Neutral Citation Number: [2025] EWHC 391 (Admin)

Case Nos: AC-2023-LON-000066 and 67

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 February 2025

Before :

LORD JUSTICE WILLIAM DAVIS
and
MR JUSTICE JOHNSON

- -

Between:

PETER WEINZIERL **Appellant**

- and -

(1) GOVERNMENT OF THE UNITED STATES OF AMERICA
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondents**

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- -

James Lewis KC, Ben Watson KC and Ciju Puthuppally (instructed by Devonshires LLP) for the Appellant
Rosemary Davidson and Richard Evans (instructed by Crown Prosecution Service) for the First Respondent
Rebecca Hill (instructed by Government Legal Department) for the Second Respondent

Hearing dates: 3-6 December 2024
Application and further written submissions: 13 and 24 January 2025 and 4 February 2025

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Approved Judgment

This judgment was handed down by release to The National Archives on 25 February 2025 at 10.30am.

Lord Justice William Davis and Mr Justice Johnson:

1. This is the judgment of the court.

2. The first respondent (who we refer to as "the respondent") alleges that the appellant committed money laundering offences. It seeks his extradition to the United States of America. The appellant opposes extradition on grounds that the request is an abuse of process, and that extradition is barred under the Extradition Act 2003. A judge rejected the appellant's arguments and sent the case to the second respondent (to whom we refer as "the Secretary of State"). The Secretary of State ordered the appellant's extradition. The appellant appeals against the decision of the judge and the decision of the Secretary of State. He also applies to adduce fresh evidence on the appeal.

3. The grounds of appeal raise these issues:

   Whether the judge's decision to send the case to the Secretary of State was wrong because:

   (1) The judgment was taken directly from the respondent's submissions.

   (2) The extradition request is an abuse of process.

   (3) The extradition request is not sufficiently particularised.

   (4) There is no extradition offence.

   (5) Extradition is barred by the passage of time.

   (6) Extradition is incompatible with article 3 of the European Convention on Human Rights ("ECHR").

   (7) Extradition is barred because of the appellant's physical or mental condition.

   (8) Extradition is incompatible with article 8 ECHR.

   And whether the Secretary of State's decision to extradite the appellant was wrong because:

   (9) Extradition is barred by inadequate specialty protection.

4. On behalf of the appellant, James Lewis KC advanced grounds (1) – (4), Ben Watson KC advanced grounds (6) – (8) and Ciju Puthuppally advanced ground (9). Rosemary Davidson responded to grounds (1) – (8) on behalf of the respondent. Rebecca Hill responded to ground (9) on behalf of the Secretary of State.

The background

The appellant

5. The appellant is a citizen of Austria. He was born in 1965 and is now 59 years old. He has two sisters. He married for a second time in March 2024, his previous marriage

having ended in 2017. He does not have children but has a stepson who is at university in the Netherlands. He is a trained lawyer and economist, with degrees from both Austrian and American universities. He has worked in the finance industry since completing further education, mostly within corporate finance in small private banks. He is a former board member of Meinl Bank AG in Austria (referred to by the respondent as "Foreign Bank 1") and Meinl Bank Antigua in Antigua and Barbuda (referred to as "Foreign Bank 2"). In 2021, the appellant lived in Russia but travelled regularly to London. He is a man of good character.

The indictment

6. On 18 September 2020, a grand jury in New York returned an indictment charging the appellant with 4 federal criminal offences: conspiracy to commit money laundering (count 1), international promotional money laundering (counts 2 and 3) and money laundering spending (count 4).

7. The allegations set out in the indictment are that:

> **Count 1 (conspiracy to commit money laundering):** "In or about and between 2006 and 2016, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants… together with others, did knowingly and intentionally conspire to commit offenses under Title 18, United States Code, Sections 1956, and 1957, to wit:
>
> (a) to transport, transmit, and transfer, and attempt to transport, transmit and transfer monetary instruments and funds from a place in the United States to and through a place outside the United States and to a place in the United States from and through a place outside the United States with the intent to promote the carrying on of one or more specified unlawful activities, to wit: (i) wire fraud, in violation of Title 18, United States Code, Section 1343; (ii) an offense against a foreign nation involving bribery of a public official, in violation of Panama's Penal Code; (iii) an offense against a foreign nation involving bribery of a public official, in violation of Mexico's Penal Code; and (iv) an offense against a foreign nation involving bribery of a public official, in violation of Brazil's Penal Code, contrary to Title 18, United States Code, Section 1956(a)(2)(A);
>
> (b) to conduct and attempt to conduct financial transactions involving the proceeds of one or more specified unlawful activities, to wit: (i) wire fraud, in violation of Title 18, United States Code, Section 1343; and (ii) international promotional money laundering, in violation of Title 18, United States Code, Section 1956(a)(2)(A), knowing that the property involved represented proceeds of some form of unlawful activity, and knowing that the transaction was designed in whole and in part to conceal and disguise the nature, location, source, ownership and control of the proceeds of the specified unlawful activity;

contrary to Title 18, United States Code, Section 1956(a)(1)(B)(i); and

(c) to engage and attempt to engage in one or more monetary transactions in criminally derived property of a value greater than $10,000 and derived from one or more specified unlawful activities, to wit: (i) wire fraud, in violation of Title 18, United States Code, Section 1343; and (ii) international promotional money laundering, in violation of Title 18, United States Code, Section 1956(a)(2)(A), contrary to Title 18, United States Code, Section 1957.

Counts 2 and 3 (international promotional money laundering): "On or about the dates set forth below, within the Eastern District of New York and elsewhere, the defendants…, together with others, did knowingly and intentionally transport, transmit and transfer, and attempt to transport, transmit and transfer monetary instruments and funds from a place in the United States to and through a place outside the United States with the intent to promote the carrying on of one or more specified unlawful activities, to wit: wire fraud, in violation of Title 18, United States Code, Section 1343, as follows:

Count	Date	Wire
2	April 22, 2013	Wire of £24,050,833.33 from OSEL account at New York Bank 1 to Foreign Bank 1
3	May 6, 2013	Wire of $17,194,166.67 from OSEL account at New York Bank 1 to Foreign Bank 1"

Count 4 (money laundering spending): "On or about December 22, 2014, within the Eastern District of New York and elsewhere, the defendant… together with others, did knowingly and intentionally engage and attempt to engage in a monetary transaction in criminally derived property of a value greater than $10,0000, to wit: a transfer of approximately $8,000,000 from Foreign Bank 2, to and through New York Bank 3, to the Brokerage Account at the Financial Institution, such property having been derived from one or more specified unlawful activities, to wit: (i) wire fraud, in violation of Title 18, United States Code, Section 1343, and (ii) international promotional money laundering in violation of Title 18, United States Code, Section 1956(a)(2)(A)."

The respondent's case as to the underlying conduct

8. The indictment sets out, over 80 paragraphs, the respondent's case as to the underlying criminal conduct. That account is expressly incorporated into each of the counts. In summary, that case is as follows.

9. The appellant was the chief executive officer and a member of the managing board of Foreign Bank 1 and was also a member of the board of Foreign Bank 2.

10. Odebrecht SA was a Brazilian holding company, which conducted business in at least 27 other countries, including the United States. Between 2001 and 2016, it "engaged in a massive fraud, bribery and money laundering scheme to… defraud the government of Brazil by falsely and fraudulently misrepresenting and overstating expenses of its foreign subsidiaries in order to deprive the government of Brazil of more than $100 million in taxes, and to pay hundreds of millions of dollars in bribes to, and for the benefit of, public officials, political parties, political party officials, political candidates and others in order to corruptly obtain and retain business and to gain advantages and benefits in various countries around the world, including in Panama, Mexico and Brazil." Odebrecht SA subsequently pleaded guilty to bribery offences.

11. To conceal the offending, transactions were layered through multiple levels of offshore entities and bank accounts around the world. The appellant and a co-conspirator assisted with laundering hundreds of millions of dollars. They did so by (a) causing hundreds of millions of dollars to be sent from Odebrecht's accounts to Foreign Bank 1 "pursuant to sham transactions and fraudulent contracts", (b) causing tens of millions of dollars to be sent through correspondent accounts in the United States "pursuant to sham transactions and fraudulent contracts", (c) causing slush funds generated by, and derived from, the sham transactions to be sent to Foreign Bank 2, and (d) causing the slush funds and bank fees to be sent through correspondent bank accounts in the United States. They obtained millions of dollars in fees for Foreign Bank 1, and tens of millions of dollars in slush fund deposits and fees for Foreign Bank 2.

12. The indictment states:

> "42. Beginning in or about 2006 and continuing through at least in or about 2016, Odebrecht and its co-conspirators… relied upon the defendants PETER WEINZIERL and ALEXANDER WALDSTEIN… to assist with laundering hundreds of millions of dollars in connection with the scheme to defraud the government of Brazil and to pay bribes to foreign officials…
>
> 43. Specifically, as part of the scheme, the defendants… executed sham transactions pursuant to fraudulent contracts for services that were never performed and were never intended to be performed. These transactions falsely and fraudulently increased the expenses Odebrecht recorded on its books and records and were intended to help Odebrecht and its co-conspirators with executing, advancing and promoting the scheme to defraud the government of Brazil and to pay bribes to foreign officials. After charging a substantial fee, Foreign Bank 1, through [the appellant] and their co-conspirators, secretly sent the funds back to Odebrecht by wire transfers, often through correspondent bank accounts located in New York, New York and elsewhere in the United States, to Odebrecht shell company bank accounts used to conceal

> Odebrecht's ownership and control of the funds. Some of the shell company bank accounts involved in the scheme, and that were used to pay bribes to foreign officials, were held at Foreign Bank 2, a bank that [the appellant] and their co-conspirators collectively controlled and used to promote, advance and execute the objectives of the money laundering conspiracy.
>
> 44. By creating the perception that Odebrecht was paying a fee to Foreign Bank 1, Odebrecht, with the help of the defendants… was able to fraudulently increase Odebrecht's expenses and correspondingly reduce its taxable income, thereby defrauding the Brazilian government of tens of millions of dollars in taxes Odebrecht should have paid. In addition, by creating off-book slush funds that concealed Odebrecht's ownership of the funds, Odebrecht, with the help of [the appellant], was able to secretly pay bribes to foreign officials to advance its business.
>
> 45. In addition, the defendants… along with their co-conspirators, caused millions of dollars in criminal proceeds to be transferred from Foreign Bank 2 to a brokerage account located in the United States, and further caused those criminal proceeds to be used to purchase U.S. Treasury securities and corporate stocks and bonds on U.S. exchanges."

13. Much of the argument concerning ground 2 of the grounds of appeal relates to arrangements that purportedly guaranteed Odebrecht's debts. The respondent alleges that there were sham guarantee agreements between Foreign Bank 1 and Odebrecht subsidiaries. An example is that on 8 April 2011, Foreign Bank 1 purported to guarantee the sum of $230M in respect of Odebrecht projects in Angola. OSEL (an Odebrecht subsidiary) transferred approximately $23M to Foreign Bank 1 as payment for the guarantee. It recorded this as a business expense to avoid paying millions of dollars of taxes. Then, on 1 June 2011, Foreign Bank 1 purported to transfer the obligations under this guarantee to an Odebrecht shell company, and paid the shell company approximately $22M. Foreign Bank 1 therefore generated a fee of about $1M. The indictment alleges:

> "The purpose of the funds transfer… was to complete the sham back-to-back transaction, which resulted in disguising the true ownership of the funds by moving funds off OSEL's books and generating slush funds in the [shell company]."

14. The extradition request is supported by an affidavit of Julia Nestor, an Assistant United States Attorney. Ms Nestor says that the respondent's case will be established by witness testimony, including testimony from cooperating witnesses, bank records, emails and other documentary evidence, including draft and signed versions of the guarantee contracts and transfer certificates.

Extradition proceedings

15. On 2 March 2021, the respondent issued a diplomatic note seeking the provisional arrest of the appellant for the purpose of his extradition to the United States. On the same day, the United States District Court for the Eastern District of New York issued a warrant for the appellant's arrest. Also on the same day, the National Crime Agency issued a provisional arrest certificate under section 74B of the 2003 Act.

16. On 25 May 2021, the appellant arrived in the United Kingdom, landing his own private aircraft at Biggin Hill airfield, having flown from the Czech Republic. He says that he had been persuaded to come to the United Kingdom under a false pretext by a man who was working for the respondent. The appellant was arrested on his arrival, pursuant to section 74A of the 2003 Act and the certificate that had been issued under section 74B.

17. On 19 July 2021, the Secretary of State certified that the extradition request was valid, pursuant to section 70 of the 2003 Act. Initially the appellant was remanded in custody. On 23 July 2021 he was granted bail by Lane J: *Weinzierl v Government of United States of America* [2021] EWHC 1847 (Admin). The conditions of bail included a £4M security.

18. On 20 April 2022, the Crown Prosecution Service asked the respondent for further information in the light of evidence that had been served on behalf of the appellant. On 6 May 2022, the respondent provided further information. This states that the appellant might be remanded at the Metropolitan Detention Center in Brooklyn, New York, but there is no guarantee that he will be located in any particular facility. An assurance was given that the appellant would be housed in "legally sufficient and constitutional conditions." He would be entitled to a 1-hour social visit and several hours of outdoor recreation each week.

19. In response to the appellant's suggestion that the allegations against the appellant are time-barred, the further information says:

> "The allegations against Mr Weinzierl are not time-barred. United States law provides a five-year statute of limitations for the charged offenses and a period of suspension of limitations of up to three additional years to permit the government to obtain foreign evidence."

20. As to the substance of the case against the appellant, the further information says:

> "According to [the prosecution] witnesses… Odebrecht presented the back-to-back structures to Meinl Bank AG as a way for Odebrecht to transfer funds from audited company accounts to undeclared companies as part of what Odebrecht characterized as an aggressive tax strategy. …Contrary to the appearance of the documents, Odebrecht employees made it clear in conversation to Mr. Weinzierl that there was never any intent for Meinl Bank AG to assume any risk nor to provide any guarantee of any kind, and that the transfer contracts would be executed at the same time as the guarantee contracts and

> before any financial transactions began. Meinl Bank AG was to serve no purpose but to transfer Odebrecht's funds to a preselected undeclared bank account and to execute contracts proposed by Odebrecht to serve its unlawful tax evasion scheme.
>
> The verbal agreements and commitments between Mr. Weinzierl and Odebrecht employees show that the purported commercial rationale of the paperwork was a farce. U.S. Prosecution Witnesses explain that separate contracts were used so that Odebrecht's auditors would see only the guarantee contracts documenting premiums paid to an accredited bank for business expenses. Mr. Weinzierl and Odebrecht employees agreed at the outset to create separate transfer contracts that, if executed simultaneously with the guarantee contracts, would completely vitiate the enormous potential financial risks represented in the guarantee contracts, risks Meinl Bank AG could neither financially nor legally undertake. According to U.S. Prosecution Witnesses, it was also verbally agreed between Mr. Weinzierl and Odebrecht that the funds would always go to a secret Odebrecht offshore shell company, never to any third-party syndication partner to be identified by Meinl Bank AG."

21. The extradition hearing took place before Senior District Judge Goldspring ("the judge") between 13-16 June 2022, 16-17 November 2022, and 16 December 2022. On 5 June 2023, the judge sent the case to the Secretary of State pursuant to section 87(3) of the 2003 Act.

22. On 28 July 2023, the Secretary of State ordered the appellant's extradition to the United States, pursuant to section 93(4) of the 2003 Act.

23. On 9 August 2023, the appellant filed a notice of appeal by which he sought permission to appeal under section 103 of the 2003 Act against the decision of the judge. On the same day, he filed a further notice of appeal seeking permission to appeal under section 108 against the decision of the Secretary of State. Finally, he applied for permission to apply for judicial review of the decision of the judge.

24. On 24 January 2024, Sir Duncan Ouseley granted permission to appeal under sections 103 and 108 of the 2003 Act. He refused permission to apply for judicial review

25. On 15 November 2024, the appellant applied to adduce, as fresh evidence, a supplementary expert report of James Troisi and a supplementary declaration of Maureen Baird. Mr Troisi and Ms Baird had both provided evidence before the judge. This evidence relates to prison conditions in the United States.

General legal framework

United States Code

26. Section 1343 of Title 18 of the United States Code states:

"Wire fraud

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both…"

27. Section 1956 states:

"Laundering of Monetary Instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

(A)(i)with the intent to promote the carrying on of specified unlawful activity; or…

(B) knowing that the transaction is designed in whole or in part –

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;…

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States –

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part-

(i) to conceal or disguise the nature, the location, the source, the ownership, or the

> control of the proceeds of specified unlawful activity;…
>
> shall be sentenced to … imprisonment for not more than twenty years…
>
> (h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the subject of the conspiracy."

28. Section 1957 states:

> "Money laundering spending
>
> (a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).
>
> (b)(l) Except as provided in paragraph (2), the punishment for an offense under this section is . . . imprisonment for not more than ten years . . .
>
> (d) The circumstances referred to in subsection (a) are –
>
> (1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or
>
> (2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person…"

Proceeds of Crime Act 2002

29. For the purposes of ground (2), and section 137 of the 2003 Act, the respondent must identify offences under English law that reflect the essence of the conduct with which the appellant is charged. The respondent relies on section 328(1) of the 2002 Act. That states:

> "A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person."

30. The term "criminal property" is defined by section 340 of the 2002 Act. That states:

"Interpretation

(1) This section applies for the purposes of this Part.

(2) Criminal conduct is conduct which—

(a) constitutes an offence in any part of the United Kingdom, or

(b) would constitute an offence in any part of the United Kingdom if it occurred there.

(3) Property is criminal property if—

(a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and

(b) the alleged offender knows or suspects that it constitutes or represents such a benefit.

(4) It is immaterial—

(a) who carried out the conduct;

(b) who benefited from it;

(c) whether the conduct occurred before or after the passing of this Act.

…

(6) If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.

(7) References to property or a pecuniary advantage obtained in connection with conduct include references to property or a pecuniary advantage obtained in both that connection and some other.

(8) If a person benefits from conduct his benefit is the property obtained as a result of or in connection with the conduct."

United States Extradition Treaty

31. The extradition treaty between the United Kingdom and the United States entered into force on 26 April 2007. The preamble recalls the previous extradition treaty of 1972 and indicates a desire to provide for more effective cooperation between the two

states in the suppression of crime and, for that purpose, to conclude a new treaty for the extradition of offenders.

32. Article 1 states that the parties agree to extradite to each other, pursuant to the provisions of the treaty, persons who are sought by the authorities in the requesting state for trial or punishment for extraditable offences.

33. Article 2 states that an offence is an extraditable offence if it is punishable under the laws of both states by way of a custodial sentence of at least a year.

34. Article 18(1)(a) states:

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

35. Article 18(3)(b) states that article 18(1)(a):

> "shall not prevent the detention, trial, or punishment of an extradited person, or the extradition of the person to a third State, if the person… does not leave the territory of the Requesting State within 20 days of the day on which that person is free to leave."

Extradition Act 2003

36. The United States is a category 2 territory for the purposes of part 2 of the 2003 Act: Extradition Act 2003 (Designation of Part 2 Territories) Order 2003. Part 2 of the 2003 Act makes provision for the making of extradition requests by category 2 territories (section 69), for the certifying of such requests by the Secretary of State (section 70) and for the provisional arrest without warrant of a requested person (sections 74A and 74B). Once the requested person is arrested under section 74A, he must be brought before the appropriate judge as soon as practicable: section 74A(3).

Consideration of extradition request by judge

37. The judge must then decide whether (among other things) the documents sent by the Secretary of State include those required by section 78(2) (which include "particulars of the offence specified in the request") and whether the offence specified in the request is an extradition offence: section 78(4)(b).

38. Section 137 defines what amounts to an extradition offence:

> "137 Extradition offences: person not sentenced for offence
>
> (1) This section sets out whether a person's conduct constitutes an "extradition offence" for the purposes of this Part in a case where the person—

> (a) is accused in a category 2 territory of an offence constituted by the conduct…
>
> (2) The conduct constitutes an extradition offence in relation to the category 2 territory if the conditions in subsection (3), (4) or (5) are satisfied.
>
> (3) The conditions in this subsection are that—
>
> (a) the conduct occurs in the category 2 territory;
>
> (b) the conduct would constitute an offence under the law of [England] punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment if it occurred in [England];
>
> (c) the conduct is so punishable under the law of the category 2 territory.
>
> …"

39. If the judge is satisfied of the matters set out in sections 78(2) and 78(4), he must proceed under section 79. If not, the person must be discharged: section 78(3), 78(6).

40. Section 79 states:

> "79 Bars to extradition
>
> (1) If the judge is required to proceed under this section he must decide whether the person's extradition to the category 2 territory is barred by reason of-
>
> …
>
> (c) the passage of time;
>
> …
>
> (2) Sections 80 to 83E apply for the interpretation of subsection (1).
>
> (3) If the judge decides any of the questions in subsection (1) in the affirmative he must order the person's discharge.
>
> (4) If the judge decides those questions in the negative and the person is accused of the commission of the extradition offence but is not alleged to be unlawfully at large after conviction of it, the judge must proceed under section 84.

…"

41. Section 82 makes provision in respect of the passage of time. It provides that a person's extradition is barred if it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have committed the extradition offence. In that event, the person must be discharged: section 79(3). If extradition is not barred, then the judge must proceed under section 87: section 79(4), read with section 84(7) and the 2003 Designation Order.

42. Section 87(2) requires the judge to order the person's discharge if extradition would not be compatible with their Convention rights within the meaning of the Human Rights Act 1998. Otherwise, the judge must send the case to the Secretary of State for her decision as to whether the person is to be extradited: section 87(3).

43. Section 91 requires the judge to order the person's discharge (or alternatively to adjourn the hearing) if their physical or mental condition is such that it would be unjust or oppressive to extradite him.

Role of Secretary of State

44. Section 93 states:

> "Secretary of State's consideration of case
>
> (1) This section applies if the appropriate judge sends a case to the Secretary of State under this Part for his decision whether a person is to be extradited.
>
> (2) The Secretary of State must decide whether he is prohibited from ordering the person's extradition under any of these sections—
>
> …
>
> (b) section 95 (speciality);
>
> …
>
> (3) If the Secretary of State decides any of the questions in subsection (2) in the affirmative he must order the person's discharge.
>
> (4) If the Secretary of State decides those questions in the negative he must order the person to be extradited to the territory to which his extradition is requested…
>
> …"

45. Section 95 states:

> "95 Speciality

(1) The Secretary of State must not order a person's extradition to a category 2 territory if there are no speciality arrangements with the category 2 territory.

…

(3) There are speciality arrangements with a category 2 territory if (and only if) under the law of that territory or arrangements made between it and the United Kingdom a person who is extradited to the territory from the United Kingdom may be dealt with in the territory for an offence committed before his extradition only if—

(a) the offence is one falling within subsection (4), or

(b) he is first given an opportunity to leave the territory.

(4) The offences are—

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

(b) an extradition offence disclosed by the same facts as that offence, other than one in respect of which a sentence of death could be imposed;

(c) an extradition offence in respect of which the Secretary of State consents to the person being dealt with;

(d) an offence in respect of which the person waives the right that he would have (but for this paragraph) not to be dealt with for the offence.

…"

Right of appeal from judge

46. Section 103 gives a right of appeal against a decision to send a case to the Secretary of State.

47. On appeal, the role of the appellate court is prescribed by section 104:

"104 Court's powers on appeal under section 103

(1) On an appeal under section 103 the High Court may-

(a) allow the appeal;

> (b) direct the judge to decide again a question (or questions) which he decided at the extradition hearing;
>
> (c) dismiss the appeal.
>
> (2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.
>
> (3) The conditions are that-
>
> (a) the judge ought to have decided a question before him at the extradition hearing differently;
>
> (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.
>
> (4) The conditions are that-
>
> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the judge deciding a question before him at the extradition hearing differently;
>
> (c) if he had decided the question in that way, he would have been required to order the person's discharge.
>
> (5) If the court allows the appeal it must-
>
> (a) order the person's discharge;
>
> (b) quash the order for his extradition.
>
> …"

48. Section 104(3) permits an appeal to be allowed only if the district judge ought to have decided a question before her differently with the result that the appellant would have had to be discharged. The role of the appellate court was explained in *Love v United States of America* [2018] EWHC 172 (Admin); [2018] 1 WLR 2889 *per* Lord Burnett CJ at [25] - [26]:

> "25. The statutory appeal power in section 104(3) permits an appeal to be allowed only if the district judge ought to have decided a question before him differently and if, had he decided it as he ought to have done, he would have had to discharge the appellant. The words "*ought* to have decided a question

> differently" (our italics) give a clear indication of the degree of error which has to be shown. The appeal must focus on error: what the judge *ought* to have decided differently, so as to mean that the appeal should be allowed. Extradition appeals are not re-hearings of evidence or mere repeats of submissions as to how factors should be weighed; courts normally have to respect the findings of fact made by the district judge, especially if he has heard oral evidence. The true focus is not on establishing a judicial review type of error, as a key to opening up a decision so that the appellate court can undertake the whole evaluation afresh. This can lead to a misplaced focus on omissions from judgments or on points not expressly dealt with in order to invite the court to start afresh, an approach which risks detracting from the proper appellate function. …
>
> 26. The true approach is more simply expressed by requiring the appellate court to decide whether the decision of the district judge was wrong. …The appellate court is entitled to stand back and say that a question ought to have been decided differently because the overall evaluation was wrong: crucial factors should have been weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed."

Right of appeal from Secretary of State

49. Section 108 gives a right of appeal against an extradition order made by the Secretary of State.

50. On appeal, the role of the appellate court is prescribed by section 109:

> "Court's powers on appeal under section 108
>
> (1) On an appeal under section 108 the High Court may—
>
> (a) allow the appeal;
>
> (b) dismiss the appeal.
>
> (2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.
>
> (3) The conditions are that—
>
> (a) the Secretary of State ought to have decided a question before him differently;
>
> (b) if he had decided the question in the way he ought to have done, he would not have ordered the person's extradition.

(4) The conditions are that—

(a) an issue is raised that was not raised when the case was being considered by the Secretary of State or information is available that was not available at that time;

(b) the issue or information would have resulted in the Secretary of State deciding a question before him differently;

(c) if he had decided the question in that way, he would not have ordered the person's extradition.

(5) If the court allows the appeal it must—

(a) order the person's discharge;

(b) quash the order for his extradition."

The application for permission to apply for judicial review

51. The judge's decision is 182 pages long. The appellant says that 113 pages are taken verbatim from the transcripts of the evidence, and that the overwhelming majority of the remaining 69 pages are taken verbatim from the respondent's written submissions. He says that there is no reference whatsoever to any of the appellant's submissions. The appellant also draws attention to the following: obvious copying errors; paragraphs which appear to have been created by the use of dictation software which have not been corrected so that the sense of the paragraphs is unclear; the absence of any judicial discussion or evaluation of the parties' competing positions on any of the issues raised before the court; the absence of any reason for rejecting the appellant's submissions; obvious errors in those few passages of the judgment that are not directly lifted from the transcript or the respondent's submissions.

52. The appellant draws attention to well-known authority which establishes that a judge is required to provide a reasoned adjudication rather than simply to adopt and repeat one party's case: *Flannery v Halifax Estates Agencies Ltd* [1999] EWCA Civ 811 [2000] 1 WLR 377 *per* Henry LJ at 382A-B, *English v Royal Mail Group Ltd* UKEAT/0027/08//MAA *per* Bean J at [4] - [13], *Fine Lady Bakeries Limited v EDF Energy Customers Limited* [2020] EWHC 87 *per* Farbey J at [70] and *Chief Constable of Avon and Somerset Constabulary v Eckland* 2021 *per* Kerr J at [117] - [122].

53. The appellant's claim for judicial review was on the grounds that the nature of the judge's decision was such that it amounted to no decision at all. The appellant sought to have the decision quashed so that he could have the benefit of a properly reasoned first instance decision. Sir Duncan Ouseley rejected this argument. He concluded that, even if all the appellant's complaints were made out, the decision of the judge was not a nullity. No steps were taken at that stage to renew the application for permission. In the skeleton argument filed on behalf of the appellant for the purposes of the appeal under section 103 of the 2003 Act, tentative reference was made to the court's power

to extend the time for making a renewed application for permission to claim judicial review. No written application accompanied the skeleton argument.

54. At the outset of the hearing of the appeals for which the appellant had leave, we asked about the reference to renewal in the skeleton argument. This prompted an oral application for permission to apply for judicial review. It was said (correctly) that, were permission to be granted and were the application for judicial review to succeed, it would save considerable court time – at least the court time set aside for the hearing of the appeals. A successful application for judicial review would require the judge's decision to be quashed without any consideration of the substantive merits of the respective cases.

55. We were taken through the judge's decision. It was clear that many of the complaints made in relation to the decision were made out. However, this left the conclusion of Sir Duncan Ouseley unaffected. He proceeded on the basis that, irrespective of the issues raised by the appellant, the decision was sufficient to allow the appellant to understand the reasoning of the judge. The decision was not a nullity. Moreover, there was no explanation for the delay in making a renewed application for permission. The extension of time required was around 9 months.

56. It is not appropriate to extend time to allow a renewed application to be made. If the appellant can establish that the judge's decision is wrong on any of the matters in relation to which he has permission, the appellant will avoid extradition. Thus, he will suffer no real prejudice as a result of any deficiencies in the judge's decision. It is not necessary for us to consider the judge's decision in detail. We shall consider the issues raised by the appellant on their substantive merits.

57. We therefore refuse the renewed application for permission to claim judicial review.

The further application to adduce fresh evidence

58. On 13 January 2025, well after oral argument had concluded, the appellant made a further application to adduce fresh evidence. Although an oral hearing was sought, we concluded that we could deal with the application on the basis of written submissions. The application was accompanied by written submissions on behalf of the appellant. Ms Davidson and Mr Evans responded in writing on 24 January 2025. A reply on behalf of the appellant was dated 3 February 2025. The proposed fresh evidence comprises a report from a Brazilian law firm, TozziniFreire Advogados ("the report"). The report provides a description of the convoluted process of the Brazilian Administrative Tax Court and the proceedings in that court relating to Odebrecht. It also seeks to explain a ruling in 2023 by the Brazilian Federal Supreme Court in relation to the state of criminal proceedings arising from an agreement between the Brazilian federal prosecutor and Odebrecht. Finally, it states that the available material does not show payments by Odebrecht to Foreign Bank 1 as being used to reduce the tax liability of Odebrecht in Brazil.

59. In the initial written submissions made on behalf of the appellant, the emphasis was on the effect the fresh evidence had on the case in respect of insufficient particularisation of the offending (ground 3) and no extradition offence (ground 4). The submissions also argued that the fresh evidence raised the possibility of an abuse of process whether by the US authorities or the CPS or both. The response on behalf

of the respondent was directed to the argument concerning grounds 3 and 4. In the reply dated 3 February 2025 it was said that the appellant's main submission was that the fresh evidence gave rise to an abuse of process.

60. The test for deciding whether fresh evidence is admissible was explained by Sir Anthony May, P. in *Hungary v Fenyvesi* [2009] EWHC 231 (Admin) [2009] 4 All ER 324. It must be shown that the fresh evidence is evidence which was "not available at the extradition hearing", meaning that it was evidence which either did not exist at the time of the hearing, or was not at the disposal of the party wishing to adduce it and which he could not with reasonable diligence have obtained. In addition, it must be shown that the evidence would have been decisive in that it would have resulted in the judge ordering the applicant's discharge.

61. We accept that the first element of this test is established. The report is based on material from tax proceedings in Brazil. That material came into the hands of the Brazilian law firm while the appeal hearing was in progress. The law firm had had no chance to review the material. Therefore, in practical terms it was not available at the time of the hearing before the judge.

62. As to whether the report would have been decisive, in substance it amounts to a challenge to the underlying allegations that are advanced against the appellant. Such evidence is not relevant to any issue in these proceedings. It is not necessary for the respondent to establish that there is a prima facie case, and it is not relevant for the court to enquire into whether the allegations are well-founded. To this extent, the report is therefore irrelevant, and reliance on it is impermissible.

63. The appellant argues that the report is relevant to the questions of whether the offences in the extradition request are sufficiently particularised, and whether they amount to extradition offences (grounds (3) and (4)). However, subject to the court's residual abuse of process jurisdiction, those issues fall to be determined by reference to the extradition request and any further information served by the respondent: *Mauro v United States* [2009] EWHC 150 (Admin) *per* Maurice Kay LJ at [16] – [20], *United States v Shlesinger* [2013] EWHC 2671 (Admin) *per* Sir John Thomas P at [12]. The report is therefore not relevant to grounds (3) and (4) of this appeal and is not therefore capable of being decisive of the issue that was before the judge. We deal with the question of abuse of process below when we come on to consider that issue as a ground of appeal.

64. There are, moreover, further difficulties with the appellant's attempt to rely on the report. Its evidential status is far from clear. It is headed "expert report" and is described as such by the appellant's representatives. Expert evidence is potentially admissible on issues of foreign law, but the particularisation and extradition offence issues do not directly raise any issue of foreign law. Further, the report does not comply with the requirements of Rule 19.4 of the Criminal Procedure Rules. It does not, for example, give details of the experts' qualifications, relevant experience and accreditation (save that the signatories to the report are described as partners). Whatever their expertise it appears that the signatories lack the independence that ordinarily attaches to any expert.

65. Further, it is clear from the report that litigation was ongoing in Brazil in the latter part of 2024 to obtain the information that forms the basis of the report. No

satisfactory reason has been given as to why the report was not put before the court at the time of the appeal hearing, or why the court was not alerted to the appellant's intention to obtain the report so that consequential case management issues could be addressed. There was no mention of the proceedings in Brazil at any point during the 4-day hearing.

Ground (1): Judgment taken directly from the respondent's submissions

66. Ground (1) reflects the renewed application for permission to claim judicial review. However, the appellant recognises that the appeal under section 103 of the 2003 Act does not enable us to exercise a judicial review jurisdiction, or even a completely open textured appellate jurisdiction. The issue for us is whether the judge was required to order the appellant's discharge (or whether, in the light of fresh evidence, he would have been required to do so): section 103(3) and (4).

67. It follows that this ground is not capable in isolation of sustaining a successful appeal. That is because even if the appellant is right in his underlying complaint, it does not necessarily mean that the judge was (or would have been) required to order the appellant's discharge. In terms of the section 103 appeal, the appellant correctly described this ground of appeal as "somewhat otiose" and that "the best approach [is] to focus on [grounds 2-8]." That is what we will do.

68. Nevertheless, we approach grounds 2 – 8 against the backdrop of a judgment which has the appearance of not engaging with the arguments that were placed before the judge. In those circumstances, we have not considered it appropriate to give any weight to the judge's findings. Instead, we assess for ourselves the arguments that are advanced by the appellant without reliance on the judge's analysis.

Ground (2) Abuse of process

69. The judge was required to refuse to extradite the appellant if the respondent's extradition request amounts to an abuse of process. To determine whether there is an abuse of process the court must determine (a) the conduct which is alleged to constitute the abuse, (b) whether that conduct is capable of amounting to an abuse, and (c) whether there are reasonable grounds for believing that the conduct occurred. If the conduct is capable of amounting to an abuse and if there are reasonable grounds for believing that the conduct occurred, then the court must not refer the case to the Secretary of State unless the court is satisfied that there has not been an abuse of process: *Government of the United States and Bow Street Magistrates' Court v Tollman* [2006] EWHC 2256 (Admin) *per* Lord Phillips CJ at [84].

70. In the course of the hearing Mr Lewis relied on three discrete strands of abuse of process. First, he says that the extradition request misstates the underlying evidence on which the request is based. Second, he says that conduct of the respondent in securing his arrest renders the proceedings abusive. Third, he says that an applicable limitation period has expired. The first strand of abuse is said to be supplemented by the report from the Brazilian lawyers.

(i) Extradition request misstates the underlying evidence

71. There is an obligation on a requesting state fairly, properly and accurately to describe the conduct that is alleged against the requested person: *Castillo v Spain* [2004] EWHC 1676 (Admin) [2005] 1 WLR 1043 *per* Thomas LJ at [25], *Criminal Court at the National High Court, First Division v Murua* [2010] EWHC 2609 (Admin) *per* Sir Anthony May P at [58]. This is of fundamental importance to the operation of the extradition jurisdiction. Extradition arrangements rely on relationships of mutual trust and confidence between the parties to extradition treaties. The court is reliant on a requesting state to provide accurate information. A court will ordinarily trust the accuracy of information provided by a requesting state. That whole relationship breaks down if the extradition court cannot rely on requesting states to provide accurate information. Accordingly, there are cases where an extradition request must be stayed as an abuse of the court's process: *Zakrzewski v Regional Court in Lodz, Poland* [2013] UKSC 2 [2013] 1 WLR 324 *per* Lord Sumption at [13]. Lord Sumption stressed that this is an exceptional jurisdiction. It only arises where statements in the extradition request which comprise statutory particulars are materially wrong or incomplete in a misleading way, and where the true facts required to correct the error or omission are clear and beyond dispute. The defect must be material to the operation of the statutory scheme (for example as to the identity of the requested person, or the offence that is charged, or because it impacts on the decision as to whether to order extradition).

72. In *Murua* (a case concerning part 1 of the 2003 Act), Sir Anthony May agreed with a submission that "this kind of inquiry should not be entertained in any case where to do so would undermine the principles to be found in the introductory preambles to the Council Framework Decision of 13 June 2002". The corollary, in a case such as the present, is that an abuse challenge should not be entertained where to do so would undermine the principles to be found in the extradition treaty between the United Kingdom and the United States. Those principles include the provision of more effective cooperation between the United Kingdom and the United States in the suppression of crime.

73. We deal first with the argument as it was put in the course of the hearing. The appellant contends that the indictment "reflects a fundamental misdescription and misapprehension of the materials". His complaint focusses on the word "sham" in the indictment. He says that the word "sham" has a technical meaning as a matter of English law and relies on the decision in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786. He says that the allegation in the indictment is that the impugned transactions never took place, that the purported financial services were never intended to be provided and that the services were never performed. He says that the indictment alleges that the transactions had no commercial rationale or effect and that the alleged services were never performed or intended to be performed. However, the documentation plainly shows that the transactions did take place and the expert evidence shows that such transactions can have a proper commercial purpose. Further, the indictment refers to "guarantee agreements" whereas in fact what was in place (as is clear from the underlying documentation) were "guarantee facility agreements" which is a different type of agreement with a different set of obligations.

74. We consider that the appellant mischaracterises the respondent's case. Read in context, the phrase "sham transaction" is not used in the sense of a transaction that did

not take place at all. It is used in the sense of a transaction that did take place, but not for the purported purpose. The respondent's case is that Foreign Bank 1 and Foreign Bank 2 were not providing a genuine financial service to Odebrecht, but were instead part of a sophisticated charade to make it look like that was what was happening whereas the reality was that it was committing money laundering offences. When the word "sham" is correctly understood, there is no mismatch between the allegations and the evidence, and there is no abuse of process.

75. There is nothing (for these purposes) in the use of the description "guarantee agreement" rather than "guarantee facility agreement." The nature of the respondent's case is clear enough. Even though, strictly, what was purportedly in place was the provision of a guarantee facility agreement rather than an agreement which itself amounted to a guarantee, the proceedings do not become abusive simply because "guarantee agreement" is used in the indictment in a portmanteau sense to denote an agreement to provide or secure a guarantee facility.

76. The appellant seeks to show that the evidence demonstrates that the transactions were in fact legitimate, and that they were made to enable Odebrecht lawfully to transfer monies out of countries such as Angola. The appellant sets out, in detail, the series of complex steps in what he says was an entirely legitimate commercial arrangement. This argument is not capable of sustaining a finding that the proceedings are an abuse of the court's process. It amounts to a challenge to the underlying prosecution case. That challenge can only be resolved by way of a defence to the prosecution in the United States.

77. The appellant makes further points about the respondent's case. For example, he says that the appellant did not personally benefit from the alleged offending, and that he therefore had no motive to jeopardise his good character, his professional good standing and to risk lengthy incarceration. He also says that if the respondent's case is correct then the Austrian financial regulator must have been duped. These points impermissibly seek to engage with the merits of the proposed criminal proceedings in the United States. They do not begin to provide a basis for invoking the court's exceptional and residual abuse jurisdiction.

78. The appellant also picks out isolated phrases in the indictment and contends that they are misleading. An example is a statement in the indictment which (according to the appellant) says that the appellant and a co-conspirator together controlled Foreign Bank 1, whereas banking regulations prevent a bank from being controlled by one or two people. The sentence in question is at paragraph 49 of the indictment. It reads "To promote and further these illegal objectives, Odebrecht and its co-conspirators sought and obtained the assistance of complicit third parties, including the defendants PETER WEINZIERL and ALEXANDER WALDSTEIN, who controlled Foreign Bank 1." It is not obvious that this has the meaning that the appellant attributes to it (ie that the appellant and Mr Waldstein controlled the bank). The more natural meaning is that the appellant and Mr Waldstein, together with other "complicit third parties" controlled the bank. Further, the appellant's role within the bank is made explicit at the very start of the indictment – that he was the chief executive officer and a member of the managing board. In any event, this is not the type of statement that is capable of amounting to an abuse of process – it is not a defect that is material to the operation of the statutory scheme. Much the same applies to the suggestion that the

indictment wrongly indicates that the appellant personally executed or signed certain of the guarantee agreements and transfer certificates.

79. It follows that the appellant has not shown that the statements in the extradition request which comprise the statutory particulars are wrong or misleading in a way that is material to the statutory scheme, and that the true facts required to correct the error or omission are clear and beyond dispute. The judge was therefore right to find that the extradition request is not an abuse of the court's process on this ground. The judge was not therefore required to discharge the appellant.

80. What if the so-called expert evidence as to the Brazilian tax position on which the appellant seeks to rely is admissible? Does that give rise to an arguable abuse of process? In the most recent written submission on behalf of the appellant what was said in *Asliturk v Turkey* [2002] EWHC 2326 (Admin) at [24] is cited, the passage dealing with the failure of the requesting authority to respond to evidence from the requested person. It is said that this is relevant here because there has been no attempt by the United States to counter what is said in the report about the Brazilian tax position and the court proceedings there. We are satisfied that *Asliturk* is not on point. The material adduced by the requested person went to the issue of the accusation against her being political. Thus, it related to a relevant issue. Evidence in respect of that issue was admissible. The same does not apply here.

81. It is submitted on behalf of the appellant that the material set out in the report from the Brazilian lawyers should prompt us to make enquiry of the United States of the kind envisaged in *Tollman* at [89]:

> "The appropriate course for the judge to take if he has reason to believe that an abuse of process may have occurred is to call upon the judicial authority that has issued the arrest warrant, or the State seeking extradition in a Part 2 case, for whatever information or evidence the judge requires in order to determine whether an abuse of process has occurred or not."

The proposition is that the report provides reason to believe that the United States are aware of the scope of the Brazilian tax proceedings. In the written submission it is said that "it would be extraordinary" if the US authorities were unaware of the position. We do not agree that an enquiry of the kind suggested is required. It is not apparent from the report that the details set out therein are generally available; rather, the reverse. There is nothing in the affidavit of Julia Nestor which indicates that the US authorities are aware from their own enquiries of the matters set out in the report. We have no material to lead us to believe that there has been an abuse of the extradition process.

82. We would reach the conclusion we have done in respect of abuse of process even if evidence excluded by the judge were admitted. The judge excluded that evidence because he considered it was not admissible. The appellant says he was wrong and points to observations that the strict rules of evidence do not apply in extradition proceedings: *R (B) v Westminster Magistrates' Court* [2014] UKSC 59 [2015] AC 1195 *per* Lord Mance at [21], *Hilali v Central Court of Criminal Proceedings No 5 of the National Court, Madrid* [2006] EWHC 1239 (Admin) *per* Scott Baker LJ at [63]. Accordingly, evidence may be admissible even if it amounts to hearsay. Here,

however, the objection to the admissibility of the evidence is not based on any technical procedural complaint based upon its nature. The complaint is that the evidence is simply irrelevant. The appellant relies on the evidence to seek to litigate issues in the substantive criminal proceedings, rather than to show any fundamental defect in the extradition request. The evidence is not relevant to any issue in the extradition proceedings and is therefore not probative of any issue. The judge was right to conclude that it was not admissible.

(ii) Conduct of the respondent in procuring the appellant's arrest

83. The appellant alleges that he was invited to come to the United Kingdom by Alexander Smirnov for the purpose of a business meeting, but that Mr Smirnov was a longstanding CIA agent, and the business meeting was a ruse to trick the appellant into coming to the United Kingdom so that he could then be extradited to the United States. The judge found that there were no reasonable grounds for believing that the conduct that was alleged to have constituted an abuse occurred.

84. The appellant submits that the judge was wrong to make this finding given that the appellant had given evidence to this effect (which, it is said, the judge wrongly excluded), and the respondent had refused to respond to requests for further information about the point.

85. Even if the judge was wrong to find that the conduct did not occur, so even if the appellant was in fact tricked into coming to the United Kingdom, the authorities show that this does not amount to an abuse of the court's process.

86. In *Liangsiriprasert v Government of the United States of America* [1991] 1 AC 225 an American undercover officer arranged for Mr Liangsiriprasert, who was resident in Thailand, to supply him with heroin to be imported into the United States. Mr Liangsiriprasert did what he was asked and then, as directed, went to Hong Kong to collect payment. There he was arrested, and his extradition was sought. He could not have been extradited from Thailand. He contended that it was an abuse of process for the United States to have enticed him to a jurisdiction from which extradition was available. The Privy Council considered this argument to be "entirely without merit." Lord Griffiths, giving the judgment of the Privy Council, said:

> "If the courts were to regard the penetration of a drug dealing organisation by the agents of a law enforcement agency and a plan to tempt the criminals into a jurisdiction from which they could be extradited as an abuse of process it would indeed be a red letter day for the drug barons. The appellant relied upon *R v Bow Street Magistrates, Ex parte Mackeson* (1981) 75 B Cr.App.R. 24 but that was an entirely different case in which a British citizen wanted for fraud in England was removed from Zimbabwe - Rhodesia by unlawful means, namely by a deportation order which was in the circumstances a disguised form of extradition and which circumvented all the safeguards for an accused which are built into the extradition process… In the present case the appellant… came to Hong Kong of their own free will to collect, as they thought, the illicit profits of their heroin trade. They were present in Hong Kong not

> because of any unlawful conduct of the authorities but because of their own criminality and greed. The proper extradition procedures have been observed and their Lordships reject without hesitation that it is in the circumstances of this case oppressive or an abuse of the judicial process for the United States to seek their extradition."

87. *Liangsiriprasert* was followed by the House of Lords in *Schmidt* [1995] 1 AC 339. Mr Schmidt was resident in Ireland and was wanted by a German court. A police officer in the International and Organised Crime Branch of the Metropolitan Police telephoned Mr Schmidt in Ireland and said he wished to exclude him from his enquiries (in relation to a matter that had nothing to do with the German investigation) and that he should come to England for interview. This was a ruse to persuade him to enter the United Kingdom so that he could be extradited. The ruse worked. Lord Jauncey distinguished this type of ruse from a forceable abduction. The only sanction that attached to the demand that Mr Schmidt come to the United Kingdom was the threat of arrest. It was thus unrealistic to suggest that he had no alternative but to come to the United Kingdom. There was no coercion. At worst, he was tricked.

88. So too here. The appellant came to the United Kingdom of his own free will. He was not subject to any threat or any use of force. As far as he was, on his case, tricked, that fell far short of the sort of egregious conduct that can engage the abuse jurisdiction. There has been no misuse of the 2003 Act, and no abuse of the court's process.

(iii) Expiry of limitation period

89. The appellant submits that the expiry of a limitation period can have the effect that an extradition request is an abuse of process. He relies on *Troka v Albania* [2021] EWHC 3424 (Admin) and *Karaqi v Greece* [2020] EWHC 2650 (Admin). To the extent that those authorities support the appellant's submission, that is only in the "rarest of circumstances" where there is "the clearest possible evidence of bad faith… coupled with unequivocal evidence that the sentence was… time-barred": *Mohammed v France* [2013] EWHC 1768 (Admin) *per* Foskett J at [12]. In *Troka* at [18], Fordham J (by reference to authority) demonstrates that courts "will not become embroiled with disputed questions as to the application, under the requesting state's law, of limitation periods… unless the position is very clear cut."

90. Here, there is no evidence of bad faith. To the extent that there is some evidence that the limitation period has expired, that evidence is equivocal. It is common ground that the statutory limitation period is 5 years, but that the prosecutor has up to three years of additional time to bring charges in an investigation if it is seeking evidence from a foreign country pursuant to a mutual legal assistance treaty. The conduct alleged in count 1 is said to have occurred in a period that ended in about 2016. The conduct alleged in counts 2-4 is alleged to have occurred in April – May 2013 and December 2014. The indictment was filed on 18 September 2020. The appellant says that the limitation period has expired. The respondent says that it has not. It seems that the resolution of this issue may depend on whether, and when, any request for mutual legal assistance was made. There is no clear or direct evidence on that issue.

91. The appellant relies on the written evidence of Dr Daniel Richman who says that there has been no request for mutual assistance that can suspend the limitation period. The

respondent made it clear that Dr Richman's evidence was contested, yet he was not called to give oral evidence. His evidence is based on assumptions as to what requests for mutual assistance have been made by the United States, and as to the end-date of the conspiracy that is alleged in count 1 (which, as charged, extends to 2016). He does not have direct knowledge of these matters. In the light of the authorities, this is not evidence of a nature or quality that can found a meritorious abuse application.

92. Mr Lewis is correct that this matter could have been put beyond doubt by the respondent producing the relevant requests for mutual legal assistance, and the responses. Alternatively, if there was any principled objection to doing that, the respondent could have disclosed the orders that would have had to have been made to extend (or "toll") the limitation period. We cannot, however, infer that the indictment is out of time from the absence of such evidence, and in the face of repeated statements from the respondent (which are not alleged to have been made in bad faith) that the indictment is not out of time.

Ground (3) Particulars of the offences specified in the request

93. The judge was required to decide if the documents sent to him by the Secretary of State included particulars of the offence specified in the request: section 78(2)(c). In *Dudko v Russian Federation* [2010] EWHC 1125 (Admin) Thomas LJ, at [16], explained that the meaning of "particulars" in section 78(2)(c) is the same as that under section 2(4)(c) of the Act, namely:

> "particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the category [2] territory under which the conduct is alleged to constitute an offence."

94. These words should be given their plain and ordinary meaning, without any gloss: *Von Der Pahlen v Austria* [2006] EWHC 1672 (Admin) *per* Dyson LJ at [21], *Ektor v The Netherlands* [2007] EWHC 3106 (Admin) *per* Cranston J at [8].

95. The indictment in the present case sets out the time and place at which each offence was committed, and the applicable provisions of United States law which create each of the offences. It also sets out the circumstances in which the appellant is alleged to have committed each of the offences – see paragraphs 9 – 12 above. The real issue, which impacts on ground (4), is whether sufficient detail was given to undertake a transposition exercise to identify corresponding offences under English law. The indictment sets out the legislation under which each count is charged, from which it is possible to discern the elements of each offence charged. It also sets out the facts that are relied on in respect of each offence. The indictment also explains how the case is put. Ms Nestor, in her affidavit, also explains, consistently with the indictment, how the case is put and what the respondent has to prove before the appellant can be convicted on each count. This is (more than) enough to enable the transposition exercise to take place.

Ground (4) Extradition offence

The test

96. The judge was required to order the appellant's discharge unless he was satisfied, to the criminal standard of proof, that the offence specified in the extradition request was an extradition offence: section 78(4)(b) and section 206. The question of whether a person's conduct constitutes an extradition offence is determined by reference to section 137. That question arises against the background of an extradition request which accuses the requested person "of an offence [in the United States] constituted by the conduct": section 137(1)(a). Against that background it is necessary to determine if that conduct would constitute an offence in England it if had occurred in England: section 137(2) and (3).

97. It is therefore necessary first to identify the conduct specified in the extradition request which is said to constitute the offence of which the requested person is accused. In order to identify the conduct that is said to constitute the offence of which the requested person is accused, it is necessary to ignore adventitious circumstances connected with the conduct alleged against the requested person and concentrate instead on the essence of the alleged offending: *Norris v Government of the United States of America* [2008] UKHL 16 [2008] 1 AC 920 *per* Lord Bingham, Lord Rodger, Lord Carswell, Lord Brown and Lord Neuberger at [99]. The source of this concept is a Canadian case, *In re Collins (No 3)* (1905) 10 CCC 80. Duff J said, at 100:

> "It is contended by the applicant that… you have to go through the conduct upon which the criminal charge is based, and you have to come to the conclusion that his identical acts, if done in this country, would have constituted a crime in accordance with the law of Canada. Taken with due qualifications, we need not quarrel with that; but it is obvious from the outset that there must be some qualification. In the first place, the treaty itself, which, after all, is the controlling document in the case, speaks not of the acts of the accused, but of the evidence of "criminality," and it seems to me that the fair and natural way to apply that is this - you are to fasten your attention not upon the adventitious circumstances connected with the conduct of the accused, but upon the essence of his acts, in their bearing upon the charge in question. And if you find that his acts so regarded furnish the component elements of the imputed offence according to the law of this country, then that requirement of the treaty is complied with."

Duff J also emphasised the need to focus on "the law supplying the definition of the crime which is charged" (see paragraph 114 below).

98. In *R (United States of America) v Gypsy Nirvana* [2018] EWHC 706 Admin, Leggatt LJ said at [5]:

> "[*Norris*] establishes that, in applying the test of dual criminality set out in s137 of the Act, it is necessary to look at

> the conduct of which the person is accused in the foreign state and to identify the essence of the conduct alleged which, if proved, would give rise to a criminal offence – ignoring for that purpose "mere narrative background" and "adventitious circumstances connected with the conduct of the accused" and focusing on the "substance of the criminality charged" against the person: see paras 91, 97 and 99 of the judgment."

99. This exercise therefore requires the extradition court to identify what conduct must be proved in order for the defendant to be convicted of the offence that is alleged in the extradition request and then to decide if that conduct amounts to an offence under English law.

The respondent's candidate for the extradition offences

100. The respondent has identified what it says are the equivalent offences under the law of England. Stripped of detail that is, for these purposes, unnecessary, they amount to offences of money laundering contrary to section 327 or 328 of the 2002 Act, or conspiracy to commit such offences. In relation to count 1 on the US indictment insofar as it relates to "back to back" transactions, the suggested equivalent charge is as follows:

> "Conspiracy to become concerned in an arrangement which facilitates the acquisition, retention, use or control of criminal property by another, contrary to section 1 of the Criminal Law Act 1977
>
> On or after the 1st day of January 2010 until a date unknown in 2014, Peter Weinzierl conspired with Alexander Waldstein and others to enter into or become concerned in an arrangement, namely the use of fraudulent back-to-back transactions, which he knew facilitated the acquisition, retention, use or control of criminal property, namely the proceeds of a tax evasion scheme, by Odebrecht SA."

There are other similar charges in relation to the other aspects of the criminality alleged in count 1 on the US indictment.

101. Counts 2 to 4 on the US indictment are represented by substantive counts of offences contrary to section 327 of the 2002 Act. For our purposes the equivalent charge representing count 2 is all that we need to specify. It is as follows:

> "Converting criminal property, contrary to section 327(1) of the Proceeds of Crime Act 2002
>
> Peter Weinzierl on the 22nd day of April 2013, converted property, namely $24,050,833.33, by causing it to be transferred from an account in New York to the Austrian Bank, which, as he knew or suspected, constituted or represented other's benefit from criminal conduct, namely the proceeds of tax evasion."

102. The ingredients of the offence created by section 328(1) of the 2002 Act were addressed by the Supreme Court in *R v GH* [2015] UKSC 24 [2015] 1 WLR 2126. In that case the defendant opened bank accounts and gave a fraudster the associated bank cards and documentation. The fraudster then committed a series of frauds, as a result of which funds were transferred from the victims into the accounts that had been opened by the defendant. The defendant was charged with an offence under section 328(1) of the 2002 Act. The issue was whether criminal property had to exist at the time of entering into the arrangement within the meaning of section 328(1). The Supreme Court held that for the purposes of this offence the "criminal property" had to have that quality "by reason of criminal conduct distinct from the conduct alleged to constitute the actus reus of the money laundering offence itself": *per* Lord Toulson at [32]. It also had to have that quality at the time of the alleged money laundering offence. At [20] Lord Toulson said:

> "…criminal property for the purposes of sections 327, 328 and 329 means property obtained as a result of or in connection with criminal activity separate from that which is the subject of the charge itself. In everyday language, the sections are aimed at various forms of dealing with dirty money (or other property). They are not aimed at the use of clean money for the purposes of a criminal offence, which is a matter for the substantive law relating to that offence."

103. That did not mean that the property had to exist at the time when the defendant entered into or became concerned in the arrangement. It was sufficient if the property existed at the time that the arrangement was put into operation: *per* Lord Toulson at [40] and [47]. As can be seen from the passage quoted above the same principles apply to an offence under section 327.

Submissions and discussion

104. In oral argument Mr Lewis advanced many reasons why the conduct set out in the extradition requests cannot be transposed in the way suggested by the respondent. Although the argument was put in different ways, he said that the respondent faced 7 insurmountable hurdles. First, the essence of the offence alleged in the extradition request concerned the transfer of legitimate funds for the purpose of future unlawful activity (for example, the bribing of foreign officials), rather than the transfer of funds which amounted to criminal property. Second, the respondent had not given sufficient particulars of the alleged tax evasion scheme. Third, the offence that had been charged, "promotional money laundering", did not require an anterior predicate offence. That is to be distinguished from the offence under the 2002 Act. The decision in *GH* requires the section 328(1) arrangement to act on the proceeds of a previous, distinct, predicate offence. Fourth, the tax evasion in Brazil could not be transposed to an offence under English law. That offence was committed by Odebrecht consolidating the expenses of a foreign subsidiary. Under English law a tax deduction cannot be claimed for such expenses. Fifth, if Odebrecht secured a pecuniary advantage from tax evasion, that advantage did not taint the legitimate trading income of its foreign subsidiaries. It was the transfer of that income that was said to amount to money laundering. Sixth, the extradition request used inconsistent language to describe the tax offending. There were references to "tax planning" and "tax avoidance" and "tax evasion", so it could not be shown, to the criminal standard of

proof, that the conduct alleged involved the mens rea required for a tax fraud that would be an offence in English law. Seventh, the respondent had to show a nexus with the United States, but there was no sufficient nexus. For at least some of the offending the only connection is that the funds were denominated in United States dollars.

105. In our view the respondent can surmount the majority of the hurdles identified by Mr Lewis without difficulty. In relation to particularisation, it was not necessary for the respondent to provide precise details of the tax evasion scheme which was said to be the source of the funds alleged to have been laundered. The indictment explained that Odebrecht, the parent company in Brazil, fraudulently inflated expenses allowable against its tax liability. The respondent was not required to provide detailed evidence of how the scheme operated. The fact that the way in which Odebrecht evaded tax could not have arisen under the tax system in this jurisdiction is nothing to the point. In this jurisdiction a money laundering offence requires proof that the defendant dealt with criminal property in one of a variety of ways. Criminal property may be the result of criminal conduct outside the United Kingdom, the conduct being unlawful under the criminal law in the foreign jurisdiction. That is clear from the exception provisions in sections 327 to 329 of the 2002 Act. The use of terms such as "tax planning" in the request did not alter the core allegation made in the request, namely that accounts were provided by the appellant (and others) into which the benefit flowing from the tax fraud was paid. The nexus with the United States was established via the participation of at least one US citizen in the alleged fraud and the use of US brokerage accounts in the course of that fraud.

106. Mr Lewis in his final submissions placed particular emphasis on an analysis of how the appellant could be convicted of the offences in the United States. By reference to the affidavit of Julia Nestor, he argued that the US offence of conspiracy to commit money laundering (count 1 on the indictment) had three core elements. First, the prosecution had to prove an agreement to commit a money laundering offence. Second, there had to be proof that the appellant was party to that agreement. Third, the object of the agreement was to commit an unlawful act. The indictment specified three unlawful acts. Two were purely forward looking. One related to engaging in a monetary transaction in property derived from a specified unlawful activity. Ms Nestor's evidence was that the prosecution only needed to prove one of those objects to convict the appellant. Whilst the indictment itself was conjunctive in relation to the unlawful acts, the evidence was that only one unlawful act needed to be proved as an object of the criminal agreement. Since two of the unlawful acts were forward looking and did not require the property being used to be the proceeds of an offence already committed, the appellant could be convicted of the offence when he could not be convicted in an English court. By that route Mr Lewis argued that the US offence could not be transposed into the offence of money laundering as defined in section 328 of the 2002 Act.

107. Ms Davidson relied on the approach in *Norris*. At [65] the House of Lords set out the competing tests:

> "Before turning, as will be necessary, to a brief history of English extradition law prior to the Extradition Act 2003, particularly with regard to the so-called double criminality rule, it is useful to stand back from the detail and recognise the

> essential choice that the legislature makes in deciding just what the double criminality principle requires. It is possible to define the crimes for which extradition is to be sought and ordered (extradition crimes) in terms either of conduct or of the elements of the foreign offence. That is the fundamental choice. The court can be required to make the comparison and to look for the necessary correspondence either between the offence abroad (for which the accused's extradition is sought) and an offence here, or between the conduct alleged against the accused abroad and an offence here. For convenience these may be called respectively the offence test and the conduct test."

108. Following a detailed analysis of the relevant legal principles and authority, the House concluded that the conduct test, which was described as the wider construction, was to be applied. In relation to any extradition request, the court was required to concentrate on the essence of the acts alleged to have been committed by the requested person. In *Norris* the first count on the US indictment charged a conspiracy to operate a price fixing cartel in the US. The offence was in effect one of strict liability. It required no proof of dishonesty. There was no relevant time when, under UK law, it was unlawful simply to operate a price fixing agreement. The House had no difficulty in concluding that it was impossible to transpose the US offence into an offence contrary to UK law. However, there were also three charges of conspiracy to obstruct justice in relation to an official proceeding, namely the grand jury investigation into price fixing. These were said to translate into UK offences of conspiracy to pervert the course of public justice. It was argued that this transposition was not possible because there could not have been a course of public justice when there was no criminal offence. The House disagreed. The mere fact that the result of the investigation in Mr Norris' case was a charge of simple price fixing, which does not constitute an offence under English law, was no reason to hold that it would not have been an offence under English law to obstruct the progress of an equivalent investigation by the appropriate body in this country.

109. On behalf of the requesting authority, it is argued that the same principle can be applied here. Although there is no offence of promotional money laundering in the UK, namely receiving funds with a view to those funds being put to a criminal purpose, that is not the essence of the conduct alleged against the appellant. The conduct alleged is as set out in paragraphs 43 to 45 of the indictment as set out above.

110. Between paragraphs 40 and 45 of the indictment what is termed "Overview of the Criminal Scheme" is set out. It begins with an explanation of the activity of Odebrecht. It is said that the company overstated the expenses of its foreign subsidiaries in order to deprive the Brazilian government of over $100 million in taxes. The money laundering scheme in part was designed to facilitate that scheme. In furtherance of the scheme a financial structure for moving money around the world was devised. From 2006 the appellant with others advanced the scheme by causing millions of dollars to be sent from Odebrecht's accounts in New York to the bank controlled by the appellant. That money was then moved onwards to further criminal activity.

111. These paragraphs were not mere narrative. The text of each count on the indictment which we have set out above was preceded by a paragraph reading "the allegations contained in paragraphs one through 80 are realleged and incorporated as if fully set forth in this paragraph". On that basis the essence of the conduct alleged in the US indictment included the allegation that the funds transferred into the account under the control of the appellant were the proceeds of the tax fraud carried out by Odebrecht against the Brazilian government. Count 1 of the US indictment alleged a conspiracy to "….transport, transmit, and transfer, and attempt to transport, transmit and transfer monetary instruments and funds from a place in the United States to and through a place outside the United States and to a place in the United States from and through a place outside the United States with the intent to promote the carrying on of one or more specified unlawful activities…" On the facts set out in the indictment the essence of this conduct included the receipt of criminal property in a bank account controlled by the appellant.

112. However, Julia Nestor's affidavit makes clear that, in the criminal proceedings in the US court, the prosecution needs to prove the appellant's participation in only one of the specified unlawful activities. Two of the unlawful activities related to future criminality. As Mr Lewis put it, US law criminalises forward looking money laundering which is not the offence of money laundering under English law. English law requires receipt of or dealing in criminal property whereas count 1 on the US indictment could be proved against the appellant on the basis that money went out of an account in his control and became criminal property thereafter. Thus, the transposition of the charge of conspiracy to become concerned in a money laundering arrangement is not possible. Despite the wording of count 1 on the US indictment and the factual background in paragraphs 40 to 45 of the indictment, Ms Nestor's evidence demonstrates that the essence of the conduct might not equate to a criminal offence in this jurisdiction.

113. The same does not apply to counts 2 to 4 on the US indictment. Ms Nestor's commentary on these counts is limited. She explains that in relation to counts 2 and 3 the prosecution will have to prove two wire transfers from an Odebrecht account to Foreign Bank 1 and that the appellant could be convicted as a secondary party. She says nothing more. She gives a similar explanation in respect of count 4 though the transfer in this case was from Foreign Bank 2 to a US account. There is no question that the appellant could be convicted of the offences in counts 2 to 4 or any of them other than on the basis that he was criminally involved in dealing in criminal property i.e. the proceeds of tax fraud. It will be for the US prosecutor to prove that the funds were criminal property. The indictment does not permit some other means of achieving a conviction on any of those counts. The transposition of offences contrary to section 327 of the 2002 Act is justified.

114. The appellant raised many other issues as to why he says that the conduct alleged does not involve an extradition offence. These included that the tax fraud would not amount to an offence under English law. That is because the tax fraud was committed by Odebrecht SA understating the tax liability of one of its foreign subsidiaries. However, under English law, a parent company is not responsible for the tax liabilities of its subsidiaries. Accordingly, the conduct alleged would not amount to an offence under English law. We are not inclined to accept that submission. The essence of the tax fraud that is alleged is that Odebrecht deceived the tax authorities as to its

tax liabilities. That is an offence under English law which could be charged in different ways. The fact that the tax liability arose because of a particular feature of the local law, and that the tax liability in England would (obviously) have been different, is nothing to the point. That is an adventitious feature of the offending rather than being part of the essence of the alleged offence. Support for this approach can be derived from both *Collins* and *Norris*. In *Collins* the requested person's extradition was sought from Canada to the United States for an offence of perjury, in that he had made a false deposition before a competent Californian tribunal or officer. It was said that this was not an extradition offence because it was not, in Canada, an offence to make a false deposition before a competent Californian tribunal or officer. Duff J rejected the argument at 101 and 103:

> "I apprehend that in the case of perjury, the accused cannot be heard to say, 'the oath on which the charge is based was administered by AB, an officer who had no authority to administer oaths in Canada (although duly authorized in the place where the oath was taken); and, consequently, if I had done here the identical thing I did there (viz: the taking of an oath before AB), perjury could not have been successfully charged against me.' The substance of the criminality charged against the accused is not that he took a false oath before AB but that he took a false oath before an officer who was authorized to administer the oath…
>
> …if you are to conceive the accused as pursuing the conduct in question in this country, then along with him you are to transplant his environment; and that environment must, I apprehend, include, so far as relevant, the local institutions of the demanding country, the laws effecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned, always excepting, of course, the law supplying the definition of the crime which is charged."

115. In *Norris*, the requested person was sought for obstructing a criminal investigation into price fixing in the carbon products industry being carried out by a Pennsylvania grand jury. The House of Lords held that it was adventitious that the investigation was being carried out by a grand jury in Pennsylvania. The essence of the offence was that the requested person had obstructed a criminal investigation by the duly appointed body.

116. Similarly, the substance of the criminality alleged against Odebrecht is not that it misstated the liabilities of a foreign subsidiary, but that it deceived the tax authorities as to its liability for tax.

117. The consequence of the foregoing is that we shall order the discharge of the appellant in relation to the charge represented in count 1 of the US indictment. Otherwise, we reject the argument that the request did not disclose extradition offences.

Ground (5) Passage of time

118. The issue is whether it would be unjust or oppressive to extradite the appellant by reason of the passage of time since he is alleged to have committed the extradition offences: section 82(a). The test for whether it would be "unjust" focusses primarily on the risk of prejudice to the appellant in the criminal proceedings in the United States. The test for whether it would be "oppressive" focusses primarily on any hardship resulting from changes in the appellant's circumstances. The twin test covers all cases where to return the appellant would not be fair: *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779 *per* Lord Diplock at 782-783.

119. In *Eason v United States of America* [2020] EWHC 604 (Admin) Leggatt LJ said, at [27] – [28]:

> "27. As regards injustice, or that aspect of injustice which relates to a risk of prejudice in the conduct of the criminal proceedings in the foreign state, the following points emerge…:
>
> i) If, because of the passage of time, a fair trial is now impossible, it would clearly be unjust to order extradition;
>
> ii) A court should, however, be very slow to come to such a conclusion where the state making the request is one that is shown to have, or may be presumed to have, appropriate safeguards to protect the defendant against unfairness resulting from the passage of time in the trial process;
>
> iii) The possibility or otherwise of a fair trial is not the only relevant consideration, as the question is not whether it would be unjust or oppressive to try the accused but whether it would be unjust or oppressive to extradite him.
>
> 28. As regards oppression in the form of hardship, it is clear that the test goes beyond mere or ordinary hardship, which is a comparatively common consequence of an order for extradition, and will not easily be satisfied... Where there has been culpable delay on the part of the requesting state, that is a relevant factor and may tip the balance in a case where the requested person is not himself to blame... Other relevant factors may include matters such as the seriousness of the offence, and the impact of extradition on other family members. Ultimately, an overall judgment on the merits is required and it is important to stay focused on the words of the statute itself..."

120. The appellant is alleged to have committed the extradition offences between 2006 and 2016. The United States authorities started to investigate Odebrecht in about 2015. A request for mutual legal assistance was issued to Austria in May 2018. The Grand Jury indictment was issued in September 2020. The request for a provisional arrest certificate was issued on 2 March 2021. The appellant was arrested on 25 May 2021 and a full extradition request was issued on 29 June 2021. The 3½ years since then

have been taken up with the extradition proceedings. It is not suggested that the United States is culpable for any delay either before or since 2021.

121. As to whether it would be unjust to extradite the appellant, much of the evidence relied on is documentary. The appellant says that some documents have been lost or destroyed, but the respondent's evidence indicates that much documentation still remains, including original agreements and contemporaneous financial documentation. The respondent has indicated that it will rely on witness testimony, and it is reasonable to infer from the further information that the witness testimony may be critical to the respondent's case on the appellant's state of knowledge about the underlying criminal purpose of the transactions. It is also likely that the passage of time will have an impact on the quality of witness' recollections as to oral conversations from many years ago. There is specific evidence that some witnesses have difficulty recollecting some of the detail. For example, Ms Mahoric says "the Indictment relates to events that occurred 10 years ago or more. As a result, although I can recall some of the transactions (with the help of the documentation), I may not have a full grasp of the specific details of each transaction." This is commonplace in legal proceedings, and is precisely the type of issue that can fairly be accommodated during the trial process. It does not mean that it would be unjust to extradite the appellant.

122. The appellant points to the death of two witnesses. Karl Hempel died in October 2015. He was a lawyer on the supervisory board of Meinl Bank Antigua and he approved a number of transactions. There is, however, no evidence that Mr Hempel would have been in a position to provide evidence that cannot be obtained from other sources.

123. Peter Glazier was a chairman of Meinl Bank Antigua. He provided a witness statement in these proceedings, and gave oral evidence on 14 June 2022. He died on 4 September 2022. That means that one effect of the passage of time is that the appellant will not be able to call him as a witness in criminal proceedings in the United States. However, the appellant will be able to seek to rely on his evidence in any criminal trial. Although the respondent (understandably) did not guarantee that the evidence of Mr Glazier would be admitted, it provided information that indicates that his evidence would be treated in much the same way as it would in a court in England and Wales. It would likely be regarded as hearsay, and would therefore be subject to a general rule rendering it inadmissible. However, there is an exception to that general rule for former testimony of a declarant who is unavailable at trial due to the declarant's death, where additional criteria are met. It would also be open to the appellant to contend that he has been prejudiced due to the passage of time. Having regard to the safeguards available to the appellant at trial to address any prejudice occasioned by the passage of time, it has not been shown that extradition would be unfair.

124. As to oppression, the appellant relies on his age, his health and the impact of extradition on his family, particularly his wife and his mother. The appellant's age is not a factor that would render extradition oppressive. He is far from advanced old age. The evidence suggests that the deterioration in his health is attributable to the extradition proceedings, rather than the passage of time. In any event, there is evidence that the respondent will provide appropriate health care.

125. The judge was right to find that extradition is not barred by the passage of time.

Ground (6) Article 3 ECHR

The test to be applied

126. It is common ground that the judge should have discharged the appellant if there are substantial grounds for believing that there is a real risk that he will be exposed to inhuman or degrading treatment owing to the conditions in which he will be detained in the United States: section 87 of the 2003 Act read with *Soering v United Kingdom* (1989) 11 EHRR 439 at [91].

Submissions

127. Mr Watson says this test is met. He relies on the evidence of Ms Baird and also the decisions in *Love* and *Rae v United States of America* [2022] EWHC 3095 (Admin). Ms Davidson says that the test is not met. She relies on assurances provided by the respondent as to the conditions in which the appellant will be incarcerated if he is remanded in custody. She also relies on previous decisions where challenges to the prison conditions in the United States have been rejected: *Hafeez v United States* [2020] EWHC 155 (Admin) [2020] 1 WLR 1296 *per* William Davis J at [59] – [67], *Babar Ahmed v United Kingdom* (2010) 51 EHRR SE6 at [126] – [131], *Hafeez v United Kingdom* appln 14198/20 (28 March 2023) at [59] – [66].

The evidence

128. It is common ground that if the appellant is extradited then he might be incarcerated at the Metropolitan Detention Center in Brooklyn, New York. Mr Watson submits that there are substantial grounds for believing that there is a real risk that incarceration at the Metropolitan Detention Center would expose the appellant to inhuman or degrading treatment. At the hearing before the judge, the appellant also relied on evidence as to the conditions at the Essex County Correctional Facility (which is addressed by Mr Troisi). Mr Watson confirmed that the appellant no longer relies on that aspect of the case, and it is not therefore necessary to consider the evidence of Mr Troisi (including the proposed fresh evidence of Mr Troisi).

129. Ms Baird worked for the Federal Bureau of Prisons in the United States from 1989 to 2016. Since her retirement she has worked as an independent prison consultant. She was the warden at the Metropolitan Correctional Center in New York between 2014 and 2016, and in that capacity she was responsible for the overall operation and all components of the prison. The Metropolitan Correctional Center and the Metropolitan Detention Center are sister prisons and share a common design.

130. The evidence of Ms Baird points to concerns about the general conditions, overcrowding, understaffing and cell-space.

131. General conditions: Ms Baird points to a description given by the "Federal Defenders of New York" that the conditions were inhumane and that they violated the constitution. In June 2016 a report issued by the National Association of Women Judges said that the conditions for women at the Metropolitan Detention Center were "unconscionable". There were no windows, so no fresh air or sunlight, the women

were in a room 24 hours a day and 7 days a week, with no opportunity for exercise. Subsequently, Judge Pollack refused to remand a female defendant to custody at the Center because of her concerns about the conditions for female inmates. In *Love*, this court indicated (at [107]) that there was no reason to suppose that the conditions for men were any better.

132. Ms Baird says that social visits at the Metropolitan Detention Center are limited when compared to federal prisons for sentenced offenders, and that between March 2020 and March 2021 there were no social visits at all because of the covid pandemic. A defendant who had kept a log said that he had been in lockdown conditions for 137 out of 245 days. At the time of her report, inmates were permitted one social visit per week. Legal visits are permitted, but these are sometimes cancelled because of emergencies or competing priorities. Ms Baird also refers to decisions of individual judges in the United States where adverse comment has been made about prison conditions. In October 2016, Federal Judge Cheryl L Pollak commented on what she called "third world" conditions inside the Metropolitan Detention Center, and refused to remand a female defendant there. In February 2022, Federal Judge Sidney H Stein decided to grant bail to a defendant because of the conditions at the Metropolitan Detention Center, citing overcrowding and staffing issues.

133. Overcrowding: In August 2021, the Metropolitan Correctional Center was closed following the high-profile suicide of an inmate, Jeffrey Epstein. Most of the inmates were transferred to the Metropolitan Detention Center, substantially increasing its population and taking it above its design (or "rated") capacity (but within its adjusted designated capacity).

134. Understaffing: The Office of the Inspector General, one of the main oversight authorities published a report in November 2020 which identified the shortage of medical staff at the Metropolitan Detention Center as one of the biggest challenges.

135. Special Housing Unit: The special housing unit is designed to house inmates who pose a specific security concern, or have a need for protective custody. This might apply to the appellant both because of the risk of suicide, and because he would be at risk of extortion or assault owing to his wealth. Ms Baird says that if the appellant were detained in the special housing unit then he would be restricted to his cell for 23-24 hours each day. He would be provided with one hour of recreation a day for 5 days a week, but that might be set aside if there were staff shortages or emergency situations. If he were housed alone then he would receive recreation on his own as well.

136. Cell-size: Ms Baird says that she has witnessed occasions where 3 or more inmates have been placed in a cell designed for 1 or 2 inmates. This has occurred because of the immediate needs of the institution. Ms Baird does not say how many times this has occurred, and does not say whether it has occurred at the Metropolitan Detention Center. The Federal Bureau of Prisons' Program Statement on Rated Capacities for Bureau Facilities states that in low security facilities (like the Metropolitan Detention Center) double occupancy cells have a floor area of between 65 square feet and 120 square feet (so between 6 and 11 square metres). This includes "the space occupied by beds, desks, plumbing fixtures (except showers) and closets." Ms Baird's evidence is that the unencumbered space in each double cell at the Metropolitan Detention Center is 24.76 square feet (so 2.3 square metres). This was not disputed by the respondent,

and it is consistent with the Program Statement figures for total space. Ms Baird also says that this standard is "non-mandatory" and that most facilities, including the Metropolitan Detention Center, do not meet it.

Assurance

137. In its letter of 6 May 2022, the United States Department of Justice Federal Bureau of Prisons provided an explicit assurance: "The BOP… can assure the Court that Mr Weinzierl will be housed in legally sufficient and constitutional conditions." The assurance that he will be housed in constitutional conditions necessarily includes an assurance that he will not be held in conditions that amount to cruel and unusual punishment contrary to the eighth amendment to the United States constitution. The assurance that he will be housed in legally sufficient conditions means that he will be held in accordance with the Bureau of Prisons' policies and procedures. These include procedures to ensure that facilities are maintained in a sanitary condition and that Mr Weinzierl would be permitted to receive social visits for 1-hour a week, that he would be entitled to several hours of outdoor recreation per week in open air facilities that are exposed to sunlight.

The case law

138. A minimum threshold of severity must be met before treatment can be regarded as "inhuman or degrading" within the meaning of Article 3. It usually involves bodily injury or intense physical or mental suffering, but treatment may also be degrading contrary to Article 3 ECHR if it "humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking [his] moral and physical resistance": *Muršić v Croatia* (2017) 65 EHRR 1 at [98].

139. Whether that minimum threshold is met in a particular case is highly fact sensitive. The duration of the treatment is relevant. So too, in principle, is the age, state of health and any vulnerability on the part of the requested person, as well as the likely physical or mental effect of the treatment. These types of factors can "play an important part" in determining whether the minimum threshold is met: *Muršić* at [103] and [122]).

140. There is a strong, but rebuttable, presumption that there is a violation of Article 3 if the space available to a detainee in such accommodation is less than 3 square metres: *Muršić* at [124] - [125]. Normally, the presumption will only be rebutted in cases of "short, occasional and minor reductions in the required personal space": *Muršić* at [130].

141. Where the space available is more than 4 square metres then no issue arises with regard to the adequacy of cell space, although other aspects of the regime may be capable of amounting to inhuman or degrading treatment: *Muršić* at [140].

142. Where the space available is in the range of 3-4m^2 then (*Muršić* at [139]):

> "the space factor remains a weighty factor in the Court's assessment of the adequacy of conditions of detention. In such instances a violation of art 3 will be found if the space factor is

> coupled with other aspects of inappropriate physical conditions of detention related to, in particular, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of room temperature, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements."

143. For these purposes, the available cell-space should exclude the space occupied by an "in-cell sanitary facility" but should allow for space occupied by furniture: [114].

144. In *Rae* Chamberlain J held, at [70], that the minimum space requirements laid down in *Muršić* also apply in the context of extradition to a non-ECHR state. Ms Davidson, realistically, does not seek to re-open that issue before us.

145. In *Love*, this court identified evidence of concerns about conditions at the Metropolitan Detention Center, which was based on some of the same sources as those identified by Ms Baird: [102] – [111]. The court considered that the extradition of Mr Love would be oppressive because of the impact that suicide prevention measures would have on him, having regard to his particular mental conditions: [115] – [122].

Are there substantial grounds for believing that there is a real risk that the appellant will be exposed to inhuman or degrading treatment owing to the conditions in which he will be detained in the United States?

146. We have considered the totality of the evidence, both that which was before the judge and the new evidence on which the appellant seeks to rely.

147. Leaving aside the decision in *Love* (where extradition was regarded as oppressive having regard to the particular mental health condition of the requested person), the courts have held that extradition to the United States does not generally give rise to a real risk of inhuman or degrading treatment by reason of prison conditions: *Hafeez v United States* [2020] EWHC 155 (Admin) [2020] 1 WLR 1296 *per* William Davis J at [59] – [67], *Babar Ahmed v United Kingdom* (2010) 51 EHRR SE6 at [126] – [131], *Hafeez v United Kingdom* appln 14198/20 (28 March 2023) at [59] – [66].

148. Ms Baird's evidence, and the underlying material from which she draws and which she has exhibited to her reports, identifies serious concerns about the regime at the Metropolitan Detention Center. It is not, however, certain that the appellant will be detained at the Metropolitan Detention Center. The respondent has provided explicit assurances about the regime that will be applied to the appellant if he is detained. The appellant has not shown that we should not rely on that assurance. No evidence was given of the United States ever having breached assurances given in extradition proceedings. If detention of the appellant at the Metropolitan Detention Center would breach the assurance, then he would have to be detained elsewhere in conditions that comply with the assurance, or else released on bail.

149. This goes a long way towards answering the general concerns that were raised by Ms Baird, including concerns about overcrowding, understaffing, visiting arrangements and time outside cells.

150. It does not, however, adequately address the issue of cell-space. There is no precise correlation between the eighth amendment to the United States constitution and article 3 ECHR. The assurance to comply with the constitution does not therefore necessarily guarantee compliance with article 3 ECHR. Cell-space is measured in a different way by the United States authorities compared to the approach taken in *Muršić*, and, in particular, it includes the space occupied by a "sanitary facility" (which in *Muršić* was taken as being $1.9m^2$). Given that the respondent's own documents suggest that a double cell might be as small as 6 square metres (which includes the space occupied by a sanitary facility) it follows that the available space for each of the two inmates might well be less than 3 square metres. On this basis, there are substantial grounds for believing that there is a real risk that the appellant will be exposed to inhuman or degrading treatment. The decisions in *Hafeez* and *Barbar Ahmad* do not assist the respondent, because they do not address this point.

151. We have concluded that we should take the same approach as was adopted by Chamberlain J in *Rae.* In *Rae* there were several factors which led the court to be concerned that the appellant was at risk of breach of his Article 3 rights. In this case it is only the issue of cell space which concerns us. We shall give the respondent an opportunity to give a specific assurance on the issue. The parties must agree the terms of the request for supplementary information prior to the handing down of this judgment.

152. Both medical experts agree that the appellant suffers from an anxiety disorder and a moderate depressive episode. Professor Rix said he is at low risk of suicide but if he were extradited to the United States, and imprisoned there, his mental health would deteriorate and his risk of suicide would increase and there would then be a high risk of suicide. Dr Galappathie also says that the risk of self-harm and suicide is currently low, but if he were extradited to the United States his depression and anxiety disorder would likely worsen, increasing the risk of self-harm and potential suicide:

> "I am in agreement with Professor Rix's oral evidence that the risk of deterioration in his mental state upon extradition would be high and the risk of suicide following a deterioration in mental state in the event of his extradition would be high and that these are both serious risks in his case.
>
> In my opinion if he was extradited to the USA and remanded to custody within a USA prison or detention centre, if he found the conditions within prison were harsh, this is likely to further worsen his mental health and increase his risk of self-harm and suicide. In my opinion being extradited to the USA and being separated from his wife he is currently living with in the UK would also worsen his mental health as he would not have the same level of support whilst in prison."

153. The further information provided by the respondent indicates that every prison in the United States maintains a Health Services Unit which provides mental health care. Depression is common in the incarcerated population, and the authorities have extensive experience of managing prisoners suffering from depression and other serious mental illnesses, including those with suicidal ideation. Within 24 hours of admission to prison, medical staff are required to screen a prisoner for signs of

suicide. If an inmate's behaviour is suggestive of suicide or self-harm then a thorough suicide risk assessment is undertaken. A psychologist will then determine the appropriate intervention to best meet the prisoner's needs, including, potentially, placing them on suicide watch in the institution's designated suicide prevention room.

154. The approach to be taken to deciding whether extradition would be unjust or oppressive due to a risk of suicide was summarised by Aikens LJ in *Turner v Government of the United States of America* [2012] EWHC 2426 (Admin) at [8]:

> "(1) The court has to form an overall judgment on the facts of the particular case…
>
> (2) A high threshold has to be reached in order to satisfy the court that a requested persons physical or mental condition is such that it would be unjust or oppressive to extradite him…
>
> (3) The court must assess the mental condition of the person threatened with extradition and determine if it is linked to a risk of a suicide attempt if the extradition order were to be made. There has to be a substantial risk that [the appellant] will commit suicide. The question is whether, on the evidence the risk of the appellant succeeding in committing suicide, whatever steps are taken is sufficiently great to result in a finding of oppression . . .
>
> (4) The mental condition of the person must be such that it removes his capacity to resist the impulse to commit suicide, otherwise it will not be his mental condition but his own voluntary act which puts him at risk of dying and if that is the case there is no oppression in ordering extradition…
>
> (5) On the evidence, is the risk that the person will succeed in committing suicide, whatever steps are taken, sufficiently great to result in a finding of oppression? . . .
>
> (6) Are there appropriate arrangements in place in the prison system of the country to which extradition is sought so that those authorities can cope properly with the person's mental condition and the risk of suicide?...
>
> (7) There is a public interest in giving effect to treaty obligations and this is an important factor to have in mind . . ."

155. The key issue in almost every case concerns the efficacy of measures to prevent a successful suicide attempt: *Polish Judicial Authority v Wolkowicz* [2013] EWHC 102 (Admin) [2013] 1 WLR 2402 *per* Sir John Thomas P at [10].

156. On the evidence in the present case, the risk arises if the appellant is extradited to the United States and then imprisoned in the United States. The evidence shows that in that event he will be subject to screening and that appropriate protective measures will, if necessary, be put in place. There is no sufficient evidence that those measures

are ineffective to prevent a successful suicide attempt. Nor is there any evidence that the measures that would be implemented would themselves be oppressive. If he is detained at the Metropolitan Detention Center then the measures might include being housed in the special housing unit. In *Love*, this court considered that was oppressive. However, that was because of Mr Love's particular circumstances: he suffered from Asperger's syndrome as well as depression and severe eczema. Solitary confinement would have "especially negative consequences" for him ([80]). The medical evidence indicated that "[d]epression in someone with Asperger syndrome is very different from depression in someone without Asperger syndrome" and that his "unique combination of mental and physical conditions made him much more high-risk than prisoners who only suffer from one of these conditions" ([81]). Lord Burnett CJ and Ouseley J said at [119]:

> "All the evidence is that [suicide watch] would be very harmful for his difficult mental conditions, Asperger syndrome and depression, linked as they are; and for his physical conditions, notable eczema, which would be exacerbated by stress. That in turn would add to his worsening mental condition, which in turn would worsen his physical conditions. There is no satisfactory and sufficiently specific evidence that treatment for this combination of severe problems would be available in the sort of prisons to which he would most likely be sent."

157. The appellant does not have a comparable constellation of health conditions. He suffers from depression, in common with a significant proportion of the prison population. The Bureau of Prisons are experienced in dealing with prisoners who suffer from depression, including those who pose a risk of suicide. There is no evidence that suicide watch would have the same type of harmful consequences for the appellant as those that were feared for Mr Love.

158. The judge was therefore right not to discharge the appellant on this ground.

Ground (8) Article 8 ECHR

159. The issue that arises under article 8 ECHR is whether the judge was wrong to conclude that extradition is compatible with the appellant's right to respect for private and family life.

160. Neither party advanced oral submissions under article 8 ECHR. Mr Watson recognised that it does not materially add to his case under grounds (6) and (7). If those grounds succeed then there is no need to advance this ground of appeal. Conversely, if (as we have decided) those grounds fail, then there is no practical scope for a successful appeal under article 8 ECHR.

161. For completeness, we dismiss this ground of appeal. The appellant accepts that the judge accurately set out the well-established legal framework, including the obligation on a judge to identify those factors that weigh in favour of, and against, extradition.

162. The appellant says that the following factors weigh against extradition: (1) the appellant's fragile mental health and the deleterious impact that extradition would have, (2) the impact of prison conditions in the United States on the appellant's well-

being, (3) the improper manner in which the appellant was lured to the United Kingdom, and (4) the passage of time.

163. As against that, there is a strong public interest in honouring the United Kingdom's extradition treaty with the United States. The offending alleged is serious within the spectrum of offending of this type, involving the laundering of amounts of money which, if the offence occurred in England, would place the case at or towards the top of the highest harm category in the sentencing council guideline. If convicted, it is likely that a lengthy term of imprisonment would be imposed. The Austrian investigation would not discharge, and is unlikely significantly to reduce, the public interest in the extradition proceedings. The United States seek to prosecute the appellant for offences that abused the United States financial system by laundering the proceeds of fraud and bribery through its financial institutions.

164. The appellant does not place particular reliance on any aspect of his family life. There are no dependent children, and he does not have any caring responsibilities. The aspect of private life on which reliance is placed (the impact on the appellant's mental health) is more directly covered by section 91 of the 2003 Act. For the reasons we have given, extradition would not be oppressive by reason of its impact on the appellant's mental health. It would have a significant impact on the appellant's right to respect for his private life, but that is proportionate to and justified by the legitimate aims of the prevention of crime and the protection of the rights and freedoms of others. The judge was right to conclude that extradition of the appellant is compatible with his rights under article 8 ECHR.

Ground (9) Specialty protection

Background

165. The judge sent the case to the Secretary of State for her decision as to whether the appellant is to be extradited. The Secretary of State was then required to decide if she was prohibited from ordering the appellant's extradition under section 95 of the 2003 Act (specialty). If so, she was required to order his discharge. Otherwise (and subject to other considerations which are not here relevant) she was required to order the appellant's extradition to the United States.

166. The Secretary of State was prohibited from ordering the appellant's extradition under section 95 if there are no specialty arrangements with the United States: section 95(1). There are specialty arrangements if and only if the appellant cannot be dealt with for an offence committed before his extradition unless he is first given an opportunity to leave the United States or else the offence falls within section 95(4): section 95(3). Leaving aside cases where the Secretary of State consents or the requested person waives their right to specialty protection (neither of which apply here), the only offences within section 95(4) are the offence in respect of which the person is extradited, or another extradition offence that is disclosed by the same facts.

167. The Secretary of State (acting through a Minister of State) decided that there are specialty arrangements with the United States. She said:

> "…the 'Rule of Specialty' is set out in Article 18 of the extradition treaty between the United Kingdom and the United

> States. The Minister of State notes too that the existence of speciality arrangements between the UK and the US has been endorsed by a series of decisions of the High Court: see *Welsh and Another v Secretary of State for the Home Department* [2007] 1 WLR 1281; *R (Bermingham) v Secretary of State for the Home Department* [2007] QB 727; *Stepp v The Government of the United States, The Secretary of State for the Home Department* [2006] EWHC 1033 (Admin); and *Norris v United States* [2009] 995 (Admin); *Barnes v United States* [2011] EWHC 2218 (Admin). In light of those decisions, the Secretary of State does not consider there are no speciality arrangements with the US on any of the grounds you raise."

Case law

168. This court has previously found that there are specialty arrangements with the United States, within the meaning of section 95(1): *Welsh and Another v Secretary of State for the Home Department* [2006] EWHC 156 (Admin) [2007] 1 WLR 1281 *per* Ouseley J at [57], [62], [84] – [85], [135] – [139] and [147], *R (Bermingham) v Secretary of State for the Home Department* [2006] EWHC 200 (Admin) [2007] QB 727 *per* Laws LJ at [149], *Stepp v The Government of the United States, The Secretary of State for the Home Department* [2006] EWHC 1033 (Admin) *per* Tugendhat J at [25] and [41], *Norris v United States* [2009] EWHC 995 (Admin) *per* Laws LJ at [50] – [57], and *Barnes v United States* [2011] EWHC 2218 (Admin) *per* Laws LJ at [8] – [14].

Submissions

169. Mr Puthuppally advances three arguments in support of the appellant's contention that there are no specialty arrangements with the United States. First, he says that article 18(1)(a) of the extradition treaty with the United States permits prosecution for "lesser included offences" even if they are not extradition offences. Second, he says that the treaty permits prosecution for alternative offences where a person has been "free to leave" the jurisdiction for 20 days. Third, he says that the treaty does not allow an individual to waive his specialty protection, and this fetters his ability to negotiate a plea deal to include matters outwith the original extradition request.

170. Ms Hill relies on the authorities set out above, and particularly *Welsh*. She accepts that Mr Puthuppally's interpretation of article 18(1)(a) is a tenable literal reading of the words of that provision, but not that it is a tenable interpretation of the provision when it is considered in its context and in the light of the object and purpose of the treaty.

Are there specialty arrangements with the United States?

171. We do not consider that there is anything in Mr Puthuppally's second or third points.

172. As to the second point, the appellant is right that the treaty permits prosecution for alternative offences where a person has been "free to leave" the jurisdiction for 20 days. But if the person has been "free to leave" the jurisdiction then they have, by definition, had an "opportunity to leave" the jurisdiction. There is no real gap in

coverage between "free to leave" and "opportunity to leave". The argument is semantic and unrealistic. The appellant points to the fact that the European Convention on Extradition provides for a 45-day period when the extradited person must have had an opportunity to leave, which is more than twice the period provide by under the treaty. That is not, however, a requirement under section 95 of the 2003 Act which simply requires that there has been an opportunity to leave without setting any minimum time period within which that opportunity may be exercised. Mr Puthuppally made faint reference to the possibility that flights might be cancelled. Given the time period over which a person must be free to leave we do not consider this provides any answer to the point – it is not realistic to suggest that all opportunity to leave the United States might be denied over a period of 20 days by reason of the cancellation of flights. If, in extremis, that did happen then the individual would not, anyway, be free to leave: they are not free to leave if they are unable to leave.

173. As to the third point, this was not advanced in oral argument. It is not a specialty complaint at all and does not disclose any error in the Secretary of State's decision.

174. That leaves the first point, which was the focus of Mr Puthuppally's oral argument. He is right that there is the potential for prosecution for a "lesser included offence": article 18(1)(a) of the treaty. His argument that the treaty permits the prosecution of a lesser included offence gains some support from the literal wording of article 18(1)(a) which permits prosecution for:

> "a differently denominated offence based on the same facts as the offense on which extradition was granted, provided such offense is extraditable, or is a lesser included offense"

175. If this had read:

> "a differently denominated offence based on the same facts as the offense on which extradition was granted, or a lesser included offence, provided that in each case such offense is extraditable"

then it would have been clear that prosecution of a non-extradition offence would be prohibited. However, on the literal wording of the provision, he submits that prosecution would be permitted for a lesser included offence even if it were not an extradition offence.

176. This argument does not in any way depend on the facts of this particular case. It is an argument of general application. Mr Puthuppally recognises the logical effect of his argument, which is that extraditions to the United States cannot take place without the imposition of some further measure because specialty arrangements within the meaning of section 95(1) are not in place.

177. Rebecca Hill, who responds to this ground of appeal on behalf of the Secretary of State, accepts that the literal words of article 18(1)(a) are consistent with the approach that Mr Puthuppally advances. However, she contends that the courts have consistently found that there are specialty arrangements in place, that the authorities show that the United States will not apply the treaty in a way that the United Kingdom would consider to be a breach of specialty protection, and that it is necessary to

interpret the treaty by applying the principles set out in the Vienna Convention on the Law of Treaties.

178. We agree with Ms Hill's submissions. It is well established that a treaty must be interpreted by reference to the principles in the Vienna Convention: see, most recently, *Fimbank plc v KCH Shipping Co Ltd* [2024] UKSC 38 *per* Lord Hamblen at [34]:

> "(1) International conventions should in general be interpreted by reference to broad and general principles of interpretation rather than any narrower domestic law principles.
>
> (2) The relevant general principles include article 31.1 of the Vienna Convention on the Law of Treaties 1969 which provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."
>
> (3) They also include article 32 of the Vienna Convention which provides that recourse may be had to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion" in order "to confirm the meaning" or "to determine the meaning" when it is "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable"."

179. The relevant context here includes longstanding extradition arrangements between the United Kingdom and the United States under which the importance of effective specialty protection has consistently been recognised by both parties. In *Welsh* Ouseley J (with whom Laws LJ agreed) said (albeit without addressing the specific point that is now raised) that the 2003 Treaty prohibits punishment for a non-extraditable offence. He added "That has long been the interpretation given by the US Supreme Court to language such as that found in the 1972 Treaty, eg *Johnson v Browne* 205 US 309, decided in 1907." There is no indication, anywhere in the Treaty, that the parties intended to depart from this position. There is no reason why the parties would have intended to permit punishment for a lesser included offence that is not an extraditable offence, whilst prohibiting punishment for an offence based on the same facts as the offence in the extradition request unless that offence is an extradition offence. On the contrary, everything in the context and the object and purpose of the treaty indicates that (leaving aside questions of consent and waiver) punishment can only be imposed for extradition offences arising out of the same facts as the offence in the extradition request or any lesser included offence. The 1842, 1972 and 2003 extradition treaties were agreed in the context of long-standing mutual respect for the specialty rule: *Welsh* at [35]. The United States Supreme Court in *Johnson* made clear that the United States adheres to the specialty rule. As in *Welsh* (at [35]) it is sufficient to cite from the headnote of *Johnson*:

> "While the treaty of 1842, with Great Britain, had no express limitation of the right of the demanding country to try a person only for the crime for which he was extradited, such a

> limitation is found in the manifest scope and object of the treaty itself and it has been so construed by this Court. *United States v Rauscher*, 119 U. S.407.
>
> A person extradited under the treaty of 1899 with Great Britain cannot be punished for an offense other than that for which his extradition has been demanded even though prior to his extradition he had been convicted and sentenced therefor.
>
> Sections 5272, 5275, Revised Statutes, clearly manifest the intention and the will of the political department of the Government, that a person extradited shall be tried only for the crime charged in the warrant of extradition, and shall be allowed a reasonable time to depart out of the United States before he can be arrested and detained for any other offense…"

180. The requirement that extradition only takes place for extraditable offences is at the heart of the treaty: articles 1 and 2. A lack of specialty protection would be inconsistent with that fundamental mutual understanding between the parties to the treaty.

181. In *Welsh*, after citing authority and considering the evidence, Ouseley J concluded at [85] – [86]:

> "85. There is nothing in the cases which would justify the conclusion that the US Government or Courts would not respect the express limits in the UK-US Treaty or in the 2003 Act or in any judgment of this Court, even if they might conclude that for other states there would be no objection in parallel circumstances…There have been no cases cited to us in which a trial has taken place on the basis of inferred consent in a UK case, let alone one in which there was arguably doubt as to the position of the UK or as to the scope of the extradition order.
>
> 86. The application of the specialty rule in the US Courts is thus affected by the known views of the sending state. If a superseding indictment alleged offences which were not covered by the terms of the 2003 Act, the US authorities would not prosecute in breach of those provisions. The provisions of s95 are satisfied in relation to prosecutions."

182. Mr Puthuppally says, correctly, that the operative treaty at the time of the facts that gave rise to *Welsh* was the 1972 treaty which was silent on the point about prosecution for a lesser included offence. He says that *Welsh* can be distinguished because the 2003 treaty explicitly permits prosecution of a lesser included offence which is not an extradition offence. But that assumes the correctness of the interpretation of the 2003 treaty for which he contends. *Welsh* illuminates the context of the 2003 treaty and its purpose and aims.

183. For all these reasons, we consider that despite what might be the more natural literal reading of article 18(1)(a), its correct interpretation in the context of the 2003 treaty and in the light of its object and purpose, is that which we have set out above. In short, it prohibits prosecution of a lesser included offence unless that offence is an extraditable offence.

184. It follows that specialty arrangements are in place.

185. It further follows that the Secretary of State was correct to order the appellant's extradition.

Outcome

186. We refuse the application to adduce further evidence from James Troisi and from TozziniFreire Advogados, because it is not capable of affecting the outcome of the appeal. We grant the application to adduce further evidence from Maureen Baird because it deals with matters since the hearing before the judge (and therefore could not have been obtained for that hearing) and it is potentially decisive of the appeal.

187. The Secretary of State was right to order the appellant's extradition. The appeal under section 108 of the 2003 Act is therefore dismissed: section 109(1)(b), section 109(2).

188. However, the judge was wrong to send the case to the Secretary of State. First, the evidence before him was such that there was a real risk of a violation of the appellant's Article 3 rights. Second, in relation to count 1 on the US indictment, the judge was wrong to find that it was an extradition offence. However, we shall make no final order at this stage pending the outcome of the further information to be supplied by the respondent. If that information allows us to conclude that the appellant's Article 3 rights will be protected, the appeal will be allowed only in relation to the offence charged in count 1.