Neutral Citation Number: [2018] EWHC 172 (Admin)

Case No: CO/5994/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/02/2018

Before:

THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON
THE LORD CHIEF JUSTICE
and
THE HONOURABLE MR JUSTICE OUSELEY

- -

Between:

LAURI LOVE	**Appellant**
- and -	
THE GOVERNMENT OF THE UNITED STATES OF AMERICA	**Respondent**
- and -	
LIBERTY	**Interested Party**

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- -

MR EDWARD FITZGERALD QC AND MR BEN COOPER
(instructed by **KAIM TODNER SOLICITORS LTD**) for the **Appellant**
MR PETER CALDWELL (instructed by **CPS EXTRADITION UNIT**) for the **Respondent**
MR ALEX BAILIN QC AND MR AARON WATKINS
(instructed by **LIBERTY**) for the **Interested Party**

Hearing dates: 29 and 30 November 2017

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Approved Judgment

THE LORD CHIEF JUSTICE AND MR JUSTICE OUSELEY :

1. This is the judgment of the Court.

2. Lauri Love appeals against the decision of District Judge Tempia, sitting at Westminster Magistrates' Court on 16 September 2016, to send his case to the Secretary of State for the Home Department for her decision whether to order his extradition to the United States of America, under Part 2 of the Extradition Act 2003 ["the 2003 Act"]. The USA is a category 2 territory under that Act. On 14 November 2016, the Home Secretary ordered his extradition.

3. The principal issues before this court are:

   i) whether the judge was wrong to hold that the forum bar in section 83A of the 2003 Act, introduced by the Crime and Courts Act 2013, did not prevent Mr Love's extradition;

   ii) whether his extradition would be unjust or oppressive by reason of his physical or mental condition, and so required his discharge under section 91 of the 2003 Act; and

   iii) whether various rights guaranteed by the European Convention of Human Rights ["ECHR"] would be breached, notably article 3, in the light of his health and the conditions he would face in the United States, and article 8 in the light of those factors, his home support and treatment, and the possibility of criminal proceedings being taken against him in the UK for the offences for which his extradition is sought. These are all issues for this Court and not for the Home Secretary. Her decision on the specific issues she had to consider is not challenged.

4. Mr Fitzgerald QC for Mr Love was at pains to emphasise that Mr Love did not seek impunity for the acts alleged against him, but contended that he should be tried and, if convicted, sentenced in the United Kingdom.

The Facts

5. We take the background from the judgment of the judge:

> "8. Mr Love is accused in three indictments that between the period October 2012 to October 2013, he, working with others, made a series of cyber-attacks on the computer networks of private companies and United States Government agencies (including the US Federal Reserve, US Army, US Department of Defence, Missile Defence Agency, NASA, Army Corps of Engineers, Department of Health and Human Services, US Sentencing Commission, FBI Regional Computer Forensics Laboratory, Deltek Inc, Department of Energy, Forte Interactive, Inc) in order to steal and then publicly disseminate confidential information found on the networks, including what is referred to as personally identifiable information ….

> 10. In most of the attacks it is alleged Mr Love gained unauthorised access by exploiting vulnerabilities in a programme the computers ran known as Adobe ColdFusion; software designed to build and administer websites and databases (the "ColdFusion Attacks"). It is further alleged Mr Love also carried out "SQL Injection Attacks" in which unauthorised access was gained to computer databases by manipulating "structured query language", computer programming language designed to retrieve and manage data on computer databases (the "SQL Injection Attacks").
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> 11. Once inside the compromised computer systems, Mr Love and others placed hidden "shells" or "backdoors" within the networks. This allowed them to return and steal the confidential data which included telephone numbers, social security numbers, credit card details and salary information of employees, health care professionals, and service personnel.
>
> 12. A confidential source working for the United States Federal Bureau of Investigation (FBI) had access to a restricted online "chat room" used by Mr Love and others from about 2012 to 2013. They had discussions about their hacking activity in the chat room using Internet Relay Chat ("IRC"). This allows multiple users to talk about their activities using typed messages to each other. Various online names were used to disguise their true identities. From this the FBI has identified Mr Love's nickname as "nsh", "peace", shift" and "route".
>
> 13. Mr Love used IRC to discuss how to "exfiltrate" the stolen data and what could be done with it."

6. This led to three federal indictments being returned by Grand Juries in the three different Federal Districts, where the agencies and companies affected were located:

   i) New Jersey on 23 October 2013 as superseded in March 2015: one count of conspiracy to access a computer without authority and to obtain information from a US department or agency (5 years maximum), and one count of accessing a computer without authorisation and obtaining information from a US department or agency (5 years maximum);

   ii) Southern District of New York on 21 February 2014: one count of computer hacking (10 years maximum) and one count of aggravated identity theft (2 years maximum but could be consecutive);

   iii) Eastern District of Virginia on 24 July 2014 as superseded in May 2015: one count of conspiracy to damage a protected computer and to commit access device fraud (5 years maximum), six counts of damaging a protected computer (5 years maximum), one count of access device fraud (10 years maximum), and one count of aggravated identity theft (2 years maximum).

7. These offences are equivalent to offences under the Computer Misuse Act 1990 with maximum sentences of 2 and 5 years, under the Proceeds of Crime Act 2002 with maximum sentences of 14 years, and the common law offence of conspiracy to defraud. The judge concluded that these were serious alleged offences, committed in three Districts over a period of a year, targeting computers in the United States, causing millions of dollars' worth of damage and stealing employees' personal details. We reject entirely the suggestion by the Interested Party that the United States was seeking to exercise some "exorbitant" jurisdiction. United States Government agencies, corporations and individuals were said to be the victims of deliberate, sustained hacking attacks.

8. On 15 July 2015, Mr Love was arrested pursuant to a warrant, issued following certification of the three extradition requests, but has been on bail since then. The subsequent proceedings have been treated as if there were a single extradition request.

9. In October 2013, the Federal Bureau of Investigation asked the National Crime Agency ["NCA"] for assistance in its investigation, which led the NCA to begin its own investigation. Its purpose was to "gather evidence with a view to mounting a potential prosecution in the UK, whilst being equally aware of the US investigation, should material relevant to their investigation become apparent…." The investigation obtained evidence linking Mr Love to the hacking offences. On 25 October 2013, the NCA executed a search warrant at Mr Love's parents' house. He lived there with them. This is explained in the witness statement of Mr Brown of the NCA dated 29 March 2016, made in connection with proceedings which related to the return of property taken during the search. One of Mr Love's computers was logged on to an online chat room using the nickname "nsh". A preliminary review of some of his computers revealed that some of the data stolen during unauthorised access was on his computers, and these intrusions had been discussed in online chats. Mr Love was arrested on suspicion for offences under the Computer Misuse Act 1990, made no comment in interview and was released on bail.

10. In July 2014, he was released from bail but was told by the CPS that the "investigation remained very much alive." It was in June 2014, though this was not before the judge, that the CPS decided that it would allow the United States indictment to take priority over a UK prosecution.

Mr Love's circumstances in outline

11. Mr Love is a British national who, through his mother, also has Finnish nationality. He will be 33 in December 2017. He has a steady girlfriend but is single. The judge made unchallenged findings about his mental and physical conditions, though Mr Fitzgerald submitted that she had not dealt with important evidence about the effect on Mr Love of the regimes to which he would be subject if extradited. We shall come to that point later, but the submissions about the forum bar require the findings about Mr Love's mental and physical conditions to be set out first:

> "75. It has been accepted by Mr Caldwell on behalf of the Government that Mr Love suffers from Asperger Syndrome (AS) although the nature and degree was challenged. It is clear from Professor Baron-Cohen's evidence, which I accept, that Mr Love is high functioning, has the capacity to participate in a

trial and give instructions to his lawyers. He does not have AS in combination with learning difficulties, attention deficit and language. His AS is a "very severe disability because it causes him to become so absorbed in his interests that he neglects important areas of his life, such as his studies, and even his health (…)."

76. It is also clear from the evidence, and from seeing Mr Love in court that he is highly intelligent and articulate. Professor Kopelman also comments his "thinking processes are generally excellent (…)."

77. It is not disputed that Mr Love suffers from eczema which he has had since birth, and which is a partly stress-related physical condition exacerbated by his mental health issues (…). I have no doubt this causes him severe problems given the evidence from his GP and Mr Love's own vivid evidence of his daily hygiene routines and his constant urge to scratch. It is not disputed he suffers from asthma." (This daily routine including creams, steroids, other medication; and he also saw his GP regularly.)

"78. Dr. Kopelman's reports and oral evidence outlined Mr Love's past psychiatric history and depression, which started in 2004. Mr Love also gave evidence about this. I find Mr Love has suffered from depression in the past and it has got worse since these proceedings began. However I also find that in the past he has not continued to take medication prescribed that could help him with his depression. Dr. Kopelman also said more could be done for his depression and suggested he saw an expert in AS and a psychiatrist; his symptoms could be managed by taking antidepressants. In his report dated 26 May 2016, he said, "Mr Love has proved very reluctant to engage in psychiatric or psychological treatment in the UK" (…).

79. There have not been any incidents of self-harm in the past but I accept Mr Love has experienced suicidal thoughts intermittently, both in the past and now. Mr Love denied any suggestion that he had exaggerated his symptoms and his suicide risk which I accept given the medical evidence.

80.I also accept Professor Baron-Cohen and Professor Kopelman's evidence that he would attempt suicide before extradition to the United States. Both are of the opinion he would be at high risk of suicide. I accept Professor Baron-Cohen's oral evidence that Mr Love's intention is not a reflection of a voluntary plan or act but due to his mental health being dependant on him being at home with his parents and not being detained for an indefinite period."

The Forum Bar

12. The forum bar is contained in the provisions of section 83A and was inserted into the 2003 Act. The legislative change followed the refusal by the then Home Secretary to order the extradition of Gary McKinnon to the United States. He was sought for computer hacking related offences.

13. By section 83A:

> "(1) The extradition of a person ("D") to a category 2 territory is barred by reason of forum if the extradition would not be in the interests of justice.
>
> (2) For the purposes of this section, the extradition would not be in the interests of justice if the judge –
>
> (a) decides that a substantial measure of D's relevant activity was performed in the United Kingdom; and
>
> (b) decides, having regard to the specified matters relating to the interests of justice (and only those matters), that the extradition should not take place.
>
> (3) These are the specified matters relating to the interests of justice –
>
> (a) the place where most of the loss or harm resulting from the extradition office occurred or was intended to occur;
>
> (b) the interests of any victims of the extradition offence;
>
> (c) any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence;
>
> (d) were D to be prosecuted in part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence is necessary to prove the offence is or could be made available in the United Kingdom;
>
> (e) any delay that might result from proceeding in one jurisdiction rather than another;
>
> (f) the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard (in particular) to –

> (i) the jurisdictions in which witnesses, co-defendants and other suspects are located, and
>
> (ii) the practicability of the evidence of such persons being given in the United Kingdom or in jurisdictions outside the United Kingdom;
>
> (g) D's connections with the United Kingdom.
>
> (4) In deciding whether the extradition would not be in the interests of justice, the judge must have regard to the desirability of not requiring the disclosure of material which is subject to restrictions on disclosure in the category 2 country concerned.
>
> (5) If, on an application by a prosecutor, it appears to the judge that the prosecutor has considered the offences for which D could be prosecuted in the United Kingdom, or part of the United Kingdom, in respect of the conduct constituting the extradition offence, the judge must make that prosecutor a party to the proceedings on the question of whether D's extradition is barred by reason of forum.
>
> (6) In this section *"D's relevant activity"* means activity which is material to the commission of the extradition offence and is alleged to have been performed by D."

By section 83B(1):

> "The judge hearing proceedings under section 83A (the "forum proceedings") must decide that the extradition is not barred by reason of forum if (at a time when the judge has not yet decided the proceedings) the judge receives a prosecutor's certificate relating to the extradition."

14. The section further permits a prosecutor to obtain an adjournment of forum proceedings if he needs to consider whether or not to issue a certificate. Section 83C governs the content of a certificate for the purposes of section 83B. It must certify that the prosecutor, after consideration, has decided that there are domestic offences corresponding to the extradition offence; and has either certified that he has made a formal decision that D should not be prosecuted for the corresponding domestic offences because he believes that there would be insufficient admissible evidence for a prosecution or that prosecution would not be in the public interest, or that there are concerns about the disclosure of sensitive material in the prosecution. Material may be sensitive because of national security, international relations or the prevention or detention of crime, including the identification of witnesses or informants. Section 83D permits a certificate to be questioned but only on appeal, and only on judicial review grounds.

15. Sections 76A and 88 of the 2003 Act in combination give priority to domestic prosecutions over extradition for any offence. By sections79 and 80, domestic

prosecution for offences corresponding to the extradition offences would raise the bar of double jeopardy.

The District Judge's assessment

16. The judge concluded that the forum bar failed. She considered the factors in sequence.

17. Section 83A(2)(a) was not at issue: a substantial measure of Mr Love's relevant activity was performed in the United Kingdom, using his computers at home. She then dealt with section 83A(2)(b), the specific and only factors relevant to the next stage of the decision on the interests of justice. At [90], she concluded in respect of section 83(3) (a) that most, if not all, of the loss or harm occurred in the United States; indeed, it appears to us that all the harm occurred there. She then dealt with the other factors as follows:

> "(b) the interests of the victims of the extradition offence: The victims are the companies and government departments who had their computers hacked into resulting in millions of dollars' worth of damage. There are also individual victims, those whose personal details were stolen. In this case, the US are of the view that "none of the victims of Love's alleged crimes have an interest in this matter being prosecuted in the United Kingdom" (…) . I do not accept Mr Cooper's submissions that the interests of the victims may not be served with a prosecution in the United States given Dr. Kopelman's evidence that Mr Love may not be fit to stand trial. That is conjecture at this stage. Dr. Kopelman's exact evidence was any refusal of bail is likely to cause a worsening of Mr Love's clinical depression but it was difficult to anticipate if this would affect him and whether he would be fit to stand trial.
>
> (c) any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence: the Crown Prosecution Service is silent in this case and I agree with Mr Caldwell's submission that the absence of a prosecutor's belief adds nothing to the decision under the interests of justice test and therefore this specified matter is neutral.
>
> (d) were D to be prosecuted in a part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence is necessary to prove the offence is or could be made available in the United Kingdom: I agree, as did Mr Caldwell for the Government that, in this digital age, evidence to prove the offence in the United Kingdom is available or could be made available. However, as already stated there are witnesses who will be required to give evidence. One is the anonymous informant. It is unknown at this time whether he would assist in any prosecution in the United Kingdom and he may not be a compellable witness in the United Kingdom. The

US Government has said it will call each of the victim organisations, law enforcement officers, forensic evidence and some individual victims whose personal information was stolen. The prosecutor's point out that it would be "substantially difficult to make available to the United Kingdom all of the evidence necessary to prosecute Love, particularly the witnesses the United States anticipates calling at trial" (…..).

(e) any delay that might result from proceeding in one jurisdiction rather than another: It was submitted that a prosecution in the United Kingdom was likely to be quicker than in the United States given the involvement of the NCA in the case and they would be at an advanced stage of readiness for trial. The latter suggestion is speculation, because apart from the NCA executing a search warrant at Mr Love's home address and seizing a number of computers, some of which they could access, some they could not. I do not have any other evidence as to any stage of readiness. In contrast, the proceedings in the United States have started, evidence has been obtained in three jurisdictions resulting in three Grand Juries issuing Indictments. The United States prosecutors' statement confirms that Mr Love has the right to be tried within 70 days following his first court appearance, unless he waives the same and, if he is tried in three separate districts, the same time limit applies (…). I have also found there is nothing procedurally incorrect in three districts wanting to prosecute Mr Love. Mr Love could also apply for all his cases to be heard under one jurisdiction (certainly for the conspiracy charges) which would reduce delay (…).

(f) the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard ("in particular") to – (i) the jurisdictions in which witnesses, co-defendants and other suspects are located, and (ii) the practicability of the evidence of such persons being given in the United Kingdom or in the jurisdictions outside the United Kingdom: There are no co-defendants. There are over twenty witnesses, all of whom are in the United States. The digital evidence could be given in the United Kingdom but the witnesses reside in the United States and as a matter of desirability and practicality it is easier for them to give evidence in the United States.

(g) D's connection with the United Kingdom: Undoubtedly all of Mr Love's connections are in the United Kingdom. He is a single man with no dependants. He is a United Kingdom citizen and lives with his parents. He is studying, teaching and working in the United Kingdom. Mr Love has been diagnosed with AS. He also suffers from depression, eczema and asthma.

> He has the support and stability of his family. The experts agree Mr Love would be at a severe risk of suicide if extradited to the United States. In my view the submission that the defendant's connection to the United Kingdom proved decisive in ensuring other United Kingdom hackers were prosecuted in the United Kingdom is not relevant to Mr Love's personal connections with the United Kingdom.
>
> 91. I accept Mr Love's connections to the United Kingdom include his own personal circumstances, his health and his support network, and not merely his connection to the State, as submitted by Mr Caldwell. Some of the evidence in this case is transportable but, in my assessment, those factors do not outweigh the facts that the conducted occurred in the United States, all the victims are in the United States, their interests are best served with the case being heard in the United States and any delay is not known because I do not have any evidence as to how far any investigation has taken in the United Kingdom. What I do know is that evidence has been produced by the United States resulting in three Indictments being issued by three Grand Juries."

The parties' contentions on Forum Bar

18. Mr Fitzgerald challenged the judge's conclusion making three groups of points. First, the judge ought to have treated Mr Love's connections to the United Kingdom as the most weighty and decisive factor, having correctly rejected Mr Caldwell's narrow approach; these connections included his mental disorder, the "overwhelming reasons of justice and humanity", "the compelling reasons of policy and justice why conduct committed here by a British citizen should be punished in accordance with our own values and our own standards of proportionality in sentencing."

19. Second, there was a genuine option of trying him here, though this was put more as a "connection" point. The judge misdirected herself that prosecutorial practice in relation to other hacking cases was irrelevant. He sought to rely on fresh evidence from Lord Macdonald QC, a former Director of Public Prosecutions, on this score. The absence of any statement of a prosecutor's belief that the UK was not the most appropriate jurisdiction to prosecute Mr Love for these alleged offences was not merely neutral but favoured barring extradition. There were inadequate reasons for the CPS ceding priority to the United States; this was a point rather more pursued by Liberty, as intervener.

20. Third, the judge wrongly dismissed as conjecture the significance of the real risk that Mr Love, though presently fit to be tried, would become unfit by the time of trial, or of the first trial, in the USA. This court had further evidence on that point, relevant also to the human rights grounds.

21. Mr Caldwell invited us to uphold the judge's findings of fact and especially her evaluation of the factors: her decision was simply not wrong, nor would it be wrong simply because the court itself would have given different weight to the various factors.

Our assessment

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

23. The approach of an appellate court to the evaluation of the section 83A factors also calls for some comment. Mr Caldwell favoured the approach taken in *Celinski v Poland* [2015] EWHC 1274 at [18-24], where the Divisional Court concluded, in relation to article 8 cases, that the correct approach for an appellate court was to ask the single question whether or not the district judge made the wrong decision, and to allow the appeal only if the decision was wrong in the way described by Lord Neuberger in *Re B (A Child) (FC)* [2013] UKSC 33. Findings of fact, especially if evidence had been heard should ordinarily be respected. The approach of Aikens LJ in *Shaw v Government of the United States of America* [2014] EWHC 4654 (Admin), was preferred by Mr Fitzgerald. He held at [42] that the appellate court could interfere with the judge's "value judgement" if there were an error of statutory construction, or if he failed to have regard to a relevant factor or considered an irrelevant one, or if the overall judgment was irrational. Such an error would "invalidate" the judgment and the appellate court "would have to re-perform the statutory exercise and reach its own 'value judgment'". He continued:

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

24. This was very much the approach adopted in relation to article 8 cases by Aikens LJ and Edis J, in *Belbin v Regional Court of Lille, France* [2015] EWHC 149 (Admin), which, while approved in *Celinski*, was overtaken by the latter's simpler approach.

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

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

Application to this case

27. We now deal with the individual factors in section 83A(3):

28. (a) *The place where most of the harm or loss took place*, here the United States, would usually be a very weighty factor, and we infer that it was correctly treated as such by the judge.

29. (b) *The interests of any victims*: no specific interests were identified here which pointed to trial in the United States, but it is likely that their interests included Mr Love being tried, and tried at the least inconvenience to themselves. The latter point overlaps with (d) and (e), but there is likely to be a greater degree of inconvenience to individual witnesses in a trial in the United Kingdom, either through travelling here or in scheduling video link appearances in a different time zone. There may be an interest in those who are victims of crime having the case tried according to their own local laws and procedures and, if there is a conviction, punishment following according to the values of their own legal system. But their interest in having a trial at all is the more important. The judge rejected Mr Cooper's submission on behalf of Mr Love that their interest might very well not be served by extradition, because of the risk that Mr Love might not be fit to stand trial in the United States. (The argument was not put on the basis that he might commit suicide beforehand, which is clearly not in any one's interest). She rejected the submission because she saw the risk of unfitness to stand trial as based on conjecture by Professor Kopelman, an Emeritus Professor of Neuropsychiatry.

30. We cannot accept that characterisation of his evidence. The detail of Mr Love's conditions is set out more fully when we deal with oppression. But Professor Kopelman concluded in his second report, after dealing with the various problems which Mr Love would face in custody in the United States:

> "His ability to cope with the proceedings in the trial, to make rational decisions, and to give evidence in a satisfactory manner would be severely compromised."

31. The judge records Professor Kopelman's "exact evidence", and it obviously deals with the position in the event that Mr Love were remanded in custody. Whilst that is not certain, it is more than a conjectural risk. The judge's remaining comments on the evidence do not reflect the report and we find it difficult to accept that Professor Kopelman watered down the clear position set out in his report to the extent identified by the judge. We have read the notes of his evidence produced by a trainee solicitor on behalf of Mr Love. Professor Kopelman clearly stated that there was a real risk that, if remanded in custody, Mr Love would become unfit to plead. The risk depended on whether his depression worsened, if he became psychotic, if his asthma and eczema worsened and in turn worsened his mood. Yet, in our view, it is clear from the rest of his evidence that severely worsening depression, with the possible onset of psychotic imagery was exactly what Professor Kopelman anticipated. In cross-examination, the challenge related only to the possible onset of psychosis as speculative, to which the Professor responded that in view of Mr Love's history of delusional and paranoid thoughts, the possibility was a "reasonable projection."

32. In any event, Professor Kopelman produced a third report, dated 29 October 2017, for this appeal. We have decided to admit it so that we have an up to date picture of Mr Love's mental state. One passage deals with the question of fitness to plead. This is what he said about fitness to stand trial**:**

> "In the light of Mr Love's current mental state, I continue to believe that there is a very high risk that Mr Love would not be fit to stand trial in the United States of America. As described in my report of 26 May 2016, there are multiple risks that would be associated with Mr Love's extradition to the United States, his incarceration in a United States facility, and his standing trial there. There would be a severe deterioration in both his physical and his mental state. His eczema, his asthma, gastrointestinal symptoms, and palpitations, would certainly become far worse, and he might lose his hair again (alopecia), thereby causing further deterioration in his mental state. Mr Love would not be able to cope with separation from his family and friends, nor would he cope with the likely isolation in a United States facility. His depression would become far worse, and he would be very likely to develop psychotic symptoms (as he has during past severe depressions). His suicide risk would become very high as a result of the exacerbation of his clinical depression and a deterioration in his physical health. In such circumstances, Mr Love's ability to concentrate and sustain attention would, in consequence, be severely affected. His ability to cope with the proceedings in the trial, to make

> rational decisions, and to give evidence in a satisfactory manner, would be severely compromised in such circumstances. In brief, it this were to occur, he would no longer be fit to plead or to stand trial in the United States."

33. We do not consider that this can be dismissed as conjecture. Of course, it is not definite, but it creates a significant risk factor, which tells against extradition being in the interests of the victims to the extent that there is at least a significant risk that there would be no trial at all. The circumstances in which there would be a risk that Mr Love could not cope with trial proceedings were far from speculative.

34. (c) *Any belief of a prosecutor that the United Kingdom is not the most appropriate jurisdiction*: the judge was wrong in our view to treat the absence of any prosecutor's belief as a neutral factor. It was a factor which, albeit modestly, favoured Mr Love. The prosecutor is given two opportunities to affect the forum bar decision. First, it can certify under section 83B that it has decided formally that D should not be prosecuted in the United Kingdom, for certain specific reasons; if it does so certify, the forum bar cannot apply. There was no certificate here nor did the prosecutor seek an adjournment in order to consider issuing one. Secondly, it can express a belief that the United Kingdom is not the most appropriate jurisdiction in which to prosecute D for the conduct constituting the extradition offence. It expressed no such belief. In view of the fact that the CPS did not express any view adverse to the prosecution of Mr Love in the United Kingdom on any of the grounds potentially available to it, this silence is a factor which tells in favour of the forum bar, though it may readily be outweighed by other factors. A positive expression of view, one way or the other, is of much more weight.

35. Mr Bailin QC for Liberty, intervening, also introduced a letter, dated 8 September 2015 from the CPS replying to Kaim Todner, Mr Love's very experienced extradition solicitors, which explained that its decision to give priority to United States proceedings was taken on 17 June 2014, and why. The letter invited Kaim Todner to be in contact if they had any further questions, an invitation not taken up. Mr Love's legal team had decided not to use this letter before the judge, as a matter of their perfectly reasonable judgement. It is not admissible before us on the issue of what the prosecutor believed, because it could have been used before the judge. Moreover, it contained an informal expression of views, and one not directed to the issue raised by the statute. It could carry no weight. The 2003 Act enables the formal and reasoned views of the prosecutor to be given to the court, and that is how they should be given. If there are no such views, cobbling things together is no substitute. If they express no such views, it is likely to be a factor favouring the operation of the bar.

36. (d) *The availability of evidence for a prosecution in the United Kingdom*: there are two aspects to the judge's appraisal of this factor. First, she accepted the position adopted by Mr Caldwell, and maintained before us, that the evidence to conduct a successful prosecution could be made available in the United Kingdom. It would be in digital form, or given over a video-link if individuals preferred not to travel. Secondly, the judge accepted that there would be substantial inconvenience in making all the evidence available to support a prosecution in the United Kingdom, rather than that the problems, which we do not minimise, would in reality preclude a successful prosecution. Mr Fitzgerald is entitled to put considerable weight on that factor. The nature of the evidence from individuals would probably be that of government or

government agency employees, whether in an official capacity or as an individual affected because of their job by the hacking. They do not fall into any particularly sensitive category of witness, such as the victim of violence, or a prisoner. Mr Caldwell submitted that we should accord respect to the judgement of the American prosecutor, recorded by the judge. We do, but it does not paint an especially compelling picture of problems specific to the case. Mr Fitzgerald made the point that there had been an Australian co-conspirator who had been tried already in Australia.

37. Mr Fitzgerald sought to introduce fresh evidence in the form of a short statement from Lord Macdonald QC, a former Director of Public Prosecutions. He commented briefly on a schedule, which was produced before the judge, of cases where the victim of the hacking was abroad and the hacker had carried out his hacking attack from the United Kingdom. Its purpose was to show prosecutorial practice in relation to hacking. We are not prepared to admit this evidence: it could readily have been produced before the judge; and its terms were too general to permit any useful conclusion to be drawn about cases where extradition had been a serious option. Mr Fitzgerald produced his own note of cases, with a degree of overlap, covering more than a decade, where such offences had been tried in England. But there was insufficient information about any parallel extradition proceedings, or the evidence required, to be persuasive about how the instant case would proceed.

38. (e) *Delay in either jurisdiction*: there is no basis for suggesting that the judge has erred in her appraisal of this factor. There is no clear justification for favouring one jurisdiction over another on that score.

39. (f) *The desirability of all prosecutions taking place in one jurisdiction*: no criticism can be made of the judge's appraisal of this factor. There are no co-defendants.

40. (g) *Connection with the United Kingdom*: The judge was right to reject Mr Caldwell's submission, repeated with due restraint before us, that the concept of "connection" was a narrow one, confined to connections to the United Kingdom as a state, principally citizenship or right of residence. In our judgment, "connection" goes rather wider than that, without being so elastic that it replicates the full scope of article 8 ECHR. No exhaustive definition can be attempted judicially, but "connection" is closer to the notion of ties for the purposes of bail decisions. It would cover family ties, their nature and strength, employment and studies, property, duration and status of residence, and nationality. It would not usually cover health conditions or medical treatment, unless there was something particular about the nature of the medical condition or the treatment it required, that connected the individual to treatment in the United Kingdom. The approach of the judge was correct.

41. The risk of suicide upon extradition, or serious deterioration in health, would not of itself create a connection to the United Kingdom. But they would be relevant if they were the consequences of breaking a separate connection, because that would evidence its nature and strength. It is also difficult to see that the prospect of being prosecuted here shows a connection to the United Kingdom. That is not the purpose of (g). The possibility of prosecution in the United Kingdom is covered by other factors. We reject the suggestion made on behalf of Mr Love that prosecutorial practice in other hacking cases was somehow relevant to how Mr Love's connections should be seen.

Conclusion on the forum bar

42. There are two areas where we find ourselves in respectful disagreement with the judge on her analysis of the factors which determine where the interests of justice lie in the forum bar: (a) the prospect that Mr Love would be unfit to plead, and (b) the significance of the absence of a prosecutor's view. By themselves, they would not have persuaded us that she was wrong in the conclusion that she reached. But additionally, in our view she significantly underplayed the weight that should be attached to her conclusion that the prosecution could realistically proceed in the United Kingdom, albeit rather less conveniently for the prosecution. The location where the harm occurred was rightly given very great weight, as too were the interests of victims, subject to what we have said about fitness to plead.

43. What persuades us that, in those circumstances, her decision was wrong, is the nature of Mr Love's connection to the United Kingdom. By itself, the fact that he is a British national, long resident here, with a girlfriend, and engaged in studies, would not have persuaded us that the decision was wrong. But there is a particular strength in the connection to his family and home circumstances provided by the nature of his medical conditions and the care and treatment they need. This is not just or even primarily the medical treatment he receives, but the stability and care which his parents provide. That could not be provided abroad. His entire well-being is bound up with the presence of his parents. This may now have been enhanced by the support of his girlfriend. The significance of the breaking of those connections, as we come to next, demonstrates their strength.

44. We do not accept the submission that the connections make an overwhelming case, regardless of whether the other factors could not tell in favour of extradition. But they, with the other factors which we consider should have told against extradition, outweigh those factors favouring extradition sufficiently clearly to persuade us that the judge was wrong on this question. In this case the forum bar found in section 83A of the 2003 operates to prevent Mr Love's extradition to the United States.

Liberty's submissions on the forum bar

45. We now turn to the discrete submissions advanced by Mr Bailin on behalf of Liberty. Mr Bailin's main submission was that, as currently operated, the forum bar did not "deliver the clarity or transparency it was intended to create", namely its "key purpose", in the decision-making of the courts and the CPS. S83A, read in the light of this purpose, required the domestic prosecutor "actively to engage with the issue of forum". Mr Bailin's researches suggested that the forum bar had not been raised successfully under section 83A in any reported case, although he did not know whether any had succeeded at Westminster Magistrates' Court. He invited the Court "to consider carefully whether the operation of the forum bar is working as envisaged." That may not be the full picture in the light of the schedule of cases we were invited to consider where hacking cases, with victims abroad, had been tried in the United Kingdom.

46. He introduced some background material to support his submission as to the purpose of the provision and how the prosecutor's role should be performed. A very general statement was made by the Home Secretary to Parliament at the time of her decision about Gary McKinnon on 16 October 2012 about the introduction of a new forum bar

to replace the one enacted in 2006, but which was never brought into force. It had been cast in broadly similar terms but in less elaborate form than the one relevant here. Her statement adds nothing to the interpretation issues. It is not admissible as an aid to construction. Whilst the Home Secretary referred to a perceived lack of transparency her comment related to the whole "process" where there was concurrent jurisdiction, and not to the prosecutor's decision-making alone.

47. The review of extradition arrangements conducted by Sir Scott Baker suggested that there was no need for a forum bar but that the prosecutor's decision-making on cases involving concurrent jurisdiction should be made more transparent through formal guidance from the Director of Public Prosecutions. The Home Affairs Select Committee recommended a statutory forum bar and that decisions about the interests of justice in a concurrent jurisdiction case should be taken by judges in open court and not by prosecutors in private.

48. The Director of Public Prosecutions published Guidelines in July 2013 on the principles to be applied where concurrent jurisdiction issues arose. These reflect the provisions of section 83A, but add the question of whether potential sentences reflect the seriousness of the offending. The Guidelines at [10] imply that where an investigation is already underway into criminal conduct when the related extradition request is received, the CPS should consider whether a prosecution should be brought in the requesting state. The Guidelines, [11], did not apply to those few offences which, "being committed wholly abroad" involved the exercise of an "extraterritorial jurisdiction" by the domestic courts.

49. Mr Caldwell for the United States suggested that the Guidelines were inapplicable here because the offences alleged were "extraterritorial" in the sense of having been "committed wholly abroad." That is not correct. They, as alleged, are clearly cases of concurrent jurisdiction, committed partly in England and partly in America.

50. The CPS "Internal Process for Dealing with Forum Bar Cases" of October 2014 considered four separate scenarios:

    i) no domestic prosecutor involvement;

    ii) a decision to charge the offences domestically;

    iii) a decision that England and Wales is not the most appropriate jurisdiction but somewhere else is; and

    iv) a decision to issue a prosecutor's certificate.

    In the third scenario, the decision should be recorded, and the court should be told of that decision if forum is raised, with the possibility of seeking an adjournment. Otherwise, where forum is raised by a requested person, duties of enquiry and assistance are adumbrated.

51. Mr Bailin subjected the four reasons in the CPS letter to Kaim Todner of 8 September 2015 to close scrutiny, in order to advance his contention that the 2003 Act required, alternatively that the Court should require, a prosecutor actively to engage with the forum bar process. That letter did not convey any prosecutor's belief that the United

Kingdom was not the most appropriate jurisdiction; indeed it did not purport to do so. The decision was not reasoned by explicit reference to Director of Public Prosecutions' Guidance. It did not go through the various factors in section 83A, or the factors in the Guidance, nor did it adequately reason its position in relation to those which it did consider. It illogically put weight on the timing of the American indictment when, in concurrent jurisdiction cases where there is an extradition request, criminal procedures will always have been initiated in the requesting state. All this was of particular concern against the background of the investigation in England, as set out above.

52. Mr Bailin submitted that this minimal engagement was not what section 83A envisaged. The CPS should either express a "sufficient prosecutor's belief", or join the proceedings or issue a prosecutor's certificate. The court should assess whether the prosecutor has "properly engaged" with the issue of its belief. The Court should recommend greater clarity, reasoning and information in relation to any prosecutor's opinion conveyed to the Court.

53. What Aikens LJ, with whom Nicol J agreed, said in *Shaw* at [53], albeit in the context of the expression of a positive but unreasoned belief by an unnamed person that the United Kingdom was not the most appropriate jurisdiction to prosecute the alleged offender, was apposite here:

> "53. The nature of this belief and its basis could also be given in the form of instructions to counsel for the category 2 requesting state (or indeed the category 1 requesting state). It is ultimately for the judge to decide on the weight to give to this factor. If the material about the belief and the basis for it is sound, then doubtless this will weigh heavily with the appropriate judge. If the material appears to be flimsy, or ill-considered or even irrational (or perhaps even given in bad faith), it will have little or no weight at all. The mere say-so of a prosecutor about his belief, which is not supported by reasons, will carry little or no weight and the judge will be entitled to dismiss this as a factor seriously."

He concluded that little weight was to be attached to the unreasoned expression of belief. That court also gave preliminary guidance at [58] on future practice in relation to expressions of belief, part of which Mr Bailin relied on:

> "First it is for the requested person to identify "Forum Bar" as an issue that is to be raised in the extradition hearing before the DJ. Secondly, if the requesting state wishes to adduce material as to the "belief" of the UK prosecutor, then that should be done in a document, something akin to a "decision letter", that is so well-known in immigration proceedings. In that document, the reasons for the belief should be given; and the "prosecutor" who has the belief should be identified in the document."

54. In our judgment, Mr Bailin's main submission is in error because it seeks to re-write the legislation on the basis of generalised comments as to the purpose behind a forum

bar. The 2003 Act spells out the role of the prosecutor in issuing a certificate and its consequences. A certificate is challengeable on judicial review grounds only. The court is not a substitute prosecutor. There is provision for the prosecutor to express a belief that the United Kingdom is not the most appropriate jurisdiction for a prosecution. We agree with what *Shaw* decided about how a belief should be considered and reasoned for those purposes, if it is to be given weight. It should be a belief expressed for the purposes of the forum decision, by a properly authorised prosecutor who knows what the expression of belief is to be used for. It would not be appropriate for a court to consider the sort of criticism which Mr Bailin levelled at the 8 September 2015 letter where the letter has not been written with a decision by the court on a forum bar in mind. Indeed, the forum bar was not addressed in that letter.

55. There is however simply no provision entitling a judge to require the expression of a belief by the prosecutor, and one cannot be manufactured by interpretation. But, as we have stated, the absence of such an expression of belief is not neutral to the forum bar issue in the scheme of the legislation. It is up to the prosecutor to decide whether and how it will participate in the issue. But it should also be borne in mind that success for a requested person on the forum bar is likely to have assumed that prosecution will ensue in the UK, and to create an expectation that the prosecutor will so act, in the absence of any expression of belief to the contrary. The vague references to transparency of prosecutor decisions in the materials adduced by Liberty do not amount to an admissible aid to interpretation, and in so far as they identify a mischief, the language of the 2003 Act must be taken to have met it as far as Parliament thought fit. It is not for this court to express a view on whether the operation of the Act according to its terms has met the aspirations of all those who have expressed views about what form the legislation should take.

Oppression

56. Sections 91(2) and (3) of the 2003 Act require the judge to order the requested person's discharge if it appears to the judge at the extradition hearing "that the physical or mental condition of the person is such that it would be unjust or oppressive to extradite him." This was not a case for adjournment of the extradition hearing until the condition of the person had improved so that extradition would cease to be oppressive, an alternative allowed by the statute. The focus of Mr Fitzgerald's argument was on oppression, to which the prospect of prosecution in the United Kingdom was also relevant, rather than injustice.

The judge's assessment

57. The judge dealt with this alongside Article 3 ECHR. She said at [96]:

> "A high threshold has to be reached to satisfy the court that Mr Love's mental condition is such that it would be unjust or oppressive to extradite him. As I have already found (para 79 – 81 above) I am satisfied that there is substantial risk Mr Love will commit suicide. The evidence of Professor Baron-Cohen and Professor Kopelman is clear; Mr Love's mental condition is such that it removes his capacity to resist the impulse to commit suicide. There will be a high risk he will commit suicide if extradited. This will be prior to removal, in transit

> and on arrival in the United States. Professor Baron-Cohen warns that to dismiss this would be "a fantasy" (para 28 above). The key issue then is what measures are in place to prevent any attempt at suicide being successful. In the United Kingdom that risk would be lessened if Mr Love were on bail with his parents. If in custody I have heard of the holistic approach of the United Kingdom prison system from the Reverend Love."

The United States Marshals Service would be responsible for transporting Mr Love to the United States. She concluded on their evidence that safeguards were in place which would ensure that Mr Love did not commit suicide in transit, or transfer to the place where he would be detained pending any bail decision, and pending trial were he remanded in custody. Once in America, she was satisfied that the preventative measures in place would be effective in preventing suicide; she drew on the evidence of Dr Kucharski that no one committed suicide on suicide watch. She accepted the evidence of Dr Lyn that he would receive dedicated mental and physical health care. Assurances from the United States authorities as to his care were not necessary.

58. She also accepted that the sentencing regime in the United States was harsher than in the United Kingdom for these offences, but considered both that the American courts could depart from the sentencing range for health reasons, and that American sentencing policy was not disproportionate, even though consecutive sentences could be imposed by each District in which he was convicted.

Submissions of the parties

59. Mr Fitzgerald attacked these conclusions on the grounds that: (1) the mere fact of extradition and detention in the United States would be likely to lead to a serious deterioration in the mental health of Mr Love; (2) to the extent that suicide was prevented by Mr Love being placed on suicide watch, the conditions in which he would be held on suicide watch, or in segregation, would lead to a serious and permanent deterioration in his mental health, which was also related to his physical health; (3) if he were in the general prison population, in which he would be a very vulnerable prisoner because of his mental health with Asperger's, depression and severe eczema, he would be able to commit suicide, which was a very high risk; (4) if in segregation but not on suicide watch, the same high risk would apply; (5) there was too much of a contrast between the bland statements of policy and intent, which the judge had accepted, and the practical reality of conditions and medical treatment in the United States prisons to which Mr Love would go pending trial or after conviction.

60. Mr Caldwell contended that the judge was entitled to reach the conclusions she did on the evidence. She had considered it very carefully. The British courts should trust the United States to provide what it said it would provide.

61. For these purposes, it is necessary to set out rather more about Mr Love's medical circumstances. His father, a prison chaplain, gave measured evidence. He had described his son as an exceptionally gifted child, who had gone downhill at the age of 13. His behaviour deteriorated, he became distracted, "he and the real world just did not connect." By 16, he had hacked into computers, and knew more about computers than his teachers. To keep his dual Finnish-British nationality, he did

military service in Finland. He simply could not manage, and came home in 2004 suffering from "terrible depression." In 2005, at Nottingham University, he became depressed, and came home "in a terrible state", "a physical and mental wreck." In 2006, he was referred to local mental health services for treatment. He is being treated at the moment. In 2008, he went to Glasgow University, but his second year did not go well, and in his third year he was "sucked into a world of protest about this or that cause", as his father put it. He developed throat abscesses, shingles and scarlet fever. He came home to live with his parents in 2012. For the last few years, the prospect of Mr Love killing himself has always been at the forefront of his parents' minds, and they have rushed him on occasions to the doctors when they thought he had suicidal thoughts.

62. His father described him in this way:

> "He is a nightmare to live with. It is like living with a continuous explosion the way he is. It is like he is caged up and caught up in world that he does not fit into. His eczema is still very bad and causes him huge problems. Lauri struggles with what is possible or real. He is very principled. His whole attitude is that the world is wrong and "I am going to fix it". He has no malice in him but he has no regard for the consequences of his actions. He just has an element of not seeing things in the right way."

He continued:

> "I don't think that he could live anywhere other than being at home with us so that we can take care of him. The only thing that keeps Lauri from killing himself is me and my wife and having him at home with us. He has told me very clearly that he would kill himself if there was an Order for Extradition. I genuinely believe he means it. It is not a threat; it is a statement of fact which I believe."

63. Mr Love, before his arrest, was on the computer day and night. "He cannot function without us." His despair "began to grip him deeper and deeper." His eczema led to daily scratching so hard that he drew blood, and he said on more than one occasion that "he could kill himself." Only his parents' support prevented it. His father thought that they were the only ones who could cope with Mr Love.

64. He was now very up and down. His parents worried about suicidal thoughts. "He is alright at home but he is frustrated with the position that he is in….We organise his life and look after him…He…gets distracted by things and then he just forgets what he is doing. His sleeping pattern is very bad…" sometimes not sleeping for days, and then sleeping for days. Mr Love has very bad asthma, and his severe childhood eczema, treated with medication, really came back when he was in Glasgow, and went downhill physically and mentally. This all affected his social confidence.

65. His parents needed to care for him, because they saw him still as a child. Were he elsewhere "he would just not survive…If [he] goes to prison in America he will die. I am quite sure of that." He would have no support network, family or friends or his

culture, but instead he would be isolated and alone. His father's experience led him to believe that people kill themselves in prison when they minimise what may be possible in the future, and decide that the pain of living is not worth the price. Positive family or other relationships can make all the difference.

> "Judging by all that Lauri has said to me about his intentions, I believe that he will take his own life. Now you may think that I say that just as a father, but I wish to emphasise that if I were dealing with someone like Lauri in a professional capacity, in a prison, I have no doubt I would arrive at the conclusion that he is a very high suicide risk."

66. In cross-examination before the judge, he said that Mr Love would not commit suicide to make his parents feel guilty, but because despair would grip him deeper. But the Rev. Love hoped that in prison in England he would "get through it." Although he deteriorated whenever he was away from his parents, they could help him through any criminal prosecution, and he could live with them, if bailed, pending trial. If sent to prison in England they would be available to help him cope. His experience as a prison chaplain led him to believe that the system of interaction and communication with vulnerable prisoners through a multidisciplinary team was "excellent". The possibility of bringing in the prisoner's family was crucial.

67. Mr Love's eczema was exacerbated by emotional anxiety, and had worsened over the months leading to the extradition hearing. His mental health had also deteriorated.

68. The judge did not expressly comment on this evidence but in the light of what she said about the experts, we have no reason to doubt that she accepted it. Her principal concern was with measures that might be in place to prevent suicide.

69. His parents provided a joint statement for the purposes of the appeal, which we admit, as it provides up to date information on Mr Love's mental and physical condition. His eczema requires seven different medications, and the sores sometimes need antibiotics, long baths are soothing. He is usually extremely withdrawn and reluctant to socialise. He has been suspended from his studies, in electrical engineering, at the University of Suffolk until January 2018 because of the extradition proceedings. This led to him spending even more time on the laptop, and on social media, obsessively and indiscriminately. He is on medication for depression which appears to have little effect. His sleep pattern, often insomniac, is irregular. He now has a girl friend who supported him, staying at the house a lot.

70. The judge summarised Mr Love's own evidence about his history, depression, breakdown at Glasgow where he spent months, homeless living in a tent in the park, and his eczema. It led to skin infections and to his skin falling off. The pain caused him stress which exacerbated the inflammation. She said this, largely quoting from Mr Love on the interaction between his eczema and depression:

> "He is unable to resist the need to scratch, "every day I try my utmost to tear apart the skin in my body. Every day I fail to control this urge. If sent to the United States of America those conditions, urges to die would be stronger than my urge to scratch every day. My degree of control is already impaired

> because of these proceedings. The urge, the despair, feeling of helplessness will result in my ending my life"."

71. In his January 2016 statement, Mr Love said that his skin condition severely affected all aspects of his life; it made him self-conscious of his appearance, and that made it hard to engage in social activities, It was "agonisingly painful", and made it difficult to sleep "because of a constant burning and itching all over" his body.

72. Mr Love worked as a volunteer teaching assistant at the University of Suffolk, and also worked during weekends at Hacker House, a body which aims at "ethical hacking", where he advises on computer security systems. He explained that the internet was such an important part of his life, in constant use: "It would be devastating if I could not access it anymore."

73. The judge accepted his evidence about his mental and physical conditions.

Evidence of the medical impact of extradition

74. We turn now to the medical evidence, which was accepted by the judge. But the measures required and their effect need to be considered in the light of the medical evidence as to the severity and interaction between his three major conditions: Asperger Syndrome , depression and eczema, and the consequent risk of serious deterioration in his mental and physical health, or suicide, or both. The evidence needs to be set out also because of its significance for the conditions in which he would be detained in the United States.

Professor Baron-Cohen

75. Professor Baron-Cohen, Professor of Developmental Psychopathology at Cambridge University, Director of the Autism Research Centre, and an NHS consultant specialising in the diagnosis of Asperger Syndrome, in adults provided three reports. He was the first to diagnose Mr Love's Asperger Syndrome. It did not come with learning disabilities, attention deficit or language difficulties; Mr Love was "high functioning." However, his Asperger Syndrome "is a very severe disability" causing him to become so absorbed in his interest that he neglects other areas of life, including his health, to the point that he becomes physically unwell. The realisation that others did not share his total commitment to any given current obsession led to severe depression, along with difficulties in social relationships.

76. Mr Love talked openly about feeling suicidal "triggered by the threat of extradition"; the risk of suicide was "very high". He had said that he would commit suicide rather than be extradited, and was very clear about that. "The risk would be present both whilst he is in the UK, should extradition be enforced; and/or whilst in transit and/or in the US in prison." Prison would be "entirely the wrong place for a man with his disabilities and vulnerable mental health…because he would not cope socially, and his previously very severe depression would be highly likely to recur."

77. Mr Love was however capable of effective participation in a trial, though reasonable modifications to the usual processes might be required.

78. A second report, of February 2016, considered his suicidal thoughts in greater detail. Mr Love said that he had them 50 times a day; it was his preferred alternative to extradition which would be "the end of existence." When pressed, he appeared to have a concrete method of committing suicide in mind, so that the United States could not "control my destiny", but rather it would be in his own hands. Mr Love "has clinical levels of severe anxiety and depression, and is at very high suicidal risk, all of which are directly attributable to his fear of extradition." His eczema "is a partly stress-related physical condition in that it is exacerbated by his current mental health issues." His depression would worsen were he extradited, and his depression and suicide risk would worsen if imprisoned in America. "He is a very vulnerable young man with a very high risk of suicide, and remains of the belief that he would prefer to die at his own hand than to go to an American prison."

79. In his third report, of June 2016, Professor Baron-Cohen took issue with the sufficiency of the protocols operated in America, to support prisoners with Asperger Syndrome, depression and at high suicidal risk, as described by Dr Lyn, Psychology Services Branch Administrator of the Federal Bureau of Prisons ("BOP"), and others. They were not satisfactory for a patient with the unique combination of depression, Asperger Syndrome and eczema. Non-emergency mental health services are voluntary but his Asperger Syndrome would be likely to prevent Mr Love seeking regular psychiatric help, so he would not receive treatment for clinical depression until it reached "crisis/suicidal" level. He would be unlikely to be allowed to see a private physician, who could be better qualified to help. Mentally ill inmates were often put in solitary confinement where they cannot access mental health services, with especially negative consequences for Mr Love.

80. Once the severity of a person's mental illness had driven them to suicide, "it is virtually impossible to prevent that person from going through with it. It is unlikely that someone of his extremely high intelligence could be prevented from committing suicide as he has thought out all possible scenarios and researched the most effective methods for doing so." It was also his opinion that Mr Love would commit suicide at the point he was to be handed over for extradition, and before he was in the hands of the US Marshals Service. Mr Love, highly intelligent as he was, had anticipated security measures and had found ways to evade them, and would find ways to evade the BOP protocols.

81. The BOP protocols for supporting those with Asperger Syndrome did not address the complexity of the problems. The programme seemed to be based on those with educational impairments, which was not Mr Love. His issues would include not being able to share a cell, sensory hyper-sensitivity, difficulties adjusting to unexpected change, risk of being bullied and obsessive interests. He needed to be in an environment which understood Asperger Syndrome. "Depression in someone with Asperger Syndrome is very different from depression in someone without Asperger Syndrome." His unique combination of mental and physical conditions "makes him much more high-risk than prisoners who only suffer from one of these conditions." Professor Baron-Cohen also expressed concern about the effect of overcrowding and staff shortages reducing Mr Love's ability to access mental health services. There was a real risk that the BOP's suicide prevention programme would not be adequate to prevent suicide by someone with Mr Love's intellect and who had declared his

suicidal intent as clearly as had Mr Love, and if suicide were prevented, the means of doing so would exacerbate his mental illnesses.

82. His painful combination of severe depression, Asperger Syndrome, and severe eczema increased his risk of completing suicide, a risk which would increase further if separated from his family or if put into solitary confinement in detention in America; his depression and eczema would also worsen. In his oral evidence to the judge, Professor Baron-Cohen said that Mr Love's expression of suicidal intent was not a reflection of a voluntary plan as he did not want to die, but his mental health was so dependant on being at home with his parents and not being detained for an indefinite period, that he could not impose restraint on himself to stop his suicide. The judge accepted this evidence. The Professor agreed that he had changed his mind about the care in the United States for prisoners with mental health issues in the light of a report by Dr Kucharski on the realities of the availability of such care.

Professor Kopelman

83. Professor Kopelman, an Emeritus Professor of Neuropsychiatry, prepared two reports for the judge and also gave oral evidence which she accepted, subject to one important point. Much of what Professor Kopelman had to say was in line with the evidence of Professor Baron-Cohen. Mr Love's depression had become less severe but was still moderately severe. Mr Love told him that he was less likely to commit suicide in the United Kingdom in prison than in America, because he anticipated that any sentence would be less severe. Professor Kopelman was of the opinion that there would be a high risk of a suicide attempt were Mr Love to face extradition at the end of these proceedings, during transition to the United States and on arrival there. If he were remanded in custody pending trial and was sent to prison on conviction,

> "his mood state certainly would plummet further, resulting in severe clinical depression, and exacerbation of his eczema and asthma, and a very definite increase in suicide risk (from 'high' to 'very high')."

84. Mr Love was currently fit to be tried in the England but it was more difficult to anticipate the situation in America, because he expected a "severe worsening of Mr Love's clinical depression" there. Remand in custody in the United States, causing a severe worsening of his depression, could affect his fitness to be tried, but would certainly affect his ability to give evidence in a satisfactory manner. Extradition itself would result in very severe psychological suffering profound mental deterioration and a very much increased suicidal risk.

85. Professor Kopelman's second report stated that Mr Love had told him that suicidal ideas were likely to become "overwhelming" if extradition became imminent when he would become actively suicidal. He had "no intention of being kidnapped". What Mr Love had read about American suicide prevention conditions would, he thought, make him even more suicidal, forcing him to pretend that he was not suicidal when he still was.

86. Professor Kopelman drew upon reports from Mr Love's consultant dermatologist, who had said that the eczema was a chronic condition often exacerbated by stress and anxiety, to point out that there was a two-way interaction whereby severe eczema

worsened Mr Love's mental state and stress worsened the eczema. He also took his medication more erratically when severely stressed.

87. The BOP suicide prevention programme involved an inmate on suicide watch being put into a suicide prevention room, wearing a suicide smock and being monitored for 24 hours a day, without any unapproved personal items. That would leave Mr Love feeling extremely isolated in the absence of an internet connection and undoubtedly would have a severe adverse effect on his mental state. Social isolation was known to precipitate psychotic experiences, including psychotic depression, and increase suicidal ideas. A severe deterioration in clinical depression, a likely recurrence of psychotic ideas, a severe deterioration in his physical health with an exacerbation of eczema and asthma, should be anticipated in such circumstances. Suicidal risk would increase to 'very high' in consequence, exacerbating rather than reducing the risk of suicide. His mental condition would remove his mental capacity to resist the impulse to commit suicide. His ability to cope with the trial would be severely compromised.

88. Mr Love's Asperger Syndrome made his social interaction very difficult, and his clinical depression would greatly exacerbate it. He would suffer from being removed from his family and support network and would need to access appropriate psychiatric care. The evidence Professor Kopelman had seen did not reassure him. Mr Love was already reluctant to engage with supporting psychiatric or psychological treatment in the United Kingdom, and in prison or under coercion, Mr Love would be unwilling or unable to seek treatment, particularly because of his Asperger Syndrome.

89. Professor Kopelman produced a third report, dated 29 October 2017, for this appeal. We are prepared to admit it so that we have an up to date picture of Mr Love's mental state. Mr Love now had a quite serious relationship with a student girlfriend. His eczema fluctuated but was manageable. He had been particularly depressed at the beginning of 2017 when he feared that he might be extradited at any time. Not for the first time, he had experienced "a vocalisation of thoughts telling him to kill himself." He was taking his anti-depressant medication regularly. Professor Kopelman assessed him as being currently severely depressed. Were he extradited, Mr Love feared "being below the red line in terms of what is the point of living". He feels this whenever he experiences setbacks, which is a prelude to "frank suicidal ideas and plans." Although he worried about the effect which his suicide would have on his grieving parents and girlfriend, this barrier would be removed were he extradited, and Mr Love regarded it as highly likely that he would commit suicide, and it "would be vital to prevent… by any means necessary" his being taken into custody and placed on a plane for America. He could face the prospect of a trial in England, with his family nearby and could survive a "short" sentence in a British prison.

90. He commented on the new "open source" material served by the appellant for the appeal. We have already set out part of this when dealing with fitness to plead. Even were suicide prevented, those factors would produce "a very high risk of persisting or permanent psychological damage" through a worsening of all his disorders. The maximum point of suicide risk would be immediately following discharge from suicide watch, when the risk would be extremely high whatever further preventative measures had been implemented. After release from prison, the persisting and permanent psychological damage and losses would result in a permanent high risk of impulsive suicide which would be extremely difficult for (family or professional) carers to anticipate or prevent.

Evidence from the United States on conditions

91. We turn from the medical evidence to what the United States authorities had to say about what would happen to Mr Love, were he to be extradited, once responsibility for him had passed to their hands. This was important evidence. The judge accepted it with the result that the risks to Mr Love which, as we read her judgment, would otherwise have precluded his extradition, would be sufficiently diminished.

92. The judge accepted the written evidence of Mr Panepinto of the Marshals Service, and it appears that of Mr Wolf, a licensed physician detailed to the Marshals Service. Mr Love would be restrained and escorted by Marshals, who would observe him within close proximity during the flight, having checked him for anything he might be able to use to harm himself. Someone from the Operational Medical Support Unit would be in attendance if necessary. He or she could dispense and administer prescription medicines, and would have additional paramedic skills. The Marshals Service would maintain custody of Mr Love until his initial district court appearance or, if not released, until delivery to the pre-trial detention facility. The Marshals Service routinely transported prisoners with mental or physical health problems. This evidence persuaded the judge that any risk of suicide in transit could be ameliorated.

93. Mr Wolf added that the Marshals Service would decide where Mr Love would be detained, if remanded in custody pending trial. Were he prosecuted in the Southern District of New York, he would be detained at a BOP facility, either the Metropolitan Detention Center ("MDC") in Brooklyn, or in the Metropolitan Correctional Center ("MCC") in New York. The likely places of detention in relation to custody in the other two Federal Districts where Mr Love was indicted were also identified. At his initial intake in court cells, non-medical staff would complete a special notice if he had a medical condition, including suicidal ideation, or any serious mental illness. This alert would be provided to the prison. At the prison, he would be screened by correctional and health care personnel, followed by a full medical and mental appraisal by a licensed health care provider who could be a nurse or a physician. Urgent or chronic health concerns would be further evaluated and addressed inside the prison or through referral to outside specialists. Psychiatric medication management was often dealt with in the prison or by consulting psychiatrists, particularly in severe cases. Emergency care could be sought at a local hospital. Requests by prison healthcare providers for non-urgent medical care were evaluated by medical staff of the Marshals Service. They would decide what is medically necessary. Were Mr Love detained in a non-BOP facility, their suicide prevention programs included risk assessment, suicide watch in the medical department or a special housing unit with 24 hour continued observation as required. Prisoners there wear a suicide smock and have a tear resistant blanket. Psychiatrists and licensed clinical social workers specifically trained in mental health needs are either directly available or through local arrangements. Mr Wolf believed that any of the pre-trial facilities were capable of providing adequate medical care for Mr Love.

94. The judge also accepted the written evidence of Dr Lyn, the BOP's Psychology Services Branch Administrator. Her evidence about MDC and MCC was to the same effect as Mr Wolf's. Following arrival, there would be medical screening within 24 hours of arrival, psychological medications would be noted and continued (or replaced with equivalents). Imminent risk of self-harm would be assessed, a questionnaire on suicidal ideation completed and assessed followed by comprehensive

examination if suicidal or mentally ill. Psychology Departments at MDC and MCC were available for all inmates with a full range of services and responsibilities for identifying inmates at various risks, advising on transfers, and providing individual treatments. The two prisons shared a full-time psychiatrist. BOP policies governed the treatment of inmates on conviction. They went to the prison appropriate for them, in the least restrictive setting possible. BOP operated a mental and medical health classification system to identify inmates with problems, to utilise resources effectively and to place them where best suited for them. Policies governed their treatment. On arrival, Mr Love would be screened. It was not unusual for BOP to receive inmates with mental illnesses and to treat them. It had over 600 doctoral level psychologists and over 600 mental health specialists, a wide variety of therapies and standard medications. It could provide appropriate treatment for asthma and eczema. The BOP housed inmates with Asperger Syndrome. Mr Love would be assisted to adjust to incarceration. He would be assigned a Correctional Counsellor, Case Manager and Unit Manager, and a variety of Psychology Service programs was available. They include programmes to address deficits in social skills in a specific unit, a "modified therapeutic community." BOP also had a "Suicide Prevention Protocol" and "Program Statement" to identify and manage suicidal inmates, involving supervision or suicide watch, where they would have a tear-resistant gown and blanket. Counselling was available for those at risk of suicide. Private physicians were not permitted, unless they were treating the inmate before incarceration, and permission to be treated by a specific physician would be infrequent. Conditions of confinement could be challenged in court. Overall, Mr Love's needs could be provided for.

Dr Kucharski

95. The primary medical response to this evidence came from Dr Kucharski, a very experienced forensic psychologist, who had worked at a BOP medical facility, had been a forensic psychologist, and ultimately Chief Psychologist at MCC. He had also been to MDC, where he thought it most likely that Mr Love would be sent. He gave oral evidence in the course of which he gave an answer on which the judge put considerable weight: "no one commits suicide on suicide watch," finding at [98] that the "preventative measures in place in the United States are effective in preventing suicide."

96. The judge correctly records the chief theme of his evidence as being that what Dr Lyn said, whilst true in terms of numbers and policies, did not reflect the reality of the services available in BOP prisons. In reality, in view of their other functions, only two or three psychologists were available in each institution for direct inmate health care. Positions were often kept vacant because of cost, and the ratio of inmates in need of care for significant psychological difficulties to staff psychologists was about 100/130:1. And that one had other tasks to fulfil as well. Court ordered evaluations were the major part of the workload. But it happened sometimes that they had to act as correctional guards because of shortages. Most inmates were only treated by way of medication. The psychologists had to respond to crises all the time, and a high level of arrivals and turnover.

97. At MDC/MCC, the number of inmates likely to have significant psychiatric difficulties yielded a caseload of nearly 500 inmates out of 2461. If all were seen weekly, the workload would be 12 inmates per hour, or half that if seen every other week. These institutions were "difficult to navigate"; they were high-rise buildings in

which inmates were moved, secured, in lifts. That was a cumbersome process which limited the number who could be seen in a day.

98. Upon conviction the judge could recommend that Mr Love should go to a medical centre which provided inpatient psychiatric services. The BOP might accept that recommendation, but thereafter he could be transferred at any time to a non-medical facility if BOP thought hospitalisation unnecessary. If an inpatient, Mr Love would be likely to be one of 1000 or more inmates in one of four medical facilities, and most of those beds were not available for sentenced inmates to receive medical care. There were therefore significant resource constraints on the delivery of inpatient mental care facilities for sentenced inmates. Mr Love was unlikely to be transferred to one of them. Programmes for low functioning inmates were irrelevant to Mr Love's needs. Dr Kucharski was not aware of any BOP program specially designed for those with Asperger Syndrome. BOP facilities were seriously over-crowded, straining the medical resources further, and increasing the stress on inmates.

99. Dr Kucharski drew upon the evidence of Professor Kopelman, Professor Baron-Cohen, and Dr Jenkins, Mr Love's dermatological consultant, to conclude that, complex and difficult as Mr Love's various conditions were to treat in the community, they would be even more difficult to treat in prison, with serious adverse consequences. The stress of incarceration would significantly worsen his eczema. His physical symptoms would lead to agitation, which would be poorly tolerated by prison authorities and would be likely to lead to his spending significant time in segregation. Time on suicide watch or on segregation would be time spent in isolation. He added in his oral evidence that suicide watch was a device to prevent suicide and not a form of treatment. Treatment would be minimal, but the international nature of the case and its notoriety would add significant pressure to keeping Mr Love on suicide watch. He would place Mr Love on suicide watch immediately on arrival at MCC/MDC. This in turn would be likely to exacerbate his depression and substantially increase the risk of suicide. Dr Kucharski concluded:

> "I would be very cautious given Mr Love's history, his intellectual capacity and his high profile ordering him released from suicide watch. This is likely to have a significant adverse effect on his psychological wellbeing further compounding the depression and risk of suicide."

Inmates, intent on committing suicide, could do so by not being forthcoming about their suicidal intent. His oral evidence, as noted by Mr Love's trainee solicitor, included the observation that the harm for anyone in segregation or isolation, was magnified for those with psychiatric disorders.

100. Mr Love would be prosecuted in three different districts, which would mean transfer from Oklahoma, where inmates usually arrive, to at least three different BOP facilities which might not appreciate equally Mr Love's suicide risk. Dr Kucharski had experience of transit itself causing those restored to competency to stand trial, then to lose that competence because their medication had not been available.

101. The effectiveness of anti-depressant medication on Mr Love remained uncertain, and facilities for thoughtful trials of medication were limited. The BOP chronic care model for conditions such as asthma was likely to have difficulty treating Mr Love

successfully because it was complicated by stress which incarceration would exacerbate. The combination of special expertise with Asperger Syndrome and intensive cognitive behaviour therapy with dermatology treatment was not available at MCC or MDC or post-sentence facilities on a regular basis. The BOP did not provide the level of comprehensive care needed.

> "The failure to provide Mr Love with comprehensive mental health and medical care, in the context of the enhanced stress of incarceration and removal of his social support system, will likely result in a deterioration of his psychological condition and significantly increase the risk of suicide."

Other evidence

102. The District Judge did not refer specifically to the evidence of Mr Zachary Katznelson, an American lawyer (and barrister called in England and Wales) and a former Legal Director of Reprieve, on the practical experience of those with mental health problems and Asperger Syndrome in the United States prison system. He, like Dr Kucharski, said that "the actual delivery of care frequently fails to meet BOP's aspirations." He summarised the failings brought to light in a report of December 2014 commissioned by the BOP itself: a very high proportion of errors in diagnosis and treatment, very little follow up, and very heavy caseloads for psychologists so that only the most unstable cases were seen. Those on suicide watch were treated in the same way as those on segregation except for the watcher who would or could be outside the cell. He said that attorneys at MCC report clients waiting months for care, often ultimately inadequate, or inadequate because of intervening deterioration.

103. He thought that Mr Love was unlikely to be considered ill enough to be housed in a specialised unit. Even low security prisons, where on a ten year sentence Mr Love was most likely to be placed, were overcrowded with all that entailed, including limitations on medical care, recreational activities leading to frustration and violence.

104. Asperger Syndrome, as described by Professor Baron-Cohen, would make him extremely vulnerable in prison because he could not read cues in social behaviour, or understand other people's behaviour or expectations, or conform to social norms. He would be socially naïve, obsessive, poor in decision-making so as to make it difficult for him to cope with prison hierarchies, personalities, gangs and the prison system more generally. He could not avoid interaction with other prisoners at meals or in recreation. His Asperger Syndrome would reduce the prospect of his being able to develop relationships with them. A violent reaction is more common in prison in response to those who do not conform to the expectations of other inmates, especially from a foreigner in an American gaol. He quickly would be recognised as vulnerable, not least because of his visible eczema, making him an easy target for abuse. He would face unrelenting stress. He therefore bore a greater risk of segregation whether for his own safety or for repeated breaches of prison rules, with ever more severe punishments. Protective custody prisoners were often mixed with those being disciplined. He would have no external support structure; visits from his family would be rare because of expense; telephone calls were limited and expensive, and his internet access could well be limited in view of the offences alleged or found against him.

105. Tor Ekelund, Mr Love's United States lawyer, gave some evidence to the same effect, which was also not referred to by the judge, on the topic of prison conditions but it is markedly less persuasive. Joshua Dratel, another United States criminal defence attorney of 30 years' experience, gave evidence which covered, among other matters, treatment in prison which the judge did refer to. But it does not add to what has been set out above.

106. Mr Fitzgerald sought to adduce further evidence about the conditions and treatment which Mr Love would be likely to experience in either MDC or MCC. We admit this evidence in the light of the witness statement from Kaim Todner on when the information came to light and could be obtained for presentation usefully to a court. It is also relevant to have up to date information for the purposes of reaching a judgment on whether extradition would be oppressive by reason of physical and mental condition. The two items of primary note were first a report of a Federal Magistrate describing conditions for female defendants at MDC as "unconscionable" because of the absence of sunlight, fresh air, air conditioning in the heat, outdoor exercise, and receiving very poor food and medical treatment. The women's prison is on an upper floor in the same building which houses male prisoners at MDC. Second, there was a report of a visit in June 2016 by the National Association of Women Judges to the MDC that made the same points. It noted that the BOP then said that it could [not] find physicians willing to work in a New York prison. Conditions had been "unconscionable" for three years.

107. There is no reason, in our view, to suppose that the conditions attributable to the state of the building are better on the men's floors or that men would be better treated in other respects. In the light of those materials, we are prepared to give greater weight than we would otherwise have done to the Complaint dated 27 October 2016 in the Class Action brought by Podius and other male inmates at MDC against the Department of Justice in the District Court for the Eastern District of New York. The allegations, which nonetheless require real caution in view of their source and the absence of response, make the same sort of points, add colour to them through examples of inadequate medical treatment and of problems created for those on suicide watch. The point is that the nature of the complaints, ignoring much of the colourful detail, chime with the observations of the National Association of Women Judges. All this emphasises the need to consider the actual conditions in which inmates will be held, and not just the policies and programmes which are in place.

108. The Office of the Inspector General ("OIG"), in the Department of Justice reported critically in July 2017 on segregated solitary confinement, termed "Restrictive Housing" in BOP prisons. It concluded such confinement could harm any inmate and particularly those with mental illnesses. It made many recommendations, all accepted by the BOP, most of which were "resolved" by October 2017.

109. We found the evidence of Mr Dratel on conditions in MDC/MCC of no real help, as it was largely commentary on what could be found in material already before us.

110. Mr Lara, an Assistant Director in the BOP, responded to some of the new evidence. Segregation in a "Special Housing Unit" in a BOP facility did not necessarily mean that a prisoner was in solitary confinement. An inmate could be placed there for his own protection, for disciplinary reasons or because of the threat they pose to others or to the good order and discipline of the prison. The BOP Program Statement required

conditions in them which were healthy and humane. There was a review every 30 days by medical staff including mental health staff and necessary medical care was provide daily. Inmates were released from that unit when they no longer needed to be there.

111. Ms Lowry, Chief of the Office of Detention Operations in the Marshals Service, elaborated on how the facilities where Mr Love would be likely to be detained in New Jersey and Virginia operated their Special Housing Units. Mr Pecoraio, of the External Auditing Branch of the BOP, also gave evidence in reply to Mr Love's further evidence, dealing with the OIG report. He said that "substantial steps to comply with each OIG's recommendations" had already been taken, which he set out. BOP was "working diligently to hire and retain mental health staff" where there were insufficient.

Evidence about the likely prosecutions

112. The judge accepted that there was nothing "unlawful or improper" in proceedings being undertaken in three separate jurisdictions in the United States. The prolific criminal activity alleged against Mr Love had occurred in three separate jurisdictions, leading to three separate investigations. She also rightly accepted the good faith of the prosecutors in the light of some unwarranted and unevidenced allegations by Mr Dratel, about why three prosecutions were being brought. In certain circumstances, were Mr Love to plead guilty to the charges and waive trial in each district where he had not yet been convicted, and the United States attorneys in those districts consented, the matters could all be dealt with by a single judge, but not otherwise. The evidence she accepted also showed that substantive offences had to be tried in the district where those crimes occurred. Mr Love could waive venue, but for there to be one trial, each of the three courts would have to agree that neither side would be prejudiced. The outcome of any joinder request was difficult to predict.

113. There was also a debate before the judge about the sentences which Mr Love could expect following convictions. The judge accepted that the relevant Sentencing Guidelines permitted departures from the range to which mental health could be relevant, but Mr Love could also receive enhancements to his sentence under them. The Guidelines advised concurrent sentences, albeit that the different courts could impose consecutive sentences, and that it was possible for one court to sentence for all matters. However, she accepted that the United States sentencing regime for these offences was "certainly harsher" than in England and Wales. The judge did not come to a particular conclusion on the likely level of sentencing, but concluded more generally that the United States sentencing regime was not disproportionate. We agree with that judgment. But some view on the likely range is necessary for deciding the issue of oppression. Mr Fitzgerald submitted that it would be realistic to expect a sentence in America of the order of 10 years, which we accept as a realistic estimate on all the evidence which we have seen, and one which respects the conclusions of the judge.

114. The judge considered evidence about the circumstances in which prisoners could be transferred after sentence from the United States back to the United Kingdom pursuant to an extant prisoner transfer agreement. Although she decided which evidence she preferred, she reached no particular conclusion on whether or when Mr Love might be transferred or under what conditions. The possibility of transfer did

not play any explicit part in her decisions. It is not necessary for us to decide whether Mr Love would be successful in any transfer request. The reality is that he might or might not be. Nor is it is possible to determine when, hypothetically, it might occur or subject to what conditions, a wide variety of which (including restitution) might be imposed.

Conclusion on oppression

115. We come to the conclusion that Mr Love's extradition would be oppressive by reason of his physical and mental condition. In this difficult case, and in the course of an impressive judgment, we conclude that the judge did not grapple with an important issue. She accepted the ability of the BOP to protect Mr Love from suicide, on the basis of Dr Kucharski's comment that "no one commits suicide on suicide watch". It was implicit that measures could be taken in America which would prevent Mr Love committing suicide even though he might be determined to do so and have the intellect to circumvent most preventative measures. The important issue which flows from that conclusion is the question whether those measures would themselves be likely to have a seriously adverse effect on his very vulnerable and unstable mental and physical wellbeing? We consider that they would, both on the evidence before the judge, and on the further evidence we have received.

116. We also consider, and this is reinforced by the further evidence, that the evidence adduced by the BOP as to its policies and programmes could not be treated as resolving the issue as to his medical treatment in favour of the United States, without deciding that the practical evidence on behalf of Mr Love was not worthy of any real weight, which is what the judge does appear to have decided. We, however, judge that the evidence as to conditions and treatment in practice is rather weightier than she did, and that, in Mr Love's rather particular circumstances, what is likely to happen in practice has to be given decisive weight. Dr Kucharski's evidence was particularly important in view of his experience.

117. We have set out the material evidence very fully, because we are differing from the District Judge in her careful judgment, and can now set out our conclusions from it shortly.

118. We accept that the evidence shows that the fact of extradition would bring on severe depression, and that Mr Love would probably be determined to commit suicide, here or in America. If the judge is right in concluding that the high risk of suicide can be prevented, notwithstanding Mr Love's determination, planning and intelligence, about which we have real doubts, on her findings it is only because of the evidence that no one has committed suicide on suicide watch in the care of the BOP. Yet one stratagem identified by Professor Kopelman and Dr Kucharski was that Mr Love would present himself as no longer suicidal for sufficiently long to be removed from suicide watch, precisely so that he could then commit suicide.

119. If he were kept on suicide watch, and reviewed every 30 days or so, he would be in segregation, with a watcher inside or outside the cell for company, and with very limited activities. All the evidence is that this would be very harmful for his difficult mental conditions, Asperger Syndrome and depression, linked as they are; and for his physical conditions, notable eczema, which would be exacerbated by stress. That in turn would add to his worsening mental condition, which in its turn would worsen his

physical conditions. There is no satisfactory and sufficiently specific evidence that treatment for this combination of severe problems would be available in the sort of prisons to which he would most likely be sent. Suicide watch is not a form of treatment; there is no evidence that treatment would or could be made available on suicide watch for the very conditions which suicide watch itself exacerbates. But once removed from suicide watch, the risk of suicide as found by the judge, cannot realistically be prevented, on her findings.

120. Were Mr Love not to be in segregation, his Asperger Syndrome and physical conditions would make him very vulnerable. He would be a likely target for bullying and intimidation by other prisoners. The response by the authorities would be segregation for his own protection, which would bring in all the problems of isolation to which we have already referred. He would have no support network available in prison in the United States. There is no basis upon which we could conclude that the severity of the problems would be brought swiftly to an end by early transfer to the United Kingdom.

121. Mr Love already experiences severe depression at times. It is very difficult to envisage that his mental state after ten years in and out of segregation would not be gravely worsened, should he not commit suicide. Professor Kopelman's evidence was that he would be at a permanent risk of suicide.

122. Oppression as a bar to extradition requires a high threshold, not readily surmounted. But we are satisfied, in the particular combination of circumstances here, that it would be oppressive to extradite Mr Love. His appeal is allowed on that ground as well.

Articles 3 and 8 ECHR

123. In the light of the conclusions to which we have come, consideration of Articles 3 and 8 ECHR is unnecessary.

Conclusion

124. This appeal is allowed and the Appellant is discharged.

125. We emphasise however that it would not be oppressive to prosecute Mr Love in England for the offences alleged against him. Far from it. If the forum bar is to operate as intended, where it prevents extradition, the other side of the coin is that prosecution in this country rather than impunity should then follow, as Mr Fitzgerald fully accepted. Much of Mr Love's argument was based on the contention that this is indeed where he should be prosecuted.

126. The CPS must now bend its endeavours to his prosecution, with the assistance to be expected from the authorities in the United States, recognising the gravity of the allegations in this case, and the harm done to the victims. As we have pointed out, the CPS did not intervene to say that prosecution in England was inappropriate. If proven, these are serious offences indeed.

127. If convicted and sentenced to imprisonment, Mr Fitzgerald accepted that the experience of imprisonment in England would be significantly different for Mr Love

from what he would face in the United States. The support of his family, in particular, would mean that he would be at far lower a risk of suicide in consequence. On the evidence we have seen, his mental and physical condition would survive imprisonment without such significant deterioration, though it would undoubtedly be more problematic for him than for many prisoners.