Neutral Citation Number: [2022] EWHC 35 (Admin)

Case No: CO/4032/2020

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

In the matter of an appeal under section 105 of the Extradition Act 2003

Date: 12/01/2022

Before :

THE HONOURABLE MR JUSTICE LANE

- -

Between :

THE GOVERNMENT OF THE UNITED STATES OF AMERICA	**Appellant**
v	
CHRISTOPHER OSBORNE	**Respondent**

- -
- -

For the appellant: Mr D Sternberg (instructed by CPS Extradition Unit)
For the respondent: Mr J Smith (instructed by Tuckers)

Hearing date: 14 December 2021

- -

Approved Judgment

Judgment Approved by the court for handing down.

Lane J:

A. BACKGROUND

1. The appellant requested the respondent's extradition to the USA in order that he might be prosecuted for four offences: two of sexual exploitation of a minor child (carrying a maximum sentence of 30 years' imprisonment and a minimum sentence of 15 years), one of coercion and enticement of a minor child (carrying a maximum sentence of life imprisonment and a minimum sentence of 10 years); and one of receipt and distribution of child pornography (carrying a maximum sentence of twenty years' imprisonment and a minimum sentence of five years).

2. The respondent's conduct is said to be as follows. In June 2016, by means of his computer, the respondent, who was in Doncaster, United Kingdom, made contact over the internet via *Kik* with Victim 1, who was in Orange County, New York. Victim 1 was 15 years old. Operating under the username, "Ozzy740", the respondent told Victim 1 that his name was Chris. He asked Victim 1 to send him a picture of her breast to show that she was real. Victim 1 did so. The respondent then asked for a picture of her full naked body, threatening Victim 1 that he would "photoshop" images of her and send them to her friends and family, if she did not comply.

3. The respondent also requested sexual images of Victim 1 and her 12-year-old sister, Victim 2, giving them instructions on how to perform sexual acts on each other. They complied.

4. The matters were reported and the respondent was identified, as a result of his IP address being used to log into the *Kik* account "Ozzy740".

5. The respondent was arrested and interviewed by police in England on 13 September 2016, with a view to prosecution in this jurisdiction for offences of blackmail and inciting child sexual activity. The respondent was advised at his interview by a representative of his solicitor.

6. The respondent, having waived privilege, adduced the notes of the solicitor's representative. She recorded her advice as being "Credit explained. Answer Q's admitting offence. Explain have talked to a lot of women". Accepting that advice, the respondent answered the questions put to him and made substantial admissions against his interest. The appellant gave varying accounts as to what he believed the ages of Victim 1 and Victim 2 to be. Initially, he said he thought they were 18, but later changed his account to say that he believed them to be at least 17. The respondent admitted telling Victim 1 and Victim 2 to engage in sexual activity and to perform oral sex on each other, which they did. He was bailed in order for the police to make "further enquires, forensic computer" (according to the representative's notes).

7. On 14 June 2017, the file on the respondent was passed to the Crown Prosecution Service for a charging decision. On 19 June 2017, the respondent attended Doncaster Police Station where he was advised that, in the event that the CPS decided he should be charged, he would be summonsed to court by post.

8. On 17 July 2017, Mr R. Sagar, a Senior Crown Prosecutor, made a record of his "decision on concurrent jurisdiction". This concluded that England and Wales was not the most appropriate jurisdiction for prosecution of the respondent. On 3 October 2018, a further record was made by Mr Sagar, comprising a further decision to the same effect.

9. In November 2018, around 17 months after the respondent had been advised by his solicitor to await a summons to a court in England, and over two years after his interview by the police in Doncaster, a Grand Jury in New York returned an indictment against the respondent.

10. The appellant's extradition request was certified by the Secretary of State on 16 March 2020, some two years after the Grand Jury indictment. The appellant was arrested in the United Kingdom on 6 April 2020 and subsequently bailed.

B. THE APPEAL

11. The extradition request came before District Judge Goozée on 9 October 2020. The District Judge's judgement was handed down on 26 October 2020. In accordance with section 79(3) of the Extradition Act 2003, the District Judge ordered the respondent's discharge.

12. The appellant sought and obtained permission from this court to appeal against the District Judge's decision under section 105 of the 2003 Act. This court's powers on an appeal under that section are as follows:

> "**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."

C. THE ISSUE BEFORE THE DISTRICT JUDGE: FORUM BAR

13. The single issue before the District Judge was whether extradition of the respondent is barred by Forum, by reference to section 83A of the 2003 Act. This provides as follows:

"**83A Forum**

(1) The extradition of a person ("D") to a category 2 territory is barred by reason of forum if the extradition would not be in the interests of justice.

(2) For the purposes of this section, the extradition would not be in the interests of justice if the judge—

(a) decides that a substantial measure of D's relevant activity was performed in the United Kingdom; and

(b) decides, having regard to the specified matters relating to the interests of justice (and only those matters), that the extradition should not take place.

(3) These are the specified matters relating to the interests of justice—

(a) the place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur;

(b) the interests of any victims of the extradition offence;

(c) any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence;

(d) were D to be prosecuted in a part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence necessary to prove the offence is or could be made available in the United Kingdom;

(e) any delay that might result from proceeding in one jurisdiction rather than another;

(f) the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard (in particular) to—

(i) the jurisdictions in which witnesses, co-defendants and other suspects are located, and

(ii) the practicability of the evidence of such persons being given in the United Kingdom or in jurisdictions outside the United Kingdom;

(g) D's connections with the United Kingdom.

(4) In deciding whether the extradition would not be in the interests of justice, the judge must have regard to the desirability of not requiring the disclosure of material which is subject to restrictions on disclosure in the category 2 territory concerned.

(5) If, on an application by a prosecutor, it appears to the judge that the prosecutor has considered the offences for which D could be prosecuted in the United Kingdom, or a part of the United Kingdom, in respect of the conduct constituting the extradition offence, the judge must make that prosecutor a party to the proceedings on the question of whether D's extradition is barred by reason of forum.

(6) In this section "D's relevant activity" means activity which is material to the commission of the extradition offence and is alleged to have been performed by D."

D. THE DISTRICT JUDGE'S JUDGMENT

14. At paragraph 20 of his judgment, the District Judge referred to evidence provided by Ms Marcia Cohen, Assistant US Attorney, in support of the extradition request. Ms Cohen stated, "the United Kingdom case was ultimately dismissed because of the investigation and prosecution of OSBORNE by US authorities in the Southern District of New York". The District Judge observed that Ms Cohen's understanding was wrong and that, in fact, a decision was made not to prosecute the respondent in the United Kingdom on the basis that a prosecution would go ahead in the USA.

15. At paragraph 21, the District Judge noted the information from Ms Cohen that the evidence required to proceed to a trial of the respondent in New York was in the possession of the US authorities. There was said to be some original evidence in the United Kingdom but copies of this material had been provided to the US authorities. A

"Mutual Legal Assistance" (MLA) request was being prepared to obtain the original evidence prior to trial.

16. Ms Cohen said that the two minor victims were located in New York and their testimony was necessary to prove the offences. Ms Cohen considered it would be "difficult" for them to travel to the United Kingdom. She also said that the evidence included "sexually explicit images of the victims which constitutes child pornography and which is subject to restrictions on disclosure in the US".

17. At paragraph 24, the District Judge noted the statements of Mr Sagar, to which I have already made reference.

18. Having set out section 83A, the District Judge continued as follows:

> "34. I have read and heard submissions from the parties and have been referred to the cases of **Love v The Government of the United States of America [2018] EWHC 172 (Admin), Scott v The Government of the United States of America [2018] EWHC 2012 (Admin) and Wyatt v. Government of the United States of America [2019] EWCA 2978 (Admin)**
>
> 35. As explained by the Divisional Court in **Love** (para 22), the underlying aim of the forum bar is to prevent extradition where the offences in question can be fairly and effectively tried in the UK and that it is not in the interests of justice, as narrowly defined in the section itself, that the requested person should be extradited. The statutory test is not whether the RP should be tried in the requesting state or in the UK but whether, in the interests of justice, there should be an extradition to the requesting state. It also sets out the approach this court should adopt when dealing with section 83A.
>
> 36. It is conceded by Mr Sternberg that the threshold requirement in section 83A(2)(a) is satisfied because a substantial measure of the relevant activity was performed in the UK.
>
> 37. I therefore must decide, having regard to the specified matters relating to the interests of justice (and only those matters) that extradition should not take place. Sub-section 3 sets out the specified matters relating to the interests of justice and, as stated in ***Scott v USA***, there is no predetermined hierarchy between those matters. It was held in *Scott* that "*section 83A(3)(c) is only "in point" if the prosecutor has expressed the belief that the UK is not the most appropriate jurisdiction in which to conduct the prosecution. However, that does not mean that, where it is found that there is unlikely to be a prosecution if the appellant is not extradited, that fact is relevant; it may have a bearing on one of the other specified matters".*
>
> 38. The relative importance of each of the specified matters, and the weight to be given to them, will vary from case to case ***Dibden v. France [2014] EWHC 3074 (Admin)*** and ***Shaw v. America [2014] EWHC 4654 (Admin)***.

19. Beginning at paragraph 40, the District Judge set out his "conclusions and findings" on the section 83A factors. At paragraph 41, he noted the concession by Mr Smith, on behalf of the respondent (as he now is) that the harm generated by the offence occurred in the USA. Invoking Love, the District Judge found that this was "a very weighty factor in favour of extradition".

20. Turning to section 83A(3)(b) – the interests of any victims – the District Judge found that "the interests of the victims having a trial at all is the more important", by which he appears to have meant that it is was more important to Victim 1 and Victim 2 that the respondent should be tried at all than where that trial should be. As to the viability of a trial in this jurisdiction, the District Judge observed that Mr Sagar had said the respondent could be tried in the UK as a resident here and the victims could be granted permission to give evidence via a video-link from the USA to a court in England and Wales. The District Judge found that Victim 1 and Victim 2 were "vulnerable victims of sexual offences". He consequently held that their interests "include a trial with least inconvenience to themselves". However, although that was a factor that told in favour of extradition, the District Judge found "it does not carry as much weight as would attach if the proposed trial in the USA was the only mechanism of redress available".

21. At paragraph 44, the District Judge addressed the factor specified in section 83A(3)(c): any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute. The District Judge recorded the submissions of Mr Smith that Mr Sagar had provided inadequate reasoning. Mr Sagar had merely said that "chat logs from victim's phone are US material", without appreciating that these logs were clearly evidence available in the United Kingdom as they had been put to the respondent at his police interview. At that point in time, Mr Smith submitted there had been no information to demonstrate an investigation or charging decision in the USA other than that the authorities there had "indicated that a Grand Jury are likely to indict the suspect". Furthermore, factors of delay had not been considered, in that it was now four and a half years since the alleged offences and the prosecution in 2017 had not considered the use of video evidence from the USA. No further consideration had been given to concurrent jurisdiction until October 2018, by when the US prosecutor was known to be planning to charge the respondent with two counts, albeit even at that stage the Grand Jury had not returned an indictment. In his second decision, Mr Sagar had simply dismissed the possibility of Victim 1 and Victim 2 giving evidence by video-link on the basis of "discussed previously with the United States of America attorney" without giving reasons.

22. The District Judge concluded his paragraph 44 as follows:

> "The formal and reasoned views of the prosecutor have been provided to the Court. Such belief is based on consideration of the statutory factors as evidenced in the Records of Decisions on Concurrent jurisdiction dated 11 July 2017 and 3 October 2018. Albeit such belief weighs in favour of extradition, when balanced against factors (d), (e) and (f) I find this diminishes the weight I attach to the prosecutors belief."

23. At paragraph 45, the District Judge considered the factor mentioned in section 83A(3)(d): whether evidence necessary to prove the offence could be made available in the United Kingdom, if the appellant were to be prosecuted in a part of that country for an offence corresponding to the extradition offence. The District Judge recorded Mr Smith's submission that a significant part of the evidence came from and was in the United Kingdom. The respondent had been arrested and interviewed here. The chat logs were put to him in interview and the police searched his home and seized his computer and digital devices. The investigation had gathered evidence and referred it to the CPS for a charging decision.

24. At paragraph 46, the District Judge found it was clear from the supplementary affidavit of Ms Cohen that, " although the evidence required to proceed to trial is still available

and in possession of the US authorities, there is still evidence in the UK". The US authorities were "preparing an MLAT in order to obtain that evidence prior to trial". This led the District Judge to conclude that at the date of Ms Cohen's supplementary affidavit, this evidence was available in the United Kingdom. He found that the victims "could give live evidence by way of video-link". It was "equally clear other exhibits are in the UK as videos downloaded from the examination of the [respondent's] laptop were viewed by officers and the CPS".

25. The District Judge's conclusion on this issue was as follows:

> "47. Most significant in my view if that the RP was arrested in the UK, his house was searched and exhibits seized and he was interviewed under caution in the UK, making certain admissions in relation to the conduct. The investigation included forensic analysis of computers and devices and a file being submitted for charging advice. For all intents and purposes, it appears that subject to charging advice the police investigation was complete. Finally, Mr Sagar notes on his decision on concurrent jurisdiction that the RP could be tried in the UK. The reality is that the evidence to prove the offences is either in the UK or could be made available in the UK to the same extent as some of the evidence which remains in the UK still needs to be made available to the US authorities. Considering specifically s.83A(4) EA 2003, albeit there may be disclosure restrictions in the USA as the evidence includes sexually explicit images, Ms Cohen does not expand on what those restrictions are. I will accept the position in the USA as per her affidavit. However, setting to one side those restrictions, it is clear from the Record of Decision on Concurrent Jurisdiction dated 3rd October 2018, the videos of the victims and other sexual images were downloaded from the RP's laptop and are exhibited in the UK investigation. Those sexual images and the videos were viewed by the police officers during the investigation and subsequently by the Crown Prosecutor. Any potential complications with regard to disclosure restrictions in the USA are therefore mitigated. Pulling together these threads, this factor tells against extradition."

26. At paragraphs 48 and 49, the District Judge considered the factor in section 83A(3)(e): any delay that might result from proceeding in one jurisdiction rather than another. At paragraph 48, the District Judge accepted the submission of Mr Sternberg, counsel for the requesting authority, that the issue of delay was, here, "a prospective factor, looking forward to any delays in the trial taking place, not any delays to date". The District Judge noted that the respondent has a right under US law to a speedy trial within 70 days, although he had not been provided with any information in this regard from Ms Cohen. By contrast, Mr Sternberg pointed to the "significant delays in the criminal jurisdiction in the UK" occasioned by the Covid pandemic and that any trial in the Crown Court would cause delay compared with the trial in the USA.

27. At paragraph 49, the District Judge held that, notwithstanding those submissions, an investigation in the United Kingdom had been completed in 2017, with the file being submitted to the CPS for a charging decision. The District Judge considered that factor to be "significant as should the matter proceed in the UK, the investigation is complete". He placed this factor against the fact that the authorities in the USA were ready to proceed to trial, "albeit some original evidence will need to be obtained." Overall, the District Judge found that there was "no clear justification for favouring one jurisdiction over another and this factor is neutral".

28. Beginning at paragraph 50, the District Judge considered the factor in section 83A(3)(f): the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction. At paragraph 52, the District Judge found that there was only one prosecution in the case before him. Having regard to the fact that the Grand Jury had returned an indictment against the respondent, it was "desirable for the matter to continue to be prosecuted in that jurisdiction". However, in the view of the District Judge, the ability of Victim 1 and Victim 2 to give evidence by live link had been actively considered by Mr Sagar, and discussed with the US Attorney. The District Judge concluded that, overall, this was "a factor against extradition".

29. At paragraph 53, the District Judge considered the factor in section 83A(3)(g): the appellant's connections with the United Kingdom. The District Judge said:

> "53. Mr Sternberg concedes that the RP has connections with the UK and that this is a factor which weights in favour. I have summarised the evidence adduced by the RP at paragraph's 31 – 32 above. The RP has strong connections to this jurisdiction and no connections with America. His family life and his employment is entrenched in the UK. I also accept Mr Smith's submission that the fact the RP was interviewed in this country and received legal advice on the basis he would be prosecuted in this country and on the back of such advice answered questions in interview is of substantial relevance to his connections with the UK and the context of this case as a whole. There has also been a significant delay since the RP was arrested in 2016. I find this factor tells substantially against extradition."

30. The District Judge's conclusions on the Forum Bar were as follows:

> "54. In undertaking the balancing exercise in respect of the factors for and against extradition in respect of forum, I find the following factors are in favour of extradition:
>
> (i) that all of the harm resulting from the extradition offence occurred in the USA,
>
> (ii) the interests of any victims in the extradition offence although it does not carry as much weight as would attach if the proposed trial in the USA was the only mechanism of redress available.
>
> (iii) any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute the RP in respect of the conduct constituting the extradition offence, albeit when balanced against factors (d) (e) and (f) I have found this diminishes the weight I attach the prosecutor's belief.
>
> 55. I have found the following factors against extradition namely:
>
> (i) were the RP to be prosecuted in a part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence necessary to prove the offence is or could be made available in the United Kingdom;
>
> (ii) the desirability and practicality of prosecutions taking place in one jurisdiction and in particular the practicability of the evidence of the victims which could be given by video link

(iii) and finally the strength of the RP connections to the UK which is a weighty factor in my view.

56. The delay that would result if the trial had to take place in the UK is a neutral factor in my view.

57. Having undertaken the balancing exercise, the most significant in my view is that the RP was arrested in the UK, his house was searched and exhibits seized and he was interviewed under caution in the UK, making certain admissions in relation to the conduct. The investigation included forensic analysis of computers and devices and a file being submitted for charging advice. For all intents and purposes, it appears that subject to charging advice the police investigation was complete. Mr Sagar notes on his decision on concurrent jurisdiction that the RP could be tried in the UK. The reality is that the evidence to prove the offences is either in the UK or could be made available in the UK to the same extent as some of the evidence which remains in the UK still needs to be made available to the US authorities. Albeit there may be disclosure restrictions in the USA, for the reasons set out in my findings in paragraph 47 above, I have had regard to the desirability of not requiring disclosure of material which is subject to restrictions in the USA and weighed that into my balancing exercise. It is practicable for the victims to give their evidence by live link and that is accepted in the record of decision on concurrent jurisdiction and finally the significant weight I attach to the RP's connections to the UK.

58. Following the balancing exercise, I decide extradition is barred by reason of forum as not being in the interests of justice."

E. CASE LAW

31. In Dibden v France [2014] EWHC 3074 (Admin), the Divisional Court (per Simon J), considering section 19B of the 2003 Act (the parallel provision to section 83A in the case of Category 1 countries) held that the first-mentioned factor, namely, the place where most of the harm occurred, "is plainly an important consideration but its weight will vary in each case. There is no hierarchy of these matters, with (a) being categorised as the most weighty" (paragraph 25).

32. Simon J also held that:

> "35. In my judgment, section 19B(3)(c) was not intended to invite a review of the prosecutor's belief as to the most appropriate jurisdiction on grounds short of irrationality. It was certainly not intended to invite a debate with demands for documents justifying the belief."

33. In Shaw v USA [2014] EWHC 4654 (Admin), a case concerned with a child pornography distribution ring, where certain of the suspects were in the USA but the requested person was in the United Kingdom, the Divisional Court (per Aikens LJ) had this to say about the overall approach to be taken when considering the section 83A(3) factors:

> "40 It is, in my view, important to remember two things in connection with the section 83A(3) factors. First, the words "having regard" in section 83A(2)(b) is an important expression. It means that the judge has to bear in mind each of the specified matters (and not any others). However, it may be that in the particular case being considered, one factor is irrelevant, or not present, or of little weight, or

alternatively of great importance. That is for the appropriate judge to decide in the first place. Nonetheless, the judge must, in my view, have regard, ie bear in mind, each of the specified matters individually, because only in that way can it be said that he will have properly done what the statute says must be done before making the decision on whether it is in the interests of justice that the extradition should not take place.

…

42 In this case the judge did go through each of the specified matters set out in section 83B(3). He reached what can be called a "value judgment" on whether it was in the interests of justice that the extradition should not take place. There is therefore a threshold question on an appeal concerning a Forum Bar issue: on what basis can this court interfere with the judge's "value judgment"? Plainly, if the judge has erred in misconstruing the statutory wording of one of the specified matters, or if he has failed to "have regard" to a specified matter or he has had regard to other matters, or lastly if his overall "value judgment" is irrational or unreasonable, this court, as an appellate court, can interfere. If this court decides that the DJ has erred in any one of those ways, that must, in my view, invalidate the DJ's "value judgment". In those circumstances this court would have to re-perform the statutory exercise and reach its own "value judgement".

43. However, if this court concludes that the DJ has not erred in any one of those respects I have identified, but simply took the view that it would give a different weight to a particular specified matter from that given to it by the judge below, I very much doubt that this court could therefore conclude that the appropriate judge ought to have decided the Forum Bar question before him in the extradition hearing differently: see section 104(3)(a) of the EA. It is possible, but in my judgment, in practice, very unlikely."

34. On the issue of section 83A(3)(c) – the prosecutor's belief – Aikens LJ said:

"48. In my view, the correct construction of section 83A(3)(c) is, for the present purposes, as follows: first, it is important to note the word "any" at the start of the paragraph. There may or may not be a belief that is stated to the court in some form or another. It is only if there is one that this factor is going to be relevant. The judge has to ask whether there is a belief; but if there is not, then he cannot have any further "regard" to this factor. Secondly, the key-word is "belief". It is not "decision" or some similar word. A "belief" in this context is more akin to a point of view or a conclusion based upon certain facts and other considerations. Thirdly, for these purposes, "a prosecutor" must mean a domestic prosecutor within the UK: see the definition in section 83E(2). In England and Wales this means someone within the domestic branch of the CPS, rather than the separate and independent branch of the CPS, called the CPS Extradition Unit, which deals with extradition matters.

49. Fourthly, the "belief" has to be a firm one in the sense that the prosecutor has to have concluded that the UK is "not the most appropriate jurisdiction in which to prosecute" the person whose extradition is sought. Note the words "the most appropriate"; therefore, it might be an appropriate jurisdiction but not necessarily "the most appropriate". Fifthly, it is important to note what precisely is the subject of the prosecution "belief". It is that the prosecution of the requested person for an offence (or offences) "in respect of the conduct constituting the extradition offence" is not the most appropriate in the UK. In other words, the prosecutor has to consider the conduct that founds the alleged extradition offence itself, not other offences or other conduct that might be involved.

> 50. Sixthly, paragraph (c) says nothing about how this "belief" is to be presented to the court. We were informed by counsel that there is nothing specifically in the EA, or in the Criminal Procedure Rules, that deals with how this "belief" is to be presented to the court at an extradition hearing, once the "Forum Bar" issue has been raised by the requested person at the initial hearing before the DJ. We understand from Mr Brandon that the issues to be raised at an extradition hearing will usually be identified by those acting on behalf of the requested person filling in a form, which indicates what points are being taken in challenging the proposed extradition."

35. At paragraph 53, Aikens LJ observed that it was "ultimately for the judge to decide on the weight to be given to this factor." If the material giving rise to the belief was sound, then "doubtless this will weigh heavily with the appropriate judge". On the other hand, if it were "flimsy, or ill-considered or even irrational", then it would carry little or no weight at all. The mere say so of a prosecutor, unsupported by reasons "will carry little or no weight".

36. Later in his judgment, Aikens LJ had this to say about section 83A(3)(b) factor:

> "61. As to the second factor, "the interests of any victims of the extradition offence", the DJ seems to have construed "interests" as meaning the views of victims as to where the trial should take place. With respect, that is too narrow an interpretation. "The interest of any victims" is a more objective matter, which has to be assessed by the appropriate judge. Where, in the court's view, would the best interests of the victims be served by having a trial? In general, their interests will be in having a trial at a place where, if they do give evidence or wish to be present, they can be so. In this case, the interests of the victims are simply to have any perpetrators of the crimes of which they are alleged to be brought to justice."

37. A similar view of that factor was reached by the Divisional Court in Love v Government of the United States of America [2018] EWHC 172 (Admin). At paragraph 29, Lord Burnett of Maldon CJ held it was likely that the interests of the victims included Mr Love "being tried, and tried at the least inconvenience to themselves". However, he went on:

> "There may be an interest in those who are victims of crime having the case tried according to their own local laws and procedures and, if there is a conviction, punishment following according to the values of their own legal system. But their interest in having a trial at all is the more important." (Paragraph 29).

38. At paragraph 40, dealing with the section 83A(3)(g) factor of connections with the United Kingdom, Lord Burnett rejected the suggestion that the concept of "connection" was, here, a narrow one "confined to connections to the United Kingdom as a state, principally citizenship or right of residence". The Divisional Court held that the concept of "connection" went "rather wider than that, without being so elastic that it replicates the false scope of Article 8 of the Convention."

39. Although no exhaustive definition could be attempted judicially, "connection" was "closer to the notion of ties for the purposes of bail decisions". On that basis, the expression would cover family ties, including their nature and strength, employment and studies, property, duration and status of residence, as well nationality; but not, usually at least, health conditions or medical treatment.

40. Earlier, at paragraph 25, Lord Burnett addressed the scope of an appeal under section 104, in terms that plainly also have an authoritative bearing on the scope of section 106:

> "25. The statutory appeal power in section 104(3) permits an appeal to be allowed only if the District Judge ought to have decided a question before him differently and if, had he decided it as he ought to have done, he would have had to discharge the appellant. The words "*ought* to have decided a question differently" (our italics) give a clear indication of the degree of error which has to be shown. The appeal must focus on error: what the judge *ought* to have decided differently, so as to mean that the appeal should be allowed. Extradition appeals are not re-hearings of evidence or mere repeats of submissions as to how factors should be weighed; courts normally have to respect the findings of fact made by the District Judge, especially if he has heard oral evidence. The true focus is not on establishing a judicial review type of error, as a key to opening up a decision so that the appellate court can undertake the whole evaluation afresh. This can lead to a misplaced focus on omissions from judgments or on points not expressly dealt with in order to invite the court to start afresh, an approach which risks detracting from the proper appellate function. That is not what *Shaw's* case or *Belbin's* case was aiming at. Both cases intended to place firm limits on the scope for re-argument at the appellate hearing, while recognising that the appellate court is not obliged to find a judicial review type error before it can say that the judge's decision was wrong, and the appeal should be allowed."

41. Having so found, Lord Burnett explained what should be done:

> "26. The true approach is more simply expressed by requiring the appellate court to decide whether the decision of the District Judge was wrong. What was said in *Celinski* and *Re B (A Child)* are apposite, even if decided in the context of article 8. In effect, the test is the same here. The appellate court is entitled to stand back and say that a question ought to have been decided differently because the overall evaluation was wrong: crucial factors should have been weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed."

42. In Wyatt v USA [2019] EWHC 2978 (Admin), the Divisional Court (per Lord Burnett of Maldon CJ) had this to say about the interests of victims:

> "15. The interests of the victims of an alleged extradition offence include the convenience of giving evidence but are not limited to that, as the judge recognised. It is commonplace for the evidence of witnesses located abroad to be taken by video link to avoid the inconvenience and expense of having to travel long distances. In a case such as this one would expect there to be a range of written evidence which, in the ordinary course, would be agreed for trial. Yet the victims of a crime have an interest in the legal proceedings beyond the narrow compass of being a witness and giving evidence. They should, if they wish, be able to attend a trial. They should be in a position to have continuing contact with the prosecuting authorities. They are likely to wish a prosecution to take place in the jurisdiction where they suffered the harm relied upon, subject to their domestic legal order culminating, if there is a conviction, in an appropriate local sentence. This case involves corporate victims, although acting through individuals and owners who are alleged to have been threatened, their families and hundreds of individuals whose personal medical data were disclosed. The judge cannot be faulted for having considered this to be a statutory factor which weighed in favour of extradition, nor for thinking it an important matter."

43. The case also contains an examination of the section 83A(3)(c) factor concerning the belief of the prosecutor:

> "18. The judge deciding an issue under section 83A of the 2003 Act is obliged to have regard exclusively to the statutory lexicon when determining where the interests of

> justice lie. One of those factors is a belief of the prosecutor that the United Kingdom is not the most appropriate place in which a prosecution should proceed. The statute requires her to have regard to such a statement of belief but the weight to be attached to it is a matter for the judge. The more reasoned or explained the belief, the more likely it is to carry substantial weight. It is almost inevitable that a prosecutor will take into account the statutory factors found in section 83A(3) in forming a belief. It would be very odd not to do so. Factors such as the interests of the victims, the availability of evidence, the location of harm, delay, the defendant's connections with the United Kingdom and the prospect of multiple prosecutions could be influential in forming a belief. The prosecutor is not, however, limited by the statutory factors in the same way that the judge is. He may take anything that rationally bears on the question into account. Obvious examples would include the dynamics of a trial and the practical implications of having to investigate alleged offences and prosecute them here, including resource implications. There may also be differences between the legal regimes in the requesting state and England and Wales which could have an impact on admissibility of evidence or raise other legal issues.
>
> 19. Thus, the judge is required to have regard to the prosecutor's belief; and that may be based largely on the statutory factors or may extend well beyond them. Yet the prosecutor's belief is an independent factor that weighs in the balance. It may be, for example, that the judge's provisional view having regard to all factors except the prosecutor's belief would be not to favour extradition. Then, taking into account the prosecutor's belief the balance may tip the other way. Whether or not that is the case, the belief must weigh in the balance, but weight is for the judge.
>
> 20. The prosecutor's belief is not diminished or undermined for the purposes of the 2003 Act simply because it takes into account factors found in section 83A. Mr Hadik's belief was explained in some detail. The strength of his belief was undoubtedly of significance."

44. In USA v McDaid [2020] EWHC 1527 (Admin) the Divisional Court (per Holroyde LJ and William Davis J) reiterated that:

> "...The appeal is not a re-hearing of evidence or repeat of submissions as to how factors should be weighed. The appellate court normally has to respect the findings of fact made by the District Judge, especially if he or she has heard oral evidence. The sole question for the appellate court is whether the judge made the wrong decision. …" (paragraph 17).

45. At paragraph 44, the Divisional Court accepted the appellant's submission that, in the context of section 83A, "the phrase 'balancing exercise' does not accurately or sufficiently describe the necessary evaluative process." The Court was not, however, persuaded that the judge had actually applied the wrong test. The judge's "use of the phrase 'balancing exercise' was an imprecise reference … rather than an indication that she was applying an incorrect test."

46. As regards the section 83A(3)(f) factor, the Divisional Court held that the weight to be given to this "will vary according to the circumstances". The court found that the District Judge had been correct to anticipate that the evidence against the requested person would largely come from an analysis of communications and that it would be practicable for the necessary witnesses to give their evidence via video-link. In those circumstances, it was open to the judge to conclude that, overall, this factor weighed against extradition (paragraph 49).

F. THE GROUNDS OF CHALLENGE

47. Mr Sternberg says the District Judge erred fundamentally in finding that the weight to be attached to the section 83A(3)(c) factor fell to be diminished by reason of other specified factors. As we have seen, at paragraph 44 the District Judge concluded that, although the prosecutor's belief weighed in favour of extradition, "when balanced against factors (d), (e) and (f) I find this diminishes the weight I attach to the prosecutors belief".

48. Mr Sternberg submits that whilst it was open to the District Judge to ascribe less weight to this factor if there were rational reasons to do so, it was plainly an error on his part to have found that, "simply because there were other factors which weighed against extradition, … they reduced or diminished the weight that should be attached to the prosecutor's statement of belief." What the District Judge should have done was to weigh up each factor individually and then reach a conclusion on whether extradition was in the interests of justice. Instead, Mr Sternberg says that the District Judge "diminished the weight he gave to the prosecutor's statement of belief solely because there were factors on the other side of the balance weighing against extradition". This meant the District Judge failed properly to assess the weight that should have attached to the sub-paragraph (c) factor.

49. In this regard, Mr Sternberg says the District Judge did not take the course of considering the cumulative weight of the factors weighing against extradition and then considering whether those outweighed the cumulative force of those in favour. It was noteworthy that the District Judge did not criticise the conclusions of Mr Sagar. It was therefore incumbent on the District Judge to give proper weight to Mr Sagar's views.

50. Finally on this issue, Mr Sternberg points out that the District Judge found the factor of delay (paragraph (e)) to be "neutral". Mr Sternberg submits that it is therefore all the more unclear why the District Judge concluded that a purely neutral factor could diminish the weight to be attached to the prosecutor's statement of belief.

51. Mr Smith submits that what the District Judge did at the end of paragraph 44 of his judgment was not only lawful but "entirely proper". The judge was giving expression to the well-established legal position that the relative importance of each of the specified matters, and, thus, the weight to be given to them, needs to be assessed by the judge and that these will vary from case to case. Mr Smith observes that the appellant itself acknowledges it was open to the District Judge to ascribe less weight to the factor concerning the prosecutor's belief.

52. In any event, Mr Smith submits that the District Judge was, if anything, too generous to the appellant in his consideration of this factor. Mr Sagar's first record of decision, on 11 July 2017, failed adequately to consider the availability of evidence in the United Kingdom or to give any proper weight to the delay which would be occasioned by commencing proceedings in the USA, along with the consequent extradition process. In fact, the delay caused by proceeding in the USA was not considered by Mr Sagar at all. His only analysis of the respondent's connections with the United Kingdom was the observation "currently resident in the UK", together with the respondent's address. No proper consideration was given to the impact of the respondent having been arrested, investigated and interviewed, and having answered questions; all in the United Kingdom.

53. The further decision of 3 October 2018 was, in large part, a "cut and paste" exercise from the previous decision. The 3 October decision did, however, indicate that a decision from the USA on prosecution was expected by September 2018 (a year later than had previously been anticipated). The view that prosecuting the respondent in the United Kingdom could cause significant delay was, according to Mr Smith, simply wrong. The decision that England and Wales was not the most appropriate forum had already, by that time, led to a delay of some two years, beginning with the police interview of the respondent. Mr Sagar had failed completely to consider the delay inevitable in the extradition proceedings; a failure which had been borne out by subsequent events. The extradition request would not be certified until March 2020 and extradition proceedings were still ongoing. Mr Sagar also failed to consider which witnesses might be contentious; or even the impact of a prosecution based in large part on the interview conducted in the United Kingdom and on evidence seized there.

54. The appellant's second ground of challenge to the District Judge's decision concerns his approach to the section 83A(3)(e) factor of delay. As we have seen, the District Judge concluded this factor to be neutral. According to the appellant, the proceedings against the respondent in the USA are ready to begin and proceed to trial, once the respondent has surrendered to the extradition request. By contrast, no charging decision has been made in the United Kingdom. It is accordingly obvious that the prosecution in this country would involve delay whilst charging decisions are made and criminal proceedings initiated, following which the appellant would need to appear at a Magistrates' Court and then "inevitably on to the Crown Court for a Plea and Trial Preparation Hearing before a trial date can be fixed or, in the event of guilty pleas, a date for sentence can be fixed. No such delay will occur in the USA".

55. Accordingly, the appellant contends that the District Judge erred in treating the USA and the UK as being in the same position procedurally. In those circumstances, the District Judge ought to have concluded that extradition to, and trial in, the USA would involve less delay than in England and Wales.

56. All that is so, the appellant says, even before one considers the effects of the coronavirus pandemic on listings in the Crown Court in England and Wales. Mr Sagar concluded that arranging the giving of evidence by Victim 1 and Victim 2 and reviewing the material evidence held in the USA, as well as potentially third-party material to ensure the prosecution complies with its disclosure obligations, would all cause delay. There was, says Mr Sternberg, no reason for the District Judge to come to a different conclusion than that of Mr Sagar and the judge gave no cogent reasons for concluding that delay was a neutral factor.

57. The respondent takes issue with the entirety of this ground. Mr Smith submits that it is wrong to say the USA is ready to proceed to trial. The further information itself concedes that there is some original evidence in the United Kingdom and that the authorities in the USA were (as at 14 August 2020, when Ms Cohen made her statement) still in the process of preparing an MLAT in order to obtain the original evidence prior to trial. Mr Smith submits that, since it took nearly two years for the extradition request to be certified from the date of the indictment being laid in New York, there can be no confidence in the amount of time that the MLAT process will take. Thus, the two jurisdictions are at approximately the same stage and the District Judge's decision that the delay factor was a neutral one was proper, and even generous to the appellant, given the delay that had already occurred. There was no evidence before the District Judge that the charging

decision in the United Kingdom could not be made swiftly. So far as coronavirus is concerned, Mr Smith points out that both the USA and the United Kingdom are suffering from the effects of the pandemic; and it would therefore be wrong to assume that only criminal trials in England and Wales are being adversely affected.

58. The appellant's third ground of challenge contends that the District Judge erred fundamentally in his approach to the section 83A(3)(f) factor. The District Judge found that this factor favoured discharge, on the basis that Victim 1 and Victim 2 could give evidence by video-link at trial in the United Kingdom. The appellant's challenge to the District Judge's decision on this factor concentrates upon the use of the word "practicability" in section 83A(3)(f); in particular, its use in paragraph (2), where regard is to be had to the practicability of the evidence of (here) witnesses being given in the United Kingdom or in a jurisdiction outside it.

59. Like the District Judge, the appellant acknowledges that there will only be one prosecution in the present case and that there are no co-defendants or other suspects. The focus, therefore according to the appellant is on the practicability of the witnesses giving evidence in the United Kingdom or the USA.

60. Mr Sternberg submits that, on this basis, the only relevant considerations under paragraph (f) were the jurisdiction in which the witnesses (that is to say Victim 1 and Victim 2) were located and the practicability of their evidence being given in the United Kingdom or outside it. Mr Sternberg contends that it is plainly more practicable for Victim 1 and Victim 2 to give live evidence in their local home jurisdiction, the Southern District of New York. Mr Sternberg submits that the District Judge failed to focus on the *practicability* of the evidence of Victim 1 and Victim 2 being given at a trial held in the United Kingdom, compared with the USA, as opposed to whether Victim 1 and Victim 2 could, *if necessary*, give evidence at such a trial. The statutory test of practicability is to be distinguished from that "the mere possibility of evidence being given by video-link" at a trial in the United Kingdom. If the District Judge had focused upon this matter, Mr Sternberg says that he would have been bound to conclude that the more practicable option for the witnesses was to give evidence at trial in the USA. That is their home jurisdiction, where there are no time differences vis a vis the United Kingdom, and where there would be no need to attend remotely by video-link.

61. Mr Sternberg further argues that the District Judge conflated his approach on factor (g) with that of factor (d), which concerns whether evidence is or could be made available in the United Kingdom to prove the extradition offence. As we have seen, the District Judge considered this to be a factor that weighed against extradition. However, factor (d), unlike factor (f), involves no consideration of practicability, being solely concerned with whether the evidence necessary to prove the offences is or could be made available in the United Kingdom.

    Mr Smith, on the other hand, submits that the District Judge was entitled to consider the availability of video-link evidence as relevant to factor (f). Mr Smith points to the finding at paragraph 49 of McDaid that it was open to the judge in that case to conclude that, overall, factor (f) weighed against extradition, having found that "it would be practicable for the necessary witnesses to give their evidence via video-link" from the USA.

G. DISCUSSION

62. It is necessary to begin by considering the correct approach to a section 83A Forum Bar case.

63. The first question for the judge is whether a substantial measure of D's relevant activity was performed in the United Kingdom. If it was not, then it is unnecessary to go further. There is no question of any trial in the requesting state being against the interests of justice, so far as section 83A is concerned.

64. Where the section 83A(2)(a) "gateway" is opened, the judge is required to decide whether extradition would not be in the interests of justice, having regard to the section 83A(3) factors, and only them. Although the words "having regard to" in section 83A(2)(b) have been equated with "bear in mind" (Shaw paragraph 40) and "consider" (Dibden, paragraph 18), it is probably best to stick to the words Parliament has used, lest there be any argument that the judge has adopted a materially different form of scrutiny.

65. Notwithstanding that section 83A does not expressly require the judge to ascribe "weight" to the statutory matters or factors the courts have regarded such an exercise as an inherent requirement of section 83A: see e.g. Love, paragraph 26.

66. The Divisional Court in McDaid did not consider that the process of according a particular weight to each of the factors can be properly said to involve any "balancing exercise". Since Lord Thomas of Cwmgiedd CJ highlighted the benefits of a "balance sheet" approach to deciding whether D's extradition would be unlawful by reason of being a disproportionate interference with the Article 8 ECHR right to D's enjoyment of a private or family life (Polish Judicial Authority v Celinski [2015] EWHC 1274 (Admin) paragraphs 15 to 17), judges have become accustomed to weighing the factors tending for and against D in this regard, in order to determine where the proportionality balance lies.

67. The process of ascribing weight to section 83A is different, in that (with the exception of the prosecutor's belief) each specified matter or factor may, depending on the facts, point in favour of or against extradition not being in the interests of justice. The statutory language is neutral in this regard. The judge therefore needs to assess the weight of each factor, as bearing for or against the Forum Bar. Having done so, the judge must reach an overall conclusion. As the result in McDaid indicates, provided that the judge has approached the task in this way, it does not matter whether he or she resorts to the metaphor of balancing in the course of the evaluation. Indeed, insofar as the metaphor encourages careful judicial engagement with each of the section 83A factors, its use can be seen as benign.

68. Once each of the specified matters has been weighed/evaluated, then, assuming no issue arises as to section 83A(4) or (5), the judge must decide the question set by section 83A(1); namely, whether extradition would not be in the interests of justice. That is not the same question as asking whether D's prosecution in the United Kingdom might be said to be in the interests of justice. At this point, reliance on balancing could lead to error, if it causes the judge merely to ask whether the interests of justice favour prosecution in the United Kingdom as opposed to in the country of proposed extradition. That is not the question posed by section 83A(1).

69. Mr Sternberg relied upon paragraph 19 of Wyatt as authority for the proposition that factor (c) is capable of having decisive weight. As a result, the alleged error of the District Judge in respect of this factor must be regarded as material.

70. As Simon J held at paragraph 25 of Dibden, there is no hierarchy within section 83A(3). No factor is expressed as being more or less significant than any other. Lord Burnett's words in paragraph 19 of Wyatt do not indicate that factor (c) is, as a general matter, to be accorded any special significance. As with any other factor, it may, depending on the circumstances, tip the balance to the conclusion that extradition would not be in the interests of justice.

71. On an appeal under section 103/104 or section 105/106, the question for the appeal court is whether the decision of the judge of the District Judge was "wrong": Love, paragraph 25. In a section 83A case, the judge's decision will be "wrong" if he or she should have weighed crucial factors significantly differently: Love, paragraph 26. That test encompasses what might be described as errors of approach by the judge, such as ignoring one or more of the section 83A(3) factors, as well as ascribing weight or lack of weight to a factor, which is not justifiable in the light of the evidence as a whole. The test is also capable of covering cases where the judge has taken account of matters other than those within section 83A(3).

72. The closing words of the test articulated at paragraph 26 of Love are crucial. Any error of the kinds described must, whether individually or cumulatively, be such "as to make the decision wrong, such that the appeal in consequence should be allowed". In other words, looking at the statutory language in section 104(3) and section 106(4), the error regarding the determinative aspect of the judge's decision must lead to the dual conclusion that the judge ought to have decided that matter differently and, if he or she had done so, he or she would (or, as the case may be, would not) have been required to order D's discharge. Any errors must, therefore, be material ones, in order for the appeal against the judge's decision to be allowed.

73. I now turn to the specific grounds of challenge to the District Judge's decision in the present case.

74. The appellant takes strong issue with the finding at the end of paragraph 44 of the District Judge's judgment that, as regards the section 83A(3)(c) factor, the District Judge diminished the weight to be given to the prosecutor's belief by balancing that factor against factors (d), (e) and (f). The District Judge repeated this finding at paragraph 54iii, in setting out his conclusions on the Forum Bar. As we have seen, Mr Sternberg says that it was wrong of the District Judge to diminish the weight to the paragraph (c) factor in this way.

75. I accept that what the District Judge did could be said to depart from the paradigm approach in ascribing weight to the section 83A factors. On closer analysis, however, the criticism loses its force. Factors (d), (e) and (f) were ones that the prosecutor, Mr Sagar, had considered, in reaching his belief that the United Kingdom was not the most appropriate jurisdiction in which to prosecute the respondent. All that the District Judge was saying, in his paragraphs 44 and 54iii, was that since he had reached different conclusions from Mr Sagar in respect of factors (d), (e) and (f), the weight to be given to the prosecutor's belief was limited. There is nothing in the judgments of Simon J in Dibden or Aikens LJ in Shaw that shows the District Judge was not permitted to approach

the issue of the prosecutor's belief in the way he did. Crucially, the District Judge did not decide to give the prosecutor's belief no weight at all, simply because the District Judge had formed different views in respect of certain of the factors to which the District Judge was legally obliged to have regard, but which had also featured in the considerations of Mr Sagar. The District Judge had due regard to the prosecutor's professional belief. It would, however, have been legally problematic for the District Judge to change the views he had arrived at in respect of factors (d), (e) and (f), based on the evidence before and submissions made to him, just because those factors had featured in Mr Sagar's analysis. Nowhere in section 83A has Parliament indicated that the prosecutor's belief, insofar as predicated on factors mentioned in that section, should override the judge's own evaluation of those factors.

76. Even if the District Judge should have reserved his observations about these factors, insofar as they impacted upon the weight to be given to the prosecutor's belief, until undertaking the final overall evaluative exercise, it is perfectly obvious that the District Judge would have arrived at the same result, concerning factor (c). Any error on his part in this regard is, accordingly, in no sense a material one.

77. Mr Sternberg criticised the District Judge for using his neutral assessment of factor (e) (delay) to diminish the weight to be given to factor (c). Whilst, on a literal approach to the concept of "weight", there may be something in this criticism, once the point in paragraph 75 above is grasped, the criticism dissolves. Proper decision-making under section 83A will not be fostered if the section becomes a terminological minefield, with concepts such as weight, which are intended to be helpful to decision-makers, being used instead as bases for challenge.

78. In view of these findings, it is unnecessary for me to rely upon the submission of Mr Smith that Mr Sagar's reasoning in both of his decisions was seriously deficient. Were the evaluative exercise have needed to be re-taken, I do, however, accept that the limited ambit of Mr Sagar's consideration is such as to diminish (but not extinguish) the weight that could properly be given to factor (c).

79. I turn to the ground which asserts the District Judge was wrong to treat the factor of delay (paragraph (e)) as neutral, as opposed to one pointing towards extradition not being barred by reason of section 83A(1). I remind myself that it is not enough to show that, on the evidence before him, the District Judge might have ascribed more weight to the readiness of the authorities in the USA to prosecute the respondent, following his extradition. It needs to be shown that the District Judge should have weighed matters "so significantly differently" as to make his decision wrong, in the sense described in Love.

80. For the reasons given by Mr Smith, I find the District Judge was entitled to regard the procedural state of play in the USA and the United Kingdom respectively as effectively equal. So far as the USA was concerned, the fact that an MLAT was still in the process of being prepared meant that more needed to be done in that jurisdiction in bringing the case to trial. In my view, the District Judge was plainly entitled to place weight on that matter. He was also entitled to place weight on the fact that the investigation in the United Kingdom had been completed in 2017 and the file on the respondent submitted to the CPS for a charging decision. Mr Smith rightly points to there having been no evidence before the District Judge that such a decision could not be made swiftly. It is unclear whether the point made by Mr Sternberg regarding any case having to make its

way through the Magistrates' Court and on to the Crown Court was put to the District Judge, but, in any event, there is no evidence that begins to show the District Judge ought to have found that this was bound to be a significant delaying factor.

81. So far as coronavirus is concerned, I can see nothing before the District Judge that required him to conclude that the effects on the pandemic on the criminal justice system in England and Wales were markedly worse than their effects on the criminal justice system in New York.

82. The third ground of challenge concerns factor (f) and, in particular, the references in that paragraph to "practicability". At paragraph 52 of his judgment, the District Judge held that the fact that the prosecution of the appellant had started in the USA following the Grand Jury indictment meant it was "desirable for the matter to continue to be prosecuted in that jurisdiction". Set against this, however, was "the ability of the victims to give evidence by live link", which had "clearly been actively considered by Mr Sagar … in October 2018 and discussed with the US Attorney …". The District Judge noted the outcome of this discussion was that giving evidence by such means "was not considered practicable". The District Judge observed that he had already dealt with the issue about evidence under factor (d). The District Judge had held at paragraph 46 that Victim 1 and Victim 2 "could give live evidence by way of video-link".

83. At paragraph 52, dealing with factor (f), the District Judge repeated that "if necessary the victim's live evidence could be received over video-link".

84. Mr Sternberg rightly takes no issue with the fact that the possibility of evidence being given by video was considered by the District Judge under both factors (d) and (f). As Lord Burnett observed in paragraph 29 of Love, the nature of the factors described in section 83A(3) is such that there may well be overlap between them.

85. The appellant's case under this ground depends upon it making good the contention that there is a material difference between "practicability" and something that "could, if necessary" occur; that is to say, something which is a "mere possibility" (see paragraph 60 above). The dictionary definitions of "practicable", however, refer to something that is "able to be done or put into action" (see e.g. the Cambridge English Dictionary). I find the District Judge was perfectly entitled to conclude that it was "practicable" for Victim 1 and Victim 2 to give evidence by video-link. The giving of such evidence is an increasingly common feature of criminal trials in this jurisdiction. The use of video-link evidence throughout the legal system has grown significantly since the beginning of the pandemic. There is nothing to suggest that, despite the (usually five hour) time difference between the Eastern United States and the United Kingdom, Victim 1 and Victim 2 could not give their evidence to the Crown Court in England at a convenient time of day for them.

86. We have seen how, at paragraph 49 of McDaid, the Divisional Court noted that "it would be practicable for the necessary witnesses to give their evidence via video-link" from the USA. It does not appear from their judgment that the Divisional Court considered what was practicable in anything other than the ordinary, dictionary sense just described.

87. For these reasons, I reject the appellant's written grounds of challenge to the decision of the District Judge. It is, however, necessary to mention the District Judge's approach to factor (g), namely, the appellant's connections with the United Kingdom.

88. The District Judge considered this factor to be a weighty one. At paragraph 53, the District Judge held that the factor "tells substantially against extradition". In so finding, the District Judge accepted Mr Smith's submission that the fact the appellant was interviewed in the United Kingdom and received legal advice on the basis he would be prosecuted in this country, as a result of which he answered as he did at interview (against interest), was of "substantial relevance to his connections with the UK and the context of this case as a whole". I have made specific reference earlier to the police interview with the appellant in Doncaster.

89. In his oral submissions, Mr Sternberg questioned whether factor (g) is, in fact, wide enough to encompass these matters, which featured so heavily in the District Judge's evaluation. I have mentioned at paragraphs 38 and 39 above what was said in Love about connections with the United Kingdom. The matters with which we are concerned do not appear to have arisen for consideration before, at least on appeal.

90. Whilst it is important not to construe factor (g) so widely as to make the specified section 83A(3) matters effectively open-ended, I am in no doubt that the District Judge did not err in treating what happened at the police interview as part of the appellant's connection with the United Kingdom. Regardless of any other connection which a person may have with the United Kingdom, the fact that they have been subject to questioning in this country by the police in connection with a suspected criminal offence and have answered questions in a way they might otherwise not have done, if they were not anticipating prosecution in this country in respect of that offence, is capable of constituting a connection with the United Kingdom. On the particular facts of this case, the District Judge was therefore entitled to regard to this matter under the ambit of factor (g).

91. I said at paragraph 68 above that resort to balancing may lead to error, if it causes the judge merely to ask whether the interests of justice favour prosecution in the United Kingdom as opposed to the country of proposed extradition. Despite his adoption of a "balancing exercise", it is evident that the District Judge in the present case did not fall into any such error. At paragraph 58 of his judgment, the District Judge had the wording of section 83A(1) firmly in mind, in reaching his overall evaluation.

H. DECISION

92. The appeal is dismissed.