SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2023] SC EDIN 24

E52/21 & E61/22

DECISION UNDER SECTIONS 79, 87 AND 91 OF THE EXTRADITION ACT 2003

BY SHERIFF N MCFADYEN

in the extradition application by

THE LORD ADVOCATE

Representing THE UNITED STATES OF AMERICA

Applicant

against

NICHOLAS ROSSI otherwise known as ARTHUR KNIGHT

Requested Person

Lord Advocate: Cameron, AD,
Stephen, advocate; the Crown Agent, Edinburgh
Requested Person: Bovey KC, Shand, advocate; Messrs Murray Ormiston, Solicitors, Aberdeen

EDINBURGH 2 August 2023

[1] On 11 November 2022 in the initial stages of an extradition hearing under section 78 of the Extradition Act 2003 I held that the requested person, who goes by the name of Arthur Knight, or sometimes Arthur Knight-Brown, is Nicholas Rossi, the man wanted for extradition to the United States in respect of a charge of rape in Utah in September 2008 (the first extradition request, case E52/21). On 15 February 2023 Sheriff C Dickson made the same finding in respect of a charge of rape in Utah in November and December 2008 (the second extradition request, case E61/22). It was agreed in the course of the proceedings in respect of both requests that the remainder of the extradition hearings would ultimately be

considered together, although there were some features and potential arguments which related only or more significantly to the first extradition request.

[2] I heard evidence in respect of the conjoined hearing between 27 and 30 June 2023 on behalf of the Lord Advocate and the requested person in respect of the outstanding issues to be determined in these extradition requests and on 30 June and 12 July I heard submissions from parties in relation to these outstanding issues and adjourned until 19 July to give my decision.

[3] On that date the requested person was medically unfit to attend court and the hearing was further adjourned until today for me to give my decision, but also to allow consideration of a motion for adjournment under section 91 of the 2003 Act in respect of the medical condition of the requested person which had rendered him unfit to attend court. When the matter called today counsel for the requested person made no further motion in that regard.

[4] Although the 2003 Act requires decisions to be made sequentially it was agreed that it was convenient to hear evidence and submissions on all the matters which required to be addressed.

Evidence

[5] Evidence would normally be presented in turn by the Lord Advocate and the requested person on the statutory analogy of summary criminal procedure (section 77 of the 2003 Act), although sometimes in extradition cases parties agree to reverse the conventional order and, unlike criminal trials, in practice it is often the defence which calls most evidence. In this case, for reasons largely to do with the availability of witnesses who required to give evidence remotely, it was agreed that evidence could be heard in subject-related chapters

with evidence sometimes taken out of sequence between the parties and out of normal sequence. I have summarised the evidence under subject headings rather than in the order in which witnesses were called.

[6] The evidence presented related to the health of the requested person (including physical health, but largely mental health), prison conditions in Utah and matters of law and practice in the United States in respect of criminal procedure and sentencing and parole practice, including in respect of credit for time spent on remand pending extradition, and as regards possible sequence of prosecutions in respect of different jurisdictions, state and federal. The requested person gave evidence more generally and was supported, as regards his treatment and mobility in Saughton Prison, by another prisoner.

[7] Parties entered into a joint minute agreeing many of the Lord Advocate's documents to which I was referred, including the medical records of the requested person (bundles C-E, H and I), as well as the Utah Board of Pardons and Parole published Factors Considered in Decision Making and two Utah news articles lodged by the requested person (defence productions 6-8), but not the affidavits by US officials lodged by the Lord Advocate, which were nonetheless admissible under 202 of the 2003 Act.

Medical evidence

[8] Evidence was given by two consultant psychiatrists and a prison general practitioner. Dr Kumal Choudhary, a consultant psychiatrist, who is also medical director of an acute mental health service at the Huntercombe Group, Roehampton Hospital, was called by the requested person and adopted his report dated 30 May 2023 (defence production 2). He had seen medical records of the requested person and interviewed him by video link at Saughton prison. He had noted the requested person's belief that his mental health was

deteriorating whilst in prison, although his assessment and the history did not sign-post acute mental illness when he was assessed. He felt that a lot of what the requested person was saying was about legal proceedings, rather than symptoms of a mental illness that was causing him distress.

[9] He had noted from the medical case notes correspondence dated 13 October 2020 of a Dr Paul Dedman, who he understood to be a private psychiatrist. Dr Dedman had observed that the requested person had a past history of being diagnosed with ADHD in Dublin, that Post Traumatic Stress Disorder was diagnosed in his mid-twenties and he was brought up by Christian brothers children's homes where he was abused. In further correspondence dated 11 February 2021 Dr Dedman noted his concluded feeling that the requested person was very disabled with a combination of physical, psychosomatic and psychological symptoms which almost defied categorisation and diagnoses.

[10] Dr Choudhary, however, noted that the psychiatric liaison consultant at the Queen Elizabeth University Hospital (Dr Angela Cogan) had found no evidence of acute mental illness as of 17 December 2021. There was a note dated 24 September 2021 of his difficult behaviour there, including refusal to engage with rehabilitative interventions, which included physiotherapy, racially abusive behaviour and making of multiple complaints including assault by staff, although he had noted that when he spoke to the requested person he was pleasant, polite and engaging; he observed that he could present differently with different health care professionals. He had noted, from the medical notes, a long history of dissocial behaviours and disagreements with the health care services. He could not say what the position was in relation to the prison authorities, because he did not have access to the relevant notes.

[11] He concluded that the requested person's presentation was suggestive of Recurrent Depressive Disorder, the current episode being moderate, without psychotic symptoms, under reference to ICD-11 code 6A71.1 (i.e. the International Classification of Diseases for Mortality and Morbidity Symptoms) and it would also be suggestive of a personality disorder, although such a diagnosis would require multiple assessments (which could be assisted by psychological assessment) and as much additional information as could be obtained. A review of the prison notes and his current behaviour and interaction would help. At the end of the day, even if there was a personality disorder it was unlikely to change his clinical opinion and it would only be at the point when the patient reflected that he had a personality disorder and he was ready to make changes that benefit would arise.

[12] A personality disorder could involve entrenched behavioural traits, a frustrated relationship with parents etc., disregard for societal norms, volatile behaviour, seeing everything as black and white and frequent disruption and argument and obstructive behaviour, which could be characterised as conflict with professionals and people in authority. He could see such evidence in the medical records, in particular in disputes with health care professionals and where his demands were not met by individuals.

[13] There could be more than one clinical assessment and such diagnoses could co-exist; recurrent depressive disorder can be part of a personality disorder, representing crises. A personality disorder can affect all areas of individual functionality, problems with relationships, and holding down jobs. He did regard his wife quite highly and that was possibly a positive influence.

[14] In cross-examination he agreed that he had not mentioned a possible diagnosis of personality disorder in his report. He was asked to comment on his mental health as a possible barrier to extradition and he had not diagnosed personality disorder. He agreed

that diagnosis of personality disorder could involve different approaches, which could include challenging what the patient says: psychiatrists cannot take everything at face value, and would use multiple sources and not base a conclusion on a single encounter. People may also lie or exaggerate in order to get particular treatment or medication.

[15] The requested person had told him that he was not Rossi and said he had never been in the United States. He was not able to provide any information about his family history, but said he was born in Ireland and adopted at birth. The mental health assessment in his report was a summary of his presentation at that point in time. He noted low mood, which was not unusual in prison. He did not show much range of emotion.

[16] He had recorded that his presentation was suggestive of Recurrent Depressive Disorder, current episode Moderate, without psychotic symptoms, ICD-11 code 6A71.1. By 'suggestive' he meant that he would need collateral information to be able to give an accurate diagnosis. The requested person's situation would impact on his mood and he would not necessarily want to make a mental health finding if it was something that was manageable in the prison setting. He had based his assessment on what the requested person told him. A diagnosis of recurrent depressive disorder would require a history of at least two episodes separated by several months and that was not something that he could observe on one occasion.

[17] He agreed that a depressive episode

> "is characterised by a period of depressed mood or diminished interest in activities occurring most of the day, nearly every day during a period lasting at least two weeks accompanied by other symptoms such as difficulty concentrating, feelings of worthlessness or excessive or inappropriate guilt, hopelessness, recurrent thoughts of death or suicide, changes in appetite or sleep, psychomotor agitation or retardation, and reduced energy or fatigue. In a moderate depressive episode, several symptoms of a depressive episode are present to a marked degree, or a large number of depressive symptoms of lesser severity are present overall. The individual

> typically has considerable difficulty functioning in multiple domains' (ICD-11 code 6A71.1)."

[18] He agreed that he had reported

> "Based on Mr Knight's current presentation he is suitable to undergo disposal via the Criminal Justice System. There was little clinical indication to suggest he required transfer to a mental health facility for urgent assessment and / or treatment.
> Following a review of the medical notes supplied relating to Mr Knight, there is a long history of dissocial behaviours and disagreements with the healthcare services.
> On balance it is unlikely that further stay in the UK for mental health treatment would benefit Mr Knight, particularly due to his dissocial behaviours aimed towards healthcare professional (sic).
> In my professional opinion Mr Knights' current mental health issues do not present as a barrier to extradition. It should be possible for him to receive similar treatment in the US.
>
> From a mental health perspective, in relation to Mr Knight's mental health issues, this should not hinder his transportation to the US."

[19] In re-examination he said that he considered a diagnosis of personality disorder after the assessment, but he could not say that it was discussed with the requested person at the time. It was possible that the behaviour noted in the medical records, such as divisive and polarised views, changing presentation according to who he was talking to, low tolerance of professionals, dissatisfaction with opinions of primary carers and of professionals in emergency services and rudeness to such professionals was attributable to a personality disorder.

[20] Dr Angela Cogan is a consultant psychiatrist at the Queen Elizabeth University Hospital, Glasgow and was called for the requested person. She examined him while he was a patient in Ward 7A there on 16 December 2021 to give a psychiatric input and she dictated a letter (bundle D p752) recording her observations and conclusions. She noted that since his arrest he had been refusing blood tests, physiotherapy, occupational therapy and speech and language therapy. He had requested that he be referred to psychiatry. He had

previously been known to psychiatry. He had been upset in the ward, and in particular about his wife not being allowed to see him while he was in police custody. She saw him for around 45 minutes to an hour and concluded that he did not have a mental illness. From recollection she only had access to previous electronic notes. She had noted that his thought content was often inconsistent, evasive and hard to pin down; that could or could not have a psychiatric significance, taken in context with the clinical picture and presentation and her conclusion was that he was not suffering from mental illness. Asked if that would extend to assessment of whether he had a personality disorder, she stated that diagnosis of such a disorder would require more than one assessment and she would want to have a report as to his history. She did not consider a diagnosis of personality disorder at the time, but he did present with behaviours which would need to have been assessed over time to make such a diagnosis. She would be looking for evidence from late childhood or early adulthood in different situations over time.

[21] In cross examination she confirmed that she understood that the requested person wanted a referral to a psychiatrist. It was difficult to tell what he wanted. She had talked to him about medical and psychological treatment, but he kept saying he needed psychiatric help. She could not get any evidence of his past history. He told her that he had multiple diagnoses, including PTSD, depression, anxiety, fibromyalgia , epilepsy, back pain and chronic regional pain, and had previous psychiatric input, but he refused to give the details of the private psychiatrist. It was not easy to get information from him. He told her that he thought he was suffering from delirium, but she did not see any signs of that. She explained to him that psychological input was contraindicated at that time because he was not in a position of safety with respect to receiving ongoing treatment for COVID and ongoing

criminal proceedings, and supportive care and ongoing treatment would be the mainstay of treatment. He was not happy with that.

[22] She noted that his mood was euthymic, i.e. not too high or low, but in keeping with being well. She noted his demeanour was aggressive, which she explained not as meaning that he was aggressive towards her, but that he was very difficult with standard questions about his symptoms, his past history and family history and would take the conversation away from such questions. She found that unusual and it felt aggressive to her. He asked if he could be "sectioned". She had found no evidence of delusional content, suicidal ideation, formal thought disorder or abnormality of perception.

[23] He was orientated in time and place and cognition was grossly intact, although it was not formally assessed: she did not see any thought processes that would cause concern and it was not therefore necessary to have a formal assessment. His insight was difficult to ascertain due to inconsistencies. Insight referred to a patient's understanding of his illness or not having illness. The inconsistencies were in the difficulty in getting a history from him: he said he had diagnoses, but the symptomology could not back up the diagnoses. She recorded her impression of no mental illness. She recommended that staff should review in twos at all times and avoid giving personal information, because staff had told her that he had made allegations against staff, which were not true. She discussed her conclusions with a clinical psychologist who agreed that psychological input was not indicated.

[24] In re-examination she said that her reference to a place of safety was to mental health safety: he was not in a place of psychological or emotional safety. As a general rule a patient can be too unwell for psychological input. He was unwell with COVID and had just been discharged from ICU and what was indicated was supportive care. She was not aware of the nature of his conflict with staff but she was aware of allegations of assault and that he

had made complaints. She was asked if such conflict and confrontation with those around him could be significant in assessing whether there might be a personality disorder and she said that if it were part of late childhood or early adulthood and not just in one situation that was possible, but patients can be very distressed in particular situations and she would need to see him in a longer and broader context.

[25] Dr Barbara Mundweil was called by the Lord Advocate. She has worked three days a week as a general practitioner at HM Prison, Edinburgh since September 2022, although she had worked in prisons since 2011 and had been a general practitioner since 2003. She was and remained involved in the care of the requested person and had met him a number of times. She was aware that he had been seriously ill with COVID but he was now a lot better. He said that he could not walk, but she was unconvinced. As to his current state of health, she had no concerns about major illnesses or health concerns. His oxygen levels were not stable when he first entered the prison, but he stopped receiving oxygen regularly in February or March 2023.

[26] She was shown a number of entries in the requested person's prison medical notes (bundle I) including her assessment on 22 February 2023 which was the first time she had seen him since his oxygen was stopped, which she thought was a few days earlier. She had noted he was short of breath and his oxygen level dropped from 95-96% to 89%, but went up immediately. His oxygen level was generally in the high 90s. The last time she measured it – the week before giving evidence – it was 97-98%. A healthy person would have a level of 98-99% and his levels were not such as to cause any concern. He had been using a wheelchair since he entered the prison. It was not clear to her why he used a wheelchair, although she had tried to find out the reason. He uses a simple manual wheelchair in

prison. There was not really any medical reason why he should need an electric wheelchair. He can use his arms and hands and can self-propel.

[27] On 5 September 2022 she noted that she had seen a video clip of the requested person kicking a door with his leg so that it swung open and hit an officer on the face: she saw the leg in the open door, although she noted that he claimed that he could not move his legs.

[28] On 5 October 2022 she noted that she had examined his legs. Both calves were 30cms in circumference, a very good size, soft and well-muscled and looked entirely normal to her, not the legs of a paraplegic. The thighs were in fact very strong and athletic and she felt them through his trousers, running her hands over them although she did not measure them. Her examination was incongruent with him having to use a wheelchair.

[29] On 17 January 2023 she noted her attempts to find out why he was using a wheelchair; she looked at the GP records and could not find a reason. There had apparently been falls in the home, but there was no diagnosis. She noted that he should not be hoisted or lifted into the wheelchair again. On one occasion staff who were not trained had lifted him back into the chair, but there was no reason why he should have fallen out of it. Her decision was based on believing he could use his legs.

[30] He was not an easy patient to deal with. She doubted whether she could rely on what he told her about his medical condition. It was noted on 4 January 2023 that he had tested positive for COVID. She was concerned when she looked at the test that the two lines were not parallel – indeed one was oblique. She had never seen a positive test like that and she requested another test, which was negative: he was not happy. She had noted staccato speech on a number of occasions, which he could maintain for 20 or 30 minutes when they were talking before his speech would improve.

[31] In cross-examination she accepted that it would seem that he had been in a wheelchair since December 2020 and that being in a chair so long would have an adverse consequence on mobility. She accepted that it was possible that he might be able to move his legs and have some mobility in a cell but that a significant walk would have been impossible. After a long time in a wheelchair muscle would get weak and you would lose muscle bulk to come extent.

[32] She was not sure that he had a history of non-epileptic seizures. They could probably arise for many reasons including psychological distress, but she was not an expert. As far as she recalled it was not an issue with the requested person. She agreed that a patient having a seizure might have an involuntary leg movement, if it were a proper seizure, but there would be movements all over the body.

[33] On 27 January 2022 (before she joined the team) it was noted that he required a hoist, although physiotherapy were unsure why, and that his behaviour was challenging. She was unable to comment on whether he also had a history of challenging behaviour in hospital. It had been noted on 8 July 2022 that psychiatry deemed he had no mental health issues but had behavioural issues and suffered from pseudo seizures although there was no neuorological basis. On 13 July 2022 he was noted to be located in H2/61 on TTM, which is a cell in a particular block. He was noted to be on 15 minute observations and that there was assistance from his carer to place him in anti-ligature clothing.

[34] TTM is *'Talk to Me'*, a programme used in prison where there is a suicide risk. He was refusing oxygen. It was noted on 14 July 2022 that he was seen for medication administration and was lying on the mattress on the floor saying he was unable to sit up, but when staff offered to help him he was aggressive and able to sit up and shouted abuse at staff and officers while taking his medication. She had not experienced such behaviour: she

had never heard him swear. On 15 July 2022 it was noted that the patient was being inconsistent in his account of events. It was noted that he was seen on that date by a triage nurse as he was having a seizure and had a history of non-epileptic seizures, with no neurological involvement. He was sat in a wheelchair and the top half of his body was shaking. She accepted that he possibly had a history of seizures in the past.

[35] There were a number of entries in the notes where he was disagreeing with staff and was confrontational and shouting and swearing and when he refused medication. There were also entries of disagreements as between NHS and prison staff as to his care.

[36] She would not make a diagnosis of personality disorder; that would be for a psychiatrist and would take a long period of time and they would require a full history of his upbringing and schooling and the like before making such a diagnosis. She had had patients with such a diagnosis. Depending on what type of personality disorder is involved, the patient may receive medication, but would usually be offered psychotherapy. The prison NHS team had a psychiatric and psychological team. The patient needs to see that they have a problem and then accept the appropriate kind of treatment. 'Personality disorder' included a huge group of disorders.

[37] On 8 September 2022 (at page 16) it was noted by a manager that during a multi-disciplinary team meeting which was also attended by his wife the requested person was talking over staff and not allowing them to speak, making multiple allegations of assault by SPS staff, complaining about the suitability of his wheelchair and requiring hospital admission. He spoke over his wife and obstructed an oxygen saturation test and when being escorted out of the area pushed himself out of the wheelchair and onto the floor and then crawled towards them before his wife and the manager helped get him back in the chair. She accepted that this demonstrated a lot of aggression. Although his behaviour had

not been as aggressive during her period there, she was often told he was aggressive and she was not surprised to read that note.

[38] On 10 September 2022 it was noted that he was demanding to go to hospital, although he had been there the previous day and there was no clinical need to keep him in and he had been demanding oxygen there and refusing to talk to staff, although his oxygen saturation level had been good and he had been rude and uncooperative (page 15). On 12 September 2022 the manager had noted that he refused to talk to her unless he was given oxygen (page 14).

[39] On 25 January 2023 she had noted him demanding to go to hospital (page 5) and the previous day he had refused to give blood samples and have observations. She had also noted his refusing bloods on 13 February 2023 (page 4) and she asked Dr Morris to advise as to why he might be doing that, including whether he might be self-harming to avoid deportation (sic). This was a *'cri de coeur'* by her. She had been concerned about a rash on his legs.

[40] On 2 February 2023 he received a written warning about concealing drugs. On 24 February 2023 it was noted that he was assessed at a *Talk to Me* case conference that he had refused to attend, but he was placed on the plan (page 3). She believed that he was still on the plan. She had noted concern about self-harming on 23 February 2023. She was concerned that something was going to happen. She refused to refer him to hospital, but she did want a back-up opinion from a psychiatrist. She was sure herself that he had capacity.

[41] In light of the high degree of conflict between him and the prison and NHS staff and other prisoners and the view that he was manipulative she thought that he might have a personality disorder. She was shown page 10 of Dr Choudhary's report and four entries for dates between 13 October 2020 and 24 February 2021 (of Dr Dedman's comments) and of 5

March 2021 (from the primary care summary), including mental health diagnoses and the diagnosis of non-epileptic attack disorder, and she was asked to what extent her observations and the prison background were supportive of these diagnoses. She explained that she had spoken to Dr Dedman and asked him on what his findings were based, in particular because he had placed the requested person on Lisdexamphetamine, which is a high risk and very addictive drug. He had said that his diagnoses were made without background information and on the basis of what the patient had reported to him. He had asked for school records etc. and was told there were not any and there were no medical records from his previous surgery. He had prescribed the drug in the absence of these things and he agreed that she should stop this medication. She recalled that she did not put that in the records because Dr Dedman did not consent to that (although I note that she appears to have been mistaken in that regard: her medical notes seem to record the essentials of her conversation with Dr Dedman, including his suggestion that the medication be stopped (page 5, 23 January 2023)).

[42] She was asked if her observations were consistent with the diagnoses recorded by Dr Dedman, but said that what she understood from Dr Dedman was that he did not now believe himself in any of the diagnoses and that this was all superseded. On the basis of her observations and what was recorded in respect of the requested person, she did not consider that he suffered from ADHD or PTSD. Non-epileptic seizure disorder had never been an issue while she had been in the prison and she had seen no evidence of PTSD.

[43] Her observations were consistent with a narcissistic personality disorder, although she did not like to 'put it out there' because she was only a general practitioner and was not qualified to make such a diagnosis, but that was where she thought the requested person's problem was.

[44] She accepted that she had never seen the requested person walk. She was not aware of him having oxygen since March 2023 and she did keep asking if there was any change. In his current location in the prison oxygen cannot be provided, but she could not say whether, for example when he was briefly in hospital, oxygen might have been given.

[45] In re-examination she stated that a hoist is used for severely disabled people who cannot mobilise, often at all, for transfer from bed to wheelchair and vice versa. He did not use a hoist and had never used one in prison as far as she was aware and was always able to mobilise.

US prison conditions and law and practice (including different proceedings, sentencing and parole)

[46] Evidence was called for the requested person from Deborah M Golden, Lance Bastian and Joshua Barron, all attorneys in the United States and reference was also made by both parties to the affidavit in the first extradition request of Sandi Johnson, Senior Deputy County Attorney, Utah County and the sworn declaration or affidavit of Matthew Higley, Chief Deputy, Utah County Sheriff's Office Corrections Division.

[47] Deborah M Golden is an attorney in Washington DC and qualified in 1998. She adopted her report (defence production 1), which ran to 43 pages, to which was annexed a note of her qualifications and experience and a disabled cell plan. She has significant experience as a prisoners' rights lawyer. She had reviewed the sworn declaration or affidavit by Matthew Higley, itself commenting on a draft of her report and which offered comments in relation to the Utah County Jail.

[48] In the United States in general jails are local places of correction, usually run by counties or cities, holding prisoners pending trial or where they are sentenced for a

misdemeanour, usually for a period less than one year. Prisons are run by state or federal government and hold prisoners who are convicted of felonies and serving more than one year, although in Utah prisoners can be transferred back from prisons to local jails as the need for spaces dictates. She expected that the requested person, if extradited, would first face charges filed in Utah County (the first request) and would be held in the Utah County Jail which had a capacity of 1092 inmates and at last check housed a bit fewer than 950, although she accepted (and had confirmed) that the figure of 526 given by Mr Higley was more current. Numbers ebb and flow.

[49] She described expected conditions of confinement and systems of security classifications, sleeping accommodation, toileting and privacy. In the county jails in which the requested person might be held housing conditions were similar and typical of American jail cells. Salt Lake County Jail had 88 health services beds for varying levels of health conditions, including mental health, but did not provide pillows, which prisoners required to purchase.

[50] The Utah State Correctional Facility is a newly built prison and is where the requested person would expect to be held if he was sentenced, in cells accommodating one to eight inmates and dormitory accommodation. If the requested person required to use a wheelchair or needed mental health treatment he would be likely to be held in the Currant Building, which was designed specifically for wheelchair accessibility and also housed the prison infirmary. Her report included plans of single cells there for able bodied and disabled prisoners.

[51] She described medical care available to prisoners in Utah which, both in jails and prisons was on a co-pay basis, which was a standard part of the American health care system. Prisoners would pay $5 for medical care appointments and $2 for prescriptions, but

would not require to pay to see mental health staff. If prisoners received outside care they would be responsible for 10% of the medical costs (capped at $2000 per year) and 50% for prosthetics. They could rent medical equipment, like wheelchairs for $5 per month. Inmates unable to pay are not denied care, but will incur a debt, which will follow them on release. There were various prescribed charges for treatment and ambulance transport etc. These charges were for prisons.

[52] Mr Higley summarised charges for the County Jail, which were $15 for a dentist/doctor visit, $5 for a nurse call, $5 per medication for a prescription, $1 per dose for over the counter medication, actual cost of emergency care due to self-inflicted injury and no cost for mental health care.

[53] Ms Golden noted a high mortality rate in Utah jails and prisons. She also observed that mental health care was a particular challenge. A 2021 federal study showed that Utah's jails had over twice the national rate of suicide and the rate in prisons was 43 per 100,000 as against a national proportion of 18 per 100,000. Mr Higley observed, in the context of the County Jail, that they had outstanding medical and mental health services and noted that they had not had a suicide in over two years. Ms Golden noted that the Americans with Disabilities Act required that anyone with a mental or physical disability receive equal access to government services and had very specific standards for prison and jail wheelchair accessibility. Utah states that its prison facilities are compliant and as the State Correctional Facility was designed and built very recently it would be expected to be compliant with the latest physical accessibility regulations.

[54] She described solitary confinement practice (pages 23-24) where prisoners would be confined to cells for almost all hours. Lengthy periods of such confinement were common at all custody levels and there was no clear limit on its duration, 30 years having been held to

be acceptable. It is more common generally in the United States than in other industrialised developed democracies. Although Mr Higley said they tried to limit its use in the County Jail, because they believed it was not good for inmates' mental health, she was not sure what he was saying in terms of putting a figure on it. In Utah, level 2 prisoners, which are close custody prisoners (the level below death row), which she believed was one of the security levels likely for the requested person, were generally confined to their cells for 21 hours per day, and may be confined up to 23 hours per day. Internal disciplinary sanctions may include up to 30 days of solitary confinement 'disciplinary restriction' to be held in their cells with 45 minutes per week allowed for showers, for each infraction, consecutively.

[55] In the United States on any given day approximately 6% of the jail or prison population is in solitary confinement, although it is more common in jails than in prisons. She considered protection from assault (pages 24-25) and commented adversely on a Utah prison case in 2022 and on the slow adoption of the Prison Rape Elimination Act of 2003 (PREA) standards, although they had now been adopted. Prisoners convicted of sex offences were at heightened risk, with a far higher percentage of prisoners in custody for a sex offence (one third) than in the federal or other state systems. There was separate housing for men participating in the sex offender program, but it was not available to every man convicted of a sex offence.

[56] Mr Higley commented that they had very few prisoner on prisoner assaults in the County Jail and was unaware of any deputy assaulting an inmate, although the converse arose. Sex offenders were housed separately from other inmates. The jail complied with the spirit of PREA and did all they could to prevent sexual assault. Ms Golden was not sure what to make of what he said, but took it that she was saying that they attempted to provide safety and security but did not comply with PREA, or have the regular audits it required.

She dealt (at pages 27-28) with phone calls for which there were charges in the jails, although in the prisons there was a free weekly 15 minute call, with extra calls based on privilege level.

[57] The Utah County Jail allowed only video visitation at $12 per session, although inmates have access to a tablet, which they can make their own for $5 per month. Ms Golden noted that Salt Lake County Jails allowed two in person visits per week and the prisons allowed in person and video visitation at no cost, on a matrix based on privilege level which varied from one video visit to twelve visits per month.

[58] She noted that Utah prisons have extreme staff shortage. She also commented on the complexity and restricted nature of complaint and redress mechanisms, judicial deference to limits imposed on civil liberties and qualified immunity of government officials from suit. The Prison Litigation Reform Act required prisoners to exhaust internal administrative remedies before they could bring a court action and blocked courts from awarding damages unless the plaintiff could prove accompanying physical injuries. All of this made it hard for prisoners to find attorneys. There was also no independent oversight of confinement in the United States: there was no independent inspectorate and such bodies as existed fell short of providing oversight. Mr Higley stated that the Utah County Jail followed the Utah Jail Standards and was inspected in accordance with these standards annually, but she did not consider that provided enough information to amount to reassurance.

[59] She was referred to the affidavit of Sandi Johnson, Chief Deputy Utah County Attorney from the first extradition request in which she referred to Nicholas Rossi being suspected of committing multiple crimes involving sexual assault, kidnapping, domestic violence assault and communication fraud in the States of Utah, Ohio, Rhode Island and Massachusetts.

[60] Ms Johnson had noted, at para 17, that the Federal Bureau of Investigation (FBI) Ohio had a current indictment and warrant of arrest against him for fraud stemming from a 2017 investigation. Ms Golden observed that once an indictment was raised, if the defendant was in a different jurisdiction a document called a detainer would be lodged, essentially as an IOU requesting that the person was not released at the end of his sentence but was held to be handed over to the next jurisdiction. Sometimes a defendant can address charges before he has finished his current sentence. Ms Johnson noted that on 2 December 2019 an FBI agent from Ohio indicated that that month he had had contact with Rossi by phone and email and he said he was living in Ireland and there was no extradition treaty with the United States. Department of Homeland Security records showed that he had boarded an American Airline Flight on 4 June 2017 and disembarked in Dublin, but no return flight was logged. An FBI indictment would be a federal prosecution and he would ultimately be transferred to Ohio. There was no need for internal extradition in the United States in respect of a federal matter.

[61] She was read what Ms Johnson had noted at para 9 of her affidavit as regards a report made by AD, an 18 year old female, of alleged rape on 7 September 2007 in Clearfield, Utah, where the requested person was described as a suspect. Ms Golden would expect that the relevant county would also lodge a detainer should the requested person enter the United States. There was a case number, which would mean some sort of criminal case had been opened, but she could not say whether there was an indictment, or information or request for a warrant. Often where there are multiple jurisdictions some will let the first jurisdiction proceed and may not decide to deal with their case because of the length of time, although that was unlikely in a sexual assault case where statutes of limitations commonly provide longer periods.

[62] In para 11 of her affidavit Ms Johnson described an investigation in Salt Lake City on 5 August 2009 of the unlawful detention or kidnap of an 18 year old female, CD, who reported to the police that she had met Rossi online and they had met and ultimately went to his home where he physically restrained her and hit her when she tried to leave. She called 911 and the police attended and Rossi accused her of assault after he changed his mind about having sex with her. He was issued a citation for unlawful detention and phoned the police claiming to be suicidal. He was taken to hospital but fled when he got there. The case was charged in Salt Lake City Justice Court and was dismissed without prejudice in 2012 after there had been no action taken by the court on the case for three years. Ms Golden observed that, if a case is dismissed without prejudice, it can be refiled with the court, subject to the statute of limitations and he could be charged again.

[63] In para 12 of her affidavit Ms Johnson noted an investigation on 5 July 2010 by Pawtucket Police in Rhode Island of kidnapping of AF, a female who said she had met Rossi online and agreed to meet him in a public place, before being invited back to his residence where he took her phone and hid it. She said that she became nervous and said she was going home. She said that she felt nauseous and began to cry and told her that she wanted her phone and to leave. She stated that he would not let her leave by blocking the door and threatening to kill himself. The witness said that she would expect the relevant Rhode Island authorities to lodge a detainer.

[64] In para 13 of Ms Johnson's affidavit she described an incident on 20 June 2010 in Winthrop, Massachusetts when police attended a 911 call from witnesses to an altercation between Rossi and RC (born 1989) who told the police she had met him online and agreed to meet him in public, but after a short while told him she was not interested in going out with him. Her cell phone rang and he hit her hand causing it to fall. She grabbed her phone and

ran and he threatened to kill himself. Other witnesses called the police. The witness indicated that it sounded like a simple assault case and would probably go to the back of the line of pending detainers.

[65] In para 15 of Ms Johnson's affidavit she stated that Rossi married KH (born 1989) in November 2015 and on 2 November 2015 Montgomery Sheriff Office in Montgomery County, Ohio investigated a domestic violence between Rossi and KH, to which a case number was assigned. She obtained a protective order against Rossi under another case number in Montgomery County Court and in protective order filings described being physically and sexually abused and physically restrained from leaving the residence by Rossi. The witness said that she would expect a detainer to be lodged on the basis of a criminal charge.

[66] The Interpol red notice requesting provisional arrest (bundle A.1) referred to an arrest warrant having been issued by the US District Court for the District of Utah on 6 January 2021 for unlawful flight to avoid prosecution for the State of Utah charges and Ms Golden was asked whether that would have any independent significance. She said that evidence of flight could be lodged to increase penalty imposed, but since it was a federal warrant it would be up to the federal prosecutor whether to pursue separate charges: it could be both.

[67] She was asked about how Utah jails might cope with an inmate with a personality disorder and said she would not expect any of the facilities would try to obtain a thorough diagnosis which depended on looking into the individual's history. Services tended to be focused on the prisoner's activity in the moment and anything that could be medicated. She understood that personality disorders were not medicated. She would expect only a superficial diagnosis to be offered. Personality disorders are very resource intensive. There

was some availability of dialectical and cognitive behavioural therapy in US prisons, but it was limited.

[68] If the requested person had a hard-wired capacity for conflict she believed that could make his time in Utah custodial facilities quite difficult. He would be held to the same standards as any prisoner, but his personality could prevent him from observing rules. He would be much more likely to be assaulted by other prisoners and maybe by staff and to spend more time in solitary. Solitary confinement is damaging to anyone and normal people have brain damage within 14 days.

[69] There was no court with first instance jurisdiction for human rights claims at state or federal level. A prisoner would have to comply with the Prison Litigation Reform Act before taking a case to a state or federal court as any other person could. There was no public funding for such cases and she had not been able to identify any lawyer in Utah that took on such issues.

[70] In cross-examination she confirmed that she undertook prisoners' rights cases as part of her practice and some of the rights that people want to vindicate do exist. There had been cases in which prisoners had vindicated rights through legal process and she had been involved in such cases.

[71] She agreed that she had not been to any of the prisons in Utah and was proceeding on the basis of publicly available material. In page 6 of her report she said that the requested person would likely be classified in terms of the Utah Department of Corrections at level 2 (close custody prisoners, typically confined to their cells for 21 hours each day) or level 3 (prisoners that must remain within the perimeter fence) and she agreed that there was quite a difference in relation to time in cell etc. as between these two levels, although she pointed

out that was in relation to state prisons, not jails. Level 2 was the highest level for non-death row cases.

[72] She did not agree that sexual offenders who were not displaying significant violence were likely to be classified at lower levels, because much of the security level in prison was based not so much on the charges but on behaviour in prison. Based on charges and history such a prisoner would probably not be allowed outside the perimeter fence, but beyond that much would be based on behaviour and ability to follow rules inside the facility. She did not agree that it was generally those who had carried out assaults in prison who were in close custody.

[73] Disciplinary charges and behaviour will affect how much time prisoners are allowed out of their cells. She did not agree that solitary confinement was generally used only for a violent offence against prison discipline. People can be held in solitary confinement when they are victims of sexual or physical assault and it is used for many non-violent offences inside the prison system.

[74] Lance Bastian is an attorney in Salt Lake City, Utah and is a partner in a law firm, with a mixture of criminal defence and civil litigation work. He had been in practice since 2012. He had very little experience of extradition to the United States, but occasionally had some limited involvement when he had been a prosecutor. He was instructed by the requested person, who he did not previously know or know of, in Spring 2022 for the limited purpose of addressing recusal of David Leavitt, the Utah County Attorney and his office on the basis of inappropriate public comments that he said that Mr Leavitt had made about the case and he filed a motion for recusal before the District Court. The application was still pending because the court held that, since the requested person denied that he was

Rossi he did not have standing to file the motion; if he is extradited the issue can be renewed.

[75] He understood that he may be instructed further as his attorney, but that had still to be considered. If he was instructed it would be on a fee paying basis. There were programmes for indigent defendants where the court would appoint a public defender. He generally did not undertake public defender work. The present extradition requests are in relation to cases in Utah County and Salt Lake County. Because the requested person is not deemed to be a party in the cases (apparently again because he denies he is Rossi) he has not received any discovery, but he had seen the extradition requests and affidavits.

[76] He was aware that the first extradition request was in a case from 2008 that was taken up after a sex assault kit initiative in 2017. This was because of a legislative initiative requiring testing of outstanding rape kits. Although both allegations were from the same time, the second request related to a complainant who only came forward recently. He was not aware of any specific legal machinery about passage of time.

[77] He was asked about practice in relation to time spent in custody and whether it would apply if time was spent in Scotland and he said that he imagined that the requested person would be given credit for that. He would certainly be given credit in the United States for time spent incarcerated locally and in any jail in the United States and he could only imagine that time spent would be counted against any sentence given. He would generally speaking consult on the dates with the jail or correctional facility holding the prisoner and generally parties agree on that; it was not difficult to ascertain locally. He imagined it was likely that the requested person would be held without bail.

[78] One of the senior prosecutors in the County Attorney's Office had been a friend for years and he had spoken to him to ask whether there could be a very informal review of the

case and he said he would have someone look at it. He now understood that the County Attorney's position was that there had been no agreement to review the case and he accepted that there was no formal agreement and they had decided not to review the case. He had in the past asked prosecutors to take a close look at a case file. He wanted this file reviewed by someone other than Ms Johnson because the issues with the case were tied to Mr Leavitt, the former County Attorney and conflicts that he saw in his involvement in the case and he did not necessarily trust his decision making. He agreed that this was because the requested person was saying things about Mr Leavitt at the time he was up for re-election as prosecutor. The requested person indicated to him that he and Mr Leavitt had had confrontations prior to charges being brought and his own concerns were wrapped up in public statements which he considered were objectively false about the rape kit initiative being a prosecution initiative and he considered that he displayed bias. Mr Leavitt had been sanctioned by the court for inappropriate public statements in a previous case.

[79] Mr Leavitt was no longer in office, but the motion for recusal was also for his office. In the previous case Mr Leavitt was taken off the case by the court. There were two categories of statement that were of concern in this case: firstly in exposing publicly information giving specific details of the investigation contrary to specific rules about what can be disclosed and, secondly, what was objectively false was in relation to the testing of the rape kit. He had taken credit on multiple occasions for the testing of the rape kit, but it was tested as a legislative initiative before he took office. He also indicated that it was because of that that Rossi was identified as the suspect, which was not true, because he was identified by the victim and indeed interviewed by Law Enforcement in 2008.

[80] The significance of the prosecutor behaving in such a way can he defamatory as regards the requested person's right to suggest he is who he claims to be, but more

significantly to prevent tainting of a potential jury pool. It is difficult to select a large enough jury pool to get people who are unaware of what has been reported, although a case can be transferred to a different jurisdiction to reduce the risk.

[81] He understood that when the Utah County case was initially investigated and considered by the prosecutor's office in 2008 a decision was taken not to proceed with charges at that time, so he did not believe that the case had a formal status then. The case was essentially closed.

[82] In cross-examination he stated that he had worked for a number of years as a prosecutor in Utah. A person charged would be brought before a judge who would make a decision on bail. He would be entitled to be legally represented and his lawyer could make representations as regards bail. If the case proceeded to trial he would be entitled to pre-trial discovery and to see everything that the prosecution would be relying on. There were some more limited requirements on the defence, e.g. as regards lodging exhibits to be founded upon. There was appeal to the state appeals court, and then the Supreme Court of Utah and in certain circumstances the Supreme Court of the United States. Either party can request trial by jury and can object to particular jurors on a *voir dire*. Penalties were fixed by law as was the process by which sentence was passed and a defendant could make representations before sentence was passed and could thereafter appeal.

[83] Joshua Barron is an attorney in Utah and passed the Utah bar and had been licensed there since 2007. He briefly worked in real estate and worked as a prosecutor in Salt Lake County in 2008-09 and since then had been in criminal defence work almost exclusively, essentially undertaking fee paid work. He had dealt with an extradition from South America and Germany to the United States. The sentence in that case was not custodial. He considered that there was a strong argument that a person extradited to Utah should get

credit in respect of a custodial sentence for time spent in custody abroad. It did not arise in the case he dealt with, but he assumed the information as to time in custody could have been readily obtained.

[84] He had been instructed on behalf of the requested person in this case to give an independent opinion. He did not know the requested person and was not retained by him. He was shown the affidavit of Sandi Johnson, where, at para 3, she referred to the allegation that Nicholas Rossi committed rape on or about September 13, 2008 in Utah and at para 7 she noted that a sexual assault kit was completed on the complainer KP and submitted to the crime lab on September 22, 2008 and a male profile was identified and entered into an index system. She noted that on May 17, 2018 the administrator of that system notified Orem Police that the profile matched an offender sample from Ohio belonging to Nicholas Rossi.

[85] He was aware that there were systematic delays in processing rape kits in Utah, although he did not think he had been involved in any cases with such a significant delay. If he was acting in the case he would try to make a speedy trial argument. There would not be a statute of limitations issue for this crime, but he could raise the question of delay pre-trial, although he did not think it was likely to succeed. The speedy trial remedy would be dismissal with prejudice, which would mean that he could no longer be prosecuted. In the State of Utah there are no specific speedy trial deadlines and the question is whether delay was unreasonable as regards what has happened since the filing date, rather than when the crime was discovered.

[86] It could be argued that the prosecution was in possession of existing evidence habile to found a prosecution as at 2008 and something could be made of that, but probably not

successfully pre-trial. It was difficult to say what impact delay would have at trial: it was a jury question.

[87] He was referred to para 11 of Ms Johnson's affidavit where she referred to the report of the unlawful detention or kidnap of an 18 year old female, CD in Salt Lake City on 5 August 2009 and the case had ultimately been dismissed without prejudice. In general it would not be possible to use this allegation in evidence at the trial for the present offences; character evidence and evidence of other acts was generally inadmissible. He considered it very unlikely that there would be re-prosecution for that case, which might very well be statute of limitations barred because of the nature of the charge. The case was in the justice court, which deals with Class B and C misdemeanours and infractions which would incur a jail sentence of 0 to 180 days. Jail sentences are imposed for an exact number of days.

[88] He was referred to para 9 of Ms Johnson's affidavit where she referred to the report made by AD, an 18 year old female, of alleged rape on 7 September 2007 in Clearfield, Utah. It was difficult to say what might happen as regards this allegation, but he did not see anything that would prevent the requested person being prosecuted if the prosecutor thought there was a likelihood of conviction.

[89] He was referred to para 12 of Ms Johnson's affidavit where she referred to the report of kidnapping of AF, a female on 5 July 2010 to Pawtucket Police in Rhode Island. He was not able to comment on Rhode Island legal procedure, but Rhode Island could potentially extradite him from Utah. Rhode Island might issue a warrant for arrest or intimate a fugitive warrant to Utah which could prevent his release until they had concluded extradition proceedings. He could be extradited from Utah while serving a sentence. He could not say what the sentencing position would be in Rhode Island, although kidnapping in Utah would attract a sentence of five years to life, or fifteen years to life if aggravated.

[90] He was referred to para 13 of Ms Johnson's affidavit as regards the alleged assault on RC on 20 June 2010 in Winthrop, Massachusetts, which he would expect to be dealt with in the same way as the Rhode Island case. He was not familiar with the expression "detainer" in this context. This looked like a simple assault, a misdemeanour, for which the maximum sentence in Utah would be six months in jail.

[91] As regards Ms Johnson's note, at para 17, that the Federal Bureau of Investigation (FBI) Ohio had a current indictment and warrant of arrest against Rossi for fraud stemming from a 2017 investigation, he considered that it could be a federal case, since the FBI was involved, but he could not say for sure that it was a federal case. If it was a federal case it would not be necessary for the prosecution to wait in line for state proceedings (subject to the rule of speciality). Sentencing would vary depending on whether the case was in a state or federal court and how serious it was; in a state court in Utah the sentence may not be custodial or it may be a jail sentence, but in federal court sentence would depend on the amount of money involved.

[92] He was referred to the Utah Code (exhibit 3 to Ms Johnson's affidavit) at section 76-5-402. Subsection (3) provides, so far as relevant:

> "(3) Rape is a felony of the first degree, punishable by a term of imprisonment of:
>
> > (a) except as provided in Subsection (3)(b) or (c), not less than five years and which may be for life".

Section 76-3-203 of the Code also provides that first degree felonies are punishable by an indeterminate sentence:

> "76-3-203. Felony conviction -- Indeterminate term of imprisonment.
> A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows:
> (1) In the case of a felony of the first degree, unless the statute provides otherwise, for a term of not less than five years and which may be for life".

[93] He explained that what happens in sentencing is that the judge imposing the sentence states that the sentence is five years and may be for life – i.e. he or she essentially uses the words of the statute. That is always the sentence that is passed for rape under section 76-5-402(3)(a) (it was not suggested that aggravations dealt with in subsection 3(b) or (c) applied).

[94] The Board of Pardons and Parole is an appointed, quasi-judicial body, making sentencing decisions; it decides when offenders are released. They publish sentencing guidelines which are non-binding. The offender can serve five years and then get notice of their first parole hearing. He had argued cases in front of the Board and would say there is less "procedure" in their decisions than in judicial decisions. An attorney can often be present and support the prisoner, but the prisoner may require to speak for himself. He had represented many people who had been sentenced to five years to life. Many defendants who plead guilty are sentenced to five years to life. If the requested person were convicted he would be sentenced to five years to life.

[95] A sentencing report is produced for the Board and contains a summary of the offence. It is pretty lengthy and will on average be 10 pages long, but may be longer and have attachments or exhibits.

[96] Judges in Utah have security of tenure. They cannot be fired by the Executive, but they are elected for a term and can be non-returned by voters if they seek re-election, although they do not run a campaign. Members of the Board of Pardons and Parole are appointed by the State Governor and that may be for a term, although he was not sure. They could only be removed by impeachment before the State Senate.

[97] Generally, the offender's attorney was only allowed to speak before the Board if invited to do so, although that generally did not happen. The members are not as

independent as members of the judiciary given that they are administrative appointees. There is an overlap between criminal law and administrative law, and the Board was in the latter category, which was not regulated by the Supreme Court but by the executive branch of government.

[98] One of the main considerations for the Board of Pardons and Parole would be if the offender had a history of conflict in prison, although non-violent conflict was not as concerning to the Board as actual violence. It could be indicative of anti-social tendencies or an inability to get along while on probation and that would be considered, but it would not be as concerning as assault. Conflict could in that sense result in a longer prison sentence being served.

[99] It was very difficult to offer a view on sentencing as regards the incident described in para 15 of Ms Johnson's affidavit (of a domestic violence between Rossi and KH on 2 November 2015 in Montgomery County, Ohio), since it was unclear what had happened. He could not imagine that in Utah the sentence would be less than 90 days, or if it was an assault 6 months, but if it was sexual abuse it could be five or fifteen years to life.

[100] As regards para 18 of Ms Johnson's affidavit, where she talked about flight from prosecution and contact made by the FBI in Ohio in 2019, people were not normally prosecuted for that in Utah, but could be prosecuted for obstructing justice. If convicted of felony the sentence would be five years to life.

The requested person and William King

[101] The requested person gave evidence. He stated that Dr Mundweil's view that he did not need to be in a wheelchair was 'unfounded'. He had been in a wheelchair for about six years, since August or September 2021, when he had a severe event with COVID (sic). Dr

Mundweil did not examine his legs, except when she assessed red marks which were indicative of meningitis and she did not use any device to measure the circumference of his leg. Soft not tender - SNT – was what was noted on his discharge letter and by her and that was consistent with atrophy. NHS staff in the prison did phlebotomy tests with bloods about two months before he gave evidence and the nurse told him that his blood test indicated that his muscle mass was very low, which was consistent with muscle wastage or atrophy.

[102] He was not paralysed and never complained of that, but he could not walk or stand or support himself in any way from the waist down. He used his arms to transfer from his wheelchair when it was placed next to his bed. At home his wife would lift and assist him. He understood that the atrophy was in consequence of 70 days in three separate comas when he had medically induced paralysis. He was already in a vulnerable state in respect of his spine and hips which created a knock-on effect in his legs.

[103] His level of disability and being in a wheelchair had significantly affected his time in Edinburgh Prison. There were physical limitations, including not having any support, depending on the individual officer. It was not true as Dr Mundweil had stated that he pushed himself about in a wheelchair. Prisoners in wheelchairs were pushed by other prisoners called pushers who were paid £1.50 a week. He did not believe he had the stamina to push a wheelchair. His ability to have a bath or shower was limited and he had to use a sink and a bar of soap as he could not lift his arms above his head and keep them there because of atrophy in his arms. He had a care plan and the carers were attentive when they attended but they were overworked.

[104] He considered that it would be more difficult in Utah. He had a hospital bed in Edinburgh Prison which allowed his legs to be raised and that did not seem to be offered in

the Utah facilities. There would not be the possibility of support from carers for physical difficulties. Charging for medical care was nefarious. He had significant medical needs prior to September 2021, which were well managed by GPs, his wife and himself.

[105] He had been left and remained in severe pain and medical and psychological distress. His problems would be substantially worse and aggravated by financial loss. He had been neglected and mistreated in prison and had not received any physiotherapy or occupational therapy to assist him in recovering and it did not sound like that would be a priority in Utah.

[106] He appeared to disagree with Dr Mundweil's evidence that he had coped well without oxygen since February or March 2023 on the basis of her limited contact with him and claimed that what she said in that regard was false, misleading and inaccurate. Everyone with whom he came into contact told him he did not sound very well. When he came off oxygen his saturation level would go down to 40-60%. His lung capacity was only 15%.

[107] When it was pointed out to him that the three doctors who gave evidence had indicated that his behaviour in hospital and prison was consistent with having a personality disorder he launched into a long explanation of his diagnoses as having PTSD, ADHD, functional neurological disorder, generalised pain disorder and fibromyalgia and said he had participated in therapy and dialectical behavioural therapy to address the challenges he faced, but when again asked to address the question of personality disorder, simply stated that, as the witnesses had said, any diagnosis would require time and assessment. He said he would gladly agree to participate in such an assessment and that if a diagnosis was made, including of personality disorder and psychological therapy was suggested he would agree to that.

[108] In cross-examination he said he was born in Dublin and his name was Arthur Knight-Brown. Asked who his parents were he said he was in contact with them under the new Irish law and the documents were in the custody of a man. Before this law was passed it was illegal for an adopted child to ascertain these records. He was awaiting these records now that the law had been passed. He grew up in Ireland and the United Kingdom and came to the United Kingdom in 2001. He had never been to the United States. His adoption and birth certificates existed and he was in the process of receiving them from an individual who had them.

[109] He had not lied about or exaggerated his medical conditions and did not accept that there was no medical reason for him to be in a wheelchair. He had been assessed by physicians and GPs and had an MRI of his spine five years ago which showed bulging discs and the presence of spinal stenosis. The pain had increased especially with tracheal stenosis.

[110] On several occasions he had considered going to the United States to simply prove that he was not Nicholas Rossi, but the requests were made because of a process initiated by David Leavitt, the former Utah County Attorney (against whom he proceeded to make allegations of criminality which I am treating as scandalous) There was evidence of a conspiracy between him and the Crown Office and he had acted in bad faith to hide the allegations against him which were made five years ago.

[111] William King was called for the requested person. He is aged 59 and is a prisoner serving a sentence in Hermiston Hall, Saughton Prison. He delivered a monologue on the iniquity of the requested person's treatment at the hands of Prison Service and NHS staff at the prison, stating that he had been treated abysmally, left on the floor and told he did not need oxygen. He was bullied constantly and refused help. He had never seen him walking.

Submissions

Requested person

[112] Senior Counsel for the requested person addressed questions arising under section 79 and, should they be answered in the negative, section 87, but also questions relating to the health of the requested person under section 91, which could be raised at any time in the extradition hearing.

Section 79

[113] It was submitted that extradition was barred under section 79(1)(a) by passage of time. It was submitted that the court was given a very broad area of judgment, although it was accepted that it did not involve an exercise of discretion.

[114] As regards the first request, the requested person had been dealt with without difficulty in the KP case between 2009 and 2012 (Ms Johnson's affidavit at para 11) and as regards JS from 2010 (affidavit at para 14: he had been convicted in Rhode Island of a domestic violence offence against his then new wife JS, on 12 November 2010 and, on 9 May 2011 Pawtucket Police investigated a violation of a protective order involving the requested person and JS), but there was no action in relation to the first extradition request before December 2019 (para 18), i.e. for 11 years, apparently because of an unexplained backlog in processing evidence between 2008 and 2018.

[115] In the second request there was no action by the complainer or law enforcement for more than 11 years between September 2008 and December 2021 (actually 13 years).

[116] It was accepted, under reference to Lord Diplock's leading speech in *Kakis* v *Cyprus* [1978] 1 WLR 779 pp782-783, that 'unjust' in section 82 was directed primarily to the risk of prejudice to the accused in the conduct of the trial itself and oppressive' was directed to

hardship to the accused resulting from change in his circumstances that had occurred during the period to be taken into consideration, but it was submitted that there was room for overlapping and that there were three judgments to be made: whether it would be unjust, or oppressive, to extradite and, taking a holistic approach of overall fairness, whether it would be unfair to extradite.

[117] Delay required to be considered unless the requested person had caused it. The complainer in the second request had only come forward in the last couple of years and the requesting state was not at fault in that regard, but it was submitted that he was entitled to the benefit of the condition of fairness, to put it shortly, without fault on the part of the state.

[118] In response to my observation that such delays arise routinely domestically and rarely ground a remedy, counsel submitted that the position was different in extradition where, as was the case here, there was no evidence that the requested person had family or extended support in Utah.

[119] The question whether the requested person was a fugitive from justice had a bearing only on the causative effect on delay. The relevant issue was delay which was not brought about by the actions of the accused himself. That was not relevant to the second request, because the allegations had not been made. But neither had his absence from the United States brought about a period of delay in respect of the first request. The information about delay was mixed. I was referred to defence productions 7 and 8. DP8 was a press release by the Utah Department of Public Safety dated 12 January 2022 and DP7 was a newspaper article from ksl.com of the same date apparently drawing on the same press release, reporting on the requested person's arrest and mentioning the rape kit initiative. These were consistent with a decade of inactivity.

[120] Accepting, as the House of Lords held in *Kakis*, that fault was not the primary focus, it was clear that the state was nonetheless at fault in the delay. There was no explanation as to why there had not been proceedings in 2008 and why thereafter nothing was done until the backlog was addressed in 2017. It was accepted that what mattered was not so much the cause of delay but its effect, where the requested person was not at fault. The issue of his location was entirely irrelevant. Insofar as he was a fugitive from justice it would appear that was from a fraud case in Ohio rather than a sexual matter. There was no indication that in 'not being around' he was in breach of any obligation arising from a charge for which extradition was sought and there was no indication that his whereabouts contributed to the passage of time.

[121] His moving abroad was not causative of delay and, even to the extent that he left the USA to avoid the Ohio fraud investigation, that did not take the case anywhere in relation to the time that had elapsed. The risk of prejudice in the conduct of the trial arose from the fact that the allegations would be at least fifteen years old when they come to trial; recollections of witnesses and the availability of evidence must have deteriorated in that time.

[122] There would be personal and family hardship greater than what is inevitable and inherent in extradition for a criminal trial in another country. The hardship to the accused resulting from change in his circumstances was that he had married and settled in the United Kingdom. Being taken to the United States where, as in Scotland, it seemed unlikely that he would be granted bail pending trial, would be a serious interference in his private and family life.

[123] As regards the deterioration in his health, it was pointed out that, having been treated in intensive care in Glasgow for COVID pneumonitis in September to December 2021 the medical records showed that he now had tracheal stenosis, abnormal narrowing of the

windpipe that restricted the ability to breathe normally and he had received supplementary oxygen at night, although it was accepted that use of oxygen had now ceased. Medical information from his GP practice in Bristol showed that he had been in a wheelchair since December 2020 (Letter from Armada Family Practice 2 February 2022 page 2, in bundle C.2)

[124] Although Dr Mundweil gained the impression that he did not need a wheelchair, she agreed that there would be a degree of muscle wastage from a prolonged period spent in a wheelchair and had never seen him walking. He spent a significant time in intensive care and in a coma between September and December 2021 and that would have caused substantial muscle wastage. His health had clearly deteriorated since the time of the allegations in 2008 and that clearly supported the argument for oppression. In recent years he had been living here with his wife and had been looked after by her and there would be exceptional hardship from extradition.

[125] It was submitted that the requested person had a recurrent depressive disorder, current episode moderate without psychotic symptoms (ICD-11 code 6A71.1), a major depressive disorder which was diagnosed when the definitional requirements for recurrent depressive disorder have been met and there was, when he was examined by Dr Choudhury a depressive episode of moderate severity, and there were no delusions or hallucinations during the episode. The requested person had been and continued to be on the prison prevention of suicide strategy *Talk to Me.*

[126] It was submitted that his mental state was such as to inhibit his ability to give instructions to his lawyers in an important trial or to conduct it himself, based on the diagnosis of Dr Choudhary of recurrent depressive disorder. It could not be said that met the high test of Scots law of unfitness for trial, but Dr Choudhary's diagnosis was of a condition that gave rise to considerable difficulty functioning in multiple domains.

[127] His physical and mental conditions were such as to intensify the suffering of incarceration. His personal and family hardships were greater than what would have been inevitable and inherent in extradition for a criminal trial in another country within a reasonable time. No explanation had been offered by the requesting state for the delays involved. Overall, it would be unfair to extradite him after such a long time.

[128] The matter of personality disorder was dealt with in a supplementary submission which was adopted as part of counsel's submission along with the updated submission of 13 June 2023. Dr Choudhary agreed that the requested person had a strange collection of symptoms and behaviours. Under reference to ICD11 he thought his symptoms suggested personality disorder, but to confirm such a diagnosis, one would have to have multiple assessments and have as much collateral information as possible, especially when the individual was in prison. Conflict with healthcare professionals appeared to be a longstanding trait in the requested person, reaching crisis point when demands were not met and this certainly suggested the sort of entrenched behavioural traits that might be seen in a personality disorder.

[129] It was significant that he could express that view even without access to prison notes, although he thought these would be helpful to a diagnosis. He was able to offer some prognosis.

[130] If the patient accepted the diagnosis, psychological interventions may mitigate the behaviour, but that was far from guaranteed; even if he acknowledged the condition, he may not successfully challenge it and an unacknowledged personality disorder was not conducive to an untroubled time as a prisoner.

[131] It was noted that Dr Cogan did not consider diagnosis of personality disorder when she examined the requested person on 16 December 2021. Her evidence was that one would

look for traits since late childhood, but it was submitted that he did not have evidence of his childhood.

[132] In response to my question whether it was more a matter of not *offering* such evidence, it was submitted that it was not unreasonable for a person to change position as to who he was and, although he did not accept he was Nicholas Rossi, information about Nicholas Rossi's childhood and youth was potentially available.

[133] Dr Mundweil was careful to observe that, as a GP, she would not make a diagnosis of personality disorder; that would be for a psychiatrist and would require a long period of time, full history of upbringing and schooling before a diagnosis of that sort would be made. However, it was clear that as a prison GP, she had significant experience of dealing with prisoners with a personality disorder. Based on prison records that showed a high degree of conflict between the requested person and prison and NHS staff and other prisoners, the view of him being highly manipulative and other aspect of his conduct, she could see force in the suggestion that there might be an underlying condition, possibly a personality disorder that only lengthy enquiry would resolve: she thought the requested person might have a personality disorder, consistent with a narcissistic personality disorder.

[134] It was submitted that the medical evidence and the evidence of his behaviour in prison was consistent with a personality disorder, in particular in a propensity for conflict. If there were a personality disorder this would have severe consequences for him if he were extradited:

1. the process of diagnosis was a prolonged one and there was no sign that it could or would be carried out in a prison in Utah;

2. the treatment for a personality disorder had extensive psychological input. There was no sign that this could or would be carried out in a prison in Utah;

3. the consequence of conflict would be that the requested person spent more time in a higher, more restrictive, level of security and solitary confinement. That was consistent with his experience in Saughton. The safety of the requested person would always be at increased risk;

4. with a five years to life sentence, what would be seen as bad behaviour could extend his sentence indefinitely.

[135] It was submitted that conflict was hard wired in him. Uncertainties about release would bear hard on him. His vulnerability was of a particularly pernicious kind: he was an unsympathetic figure.

Section 91 - health

[136] While these points were factored into the submissions on passage of time etc., they were focused also on section 91 of the 2003 Act, which arose at any time in the extradition hearing and required that, if it appeared to the sheriff that the physical or mental condition of the person was such that it would be unjust or oppressive to extradite him, he must discharge the person or adjourn the extradition hearing until it appeared to him that that condition no longer existed.

[137] It was submitted that the court should discharge the requested person, which failing adjourn to allow it to be investigated whether he had a personality disorder; adjournment for such a purpose fell within section 91 and I was referred to *Government of the Republic of South Africa* v *Dewani (No 2)* [2014] EWHC 153 (Admin),where there was a question whether the requested person's health would recover sufficiently to participate in a trial in South Africa and it was suggested that adjournment was appropriate to see if an undertaking would be provided by the requesting state (at para 46(v)).

[138] In response to my observation that that would require his cooperation and he had so far refused to share anything about his younger years, it was submitted that it would be under the control of the court, which could withdraw the adjournment and it was not known how the process might be illuminated by obtaining the history of Nicholas Rossi.

[139} In response to my question whether that would also need the cooperation of the requested person in the acknowledgement of his history, it was pointed out that he had said in evidence that he would cooperate. Against a background of using evidence of the youth of a person the patient did not accept as his, it would be worth investigating whether that was an exercise in which the psychiatrists would be prepared to engage.

Section 87

[140] If I found that there was no bar to extradition under section 79 and therefore required, in terms of section 87, to address the question of compatibility of extradition with the Convention rights within the meaning of the Human Rights Act 1998, that is rights under the European Convention on Human Rights (ECHR), it was submitted that Convention rights issues arose under five headings: (a) other prosecutions, (b) health, (c) prison conditions, (d) arbitrary detention and (e) sentencing. It was not entirely clear to what extent counsel was making a point about proportionality of extradition, given that section 87 does not require the court to consider whether extradition would be disproportionate, in contrast to section 21A which applies to category 1 territories, such as European Union countries, but counsel did refer to the discussion between Mr Bastian and the Utah prosecutor about reviewing the evidence in the charge which is the subject of the first extradition request and what he had understood to be agreement that the evidence would be reviewed. It was submitted that any doubt as to whether the prosecution would

in fact proceed would affect the proportionality of the interference with his rights that the extradition involves.

(a) other prosecutions

[141] Reference was made to Ms Johnson's affidavit and the Interpol red notice and reference there to arrest warrants and other offences said to have been committed in the United States but not resolved, in particular in relation to offences alleged to have been committed against AD AF, RC and KH, although it was recognised that the RC case would probably be at the back of the queue. It was submitted that it seemed that the US law enforcement authorities intended to prosecute the requested person for these various offences in addition to the extradition request offences. Such offences could have been but were not included in the extradition request. Rather, it appeared that the USA intended to seek consent to do so, presumably under section 129. To extradite him in these circumstances would be contrary to his Convention rights. Such extradition would fall within the ambit of articles 3, 6 and 8 of ECHR.

[142] In relation to the Ohio federal warrant for fraud, Ms Johnson and Mr Barron were clear that the information in the request suggested that that would proceed and Mr Barron suggested there was a danger federal law enforcement would come in first even ahead of the extradition case, subject to consent, but the argument was that the use of consent would be oppressive and contrary to article 8.

[143] The lawyers who gave evidence had no information beyond what was in the extradition request and affidavit, but it was not put to them that they were speculating or it was unsound. These points had been made by the requested person in a written submission

of 6 November 2022, but the United States had not sought to respond to the concern that section 129 might be utilised.

[144] Consent procedure under section 129 was unfair. The requested person would require to instruct legal representatives from prison in the United States. It was difficult enough to get instructions within Edinburgh. Consent would be a decision by Ministers. There would be no oral hearing or evidence and Ministers would hear no evidence from the requested person, in contrast to what would have happened if such charges had been included in the extradition requests. Unlike Part 2 extradition procedure there is no appeal from a consent decision: *Chyba* v *Strakonice* [2008] EWCH 3392 (Admin), at paras 9 and 10. Judicial review may be possible, but had never been used in extradition proceedings in Scotland. What is clear is that there is no statutory right of appeal under the 2003 Act (*Chyba*, para 21).

[145] I was also referred to *Sullivan* v *USA* [2012] EWHC 1680 (Admin), which was concerned with the possibility of the requested person being detained under civil commitment, with possible breach of articles 5 and 6 and speciality (paras 2 and 3). Compliance with speciality does not mean article 5 or 6 rights cannot be engaged. At para 14 Moses LJ quoted Lord Bingham's words (from *R (Ulla)* v *Special Adjudicator* [2004] 2 AC 323):

> "While the Strasbourg jurisprudence does not preclude reliance on Articles other than Article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to Art. 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subject to torture or to inhuman or degrading treatment or punishment: *Soering* [*Soering* v *United Kingdom* [1989] **ECHR** 14] paragraph 91…Where reliance is placed on Article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state: *Soering* paragraph 113…Successful reliance on Article 5 would have to meet no less exacting a test. The lack of success of applicants relying on Articles 2, 5 and 6 before the Strasbourg court highlights the difficulty of meeting the stringent test which that court imposes."

[146] That test was applied in *Sullivan*, at para 16. At para 25 it was noted that there had been a shift in position of the USA and Moses LJ concluded, at para 28 that there was 'a real risk that if returned Mr Sullivan will be the subject of an order of civil commitment'. I was referred to para 10 where Moses LJ stated:

> "The procedure for commitment is mainly applied to those serving prison sentences for sexual crimes. The Department of Corrections reviews inmates as they approach release. If the Department decides to refer an individual for commitment, his file is sent to the relevant prosecutor's office, an elected county attorney, who determines whether the case is appropriate for civil commitment or not. Civil commitment proceedings start when a prosecutor files a petition to a district court. The court appoints a mental health expert as examiner."

[147] It was submitted that that was relevant to sentencing in a case where the sentencing court was not deciding how long the sentence is.

[148] At paras 34 and 35 the Divisonal Court made tentative obiter observations about article 6 and speciality. The court was properly engaging with article 6 separately from the speciality issue. It was conceded that *Sullivan* was about the position in Minnesota and there had been other civil commitment cases, including cases where decision had gone the other way, but it was submitted that it was the leading case and the requested person was not relying on it as regards the risk of civil commitment, but as regards the more than fanciful risk that he will be prosecuted by consent procedure, which would be a flagrant violation of articles 3, 5 and 6.

[149] The consent procedure alone would not allow rigorous scrutiny of the personal circumstances of the requested person (*Mamazhonov* v *Russia* [2014] ECHR 1135 (23 October 2014) paragraphs 152 and 161 (a case where the requested person had been released from custody and was then 'abducted' and disappeared, indeed possibly murdered, all in the course of ECtHR proceedings and which was not about consent)).

[150] The procedural requirement inherent in Article 8 covered administrative procedures as well as judicial proceedings, but it is ancillary to the wider purpose of ensuring proper respect for private and family life (*McMichael* v *the United Kingdom*, 24 February 1995, [1995] ECHR 8, (1995) 20 EHRR 205 paras 87 and 91; *Van Kuck* v *Germany* [2003] ECHR 285 (12 June 2003)(2003) 37 EHRR 51 applying para 1 of *McMichael* to private life at para 74). The court must ensure that the interests of the community are balanced against the individual's right to respect for his family and private life. Although Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and must afford due respect to the interests safeguarded to the individual by article 8. It was therefore necessary to consider all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals were taken into account throughout the decision-making process, and the procedural safeguards available (*Giacomelli* v *Italy* [2006] ECHR 916 (2 November 2006) (2006) 45 EHRR 871 para 82).

[151] A failure to consider the further charges before extraditing the requested person from the United Kingdom would amount to interference in his procedural rights. In the present circumstances, this interference was not necessary in a democratic society. The justifications for interfering with private life need to be kept separate from the justifications for excluding the appellant from the decision-making process at a crucial stage: *Principal Reporter* v *K* [2010] UKSC 56); 2011 SLT 271 para 44 (in the context of excluding a father from the children's hearings process unless and until he secured a parental responsibilities and parental rights order from the sheriff court).

[152] It was submitted that the use of the consent procedure in relation to extant criminal allegations was an unnecessary restriction on the requested person’s exercise of article 8 rights.

[153] In the Lord Advocate's case and argument she submitted that there was no article 6 breach because the United States is a long-standing extradition partner and they hold a presumption of good faith: *Government of the USA* v *Assange* [2022] 4 WLR 11 at para 55 and there was nothing to suggest that, if they had the material to make a further extradition request before extradition, they would not do so; but the requested person's position was that section 129 was being misused.

[154] In response to my questions whether it was more an anticipation that it would be misused and why the United States did not just proceed with one application, if that were their intention, rather than bringing a second extradition request, counsel observed that if the authorities were not intending to prosecute it would have been easy to make that clear: it should be within the capacity of the USA to say that, as things stand, these two charges were all there was. It was submitted that it was not speculation that section 129 would be used, but there was a degree of certainty.

[155] The same point arose to an extent as regards article 6. As a resident of the United Kingdom for some years, the requested person had, for aught yet seen, the right of residence here. He was entitled to the benefit of article 6-1 of ECHR in its domestic form – not the flagrant violation test used for violations abroad (*Pomiechowski* v *The District Court of Legnica, Poland* [2012] UKSC 20, [2012] I WLR 1694 *per* Lord Mance at paragraphs 31 to 35). A failure to deal with the further charges before extraditing would be inconsistent with his right to a fair trial of his civil right to remain in the United Kingdom and would be inconsistent with his right to a fair trial of a criminal charge against him. The Crown make the point he did not have a right of residence in the United Kingdom, but the advocate depute cannot give evidence.

(b) health and (c) prison conditions

[156] As regards health, his medical conditions need to be assessed cumulatively and article 3 ECHR may also arise in relation to his health and the interlinked issue of prison conditions. These issues may raise article 8 issues along with the loss of family life. As regards prison conditions, Ms Golden's evidence was authoritative, experienced and unchallenged. She gave evidence that the Utah prisons are extremely short-staffed, still having 61% vacancies in October 2022 despite improvements, problems were structural and Utah had a poor record in medical care and a high mortality rate even compared with prisons elsewhere in the United States. In particular, it had over twice the national rate of death by suicide, a particular concern in the context of mental health care. Qualified immunity had shielded prison staff who allowed an arrestee to die by suicide from constitutional claims. Protection from rape or other assault by fellow prisoners was not adequate. Qualified immunity has shielded prison staff who ignored a prisoner who was "leaking blood all over" and who "left a path of blood" across the floor from constitutional claims.

[157] The requested person was likely to be confined on his own for 21 or more hours a day. 30 years in solitary confinement was acceptable. There was no in-person visitation in the Utah County Jail and video visitation was charged at $12 a session. Prisoners in Utah prison may be allowed as little as one video visit a month. Prohibitions on receiving visitors had been upheld by the courts. Prisoners required to pay for medical treatment. Those in Salt Lake County Jail were not provided with pillows but must buy their own. The amount they could spend was very limited and any external funding was greatly reduced by charges imposed by the State. Denials of magazines, newspapers and photographs to some prisoners had been upheld by the courts.

[158] Constitutional protection was severely restricted. Court action by prisoners was barred until Utah's complex system of internal administrative remedies had been exhausted and perfectly complied with. There were a large number of procedural hurdles to legal action not applicable to the non-prisoner community. Nor was there independent oversight of conditions of confinement.

[159] Article 3 can in principle apply where a state that is a party to ECHR proposes to extradite a person to another state, whether or not that other state is itself a party to the ECHR. There must be substantial grounds for believing that, if extradited, the requested person faced a real risk of being subjected to inhuman or degrading treatment. Once such evidence has been adduced by the requested person it was for the requesting state to dispel any doubts about it: *Saadi* v *Italy* [2009] 49 EHRR 30, paras 129 and 140 cited in *Shumba* v *France* [2018] EWHC 1762 (Admin) paragraph 34 *et seq*. There may also be a duty on the court in this jurisdiction to request further information from the state concerned where this is necessary to dispel any doubts.

[160] The primary duty of a state to secure the right not to be exposed to treatment contrary to articles 3 and 8 of the Convention by way of attacks on one's personal integrity was by putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions: *D J* v *Croatia* - 42418/10 - HEJUD [2012] ECHR 1642 (24 July 2012) paragraph 86. State authorities have an obligation to act on their own motion in cases of ill-treatment: *D J* v *Croatia,* paras 63 to 65; *Tadic* v *Croatia* - 10633/15 [2017] ECHR 1035 (23 November 2017) paragraph 43.

[161] This was reflective of international practice; The Inter-American Commission on Human Rights Report 'Towards the Closure of Guantánamo', published on 3 June 2015

considers that in order to guarantee that prisoners' rights are effectively protected in accordance with applicable international human rights standards, the State must ensure that all persons deprived of liberty have access to judicial remedies (para 162). I was referred to *Abu Zubaydah* v *Lithuania* (46454/11 (First Section) [2018] ECHR 446 (31 May 2018) paras 643 & 644) where the ECtHR found a violation of article 3 in relation to extra-judicial transfer, in a case where there was a real risk of torture or cruel, inhuman or degrading treatment.

[162] Whenever an individual made a credible assertion that he had suffered treatment infringing article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", required by implication that there should be an effective official investigation which should be capable of leading to the identification and punishment of those responsible. Any investigation into serious allegations of ill-treatment must be both prompt and thorough. That meant that the authorities must always make a serious attempt to find out what has happened and should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis for their decisions. Any deficiency in the investigation which undermined its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard: *El-Masri* v *the former Yugoslav Republic of Macedonia*[GC], no.39630/09, ECHR 2012 para 183. It was submitted that article 3 was not satisfied where there was a lack of adequate judicial or other independent control or supervision, where the prisoner was kept by reckless authorities or those who act maliciously or sadistically.

[163] These arguments also informed submissions about flagrant breaches of articles 5 and 8 and the context here was a sentence of five years to life.

(d) arbitrary detention and (e) sentencing

[164] On arbitrary detention, I was advised that the requested person had sought from the Lord Advocate an assurance that, if extradited, he would be provided with a certificate of the length of time he had spent in prison awaiting extradition and this had not been forthcoming. Without the ability to establish how long he had already spent in custody, the requested person would face an arbitrary period of custodial punishment. That said, I was advised that the Lord Advocate had said that a calculation is made in every case of all periods spent in custody by requested persons until the day they leave the country and that that is emailed to the requesting state and that can be in the form of a letter.

[165] It was submitted that the argument about arbitrary detention maintained force: although Mr Bastian thought it possible that the period would be taken into account, the US Department of Justice letter dated February 28, 2023 (bundle G.3, page 2) said there was no guarantee, but it was local practice. The assertion that the Board of Pardons takes it into account was not borne out by what was said in the Board of Pardons website (defence production 6) in factors considered in decision making.

[166] This was contrary to article 5 of ECHR, the aim of which is to ensure that no one should be dispossessed of his liberty in an arbitrary fashion, the governing requirement being *a procedure prescribed by law*. The requirement that an interference must be in accordance with the law was an absolute one: *Craig* v *HMA (for the Government of the United States of America)* [2022] UKSC 6, para 50, 200 SC (UKSC) 27.

[167] Counsel developed the arguments in his supplementary submission as regards fair trial and disproportionate sentencing. It was apparent from the unchallenged evidence of Joshua Barron, who gave expert evidence on behalf of the requested person, that the sentence to be imposed by the Court in Utah in respect of each case would not be a sentence

within the band of five years to life imprisonment, as the statute might suggest on a plain reading, but would in fact be a sentence of "five years to life" and that thereafter, the issue of how long the sentence actually was, would be determined by the Utah Board of Pardons. This gave rise to a number of problems:

1. Such a penalty was not consistent with the statute provided by the requesting state and was therefore not according to law of reasonable certainty and foreseeability as it required to be;

2. The Board of Pardons is an administrative body, part of the executive and not a judicial body;

3. The Board of Pardons does not hear trials so that the person who does hear the case does not decide it in this respect;

4. The legal representatives of the prisoners at the hearing before the Board of Pardons do not address the Board as of right but only if invited to do so by a Board member or a case officer which often did not happen;

5. As prisoners receive on conviction no official indication of the term they might be required to serve as punishment they are left in a state of uncertainty.

[168] This was unlike an Order for Lifelong Restriction or a life sentence, where there was always a fixed punishment part determined by the sentencing court and the parole board was a tribunal and had a legal chair and was concerned with public safety, not punishment for the crime.

[169] This all gave rise to an inevitable conclusion that the trial would take place in conditions that contravene article 6. The ECtHR does not exclude that an issue might exceptionally be raised under article 6 by an extradition decision in circumstances where the fugitive risks suffering a flagrant denial of a fair trial in the requesting country: *Drozd &*

Janousek v *France and Spain* 12747/87 [1992] ECHR 52 (26 June 1992) (1992) 14 EHRR 745 paragraph 110.

[170] What was involved here was a flagrant breach of article 6 ECHR, worse than the situation that gave rise to the adoption of punishment parts in Scotland: *Flynn & Ors* v *HM Advocate* [2004] UKPC D1, 2004 SC (PC) 1 para 3. It was a structural failing which, being part of the Utah system, could not be cured by an assurance. It plainly violated prisoner's rights: it was not trial by the judiciary but by the executive and thus was a flagrant breach of article 6.

[171] As regards article 5.1(a)

> "(Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court),"

Lord Bingham had described sentencing in *Sullivan* as being at the sharp end of the judicial process. There was every indication that the requested person's hard wired propensity for conflict would endanger him in attempting to persuade this non-judicial body that he should be released. The sentence was flagrantly longer than what would be imposed in the United Kingdom and the penalty was flagrantly disproportionate to the offence charged, under reference to *Veermae* v *Finland* 38704/03 [2005] ECHR 958 (15 March 2005), a case concerned with transfer of prisoners in order to serve a sentence, when the parole regime in the receiving country would be less favourable and the ECtHR held that there could be an issue under article 5, if the period to be served would be flagrantly disproportionate to the time which would have had to be served in the sentencing State.

[172] It is, accordingly a flagrant violation of article 5 ECHR where sentence was flagrantly disproportionate to that of the sending country. The present case would involve a life

sentence which was not imposed by a judicial body. Sending the requested person to the United States would be contravention of his convention rights.

[173] Counsel accepted that his argument as regards likely prison conditions was largely based not so much on the generality of the conditions but on how they might impact in particular on a prisoner who was likely to be challenging in his behaviour, on a holistic view of the medical and psychiatric evidence and the evidence as to prison conditions and method of sentencing.

Lord Advocate

[174] The advocate depute adopted his case and argument. It was submitted that I should not rely on anything that the requested person said in evidence. I had already found him to be Nicholas Rossi, with all that that signified for his credibility and reliability. Yet in his evidence he maintained the lies about his name, nationality, background and so on. He made claims about others involved in this process which I had previously characterised as 'scandalous' and extended these to a vast implausible conspiracy against him. He made repeated claims about his health and physical abilities which were unsupported, or even contradicted, by medical evidence and even, in the case of his supposed inability to raise hands above his head for any length of time, by his own actions in court. I was invited simply to disregard all that he said as both incredible and unreliable, designed solely to avoid extradition.

[175] On the matter of review of evidence, whatever the background to this was, it was quite clear that there was no current review of either case and the prosecution continued in both cases.

Medical evidence

[176] There was no medical evidence before the court that the requested person suffered from any significant illness, whether physical or mental. As regards his physical condition, he was undoubtedly ill when first arrested, having been very sick with COVID in September 2021, but he was discharged from hospital once he was sufficiently recovered and since being remanded in custody any health conditions had been managed in prison. He had not used oxygen for at least four months and has suffered no ill-effects. His oxygen saturation levels were consistently those of a healthy person.

[177] The only other physical health issue was his physical mobility and use of a wheelchair. There was no medical evidence to explain why he did so. Dr Mundweil was extremely sceptical about his need for the wheelchair. She confirmed that he did not use a hoist in prison and, in her view, did not need one. She confirmed that she had made attempts to ascertain why he was in a wheelchair and could find nothing to explain it in his medical records. She had examined his legs and said that his calves were soft and well-muscled and his thighs were strong and athletic. Moreover, she had seen CCTV which showed him kicking open a door. A decision was taken by the whole team that when he threw himself from his wheelchair they would stop assisting him up as he could do it himself.

[178] The court had heard no evidence of any other physical health condition from which he is said to suffer and it was submitted that there was simply no evidence in relation to physical health upon which to base any submission that extradition should not proceed, whether that be under section 91 of the 2003 Act or in relation to any article of ECHR.

[179] Putting personality disorder to the side, the only mental health evidence which the court had heard in relation to any possible psychiatric condition was that of Dr Choudhary

and Dr Cogan. Dr Cogan had examined him in December 2021 and concluded he had no mental illness and did not need either psychiatric or psychological input. It was also of significance that she described how the referral to psychiatry had been at his request and that he had seemed keen to attract a psychiatric diagnosis.

[180] Dr Choudhary had seen him in May 2023 and had had access to medical records. The only possible mental health condition which he mentioned in his report was recurrent depressive disorder, current episode moderate. This was not a diagnosis. He said that his presentation was 'suggestive' of that condition. However, he also confirmed that that opinion was based largely on what the requested person had told him about how he felt and his moods, not least as the particular condition required there to have been multiple episodes over a period of time. The court might be loathe to rely on any conclusion which was based on what the requested person had said, particularly where he had a clear motivation to obtain a diagnosis. In that session alone Dr Choudhary confirmed that he had told him a series of things about his background which the court had already ruled were simply untrue. It was clear from his evidence that he would continue to tell these lies in any assessment of him in the future.

[181] As regards other conditions mentioned in his records, Dr Mundweil confirmed that she had seen no signs of ADHD, ADD, PTSD or non-epileptic attack disorder in the time that she had been dealing with him. It was notable that, for example, in relation to the entry on page 10 of Dr Choudhary's report in which ADHD and PTSD were mentioned, it was in the context of this apparently being a claimed past diagnosis in Dublin, where he said that he was brought up by the Christian Brother and was attached to other biographical material which was not true. In summary, there was no positive diagnosis of any of these conditions and no evidence from any medical source which would suggest that he truly had them.

[182] There was no medical evidence that he had a personality disorder: there was no diagnosis of such a condition. The two doctors who were qualified to make such a diagnosis both explained the lengthy and detailed process which would have to be gone through before such a condition could be diagnosed. Neither had gone through that process and they were careful to point that out. Dr Choudhary did say that he had seen indications within the medical records of traits which might suggest the existence of a personality disorder but, again, stressed the need to go through the full process before any diagnosis could be made.

[183] Dr Mundweil expressed a view that he may have a personality disorder and mentioned narcissistic personality disorder. However, she was also very clear that as a GP she could not diagnose a personality disorder; that was for a psychiatrist. She also mentioned the need for a process of assessment before such a diagnosis could be made.

[184] All this evidence came to was that the requested person had some traits which may be suggestive of a personality disorder but that confirmation could only come by way of extensive and detailed investigation which nobody had come close to carrying out. It was suggested that the court was, in effect, being asked to make that diagnosis, but it had no basis upon which to do so. It must proceed on the evidence and that was that no diagnosis of personality disorder had been made.

[185] In any event, it was not enough simply to say that a requested person had a mental health condition; it would also be necessary to explain why it would present a barrier to extradition. Nothing of the sort had been done here. There was no indication that any treatment was required, nor what that treatment would be, nor that it would be unavailable in the USA and that such non-availability would impact negatively upon the requested person. Ms Golden was the only person asked about anything even vaguely connected to

these latter questions. It was accepted that she was knowledgeable in relation to the question of prison conditions but the court might have difficulty in placing any weight on views she might express about treatment for personality disorder.

[186] Dr Choudhary said that treatment for a personality disorder would be pointless if the person concerned did not accept that they had such a disorder. In spite of the requested person's somewhat desperate evidence ultimately tending to the contrary, the evidence of his history of aggressive, argumentative and non-compliant interaction with medical personnel made it exceptionally unlikely that he would comply with such an assessment and follow-up treatment, effectively rendering it pointless in any event.

[187] Dr Choudhary *was* specifically asked about the question of extradition and his view was unequivocal: the requested person's mental health issues, such as they were, did not present as a barrier to extradition. They should not hinder his transportation to the USA. It was unlikely that further stay for treatment in the United Kingdom would benefit him. He was suitable to undergo disposal via the criminal justice system. Even if he did have a particular mental health condition there was still nothing to prevent his extradition. That was the evidence upon which the court must proceed.

[188] There was simply no evidence which could found any submission under section 91 or in relation to any article of ECHR grounded on his health; all arguments based on his health were without evidential foundation, without merit and should be rejected.

Prison conditions

[189] On extradition, the requested person may be held in a County Jail pending the outcome of his case if a judge determines that bail is not appropriate. The two possible jails were Utah County Jail or Salt Lake County Jail. If the requested person is convicted, he will

serve any sentence in the Utah State Prison system. The Utah Department of Corrections maintains two such prisons: (i) Utah State Prison – Utah State Correctional Facility; and (ii) Utah State Prison – Central Utah Correctional Facility.

[190] Even if it were accepted that the requested person will use a wheelchair or require oxygen, each County Jail is able to provide these: (bundle G.3 - *Supplementary letter from US Department of Justice to Crown Office International Co-operation Unit dated 28 February 2023*). The Utah State Correctional Facility is a newly built prison; if the requested person was convicted and remained using a wheelchair, he would likely be housed in the prison's Currant Building, which is designed specifically for those needing wheelchair accessibility (Ms Golden's report at pages 10 and 13).

[191] The court had the evidence of Ms Golden generally and the affidavit from Matthew Higley in respect of conditions in one of the jails in which he may end up pending trial – Utah County Jail. Ms Golden accepted most of Mr Higley's points, which were confined to that jail, albeit with some scepticism in relation to broad statements. It was accepted that Ms Golden had the relevant background and expertise to be persuasive on the topic. She accepted that she had not been to any of the prisons or jails concerned but it was not suggested that anything much turned on that.

[192] It was submitted that nothing which she said, either individually or cumulatively, gave rise to 'substantial grounds for believing that he faces a real risk of being subjected to treatment contrary to article 3 if he is extradited' (*Dean* v *Lord Advocate* 2018 SC (UKSC) 1 per Lord Hodge at paragraph 25). The test was a stringent one and not easy to satisfy: *Dempsey* v *Government of the USA* [2020] 1 WLR 3115 at paragraph 43(i). Generalised evidence as to human rights violations was not sufficient. It must be shown that the individual requested person is specifically at risk: *ibid* at paragraph 43(ii).

[193] I was also referred to *Amnott* v *United States* 2022 SLT 456 at para [38]. It was not for contracting states to impose Convention standards in non-contracting states and it would require a high level of ill treatment, including death or torture, to amount to a bar to extradition to states with a long history of respect for democracy, human rights and the rule of law.

[194] It was suggested with that in mind, that while the conditions described by Ms Golden might not, in some respects, be those which we would expect in the United Kingdom, they certainly did not indicate the sort of high level of ill treatment suggested by the court in *Amnott* and I was invited to reject the claim that article 3 rights would be breached by reason of prison conditions in the United States.

Passage of time

[195] Passage of time was the only point taken under section 79, and it was submitted that the requested person cannot rely on the passage of time to the extent that he is a fugitive from justice and, in any event, because the high test for injustice or oppression was not met.

[196] A fugitive cannot rely on passage of time: *Kakis* v *Government of the Republic of Cyprus* [1978] 1 WLR 779 per Lord Diplock at 782H-783B; *Gomes* v *Government of the Republic of Trinidad and Tobago* [2009] 1 WLR 1038 at paras 18-21; and *Wisniewski* v *Poland* [2016] 1 WLR 3750 at paragraph 39. The requested person fled from the United States authorities in 2017 and, on the facts found by the court at the identity hearing in November 2022, had been living in the United Kingdom under a series of aliases since 2018: *Lord Advocate* v *Rossi* 2022 SLT (Sh. Ct) 245. He had gone to elaborate lengths to evade the authorities. The present case fell squarely within the fugitive principle enunciated in *Kakis* and *Gomes*. By fleeing

from Utah the requested person had, as a matter of choice, placed himself beyond the reach of the Utah criminal justice system and he had brought about any resulting delay himself.

[197] Whether he was fleeing in relation to these specific offences or another or others, the position was that he left the country, assumed a series of false identities and even to this day continued to attempt to maintain the pretence, all in an attempt to avoid facing the prospect of prosecution. That applied from at least 4 June 2017 when he flew to Ireland (affidavit of Sandi Johnson, para 18).

[198] It was, however, conceded that he was not a fugitive before June 2017 and he was entitled to attempt to rely on passage of time before then. It was acknowledged that in the first request there was a further period which passed between the commission of the offences and the initiation of proceedings, but the focus at this stage should in any event be on the demonstrable effect that the passage of time has had on the individual rather than on the length of time or the reasons for it. Suggestions of delay in processing in Utah laboratories was of very little significance. What the court must consider is the effect.

[199] In relation to second request, there had been no delay whatsoever on the part of the state. The complainer saw publicity about the requested person and this extradition process in January 2022 and reported the matter to the police, leading to an investigation and, ultimately, the making of the second request. The only delay in that case was on the part of the complainer in reporting to the police. Delayed disclosure in relation to sexual offending is now such a well-recognised phenomenon that there are mandatory directions about it which judges must give in any trial in Scotland in which it arises. In any event, it is not a delay on the part of the state.

[200] Extradition is barred by reason of the passage of time if (*and only if*) it would be '*unjust or oppressive*' to extradite the requested person by reason of the passage of time since

he is alleged to have committed these extradition offences: section 82 of the Act. *'Unjust'* is directed to the risk of prejudice to the accused in the conduct of the trial itself, that is, whether a fair trial is impossible: *Gomes* at paras 32 and 33. 'O*ppressive*' is directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration: *Lagunionek* v *Lord Advocate* 2015 JC 300 at para 14. It requires personal or family hardship greater than what is inevitable and inherent in extradition for a criminal trial in another country. The test for oppression is an extremely high one (*ibid* at para 15).

[201] Neither threshold, for injustice or oppression, was met in the present case. As regards injustice, a fair trial is possible in Utah. The requested person will be able to cross-examine the complainers (and any other prosecution witnesses) and give evidence on the charges himself. Rape trials are often conducted in this jurisdiction some years after the alleged offence, with no suggestion that it is unjust to do so. Lance Bastian confirmed the position: there was a whole system by which a fair trial can be ensured in Utah. There was nothing procedurally or institutionally unfair: the United States is a country with a strong history of the rule of law.

[202] Nothing had been said as to how the requested person will be prejudiced by the passage of time. Joshua Barron said that in a case where there had been a long gap between alleged offence and trial he might suggest to the jury that it had prejudiced the accused by dint of fading memories or a loss of the opportunity to get hold of exculpatory evidence but that was a general statement and it had not been suggested that it arose in either of the cases in which extradition had been requested. In any event, cases of this age and older, particularly sexual cases, are prosecuted in significant numbers in this jurisdiction every week. There is no suggestion that such cases are unfair; they do not give rise to successful

claims under ECHR. It was difficult to see how the position is different in either of these cases. No injustice had been shown.

[203] As regards oppression, there was no change in circumstances, nor any hardship greater than what was inevitable and inherent in a criminal trial in any country. All that had occurred was that the requested person had fled his home jurisdiction, married in the United Kingdom under an assumed name, and contracted, but largely recovered from, COVID.

[204] Now that the issue of the requested person's identity had been resolved, at its core this case was routine and straightforward. Two women in the United States had made allegations of rape against the requested person. Accordingly, the United States – a long-standing extradition partner - had properly and responsibly sought his extradition. Therefore, if extradited, the requested person will be tried for two serious but ordinary offences of the kind routinely tried in the Scottish courts every day. That will not involve any unfairness or any hardship greater that what is inevitable in a criminal trial for sexual offences in any country. There is no oppression in extradition or in trying the requested person for those offences. The questions in section 79 should be answered in the negative.

Article 6

[205] As regards article 6, the 'domestic' limb was said to apply by the defence because the requested person had or may have a right of residence in the United Kingdom. He did not. The question of his identity was resolved at an earlier stage in these proceedings: *Lord Advocate* v *Rossi* 2022 SLT (Sh Ct) 245. The court was satisfied that the requested person was Nicholas Rossi, a United States citizen, not Arthur Knight, an Irish citizen. A United States citizen has no automatic right to reside in the United Kingdom and must make an

application to the Home Secretary for leave to remain in the ordinary way. To the knowledge of the Lord Advocate, the requested person had not made such an application and indeed could not do so since he still maintained that he is not American but Irish.

[206] When a requested person does not have a right to residence in the United Kingdom, article 6 does not apply to their extradition proceedings: *Pomiechowski* v *District Court of Legunica* [2012] 1 WLR 1604 per Lord Mance JSC at paragraph 31. Even if that were not so, there would be no breach of article 6 in this case. The case as it appears to be put by the requested person is that it would be unfair for this court to allow extradition when there might be other prosecutions against him in the United States at some indeterminate point in the future. Not so. The United States is a long-standing extradition partner. They hold a presumption of good faith: *Government of the USA* v *Assange* [2022] 4 WLR 11 at para 55. There was nothing to suggest that, if they had the material to make a further extradition request before extradition, they would not do so.

[207] Equally, there was nothing to suggest that, if further offending came to light after extradition, they would not make the appropriate section 129 request for the Scottish Ministers' consent to prosecution. The court can only consider the extradition requests before it and determine whether any of the specific bars to extradition apply in respect of those extradition requests. Doing so, the court would no doubt consider all of the evidence before it and the submissions made for and against the requested person. That would ensure that these proceedings complied with article 6 (to that extent that article 6 applied at all in this requested person's case). The court cannot consider extradition requests that are not before it and that might never be made. A court cannot breach article 6 by failing to consider hypothetical scenarios; thus, the court in these proceedings cannot breach article 6

by a failure to consider offences that might or might not be the subject of future extradition requests or a section 129 request.

[208] The court was invited to consider the two extradition requests before it and to place the usual trust that reposes in the US authorities that, if further offences come to light, they will act appropriately and make either an extradition request or a section 129 request, as the case may be. By considering only the extradition requests before it and ruling appropriately on them, the court will be acting compatibly with article 6.

[209] It was accepted that there were other extant proceedings in the United States, but the good faith assumption in case law and the sequence of requests in this case should confirm the United States will act properly. It was not clear why it should be different if a new case arises, where the defence accept that consent procedure could be used. Judicial review would be open to the requested person in respect of the decision of the Minister as elsewhere in the United Kingdom. There was no merit in the suggestion that other possible proceedings should give rise to a breach of article 6.

Article 8

[210] As regards article 8, the case as it appeared to be put by the requested person was that if the court were to allow his extradition before considering whether there might be other prosecutions against him in the United States, there would be an unlawful interference with his article 8 procedural rights. This assertion is without merit for substantially the same reasons as for article 6. A court cannot breach the procedural requirements of article 8 through a failure to consider hypothetical scenarios. In any event, the Extradition Act ensures that, to the extent that they are engaged at all, the procedural requirements of article 8 are met.

[211] Should the United States make a further (i.e. third) extradition request before extradition on these two requests, that would be considered by the court and Scottish Ministers under the Extradition Act in the usual way, and he could make any article 8 submissions he chose in in the course of those extradition proceedings. Should the United States make a section 129 request after extradition, the requested person would be given notice of the request under section 129(3). He would have the opportunity to make representations to Scottish Ministers before the request was considered, including on article 8, since one of the questions the Scottish Ministers would have to decide would be whether consent would be compatible with the Convention rights: section 129(6). The requested person would be able to apply for judicial review of any decision of the Scottish Ministers to consent to a further prosecution, in the course of which he could again rely on article 8 in the usual way. All of that would ensure compatibility with the procedural requirements of article 8. The requested person would be able to participate effectively in a fair process: *IR (Sri Lanka)* v *Secretary of State for the Home Department* [2012] 1 WLR 232 at paras 8-9.

[212] Regarding the *substantive* limb of article 8, the question was whether the interference with the private and family lives of the requested person and other members of his family was outweighed by the public interest in extradition. The relevant principles were summarised by Lady Hale in *H(H)* v *Deputy Prosecutor of the Italian Republic, Genoa* [2013] 1 AC 338 at paragraph 8. The public interest in ensuring that extradition arrangements are honoured is very high, as is the public interest in discouraging persons seeing the United Kingdom as a State willing to accept fugitives from justice: *Polish Judicial Authority* v *Celinski* [2016] 1 WLR 551 at paragraph 9 and *Osipczuk* v *Lord Advocate* 2022 SLT 1263 at paras [21] and [22]. Indeed the strength of the public interest in extradition always carries great weight and will likely outweigh the article 8 rights of the family unless the consequences of

the interference with family life will be "exceptionally severe": *H(H)* v *Deputy Prosecutor of the Italian Republic, Genoa* [2013] 1 AC 338 at para 8.

[213] In the present case, the balance was firmly in favour of the requested person's extradition. The weighty public interest in extradition and ensuring the United Kingdom does not become a "safe haven" for fugitives from justice clearly outweighs any interference with the requested person's limited private and family life or that of his wife. He has no children or other dependants. He married his wife having fled from the United States and in the knowledge that he was Nicholas Rossi, a US citizen with no right to reside here.

Article 5

[214] The article 5 argument seemed to be focused on the period of detention to which Mr Rossi is currently subject. That detention was lawful and did not breach article 5. Article 5.1 provides an exhaustive list of the circumstances in which detention may be lawful. Sub-paragraph (f) includes 'the lawful arrest or detention of a person to prevent his/her effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.' His detention plainly fell within the latter limb. Moreover, his detention on that basis was both lawful and in accordance with a procedure prescribed by law – it is all clearly set out in the 2003 Act and, in relation to questions of bail, in the relevant sections of the Criminal Procedure (Scotland) Act 1995.

[215] What seemed to be suggested was that that period of detention would somehow be rendered retrospectively arbitrary, and thus unlawful, by what may happen in the USA. That proposition simply did not hold up to scrutiny. The suggestion that a posited failure to take into account, when imposing a sentence, of a period of detention related to extradition proceedings would render the initial detention arbitrary was unvouched. There was no

authority which said that credit for detention for one purpose must be given when imposing detention for a different purpose, far less that failure to do so rendered the initial – previously lawful – detention arbitrary.

[216] Even if there was such a requirement to give credit, the evidence from both Lance Bastian and Joshua Barron was that they would expect an individual sentenced in Utah to be given credit for time spent in custody abroad in respect of extradition proceedings for the offence for which they were being sentenced. Defence production 6, the list of factors from the Board of Pardons website, indicates that it is non-exhaustive and states that the factors listed are 'examples' of those which may be considered by the Board.

[217] On the question of the provision of a 'certificate' to the requested person in respect of time spent in custody, there was no requirement on the Lord Advocate to do so and no legal basis for the request was made, but in every case of extradition to a category 2 territory, the relevant authority of the requesting state – in this case the Department of Justice in the USA – is supplied by Crown Office with information on the total period which the requested person has spent in custody in connection with extradition proceedings in Scotland. Again, Mr Bastian and Mr Barron indicated that they would expect to be able to get that information and that the prosecutor would also likely get it and that they would agree on a term. There was thus no merit in the argument that the requested person's detention in Scotland could be rendered retrospectively unlawful for the reason suggested and even if there was, there was no evidence to suggest that that would happen.

Board of Pardons

[218] Much like the arguments now advanced about personality disorder, this issue was not raised in advance of the hearing, was not mentioned in the case and argument for the

requested person and had not featured at any point before this part of the hearing was underway.

[219] In any event, the argument was entirely misconceived. As was acknowledged in the supplementary submissions of the requested person, article 6 is only exceptionally relevant in the context of extradition to a non-Convention state and then only if the fugitive risks suffering a flagrant denial of justice. No such risk has been demonstrated. The challenge on the basis of article 6 should be rejected.

[220] The evidence of Joshua Barron was to the effect that upon conviction a court could impose a sentence of five years to life. It was imposed by the court which had heard the trial. At a later stage the Board of Pardons would consider when the individual was suitable for release. A broadly similar approach existed in Scotland in relation to the possibility of early release from a long term sentence or release from an indeterminate sentence after the minimum period has been served. Whether, and if so when, a person should be released in Scotland was in the hands of the Parole Board – a separate body from the trial court. The minimum period to be served was set by the court, as was recognised in defence production 6.

[221] Mr Barron described the Board as a quasi-judicial body. As the Board itself makes clear (defence production 6) it is governed by rules and makes public the sort of information which they take into account, as well as that each case has to be considered on an individualised basis. This is far from trial by the executive or arbitrary detention.

[222] As regards the length of sentence itself and the suggestion that it was flagrantly disproportionate to the crime charged it was submitted that this too was without merit. The recent case of *Amnott* considered these issues in the context of a challenge to extradition on

the basis of article 3 ECHR. At para [29] the court quoted with approval the comments made in the case of *Judicial Authority* v *Celinski* at para. 13(iii)

> "it will … rarely be appropriate for the court in the UK to consider whether the sentence was very significantly different from what a UK court would have imposed, let alone to approach extradition issues by substituting its own view of what the appropriate sentence should have been."

[223] That was exactly what was being suggested here and the court should not indulge in it. The ultimate conclusion of *Amnott* was that a sentence of mandatory life imprisonment without the possibility of parole did not constitute a bar to extradition. That was significantly more draconian than anything in the present case.

[224] *Sullivan* was entirely distinguishable from the current circumstances. It did not concern the procedure for deciding on a release date from a sentence imposed following conviction but, rather, an entirely separate civil regime in which the existence of a relevant previous conviction may be taken into account when deciding whether to impose civil commitment. It simply had no application to the present circumstances.

[225] I was referred to *Castle* v *Government of the USA* [2013] EWHC 1048 (Admin), another case dealing with civil commitment, this time in a US federal context where Moses LJ cautioned at para [28] about the dangers of seeking to deploy *Sullivan* in a different statutory context, even though in *Castle* that context was still civil commitment. That caution should be all the greater when, as here, the court was invited to apply it to decisions about release from sentences imposed following upon criminal conviction.

[226] Counsel for the requested person had referred to *Veermae* v *Finland*, which it should be noted was a case involving someone sentenced in Finland who was to be extradited to Estonia to serve their sentence – not about the imposition of sentences in a foreign jurisdiction for a crime committed there but in section B.3 (the court's assessment) the

ECtHR again make the point that ECHR does not require contracting parties to impose their standards on third states or countries. This was just as relevant here as to the earlier point under article 3. Not all aspects of the Board of Pardons set-up as described may be what might be required in a contracting state. But that was far from meaning that extradition to the USA was barred by virtue of its existence.

[227] There would have to be 'substantial grounds' for believing that time served in the third state would be 'flagrantly disproportionate' to the time served in original state. No violation of article 5 was found in that case. The same was true here and it did not support the argument made. There was nothing in this ground which would support a claim under either article 5 or article 6.

Assurances

[228] Although the advocate depute did not suggest that the court should seek any further assurances from the United States, he suggested that if, contrary to his submissions, there was a specific point on which I had concern which could be displaced by an assurance from the US authorities, I should make that clear and give time for the possibility of obtaining such an assurance to be explored. I was referred to *Government of USA* v *Assange* from para [39], particularly at paras [44]-[46], for observations on that being the appropriate course. It was not suggested that any specific assurances should be sought.

Conclusion

[229] I was invited to

1) conclude that the condition mentioned in section 91(2) is not satisfied;

2) answer the question in section 79 in the negative;

3) answer the question in section 87 in the affirmative; and

send the case to the Scottish Ministers for their decision

Further submissions for requested person.

[230] In brief further submissions as regards the question of assurances, counsel for the requested person submitted that the role of the Board of Pardons and Parole seemed to be structural and he was at a loss to see how its role could be a matter of assurances, even though the issue only arose late in the proceedings. As regards the other prosecutions, it was for the Americans to get their house in order and would not have been unreasonable or unrealistic to have sought assurances in relation to those known allegations.

[231] In response to my observation that no such enquiry appeared to have been addressed, he submitted that it was for the Lord Advocate to put such matters to the US authorities and get a response. He would caution against refraining from seeking assurances as regards other prosecutions – the existence of separate jurisdictions (among states and in federal jurisdiction) should not prevent the court seeking assurances.

[232] Issues of how the requested person might be cared for focused an area of concern in which assurances might be sought; it would require some detailed fact finding or scene setting to convey a rounded picture.

Sufficiency of evidence

[233] I should note that no submissions were directed to sufficiency of evidence under section 84 and I understood it to be accepted that this was a case where, if the court required to proceed to section 84, it did not require to determine sufficiency in light of the designation

of the United States under section 84(7) (Extradition Act 2003 (Designation of Part 2 Territories) Order 2003/3334).

Discussion and Decision

Evidence

[234] I heard evidence from three medical professional witnesses and three American legal professional witnesses and I was satisfied that all of them were giving credible and reliable evidence and endeavouring to assist the court, whether, as in the case of one of the medical witnesses, Dr Choudhary and two of the legal witnesses, Ms Golden and Mr Barron, they were called as experts, or as witnesses of fact; in the event, all of them had a degree of expertise and I accepted that expertise, within its proper scope. My only reservations in relation to the evidence of these witnesses were on the basis of the information upon which they were expressing a view or opinion and that, in some regards, may have reduced the value of that opinion, but where that arises I will make clear my reservations.

[235] I was also entitled to found on material contained in documents which were admitted in evidence and documents which were admissible under section 202 of the 2003 Act and the latter included in particular affidavits from Ms Sandi Johnson, Senior Deputy County Attorney and Matthew Higley, Chief Deputy, Utah County Sheriff's Office Corrections Division. I saw no reason not to rely on that material.

[236] In addition, evidence was adduced from the requested person and William King, a fellow inmate in Edinburgh Prison. I concluded that the evidence of the requested person was unreliable to the extent that I would not be prepared to accept any statement of fact made by him unless it was independently supported. He contradicted himself as regards the length of time he had been in a wheelchair in the same breath. His claim that he could

not lift his arms above his head and keep them there because of atrophy in his arms was contradicted by his behaviour during the proceedings when he regularly raised and kept his hand raised during the hearing as he tried to engage the attention of the court. I am not alone in finding his reporting unreliable; I recall, for example, that Dr Mundweil doubted whether she could rely on what he told her about his medical condition.

[237] He continues, of course, to deny that he is Nicholas Rossi, the man who is the subject of the extradition requests who we know was born in the USA and is a US citizen (affidavit of Ms Johnson at para 34) and who the court has already found him to be; and he continues to maintain that he is an Irishman, adopted at birth, long resident in the United Kingdom and who has never set foot in the United States. He has, with medical professionals and in court, avoided questions about his childhood and upbringing, I conclude because that is a canvas on which he has not yet chosen to paint, although he has asserted various psychiatric ailments which ultimately could not be established without the history that he has chosen not to share. I conclude that he is as dishonest and deceitful as he is evasive and manipulative. These unfortunate facets of his character have undoubtedly complicated and extended what is ultimately a straightforward case.

[238] As regards Mr King, his evidence was, as I have noted, largely in the form of a monologue, or indeed diatribe against the iniquity of the requested person's treatment at the hands of prison and NHS staff at HM Prison Edinburgh. His evidence was unspecific and, I concluded, not reliable. The court had ample evidence of the patience shown to the requested person by prison and NHS staff in the agreed records, although unsurprisingly there appeared to have been moments when the patience of the former in particular may have been stretched. I disregard Mr King's evidence, to the extent that it is relevant, which is very slightly indeed.

[239] As I have noted, the court requires to address questions in a particular order, but also to consider matters of health of the requested person under section 91 of the 2003 Act. Since the motion in that regard is for discharge or adjournment it makes sense for me to address that question firstly, before turning to section 79, which governs this part of the hearing.

Section 91

[240] Section 91 provides as follows:

> "(1) This section applies if at any time in the extradition hearing it appears to the judge that the condition in subsection (2) is satisfied.
> (2) The condition is that the physical or mental condition of the person is such that it would be unjust or oppressive to extradite him.
> (3) The judge must—
> (a) order the person's discharge, or
> (b) adjourn the extradition hearing until it appears to him that the condition in subsection (2) is no longer satisfied."

[241] It was suggested that the condition was satisfied in respect of the possible diagnosis of a personality disorder, and in order to investigate whether he had such a disorder. The evidence of the psychiatrists and, to the extent that she was qualified to give a view, the GP who gave evidence was at its highest only suggestive of a personality disorder. A diagnosis would require the cooperation of the requested person in the exploration of his history, but he had consistently failed to give a history beyond the vaguest (and false) account of his childhood in Dublin. Nonetheless, it was submitted on his behalf that it would be worth investigating whether the psychiatrists would be prepared to engage in an exercise of diagnosis on the basis of a fuller history of Nicholas Rossi. This was not explored with the psychiatrists. No evidence was taken from either of them as to whether they could proceed on the basis of such a history, where the patient was insisting that it was not his history and it seems to me speculative, if not improbable, to suggest that that may assist – but even more

so to suggest that it may assist in the treatment of the condition if diagnosed. The requested person's airy assurances of cooperation rang hollow, given his now long history of non–cooperation with medical professionals and his stout maintenance of the fiction that he is not Nicholas Rossi.

[242] Of course, the court may adjourn for investigation in respect of the mental health of the requested person: *Government of the Republic of South Africa* v *Dewani (No 2)* [2014] EWHC 153 (Admin), although the Court of Appeal declined to do so in that case, noting that there should be no further delay (para 62); but adjournment under section 91 in such a case is adjournment until it appears to the court that the mental condition of the person is such that it would be unjust or oppressive to extradite him is no longer satisfied.

[243] While adjournment under section 91 would not appear to require a firm diagnosis, the court should be slow to adjourn where the requested person has been exhibiting the behaviour which grounds a potential diagnosis for a considerable period and yet none has been made. Treatment of a personality disorder is not a short term exercise and may not be successful, quite apart from the concerns I have mentioned, but adjournment (or indeed discharge) cannot be granted unless it appears to the court that it would be unjust or oppressive to extradite on account of the condition. In this case, not only is there as yet no diagnosis of a personality disorder, but nor is there any basis to conclude that he could not be housed in a Utah prison with such a disorder or that, if he were willing to cooperate, appropriate psychiatric or psychological intervention would not be available. In that regard I was not convinced that Ms Golden's specific scepticism was founded on any expertise rather than a general scepticism about prison services and her evidence was in any event vague. It is within judicial knowledge and experience that significant numbers of those

sentenced for sexual or violent crimes in this country have diagnosed or suspected personality disorders and it would be surprising if it were otherwise in the United States.

[244] It was submitted that the requested person's mental state was such as to inhibit his ability to give instructions to his lawyers in an important trial or to conduct it himself, but the requested person was not in the slightest inhibited from giving instructions to his lawyers (which he did throughout the evidential hearing) and would not require to conduct the trial himself; indeed in this country that would be prohibited.

[245] In any event, and perhaps most importantly, Dr Choudhary, the expert called for the defence, who had most recently examined the requested person, gave evidence that his mental health issues did not present as a barrier to extradition. He said in terms that it was unlikely that diagnosis of a personality disorder would present a barrier to his extradition. His evidence was that even if there was a personality disorder, it would only be at the point when the patient reflected that he had a personality disorder and he was ready to make changes that benefit would arise. If a patient recognised that he had a personality disorder psychiatric intervention can mitigate challenging behaviour and such interventions are available in prison. His evidence was that the requested person's mental health issues should not hinder his transportation to the USA. It was unlikely that further stay for mental health treatment in the United Kingdom would benefit him 'particularly due to his dissocial behaviours aimed towards healthcare professional (sic)'. He was suitable to undergo disposal via the criminal justice system.

[246] It is clear to me that there is no basis for discharge or adjournment under section 91 and I will refuse so to order.

Section 79

[247] Having already completed the initial stages of the extradition hearing under section 78 at previous hearings, the court is required to proceed under section 79 and to consider whether there are any bars to extradition. Although section 79 recognises a number of potential bars to extradition, the only one arising in this case is passage of time. The court requires to decide whether the person's extradition to the category 2 territory (i.e. the United States) is barred by reason of the passage of time and, if so, order his discharge. If extradition is not so barred, then, since the requested person is accused of the commission of the extradition offences but is not alleged to be unlawfully at large after conviction, the court must proceed under section 84.

[248] The 2003 Act explains precisely how extradition can be barred by passage of time, in section 82 which provides, for present purposes:

> "A person's extradition to a category 2 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have–
>
> (a) committed the extradition offence (where he is accused of its commission)."

[249] This provision is highly prescriptive: the expression 'and only if' makes it clear there is no third or overarching test, for example of fairness, as seemed to be suggested by counsel for the requested person and I do not read Lord Diplock's speech in *Kakis* v *Cyprus* [1978] 1 WLR 779, at 782G-783B as suggesting as much. Rather, what his Lordship said as regards what is now section 82, was

> " 'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, " oppressive " as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover ail cases where to return him would not be fair."

[250] 'Unjust' has been further and more restrictively interpreted as requiring that a fair trial is impossible: *Gomes* v *Government of the Republic of Trinidad and Tobago* [2009] 1 WLR 1038 at paras 32 and 33. 'Oppressive' has been held to require personal or family hardship greater than what is inevitable and inherent in extradition for a criminal trial in another country and the test is an extremely high one: *Lagunionek* v *Lord Advocate* 2015 JC 300 at para 14. In any event, the burden of proof is on the requested person, on the balance of probabilities.

[251] It is well established that where the court finds that the requested person is a fugitive from justice then 'save in the most exceptional circumstances' his being a fugitive 'will operate as an almost automatic bar to reliance on delay' (*Lagunionek* at [16], applying *Krzyzowski* v *Circuit Court in Gliwice Poland* [2007] EWHC 2754 (Admin), Extradition LR 16 at paras 16, 18 and 29).

[252] It seemed initially to be suggested by the Lord Advocate that the requested person could not rely on delay at all, at least as regards the first extradition request, because he had fled the United States in 2017, but in the course of argument it was accepted that he would still be entitled to found on the delay prior to 2017.

[253] In such cases it is in any event for the requesting state to prove beyond reasonable doubt that the requested person did deliberately flee the country (*Krzyzowski* at para 16). While there was ample evidence in the affidavit of Ms Johnson that the requested person fled the United States and that he did so in part at least to avoid extradition and prosecution, there was no evidence that his flight related to the criminal offences charged in either of these extradition requests. No complaint had been made in respect of the second request until 2022 and no action had been taken in respect of the alleged crime which is the subject of the first request since 2008 when he was interviewed by the police.

[254] The evidence as to any contact between him and the US authorities around the time of or after his flight was in respect of contact by the FBI and they had investigated a fraud which was the subject of indictment and an arrest warrant. It seems more likely that, if his flight from the United States was related to any specific prosecution or apprehended prosecution, it related to that matter rather than the first extradition request. It has certainly not been proved beyond reasonable doubt that the requested person fled from the United States to avoid justice in the first extradition request and in that situation I doubt that the bar on reliance on delay arises, but even if it did arise it would be of very limited significance, given that there was a delay of around nine years from the making of the initial complaint and his being interviewed by the police until he apparently left the United States. For practical purposes, the question of his being a fugitive from justice in that sense can simply be disregarded.

[255] It was submitted for the requested person that the risk of prejudice to him in the conduct of the trial arose from the fact that the allegations will be at least fifteen years old when they come to trial; recollections of witnesses and the availability of evidence must have deteriorated in that time. Although it was submitted that there was fault on the part of the Utah authorities as regards the first request, it was accepted that it was the effect rather than cause of delay which was the issue. It was also submitted in this regard that the requested person's mental state was such as to inhibit his ability to give instructions to his lawyers in an important trial or to conduct it himself (although I have already indicated why I have rejected that argument).

[256] There is nothing at all exceptional about allegations of this age being tried after 15 years and no particular circumstances were advanced as to why a fair trial would not be possible, in respect of either request and, indeed, as regards the allegation in the second

request, were it to be tried in this jurisdiction the presiding judge would almost certainly direct the jury there can be good reasons why a person against whom a sexual offence is committed may not tell others about it or report it to an investigating agency, or may delay in doing either of those things (Criminal Procedure (Scotland) Act 1995, section 288DA(2)). I conclude that it cannot be said that it would be unjust to extradite the requested person on account of delay.

[257] As regards oppression, in the sense of personal or family hardship greater than what is inevitable and inherent in extradition for a criminal trial in another country, there is nothing at all exceptional here. The requested person has not shown himself to have any family in the United Kingdom or Ireland or indeed any dependants or circle of friends or support other than that of his wife, who I do not doubt is devoted to him. Indeed, since the evidence which I accept is that he is an American citizen who left the United States and travelled to Ireland or the United Kingdom in 2017 and who has lived here under a succession of false identities until his arrest in 2021, his roots in this country are shallow indeed.

[258] Counsel founded on the deterioration of the requested person's health, in particular since he had been seriously ill with COVID in 2021. I accept that his health has deteriorated since 2008 and that he may have continuing health issues in part related to his serious illness in 2021. I share Dr Cogan's scepticism about the need for a wheelchair. The requested person's evidence on that score was contradictory: stating in the same breath that he had used a wheelchair for six years and since August or September 2021. The evidence from his former GP practice in Bristol was at best inconclusive: he had told the practice he needed and then was using a wheelchair, but they had no record of his attendance in a wheelchair. I am, however, prepared to accept for present purposes that he may at least benefit from the

use of a wheelchair. I do not, however, consider that his physical health is such that it would result in personal or family hardship greater than what is inevitable and inherent in extradition for a criminal trial in another country.

[259] As regards his mental health, he has not been diagnosed with any condition. Prior diagnoses of ADHD, ADD and PTSD, if they were made, were not so much diagnoses as repetitions of his own false narrative of having been so diagnosed in Dublin. Indeed, although Dr Choudhary found indications of a recurrent depressive disorder, that again was on the basis of the requested person's presentation and own history and could not properly be diagnosed without more evidence and a history. Dr Cogan found no evidence of mental illness. Both psychiatrists and the prison GP accepted that his presentation and behaviour were suggestive of a personality disorder or at least may indicate a possible personality disorder, but they could not make a diagnosis without further assessment and a proper history. As I have already noted, Dr Choudhary did not consider that any mental health condition should be a bar to extradition.

[260] For these reasons and also for the reasons I have already given in the context of my decision under section 91 in respect of health, I do not consider that the requested person's health issues, such as they are, and his limited ties to this country, to his certainly devoted wife, tilt the balance against concluding that it has not been shown by him that he would suffer personal or family hardship greater than what is inevitable and inherent in extradition for a criminal trial in another country, which is the country of his birth and substantial prior residence and when set against the strong public interest in allowing the trial of serious crimes. I therefore conclude that it cannot be said that it would be oppressive to extradite the requested person on account of delay.

[261] Accordingly I require to answer the questions in section 79(1) of the 2003 Act in the negative and, since the requested person is accused of the commission of the extradition offences but is not alleged to be unlawfully at large after conviction of them, I must proceed under section 84. I do not require to determine sufficiency of evidence for summary trial in light of the designation of the United States under section 84(7), as I have already noted and in terms of section 87(7) I require to proceed to section 87.

Section 87

[262] The question to be addressed under section 87 is whether extradition would be compatible with Convention rights under ECHR. I have already noted that the court is not required to address the proportionality of extradition, in contrast to the position in relation to category 1 territories, such as European Union countries, but since ultimately there did not appear to be any question of a review being conducted in Utah (nor any clear basis upon which a review should be conducted) I cannot see anything in that regard which gives rise to an issue of proportionality of extradition, even if that were a test, or which would affect the proportionality of the interference with his ECHR rights that extradition would involve. I shall approach the question under the headings suggested by counsel for the requested person.

(a) Other prosecutions

[263] The requested person submits that it seems that relevant US law enforcement authorities intend to prosecute him in respect in particular of offences against AD, AF, RC and KH, although RC would probably be at the back of the queue. To these can probably be added, on the basis of submissions, the Ohio fraud indictment which was investigated by

the FBI and, possibly, flight from justice, which was the subject of a warrant, although Mr Barron did say that people were not normally prosecuted for that in Utah.

[264] The Lord Advocate accepts that there are other extant proceedings in the United States, although it was not clear to which case or cases that acceptance relates. It seems to me reasonable to conclude that the Ohio fraud indictment proceedings remain active (Ms Johnson describes them as current in her affidavit), but I am not convinced that it can reasonably be inferred that the relevant authorities are proceeding with or have any formed intention of proceeding in respect of the other allegations.

[265] While there was evidence of the US attorney witnesses Ms Golden and Mr Barron as to what might happen in these cases, and I accept that evidence was given in good faith to the extent of their knowledge of the relevant jurisdictions (which was either not really or at least not established in relation to Ohio, Massachusetts and Rhode Island) it rather assumed that there were active cases and there were prosecutors interested in proceeding with them. But the information provided as regards the allegations made by AD, AF, RC and KH was very vague.

[266] As regards AD we know that a complaint was made by AD, an 18 year old female, of alleged rape on 7 September 2007 in Clearfield, Utah, where the requested person was described as a suspect and there was a case number. There is no information about any steps taken by any competent prosecutor to pursue a case, although almost 16 years have now passed.

[267] As regards AF, the investigation on 5 July 2010 by Pawtucket Police in Rhode Island of kidnapping of a female, the information is similarly vague, except here there is no indication of a case number.

[268] As regards RC, a case of what appeared to be simple assault on 20 June 2010 in Winthrop, Massachusetts, again there is no indication of any steps taken to pursue a case, but Mr Barron, although not familiar with Massachusetts law, considered that it looked like a simple assault, a misdemeanour, for which the maximum sentence in Utah would be six months in jail. Such a crime would not be extraditable, nor could it be made the subject of a consent request.

[269] As regards KH and the investigation on 2 November 2015 by Montgomery Sheriff Office in Montgomery County, Ohio of a domestic violence between Rossi and KH, to which a case number was assigned, again there is nothing to indicate any steps taken to pursue a criminal case, although KH appears to have obtained a civil protective order.

[270] Given the time that has elapsed without any indication of commencement, far less the continuation of prosecutions in these various cases I consider that the foundation for the evidence as to what the various attorneys would expect to happen with these cases is essentially speculative.

[271] The evidence as to what might happen as regards the flight from justice warrant was unclear, but given that that was essentially in support of the case which is the subject of the first extradition request it would be surprising if it had not been included in an extradition request, had there been a desire to pursue a separate case.

[272] In the Ohio fraud indictment it would seem the FBI had been active in seeking to locate the requested person, but given that focus and that the United States have chosen to pursue a further extradition request in respect of the second case, where a fresh allegation was made, it would seem to me likely that if there was an intention to proceed with that case an extradition request would have been made.

[273] It would therefore appear that there is no great likelihood of prosecutions in respect of known allegations other than those in the extradition requests being taken up or pursued in the event of the requested person being extradited.

[274] The rule of speciality in extradition in the United Kingdom is the rule that a person who is extradited may not be dealt with in the requesting state except for any offence for which extradition was granted, or an extraditable offence disclosed by the same facts (other than one in respect of which a sentence of death could be imposed) or where the Secretary of State (in Scotland, Scottish Ministers) consent to the person being dealt with, or the person waives the right not to be dealt with for the offence, unless the person is first given an opportunity to leave the territory. Scottish Ministers can only order extradition to a territory which has speciality arrangements to that effect (section 95).

[275] It is accepted that the United States have such arrangements and therefore any cases arising from the various other allegations described in Ms Johnson's affidavit could only proceed if the requested person waived his right not to be dealt with for those offences, or if Scottish Ministers consented to any case being dealt with under section 129 of the 2003 Act.

[276] Section 129, so far as it applies to Scotland, provides that where a person has been extradited and a valid request for such consent is received Scottish Ministers must serve notice on the person that they have received the request for consent, unless they are satisfied that it would not be practicable to do so (subsection (3) and

> "(4) [Scottish Ministers] must decide whether the offence is an extradition offence.
> (5) If [Scottish Ministers decide] the question in subsection (4) in the negative [they] must refuse [their] consent.
> (6) If [Scottish Ministers decide] that question in the affirmative [they] must decide whether the appropriate judge would send the case to [them] (for [their] decision whether the person was to be extradited) under sections 79 to 91 if—
> (a) the person were in the United Kingdom, and
> (b) the judge were required to proceed under section 79 in respect of the offence for which [Scottish Ministers'] consent is requested.

> (7) If [Scottish Ministers decide] the question in subsection (6) in the negative they must refuse [their] consent.
> (8) If [Scottish Ministers decide] that question in the affirmative [they] must decide whether, if the person were in the United Kingdom, his extradition in respect of the offence would be prohibited under section 94, 95 or 96.
> (9) If [Scottish Ministers decide] the question in subsection (8) in the affirmative [they] must refuse [their] consent.
> (10) If [Scottish Ministers decide] that question in the negative [they] may give [their] consent."

[277] The statutory provisions as to the tests which must be applied to an application for consent essentially include those to be applied by the court during the main part of an extradition hearing – indeed during the hearing that I have been conducting and am today ruling upon. The most significant differences are procedural, in that the decisions are taken by Ministers rather than a judge, there is no hearing and the exercise is carried out on the basis of consideration of paperwork, including such representations as are made on behalf of the requested person. It is also true that there is no appeal to the High Court, such as is available in relation to my decision, but, although it was said that this had not happened in the past, it is not disputed that the requested person would be entitled to petition the Court of Session for judicial review of the decision of Scottish Ministers and that court would be entitled to review the legality of their decision. It is not clear to me that such a procedure, although different from extradition procedure, is not to be regarded as rigorous.

[278] Nonetheless, counsel for the requested person somewhat boldly submits that this well-established procedure would be unfair. I was referred to *Sullivan* v *USA*, but I struggle to see how it is relevant to consent procedure and how that well-established procedure, which incorporates the same human rights tests as extradition proper, can be said to fall foul of ECHR provisions, and in particular articles 3, 5, 6 and even 8. I understood the submission to be that the procedure was generally unfair, but that it was particularly so (and

especially under reference to article 8 (the right to family life)) when it was expected, to a high degree of certainty, that it would be used in relation to extant proceedings.

[279] I do not consider that that expectation is objectively grounded, especially in light of the United States' pursuit of the second request. It would have been very easy for the United States to have sat on that case, which came to light at a late stage, with a view to pursuing a later request for consent, but they chose nonetheless to proceed with a fresh request, even though it was liable to delay consideration of the first request.

[280] But even if the United States have cases on, or maybe beside, the back burner, does that engage the requested person's Convention rights? I do not consider that article 6 (the right to a fair trial) is engaged. In *Pomiechowski* v *Distrct Court of Legnica* Lord Mance JSC examines just how the application of article 6 to the extradition of aliens has been rejected.

[281] It was suggested by counsel that the requested person may have a right of residence in the United Kingdom. Were he, as he maintains, an Irish national, then he would certainly have a right to enter and remain in the United Kingdom as part of the Common Travel Area. But he is not an Irish national. It has already been determined that he is Nicholas Rossi, the person wanted for extradition, and, according to the affidavit of Ms Johnson, which I accept, he was born in and is a citizen of the USA. It would indeed require a fairly deep dive through the looking glass even to contemplate that the requested person may have some basis for claiming a right of residence in the United Kingdom.

[282] It is not unusual in a domestic setting for investigations or proceedings to be put on hold pending the determination of serious criminal charges and for a view to be taken in light of that disposal. Even if prosecutors in the United States are keeping their options open, I do not consider that there is any Convention right that would be infringed by them doing so with a view possibly to requesting consent in the future.

[283] The appropriate tests for the application of Convention rights are those noted by Lord Bingham in *R (Ulla)* v *Special Adjudicator* [2004] 2 AC 323, at para 24:

> "While the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment…… Where reliance is placed on article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state……. Successful reliance on article 5 would have to meet no less exacting a test. The lack of success of applicants relying on articles 2, 5 and 6 before the Strasbourg court highlights the difficulty of meeting the stringent test which that court imposes".

I cannot see any basis on which it can be said that the possibility of a well established consent procedure being invoked in due course gives rise to a real risk of torture or inhuman or degrading treatment or punishment, or that it would risk him suffering a flagrant denial of a fair trial in the United States or that he would suffer a flagrant denial of his right to liberty and security of the person as provided for in article 5. I similarly cannot see how the possible future application of consent procedure can violate this requested person's article 8 rights.

(b) health and (c) prison conditions

[284] It was submitted that article 3 rights may arise in relation to his health and prison conditions, along with article 8 issues. I was referred to Ms Golden's comments and criticisms as regards the likely use of solitary confinement and issues about mortality and suicide rates and protection from rape and assault, as well as limited video visitation, although as I understood it the article 3 submission was largely directed to the legal and administrative framework to deter, prevent and punish offences against the person.

[285] It seems to me that Ms Golden's evidence about likely solitary confinement was somewhat speculative. I accept much may turn on the requested person's behaviour, but he has shown himself capable of being polite in his dealings with witnesses – for example Dr Choudhary and Dr Mundweil and indeed (sometimes ingratiatingly so) with the court - and, whether or not he has a personality disorder, he is capable of moderating his behaviour. As Dr Choudhary observed, he could present differently with different health care professionals. There is no evidence that he is hard-wired for conflict; on the contrary the evidence would suggest that he regularly engages in conflict, but can choose not to.

[286] The jail and prison conditions appear well adapted to wheelchair users and nothing in the evidence indicated the sort of extremes in relation to treatment of and facilities for prisoners that are often encountered in extradition cases. I cannot see anything in the likely jail or prison conditions for the requested person which would come close to meeting the high level of ill-treatment which would violate article 3, nor do I see the criticisms of investigation of incidents or complaints and access to justice as coming in any way close to violating Convention articles, particularly bearing in mind the recent words of the High Court in *Amnott* v *United States*, at para [38]:

> "The European Court recognised ……. that there is a distinction to be made between extraditions or removals within contracting states and those involving non-contracting states. It was not for contracting states to impose Convention standards in non-contracting states. It would therefore require a high level of ill treatment, including death or torture, to amount to a bar to extradition to states with a long history of respect for democracy, human rights and the rule of law. Although the judiciaries in Europe may not, in the context of Article 3, agree with all aspects of the penal system in the USA, it is not for them to insist upon that system abiding strictly by the Convention standards, which apply to contracting states, before granting an order for extradition. The existence of compassionate release and executive clemency within the US criminal justice system is sufficient to meet the requirements of Article 3 in the extradition context, even if it may not be likely that the appellants will be afforded either remedy over time."

(d) arbitrary detention and (d) sentencing

[287] The original point here related to the failure of the Lord Advocate to undertake to provide a certificate as to the length of time spent on remand here prior to extradition and also to the lack of a guarantee that that period would be taken into account in sentencing. As the hearing proceeded and evidence came out, however, these points seemed to weaken: the Lord Advocate does not provide such certificates, but the Crown Office does provide the necessary information when a person is extradited, both Mr Bastian and Mr Barron considered that it should be easy enough to get such information and that it was likely that credit would be given for time on remand here and that was consistent with practice as described by the US Department of Justice. It is true that time on remand is not mentioned as a factor in the list of factors published in the Board of Pardons website (defence production 6), but that list does not purport to be exhaustive. It is said that the failure to have guarantees about time on remand being taken into account violates article 5. It seems to me that there is no evidential basis for such a concern.

[288] However, the point was developed in light of the evidence of Mr Barron into an argument around particular features of the sentencing and parole process in Utah. It seemed that the Scottish lawyers, counsel for the accused and myself included, were taken somewhat unawares by his evidence as to the sentencing process. On the face of it, on a plain (i.e. Scots lawyer's) reading, section 76-5-402.(3) of the Utah code, in providing that rape as charged in these cases is "(3) punishable by a term of imprisonment of:
(a) ……not less than five years and which may be for life", is setting a minimum custodial sentence of five years and a maximum of life imprisonment. It was, however, clear from Mr Barron's evidence that in invariable practice the court passes a sentence in terms of the statute: that is that it passes a sentence of not less than five years and which may be for

life and that it is then the Board of Pardons and Parole that determines when the offender is released, after a minimum period of five years.

[289] Viewed in United Kingdom terms it means that every custodial sentence for such a crime will be an indeterminate sentence (the question of non-custodial sentences was not explored, but it was not suggested that such a sentence could arise in a case such as the present one).

[290] It is in that context that counsel developed his main line of attack on the sentencing and parole process. This was grounded on articles 5 and 6. It was submitted that the penalty was not consistent with the statute and was not according to law and of reasonable certainty and foreseeability. While the fact that the Scottish lawyers seem to have been taken unawares by the approach of the Utah courts may at first blush indeed support such an argument, it is not unusual in our own system for legal provisions, whether under statute or at common law to benefit from qualified (or at least well informed) legal explanation.

[291] The statutory basis for many offences and indeed for many penalties in the United Kingdom is labyrinthine or opaque. The casual or indeed interested reader of apparently up-to-date statutes might be misled into thinking that the maximum penalty on summary complaint for a contravention of section 83 of the Adults with Incapacity (Scotland) Act 2000 was 6 months imprisonment and that reader will find nothing in that statute to suggest otherwise. But because the offence can also be tried on indictment and the statute was passed before 2007, section 45 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 enhances the maximum penalty to 12 months imprisonment.

[292] Many of the crimes for which sentence is passed in Scotland are defined at common law, including murder and assault, and are not therefore set out in a convenient text. The fact that foreigners may misunderstand the law of Utah does not make it uncertain: it just

benefits from qualified legal consideration and advice, just as may the law of Scotland as regards statutory penalties and the meaning, for example, of evil intent in assault.

[293] The other arguments in this regard focused on the Board of Pardons and Parole. These arguments were free standing, but were given more weight in light of the fact that, after the indeterminate sentence is passed (subject to any appeals), all power is essentially turned over to the Board. There was criticism of the Board as what was described as an administrative body, but it was also described by Mr Barron as quasi-judicial and, although appointed by the Executive, its members do enjoy security of tenure, being removed only by impeachment before the state Senate. There were criticisms of the procedure before the Board and the potential limits on legal representatives addressing the Board.

[294] The argument appeared to come down to one that the Board as a non-judicial body was effectively part of the trial process, given its total control over sentencing and that article 6 could thus be invoked on the basis of flagrant denial of a fair trial. The sentence would also breach article 5, since it was said that the penalty was flagrantly longer than would be imposed in the United Kingdom and flagrantly disproportionate to the crime charged.

[295] Quite apart from the requirement of flagrancy, I cannot see how the Board of Pardons process can properly be regarded as part of the trial. An offender is convicted by a jury (or if parties agree a judge sitting alone) and is sentenced by the judge. The Board then exercises the familiar role of a parole board, albeit without the distinction between punishment and public protection which arises in Scotland; but that does not make it part of the trial process. I do not consider that it is appropriate for the court to dissect the workings of the Board.

[296] The fact that the sentence – or at least the sentence to be served - may be greater than would be the case in a comparable case here does not justify a finding that it would be flagrantly disproportionate:

> "it will … rarely be appropriate for the court in the UK to consider whether the sentence was very significantly different from what a UK court would have imposed, let alone to approach extradition issues by substituting its own view of what the appropriate sentence should have been": *Judicial Authority* v *Celinski* at para. 13(iii)

quoted with approval in *Amnott* at [29].

[297] In the present case, if the requested person was found guilty of the rape of the two different young women he is alleged to have raped in 2008 he could anticipate a prison sentence in excess, perhaps significantly in excess, of five years and, subject to his assessment of risk, might well expect to receive an extended sentence. I do not consider that what is apparently the mandatory sentence in Utah can properly be characterised as flagrantly disproportionate, any more (and indeed perhaps less) than a mandatory life sentence without parole for conspiracy to kill witnesses as in *Amnott* (at [29]).

Assurances

[298] There was discussion towards the end of the Lord Advocate's submissions, on something of a fall back basis that if I was left with a concern about any point that might be resolved by an assurance I should not discount seeking an assurance and the same point was taken up by counsel for the requested person. While there are of course circumstances in which the court ought properly to seek an assurance from the requesting state before deciding the case, I would hope that in most cases parties, or at least the interested party, would have focused the issue and normally done so long before the full evidential hearing. As it is, I did not find the somewhat unfocused discussion of assurances to be helpful and I

consider that I have sufficient information from the United States to determine the questions before me.

Conclusion

[299] I conclude that extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 and that the question to that effect in section 87(1) of the 2003 Act must be answered in the affirmative. It follows that I must send the case of the requested person Nicholas Rossi to the Scottish Ministers for their decision whether he is to be extradited.