



Neutral Citation Number: [2023] EWHC 422 (Admin)

Case No: CO/4308/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2023

Before:

MR JUSTICE CHAMBERLAIN

Between:

CECIL STEVEN HEILLIGER

Applicant

-and-

(1) GOVERNMENT OF SINT MAARTEN

**(2) SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

Respondents

Alun Jones KC (instructed by **Hollingsworth Edwards Solicitors**) for the **Applicant**

Peter Caldwell and Alexander dos Santos (instructed by the **Crown Prosecution Service**)
for the **Respondent**

Hearing date: 7 February 2023

Approved Judgment

This judgment was handed down remotely at 10.00am on 28 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain:

Introduction

- 1 The island of Saint Martin lies in the northeast Caribbean Sea. The northern part of the island is known by its French name, Saint Martin, and is constitutionally a *collectivité d'outre-mer* (overseas territory) of the French Republic. The southern part is known by its Dutch name, Sint Maarten, and is one of four autonomous *landen* (countries) of the Kingdom of the Netherlands. Curaçao, in the southern Caribbean Sea, is another. Sint Maarten and Curaçao have been designated category 2 territories for the purposes of the Extradition Act 2003 (“the 2003 Act”): see SI 2003/333 as amended.
- 2 Mr R.H. de Haan is Solicitor General for Curaçao, Sint Maarten, Bonaire, Sint-Eustatius and Saba, the latter three being special municipalities of the Netherlands (sometimes referred to collectively as “the Caribbean part of the Netherlands”). On 19 November 2020, he signed a request for the appellant’s extradition to Curaçao pursuant to the European Convention on Extradition. He said that a domestic arrest warrant had been issued against the appellant by the Public Prosecutor of Sint Maarten, Ms Esmahan Ahbata, following an investigation undertaken jointly by her and the public prosecutor of Curaçao into a criminal organisation called “No Limit Soldiers” and that the appellant would be prosecuted before “the Joint Court of Justice of Aruba, Curaçao, Sint Maarten and of Bonaire, Sint Eustatius and Saba before the Court of Curaçao”.
- 3 Mr de Haan attached a sworn statement by Ms Ahbata, which indicates that the appellant is suspected of seven criminal offences: (1) participation in a criminal organisation in Curaçao and Sint Maarten; (2) inciting or co-perpetrating the attempted murder by shooting of K. Gumbs, which took place in Saint Martin (French part); (3) inciting or co-perpetrating the murder by shooting of one K. Metura, which took place in Saint Martin (French part); (4) inciting or co-perpetrating the murder by shooting of A.R.L. Browne-Thewet, which took place in Sint Maarten; (5) inciting or co-perpetrating the attempted murder by shooting of M.C.G. Nunes, which took place in Sint Maarten; (6) inciting or co-perpetrating the attempted unlawful deprivation of liberty, hostage taking and extortion of “a person named Rachid” and/or “a person named François”, which took place in Sint Maarten, Saint Martin and/or France; (7) money laundering.
- 4 The extradition request was transmitted to the Lord Chancellor by Quincy Girigori, Minister of Justice of Curaçao, on 20 November 2020.
- 5 On 11 January 2021, the Secretary of State for the Home Department certified under s. 70 of the 2003 Act that “the request from Sint Maarten” was valid and had been made in the approved way. On 27 January 2021, an arrest warrant was issued by District Judge Branston at Westminster Magistrates’ Court. That warrant was executed on 19 March 2021 and the appellant has been in custody ever since.
- 6 The extradition hearing took place on 4-6 August 2021 before the Chief Magistrate. He asked for written assurances in relation to Articles 2 and 3 ECHR. On 1 November 2021, he delivered his judgment in open court, dismissing the appellant’s objections to extradition and sending the case to the Secretary of State, who on 9 December 2021 ordered the appellant’s extradition to Sint Maarten.

- 7 There were initially five grounds of appeal. Permission to appeal was refused on the papers in relation to all of them by Heather Williams J on 5 December 2022. The application for permission to appeal was renewed. In his oral submissions, Mr Alun Jones KC, for the appellant, confirmed at the hearing that only three grounds were now pursued. These were grounds 1 and 2 (which challenge the Chief Magistrate’s decision to send the case to the Secretary of State) and 5 (which challenges the Secretary of State’s decision to order the appellant’s extradition). In relation to grounds 1 and 5, only parts of the arguments in the Perfected Grounds of Appeal were pursued.

Ground 1

- 8 Under ground 1, the appellant submitted that the Chief Magistrate was wrong to hold that he was accused of extradition offences within the meaning of s. 137 of the 2003 Act. As originally pleaded, this ground was advanced on two bases: first (in relation to all offences) that the request was for extradition to Curaçao and no sufficient conduct was alleged to have been committed there; second (in relation to some offences only), even if the request was properly regarded as having been for extradition to Sint Maarten, no sufficient conduct is alleged to have been committed there.
- 9 Mr Jones confirmed at the hearing that he was abandoning the first basis of challenge. He now conceded that the request was for extradition to Sint Maarten, as the Secretary of State had certified. Any challenge to that certificate would have had to be by way of judicial review. No such challenge has been brought. If a challenge had been brought, it would not have succeeded in the light of the further information provided by Mr den Haan in his letter of 11 June 2020. This sets out in detail the interrelation between the jurisdictions of Curaçao and Sint Maarten and establishes that the appellant is to be prosecuted before the Court of First Instance of Sint Maarten, which would sit for this purpose in Sint Maarten (though it is “based” in Curaçao).
- 10 Ground 1 was therefore pursued only on the second basis (i.e. that the request was for extradition to Sint Maarten) and, as Mr Jones confirmed at the hearing, only in relation to offences 2, 3 and 6.

Offences 2 and 3

- 11 In the case of the other offences, the respondent says that the conduct complained of had intended effects in Sint Maarten and that, applying the principle in *Belgium v Cando Armas* [2005] UKHL 67, [2006] 2 AC 1, this is sufficient to establish that the conduct occurred in that territory for the purposes of s. 137(3)(a) of the 2003 Act. But in respect of offences 2 and 3, the shootings are said to have taken place in the French part of Saint Martin and the respondent must accordingly establish that the conditions in s. 137(4) apply. These are that:

“(a) the conduct occurs outside the category 2 territory;

(b) in corresponding circumstances equivalent conduct would constitute an extra-territorial offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment;

(c) the conduct is so punishable under the law of the category 2 territory.”

12 The respondent submits that these conditions are satisfied because attempted murder and murder are extra-territorial offences under s. 9 of the Offences Against the Person Act 1861 (“OAPA”), or, alternatively, under s. 4 of the Suppression of Terrorism Act 1978 (“STA”).

13 Section 9 of the OAPA is headed “Murder or manslaughter abroad” and provides in material part as follows:

“Where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the Queen’s dominions or without, and whether the person killed were a subject of Her Majesty or not, every offence committed by any subject of Her Majesty in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, may be dealt with, inquired of, tried, determined, and punished in England or Ireland...”

14 Peter Caldwell, for the respondent, submits that the phrase “every offence... in respect of any such case” is deliberately broad language, which establishes that the provision applies to offences of attempted murder as well as to offences of murder. This does not seem to me to be obvious, in the absence of any authority on the point. To my mind, the immediately following words (“whether the same shall amount to the offence of murder or manslaughter”) make it at least arguable that s. 9 applies only to those offences and not to attempted murder. It might be argued that, where Parliament wishes to establish extra-territorial jurisdiction in respect of attempts, it does so expressly: cf. s. 4(1)(b) of the STA. If s. 9 of the OAPA had been the sole basis for the respondent’s argument that the conditions in s. 137(4) of the 2003 Act are satisfied, I would have granted permission to appeal, at least in relation to offence 2.

15 But, as I have said, the respondent has an alternative basis for asserting that s. 137(4) is satisfied. The STA implemented the UK’s obligations under the European Convention on the Suppression of Terrorism. Section 4 of the STA is headed “Jurisdiction in respect of offences committed outside the United Kingdom” and provides as follows:

“(1) If a person, whether a citizen of the United Kingdom and Colonies or not, does in a convention country any act which, if he had done it in a part of the United Kingdom, would have made him guilty in that part of the United Kingdom of—

(a) an offence mentioned in paragraph 1... of Schedule 1 to this Act; or

(b) an offence of attempting to commit any offence so mentioned,

he shall, in that part of the United Kingdom, be guilty of the offence or offences aforesaid of which the act would have made him guilty if he had done it there.

...

(3) If a person who is a national of a convention country but not a citizen of the United Kingdom and Colonies does outside the United Kingdom and that convention country any act which makes him in that convention

country guilty of an offence and which, if he had been a citizen of the United Kingdom and Colonies, would have made him in any part of the United Kingdom guilty of an offence mentioned in paragraph 1... of Schedule 1 to this Act, he shall, in any part of the United Kingdom, be guilty of the offence or offences aforesaid of which the act would have made him guilty if he had been such a citizen.”

- 16 The offence mentioned in paragraph 1 of Schedule 1 is murder. Both the Netherlands and France have been designated “convention countries” by order under s. 9: see SIs 1986/271 and 1987/2137. France has declared that the Convention applies to the “European and overseas departments of the French Republic”. The latter included Saint Martin at the relevant time. Its constitutional status has now changed but there is no suggestion that this affects the applicability of the Convention. The appellant is a national of the Netherlands and is not a national of the UK.
- 17 It is apparent that s. 4 of the STA establishes two different bases for extraterritorial jurisdiction. Section 4(1) applies irrespective of nationality to an act done in a convention country which, if done in a part of the UK, would give rise to liability in that part of the UK for murder or attempted murder (*inter alia*). Section 4(3) applies only to nationals of a convention country who are not UK nationals. It establishes extraterritorial jurisdiction over an act done by a person outside both the UK and the convention country of his nationality if, were he a UK national, he would be guilty of murder (*inter alia*) in a part of the UK.
- 18 In the Respondent’s Notice, the respondent sets out both subsections but appears to rely on s. 4(3). That reliance is problematic for two reasons. First, s. 4(3) applies to specified offences but does not apply to attempts. Secondly, s. 4(3) provides a basis for establishing jurisdiction only if, were the appellant a UK national, he would be guilty of the offence. In the case of offence 2, that depends on showing that s. 9 of the OAPA applies to attempts. As I have said, that is not clear.
- 19 In my judgment, however, none of this matters, because s. 4(1) of the STA applies. In the case of both offences 2 and 3, the relevant act was done in a convention country (Saint Martin, part of France). The relevant acts would render the appellant liable for murder (offence 3) and attempted murder (offence 2) in England and Wales if they had been done here. So, the offences could in fact be tried in England and Wales. This means that s. 137(4) is satisfied without having to consider how widely the phrase “corresponding circumstances” should be read: if, by virtue of s. 4(1), the conduct does in fact constitute an extraterritorial offence under the law of England and Wales, there can be no doubt that the circumstances are “corresponding” and the conduct “equivalent”.
- 20 Because this was a point not fully canvassed at the hearing I wrote to counsel before finalising this judgment to invite their submissions. Mr Jones for the appellant accepted that, if the respondent relied upon s. 4(1) of the STA, he could not resist the conclusion that s. 137(4) was satisfied in respect of offences 2 and 3. Mr Caldwell confirmed that the respondent does rely on s. 4(1). It follows that, even if correct, ground 1 would make no difference to the result, at least as respects offences 2 and 3.

Offence 6

- 21 Mr Jones’s argument in respect of offence 6 is that it is not clear where the abduction took place and that the respondent was relying on an unduly wide reading of the “intended effects” doctrine in *Cando Armas*. That doctrine was not apt to cover the case where a crime was committed in one jurisdiction but did nothing more than cause fear in another.
- 22 The short answer to this point is provided in the CPS’ Opening Note before the Chief Magistrate. The evidence relied upon by the respondent consists of PGP (i.e. encrypted) messages showing a plan to locate and abduct “Rachid”. The appellant’s role was to pay the hitmen. Their search for Rachid covered the whole of the Island of Saint Martin. It was initially believed that Rachid was in Sint Maarten, but he was later found in a bakery in Marigot, in the French part of the Island.
- 23 This is not, therefore, a case where the respondent is relying on an unduly wide reading of “intended effects”. The respondents do not need to rely on the fact that the conduct caused fear in Sint Maarten. The conduct alleged (the search for Rachid in order to abduct and/or harm him, for which the appellant is said to have paid) was committed in both parts of the Island. There is, therefore, nothing in this ground.

Ground 2

- 24 Under ground 2, the appellant argues that the Chief Magistrate was wrong to hold that there were no substantial grounds for believing that there was a real risk of a violation of the applicant’s rights under Articles 2 and 3 ECHR.
- 25 The respondent accepts that, if detained in Sint Maarten, he would face a real risk of death or Article 3 ill-treatment. In order to address this risk, the respondent proposes that the appellant is sent initially to the European part of the Netherlands and confirms that special arrangements will apply to him. Mr den Hann said as follows in his letter of 10 September 2023:

“I can inform you that as long as there are safety risks Heilligger will not be detained or released in Sint Maarten without the appropriate measures to ensure his safety and in case of detention the safety of the other detainees. If for any reason Heilligger will be released from custody while being detained in the Netherlands, a safety assessment will take place. If there are still concerns for the safety of Heilligger at the moment of his release, he will not be released in Sint Maarten. Heilligger has the Dutch nationality and is a Dutch passport holder which gives him the right to reside in the European part of the Kingdom of the Netherlands...

If the court decides that the substantive hearing in the case of Heilligger will take place on Sint Maarten, Heilligger will be transported from the Netherlands to Sint Maarten. the transport will take place under the supervision of the Royal Dutch Military police who will fly with Heilligger from the Netherlands to Sint Maarten. On Sint Maarten the assistance of the Royal Dutch Navy will be asked and they will assist in the security of Heilligger during his stay on Sint Maarten. The Royal Dutch Navy will also assist in the security in court during the court hearings.”

- 26 Attached was a statement signed by the Director of Legal Affairs at the Ministry of Defence, on behalf of the Minister of Defence, confirming as follows:

“It is possible to provide military assistance on the basis of the 1987 Royal Decree Instruction regarding the deployment of the armed forces in Aruba, Curaçao and St Maarten.

If an application for military assistance is to be made this will have to be done by means of a formal request for assistance via the Minister of Justice, the Minister of General Affairs and the Governor of St Maarten. on the basis thereof, the Ministry of Defence will, with the approval of the Minister of General Affairs, the Minister of Interior Affairs, the Minister of Foreign Affairs and the Minister of Justice and Security, examine to what extent it is operationally feasible to provide support under the appropriate conditions and security measures regarding the security and transportation of the defendant involved in this criminal investigation.”

- 27 Also attached was a statement from Ms Ahbata confirming that the appellant is considered a “high risk prisoner” and that the prison on Sint Maarten was not suitable for such prisoners. For this reason, she had requested the Netherlands to provide a “detention space” under the “ORD” procedure. Even if detained in the Netherlands, the appellant would still be considered a prisoner for whom Sint Maarten was responsible. If the reasons for the ORD request fell away, the appellant would be returned to Sint Maarten. But, “as long as the reasons for the ORD still exist, the ORD will be prolonged”. In the appellant’s case those are safety reasons. There will be a risk assessment every six months to determine whether the safety reasons remain. When he is released, either upon acquittal or after serving his sentence, there will be another assessment. If it is too risky to release him in Sint Maarten, he will be released elsewhere.

- 28 Ms Ahbata confirmed that, if the trial takes place in Sint Maarten, extra security measures would be taken. The Royal Dutch Navy would assist. He would be held under the supervision of the Royal Dutch Navy, which would also assist in his transportation to and from court and provide security during the trial. Ms Ahbata concludes as follows:

“Sint Maarten has dealt with high risk cases before. And sufficient extra security measures have always been taken and the security measures have always been effective.”

- 29 Mr Jones says that this material does not meet the requirements for assurances set out in *Othman v UK* (2012) 55 EHRR 1, [187]: the letter from the Dutch Ministry of Defence is not an assurance but a communication to the prosecuting authority; its extent and adequacy is unclear; it does not bind the requesting state or even the authorities of the Netherlands (having been given only by a lawyer).

- 30 These objections rely on an artificially narrow reading of the documents relied upon. The complaint that the letter emanates from “a lawyer” is misconceived. It comes from a Director of Legal Affairs and is expressly signed on behalf of the Minister of Defence. It is true that the letter is addressed to the prosecuting authority, but this is not surprising. It is merely an exhibit to a formal letter from the proper authority of the

requesting territory, Mr den Haan. His assurance is unequivocal that “as long as there are safety risks Heilligger will not be detained or released in Sint Maarten without the appropriate measures to ensure his safety and in case of detention the safety of the other detainees” (emphasis added).

- 31 Although the Ministry of Defence letter refers to the need for a formal application for the assistance of the Royal Dutch Navy under the relevant provisions of Dutch law, there is no reason to doubt that such assistance would be granted if the Sint Maarten court decided that the appellant should be physically brought to court in Sint Maarten. This is particularly so in the light of Ms Ahbata’s statement that Sint Maarten has always dealt appropriately and effectively with high risk prisoners before and in the absence of any evidence to the contrary.
- 32 At the permission hearing. I asked Mr Caldwell to confirm whether the ECHR had been extended to Sint Maarten. In a note produced after the hearing, he confirmed that it had. Mr Jones criticised this as an unacceptable change of position on the part of the respondent. I do not regard it as such. The confirmation that the ECHR applies to Sint Maarten was given in response to a specific question from me. In any event, it is not advanced as a freestanding basis for concluding that there is no real risk of treatment contrary to Articles 2 and 3, separately from the assurance. Its significance lies in interpreting that assurance.
- 33 If (contrary to my view) the documents are inadequate because they allow for the exercise of discretion by the Sint Maarten judge (in relation to the location of the trial and/or the need for the appellant to attend in person) and the Ministry of Defence (in relation to the decision whether to provide security), it would be relevant to note that both discretions would have to be (and, it may be assumed, would be) exercised consistently with ECHR standards. It must also be borne in mind that, unlike in many cases, the assurances here are given not because Sint Maarten has a track record of violating the rights of prisoners under Articles 2 and 3 ECHR, but in the context of an established and apparently effective procedure for avoiding such violations in high risk cases. I would add that the Netherlands (of which Sint Maarten is a component part) is not only an ECHR contracting state; it is one with a long and distinguished track record of respect for and compliance with ECHR and other international legal standards.
- 34 In my judgment, there is no real risk that the appellant will be subject to treatment contrary to Articles 2 or 3 ECHR. The contrary is not reasonably arguable.

Ground 5

- 35 Under ground 5, the appellant argues that the extradition order made by the Secretary of State was unlawful in that it orders the appellant’s extradition to Sint Maarten. There were initially two limbs to this ground. The first (that it was Curaçao, and not Sint Maarten, which requested extradition) has now been abandoned. Only the second limb remains: that, as the Secretary of State knows, the appellant is to be sent not to Sint Maarten but to the European territory of the Netherlands. This, it is said, is contrary to s. 93(4) of the 2003 Act. To permit extradition in those circumstances would be unprecedented and would be akin to permitting “rendition”.
- 36 There is an issue about whether this complaint falls within the scope of a statutory appeal or should have been ventilated by judicial review. I have assumed without

deciding that it can properly form part of this statutory appeal. I make that assumption because the complaint is, in any event, unmeritorious.

- 37 In my judgment, Mr Jones’s argument confuses legality and logistics. When the Secretary of State orders a requested person’s extradition “to the territory to which his extradition is requested”, the effect of her order (subject to appeal) is to authorise the surrender of the appellant into the legal custody of the judicial authorities of that territory. This says nothing about the logistics of the transfer. The list of category 2 territories includes some (e.g. Pitcairn Island and South Georgia) which do not have their own detention facilities or court buildings and other small territories which are bound to have difficulties accommodating prisoners or holding trials on their own territory in some cases. If s. 93(4) prohibited extradition in circumstances where the Secretary of State knew that the requested person might in practice be held outside the territory, extradition to these places would be impossible.
- 38 I can see that the Secretary of State might act unlawfully if the requested person were to be sent to a place where he would not be subject to the jurisdiction of the courts of the requesting territory. Then, the description of the arrangement as a “rendition” might be appropriate. But in this case, that description is completely inapposite, given that: (i) the place to which the appellant is to be sent is part of the same State as the requesting territory; (ii) Mr den Haan has given a detailed explanation of the legal provisions under which the courts of that territory are able to exercise jurisdiction over prisoners held pursuant to the ORD in the European part of the Netherlands; and (iii) the ECHR applies.
- 39 Ground 5 is accordingly not reasonably arguable.

Conclusion

- 40 For these reasons, I agree with Heather Williams J that none of the grounds now advanced is reasonably arguable. Permission to appeal is therefore refused.