England and Wales High Court (Administrative Court) Decisions

Neutral Citation Number: [2014] EWHC 614 (Admin)
Case No: CO/17599/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL
11/03/2014

B e f o r e :

LORD JUSTICE McCOMBE
And
MR JUSTICE HICKINBOTTOM

Between:

HAYLE ABDI BADRE	**Appellant**
- and -	
COURT OF FLORENCE, ITALY	**Respondent**

Mark Summers (instructed by Birnberg Peirce & Partners) for the Appellant
Hannah Hinton (instructed by Crown Prosecution Service) for the Respondent
Hearing date: 26 February 2014

HTML VERSION OF JUDGMENT

Lord Justice McCombe:

(A) **Introduction**

1. This is an appeal by Mr Hayle Abdi Badre ("the Appellant") from an order dated 19 December 2013 of District Judge Zani, sitting at the Westminster Magistrates' Court, whereby the learned District Judge ordered the extradition of the Appellant to Italy, pursuant to section 21(3) of the Extradition Act 2003 ("the Act").

2. The extradition order was made in enforcement of a European Arrest Warrant ("EAW") of 22 May 2013, issued by the Court of Florence in Italy ("the Respondent"). The warrant sought the Appellant's extradition to face one charge of unauthorised financial activity contrary to Article 132 of the Legislative Decree 385/1993 and Article 4 of Law No.146/2006. The initial description of the alleged offence set out in the EAW was that the Appellant had,

> "organise[d] and manage[d] unauthorised criminal activity as a financial intermediary for the public collection and the transfer of huge amounts of financial flows to agencies not authorised by the Italian Monetary Authorities".
>
> It is alleged that the offence was committed between 2 September 2011 and July 2012.

3. The District Judge rejected submissions by the Appellant that (1) the EAW failed to supply the information required by section 2(4) of the Act; (2) the offence charged was not an "extradition offence", within the meaning of sections 10 and 64 of the Act, because it failed to satisfy the dual criminality test; (3) that proceedings were an abuse of process, because, by virtue of "registration" under UK legislation, the Appellant's company was lawfully providing services in Italy; and (4) the return of the Appellant to Italy would constitute a breach of the Appellant's rights under Article 3 of the European Convention on Human Rights, in view of the prevailing prison conditions in Italy (see *Torreggiani v Italy* (2013) App. 43517, 8 January 2013). At the hearing before us, Mr Summers for the Appellant abandoned ground (3) and I will say no more about it.

4. For the Appellant, Mr Summers argues that the judge was wrong to reject the submissions which he made, giving rise to grounds (1), (2) and (4) above, and adds a further ground, namely that District Judge Bayne had erred, in her decision of 23 May 2013 at the initial hearing, in finding that there was a sufficient certificate issued by the designated authority in this country in respect of the EAW within the meaning of section 2(7) of the Act. On this additional point, there was brief discussion in argument as to whether an appeal lay in respect of District Judge Bayne's decision on the present appeal from District Judge Zani's order. However, Miss Hinton for the Respondent did not argue that this ground was not open to the Appellant and the point was, therefore, argued before us on its merits.

(B) **Background Facts**

5. The Appellant operated, through a company called Sahal Express Limited ("Sahal"), a "payment services" business, enabling the transmission or payment of funds from a payer in one country to a recipient in another country by a system known as "hawalla". The expert evidence before the judge showed this to be a system of payments, developed largely by those of the Muslim faith, in pursuit of the tradition forbidding the receipt of interest on money. The payer provides money to a "hawaladar" in country A. The "hawaladar" provides a credit to a correspondent "hawaladar" in the country B who pays the intended recipient in that country. There is no transfer of money, in a traditional banking sense, and no record of the full transaction is maintained. The system works by way of a mutual off-setting of debts between payer and payee. The precise details of the system do not, however, matter for present purposes.

6. The legal context of the offence alleged is the EU Directive on Payment Services 2007/64/EC, implemented in this country by the Payment Services Regulations 2009 and in Italy by the Legislative Decree mentioned above. The Directive provides that member states shall require undertakings intending to provide payment services to obtain "authorisation" from a relevant authority before commencing to provide such services (Article 10). However, the Directive (by Article 26) enables member states to waive the criteria for "authorisation" in respect of certain undertakings with a limited average total payment transactions in any month of €3 million, subject however to a requirement of "registration" of those undertakings in the register provided for in Article 13 of the Directive.

7. The UK has taken advantage of the "waiver" provisions of Article 26 of the Directive to enable what our Regulations call a "small payment institution" to "register" without seeking full "authorisation". Sahal was such an institution at the relevant times and was registered in the relevant register. Italy has not adopted the waiver provisions and all undertakings operating a payment services business must seek full authorisation. "Authorisation" involves a more formal and rigorous process of scrutiny than "registration". However, it appears that the Appellant, through Sahal, is said to have conducted payment transactions in part in or through Italy, without the appropriate "authorisation" under the Directive and the Italian implementing legislation. In the context of the argument on "dual criminality", however, the Respondent seeks to cast the net wider than the Payment Services Directive in identifying the parallel criminal conduct in this country, so as to include offences under the Money Laundering legislation.

8. The further particulars of the alleged offence, as set out in the EAW, include the following details,

> "....the suspect is the manager of the company named **Sahal Express Ltd,** having its headquarters in London, carrying out this activity also through, the system of collection of funds and financial flows typical of the Islamic finance known as "hawala", having branches in more countries.
>
> This company is not entitled to operate in Italy, as financial intermediary, as it lacks the required authorization from the competent national monetary and financial authorities.
>
> **Abdi Badre Hayle**, managing Sahal Express Ltd, acted in complicity with **Mohamed Geddi Bashir** and other co-defendants of Somali origin, as the aforementioned Geddi Bashir had been delegated by Abdi in the area of Florence and other places in Italy to manage agencies for the transfer of funds at international level using the system and the business name of Sahal Express, and Abdi Badre came periodically to Italy and in particular to Florence to coordinate the activity of the persons acting under his control and management.
>
> In such a way, Abdi Badre Hayle operated as Sahal Express Ltd also in Italy, even though the company lacked completely the necessary authorizations required by Italian Monetary and Financial Authorities, in particular those granted by the Bank of Italy, a conduct which amounts to the offence of unauthorized financial activity in that not duly authorized and regulated according to the law.
>
> This conduct amounts to the offence provided for in article 132 of Legislative Decree 385\1983 as explained above."

The particulars go on to record the potential vice in the offence alleged, which is said to lie in an ability here to escape from the scrutiny of the financial regulators, thus facilitating terrorism

or illegal immigration of persons of Somali origin. The EAW does concede, however, that "no real connection of the defendant and his accomplices with Islamic terrorist groups operating in Somalia could be traced".

(C) **The Grounds of Appeal**

9. I will take these in turn, beginning, however, with the additional point raised as to the adequacy of the certificate under section 2 of the Act issued in the present case.

The Certificate

10. The point here is that the certificate issued by the Serious Organised Crime Agency ("SOCA") is not subscribed with a physical signature in ink, but with an electronic signature in the form "GW (200820)". There is no other dispute about the content of the certificate. It is accepted that in all other respects the document produced is a proper certificate.

11. Section 2(7) and (8) provide as follows:

> "2(7) The designated authority may issue a certificate under this section if it believes that the authority which issued the Part 1 warrant has the function of issuing arrest warrants in the category 1 territory.
>
> (8) A certificate under this section must certify that the authority which issued the Part 1 warrant has the function of issuing arrest warrants in the category 1 territory."

12. Mr Summers submits that the provision of a proper certificate under section 2 of the Act is a precursor to the validity of the warrant and the subsequent jurisdiction of the court. When a certificate is issued the requested person may be lawfully arrested: see section 3(2) of the Act. The powers of the court, Mr Summers submits, follow on from such an arrest. If the arrest cannot be shown to be lawful the court has no jurisdiction. Mr Summers argues that the process of certification requires the designated authority to scrutinise the warrant to determine that it has been issued by an appropriate judicial authority of a category 1 territory; such a task requires the intervention of a human mind and cannot be performed by a machine. He argues that it is a machine that has purported to issue the certificate in this case.

13. We were referred to the judgments of the House of Lords in *Dabas v High Court of Justice, Madrid* [2007] 2 AC 31, a case concerning the adequacy of a certificate under section 64(2) of the Act. In that case, it was held that the EAW itself can constitute the "certificate" for the purposes of that subsection. We were referred to certain passages in the speeches of Lord Bingham of Cornhill and Lord Hope of Craighead. At paragraph 8 of his speech Lord Bingham said,

> "...the Spanish judge, by signing the warrant, has given his authority to and thereby vouched the accuracy of its contents. Thus the warrant is in substance if not in form a certification..."

Lord Hope said,

> "...The purpose of the certificate, then, is not to provide any further information than that which in a Part 1 warrant is already available. Its purpose is to vouch for, or affirm its accuracy...Any form of words will do, so long as they indicate that the person who authenticates the document accepts responsibility for its accuracy..."

14. For my part, I do not doubt the importance of the certification requirements in the Act; they must be scrupulously followed. I also accept Mr Summers' submission that it is implicit in the certification requirements that the relevant mind must be properly addressed to the relevant statutory requirements. However, I do not accept his argument that the certificate in this case was provided by a machine. It seems clear to me that it was provided by the designated authority, through its official (with the authenticating initials GW and an identifying code).

15. We were told that at the initial hearing District Judge Bayne asked for confirmation of the name of the official. It was provided and she satisfied herself that the certificate had been duly provided by that official on behalf of the designated authority, namely SOCA. I would have been prepared to infer as much from the form of the certificate, but the information provided to District Judge Bayne and in a new witness statement before us confirms the position. I do not see that the electronic form of the signature on the certificate detracts from the validity of it, which appears to me to speak for itself from the face of the document.

16. It is perhaps unfortunate that the electronic age has produced more haste and less speed, because it has thrown up this technical argument where none existed before. It must surely be the easiest task in the world to produce a signature in ink, or at least the full name and designation of the individual certifying and perhaps an official stamp or rubric confirming that that individual does indeed certify the contents of the document to lend some additional force of authority to the certificate that is being produced. I would hope that SOCA would consider either reverting to the old practice of producing these certificates, properly signed by a real person, in the form that was actually used in an earlier warrant in this case (subsequently withdrawn); or at least better identifying the individual making the certification on the face of the document. However, for the reasons given, I would reject this ground of the appeal.

Section 2(4)(c): sufficiency of particulars of the alleged offence

17. Section 2 (2)(a) and (4)(c) of the Act requires the provision of (inter alia) the following information:

> "2(2)(a) the statement referred to in subsection (3) and the information referred to in subsection (4), or
>
> .....
>
> (4)(c) particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the category 1 territory under which the conduct is alleged to constitute an offence;"

18. It is trite law that the provision of proper particulars is a prerequisite of the validity of the warrant. Mr Summers argues that the warrant in this case did not provide such particulars. He says that no particulars are given of the funds said to have been raised, the quantum of the financial flows or of the number of transactions concerned.

19. Mr Summers submits (and I accept) that the statute requires the warrant to provide sufficient particulars of the conduct alleged to enable the accused person to understand the nature and extent of the allegations against him, in order that he may exercise his right to invoke any restrictions upon extradition that may arise and, if surrendered, so that he may ensure that the charge presented does not extend beyond the allegation upon which the extradition was based. Further, says Mr Summers, proof of compliance with the section 2 requirements must be to the criminal standard: section 206 of the Act.

20. Mr Summers submits that the particulars should at least have contained some indication of the amount of money and the number of transactions involved. He argues that, quite apart from knowing what the precise allegation is, such details could go to the proportionality requirements of Article 8 of the ECHR. He says that we do not know here whether the charge involves €30 or €30 million.

21. We were referred by Mr Summers in his skeleton argument to the judgment of Cranston J (with which Richards LJ agreed) in *Ektor v National Public Prosecutor of Holland* [2007] EWHC 3106 (Admin) at paragraphs 7 and 8 for the following principles:

> "34.....
>
> i. The description must include when and where the offence is said to have happened and what involvement the person named in the warrant had (§7);
>
> ii. A balance must be struck between the need on the one hand for an adequate description to inform the person, and on the other the object of simplifying extradition procedures (§7);
>
> iii. The person sought by the warrant needs to know what offence he is said to have committed and to have an idea of the nature and extent of the allegations against him in relation to that offence (§7);
>
> iv. The language of the 2003 Act does not connote the specificity or lack of it demanded in the particulars for a count on an indictment (§8);
>
> v. The amount of detail may turn on the nature of the offence (§7);
>
> vi. Where dual criminality is involved, the detail must also be sufficient to enable the transposition exercise to take place (§7);
>
> vii. Allowance must be made where an EAW has been translated (§8)."

22. Mr Summers also relies upon the further decision of this court in *Von der Pahlen v Austria* [2006] EWHC 1672 (Admin) (Dyson LJ, as he then was, and Walker J). It was a case of complicated frauds and the particulars were held insufficient in failing, for example, to identify the victims and the number and size of the advance payments alleged to have been fraudulently obtained.

23. Miss Hinton for the Respondent submits that the nature of the conduct alleged is sufficiently particularised, in that the crux of the allegation is trading in Italy as a payment institution, in the relevant period without authorisation; the amount of money and the number of transactions are, she argues, immaterial. Indeed, such particulars are eminently ones that are within the knowledge of the alleged offender and not known to the prosecuting authorities.

24. I believe that there is force in Mr Summers' submissions but, even with the burden of proof as it is, I would have hesitated before allowing the appeal on this ground and I prefer not to rest my decision upon it, in the light of the conclusions that I have reached upon the remaining two grounds.

Dual Criminality

25. Under this head, it is argued for the Appellant that District Judge Zani was wrong to conclude that the EAW disclosed an extradition offence under sections 10 and 64 of the Act.

26. There is no doubt that, in this case, it was necessary for the court to be satisfied to the criminal standard that the conduct said to amount to the commission of an offence would constitute an offence under the law of the relevant part of the United Kingdom (i.e. England and Wales) if it occurred in that part of the United Kingdom: see section 64(3)(b) of the Act.

27. Mr Summers submits that it is plain from the terms of the warrant itself, and from the further information submitted to the court by the prosecuting authority in Italy, that the charge against the Appellant is one of conducting the relevant business without *authorisation* under the Payment Services Directive and the relevant implementing legislation in Italy. That is the charge formulated by the warrant, and is copiously confirmed by the further information supplied by the Italian court[1]. Such conduct would not involve the commission of any offence here by an organisation such as Sahal or the Appellant, because there is no requirement for such authorisation under the Directive as implemented by the UK legislation.

28. Before the District Judge, and in this court, Miss Hinton's argument was and is that it is not necessary to focus upon the Payment Services Directive and the 2009 Regulations, as it is a requirement of the law in this country that payment institutions also register under the Money Laundering Regulations 2007 and that under regulations 26 and 45 it is an offence if this is not done. The District Judge accepted that submission. He said in paragraph 41 of his judgment that,

> "...I am satisfied that so far as Dual Criminality is concerned the comparable offence would be s.26 [sic, regulation 26] of the Money Laundering Regulations 2007 which requires registration with the Commissioners[2], and in default of compliance, renders the person liable to 2 years imprisonment (per s. 45 thereof)."

29. It seems to me, however, that there is no charge in the present EAW, on which the extradition is sought, of failing to register under the money laundering legislation. That legislation therefore, as Mr Summers submits, is legally irrelevant to the present enquiry.

30. The specific charge is transacting the relevant business without being "authorised" (a term of art under the Payment Services Directive). The conduct alleged is not merely the trading as a payment services business, but trading without having satisfied the rigorous requirements of Articles 5 to 10 of the Directive (and the Italian equivalent), which lead to "authorisation". The conduct of the business in the UK, without having gone through those hoops, would not necessarily constitute an offence under the law of England and Wales. Accordingly, it seems to me that the court could not be satisfied, to the requisite standard, that section 64(3)(b) of the Act was satisfied.

31. I accept, of course, that it is not necessary that the foreign offence charged should be "on all fours" with a comparable offence here (*Mauro v United States* [2009] EWHC 150 (Admin), paragraph 4, per Maurice Kay LJ). However, the question is whether the essence of the conduct would constitute an offence in this country. It seems to me that the essence of the conduct alleged in this case is entirely clear, it is trading as a "financial intermediary" having failed to obtain "authorisation", with all the prerequisites that that entails, under the legislative equivalent of our Payment Services Regulations.

32. On this aspect of the case, I would finally wish to refer briefly to a point raised by my Lord, Hickinbottom J, in the course of argument. He enquired of Miss Hinton whether the relevant conduct might not be formulated as trading in the relevant business without having complied

with the national requirements of the Directive, i.e. in Italy authorisation or here authorisation/registration as appropriate. I did not detect that Miss Hinton espoused the suggestion with any great enthusiasm. In the end, I do not consider that this is the essence of the conduct alleged. As I have said above, I think the essence of the allegation is trading without going through the authorisation process. That is not necessarily an offence here and accordingly, as I have said, section 64(3)(b) is not satisfied to the relevant standard.

33. I would allow the appeal on this ground.

Prison Conditions

34. The final ground of appeal is that the District Judge erred in concluding that there were no substantial grounds for believing that extradition would expose the Appellant to a real risk of being subjected to treatment contrary to Article 3 of the ECHR, by reasons of conditions in the Italian prison estate.

35. The argument here focuses on overcrowding in the Italian prisons. Mr Summers' outline of the legal background appears in paragraphs 102 and 103 of his skeleton argument as follows:

> "102. Prison overcrowding violates international and European prison rules which set the recommended minimum space to be afforded to each detainee. Overcrowding does not, however, necessarily violate Article 3 ECHR. The "minimum level of severity" inherent in Article 3 tolerates some degree of overcrowding. In a case where a country's prison estate has not reached a level of overcrowding that, of itself, violates Article 3, a defendant will have to show that overcrowding had other specific effects in his individual case (such as lack of access to heat, light or sanitary facilities etc.). See, for example, ***Achmant v Greece*** [2012] EWHC 3470 (Admin).
>
> 103. But overcrowding *is* capable of reaching such an endemic and serious level (where the prison estate as a whole is so overcrowded that individuals are habitually kept in spaces less than $3m^2$) that detainees are subjected to a systemic Article 3 violation. Such cases are obviously rare. But they do occur. Amongst the 48 member states of the Council of Europe, until recently, international acknowledgement of such conditions was confined to Russia."

36. In January 2013, the European Court of Human Rights delivered its judgment in *Torreggiani v Italy (requests nos. 43517, 46882, 55400, 57875, 61535 of 09 and 35315 and 37818 of 10)*. In that case the court considered the cases of seven prisoners in Busto Arsizio and Piacenza prisons respectively. The judgment was a pilot judgment, delivered pursuant to rule 61 of the Court's rules. That rule provides as follows:

> "1. The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications."

37. In its judgment, the court referred to 2010 statistics indicating a total of 67,961 persons held in 206 prisons, with a maximum capacity of 45,000 prisoners, a national overcrowding rate of 151% (paragraph 23). It went on to record the state of emergency, with regard to prison overcrowding, declared by the President of the Council of Ministers for a period of one year. It found that that state of emergency was continuing as at 31 December 2012. By 13 April 2012, the number of persons held was 66,585, an over-crowding rate of 148% (paragraphs 28 and 29). The court recognised the steps taken and being taken by the Italian authorities to improve

conditions in the prisons. However, dealing with the admissibility arguments, the court concluded:

> "55. In view of these circumstances, the Court considers that it has not been demonstrated that the action indicated by the government, taking particular account of the current prison system situation will be effective in practice, i.e. likely to prevent the continuation of the alleged infringement and ensure an improvement in the applicants' physical conditions of detention. Therefore, they were not obliged to exhaust things before applying to the Court."

38. On the merits of the cases and the applicability of the pilot judgment procedure, the court's conclusions in paragraphs 87 to 89 of the judgment, were as follows:

> "87. The Court has observed that prison overcrowding in Italy does not concern only the applicants' case (paragraph 54 above). It notes in particular that the structural and systemic nature of prison overcrowding in Italy is clearly evident from the statistical data indicated above and from the terms of a national state of emergency declaration made by the President of the Italian Council of Ministers in 2010 (paragraphs 23-29 above),
>
> 88. The combination of these data shows that the breach of the applicants' right to benefit from adequate conditions of detention is not the result of isolated incidents but arises from a systemic problem, which results in turn from a chronic malfunction particular to the Italian penitentiary system, which has affected, and is likely to affect again in the future, many people (see mutatis mutandis, *Broniowski* v. *Poland, cited above, §189).* According to the Court, the situation found in the present case therefore constitutes a practice incompatible with the Convention (*Bottazzi* v. *Italy [GC], No 34884/97, §22, ECHR 1999-V; Bourdov (No.2), above, §135).*
>
> 89. Furthermore, the structural nature of the problem identified in these cases is confirmed by the fact that several hundreds of requests directed against Italy and raising a problem of compatibility with Article 3 of the Convention for inadequate conditions of detention related to overcrowding in different Italian prisons are currently pending before it. The number of such requests continues to increase."

With regard to more recent measures, the court said this (at paragraph 92):

> "92. It notes that the Italian State has recently taken measures likely to contribute to reduce the phenomenon of prison overcrowding and its consequences. It welcomes the steps taken by the national authorities and cannot but encourage the Italian State to continue its efforts.
>
> However, it must be observed that, in spite of the legislative and logistical efforts made by Italy in 2010, the national rate of overcrowding was still very high in April 2012 (reduced from 151% in 2010 to 148% in 2012). It notes that this mitigated balance sheet is of particular concern as the emergency plan of action prepared by the national authorities is limited in time with the end of works for construction of new prisons planned for the end of 2012 and that the sentence enforcement provisions, extraordinary in nature, shall apply only until the end of 2013 (paragraph 27 above)."

The court decided that satisfactory remedial measures had to be put in place within one year from the date on which the judgment became definitive.

39. Italy's application for referral to the Grand Chamber of the Court was refused and the judgment became final on 27 May 2013.

40. The Article 3 test in an extradition case is that it is for the requested person in an extradition case to show that there are substantial grounds for believing that he or she, if extradited, would face a real risk of being subjected to treatment contrary to the Article: *Saadi v Italy* (2009) 49 EHRR 30, at paragraph 140. The burden is less than proof "on the balance of probabilities", but the risk must be more than fanciful. This was the test which the District Judge adopted in his judgment, in my view correctly.

41. It is also the case that there is a strong, but rebuttable, presumption that in the case of a member state of the Council of Europe that such a state is able and willing to fulfil its obligations under the Convention. To rebut the presumption, it will often be necessary to adduce evidence from a number of recognised sources that the presumption ought not to be applied. Something "approaching an international consensus is required": see *Krolik v Polish Judicial Authorities* [2013] 1 WLR 2013 (Sir John Thomas P, as he then was, and Globe J), concerning conditions in Polish prisons and the applicability of Article 3.

42. The problem for the Respondent in the present case is that the European Court, in a pilot judgment as recently as January 2013, has found that there was a systemic problem in the Italian penitentiary system, resulting from a chronic malfunction.

43. This court is bound by statute to take into account that judgment in considering whether the Appellant in this case should have been held by the court below to have satisfied the burden of showing that there were substantial grounds for believing that there was a real risk of infringement of Article 3, if the Appellant were to be extradited: see section 2 of the Human Rights Act 1998.

44. As is well known, and recently much debated, the requirement to take the judgment into account does not necessarily mean that the judgment has to be followed. However, in the present case, I consider that the judgment does provide a very clear rebuttal of the presumption that might otherwise apply to this court's view of extradition to Italy as a member state of the Council of Europe and of the European Union. Where there is evidence that the relevant risk exists, it is for the requesting state to dispel any doubts: see the *Saadi* case (supra), at paragraph 129.

45. In response to a direct question from the bench, Miss Hinton said that she was not submitting that there was not a continuing systemic problem in the Italian prison estate. That seems to me to have been a correct concession on the evidence before the court. We have seen a letter dated 15 November 2013, sent to "the UK Liaison Magistrate in Italy" in the context of this case reporting upon continuing efforts in Italy to meet the requirements of the judgment of the European Court in *Torreggiani* (supra). The letter reported upon a visit by the Italian Minister of Justice to the President of the European Court on 5 November 2013. The letter included the following,

> "...The Minister expressed that awareness of the necessity to remove the prison conditions which may be defined as inhuman or degrading has been acknowledged by the highest Institutions of the Country. By means of an exceptional procedure, which Article 87 of our Constitution reserves for situations of absolute national relevance, the President of the Italian Republic sent a message to Parliament – the first of his long Presidential term – so as to invite the legislature to promptly consider the "fact of exceptional importance constituted by the European Court of Human Right's [sic] decision" and "of proceeding to an internal remedy which may offer a restoration for the overcrowding conditions already suffered by

prisoners..."

The letter then proceeds to set out steps being taken and to be taken to ensure compliance with the European Court's requirements, as expressed in the judgment. The letter did not suggest that those requirements had already been met.

46. It seems to me, therefore, that to dispel the doubts that must be found to have arisen in the present case, the burden was on the Respondent to provide evidence to satisfy the court that the relevant real risk of incarceration in conditions contrary to Article 3 did not arise in the particular case of the Appellant. The court could not, in my judgment, be satisfied by the general presumption.

47. Miss Hinton relied upon a letter of November 2013[3] from the Italian Ministry of Justice to the Liaison Magistrate in these terms;

"RE: ABDI BADRE Hayle, born on 24 October 1960. European Arrest Warrant

Our Ministry assures you that should the Somali national ABDI BADRE Hayle be surrendered by the Authorities of the United Kingdom of Great Britain and Northern Ireland under the European Arrest Warrant, he will be kept in conditions complying with the provisions of Article 3 of the European Convention for the protection of human rights and fundamental freedoms signed in Rome on 4 November 1950 as modified on 11 May 1994.

Following his surrender ABDI BADRE Hayle shall not be necessarily incarcerated in the Detention Institution of Busto Arsizio or Piacenza in that he can be imprisoned in other correctional institutions."

48. We were referred by Mr Summers to the decision of the European Court, in a very different context, in *Othman (Abu Qatada) v UK* (2012) 55 EHRR 1. The court there examining some of the appropriate questions that it may be appropriate to ask, when faced with assurances that real risks of ill-treatment will not be turned into reality in a particular case, said this in paragraph 189 of its judgment (omitting the references to the previous cases to which the court referred):

"189. More usually, the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving State's practices they can be relied upon. In doing so, the Court will have regard, *inter alia,* to the following factors:

(i) whether the terms of the assurances have been disclosed to the Court....;

.....

(ii) whether the assurances are specific or are general and vague...;

.....

(iii) who has given the assurances and whether that person can bind the receiving State;

.....

(iv) if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them;

> .....
>
> (v) whether the assurances concerns treatment which is legal or illegal in the receiving State;
>
> ......
>
> (vi) whether they have been given by a Contracting State;
>
> .....
>
> (vii) the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances;
>
> .....
>
> (viii) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers;
>
> .....
>
> (ix) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible;
>
> ......
>
> (x) whether the applicant has previously been ill-treated in the receiving State; and
>
> .....
>
> (xi) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State...."

Here it seems to me that questions (i), (ii), (iv), (vi), (vii) and (viii) at least are of some assistance.

49. The assurance produced by the Respondent here, in the November 2013 letter, is certainly general and not specific and, although given by central government, nothing is said about conditions locally where the Appellant may be detained while in Italy. On the other hand, and Miss Hinton emphasised this, the assurance is given by a contracting state to the Convention and of long-standing friendly status vis-à-vis this country.

50. In my judgment, the District Judge was wrong to be satisfied by this general letter of assurance. It is of discomfort that the letter does not even give an assurance that the Appellant would not be housed at one of the two prisons whose conditions were called into in question in the *Torreggiani* case itself. The failure to give such an assurance is, to my mind, a serious weakness, reflecting upon the letter as a whole.

51. Mr Summers stated expressly that he did not call into question the good faith of the Italian authorities in offering the assurance and in seeking to better the situation in Italian prisons. However, he submitted that, given the acknowledgment of a continuing systemic Article 3

problem in the letter of 15 November 2013 (just over a month before the decision below) (which was also accepted by counsel before this court,) we should not uphold the District Judge's decision.

52. In my judgment, Mr Summers' submission is correct. I am far from saying that in no case can a court in this country safely order an extradition to Italy. Like Mr Summers, I do not call into question for one minute the good faith of the Italian authorities in writing the letter that they did. However, it seems to me that, on the specific facts of this present case, the judgment of the European Court, together with the acknowledgment of a continuing systemic problem in the Italian prison system, has rebutted the presumption of compliance with the Convention which would normally arise in the case of a member state of the Council of Europe and of the European Union. This state of affairs, therefore, raises substantial grounds for believing that there is a real risk of treatment contrary to Article 3 and the Respondent has not produced sufficient material to dispel that belief.

53. For my part, I would have expected at least some information as to whether bail might be available to the Appellant in Italy and on what terms, and, if not available or if not likely to be granted, some information as to the specific institution or type of institution in which the Appellant would be confined and some information as to the prevalent conditions in that institution or those institutions.

54. While I accept that the Respondent in good faith has sought to provide satisfactory assurance to the court, in my judgment, the material provided, in this particular case, is not sufficient for the purpose.

55. In my judgment, therefore, I consider that this appeal should be allowed on this ground also.

56. Before leaving this part of the appeal, however, I must address one further matter.

57. In the course of her submissions on this ground of appeal, Miss Hinton said that, if this court were inclined to allow the appeal on this ground, she would apply and did apply now for an adjournment to take instructions from the Respondent as to whether any more specific assurances as to compliance with Article 3 could be offered to meet the court's concerns.

58. Mr Summers opposed the application. He argued that to grant an adjournment would be tantamount to permitting the Respondent to adduce fresh evidence on the appeal and that should not, therefore, be permitted. The issue as to Italian prison conditions was first raised a very long time ago. His client had been kept in custody for three months following arrest and had subsequently been subjected to stringent bail conditions. He argued that the issue as to prison conditions was well known to the Respondent and it had had ample time to present appropriate assurances to the court; it should not be permitted to boost its case at this late stage.

59. We considered the application for the adjournment and, at the end of the hearing, we announced our decision to refuse it. We indicated that we would consider the substantive ground of appeal on the existing materials.

60. Our refusal of an adjournment was based, for my part, on an acceptance of Mr Summers' submissions on the point. In my view, it was far too late in the day for the Respondent to supplement its case in this way. Our task is to judge whether the District Judge was correct to decide to order the Appellant's extradition on the materials before him. There was no good reason to allow the Respondent to add to its evidence in the manner proposed.

(D) **A point of practice**

61. The arguments of Counsel, both written and oral, made copious reference to provisions of the Act. However, notwithstanding the submission of bundles containing a very large number of reported cases, we were not provided with copies of the relevant provisions of the Act. It would be more helpful for the future in extradition cases, if Counsel would be so kind as to provide, with the authorities, copies of any parts of the Act which they consider to be relevant.

(E) Result

62. For the reasons given, I would allow the appeal.

Mr Justice Hickinbottom:

63. For the reasons given by my Lord, McCombe LJ, I too would allow this appeal. Given that I set a different hare running, I expressly align myself with his finding at [32] above, that the essence of the allegation in the warrant here is trading without EU Directive authorisation.

64. In respect of prison conditions in Italy, my Lord has set out clearly and comprehensively why the appeal must be allowed on that ground. I agree with that analysis, and add the following only because we are disagreeing with the learned District Judge and it is important, in my view, to emphasise what I see to be the scope and limits of my decision on the facts of this case.

65. There is a strong but rebuttable presumption that signatories to the European Convention on Human Rights will comply with their obligations under that instrument. There is thus a presumption that, where an individual is extradited to a signatory state, he will not be subject to any breach of his Article 3 or other human rights, if he is detained on return. However, where the European Court of Human Rights has made a finding in a pilot judgment that the prison regime of a state is in systemic breach of Article 3, absent other specific evidence, there is a risk that, if detained in that prison system, a returned individual will be subjected to prison conditions that breach his human rights. Of course, it is open to that state to adduce evidence that there is no such risk. For example, it could produce evidence that, since the pilot judgment, prison conditions have improved, so that there is no longer a systemic problem with them; or give an assurance that, if the individual is returned and then detained, he will be kept in a particular prison (or in one of a number of identified prisons) which does not suffer from the general problem identified by the European Court.

66. However, whilst I fully accept the good faith of the Italian Government, like my Lord, I am entirely unpersuaded that the assurance given in this case is sufficient. We know from the face of the warrant that the Appellant, on any return, is due to be remanded in custody. Miss Hinton, rightly, conceded that, on the evidence before us, it would not be open to argue or find that the prison conditions in Italy had improved to such an extent that there is no longer a systemic problem with them. However, the assurance given does not say that the Appellant, if returned, will not be subject to that general regime; and it expressly allows the real possibility of the Appellant being detained in one of the two Italian prisons that were the particular subject of the *Torreggiani* case. It does not on its face show that any thought has been given to the practicalities of ensuring that, in the light of *Torreggiani*, if returned the appellant will not be exposed to prison conditions that are in breach of Article 3. Whilst of course every case will be fact specific, in my view, in the face of a pilot judgment identifying a systemic failure of a state's prison system, a simple assurance from that state that the Article 3 rights of an individual (who, if returned is at risk of being detained) will not be breached, will, without more, rarely if ever be sufficient to persuade a court that there is not a risk of such a breach.

67. By allowing the appeal on this ground, I find that it is important to state that, in my judgment, this does not mean that, in the period in which Italy seeks to resolve the systemic prison problems identified by the European Court, individuals cannot be extradited there from the

United Kingdom. Miss Hinton sought an adjournment, to enable further instructions to be taken in terms of a more specific assurance than that already given. That application was refused, for the reasons given by McCombe LJ; but the fact that it was made suggests that more consideration might have been given to the terms of the assurance in this case. To overcome the consequences of *Torreggiani,* one would expect to see an assurance that (e.g.) the individual, if returned to Italy, would be detained in a particular prison, with an indication of the conditions in that prison and why they are not open to the criticism of Italian prisons in general. Where there is an assurance of some specificity, the presumption that a signatory state will comply with its assurances will once more apply. However, for the reasons given above, the assurance in this case is insufficient to persuade me that, if the Appellant were returned to Italy, he would not face the risk of being exposed to prison conditions that would breach his Article 3 rights.

Note 1 Appeal Bundle, tab 16. [Back]

Note 2 Of HM Revenue and Customs [Back]

Note 3 The date is not clear, but appears to be November. The English translation is clearly dated 5th November 2013. [Back]
