



### Asylum claims from democracies: the unusual suspects

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For years, Vijay Mallya was known as “the King of Good Times”. Now, the Indian businessman and former Member of Parliament finds himself charged with fraud resulting from the collapse of Kingfisher Airlines. In the face of these accusations, Mallya has consistently pleaded innocence, arguing that the case against him is politically motivated and that he would be denied a fair trial in India.

These defences have been given short shrift by the extradition courts, and last week his plea for permission to appeal to the Supreme Court was refused. It remains to be seen whether Mallya has or will apply for asylum and, if he does, whether the confidential procedure in asylum proceedings will enable him to obtain protection.

In any event, it is not for the authors to comment on the propriety of Mallya’s extradition decision or the specifics of any asylum claim. What is clear, however, is that the *type* of arguments he is making would more likely gain traction if he came from a country with a long history of abuses. Put simply, businessmen from developed democracies with strong diplomatic ties to the UK face a far harder battle.

In part, this is because of an understandable scepticism that countries that have historically respected democratic norms could be guilty of high-level corruption. Yet there is evidence that many traditional democracies are sliding towards authoritarianism. In India, for example, several senior lawmakers have identified an increasing trend of spurious allegations against judges on the eve of important constitutional cases. The allegations are then dropped, but the damage to the judge’s reputation and to judicial independence is already done. Similarly, Reporters Sans Frontiers argue that since Narendra Modi’s re-election in 2019, “pressure on the media to toe the Hindu nationalist government’s line has increased”, with police violence against journalists and reprisals from corrupt officials.

In light of all this, can it really be said that Modi has been a fundamentally different Prime Minister to Putin, Orban or Erdogan? More likely, part of the English legal system’s reluctance to accept claims of corruption relating to countries like India comes from an institutional unwillingness to upset our diplomatic and trade relationships. Similar concerns arise in relation to the oil-rich states with whom our government does business.

Although all this makes it hard for prominent businessmen from such countries to argue that their prosecution is politically motivated, it is still possible to obtain protection. Asylum is almost always superior to extradition in this regard, for a number of reasons. First, experts are far more likely to come forward in your defence. Second, asylum proceedings are usually confidential and unlisted, meaning you can rely on sensitive evidence you would not want to deploy in public, and the decision is less likely to be affected by public policy or diplomatic considerations. Third, asylum claims are ultimately determined by the specialist First-tier Tribunal, which has a more nuanced understanding of political

persecution and corporate raiding.

In addition, there is a greater degree of legally imbedded bias towards the requesting state in extradition. As we have discussed previously (see our article here) biases do exist in asylum, for example towards EU countries, but they pale in comparison. In the extradition context, requests from EU Member States are presumed to be lawful and not to be affected by extraneous or political considerations, and many other countries are allowed to follow up on their requests with direct input into the extradition process.

We would therefore always recommend claiming asylum, and applying to adjourn extradition proceedings behind your claim. But even in asylum, the barriers to success in high profile cases mean that creative solutions are often required.

Such solutions can include parallel international arbitration proceedings, which help to demonstrate the impropriety of any civil case brought against the applicant and provide evidence for use in asylum, as well as undermining the credibility of criminal proceedings in the applicant's home country. They also include ambitious public law challenges to prevent the Home Office from delaying their decision or to challenge rules that are fundamentally unfair, as well as strategic communications to publicly shine a light on the reality of the situation.

Another option is to bring a civil tort against the UK government if you have reason to suspect it has put diplomatic expediency ahead of its obligations under international law. One such tort is misfeasance in public office. The threshold for successfully claiming misfeasance is high, but it is possible if you have evidence that a public body has abused its power, for example by deciding an asylum claim based on improper considerations. In the past, this tort has successfully been used against the Foreign and Commonwealth Office for its part in illegal renditions.

We also often advise clients to make strategic use of data actions. Subject access requests can be sent to the Home Office to police their use of data and ensure their decision making process is being conducted properly, and to agents of the persecuting state, provided they have a presence in the EU.

To achieve all this, it can be beneficial to make instruct investigators and business intelligence units to gather the evidence required. We also seek to work closely with expert harassment and defamation lawyers to ensure our clients benefit from a comprehensive, joined up strategy.

A further consideration in these kind of asylum claims is the relevance of Article 1F(B) of the Refugee Convention, which enables the Home Office to exclude applicants from protection if there are serious reasons to consider that they have committed serious non-political crimes. In our experience the Home Office will often rely on this exclusion in diplomatically sensitive cases, and leave the First-tier Tribunal to resolve them on appeal – which in turn can lead to re-litigating the criminal proceedings in the asylum context.

It is clear therefore that there will always be obstacles to seeking protection where a client alleges persecution by a state that is widely considered democratic. Nevertheless, we believe that success remains in reach, provided you are prepared to utilise an innovative, multi-pronged approach.

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