Neutral Citation Number: [2020] EWHC 102 (Admin)

Case No: CO/990/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2020

Before :

THE RIGHT HONOURABLE LORD JUSTICE BEAN
THE HONOURABLE MR JUSTICE LEWIS

- -

Between :

SHANJEEV KUMAR CHAWLA	**Applicant**
- and -	
THE GOVERNMENT OF INDIA	**Respondent**

- -
- -

Steven Powles Q.C. and Malcolm Hawkes (instructed by **'Russell Cooke' Solicitors**) for the **Applicant**
Mark Summers Q.C. and Aaron Watkins (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 16 January 2020

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Approved Judgment

Mr Justice Lewis (giving the judgment of the court):

INTRODUCTION

1. This is in form an application for permission to appeal in relation to proceedings in the Westminster Magistrates' Court on 7 January 2019 when District Judge Crane sent the case of the applicant, Mr Chawla, to the Secretary of State for his decision on whether the applicant should be extradited to India.

2. In brief, on 16 October 2017, the District Judge had ordered that Mr Chawla be discharged pursuant to section 87 of the Extradition Act 2003 ("the 2003 Act") as his extradition to India would not be compatible with his rights under Article 3 of the European Convention on Human Rights ("ECHR"). The respondent, the Government of India, appealed to the High Court under section 105 of the 2003 Act. The Divisional Court held that the District Judge was correct to hold that there was a real risk of Mr Chawla being subject to treatment contrary to Article 3 ECHR by reason of the prison conditions in which he would be detained in India and that two assurances given by the respondent were insufficient to ensure that such a risk would not arise. The Divisional Court stayed the appeal to enable the respondent to provide a further assurance. The respondent did give such an assurance ("the third assurance").

3. At a further hearing the Divisional Court heard submissions on the third assurance. In a judgment handed down on 16 November 2018, the Divisional Court concluded that the terms of the third assurance were sufficient to show that there would be no real risk that Mr Chawla would be subject to treatment contrary to Article 3 ECHR in the Tihar prisons where he would be detained if extradited. Pursuant to the provisions of section 106(1)(a) and (6) of the 2003 Act, the Divisional Court allowed the appeal, remitted the matter to the District Judge and directed that the judge proceed as if she had not ordered the applicant's discharge.

4. On 7 January 2019, the District Judge complied with that direction and sent the case to the Secretary of State for him to consider whether to extradite the applicant to India. The applicant then sought permission to appeal pursuant to section 103 of the 2003 Act. The applicant wished to contend that new evidence showed that extradition would expose him to a risk of being subjected to treatment contrary to Article 3 ECHR because of the prison conditions in India and that the third assurance could not be relied upon to remove that risk.

5. The following issues arise:

    (1) Does the High Court have jurisdiction under section 103 of the 2003 Act to hear an appeal against the decision of the District Judge of 7 January 2019 or is the appropriate means of proceeding for the applicant to make an application to re-open the decision of the Divisional Court pursuant to Criminal Procedure Rule 50.27 ?;

    (2) Should leave to appeal be granted either to re-open the determination of the Divisional Court or, if the court has jurisdiction, to appeal?

THE FACTS

The Criminal Investigation

6. The Government of India seeks Mr Chawla's extradition in respect of alleged criminal conduct between January and March 2000. It is alleged that Mr Chawla was involved as a conduit between bookmakers who wanted to fix the outcome of cricket matches and the then captain of the South African test cricket team. The alleged conduct was discovered when law enforcement agencies undertook telephone tapping in an unrelated investigation. The telephone tapping is alleged to have revealed plans to fix the outcome of forthcoming cricket matches between the touring South African and the Indian test cricket teams. The agreements allegedly reached included the number of runs that would not be exceeded by the South African team in both of their innings in a particular match. The alleged conduct was contrary to the Indian Penal Code and would amount to a conspiracy to agree or give corrupt payments in England and Wales.

7. A criminal investigation was carried out in India. The Indian authorities sought assistance from the South African authorities between 2004 and 2008. Voice analysis was undertaken. A final report into the investigation was submitted to the prosecution authorities in India in 2013.

8. Mr Chawla, who was born in India, had moved to the United Kingdom in 1996. An extradition warrant was obtained pursuant to an affidavit sworn before the Chief Metropolitan Magistrate in New Delhi on 27 February 2015. A request that Mr Chawla be extradited to India was made by the Government of India on 1 February 2016 and certified by the Secretary of State on 11 March 2016.

Proceedings in the Westminster Magistrate's Court

9. Mr Chawla was arrested and brought before the Westminster Magistrates' Court on 14 June 2016. Details of the proceedings including the two assurances given by the respondent and the hearing before the District Judge are set out at paragraphs 7 to 18 of the first *Chawla* judgment, *Government of India v Chawla* [2018] EWHC 1050 (Admin).

10. The District Judge decided the various questions that she was required to decide under sections 78, 79, and 84 of the 2003 Act (such as, for example, whether there were any bars to extradition by reason of the passage of time since the commission of the alleged offences). The District Judge then considered whether extradition would be compatible with Mr Chawla's Convention rights (that is the rights contained in the ECHR which are incorporated into domestic law by the Human Rights Act 1998) as required by section 87 of the 2003 Act. She decided that extradition would not be incompatible with the applicant's right to respect for family and private life under Article 8 ECHR. In relation to Article 3 ECHR, she considered the question of prison conditions. She reviewed all the evidence before her and the terms of the first assurance given by the Government. She declined to consider a second assurance as that had been given too late. The District Judge concluded that:

> "The combination of evidence provided by the [applicant] provides strong grounds for believing that the [applicant] would be subjected to torture or inhuman or

degrading treatment or punishment in the Tihar prison complex, due to the overcrowding, lack of medical provision, risk of being subjected to torture and violence either from other inmates or prison staff which is endemic in Tihar".

11. The District Judge considered the terms of the first assurance but found that it was too general in nature and it was not sufficient in its current form to ensure that the risks of the applicant being subjected to treatment contrary to Article 3 would be mitigated. She, therefore, ordered that Mr Chawla be discharged pursuant to section 87 of the 2003 Act.

Proceedings in the High Court – the first *Chawla* judgment

12. The Government of India appealed against the decision resulting in the order for the discharge of the applicant pursuant to section 105 of the 2003 Act. The appeal was heard by a Divisional Court comprised of Leggatt L.J., and Dingemans J., as he then was. The Divisional Court held that the District Judge had been entitled to find that there was a real risk of inhuman and degrading treatment by reason of the prison conditions in the Tihar prisons. In particular, the Divisional Court referred to the evidence of overcrowding and the absence of detailed evidence to show how detained persons were being held and the amount of personal space which such persons had, and the concerns about the risk of violence in the prison and the absence of sufficient medical staff. The Divisional Court concluded that the District Judge was entitled to find that the first assurance was not sufficient to ensure that there was no real risk of impermissible treatment.

13. The Divisional Court held that the District Judge had been entitled to exclude the second assurance from the extradition hearing, but the position became different once she made findings on the evidence that the prison conditions in Tihar did give rise to a real risk of impermissible ill-treatment. In those circumstances, she ought to have permitted the Government the opportunity to satisfy her that the risk of impermissible ill-treatment could be discounted. The Divisional Court therefore went on itself to consider the second assurance given by the Indian authorities. That gave details of the cells in which the applicant may be detained, the dimensions of those cells, the amount of personal space available, medical facilities, toilet and washing facilities and other matters. The Divisional Court observed that the second assurance did not identify whether any of the wards were high security wards which the evidence had identified as giving rise to a real risk of intra-prisoner violence. Further, it did not identify whether toilet facilities would be shared and if so what those facilities would be. It noted concerns about the under recruitment of medical staff but noted also the assurance that the applicant would have speedy access to prison medical facilities if needed. At paragraphs 54 and 55 of the first *Chawla* judgment, the Divisional Court concluded:

> 54. In these circumstances if matters remain as they are the appeal will be dismissed. However, it is apparent that it will be possible to meet the real risk of article 3 treatment by offering a suitable assurance that Mr Chawla will be kept in article 3 compliant conditions in Tihar prison before, during trial and, in the event of conviction and sentence of imprisonment, after trial. Such an assurance will need to: address the personal space available to Mr Chawla in Tihar prisons; the toilet facilities available to him; identify the ways in which Mr Chawla will be kept free from the risk of intra-prisoner violence in the High Security wards; and repeat the guarantee of medical treatment for Mr Chawla.

> 55. Therefore, following the approach set out in *Georgiev* at paragraph 8(ix) and (x), we stay the appeal to give the Government an opportunity to provide further assurances. We require a response from the CPS within 42 days of the date of the handing down of this judgment. We give permission to apply to both parties as regards the wording of any further assurances, the timing for their production, and the final disposal of this appeal."

The Third Assurance

14. The joint secretary to the Government of India provided a third assurance dated 11 June 2018. That assurances runs to 5 pages and deals with a number of matters including those referred to by the Divisional Court in its conclusion. It provided that Mr Chawla would be accommodated in a cell occupied exclusively him. The cell would be located in a ward which was not a high security ward. It said that the ward where Mr Chawla would be detained would have inmates who had not violated any prison rules and had satisfactory conduct. It also contained details about the provision for ensuring safety from violence.

15. The assurance identified four cells where Mr Chawla would be kept. It said that the reason for identifying more than one cell was to enable a degree of operational flexibility should that be necessary. It gave the dimensions of each cell. It described the sanitary facilities provided in each of the four cells which included a toilet with a partition for the toilet area so that it was separated from the living area of the cell to ensure privacy. Photographs were provided. The assurance dealt with the provisions for medical care.

Proceedings in the High Court – the second *Chawla* judgment

16. The Divisional Court held another hearing on 13 November 2018 to consider the third assurance. Mr Chawla was represented by leading and junior counsel as was the Government of India. It also considered new evidence about articles and reports on prison conditions in Tihar. It gave a full judgment on 16 November 2019: see *Government of India v Chawla* [2018] EWHC 3098 (Admin).

17. Three issues were identified by the representatives of Mr Chawla as arising out of the assurance. These were (1) whether there was provision for alternative accommodation in the event that the cells identified in the assurance were unusable (2), whether there remained a real risk of intra-prisoner violence and (3) whether the medical provision was adequate. The Divisional Court considered and made conclusions about all three issues. On the first, the Divisional Court was satisfied that the assurance was specific about the space to be provided to Mr Chawla and the location of cells to be occupied by him. There did not remain a real risk of impermissible treatment by reason of the cell in which Mr Chawla would be held. On the second, the Divisional Court concluded that Mr Chawla would not be accommodated in a high security ward and that "while nothing could be guaranteed, there is no real risk of intra prisoner violence to Mr Chawla" (see paragraph 18 of the second *Chawla* judgment). On the third issue, the Divisional Court concluded that there was a guarantee of medical treatment for Mr Chawla should he require it. The Divisional Court concluded at paragraphs 21 and 22 that:

> "21. In these circumstances, having regard to all of the information available to this Court about Tihar prisons, the terms of the third assurance (which was not before the District Judge) are sufficient to show that there will be no real risk that Mr Chawla will be subjected to impermissible treatment in Tihar prisons.
>
> "22. Therefore, pursuant to the provisions of section 106 of the Extradition Act 2003, we quash the order discharging Mr Chawla, remit the case to the District Judge, and direct the District Judge to proceed as if the District Judge had not ordered Mr Chawla's discharge."

18. The order of the Divisional Court made on 16 November 2018 provides that:

> "THE COURT ORDERS THAT
>
> 1. The Appeal be allowed pursuant to section 106(1)(a) of the Extradition Act 2003.
> 2. The order discharging the Respondent is quashed pursuant to section 106(6)(a) of the Extradition Act 2003.
> 3. The case is remitted to the District Judge pursuant to section 106(6)(b) of the Extradition Act 2003.
> 4. The District Judge is directed to proceed as she would have been required to do had she decided the question under s. 87 differently at the extradition hearing.
> 5. There be no order for costs, save for an assessment of the Respondent's publicly funded costs."

Proceedings before the Westminster Magistrates' Court

19. The matter was considered by the District Judge at Westminster Magistrates' Court at a hearing on 7 January 2019. We do not have a transcript of the proceedings. We were told that both parties were represented. There were no submissions made in opposition to the request that the case should be sent to the Secretary of State in accordance with the directions of the Divisional Court. There is a record that the District Judge decided to send the case to the Secretary of State for his decision on whether Mr Chawla should be extradited.

The Extradition Order

20. The Secretary of State made an order on 27 February 2019 providing for the extradition of Mr Chawla to India.

The Application for Permission to Appeal

21. Mr Chawla lodged an appellant's notice on 12 March 2019. That notice states that the decision Mr Chawla wishes to appeal is "The order made by the District Judge sitting at Westminster Magistrates' Court sending this matter to the Secretary of State". He also sought permission to adduce fresh evidence, namely, (1) a newspaper article indicating that the Indian authorities intended to demolish jails one, two and three in Tihar prison and build a multi-level prison (2) newspaper reports on prison conditions (3) a report dated 30 March 2019, described as an expert legal opinion, by a Mr Gupta who had been a legal adviser for the Officer of the Director General, Delhi Jails (i.e.

Tihar Jails) until his retirement in 2017 and (4) a document bearing dates in April 2000 which is an application by one of Mr Chawla's co-accused to the Magistrates' Court in Delhi for directions to the police about the conduct of the investigation.

22. The provisional grounds of appeal relied contained one ground in the following terms:

> "The Applicant relies upon a single ground of appeal, namely that notwithstanding the assurances accepted by the court, there remain substantial grounds to believe that the Applicant is at real risk of detention in conditions of detention which are so overcrowded and materially poor with a concomitant risk of violence from other prisoners as to engage and breach Article 3 of the Convention."

23. The perfected grounds filed on 26 March 2019 identified three grounds namely, whether:

> (1) extradition of Mr Chawla would subject him to a real risk of treatment contrary to Article 3 ECHR;
>
> (2) there would be a risk of a flagrant breach of Article 6 ECHR by reason of the use of evidence obtained by torture or inhuman or degrading treatment; or
>
> (3) extradition would be an abuse of process by reason of non-disclosure of material matters by the respondent?

24. By an order made on the papers by Sir Wyn Williams and served on 9 July 2019, the application was adjourned to a rolled-up hearing, that is to an oral hearing where the application for permission to appeal and, if permission were granted, the appeal would be heard at the same hearing. That hearing took place before us on 16 January 2020. At that hearing the application was treated as either an application for permission to appeal against the sending of the case by the District Judge to the Secretary of State or alternatively as an application for permission to re-open the determination of the Divisional Court in the second *Chawla* case. Full argument was heard on whether permission to proceed should be granted. At the conclusion of the hearing we indicated that leave to proceed on either basis would be refused with reasons to be given in writing later.

THE STATUTORY FRAMEWORK

25. Part 2 of the 2003 Act deals with extradition to territories designated as category 2 territories for these purposes by the Secretary of State: see section 69 of the 2003 Act. India is a category 2 territory. Provision is made for the certification of requests for the extradition of a person to a category 2 territory and for the issuing of arrest warrants. A person arrested under such a warrant must be brought before an appropriate judge, that is a designated District Judge, who fixes a date for an extradition hearing (see sections 75 and 139 of the 2003 Act).

26. The 2003 Act then proceeds by setting out, in various sections, questions that the District Judge must decide including whether the relevant documents have been

provided (section 78) and whether there are any specified bars to extradition such as the passage of time (section 79). The sections are framed so that the District Judge must order the discharge of the requested person if he answers a question in a particular way or must go on to deal with the person under another section and reach a decision on the question identified in that section. The final stage in that sequence is consideration of whether extradition would be compatible with the person's Convention rights, that is the rights conferred by the ECHR and incorporated into domestic law by the Human Rights Act. If extradition would not be compatible with a person's Convention rights, he or she must be discharged. If extradition would be compatible, the District Judge must send the case to the Secretary of State for his decision on whether the person is to be extradited. Section 87 of the 2003 Act is in the following terms:

> " **87 Human rights**
>
> (1) If the judge is required to proceed under this section (by virtue of section 84, 85 or 86) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c. 42).
>
> (2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.
>
> (3) If the judge decides that question in the affirmative he must send the case to the Secretary of State for his decision whether the person is to be extradited."

27. Section 92 of the 2003 Act provides, so far as material, that:

> "**92 Case sent to Secretary of State**
>
> (1) This section applies if the appropriate judge sends a case to the Secretary of State under this Part for his decision whether a person is to be extradited.
>
> (2) The judge must inform the person in ordinary language that—
> (a) he has a right to appeal to the High Court;
> (b) if he exercises the right the appeal will not be heard until the Secretary of State has made his decision."

28. Appeals are dealt with in sections 103 and following of the 2003 Act. Sections 103 and 104 deal with appeals where a case is sent to the Secretary of State. They provide, so far as is material, that:

> "**103 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.

…..~"

"**104 Court's powers on appeal under section 103**

(1) On an appeal under section 103 the High Court may—
(a) allow the appeal;
(b) direct the judge to decide again a question (or questions) which he decided at the extradition hearing;
(c) dismiss the appeal.

(2) The court may allow the appeal only if the conditions in subsection
(3) or the conditions in subsection (4) are satisfied.

(3) The conditions are that—

(a) the judge ought to have decided a question before him at the extradition hearing differently;
(b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.

(4) The conditions are that—
(a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;

(b) the issue or evidence would have resulted in the judge deciding a question before him at the extradition hearing differently;

(c) if he had decided the question in that way, he would have been required to order the person's discharge.

(5) If the court allows the appeal it must—
(a) order the person's discharge;
(b) quash the order for his extradition.

(6) If the judge comes to a different decision on any question that is the subject of a direction under subsection (1)(b) he must order the person's discharge.
(7) If the judge comes to the same decision as he did at the extradition hearing on the question that is (or all the questions that are) the subject of a direction under subsection (1)(b) the appeal must be taken to have been dismissed by a decision of the High Court.

(8) If the court makes a direction under subsection (1)(b) it must remand the person in custody or on bail.

(9) If the court remands the person in custody it may later grant bail."

29. Sections 105 and 106 of the 2003 Act deal with an appeal where the District Judge ordered a person's discharge. That is what happened in this case. The District Judge ordered the discharge of Mr Chawla and the Government of India appealed. Sections 105 and 106 provide as follows:

"**105 Appeal against discharge at extradition hearing**

(1) If at the extradition hearing the judge orders a person's discharge, an appeal to the High Court may be brought on behalf of the category 2 territory against the relevant decision.
(2) But subsection (1) does not apply if the order for the person's discharge was under section 122.
(3) The relevant decision is the decision which resulted in the order for the person's discharge.
(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.

(5) Notice of application for leave to appeal under this section must be given in accordance with rules of court before the end of the permitted period, which is 14 days starting with the day on which the order for the person's discharge is made.

"**106 Court's powers on appeal under section 105**

(1) On an appeal under section 105 the High Court may—
(a) allow the appeal;
(b) direct the judge to decide the relevant question again;
(c) dismiss the appeal.

(2) A question is the relevant question if the judge's decision on it resulted in the order for the person's discharge.

(3) The court may allow the appeal only if the conditions in subsection (4) or the conditions in subsection (5) are satisfied.

(4) The conditions are that—
(a) the judge ought to have decided the relevant question differently;
(b) if he had decided the question in the way he ought to have done, he would not have been required to order the person's discharge.

(5) 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 the relevant question differently;
(c) if he had decided the question in that way, he would not have been required to order the person's discharge.
(6) If the court allows the appeal it must—
(a) quash the order discharging the person;
(b) remit the case to the judge;
(c) direct him to proceed as he would have been required to do if he had decided the relevant question differently at the extradition hearing.

(7) If the court makes a direction under subsection (1)(b) and the judge decides the relevant question differently he must proceed as he would have been required to do if he had decided that question differently at the extradition hearing.

(8) If the court makes a direction under subsection (1)(b) and the judge does not decide the relevant question differently the appeal must be taken to have been dismissed by a decision of the High Court.

(9) If the court–
(a) allows the appeal, or
(b) makes a direction under subsection (1)(b),
it must remand the person in custody or on bail.

(10) If the court remands the person in custody it may later grant bail."

30. Section 108 of the 2003 Act deals with appeals against an extradition order made by the Secretary of State. Sections 113 and 114 deal with appeals to the Supreme Court.

The Criminal Procedure Rules Part 50

31. Rules governing extradition are contained in Part 50 of the Criminal Procedure Rules ("the CrPR"). CrPR 50.13 sets out the sequence in which the questions set out in the various sections of the 2003 Act must be considered by the District Judge.

32. CrPR 50.27 deals with applications to re-open the determination of an appeal and provides as follows:

"Reopening the determination of an appeal

50.27 (1) This rule applies where a party wants the High Court to reopen a decision of that Court which determines an appeal or an application for permission to appeal.

(2) Such a party must –

(a) apply in writing for permission to reopen that decision, as soon as practicable after becoming aware of the grounds for doing so; and

(b) serve the application on the High Court officer and every other party.

(3) The application must-

(a) specify the decision which the applicant wants the court to reopen; and

(b) give reasons why –

(i) it is necessary for the court to reopen that decision in order to avoid real injustice;

(ii) the circumstances are exceptional and make it appropriate to re-open the decision, and

(iii) there is no alternative effective remedy.

(5) The court must not give permission to reopen a decision unless each other party has had an opportunity to make representations".

THE PROPER APPROACH TO DETERMINING THE APPLICATION

Submissions of the Parties

33. Mr Powles Q.C. for Mr Chawla submits that section 103 of the 2003 Act provides for an appeal against the decision of the District Judge to send the case to the Secretary of State for a decision on whether a person should be extradited. That enables the court to hear an appeal under section 103, and to allow the appeal if either the judge ought to have decided a question differently or if new issues or fresh evidence is adduced that was not available at the extradition hearing, which have resulted in the District Judge deciding a question differently and ordering the person's discharge as envisaged by section 103(3) or (4) of the 2003 Act. That, he submitted was further confirmed by section 92 of the 2003 Act. That section applies where a judge sends a case to the Secretary of State for his decision on whether a person is to be extradited. The judge must inform the person that he has the right of appeal to the High Court. Mr Powles submits this demonstrates that that there is a right of appeal in the present case and that it should be determined in what he described as the usual way.

34. Mr Summers Q.C., for the respondent submits that, on the facts of this case, there is no right of appeal under section 103 of the 2003 Act. Here, the original appeal was dealt with under section 106(1)(a) and (6) of the 2003 Act. The order of the Divisional Court provided for the appeal to be allowed, and, quashed the order for discharge and remitted the matter to the District Judge with a direction that she proceed as she would have done if she had decided the question of compatibility with Article 3 ECHR differently, that is, to proceed by sending the case to the Secretary of State. The relevant decision that extradition was compatible with Article 3 (and thus discharge was not required under section 87 of the 2003 Act) was taken by the Divisional Court, not the District Judge. There was no provision for any appeal under section 103 against the sending of the case by the District Judge to the Secretary of State in those circumstances. Mr Summers submitted that section 92 of the 2003 Act does not itself confer a right of appeal. It is dealing with the generality of the cases sent to the Secretary of State for decisions where an appeal is possible and imposes a duty on the District Judge in those cases to tell the person concerned of the right of appeal. Alternatively, he submitted that if there were jurisdiction to entertain an appeal, it would be an abuse of process to allow an applicant to re-litigate the relevant question decided against him by the High Court and permission to appeal should only be granted if a test which is in substance the same as that in CrPR 50.27 is met, namely that it is necessary to grant permission in order to avoid real injustice and the circumstances are exceptional.

Discussion

35. The only disputed question that had to be decided in this case was whether the extradition of Mr Chawla was compatible with his rights under Article 3 ECHR. If the answer was in the affirmative, the case had to be sent to Secretary of State for his decision on whether to extradite Mr Chawla: see section 87(3) of the 2003 Act. The High Court answered that question in the second *Chawla* case and determined that extradition would be compatible with Mr Chawla's rights under Article 3 ECHR. It

therefore allowed the appeal and directed the District Judge to proceed as if she had decided that question in that way, i.e., to send the case to the Secretary of State. The District Judge did that on 7 January 2019. The District Judge did not consider or decide any other question on that day.

The Issue of Jurisdiction

36. In those circumstances, section 103 of the 2003 Act does not provide for an appeal against the action of the District Judge in sending the case to the Secretary of State. The proper course of action, if Mr Chawla sought to challenge the decision that extradition was compatible with his rights under Article 3 ECHR, was to apply to re-open the determination of the High Court under CrPR 50.27. That follows from the wording of sections 103 and 106, and the structure of the 2003 Act.

37 First, section 106 of the 2003 Act sets out the powers of the High Court when, as in this case, it is dealing with an appeal against an order that a person be discharged. There are three options. Section 106(1)(a) provides for the High Court to allow the appeal where the conditions in section 106(4) or (5) are satisfied, i.e. the District Judge should or would have decided the relevant question (i.e. the question which resulted in the order for discharge) differently and if so, the District Judge would not have been required to make the order for discharge. Here the High Court determined that the District Judge would have decided the question of whether Mr Chawla's extradition was compatible with his rights under Article 3 differently in the light of the third assurance and, in those circumstances, would not have been required to order the discharge of Mr Chawla. Rather, she would have sent the case to the Secretary of State as provided for by section 87(3) of the 2003 Act.

38 Having allowed the appeal, the High Court therefore proceeded under section 106(6) of the 2003 Act. It quashed the order discharging Mr Chawla, it remitted the case back to the District Judge, and it directed her to proceed as she would have been required to do if she had decided the question of compatibility of extradition with Article 3 ECHR differently. That is what the District Judge did on 7 January 2019. She complied with the direction of the High Court. She proceeded by sending the case to the Secretary of State. She did not, and was not required to, decide the question of the compatibility of extradition with Article 3 ECHR herself. That question had been decided by the High Court. The position can be contrasted with other provisions of section 106 of the 2003 Act. One option open to the High Court on an appeal against an order to discharge a person is to "direct the judge to decide the relevant question again": see section 106(1)(b) of the 2003 Act. Section 106(6), however, does not contemplate the District Judge deciding the relevant question: it provides for a direction to proceed as if he or she had decided the relevant question differently.

39 Secondly, section 103(1) of the 2003 Act provides that if the District Judge sends the case to the Secretary of State for his decision on whether to extradite the person, the person may appeal against "the relevant decision". That is defined in section 103(3) as "the decision that resulted in the case being sent to the Secretary of State". The section does not, therefore, provide for an appeal against the sending of the case (even if expressed as a decision to send the case) to the Secretary of State. It provides for an appeal against the "decision resulting in the case being sent". The section itself, therefore, draws a distinction between the sending of the case, and the decision that resulted in that action occurring.

40 In the present case, the District Judge did not on 7 January 2019 take a decision which resulted in the case being sent to the Secretary of State. That decision had already been taken by the High Court. The District Judge simply proceeded differently in light of the decision of the High Court and sent the case to the Secretary of State. The act of sending the case to the Secretary of State pursuant to a direction made under section 106(1)(a) and (6) of the 2003 Act does not itself generate the possibility of an application for permission to appeal.

41 That result also accords with the reality of the situation. Mr Chawla wishes in substance to challenge the decision of the Divisional Court in the second *Chawla* case that the third assurance was sufficient to show that there would not be a real risk that he would be subject to impermissible treatment in Tihar jail. He is not challenging any finding or decision of the District Judge. The appropriate mechanism for challenging a decision of the High Court in such circumstances is by way of an application to re-open the determination under CrPR 50.27 not by means of an application for permission to appeal under section 103 of the 2003 Act.

42 That result is not inconsistent with section 92 of the 2003 Act. That section does not create a right of appeal. It imposes a duty on the District Judge to inform the person concerned of the possibility of an appeal. It deals with all situations where cases are sent to the Secretary of State and where, in the great majority, there will be the possibility of appeal. In a small group of cases, there will be no appeal for the reasons given. The fact that section 92 does not in terms differentiate between the different groups of cases cannot of itself create a right of appeal or result in a different interpretation of section 103 of the 2003 Act.

43 For completeness, it is important to note that this case does not involve any other decision by the District Judge. It was not a case where one or more questions set out in the sections of the 2003 Act had been left undetermined at the extradition hearing because the District Judge had decided to order discharge of the person in answer to another question. Nor was it a case where the applicant sought to rely on additional reasons at the hearing before the District Judge on 7 January 2019 for resisting extradition (and it is not necessary to express a view on whether or not the applicant could have done so). All that the District Judge did on 7 January 2019 was to proceed by sending the case to the Secretary of State pursuant to a direction given under section 106(6) of the 2003 Act. In those circumstances, section 103 does not provide for a right of appeal to the High Court.

The Approach to Leave if Jurisdiction Exists

44 Even if we had jurisdiction to entertain an appeal under section 103 of the 2003 Act, we would have had to decide whether it was appropriate to grant leave to appeal. In the usual case, leave is likely to be granted where there is one or more reasonably arguable grounds for considering that the District Judge should have decided one of the relevant questions differently (or there is admissible new evidence, or a new issue arises, and it is arguable that the District Judge would have decided a relevant question differently). That would be consistent, for example, with CrPR 50.17(4) which provides that, unless the court directs otherwise, the grant of permission indicates that the court has found each ground for which permission to appeal is granted to "be reasonably arguable".

45 In the present case, however, the situation is that the High Court has already considered and determined for itself the relevant question, that is whether extradition would be compatible with Article 3 ECHR. Any appeal would inevitably involve re-considering the decision already reached by the High Court. It would not be appropriate to grant leave to appeal unless there was a proper basis for considering that the decision of the High Court should be re-considered. Assuming, therefore, that the High Court has jurisdiction to entertain an appeal in such cases, leave ought only to be granted where it is necessary to do so to avoid real injustice in exceptional circumstances. That reflects the position in CrPR 50.27 and the approach to re-opening appellate decisions in the civil courts in *Taylor v Lawrence* [2003] Q.B. 528.

THE SECOND ISSUE – SHOULD LEAVE TO PROCEED BE GRANTED?

46 Mr Powles submitted that leave should be granted either to re-open the determination of the High Court in the second *Chawla* decision or to appeal under section 103 of the 2003 Act. He submitted that there is new evidence, not available at the time of the hearing before the High Court which demonstrates that there is a real risk that the third assurance will not be sufficient to prevent ill-treatment contrary to Article 3 ECHR if Mr Chawla is extradited. Mr Powles identified three matters in particular which it is appropriate to consider in turn.

47 First, he refers to a newspaper article dated 19 January 2019 reporting that the Indian authorities plan to construct a multilevel prison at Tihar to solve the overcrowding. That is reported as entailing the possible demolition of jail numbers 1, 2 and 3 at Tihar which would take many months to complete and some prisoners would be moved to other prisons and brought back. Mr Powles made it clear that he is not contending that the building of a new, and improved, prison would result in a breach of the assurance. Rather, he submits that there is a real possibility that, during any period of construction, prisoners, including Mr Chawla, will be moved to other prisons. That, he submitted, would be inconsistent with the assurance given by the Indian authorities and would result in a real risk of impermissible ill-treatment in those other prisons.

48 The third assurance identified four specific cells, two in ward 9 in Central Jail 1 and two in ward 4 in Central Jail 3 (jails 1 and 3 of the Tihar jails referred to in the newspaper article). The assurance explains that four cells have been identified in order to ensure operational flexibility if necessary (e.g. if, for some reason, Mr Chawla has to be moved). We accept Mr Summers' submission that it is simply speculative to extrapolate from the generalised plan for the possible demolition of jails 1, 2 and 3, and the possibility of some prisoners being re-housed, a risk that Mr Chawla will be detained other than in accordance with the third assurance.

49 Mr Powles refers to newspaper articles and court orders dealing with incidents of violence in Tihar prison or difficulties with the CCTV cameras. Those issues were considered by the Divisional Court which was satisfied that the third assurance would remove the risk of Mr Chawla being subjected to violence within the prison. Mr Powles seeks to rely on the report by Mr Gupta indicating that Mr Chawla would be at risk of violence from other prisoners when outside his cell in open times or during visits or transfers to court. The Divisional Court considered that issue. The third assurance confirms that the cells where Mr Chawla will be detained are not in high security wards and he will be lodged with inmates whose conduct is satisfactory and

who have not violated prison rules. Mr Gupta's opinion, even if admissible, offers no credible or realistic reason for doubting the correctness of the Divisional Court's assessment of the situation.

50 Mr Powles also relies on the presence of photographs showing curtains and rods in the toilet facilities in the cells identified as ones where Mr Chawla is to be detained. Again, the Divisional Court in the first *Chawla* decision required that any assurances deal with toilet facilities. The third assurance provides that Mr Chawla will be held in a single occupancy cell, and that there is a partition between the toilet and the living area of the cell. The High Court accepted the adequacy of that assurance in the second *Chawla* decision. Mr Gupta's opinion, even if admissible, offers no credible or realistic reason why the Divisional Court's assessment that detention in accordance with those arrangements would not result in a real risk of impermissible treatment. Nor is there any real basis for assuming that the presence of curtains and rods, which Mr Gupta considers should not be permitted in the prison under prison rules, indicates that the third assurance would not be adhered to.

51 There is no basis for considering therefore that we should grant leave in the present case. Nothing suggests that there is any real risk of injustice, nor are the circumstances exceptional. Indeed, the material does not even demonstrate reasonably arguable grounds for contending that there would be a real risk of ill-treatment contrary to Article 3 ECHR.

52 Mr Powles also seeks to contend that there is a real risk that the police would seek to rely on evidence obtained by torture. The basis of this allegation is that three of Mr Chawla's co-accused have made confessions which implicate Mr Chawla. One of these, Mr Kalra, made an application to the Delhi Magistrates' Court in April 2000 contending that he had been the subject of high-handed treatment by the police and that they had forcibly extracted his signature on a blank piece of paper. The application was said to be an application for directions to the police. Mr Powles confirmed in oral submissions that there was no evidence before this court as to what happened to this application. Mr Kalra subsequently made a written confession implicating Mr Chawla. Mr Powles does not suggest that there is any evidence that the confession was written by police on the blank piece of paper that Mr Kalra was allegedly forced to sign. There is no evidence before this court indicating that Mr Kalra's confession, or that of the other two co-accused were extracted by torture or improper means. Mr Powles invites us to infer that that may be the case as the three co-accused have, it seems, maintained their pleas of not guilty and have not yet been tried. There is simply no realistic basis upon which the fact that an application was made in 2000 alleging police high-handedness or the forcible extraction of a signature on a blank sheet of paper could give rise to any real risk that Mr Chawla would not have a fair trial because the authorities would rely on evidence obtained by torture. The suggestion, on the limited evidence available, is speculative in the extreme.

53 Mr Powles submitted that there has been material non-disclosure on the part of the respondent by failing to disclose the plans to demolish the Tihar jails or the application made by the co-accused, Mr Kalra, to the Delhi Magistrates' Court in 2000. He submitted that that amounted to an abuse of the extradition process such that the High Court should refuse extradition. There can realistically be no complaint that the absence of any reference to those two matters involves material non-disclosure or that the Divisional Court was in any way unaware of material issues in deciding

whether the third assurance was sufficient to ensure that there was no real risk of ill-treatment. Nor could it be said that there was any abuse or usurpation of the extradition process.

CONCLUSION

54 For those reasons, permission to appeal from the decision of District Judge Crane of 7 January 2019 is refused as we have no jurisdiction to entertain an appeal or, even if we do, leave should not be granted and permission to re-open the determination of the Divisional Court in the second *Chawla* judgment is refused.

Neutral Citation Number: [2020] EWHC 102 (Admin)

Case No: CO/990/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2020

Before :

THE RIGHT HONOURABLE LORD JUSTICE BEAN
THE HONOURABLE MR JUSTICE LEWIS

- -

Between :

SHANJEEV KUMAR CHAWLA	**Applicant**
- and -	
THE GOVERNMENT OF INDIA	**Respondent**

- -
- -

Steven Powles Q.C. and Malcolm Hawkes (instructed by **'Russell Cooke' Solicitors**) for the **Applicant**
Mark Summers Q.C. and Aaron Watkins (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 16 January 2020

- -

Approved Judgment

Mr Justice Lewis (giving the judgment of the court):

INTRODUCTION

1. This is in form an application for permission to appeal in relation to proceedings in the Westminster Magistrates' Court on 7 January 2019 when District Judge Crane sent the case of the applicant, Mr Chawla, to the Secretary of State for his decision on whether the applicant should be extradited to India.

2. In brief, on 16 October 2017, the District Judge had ordered that Mr Chawla be discharged pursuant to section 87 of the Extradition Act 2003 ("the 2003 Act") as his extradition to India would not be compatible with his rights under Article 3 of the European Convention on Human Rights ("ECHR"). The respondent, the Government of India, appealed to the High Court under section 105 of the 2003 Act. The Divisional Court held that the District Judge was correct to hold that there was a real risk of Mr Chawla being subject to treatment contrary to Article 3 ECHR by reason of the prison conditions in which he would be detained in India and that two assurances given by the respondent were insufficient to ensure that such a risk would not arise. The Divisional Court stayed the appeal to enable the respondent to provide a further assurance. The respondent did give such an assurance ("the third assurance").

3. At a further hearing the Divisional Court heard submissions on the third assurance. In a judgment handed down on 16 November 2018, the Divisional Court concluded that the terms of the third assurance were sufficient to show that there would be no real risk that Mr Chawla would be subject to treatment contrary to Article 3 ECHR in the Tihar prisons where he would be detained if extradited. Pursuant to the provisions of section 106(1)(a) and (6) of the 2003 Act, the Divisional Court allowed the appeal, remitted the matter to the District Judge and directed that the judge proceed as if she had not ordered the applicant's discharge.

4. On 7 January 2019, the District Judge complied with that direction and sent the case to the Secretary of State for him to consider whether to extradite the applicant to India. The applicant then sought permission to appeal pursuant to section 103 of the 2003 Act. The applicant wished to contend that new evidence showed that extradition would expose him to a risk of being subjected to treatment contrary to Article 3 ECHR because of the prison conditions in India and that the third assurance could not be relied upon to remove that risk.

5. The following issues arise:

   (1) Does the High Court have jurisdiction under section 103 of the 2003 Act to hear an appeal against the decision of the District Judge of 7 January 2019 or is the appropriate means of proceeding for the applicant to make an application to re-open the decision of the Divisional Court pursuant to Criminal Procedure Rule 50.27 ?;

   (2) Should leave to appeal be granted either to re-open the determination of the Divisional Court or, if the court has jurisdiction, to appeal?

THE FACTS

The Criminal Investigation

6. The Government of India seeks Mr Chawla's extradition in respect of alleged criminal conduct between January and March 2000. It is alleged that Mr Chawla was involved as a conduit between bookmakers who wanted to fix the outcome of cricket matches and the then captain of the South African test cricket team. The alleged conduct was discovered when law enforcement agencies undertook telephone tapping in an unrelated investigation. The telephone tapping is alleged to have revealed plans to fix the outcome of forthcoming cricket matches between the touring South African and the Indian test cricket teams. The agreements allegedly reached included the number of runs that would not be exceeded by the South African team in both of their innings in a particular match. The alleged conduct was contrary to the Indian Penal Code and would amount to a conspiracy to agree or give corrupt payments in England and Wales.

7. A criminal investigation was carried out in India. The Indian authorities sought assistance from the South African authorities between 2004 and 2008. Voice analysis was undertaken. A final report into the investigation was submitted to the prosecution authorities in India in 2013.

8. Mr Chawla, who was born in India, had moved to the United Kingdom in 1996. An extradition warrant was obtained pursuant to an affidavit sworn before the Chief Metropolitan Magistrate in New Delhi on 27 February 2015. A request that Mr Chawla be extradited to India was made by the Government of India on 1 February 2016 and certified by the Secretary of State on 11 March 2016.

Proceedings in the Westminster Magistrate's Court

9. Mr Chawla was arrested and brought before the Westminster Magistrates' Court on 14 June 2016. Details of the proceedings including the two assurances given by the respondent and the hearing before the District Judge are set out at paragraphs 7 to 18 of the first *Chawla* judgment, *Government of India v Chawla* [2018] EWHC 1050 (Admin).

10. The District Judge decided the various questions that she was required to decide under sections 78, 79, and 84 of the 2003 Act (such as, for example, whether there were any bars to extradition by reason of the passage of time since the commission of the alleged offences). The District Judge then considered whether extradition would be compatible with Mr Chawla's Convention rights (that is the rights contained in the ECHR which are incorporated into domestic law by the Human Rights Act 1998) as required by section 87 of the 2003 Act. She decided that extradition would not be incompatible with the applicant's right to respect for family and private life under Article 8 ECHR. In relation to Article 3 ECHR, she considered the question of prison conditions. She reviewed all the evidence before her and the terms of the first assurance given by the Government. She declined to consider a second assurance as that had been given too late. The District Judge concluded that:

> "The combination of evidence provided by the [applicant] provides strong grounds for believing that the [applicant] would be subjected to torture or inhuman or

degrading treatment or punishment in the Tihar prison complex, due to the overcrowding, lack of medical provision, risk of being subjected to torture and violence either from other inmates or prison staff which is endemic in Tihar".

11. The District Judge considered the terms of the first assurance but found that it was too general in nature and it was not sufficient in its current form to ensure that the risks of the applicant being subjected to treatment contrary to Article 3 would be mitigated. She, therefore, ordered that Mr Chawla be discharged pursuant to section 87 of the 2003 Act.

Proceedings in the High Court – the first *Chawla* judgment

12. The Government of India appealed against the decision resulting in the order for the discharge of the applicant pursuant to section 105 of the 2003 Act. The appeal was heard by a Divisional Court comprised of Leggatt L.J., and Dingemans J., as he then was. The Divisional Court held that the District Judge had been entitled to find that there was a real risk of inhuman and degrading treatment by reason of the prison conditions in the Tihar prisons. In particular, the Divisional Court referred to the evidence of overcrowding and the absence of detailed evidence to show how detained persons were being held and the amount of personal space which such persons had, and the concerns about the risk of violence in the prison and the absence of sufficient medical staff. The Divisional Court concluded that the District Judge was entitled to find that the first assurance was not sufficient to ensure that there was no real risk of impermissible treatment.

13. The Divisional Court held that the District Judge had been entitled to exclude the second assurance from the extradition hearing, but the position became different once she made findings on the evidence that the prison conditions in Tihar did give rise to a real risk of impermissible ill-treatment. In those circumstances, she ought to have permitted the Government the opportunity to satisfy her that the risk of impermissible ill-treatment could be discounted. The Divisional Court therefore went on itself to consider the second assurance given by the Indian authorities. That gave details of the cells in which the applicant may be detained, the dimensions of those cells, the amount of personal space available, medical facilities, toilet and washing facilities and other matters. The Divisional Court observed that the second assurance did not identify whether any of the wards were high security wards which the evidence had identified as giving rise to a real risk of intra-prisoner violence. Further, it did not identify whether toilet facilities would be shared and if so what those facilities would be. It noted concerns about the under recruitment of medical staff but noted also the assurance that the applicant would have speedy access to prison medical facilities if needed. At paragraphs 54 and 55 of the first *Chawla* judgment, the Divisional Court concluded:

> 54. In these circumstances if matters remain as they are the appeal will be dismissed. However, it is apparent that it will be possible to meet the real risk of article 3 treatment by offering a suitable assurance that Mr Chawla will be kept in article 3 compliant conditions in Tihar prison before, during trial and, in the event of conviction and sentence of imprisonment, after trial. Such an assurance will need to: address the personal space available to Mr Chawla in Tihar prisons; the toilet facilities available to him; identify the ways in which Mr Chawla will be kept free from the risk of intra-prisoner violence in the High Security wards; and repeat the guarantee of medical treatment for Mr Chawla.

> 55. Therefore, following the approach set out in *Georgiev* at paragraph 8(ix) and (x), we stay the appeal to give the Government an opportunity to provide further assurances. We require a response from the CPS within 42 days of the date of the handing down of this judgment. We give permission to apply to both parties as regards the wording of any further assurances, the timing for their production, and the final disposal of this appeal."

The Third Assurance

14. The joint secretary to the Government of India provided a third assurance dated 11 June 2018. That assurances runs to 5 pages and deals with a number of matters including those referred to by the Divisional Court in its conclusion. It provided that Mr Chawla would be accommodated in a cell occupied exclusively him. The cell would be located in a ward which was not a high security ward. It said that the ward where Mr Chawla would be detained would have inmates who had not violated any prison rules and had satisfactory conduct. It also contained details about the provision for ensuring safety from violence.

15. The assurance identified four cells where Mr Chawla would be kept. It said that the reason for identifying more than one cell was to enable a degree of operational flexibility should that be necessary. It gave the dimensions of each cell. It described the sanitary facilities provided in each of the four cells which included a toilet with a partition for the toilet area so that it was separated from the living area of the cell to ensure privacy. Photographs were provided. The assurance dealt with the provisions for medical care.

Proceedings in the High Court – the second *Chawla* judgment

16. The Divisional Court held another hearing on 13 November 2018 to consider the third assurance. Mr Chawla was represented by leading and junior counsel as was the Government of India. It also considered new evidence about articles and reports on prison conditions in Tihar. It gave a full judgment on 16 November 2019: see *Government of India v Chawla* [2018] EWHC 3098 (Admin).

17. Three issues were identified by the representatives of Mr Chawla as arising out of the assurance. These were (1) whether there was provision for alternative accommodation in the event that the cells identified in the assurance were unusable (2), whether there remained a real risk of intra-prisoner violence and (3) whether the medical provision was adequate. The Divisional Court considered and made conclusions about all three issues. On the first, the Divisional Court was satisfied that the assurance was specific about the space to be provided to Mr Chawla and the location of cells to be occupied by him. There did not remain a real risk of impermissible treatment by reason of the cell in which Mr Chawla would be held. On the second, the Divisional Court concluded that Mr Chawla would not be accommodated in a high security ward and that "while nothing could be guaranteed, there is no real risk of intra prisoner violence to Mr Chawla" (see paragraph 18 of the second *Chawla* judgment). On the third issue, the Divisional Court concluded that there was a guarantee of medical treatment for Mr Chawla should he require it. The Divisional Court concluded at paragraphs 21 and 22 that:

> "21. In these circumstances, having regard to all of the information available to this Court about Tihar prisons, the terms of the third assurance (which was not before the District Judge) are sufficient to show that there will be no real risk that Mr Chawla will be subjected to impermissible treatment in Tihar prisons.
>
> "22. Therefore, pursuant to the provisions of section 106 of the Extradition Act 2003, we quash the order discharging Mr Chawla, remit the case to the District Judge, and direct the District Judge to proceed as if the District Judge had not ordered Mr Chawla's discharge."

18. The order of the Divisional Court made on 16 November 2018 provides that:

> "THE COURT ORDERS THAT
>
> 1. The Appeal be allowed pursuant to section 106(1)(a) of the Extradition Act 2003.
> 2. The order discharging the Respondent is quashed pursuant to section 106(6)(a) of the Extradition Act 2003.
> 3. The case is remitted to the District Judge pursuant to section 106(6)(b) of the Extradition Act 2003.
> 4. The District Judge is directed to proceed as she would have been required to do had she decided the question under s. 87 differently at the extradition hearing.
> 5. There be no order for costs, save for an assessment of the Respondent's publicly funded costs."

Proceedings before the Westminster Magistrates' Court

19. The matter was considered by the District Judge at Westminster Magistrates' Court at a hearing on 7 January 2019. We do not have a transcript of the proceedings. We were told that both parties were represented. There were no submissions made in opposition to the request that the case should be sent to the Secretary of State in accordance with the directions of the Divisional Court. There is a record that the District Judge decided to send the case to the Secretary of State for his decision on whether Mr Chawla should be extradited.

The Extradition Order

20. The Secretary of State made an order on 27 February 2019 providing for the extradition of Mr Chawla to India.

The Application for Permission to Appeal

21. Mr Chawla lodged an appellant's notice on 12 March 2019. That notice states that the decision Mr Chawla wishes to appeal is "The order made by the District Judge sitting at Westminster Magistrates' Court sending this matter to the Secretary of State". He also sought permission to adduce fresh evidence, namely, (1) a newspaper article indicating that the Indian authorities intended to demolish jails one, two and three in Tihar prison and build a multi-level prison (2) newspaper reports on prison conditions (3) a report dated 30 March 2019, described as an expert legal opinion, by a Mr Gupta who had been a legal adviser for the Officer of the Director General, Delhi Jails (i.e.

Tihar Jails) until his retirement in 2017 and (4) a document bearing dates in April 2000 which is an application by one of Mr Chawla's co-accused to the Magistrates' Court in Delhi for directions to the police about the conduct of the investigation.

22. The provisional grounds of appeal relied contained one ground in the following terms:

> "The Applicant relies upon a single ground of appeal, namely that notwithstanding the assurances accepted by the court, there remain substantial grounds to believe that the Applicant is at real risk of detention in conditions of detention which are so overcrowded and materially poor with a concomitant risk of violence from other prisoners as to engage and breach Article 3 of the Convention."

23. The perfected grounds filed on 26 March 2019 identified three grounds namely, whether:

(1) extradition of Mr Chawla would subject him to a real risk of treatment contrary to Article 3 ECHR;

(2) there would be a risk of a flagrant breach of Article 6 ECHR by reason of the use of evidence obtained by torture or inhuman or degrading treatment; or

(3) extradition would be an abuse of process by reason of non-disclosure of material matters by the respondent?

24. By an order made on the papers by Sir Wyn Williams and served on 9 July 2019, the application was adjourned to a rolled-up hearing, that is to an oral hearing where the application for permission to appeal and, if permission were granted, the appeal would be heard at the same hearing. That hearing took place before us on 16 January 2020. At that hearing the application was treated as either an application for permission to appeal against the sending of the case by the District Judge to the Secretary of State or alternatively as an application for permission to re-open the determination of the Divisional Court in the second *Chawla* case. Full argument was heard on whether permission to proceed should be granted. At the conclusion of the hearing we indicated that leave to proceed on either basis would be refused with reasons to be given in writing later.

THE STATUTORY FRAMEWORK

25. Part 2 of the 2003 Act deals with extradition to territories designated as category 2 territories for these purposes by the Secretary of State: see section 69 of the 2003 Act. India is a category 2 territory. Provision is made for the certification of requests for the extradition of a person to a category 2 territory and for the issuing of arrest warrants. A person arrested under such a warrant must be brought before an appropriate judge, that is a designated District Judge, who fixes a date for an extradition hearing (see sections 75 and 139 of the 2003 Act).

26. The 2003 Act then proceeds by setting out, in various sections, questions that the District Judge must decide including whether the relevant documents have been

provided (section 78) and whether there are any specified bars to extradition such as the passage of time (section 79). The sections are framed so that the District Judge must order the discharge of the requested person if he answers a question in a particular way or must go on to deal with the person under another section and reach a decision on the question identified in that section. The final stage in that sequence is consideration of whether extradition would be compatible with the person's Convention rights, that is the rights conferred by the ECHR and incorporated into domestic law by the Human Rights Act. If extradition would not be compatible with a person's Convention rights, he or she must be discharged. If extradition would be compatible, the District Judge must send the case to the Secretary of State for his decision on whether the person is to be extradited. Section 87 of the 2003 Act is in the following terms:

> " **87 Human rights**
>
> (1) If the judge is required to proceed under this section (by virtue of section 84, 85 or 86) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c. 42).
>
> (2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.
>
> (3) If the judge decides that question in the affirmative he must send the case to the Secretary of State for his decision whether the person is to be extradited."

27. Section 92 of the 2003 Act provides, so far as material, that:

> "**92 Case sent to Secretary of State**
>
> (1) This section applies if the appropriate judge sends a case to the Secretary of State under this Part for his decision whether a person is to be extradited.
>
> (2) The judge must inform the person in ordinary language that—
> (a) he has a right to appeal to the High Court;
> (b) if he exercises the right the appeal will not be heard until the Secretary of State has made his decision."

28. Appeals are dealt with in sections 103 and following of the 2003 Act. Sections 103 and 104 deal with appeals where a case is sent to the Secretary of State. They provide, so far as is material, that:

> "**103 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.

…..~"

"**104 Court's powers on appeal under section 103**

(1) On an appeal under section 103 the High Court may—
(a) allow the appeal;
(b) direct the judge to decide again a question (or questions) which he decided at the extradition hearing;
(c) dismiss the appeal.

(2) The court may allow the appeal only if the conditions in subsection
(3) or the conditions in subsection (4) are satisfied.

(3) The conditions are that—

(a) the judge ought to have decided a question before him at the extradition hearing differently;
(b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.

(4) The conditions are that—
(a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;

(b) the issue or evidence would have resulted in the judge deciding a question before him at the extradition hearing differently;

(c) if he had decided the question in that way, he would have been required to order the person's discharge.

(5) If the court allows the appeal it must—
(a) order the person's discharge;
(b) quash the order for his extradition.

(6) If the judge comes to a different decision on any question that is the subject of a direction under subsection (1)(b) he must order the person's discharge.
(7) If the judge comes to the same decision as he did at the extradition hearing on the question that is (or all the questions that are) the subject of a direction under subsection (1)(b) the appeal must be taken to have been dismissed by a decision of the High Court.

(8) If the court makes a direction under subsection (1)(b) it must remand the person in custody or on bail.

(9) If the court remands the person in custody it may later grant bail."

29. Sections 105 and 106 of the 2003 Act deal with an appeal where the District Judge ordered a person's discharge. That is what happened in this case. The District Judge ordered the discharge of Mr Chawla and the Government of India appealed. Sections 105 and 106 provide as follows:

"**105 Appeal against discharge at extradition hearing**

(1) If at the extradition hearing the judge orders a person's discharge, an appeal to the High Court may be brought on behalf of the category 2 territory against the relevant decision.
(2) But subsection (1) does not apply if the order for the person's discharge was under section 122.
(3) The relevant decision is the decision which resulted in the order for the person's discharge.
(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.

(5) Notice of application for leave to appeal under this section must be given in accordance with rules of court before the end of the permitted period, which is 14 days starting with the day on which the order for the person's discharge is made.

"**106 Court's powers on appeal under section 105**

(1) On an appeal under section 105 the High Court may—
(a) allow the appeal;
(b) direct the judge to decide the relevant question again;
(c) dismiss the appeal.

(2) A question is the relevant question if the judge's decision on it resulted in the order for the person's discharge.

(3) The court may allow the appeal only if the conditions in subsection (4) or the conditions in subsection (5) are satisfied.

(4) The conditions are that—
(a) the judge ought to have decided the relevant question differently;
(b) if he had decided the question in the way he ought to have done, he would not have been required to order the person's discharge.

(5) 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 the relevant question differently;
(c) if he had decided the question in that way, he would not have been required to order the person's discharge.
(6) If the court allows the appeal it must—
(a) quash the order discharging the person;
(b) remit the case to the judge;
(c) direct him to proceed as he would have been required to do if he had decided the relevant question differently at the extradition hearing.

(7) If the court makes a direction under subsection (1)(b) and the judge decides the relevant question differently he must proceed as he would have been required to do if he had decided that question differently at the extradition hearing.

(8) If the court makes a direction under subsection (1)(b) and the judge does not decide the relevant question differently the appeal must be taken to have been dismissed by a decision of the High Court.

(9) If the court–
(a) allows the appeal, or
(b) makes a direction under subsection (1)(b),
it must remand the person in custody or on bail.

(10) If the court remands the person in custody it may later grant bail."

30. Section 108 of the 2003 Act deals with appeals against an extradition order made by the Secretary of State. Sections 113 and 114 deal with appeals to the Supreme Court.

The Criminal Procedure Rules Part 50

31. Rules governing extradition are contained in Part 50 of the Criminal Procedure Rules ("the CrPR"). CrPR 50.13 sets out the sequence in which the questions set out in the various sections of the 2003 Act must be considered by the District Judge.

32. CrPR 50.27 deals with applications to re-open the determination of an appeal and provides as follows:

"Reopening the determination of an appeal

50.27 (1) This rule applies where a party wants the High Court to reopen a decision of that Court which determines an appeal or an application for permission to appeal.

(2) Such a party must –

(a) apply in writing for permission to reopen that decision, as soon as practicable after becoming aware of the grounds for doing so; and

(b) serve the application on the High Court officer and every other party.

(3) The application must-

(a) specify the decision which the applicant wants the court to reopen; and

(b) give reasons why –

(i) it is necessary for the court to reopen that decision in order to avoid real injustice;

(ii) the circumstances are exceptional and make it appropriate to re-open the decision, and

(iii) there is no alternative effective remedy.

(5) The court must not give permission to reopen a decision unless each other party has had an opportunity to make representations".

THE PROPER APPROACH TO DETERMINING THE APPLICATION

Submissions of the Parties

33. Mr Powles Q.C. for Mr Chawla submits that section 103 of the 2003 Act provides for an appeal against the decision of the District Judge to send the case to the Secretary of State for a decision on whether a person should be extradited. That enables the court to hear an appeal under section 103, and to allow the appeal if either the judge ought to have decided a question differently or if new issues or fresh evidence is adduced that was not available at the extradition hearing, which have resulted in the District Judge deciding a question differently and ordering the person's discharge as envisaged by section 103(3) or (4) of the 2003 Act. That, he submitted was further confirmed by section 92 of the 2003 Act. That section applies where a judge sends a case to the Secretary of State for his decision on whether a person is to be extradited. The judge must inform the person that he has the right of appeal to the High Court. Mr Powles submits this demonstrates that that there is a right of appeal in the present case and that it should be determined in what he described as the usual way.

34. Mr Summers Q.C., for the respondent submits that, on the facts of this case, there is no right of appeal under section 103 of the 2003 Act. Here, the original appeal was dealt with under section 106(1)(a) and (6) of the 2003 Act. The order of the Divisional Court provided for the appeal to be allowed, and, quashed the order for discharge and remitted the matter to the District Judge with a direction that she proceed as she would have done if she had decided the question of compatibility with Article 3 ECHR differently, that is, to proceed by sending the case to the Secretary of State. The relevant decision that extradition was compatible with Article 3 (and thus discharge was not required under section 87 of the 2003 Act) was taken by the Divisional Court, not the District Judge. There was no provision for any appeal under section 103 against the sending of the case by the District Judge to the Secretary of State in those circumstances. Mr Summers submitted that section 92 of the 2003 Act does not itself confer a right of appeal. It is dealing with the generality of the cases sent to the Secretary of State for decisions where an appeal is possible and imposes a duty on the District Judge in those cases to tell the person concerned of the right of appeal. Alternatively, he submitted that if there were jurisdiction to entertain an appeal, it would be an abuse of process to allow an applicant to re-litigate the relevant question decided against him by the High Court and permission to appeal should only be granted if a test which is in substance the same as that in CrPR 50.27 is met, namely that it is necessary to grant permission in order to avoid real injustice and the circumstances are exceptional.

Discussion

35. The only disputed question that had to be decided in this case was whether the extradition of Mr Chawla was compatible with his rights under Article 3 ECHR. If the answer was in the affirmative, the case had to be sent to Secretary of State for his decision on whether to extradite Mr Chawla: see section 87(3) of the 2003 Act. The High Court answered that question in the second *Chawla* case and determined that extradition would be compatible with Mr Chawla's rights under Article 3 ECHR. It

therefore allowed the appeal and directed the District Judge to proceed as if she had decided that question in that way, i.e., to send the case to the Secretary of State. The District Judge did that on 7 January 2019. The District Judge did not consider or decide any other question on that day.

The Issue of Jurisdiction

36. In those circumstances, section 103 of the 2003 Act does not provide for an appeal against the action of the District Judge in sending the case to the Secretary of State. The proper course of action, if Mr Chawla sought to challenge the decision that extradition was compatible with his rights under Article 3 ECHR, was to apply to re-open the determination of the High Court under CrPR 50.27. That follows from the wording of sections 103 and 106, and the structure of the 2003 Act.

37 First, section 106 of the 2003 Act sets out the powers of the High Court when, as in this case, it is dealing with an appeal against an order that a person be discharged. There are three options. Section 106(1)(a) provides for the High Court to allow the appeal where the conditions in section 106(4) or (5) are satisfied, i.e. the District Judge should or would have decided the relevant question (i.e. the question which resulted in the order for discharge) differently and if so, the District Judge would not have been required to make the order for discharge. Here the High Court determined that the District Judge would have decided the question of whether Mr Chawla's extradition was compatible with his rights under Article 3 differently in the light of the third assurance and, in those circumstances, would not have been required to order the discharge of Mr Chawla. Rather, she would have sent the case to the Secretary of State as provided for by section 87(3) of the 2003 Act.

38 Having allowed the appeal, the High Court therefore proceeded under section 106(6) of the 2003 Act. It quashed the order discharging Mr Chawla, it remitted the case back to the District Judge, and it directed her to proceed as she would have been required to do if she had decided the question of compatibility of extradition with Article 3 ECHR differently. That is what the District Judge did on 7 January 2019. She complied with the direction of the High Court. She proceeded by sending the case to the Secretary of State. She did not, and was not required to, decide the question of the compatibility of extradition with Article 3 ECHR herself. That question had been decided by the High Court. The position can be contrasted with other provisions of section 106 of the 2003 Act. One option open to the High Court on an appeal against an order to discharge a person is to "direct the judge to decide the relevant question again": see section 106(1)(b) of the 2003 Act. Section 106(6), however, does not contemplate the District Judge deciding the relevant question: it provides for a direction to proceed as if he or she had decided the relevant question differently.

39 Secondly, section 103(1) of the 2003 Act provides that if the District Judge sends the case to the Secretary of State for his decision on whether to extradite the person, the person may appeal against "the relevant decision". That is defined in section 103(3) as "the decision that resulted in the case being sent to the Secretary of State". The section does not, therefore, provide for an appeal against the sending of the case (even if expressed as a decision to send the case) to the Secretary of State. It provides for an appeal against the "decision resulting in the case being sent". The section itself, therefore, draws a distinction between the sending of the case, and the decision that resulted in that action occurring.

40 In the present case, the District Judge did not on 7 January 2019 take a decision which resulted in the case being sent to the Secretary of State. That decision had already been taken by the High Court. The District Judge simply proceeded differently in light of the decision of the High Court and sent the case to the Secretary of State. The act of sending the case to the Secretary of State pursuant to a direction made under section 106(1)(a) and (6) of the 2003 Act does not itself generate the possibility of an application for permission to appeal.

41 That result also accords with the reality of the situation. Mr Chawla wishes in substance to challenge the decision of the Divisional Court in the second *Chawla* case that the third assurance was sufficient to show that there would not be a real risk that he would be subject to impermissible treatment in Tihar jail. He is not challenging any finding or decision of the District Judge. The appropriate mechanism for challenging a decision of the High Court in such circumstances is by way of an application to re-open the determination under CrPR 50.27 not by means of an application for permission to appeal under section 103 of the 2003 Act.

42 That result is not inconsistent with section 92 of the 2003 Act. That section does not create a right of appeal. It imposes a duty on the District Judge to inform the person concerned of the possibility of an appeal. It deals with all situations where cases are sent to the Secretary of State and where, in the great majority, there will be the possibility of appeal. In a small group of cases, there will be no appeal for the reasons given. The fact that section 92 does not in terms differentiate between the different groups of cases cannot of itself create a right of appeal or result in a different interpretation of section 103 of the 2003 Act.

43 For completeness, it is important to note that this case does not involve any other decision by the District Judge. It was not a case where one or more questions set out in the sections of the 2003 Act had been left undetermined at the extradition hearing because the District Judge had decided to order discharge of the person in answer to another question. Nor was it a case where the applicant sought to rely on additional reasons at the hearing before the District Judge on 7 January 2019 for resisting extradition (and it is not necessary to express a view on whether or not the applicant could have done so). All that the District Judge did on 7 January 2019 was to proceed by sending the case to the Secretary of State pursuant to a direction given under section 106(6) of the 2003 Act. In those circumstances, section 103 does not provide for a right of appeal to the High Court.

The Approach to Leave if Jurisdiction Exists

44 Even if we had jurisdiction to entertain an appeal under section 103 of the 2003 Act, we would have had to decide whether it was appropriate to grant leave to appeal. In the usual case, leave is likely to be granted where there is one or more reasonably arguable grounds for considering that the District Judge should have decided one of the relevant questions differently (or there is admissible new evidence, or a new issue arises, and it is arguable that the District Judge would have decided a relevant question differently). That would be consistent, for example, with CrPR 50.17(4) which provides that, unless the court directs otherwise, the grant of permission indicates that the court has found each ground for which permission to appeal is granted to "be reasonably arguable".

45 In the present case, however, the situation is that the High Court has already considered and determined for itself the relevant question, that is whether extradition would be compatible with Article 3 ECHR. Any appeal would inevitably involve re-considering the decision already reached by the High Court. It would not be appropriate to grant leave to appeal unless there was a proper basis for considering that the decision of the High Court should be re-considered. Assuming, therefore, that the High Court has jurisdiction to entertain an appeal in such cases, leave ought only to be granted where it is necessary to do so to avoid real injustice in exceptional circumstances. That reflects the position in CrPR 50.27 and the approach to re-opening appellate decisions in the civil courts in *Taylor v Lawrence* [2003] Q.B. 528.

THE SECOND ISSUE – SHOULD LEAVE TO PROCEED BE GRANTED?

46 Mr Powles submitted that leave should be granted either to re-open the determination of the High Court in the second *Chawla* decision or to appeal under section 103 of the 2003 Act. He submitted that there is new evidence, not available at the time of the hearing before the High Court which demonstrates that there is a real risk that the third assurance will not be sufficient to prevent ill-treatment contrary to Article 3 ECHR if Mr Chawla is extradited. Mr Powles identified three matters in particular which it is appropriate to consider in turn.

47 First, he refers to a newspaper article dated 19 January 2019 reporting that the Indian authorities plan to construct a multilevel prison at Tihar to solve the overcrowding. That is reported as entailing the possible demolition of jail numbers 1, 2 and 3 at Tihar which would take many months to complete and some prisoners would be moved to other prisons and brought back. Mr Powles made it clear that he is not contending that the building of a new, and improved, prison would result in a breach of the assurance. Rather, he submits that there is a real possibility that, during any period of construction, prisoners, including Mr Chawla, will be moved to other prisons. That, he submitted, would be inconsistent with the assurance given by the Indian authorities and would result in a real risk of impermissible ill-treatment in those other prisons.

48 The third assurance identified four specific cells, two in ward 9 in Central Jail 1 and two in ward 4 in Central Jail 3 (jails 1 and 3 of the Tihar jails referred to in the newspaper article). The assurance explains that four cells have been identified in order to ensure operational flexibility if necessary (e.g. if, for some reason, Mr Chawla has to be moved). We accept Mr Summers' submission that it is simply speculative to extrapolate from the generalised plan for the possible demolition of jails 1, 2 and 3, and the possibility of some prisoners being re-housed, a risk that Mr Chawla will be detained other than in accordance with the third assurance.

49 Mr Powles refers to newspaper articles and court orders dealing with incidents of violence in Tihar prison or difficulties with the CCTV cameras. Those issues were considered by the Divisional Court which was satisfied that the third assurance would remove the risk of Mr Chawla being subjected to violence within the prison. Mr Powles seeks to rely on the report by Mr Gupta indicating that Mr Chawla would be at risk of violence from other prisoners when outside his cell in open times or during visits or transfers to court. The Divisional Court considered that issue. The third assurance confirms that the cells where Mr Chawla will be detained are not in high security wards and he will be lodged with inmates whose conduct is satisfactory and

who have not violated prison rules. Mr Gupta's opinion, even if admissible, offers no credible or realistic reason for doubting the correctness of the Divisional Court's assessment of the situation.

50 Mr Powles also relies on the presence of photographs showing curtains and rods in the toilet facilities in the cells identified as ones where Mr Chawla is to be detained. Again, the Divisional Court in the first *Chawla* decision required that any assurances deal with toilet facilities. The third assurance provides that Mr Chawla will be held in a single occupancy cell, and that there is a partition between the toilet and the living area of the cell. The High Court accepted the adequacy of that assurance in the second *Chawla* decision. Mr Gupta's opinion, even if admissible, offers no credible or realistic reason why the Divisional Court's assessment that detention in accordance with those arrangements would not result in a real risk of impermissible treatment. Nor is there any real basis for assuming that the presence of curtains and rods, which Mr Gupta considers should not be permitted in the prison under prison rules, indicates that the third assurance would not be adhered to.

51 There is no basis for considering therefore that we should grant leave in the present case. Nothing suggests that there is any real risk of injustice, nor are the circumstances exceptional. Indeed, the material does not even demonstrate reasonably arguable grounds for contending that there would be a real risk of ill-treatment contrary to Article 3 ECHR.

52 Mr Powles also seeks to contend that there is a real risk that the police would seek to rely on evidence obtained by torture. The basis of this allegation is that three of Mr Chawla's co-accused have made confessions which implicate Mr Chawla. One of these, Mr Kalra, made an application to the Delhi Magistrates' Court in April 2000 contending that he had been the subject of high-handed treatment by the police and that they had forcibly extracted his signature on a blank piece of paper. The application was said to be an application for directions to the police. Mr Powles confirmed in oral submissions that there was no evidence before this court as to what happened to this application. Mr Kalra subsequently made a written confession implicating Mr Chawla. Mr Powles does not suggest that there is any evidence that the confession was written by police on the blank piece of paper that Mr Kalra was allegedly forced to sign. There is no evidence before this court indicating that Mr Kalra's confession, or that of the other two co-accused were extracted by torture or improper means. Mr Powles invites us to infer that that may be the case as the three co-accused have, it seems, maintained their pleas of not guilty and have not yet been tried. There is simply no realistic basis upon which the fact that an application was made in 2000 alleging police high-handedness or the forcible extraction of a signature on a blank sheet of paper could give rise to any real risk that Mr Chawla would not have a fair trial because the authorities would rely on evidence obtained by torture. The suggestion, on the limited evidence available, is speculative in the extreme.

53 Mr Powles submitted that there has been material non-disclosure on the part of the respondent by failing to disclose the plans to demolish the Tihar jails or the application made by the co-accused, Mr Kalra, to the Delhi Magistrates' Court in 2000. He submitted that that amounted to an abuse of the extradition process such that the High Court should refuse extradition. There can realistically be no complaint that the absence of any reference to those two matters involves material non-disclosure or that the Divisional Court was in any way unaware of material issues in deciding

whether the third assurance was sufficient to ensure that there was no real risk of ill-treatment. Nor could it be said that there was any abuse or usurpation of the extradition process.

CONCLUSION

54 For those reasons, permission to appeal from the decision of District Judge Crane of 7 January 2019 is refused as we have no jurisdiction to entertain an appeal or, even if we do, leave should not be granted and permission to re-open the determination of the Divisional Court in the second *Chawla* judgment is refused.

Neutral Citation Number: [2020] EWHC 102 (Admin)

Case No: CO/990/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2020

Before :

THE RIGHT HONOURABLE LORD JUSTICE BEAN
THE HONOURABLE MR JUSTICE LEWIS

- -

Between :

SHANJEEV KUMAR CHAWLA	**Applicant**
- and -	
THE GOVERNMENT OF INDIA	**Respondent**

- -
- -

Steven Powles Q.C. and Malcolm Hawkes (instructed by **'Russell Cooke' Solicitors**) for the **Applicant**
Mark Summers Q.C. and Aaron Watkins (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 16 January 2020

- -

Approved Judgment

Mr Justice Lewis (giving the judgment of the court):

INTRODUCTION

1. This is in form an application for permission to appeal in relation to proceedings in the Westminster Magistrates' Court on 7 January 2019 when District Judge Crane sent the case of the applicant, Mr Chawla, to the Secretary of State for his decision on whether the applicant should be extradited to India.

2. In brief, on 16 October 2017, the District Judge had ordered that Mr Chawla be discharged pursuant to section 87 of the Extradition Act 2003 ("the 2003 Act") as his extradition to India would not be compatible with his rights under Article 3 of the European Convention on Human Rights ("ECHR"). The respondent, the Government of India, appealed to the High Court under section 105 of the 2003 Act. The Divisional Court held that the District Judge was correct to hold that there was a real risk of Mr Chawla being subject to treatment contrary to Article 3 ECHR by reason of the prison conditions in which he would be detained in India and that two assurances given by the respondent were insufficient to ensure that such a risk would not arise. The Divisional Court stayed the appeal to enable the respondent to provide a further assurance. The respondent did give such an assurance ("the third assurance").

3. At a further hearing the Divisional Court heard submissions on the third assurance. In a judgment handed down on 16 November 2018, the Divisional Court concluded that the terms of the third assurance were sufficient to show that there would be no real risk that Mr Chawla would be subject to treatment contrary to Article 3 ECHR in the Tihar prisons where he would be detained if extradited. Pursuant to the provisions of section 106(1)(a) and (6) of the 2003 Act, the Divisional Court allowed the appeal, remitted the matter to the District Judge and directed that the judge proceed as if she had not ordered the applicant's discharge.

4. On 7 January 2019, the District Judge complied with that direction and sent the case to the Secretary of State for him to consider whether to extradite the applicant to India. The applicant then sought permission to appeal pursuant to section 103 of the 2003 Act. The applicant wished to contend that new evidence showed that extradition would expose him to a risk of being subjected to treatment contrary to Article 3 ECHR because of the prison conditions in India and that the third assurance could not be relied upon to remove that risk.

5. The following issues arise:

   (1) Does the High Court have jurisdiction under section 103 of the 2003 Act to hear an appeal against the decision of the District Judge of 7 January 2019 or is the appropriate means of proceeding for the applicant to make an application to re-open the decision of the Divisional Court pursuant to Criminal Procedure Rule 50.27 ?;

   (2) Should leave to appeal be granted either to re-open the determination of the Divisional Court or, if the court has jurisdiction, to appeal?

THE FACTS

The Criminal Investigation

6. The Government of India seeks Mr Chawla's extradition in respect of alleged criminal conduct between January and March 2000. It is alleged that Mr Chawla was involved as a conduit between bookmakers who wanted to fix the outcome of cricket matches and the then captain of the South African test cricket team. The alleged conduct was discovered when law enforcement agencies undertook telephone tapping in an unrelated investigation. The telephone tapping is alleged to have revealed plans to fix the outcome of forthcoming cricket matches between the touring South African and the Indian test cricket teams. The agreements allegedly reached included the number of runs that would not be exceeded by the South African team in both of their innings in a particular match. The alleged conduct was contrary to the Indian Penal Code and would amount to a conspiracy to agree or give corrupt payments in England and Wales.

7. A criminal investigation was carried out in India. The Indian authorities sought assistance from the South African authorities between 2004 and 2008. Voice analysis was undertaken. A final report into the investigation was submitted to the prosecution authorities in India in 2013.

8. Mr Chawla, who was born in India, had moved to the United Kingdom in 1996. An extradition warrant was obtained pursuant to an affidavit sworn before the Chief Metropolitan Magistrate in New Delhi on 27 February 2015. A request that Mr Chawla be extradited to India was made by the Government of India on 1 February 2016 and certified by the Secretary of State on 11 March 2016.

Proceedings in the Westminster Magistrate's Court

9. Mr Chawla was arrested and brought before the Westminster Magistrates' Court on 14 June 2016. Details of the proceedings including the two assurances given by the respondent and the hearing before the District Judge are set out at paragraphs 7 to 18 of the first *Chawla* judgment, *Government of India v Chawla* [2018] EWHC 1050 (Admin).

10. The District Judge decided the various questions that she was required to decide under sections 78, 79, and 84 of the 2003 Act (such as, for example, whether there were any bars to extradition by reason of the passage of time since the commission of the alleged offences). The District Judge then considered whether extradition would be compatible with Mr Chawla's Convention rights (that is the rights contained in the ECHR which are incorporated into domestic law by the Human Rights Act 1998) as required by section 87 of the 2003 Act. She decided that extradition would not be incompatible with the applicant's right to respect for family and private life under Article 8 ECHR. In relation to Article 3 ECHR, she considered the question of prison conditions. She reviewed all the evidence before her and the terms of the first assurance given by the Government. She declined to consider a second assurance as that had been given too late. The District Judge concluded that:

> "The combination of evidence provided by the [applicant] provides strong grounds for believing that the [applicant] would be subjected to torture or inhuman or

degrading treatment or punishment in the Tihar prison complex, due to the overcrowding, lack of medical provision, risk of being subjected to torture and violence either from other inmates or prison staff which is endemic in Tihar".

11. The District Judge considered the terms of the first assurance but found that it was too general in nature and it was not sufficient in its current form to ensure that the risks of the applicant being subjected to treatment contrary to Article 3 would be mitigated. She, therefore, ordered that Mr Chawla be discharged pursuant to section 87 of the 2003 Act.

Proceedings in the High Court – the first *Chawla* judgment

12. The Government of India appealed against the decision resulting in the order for the discharge of the applicant pursuant to section 105 of the 2003 Act. The appeal was heard by a Divisional Court comprised of Leggatt L.J., and Dingemans J., as he then was. The Divisional Court held that the District Judge had been entitled to find that there was a real risk of inhuman and degrading treatment by reason of the prison conditions in the Tihar prisons. In particular, the Divisional Court referred to the evidence of overcrowding and the absence of detailed evidence to show how detained persons were being held and the amount of personal space which such persons had, and the concerns about the risk of violence in the prison and the absence of sufficient medical staff. The Divisional Court concluded that the District Judge was entitled to find that the first assurance was not sufficient to ensure that there was no real risk of impermissible treatment.

13. The Divisional Court held that the District Judge had been entitled to exclude the second assurance from the extradition hearing, but the position became different once she made findings on the evidence that the prison conditions in Tihar did give rise to a real risk of impermissible ill-treatment. In those circumstances, she ought to have permitted the Government the opportunity to satisfy her that the risk of impermissible ill-treatment could be discounted. The Divisional Court therefore went on itself to consider the second assurance given by the Indian authorities. That gave details of the cells in which the applicant may be detained, the dimensions of those cells, the amount of personal space available, medical facilities, toilet and washing facilities and other matters. The Divisional Court observed that the second assurance did not identify whether any of the wards were high security wards which the evidence had identified as giving rise to a real risk of intra-prisoner violence. Further, it did not identify whether toilet facilities would be shared and if so what those facilities would be. It noted concerns about the under recruitment of medical staff but noted also the assurance that the applicant would have speedy access to prison medical facilities if needed. At paragraphs 54 and 55 of the first *Chawla* judgment, the Divisional Court concluded:

> 54. In these circumstances if matters remain as they are the appeal will be dismissed. However, it is apparent that it will be possible to meet the real risk of article 3 treatment by offering a suitable assurance that Mr Chawla will be kept in article 3 compliant conditions in Tihar prison before, during trial and, in the event of conviction and sentence of imprisonment, after trial. Such an assurance will need to: address the personal space available to Mr Chawla in Tihar prisons; the toilet facilities available to him; identify the ways in which Mr Chawla will be kept free from the risk of intra-prisoner violence in the High Security wards; and repeat the guarantee of medical treatment for Mr Chawla.

> 55. Therefore, following the approach set out in *Georgiev* at paragraph 8(ix) and (x), we stay the appeal to give the Government an opportunity to provide further assurances. We require a response from the CPS within 42 days of the date of the handing down of this judgment. We give permission to apply to both parties as regards the wording of any further assurances, the timing for their production, and the final disposal of this appeal."

The Third Assurance

14. The joint secretary to the Government of India provided a third assurance dated 11 June 2018. That assurances runs to 5 pages and deals with a number of matters including those referred to by the Divisional Court in its conclusion. It provided that Mr Chawla would be accommodated in a cell occupied exclusively him. The cell would be located in a ward which was not a high security ward. It said that the ward where Mr Chawla would be detained would have inmates who had not violated any prison rules and had satisfactory conduct. It also contained details about the provision for ensuring safety from violence.

15. The assurance identified four cells where Mr Chawla would be kept. It said that the reason for identifying more than one cell was to enable a degree of operational flexibility should that be necessary. It gave the dimensions of each cell. It described the sanitary facilities provided in each of the four cells which included a toilet with a partition for the toilet area so that it was separated from the living area of the cell to ensure privacy. Photographs were provided. The assurance dealt with the provisions for medical care.

Proceedings in the High Court – the second *Chawla* judgment

16. The Divisional Court held another hearing on 13 November 2018 to consider the third assurance. Mr Chawla was represented by leading and junior counsel as was the Government of India. It also considered new evidence about articles and reports on prison conditions in Tihar. It gave a full judgment on 16 November 2019: see *Government of India v Chawla* [2018] EWHC 3098 (Admin).

17. Three issues were identified by the representatives of Mr Chawla as arising out of the assurance. These were (1) whether there was provision for alternative accommodation in the event that the cells identified in the assurance were unusable (2), whether there remained a real risk of intra-prisoner violence and (3) whether the medical provision was adequate. The Divisional Court considered and made conclusions about all three issues. On the first, the Divisional Court was satisfied that the assurance was specific about the space to be provided to Mr Chawla and the location of cells to be occupied by him. There did not remain a real risk of impermissible treatment by reason of the cell in which Mr Chawla would be held. On the second, the Divisional Court concluded that Mr Chawla would not be accommodated in a high security ward and that "while nothing could be guaranteed, there is no real risk of intra prisoner violence to Mr Chawla" (see paragraph 18 of the second *Chawla* judgment). On the third issue, the Divisional Court concluded that there was a guarantee of medical treatment for Mr Chawla should he require it. The Divisional Court concluded at paragraphs 21 and 22 that:

> "21. In these circumstances, having regard to all of the information available to this Court about Tihar prisons, the terms of the third assurance (which was not before the District Judge) are sufficient to show that there will be no real risk that Mr Chawla will be subjected to impermissible treatment in Tihar prisons.
>
> "22. Therefore, pursuant to the provisions of section 106 of the Extradition Act 2003, we quash the order discharging Mr Chawla, remit the case to the District Judge, and direct the District Judge to proceed as if the District Judge had not ordered Mr Chawla's discharge."

18. The order of the Divisional Court made on 16 November 2018 provides that:

> "THE COURT ORDERS THAT
>
> 1. The Appeal be allowed pursuant to section 106(1)(a) of the Extradition Act 2003.
> 2. The order discharging the Respondent is quashed pursuant to section 106(6)(a) of the Extradition Act 2003.
> 3. The case is remitted to the District Judge pursuant to section 106(6)(b) of the Extradition Act 2003.
> 4. The District Judge is directed to proceed as she would have been required to do had she decided the question under s. 87 differently at the extradition hearing.
> 5. There be no order for costs, save for an assessment of the Respondent's publicly funded costs."

Proceedings before the Westminster Magistrates' Court

19. The matter was considered by the District Judge at Westminster Magistrates' Court at a hearing on 7 January 2019. We do not have a transcript of the proceedings. We were told that both parties were represented. There were no submissions made in opposition to the request that the case should be sent to the Secretary of State in accordance with the directions of the Divisional Court. There is a record that the District Judge decided to send the case to the Secretary of State for his decision on whether Mr Chawla should be extradited.

The Extradition Order

20. The Secretary of State made an order on 27 February 2019 providing for the extradition of Mr Chawla to India.

The Application for Permission to Appeal

21. Mr Chawla lodged an appellant's notice on 12 March 2019. That notice states that the decision Mr Chawla wishes to appeal is "The order made by the District Judge sitting at Westminster Magistrates' Court sending this matter to the Secretary of State". He also sought permission to adduce fresh evidence, namely, (1) a newspaper article indicating that the Indian authorities intended to demolish jails one, two and three in Tihar prison and build a multi-level prison (2) newspaper reports on prison conditions (3) a report dated 30 March 2019, described as an expert legal opinion, by a Mr Gupta who had been a legal adviser for the Officer of the Director General, Delhi Jails (i.e.

Tihar Jails) until his retirement in 2017 and (4) a document bearing dates in April 2000 which is an application by one of Mr Chawla's co-accused to the Magistrates' Court in Delhi for directions to the police about the conduct of the investigation.

22. The provisional grounds of appeal relied contained one ground in the following terms:

> "The Applicant relies upon a single ground of appeal, namely that notwithstanding the assurances accepted by the court, there remain substantial grounds to believe that the Applicant is at real risk of detention in conditions of detention which are so overcrowded and materially poor with a concomitant risk of violence from other prisoners as to engage and breach Article 3 of the Convention."

23. The perfected grounds filed on 26 March 2019 identified three grounds namely, whether:

> (1) extradition of Mr Chawla would subject him to a real risk of treatment contrary to Article 3 ECHR;
>
> (2) there would be a risk of a flagrant breach of Article 6 ECHR by reason of the use of evidence obtained by torture or inhuman or degrading treatment; or
>
> (3) extradition would be an abuse of process by reason of non-disclosure of material matters by the respondent?

24. By an order made on the papers by Sir Wyn Williams and served on 9 July 2019, the application was adjourned to a rolled-up hearing, that is to an oral hearing where the application for permission to appeal and, if permission were granted, the appeal would be heard at the same hearing. That hearing took place before us on 16 January 2020. At that hearing the application was treated as either an application for permission to appeal against the sending of the case by the District Judge to the Secretary of State or alternatively as an application for permission to re-open the determination of the Divisional Court in the second *Chawla* case. Full argument was heard on whether permission to proceed should be granted. At the conclusion of the hearing we indicated that leave to proceed on either basis would be refused with reasons to be given in writing later.

THE STATUTORY FRAMEWORK

25. Part 2 of the 2003 Act deals with extradition to territories designated as category 2 territories for these purposes by the Secretary of State: see section 69 of the 2003 Act. India is a category 2 territory. Provision is made for the certification of requests for the extradition of a person to a category 2 territory and for the issuing of arrest warrants. A person arrested under such a warrant must be brought before an appropriate judge, that is a designated District Judge, who fixes a date for an extradition hearing (see sections 75 and 139 of the 2003 Act).

26. The 2003 Act then proceeds by setting out, in various sections, questions that the District Judge must decide including whether the relevant documents have been

provided (section 78) and whether there are any specified bars to extradition such as the passage of time (section 79). The sections are framed so that the District Judge must order the discharge of the requested person if he answers a question in a particular way or must go on to deal with the person under another section and reach a decision on the question identified in that section. The final stage in that sequence is consideration of whether extradition would be compatible with the person's Convention rights, that is the rights conferred by the ECHR and incorporated into domestic law by the Human Rights Act. If extradition would not be compatible with a person's Convention rights, he or she must be discharged. If extradition would be compatible, the District Judge must send the case to the Secretary of State for his decision on whether the person is to be extradited. Section 87 of the 2003 Act is in the following terms:

> " **87 Human rights**
>
> (1) If the judge is required to proceed under this section (by virtue of section 84, 85 or 86) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c. 42).
>
> (2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.
>
> (3) If the judge decides that question in the affirmative he must send the case to the Secretary of State for his decision whether the person is to be extradited."

27. Section 92 of the 2003 Act provides, so far as material, that:

> "**92 Case sent to Secretary of State**
>
> (1) This section applies if the appropriate judge sends a case to the Secretary of State under this Part for his decision whether a person is to be extradited.
>
> (2) The judge must inform the person in ordinary language that—
> (a) he has a right to appeal to the High Court;
> (b) if he exercises the right the appeal will not be heard until the Secretary of State has made his decision."

28. Appeals are dealt with in sections 103 and following of the 2003 Act. Sections 103 and 104 deal with appeals where a case is sent to the Secretary of State. They provide, so far as is material, that:

> "**103 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.

…..~"

"**104 Court's powers on appeal under section 103**

(1) On an appeal under section 103 the High Court may—
(a) allow the appeal;
(b) direct the judge to decide again a question (or questions) which he decided at the extradition hearing;
(c) dismiss the appeal.

(2) The court may allow the appeal only if the conditions in subsection
(3) or the conditions in subsection (4) are satisfied.

(3) The conditions are that—

(a) the judge ought to have decided a question before him at the extradition hearing differently;
(b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.

(4) The conditions are that—
(a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;

(b) the issue or evidence would have resulted in the judge deciding a question before him at the extradition hearing differently;

(c) if he had decided the question in that way, he would have been required to order the person's discharge.

(5) If the court allows the appeal it must—
(a) order the person's discharge;
(b) quash the order for his extradition.

(6) If the judge comes to a different decision on any question that is the subject of a direction under subsection (1)(b) he must order the person's discharge.
(7) If the judge comes to the same decision as he did at the extradition hearing on the question that is (or all the questions that are) the subject of a direction under subsection (1)(b) the appeal must be taken to have been dismissed by a decision of the High Court.

(8) If the court makes a direction under subsection (1)(b) it must remand the person in custody or on bail.

(9) If the court remands the person in custody it may later grant bail."

29. Sections 105 and 106 of the 2003 Act deal with an appeal where the District Judge ordered a person's discharge. That is what happened in this case. The District Judge ordered the discharge of Mr Chawla and the Government of India appealed. Sections 105 and 106 provide as follows:

"**105 Appeal against discharge at extradition hearing**

(1) If at the extradition hearing the judge orders a person's discharge, an appeal to the High Court may be brought on behalf of the category 2 territory against the relevant decision.
(2) But subsection (1) does not apply if the order for the person's discharge was under section 122.
(3) The relevant decision is the decision which resulted in the order for the person's discharge.
(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.

(5) Notice of application for leave to appeal under this section must be given in accordance with rules of court before the end of the permitted period, which is 14 days starting with the day on which the order for the person's discharge is made.

"**106 Court's powers on appeal under section 105**

(1) On an appeal under section 105 the High Court may—
(a) allow the appeal;
(b) direct the judge to decide the relevant question again;
(c) dismiss the appeal.

(2) A question is the relevant question if the judge's decision on it resulted in the order for the person's discharge.

(3) The court may allow the appeal only if the conditions in subsection (4) or the conditions in subsection (5) are satisfied.

(4) The conditions are that—
(a) the judge ought to have decided the relevant question differently;
(b) if he had decided the question in the way he ought to have done, he would not have been required to order the person's discharge.

(5) 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 the relevant question differently;
(c) if he had decided the question in that way, he would not have been required to order the person's discharge.
(6) If the court allows the appeal it must—
(a) quash the order discharging the person;
(b) remit the case to the judge;
(c) direct him to proceed as he would have been required to do if he had decided the relevant question differently at the extradition hearing.

(7) If the court makes a direction under subsection (1)(b) and the judge decides the relevant question differently he must proceed as he would have been required to do if he had decided that question differently at the extradition hearing.

(8) If the court makes a direction under subsection (1)(b) and the judge does not decide the relevant question differently the appeal must be taken to have been dismissed by a decision of the High Court.

(9) If the court–
(a) allows the appeal, or
(b) makes a direction under subsection (1)(b),
it must remand the person in custody or on bail.

(10) If the court remands the person in custody it may later grant bail."

30. Section 108 of the 2003 Act deals with appeals against an extradition order made by the Secretary of State. Sections 113 and 114 deal with appeals to the Supreme Court.

The Criminal Procedure Rules Part 50

31. Rules governing extradition are contained in Part 50 of the Criminal Procedure Rules ("the CrPR"). CrPR 50.13 sets out the sequence in which the questions set out in the various sections of the 2003 Act must be considered by the District Judge.

32. CrPR 50.27 deals with applications to re-open the determination of an appeal and provides as follows:

> **"Reopening the determination of an appeal**
>
> 50.27 (1) This rule applies where a party wants the High Court to reopen a decision of that Court which determines an appeal or an application for permission to appeal.
>
> (2) Such a party must –
>
> (a) apply in writing for permission to reopen that decision, as soon as practicable after becoming aware of the grounds for doing so; and
>
> (b) serve the application on the High Court officer and every other party.
>
> (3) The application must-
>
> (a) specify the decision which the applicant wants the court to reopen; and
>
> (b) give reasons why –
>
> (i) it is necessary for the court to reopen that decision in order to avoid real injustice;
>
> (ii) the circumstances are exceptional and make it appropriate to re-open the decision, and
>
> (iii) there is no alternative effective remedy.

(5) The court must not give permission to reopen a decision unless each other party has had an opportunity to make representations".

THE PROPER APPROACH TO DETERMINING THE APPLICATION

Submissions of the Parties

33. Mr Powles Q.C. for Mr Chawla submits that section 103 of the 2003 Act provides for an appeal against the decision of the District Judge to send the case to the Secretary of State for a decision on whether a person should be extradited. That enables the court to hear an appeal under section 103, and to allow the appeal if either the judge ought to have decided a question differently or if new issues or fresh evidence is adduced that was not available at the extradition hearing, which have resulted in the District Judge deciding a question differently and ordering the person's discharge as envisaged by section 103(3) or (4) of the 2003 Act. That, he submitted was further confirmed by section 92 of the 2003 Act. That section applies where a judge sends a case to the Secretary of State for his decision on whether a person is to be extradited. The judge must inform the person that he has the right of appeal to the High Court. Mr Powles submits this demonstrates that that there is a right of appeal in the present case and that it should be determined in what he described as the usual way.

34. Mr Summers Q.C., for the respondent submits that, on the facts of this case, there is no right of appeal under section 103 of the 2003 Act. Here, the original appeal was dealt with under section 106(1)(a) and (6) of the 2003 Act. The order of the Divisional Court provided for the appeal to be allowed, and, quashed the order for discharge and remitted the matter to the District Judge with a direction that she proceed as she would have done if she had decided the question of compatibility with Article 3 ECHR differently, that is, to proceed by sending the case to the Secretary of State. The relevant decision that extradition was compatible with Article 3 (and thus discharge was not required under section 87 of the 2003 Act) was taken by the Divisional Court, not the District Judge. There was no provision for any appeal under section 103 against the sending of the case by the District Judge to the Secretary of State in those circumstances. Mr Summers submitted that section 92 of the 2003 Act does not itself confer a right of appeal. It is dealing with the generality of the cases sent to the Secretary of State for decisions where an appeal is possible and imposes a duty on the District Judge in those cases to tell the person concerned of the right of appeal. Alternatively, he submitted that if there were jurisdiction to entertain an appeal, it would be an abuse of process to allow an applicant to re-litigate the relevant question decided against him by the High Court and permission to appeal should only be granted if a test which is in substance the same as that in CrPR 50.27 is met, namely that it is necessary to grant permission in order to avoid real injustice and the circumstances are exceptional.

Discussion

35. The only disputed question that had to be decided in this case was whether the extradition of Mr Chawla was compatible with his rights under Article 3 ECHR. If the answer was in the affirmative, the case had to be sent to Secretary of State for his decision on whether to extradite Mr Chawla: see section 87(3) of the 2003 Act. The High Court answered that question in the second *Chawla* case and determined that extradition would be compatible with Mr Chawla's rights under Article 3 ECHR. It

therefore allowed the appeal and directed the District Judge to proceed as if she had decided that question in that way, i.e., to send the case to the Secretary of State. The District Judge did that on 7 January 2019. The District Judge did not consider or decide any other question on that day.

The Issue of Jurisdiction

36. In those circumstances, section 103 of the 2003 Act does not provide for an appeal against the action of the District Judge in sending the case to the Secretary of State. The proper course of action, if Mr Chawla sought to challenge the decision that extradition was compatible with his rights under Article 3 ECHR, was to apply to re-open the determination of the High Court under CrPR 50.27. That follows from the wording of sections 103 and 106, and the structure of the 2003 Act.

37 First, section 106 of the 2003 Act sets out the powers of the High Court when, as in this case, it is dealing with an appeal against an order that a person be discharged. There are three options. Section 106(1)(a) provides for the High Court to allow the appeal where the conditions in section 106(4) or (5) are satisfied, i.e. the District Judge should or would have decided the relevant question (i.e. the question which resulted in the order for discharge) differently and if so, the District Judge would not have been required to make the order for discharge. Here the High Court determined that the District Judge would have decided the question of whether Mr Chawla's extradition was compatible with his rights under Article 3 differently in the light of the third assurance and, in those circumstances, would not have been required to order the discharge of Mr Chawla. Rather, she would have sent the case to the Secretary of State as provided for by section 87(3) of the 2003 Act.

38 Having allowed the appeal, the High Court therefore proceeded under section 106(6) of the 2003 Act. It quashed the order discharging Mr Chawla, it remitted the case back to the District Judge, and it directed her to proceed as she would have been required to do if she had decided the question of compatibility of extradition with Article 3 ECHR differently. That is what the District Judge did on 7 January 2019. She complied with the direction of the High Court. She proceeded by sending the case to the Secretary of State. She did not, and was not required to, decide the question of the compatibility of extradition with Article 3 ECHR herself. That question had been decided by the High Court. The position can be contrasted with other provisions of section 106 of the 2003 Act. One option open to the High Court on an appeal against an order to discharge a person is to "direct the judge to decide the relevant question again": see section 106(1)(b) of the 2003 Act. Section 106(6), however, does not contemplate the District Judge deciding the relevant question: it provides for a direction to proceed as if he or she had decided the relevant question differently.

39 Secondly, section 103(1) of the 2003 Act provides that if the District Judge sends the case to the Secretary of State for his decision on whether to extradite the person, the person may appeal against "the relevant decision". That is defined in section 103(3) as "the decision that resulted in the case being sent to the Secretary of State". The section does not, therefore, provide for an appeal against the sending of the case (even if expressed as a decision to send the case) to the Secretary of State. It provides for an appeal against the "decision resulting in the case being sent". The section itself, therefore, draws a distinction between the sending of the case, and the decision that resulted in that action occurring.

40 In the present case, the District Judge did not on 7 January 2019 take a decision which resulted in the case being sent to the Secretary of State. That decision had already been taken by the High Court. The District Judge simply proceeded differently in light of the decision of the High Court and sent the case to the Secretary of State. The act of sending the case to the Secretary of State pursuant to a direction made under section 106(1)(a) and (6) of the 2003 Act does not itself generate the possibility of an application for permission to appeal.

41 That result also accords with the reality of the situation. Mr Chawla wishes in substance to challenge the decision of the Divisional Court in the second *Chawla* case that the third assurance was sufficient to show that there would not be a real risk that he would be subject to impermissible treatment in Tihar jail. He is not challenging any finding or decision of the District Judge. The appropriate mechanism for challenging a decision of the High Court in such circumstances is by way of an application to re-open the determination under CrPR 50.27 not by means of an application for permission to appeal under section 103 of the 2003 Act.

42 That result is not inconsistent with section 92 of the 2003 Act. That section does not create a right of appeal. It imposes a duty on the District Judge to inform the person concerned of the possibility of an appeal. It deals with all situations where cases are sent to the Secretary of State and where, in the great majority, there will be the possibility of appeal. In a small group of cases, there will be no appeal for the reasons given. The fact that section 92 does not in terms differentiate between the different groups of cases cannot of itself create a right of appeal or result in a different interpretation of section 103 of the 2003 Act.

43 For completeness, it is important to note that this case does not involve any other decision by the District Judge. It was not a case where one or more questions set out in the sections of the 2003 Act had been left undetermined at the extradition hearing because the District Judge had decided to order discharge of the person in answer to another question. Nor was it a case where the applicant sought to rely on additional reasons at the hearing before the District Judge on 7 January 2019 for resisting extradition (and it is not necessary to express a view on whether or not the applicant could have done so). All that the District Judge did on 7 January 2019 was to proceed by sending the case to the Secretary of State pursuant to a direction given under section 106(6) of the 2003 Act. In those circumstances, section 103 does not provide for a right of appeal to the High Court.

The Approach to Leave if Jurisdiction Exists

44 Even if we had jurisdiction to entertain an appeal under section 103 of the 2003 Act, we would have had to decide whether it was appropriate to grant leave to appeal. In the usual case, leave is likely to be granted where there is one or more reasonably arguable grounds for considering that the District Judge should have decided one of the relevant questions differently (or there is admissible new evidence, or a new issue arises, and it is arguable that the District Judge would have decided a relevant question differently). That would be consistent, for example, with CrPR 50.17(4) which provides that, unless the court directs otherwise, the grant of permission indicates that the court has found each ground for which permission to appeal is granted to "be reasonably arguable".

45 In the present case, however, the situation is that the High Court has already considered and determined for itself the relevant question, that is whether extradition would be compatible with Article 3 ECHR. Any appeal would inevitably involve re-considering the decision already reached by the High Court. It would not be appropriate to grant leave to appeal unless there was a proper basis for considering that the decision of the High Court should be re-considered. Assuming, therefore, that the High Court has jurisdiction to entertain an appeal in such cases, leave ought only to be granted where it is necessary to do so to avoid real injustice in exceptional circumstances. That reflects the position in CrPR 50.27 and the approach to re-opening appellate decisions in the civil courts in *Taylor v Lawrence* [2003] Q.B. 528.

THE SECOND ISSUE – SHOULD LEAVE TO PROCEED BE GRANTED?

46 Mr Powles submitted that leave should be granted either to re-open the determination of the High Court in the second *Chawla* decision or to appeal under section 103 of the 2003 Act. He submitted that there is new evidence, not available at the time of the hearing before the High Court which demonstrates that there is a real risk that the third assurance will not be sufficient to prevent ill-treatment contrary to Article 3 ECHR if Mr Chawla is extradited. Mr Powles identified three matters in particular which it is appropriate to consider in turn.

47 First, he refers to a newspaper article dated 19 January 2019 reporting that the Indian authorities plan to construct a multilevel prison at Tihar to solve the overcrowding. That is reported as entailing the possible demolition of jail numbers 1, 2 and 3 at Tihar which would take many months to complete and some prisoners would be moved to other prisons and brought back. Mr Powles made it clear that he is not contending that the building of a new, and improved, prison would result in a breach of the assurance. Rather, he submits that there is a real possibility that, during any period of construction, prisoners, including Mr Chawla, will be moved to other prisons. That, he submitted, would be inconsistent with the assurance given by the Indian authorities and would result in a real risk of impermissible ill-treatment in those other prisons.

48 The third assurance identified four specific cells, two in ward 9 in Central Jail 1 and two in ward 4 in Central Jail 3 (jails 1 and 3 of the Tihar jails referred to in the newspaper article). The assurance explains that four cells have been identified in order to ensure operational flexibility if necessary (e.g. if, for some reason, Mr Chawla has to be moved). We accept Mr Summers' submission that it is simply speculative to extrapolate from the generalised plan for the possible demolition of jails 1, 2 and 3, and the possibility of some prisoners being re-housed, a risk that Mr Chawla will be detained other than in accordance with the third assurance.

49 Mr Powles refers to newspaper articles and court orders dealing with incidents of violence in Tihar prison or difficulties with the CCTV cameras. Those issues were considered by the Divisional Court which was satisfied that the third assurance would remove the risk of Mr Chawla being subjected to violence within the prison. Mr Powles seeks to rely on the report by Mr Gupta indicating that Mr Chawla would be at risk of violence from other prisoners when outside his cell in open times or during visits or transfers to court. The Divisional Court considered that issue. The third assurance confirms that the cells where Mr Chawla will be detained are not in high security wards and he will be lodged with inmates whose conduct is satisfactory and

who have not violated prison rules. Mr Gupta's opinion, even if admissible, offers no credible or realistic reason for doubting the correctness of the Divisional Court's assessment of the situation.

50 Mr Powles also relies on the presence of photographs showing curtains and rods in the toilet facilities in the cells identified as ones where Mr Chawla is to be detained. Again, the Divisional Court in the first *Chawla* decision required that any assurances deal with toilet facilities. The third assurance provides that Mr Chawla will be held in a single occupancy cell, and that there is a partition between the toilet and the living area of the cell. The High Court accepted the adequacy of that assurance in the second *Chawla* decision. Mr Gupta's opinion, even if admissible, offers no credible or realistic reason why the Divisional Court's assessment that detention in accordance with those arrangements would not result in a real risk of impermissible treatment. Nor is there any real basis for assuming that the presence of curtains and rods, which Mr Gupta considers should not be permitted in the prison under prison rules, indicates that the third assurance would not be adhered to.

51 There is no basis for considering therefore that we should grant leave in the present case. Nothing suggests that there is any real risk of injustice, nor are the circumstances exceptional. Indeed, the material does not even demonstrate reasonably arguable grounds for contending that there would be a real risk of ill-treatment contrary to Article 3 ECHR.

52 Mr Powles also seeks to contend that there is a real risk that the police would seek to rely on evidence obtained by torture. The basis of this allegation is that three of Mr Chawla's co-accused have made confessions which implicate Mr Chawla. One of these, Mr Kalra, made an application to the Delhi Magistrates' Court in April 2000 contending that he had been the subject of high-handed treatment by the police and that they had forcibly extracted his signature on a blank piece of paper. The application was said to be an application for directions to the police. Mr Powles confirmed in oral submissions that there was no evidence before this court as to what happened to this application. Mr Kalra subsequently made a written confession implicating Mr Chawla. Mr Powles does not suggest that there is any evidence that the confession was written by police on the blank piece of paper that Mr Kalra was allegedly forced to sign. There is no evidence before this court indicating that Mr Kalra's confession, or that of the other two co-accused were extracted by torture or improper means. Mr Powles invites us to infer that that may be the case as the three co-accused have, it seems, maintained their pleas of not guilty and have not yet been tried. There is simply no realistic basis upon which the fact that an application was made in 2000 alleging police high-handedness or the forcible extraction of a signature on a blank sheet of paper could give rise to any real risk that Mr Chawla would not have a fair trial because the authorities would rely on evidence obtained by torture. The suggestion, on the limited evidence available, is speculative in the extreme.

53 Mr Powles submitted that there has been material non-disclosure on the part of the respondent by failing to disclose the plans to demolish the Tihar jails or the application made by the co-accused, Mr Kalra, to the Delhi Magistrates' Court in 2000. He submitted that that amounted to an abuse of the extradition process such that the High Court should refuse extradition. There can realistically be no complaint that the absence of any reference to those two matters involves material non-disclosure or that the Divisional Court was in any way unaware of material issues in deciding

whether the third assurance was sufficient to ensure that there was no real risk of ill-treatment. Nor could it be said that there was any abuse or usurpation of the extradition process.

CONCLUSION

54 For those reasons, permission to appeal from the decision of District Judge Crane of 7 January 2019 is refused as we have no jurisdiction to entertain an appeal or, even if we do, leave should not be granted and permission to re-open the determination of the Divisional Court in the second *Chawla* judgment is refused.

IN THE HIGH COURT OF JUSTICE CO/990/2019
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
BEFORE THE RIGHT HONOURABLE LORD JUSTICE BEAN AND
THE HONOURABLE MR JUSTICE LEWIS

BETWEEN

SANJEEV CHAWLA

Applicant

v

GOVERNMENT OF INDIA

Respondent

ORDER

UPON hearing counsel for the Applicant and Respondent on 16 January 2020; and

UPON considering the evidence and written materials filed by the parties

THE COURT ORDERS THAT

1. Permission to appeal under s.103 of the Extradition Act 2003 is refused.

2. The application to reopen the appeal in *Government of India v Chawla* [2018] EWHC 3096 (Admin), case number CO/4973/2017, pursuant to Criminal Procedure Rules r50.27, is refused.

3. Pursuant to s.117(2)(b) of the Extradition Act 2003, the 28-day period for extradition to take place commences on the date of this order.

4. There be no order for costs, save the Applicant's publicly funded costs are to be subject to detailed assessment.

Dated: 23 January 2020

By the Court