Neutral Citation Number: [2020] EWHC 155 (Admin)

Case No: CO/1097/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/01/2020

Before :

LORD JUSTICE HAMBLEN
MR JUSTICE WILLIAM DAVIS

- -

Between :

MUHAMMED ASIF HAFEEZ	**Applicant**
- and –	
GOVERNMENT OF THE UNITED STATES OF AMERICA	**Respondent**
-and-	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

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Edward Fitzgerald QC & Ben Cooper (instructed by **BDP Pitmans LLP**) for the Applicant
Rosemary Davidson (instructed by **CPS**) for the Respondent

Hearing dates: 5th December 2019

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Approved Judgment

Mr Justice William Davis:

This is the judgment of the court.

Introduction

1. On 11 January 2019 District Judge (Magistrates' Court) Zani ("the District Judge") sent the case of Muhammad Asif Hafeez to the Secretary of State for the Home Department for a decision as to whether Mr Hafeez was to be extradited to the United States of America. On 5 March 2019 the Secretary of State ordered his extradition to the United States.

2. Mr Hafeez applied for permission to appeal against the decision of the District Judge. Sir Wyn Williams on 27 September 2019 ordered a rolled-up hearing of the application for permission and, if permission were to be granted, the substantive appeal.

3. The charges in respect of which the Government of the United States ("the US Government") sought the extradition of Mr Hafeez were:

   (i) Conspiracy to import heroin into the United States of America.

   (ii) Conspiracy to import methamphetamines and hashish into the United States of America.

   (iii) Aiding and abetting the manufacture/distribution of heroin, knowing and intending that it would be imported into the United States of America.

4. Before the District Judge Mr Hafeez argued that his extradition to the United States would violate his rights pursuant to Article 3 of the European Convention on Human Rights ("the Convention") in two respects. First, if convicted, he would be likely to be sentenced to life imprisonment without parole without any or any sufficient mechanism of review for his continued detention under that sentence. Second, he would be detained both pre-conviction and post-conviction in conditions which were likely to be inhuman. Associated with these arguments was the submission that Mr Hafeez's physical and mental health was such that it would be oppressive to order his extradition i.e. the bar under Section 91 of the Extradition Act 2003 ("the Act"). Mr Hafeez further argued that the US Government based its case on evidence from men alleged to be accomplices of Hafeez when those men had been unlawfully rendered by the Kenyan authorities to the US Government. As such the application for extradition was an abuse of process and any trial in the United States would amount to a breach of Article 6 of the Convention. The District Judge resolved all of those issues against Mr Hafeez. He submits that the District Judge was wrong to do so.

The alleged offences

5. The US Drug Enforcement Agency ("DEA") between 2014 and 2017 conducted an investigation into proposed importation of drugs into the United States, the geographical centre of the investigation being Kenya. In the course of that investigation the DEA co-operating sources were used by the DEA to contact a man named Baktash Akasha. The sources posed as Columbian drug traffickers wishing to obtain heroin for importation into the United States. They had various discussions with Akasha during the autumn of 2014 during which he apparently agreed that he could obtain heroin. He

told the sources that his supplier was from Pakistan and went by various pseudonyms, one of which was the Sultan. Akasha was part of a criminal group which included his brother, Ibrahim, Vijay Goswami and Ghulam Hussein. In October 2014 98 kilos of heroin were delivered to the sources, the delivery said to have been organised by those four men in conjunction with the Sultan. In November 2014 the four men were arrested. The US Government's case is that the Sultan thereafter was identified as Muhammad Hafeez.

6. The four men arrested in November 2014 were later released on bail in Kenya. The US Government's case is that one of the men bailed, Vijay Goswami, then agreed with Mr Hafeez to set up a factory to manufacture methamphetamine. The proposal was for the factory to be in Mozambique. A precursor chemical element in the manufacture of methamphetamine is ephedrine. In 2016 authorities in India seized a very large quantity of ephedrine from a factory in Solapur in India, this said to have been intended for use in the factory in Mozambique. The intended destination of the methamphetamine, once produced, was said to be the United States.

7. The evidence supporting the US Government's case as rehearsed in the extradition request comes from recordings made by the co-operating sources coupled with material obtained from various electronic devices seized from the four men first arrested in November 2014.

8. The DEA previously had investigated Mr Hafeez. In 2004 another co-operating source used by the DEA made direct contact with Mr Hafeez. Mr Hafeez is said to have sought the assistance of the source in concealing drugs in container shipments so that the drugs could be sent to the United States. In December 2004 acting on information supplied by the source Greek authorities seized approximately 6.5 tonnes of hashish from a container. The DEA directed the source to inform Mr Hafeez that the container was being held at a warehouse in Piraeus. Thereafter, an individual arrived at the warehouse to inspect the container though he could not be linked conclusively to Mr Hafeez.

Proceedings in Kenya

9. After the Akasha brothers, Goswami and Hussein were arrested in Kenya, the US Government made an extradition request in relation to all four men, the alleged offence being conspiracy to import heroin into the United States. The prosecution of those extradition proceedings was delayed by applications being filed in the course of the proceedings. The precise nature of the applications is not apparent because a number of court files has been lost, misplaced or archived. There was a petition of some kind directed at the constitutional propriety of the proceedings. Associated with this petition in early 2016 was an application for a stay of the extradition proceedings.

10. By early December 2016 some progress had been made in the proceedings. The US Government had presented its case. This had not involved the calling of any witness from the United States. Rather, the US Government relied on the sworn affidavits of US witnesses. However, the subjects of the extradition request applied for those witnesses to attend for cross-examination. The court directed that the US witnesses should attend for that purpose.

11. The US Government objected to this direction and applied to the High Court in Kenya for a review of the lower court's order. What order (if any) was made by the High Court is not apparent from the available evidence. The resumed extradition hearing was due to take place on 30 January 2017. There is a suggestion that the High Court made an order which operated as a stay on the extradition proceedings. Whatever the position in terms of applications and court orders, no hearing did take place on 30 January. On that date the subjects of the extradition request no longer were in Kenya.

12. This was because the Kenyan authorities had arrested the four men on different dates on and after 23 January 2017. For whatever reason the Kenyan authorities had decided to expel the men. Those authorities handed the men over to US Government DEA agents. On 30 January 2017 all four were before a court in New York.

13. At around the same time those representing the men in Kenya obtained orders from the High Court in Kenya directing the Kenyan authorities to produce the men and restraining the authorities from removing the men from the jurisdiction. These orders were of no practical effect because by the time they were made the men had left Kenya.

US Proceedings

14. Since their arrival in the United States, a fresh indictment (known as a superseding indictment) has been returned by the grand jury in relation to the Akasha brothers and Hussein. It charges them inter alia with a conspiracy to pay bribes to officials in Kenya to avoid extradition to the United States. Following the handing down of this indictment the Akasha brothers applied for disclosure by the US Government of documents relating to their "extradition and/or expulsion from Kenya". In their application they stated that their defence was that they had been forcibly kidnapped by US Government agents. As victims of such kidnapping the US court had no jurisdiction to try them.

15. The application was refused by the court in a ruling dated 2 July 2018. The US District Judge acknowledged that a US court would decline jurisdiction to try a defendant first detained in another country where the transfer of the defendant from that country to the United States violated the relevant extradition treaty or where the US Government had engaged in gross misconduct to obtain the presence of the defendant before the US court. The judge concluded that there had been no violation of the extradition treaty between the United States and Kenya because the treaty did not purport to provide the sole mechanism by which a person could be transferred from Kenya to the United States for the purposes of criminal prosecution. In any event the Akasha brothers had no standing to challenge their prosecution on the basis of any supposed violation of the extradition treaty. The treaty did not create privately enforceable rights. The Kenyan government had the standing to object to the prosecution by reference to a violation of the treaty but it had not done so. The judge went on to consider the argument that the US Government had engaged in gross misconduct. He accepted that there was evidence that Ibrahim Akasha had been detained and interrogated by Kenyan police officers prior to Akasha being handed over to DEA agents. However, he found that there was no evidence that the US Government had directed Kenyan government officials to behave in this way.

16. The fresh indictment to which we have referred did not charge Goswani. No disclosure has been made by the US Government as to his current status. The US Government

have adopted the position that premature disclosure would risk the safety of any defendant who might have pleaded guilty and agreed to give evidence against his co-accused and would threaten the integrity of the ongoing investigation. Thus, they have neither confirmed nor denied that any defendant will give evidence against his co-defendants. For the purposes of the hearing before the District Judge the Crown Prosecution Service on behalf of the US Government stated that it was content for the judge to proceed on the basis that one or more of Mr Hafeez's co-defendants would give evidence against Mr Hafeez should he be tried in the United States. The same concession was made before us.

The evidence before the District Judge

17. Mr Hafeez called five witnesses in the course of the proceedings before the District Judge. They were:

    - William Hughes, a US attorney retained by Mr Hafeez to represent him in the criminal proceedings in the United States.

    - Evans Monari, a Kenyan attorney instructed by those representing Mr Hafeez in the extradition proceedings to conduct enquiries in Kenya.

    - Dr Crofton Black, a research consultant for human rights groups with a particular interest in the use of renditions by the United States.

    - Davina Chen, a US Attorney with an interest and expertise in US federal sentencing law and procedure.

    - Zachary Katznelson, a US Attorney with a campaigning interest in the prison system in New York.

18. The District Judge also received reports from Margaret Love, a US attorney with long experience of the federal pardon system, and Dr Anupam Gupta, a consultant psychiatrist who had reviewed the medical records of Mr Hafeez. These were receivable documents within Section 202 of the Act. Mr Hafeez himself did not give evidence although he lodged a defence statement in the extradition proceedings.

19. The US Government relied on two letters dated May and July 2018 from United States Attorney Geoffrey Berman written in response to issues raised in the course of the extradition proceedings both in the evidence adduced by Mr Hafeez and otherwise. Mr Berman produced documents relating to prison conditions and to federal sentencing practice and procedure in the United States. Further he exhibited sworn statements from the clinical director and the chief psychologist within the New York prison system. All of this material was received pursuant to Section 202 of the Act.

20. On the issue of life imprisonment without parole the evidence of Davina Chen was that Mr Hafeez faced a real risk of being sentenced to a term of life imprisonment. She explained that life imprisonment in the federal system in the United States has no provision for parole. There is a system of judicial review of a federal life sentence by way of an application to the sentencing judge for compassionate release and also the prospect of commutation of sentence via presidential clemency.

21. The materials produced by Mr Berman included the statutory provisions relating to compassionate release together with the criteria for exercise of presidential clemency as published by the US Department of Justice. Those materials make it clear that a case has to be "extraordinary" for compassionate release or commutation of sentence via presidential clemency to be granted.

22. In relation to prison conditions Mr Katznelson considered that it was most likely that pre-trial Mr Hafeez would be held in a particular unit at the Metropolitan Correctional Centre ("MCC") in Manhattan which would involve solitary confinement for 23 hours each day in a windowless cell with the light on in the cell almost permanently. His evidence was that Mr Hafeez was highly likely to be subject to special administrative measures which would further affect the conditions in which he was kept. Mr Katznelson suggested that there was a real risk that post-conviction Mr Hafeez would be housed in a Supermax facility. Even if that were not the case, he would be housed in a special management unit at a prison in Lewisburg. Mr Katznelson argued that the manner in which Mr Hafeez was likely to be detained, both pre-trial and post-conviction, put him at serious risk of significant physical and psychological harm.

23. Mr Katznelson described the risks to Mr Hafeez were his status as an informant to be known within the prison system, such status being something put forward in Mr Hafeez's defence statement. He also considered that Mr Hafeez's health issues would render him extremely vulnerable in any prison environment within the United States. Finally, Mr Katznelson referred to staff shortages and overcrowding throughout the prison system in the United States, those factors affecting access to health care.

24. Mr Katznelson's assessment of the conditions in which Mr Hafeez would be detained and of the lack of appropriate medical facilities was challenged by Mr Berman and the witnesses whose statements he exhibited. Mr Berman also disputed Mr Hafeez's claim to be an informant for the DEA. Rather, Mr Hafeez had met DEA agents in order to discover the state of the investigation against him and to create a false appearance of a co-operative relationship.

25. Dr Black and Mr Monari dealt at some length with the course of events in Kenya in the period leading up to the end of January 2017 when the four co-defendants were handed over to the DEA by the Kenyan authorities. Dr Black, in assessing the involvement of the US Government in the expulsion of the men from Kenya, said that on the known facts it was hard to determine whether the US Government had instigated the expulsion or tacitly collaborated with it or merely turned a blind eye. He tended "to lean towards more direct US involvement". Mr Monari, the attorney who conducted the enquiries on the ground in Kenya, said that he was "unable to establish whether the US was directly involved in the removal".

26. The position of the US Government as expressed by Mr Berman was that it was the Government of Kenya which elected to remove the four men from Kenya in lieu of extradition and to deliver them to the custody of the DEA. The Kenyan decision was taken on or about 23 January 2017. By inference the US Government took advantage of that decision.

Proposed fresh evidence

27. Before we can consider the decision of the District Judge based on the evidence placed before him, we must determine whether Mr Hafeez should be permitted to rely on evidence not adduced in the court below. The evidence on which he seeks to rely comes from Mr Katznelson who gave evidence before the District Judge and a witness named Maureen Baird who did not. The evidence relates to the issue of prison conditions in the United States and whether those conditions create a real risk of a violation of Mr Hafeez's rights under Article 3 of the Convention should he be extradited.

28. Although submissions were made to us at some length as to the appropriate test to be applied when admitting fresh evidence in a case under Part 2 of the Act where human rights issues are in play, no issue was taken as to the need for a proper explanation for the evidence not being called before the District Judge. The position was most recently restated by this court in *Baia Mare Court, Romania v Varga [2019] EWHC 890 (Admin)* at [51]:

> *Where there is an application to justify fresh evidence before the High Court, the Court will expect a witness statement explaining why the evidence was not available before. An explanation fed through counsel, to the effect that "we did not think of it" or "we did not consider it necessary then but we have changed our minds now" must and will get short shrift.*

Varga was a case under Part 1 of the Act but the statement of principle applies equally to a case under Part 2 of the Act.

29. We have been provided with two witness statements from Anthony Hanratty on behalf of the solicitors acting for Mr Hafeez. One is dated 25 November 2019 and is concerned with the further evidence of Mr Katznelson. Mr Hanratty explains that the further evidence deals with matters which have occurred since the hearing before the District Judge but which are relevant to the issue of prison conditions. We shall consider the relevance of the evidence hereafter. We are satisfied that there is an obvious explanation given as to why the evidence was not available before.

30. The second statement from Mr Hanratty is dated 21 November 2019 and is directed to the evidence of Maureen Baird. In this statement Mr Hanratty refers to events which have occurred since the hearing before the District Judge, namely the suicide in the MCC of Jeffrey Epstein and criticisms made of the MCC by the US Attorney-General. He states that Maureen Baird's evidence deals with these developments. To the extent that her evidence does deal with those matters Mr Hanratty provides an explanation for the evidence not being available before the District Judge. The problem is that the death of Jeffrey Epstein and events following his death form but an insignificant part of the evidence of Maureen Baird. Most of her evidence is directed to the conditions at the MCC and elsewhere in the US prison system prior to the date of the hearing before the District Judge. Ms Baird was employed within the prison system from 1989 to 2016 and has drawn on her experience in giving her evidence. Mr Hanratty does not begin to address the obvious question: why was she not approached prior to the hearing in the court below?

31. We were provided with some explanation via submissions from counsel. It was said that the existence and relevant expertise of Ms Baird only became known to Mr

Hafeez's defence team after the hearing before the District Judge and this was only by chance. She was instructed in an unconnected case in which counsel appeared at which point it became apparent that she could give relevant evidence in the case of Mr Hafeez. Counsel submitted that reasonable diligence would not have revealed the existence of Ms Baird. We are unimpressed by this bare assertion. As is apparent from her witness statement Ms Baird since early 2017 has worked as an independent prison consultant. She apparently has given expert evidence in various courts within the United States. It is a proper inference that she advertises her services in some fashion. Whether a search for an independent US prison consultant necessarily would have led Mr Hafeez's solicitors to Ms Baird is moot. But we are satisfied that reasonable diligence would have revealed the existence of someone with the same expertise.

32. The reason for seeking to introduce the evidence of Ms Baird is clear. Mr Katznelson has no direct knowledge or experience of any of the prisons or detention facilities. This was something to which the District Judge referred in his judgment. The District Judge did not reject the evidence of Mr Katznelson on this basis. Equally, it was something which he saw fit to mention. Ms Baird could not be subject to the same comment. She has extensive personal and direct experience of the relevant prisons. That Mr Katznelson did not have any direct knowledge of the relevant prisons was never in doubt. His evidence did not suggest otherwise. That this lack of knowledge might leave him open to adverse comment must have been obvious. We do not consider that it is even arguably appropriate for fresh evidence to be admitted in those circumstances.

33. On behalf of Mr Hafeez two arguments are raised to overcome the principled objection to the introduction of fresh evidence. Before dealing with those we should return to those parts of the fresh evidence which deal with events occurring since the hearing before the District Judge. That evidence could be admissible subject to relevance. In fact, it is not relevant to any issue in the case. The first matter with which the fresh evidence is concerned is the suicide of Jeffrey Epstein. It is a matter of concern that a high-profile inmate such as Jeffrey Epstein was allowed to commit suicide. The US Attorney-General apparently shares that concern. It does not provide any support for the case put on behalf of Mr Hafeez in relation to prison conditions. Ms Baird links the suicide of Mr Epstein to the case of Mr Hafeez by reference to the latter's "mental health, specifically his history of bi-polar disorder and depression". There is no evidence to support this description. The most that can be said is that Dr Gupta, in his review of Mr Hafeez's medical history, observed that he was being prescribed an anti-depressant in prison whilst awaiting the extradition hearing and that on arrival at prison he had given a history of having taken an anti-depressant in the past. The medical notes indicated that Mr Hafeez's mood had improved since his initial remand into custody with some of his symptoms of depression being ascribed to his new environment i.e. Belmarsh Prison. Dr Gupta stated in terms that he had "not been able to identify a reference to bi-polar illness".

34. The second matter raised in the fresh evidence is a loss of the power supply at the detention facility in Brooklyn (MDC) over the course of a week in January and February 2019. Mr Katznelson deals with this at some length. He refers to the fact that the conditions at the MDC during the week in question caused great hardship to those detained at the MDC and that the authorities failed to deal with the problems properly or at all. Assuming that these events have been accurately reported by Mr Katznelson, they reflect no credit on those responsible for the MDC. However, the issue is whether

the nature of the events was such as to support Mr Hafeez's case that his rights under Article 3 of the Convention would be violated were he to be extradited to the United States. We are satisfied that those events do not establish a breach of Article 3. The burden is on Mr Hafeez to establish the real risk of such a breach. The limited duration of the power failure means that he cannot satisfy that burden, the threshold for Article 3 being a high one. In any event the case always has proceeded on the basis that Mr Hafeez would be detained at the MCC. Whatever the conditions at the MDC they could not present a real risk of a violation of Mr Hafeez's Article 3 rights.

35. We turn then to the submission that we should admit the evidence of Ms Baird in relation to prison conditions as they were at the time of the hearing before the District Judge even though this evidence apparently was available at the time of that hearing. The leading authority on the admission of fresh evidence in extradition appeals remains *Szombathely City Court v Fenyvesi [2009] 4 All ER 324. Fenyvesi* involved an appeal by the requesting authority in a Part 1 case. The requesting authority sought to adduce further evidence not called in the court below. This court had to consider the meaning of the words "evidence is available that was not available at the extradition hearing" in Section 29(4) of the 2003 Act, Section 29 dealing with the powers of this court on an appeal by a requesting authority. The same words appear in Section 104(4) of the 2003 Act i.e. the section dealing with the powers of the court on an appeal in a Part 2 case. The principles set out in *Fenyvesi* are at [32] to [35]:

32. In our judgment, evidence which was "not available at the extradition hearing" means evidence which either did not exist at the time of the extradition hearing, or which was not at the disposal of the party wishing to adduce it and which he could not with reasonable diligence have obtained. If it was at the party's disposal or could have been so obtained, it was available. It may on occasions be material to consider whether or when the party knew the case he had to meet. But a party taken by surprise is able to ask for an adjournment. In addition, the court needs to decide that, if the evidence had been adduced, the result would have been different resulting in the person's discharge. This is a strict test, consonant with the parliamentary intent and that of the Framework Decision, that extradition cases should be dealt with speedily and should not generally be held up by an attempt to introduce equivocal fresh evidence which was available to a diligent party at the extradition hearing……

34. Section 29(4) of the 2003 Act is not expressed in terms which appear to give the court a discretion; although a degree of latitude may need to be introduced from elsewhere. As Latham LJ said in Miklis, there may occasionally be cases where what might otherwise be a breach of the European Convention on Human Rights may be avoided by admitting fresh evidence, tendered on behalf of a defendant, which a strict application of the section would not permit. The justification for this would be a modulation of section 29(4) with reference to section 3 of the Human Rights Act 1998…..

35. Even for defendants, the court will not readily admit fresh evidence which they should have adduced before the district judge and which is tendered to try to repair holes which should have been plugged before the district judge, simply because it has a Human Rights label attached to it. The threshold remains high. The court must still be satisfied that the evidence would have resulted in the judge deciding the relevant question differently, so that he would not have ordered the defendant's discharge. In short, the fresh evidence must be decisive.

36. The application of the principles in *Fenyvesi* to Part 2 cases can be seen in *Beshiri v Albania [2018] 1 WLR 3481* at [12] to [21]:

> *12. It is incumbent on parties and their representatives to keep in mind that the court's powers in an extradition appeal have a statutory basis. In relation to a Part 2 extradition, the court's powers on appeal are laid down in sections 103 and 104 of the 2003 Act. In order for the court to exercise its powers on appeal under section 103 , the court may only allow such an appeal if the conditions in subsections 104(3) or (4) are satisfied. Section 104(3) is directed to a case where the issues and evidence below and on appeal are identical. Where it is said that fresh issues or further evidence arise, the court's powers are founded on the satisfaction of the conditions under section 104(4) , which subsection reads:*
>
> *"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."*
>
> *13. For present purposes the provisions in relation to Part 2 of the 2003 Act are identical to those in sections 26 and 27 of the Act, bearing on *3487 extradition to Category 1 territories and the authorities dealing with section 27 have equal force as to the interpretation of section 104 .....*
>
> *…….As was recognised in the Miklis and Fenyvesi cases, where the appellant's Convention rights are engaged the court owes its own duty to protect those rights. If on an appeal there is an application to introduce material which is said to be central to the protection of those rights then, particularly with the agreement of the requesting state or judicial authority, the court may consider such material de bene esse and, if the material can properly be brought within the relevant statutory test, may rely on such material in reaching a conclusion to allow an appeal.*
>
> *21. However, the statutory test must be kept in mind. There has been no submission in this case that the statutory basis upon which an appeal may be allowed is incompatible with the Convention. Nor is there any authority to that effect. Thus the court cannot allow an appeal in an extradition case save in conformity with the statute.*

37. The first argument relied on to support the admission of fresh evidence is that, where a human rights issue is engaged, a flexible attitude should be taken to admitting the evidence. This goes beyond the proposition that the court may consider the fresh material de bene esse in order to assess whether the statutory test is satisfied. Mr Fitzgerald QC went so far as to say that *Fenyvesi* was wrongly decided insofar as it does not encompass human rights issues. He argued that it was inconsistent with the Human Rights Act 1998. This is a bold submission given the fact that *Fenyvesi* was decided some 10 years after the introduction of the Human Rights Act. In fact, the judgment in *Fenyvesi* makes it clear that occasionally there will be cases where a modulation of the strict test is required to avoid a violation of human rights. Those cases will involve evidence which could have been obtained with reasonable diligence (but was not) and which is decisive in showing that extradition will involve a violation of the requested person's human rights. As was said in *Fenyvesi* the statutory test cannot be circumvented simply by attaching a Human Rights label to the evidence. The

statutory test of itself is not incompatible with the Human Rights Act. In this case the evidence of Ms Baird effectively mirrors that of Mr Katznelson as given at the hearing before the District Judge. Save that the District Judge would not have been able to comment that Ms Baird had not visited the relevant prisons, he would have been in exactly the same position with her evidence as he was with the evidence of Mr Katznelson. It is not sensible to suggest that Ms Baird's evidence would have been decisive.

38. The second argument put forward is that the statutory test does not apply at all where the court exercises its power under Section 104(1)(b). Where the appeal relates to a Part 1 case this court must either allow or dismiss the appeal. The power of the court in a Part 2 case is different. Section 104(1)(b) permits the court to "direct the judge to decide again a question (or questions) which he decided at the extradition hearing" i.e. to remit the case to the District Judge. The usual manner in which this power arises is where the District Judge has reached a decision on the law such as whether the conduct alleged was an extradition offence or the application of extra-territoriality principles and the court concludes that the District Judge erred in his or her decision on the law. The matter then will be remitted for the District Judge to apply correct legal principles to the facts.

39. Mr Fitzgerald submits that the issue of whether the prison conditions in the United States creates a real risk of a violation of Mr Hafeez's Article 3 rights can and should be remitted to the District Judge to decide again. If that is the route adopted by the court, the conditions in Section 104(4) of the Act do not apply since they relate only to where the court allows the appeal. Exercising the power in Section 104(1)(b) would not involve allowing the appeal. This ingenious argument only saw the light of day during the rolled-up hearing. It is not a proposition which was presaged in any document in advance of the hearing even though Mr Fitzgerald on 26 November 2019 served a skeleton argument which purported to deal comprehensively with the issue of fresh evidence. That this argument came late in the day is not determinative. However, it may provide some indication as to its fundamental merit.

40. We are satisfied that the argument is misconceived. First, as we have set out above, the purpose of Section 104(1)(b) is to permit the court to correct errors of law (or potentially mixed fact and law) and to remit the case to the District Judge for him or her to proceed on the basis of a correct understanding of the law. It is not a provision intended to permit the requested person (or indeed the requesting authority) to have a second bite of the cherry with no hindrance on the admission of further evidence. The consequence of Mr Fitzgerald's argument would be that an appellant could adduce further evidence whatever the issues. If the condition in relation to fresh evidence were not to apply where an appellant invited the court to remit the case to the District Judge, it would not matter whether a human rights issue arose. In any event, if fresh evidence were to be admitted in the circumstances of this case, we would consider the case in the round and allow or dismiss the appeal depending on our view of its effect on the relevant issue. It would not be appropriate to remit the case to the District Judge. Second, a purposive reading of Sections 103 and 104 of the Act must lead to the conclusion that the statutory criteria for the admission of fresh evidence apply to the hearing of the appeal or the application for permission to appeal. The course identified in Section 104(1)(b) is a remedy available to the court at the conclusion of the hearing of the appeal. The remedy

which eventually is adopted by the court cannot be the basis on which the court considers the outcome.

41. It follows that we do not admit any of the evidence of Ms Baird and we do not admit the fresh evidence of Mr Katznelson.

Life imprisonment without parole

42. The evidence before the District Judge established that there was a real risk that Mr Hafeez, if convicted of the charges in respect of which his extradition was sought, would receive a sentence of life imprisonment. This was by no means the certain outcome. The US Government provided evidence from the US Sentencing Commission demonstrating that life sentences are rare in the Federal System even in cases of serious drug trafficking. This general evidence was supported by specific examples of cases not dissimilar to that of Mr Hafeez where a determinate sentence was imposed. However, the District Judge simply considered whether a life sentence in the US Federal System would involve a violation of Mr Hafeez's Article 3 rights. It is not appropriate for us to consider whether the evidence established a real risk of a life sentence. We were not invited to do so.

43. If a defendant in a Federal Court in the United States receives a sentence of life imprisonment, that sentence will have no provision for parole. The life sentence prisoner will have two routes by which he may obtain a reduction in or commutation of the sentence. First, he may apply for compassionate release pursuant to Title 18 Paragraph 3582 of the United States Code. At the time of the hearing before the District Judge this procedure involved the prisoner requesting that the Bureau of Prisons make such an application to the court on his behalf. The position changed in December 2018. The prisoner now may make an application directly to the court.

44. The prisoner must persuade the court that "extraordinary and compelling reasons" exist which would warrant a reduction of the sentence. There is no all-embracing definition of that term. The Sentencing Commission has identified four scenarios which would fulfil the definition of extraordinary and compelling. Three are specific: terminal illness of the prisoner; the prisoner is over 65 and experiencing a serious deterioration in his health because of the ageing process; a change in family circumstances leading to the prisoner being the only available caregiver to a child or spouse. The fourth scenario is left undefined save that it is stated that rehabilitation by itself is not an extraordinary and compelling reason. The Code requires the court to consider the general sentencing principles as set out in Paragraph 3553(a) of the Code which include consideration of "the nature and circumstances of the offence and the history and characteristics of the defendant". Thus, rehabilitation apparently will be a relevant factor even though it cannot serve on its own to reduce the sentence. We were referred to a recent decision of the United States District Court in Iowa (Brown) which confirms this analysis.

45. The second route for a reduction of sentence available to a life prisoner in the Federal System is a petition for Executive Clemency. We note that, when the court in Brown declined to reduce the sentence because the sole basis of seeking compassionate release was rehabilitation, the court went on to refer to a previous application for commutation of sentence under the Executive Clemency provisions. The court invited the relevant authority to reconsider the application. The basis for commutation of sentence pursuant

to Executive Clemency is set out in guidance published by the US Department of Justice. It is as follows:

Commutation of sentence is an extraordinary remedy. Appropriate grounds for considering commutation have traditionally included disparity or undue severity of sentence, critical illness or old age and meritorious service rendered to the government by the petitioner e.g. co-operation with investigative or prosecutive efforts that has not been adequately rewarded by other official action. A combination of these and/or other equitable factors (such as demonstrated rehabilitation whilst in custody or exigent circumstances unforeseen by the court at the time of sentencing) may also provide a basis for recommending commutation in the context of a particular case.

The published guidance does not indicate any means by which a clemency decision can be the subject of judicial review. Margaret Love's evidence was that "judicial review of a clemency decision is very rare and is certainly not routine". The District Judge proceeded on the basis that there was no provision for judicial review of an adverse decision. That is the basis on which we shall proceed. What undoubtedly is the case is that there is no limit on the number of applications which a prisoner may make for Executive Clemency.

46. Mr Fitzgerald argues that the system of life imprisonment with parole and its potential application to Mr Hafeez involves a real risk of a violation of Mr Hafeez's Article 3 rights. This without more should require Mr Hafeez's discharge. The District Judge concluded that the system of review as set out above was sufficient to avoid a risk of a violation of Article 3. Mr Fitzgerald's submission is that this conclusion was wrong. He argues that the court would not countenance extradition if there were a real risk of a death sentence being imposed. A life sentence without parole and without any adequate review mechanism should be regarded in the same way.

47. Mr Fitzgerald's submission is founded on jurisprudence from the European Court of Human Rights ("ECHR"). We must review that jurisprudence in a little detail even though that task was undertaken by this court in *R (Harkins) v Secretary of State for Home Department (No 2) [2015] 1 WLR 2975*. As well as the general principles there are two particular considerations relevant to the case of Mr Hafeez. First, to what extent is the position different in an extradition context as compared to a national case? Second, how specific are the requirements for review of a life sentence without parole? We note that, although we must take account of any relevant decision of the European Court of Human Rights, we are not obliged to follow the decision if a reasoned analysis of the position leads us to a contrary conclusion.

48. The starting point in the jurisprudence of the ECHR in relation to Article 3 and life sentences is *Karkaris v Cyprus (2009) 49 EHRR 35* at [98 to [100]:

98. The imposition of a sentence of life imprisonment on an adult offender is not in itself prohibited by or incompatible with art.3 or any other article of the Convention. At the same time, however, the Court has also held that the imposition of an irreducible life sentence on an adult may raise an issue under art.3.

99. In determining whether a life sentence in a given case can be regarded as irreducible the Court has sought to ascertain whether a life prisoner can be said to have any prospect of release. An analysis of the Court's case law on the subject

discloses that where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy art.3….It follows that a life sentence does not become "irreducible" by the mere fact that in practice it may be served in full. It is enough for the purposes of art.3 that a life sentence is de jure and de facto reducible.

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

No subsequent authority in the ECHR has cast doubt on the fundamental principles articulated in *Karkaris*. It is important to note that the Court abjured the proposition that it was in a position to lay down standards or guidelines applicable to every criminal justice system. All that was required was that the life sentence should be de jure and de facto reducible.

49. *Karkaris* was a national case in that the ECHR was concerned with the criminal justice system in a contracting state. In *Harkins v UK (2012) 55 EHRR 19* the court considered the case of a man who was the subject of an extradition request from the United States. Save that the request related to offences contrary to Florida State law, the circumstances were very similar to those facing Mr Hafeez. The applicant in *Harkins* faced a mandatory life sentence without parole. The court considered the application of *Karkaris* in an extradition setting as follows [129], [131] and [137]:

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

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

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

Thus, the ECHR confirmed the principles in *Kafkaris* and emphasised the caution to be adopted in extradition or removal cases in respect of alleged violations of Article 3.

50. In *Vinter v UK (2016) 63 E.H.R.R 1* the EHCR considered the life sentence regime in the UK, in particular the whole life order. A prisoner subject to a whole life order had not right to apply for and be considered for parole. The only way in which his sentence could be reduced was by the discretionary power given the Secretary of State under Section 30 of the Crime (Sentences) Act 1997. The ECHR repeated the principles in *Kafkaris*. It stated that, so long as national law afforded the possibility of a review of a life sentence, this would be sufficient to satisfy Article 3. The general conclusions are at [119] and [122]:

.....the Court considers that, in the context of a life sentence, art.3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds….

…A whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with art.3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration.

The ECHR in *Vinter* was more explicit as to the nature of the review required i.e. one which addressed changes in the prisoner and progress towards rehabilitation. Nonetheless, the court repeated the reference to legitimate penological grounds which include punishment and deterrence. The ECHR also found that the review mechanism, whatever it may be, should be apparent from the outset of the sentence. The outcome of the case was a finding that the whole life order in the UK violated Article 3 on the basis that the Secretary of State's discretionary power in Section 30 of the 1997 Act did not satisfy the requirement in *Kafkaris* that the life sentence should be de facto reducible.

51. The decision in *Vinter* was considered by the Court of Appeal Criminal Division in the context of an appeal against a whole life order imposed for an offence of murder: *McLoughlin [2014] 1 WLR 3964.* The court considered the power as set out in Section 30(1) of the 1997 Act: *(1) The Secretary of State may at any time release a life prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner´s release on compassionate grounds.* The court disagreed with the conclusion of the ECHR in *Vinter*. It found that the term "exceptional circumstances" was sufficiently certain to inform the prisoner of the approach that would be taken by the Secretary of State. The Secretary of State was bound by law to act in a manner compatible with the prisoner's Convention rights. His decision in an appropriate case would be subject to scrutiny by way of judicial review. Thus, a whole life order in UK law did not violate Article 3.

52. Mr Fitzgerald relies on *McLoughlin* as authority for the proposition that any scheme for the review of a life sentence necessarily must include the option of judicial review of a decision made under the scheme. We consider that this is an over literal reading of *McLoughlin*. Moreover, it is not consistent with what was said at [100] in *Karkaris*. We observe also that *McLoughlin* is an example of a court in this jurisdiction declining

to follow the reasoning of the ECHR. This may be of significance in considering the impact of the next stage of the jurisprudence of the ECHR.

53. *Trabelsi v Belgium (2015) 60 E.H.R.R. 21* concerned a man extradited to the United States in relation to terrorist charges. He was liable to be sentenced to a mandatory term of life imprisonment without parole. He argued that his extradition violated his Article 3 rights because the sentence was de facto irreducible. The ECHR repeated the principles set out in *Vinter* at [119] and 122]. The court then said this at [116]:

Under well-established case-law, protection against the treatment prohibited under art.3 is absolute, and as a result the extradition of a person by a Contracting State can raise problems under this provision and therefore engage the responsibility of the state in question under the Convention, where there are serious grounds to believe that if the person is extradited to the requesting country he would run the real risk of being subjected to treatment contrary to art.3 . The fact that the ill-treatment is inflicted by a non-Convention State is beside the point. In such cases art.3 implies an obligation not to remove the person in question to the said country, even if it is a non-Convention State. The Court draws no distinction in terms of the legal basis for removal; it adopts the same approach in cases of both expulsion and extradition.

Cited in support of this general proposition is *Harkins v UK.* As will be apparent from our citation and discussion of the decision of the ECHR in *Harkins*, *Harkins* does not provide the support suggested. The court went on to conclude that, if extradition would be likely to have consequences in the requesting state incompatible with Article 3, the Contracting State must not extradite. Stress was laid on the absolute nature of Article 3.

54. The court went on to consider the nature of the life sentence liable to be imposed. The sentence, were it to be imposed, would be subject to the same avenues of review as put forward in this case. The conclusion of the court was as follows at [136 and 137]:

136. The Court now comes to the central issue in the present case, which involves establishing whether, over and above the assurances provided, the provisions of US legislation governing the possibilities for reduction of life sentences and Presidential pardons fulfil the criteria which it has laid down for assessing the reducibility of a life sentence and its conformity with art.3 of the Convention.

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

Unsurprisingly Mr Fitzgerald relies on this conclusion. He argues that the decision of ECHR is clear. The procedures which the US Government put forward as providing for de facto reducibility do not meet the requirements of the ECHR jurisprudence. He submits that *Trabelsi* is conclusive in establishing a violation of Article 3.

55. *Trabelsi* has been mentioned in succeeding ECHR authority. For instance, in *Murray v Netherlands (2017) 64 E.H.R.R. 3* the court referred to the requirement that an assessment for release must be based on objective pre-established criteria. In no case has the ECHR confirmed the view expressed in *Trabelsi* that no distinction is to be drawn between removal and extradition cases and cases involving the criminal justice system of a contracting state. Nor has the ECHR analysed the specific provisions of life sentence review in the United States in the same way as was done in *Trabelsi*. It is of note that the ECHR re-considered the position of the whole life order in the UK following the decision of the Court of Appeal Criminal Division in *McLoughlin*. In *Hutchinson v UK (17 January 2017)* the ECHR concluded that the system of review adopted by the UK in relation to whole life orders did not violate Article 3. The court said at [45]:

> A*s for the nature of the review, the Court has emphasised that it is not its task to prescribe whether it should be judicial or executive, having regard to the margin of appreciation that must be accorded to Contracting States (Vinter and Others, cited above, § 120). It is therefore for each State to determine whether the review of sentence is conducted by the executive or the judiciary.*

The court went on to consider the system of review under Section 30 of the 1997 Act and, contrary to the conclusion in *Vinter*, determined that it did not violate Article 3. The important point is the overriding principle set out in *Karkaris* at [100]. So long as the principles of the Convention are observed, the precise mechanism by which a review is conducted is not to be subject to close scrutiny.

56. We have referred already to *R (Harkins) v Secretary of State for Home Department (No 2) [2015] 1 WLR 2975.* The Divisional Court in that case was invited to re-open an application for judicial review of the decision of the Secretary of State to extradite Harkins notwithstanding the fact that his case already had been considered by the ECHR as set out above. The invitation was on the basis that *Trabelsi* had changed the position of anyone facing extradition and the risk of a life sentence without parole. This court declined the invitation. First, the court considered [136] and [137] of *Trabelsi* as cited above and observed that the judgment in *Trabelsi* ignored the basic principle in *Karkaris* at [100] as repeated and adopted in *Vinter*. Second, the court considered that, even if some detailed consideration of the review scheme in the United States were appropriate, on this issue the judgment in *Trabelsi* was wholly unreasoned. We agree unreservedly with those observations. The court also noted that the alignment of cases involving violations of Article 3 in a contracting state with cases concerning extradition which is part of the reasoning in *Trabelsi* is unsupported in any other ECHR jurisprudence. As we have observed, the ECHR in *Trabelsi* relied on authority to support a particular proposition when that authority ran contrary to that proposition.

57. We do not find any significant assistance in the decision in *Trabelsi*. We do not agree with Mr Fitzgerald when he states that the case "settles the issue" for us. Insofar as it purports to reach a concluded view on the compatibility of life imprisonment without parole in the United States with Article 3, it does so without any or any proper reasoning. Insofar as it departs from the established ECHR jurisprudence on the application of Article 3 in relation to removal to a non-contracting state, we prefer the rationale as set out in *Harkins v UK*.

58. We can express our conclusion on the substance of argument relating to life imprisonment without parole relatively shortly in the light of our review of the authorities. The prisoner in the US Federal System who is subject to a life sentence without parole may seek a reduction in his sentence by one of two routes. The first route – compassionate release pursuant to Title 18 of the US Code – will not allow his release purely by reference to his rehabilitation. However, rehabilitation can and will be relevant combined with other factors. We do not accept the proposition put by Mr Fitzgerald that any review scheme must permit release purely by reason of the prisoner's rehabilitative efforts. He relies on the language in *Vinter* i.e. detention can no longer be justified on legitimate penological grounds. Yet legitimate penological grounds inevitably must include punishment and deterrence. The second route – Executive Clemency – has clear criteria within the guidance provided by the Department of Justice. Mr Fitzgerald argues that this route cannot satisfy Article 3 because it is not a judicial process and not subject to judicial review. The former objection is unsustainable in the light of the weight of ECHR authority to the effect that executive clemency is an acceptable method of review. That was the nature of the review in *Karkaris*. *Hutchinson* re-affirmed that principle. The prisoner is not restricted in the number of applications he can made for Executive Clemency. Given that factor and the transparent nature of the process, we are satisfied that the sentence of life imprisonment without parole to which Mr Hafeez may be subject does not violate Article 3.

Prison conditions/Oppression

59. We deal first with the issue of whether the extradition of Mr Hafeez would be oppressive. Section 91(2) of the Act provides for a condition in which the requested person should be discharged or the extradition hearing adjourned. The condition is as follows: *…the physical or mental condition of the person is such that it would be unjust or oppressive to extradite him.* The only evidence which the District Judge had in relation to Mr Hafeez's medical condition was the report of Dr Gupta. He had no evidence from Mr Hafeez himself. Dr Gupta had not examined Mr Hafeez; rather he had reviewed medical notes.

60. Dr Gupta is a consultant psychiatrist. He is not without wider medical experience since he has spent time working as a forensic medical examiner within the criminal justice system and he is registered as a general practitioner. Equally, he is not a practising physician in regular practice. His principal occupation is undertaking mental health assessments.

61. It is very difficult to understand from Dr Gupta's report which conditions currently affect Mr Hafeez. He has suffered from Type 2 diabetes. In April 2018 he was prescribed medication for that condition. For whatever reason that was not the case in May 2018. Assuming that he continues to suffer this disease (which must be the case) it is a common condition and readily controllable. He appears to suffer from sleep apnoea. This requires the sufferer to wear a CPAP machine. Such machines are readily available in the prison system whether here or in the United States. Dr Gupta refers in some detail in his report to gastric by-pass surgery. It is not clear whether this is proposed or has taken place. If the latter, it is now a matter of history. We already have referred to Dr Gupta's assessment of Mr Hafeez's mental health. Beyond a prescription for an anti-depressant in the period following his incarceration and a reference to a

prescription for a different anti-depressant at some point in the past, there is no indication at all of any mental health issues.

62. Mr Hafeez is a man in his early 60s. He is not without medical issues. However, his medical condition is unremarkable for a man of his age. It does not begin to provide a basis for concluding that to extradite him would be oppressive.

63. We already have rehearsed the evidence of Mr Katznelson in relation to the conditions under which Mr Hafeez would be likely to be held on his arrival in the United States and, should that eventuality arise, after conviction. The District Judge referred to the fact that Mr Katznelson had not visited the institutions of which he spoke in his report. Perhaps more germane is the fact that much of his evidence about the conditions under which Mr Hafeez would be held was speculative. Mr Hafeez's pre-trial detention most likely would be at the MCC. The clinical director at the MCC, Dr Bussanich, has stated unequivocally that Mr Hafeez's medical needs would be met including provision for a CPAP machine. The US Government has no current intention of imposing special administrative measures on Mr Hafeez. Thus, there is no evidence that he will be treated as a prisoner requiring enhanced security. Post-conviction should that arise, there is nothing about Mr Hafeez which would warrant his transfer to a Supermax facility. Given Mr Hafeez's mental health, which appears to be relatively straightforward, the proposition that Mr Hafeez will be at risk of serious harm is tendentious.

64. Even if it were the case that Mr Hafeez were at risk of being kept in solitary confinement at any point or housed at a Supermax facility post-conviction, this does not give rise without more to a violation of Article 3: *Ahmad v UK (2013) 56 E.H.R.R. 1; Pham v United States of America [2014] EWHC 4167 (Admin).*

65. Mr Katznelson laid considerable store by the fact that Mr Hafeez will have informant status within the prison system. The District Judge had no direct evidence of this. Nor do we. There is no doubt that, shortly after the arrest in November 2014 of the four men in Kenya, Mr Hafeez approached officials at the US Embassy and thereafter had contact with DEA agents. The position of the US Government is that he did so in part to obtain information about the DEA investigation, and in part to create a false impression which he could later use as part of his defence. Whatever Mr Hafeez chooses to say about himself is a matter for him. It is clear that the US Government will not regard him as an informant. Mr Hafeez cannot take advantage of a status which he does not have.

66. Strong evidence is required to establish a violation of Article 3 by reference to prison conditions when the requesting state is a well-established democratic country. The evidence in this case falls well short of the necessary threshold.

67. Mr Fitzgerald places significant reliance on the decision of this court in *Love v Government of the USA [2018] 1 WLR 2889*. We do not consider that this case assists us in any material respect. Save that the requested person in that case, had he been extradited, would have been housed in one of the detention facilities in New York to which the evidence referred in this case, the case bears no similarities to that of Mr Hafeez. Mr Love was a young man suffering from Asperger's Syndrome and obvious and serious mental health issues. The mere fact of incarceration would have led to a serious deterioration in his mental health. Incarceration in a facility thousands of miles

from his home would have exacerbated the position. The nature of Mr Love's condition, both serious and unusual, was such that the medical facilities at the detention centre would struggle to cope. Although measures could be put in place to prevent suicide, those measures of themselves would aggravate the mental illness. The conclusion of the court was that the high threshold set by Section 91 of the Act was met in Mr Love's case. It will be apparent from our review of the evidence concerning Mr Hafeez's health that Mr Hafeez does not begin to approach the position of Mr Love. We note that Mr Love's case did not address Article 3 at all.

Abuse of process/Article 6

68. The argument put on behalf of Mr Hafeez is as follows: his potential co-accused in the United States were unlawfully expelled from Kenya; the United States Government was complicit in that unlawful expulsion; at least one of the men expelled unlawfully from Kenya is likely to give evidence against Mr Hafeez; to extradite Mr Hafeez when the evidence to be called against him is likely to include (a) evidence from the co-accused and (b) evidence gleaned from devices seized at the time of the unlawful expulsion is an abuse of the extradition process; a trial of Mr Hafeez in the United States would be a violation of his Article 6 rights.

69. The District Judge made a finding of fact to the effect that there was nothing to suggest that DEA agents who in early 2017 were in Kenya had acted in any way contrary to US domestic legislation. The District Judge also noted and accepted the evidence of Mr Monari which was that it could not be established that the US Government was directly involved in the removal of the suspects. The factual position is that the Kenyan authorities acted contrary to a Kenyan court order but that the US Government did nothing actively to facilitate that behaviour.

70. Given those facts the argument must fail almost at the first hurdle. There is insufficient material to support a conclusion that the US Government was complicit in the unlawful activity save that they took advantage of it. We are satisfied that the District Judge was not wrong in coming to the conclusion he did about the involvement of the US Government.

71. But whatever the involvement of the US Government in the expulsion of the co-accused, this cannot amount to an abuse of the extradition process vis-à-vis Mr Hafeez. A bona fide extradition request has been made in good faith. Mr Hafeez's extradition is not being sought for some collateral purpose. Nor is it being sought when the US Government knows the trial in the United States would be bound to fail.

72. It is not known whether one of the co-accused will give evidence against Mr Hafeez. If he does, there is not a shred of evidence that the testimony of the co-accused of itself might be tainted by a violation of that man's Convention rights. If Mr Hafeez were the subject of an extradition request and it was plain that a significant witness was to give evidence which had been obtained when he was tortured, there would be some basis for a challenge to the extradition request. In fact, the co-accused have been represented in the United States. Some are pursuing or have pursued arguments based on the allegation that they were expelled unlawfully from Kenya. It appears at least possible that another has decided to plead guilty and to co-operate with the authorities. That must be taken to have been his choice. There is no evidence to suggest otherwise. Mr Hafeez's argument depends on the proposition that this co-accused was only put in the

position where he felt compelled to plead guilty and to co-operate because of the unlawful expulsion. We conclude that the chain of causation was broken by the co-accused's decision. On the face of it the other three co-accused are taking the matter to trial. Their colleague could have done likewise.

73. The well-known line of authorities including *Ex Parte Bennett [1994] 1 AC 42* and *Mullen [1999] 2 Cr.App.R. 143* shed no light on the position. Mr Hafeez is in custody in this jurisdiction having been arrested here. He is liable to extradition if and only if a court is satisfied that there are no bars to his extradition. In his case his position and that of the US Government are wholly regular. It would be entirely novel and without any foundation in authority were it to be considered that a man should not be extradited to a requesting state because he might be tried with men who had been unlawfully expelled from a third country and/or because a man unlawfully expelled from a third country might give evidence against him. If these matters are justiciable at all, it will be in the United States courts.

Conclusion

74. We have been persuaded that Mr Hafeez had an arguable case in relation to life imprisonment without parole and a potential violation of Article 3. Therefore, we give permission to appeal on that point. However, we are satisfied, on a full review of the relevant legal principles and the facts found in the court below, that the District Judge did not go wrong in concluding that extradition would not involve a violation of Article 3. We dismiss the appeal on that ground. For the reasons we have set out, we are satisfied that none of the other grounds is arguable. It follows that we refuse permission to appeal on those grounds.