that "[t]he applicant [had] not been able to point to any previous case in which there has been any alleged breach by the Indian authorities of its extradition treaty with this country". The Secretary of State was entitled to rely on the court's conclusions in *Mallya* rather than reconsidering whether the alleged breaches of international law which had already been considered by the Divisional Court could rebut the presumption that the GoI will comply with its obligations under Article 13.

74 Of the material which post-dates *Mallya,* the only case which involved extradition was Christian Michel and that had been considered by the judge in this case at [120] of his judgment. In any event, criticism of the conditions in which Mr Michel has been held in India has no bearing on the specific question whether the GoI will honour its Treaty obligation to accord specialty protection to the appellant.

75 The Secretary of State's reasons for her decision were stated briefly, but the level of detail required is context-specific: *R v Home Secretary, ex parte Doody* [1994] 1 AC 531. Given

that the arguments made by the appellant had been considered in detail by the courts, the context in this case made a short response appropriate.

Discussion

76 In my judgment, there is nothing in this ground of appeal. I can state my reasons very briefly:

(a) The courts have repeatedly held that there are effective specialty arrangements between the UK and India. The most recent such finding was by the Divisional Court in *Mallya* on 2 July 2019. In that case, the Court considered the case of Abu Salem, on which Mr Fitzgerald relied, and held at [34] that it provided no reasonably arguable basis for doubting the effectiveness of the specialty arrangements between the UK and India.

(b) Of the other cases relied upon by the appellant, none was a case where the specialty arrangements between the UK and India applied. The case of Christian Michel was considered by the judge and, applying the logic of the Divisional Court's judgment in *Mallya*, the other cases cast no light on the likelihood of India honouring its extradition arrangements with the UK.

(c) Nothing in the Supreme Court's decision in *Zabolotnyi* alters the analysis. The issue there was the proper approach to evidence that a requesting state had breached assurances to third party States about prison conditions. Nothing in the judgment in that case casts doubt on the Divisional Court's conclusion in *Mallya*, where the evidence about Abu Salem was rejected not only because it related to a third party State, but also because it was a single case in which compliance with the specialty arrangements was disputed between India and Portugal.

77 In my judgment, there was nothing before the Secretary of State which suggested that the conclusion of effectiveness was displaced. In those circumstances the short reasons given by the Secretary of State were adequate. The contrary is not reasonably arguable.

78 Permission to appeal on ground 6 is therefore refused.

Conclusion

79 Permission to appeal will therefore be granted on grounds 3 and 4 but otherwise refused.