Neutral Citation Number: [2020] EWHC 200 (Admin)

Case No: CO/2737/2019 AND CO/2759/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/02/2020

Before :

LORD JUSTICE DINGEMANS
MR JUSTICE SPENCER

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Between :

The Government of India	**Appellant**
- and -	
(1) Arti Dhir	**Respondents**
(2) Kavaljitsinh Mahendrasinh Raijada	

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Toby Cadman (instructed by **Crown Prosecution Service**) for the **Appellant**
Edward Fitzgerald QC and Graeme Hall (instructed by **Tuckers Solicitors**) for the **First Respondent**
Edward Fitzgerald QC and Peter Caldwell (instructed by **Dalton Holmes Gray Solicitors**) for the **Second Respondent**

Hearing date: 28th January 2020

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Approved Judgment

Lord Justice Dingemans (giving the judgment of the Court):

Introduction

1. This is the judgment of the Court to which we have both contributed. The judgment concerns an appeal by the Government of the Republic of India ("the Government") from the judgment of Senior District Judge (Chief Magistrate) Arbuthnot ("the Chief Magistrate") dated 2 July 2019 ordering the discharge of Ms Arti Dhir ("Ms Dhir") and Mr Kavaljitsinh Mahendrasinh Raijada ("Mr Raijada"). Ms Dhir and Mr Raijada are a wife and husband whose extradition to India had been sought for the offences of: conspiracy to commit murder; murder; attempting to commit murder; kidnapping; and abduction for the purpose of committing murder and abetting a crime. The appeal raises issues about the case management of extradition cases and timetabling of evidence and assurances.

The alleged offences

2. The allegations against Ms Dhir and Mr Raijada are that they arranged for Ms Dhir to adopt an 11 year old boy known as Gopal Sejani ("Gopal"), who lived on a smallholding in a village in the State of Gujarat with members of his family including his sister and her husband Harsukhbhai Chaganbhai Kardani ("Mr Kardani"). Mr Raijada's father lived in the same village. Ms Dhir and Mr Raijada then arranged for a Wealth Builder policy to be taken out for Gopal, which included life insurance of 10 times the annual premium in the event of his death.

3. On 8 February 2017 Gopal travelled with his brother-in-law Mr Kardani to Rajkot to prepare visa papers. There had been a number of earlier visits to Rajkot when, according to the prosecution case, plans to kill Gopal had failed. After the visit on 8 February 2017 Gopal and Mr Kardani were taken back by Mr Mund, who knew Mr Raijada's father, to the village in a car with a driver. The car stopped and Mr Kardani got out of the car to urinate. Two men approached on a motorbike and seized Gopal. There was no apparent reason to take Gopal who had nothing valuable on him. Mr Kardani tried to intervene but was stabbed in the stomach. Gopal was taken away by the two men and was later found with stab wounds in the stomach. He died in hospital on 11 February 2017. Mr Kardani was taken to hospital where he made two statements before he also died on 17 February 2017.

4. Mr Mund, who was also arrested and charged for his part in the matter, made statements to the effect that he had been recruited by Ms Dhir and Mr Raijada and coerced by them to arrange the murder of Gopal. The admissibility of his statement against Ms Dhir and Mr Raijada became an issue in the extradition proceedings. There was evidence of payment of Mr Mund by Ms Dhir and Mr Raijada. There had been communications with Mr Mund, including sending and resending visa papers which was said to be a pretext to get Gopal to Rajkot where he could be killed. After Gopal's death Mr Raijada's father offered money to Gopal's sister who was Mr Kardani's wife to say that Mr Mund was innocent. Ms Dhir, who had adopted Gopal, made no attempts to make any funeral arrangements or contact Gopal's family. Ms Dhir is said to have lied about whether she had adopted Gopal.

5. The Chief Magistrate summarised the evidence relied on against Ms Dhir and Mr Raijada in paragraphs 14 to 45 of the judgment. It is apparent that, as Mr Cadman submitted, these are very serious proceedings.

The issues in the Magistrates' Court

6. Ms Dhir and Mr Raijada resisted their extradition on the ground (1) that there was no prima facie case against them. Ms Dhir and Mr Raijada also resisted their extradition on (2) human rights grounds pursuant to section 87 of the Extradition Act 2003 ("the 2003 Act"). The relevant ground was that Ms Dhir and Mr Raijada would, if convicted of the murder of both Gopal and Mr Kardani, be sentenced to a sentence of life imprisonment from which they would never be released, which would create a real risk of impermissible treatment contrary to article 3 of the European Convention on Human Rights ("ECHR"). The life sentence was said to be irreducible because of the published "State Remission and Premature Release" policy of the State of Gujarat which was that offenders convicted of the murder of two persons would serve a full life sentence.

7. It was common ground that it is permissible to impose a sentence of life imprisonment, but that if the sentence of life imprisonment could never be reduced, such a sentence would breach article 3 of the ECHR, see *Harkins and Edwards v United Kingdom* (2012) 55 EHRR 19 and *Vinter v United Kingdom* (2016) 62 EHRR 1. In this respect it might be noted that the "whole life orders" permitted under section 269 and schedule 21 of the Criminal Justice Act 2003 may be reduced on compassionate grounds, which is interpreted widely to permit release in certain situations, see *R v McLoughlin* [2014] EWCA Crim 188; [2014] 1 WLR 3964. It was only the grounds relating to a prima facie case and the irreducible life sentence which were determined by the Chief Magistrate in the judgment dated 2 July 2019.

8. However in order to understand some of the delays in the case at the Magistrates' Court it is necessary to identify briefly the other grounds of challenge which were raised in the course of the extradition proceedings. These were: (3) whether Ms Dhir and Mr Raijada might be sentenced to death. This issue was resolved when it appeared that there is an Indian statutory provision preventing the death penalty being imposed on persons extradited to India; (4) whether there was an abuse of process. This ground was apparently put on the basis that the use of Mr Mund's evidence undermined the fairness of the proceedings against Ms Dhir and Mr Raijada; (5) the prison conditions created a real risk of impermissible treatment contrary to article 3 of the European Convention on Human Rights ("ECHR"). The Chief Magistrate was provided with expert evidence and assurances but it was apparent that further information was required to determine this point. As it was we were provided with further assurances dated 24 January 2020 which related to this point. These assurances were provided to us shortly before the hearing but no application was made to rely on them; (6) there would be an infringement of rights under articles 5 and 6 of the ECHR on the basis that Ms Dhir and Mr Raijada would be detained for an excessive period pre-trial and because they would be unable to afford to obtain competent representation.

9. In respect of the issue about representation we were provided with many pages of financial information which were also served by the Government with the further assurance on 24 January 2020. We were told at the hearing that this information

showed that representation could be afforded. This financial information was served without an application notice and supporting witness statement asking for permission to rely on this as fresh evidence in breach of the Criminal Procedure Rules, see rule 50.20(6) of the Criminal Procedure Rules ("Crim PR"). There was no covering note or Skeleton Argument explaining why the materials were relevant and admissible.

10. The new material about financial information was received by us very shortly before the hearing. Serving material in that way is not helpful to any party or the Court and is in breach of the rules. If an application is made to rely on late material the Court is usually in the position of: either having to refuse to look at it, leaving a party unhappy that a decision has been taken without considering all the relevant material; or granting some form of adjournment, causing delay and disruption which undermines justice. As it was no reliance was placed on the materials before us and we therefore refuse to admit them on this appeal.

The proceedings in the Magistrates' Court

11. Given the relevance of the procedural background to the decision of the Chief Magistrate it is necessary to say something about the chronology of the proceedings below.

12. On 28 June 2017 a provisional arrest warrant for Ms Dhir and Mr Raijada was issued. A day later, on 29 June 2017, Ms Dhir and Mr Raijada were arrested. The preliminary hearing took place that day at the Westminster Magistrates' Court pursuant to the rule 50.11 of the Crim PR, and bail was refused.

13. On 6 July 2017 there was a hearing before the Chief Magistrate. There was a direction for the Government to serve a full request by 1 September 2017 and information was sought about prison conditions and the possible imposition of a death sentence. It was directed that there would be a case management hearing on 11 September 2017, and that the extradition hearing pursuant to rule 50.12 of the Crim PR would take place on the 3 to 5 January 2018.

14. On 29 August 2017 a certificate was issued by the Home Office pursuant to section 70 of the 2003 Act. There were further hearings on 3 August 2017, 31 August 2017, 11 September 2017, 9 October 2017, and 6 November 2017 in relation to bail and identification of the issues. On 19 November 2017 there was a case management hearing and a further bail application was refused. On 23 November 2017 there was a bail application before Mr Justice Edis which was also refused.

15. On 30 November 2017 there was a case management hearing before the Chief Magistrate. The extradition hearing set for 3 January 2018 was vacated and the Government was directed to serve further information about the possible imposition of the death penalty and further information about prison conditions. It is apparent that the final extradition hearing set for 3 January 2018 was adjourned because the Government had failed to provide information about the death penalty and failed to provide sufficient information about prison conditions. This was the first adjournment of the extradition hearing and it was relisted for 17-19 September 2018.

16. On 8 January 2018 there was a further case management hearing and bail application before the judge. Bail was granted to Ms Dhir. An appeal against that decision was

refused on 10 January 2018. There was a hearing on 13 March 2018 when the Government confirmed that a prison inspection might take place. On 12 April 2018 Mr Raijada was granted bail. Thereafter there was an inspection of the relevant prison in India and a prison expert report was served.

17. On 28 March 2018 there was a case management hearing before the judge. The judge accepted that further information regarding the possible imposition of the death penalty was required. The judge directed that if an assurance about the death penalty was not provided by 29 June 2018 the case would go no further. It is apparent that nearly four months had passed since that issue was identified. Directions were given for further dates for inspections and a joint report in relation to prison conditions. The second fixture for the extradition hearing of 17 to 19 September 2018 was adjourned. This was the second adjournment of the extradition hearing.

18. On 29 June 2018 the Government sought an extension of time to serve information on the death penalty and the issue of "rigorous punishment" set out in the Indian prison rules. On 19 July 2018 there was a further hearing and directions were given for service of evidence and submissions to lead to an extradition hearing on 21 to 23 January 2019.

19. There was some compliance with the directions by the Government. The first expert reported of Dr Suresh was served on 19 September 2018 on behalf of Ms Dhir and Mr Raijada and on 13 November 2018 a second report from Dr Suresh was served. This second report raised the issue of whether if Ms Dhir and Mr Raijada were convicted of the murder of both Gopal and Mr Kardani they would be sentenced to life imprisonment with no prospect of release which became known as the "irreducible life sentence" point.

20. On 17 January 2019 the Government applied to vacate the extradition hearing fixed for 21 to 23 January 2019. The application was refused. The Chief Magistrate said that she might permit the CPS to seek further information about the irreducible life sentence but the CPS would need to produce a chronology showing the action taken to obtain instructions. No such chronology was produced.

21. The extradition hearing took place on 21 and 22 January 2019. Dr Suresh gave evidence and was cross examined. At this stage the Government's case on the irreducible life sentence point was that the President of India might grant remission of sentence to Ms Dhir and Mr Raijada pursuant to article 72 of the Constitution of India ("power of president to grant pardons, etc., and to suspend, remit or commute sentences in certain cases"). This was not accepted by Dr Suresh, who gave evidence that the category of cases set out in article 72 of the Constitution did not include the offences for which extradition was sought.

22. The final day of the extradition hearing was set for 23 January 2019 but in the event it was agreed by the parties, and the Chief Magistrate gave directions, that the Government should serve further evidence relating to the irreducible life sentence point by 12 February 2019. This meant that the extradition hearing which had been adjourned on two occasions, was itself adjourned part heard.

23. Further evidence was served by the Government on 15, 18 and 22 February 2019. Ms Dhir and Mr Raijada had served further expert evidence from Dr McManus on prison

conditions, and from Dr Suresh on, among other matters, the irreducible life sentence. A further case management hearing was listed on 25 March 2019 and directions were given for the final day of the extradition hearing to take place on 14 June 2019. The Government was directed to confirm whether it wished to question Dr McManus or Dr Suresh. The CPS confirmed that the Government did not intend to ask any questions of Dr Suresh on 9 May 2019. This meant that it was inevitable that the Government would lose the point about the irreducible life sentence. This is because it was common ground that an irreducible life sentence would not be compatible with article 3 of the ECHR, and because Dr Suresh's evidence to the effect that article 72 of the Constitution did not apply would be accepted.

24. Written closing submissions were served and on 14 June 2019 the Chief Magistrate heard oral submissions. In the course of submissions it became clear that the Chief Magistrate was very likely to order the discharge of Ms Dhir and Mr Raijada on the irreducible life sentence point. The Chief Magistrate canvassed with the parties whether she should give judgment dealing only with whether there was a prima facie case point and the irreducible life sentence issue or dealing with all the issues. Submissions were made on behalf of Ms Dhir and Mr Raijada that there was no need to deal with all the issues, and the Government asked for a judgment on all the issues. The Chief Magistrate reserved judgment and the date for hand down of the judgment was set for 2 July 2019 at 1600 hours.

The assurance and hand down of judgment on 2 July 2019

25. On 2 July 2019 at 1516 hours, some 45 minutes before the Chief Magistrate was due to give judgment and without any prior warning, an email was sent by the CPS attaching an assurance from the Government dated 2 July 2019. The letter from the Joint Secretary to the Government assured the court that if extradited and convicted and sentenced to life imprisonment Ms Dhir and Mr Raijada would be eligible to apply for remission, notwithstanding the written State policy relating to a case of double murder, stating that the Government of India gave this solemn assurance "…on the basis of assurance provided by the Government of Gujarat …and as an exception…life imprisonment in this case will be considered reducible as per the Prison Act and Rules and they will be eligible to apply for remission."

26. Mr Cadman on behalf of the CPS applied to adjourn the case; this was resisted by Mr Hall on behalf of both Ms Dhir and Mr Raijada. The Chief Magistrate refused the adjournment and declined to consider this very late assurance. The Chief Magistrate then gave judgment setting out the background to the extradition request before finding that there was a prima facie case against Ms Dhir and Mr Raijada. The Chief Magistrate then found that if Ms Dhir and Mr Raijada were convicted of the murder of both Gopal and Mr Kardani they would be imprisoned for life with no prospect of release, which would infringe the rights guaranteed by article 3 of the ECHR.

27. The Chief Magistrate therefore ordered the discharge of Ms Dhir and Mr Raijada but said that Ms Dhir and Mr Raijada should be aware of two things. First that the law in the State of Gujarat relating to the irreducible life sentence might be changed and a further extradition request might be brought, and the second was that many of the acts alleged to have been carried out by Ms Dhir and Mr Raijada were carried out in this jurisdiction, meaning that it was not impossible for a prosecution to be initiated in England.

The issue on appeal

28. The appeal raises the issue of whether the Chief Magistrate was wrong to refuse to adjourn the proceedings to consider an assurance provided by the Government on 2 July 2019, which was the day on which the Chief Magistrate handed down her reserved judgment following a final hearing on 14 June 2019.

29. Mr Cadman on behalf of the Government submitted that the Chief Magistrate should have considered the assurance provided by the Government, even though it was provided only 45 minutes before the reserved judgment was due to be given. This is because: it is established that an assurance can be provided even on appeal; there were financial consequences of discharging Ms Dhir and Mr Raijada in circumstances where the Government could bring fresh extradition proceedings; and the cases against Ms Dhir and Mr Raijada were very serious.

30. Mr Fitzgerald QC on behalf of Ms Dhir and Mr Raijada submitted that: the Chief Magistrate was right to refuse to accept the assurance and discharge Ms Dhir and Mr Raijada because the proceedings had already been delayed and adjourned by the Government; even with the assurance it was apparent that further hearings would have to take place meaning that the financial consequences of discharge would not be significant; and that although it was accepted that the Government could bring fresh extradition proceedings, the proper case management of this set of extradition proceedings should be supported.

31. We are very grateful to Mr Cadman, Mr Fitzgerald QC and their respective legal teams for their helpful written and oral submissions.

Relevant principles relating to appeals in extradition cases

32. It is established that when considering what approach to take to a challenge to a District Judge's findings the question is "whether [the judge] made the wrong decision …", see *Dzgoev v Russian Federation* [2017] EWHC 735 (Admin) at paragraph 23.

Relevant parts of the Criminal Procedure Rules

33. The Criminal Procedure Rules Part 50 apply to extradition proceedings. So far as is material the Rules provide:

> **Further objective in extradition proceedings** 50.2 When exercising a power to which this Part applies, in furthering the overriding objective, in accordance with rule 1.3, the court must have regard to the importance of- (a) mutual confidence and recognition between judicial authorities in the United Kingdom and in requesting territories; and (b) the conduct of extradition proceedings in accordance with international obligations, including obligations to deal swiftly with extradition requests.
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> **Arrangement of extradition hearing after provisional arrest** 50.12 … (2) the court must … (c) give such directions as are

> required for the preparation and conduct of the extradition hearing.
>
> **CPD XI Other Proceedings 50A: Extradition: General Matters and Management of the Appeal**
>
> ***General matters: expedition at all times***
>
> 50A.1 Compliance with these directions is essential to ensure that extradition proceedings are dealt with expeditiously … It is of the utmost importance that orders which provide directions for the proper management and progress of cases are obeyed so that the parties can fulfil their duty to assist the court in furthering the overriding objective and in making efficient use of judicial resources. To that end: … (iii) where the issues are such that further information from the requesting authority or state is needed then it is essential that the request is formulated clearly and in good time …

Relevant legal principles relating to assurances

34. It is unlawful for the United Kingdom to extradite a person where they will be at real risk of being subjected to treatment contrary to the right in article 3 of the ECHR not to "be subjected to torture or to inhuman or degrading treatment or punishment".

35. Even where there is evidence that there is a real risk of impermissible treatment contrary to article 3 of the ECHR the requesting state may nevertheless show that the requested person will not be exposed to such a risk by providing an assurance that the individual will not be subjected to that treatment. Such assurances form an important part of extradition law, see *Shankaran v India* [2014] EWHC 957 (Admin) at paragraph 59, *India v Chawla* [2018] EWHC 1050 (Admin) at paragraphs 29 to 33 and *Giese v USA (No.4)* [2018] EWHC 1480 (Admin), [2018] 4 WLR 103 at paragraphs 37 to 39.

36. The Court may consider undertakings or assurances at various stages of the proceedings, including on appeal, and the Court may consider a later assurance even if an earlier undertaking was held to be defective, see *Dzgoev v Russia* [2017] EWHC 735 at paragraph 68 and 87 and *Giese v USA (No.4)*.

37. For those states which are for the purposes of the Extradition Act category 1 states (which does not include India) the Framework Decision provides at article 15(2) that if the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it should request supplementary information to be furnished as a matter of urgency and may fix a time limit for receipt thereof. The Court of Justice of the European Union (CJEU) in criminal proceedings against *Aranyosi and Caldararu* (Case Nos C-404/15 and C-659/15PPU); [2016] QB 921 held, at paragraph 104, that where there was a real risk of impermissible treatment "the executing judicial authority must request that supplementary information be provided by the issuing judicial authority … which must send that information within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the

individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end".

38. It was common ground before us that similar principles apply to India, which is an Extradition Act category 2 State. This was in part because the Extradition Treaty between the UK and India provides at article 11(6) that if the requested state considers that the evidence produced or information supplied for the purposes of the treaty is not sufficient in order to enable a decision to be taken as to the request, additional evidence or information shall be submitted within such time as the requested state shall require. These terms are similar to article 15(2) of the Framework Decision, see *India v Chawla*, at paragraph 33.

39. Where a real risk of inhuman and degrading treatment is established, it is not appropriate to discharge the requested person but to enable the requesting state "to satisfy the court that the risk can be discounted" by providing assurances, see *Georgiev v Bulgaria* [2018] EWHC 359 (Admin) at paragraph 8(ix). If such an assurance cannot be provided within a reasonable time it may then be necessary to order the discharge of the requested person, see *Aranyosi* and *India v Chawla* at paragraph 47.

Chief Magistrate entitled to refuse to consider the assurance

40. The starting point is to consider the Criminal Procedure Rules which emphasise "expedition at all times" and that "compliance with these directions is essential to ensure that extradition proceedings are dealt with expeditiously". It is of the "utmost importance" that parties obey directions. These rules were implemented against a background where, before the 2003 Act, delays in extradition proceedings had become notorious and justice for all the relevant parties was being delayed.

41. It was common ground before us that a District Judge in Westminster Magistrates' Court had power to give directions not only as to service of evidence but also as to service of assurances, which it is established are not formally evidence, see *USA v Giese (No.2)* [2014] EWHC 3658 (Admin), [2016] 4 WLR 10 at paragraph 14. This is important, because with proper case management of the timetabling of assurances it should be possible to avoid the problems caused in *India v Chawla* and this case.

42. In some cases it will not be possible to identify the way in which an assurance will need to be framed until contested evidence has been heard, compare *India v Chawla* at paragraph 47, but in other cases it might be possible to require any relevant assurance on a particular issue to be provided by a certain date before the extradition hearing. In such cases directions should be sought and given by the court providing for the service of any assurances.

43. In this case it is right to note that the Chief Magistrate did not give any directions requiring an assurance to be provided at any time, but it is also right to note that it does not appear to have been suggested by the Government that they were able to provide any relevant assurance which would meet the irreducible life sentence point. It is important to note from the chronology of the proceedings set out above that two extradition hearings were adjourned because of delays by the Government in

complying with directions, and the third and final extradition hearing was adjourned part heard to enable the Government to deal with the irreducible life sentence point. It was plain from the evidence given by Dr Suresh in January 2019 that, absent further information, the Government would lose on the irreducible life sentence point, and the Government did not introduce any further information. If the Government had considered it could provide an assurance it should have sought directions providing a timetable for the service of an assurance, and served an assurance in accordance with that timetable.

44. In this regard we were told by Mr Cadman in oral submissions that as early as January 2019 it was recognised by those advising the Government that an appropriate assurance was going to be required on the irreducible life sentence point and was being actively sought. Had that been made clear to the Chief Magistrate, as it should have been, at the case management hearing on 25 March 2019 the implications could have been considered, appropriate directions could have been given and a deadline set. Instead it appears that the first mention of such an assurance being sought was in the course of closing submissions at the hearing on 14 June 2019.

45. We accept that there will be financial consequences of discharging Ms Dhir and Mr Raijada and requiring the Government to start extradition proceedings again. However, had the adjournment been granted by the Chief Magistrate there would have been financial consequences caused by the fact that the assurance provided by the Government required to be assessed by the Court and parties. Those financial consequences were brought about by the Government's failure to obtain directions in relation to the assurance or to provide the assurance at an earlier stage.

46. We also accept that this is a serious case, as is apparent from the careful analysis of the facts carried out by the Chief Magistrate when determining that there was a prima facie case on the offences against both Ms Dhir and Mr Raijada. However that means that the Government should have complied with directions from the court to avoid unnecessary delays. In all these circumstances we are unable to say that the Chief Magistrate was wrong to refuse to adjourn the extradition proceedings.

Conclusion

47. For the detailed reasons given above we dismiss the appeal. However as the Chief Magistrate noted there is a possibility that Ms Dhir and Mr Raijada might be prosecuted in this jurisdiction. The Chief Magistrate also noted that further extradition proceedings might be brought after a change in the law in India. It should also be noted that a change in the law may not be required in India. This is because the life sentence appears to be irreducible only because of a State policy, which might itself be changed or waived in order to enable the extradition of Ms Dhir and Mr Raijada. Therefore further extradition proceedings might also be brought if an adequate assurance is provided showing that an irreducible life sentence will not be imposed on Ms Dhir or Mr Raijada. We make it clear that in order to determine this appeal it has not been necessary to make any assessment of the adequacy of the assurance dated 2 July 2019 or the further assurances dated 24 January 2020, and we have not made any such assessment.