Hilary Term
[2014] UKSC 23
On appeal from: [2012] EWCA Crim 67

JUDGMENT

R *v* O'Brien (Appellant)

before

Lord Mance
Lord Wilson
Lord Carnwath
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

2 April 2014

Heard on 5 December 2013

Appellant	*Respondent*
Alun Jones QC Colin Wells (Instructed by Morgan Rose)	Edward Jenkins QC Ben Douglas-Jones (Instructed by Serious Fraud Office)

LORD TOULSON (with whom Lord Mance, Lord Wilson, Lord Carnwath and Lord Hughes agree)

INTRODUCTION

1. Is a person who has been extradited to this country for trial on a criminal charge, and who prior to his extradition was guilty of contempt of court by disobeying a court order, open to punishment for his contempt although it was not the basis of his extradition? The answer depends in part on the proper interpretation of the so – called "specialty" or "speciality" provisions of the Extradition Act 2003 and partly on the law relating to contempt. The speciality principle (widely recognised in extradition law and extradition treaties) prohibits a person who has been extradited for a particular offence or offences from being dealt with by the requesting state for another offence or offences committed (or alleged to have been committed) before his extradition, subject to such exceptions as may be contained in the relevant statute or treaty.

2. Mr O'Brien appeals against a decision of the Criminal Division of the Court of Appeal (Gross LJ, Openshaw J and Judge Milford QC) [2012] 1 WLR 3170, upholding an order of the Common Serjeant (Judge Barker QC) committing him to prison for 15 months for contempt of court in disobeying a restraint order made against him under section 41 of the Proceeds of Crime Act 2002 ("POCA"). The appellant does not dispute that he was guilty of contempt, but he submits that his committal was unlawful by reason of the specialty provisions of Part 3 of the Extradition Act 2003. After committing the contempt the appellant fled to the USA, from where he was extradited to the UK for other reasons. It is submitted that it was not thereafter open to the English court to punish him for his earlier contempt, for which he had not been extradited.

3. The Court of Appeal certified the following points of law of general public importance:

i. Whether a contempt of court constituted by breach of a restraint order made under section 41 of the Proceeds of Crime Act 2002 constitutes a civil or criminal contempt.

ii. If the answer to i) is a civil contempt, whether Section 151A of the Extradition Act 2003 and/or article 18 of the United Kingdom-United States Extradition Treaty 2003 preclude/s a court from dealing with a

person for such a contempt when that person has been extradited to the United Kingdom in respect of criminal offences but not the contempt in question.

Facts

4. In 2009 the Appellant came under investigation on suspicion of involvement in a large scale scheme to defraud investors, commonly known as a "boiler room" fraud. On 24 September 2009 the Common Serjeant made a restraint order against him under section 41 of POCA. It required the appellant, among other things, to make disclosure of his assets, not to remove assets from England and Wales, and to repatriate within 21 days any moveable asset in which he had an interest outside England and Wales. The order was prefaced in the usual way with a penal notice, that is, a warning that if he disobeyed the order he may be held to be in contempt of court and imprisoned, fined or have his assets seized. In this respect the order followed the standard form of freezing order in civil proceedings (originally known as a *Mareva* order), on which the statutory criminal restraint order provisions were modelled.

5. The appellant failed to comply with the restraint order and he fled the jurisdiction. On 18 December 2009 the Common Serjeant found that he was in contempt of court, issued a warrant for his arrest and adjourned the imposition of a penalty.

6. Six months later the Appellant was traced to Chicago. The Serious Fraud Office ("SFO") by now wanted his extradition in order to prosecute him on charges relating to the alleged fraud. They sought the assistance of the US authorities and a federal arrest warrant was issued against him. On 8 October 2010 he was arrested in Chicago and appeared before the local US District Court. He consented to his extradition in accordance with the UK's request but did not waive entitlement to the benefit of the specialty principle.

7. The SFO was initially under the impression that as a matter of law the appellant's contempt was criminal in nature. However, the United Kingdom-United States Extradition Treaty 2003 limited extradition to offences punishable by imprisonment for 12 months or more, and in the USA the maximum sentence for the appellant's contempt, if punishable as a misdemeanour, would have been six months' imprisonment. In those circumstances the SFO was concerned that there might be complications if the appellant were returned to the UK under an extradition order for prosecution for the boiler room fraud but at the same time was subject to a bench warrant for the earlier contempt. This concern led the SFO to apply to the Common Serjeant to set aside the bench warrant, and on 30 November 2010 he did

so. On 2 December 2010 the appellant was returned to the UK. He was arrested, charged with various offences of fraud and remanded in custody.

8. On further consideration, the SFO came to the view that the appellant's contempt was not a criminal offence and so was not affected by the specialty principle. It therefore applied to the Common Serjeant for the appellant's committal. The appellant objected that the court had no jurisdiction to hear the application. In a judgment delivered on 1 April 2011 the Common Serjeant rejected the appellant's objection. After reviewing the authorities he concluded that the contempt was not a criminal offence, but was a civil contempt, and that the specialty principle therefore did not afford the appellant any protection.

9. The Court of Appeal upheld the Common Serjeant's decision. For the avoidance of doubt, the question whether the appellant's contempt constituted a civil or criminal contempt made no difference to the jurisdiction of the Criminal Division to hear his appeal, by virtue of section 13 of the Administration of Justice Act 1960 and section 53 of the Senior Courts Act 1981. Section 13 of the 1960 Act provides that an appeal shall lie from any order or decision of a court in the exercise of jurisdiction to punish for contempt of court (including criminal contempt), and that such an appeal from the Crown Court shall lie to the Court of Appeal. Section 53 of the 1981 Act provides that the Criminal Division of the Court of Appeal shall exercise the jurisdiction of the Court of Appeal under the former section in relation to appeals from orders and decisions of the Crown Court.

Grounds of appeal

10. Mr Alun Jones QC advanced two arguments on behalf of the appellant. His primary submission was that on the appellant's extradition to the UK the Crown Court had no power to deal with him for his earlier contempt, no matter whether it constituted a civil or a criminal contempt. If he failed on that point, his second submission was that the appellant's contempt should be classified as criminal. The first point depends on the proper construction of the Extradition Act. The second depends on the law of contempt.

Extradition Act 2003

11. Part 1 of the Extradition Act deals with extradition from the UK to category 1 territories. Part 2 deals with extradition from the UK to category 2 territories. Part 3 deals with extradition to the UK from category 1 and 2 territories. The USA is a category 2 territory.

12. The appellant's argument is clear and simple. Part 3 should be regarded as a self-contained code governing extradition to the UK. It comprises sections 142 – 155A (section 155A, as inserted by section 42 of, and paragraph 24 of Schedule 13 to, the Police and Justice Act 2006) but the important provisions for the purposes of the appellant's argument are sections 148 and 151A (as inserted by section 76(3) of the Policing and Crime Act 2009).

13. Section 148(1) provides:

> "Conduct constitutes an extradition offence in relation to the United Kingdom if these conditions are satisfied –
>
> (a) the conduct occurs in the United Kingdom;
>
> (b) the conduct is punishable under the law of the relevant part of the United Kingdom with imprisonment or another form of detention for a term of 12 months or a greater punishment."

14. The appellant's contempt occurred in the United Kingdom and was punishable under section 14(1) of the Contempt of Court Act 1981 with imprisonment for longer than 12 months. He submits that it was therefore an extradition offence within the definition of section 148.

15. Section 151A provides:

> (1) This section applies if a person is extradited to the United Kingdom from a territory which is not -
>
> (a) a category 1 territory, or
>
> (b) a territory falling within section 150(1)(b) [which does not include the USA].
>
> (2) The person may be dealt with in the United Kingdom for an offence committed before the person's extradition only if –
>
> (a) the offence is one falling within subsection (3), or

(b) the condition in subsection (4) is satisfied.

(3) The offences are –

(a) the offence in respect of which the person is extradited;

(b) an offence disclosed by the information provided to the territory in respect of that offence;

(c) an offence in respect of which consent to the person being dealt with is given on behalf of the territory.

(4) The condition is that –

(a) the person has returned to the territory from which the person was extradited,

(b) the person has been given an opportunity to leave the United Kingdom.

(5) A person is dealt with in the United Kingdom for an offence if –

(a) the person is tried there for it;

(b) the person is detained with a view to trial there for it.

16. For reasons which I will explain, section 148 has no direct application to the extradition of a person to the United Kingdom from the United States. However, two matters are not in dispute. First, it is common ground that if the appellant's contempt amounted to an offence within the meaning of section 151A, it was not open to a court in the United Kingdom to deal with him for that contempt. Secondly, although an "offence" (in section 151A) is wider than an "extradition offence" (in section 148) in that it is not limited to an extraditable offence, it is not suggested that the meaning of the word "offence" itself varies in different sections of the Act. If it means a criminal offence in one section it must mean a criminal offence in the other.

17. For completeness it is right to record that the United Kingdom – United States Extradition Treaty 2003 (Cm 7146) contains the following specialty clause in article 18(1):

> "A person extradited under this Treaty may not be detained, tried, or punished in the Requesting State except for: …
>
> (a) any offense for which extradition was granted, or a different denominated offense based on the same facts as the offense on which the extradition was granted, provided such offense is extraditable, or is a lesser included offense…"

Article 2.1 provides:

> "An offense shall be an extraditable offense if the conduct on which the offense is based is punishable under the laws in both States by deprivation of liberty for a period of one year or more or by a more severe penalty."

Those provisions of the Treaty run in tandem with the Act but do not give rise to a separate argument.

18. The argument clearly and forcefully presented by Mr Jones depends for its persuasiveness on reading section 148 in isolation. However, for a proper understanding of its purpose and construction it is necessary to see how the section fits into the structure of the Act.

19. Parts 1, 2 and 3 of the Act each contains a definition of extradition offence, which have in common that they refer to "conduct punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment". In Part 1 the relevant sections are 64 and 65; in Part 2 the relevant sections are sections 137 and 138. The full definitions vary according to whether the extradition is outwards or inwards, the territories concerned, and whether the person subject to the proceedings has already been sentenced, but there is a common structure.

20. The Extradition Act 2003 replaced the Extradition Act 1989. The need for new legislation arose from the Council Framework Decision of 13 June 2002 on the European arrest warrant and surrender procedures between member states (2002/584/JHA). Those states are designated as category 1 territories under the

2003 Act, and Part 1 of the Act implements the Framework Decision in relation to arrest warrants issued by them.

21. The rationale of the Framework Decision is summarised in para (5) of the preamble:

> "The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of *criminal* sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional co-operation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in *criminal* matters, covering both pre- sentence and final decisions within an area of freedom, security and justice. [Emphasis added.]"

22. Article 1.1 provides:

> "The European Arrest Warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a *criminal* prosecution or executing a custodial sentence or detention order. [Emphasis added.]"

23. It follows that under the Framework Decision it is a prerequisite of a valid arrest warrant that the conduct of which the person is accused or has been convicted constitutes a criminal offence under the law of the requesting state.

24. The process by which Part 1 of the 2003 Act gives effect to the Framework Decision is linear, by which I mean that it sets out a series of stages and what is required at each stage. Section 2 sets out the formal requirements of a European Arrest Warrant; it must specify the offence of which the person is accused or has been convicted. Section 3 authorises the arrest of the person who is the subject of a European Arrest Warrant. The arrested person must be brought before a judge within 48 hours (section 6). If the judge is satisfied that the person brought before him is the subject of the arrest warrant, he must fix a date for the extradition hearing and deal with various procedural matters (section 8). At the initial stage of the extradition

hearing, section 10(2) requires the judge to decide "whether the offence specified in the Part 1 warrant is an extradition offence".

25. In order to decide that question the judge must apply either section 64 or section 65. Section 64 applies to a person who has not been sentenced, ie someone who has been accused but not tried or who has been convicted but not sentenced. Section 65 applies to a person who is alleged to be unlawfully at large after conviction and has been sentenced for the offence.

26. The question whether the offence specified in the warrant is an extradition offence for the purposes of Part 1 depends on (a) the nature of the offence, in particular whether it is included in the European Framework list of extraditable offences or, if not, whether it would constitute an offence under the law of the United Kingdom if committed in the United Kingdom and (b) the length of the term of imprisonment to which the person either might be sentenced or has been sentenced. Thus section 64 provides (in relation to a person not sentenced for the specified offence):

> (2) The conduct constitutes an extradition offence in relation to the category 1 territory if these conditions are satisfied –
>
> (a) the conduct occurs in the category 1 territory and no part of it occurs in the United Kingdom;
>
> (b) a certificate issued by the appropriate authority of the category 1 territory shows that the conduct falls within the European framework list;
>
> (c) the certificate shows the conduct is punishable under the law of the category 1 territory with imprisonment or another form of detention for a term of 3 years or a greater punishment.
>
> (3) The conduct also constitutes an extradition offence in relation to the category 1 territory if these conditions are satisfied –
>
> (a) the conduct occurs in the category 1 territory;

(b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom if it occurred in that part of the United Kingdom;

(c) the conduct is punishable under the law of the category 1 territory with imprisonment or another form of detention for a term of 12 months or a greater punishment (however it is described in that law).

Section 65 contains analogous provisions in relation to sentenced offenders.

27. Extradition to non-EU Member States with which the UK has extradition arrangements (category 2 territories) is governed by Part 2 of the 2003 Act. The process begins with a request through diplomatic channels but the judicial process in the UK follows a similar pattern to that set out in Part 1. At an initial stage the judge has to decide under section 78(4) whether the offence specified in the request for extradition is an extradition offence. For that purpose the judge has to apply section 137 (in relation to a person who is accused of the offence or has been convicted but not sentenced) or section 138 (in relation to a person who has been sentenced for the offence). Those sections closely resemble sections 64 and 65 in Part 1. Thus section 137(2), which is the counterpart to section 64(2), provides:

"The conduct constitutes an extradition offence in relation to the category 2 territory if these conditions are satisfied –

(a) the conduct occurs in the category 2 territory;

(b) the conduct would constitute an 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 if it occurred in that part of the United Kingdom;

(c) the conduct is so punishable under the law of the category 2 territory (however it is described in that law)."

28. The function of the definition of extradition offence in sections 64 and 65 of Part 1 and sections 137 and 138 of Part 2 is to differentiate between an offence for which a person may be extradited and one for which he may not. To be an extradition

offence, it must not only be a criminal offence but it must satisfy the prescribed criteria.

29. That accords not only with the scope of extradition under the Framework Decision but also with the essential nature of extradition as historically it has always been understood in the United Kingdom.

30. The Extradition Act 1870 (33 and 34 Vict, c 52) set out in the language of its preamble:

> "the law relating to the surrender to foreign states of persons accused or convicted of the commission of certain crimes within the jurisdiction of such states, and to the trial of criminals surrendered by foreign states to this country."

Such persons were referred to in the Act as "fugitive criminals". The Extradition Act 1989 defined the term "extradition crime" as:

> "Conduct in the territory of a foreign state….which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment, and which, however described in the law of the foreign state…, is so punishable under that law."

The word "offence" in that definition clearly referred to a criminal offence because that was the word being defined. The effect of the definition was to narrow the class of crimes constituting extradition crimes to those of sufficient seriousness to warrant extradition.

31. Similarly, section 2(1)(a) of the 1989 Act contained a definition of "extradition crime" in language which closely resembles section 137(2) of the 2003 Act. There is a difference in the introductory words in that section 2(1) of the 1989 Act began with the words "Extradition crime means", whereas section 137(2) of the 2003 Act begins with the words "the conduct constitutes an extradition offence…if", but I would reject the idea that the change of wording reflects a subtle intention to widen the concept of an extradition offence so as to include non-criminal conduct. To change the law in that respect would have been a significant step which one would expect to have been highlighted at that time.

32. Part 3, under which the present appeal arises, is the reciprocal of Parts 1 and 2 in that it is concerned with extradition from category 1 and category 2 territories to the UK. Extradition from a category 1 territory is a judicial process under the Framework Decision. Sections 142 to 149 implement that process. Under section 142 a judge may issue a part 3 warrant if satisfied among other things that there are reasonable grounds for believing that the person has committed an extradition offence or that the person is unlawfully at large having been convicted of an extradition offence. Section 148 applies in this context.

33. Section 148 has no direct application in relation to the extradition of a person from a category 2 territory, as in the present case, because the UK judiciary is not involved in the process of obtaining the extradition of a person from a category 2 territory. The process of extradition from a category 2 territory is triggered not by a warrant issued by a UK judge but by a request from the Government to the foreign state. For that reason sections 142-149 have no counterpart in relation to extradition from category 2 territories.

34. In any event, however, it is in my judgment clear for the reasons set out above that nothing can constitute an extradition offence (whether for the purposes of Part 1, Part 2 or Part 3) unless it is a criminal offence under the law of the relevant state. Not every alleged criminal offence will amount to an extradition offence, but it is a necessary pre-condition of an extradition offence that the conduct or alleged conduct is proscribed by the criminal law of the relevant state. For those reasons I would reject Mr Jones's principal argument.

Civil or criminal contempt

35. A restraint order under section 41 of POCA is an interim remedy. Its aim is to prevent the disposal of realisable assets during a criminal investigation or criminal proceedings. Under section 41(7) the court may make such order as it believes is appropriate for the purpose of insuring that the restraint order is effective. This may include, for example, an order requiring disclosure of assets by the person against whom the restraint order is made. A restraint order may also be reinforced by the appointment of a receiver under section 48 and the court may order any person who has possession of realisable property to which the restraint order applies to give possession of it to the receiver.

36. POCA does not provide that it is an offence to disobey or obstruct a restraint order or a receivership order, but the Crown Court has an inherent power to treat such behaviour as contempt of court, for which it may impose punishment under section 45 of the Senior Courts Act 1981. Rule 59.6 of the Criminal Procedure Rules 2013 (SI 2013/1554) provides that an applicant who wants the Crown Court to

exercise that power must comply with the rules set out in part 62 (Contempt of Court).

37. There is a distinction long recognised in English law between "civil contempt", ie conduct which is not in itself a crime but which is punishable by the court in order to ensure that its orders are observed, and "criminal contempt". Among modern authorities, the distinction was explained in general terms in *Home Office v Harman* [1983] 1 AC 280 (in particular by Lord Scarman at p 310) and *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191 (in particular by Lord Oliver at pp 217-218).

38. Breach of an order made (or undertaking obtained) in the course of legal proceedings may result in punishment of the person against whom the order was made (or from whom the undertaking was obtained) as a form of contempt. As Lord Oliver observed in *Attorney General v Times Newspapers Ltd*, although the intention with which the person acted will be relevant to the question of penalty, the liability is strict in the sense that all that is required to be proved is the service of the order and the subsequent doing by the party bound of that which was prohibited (or failure to do that which was ordered). However, a contempt of that kind does not constitute a criminal offence. Although the penalty contains a punitive element, its primary purpose is to make the order of the court effective. A person who commits this type of contempt does not acquire a criminal record.

39. A criminal contempt is conduct which goes beyond mere non-compliance with a court order or undertaking and involves a serious interference with the administration of justice. Examples include physically interfering with the course of a trial, threatening witnesses or publishing material likely to prejudice a fair trial.

40. The distinction is not unique to English law. A similar distinction is recognised in the U.S.A. In *Turner v Rogers* 564 US 1 (2011) the US Supreme Court had to decide whether the Due Process Clause of the US Constitution granted an indigent defendant a right to state-appointed counsel in civil contempt proceedings which might lead to his imprisonment. Justice Breyer, at page 8, said that civil contempt differs from criminal contempt in that it seeks only to coerce the defendant to do what the court had ordered him previously to do.

41. If a victim of the appellant's fraud had obtained a freezing order against him similar to the restraint order made under section 41 of POCA, there is no doubt that the claimant would have been entitled to bring contempt proceedings against the appellant after his extradition to the United Kingdom. The case would be analogous to *Pooley v Whetham* (1880) LR 15 Ch D435. An order was made in litigation between Mr Pooley and a bank that Mr Pooley was to give up possession of certain

property to a receiver and manager appointed by the court. Mr Pooley disobeyed the order and went to Paris, where he was arrested under a warrant issued under the Extradition Act 1870 for an alleged offence of fraud. After his return Mr Pooley was acquitted for the fraud for which he had been extradited to stand trial, but the bank sought to proceed against him for his earlier contempt. It was argued unsuccessfully on his behalf that the proceedings contravened section 19 of the 1870 Act, which provided that a person who was arrested under the Act should not be triable or tried for any offence committed prior to his arrest other than a crime for which the surrender was granted. The Court of Appeal held that the process instituted by the bank was not a proceeding for punishing a crime. It was a process for the purpose of enforcing civil rights.

42. Mr Jones submitted that the position is different with a restraint order under section 41, because it is not an order obtained in order to protect an applicant's civil rights but is an order obtained by the state in the course of a criminal investigation. The Common Serjeant and the Court of Appeal rejected this argument and I agree with them. It is necessary to look at the nature and purpose of the order. It is fallacious to argue that because the order was made by a criminal court, rather than a civil court, disobedience to the order amounts to a crime, whereas it would not have been a crime to disobey a similar order imposed by a civil court. The question whether a contempt is a criminal contempt does not depend on the nature of the *court* to which the contempt was displayed; it depends on nature of the *conduct*. To burst into a court room and disrupt a civil trial would be a criminal contempt just as much as if the court had been conducting a criminal trial. Conversely, disobedience to a procedural order of a court is not in itself a crime, just because the order was made in the course of criminal proceedings. To hold that a breach of a procedural order made in a criminal court is itself a crime would be to introduce an unjustified and anomalous extension of the criminal law. "Civil contempt" is not confined to contempt of a civil court. It simply denotes a contempt which is not itself a crime.

Conclusion

43. I would dismiss the appeal and would answer the questions certified by the Court of Appeal as follows:

(i) a contempt of court constituted by a breach of a restraint order made under section 41 of POCA is not itself a crime.

(ii) section 151A of the Extradition Act 2003 and article 18 of the United Kingdom-United States Extradition Treaty 2003 do not preclude a court from dealing with the person for such a contempt when that person has been extradited to the United Kingdom in respect of criminal offences.