Neutral Citation Number: [2018] EWHC 1724 (Admin)

Case No: CO/5167/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL
Admin
Date: 06/07/2018

Before :

LORD JUSTICE GROSS

and

MR JUSTICE WILLIAM DAVIS

- -

Between :

GOVERNMENT OF THE UNITED STATES OF AMERICA	**Appellant**
- and -	
BRIAN DEMPSEY	**Respondent**

- -
- -

David Perry QC & Richard Evans (instructed by the Crown Prosecution Service) for the **Applicant**
Simon Farrell QC & Ben Cooper (instructed by JFH Law) for the **Respondent**

Hearing dates: 7 June 2018

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Judgment Approved

Mr Justice William Davis:

Introduction

1. This is the judgment of the Court to which we have each contributed.

2. Brian Dempsey ("the Respondent") is a citizen of the United States. On 23 June 2016 a grand jury sitting in the Eastern District of California returned an indictment charging the Respondent with a single offence, namely making a false statement involving international terrorism contrary to Title 18, United States Code, Section 1001. Based on that indictment the U.S. District Court for the Eastern District of California issued a warrant for his arrest. The Government of the United States of America ("the Appellant") on 27 September 2016 requested the extradition of the Respondent from the United Kingdom, the Respondent having come to England in September 2014.

3. The Respondent was arrested pursuant to the Appellant's extradition request on 17 January 2017. He contested the extradition request. A substantive hearing in respect of the request was conducted on 14 and 29 September 2017 in the Westminster

Magistrates' Court before District Judge (Magistrates' Court) Kenneth Grant. The Respondent argued that the alleged conduct, if committed in the United Kingdom, would not amount to a criminal offence such that the offence was not an extradition offence. In the alternative he argued that the request was politically motivated so as to offend Section 81 of the Extradition Act 2003 ("the Act") and/or was an abuse of the process of the court.

4. The District Judge rejected the argument that the request for extradition was politically motivated. He also rejected the proposition that the request amounted to an abuse of process. However, the District Judge concluded that the alleged conduct did not amount to an extradition offence. Having so concluded, he discharged the Respondent.

5. The Appellant now appeals with leave of the single judge against the decision of the District Judge to discharge the Respondent. In addition to resisting that appeal the Respondent applies for permission to appeal against the rejection by the District Judge of his arguments in respect of the request being politically motivated and/or amounting to an abuse of process.

Factual and procedural background

6. On or about 5 August 2013 the U.S. Federal Bureau of Investigation ("FBI") opened an investigation into the Respondent travelling to Syria, the indication being that he had travelled to Syria in order to fight in that country. Later in that month the FBI became aware that the Respondent was to land at Fiumicino Airport in Rome. On 22 August 2013 an agent of the FBI interviewed the Respondent at the airport. In the course of the interview the Respondent said the following:

    - He and another person had decided some months before to travel to Syria to help refugees.
    - He had no intention to fight in Syria.
    - He had asked his brother to enquire of the U.S. Department of State whether it was legal for him to enter Syria.
    - He had generally resided in Azaz when he had been in Syria. He had encountered no members of any terrorist organisation or of the Free Syrian Army whilst he had been there.
    - There was no-one in Azaz who was involved in fighting those supporting the incumbent government of Bashar al-Assad.

    At the conclusion of the interview the Respondent asked the agent of the FBI whether "if I did actually fight in Syria would I be arrested?"

7. Upon completion of this interview the Respondent returned to Syria. At that point he was subject to a "no fly" restriction in respect of the United States. In January 2014 he returned to Rome where he was questioned again by an agent of the FBI. He then gave a different account of events. He admitted that he had travelled to Syria with the intention of fighting. This admission was corroborated by what the Respondent told a witness in the United States prior to travelling to Syria as to his intention once in Syria.

He said that he had joined a group called Ahrar al-Sham in Azaz and, with that group, had engaged in fighting on at least two occasions. This assertion was supported by material retrieved from the Respondent's computer which showed on-line searches for Ahrar al-Sham prior to his departure for Syria. He stated that he understood that his brother intended to call the U.S. Department of State but that this was with a view to stopping the Respondent from travelling to Syria. He acknowledged that Azaz was largely populated by fighters aligned against the government of Bashar al-Assad.

8. The offence with which the Respondent has been indicted in the United States requires proof of four elements:

- The Respondent made a false statement in a matter within the jurisdiction of the Executive Branch of the Government of the United States.
- The Respondent acted wilfully i.e. deliberately and with knowledge (a) that the statement was untrue and (b) that his conduct was unlawful.
- The statement was material to an investigation i.e. if believed it had a natural tendency to influence or was capable of influencing the FBI's decisions or activities.
- The offence involved international or domestic terrorism.

9. The District Judge received evidence from Jean Hobler, an Assistant United States Attorney for the Eastern District of California, and Michael J Dittoe, a federal prosecutor with the Counter Terrorism Section of the U.S. Department of Justice. Jean Hobler's evidence established that the Respondent had been employed as a peace officer (or law enforcement officer) within the penal system in California from 2001. As such he would have been aware of unlawfulness of making untrue statements to the FBI. Mr Dittoe's evidence dealt with the evidence of Eric Lewis, an attorney practising in Washington DC, adduced on behalf of the Respondent in the proceedings before the District Judge. Mr Lewis stated that the facts taken at their highest could not involve any criminal offence because the Respondent was entitled to combatant immunity. Mr Dittoe explained why this proposition was untenable.

The judgment of the District Judge

10. The District Judge established that all of the preliminary procedural requirements had been satisfied. He identified that the principal issue was whether the offence set out in the request was an extradition offence. Before addressing that point, he reviewed the evidence of Eric Lewis, in particular what Mr Lewis said when cross-examined. The effect of that evidence taken as a whole was that, whilst the defence suggested by Mr Lewis technically might be available, in practical terms it would not succeed.

11. In relation to the question of whether the request had been made in relation to an extradition offence, the District Judge noted that the conduct set out in the request was said to amount to the offence of perverting the course of public justice. He cited the relevant passages in the main criminal textbooks: Blackstone's Criminal Practice at 14.35; Archbold at 28-4/5. He described the case law on the point in issue as "thin". He referred to two decisions of the Court of Appeal Criminal Division: Sookoo [2002] EWCA Crim 800; Hamshaw [2003] EWCA Crim 2435. Both cases were instances of

an arrested person giving false details on arrest. The Court of Appeal was concerned in each case with the sentence imposed though observations were made about the prosecutorial propriety of charging a defendant with the offence of perverting the course of public justice in such circumstances.

12. Having conducted this brief review of English authority, the District Judge said:

> "*Whilst both cases (i.e. Sookoo and Hamshaw) are of a completely different order to that of the (Respondent's) case there is remarkably little case law to assist. The (Appellant) is unable to refer to any case law which assists the contention that "making a false statement with no prior indication of the unlawfulness of doing so constitutes the common law criminal offence of perverting the course of public justice….." Moreover, the (Appellant) has not shown that (the Respondent's) alleged conduct was intended to pervert the course of public justice.*
>
> *I am also not satisfied that the consequences of the (Respondent's) action are such that UK law would provide for extraterritorial jurisdiction under similar circumstances…*
>
> *…The (Appellant's) assertion that the intended effect (or actual effect) of the false statements was to prejudice (or potentially prejudice) the criminal investigation in the United States could hold water only if (the Respondent) were aware of the criminal investigation in question. However, the (Appellant's) submissions to date suggest only that (the Respondent) was aware he was being interviewed by an FBI agent not that he was aware that the interview was being conducted pursuant to particular criminal or judicial proceedings.*"

The District Judge then concluded that the Appellant had not demonstrated that the conduct alleged on the part of the Respondent would amount to the offence of perverting the course of public justice. In relation to extra-territoriality he said that he was not satisfied that the consequences of the Respondent's conduct were such that UK law would provide for jurisdiction in those circumstances.

13. The District Judge dealt succinctly with the proposition that the Respondent's extradition should be barred because his extradition or any subsequent trial involved prosecution or punishment on account of the Respondent's political opinions. He found that there was no evidence about those political opinions which meant that there could not be any finding that those opinions were the motivation behind the extradition request. The District Judge considered the proposition that the extradition request amounted to an abuse of process with similar economy. As he observed, the first step in any case where an abuse of process is alleged is to identify with particularity the conduct alleged to be an abuse. He could not identify any such conduct.

The offence of perverting the course of public justice

14. The English offence of perverting the course of public justice is a common law offence. The essential ingredients were identified in R v Vreones [1891] 1 QB 360, p.369 as

"the doing of some act which has a tendency and is intended to pervert the administration of public justice". Since then many types of conduct have been held to satisfy this definition. In 1979 the Law Commission's Report No. 96 into Offences Relating to Interference with the Course of Justice said that the offence included interfering with evidence with intent to influence the outcome of judicial proceedings whether or not they have yet been instituted and giving a false story to the police in respect of a criminal offence resulting in the arrest of another. The report emphasised that the boundaries of the offence were uncertain and that the examples given were not exclusive.

15. An example of the potential ambit of the offence is to be found in R v Cotter [2002] 2 Cr.App.R. 29. The Court of Appeal considered an appeal by three men convicted of a conspiracy to pervert the course of public justice by falsely representing that there was a racially motivated conspiracy to commit violent acts against black athletes. One of the men had had a relationship with a well-known black athlete. He wished to rekindle the relationship. He deliberately allowed himself to be injured by others so that he could go to the home of the athlete in an injured state at which point he then claimed the attack was apparently racially motivated. There was no attack. It was a charade designed to illicit the sympathy of the athlete so she would be encouraged to renew the relationship with the supposed victim of the assault. The submission on behalf of the defendants was that there was no English authority justifying the conclusion that simply to make up an invented story of a crime to the police would be sufficient to make out the offence. The Court of Appeal discussed in detail the available authority in relation to the offence. The court concluded that the ingredients of the offence were met by the facts of the case. The defendants reported a racially motivated assault to the police when there had been no such assault. This act had a tendency to pervert the course of justice because it was capable of being taken seriously by the police with the possible consequence of proceedings. It was intended to have that result.

16. In R v Kenny [2013] EWCA Crim 1; [2013] QB 896 it was noted that there is not a closed list of acts which will fall within the definition of the offence. The Court of Appeal said that it would be wrong to confine the offence to specific instances previously reported. (Cotter provides a good example of that.) Equally, the Court said that caution was required in extending the ambit of the offence. Where it was to be enlarged, that should be done on a case by case basis and not with one large leap.

17. The essential conclusion to be drawn from the authorities is that the offence is committed if the ingredients as set out in Vreones are satisfied. It is not a question in any given case of identifying via authority a previous instance of the conduct in question being categorised as perverting the course of justice. Equally, not all conduct which misleads or wastes the time of the police amounts to the offence. The conduct must have the tendency to pervert the course of justice, pervert being a strong word: see R v Withers [1975] A.C. 842, at p.867. What is clear is that such conduct will include giving false information to the police with the object of putting the police on a false trail or obstructing the police in their enquiries into crime: see R v Selvage and Morgan [1982] 1 Q.B. 372.

Extraneous considerations

18. Before considering the appeal for which leave has been given, we shall consider the application for permission by the Respondent to appeal against the District Judge's

decision in relation to the political motivation for the request and abuse of process. Both proposed grounds rely on the evidence of Eric Lewis to which I already have made reference. As well as dealing with the issue of combatant immunity, Mr Lewis discussed the change in U.S government policy between 2013 and 2016 and opined that this explained the delay between the interviews with the Respondent in 2013 and 2014 allegedly giving rise to the offence and the return of the indictment in 2016. On that basis he suggested that the prosecution was politically motivated. We are satisfied that the opinion offered by Mr Lewis is pure conjecture. More to the point it does not begin to demonstrate that the prosecution of the Respondent is motivated by his political opinions. That is the extraneous consideration which must be demonstrated for the bar in Section 81 of the Act to apply. As the District Judge found, there was and is no evidence as to what the political opinions of the Respondent were or are.

19. The abuse of process asserted relates to the basis of the proposed prosecution of the Respondent in the United States. Mr Lewis's evidence is that the prosecution is in breach of U.S. Department of Justice policy and arises from illegal questioning of the Respondent by the FBI. It is not necessary for us to consider the merits of those propositions. Abuse of process in the context of the extradition process is concerned with usurping of the statutory regime in the Act. For an abuse of process to be established there must be bad faith on the part of the requesting state in the extradition proceedings or a deliberate manipulation of the extradition process. Issues relating to internal procedure of the requesting state are outside the abuse of process jurisdiction in relation to extradition proceedings. In this case the issues raised by Mr Lewis concern matters which are for consideration by the trial court in the United States.

20. It follows that neither of the grounds in respect of which the Respondent seeks permission to cross appeal is arguable. We refuse permission.

The competing arguments in relation to the substantive appeal

21. The Appellant submits that the conduct set out in the request, namely lying to an FBI agent, is capable of amounting to the offence of perverting the course of public justice. The offence would be committed if someone subject to English law were to lie to UK investigators in Italy about a UK investigation. The Appellant argues that lying to investigators is capable of stifling their inquiries. Whilst the facts in Sookoo and Hamshaw were not on all fours with the situation as it applied to the Respondent, there is no qualitative difference between lies as to identity and lies in relation to the commission of the offence. Moreover, the position of the Respondent at the time of the interview in August 2013 was in part a potential witness able to assist the FBI. If a witness lies in a witness statement, that is capable of amounting to perverting the course of justice.

22. The Appellant submits that the intent to pervert the course of justice is demonstrated by the following: the Respondent knew that he was being questioned by the FBI; he lied throughout the interview in August 2013; he thereby intended to mislead the FBI; by asking the question he did at the conclusion of the interview he showed that he was aware of the significance of what he was saying to the FBI.

23. As to the territorial aspect of the offence, the Appellant argues that the effect (or potential effect) of the false statements was to prejudice an investigation in the United States.

24. The Respondent's case is that the mere fact of lying to an investigator does not amount to the conduct required for the offence of perverting the course of public justice. The common theme of the various factual situations which have arisen in the English authorities is that investigators have been sent off on the wrong footing. Simply obstructing an investigation is not sufficient to establish the offence. To pervert means to distort to ill effect. In the context of the offence, that means that the conduct must lead to some diverting of the investigators. The Respondent argues that his lies did not divert the investigators. This is to be contrasted with the position in Sookoo and Hamshaw where the giving of a false name and address diverted the investigators from discovering the true identity of the person detained.

25. In relation to the necessary intent the Respondent argues that the Appellant has failed to show that he knew that there was a course of justice in train. If he did not know that there was an investigation, he cannot have intended to pervert it. All that can be said here is that there was a random stop of the Respondent at an airport in Rome. There is no evidence that he knew of the course of justice or of any investigation.

26. As to extra-territoriality the Respondent submits that there is no example of the offence of perverting the course of justice having been applied extra-territorially in the English courts. It is said that English law would not provide for extra-territorial jurisdiction in the circumstances of this case.

Discussion

27. When the District Judge said that the two authorities to which he made direct reference – Sookoo and Hamshaw – were of "a completely different order" to the Respondent's case, he was correct in terms of the relative gravity of the conduct. In the two cases cited the defendant had stolen property of modest value from a shop in an unsophisticated fashion followed by the giving of a false name and address. However, in each case the act tending and intended to pervert the course of public justice was telling a lie to a police officer who attended the shop to investigate the theft. The Court of Appeal in Sookoo deprecated the charging of the offence of perverting the course of justice in that case by reference to proportionality. In the judgment of the court Mr Justice Douglas Brown said "…counts for perverting the course of justice appear with increasing frequency in indictments along with counts for the principal offence or offences. It seems to us that in many cases these counts are quite unnecessary and only serve to complicate the sentencing process…" The Court of Appeal did not suggest that such counts had no basis in law. There is no qualitative difference between a lie as to identity after committing an offence and a lie about activity which forms the subject matter of the investigation.

28. We agree with the proposition that the mere fact of lying to a police officer or other investigator may not of itself disclose the offence of perverting the course of justice. A lie may or may not tend to have and be intended to have the relevant effect. But that a lie is capable of constituting the necessary conduct is clear. For instance, a common form of the charge as preferred in this jurisdiction relates to witnesses who deliberately provide false statements to an investigator. This may be to assist others or for some other reason. Examples of such conduct are to be found in R v Robinson (1937) 2 Jo. Crim. Law 62 and R v Bailey [1956] NI 15. In Robinson passengers in a car had provided untrue statements to the police about who had been driving the car when it had been involved in an accident. The fact that they had made false statements "to

affect the judgment of the police" amounted to the offence even though no proceedings were taken in relation to the accident. In Bailey a man made a false confession implicating himself in a murder. It was beside the point that this had not resulted in any trial.

29. The District Judge did not base his decision on the absence of authority directly comparable on the facts. Rather, he referred to the lack of authority to support the contention that making a false statement with no prior indication of the unlawfulness of doing so amounted to the offence. With respect, we do not find this passage, especially the reference to "no prior indication of…unlawfulness" entirely clear.

30. Be that as it may, the Respondent's argument is that the lies he is alleged to have told were no more than that. The conduct did not have the tendency to pervert the course of public justice. We do not accept this argument. To begin with, we do not accept the contention that only lies which *divert* investigators are capable of constituting the relevant conduct. Lies (or other acts) which *obstruct* investigators and the investigation are themselves capable of amounting to the relevant conduct. In any event, however, the lies told by the Respondent went beyond the mere fact of lying. He said things that had the tendency to put the FBI on to the wrong track. As an example, he told the FBI agent that he had asked his brother to take certain steps in relation to the U.S. Department of State. The FBI's investigation was liable to be diverted as a result whether because fruitless inquiries would follow with the Department of State or with the brother or both.

31. The offence with which the Respondent has been indicted in the United States is not precisely the same as the common law offence of perverting the course of public justice. The United States offence refers to the making of a material statement which "had a natural tendency to influence, or was capable of influencing, the (FBI's) decisions or activities". The concept of "influencing decisions" is not the same as tending to pervert the course of public justice. However, the requirements of the English common law offence include the elements of the United States offence, those requirements being more stringent. Given that we are satisfied that the lies told by the Respondent did have the tendency to pervert the course of public justice, the lesser nature of the offence in respect of which the request has been made does not affect the outcome.

32. It follows that the Appellant succeeds on the argument as to the *actus reus*. Having regard to *Kenny*, no extension of the ambit of the offence is required to reach this conclusion, though, if it had been, it would have been no more than permissibly incremental. We turn to a consideration of the *mens rea*.

33. The United States offence requires a wilful act on the part of the Respondent i.e. a deliberate act committed in the knowledge that it was unlawful. The common law offence of perverting the course of public justice can only be committed if the act is committed with the intent to do so. Again, this is a more stringent requirement that the United States offence. On this issue the District Judge agreed with the submission that the Respondent could only intend to pervert the course of justice if he was aware of the criminal investigation in question.

34. This proposition is not supported by authority. Many of the English cases concern efforts by a defendant to pervert a particular investigation. But that is not the basis of the offence. The offence is perverting the course of public justice. It is sufficient to

show that the defendant intended to pervert the course of public justice in a general sense by obstructing or diverting those involved in the investigation of criminal offences. In this case there is ample material to establish that the FBI were investigating participation by United States citizens in the conflict in Syria. Where an FBI agent questioned a United States citizen about such participation, that was part of the course of public justice reflected by the general investigation. The Respondent knew that he was answering questions posed by an FBI agent acting in an official capacity. There is an irresistible inference that he was aware that the interview was part of an FBI investigation albeit that he did not know its precise scope. The evidence of the Respondent's status as a law enforcement officer in the United and his final response in the interview in January 2013 provides a proper basis for a finding that he knew that lying to an FBI agent was unlawful (as required by the offence in the United States) and that he intended to pervert the course of public justice (as required by the common law offence). Accordingly, the Appellant succeeds on the argument as to *mens rea.*

35. In relation to extra-territoriality the District Judge conducted no analysis of the available authority. He simply adopted the core submission of the Respondent, namely that there is no example of English courts applying the principles of extra-territoriality to the offence of perverting the course of public justice. The absence of any reported example is hardly to the point. The issue is whether the principles of extra-territoriality as explained in Liangsiriprasert v Government of United States [1991] 1 A.C. 225 would permit the Respondent's conduct to be the subject of prosecution in this jurisdiction. We are satisfied that they would. If the Respondent had been a British citizen and he had lied to a British police officer making investigations which could have led to proceedings in this jurisdiction, he would have been liable to prosecution for perverting the course of public justice. The fact that the police officer was conducting inquiries in another jurisdiction would not affect the existence of the course of justice in this jurisdiction. The harm resulting from the lies told in the foreign jurisdiction would be the perverting of the course of justice in this jurisdiction. The Appellant succeeds on this issue as well.

Conclusion

36. For these reasons we are satisfied that the District Judge fell into error when he decided that the Appellant had failed to prove that the Respondent's alleged conduct did not amount to an extradition offence and that, insofar as it was so proved, it was an offence which could have been prosecuted in this jurisdiction. The discharge of the Respondent will be quashed and the case remitted to the District Judge. The order will be that the District Judge shall proceed as he would have been required to do had he decided the issues of extradition and extra-territoriality differently and in accordance with the conclusions expressed in this judgment.