Neutral Citation Number: [2023] EWHC 2893 (Admin)

Case No: AC-2022-LON-03116

IN THE HIGH COURT OF JUSTICE
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 November 2023

Before :

DAME VICTORIA SHARP, PRESIDENT OF THE KING'S BENCH DIVISION
and
MR JUSTICE JOHNSON

- -

Between :

CHRISTOPHER HAMILTON	**Appellant**
- and -	
THE GOVERNMENT OF THE UNITED STATES OF AMERICA	**Respondent**

- -
- -

Ben Lloyd and Adam Payter (instructed by Sonn Macmillan Walker) for the Appellant
Peter Caldwell (instructed by Crown Prosecution Service) for the Respondent

Hearing date: 2 November 2023

- -

Approved Judgment

This judgment was handed down by release to The National Archives
on 16 November 2023 at 10.30am.

President of the King's Bench Division:

1. This is the judgment of the court.

2. The appellant appeals against the order of District Judge Rimmer made on 30 August 2022 to send his case to the Secretary of State for her to decide whether he should be extradited to the United States of America ("USA"). On 26 October 2022, the Secretary of State ordered the appellant's extradition to the USA.

3. The issue on the appeal is whether the judge was wrong to dismiss the appellant's "forum" challenge to extradition. We are grateful to counsel for each party for their excellent submissions.

4. The appeal concerns the respondent's request for extradition and the judge's assessment of the forum objection to extradition. We have not heard any live evidence. The appellant is of good character. He has not yet been tried for any offence. We stress that nothing in this judgment should be treated as indicating that the appellant is guilty of the conduct that is alleged against him.

The background

The underlying offences: OneCoin

5. The following account is based on the respondent's request for extradition, evidence filed by (and material emanating from) the respondent, and a statement made by Helen Graves, a crown prosecutor, under section 83A(3)(c) of the Extradition Act 2003.

6. The offences for which the appellant's extradition is sought arise out of the proceeds of a fraudulent scheme concerning the sale of "OneCoin." OneCoin was marketed worldwide as an investment by Ruja Ignatova and Karl Greenwood. It was marketed as a cryptocurrency that was mined using computer servers (so that there was limited supply) with transactions maintained on a secure blockchain. The purported value of OneCoin was artificially set each day in a way that steadily increased from €0.5 to almost €30 per coin. Its purported value never decreased. It became popular. It was marketed at events around the world. One such event, attracting thousands of people, was at Wembley Arena in London. Members of the scheme were paid commissions for recruiting others to purchase OneCoin. In reality, OneCoin was a fraudulent Ponzi scheme. It was not mined, and its supply was unlimited. It had no intrinsic economic value. There was no true blockchain. The total fraud is valued at £4 billion. There were 3.5 million victims. About half of the revenue was generated from people residing in China.

The laundering of the proceeds of the OneCoin fraud

7. Ruja Ignatova and Karl Greenwood used others to launder the proceeds of the fraud. One of these was Gilbert Armenta. Between 2015 and 2017 Mr Armenta laundered $150M of the proceeds of the fraud through numerous bank accounts in the USA, before transferring the proceeds to those who were operating the OneCoin fraud.

8. In 2015 the appellant and Robert MacDonald agreed with Mr Armenta that they would assist him to launder €16M through Viola Asset Management ("VAM") (a business that

was controlled by the appellant). The respondent does not allege that the appellant was, at this point, aware of the precise provenance of the funds, but it does allege that he knew or suspected that they were the proceeds of crime.

9. In October 2015 Mr Armenta attempted to transfer $18.6M from a US bank account to a $US denominated bank account operated by VAM in London. The transaction was rejected and returned. Thereafter, Mr Armenta successfully transferred the money through a series of US bank accounts (in a process known as "layering" which is intended to disguise the origin and nature of the funds) and thence transferred over $19M to the same VAM account. Several days later, an attempt was made to transfer $18.7M from VAM to a London foreign exchange service to be transferred to an individual's euro denominated account. That transfer was rejected. Eventually, the money was transferred back to VAM (into a Euro denominated account).

10. On 12 November 2015, €16 million was transferred from VAM to bank accounts held by Mr Armenta at Capital Bank in Tbilisi, Georgia. Of the balance, nearly €400,000 was transferred to a personal bank account operated by the appellant.

11. Between 26 January 2016 and 3 February 2016, Mr Armenta transferred approximately $40 million in OneCoin proceeds to VAM.

12. From about February 2016, Mr Armenta sought the appellant's assistance to transfer funds from China to the United States. The funds represented part of the proceeds of the OneCoin fraud: in the first six months of 2016 approximately $105M of the proceeds were paid into two bank accounts in China.

13. The appellant and Mr MacDonald set up several shell company bank accounts at an intermediary bank in China. Mr Armenta then, in coordination with the appellant and Mr MacDonald, arranged for the transfer of funds from the OneCoin China accounts to the shell accounts. The appellant and Mr MacDonald arranged for the funds to be moved into pool accounts, where they were swapped for other funds available in Hong Kong by a Hong Kong foreign exchange payment processor.

14. On about 3 February 2016, the appellant and Mr MacDonald opened an account with the Hong Kong processor. They agreed to transfer funds, less a fee, to a US bank account controlled by Mr Armenta and his business partner. On the same day Mr MacDonald emailed the appellant:

> "Suggestion is to use this first one to establish principle .... 5 or 10 perhaps … which we can do fast clean and show all paperwork ... then he gets happy ... and then we can (from Feb 11) take pretty much anything ....."

15. On 4 February 2016, Mr MacDonald instructed the Hong Kong processor to initiate a $1M test transaction, to move funds from the OneCoin China accounts through the shell accounts into the Hong Kong VAM account, and onward to the US account. That transaction was ultimately completed in late February 2016.

16. On 26 February 2016, a German OneCoin processor transferred €3 million to VAM. The appellant transferred over €600,000 of these funds into a personal bank account. VAM's bank notified the authorities of what it considered to be suspicious transactions.

17. On 4 March 2016, Mr MacDonald emailed the appellant in respect of the proposal to transfer monies from China:

> "How much is he looking to store? For how long? W'at's ultimate plan with it? And crucial ... Where's it from and why is he storing it for other people? Kyc needed ... It needs to be real and sensible but this IS possible (but a little risky as kyc is going to be sticky)"
>
> ["Kyc" appears to be a reference to "Know Your Client" checks required by the Money Laundering Regulations 2007].

18. In early March 2016, the German processor attempted to transfer approximately €3 million to VAM. The transfer was rejected because the account had been frozen by HSBC.

19. On 10 March 2016, Mr MacDonald emailed the appellant and said, "where has [the German Processor] got or getting the money from ... ? cus its not from selling toothpicks ….lol." Later, Mr MacDonald sent the appellant a further email:

> "OneCoin is selling (it appears) CryptoCurrency as [part of a multilevel marketing (UMLM) network] but its clearly a ponzi scheme ...
>
> Ok Ive been doing this for best part of an hour now and from everything Ive seen and read ... (dozens and dozens and dozens of pages videos blogs etc) I cant catagorocally [sic] prove anything (which is bad in itself) ... but I think they are running a giant Ponzi based in Bulgaria and covering Eastern Europe and far East ... My question is are we banking or being asked to assist in the banking of a large Ponzi? Clearly we can help I dont have a financial ethic against this but. ..... if someone is upfront with us ..."

20. The City of London Police launched an investigation. The investigation focussed on establishing that OneCoin was a Ponzi fraud rather than a legitimate investment scheme. Difficulties were encountered. An expert who was appointed concluded that she was not sufficiently experienced in the operation of OneCoin to address its legitimacy, and evidence was missing as to the money flow. It was known that evidence was held by the US authorities, but this material was not available or shared with the UK authorities (there is no suggestion that the material was requested and refused).

21. The police seized a computer from the appellant's home and secured a full forensic download of material from that computer. Search terms were used to identify potentially relevant material from the download. Mr MacDonald was not part of the police investigation, and the search terms that were used did not capture the email correspondence between the appellant and Mr MacDonald.

22. The appellant was interviewed in April 2016. He denied any criminal wrongdoing. The respondent says that from this point the appellant cannot have been in any doubt that Mr Armenta was asking him to launder the proceeds of serious crime.

23. In August 2016 the case was referred to the Specialist Fraud Division of the Crown Prosecution Service ("CPS"). Following cash forfeiture proceedings under the Proceeds of Crime Act 2002, no criminal charges were brought. The investigation was closed in January 2019, and the cash was returned. Following the closure of the investigation, the police remained in contact with the US authorities to assist with their investigation. This included the provision of bank details and company documents. It also included the provision of the full download of the computer that had been seized from the appellant's home. The police did not carry out any further investigations themselves – they just responded to requests from the US authorities.

24. Between January and June 2016, and following the successful test transaction referred to above, the appellant and Mr MacDonald agreed to transfer approximately $34 million from the OneCoin China accounts, through the shell accounts, to the Hong Kong VAM account.

25. Instead of then paying the funds to the US account, the appellant and Mr MacDonald redirected approximately $32M from the Hong Kong VAM Account to bank accounts they controlled in several other Asian and European countries. Several of these transactions involved the use of a New York bank. The appellant and Mr MacDonald are thereby said to have stolen the $32M, as foreshadowed by the email of 3 February 2016. Bank records indicate that approximately $5M of the funds may have been returned to Mr Armenta via wire transfers through the UK to the US.

Proceedings against Ruja Ignatova, Karl Greenwood, Gilbert Armenta and Mark Scott

26. On 12 October 2017, Ruja Ignatova was charged (in her absence) with offences of fraud and money laundering relating to OneCoin. On 25 October 2017 she travelled on a commercial flight from Bulgaria to Greece. She has not been seen publicly since. She was added to "the FBI's Top Ten Most Wanted List" in June 2022.

27. In July 2018, Karl Greenwood was arrested in Thailand. He was extradited to the USA to face fraud and money laundering charges. He pleaded guilty in December 2022. On 12 September 2023 Mr Greenwood was sentenced to 20 years' imprisonment.

28. In November 2019, Mark Scott was convicted by a jury of conspiring to commit money laundering and conspiracy to commit bank fraud.

29. In February 2023, Gilbert Armenta was sentenced. A sum of approximately $40.8M was forfeited to the US government.

The indictment

30. On 21 March 2019, a grand jury in New York returned an indictment charging the appellant with two offences. Count 1 alleges a conspiracy to commit money laundering. Count 2 alleges a conspiracy to commit wire fraud.

31. As to count 1, the respondent says that the appellant and Mr MacDonald "agreed to conduct financial transactions using the proceeds of the OneCoin wire fraud scheme, or caused others to conduct such financial transactions, in order to conceal the nature, source, location, ownership, and control of the proceeds of the wire fraud schemes." The respondent relies on the flow of funds through the VAM accounts and through US

based bank accounts. It also relies on emails between the appellant and Mr MacDonald which, it says, demonstrate knowledge of the underlying fraud.

32. As to count 2, the respondent says that the appellant and Mr MacDonald conspired to falsely represent that they would assist in transferring proceeds of the OneCoin scheme from China to the United States, and that they subsequently stole millions of dollars of those funds by transferring the money to bank accounts that they controlled. The respondent relies on (a) the transfer of $7M of OneCoin proceeds to the US bank account to gain Mr Armenta's trust, and (b) the subsequent diversion of $32M of OneCoin proceeds to accounts that they controlled, some of which passed through US accounts.

The extradition proceedings

33. On 17 August 2020, the US Government requested the extradition of the appellant and Mr MacDonald for prosecution on the indictment that was returned by the grand jury. On 9 October 2020, the Secretary of State certified the request as valid.

34. On 22 January 2021, the appellant was arrested at Heathrow airport on his arrival from Dubai. He was produced at Westminster Magistrates' Court. The hearing was adjourned (and there were several further adjournments).

35. On 18 November 2021, Ms Graves provided a statement pursuant to section 83A(3)(c) of the 2003 Act. She said that the City of London Police investigation did not secure sufficient evidence as to the money flow. Evidence held by the US authorities would have been important for the UK investigation, but it was never made available or shared with the UK. A full investigation was carried out based on the evidence that was available, but there was insufficient evidence to prove criminality. As a result, the investigation was closed in January 2019. There had been 10 reports to ActionFraud since the closure of the investigation, but the police believe that it is highly unlikely that any of these would lead back to the appellant. Ms Graves addresses each of the statutory factors that are relevant to the "forum" bar to extradition in section 83A(3) of the 2003 Act. She concludes:

> "There was an overlapping investigation in the UK in respect of Count One for which the extradition of Christopher Hamilton is sought. The criminality surrounding this investigation was wide-ranging and included the cryptocurrency called OneCoin. As OneCoin was marketed worldwide, there was interest into various money laundering investigations by several jurisdictions.
>
> The investigation in the UK was closed in January 2019. No suspects were prosecuted as a result of the investigation and there are no outstanding suspects being considered under Operation Satellite.
>
> In respect of Count two, these allegations did not feature as part of any UK investigation. The UK authorities do not have any evidence in relation to the transfers between the US and Asia,

> nor was any evidence obtained in relation to bank accounts held by VAM in Hong Kong.
>
> As above, further material would need to be provided to enable authorities in the UK to consider a prosecution. This would require an extensive review of the case and cause a large delay with any proceedings.
>
> Having considered all the above, it is my belief that the UK is not the most appropriate jurisdiction in which to prosecute either or both of the requested persons Christopher Hamilton and Robert MacDonald for the conduct referred to in the alleged extradition offences."

36. The substantive extradition hearing took place on 9-10 February 2022. The appellant and Mr MacDonald opposed extradition on the grounds that:

(1) The request does not seek extradition for extradition offences (section 78(4)(b) of the Extradition Act 2003).

(2) The request was an abuse of the court's process.

(3) Extradition would not be in the interests of justice and was therefore barred on "forum" grounds (section 83A(1)).

(4) Prison conditions in the USA are not compatible with the prohibition of inhuman and degrading treatment under the Human Rights Act 1998 read with article 3 of the European Convention on Human Rights ("ECHR") (section 87(1)).

(5) (In Mr MacDonald's case only) the physical or mental condition of Mr MacDonald is such that it would be unjust or oppressive to extradite him (section 91(2)). This ground was withdrawn by the end of the hearing.

(6) (In Mr MacDonald's case only) extradition would not be compatible with the right to respect for private and family life under the Human Rights Act 1998 read with article 8 ECHR (section 87(1)).

37. The judge heard factual and expert evidence. The witnesses included Joshua Dratel, a trial attorney in the Southern District of New York. Mr Dratel said that US victims had lost €50M from the OneCoin fraud, and that the US authorities could make the prosecution evidence available to the UK authorities. He gave evidence as to delays in criminal proceedings in New York due to Covid. Trials that had been set in December 2021 were now being set in 2022. There were difficulties with attorney prison visits due to the (then) prevalent Omicron variant of Covid, and prisoners were unable to review materials in a library or on a computer because they were not allowed out of their cells. He said that there had been delays in the OneCoin proceedings, although in many instances this was due to requests for adjournments on the part of the defence. There were also, more generally, court delays due to Covid – for example Mr Dratel's current client's case had initially been listed for June 2020 but was now being heard in March 2022. Mr Dratel also gave evidence as to the terms under which cooperating prosecution witnesses might give evidence in proceedings in the UK.

38. Closing submissions were heard on 24 June 2022. The judge gave judgment on 30 August 2022. His detailed judgment runs to just over 100 pages of closely typed text. The judge found that the extradition of Mr MacDonald would be incompatible with article 8 (having regard to Mr MacDonald's role as the permanent carer of his extremely unwell wife). He therefore discharged Mr MacDonald from the extradition proceedings. The respondent does not appeal against that decision. The judge rejected all the challenges to extradition that were raised by the appellant. He therefore sent the appellant's case to the Secretary of State for her decision as to whether he should be extradited.

39. On the question of forum, the judge rehearsed the arguments of the parties over 22 pages of his judgment. He accurately recorded that it was common ground that "a substantial measure of the [appellant's] relevant activity was performed in the United Kingdom." The question whether extradition was barred on forum grounds therefore depended on the judge's assessment of the seven factors set out in section 83A(3)(a)-(g).

40. The judge considered that factors (a), (b), (c), (e) and (f) weighted in favour of extradition (factor (e) being heavily in favour of extradition), and that factor (g) weighed heavily against extradition (and that factor (d) was neutral). Applying "a carefully weighted (and not a mechanistically numerical) assessment" the judge (applying the double negative that is inherent in the statutory test) did not conclude that it would not be in the interests of justice to extradite the appellant.

41. As to the seven individual factors, the judge said:

> "a) The US is the principal location of the loss and harm, both intended and achieved. I accept Mr Caldwell's submission that I am not concerned with OneCoin fraud losses globally, but with the transactions at the heart of this intended US prosecution of CH and RM. It is therefore of little avail for the RPs to seek to rely on the limited OneCoin USA losses (put at circa $50m) as a proportion of overall global losses. In respect of the latter, it is impossible for me to determine where most of the loss occurred, although I agree with Miss Malcolm QC that perhaps China seems likely. However, that is not the question I must address, which is focused strictly on these instant extradition offences. I agree with Mr Caldwell's submission that there can be no doubt that there was harmful effect in the USA, as a location from which: (a) funds were removed and (b) to which there was (at least) an agreement that some funds should be returned or reinstated. This factor therefore weighs in favour of extradition in my judgment, despite the fact I accept that some funds flowed to and from the UK where some harmful effects were no doubt felt by the misuse of the banking system. The $7m which flowed from Hong Kong to the USA saw no harmful effect to the UK;
>
> b) The victim interests of the OneCoin fraud are global. All victims, including those in the US, have an interest in further prosecutions of those involved in the fraud. Victim interests may be shared across a number of jurisdictions and I accept (as the

RPs have relied on) that there also appear to be many OneCoin victims in the UK (Mr Lloyd submitted as many as 70,000 and noted 63 complaints to UK's Action Fraud), although there is no evidence they have been affected by the particular transactions which underpin this Request. I must also evaluate the situation as it is, avoiding speculation. There appears to be no indication, still less certainty, of a prosecution here in the UK. The discontinued City of London Police investigation did not conclude in charges. Much work has evidently been done in the USA, and multiple guilty pleas have been entered. Victims' interests are generally served by prosecutorial pursuit rather than abandonment. Wherever victims are based, it is in their interests for perpetrators involved to be prosecuted rather than not to be. This factor weighs in favour of extradition. For the avoidance of doubt, I am untroubled by what I consider to be the 'red herring' of Armenta's technical (or moral) status as a victim or otherwise in respect of this issue. His status is clearly as a person from whom funds were appropriated (even if some were held offshore by corporate entities in e.g. the British Virgin Islands), and the offence of theft does not require the person from whom items are appropriated to hold good title (though that aspect has greater relevance to 'extradition offences' at issue one, above). I am not considering him as a victim relevant to this forum factor;

c) A Crown Prosecution Service prosecutor has expressed a cogently reasoned belief that the UK is not the most appropriate jurisdiction for a prosecution. While I acknowledge that there are some limitations and factual errors in Ms Helen Graves' statement of 18 November 2021 and her application of the law (such as inverting the statutory test), as has been rightly observed on the RPs' behalf, I do accept Ms Graves' overall view, noting that it is a view informed by her position within the CPS. I deem this factor weighs in favour of extradition;

d) As with any case in the digital era, some evidence could be transferred, and I accept there could be videolink evidence in either jurisdiction, with timing appropriately adjusted for international time zones (as indeed we had in these extradition proceedings). With technology those concerns are not insuperable. There may be some obstacles to a prosecution in the UK deploying important witness evidence in terms of the US elements of the conspiratorial conduct (including those convicted by way of guilty pleas under cooperation agreements such as Gilbert Armenta), but I do accept the RPs' collective position supported by the evidence of Mr Dratel that such witnesses would be likely to cooperate in their own interests. Overall I find this factor neutral;

e) Substantial delay would necessarily arise from a prosecution in the UK. I bear in mind the oral evidence of Mr Dratel that any

case now entering the US system would have to "get in line" behind other trials already delayed some two years following Covid, and as to the inefficacy of the 70-day Speedy Trial Act timeframe. I accept Mr Caldwell's submission that often disruptions to that time limit are by parties' timetable negotiations for either side's or mutual convenience, or at least with the opponent's acquiescence. I also take judicial notice that many trials in this jurisdiction in the Crown Court may expect similar delays for partly related reasons. Moreover, in this jurisdiction there would be the additional delay of the resolution of the extradition proceedings (including any potential appeal(s)), awaiting the outcome of a Mutual Legal Assistance request, further pre-trial investigation, a thorough review of the evidence, charging decisions, disclosure management, before finally a listing for a Pre-Trial Preparation Hearing at an appropriate court centre with capacity to hear a lengthy fraud trial, such as Southwark Crown Court in London. The trial would then be unlikely to take place for a further year or two from that point. All of that is likely to lead to a much more protracted delay than trial in the USA. I assess this factor as weighing heavily in favour of extradition;

f) It is desirable that these RPs should be prosecuted alongside any linked co-accused defendants in the United States whose conduct relates to these extradition offences. As to sub-factor (f)(i), in oral closing submissions, Mr Caldwell's position was that there are such co-defendants (the co-conspirators listed by Agent Shimko whose trials are to be heard by Judge Edgardo Ramos); Mr Lloyd's was that there are not. It may be that more such defendants come to light to be apprehended in due course. I appreciate that in a global conspiracy there are bound to be prosecutions in multiple jurisdictions (in this case such as in China, and of Frank Ricketts in Germany, and many other countries), but I do not find that undermines this factor. That is because those worldwide defendants likely have nothing to do with the particular conduct underpinning this extradition request. Linked defendants in the USA may do (such as Gilbert Armenta and Mark Scott who have respectively pleaded and been found guilty). There are clearly relevant witnesses in the USA. As to sub-factor (f)(ii), I have already dealt with the practicability of evidence being given in the UK as part of factor (d) above, which I have determined to be neutral. Overall however, I conclude this factor weighs in favour of extradition;

g) The Requested Persons' connections to the UK though strong, do not outweigh the overwhelming balance of the foregoing specified matters which mostly favour extradition to the United States. I do find RM's particular personal circumstances weigh much more heavily than those of CH as regards this factor in view of Mrs MacDonald's poor health, and of course I shall

> consider the couple's private and family life more extensively when in due course I reflect upon the more nuanced, extensive and separate ECHR Article 8 considerations (issue six, below). Overall, I find this factor weighs heavily against the extradition of each RP, considering each RP distinctly."

42. On 26 October 2022, the Secretary of State ordered the appellant's extradition to the USA pursuant to section 93(4).

43. On 8 November 2022, the appellant filed a notice of appeal, contending that the judge was wrong not to order his discharge from the proceedings pursuant to section 83A(1) ("forum") and/or section 87(1) (article 3 ECHR). On 14 March 2023, permission to appeal was refused on the papers. The appellant renewed his application for permission to appeal. On 24 May 2023, following a hearing, Julian Knowles J granted permission to appeal on the forum ground, and refused permission to appeal on the article 3 ground.

The legal framework

44. The USA is a category 2 territory for the purposes of part 2 of the 2003 Act: Extradition Act 2003 (Designation of Part 2 Territories) Order 2003. Part 2 of the 2003 Act makes provision for the making of extradition requests by category 2 territories (section 69), for the certifying of such requests by the Secretary of State (section 70), and for the issuing of an arrest warrant for the requested person (sections 71 and 72). Once the requested person is arrested, he must be brought before the appropriate judge as soon as practicable (section 72(3)). The judge must then decide whether the documents sent by the Secretary of State include those required by section 78(2). If so, the judge must proceed under section 79 (section 78(7)).

45. Section 79 states:

> "**79 Bars to extradition**
>
> (1) If the judge is required to proceed under this section he must decide whether the person's extradition to the category 2 territory is barred by reason of—
>
> …
>
> (e) forum.
>
> (1A) But the judge is to decide whether the person's extradition is barred by reason of forum only in a case where the request for extradition contains the statement referred to in section 70(4) (warrant issued for purposes of prosecution for offence in category 2 territory).
>
> (2) Sections 80 to 83E apply for the interpretation of subsection (1).
>
> (3) If the judge decides any of the questions in subsection (1) in the affirmative he must order the person's discharge.

(4) If the judge decides those questions in the negative and the person is accused of the commission of the extradition offence but is not alleged to be unlawfully at large after conviction of it, the judge must proceed under section 84.

…"

46. Section 83A prescribes the ambit of the "forum" bar to extradition:

"**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."

47. The overarching test prescribed by section 83A is whether extradition would not be in the interests of justice: section 83A(1), *Dibden v Tribunal De Grande Instance De Lille, France* [2014] EWHC 3074 (Admin) *per* Simon J at [18], *Shaw v USA* [2014] EWHC 4654 (Admin) *per* Aikens LJ at [41], *Love v USA* [2018] EWHC 172 (Admin); [2018] 1 WLR 2889 *per* Lord Burnett CJ at [22].

48. Section 83A prescribes the circumstances in which extradition would not be in the interests of justice. Two conditions must both be fulfilled. First, section 83A(2)(a) imposes a threshold or qualifying condition. Read with section 83A(6), this threshold condition is that activity which was material to the commission of the extradition offence, and which is alleged to have been performed by the requested person, was performed in the United Kingdom.

49. If (and only if) the threshold condition imposed by section 83A(2)(a) is satisfied, the court must then consider the seven specified matters in order to determine whether extradition should not take place: section 83A(2)(b), *Dibden* at [18], *Atraskevic v*

Prosecutor General's Office, Republic of Lithuania [2015] EWHC 131 (Admin) *per* Aikens LJ at [13].

50. The seven specified matters that must be considered have no necessary hierarchical weight. They are matters that the court must consider to reach an overall evaluative judgment as to whether extradition would not be in the interests of justice: *Shaw* at [40], *Atraskevic* at [14], *Dibden* at [18], *Love* at [43] – [44], *USA v McDaid* [2020] EWHC 1527 (Admin) at [43] – [44].

51. In *Love* Lord Burnett CJ and Ouseley J explained the purpose of section 83A at [22]:

> "In our judgment, section 83A is clearly intended to provide a safeguard for requested persons, not distinctly to be found in any of the other bars to extradition or grounds for discharge, including section 87 and the wide scope of article 8 ECHR. The safeguard is not confined to British nationals, but it is to be borne in mind that the United Kingdom is one of those countries which is prepared to extradite its own nationals. Its underlying aim is to prevent extradition where the offences can be fairly and effectively tried here, and it is not in the interests of justice that the requested person should be extradited. But close attention has to be paid to the wording of the statute rather than to short summaries of its purpose or to general Parliamentary statements. The forum bar only arises if extradition would not be in the interests of justice; section 83A(1). The matters relevant to an evaluation of "the interests of justice" for these purposes are found in section 83A(2)(b). They do not leave to the court the task of some vague or broader evaluation of what is just. Nor is the bar a general provision requiring the court to form a view directly on which is the more suitable forum, let alone having regard to sentencing policy or the potential for prisoner transfer, save to the extent that one of the listed factors might in any particular case require consideration of it."

52. In *Patman and Safi v Specialist Criminal Court in Pezinok, Slovakia* [2020] EWHC 3512, Swift J said (in the context of section 19B which is in materially identical terms to section 83A) at [18]:

> "the notion of "interests of justice" is not a matter at large; rather it is carefully calibrated by the matters listed at section 19(3). The objective pursued by section 19B, a curb on claims to exorbitant jurisdiction, is also relevant because this too informs the choice of the matters which are listed in section 19B(3)."

53. As to the relative importance of each of the factors, Simon J said in *Dibden* at [18]:

> "The relative importance of each matter will vary from case to case, and the weight to be accorded to the specified matters may also vary. The court will be engaged in a fact-specific exercise in order to determine whether the particular extradition would not be in the interests of justice."

54. Where a forum bar is raised, it is for the first instance judge to determine, in accordance with section 83A, whether extradition would not be in the interests of justice. On appeal, the role of the appellate court is prescribed by 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 subsection (3) or the conditions in subsection (4) are satisfied.
>
> (3) The conditions are that—
>
> (a) the judge ought to have decided a question before him at the extradition hearing differently;
>
> (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.
>
> (4) The conditions are that—
>
> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the judge deciding a question before him at the extradition hearing differently;
>
> (c) if he had decided the question in that way, he would have been required to order the person's discharge.
>
> (5) If the court allows the appeal it must—
>
> (a) order the person's discharge;
>
> (b) quash the order for his extradition.
>
> …"

55. Section 104(3) permits an appeal to be allowed only if the district judge ought to have decided a question before him differently with the result that the appellant would have had to be discharged. It follows that it is not the role of the appellate court to undertake the exercise of evaluative judgment that is required by section 83A afresh, but rather to determine whether the judge's decision was wrong. This was explained in *Love* at [25] – [26]:

> "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. …
>
> 26. The true approach is more simply expressed by requiring the appellate court to decide whether the decision of the district judge was wrong. …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."

56. It is clear, therefore, that the focus is on the first instance judge's judgment, rather than the appellate court's own evaluation of the statutory test. However, where the first instance judge's analysis is flawed, it may then be necessary for the appellate court to undertake that evaluation for itself, in order to determine whether the judge ought to have determined a question differently.

Application to admit fresh evidence

57. On 17 May 2023, and 12 October 2023, the appellant applied for permission to adduce fresh evidence (that is, evidence that was not put before DJ Rimmer) on this appeal. The fresh evidence comprises statements from the appellant's solicitor exhibiting medical evidence concerning the appellant's medical condition, an updating proof of evidence from the appellant, and two press releases from the US Attorney's Office for the Southern District of New York following the sentencing of Karl Greenwood on 12 September 2023.

58. The medical evidence comprises a letter from Dr Alison Whittaker, Consultant Respiratory Physician of University Llandough Hospital, dated 17 April 2023, and a letter from Dr Richard Wheeler, Consultant Cardiologist, dated 14 September 2023 (together with other documentation, such as notices of appointments). Dr Whittaker says that the appellant was diagnosed with severe asthma in 2019 and has been steroid dependent since 2020. The medication that the appellant requires is expensive (annual cost approximately £34,000), and the costs are being met by the NHS. If the appellant were unable to access his medication then he would be significantly more vulnerable and at risk of further potentially severe health complications. He is at risk of ischaemic heart disease and a high risk of significant coronary artery disease.

59. On 23 May 2023, the respondent provided confirmation that the Federal Bureau of Prisons in the USA is able effectively to manage the appellant's medical conditions. It said that the Bureau of Prisons' formulary listed most of the appellant's medications. It did not list three of his medications, including dupilumab. Dupilumab is authorised for prescription in the US and if "other medications in the same or similar classes have failed to adequately control a condition, BOP physicians can pursue brand name medications… Therefore, it is possible Mr Hamilton could be prescribed dupilumab…" Dr Whittaker responded that "it is vital that there is a guarantee that [Dupilumab] would be made available to him without a gap or delay should he be extradited."

60. In his updated proof of evidence, the appellant says that since 2021 he has provided consultancy services, free of charge, to a company that provides financial services technology to underserved and overlooked members of the public, such as the visually impaired and the elderly. He says that if he were extradited, the company would suffer a significant detrimental impact without the benefit of his technical expertise. He also expresses concern about his health if he is extradited.

61. The press releases from the US Attorney's Office for the Southern District of New York show that on 16 December 2022 Karl Greenwood, who co-founded OneCoin with Ruja Ignatova, pleaded guilty to offences of wire fraud and money laundering.

62. We have considered the appeal on the assumption that the fresh evidence is admitted but will return to the question of whether it should be admitted at the end of this judgment.

Submissions

Appellant

63. Ben Lloyd, on behalf of the appellant, submits that the judge was wrong to conclude that extradition was not barred by reason of forum pursuant to section 83A. He says the judge ought to have reached the opposite conclusion, which would have resulted in the appellant's discharge. His case is that the judge failed to identify the principles he applied, and that he impermissibly adopted submissions made by the respondent. As a result, he did not resolve significant issues in dispute between the parties as to the law (or that, if he did, he adopted legal and factual errors made by the respondent) and did not explain why he had not accepted the appellant's arguments.

64. As to each of the statutory factors, the appellant submits:

(a) (place where most of the loss/harm occurred). The judge failed to recognise that part of the harm was that occasioned by the underlying OneCoin fraud, failed to quantify the loss or harm, focussed on the "principal" harm, rather than (as required by the statute) "most" of the harm, wrongly found that US financial systems suffered greater harm than those in the UK and, in respect of the wire fraud, wrongly concluded that harm had been suffered by Mr Armenta.

(b) (the interests of any victims of the extradition offence). The judge failed to take account of the fact that the interests of victims in the USA had already been served by prosecutions in that jurisdiction, and that there had been a civil settlement, whereas victims in the UK had not been served by any domestic prosecution and had been critical of the police's decision to close the investigation. The judge was also wrong to find that there was no certainty of a prosecution in the UK: if a domestic prosecution were certain then extradition could not proceed anyway, because of the effect of section 76A.

(c) (any belief of a prosecutor that the UK is not the most appropriate place for a prosecution). The basis for Ms Graves' professed belief that the UK was not the most appropriate place for a prosecution was "flimsy" because she had not seen the evidence and had based her view on a conversation with the former police investigating officer. She had also made errors in her statement in that she had wrongly stated that the harm to OneCoin victims was not quantifiable, she erroneously thought US victims would have to give evidence in the UK, she failed to focus on the availability of evidence necessary to prove the offences, she gave no estimate of when a trial could take place, and she applied only the most cursory attention to the appellant's UK connections. Further, the judge had come to a different view from Ms Graves as to the impact of the appellant's UK connections. The judge ought to have attached no weight to her evidence.

(d) (whether evidence necessary to prove the offence is or could be made available in the United Kingdom). The judge wrongly considered that this could never be a factor against extradition. He wrongly failed to recognise that the sole focus is on the evidence that is necessary to prove the offence, and as a result wrongly considered that this was a neutral factor, when it was a factor that weighed strongly against extradition.

(e) (any delay that might result from proceeding in one jurisdiction rather than another). The judge was wrong to find this factor weighed heavily in favour of extradition. It weighed against extradition or, alternatively, was neutral. The judge cited no authority for his conclusion, and there is no precedent for his finding.

(f) (desirability/practicability of all proceedings taking place in one jurisdiction). The judge was wrong to find that this weighed in favour of extradition. The judge decided to discharge Mr MacDonald, who was jointly charged with the appellant. It followed that this factor should have weighed heavily against extradition. Further, the judge erred in finding that other "co-defendants" were in the USA (because they have now all either pleaded guilty or been found guilty) and erred in leaving out of account the fact that other proceedings had taken place in other jurisdictions.

(g) (D's connections with the UK). The judge was right to find that this weighed heavily against extradition. The fresh evidence adds additional strength to this factor. It shows that the appellant is receiving extensive treatment for severe and potentially life threatening asthma and heart disfunction. Evidence showed that there were substantial deficiencies in the healthcare available in the Metropolitan Detention Centre where the appellant is likely to be incarcerated. Further, the appellant had answered questions in interview and those answers were now likely to be used in the USA proceedings. That provides a further connection to the UK: *Osborne v United States of America* [2022] EWHC 35 (Admin) *per* Lane J at [6].

65. Mr Lloyd says that the judge appeared to perform a "balancing exercise" rather than an evaluation of the respective weights of the specified factors, and that he did not identify which factors weighed more heavily with him.

Respondent

66. The respondent submits that section 83A carefully curtails the factors that a judge must consider when assessing the forum test. The appellant's broader discussion as to the interests of the public in the reporting of the OneCoin fraud or a comparative assessment of investor loss is entirely misplaced. The judge's evaluation that the USA is the principal location of the harm is consonant with a finding that most of the harm occurred there. He was entitled to conclude that victim interests would be met by a prosecution and, in the absence of any ongoing investigation in the UK or any other state with criminal jurisdiction over the conduct in the extradition offences, the USA was the only jurisdiction where there was some prospect of a prosecution. The appellant has not established that the judge's decision is wrong, and the appeal should therefore be dismissed.

Discussion

67. The District Judge was faced with a hearing raising six substantial issues (five by the end of the hearing). Each of them was difficult and complex. He produced a detailed judgment in which he addressed and made findings on each of the disputed issues. Leaving aside the question of forum, it is not arguable that his decision in respect of any of the other issues was wrong. So far as the question of forum is concerned, the judge faithfully and accurately recorded, in detail, the submissions that were made by each of the parties. He concluded that, on most of the issues, the submissions of the respondent were to be preferred. He adopted the structure, and some of the language, of those submissions. It was not necessarily wrong for him to do that, but it was necessary to explain why he was rejecting the submissions of the appellant and to ensure that his conclusions on the forum test were consistent with, and took account of, the findings he made elsewhere in the judgment.

68. We have concluded that there are a number of flaws in the judge's reasoning:

(1) The judge accepted the view of Ms Graves that the UK is not the most appropriate jurisdiction for a prosecution. He considered that she gave cogent reasons for that view. We respectfully disagree. For the reasons explained in more detail below, we do not consider that Ms Graves has given any convincing reason as to why the UK is not the most appropriate jurisdiction for a prosecution. This has a direct impact on the issue that arises under s83A(3)(c) (the belief of a prosecutor that the UK is

not the most appropriate jurisdiction for prosecution) but also those that arise under s83A(3)(b) (the interests of any victims) and s83A(3)(d) (availability of evidence) and s83A(3)(f) (desirability and practicability of all prosecutions taking place in one jurisdiction). It also has an overarching impact on the ultimate assessment that must be made, namely whether extradition would not be in the interests of justice.

(2) The judge discharged Mr MacDonald, but he did not take account of this when determining the forum question. He approached that question on the assumption that there was a binary choice between extraditing both or neither. He did not separately address the question of whether the appellant should be extradited alone, taking account of his decision to discharge Mr MacDonald (with the consequence that any prosecution of Mr MacDonald would necessarily take place in the UK). This was relevant to, at least, factor (f) (desirability of all prosecutions taking place in one jurisdiction).

(3) On each of the factors identified in section 83A(3) (with the exception of factor (d)) the judge accepted the submissions of the respondent, and framed his judgment by reference to the language used by the respondent. In doing so, it is not always clear that he fully grappled with the arguments advanced on behalf of the appellant, or why those arguments were rejected.

(4) Perhaps as a result of simply adopting language that had been used by one of the parties, the judge departed from the strict terms of the statutory test. Thus, for example, he referred to the "principal" place where harm had been caused, whereas the statute requires an assessment of where "most" of the harm has been caused.

(5) It is not clear why the judge considered that factor (f) (desirability of all prosecutions taking place in one jurisdiction) weighed in favour of extradition, given that there was no clear evidence that anybody other than the appellant remains to be prosecuted in the USA, that other prosecutions have taken place in other countries, and that any prosecution of Mr MacDonald will now, necessarily, be in the UK.

(6) The judge did not have the benefit of the fresh evidence. The appellant could not have put that material before the judge because it did not exist at the time of the hearing. It is relevant to the forum test.

69. For these reasons, we consider it necessary to conduct our own fresh analysis of the statutory factors relating to the interests of justice in order to decide whether extradition would not be in the interests of justice.

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

70. The appellant is correct that domestic sentencing principles require a court to take account of harm caused by the underlying offending when sentencing an offender for laundering the proceeds of that offending (although the initial assessment of harm is based on the value of the money laundered): Sentencing Council's guideline on money laundering. Here, the underlying offending took place all over the world. The judge was entitled to conclude that it was impossible to conclude where most of these losses

occurred, and to focus on where most of the harm that had resulted from the extradition offences occurred or was intended to occur. That is what section 83A(3)(a) requires.

71. There are two features of the offending that make the analysis of harm difficult. One is that the underlying alleged substantive offence (at least so far as count 1 is concerned) is money laundering. The harm that is caused by money laundering is less tangible than harm caused by offences against the person or property. It comprises damage to the integrity of the banking system, tarnishing its reputation and eroding public trust and confidence. So far as count 2 is concerned, Mr Armenta might (at a highly technical and theoretical level) be said to be a victim. He was not a victim in any true sense: what was stolen from him had been stolen by him. The judge said (but in the context of factor (b)) that he was "untroubled by what I consider to be the 'red herring' of Armenta's technical (or moral) status as a victim." We agree that Mr Armenta is not properly to be regarded as a victim. Leaving the position of Mr Armenta to one side, the harm occasioned by count 2 concerns the misuse of the banking system.

72. The second factor that makes assessment of harm more difficult is that it is a conspiracy. Different conspirators had different roles. The "extradition offence" is the offence allegedly committed by the appellant (rather than other alleged co-conspirators): section 64 of the 2003 Act defines "extradition offence" by reference to the requested person's conduct. Further, although this is not spelt out in the indictment, it is clear from the way in which the case is put in the request for extradition that the principal co-conspirator is said to be Mr Armenta. His role within the conspiracy included the laundering of funds through US accounts. Within the overall scheme of the conspiracy, Mr Armenta was principally responsible for the harm caused in the US, whereas the appellant (and Mr MacDonald) were principally responsible for the harm caused in the UK. Mr Armenta has already been prosecuted and sentenced, and a substantial sum of money has been forfeited from him.

73. For these reasons, it is relevant to focus on the conduct of the appellant in entering into the conspiracy, and the harm that the appellant caused (or intended to cause), rather than the harm caused by other co-conspirators. That is so both for the purpose of analysing where "most of the harm" occurred (as required by sub-factor (a)) and also for the purpose of analysing the interests of justice test by reference to the statutory factors.

74. So far as count 1 is concerned, funds were laundered through both US accounts and accounts in the UK. On a strictly arithmetical or balance sheet basis, there may be force in Mr Caldwell's argument that a greater share of the overall laundering conspiracy took place in the US than the UK. That is because: (a) the total amount laundered through US accounts appears to have been in the region of $150M (paragraph 7 above) whereas the amount transferred through the UK appears to have been a fraction of that (paragraphs 9-11, 16 and 18 above) (b) subject to the monies that were transferred through China, Hong Kong and Germany, all of the monies that were transferred to London came from US accounts, (c) before being transferred to London the monies had been transferred through a number of US accounts (the "layering"), (d) HSBC suspended VAM's London account in February 2016, so after that point it could not be used to launder funds, (d) there were a number of discrete transactions which involved transfers within the US system which did not result in a transfer to the UK.

75. So far as the appellant's role in the conspiracy is concerned, however, the greater share of the laundering that is attributable to his conduct occurred in the UK. He does not appear to have had control of any US accounts. He transferred large amounts of money through a number of different UK accounts, including the VAM London account and his personal account. The harm that he directly caused, and intended, was the misuse of the UK banking system for the purpose of money laundering. The greater share of the harm caused by him was in the UK, not the US.

76. So far as count 2 is concerned, most of the transactions appear to have taken place in Hong Kong or China. The underlying facts set out in the extradition request suggest that at least some of the funds were routed through UK accounts, and there is no evidence that any greater harm was caused in the US compared to that caused in the UK.

77. It follows that most of the harm caused by the extradition offences took place in the UK. Even if that is not correct, insofar as harm was sustained in the US that was primarily the responsibility of Mr Armenta rather than the appellant or Mr MacDonald. Mr Armenta has already been prosecuted, convicted, and sentenced. It follows that the interests of justice (viewed through the prism of where most of the harm occurred) militates in favour of prosecution in the UK rather than the USA.

78. If the harm caused to those who lost money in the OneCoin fraud is taken into account, then, as the judge observed, it appears likely that most of the harm occurred in China, rather than the US.

79. It is clear from the authorities that the question of where most of the harm occurred is usually to be treated as a "very weighty factor" in the overall assessment of where the interests of justice lie: *Love per* Lord Burnett CJ at [28], *Scott* at [37].

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

80. The victims of the extradition offences can be taken as including the underlying victims of the OneCoin fraud. The extradition offences had the effect of making it more difficult to trace and recover the sums of money that they had paid as intended OneCoin investments.

81. Insofar as victims reside outside the USA and the UK, their interests would be served equally by a prosecution of the appellant in the USA or the UK. Insofar as those victims reside in the USA, their interests have been vindicated by the prosecutions that have already taken place in the USA, including of Mr Greenwood (so far as the underlying fraud is concerned) and of Mr Armenta (so far as the laundering of funds within the USA is concerned) and also by the outstanding proceedings against Ruja Ignatova.

82. So far as victims in the UK are concerned, everything else being equal, their interests may be best served by a prosecution in the UK – see *Love per* Lord Burnett CJ at [29]:

> "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."

83. On the other hand, the interests of victims would be better served by a prosecution in the US rather than no prosecution in the UK. The evaluation of this factor therefore necessarily requires consideration of the practicality of criminal proceedings taking place in the UK.

84. It is common ground that the dual criminality criterion is satisfied. In other words, subject to making the evidence available, the appellant could be prosecuted in the UK. Much of the evidence already is available. Insofar as further evidence is required from the respondent, that can be provided in response to an international letter of request. No obstacle has been identified by the parties to evidence in the hands of the US authorities being made available to the police and CPS. The CPS has not made a decision that there should not be a prosecution in the UK, and it has not identified any obstacle to a prosecution in the UK. Mr Lloyd submitted that if a forum bar objection succeeds it naturally follows that consideration should be given to prosecution in the UK, albeit there is no statutory obligation to do so. Mr Caldwell did not challenge that proposition, which is supported by *Love* (see paragraph 111 below). There is logical force in Mr Lloyd's submission. The question of "forum bar" only falls to be considered if the requested person's alleged conduct would constitute an offence in the UK (section 64(3)(b) and section 78(4)(b)). The forum bar can only operate where a substantial measure of the requested person's relevant activity was performed in the UK (section 83A(2)(a)). On the facts alleged against the appellant, his conduct (if proved) amounts to an offence within the UK. It follows that a prosecution could, in principle, take place in the UK. The CPS have not identified any reason why the application of the test in the Code for Crown Prosecutors would not result in a decision to prosecute. None of this involves any impermissible speculation; it is the natural consequence of the operation of the forum test on the facts of this case. Moreover, victims in the UK are well placed to influence the police to carry out an investigation with a view to a prosecution in the UK.

85. It follows that there is a choice between a very high likelihood of prosecution in the USA if extradition takes place as against a perhaps less high likelihood that a prosecution would take place in the UK (which might better advance the interests of victims in the UK). We consider that this factor does not weigh significantly in either direction.

(c) any belief of a prosecutor that the United Kingdom is not the most appropriate jurisdiction in which to prosecute D

86. Ms Graves expresses the clear view that the UK is not the most appropriate jurisdiction in which to prosecute the appellant. That is a factor that weighs heavily in the balance, if the view is sound. Conversely, if it is based on flimsy material, or is ill-considered or even irrational then it will carry no weight at all. Similarly, the mere assertion the UK is the most appropriate jurisdiction in which to prosecute a requested person does not, in itself, carry any significant weight: *Shaw* at [51] – [53], *Dibden* at [35], *Love* at [54] and *Wyatt* at [18] – [20].

87. Ms Graves is a specialist prosecutor employed by the Specialist Fraud Division of the CPS. She does not merely assert a belief that the UK is not the most appropriate jurisdiction in which to prosecute the appellant. She gives an account of the background, the UK investigation, the current position, and the statutory factors set out

in section 83A(3) in a detailed analysis. There are, however, a number of difficulties with her analysis.

88. Ms Graves had no involvement in the underlying investigation. The CPS employee who had been involved has since left. Ms Graves has not directly considered the available evidence. Understandably, Ms Graves considered the question of forum in respect of both the appellant and Mr MacDonald, rather than in respect of the appellant alone. That is because, at the time, the extradition request concerned both men. Mr MacDonald had not formed any part of the UK investigation. The police had not considered communications between the appellant and Mr MacDonald. That material had been in their possession, but it had not been considered because it had not responded to the search terms that they had deployed when carrying out electronic searches of the material. It was the US authorities that identified the emails between Mr MacDonald and the appellant.

89. In the light of the discharge of Mr MacDonald, and in the light of the evidence identified by the US authorities, the issue falls to be considered in a completely different context. There is no prospect of a joint prosecution of the appellant and Mr MacDonald in the USA. Absent extradition, the only jurisdiction in which such a prosecution can take place is the UK. Further, the US authorities have identified relevant evidence that is in the possession of the UK police which had not previously been considered by the police or CPS.

90. Ms Graves approaches much of her analysis by reference to the broad underlying offending ("The criminality surrounding this investigation was wide-ranging and included the cryptocurrency called OneCoin. As OneCoin was marketed worldwide, there was interest into various money laundering investigations by several jurisdictions"). However, the primary focus should be on the extradition offence with which the appellant is charged. His conduct took place within the UK and most of the harm directly occasioned by his activities was in the UK. The UK police investigation failed to identify potentially critical incriminating evidence which was in its possession. That material has now been identified as a result of the work done by the US authorities, and it is available to be deployed in a criminal investigation. Insofar as further evidence is needed, it can be provided by the US authorities. Ms Graves does not address these important considerations. Where Ms Graves addresses the individual statutory factors, she has reached an assessment which differs from that reached by the judge, and from that reached by us. The one factor that she presumably recognises as weighing against extradition is the appellant's connection with the UK. That is dealt with summarily with the recognition "It is accepted that both defendants reside in the UK and have family ties here", but without any analysis of the strength and depth of the appellant's connections with the UK and how that impacts on the appropriate jurisdiction for prosecution.

91. For all these reasons we do not consider that any weight should be attached to Ms Graves' belief. We leave it out of account and assess where the interests of justice lie by reference to the other statutory factors.

(d) whether evidence necessary to prove the offence is or could be made available in the United Kingdom

92. It is common ground that the evidence that is necessary to prove the offence is or could be made available in the UK. The issue is how that conclusion should then be factored into the overall "interests of justice" test. If the evidence that was necessary to prove the offence was not, and could not be made, available in the UK then that would be a factor weighing in favour of a conclusion that the interests of justice require extradition. Otherwise, there could be no prosecution. Conversely, the fact that all the evidence is or can be made available in the UK is capable of being a factor that weighs against extradition: *McDaid* at [27] and [47]. Whether it does so or not depends on the particular circumstances. Where the evidence is not already in the possession of the UK authorities, and where it would involve a great deal of effort and expense to obtain the evidence, then factor (d) might not weigh against extradition (although in *McDaid* it did weigh against extradition even though expense and inconvenience would be involved in obtaining the evidence). In the present case, it seems likely that much (if not quite all) of the evidence is already in the possession of the UK authorities. The remainder of the evidence that is necessary to prove the offences is (according to Ms Graves) evidence as to the flow of funds. This is likely to be documentary evidence that could be provided without any significant inconvenience or cost.

93. When taken together with the facts that the alleged offences were committed in the UK and that they can be prosecuted in the UK and that the appellant is a UK national who resides in the UK, the fact that the evidence necessary to prove the offence can be made available to the UK authorities weighs in favour of a UK prosecution, and against extradition to the US.

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

94. Ms Graves' evidence was that proceeding in the UK would cause some delay. That is hardly surprising given that the investigation was closed for lack of evidence 4 years ago. The judge was entitled to take judicial notice of the current delays to crown court trials. He took account of the expert evidence of Mr Dratel as to the position in New York. He was entitled to conclude that proceedings in this jurisdiction would probably involve more delay than a trial in the US. This does not depend on precedent or authority. It is a factual assessment soundly based on evidence and permissible judicial notice.

95. That said, we do not consider that the position is quite as stark ("much more protected delay") as the judge suggested.

96. The UK authorities would not be embarking on an investigation from a standing start. They will have the benefit of the work that has already been carried out by the City of London Police. They will also have the benefit of the material that has been gathered by the US authorities. What is left is likely to be largely a paper exercise of analysis, rather than a long drawn out police investigation. If a prosecution is then brought and the appellant pleads guilty then there is no reason why there should be a lengthy delay before sentencing. If the appellant contests the charge then the current backlog of cases in the crown court means that it is likely to be some time before a trial would take place. The judge suggested that might be 1-2 years. Neither party took issue with that forecast.

97. The US authorities have completed their investigation and a grand jury has returned an indictment. To that extent, the case in the US is ahead of any case in the UK. However, the evidence does not suggest that the time taken between arraignment and trial in the US is any shorter than would be the case in the UK. The judge accepted the evidence of Mr Dratel and considered that the 70-day Speedy Trial Act timeframe would not be effective. Mr Dratel's evidence suggests that trials are taking place "years" after arrest. His current case had initially been listed for June 2020 but had been moved to March 2022. That suggests that the time between arraignment and trial in the appellant's case might be at least as long, or even substantially longer, in the US than in the UK.

98. The dynamics and uncertainties are such that it is not possible to make any firm forecast as to when a trial would take place in either the UK or the US. It is likely that it would occur sooner in the US than the UK, if only because the investigative stage in the US has concluded. This factor therefore weighs in favour of extradition, but it does not carry great weight.

(f) desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction

99. Section 83A(3)(f) requires the court to have regard to the jurisdiction in which witnesses, co-defendants and other suspects are located, and the practicality of the evidence of such persons being given in the United Kingdom or in jurisdictions outside the United Kingdom.

100. The potential prosecution that most directly relates to the extradition offences is the prosecution of Mr MacDonald on joint charges for precisely the same offences. It is highly desirable that any prosecution of Mr MacDonald takes place in the same jurisdiction as a prosecution of the appellant. It cannot now take place in the US because Mr MacDonald has been discharged. No practical obstacle has been identified to Mr MacDonald and the appellant being jointly prosecuted in the UK.

101. A further prosecution that relates to the extradition offences is that of Mr Armenta. That has already taken place, and he has been sentenced. There is a public interest in co-conspirators being dealt with consistently even if they are not subject to a joint trial – and this can weigh in favour of extradition: *Enjinyere v United States of America* [2018] EWHC 2841 (Admin) *per* Lord Burnett CJ at [38]:

> "the advantage that flows from having all prosecutions in one jurisdiction is not limited to the possibility of trying all co-defendants at the same time. There are also benefits from trying all co-defendants under the same law, before the same courts and ensuring that all those convicted are sentenced under the same sentencing regime"

102. Aside from Mr Armenta, the New York court has been seized of several other prosecutions that result from the OneCoin fraud and associated criminality, some of which have proceeded to sentencing. None of those appear to be directly concerned with the charges facing the appellant.

103. It is likely that most of the evidence for a prosecution will be documentary evidence. Witnesses are likely, in the main, to be professional or expert witnesses who could be

instructed. That is so, wherever a prosecution takes place. Insofar as direct witnesses are required in respect of the appellant's conduct, any witness from HSBC bank is likely to be located in the UK. The same is true of any other witness who might be able to give direct evidence as to the appellant's activities (because he was in the UK throughout). It is practical for all these witnesses to give evidence in the UK. It is not suggested that there are any other suspects that are directly related to the extradition offences. If the appellant were prosecuted in the US then Mr MacDonald would not be a co-defendant, but he would, potentially, be a witness. There is no suggestion that it would be practicable for Mr MacDonald to give evidence in the US.

104. This factor weighs against extradition.

(g) D's connections with the United Kingdom

105. This was a factor that the judge considered weighed heavily against extradition. We agree. The appellant has strong connections with the UK. He is a British national. He has lived in the UK his whole life. He currently lives with his wife and two of his daughters. He is of good character. There is no suggestion that he has any real connection with the US.

106. The fresh evidence adds significant additional weight to this factor. The appellant has health conditions that, untreated, are potentially life threatening. There is no doubt that those conditions could be treated effectively in the US, and the appellant does not now suggest that extradition would be incompatible with article 3 ECHR. However, he has a close and dependent relationship with his treating clinicians. With evident difficulty, they have alighted on a combination of medication that appears to be effective for the appellant. Three of the medicines that are currently being used are not readily and immediately available to those in custody in the US. Extradition would completely dislocate the appellant's relationship with his current medical team, would likely result in a pause in some of the medication, and would likely result in a period of uncertainty whilst those responsible for his care in the US work out the best treatment plan for him. The appellant's relationship with his treating doctors, taken together with his treatment plan, represents a significant additional connection with the UK.

107. The appellant also relies on the fact that he was subject to a police interview in the UK, and that he was not made aware that this might be relied on by the US authorities. We do not consider that this carries any additional weight. Quite apart from that, the appellant has a strong connection with the UK.

Overall assessment

108. The appellant is a British national who has lived in the UK his entire life and who is dependent on his doctors here for medical treatment for conditions that, untreated, are potentially life-threatening. The conduct which is said to amount to the extradition offences took place when he was in the UK. The greatest share of the direct harm directly occasioned by the appellant's conduct occurred in the UK rather than the US. Victims in the US have secured a measure of vindication by the prosecutions (including of Mr Armenta) that have taken place. There are also UK victims, but there has been no UK prosecution. All the evidence necessary for a prosecution can be made available in the UK. The appellant's putative co-defendant can be tried in the UK, but not the US. It is highly desirable, and it is practicable, that they be tried in the same jurisdiction.

Proceedings in the US would probably conclude more quickly than in the UK, but it is not possibly to quantify how much more quickly, and that factor is not sufficiently weighty to change the overall assessment of where the interests of justice lie. The expressed belief of a CPS prosecutor as to the most appropriate location for a prosecution does not carry any weight, for the reasons we have given. We consider that the most appropriate location for a prosecution is the UK. The judge should have decided, having regard to the specified statutory matters relating to the interests of justice, that extradition should not take place. We would have reached this conclusion irrespective of the fresh evidence, but it is reinforced by the fresh evidence. If the judge had decided that extradition should not take place, then he would have been required to discharge the appellant: section 83A(1), section 79(1)(e) and section 79(3). It follows, by application of section 104(3), that we allow the appeal.

Fresh evidence

109. Section 104 provides that an appeal may be allowed in two different circumstances. The first (section 104(3)) is where the judge ought to have decided a question before him differently, with the result that the judge would have been required to order the requested person's discharge. The second (section 104(4)) is where a new issue or fresh evidence is available, and that would have resulted in the judge deciding a question differently, with the result that the judge would have been required to order the requested person's discharge. The principles regulating the admission of fresh evidence under section 104(4) were discussed by Sir Anthony May, President of the Queen's Bench Division, in *Hungary v Fenyvesi* [2009] EWHC 231 (Admin).

110. In the present case, we have allowed the appeal under section 104(3). That is because, irrespective of the fresh evidence, we consider that the appellant should have been discharged. It is not therefore necessary to consider whether the appellant should be given permission to rely on the fresh evidence.

Postscript

111. In *Love,* Lord Burnett CJ said at [125] – [126]:

> "125. We emphasise… that it would not be oppressive to prosecute Mr Love in England for the offences alleged against him. Far from it. If the forum bar is to operate as intended, where it prevents extradition, the other side of the coin is that prosecution in this country rather than impunity should then follow... Much of Mr Love's argument was based on the contention that this is indeed where he should be prosecuted.
>
> 126. The CPS must now bend its endeavours to his prosecution, with the assistance to be expected from the authorities in the United States, recognising the gravity of the allegations in this case, and the harm done to the victims. As we have pointed out, the CPS did not intervene to say that prosecution in England was inappropriate. If proven, these are serious offences indeed."

112. The same observations apply, with equal force, to the present case. The consequence of the appellant's success on this appeal is not that he secures impunity; it is that he should be answerable to the law in the UK rather than the US.

Outcome

113. The judge was wrong to find that extradition is in the interests of justice. The appeal is allowed. We order the appellant's discharge and quash the request for extradition.