IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
[2019] EWHC 3403 (Admin)

No. CO/5142/2019

Royal Courts of Justice

Tuesday, 26 November 2019

Before:

LORD JUSTICE SINGH

MRS JUSTICE MCGOWAN DBE

B E T W E E N:

RICHARD KLEMIS — Applicant

- and -

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS — Respondent

MR M. HAWKES (instructed by NLS Solicitors) appeared on behalf of the Applicant.

MR T. CADMAN (instructed by the U.S Government) appeared on behalf of the Respondent

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J U D G M E N T

LORD JUSTICE SINGH:

Introduction

1 The applicant seeks permission to appeal against the order for his re-extradition to the United States made by Westminster Magistrates' Court on 14 December 2018. On that date, the Chief Magistrate, Senior District Judge Arbuthnot, ordered his return to serve the balance of a 20-year sentence imposed in the US on 8 May 2015 following his conviction of nine offences of supplying drugs in 2011. This is a rolled-up hearing; in other words, if permission is granted, it has been directed in an order dated 3 May 2019, that the Court will proceed immediately to consider the appeal as well.

Factual background

2 The applicant is a UK citizen and is 46 years old. He was born on 7 May 1973. In November 2009, while he was in the US, he was convicted in his absence at Northampton Crown Court for the supply of class A drugs and sentenced to eight years' imprisonment. He returned to the UK voluntarily on 17 May 2011 to begin serving that sentence. In 2012, the US government issued an extradition request to the UK seeking the applicant's extradition to stand trial in that country pursuant to a nine-count indictment for drug offences, which included two counts in which the purchaser of the drugs died or suffered serious harm (see Counts 2 and 4 on the indictment).

3 On 8 January 2013, the applicant was arrested in the UK pursuant to a US extradition request for temporary surrender and was brought before Westminster Magistrates' Court. By a judgment dated 28 June 2013, DJ Purdy sent his case to the Secretary of State to order extradition. The extradition was ordered by the Secretary of State on the condition that an undertaking would be provided by the US to return the applicant following trial to serve the balance of his UK sentence. The applicant appealed against the Secretary of State's extradition order to the Divisional Court, arguing that the mandatory minimum 20-year sentence for the alleged conduct was grossly disproportionate and in breach of his rights under Art.3 of the European Convention on Human Rights. His appeal was dismissed on 26 November 2013: see *Klemis v Government of the United States* [2013] EWHC 4454 (Admin). King J gave the main judgment, with which Goldring LJ agreed.

4 The applicant was extradited to the US and, on 8 May 2015, he was convicted after trial by a jury at the District Court in the Southern District of Illinois of nine offences. He was sentenced to 20 years' imprisonment for Counts 1 to 8 concurrent, and 12 months' imprisonment on Count 9 – also concurrent. The court granted the applicant credit for time served in the US awaiting trial but not for time served in the UK while awaiting extradition or after extradition.

5 Count 2 on the indictment concerned distribution of a controlled substance contrary to the United States Code Title 21 s.841(a)(1) and s.841(b)(1)(C). Count 4 on the indictment concerned a similar offence in relation to another victim.

6 In August 2017, the applicant was returned to the UK to complete the balance of his eight-year prison sentence. The applicant submits that, at the time of his re-extradition from the US to the UK, he was preparing to continue his challenge to his US convictions. In 2016, with the assistance of new counsel, he had lodged an appeal which was dismissed by the Court of Appeals for the Seventh Circuit on 12 June 2017. The applicant submits that he

intended thereafter to lodge a further appeal to the US Supreme Court and also an application for permission to appeal under Title 28 of the US Code s.2255 relating to ineffective assistance of counsel at his trial (see the applicant's skeleton argument para.75). A s.2255 motion is a statutory procedure, similar to an application for *habeas corpus,* and can be instituted after an appeal has taken place (see the expert report of Peter Goldberger).

7 The custodial portion of the applicant's UK sentence expired on 14 December 2018. Therefore, his detention now is predicated on these re-extradition proceedings.

Current proceedings

8 The applicant appeared before the Chief Magistrate, Senior District Judge Arbuthnot, at Westminster Magistrates' Court on 12 December 2018. At the initial hearing on this date, the applicant appeared without legal representation, his previous solicitors from 2013 no longer being on the record. As a result, the matter was adjourned until 16:00 in order for him to see the duty solicitor. The applicant is represented by that duty solicitor, Mr Noam Almaz, in these proceedings.

9 At this later hearing on 12 December, the applicant claimed that the certificate pursuant to s.186(5)(b) of the Extradition Act 2003, ("the Act") did not confirm that the US sentence was for the same conduct for which he was extradited. The case was adjourned until 14 December 2018 to deal with this matter. On 14 December, the Chief Magistrate dismissed the applicant's objection and ruled that the correct certificate had been provided. The applicant's re-extradition was ordered under s.189 of the Act. The Chief Magistrate did not give any judgment, written or oral.

10 Mr Almaz records in his witness statement that he raised human rights arguments before the Court in relation to the fairness of the applicant's US trial, the ineffective assistance of US counsel and the applicant's removal back to the UK before he had completed his appeal process in the US. He states that he submitted to the Court that these were human rights arguments which would be pursued on an appeal - in other words, an appeal to this Court. It is admitted by Mr Hawkes on behalf of the applicant that the understanding of the parties, including the Judge, appeared to have been in error in that no substantive challenge to extradition could be heard at that hearing – rather, these were matters for a statutory appeal pursuant to s.108 of the Act (see the applicant's skeleton argument at para.10).

11 The respondent accepts that reference was made before the Magistrates' Court to raising human rights grounds on an appeal. However, counsel for the respondent, Mr Cadman, who appeared before the Magistrates' Court unlike Mr Hawkes, notes that no challenge on human rights grounds was in fact raised at the hearing and no objection was raised as to the Court proceeding without human rights having been considered (see the respondent's skeleton argument at para.1.4).

12 The respondent submits that it was the applicant's obligation to raise matters before the Senior District Judge and a failure to do so does not provide him with an opportunity now to raise it for the first time on appeal. Mr Cadman accepts that, at the hearing on 14 December, Mr Almaz indicated that he intended to argue human rights grounds on an appeal but notes that it remains unclear whether and to what extent these matters were raised before the Senior District Judge prior to her reordering extradition. It is accepted that it is quite clear from the applicant's written submissions that no substantive argument was put before the Magistrates' Court, but whether giving an indication to appeal on grounds is sufficient is queried by the respondent.

13 The applicant lodged an appeal in the High Court against the Magistrates' Court's decision on 20 December 2018. On 21 December 2018, Ouseley J directed the applicant to lodge a skeleton argument to address the following three issues: first, the specific statutory provisions relied upon, including the statutory provisions which give rise to a right of appeal to the High Court, and any time limits that arise (see s.189 of the Act and Part 2 of Schedule 1); secondly, a full account of the proceedings before the Senior District Judge, including any issues or bars to extradition that were raised, supported by a witness statement; and thirdly, the judgment of the Senior District Judge, if applicable.

14 In his written submissions of 23 January 2019, the applicant addressed the first of those three questions. The applicant submitted that there is a clear statutory right to challenge the decision to re-extradite him to the US. A request was made for an extension of time to deal with the other matters. With regard to the second question, the applicant relies on the witness statement of his solicitor, Mr Almaz, to provide a full account of the proceedings before the Senior District Judge. As to the third matter, and as I have already mentioned, there is no judgment from the Senior District Judge.

15 On 30 April 2019, the applicant filed a further skeleton argument in support of his application for permission to appeal. At a case management hearing before the Divisional Court, comprising Irwin LJ and Jeremy Baker J, on 3 May 2019, the Court directed that the respondent should seek an undertaking from the US Government to the effect that the one year limitation period to file an application for permission to appeal his US convictions under s.2255 would be waived if the applicant is re-extradited. This undertaking was given by the US Government in a letter dated 14 May 2019.

16 On 10 July 2019, the applicant applied to adjourn the hearing of this case; this was granted by order of 12 July, which vacated the original hearing of 17 July and listed the case for the Michaelmas term. The order further provided for the provision of a report on the mental health of the applicant by a consultant forensic psychologist, Dr Frank Farnham.

Material legislation

17 The applicant notes that the application of the Act in this case, a category 2 re-extradition case, is complex as it is subject to extensive amendments pursuant to Part 2 of Schedule 1 to the Act which are not formally set out in amended form. The applicant outlines the position in his latest skeleton argument, dated 20 November 2019, at para.22 to para.32 and also in a helpful appendix.

18 Section 187, which has the side note 'Re-extradition hearing' so far as material, provides:

> "(1) If this section applies in relation to a person, as soon as practicable after the relevant time the person must be brought before the appropriate judge for the judge to decide whether the person is to be extradited again to the territory in which the overseas sentence was imposed.
>
> (2) The relevant time is the time at which the person would otherwise be released from detention pursuant to the UK sentence (whether or not on licence)."

19 Section 189, which has the side note 'Re-extradition to category 2 territories' then applies for category 2 territories and determines that the Act applies as it would if there had been a valid request for extradition; there is a statement setting out the conviction and the hearing takes place in accordance with s.187. Section 189 provides:

"(1) If this section applies, this Act applies as it would if—

(a) a valid request for the person's extradition to the territory had been made;

(b) the request contained a statement that the person had been convicted of the relevant offence;

(c) the relevant offence were specified in the request;

(d) the hearing at which the appropriate judge is to make the decision referred to in section 187(1) were the extradition hearing;

(e) the proceedings before the judge were under Part 2.

(2) As applied by subsection (1) this Act has effect with the modifications set out in Part 2 of Schedule 1.

(3) The relevant offence is the offence in respect of which the overseas sentence is imposed."

20 Section 189(2) determines that the modifications to the Act set out in Part 2 of Schedule 1 apply. This is set out as modified at Appendix A of the applicant's skeleton argument. It is submitted that the applicable route in the instant case is as follows. The Judge is to determine whether the offence is an extradition offence: see s.78(4). If the offence is an extradition offence, the judge must proceed to s.79 entitled 'bars to extradition'. These bars are modified from the original and include only:

"(a) the rule against double jeopardy;

(b) extraneous considerations;

(c) the passage of time;

(d) hostage-taking considerations.

(e) forum."

21 In a conviction case where the person is unlawfully at large, the Judge must proceed to s.85 to determine whether the person was convicted in his presence. If so, the Judge must proceed to s.87 entitled 'Human rights'. This section is amended to empower the Judge to order the person's extradition rather than sending it to the Secretary of State to decide that question (see s.87(3)).

22 It is open to the person to appeal against the decision of the Judge to order his extradition. This, it is submitted, is clear from the wording of s.103 as amended by Part 2 of Schedule 1, which would read as follows: "(1) If the... judge orders a person's extradition under this part the person may appeal to the High Court against the order."

23 The notice of appeal must be lodged within 14 days of the date of the order: see s.103(9) as amended. The powers of the High Court, pursuant to such an application, apply in the usual

way. The leave of the Court is required to appeal against the decision and the appeal may be allowed if the Judge ought to have decided a question before her at the extradition hearing differently and, having done so, would have been required to order the person's discharge:

> "(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."

24 The applicant further submits that Section 3 of the Criminal Procedure Rules 2015 also applies. For example, r.50.1 is explicit that Section 3 applies where: "... a party wants to appeal to the High Court against an order by the magistrates' court or by the Secretary of State". These rules govern applications for leave to appeal in the usual way, such as r.50.17.

25 On behalf of the respondent, Mr Cadman did not dispute any of the analysis of the legislation which has been set out on behalf of the applicant by Mr Hawkes.

Decision of the Magistrates' Court

26 As I have mentioned earlier, the applicant appeared before the Senior District Judge at Westminster Magistrates' Court on 12 and 14 December 2019; on the latter date, his re-extradition was ordered. The applicant now seeks permission to appeal against that order. The Senior District Judge did not give any judgment; however, she is recorded by Mr Almaz as having said the following in his witness statement:

> "Mr Klemis had a seven day trial in 2015. He was found guilty and given 20 years. Sections 186-187 EA therefore apply. I find that the five conditions in s.186 are satisfied and I therefore make an order for his re-extradition to the United States to serve the sentence imposed in respect of all nine Counts that Mr Klemis was convicted of in Illinois on 8th May 2017 [that should be 2015]".

Grounds of appeal

27 On 20 December 2018, the applicant served his application for leave to appeal with, at that time, s.87 of the Act – based on Art.5 and Art.6 of the ECHR being specified as the only ground of appeal. On 23 January 2019, the applicant filed a skeleton argument in support of his application. On 30 April 2019, he served a further skeleton argument which raised Art.8 of the ECHR for the first time. This has become Ground 2 in this application. Mr Hawkes accepts that the applicant needs permission to amend his grounds of appeal if he is to advance this second ground.

28 In yet another skeleton argument, dated 20 November 2019, and therefore just six days before the scheduled date of this hearing – which had itself already been adjourned – the following three grounds of appeal are now raised by the applicant:

i. Ground 1, under s.87 and Art. 6 on which Art.5 is, as Mr Hawkes fairly acknowledges, entirely parasitic.

ii. Ground 2, under s.87 and Art. 8.

iii. Ground 3, under s.138 of the Act, concerning Counts 2 and 4 of the US indictment. Again, the applicant seeks leave to amend his grounds of appeal out of time to add this Ground 3.

Submissions of the parties

29 On behalf of the applicant, Mr Hawkes, makes the following essential submissions:

i. The applicant has the right to challenge the decision of the Senior District Judge of 14 December 2018. The Judge fell into clear error in proceeding to hear and decide the case as quickly as she did, failing to make any assessment of the human rights issues at stake.

ii. There are grounds to believe that, although the applicant is essentially fit to plead and stand trial, his mental health is such that he would not be capable of presenting and arguing an application for permission to appeal his US convictions under s.2255. He is likely to have to litigate in person as there is no right to state-funded counsel to prepare a s.2255 application. The applicant relies on Dr Farnham's report dated 30 October 2019 and his supplementary report dated 12 November 2019, which evidences his mental health (see in particular para.83 of the main report dated 30 October).

iii. There are strong grounds to believe that the applicant's US conviction for the offence of distribution of heroin resulting in death, contrary to the US Code s.841(a)(1), is at least arguably unsafe. The applicant proposes to advance a scientific argument, which disputes the evidence of the state's toxicologist. It is noted that there was no challenge to the toxicology evidence at trial and the US Court of Appeals was only concerned with the very high "plain error" test and did not consider any *contra* expert evidence. The applicant also raises concerns in relation to the telephone evidence at trial, and the failure to challenge prosecution witnesses – many of whom had themselves been granted immunity from prosecution.

iv. The US Government's waiver, in relation to the s.2255 application's one-year limitation period, will be illusory if the applicant cannot prepare argument on one of the major issues in question, i.e. toxicology. This issue will be highly complex, it will include an attack on his original trial attorney's handling of the case.

v. Under Ground 1 it is submitted that, in breach of his Art.6 rights, the applicant has no effective remedy for ineffective assistance of counsel at his trial. The applicant does not have the capacity to file and argue a s.2255 motion as a litigant-in-person and state-funded appointment of counsel is discretionary, there is no entitlement to it as of right. Furthermore, the applicant's removal back to the UK in August 2017 has caused loss of necessary materials. He was not permitted to bring any of his trial papers, legal correspondence and advice and the whereabouts of these is now unknown. The applicant submits that his re-extradition would constitute a "flagrant breach" of his right to a fair trial and would also amount to a breach of Art.5. Furthermore, as the corollary of his convictions is a very lengthy sentence of imprisonment, the applicant's extradition would also interfere with his Art.8 rights.

vi. Under Ground 2, it is submitted that compounding the disproportionate interference with his Art.8 rights, the US Government will not deduct the time the applicant has spent in custody during these re-extradition proceedings. Mr Hawkes submits that the applicant is a British citizen, that he has three children in this country and that removing him to the US would be a disproportionate interference with his right to respect for private and family life.

vii. Under Ground 3, the applicant argues that causing death or serious injury by supplying heroin are not extradition offences pursuant to s.138 of the Act as they would not constitute an offence in England and Wales. The applicant seeks leave to amend his grounds of appeal out of time pursuant to r.50.17(b)(i) to add Ground 3. He argues that there is a clear distinction to be drawn between the law in the US, which criminalises drug offences which result in death or serious injury, and the law in the UK, which does not unless there is evidence that the drugs were actually administered by the offender. It is not in dispute that the offence of manslaughter could not be made out in this jurisdiction unless it can be proved that the defendant himself administered the drug he supplied to the deceased and would not be made out if the deceased administered the drug himself.

30 We have been assisted by written submissions made on behalf of the respondent by Mr Cadman and did not need to call on him at the hearing, save insofar as he wished to add anything by way of assistance to the Court. Mr Cadman opposes the application made by the applicant on the following basis:

i. The applicant unsuccessfully appealed the first extradition order in 2013.

ii. The applicant failed to raise before the Senior District Judge the issues that he now seeks to raise on appeal and is therefore barred from raising points on appeal, both because they would require the admission of fresh evidence and because they raise new issues which were not argued before the lower court. It is not accepted by the respondent that the test for admission of fresh evidence in *Szombathely City Court & Ors v Fenyvesi & Anor* [2009] EWHC 231 (Admin) has been met, and therefore it is submitted that any apparent fresh evidence ought to be deemed inadmissible.

iii. The applicant seeks to advance matters in an extradition appeal which are properly matters for the courts in the US.

iv. The applicant's arguments do not pass the required threshold for the grant of permission or, if permission is granted, for any appeal to be allowed.

31 The respondent challenges the applicant's grounds of appeal on the following main points:

i. Article 6: it is submitted that the evidential threshold for establishing a breach of Art.6 is a high one and requires a standard higher than mere belief or anecdotal reports. It requires there to be a flagrant denial of justice or the complete denial or nullification of the right. It is submitted that the case advanced by the applicant does not come close to reaching this high bar. See the decision of the House of Lords in *R (on the Application of Ullah) v Special Adjudicator* [2004] 2 AC 323, where it was held that, where a person seeks to resist extradition on the basis of convention rights other than Art.3, the threshold is a very high one.

ii. Article 8: it is argued that the test is that in the Supreme Court decision in *HH v Deputy Prosecutor of The Italian Republic, Genoa* [2013] 1 AC 338 - in other words, whether the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition - it is submitted that there is little or no evidence before the Court to suggest that the effect on the applicant's family life would be one which is exceptionally severe – taking into account the relevant matters put before the Court, and that the applicant has only just finished serving a lengthy domestic sentence in the UK.

iii. Turning to s.138 of the Act, under which the applicant argues that causing death or serious injury by supplying heroin are not extradition offences pursuant to s.138 as they would not constitute an offence in England and Wales: the respondent notes that it is clear that the counts which the applicant seeks to have removed from the indictment would attract a penalty punishable by 12 months' imprisonment had they taken place in England and Wales.

Application to seek permission to amend the grounds of appeal to include Grounds 2 and 3

32 In his latest skeleton argument of 20 November 2019, the applicant seeks leave to amend his grounds of appeal out of time to include a new ground pursuant to s.138 of the Act. Section 138 requires the conduct for which the person's extradition is sought to serve a sentence to be an "extradition offence". The applicant argues that Counts 2 and 4 would not constitute an offence in England and Wales had it occurred in this jurisdiction. Counts 2 and 4 in the US indictment are headed "distribution of a controlled substance", namely heroin.

33 The applicant states in his skeleton argument, at para.102, that the question in the instant case is whether the applicant has been convicted of a drug supply offence which is aggravated, for sentencing purposes only, by the death and life threatening injury to those who consumed the drugs per Counts 2 and 4 of the indictment or whether Count 2 and 4 in fact reflect discrete offences to simple drug supply offences, namely the supply of drugs causing the death and or serious injury of the user. This is the first time the applicant has sought to rely on s.138 of the Act; this is despite the fact that the offences in Counts 2 and 4 were outlined in the original extradition request dated 9 August 2013. Furthermore, the elements of the offences under Counts 2 and 4 were clearly outlined in the supporting affidavit which supported the extradition request.

34 The nature of the offences under Counts 2 and 4 arose in the first instance judgment of DJ Purdy, relating to the original extradition request at pp.4 - 5, and the judgment of King J in *Klemis* at para.7 and para.11 to para.12. Section 138 of the Act was not raised by the applicant in those proceedings. Before this court, Mr Hawkes accepted that it could have been raised in those proceedings. In my view, it should have been raised then before the applicant was ever extradited to face trial on the indictment which included Counts 2 and 4 to which objection is now taken. Further, and in any event, in my view, the point could and should have been raised before the Magistrates' Court in December 2018. Whatever may be said about the human rights issues, which it was said at the time would be raised on an appeal later, Ground 3 is not a human rights ground. If it has merit, it would have been a bar to extradition in respect of Counts 2 and 4 on the indictment.

35 It is clear that the applicant was aware of the nature of the offences under Counts 2 and 4. There is little reason why leave to amend the grounds of appeal to add Ground 3 should be granted at this late date when there is no reason why it could not have been included with

the applicant's original skeleton argument on 23 January or his further skeleton argument on 30 April 2019.

36 I would also refuse permission to amend the grounds of appeal to include Ground 2, based on Art.8, because that was raised for the first time in the skeleton argument of 3 April 2019 and no good reason has been given for why it could not be raised earlier. I would refuse such permission, in addition, for the reason that the argument based on Art.8 requires evidence; such evidence has necessarily to be placed before this court for the first time on an appeal. There is no warrant in the well-known criteria in *Fenyvesi* for the admission of fresh evidence in this Court to do so in this case. Further, and in any event, for reasons that will become apparent, I have come to the conclusion that Ground 2 has no merit in any event.

The applicant's other grounds

37 In the absence of a written note from the Senior District Judge, and because of the dispute between the parties, it is difficult to determine exactly what was advanced at the hearing on 14 December 2018. It is clear that Mr Almaz mentioned human rights arguments before the Magistrates' Court, but whether giving an indication to appeal on human rights grounds is sufficient is queried by the respondent. I have come to the conclusion the application for permission should be refused on its merits for the following reasons.

38 Ground 1: in my view it is not reasonably arguable that the high threshold for establishing a breach of Art.6 has been reached (see the decision of the House of Lords in *Ullah* where it was held that, where a person seek to resist extradition on the basis of protections other than Art.3, the threshold is a very high one (para.24)). As Mr Hawkes accepts, there has to be a real risk that there would be a flagrant denial of the right to a fair trial in Art.6.

39 There can be no dispute, and is none, that this Court does not sit on appeal from the applicant's trial court in the US, nor does it consider any s.2255 application which he may make in due course. The question whether Mr Hawkes' criticisms of counsel, who conducted the applicant's defence at his trial, are justified or not must be a matter for the American court system. The fundamental basis for Ground 1 is that the applicant will not be able effectively to make a s.2255 application if he has to act in person, given both the complexity of the issues and the state of his mental health.

40 Complaint is made that the applicant will not have an absolute right to state-funded counsel to make a s.2255 application for him. American law provides for this to be within the discretion of the District Court Judge to whom the matter returns once an appeal has been concluded, as it has been in this case. However, it must be recalled that the discretion is one which is vested by law in a judge. This Court can and must proceed on the basis that the courts of another state with which this country has an extradition treaty will exercise its judicial functions properly and fairly; certainly, no evidence has been adduced to suggest otherwise. If the opinion of Mr Goldberger – in particular at pp.12 - 13 – is correct, that point will no doubt also impress itself upon the judge who has to decide whether to assign counsel to the case.

41 In his conclusion, Mr Goldberger states the following:

> "... it is my professional opinion that Mr Klemis, if returned to the United States, will have an opportunity to raise any new issues he may wish to advance concerning the propriety of his convictions and sentence in motion under 28 U.S.C. § 2255 filed in the trial court. Those issues will not avail him, however, unless Mr Klemis has good grounds to challenge the fundamental procedural fairness or the substantive legality

> of his convictions or sentence. To maximize his chances of success, he will need the assistance of a lawyer who is not only well versed in federal criminal law, but also experienced in the area of post-conviction remedies. I cannot and do not offer any opinion about whether such issues exist in his case, as I have not studied the underlying record or conducted any new investigation."

42 In this context, it is also worth noting that the US Government has given an assurance to this Court, in a letter dated 22 November 2019, that it will not raise any objection to any application that there should be state-funded counsel for the s.2255 application. I am unable to conclude therefore that there is a real risk that there would be a flagrant denial of justice if the applicant is extradited to the US, or even that it is arguable that there would.

43 Ground 2: I have already said that I would refuse permission to amend the grounds to include Ground 2, but in any event, in my view, it has no reasonable prospect for success. As submitted by the respondent, the consideration of Art.8 entails a balancing exercise between the circumstances of the defendant and the strong public interest in honouring extradition treaties and also that of ensuring that those convicted of serious crimes duly serve the punishment imposed on them by courts of law.

44 Given the seriousness of the applicant's US convictions and little evidence before the Court to suggest that the effect of extradition on the applicant's family life would be one that is exceptionally severe, this ground also would fail. There is very little evidence that the applicant even enjoys family life in the UK. Some members of his family, including his mother, live in the US where he was taken as a child and spent much of the early part of his life. It is telling what the applicant himself told Dr Farnham about his relationships in the UK when he was interviewed by him for the purpose of his report dated 30 October 2019. At para.28, Dr Farnham states:

> "Mr Klemis described himself as exclusively heterosexual in orientation. He confirmed that he has had two significant relationships in his life. The first was with a woman ... who he met at the age of seventeen after he had returned from the United States the first time. They were together for thirteen or fourteen years, but he was in prison for seven of them. Their children are now aged fifteen and twenty, he does not have any contact with them."

45 At para. 29, Dr Farnham states:

> "Mr Klemis confirmed a second significant relationship with a woman ... between between 2004 and 2009. They have a son... now aged eleven. He told me that he does not have any contact with his son."

Conclusion

46 For the reasons I have given, I would refuse permission to add Grounds 2 and 3 out of time and would refuse permission to appeal on Ground 1.

47 Finally, although this is a permission judgment, I would certify that it should be capable of being cited in future cases.

MRS JUSTICE McGOWAN: I agree.

CERTIFICATE

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5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

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