Neutral Citation Number: [2020] EWHC 603 (Admin)

Case No: CO/4870/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 March 2020

**Before:**

**THE RT HON. THE LORD BURNETT OF MALDON**
**LORD CHIEF JUSTICE OF ENGLAND AND WALES**
**THE HON. MR JUSTICE WILLIAM DAVIS**

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**Between:**

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| **DEMPSEY** | **Appellant** |
| **- and -** | |
| **GOVERNMENT OF THE UNITED STATES OF AMERICA** | **Respondent** |

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**Edward Fitzgerald QC and Ben Cooper** (instructed by **JFH Law**) for the **Claimant**
**David Perry QC and Richard Evans** (instructed by **CPS**) for the **Defendant**

Hearing date: 29 January 2020

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# Approved Judgment

**The Lord Burnett of Maldon**

**Introduction**

1. This is the judgment of the court to which we have both contributed.

2. This is an appeal pursuant section 103 of the Extradition Act 2003 ("the 2003 Act") against the Order of District Judge (Magistrates' Court) Kenneth Grant of 28 September 2018 to send the case of Brian Dempsey to the Secretary of State for the Home Department. On 22 November 2018 the Secretary of State ordered his extradition to the United States of America.

3. It is the appellant's second appeal. At the end of the extradition hearing in September 2017 the judge had discharged the appellant on the basis that the offence in relation to which the extradition request had been made was not an extradition offence for the purposes of section 78(4) of the 2003 Act. In other words that the conduct complained of would not amount to an offence in this jurisdiction. The Government of the United States ("the USA") successfully appealed that order. The judge had dealt fully at the extradition hearing with the other grounds raised by the appellant to resist extradition. Those were "extraneous considerations" within the meaning of section 81 of the 2003 Act; and that his extradition would be an abuse of process. The judge found against the appellant on both those issues. He cross-appealed but was unsuccessful: *Government of the United States of America v Dempsey* [2018] 4 WLR 110, [2018] EWHC 1684 (Admin) . In allowing the appeal on 6 July 2018 this Court remitted the matter to the judge pursuant to section 106 of the 2003 Act and made the following order consistent with section 106(3):

   > "The District Judge shall proceed as he would have been required to do had he decided the question of extradition offence differently and in accordance with the conclusions expressed in the judgment."

4. The judge reversed his decision on the extradition offence issue in accordance with the judgment and order of this Court. The appellant did not attempt to re-litigate the issues upon which he had failed before the judge and on appeal, but he sought to raise a new one. He wished to argue that his extradition to the United States would be incompatible with his rights under article 3 of the European Convention on Human Rights ("ECHR") on account of the conditions in which he would be detained in California. The judge declined to determine the issue or consider the material deployed in support.

5. Leave to appeal was granted on the single ground that the judge should have determined the article 3 issue and thus whether extradition would be "compatible with the Convention rights within the meaning of the Human Rights Act 1998" as required by section 87 of the 2003 Act.

6. The primary question for consideration is whether, at the remitted hearing in September 2018, the judge had jurisdiction to consider an issue which had not been raised at the extradition hearing in September 2017? Was he wrong to decline to determine the issue? The subsidiary question, depending on the answer to the first, is what approach should this court adopt in relation to the article 3 issue?

## The hearings before the District Judge

7. The extradition hearing took place over two days in September 2017. On the first day the appellant was not produced from prison but, by agreement, the evidence of Eric Lewis, an American attorney, was called in the appellant's absence. That evidence was relied upon in support of the arguments in respect of extraneous considerations (section 81 of the 2003 Act) and abuse of process. On the second day the judge heard submissions from both parties including on the question whether the request concerned an extradition offence (dual criminality). Judgment was reserved until 27 October 2017.

8. The judgment handed down on 27 October recorded the issues raised by the appellant. The judge had been invited by the appellant to rule only on the question of dual criminality, but the respondent urged him to deal with all the issues which had been raised. That he did. It was in those circumstances that the judge recorded his conclusions on the three issues raised. No other potential bars to extradition were put in issue by the evidence produced before the judge or the arguments advanced.

9. Following the successful appeal by the USA the case was relisted before the judge for hearing on 27 July 2018. As we have foreshadowed, the appellant sought to argue that extradition would involve a violation of article 3 ECHR due to prison conditions in Sacramento County Main jail where the appellant would probably be held. The evidence then relied upon was a declaration from Mark Reichel, an American attorney. The judge declined to hear submissions on the issue. On 28 September 2018 the appellant was produced before the judge. He had not been produced on the previous occasion. A further attempt was made to argue the article 3 point. By then, the judge had been provided with reports disclosed in civil proceedings begun on 31 July 2018 by many prisoners against the prison authorities in Sacramento, California relating to prison conditions. The respondent argued that the jurisdiction of the judge was limited to sending the extradition request to the Secretary of State in the light of the decision of this court. The judge accepted that limitation on his jurisdiction and declined to consider the evidence or rule upon the issue.

## The Statutory Scheme

10. The 2003 Act requires the judge to consider a series of questions found between sections 78 and 87.

11. The question whether the offence is an extradition offence arises at section 78(4) of the 2003 Act following anterior decisions relating to the documentation and the identity of the requested person. Section 78(7) provides that "if the Judge decides those matters in the affirmative he must proceed under section 79". There follows a series of steps which the judge must follow, each of which provides an opportunity to discharge the requested person. At each step, if the requested person is not discharged, the judge is required "to proceed" to the next until he or she reaches section 87 and human rights considerations.

12. Section 79 concerns four bars to extradition namely, double-jeopardy, extraneous considerations, the passage of time and hostage-taking considerations. If the judge finds that any of those bars applies, the requested person must be discharged. If he finds that there are no bars to extradition at the section 79 stage, the judge must

proceed under section 84, 85 or 86. This part of the statutory scheme provides that where the requested person has not already been convicted in the requesting state, and the category 2 territory to which extradition is requested is designated for the purposes of this section by order made by the Secretary of State, the judge must decide whether the evidence would be sufficient in this jurisdiction to establish a case to answer. Different considerations apply where there has been a conviction (section 85) or a conviction in the requested person's absence (section 86). Once satisfied that the evidence establishes a case to answer the judge goes on to determine whether extradition would be compatible with the requested person's Convention rights (section 87). If it would be compatible, the judge is then required to send the case to the Secretary of State: section 87(3); if not the person is discharged.

13. The appeal provisions are found between sections 103 and 106 of the 2003 Act. Sections 103 and 104 are concerned with appeals by the requested person. Section 103 provides for an appeal against the judge's decision on fact or law with leave to the High Court. The Court's powers on such an appeal are set out in section 104:

> "104 Court's powers on appeal under section 103
>
> (1) On an appeal under section 103 the High Court may—
>
> (a) allow the appeal;
>
> (b) direct the judge to decide again a question (or questions) which he decided at the extradition hearing;
>
> (c) dismiss the appeal.
>
> (2) The court may allow the appeal only if the conditions in sub-section (3) or the conditions in sub-section (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 sub-section (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 sub-section (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 sub-section (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."

14. The provisions of section 105 provide for an appeal with leave to the High Court on a question of fact or law against the order discharging a requested person. The Court's powers on such an appeal are set out in section 106:

"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.

**The jurisdiction of the District Judge – the parties' submissions**

15. We have set out the material part of the order made by the Court on the first appeal under section 106 of the 2003 Act. The appeal of the USA had been allowed because the conditions in section 106(4) were satisfied and the order was made under section 106(6).

16. Mr Fitzgerald QC, for the appellant, submits that the plain language of the 2003 Act when an appeal is allowed under section 106 requires the judge to whom the case is remitted to return to the point in the 2003 Act where the error identified by the High Court was made and then continue through each of the steps required by the statutory

scheme until he or she reaches the point once more of discharging the appellant or alternatively sending his case to the Secretary of State having reached human rights considerations in section 87. Mr Fitzgerald submits that each of these steps is mandatory. It follows, he submits, that when a case is remitted under section 106(6) in respect of a question arising under section 78 with a view to the judge answering that question in the affirmative, section 78(7) requires the judge to proceed under section 79 and thence through each of the steps identified in the intervening sections until he arrives at the ECHR considerations of section 87. To counter the obvious problem that a reading of this sort would enable a requested person to relitigate issues already decided, with the possibility of multiple appeals, Mr Fitzgerald submits that if any intervening question in the sequence had already been answered at the extradition hearing, the judge would not be required to reconsider the question. That is because it would be an abuse of process or res judicata for the requested person to seek to re-open a question that had already been decided by the judge, at least in the absence of a change of circumstances. He also accepts that if a point had been available to the requested person but not taken, an abuse of process argument might be available to the requesting state to prevent it being raised late.

17. The question of a violation of the appellant's article 3 rights was not decided. The issue had not been raised at the first extradition hearing. It follows, submits Mr Fitzgerald, that the judge was required to decide it at the hearing in July or September 2018. The same would have been true had the appellant raised any other new issue, not only under the ECHR, but also under the three other bars to extradition found in section 79 of the 2003 Act or a question under section 84.

18. Mr Perry QC, for the USA, submits that this interpretation of the statutory scheme would lead to the prospect of multiple appeals which the legislation was drafted to avoid. He points to the power in section 104(1)(b) to direct that the judge reconsider a matter combined with subsection (7) which provides that if the judge comes to the same decision as he did on the first occasion, the consequence is that the appeal is taken to have been dismissed by a decision of the High Court. In short, the appellant is denied a second appeal and the judge is required only to re-decide the question or questions identified by the High Court. Mr Perry submits that section 106 is to similar effect. If the High Court directs the judge to decide the relevant question again, namely the question whose answer resulted in the discharge of the requested person, sections 106 (7) and (8) set out what the Court must do. If the decision is the same the appeal to the High Court is taken to have been dismissed and there can be no second appeal (section 106(8)). If the judge decides it differently, he or she must proceed as would have been required at the extradition hearing.

19. Mr Perry submits that the reference in both sections 106(6) and 106(7) to the judge proceeding as "he would have been required to do had he decided the question differently at the extradition hearing", should be construed as directing him to take whatever step he would otherwise have taken at the end of the extradition hearing but for the error identified. In this case, that step was to send the case to the Secretary of State. He relies on what was said by the then President of the Queen's Bench Division in *Romanian Judicial Authority v Bohm* [2013] EWHC 1171 (Admin) at [20] to [23] in relation to the need for a single extradition hearing and a single appeal.

## The jurisdiction of the District Judge – discussion

20. There can be no doubt that one of the underlying purposes of the 2003 Act, particularly but not exclusively as it affects extradition requests not governed by the European Arrest Warrant, was to squeeze out of the system notorious delays.

21. It is for that reason that in both section 104(7) and 106(8) the consequence following the return of a question for re-decision when the same decision is made by the judge is that the underlying appeal is treated as being dismissed. The power found in section 104(1)(b) and 106(1)(b) to direct the judge to decide a question or questions again is an alternative to allowing the appeal, in circumstances where the High Court is not equipped to determine the question on the materials available to it, but a legal error has been established. In such circumstances there is no possibility of the judge being able to travel into other issues if he or she decides the question in the same way. On any view of the language of the 2003 Act that is not permitted. No new issues may be raised. Determining the issue in the same way results in the dismissal of the underlying appeal.

22. It would be odd indeed if Parliament had limited the judge if the question is decided in the same way, but gave free reign, even subject to abuse of process or issue estoppel arguments conceded as available by Mr Fitzgerald, to entertain arguments on bars to extradition not raised at the extradition hearing if he or she decides it differently. The expectation is that all matters in issue would be resolved at the extradition hearing with all disputed matters resolved at a subsequent appeal and then the matter returned to the judge for final disposal.

23. The judge is required to "to proceed as he would have been required to do if he had decided the relevant question differently at the extradition hearing". That language is the same in section 106(7), which governs cases in which a question has been returned for re-decision, and also in section 106(6) in cases in which the appeal has been allowed and remitted to the judge. It is also found in the cognate subsections of section 104 governing appeals by the requested person.

24. In our judgment, the key to understanding what the judge is required to do is in what is meant by "the extradition hearing" in that phrase. It is not a reference to a hypothetical extradition hearing, but the extradition hearing that occurred and gave rise to the appeal. The judge must proceed as he or she would have done at the earlier extradition hearing if the question had been determined differently. In September 2017 had the judge decided the extradition offence issue differently under section 78, he would not have considered any further bars to extradition beyond those raised by the appellant, but taken the step required of him at the end of the process. He would have sent the case to the Secretary of State. "Proceed" in this context includes sending the case to the Secretary of State and is not limited to the narrower statutory steps: *Chawla v The Government of India* [2020] EWHC 102 (Admin) at [38] to [40] and [43].

25. The judge was correct to decline to hear evidence or argument on a suggested bar to extradition not raised at the extradition hearing which gave rise to the appeal. It follows that there can be no appeal under section 103 of the Act against his decision not to do so, or his implicit rejection of the ground.

26. In *Chawla* the appellant had been discharged by the judge because she decided, at the section 87 stage, that his extradition would not be compatible with his article 3 ECHR rights on account of the prison conditions in India. The requesting state appealed. In the light of assurances given by the Government of India this court concluded that there was no real risk of a violation of article 3 and directed the judge accordingly under section 106(6). She sent the case to the Secretary of State. Mr Chawla then applied for leave to appeal the order of the judge on the basis of fresh evidence of conditions in the relevant prison. Leave to appeal was refused. The proper course in the circumstances was for Mr Chawla to apply to re-open the determination of the requesting state's appeal pursuant to Criminal Procedure Rules Part 50.27.

27. The same position applies here. Although there is no formal application before us under Rule 50.27, the respondent was content that we should consider the article 3 question using that jurisdictional mechanism despite the procedural requirements not being met. We will return to article 3 after making observations on the issue of the piecemeal approach to extradition hearings.

## Piecemeal consideration of issues generally

28. At the extradition hearing the judge considered the extradition offence issue and decided it in favour of the appellant. As a result, he was required by Section 78(6) to order the appellant's discharge. Although it might theoretically have been possible to stop there, the language of the 2003 Act does not require the judge to go no further. The judge "must proceed" to the next statutory provision in the event that he decides any issue against the requested person but that language does not mean the judge must not proceed to determine other, indeed all, issues that do or may arise in the case before him. There is no impediment to deciding all issues. On the contrary, it would be inconsistent with proper case management, to common sense and to usual practice not to do so. A piecemeal approach could result in multiple appeals and hearings which is incompatible with the scheme of the 2003 Act.

29. We have noted that the appellant in this case asked the judge to determine the extradition offence issue only. Mr Fitzgerald tells us that there have been extradition cases in which a discrete issue has been argued with a view to seeking the requested person's discharge, with others being held over. If the person is discharged there may be an appeal on the discrete issue with the held over issues capable of being revisited if the appeal is successful. We entertain doubt that such a course is consistent with the statutory scheme. It does not provide for preliminary issues to be determined with interim or interlocutory appeals as, for example, can arise in limited circumstances in criminal proceedings in the Crown Court.

30. At the extradition hearing in September 2017 the judge did not permit the appellant to rely simply on the extradition offence ground in resisting extradition. In our view, he was correct to do so. He was following the guidance given in *Bohm* (supra), *Spain v Warne* [2015] EWHC 981 (Admin) at [7] and in *McIntyre v Government of the United States* [2014] EWHC 1886 (Admin) at [11(i)]. Moreover, he was observing the Criminal Practice Direction Part 50A.1. This part of the Practice Direction was introduced by the 4th amendment to the Practice Direction of 2015 and came into force in April 2017. As Criminal Practice Direction Part 1A.3 confirms, "the Criminal Procedure Rules and the Criminal Practice Directions are the law." Part 50A.1 states:

> "Compliance with these directions is essential to ensure that extradition proceedings are dealt with expeditiously, both in accordance with the spirit of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and surrender procedures between Member States and the United Kingdom's other treaty obligations. It is of the utmost importance that orders which provide directions for the proper management and progress of cases are obeyed so that the parties can fulfil their duty to assist the court in furthering the overriding objective and in making efficient use of judicial resources. To that end:
>
> (i) the court may, and usually should, give case management directions, which may be based on a model, but adapted to the needs of the individual case, requiring the parties to supply case management information, consistently with the overriding objective of the Criminal Procedure Rules and compatibly with the parties' entitlement to legal professional and litigation privilege;
>
> (ii) a defendant whose extradition is requested must expect to be required to identify what he or she intends to put in issue so that directions can be given to achieve a single, comprehensive and effective extradition hearing at the earliest possible date…."

31. Piecemeal consideration of issues in an extradition hearing is not in accordance with the Practice Direction. A requested person shall identify all issues on which he intends to rely. "A single, comprehensive and effective extradition hearing" is one at which all potential grounds to resist extradition must be placed before the court for a decision.

**Re-opening the determination of an appeal**

32. The Criminal Procedure Rules Part 50.27(3) provides:

> (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 reopen the decision, and (iii) there is no alternative effective remedy.

Applications to re-open the determination of an extradition appeal previously were dealt with in Part 17.27 of the Criminal Procedure Rules. The wording of the Part 50.27 is identical to Part 17.27. The ambit of Part 17.27 (as it was then) was considered in detail by this Court in *Government of the United States v Bowen* [2015] EWHC 1873 (Admin) at [7] to [9]. We adopt that analysis of Part 17.27 as it then was – Part 50.27 as it now is. The requirements in Part 50.27(3)(b) are cumulative.

33. We are far from satisfied that the circumstances are exceptional. The appellant was employed as a peace officer or law enforcement officer within the penal system in California from 2001 onwards. He left his last post in the prison estate in about 2012 or 2013. During that time, he gained wide experience of working in prisons in California. He told his own psychiatrist instructed in these proceedings of his views about the conditions in Californian prisons. He had direct and personal knowledge of prison conditions in the state to which he was to be extradited. The appellant has a good appreciation of the issues in his case. His discussion with the psychiatrist included his belief that he would be placed in solitary confinement and the possibility that the court in the United States might add what he called "a terrorist enhancement" to any sentence he might have to serve. The appellant cannot be described as vulnerable; rather the reverse. The power that we are invited to exercise in the appellant's favour ordinarily requires the requested person to show that the basis for re-opening the appeal arises from a supervening development which was not anticipated at the hearing of the appeal. In June 2018 (when the appeal was heard) the appellant without doubt could have anticipated the prison conditions of which complaint now is made. True it is that the full panoply of the evidence upon which he now wishes to rely was not available to him, but it remains unexplained why the article 3 point was not taken in the light of the appellant's own deep knowledge of the conditions to which he would be likely to return.

### Article 3 ECHR and prison conditions

34. Nonetheless, we turn to consider the evidence said to demonstrate that the appellant's extradition to the United States would violate his article 3 rights.

35. In 2015 Disability Rights California ("DRC"), an agency concerned with the protection of people with disabilities in California, conducted inspections of six county correctional facilities in California. On 13 and 14 April 2015 DRC inspected Sacramento County Jail, the jail at which the appellant would be housed were he to be returned to the United States and not granted bail. The inspection was concerned particularly with how the jail dealt with inmates with disabilities whether physical or mental.

36. The DRC inspection in April 2015 found evidence of three adverse matters affecting inmates with disabilities. First, undue and excessive isolation and solitary confinement; secondly, inadequate mental health care; and thirdly lack of provision satisfying the requirements of the Americans with Disabilities Act. Various recommendations were made to improve the conditions within the jail. The DRC published its report of the inspection. In the course of the hearing we were told that the report was in the public domain from 2015. The report contained an appendix setting out the response of the authorities responsible for the jail (Sacramento County) to the recommendations made by the DRC. The response made clear that the authorities took on board at least some of the recommendations.

37. In January 2016 the DRC and Sacramento County entered into a structured negotiations agreement. This is a form of alternative dispute resolution. As part of the agreement Sacramento County either consented to inspection of the County Jail by independent consultants or instructed such consultants to inspect the jail. As a result, reports were prepared by those consultants:

i) June 2016 – Eldon Vail, an expert in prison regimes, reported on the issues of undue use of solitary confinement and inadequate mental health care.

ii) June 2016 – Dr Bruce Gage, a consultant psychiatrist, evaluated mental health care in the jail.

iii) November 2016 – Lindsay Hayes, an expert on suicide prevention in prisons, considered the level of suicides in the jail and proposals to reduce the suicide rate.

iv) December 2016 – Sabot Consulting, a firm with expertise in relation to facilities for the disabled by reference to the Americans with Disabilities Act, conducted an assessment of the jail's facilities and programmes with respect to access by inmates with disabilities.

v) May 2017 – James Austin reported on the inmate classification system at the jail with particular reference to inmates subject to total separation or T-Sep.

38. The parties did not reach a settlement within the negotiated agreement process. On 31 July 2018 a class action was commenced with the support of DRC by six prisoners against Sacramento County. Given the initial focus of the DRC report, it is unsurprising that each prisoner suffered from serious mental and/or physical illness.

39. Two psychiatric reports have been prepared in relation to the appellant. In September 2018 he was examined by Dr Hillier. By this time the appellant had been in custody in HMP Belmarsh for just over 18 months. The report was based on an interview lasting approximately two hours. Dr Hillier had no access to any medical records which Dr Hillier himself noted as a limitation of his report. Dr Hillier concluded that the appellant was "likely to fulfil the diagnostic criteria…for a moderate depressive episode". He recommended anti-depressant medication. He said that the prognosis was good. Dr Chin examined the appellant in July 2019. He also did not have access to any medical records. Dr Chin's report does not refer to the appellant having been prescribed any anti-depressants following the examination of Dr Hillier. Dr Chin's view was that it was "highly likely that (the appellant) will fulfil diagnostic criteria for a mild depressive episode."

40. The appellant's case is that the matters revealed in the various reports commissioned in the context of the structured negotiations agreement give rise to substantial grounds for believing that there is a real risk that he will be subjected to inhuman treatment when detained in the County Jail sufficient to amount to a violation of his article 3 rights under the Convention.

41. The appellant also relies on evidence from Mark Reichel and Mark Merin, both of whom are attorneys practising in California. Mark Reichel's evidence was placed before the District Judge in July 2018, before the consultants' reports were available. Mark Merin's evidence purports to deal with the evidence provided by the Sacramento County official with oversight of regulatory compliance at the County Jail.

42. Although the DRC report was publicly available from 2015 onwards, the further reports commissioned as a result of the DRC inspection were not in the public domain

until the commencement of the class action. The evidence of the Californian attorneys was obtained in 2018. The respondent takes no issue with the proposition that the reports and the statements of the Californian attorneys were not available at the time of the extradition hearing. However, the respondent submits that the evidence does not surmount the article 3 hurdle.

43. The relevant legal principles in relation to prison conditions and article 3 of the Convention are well-settled. They are as follows:

i) The test is whether there are substantial grounds for believing that the requested person would face a real risk of being subjected to torture or inhuman or degrading treatment in the receiving country. The test is a stringent one. It is not easy to satisfy.

ii) Generalised evidence as to human rights violations is not sufficient. It must be shown that the individual requested person is specifically at risk.

iii) Whether solitary confinement will constitute a violation of Article 3 will depend upon the conditions of detention, the nature of the solitary confinement and the duration of the solitary confinement. Prohibition of contact with other prisoners for protective reasons does not of itself amount to inhuman treatment or punishment.

iv) In respect of alleged lack of medical provision and support, strong evidence will be required to show that it would lead to a real risk of a violation of article 3 where the requested person does not suffer from any serious or significant health problems.

44. The issue of solitary confinement was considered by Eldon Vail and James Austin. Mr Vail's focus was on the use of segregation in relation to mentally ill inmates. At the time of his report in 2016, he found that the County Jail overused segregation both for the mentally ill and for inmates without mental illness. He described different categories of segregation: disciplinary detention following misbehaviour; total separation for those too dangerous to be with other inmates; protective custody for those at risk from other inmates; administrative segregation which encompassed inmates previously employed within the prison system or law enforcement. Mr Vail criticised the lack of a coherent segregation policy at the prison. He found that the recreation time allowed to any inmate – whether in some form of segregation or not – was limited to three hours a week. Mr Austin was concerned with the way in which inmates were classified as requiring some form of segregation. He identified two forms of segregation, total separation and administrative segregation. Those in total separation were housed in a single cell whereas those in administrative segregation shared a cell with one other inmate. His findings in relation to recreation time mirrored that of Mr Vail. He was able to provide details of the number of inmates subject to total separation as at 11 January 2017. The average time spent in total separation was 180 days. The only basis upon which appellant might be segregated would be because he had previously been employed within the prison system. Segregation would be for his own protection. There is no indication before us whether the appellant intends to plead guilty or not guilty to the alleged offence or of the reality of the length of sentence he might serve given the time spent in custody here. The maximum sentence available is 8 years' imprisonment.

45. Taken at its highest we do not consider that the evidence establishes that the use of segregation at the County Jail constitutes a violation of article 3. There is no evidence that the conditions in the cells occupied by those subject to segregation amount to inhuman treatment. The amount of recreation time as reported in 2016 and 2017 may have been low; it does not represent a failure to abide by article 3 standards.

46. The up to date evidence provided by the respondent goes further. We have a declaration dated 12 November 2019 from Lieutenant McCahy, an official of Sacramento County with oversight of regulatory compliance at the County Jail. He confirmed that the appellant would likely be held at the County Jail. On the basis that the appellant was a former peace officer, he would be housed in administrative segregation but it would not be solitary confinement. Lt. McCahy dealt in detail with the physical conditions of the type of cell in which the appellant probably would be housed. Nothing about those conditions comes close to violating article 3: rather the reverse. Lt. McCahy stated that recreation time out of cell in the first instance would be seven hours a week. In the second phase of administrative segregation this period would extend to 17 hours per week. His evidence relates to the circumstances as they are now rather than when Mr Vail and Mr Austin conducted their investigations. We observe that the reports of those witnesses made various recommendations for reform with greater recreation time being one of the recommendations.

47. Much was made in submissions to us of the prospect of the appellant being housed in a cell with someone who might attack him. The only evidence to suggest that this could occur came from the declaration of Mark Merin dated 8 January 2020. He identified two instances of a mentally ill inmate being critically injured in an assault by his cell mate, the cell mate in each case being someone with a history of violence. These events were tragic and disturbing. But they provide no basis for suggesting that the appellant would be housed with such an inmate. First, they are not sufficient to establish any systemic failure in the County Jail. Secondly, it is not suggested that either event occurred when the relevant inmates were in administrative segregation. The evidence we have is that the appellant is likely to be housed with another inmate previously employed as a peace officer.

48. Dr Gage was concerned principally with the level of medical care available to mentally ill inmates at the County Jail. He concluded that the general conditions of confinement were typical and did not represent a substantial problem. His concern in relation to confinement was the access to recreation available to mentally ill inmates. In relation to mental health care Dr Gage considered that what he termed "crisis response" was efficient and sound. Where an inmate required psychotropic medication, he was provided with it. His criticism was that there was insufficient provision of individual or group treatment of mental illness. He also was concerned about the system of suicide prevention in the County Jail. This last issue was addressed by Lindsay Hayes. He noted that the suicide rate at the County Jail was low in comparison to similar jails across the United States. It was approximately half the national average. Mr Hayes set out various recommendations in his report but concluded that the jail system in Sacramento had the foundation for a good suicide prevention programme. The evidence of Dr Gage and Mr Hayes does not come close to establishing a real risk of a violation of the appellant's article 3 rights were he to be housed at the County Jail.

49. It is of significance that the appellant's mental health is reasonably good. Notwithstanding his long incarceration at HMP Belmarsh, the most recent medical evidence is that he is suffering only from a mild depressive episode and that he has not been prescribed any medication. Dr Chin suggested in his report that the appellant might develop more serious mental illness were he to be housed at the County Jail. However, this was based on an incomplete summary of the materials disclosed in the class action. Whatever the mental health provision at the County Jail, the appellant has not demonstrated that it would be of significance in his case.

50. We conclude that there is not even generalised evidence showing violations of article 3 in the County Jail. There certainly is no satisfactory evidence that the appellant's article 3 rights would be violated were he to be housed there. Had the judge considered the evidence with which we have been provided, he inevitably would have come to the same conclusion. Thus, irrespective of the issue of jurisdiction, had there been jurisdiction to entertain an appeal, it would have failed. Our conclusion on the article 3 issue must mean that, insofar as we are concerned with a re-opening of the appeal pursuant to Part 50.27 of the Criminal Procedure Rules, it is not necessary to re-open the decision made by this Court in July 2018 in order to avoid real injustice.

Neutral Citation Number: [2020] EWHC 603 (Admin)

Case No: CO/4870/2018

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

**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

**Before** :

**THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON**

**LORD CHIEF JUSTICE OF ENGLAND AND WALES**

**MR JUSTICE WILLIAM DAVIS**

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**Between :**

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| | **DEMPSEY** | **Appellant** |
| | **- and –** | |
| | **GOVERNMENT OF THE UNITED STATES OF AMERICA** | **Respondent** |

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**Edward Fitzgerald QC & Ben Cooper** (instructed by **JFH Law**) for the Appellant

**David Perry QC & Richard Evans** (instructed by **CPS**) for the Respondent

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**SUPREME COURT PRONOUNCEMENT**

**The Lord Burnett of Maldon and Mr Justice William Davis**

1. The Appellant applies to the Court to certify a point of law of general public importance involved in its decision of 13 March 2020 and to grant leave to appeal to the Supreme Court.
2. The points which the Appellant invites to certify are:

   > Where, on a prosecution appeal, a case is remitted under section 106 (6) of the Extradition Act 2003 in respect of a question under section 78 with a view to the judge now answering that question in the affirmative, does section 78 (7), and the Scheme of the Act, require the Judge then to proceed with the extradition hearing by reference to the successive steps laid down in the Act, subject only to the limits imposed by prior determinations at the earlier hearing, and the Court's inherent power to prevent abuse of process?
   >
   > (ii) Alternatively, where a case is remitted to the District Judge under section 106 (6) of the Extradition Act 2003 pursuant to a successful prosecution appeal on a particular point relating to whether the offence alleged is an extradition offence, is the District Judge dealing with the remitted matter precluded from going on to consider whether extradition would be incompatible with Article 3 – particularly if new evidence becomes available as to a new Article 3 risk at the remitted hearing that extradition would now be incompatible with Article 3?

3. Written submissions have been made by the Appellant and the Respondent. No further hearing is necessary.

4. The scheme of the Extradition Act 2003 is clear. It does not permit successive appeals. Any inconsistency of approach that there might be currently in the Westminster Magistrates' Court is met by the terms of the Criminal Practice Direction in respect of which no point of law possibly can arise. If new evidence becomes available after an appeal whether in respect of an Article 3 issue or some other extradition bar, this can be raised via an application to re-open the appeal. Neither question raises a point of law of general public importance.

5. It follows that we refuse to certify either question and we refuse leave to appeal to the Supreme Court.