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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **29/04/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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IN THE MATTER OF AN APPLICATION UNDER THE EXTRADITION ACT 2003

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BETWEEN:

JONAH HORNE

Appellant;

-and-

UNITED STATES OF AMERICA
[No 3]

Respondent.

_____

Before: McCloskey LJ, McFarland J and Rooney J

_____

Representation

Appellant: Mr Frank O'Donoghue QC with Mr Sean Docherty of counsel, instructed by Gillen & Co Solicitors
Respondent: Mr Tony McGleenan QC with Mr Stephen Ritchie of counsel, instructed by the Crown Solicitor

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McCloskey LJ (giving the judgment of the court)

Introduction

[1] This is the court's substantive determination of the appellant's renewed application for leave to appeal against the following:

(i) The judgment and order of the "Appropriate Judge", Her Honour Judge Smyth, (hereinafter "*the judge*") of Belfast County Court dated 24 January 2020

whereby the issue of whether the appellant should be extradited to the USA was, pursuant to section 87 of the Extradition Act 2003 (the "*2003 Act*"), referred to the Secretary of State for the Home Department (the "*Home Secretary*") for final decision.

(ii) The decision of the Home Secretary dated 09 March 2020 which determined, in substance, that the appellant should be extradited to the USA.

In Brief

[2] The Requesting State is the USA. Pursuant to a warrant dated 12 November 2016 issued by the Fifteenth Judicial Circuit Court the extradition of Jonah Horne ("*the appellant")* on the charge of second degree murder with a firearm is sought. It is alleged that on 07 June 2016 in the context of a drugs dispute the appellant shot and mortally wounded Jacob Walsh ("*the deceased")* when in the passenger seat of a vehicle at Boca Raton, Florida, USA.

[3] The appellant's resistance to his extradition is based on three grounds:

(i) While the maximum sentence in the State of Florida for second degree murder with a firearm is life imprisonment, it is contended that there is a real risk that if extradited the appellant will be charged with first degree murder on the same alleged facts and subjected to the death penalty if convicted, in contravention of his rights under Article 2 and Article 3 ECHR.

(ii) Secondly, although it is accepted that the imposition of a sentence of life imprisonment on an adult offender is not, in itself, prohibited by any article of the Convention, it is submitted that the real possibility of an irreducible life sentence is incompatible with his Article 3 Convention rights. For a life sentence to remain compatible with Article 3, there must be both a prospect of release and a possibility of review. It is submitted that no review mechanism exists.

(iii) Thirdly, it is submitted that the conditions in Florida prisons are such that there is a real risk that he would be subjected to torture, inhuman or degrading treatment if returned which would be incompatible with his Article 3 Convention rights.

The History

[4] In compliance with the court's direction the parties agreed the following chronology:

7.6.16	Jacob Walsh was found mortally wounded outside an apartment located at 5555 North Military Trail, Boca Raton, Florida.
12.11.16	Warrant issued by Judicial Circuit Court for the state of Florida
10.3.17	Request for provisional arrest by Embassy of the USA
13.3.17	A provisional warrant was issued under section 73 of the 2003 Act
13.3.17	The appellant was arrested by the PSNI at 14.35 hours.
14.4.17	Brought before the court and was remanded in custody.
1.5.17	Extradition Request.
26.4.17	Affidavit of Lauren E Godden, Assistant State Attorney, with Exhibits A-E.
9.5.17	Certificate issued pursuant to section 70 of the 2003 Act.
24.5.17	Affidavit of Carey S. Haughwout.
9.6.17	Affidavit of Professor Jeffrey Ian Ross
25.8.15	Letter from David Aronberg State Attorney, Palm Beach County to the Extradition Section UK Central Authority
25.8.17	Affidavit of Michael Harrell, Bureau Chief of security operations for the Florida Department of Corrections.
24.8.17	Affidavit of Dr. Timothy Whalen, Director of Medical Services for the Florida Department of Corrections.
29.8.15	Covering letter of Lauren Godden Assistant State Attorney, Palm Beach County to the Extradition Section UK Central Authority
28.8.17	Affidavit of Captain Michael DeVoter of Palm Beach Sheriff's Office Department of Corrections, dated.
11.5.18	Correspondence from Scott Pribble, assistant public defender, Palm Beach County.
22.8.18	First Instance Judgment
10.9.18	Diplomatic Note
7.9.18	Assurance from David Aronberg State Attorney, Palm Beach County to the CSO that the defendant will not be tried for any offense other than the one for which he is presently charged and for which extradition is sought.
7.9.18	Letter from Lauren Godden Assistant State Attorney

11.10.18	Affidavit of Scott T. Pribble, an assistant public defender in Palm Beach County Florida
8.3.19	Judgment addendum – appellant discharged
20.3.19	Application for leave to appeal on behalf of the USA
25.3.19	Decision of the single judge. Mr J McAlinden refusing leave to appeal
27.3.19	Renewed application for leave to appeal on behalf of the USA
30.5.19	Letter from Mr. Pribble under cover of a letter from Peter Dornan and Co., Solicitors.
14.6.19	Diplomatic Note of the Embassy of the United States of America furnished to the High Court
20.12.19	Decision of the High Court allowing the appeal by the USA.
24.1.20	Order by the Appropriate Judge that the matter be referred to the Secretary of State for his decision whether the defendant is to be extradited.
8.3.20	Secretary of State Extradition Order
20.3.20	Notice of appeal
3.6.20	Decision of the single judge, Mr Justice Colton refusing leave to appeal.
5.6.20	Renewed application for leave to appeal
15.3.21	Application for leave to call fresh evidence
31.3.21	Decision of the court refusing application
15.4.21	Hearing of the renewed application for leave to appeal

[5] In these now elderly proceedings the history has become somewhat protracted and we shall therefore rehearse it in a little more detail.

[6] In [7] – [13] ff we gratefully adopt the narrative in the judgment of the single judge, Colton J.

[7] The matter first came before the judge on 29 August 2018. In a detailed written judgment she dealt with each of the issues raised by the appellant. In

relation to the first issue she determined that in the absence of an adequate assurance within 14 days that the appellant would not be charged with first degree murder, or that, in the event of his conviction for that offence, the death penalty would not be sought, the appellant would be discharged.

[8] In relation to the second objection the judge concluded that the arrangements within the Requesting State for clemency or commutation of a life sentence were not Article 3 ECHR compliant. The judge ruled that in the absence of an assurance from the USA within 14 days sufficient to safeguard this aspect of the appellant's Article 3 rights he would be discharged. The judge rejected the second element of the appellant's Article 3 case which related to the prison conditions to which he would predictably be exposed in the event of extradition to the USA, prosecution and conviction.

[9] On 8 March 2019, in the wake of the Requesting State's Response to the aforementioned ruling, the judge promulgated a supplementary judgment. In this she expressed herself satisfied that the assurances relating to a possible death sentence were sufficient to address this aspect of the appellant's Article 3 case, which she dismissed in consequence.

[10] The judge then considered the response of the Requesting State relating to the separate Article 3 issue of the possible length of sentence which might be imposed on the appellant in the event of his prosecution for and conviction of the specified offence. She remained dissatisfied with the assurances given in relation to the potential sentence of the applicant in the event of his conviction. The judge therefore required the Requesting State to provide, within 14 days, an assurance that any sentence of imprisonment to which the appellant might be subjected would not exceed 40 years, in default whereof the court would order his discharge. The Requesting State declined to provide an assurance in the terms sought. The court, in consequence, ordered the discharge of the appellant.

[11] The Requesting State appealed the order of discharge. On 20 December 2019 a different constitution of this court allowed the appeal. The order of this court, pursuant to Section 106 of the 2003 Act, quashed the order for a discharge, remitted the case to the judge and directed her to proceed as she would have been required to do if she had decided the question differently at the extradition hearing.

[12] The matter was listed again before the judge on 24 January 2020 who in accordance with Section 87 of the Extradition Act 2003 and the decision of this court directed the case to be sent to the Secretary of State for the Home Department for a decision as to whether the appellant should be extradited and remanded him in custody.

[13] A letter was received from the Home Office dated 9 March 2020 intimating that the Home Secretary was of the opinion that she was not prohibited from ordering the applicant's extradition on any of the grounds set out in Section 93(2) of

the Extradition Act 2003. As a result the Secretary of State ordered Mr Horne's extradition to the United States pursuant to Section 93(4) of the Extradition Act 2003 on 8 March 2020.

[14] On 20 March 2020 the appellant lodged a Notice of Appeal challenging both the decision of the judge and the order of the Secretary of State. During the case management phase the court proactively identified an issue, preliminary and procedural in nature, arising out of the appellant's proposed reliance on certain new evidence, namely a report, in the format of a "*declaration*" of one Paul Wright. By the judgment of this court delivered on 31 March 2021 the appellant's application to adduce this evidence was refused.

The Applicable Statutory Provisions

[15] The relevant statutory provisions are, in material part, the following:

> "***Section 103(1)***
>
> *"I Appeal where case sent to Secretary of State*
>
> *(1) If the judge sends a case to the Secretary of State under this Part for his decision whether a person is to be extradited, the person may appeal to the High Court against the relevant decision.*
>
> *(2) But subsection (1) does not apply if the person consented to his extradition under section 127 before his case was sent to the Secretary of State.*
>
> *(3) The relevant decision is the decision that resulted in the case being sent to the Secretary of State.*
>
> *(4) An appeal under this section –*
>
> *(a) may be brought on a question of law or fact, but*
>
> *(b) lies only with the leave of the High Court.*
>
> ***Section 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;

(c) quash the order for his extradition.

Section 108

"Appeal against extradition order

(1) If the Secretary of State orders a person's extradition under this Part, the person may appeal to the High Court against the order.

(2) But subsection (1) does not apply if the person has consented to his extradition under section 127.

(3) An appeal under this [section –

(a) may] be brought on a question of law or fact [but

(b) lies only with the leave of the High Court.]

(4) Notice of application for leave to appeal under this section must be given –

(a) in accordance with rules of court, and

(a) subject to subsections (5) and (7A), before the end of the permitted period, which] is 14 days starting with the day on which the Secretary of State informs the person of the order under section 100(1)."

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.

(3) 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.

(4) If the court allows the appeal it must –

(a) order the person's discharge;

(b) quash the order for his extradition."

Grounds of Appeal

[16] The grounds of appeal to this court, as refined, are:

(i) The judge and the Secretary of State by accepting the assurances provided by the State Attorney and the diplomatic note regarding the death penalty as sufficient erred in law and fact. The assurances do not sufficiently militate against the risk as in particular they do not bind elected successors at the State Attorney's Office. Given the importance of the protection afforded by the ECHR regarding the death penalty the court should proceed with caution and request assurances of a nature that had been provided in relevant and comparable previously adjudicated cases in the UK.

(ii) The judge and the Secretary of State erred in their determination that the speciality arrangements are adequate for the purposes of Section 95 of the Act. In the particular circumstances of this case the speciality arrangements as disclosed in Article 18 of the Treaty are not adequate for the purposes of section 95(4)(b) and that they would not prevent the prosecution of the appellant on account of first degree murder.

(iii) The judge and the Secretary of State erred in the determination that the appellant's extradition would not be incompatible with his rights as per Article 3 of the Convention as a consequence of prison conditions in the State of Florida. It is submitted that the material conditions alone, with most prisoners housed in over-crowded dormitories without air conditioning do not meet the minimum requirements as per the ECHR jurisprudence. In the absence of any appropriate assurances required in relation to such conditions the appeal should be allowed and the appellant discharged.

First Ground of Appeal

[17] There is an evident degree of overlap between the first and second grounds of appeal. They resolve to a common core contention which Mr O'Donoghue QC formulated in the following terms. Whereas the offence specified in the request of

the Requesting State is that of second degree murder, by virtue of the applicable laws of the State of Florida, this will not preclude the appellant from being prosecuted and/or convicted of first degree murder, thereby exposing him to the risk of the death penalty in contravention of his rights under Article 2 ECHR, protected by the Human Rights Act 1998. In the alternative, if convicted of second degree murder the appellant, by virtue of the same laws, will be at risk of punishment by a whole life sentence of imprisonment in breach of his rights under Article 3 ECHR.

[18] It is necessary at this juncture to consider the terms in which various "*assurances*" have been provided on behalf of the Requesting State. The first of these is dated 10 September 2018. It is contained in a formal Diplomatic Note from the US Embassy in London (in essence, therefore from the Federal Government of the USA) to the Principal Secretary of State for Foreign and Commonwealth Affairs. This, as recited, was stimulated by the judge's request that the Requesting State "*… provides assurances that Horne will not be charged with first degree murder, a death penalty eligible offence, upon his surrender or that in the event of his conviction for that offence the death penalty will not be sought*". The text continues:

> "*The Government of the United States assures the Government of the United Kingdom of Great Britain and Northern Ireland that a sentence of death will neither be sought nor imposed on Horne should he be extradition to the United States. The United States is able to provide such assurance as Horne is not charged with a death penalty eligible offence and the prosecutor's office for the State of Florida has provided an assurance that he will only be tried for the offence of second degree murder for* [sic] *he is presently charged and for which his extradition is sought.*"

In a later passage the Diplomatic Note states:

> "*…. the United States is prepared in this case to further inform the Government of the United Kingdom of Great Britain and Northern Ireland as follows: should Horne be convicted of the charge which carries a potential penalty of life imprisonment, he will not be subject to an unalterable sentence of life imprisonment because, if a life sentence is imposed, he may seek review of his sentence on appeal and he may subsequently seek relief from his sentence in the form of a petition for a pardon or commutation to a lesser sentence.*"

[19] The Diplomatic Note was accompanied by two letters, each dated 07 September 2018, from the Office of the State Attorney of Palm Beach County. The shorter of these letters states:

> "*The Defendant Jonah Joseph Horne is charged with second degree murder with a firearm …*
>
> *Under Florida Law, the death sentence is not an applicable penalty for the crime charged. I hereby give my assurances that the Defendant will not be tried for any offence other than the one for which he is presently charged and for which extradition is sought. The State of Florida will not seek the death penalty in this case nor will a sentence of death be imposed. This assurance is binding on all future prosecutors in the State of Florida.*"

The longer of the two letters was written by the Assistant State Attorney, describing himself as "*the homicide prosecutor assigned to the case*". It begins:

> "*… I hereby give my assurances that the Defendant will not be tried for any offence other than the one for which he is presently charged and for which extradition is sought. The State of Florida will not seek the death penalty in this case nor will a sentence of death be imposed. If Jonah Horne is convicted, the State of Florida agrees to seek a term of imprisonment no greater than 40 years, as well as inform the sentence judge of such assurance. This assurance is binding on all future prosecutors in the State of Florida, as stated in the letter from the elected State Attorney ….*"

In a later passage it is stated:

> "*If Jonah Horne was convicted as charged, the Defendant could be sentenced to a life sentence, but the minimum sentence required would be 25 years as a mandatory minimum. The Defendant would not be subject to a mandatory life sentence. The Defendant could also be found guilty of lesser included crimes, such as manslaughter with a firearm or manslaughter which would carry a lesser sentence of a maximum of 30 years or 15 years respectively. For any portion of the sentence that is not deemed a mandatory minimum, the Defendant would be eligible to receive gain time with the Department of Corrections.*"

Having outlined the review and appeal mechanisms which would be available to the appellant in the event of conviction, the author states:

> "*The Defendant could petition the Governor of Florida for a reduction of the sentence her received requesting a commutation or a pardon. The State of Florida allows for various types of clemency relief.*"

Elaboration of the several possibilities in this respect follows. Several of the strands of the letter are drawn together in the final paragraph:

> "*The Defendant, Jonah Horne, would at no time face the charge of first degree murder nor at any time the death penalty if extradited. The appellate process accessible to Horne, both in the State of Florida and in the Federal system, allows for a thorough review mechanism for which both his conviction and sentence would be reviewed; furthermore, not only is the Defendant made aware of this review process at his sentencing, but an appellate attorney is provided to him to further explain this pre-established appellate mechanism.*"

[20] A further letter dated 17 September 2018 from the Assistant State Attorney followed:

> "*Further to my letter dated September 7th 2018 providing assurances that a determinate sentence of no more than 40 years will be sought …. against Jonah Horne and providing further assurances to inform the sentencing judge of such assurances having been provided to the UK by the diplomatic channels, please be advised that it is highly unlikely that the sentencing judge would sentence Horne to a more severe term than 40 years. In relation to commutation, the Defendant has the* ***de jure*** *and* ***de facto*** *right to apply for commutation as may be seen from the Florida Clemency Rules and the commutation of census statistics ….*"

This was not the end of the correspondence trail. One further letter intervened between the judge's principal judgment and the supplementary judgment promulgated on 08 March 2019. Paragraph [19] of this judgment adverts to a letter dated 01 March 2019 from the Crown Solicitor's Office containing the following statement:

> "*… the Governor's Office will not be providing a commutation assurance in this case. The Assistant State Attorney …. has provided an assurance that a determinate sentence of no more than 40 years will be sought …*"

This letter attached a further letter from the Assistant State Attorney dated 28 February 2019. The judge was thereby prompted to conclude:

> "*In short, the Requesting State has declined the opportunity to provide an adequate assurance that the Defendant's Article 3 rights will be protected if extradited ….* [adding] *…. the refusal of the USA to provide guarantees in respect of a potential death*

penalty and an irreducible life sentence, despite repeated requests from the court to do so."

Properly analysed, the decision of the judge was not based on the death penalty risk. Rather it was based solely on her assessment that the appellant would be at risk of an irreducible life sentence of imprisonment, thereby infringing his rights under Article 3 ECHR.

[21] As the supplementary judgment indicates the evidence assembled at first instance increased progressively and substantially. It included, as noted by the judge, an affidavit sworn by one Scott Pribble, an attorney at law who held the position of assistant public defender in Palm Beach County, Florida. Mr Pribble deposes *inter alia*:

(i) If convicted of second degree murder the appellant could be punished by a whole life sentence of imprisonment without any possibility of parole.

(ii) His minimum sentence of imprisonment would be the mandatory minimum under the relevant laws of Florida, being 25 years during which he would be ineligible for release.

(iii) The "*assurances*" provided by the Requesting State would be unenforceable in Florida courts. In particular they would not be binding on the sentencing judge.

(iv) Approximately 25% of all prisoners convicted of second degree murder are serving life imprisonment without parole; approximately 40% are serving sentences of 40 years or more; approximately 58% are serving sentences of 30 years or more; and approximately 84% are serving sentences of 20 years or more.

(v) Nearly all of these offenders have had recourse to review by appellate courts without relief and will serve their sentences without any meaningful consideration for clemency or possibility of commutation.

The judge noted that the above evidence was uncontradicted by the Requesting State.

[22] As noted above the discharge order at first instance was the subject of an earlier appeal to this court. The appeal succeeded, in essence, on the ground that the judge had failed to apply the appropriate test, namely whether substantial grounds had been demonstrated for believing that the appellant, if extradited, faced a real risk of being subjected to treatment proscribed by Article 3 ECHR (*Soering v The United Kingdom* [1989] 11 EHRR 439 at 91). At [33] – [48] the court evaluated all of

the evidence bearing on the application of this test. Its omnibus conclusion was expressed at [49] in these terms:

> "*Taking all these factors into consideration we consider the risk of a whole life sentence without possibility of remission being imposed on this citizen of Florida, if convicted of the crime of second degree murder, to be very slight and most unlikely. We consider the possibility of that whole life sentence being maintained on appeal and after consideration by the Governor of Florida and the President of the United States to be wholly negligible. We do not consider therefore that there is a real risk, a more than fanciful risk …. of this man being subjected to cruel or inhumane and degrading treatment by suffering a whole life irreducible sentence.*"

A quashing and remittal order was made accordingly.

[23] It is not in dispute that *Soering* prescribes the test to be applied. What, therefore, is the "*real risk*" in play in this appeal? Stated succinctly, it is firstly the risk of this appellant, following trial and conviction, being punished by a sentence of death. This element of the appellant's case faded noticeably as the proceedings advanced, albeit not to the point of formal abandonment. This is reflected in counsels' detailed skeleton argument where this issue barely flickers. In oral submissions the sole argument advanced by Mr O'Donoghue QC was that, *pace* the assurances provided, the appellant if extradited might be prosecuted for an offence attracting the possibility of punishment by the death penalty viz first degree murder.

[24] It has been the unremittingly consistent position of the Requesting State that the appellant's extradition is sought for the purpose of being prosecuted for the offence of second degree murder with a firearm. The evidence establishes unequivocally that under Florida law the death sentence cannot be imposed for this offence. The assurances emanating from the Requesting State have consistently stated that if extradited the appellant will not be prosecuted for an offence attracting the death penalty: see [18] – [20] above.

[25] Three successive courts have held that this aspect of the appellant's case is unsustainable: the first instance court, a different constitution of this court in *USA v Horne (Number 1)* [2019] NIQB 106 and the leave judge in this new (second) appeal, Colton J. We agree with those assessments. In summary, this aspect of the appellant's case is confounded by a combination of the principle of mutual trust and confidence and an evidentially barren foundation characterised by conjecture.

[25] As the legal underpinning of this submission merges with that relating to the second of the Article 3 risks asserted by the appellant, which we consider at [25] ff *infra*, where we shall defer our conclusion. In short, the two elements of the appellant's Article 3 ECHR case stand together or fall together.

[26] The second of the Art 3 ECHR risks canvassed is that of this appellant, following trial and conviction, being punished by a sentence of whole life imprisonment excluding any possibility of reduction or commutation. The Strasbourg jurisprudence in this discrete sphere begins with the decision in *Kafkaris* [2008] 49 EHRR 35, a decision of the Grand Chamber. The most important passages are at [98] – [100]. This decision enunciated the principle that the imposition of an irreducible life sentence on an accused person may raise an issue under Article 3 ECHR. This general principle was refined into the following proposition, at [99]:

> "*… where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3 …*
>
> *It is enough for the purposes of Article 3 that a life sentence is* ***de iure*** *and* ***de facto*** *reducible*".

[27] This aspect of the appellant's case arose also in the decision of the ECtHR in *Vinter & Others v United Kingdom* [2013] 63 EHRR 1. This case marked the continuation of a fairly consistent line of Strasbourg jurisprudence, springing from *Kafkaris*, concerning the possibility of Article 3 ECHR violations in expulsion cases where the person concerned would in consequence be exposed to the risk of a grossly disproportionate penal sentence. The court held at [92]:

> "*…. An Article 3 issue will arise for a mandatory sentence of life imprisonment without the possibility of parole in the same way as for a discretionary life sentence, that is when it can be shown: (i) that the applicant's continued imprisonment can no longer be justified on any legitimate penological ground; and (ii) the sentence is irreducible* ***de facto*** *and* ***de iure …..***"

Thus, as the court made clear in an earlier passage, a mandatory sentence of whole life imprisonment is not *per se* incompatible with Article 3 ECHR. However, in order to avoid such incompatibility there must be a legal mechanism providing for possible release which the prisoner can invoke at an appropriate stage of the sentence.

[28] The combined effect of the decisions in *Soering, Kafkaris* and *Vinter* (and other kindred Strasbourg cases) is that the test to be applied by this court in determining the first and second of the appellant's grounds of appeal is this: *have substantial grounds been shown for believing that the appellant, if extradited, will face a real risk of being punished by a whole life sentence of imprisonment excluding any possibility of reduction or commutation?*

[29] The debate before this court revolved around three reported cases in particular. The first of these is *Othman v United Kingdom* [2012] 55 EHRR 1 where the issue was whether the applicant's deportation to Jordan where he had been convicted of terrorist offences in his absence would be contrary to Article 3 ECHR. The factual matrix included in particular assurances from the Jordanian Government that the Applicant would not be at risk of the death penalty and, further, that evidence obtained by torture would not be deployed against him. The ECtHR held that his deportation would not infringe Article 3.

[30] In thus deciding the court gave specific consideration to what it described as "*the practice of seeking assurances to allow for the deportation of those considered to be a threat to national security*", at [186]. The court stated that its –

> "*… only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill treatment.*"

Having earlier reiterated the *Soering* test at [185], the court continued at [187]:

> "*In a case where assurances have been provided by the receiving state, those assurances constitute a further relevant factor which the Court will consider. However, assurances are not in themselves sufficient to ensure adequate protection against the risk of ill treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill treatment. The weight to be given to assurances from the receiving state depends, in each case, on the circumstances prevailing at the material time.*"

[31] The court then postulated two scenarios. The first was one in which the general human rights situation in the receiving state would preclude the acceptance of assurances given. Noting that this scenario would arise only in rare cases, the court then turned to the second, more usual, scenario at [189]

> "*189. More usually, the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving state's practices they can be relied upon. In doing so, the Court will have regard, inter alia, to the following factors:*
>
> *(1) whether the terms of the assurances have been disclosed to the Court;*
>
> *(2) whether the assurances are specific or are general and vague;*

(3) who has given the assurances and whether that person can bind the receiving state;

(4) if the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them;

(5) whether the assurances concerns treatment which is legal or illegal in the receiving state ;

(6) whether they have been given by a Contracting State;

(7) the length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances;

(8) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers;

(9) whether there is an effective system of protection against torture in the receiving state, including whether it is willing to co-operate with international monitoring mechanisms (including international human-rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible;

(10) whether the applicant has previously been ill-treated in the receiving state; and

(11) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State,"

[32] In *Harkins v United Kingdom* [2012] 55 EHRR 19 the ECtHR gave detailed consideration to certain aspects of the operation of Article 3 ECHR in cases where the extradition of a person to a foreign state could give rise to the imposition of a life sentence. The court stated at [129]:

> *"… the Court would underline that it agrees with Lord Brown's observation in* ***Wellington*** *that the absolute nature of art.3 does not mean that any form of ill-treatment will act as a bar to removal from a contracting state. As Lord Brown observed, this Court has repeatedly stated that the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other states. "*

The judgment continues at [131]:

> *"…the Court reiterates that, as was observed by Lord Brown, it has been very cautious in finding that removal from the territory of a contracting state would be contrary to art.3 of the Convention. It has only rarely reached such a conclusion since adopting the* ***Chahal*** *judgment. The Court would further add that, save for cases involving the death penalty, it has even more rarely found that there would be a violation of art.3 if an applicant were to be removed to a state which had a long history of respect for democracy, human rights and the rule of law."*

And finally at [137]:

> *"If a discretionary life sentence is imposed by a court after due consideration of all relevant mitigating and aggravating factors, an art.3 issue cannot arise at the moment when it is imposed. Instead, the Court agrees with the Court of Appeal in Bieber and the House of Lords in Wellington that an art.3 issue will only arise when it can be shown: (i) that the applicant's continued imprisonment can no longer be justified on any legitimate penological grounds (such as punishment, deterrence, public protection or rehabilitation); and (ii) as the Grand Chamber stated in Kafkaris, the sentence is irreducible de facto and de iure."*

[33] It is far from incidental that in *Harkins* the requesting state was the US and the applicant was alleged to have committed offences contrary to Florida state law punishable by a mandatory life sentence without parole. At [52] of its judgment the Strasbourg court rehearsed the provisions of the Florida Constitution and Florida Statute empowering the Governor, acting in tandem with the Board of Executive Clemency, to grant pardons and commute punishments. This was the *de iure* aspect. The court then highlighted the *de facto* element, by reference to a letter from the US Department of Justice disclosing that during a recent 26 year period the Governor had commuted 133 sentences of which 44 were for first degree murder. The possibility of repeated applications for commutation was also noted. Both applicants' Article 3 cases were rejected.

[34] The terms in which Mr Harkins' case was dismissed must be noted. This entailed two conclusions by the court. First, the imposition of a life sentence without possibility of parole would not be grossly disproportionate: see [139]. Second, at [140]:

> *"As the Court has stated, an art.3 issue will only arise when it can be shown: (i) that the first applicant's continued incarceration no longer serves any legitimate penological*

> *purpose; and (ii) his sentence is irreducible de facto and de iure. The first applicant has not yet been convicted, still less begun serving his sentence. The Court therefore considers that he has not shown that, upon extradition, his incarceration in the United States would not serve any legitimate penological purpose. Indeed, if he is convicted and given a mandatory life sentence, it may well be that, as the Government has submitted, the point at which his continued incarceration would no longer serve any purpose may never arise. It is still less certain that, if that point were ever reached, the Governor of Florida and the Board of Executive Clemency would refuse to avail themselves of their power to commute the applicant's sentence.*
>
> *140. Accordingly, the Court does not find that the first applicant has demonstrated that there would be a real risk of treatment reaching the art.3 threshold as a result of his sentence if he were extradited to the United States. The Court therefore finds that there would be no violation of art.3 in his case in the event of his extradition."*

[35] The second case occupying centre stage in the appellant's argument was *Trabelsi v Belgium* [2015] 60 EHRR 21. There the issue was whether the extradition of the applicant from Belgium to the US to be prosecuted for alleged terrorist offences would be contrary to Article 3 ECHR. Once again, one of the features of the factual matrix was that of certain assurances provided by the US. The court found in the applicant's favour. The critical factor was the failure of the US to provide an express assurance that the applicant would not be punished by a life sentence or that any life sentence imposed would entail the possibility of reduction or commutation: see [134] – [135]. In thus deciding the court stated at [113]:

> "*Where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner this will be sufficient to satisfy Article 3.*"

At [116] the court repeated the *Soering* test, adding at [130]:

> "*Furthermore, the Court holds, as it has done in all extradition cases since* ***Soering*** *that it must assess the risk incurred by the applicant under Article 3* ***ex ante*** *– that is to say, in the present case, before his possible conviction in the United States – and not* ***ex post facto*** *…."

[36] At [135] the court observed that its task did not extend to assessment of *the sufficiency of assurances provided*, as the US had provided no assurance that the

applicant would be spared a life sentence or that any life sentence would entail the possibility of reduction or commutation. The court added that it –

> "*… therefore does not have to ascertain, in this case, whether the assurances provided by the requesting authorities are sufficient, in terms of their content,* ***to guarantee*** *that the applicant is protected against the risk of a penalty incompatible with Article 3 of the Convention.*"
>
> [Our emphasis.]

Noting that the US had provided certain "*explanations*", the court added that these were in any event "*very general and vague and cannot be deemed sufficiently precise*".

[37] The judgment continues at [137]:

> "*No lengthy disquisitions are required to answer this question: the Court needs simply need that while the said provisions point to the existence of a 'prospect of release' within the meaning of the* ***Kafkaris*** *judgment – even if doubts might be expressed as to the reality of such a prospect in practice – none of the procedures provided for amounts to a review mechanism requiring the national authorities to ascertain, on the basis of objective, pre-established criteria of which the prisoner had precise cognisance at the time of imposition of the life sentence, whether, while serving his sentence, the prisoner has changed and progressed to such an extent that continued detention can no longer be justified on legitimate penological grounds.*"

The court held that the provisions of US legislation, which included the possibility of Presidential pardon, failed to satisfy this test.

[38] There was a notable sequel to the ECtHR decisions in *Harkins* and *Trabelsi*. Mr Harkins had resort to the Divisional Court once again, inviting it to reopen his previously unsuccessful application for judicial review of the Home Secretary's extradition decision: see *R (Harkins) v Secretary of State for the Home Department (Number 2)* [2015] 1 WLR 2975. This was based on the contention that the decision in *Trabelsi* had altered the landscape in cases involving extradition to the US and the risk of a life sentence without parole. Mr Harkins was unsuccessful. The Divisional Court was unimpressed with the key passages in *Trabelsi* ie [136] – [137]. In particular it highlighted that this approach was not in harmony with *Kafkaris* at [100], as adopted and applied subsequently in *Vintner* in a context where the three applicants had been sentenced to terms of whole life imprisonment (characterised by the court as in substance "*discretionary sentences of life imprisonment without parole*" at [94] and the only possibility of release was via the Home Secretary's policy on

compassionate release which the court described as "*much narrower than the Cypriot policy on release which was considered in Kafkaris*."

[39] In *Vinter v United Kingdom* [2016] 63 EHRR 1 the three applicants contended that the whole life sentences of imprisonment imposed on them amounted to ill treatment contrary to Article 3 ECHR. Following a rejection of their claims by a chamber of the court (by a 4/3 majority) the Grand Chamber convened pursuant to a request by the applicants. The Grand Chamber found in their favour. Its reasoning is discernible from paragraphs [129] – [130] of its judgment:

> "*129. As a result, given the present lack of clarity as to the state of the applicable domestic law as far as whole life prisoners are concerned, the Court is unable to accept the Government's submission that s.30 of the 1997 Act can be taken as providing the applicants with an appropriate and adequate avenue of redress, should they ever seek to demonstrate that their continued imprisonment was no longer justified on legitimate penological grounds and thus contrary to art.3 of the Convention. At the present time, it is unclear whether, in considering such an application for release under s.30 by a whole life prisoner, the Secretary of State would apply his existing, restrictive policy, as set out in the Prison Service Order, or would go beyond the apparently exhaustive terms of that Order by applying the art.3 test set out in Bieber. Of course, any ministerial refusal to release would be amenable to judicial review and it could well be that, in the course of such proceedings, the legal position would come to be clarified, for example by the withdrawal and replacement of the Prison Service Order by the Secretary of State or its quashing by the courts. However, such possibilities are not sufficient to remedy the lack of clarity that exists at present as to the state of the applicable domestic law governing possible exceptional release of whole life prisoners.*
>
> *130. In light, therefore, of this contrast between the broad wording of s.30 (as interpreted by the Court of Appeal in a Convention-compliant manner, as it is required to be as a matter of UK law in accordance with the Human Rights Act) and the exhaustive conditions announced in the Prison Service Order, as well as the absence of any dedicated review mechanism for the whole life orders, the Court is not persuaded that, at the present time, the applicants' life sentences can be regarded as reducible for the purposes of art.3 of the Convention. It accordingly finds that the requirements of art.3 in this respect have not been met in relation to any of the three applicants."*

[40] In *Hutchinson v United Kingdom* [2017] 43 BHRC 667 the Grand Chamber, strongly impelled by the intervening decision of the English Court of Appeal in *R v McLoughlin and Others* [2014] EWCA Crim 188 took the somewhat unusual course of effectively reversing its earlier decision in *Vinter [No 2]*. By a majority of 14/3 it was held that a whole life term of imprisonment did not violate Article 3 ECHR. Central to the Grand Chamber's conclusion was its assessment that the whole life sentence of imprisonment in the United Kingdom is reducible. See paragraphs [70] – [73]:

> *"70. The Court considers that the* McLoughlin *decision has dispelled the lack of clarity identified in* Vinter *arising out of the discrepancy within the domestic system between the applicable law and the published official policy. In addition, the Court of Appeal has brought clarification as regards the scope and grounds of the review by the Secretary of State, the manner in which it should be conducted, as well as the duty of the Secretary of State to release a whole life prisoner where continued detention can no longer be justified on legitimate penological grounds. In this way, the domestic system, based on statute (the 1997 Act and the Human Rights Act 1998), case law (of the domestic courts and this court) and published official policy (the Lifer Manual) no longer displays the contrast that the Court identified in* Vinter *(para 130). Further specification of the circumstances in which a whole life prisoner may seek release, with reference to the legitimate penological grounds for detention, may come through domestic practice. The statutory obligation on national courts to take into account the art 3 case law as it may develop in future provides an additional important safeguard.*
>
> *71. As the Court has often stated, the primary responsibility for protecting the rights set out in the Convention lies with the domestic authorities (see for example* OH v Germany *[2011] ECHR 4646/08, para 118). It considers that the Court of Appeal drew the necessary conclusions from the* Vinter *judgment and, by clarifying domestic law, addressed the cause of the Convention violation (see also* Kronfeldner v Germany *(App no 21906/09) (judgment,19 January 2012), para 59).*
>
> *72. The Court concludes that the whole life sentence can now be regarded as reducible, in keeping with art 3 of the Convention."*
>
> *73. As indicated at the outset (see para 37, above), given that the parties' submissions were confined to the current state of*

> *the domestic law, the Court has not found it necessary to examine separately whether the requirements of art 3 in*
>
> *(2017) 43 BHRC 667 at 692 relation to whole life sentences, as laid down in the* Vinter *judgment, were complied with in the applicant's case prior to the* McLoughlin *decision. It would nevertheless observe, as the Government themselves in effect recognised before the Court of Appeal delivered its judgment in* McLoughlin*, that at that time the material circumstances regarding the applicant's whole life sentence were indistinguishable from those of the applicants in the* Vinter *case (see para 23, above)".*

[41] This court has turned its attention to the post-2015 decisions of the ECtHR in which *Trabelsi* is mentioned. In *Findikoglu v Germany* [2016] 63 EHRR SES [Application number 20672/15] there are two material references. The first is at paragraph [28], where the judgment refers to paragraph [116] of *Trabelsi*: this was simply a convenient mechanism of rehearsing the *Soering* test. The second is at paragraph [40], where the court expresses its conclusion that no risk of a sentence of life imprisonment had been established, with the result that *Trabelsi* at [133] – [139] fell to be distinguished.

[42] Next, we take cognisance of the reference to *Trabelsi* in *Elorza v Spain* [Application number 30614/15] where, at [111], the court took note of the observation in *Trabelsi* at [117] (in substance) that there is a strong general interest in ensuring that justice is done in criminal cases. The court further referred to *Trabelsi* in [114] – [115] in the context of highlighting material factual differences.

[43] Continuing this discrete sequence of cases, in *X v The Netherlands* [Application number 14319/17], an asylum/expulsion case in which the applicant claimed that his removal from the Netherlands to Morocco would expose him to a real risk of being tortured or subjected to inhuman or degrading treatment or punishment in a general way. The court, in dismissing his application, made a fleeting reference to *Trabelsi* at [71]. In this paragraph, which is entitled "General Principles", the court reiterated one of its long established principles, traceable to *Chahal v United Kingdom* [1996] 23 EHRR 413, that by virtue of the absolute prohibition enshrined in Article 3 the alleged conduct of the person concerned must be disregarded in the exercise of assessing the risk of proscribed treatment "*against the reasons put forward for the expulsion …*"

[44] We have also taken note of the reference to *Trabelsi* in ***Murray v The Netherlands*** [2017] 64 EHRR 3. This reference is buried in a footnote to paragraph [100]. It is of no moment whatsoever, for at least two reasons. First the proposition relating to which the reference is made has nothing whatsoever to do with this appeal "*… it may be of relevance to take account of statistical information on prior use of the review mechanism in question, including the number of persons having been granted a*

pardon". Second, the central issue in that case is equally remote from the present appeal. It was whether the requirement of a real prospect of release in the case of the life prisoner concerned was satisfied in circumstances where the State authorities had failed to provide him with the mental care and therapy he needed to achieve a sufficient degree of rehabilitation for the purpose of being released.

[45] Having regard to our analysis in the immediately preceding paragraphs, it is evident that the ECtHR has not examined, much less endorsed, those passages in *Trabelsi* which have subsequently generated some controversy, namely [136] – [137].

[46] *Giese v Government of the USA* [2018] EWHC 1480 (Admin) is the third of the three dominant cases in Mr O'Donoghue's submissions. There the requested person unsuccessfully appealed against an order of the district judge whereby the case was transmitted to the Home Secretary to determine whether he should be extradited. The main feature of the proceedings was that of assurances received from the US Government. At [37] – [39] the Divisional Court provided the following summary of principles relating to assurances of this kind:

> *"If there are substantial grounds for believing that there is a real risk of impermissible treatment contrary to the Convention following extradition, the requesting state may show that the requested person will not be exposed to such a risk by providing an appropriate assurance. In extradition proceedings there has been a long history of the United Kingdom seeking and being provided with assurances that a requested person will not be subject to the death penalty if convicted. Assurances are commonly given in respect of conditions of detention and may be provided in connection with article 5 and article 6 concerns. Such assurances form an important part of extradition law, see* ***Shankaran v India*** *[2014] EWHC 957 (Admin) at [59].*
>
> *The principles relating to the assessment of assurances were summarised by the European Court of Human Rights in* ***Othman v UK*** *(2012) EHRR 1 at [188] and [189]. The overarching question is whether the assurance is such as to mitigate the relevant risks sufficiently. That requires an assessment of the practical as well as the legal effect of the assurance in the context of the nature and reliability of the officials and country giving it. Whilst there may be states whose assurances should be viewed through the lens of a technical analysis of the words used and suspicion that they will do everything possible to wriggle out of them, that is not appropriate when dealing with friendly foreign governments of states governed by the rule of law where the expectation is that promises given will be kept. The principles identified in* Othman*, which are not a check list, have been applied to*

> *assurances in extradition cases in this jurisdiction. A court is ordinarily entitled to assume that the state concerned is acting in good faith in providing an assurance and that the relevant authorities will make every effort to comply with the undertakings, see* ***Dean (Zain Taj) v Lord Advocate*** *[2017] UKSC 44; [2017] 1 WLR 2721 at [36].*
>
> *The court may consider undertakings or assurances at various stages of the proceedings, including on appeal, see* Florea v Romania *and* Giese (No.2)*, and the court may consider a later assurance even if an earlier undertaking was held to be defective, see* ***Dzgoev v Russia*** *[2017] EWHC 735 at [68] and [87]."*

At [42] and [44] the court employed the language of "*…. assurances which sufficiently mitigate the risk …*" and assurances which are "*adequate*".

[47] In *Giese*, one of the appellant's specific objections to extradition was the asserted risk to him of intra-prisoner violence in the Californian prison estate. Noting the decisions in *R (Bagdanavicius) v Secretary of State for the Home Department* [2005] 2 AC 668 and *Lord Advocate v Dean* [2017] UKSC 44 the court, at [53], identified the governing test as "*…. whether the state can provide reasonable protection against such violence …*" This entails consideration of two factors, namely the objective risk of such violence to the requested person and the extent to which the authorities will take steps to protect from such risk. At [54] the test formulated by the court was the *Soering* one, namely whether there were substantial grounds for believing that the appellant would be at real risk of such violence or that the relevant authorities would not take appropriate steps to protect the prison population against such risk. In this context the court stated:

> "*Article 3 does not require a guarantee of safety.*"

[48] The final noteworthy feature of the decision in *Giese* is the court's approach to the identity of the requesting state. This is first addressed in the passage at [38] reproduced above. The court returned to this theme at [47]:

> "*We start by reminding ourselves that the United States of America and its constituent states including California is a mature democracy governed by the rule of law. The assurance given by the District Attorney has been transmitted by the Department of Justice as a solemn promise between friendly states who have long enjoyed mutual trust and recognition. Assurances have been accepted routinely from the government and the promises made have been honoured. The stated intention of the further assurances is clear, namely that the*

> *appellant will not be subjected to an order for civil commitment if convicted of the crimes for which his extradition is sought."*

The two passages in question partake of elements of the general and the particular. The general element consists of the court taking into account evidence of the broader picture in the requesting state which, where applicable, can permissibly include consideration of the requesting state's previous conduct in the matter of honouring assurances in the context of extradition proceedings. The particular element relates to the terms of the assurance given in the instant case. The *Giese* litigation illustrates this element. In the context of an earlier, unsuccessful request to extradite the appellant the English Divisional Court had ruled that an assurance provided by the US Government was inadequate. However, in the context of the second extradition request giving rise to the unsuccessful appeal to the Divisional Court the evidence included a new, substituted assurance which satisfied the later court.

[49] Certain other decisions of the English Divisional Court concerning extradition to the US merit attention. These include *Hafeez v –Government of the USA* [2020] EWHC 155 (Admin) and *Sanchez v Government of the USA* [2020] EWHC 508 (Admin). The decision in *Hafeez* contains a useful review by Hamblen LJ of the Strasbourg jurisprudence at [48] – [57]. As this indicates, the line of Strasbourg authority has been consistent and, further, has developed incrementally. This decision is notable particularly on account of its review of one aspect of the decision of the ECtHR in *Trabelsi*.

[50] As the learned analysis of Hamblen LJ demonstrates, the suggestion in *Trabelsi* that the court's earlier decision in *Harkins v United Kingdom* [2012] 55 EHRR 19 supports the proposition that in Article 3 removal cases the court has adopted the same approach in cases of both expulsion and extradition does not withstand scrutiny. Hamblen LJ further questioned the statement in *Trabelsi* at [116] that in removal cases Article 3 applies without distinction between ECHR Contracting Parties and non-Convention States. The Divisional Court was at pains to emphasise one central and recurring theme of the Strasbourg jurisprudence beginning with *Kafkaris v Cyprus* [2008] 49 EHRR 35 at [100]:

> *"… it should be observed that a state's choice of a specific criminal justice system, including sentence review and release arrangements, is in principle outside the scope of the supervision the court carries out at European level, provided that the system does not contravene the principles set forth in the Convention …."*

This has been subsequently reiterated by the Strasbourg court in, for example, *Hutchinson* at [45]. In the succinct language of Hamblen LJ at [55]:

> *"So long as the principles of the Convention are observed, the precise mechanism by which a review is conducted is not to be subject to close scrutiny."*

The Divisional Court considered, in terms, that the exercise conducted by the ECtHR in *Trabelsi* culminating in its rejection of the US arrangements for the reduction and commutation of life sentences trespassed upon this principle.

[51] Most recently the central issues arising in the present case were considered again by a different constitution of the English Divisional Court in *Sanchez v Government of the USA* [2020] EWHC 508 (Admin). The first ground upon which leave to appeal was granted in that case is recited at [2]:

> *"……. whether a potential sentence of imprisonment for life without parole is reducible and compatible with Article 3* [ECHR] *in the light of the decision …… in* ***Trabelsi – v – Belgium*** *……"*

The appellant's challenge was dismissed in the following terms by Mrs Justice Elizabeth Laing, delivering the judgment of the court at [60] – [61]:

> *"I do not consider that Ground 1 is well founded. I have summarised the authorities and the arguments fully and can therefore explain why very shortly. This Court is bound by the decision of the House of Lords in* Wellington *to hold that to extradite a claimant to the United States of America to face, if convicted, a life sentence without parole does not breach Art.3. If that were not so, I would, in any event, follow* Harkins no.2 *and* Hafeez *on the grounds that neither is clearly wrong.* Harkins no.2 *is a decision to refuse permission to apply for judicial review, but it was given after a "rolled-up" hearing at which both sides were represented and is fully reasoned. Indeed, I consider that both of those decisions are clearly right.*
>
> *Finally, this Court is not, in any event, bound to follow* Trabelsi. *In the light of the reasoning in* Harkins No.2 *and* Hafeez, *I consider that* Trabelsi *is an unexplained departure from the approach of the ECtHR in* Harkins *– it has not been followed subsequently in the extradition context. There is, therefore, no "clear and constant jurisprudence" of the ECtHR, which indicates that it is a breach of Art.3 for a claimant to be extradited to the United States of America where he faces, if convicted, a life sentence without parole. We agree with para.58 of* Hafeez *in which this Court summarised its reasonings for holding that such a sentence was not irreducible."*

[52] The centrepiece of Mr O'Donoghue's submission was that in both *USA v Horne (No 1)* and *Giese* the respective courts misdirected themselves in law. The essence of the suggested misdirection was that neither court had given effect to paragraph [187] of *Othman*. In written form the argument was couched in the following terms:

> "*Once the real risk is established, it is the function of the assurances to provide a practical guarantee to the Requested State that no* [Article 3 ECHR] *breach shall occur. It is insufficient that the assurances diminish the risk. They must go further and provide a practical guarantee that the applicant will not be the victim of an Article 3 breach. A practical guarantee goes much further than an assurance that invites the court to find that the Requested Person is no longer at a real risk of an Article 3 breach.*"

The substance of this submission is that in any case where there is an Article 3 issue and, further, where the evidential matrix includes assurances from the Requesting State addressing the asserted risk, such assurances must be couched in the terms of an absolute guarantee.

[53] The court considers that this argument cannot be sustained. We find it impossible to distil from *Othman* a requirement that in Article 3 expulsion cases the Requesting State provide an assurance framed in the terms of an absolute guarantee. The starting point is that the evidential matrix in any given case may, or may not, include assurances from the Requesting State. In a case where an assurance falls to be considered by the court of the requested state, the ECtHR in *Othman* described this as constituting "*a further relevant factor*" to be considered. This, we consider, denotes that it must be weighed with all other evidence bearing on the Article 3 issue available to the court. In the next part of paragraph [187] the Strasbourg court in substance exhorts the domestic court to probe the adequacy of the assurance, to peel back its outer layers. It is incumbent on the domestic court to step beyond the written word and to enquire whether at a practical level the protection promised by the requesting state will in fact be provided. Both theory and practice – *de iure* and *de facto* – must be considered. The question for the domestic court is whether the assurance provides a "*sufficient*" guarantee of protection of the requested person against the risk of the ill treatment asserted.

[54] The language of Othman is that of *sufficient guarantee*, not *absolute guarantee*. This analysis is reinforced beyond plausible argument by the final sentence in paragraph [187] where the court states that the weight to be given to assurances from the requesting state will depend in every case on the circumstances prevailing at the material time. If the appellant's submission is correct, there would be no weighing exercise to be carried out by the court. Rather the sole question for the court would be whether the relevant assurance provides an absolute guarantee that the requested person will not be subjected to the proscribed treatment in question.

[55] Furthermore, in *Othman* and, indeed, all of the other Strasbourg decisions belonging to this territory, the *Soering* test has been consistently applied. There are no absolutes in this test. Rather, in its entirety, it is infused with predictive evaluative judgment on the part of the court of the requested state. In *Othman* the court applied this test without qualification: see [185]. The effect of the appellant's argument, if correct, is that in Article 3 expulsion cases the ECtHR in *Othman* modified the *Soering* test. We consider that this is not the correct analysis of *Othman*.

[56] Given the foregoing analysis, this court considers that the statement of the Divisional Court in *Giese* at [54] that Article 3 ECHR does not require a guarantee of safety contains no error. While *Giese* is not as a matter of precedent binding on this court, we are satisfied that it is harmonious with the Strasbourg jurisprudence, in particular *Othman*. We would add that this court's determination of the present appeal will not, in any event, be determined by the Divisional Court's determination of the fact sensitive appeal in *Giese*.

[57] As we have conducted a detailed review of both Strasbourg and domestic jurisprudence, perhaps even more extensive than that found in the decision of the English Divisional Court in *Hafeez*, we consider it appropriate to express our view on the decision of the ECtHR in *Trabelsi*. In short, we share the reservations about the correctness of this decision expressed in *Hafeez*. As this is a case concerning one of the Convention rights protected by the Human Rights Act 1998, *Trabelsi* must be viewed through the lens of section 2(1) (a), which obliges this court to take this decision into account. We do so, bearing in mind the exposition of section 2(1) provided in decisions of the House of Lords binding on this court: see in particular *Manchester City Council v Pinnock* [2010] UKSC 45 at [48]. In our judgment *Trabelsi* bears the hallmarks of an aberrant decision, one which certainly cannot be classified as forming part of a clear and consistent line of Strasbourg authority.

[58] The attention of the court has been drawn to certain decisions of the CJEU in expulsion cases under the Framework decision in which Article 4 of the EU Charter of Fundamental Rights, the analogue of Article 3 ECHR has been considered. These include in particular *Aranyosi* [2016] 42 BHRC 551 and *ML* [2018] C-220/18. We can identify nothing in these decisions supportive of the appellant's central Article 3 ECHR contention.

[59] Summarising, we consider that the cumulative weight of both the Strasbourg and domestic decisions considered above confounds the cornerstone of the first and second of the appellant's grounds of appeal, namely the contention that he cannot be lawfully extradited to the US in the absence of a cogent guarantee from the Requesting State that he will not be at risk of punishment by a sentence of whole life imprisonment.

[60] The subsidiary submission on behalf of the appellant is that the assurances provided on behalf of the Requesting State are vitiated on the ground that the Florida District Attorney cannot bind his successors to the undertakings provided by

him. While the evidence adduced in support of this contention is of questionable strength, this court is disposed to accept that it is correct. However, for the reasons elaborated in both *Horne No 1* and *Giese*, which we adopt, and given our assessment in [24] – [25] above we consider that it is of no merit.

[61] Applying the *Soering* test, the first and second grounds of appeal are dismissed accordingly.

Third Ground of Appeal

[62] This ground of appeal is couched in the following terms: *The appropriate judge and Secretary of State erred in their determination that the appellant's extradition would not be incompatible with his rights* [under] *Article 3 ECHR as a consequence of prison conditions in the State of Florida. It is submitted that the material conditions alone, with most prisoners housed in overcrowded dormitories without air conditioning, do not meet the minimum requirements* [of] *the ECHR jurisprudence. In* [the] *absence of any appropriate assurances regarding such conditions the appeal should be allowed and* [the] *appellant discharged.*

[63] Both at first instance and on appeal the appellant has based this ground on the written evidence of one Professor Ross, attached to the School of Criminal Justice, College of Public Affairs at the University of Baltimore, where he is also a Research Fellow of the Centre for International and Comparative Law. The document containing the evidence of Professor Ross which purports to be an "affidavit" contains no signature of the author, is unsworn and has a reference to an unidentified "*Notary Public*". There is a still further incongruity. Whereas the printed date adjoining the uncompleted *jurat* in the unsworn document of 09 June 2017, immediately following the bibliography there is an "*Expert's Declaration*" purportedly signed by Professor Ross bearing an entirely different date namely 12 October 2017. The discrepancy between these two dates is acute. None of these issues was addressed before this court. The several irregularities which this court identified are not matters of either procedural or pedantic detail. They are, rather, matters of substance given that the issue is one of expert evidence which purports to have been sworn. Stated succinctly, this court considers the "affidavit" of Dr Ross to be a highly irregular document.

[64] At first instance the judge noted that while there was no challenge to the professional credentials of the Professor the Requesting State "*… did challenge the evidential basis for some assertions and highlighted some errors which were accepted*". In addition two affidavits sworn by senior officials of the Florida Department of Corrections ("*FDOC*") were filed.

[65] We gratefully adopt the judge's summary of the written evidence of Professor Ross at [59] – [63] of her judgment. Fundamentally, Professor Ross claims that prison conditions in the FDOC are among the worst in the US. There is a long history of substandard conditions and prisoner abuse entailing *inter alia* assaults on

prisoners, sexual assaults, inadequate medical care, overcrowding, strip searches and solitary confinement. He accuses the FDOC of corruption and lack of accountability.

[66] The Professor cannot be criticised for understatement. This is illustrated in a number of passages, including the following:

> "*… the deviance and corruption in the FDOC is not a matter of one or two bad apples, this organisational dysfunction is rampant and system wide.*"

In the same paragraph he alleges that prison officers are involved in –

> "*… smuggling contraband, sexual assault and ordering inmates to kill (ordering a hit) on particular convicts etc …*"

In another passage he accuses both high level FDOC officials and prison officers of –

> "*.. prisoner abuse and deaths in custody precipitated by correctional officer abuse of inmates and corruption at the Department's highest levels.*"

The reader will search in vain for any accompanying specificity and particularity.

[67] The concluding passage in Professor Ross's affidavit is in the following terms:

> "*Given the news media, government agency and social scientific literature presented and reviewed, those sentenced in the* (FDOC) ***will not*** *escape violence (including sexual assault) and perhaps death both at the hands of other inmates and perhaps correctional officers, poor medical attention and their ability to seek legal remedies to challenge their conditions are seriously curtailed, in particular, high levels of prison violence and poor medical care, violates Article 3* (ECHR) *and Article 4* (CFEU). *Additionally the passage of the Prison Litigation Reform Act violates Article 13* (ECHR) *and Article 47* (CFEU) *and those signatories to this document are well within their rights to block extradition to the United States.*"

The absolute and unqualified language of this paragraph is unmistakable. The problematic syntax and grammar do not facilitate the task of understanding the words used. Furthermore the Professor has without apology, hesitation or qualification trespassed on the function of the court in the final sentence.

[68] One of the discrete topics addressed by Professor Ross is entitled "Violence and Mortality in Florida Department of Corrections Facilities". He states inter alia:

> "*From 2000 – present, roughly 3% of all inmates incarcerated in the FDOC facilities die in any year.*"

He suggests that the total number of inmates in FDOC facilities is a little short of 100,000: 3% of this figure is 3,000. Is he really suggesting that during the past 15 years approximately there have been up to 3,000 deaths per annum in FDOC prisons? In the next paragraph he refers to "*an average of 285 persons*" dying annually in such facilities and in other parts of his "affidavit" comparable figures can be found. Neither the figure of 285 nor the other comparable figures can be reconciled with 3% of just under 100,000, ie something approaching 3,000. The Professor, however, provides no correction or illumination. The figure of 3,000 is, of course, positively startling. Is this one of the admitted errors in his evidence noted by the judge at first instance? This appellate court does not know, as these errors are unparticularised. If this was an error, it is of the egregious kind.

[69] The affidavits on which the Requesting State relies are summarised by the judge. Professor Ross's engagement with the main themes of these affidavits is either inadequate or non-existent. He could, of course, have rejoined in writing. However he did not do so.

[70] In one part of Professor Ross's "affidavit" one finds the following:

> "*This case differs significantly from* [Attorney General of Ireland – v – James O'Gara] …. *Mr O'Gara, a first time offender, was charged with a bank robbery. In the United States bank robberies are federal crimes and with few exceptions punishment is typically in the United States Federal Bureau of Prisons (FBOP) system.*"

Strangely, Professor Ross makes no attempt to illuminate or elaborate on the material differences, if any, between incarceration in a FBOP facility and a FDOC facility.

[71] The inclusion of this short passage in the "affidavit" of Professor Ross was presumably motivated by the judgment of the Irish High Court in *Attorney General v O'Gara* [2012] IEHC 179. In that case, as the judgment of Edwards J indicates, the requested person relied upon an affidavit of Professor Ross. Accompanying this affidavit were some 100 publications of various kinds to which the deponent referred. Edwards J indicates at paragraph 7.11 of his judgment that all of this material had been "*carefully considered*" by him.

[72] The judge noted that the three areas of concern about US prisons generally raised by the Professor were prison violence, poor medical care and limited rights of access to a court. At paragraph 7.23 Edwards J quotes the final paragraph of the Professor's affidavit. The striking similarities between this paragraph and its equivalent in the present case are unmistakable. Furthermore and notably, in

contrast with the present case, Professor Ross rejoined to the first of the affidavits filed on behalf of the Requesting State.

[73] At paragraph 10.10 Edwards J observed that a strikingly high percentage (over 80%) of the materials provided by Professor Ross in support of his averments were, in essence, irrelevant to the issue of prison rape and sexual assault. At paragraph 10.12 the judge noted that two thirds of the other publications detailed in the bibliography had not been provided. Most of the others consisted of opinion rather than original data. Some of the other materials suffered from identified shortcomings: all of the foregoing is addressed by the judge in some detail at paragraphs 10.10 – 10.32. The judge's overall assessment of the evidence of Professor Ross and the supporting materials is expressed at paragraph 11.1:

> "*In the court's view the evidence in this case, while it was sufficient to put the court upon its enquiry, falls short of demonstrating that the particular respondent in this case will, if extradited, be exposed to a real risk that his fundamental rights will be breached … this is not a case where it is suggested that the respondent is at risk of having his rights violated by virtue of some characteristic unique to him or his case eg membership of a particular grouping, or his sexuality. His case is correctly characterised as being based upon* ***general criticism of the American prison system and its human rights record with regard to the treatment of prisoners particularly as it is perceived in some quarters both in the USA and on this side of the Atlantic. That alone is not enough in this court's view to justify it in regarding the respondent as being at real risk.***"
>
> [Our emphasis]

[74] This court adopts the cogently reasoned critique and conclusion of Edwards J in their entirety. In short, the judge identified multiple shortcomings in the evidence of Professor Ross. Strikingly, in the present case also the "affidavit" of the Professor has an accompanying bibliography identifying more than 70 publications. None of these was provided to this court. Furthermore the comparison between this bibliography and that contained in the judgment of Edwards J is strong.

[75] Given all of the foregoing, this court finds the evidence of Professor Ross unreliable and unpersuasive. It is appropriate to rehearse [46] – [48] of our earlier judgment in this appeal (***Horne v USA, No 2*** [2021] NIQB 36):

> *"[46] Standing back, having regard to all of the matters highlighted in paragraph [35]–[43]and giving effect to the principles rehearsed in [44] – [45] above, this court's unhesitating conclusion is that in the context of these*

proceedings and for the purpose of adducing the evidence contained in his declaration Mr Wright must be declined the accreditation of expert witness. The court's reasons for thus concluding are based on the multiple flaws, limitations and other features detailed in the aforementioned paragraphs of this judgment. Properly analysed, the "evidence" which Mr Wright would propose to give through his declaration consists of a series of hearsay allegations, claims and assertions accompanied by no – or hopelessly inadequate - particularity and specificity.

[47] Linked to this is the court's assessment that, duly analysed, Mr Wright's declaration contains no opinion evidence at all. Real expert witnesses express opinions having first defined the relevant topic with precision and having then identified everything material pertaining thereto, including elements pointing in different directions, before expressing a balanced, reasoned conclusion. There is none of this in Mr Wright's declaration. Furthermore, Mr Wright has opted for hyperbole in preference to moderation of language, objectivity and detachment. In addition, neither his declaration nor his evidence under affirmation discloses the slightly indication of understanding his duty to the court. Moreover, his report is in this court's estimation pure advocacy, that is to say an instrument devised for the sole purpose of securing a satisfactory result for the party on whose behalf Mr Wright has been instructed.

[48] Mr Wright is, in this court's view, an advocate and activist and not an expert witness. He is an advocate for the Appellant and an advocate and activist for prisoners generally. It is in these capacities that he has gained recognition and secured awards in the US. Many would regard Mr Wright's activities as socially admirable. This court would not disagree and this judgment is not to be interpreted as questioning this in any way. Mr Wright's asserted status and acceptance as an expert witness in other jurisdictions, in particular the US, lies well beyond the purview of this court. It carries at most minimal weight in these proceedings, given our analysis above."

[76] In the present case the first instance judge made three specific, case sensitive conclusions:

(i) While it is suggested that the appellant has a history of mental illness, the evidence falls short of demonstrating a consequential particular vulnerability.

(ii) Similarly, the evidence falls far short of demonstrating that he would be at risk of attack because the killing in question is alleged to have been "drug related".

(iii) The appellant suffers from no heightened vulnerability to sexual assault.

The judge also made the following general conclusions:

(iv) Whereas prison conditions in Florida are harsh there have been improvements.

(v) The court accepted the good faith of the Requesting State relating to the evidence of steps taken to bring about such improvements, in particular in safe guarding the health and welfare of prisoners.

(vi) Finally "*… in light of the affidavits submitted by the requesting state there is no basis for suggesting that the requesting state does not take appropriate steps to protect its prisoners*".

[77] In challenging these conclusions the essence of Mr O'Donoghue's submission was that the judge had failed to engage comprehensively with everything raised in the "affidavit" of Professor Ross. This court considers this a criticism of form rather than substance. The judge, dealt with the main issues in careful and balanced terms. In particular, with specific reference to one of Mr O'Donoghue's submissions, the judge was not required as a matter of law to identify any distinction between State and non-State actors in the context of these proceedings. Furthermore the exercise in which the judge engaged was one of evaluative judgment.

[78] By virtue of section 103(4) of the 2003 Act an appeal to this court may be brought only on a question of law or fact. As paragraphs [62]ff of this judgment demonstrate, there is no identifiable question of law in the appellant's third ground of appeal. Nor is there any discernible question of fact. In particular there is no suggested material error of fact on the part of the judge and we are satisfied that all material factual matters were considered.

[79] Finally, the judge's conclusions were based upon a relatively benign view of the evidence of Professor Ross. The critique of this evidence which this court has conducted is not mirrored in her judgment. For the reasons given this court is wholly unpersuaded by the evidence of Professor Ross.

[79] It follows from all of the foregoing that the third ground of appeal must be rejected.

Conclusion

[80] The appellant's case must fail accordingly. As the court is persuaded that the modest threshold of arguability has been overcome, leave to appeal is granted. The appeal is dismissed substantively for the reasons given.

ADDENDUM

[81] Following delivery of this judgment, the appellant applied to the court to certify a question of law of general public importance and to grant leave to appeal to the Supreme Court under section 32 of the Extradition Act 2003. It is contended that the following question of law of general public importance arises:

> "*In an extradition case where there is an Article 3 ECHR issue and, further, where the evidential matrix includes assurances from the Requesting State addressing an asserted risk, what is the proper approach of the court having regard to the requirement of a sufficient guarantee as identified at paragraph [187] of* ***Othman v United Kingdom*** *[2012] 55 EHRR 1?"*

[82] As the appellant's application demonstrates, in this discrete jurisprudential sphere one finds a range of expressions in the decided cases – "*assurance*", "*a sufficient guarantee*" and (in terms) a "*practical guarantee.*" This court considers that "*assurance*" and "*guarantee*" are synonyms. This court further considers that "*adequate/sufficient assurance*" and "*sufficient guarantee*" are synonymous terms. Furthermore, this court considers that "*practical guarantee*" constitutes the second part of what has been identified in the relevant jurisprudence as the twofold requirement of a "*de iure guarantee/assurance*" and a "*de facto guarantee/assurance*".

[84] Properly analysed, the appellant appears to be contending that in the Article 3 ECHR extradition context, the *Soering* test either is too weak or, alternatively, is inapplicable, being substituted by a more robust test. The court is unable to identify any jurisprudential basis for this contention. Furthermore, the court considers that the terminology of paragraph [4] of this application confirms the correctness of the court's construction of the argument at the centre of the appellant's case, namely that an assurance/guarantee from the Requesting State in absolute terms is necessary, which the court rejected. The court, with respect, rejects the suggestion in paragraphs [5] and [6] of the appellant's application that it misconstrued the appellant's case in this respect. The court further considers that the remaining paragraphs of the application betray a misunderstanding of the basic dogma rehearsed at [83] above.

[85] In conclusion, the court considers that its decision involved the application of well established principles to a fact sensitive matrix. No novel issue of law was ventilated in argument and none is to be found in the court's decision. Accordingly, the court declines the application for certification in the terms formulated or in

suitable reconfigured terms, the effect whereof is that leave to appeal to the Supreme Court is necessarily refused.