Neutral Citation Number: [2023] EWHC 876 (Admin)

Case No: CO/468/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/04/2023

Before :

LORD JUSTICE LEWIS
MR JUSTICE JULIAN KNOWLES

- -

Between :

Michael Lynch	**Applicant**
- and -	
Government of the United States of America	**Respondent**

- -
- -

Alex Bailin KC, Aaron Watkins and Jessica Jones (instructed by **Clifford Chance LLP**) for the **Applicant**
Mark Summers KC and Rachel Barnes KC (instructed by **CPS**) for the **Respondent**

Hearing dates: **15-16 March 2023**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 21 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewis and Mr Justice Julian Knowles handed down the following judgment of the Court:

Introduction

1. Before us is an application for permission to appeal by Dr Michael Lynch (the Applicant) against the decision of District Judge Snow under Part 2 of the Extradition Act 2003 (EA 2003) to send his case to the Secretary of State.

2. The Applicant's extradition has been sought by the Respondent so that he can stand trial in California for fraud. The American prosecutors have described the case as 'one of the largest frauds ever prosecuted by the United States Department of Justice.' The value of the alleged fraud runs into the billions of dollars.

3. It is right to record at the outset that the Applicant strongly denies all of the charges against him. Hence, where we describe in this judgment what he is said to have done, these are to be understood as allegations only. They remain to be proved, should there be a trial.

4. The district judge's ruling is dated 22 July 2021 and followed a four-day extradition hearing at which live evidence was called. In January 2022 the Secretary of State ordered the Applicant's extradition to the United States under s 93 of the EA 2003.

5. Pursuant to an order made by Julian Knowles J on 4 December 2022, on 15 and 16 March 2023 we held a 'rolled up' permission hearing, that is a hearing at which the application for permission and the substantive hearing were considered together. We reserved our decision. We are grateful to all counsel and their legal teams for their assistance.

6. We acknowledge that this judgment is unusually long for a permission decision. However, given the nature of the case and the Applicant's root and branch attack on all of the district judge's reasons, that is inevitable.

7. For the reasons which follow we have concluded that none of the grounds of appeal are arguable, and we therefore refuse permission to appeal. Of the five grounds of appeal argued by Mr Bailin KC, we only required Mr Summers KC to address us on one, that relating to the forum bar.

Factual background

8. In simple terms Autonomy Corporation plc was the holding company for a number of companies in the Autonomy Group. We will refer to this company as Autonomy. The background is as follows.

9. Following undergraduate, doctoral and post-doctoral research, in April 1996 the Applicant co-founded the computer software company Autonomy Corporation Group plc. That company used innovative techniques which the Applicant had developed to process data. Its products were of widespread application in many different sectors. The Applicant's solicitor, Mr Nicholls of Clifford Chance LLP, described these as follows in his witness statement of 29 May 2020 at [11]:

> "Autonomy's principal business was the sale and supply of software to companies, in particular in the area of 'unstructured data analysis' through a platform called 'IDOL' (Intelligent Data Operating Layer). In short, IDOL was an engine designed to enable computers to make sense of unstructured data using probability-based theories. The technology was described by [Hewlett Packard's] Meg Whitman as 'almost magical'. The algorithms designed and sold in Autonomy software were highly sophisticated, enabling analysis of unstructured data in the form of, inter alia, emails, telephone conversations, website pages etc. The wide utility of this technology is easy to see. By way of illustration, IDOL enabled financial institutions to monitor emails and telephone calls to identify suspicious conduct for compliance purposes. The attractiveness of this type of advanced technology enabled Autonomy to sell its products across the world to approximately 20,000 customers, including global leaders in the fields of consulting and professional services, media, pharmaceuticals and healthcare, telecommunications, aerospace, e-commerce, legal and manufacturing, as well as to government agencies, intelligence defence and technology services and to the public sector."

10. From 1996 until 2012, the Applicant was Autonomy's CEO. In 2005 the company was listed on the London Stock Exchange, and it joined the FTSE 100 in 2008. Its shares were heavily traded, and many were held by US entities. Many of its staff were based in the US. It had headquarters in Cambridge in the UK and San Francisco in the US.

11. Autonomy had several US subsidiaries, including Autonomy Inc, with offices in San Francisco and San Jose, California; Interwoven Inc, with offices in San Jose; and Zantaz Inc, with offices in Pleasanton, California.

12. Autonomy received substantial revenues from the US. For example, in 2010, $592 358 000 of its $870 366 000 in reported revenues (approximately 68%) came from the US and other countries in the Americas.

13. This case primarily arises out of the acquisition in 2011 of Autonomy by Hewlett Packard Company (HP), a large, long-established and well-known American computer company. HP is incorporated in the US and headquartered in Palo Alto, California. It had about 349 000 employees at that time.

14. HP had traditionally focussed on hardware, where margins are relatively low. Its acquisition of Autonomy was intended to position it in the software market, where margins and profitability are higher.

15. In summary, the Applicant is accused of engaging in a conspiracy to provide dishonest financial and other information about Autonomy's performance to the markets from 2009, and then to HP from about 2011 during the purchase negotiations, thereby dishonestly maintaining or inflating Autonomy's share price, and hence, ultimately, the price which HP paid for it. The Applicant owned a substantial number of Autonomy's shares, and so the alleged fraud benefitted him personally.

16. The Applicant is also accused of attempting to obstruct justice in relation to the investigation into the alleged fraud, and of money laundering in relation to the money he personally received following HP's acquisition.

17. The Applicant has been indicted in the US District Court for the Northern District of California (San Francisco Division) together with Stephen Chamberlain, Autonomy's Vice-President of Finance until March 2012, in *United States v. Michael Lynch and Stephen Chamberlain*, Criminal No. 18-CR-577 (CRB). Mr Chamberlain returned voluntarily to the US and has been released on bail. The judge in charge of the case (US District Judge Charles Breyer) has expressed the wish that the Applicant and Mr Chamberlain be jointly tried, although we were also told that in the event that the Applicant is extradited, an application for severance would be made. Autonomy's former Chief Financial Officer, Sushovan Hussain, has already been tried and convicted in California and sentenced to five years imprisonment, and his conviction upheld on appeal: *United States v Hussain* 972 F 3d 1138 (9th Cir 2020).

18. The Superseding Indictment against the Applicant, on the basis of which his extradition is sought, is dated 29 March 2019. We will refer to this as 'the Indictment'.

19. Paragraphs 4-5 of the affidavit of William Frentzen, an Assistant United States Attorney, and one of the California prosecutors, contained within the extradition request, summarises the Government's case as follows:

> "4. This prosecution arose from an investigation by the Federal Bureau of Investigation ('FBI'), which revealed that from January 2009 to October 2011, Michael Lynch, a citizen of the United Kingdom, was the leader of a corporate conspiracy to fraudulently inflate the reported revenue, earnings and value of a publicly traded company, Autonomy Corporation plc ('Autonomy'), and to sell Autonomy to Hewlett-Packard ('HP'), a publicly traded company based in the Northern District of California, for approximately $11.7 billion. Additionally, Lynch conspired with others to conceal the fraudulent nature of the accounting at Autonomy and engaged in activity to further that goal, including violating internal controls of a publicly traded company, obstruction of justice, and money laundering.
>
> 5. The FBI's investigation established that from 2009 to 2011, Autonomy's founder and Chief Executive Officer Michael Lynch, Autonomy's Chief Financial Officer Sushovan Hussain, and Autonomy's Vice President of Finance Stephen Chamberlain (and others) carried out a fraudulent scheme to deceive purchasers and sellers of Autonomy securities - traded on the London stock exchange - and potential buyers of the company such as HP. The core of the fraud was to falsely portray the performance of Autonomy's business, its financial condition, and its prospects for growth. Using a variety of different fraudulent means, Lynch, Hussain, and Chamberlain made it appear that Autonomy's revenues were growing by 10-25% a year when, in reality, during each of the quarters for most of 2009-2011, Autonomy was not growing or was slowing …"

20. The evidence concerning the process by which HP came to purchase Autonomy is fairly lengthy, but can be summarised as follows. This is taken mainly from Mr Frentzen's affidavit and the declaration of Robert S. Leach, an Assistant United States Attorney who is also involved in the Applicant's prosecution.

21. In October 2010 Autonomy announced that it would miss its projected earnings targets. That month the Applicant entered into discussions with an American investment banker, Frank Quattrone, about a possible sale of Autonomy. Mr Quattrone works for Qatalyst Partners and specialises in technology companies. Qatalyst are based in San Francisco. It is important to emphasise that it is the prosecution's case that even at that point the Applicant had, for nearly two years, been involved in releasing dishonest financial information about Autonomy's performance (and hence its potential value).

22. In or about November 2010, the Applicant authorised Mr Quattrone to solicit interest in Autonomy from major technology companies headquartered and incorporated in the US and traded on US stock exchanges. Qatalyst identified potential buyers as IBM, Microsoft, HP, Oracle, EMC, Google, Cisco, and Dell – all well-known US-based technology companies. There were one or two possible other non-US companies that were considered (a point we will return to), but for the most part potential purchasers were American companies.

23. Mr Leach said at [42]:

> "42. On or about January 13, 2011, Dr Lynch spoke to Mr. Quattrone. Dr Lynch affirmed that '[h]e is OK with [Qatalyst] reaching out to buyers.' Dr Lynch said: 'He will be in the US for a month starting around March 11 and could pop over easily if there is something serious to discuss.' He also stated: 'He thinks HP is the best buyer … [and] Dell, Intel and Cisco are interesting."

24. Discussions with HP began in earnest in early 2011 and carried on during that year. On 26 January 2011, Mr Quattrone distributed a 'teaser pitch' to HP's Chairman. The teaser pitch included Autonomy's 2009 annual revenues and a chart showing Autonomy's 'IDOL Software Business Model'. In the months that followed, a large quantity of material was sent to HP by or on behalf of Autonomy as negotiations progressed. Paragraphs 17-18 of the Indictment allege:

> "17. Between January and August 2011, LYNCH and others acting on behalf of Autonomy provided Autonomy's financial statements and documents reflecting Autonomy's results for the year ended 2009, the year ended 2010, the first half of 2011, and other periods to persons at, or acting on behalf of, HP in the course of HP's consideration of whether to buy Autonomy and, if so, for what price.
>
> 18. Among other information, HP relied on the accuracy and truthfulness of the statements and disclosures made in Autonomy's historically reported financial statements and other public statements including, but not limited to, Autonomy's claims about its financial performance, revenues, expenses, and products and its claim to be a 'pure software' company with high gross margins."

25. During the negotiations there were numerous meetings, both in person in California and elsewhere, and over video-links between the UK and California. For example, in February 2011, Autonomy and HP conducted a video conference. On the Autonomy side, the Applicant and Mr Hussain participated, as did Mr Quattrone. On HP's side, a number of executives in Palo Alto took part. The Applicant gave a presentation about what he said had been Autonomy's historical financial performance. That presentation is alleged to have been dishonest and deceptive.

26. In April 2011, the Applicant met with HP's Executive Vice President for HP Software in San Francisco. Later that month the Applicant met with Leo Apotheker, the then President and CEO of HP, in Palo Alto. Of this meeting, Mr Leach said at [59]:

> "Dr Lynch and Mr Apotheker exchanged views about the state of the software business. Dr Lynch spoke about Autonomy's strong financial performance and how proud he was of its recently announced 2010 results. Among other things, Dr Lynch talked about Autonomy's strong organic growth, its high margins, and its 'pure software' model. Mr. Apotheker came away with the impression that Autonomy was a well-run, very successful company, and was impressed with Dr Lynch's description of Autonomy's technology and his understanding of the software industry."

27. There were many further meetings involving the Applicant and HP executives during 2011. On or about July 19 to 21 2011, HP's board, in Palo Alto, authorised Mr Apotheker to pursue the acquisition of Autonomy with a maximum acquisition price of $11.7 billion.

28. HP's due diligence work continued through July 2011 and involved the Applicant personally. Mr Frentzen said at [15]:

> "15. On July 26, 2011, HP sent a detailed due diligence request list to Kanter. Autonomy rebuffed many of HP's requests for information, most notably for access to Autonomy's accountant's workpapers. To justify not providing certain information, Autonomy claimed that UK takeover laws required that any information shared with one potential bidder needed to be shared with all other bidders even if their interest was not genuine. In lieu of responding to certain due diligence requests, Lynch and Hussain repeatedly referred HP to Autonomy's publicly available financial statements."

29. Mr Frentzen went on at [16]-[19]:

> "16. In targeting and pricing the second largest acquisition in its history, HP relied on the accuracy of Autonomy's publicly-filed financial statements, which were prepared by Hussain and Chamberlain and certified by Lynch. Manish Sarin, a senior HP acquisitions officer, and Andy Gersh, the acquisition consultant HP retained from KPMG, carefully reviewed Autonomy's 2010 year-end financial statement (which also reported 2009 revenues), and

> its QI 2011 and Q2 2011 quarterly financial statements, to evaluate Autonomy's revenues and profitability. They did so with a particular eye toward Autonomy's claims about its high gross margins or the profitability of its revenue segments.
>
> 17. During HP's due diligence of Autonomy, Lynch, Hussain, and Chamberlain lied to Manish Sarin and others at HP in at least three ways. First, the three passed off Autonomy's financial statements as accurate - when they were not - and as audited by Deloitte - when Autonomy had lied to Deloitte in order to obtain Deloitte's audit opinion. Autonomy's financial statements were a baseline for HP in both its valuation of what price HP would pay for Autonomy and its internal modelling for how profitable over time any acquisition of Autonomy would be for HP.
>
> 18. Second, in response to HP's request, Hussain and Chamberlain prepared a list of Autonomy's top 40 customers and contracts, and then removed more than $142 million in hardware sales and at least $19 million in other VAR-related revenue that was, in fact, uncollectible or otherwise problematic. This deception reinforced HP's (false) belief that it was buying a "pure software" company with a record of hitting market expectations and gross margins that drove the price HP was willing to pay to over $11 billion.
>
> 19. Third, Autonomy misled HP during its due diligence about the nature of Autonomy's revenues by concealing, in its due diligence disclosures, more than $105 million in loss-generating hardware sales in 2010 alone and another approximately $40 million in Q 1 2011 and Q2 2011."

30. 'VAR' stands for 'value-added reseller' which, in general terms, is an entity which adds value to a third party product before selling it on to the end user.

31. On or about 28 July 2011, the Applicant met with Mr Apotheker and Mr Robison (HP's Chief Strategy and Technology Officer) in France. They discussed the reasons why an acquisition would make sense for both sides, and other matters, including the Applicant leading HP's other software programmes.

32. The parties also discussed price. The Applicant pushed for £27 per share. Ultimately, the parties agreed that further discussions would be held within a price range between £24.94 and £26.94. The figures were subject to due diligence efforts and board approval. On the same day Mr Robison signed and provided to Autonomy a non-binding proposal indicating that HP was prepared to make an all-cash offer to buy Autonomy's shares at a price between £24.94 and £26.94 per share.

33. Beginning on 1 August 2011, HP executives conducted further daily due diligence calls with Autonomy executives. The Applicant participated in some of these. The vast amount of HP's due diligence was performed by HP executives in the US.

34. Then, in August 2011, anonymous whistle-blower allegations began to emerge from inside the company about Autonomy's claimed sales figures, suggesting they were

inflated and not accurate. These allegations prompted journalists to begin asking questions, as did HP, to which the Applicant allegedly gave false answers.

35. During August there was a decline in Autonomy's share price (not, or not solely, referrable to the whistle-blowing allegations, but also due to market movements) and HP's offer price reduced accordingly. The Applicant agreed to recommend a price of £25.50 per share to Autonomy's board.

36. On or about 18 August 2011, HP's Finance and Investment Committee met and was provided with a presentation on the terms of the offer for Autonomy and information on the due diligence findings. The Committee reviewed how the contemplated Autonomy offer was to be financed, and received confirmation that HP had the necessary financial resources to enable it to implement the offer. The Finance and Investment Committee approved going forward with the acquisition.

37. At [104] Mr Leach said:

> "After that meeting, HP's full Board convened. The Board was provided valuation information prepared by HP management (based on Autonomy's falsified financial statements), which valued Autonomy at $9.5 billion on a standalone basis and $17.08 billion when 'synergies' – HP management's assessment of increased value that could be achieved through a combination of the two companies – were considered. The Board unanimously approved the acquisition."

38. On or about 18 August 2011, HP and Autonomy announced HP's offer to buy all of Autonomy shares for £25.50 ($42.11) per share, which amounted to a total purchase price of $11.7 billion. This was to be funded from HP's capital reserves and by debt financing (ie, borrowing). The Indictment says this at [9]:

> "9. On or about August 18, 2011, in a press release announcing the acquisition, HP emphasized that 'Autonomy's recent operating and financial performance has been strong.' HP also stated that '[o]ver the last five years, Autonomy has grown its revenues at a compound annual growth rate of approximately 55 percent and adjusted operating profit at a rate of approximately 83 percent.' Among the acquisition's '[s]trategic and financial benefits,' HP said Autonomy would enhance HP's financial profile because 'Autonomy's strong growth and profit margin profile complement[ed] HP's efforts to improve its business mix by focusing on enterprise software and solutions. Autonomy [had] ... a consistent track record of double-digit revenue growth, with 87 percent gross margins and percent operating margins in calendar year 2010."

39. Earlier, at [4], the Indictment alleges that:

> "As Autonomy's CEO and a director, LYNCH was responsible for certifying Autonomy's publicly filed financial statements. LYNCH was also responsible for the accuracy of statements made by him

> and others at Autonomy to market analysts, shareholders, and other persons in the investing public about the nature and composition of Autonomy's products, revenue, and expenses and its potential for growth."

40. To complete the acquisition, HP formed Hewlett-Packard Vision BV, a special purpose vehicle incorporated under the laws of the Netherlands. We will refer to this as 'Bidco'. It was a wholly owned subsidiary of HP, in other words, HP owned 100% of its shares (no doubt through some sort of corporate structure: we do not have the detail and it does not matter). We assume Bidco was created for tax-efficiency reasons. What we do know is that it had no funds, assets, or operations of its own and the money it used to purchase Autonomy's shares was provided by HP, as we have said. Bidco was incorporated on 15 August, just three days before the public announcement of HP's offer.

41. At [108] Mr Leach said:

> "108. In connection with the acquisition, Dr Lynch and Mr Hussain signed letters committing to sell their shares in the contemplated HP acquisition. Each represented and warranted that 'any information provided by me for inclusion in the Press Announcement, the Offer Document, and any other announcement made or document issued in connection to the Offer, is and will be true and accurate in all respects and not misleading in any respect.' On August 18, 2011, HP incorporated false and misleading information provided by Dr Lynch and Mr Hussain in a press release it made to the public. Among other things, the release stated: 'Autonomy's strong growth and profit margin profile complements HP's efforts to improve its business mix by focusing on enterprise software and solutions. Autonomy has a consistent track record of double-digit revenue growth, with 87 percent gross margins and 43 percent operating margins in calendar year 2010. The Offer Documents also stated: 'Autonomy continues to grow strongly and profitably, reporting record revenue in Q2 2011 of $256 million. For the six months to 30 June 2011, Autonomy reported revenue of $476 million … For the full year ended 31 December 2010, Autonomy reported revenue of $870 million …"

42. On 22 September 2011, HP's board replaced Mr Apotheker as CEO, effective immediately, with fellow board member Meg Whitman. The reasons why he was replaced do not matter for the purposes of this judgment.

43. The questions which had emerged about Autonomy's figures did not stop the deal, which closed on 3 October 2011. The Applicant held about 7% of Autonomy's stock and he personally received about $800 million from its sale.

44. Taking matters shortly thereafter, in the first two quarters of 2012 Autonomy (by now operating as an independent division of HP) badly missed its revenue targets. Shortly thereafter the Applicant and other Autonomy executives resigned or were dismissed.

45. Later that year, in November 2012, after an internal investigation, HP announced an $8.8 billion impairment charge in relation to Autonomy (ie, the assessed reduction in its recoverable value) – about $5.5 billion of which it attributed to the alleged fraud. The matter was reported to the prosecuting authorities in the US, and the criminal investigation began.

46. In his affidavit at [10] Mr Frentzen described six fraudulent devices which the Applicant and his co-conspirators had allegedly used to inflate Autonomy's figures in the period from 2009: (a) revenue recognition fraud involving backdated contracts and side agreements; (b) 'channel stuffing' that involved reciprocal deals and round-trip financing with 'value added resellers' or 'VARs,' where Autonomy retained effective control over the goods sold and made misleading statements about the status of the likelihood of the re-sale of the software by the VAR to end-users; (c) acceleration of deferred revenue streams from the US companies which Autonomy had acquired; (d) resale of hardware at a loss, in which Autonomy made false and misleading statements to the investing public that characterised the low margin hardware sales as high margin sales; (e) misrepresentation of the scale of OEM (original manufactured equipment) sales in which Autonomy made false and misleading statements to investors about the number and revenue amounts of OEM sales in a quarter, in other words, falsely inflating the number of customers adopting Autonomy's products; (f) circular/reciprocal transactions, that included Autonomy purchasing software and/or services from other companies that it did not need or meaningfully use in exchange for the buyer purchasing an equivalent amount of Autonomy software.

47. Mr Frentzen said at [11]:

> "11. By using these measures, Autonomy was able to meet or exceed the all-important performance expectations set by the market analysts who covered Autonomy quarter after quarter. These measures kept Autonomy's stock price comparatively high. Analysts who studied Autonomy's financial performance for investing clients testified that, but for these accounting measures, Autonomy's stock price and overall value would have diminished substantially."

The conduct of which the Applicant is accused and the American charges to which it gives rise

48. There are seventeen counts on the Indictment. It is structured as follows.

49. Under the heading 'The Scheme to Defraud', the Indictment summarises the Applicant's alleged conduct as follows (at [19]-[21]):

> "19. Beginning in or about January 2009 and continuing through in or about October 2011, defendants LYNCH and CHAMBERLAIN, together with others including former Chief Financial Officer Sushovan Hussain, engaged in a fraudulent scheme to deceive purchasers and sellers of Autonomy securities about the true performance of Autonomy's business, its financial performance and condition, the nature and composition of its products, revenue and expenses, and its prospects for growth.

> 20. The objectives of the scheme to defraud were, among other things, (a) to ensure that Autonomy reported that it had met or exceeded projected quarterly results for, among other things, revenue, gross margin, net income, and earnings per share, (b) to maintain and increase the defendants' positions within the company, and to enrich themselves and others through bonuses, salaries, and options, and (c) to artificially increase and maintain the share price of Autonomy securities to, among other things, make Autonomy attractive to potential purchasers.
>
> 21. In or about 2011, LYNCH and others met with representatives of HP about a potential acquisition of Autonomy by HP. At or about that time, LYNCH and others used Autonomy's false and misleading financial statements from 2009, 2010, and early 2011, and other false and misleading documents created by CHAMBERLAIN and others to make Autonomy more attractive to a potential purchaser like HP."

50. The conduct involved in this scheme to defraud gives rise to Counts 1-16. These are: (a) Count 1: conspiracy to commit wire fraud, in violation of Title 18, US Code, s 1349 between about January 2009 and October 2011; (b) Counts 2-15: wire fraud and aiding and abetting wire fraud, in violation of Title 18, US Code, ss 1343 and 2, on or about the same dates; (c) Count 16: securities fraud and aiding and abetting securities fraud, in violation of Title 18, US Code, ss 1348 and 2, in or about August 2011.

51. The conduct reflected by Count 1 is as follows (see Indictment, [26]):

> "26. Beginning in or about January of 2009, and continuing until in or about October 2011, in the Northern District of California and elsewhere, the defendants, and others, did knowingly conspire to devise and intend to devise a scheme and artifice to defraud as to a material matter and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, and by concealment of material facts, and, for the purpose of executing such scheme and artifice and attempting to do so, did transmit, and cause to be transmitted, by means of wire communication in interstate and foreign commerce, certain writings, signs, signals, pictures, and sounds, in violation of Title 18, United States Code, Section 1343.
>
> In violation of Title 18, United States Code, Section 1349."

52. In relation to Count 1, Mr Frentzen says at [44]:

> "44. The government's evidence will establish that: Lynch and his co-conspirators agreed with each other to launch a scheme to defraud the investing public and, eventually, potential buyers of Autonomy beginning in early 2009. That scheme continued into 2011 and resulted in the sale of Autonomy to HP on the basis of false information and falsified accounting practices. In the course of completing the sale to HP, Lynch and his co-conspirators used

> wire communications such as email, video conferences, and other means, as described above. Each of those wire communications that entered the Northern District of California constituted a charge of wire fraud."

53. Counts 2-15 are then substantive counts of wire fraud, alleging in each case a specific communication by a telecommunications system (ie, by 'wire') with 'intent to defraud, devise and intend to devise a scheme and artifice to defraud as to a material matter and to obtain money and property by means of materially false and fraudulent pretences …' There is then a table where each specific communication giving rise to each Count is identified. For example, in relation to Count 8, it is alleged that on 27 July 2011 a press release titled 'Autonomy Corporation plc Announces Interim Results for the Six Months Ended June 30, 2011,' was distributed from the UK to the Northern District of California.

54. Of these wire fraud Counts, Mr Frentzen says at [47]:

> "47. The government's evidence will establish that: Lynch and his co-conspirators launched a scheme to defraud the investing public and, eventually, potential buyers of Autonomy beginning in early 2009. That scheme continued into 2011 and resulted in the sale of Autonomy to HP on the basis of false information and falsified accounting practices. In the course of completing the sale to HP, Lynch and his co-conspirators used wire communications such as email, video conferences, and other means. Each of those wire communications that entered the Northern District of California, as described above, constituted a separate charge of wire fraud."

55. Count 16 is dealt with in [30]. It alleges that in August 2011 the Applicant 'did knowingly and intentionally execute, and attempted to execute, a scheme and artifice (a) to defraud any person in connection with securities of [HP] … and (b) to obtain, by means of materially false and fraudulent pretenses [etc] money and property in connection with the purchase and sale of securities of [HP] …'.

56. The conduct giving rise to this Count is set out in [1]-[24] of the Indictment, which are incorporated in Count 16 by reference (in [29]). Two particulars from [22(aa)] and [22(bb)], relating specifically to August 2011, are as follows and give the flavour:

> "aa. On or about August 4, 2011, LYNCH, CHAMBERLAIN, and others caused Autonomy to provide to HP and its advisors false and misleading listings of Autonomy's top contracts and customers.
>
> bb. On or about August 18, 2011, to induce the offer by HP and HP Vision [ie Bidco], LYNCH executed a letter irrevocably undertaking to accept the offer, agreeing to recommend the offer to others, and warranting that all information provided by him for inclusion in any document issued in connection with the offer was true and accurate in all respects and not misleading in any respect."

57. Of this Count, Mr Frentzen says at [50]:

> "50. The government's evidence will establish that: Lynch knew that Autonomy's false financial statements were used by HP to advertise the purchase of Autonomy to potential investors and purchasers of HP stock. That constituted the crime of Lynch causing HP to commit securities fraud."

58. Count 17 stands apart. It alleges a conspiracy to commit offences against the US, in violation of Title 18, US Code, s 371, in the Northern District of California and elsewhere. The particulars are that beginning in or about October 2011, and continuing until about November 2018, the Applicant conspired to commit offences against the United States by, essentially, obstructing the investigation in various ways such as tampering with witnesses; engaging in money laundering; and falsifying, destroying, and stealing business records of HP.

59. The conduct reflected in this Count is set out in [33]-[34] of the Indictment. Paragraph 33 alleges:

> "33. The objectives of the conspiracy were, among other things, to cover up, conceal, influence witnesses to, and otherwise obstruct investigations of the scheme to defraud set forth in Paragraphs 19 through 24 by, among other things, (a) falsifying, destroying, and stealing business records of HP, (b) altering, destroying, mutilating, and concealing records, documents, and objects with intent to impair their integrity and availability for use in official proceedings, (c) paying hush money and other benefits to influence, delay, and prevent the testimony of persons in official proceedings, (d) otherwise obstructing, influencing, and impeding official proceedings, and (e) laundering the proceeds of the Autonomy acquisition."

60. The overt acts said to have been carried out in furtherance of the conspiracy are listed in [34]. They are numerous. It is sufficient to cite a few examples:

> "l. On or about July 29, 2012, in an interview with counsel for HP, LYNCH made false and misleading statements to counsel for HP.
>
> m. In or around January 2013, and thereafter, LYNCH refused to return books and records and other property belonging to HP.
>
> n. In or about February 2013, a co-conspirator stole HP's confidential information by uploading thousands of documents from her company laptop to a USB device/pen drive, in violation of'HP's policies and internal controls. The co-conspirator subsequently provided some or all of the documents to LYNCH and Hussain."

61. Mr Frentzen described Count 17 as follows at [53]-[54]:

> "53. The government's evidence will establish that: Lynch and his co-conspirators agreed to cover up the fraud perpetrated by

> Autonomy on HP by engaging in obstruction of justice, violation of internal controls at HP, and money laundering.
>
> 54. This will be shown at trial by the testimony of numerous witnesses who witnessed actions designed to cover up the fraud in Autonomy's accounting. Additionally, it will be shown through witnesses and documents reflecting that Lynch and his co-conspirators refused to return documents that belonged to HP, stole additional documents that belonged to HP, and attempted to destroy evidence of the fraud at Autonomy, including by wiping a laptop that belonged to co-conspirator Chamberlain. Financial records will also show monetary transactions performed by Lynch and others involving the proceeds of the fraud perpetrated on HP."

62. The broad shape of the Indictment, therefore, is that Counts 1-16 reflect the alleged conspiracy to defraud between 2009 and 2011; and Count 17 reflects the attempted cover-up.

63. Although it has been convenient to describe the Indictment by reference to the seventeen counts within it, it is important to keep in mind, as we shall further explain when we deal with the Applicant's arguments on dual criminality, that what we are primarily concerned with is the *conduct* that the Applicant is accused of, which is said to give rise to those offences. When we come to deal with dual criminality, that is where the focus must be.

64. At the hearing we floated the idea of separating that total conduct into three parts for the purposes of analysis (ie, the conduct 2009-2011 and alleged false statements to the market generally; then the conduct in 2011 involving HP specifically and alleged false statements during the negotiations; and then the post-purchase cover-up). On further reflection, and having regard to a careful analysis of how the conduct is described by Mr Frentzen and is set out in the Indictment, it seems to us that the conduct said to give rise to extradition offences under the EA 2003 can more conveniently and appropriately be divided into just two separate parcels of conduct: (a) the overall scheme to defraud purchasers and sellers of Autonomy's shares which began in 2009 to the market in Autonomy's shares in general (including those in the US) which was then carried on specifically in relation to HP in 2011 once negotiations began after the Applicant put Autonomy up for sale but which was part of the same conspiracy (the fraud conspiracy); and then (b) the alleged cover-up afterwards. We will refer to these as the 'fraud conspiracy' and the 'cover-up conspiracy' respectively.

The civil proceedings in England

65. From 2019 through 2020 there was a long civil fraud trial in the High Court before Hildyard J arising out of HP's purchase of Autonomy: *ACL Netherlands BV and others v Lynch and another* [2022] EWHC 1178 (Ch) (17 May 2022). It broadly covered the same matters as the Indictment.

66. Hildyard J's judgment runs to 1600 pages, 4155 paragraphs, several appendices and over 500 footnotes. On 28 January 2022, he gave a summary of his conclusions; the judgment itself remained under embargo until it was handed down on 17 May 2022. He found for the Claimant and against the Defendants (including the Applicant). The

amount of *quantum* is to be determined in a separate trial. We were told that any application for permission to appeal will be made once *quantum* has been determined.

67. Without objection from the Respondent we agreed to receive this judgment *de bene esse* pursuant to the order of Julian Knowles J of 4 December 2022. As we shall explain, Mr Bailin sought to rely upon parts of it in support of his arguments on this application.

The proceedings below

68. In the court below the request for the Applicant's extradition was resisted on five grounds: (a) the alleged conduct does not amount to extradition offences under s 137 of the EA 2003; (b) extradition is barred by the passage of time (s 82); (c) extradition is barred on the grounds of forum (s 83A); (d) extradition is barred on human rights grounds (s 87/Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) based on the Applicant's medical conditions and treatment in prison and; (e) the extradition request is an abuse of process.

69. In a careful and detailed judgment running to some 211 paragraphs, the district judge rejected each of these arguments and sent the case to the Secretary of State pursuant to s 87(3) of the EA 2003.

70. We will address particular parts of the district judge's judgment later in this judgment.

Grounds of appeal in summary

71. The Applicant seeks permission to appeal on five grounds, essentially challenging each of the district judge's conclusions (we have re-ordered the issues): (a) the district judge was wrong to reject the forum bar and to conclude that extradition was in the interests of justice. It is said the district judge was wrong in his assessment of the specified factors in s 83A(3), and so his overall evaluative assessment of the interests of justice under s 83A(2) was wrong; (b) the district judge was wrong to decide that the proceedings did not amount to an abuse of process; (c) the district judge was wrong to decide that the Applicant's extradition was not barred by the passage of time; (d) the district judge was wrong to decide that the Respondent had established beyond reasonable doubt that the alleged offences satisfied the relevant extradition offence test, in particular the 'dual criminality' requirement (ss 78/137, EA 2003); (e) the district judge was wrong to decide that extradition would be compatible with the Applicant's Convention rights.

72. On behalf of the Applicant, Mr Bailin put forum front and centre of his submissions, and the greater part of his oral submissions were on that issue.

Statutory provisions

73. The US is a Category 2 territory for the purposes of the EA 2003. Extradition requests from the US are dealt with under Part 2.

74. Section 78(4)(b) requires the district judge conducting a hearing under Part 2 to decide whether the offence specified in the request is an extradition offence. For present

purposes, the relevant definition of ‘extradition offence’ is in s 137 (Extradition offences: person not sentenced for offence) the relevant parts of which are:

> “(1) This section sets out whether a person's conduct constitutes an “extradition offence” for the purposes of this Part in a case where the person -
>
> (a) is accused in a category 2 territory of an offence constituted by the conduct, or (b) has been convicted in that territory of an offence constituted by the conduct but not sentenced for it.
>
> (2) The conduct constitutes an extradition offence in relation to the category 2 territory if the conditions in subsection (3), (4) or (5) are satisfied.
>
> (3) The conditions in this subsection are that—
> (a) the conduct occurs in the category 2 territory;
>
> (b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment if it occurred in that part of the United Kingdom;
>
> (c) the conduct is so punishable under the law of the category 2 territory.
>
> (4) The conditions in this subsection are that—
>
> (a) the conduct occurs outside the category 2 territory;
>
> (b) in corresponding circumstances equivalent conduct would constitute an extra-territorial offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment;
>
> (c) the conduct is so punishable under the law of the category 2 territory.
>
> …..
>
> (7A) References in this section to ‘conduct’ (except in the expression ‘equivalent conduct’) are to the conduct specified in the request for the person's extradition]
>
> (8) The relevant part of the United Kingdom is the part of the United Kingdom in which -

(a) the extradition hearing took place, if the question of whether conduct constitutes an extradition offence is to be decided by the Secretary of State;

(b) proceedings in which it is necessary to decide that question are taking place, in any other case."

75. Section 82 of the EA 2003 (passage of time) provides:

"A person's extradition to a category 2 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have -

(a) committed the extradition offence (where he is accused of its commission), or

(b) become unlawfully at large (where he is alleged to have been convicted of it)"

76. Section 83A (forum) provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

77. Section 87 (human rights) provides:

"(1) If the judge is required to proceed under this section (by virtue of section 84, 85 or 86) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c. 42).

(2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.

> (3) If the judge decides that question in the affirmative he must send the case to the Secretary of State for his decision whether the person is to be extradited."

78. The Extradition (Multiple Offences) Order 2003 (SI 2003/3150) (the Multiple Offences Order) contains amendments to the EA 2003 to cater for the situation where an extradition request contains more than one episode of conduct said to constitute an extradition offence. In simple terms, it requires the statutory machinery in the EA 2003 to be applied to each separate episode of conduct as described in the request to determine whether it is, in fact, an extradition offence according to the relevant definition in the EA 2003, and whether extradition is barred in relation to it on one or more of the statutory grounds.

The test on an extradition appeal

79. The relevant statutory appellate provisions in Part 2 cases are ss 103 and 104 of the EA 2003. Section 104 provides that we can only allow an appeal if the conditions in s 104(3) or (4) are satisfied:

> "(3) The conditions are that -
>
> (a) the judge ought to have decided a question before him at the extradition hearing differently;
>
> (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.
>
> (4) The conditions are that -
>
> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the judge deciding a question before him at the extradition hearing differently;"
>
> (c) if he had decided the question in that way, he would have been required to order the person's discharge."

80. The test we have to apply in deciding whether to grant permission to appeal on an issue is whether the district judge's decision was arguably wrong. In *Love v Government of the United States of America* [2018] 1 WLR 2889 (an appeal against the district judge's decision on the forum bar) Lord Burnett of Maldon CJ and Ouseley J said at [22]-[26]

> "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."

81. *Love* sets out the authoritative appellate approach, and other cases need to be read in light of it. It makes clear that it is not for us simply to make our own value judgment on the interests of justice test under s 83A, for example if we think the district judge should have given more or less weight to some particular statutory factor. This is an application for permission to appeal, and not a re-hearing.

82. We were referred, in particular by Mr Bailin, to *Scott v Government of the United States of America* [2019] 1 WLR 774, another decision of the Lord Chief Justice on forum, this time sitting with Males J (as he then was). At [23] the Court described *Love* as 'the leading case' on the forum bar. The Court said at [25]:

> "25. Each of the specified matters must be taken into account in the sense of being borne in mind, but the extent (if at all) to which they are relevant and the weight to be accorded to them will vary from

> case to case. There is no predetermined hierarchy whereby one or more factors will have greater significance than others. This is well established: see *Dibden v Tribunal de Grande Instance de Lille, France* [2014] EWHC 3074 (Admin) at [18], referring to the corresponding provisions under Part 1 of the 2003 Act and *Shaw v Government of the United States of America* [2014] EWHC 4654 (Admin) at [40]."

83. Having considered the district judge's findings on the statutory factors, the Court concluded at [59]-[60]:

> "59. Having set out his view of each of the individual factors, the judge concluded that, having regard to the statutory factors, he was satisfied that it was in the interests of justice for extradition to take place.
>
> 60. We have concluded that the judge's approach to some of the individual factors was mistaken. There were two powerful factors against extradition, namely the fact that most of the harm took place in this jurisdiction and the appellant's strong connection with the United Kingdom and absence of any significant connection with the United States. As we have explained, the judge carried over his finding that there was relevant conduct in the United States and did not consider separately where the majority of the harm took place. Moreover, the treatment of the appellant's connections with United Kingdom, the personal family details which we have outlined above, do not appear to have carried much weight below. Conversely, those factors which told in favour of extradition were of significantly less weight. In these circumstances this court is entitled to say that the judge's overall evaluation was wrong. We conclude that, having regard to the specified matters (and only those matters), the appellant's extradition is not in the interests of justice and the appeal should be allowed."

84. *Scott* was therefore a case where the Divisional Court allowed the appeal not because it decided the interests of justice question in s 83A(1) for itself on some sort of *de novo* basis, but because it identified errors in the district judge's conclusions on the statutory factors in s 83A(3) and concluded that, had he considered those factors correctly, he should have decided the forum question differently.

85. *Scott* therefore emphasises that our principal task is to determine whether the district judge erred in his assessment of the statutory factors and, if so, whether that leads us to conclude that his rejection of the forum bar was wrong. The same approach applies to other statutory bars, eg, passage of time; cf *Surico v Public Prosecutor of the Public Prosecuting Office of Bari, Italy* [2018] EWHC 401 (Admin), [24]-[31].

The grounds of appeal

86. We propose to address the grounds of appeal in the order which Mr Bailin took them.

(i) Forum

87. It is accepted that the issue of forum arose for consideration because the condition in s 83A(2)(a) was satisfied (a substantial measure of the Applicant's relevant activity was performed in the UK).

88. The district judge set out his overall conclusion on the forum bar argument at [169]-[171]:

> "169. 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 ...' (*Love* at §22).
>
> 170. All of the specified matters in section 83A(2)(b) strongly favour trial in the USA save for the Defendant's connections to the UK that are an important factor against extradition. However, the Defendant's connections to the UK do not affect his ability to be extradited.
>
> 171. The preponderance and collective weight of the specified matters in this case satisfies me that extradition to the USA is in the interests of justice."

89. On behalf of the Applicant, Mr Bailin challenged the district judge's conclusions on each of the factors in s 83A(3). He said the district judge had erred on some or all of them in a way which fatally flawed his overall evaluative assessment of the interests of justice.

90. We propose to take each factor in turn.

Section 83A(3)(a) (loss/harm)

91. In relation to this factor, the district judge's main findings on loss at [119]-[121] were:

> "119. I am satisfied that the financial loss to be wrought by this fraud was always intended to fall on a US-based entity. Those were the only companies targeted by the defendant and his US-based agent. Those companies were targeted before the incorporation of Bidco.
>
> 120. I am satisfied that the loss actually fell, on HP, a USA-based company. Its shareholders were predominantly (79%) US-based. It paid $11.7 billion for Autonomy based upon the alleged fraud perpetrated by the defendant and his co-conspirators. Once the fraud emerged a year later, HP was forced to issue an $8.8 billion write-down on the value of the asset it had acquired. It is the

> Government's case that on the most conservative estimate possible, it had been deceived by at least $1.7 billion.
>
> 121. I am satisfied that loss extends far beyond the money HP paid for Autonomy; it includes, defending lawsuits, assisting multi-jurisdictional investigations; etc all of which 'forced [HP] to divert resources away from business operations'. Moreover, 'The company has expended tremendous resources to shine a light on the truth and achieve justice', including by bringing civil proceedings. 'The amount of time, resources, and energy that the company devoted to the Autonomy investigation and all the aftermath, it is staggering...' ."

92. Earlier, at [75]-[76] the district judge said (in relation to dual criminality):

> "75. Further, I reject the suggestion that loss was not caused in the [USA] as HP had chosen to purchase Autonomy through Bidco. HP is an American company. The money used to purchase Autonomy was HP's money whether it was held offshore (as part of it was) or within the USA (as part of it was). I have directly quoted from Mr Nicholl's evidence at paragraph 34 above. On his evidence HP settled the shareholders claims and HP resolved to seek redress for the alleged harm suffered by it. Bidco was clearly not the loser, harm is not to be assessed solely on the basis of where the money was paid.
>
> 76. I have no doubt that significant financial and reputational harm was caused, both directly and indirectly, within the USA to HP and its' shareholders."

93. In relation to harm, the district judge said at [124] that he took into account reputational harm, and quoted evidence from Mr Leach which we will return to.

94. Mr Bailin submitted that the district judge made the following errors, in particular in [119]-[121]: he wrongly deferred to the prosecutor's views of location of the loss/harm; the district judge wrongly held the role of Bidco to be irrelevant; the district judge wrongly assumed a minimum quantum of loss; the district judge was wrong to include reputational harm; his conclusions on intended harm were contrary to the evidence; and he improperly downgraded UK harm; and the district judge did not address key defence arguments. Mr Bailin also said that the figure of $8.8 billion in [120] was wrong and it should have been $5.5 billion. Assuming that is correct, it is still a vast amount of money. Mr Bailin did not suggest this of itself rendered the district judge's conclusion flawed.

95. Mr Bailin said this prosecution 'firmly belonged in the UK' having regard to the statutory factors and that extradition would not be in the interests of justice. He made a number of general points. He said most of the relevant events occurred here. Autonomy was a UK company listed on the London Stock Exchange. Most of its senior management was based in the UK. The allegedly misleading information was produced in the UK. The relevant accounting decisions were made in the UK. The auditors were UK-regulated. He said the case was obviously 'UK centric'. He placed heavy reliance

on the fact of the civil trial having taken place in England and said that shed light on where the criminal trial should take place. He referred to a remark by Hildyard J in his summary that England was 'the natural forum'. He did also acknowledge Autonomy's strong links to, and presence in, the US, and conceded that 36% of its shares were held in the US.

96. Mr Bailin's central point on the loss aspect of this factor was that the overpayment had taken place in England in respect of an English company, and he therefore said it followed that England was where all of the loss took place, and that is reflected by the fact that the civil action in London (brought by Bidco in response to shareholder claims against HP, Bidco being the only vehicle which can take civil action), reflects that London was where the loss took place.

97. In relation to harm from the fraud conspiracy, Mr Bailin accepted this was a wider consideration than where the money was paid (or equivalently, as he would have it, where the loss occurred). He said the principal harm was misleading UK markets, and quoted the Respondent's Notice, [18]:

> "It is alleged that the Applicant and his co-defendants made false and misleading statements about Autonomy's earnings to the company's auditor Deloitte, to market analysts, and to regulators; made and caused fraudulent entries to Autonomy's books and records; issued materially false and misleading quarterly and annual reports; intimidated, pressured and paid off persons who raised complaints or openly criticised Autonomy's financial practices and performance. But for this conduct, Autonomy's share price and overall value would have diminished substantially."

98. In very simple terms, therefore, Mr Bailin's argument was that the correct legal analysis was that: the entire loss was the overpayment (in England); most of the harm was misleading the market (in England); and therefore the district judge was wrong in his assessment of s 83A(3)(a) to the extent that he found to the contrary and that most of the loss or harm from the fraud conspiracy had occurred in the US.

99. In response, Mr Summers said that the district judge's findings on this issue in particular at [120] could not properly be criticised. The main victim upon whom the financial loss actually fell was HP, a US-based company with predominantly (79%) USA-based shareholders. He pointed out that HP's losses were truly enormous. It paid over $11 billion for Autonomy based upon the fraud perpetrated by the Applicant and his co-conspirators as Mr Leach said at [111]-[115] of his declaration. The district judge properly identified that HP was forced to issue a write-down on the value of the asset it had acquired, attributing over $5 billion of losses to the fraud. It had obviously suffered reputational and other harm in the US.

Discussion

100. The factor in section 83A(3)(a) is the 'place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur'. We start first with loss. We regard Mr Bailin's argument on loss (and intended loss) to be over-simplistic and to ignore the realities of what is said to have occurred.

101. The fact is that the loss was felt by HP, or its shareholders the majority of whom were based in the US. HP acquired the shares in Autonomy, using a company that HP wholly owned, and HP provided the funds for purchasing Autonomy. Put differently, HP, through its ownership and control of Bidco, acquired an asset for which it paid $11.7 billion but the value of the asset had been vastly overstated and it was worth billions less than the purchase price paid by HP. As such, the loss was mainly suffered in the US.

102. We acknowledge all of the general points made by Mr Bailin, including the fact that Bidco was a company incorporated in the Netherlands; the purchase money for the shares in Autonomy was paid in the UK; and the majority of the money paid by HP was held by it outside the US. But all these points are beside the point. The loss did not – or did not just – occur in the place where the payment was made for Autonomy, ie, London ('where the cheque arrived', as Julian Knowles J said in argument). It seems to us that the main flaw in Mr Bailin's argument is that it approaches loss on too narrow a basis. As Mr Leach crisply put it in his declaration at [111]:

> "The overwhelming majority of the loss or harm resulting from the extradition offenses occurred in the United States, in significant part because Dr Lynch's and his co-conspirators' fraudulent statements ultimately induced HP, based in the United States and listed on the New York Stock Exchange, to affect the acquisition of Autonomy, at an overvalue measured in the billions of US dollars."

103. Furthermore, when the write-down of the value of Autonomy took place in November 2012, that impacted financially on HP in all sorts of different ways, and that loss again took place in the US. For example, Mr Leach referred at [115] of his declaration to the fact that HP's shares fell 13% on the day the write-down was announced. Mr Bailin's attempt to argue there were only two shareholder victims was misconceived. On that day many people would have seen their investments in HP decline in value due to the Applicant's alleged fraud.

104. Mr Bailin attempted to argue that shareholder claims against HP would be recompensed from what Bidco receives in the English civil proceedings, and hence there would be no loss. We are unpersuaded. Firstly, *quantum* has yet to be determined. As we understand it, Hildyard J has already indicated that the amount will be much less than that claimed, and so HP may remain unsatisfied at the outcome. Second, as of now, loss has occurred in the US, whatever happens in the future.

105. Mr Bailin mentioned a number of times that most of the funds (71%) which HP (via Bidco) used to buy Autonomy had been held off-shore and not in the US. That was money which belonged to HP, and which it lost through the alleged fraud. The fact that HP held the majority of the money in offshore accounts does not alter the fact that the loss was felt by HP, a US incorporated company most of whose shareholders were based in the US.

106. Nor are we persuaded that the fact of the civil trial having taken place in England is particularly relevant. We are concerned with the application of a statutory test in the extradition context. As we understand it, England was the only jurisdiction in which the civil claim could be brought under the terms of the contractual acquisition

arrangements, and Bidco was the only entity in English law that could bring the claim. Those contractual arrangements tell us nothing about the location of the loss.

107. Another point is that the fraud conspiracy extended beyond HP and goes back to 2009 when, it is alleged, there was a conspiracy to deceive purchasers and sellers of Autonomy's shares in general (and not just HP), many of whom were in the US.

108. On intended loss, the district judge was not wrong in [119] in any meaningful sense. Mr Bailin criticised the district judge's use of the word 'always', because early on there was the possibility of a sale to a non-US company. The fact is that there came a point in early 2011 where HP became the frontrunner to purchase Autonomy, and therefore the primary intended victim of the fraud. The intended loss therefore was in the US. That is so even if, as Mr Bailin said, at the very start of the sale process some companies on Mr Quattrone's and Mr Lynch's hit list were non-US companies (a German software company called SAP was mentioned). Very soon in the process the potential purchaser list was whittled down to American companies only. Even if saying the intended loss was 'always' intended to be in the US could on one analysis be said, strictly, to be overstating matters slightly, it was not a material error as there became a time when the targeted companies were US-based companies and, more significantly, the alleged fraud when carried out was intended to cause loss to HP, a US-based company.

109. We turn to harm. We think the answer as to where most of the harm (or intended harm) took place from the fraud conspiracy is as clear, if not clearer. It was plainly mainly in the US. Mr Bailin's approach was, again, too narrow.

110. So far as Mr Bailin's argument that the harm was misleading the UK market – and only the UK market - is concerned, we reject it. True, that happened, but US investors in general in Autonomy (pre-purchase), were also misled, and in a very substantial way, as no doubt were those doing business with it in the US, or thinking of doing so. We note, again, that most of Autonomy's revenues came from the US.

111. We therefore consider that the district judge was correct in [125] of his judgment when he said:

> "125. I accept that the defendant's alleged fraudulent actions also caused 'harm' in the UK as the UK's financial reputation was tarnished by the defendant's fraudulent activity. I accept that the harm caused to the UK financial institutions is the 'significant and serious' harm as recognised by the SFO. However, similar reputational damage would have been caused to financial institutions within the USA. That harm is abstract and impossible to quantify. The harm financial losses caused to HP were huge and the reputational harm caused to HP in the USA significant and long lasting."

112. On harm to HP specifically, it suffices to refer to Mr Leach's declaration at [115] where he quoted a letter HP had submitted at Hussain's sentencing, describing 'the impact that Mr Hussain's crimes have had on HP and our employees, management, and shareholders.' The letter described in relevant part:

> "Founded in 1939 in Palo Alto, California, HP was one of the world's best known technology companies. In 2011, when HP acquired Autonomy Corporation plc ('Autonomy'), it employed more than 349,000 men and women . . . . Hussain's scheme to defraud caused HP to incur significant financial losses, but his fraud also damaged the trust that HP's customers and shareholders had in the Company and its management. It has been a costly – and frankly, painful – process for the Company to work at restoring its brand and regaining the trust of its employees, shareholders, and the public. And the company has expended tremendous resources to shine a light on the truth and achieve justice.
>
> …
>
> Mr. Hussain's (and his co-conspirators') fraudulent scheme had a substantial impact on HP. Not only did the fraud cause HP to overpay for Autonomy, but it also visited on HP lasting reputational injury.
>
> On November 20, 2012, after discovering serious accounting improprieties at Autonomy, HP wrote down $8.8 billion of the Autonomy asset. When HP announced the impairment, it disclosed that at least a majority of the impairment was attributable to Autonomy management's fraud. HP's shareholders were immediately harmed by the write down, with HP's shares falling 13% on the day of the announcement.
>
> The public's reaction to the write-down announcement was swift and harsh. Without knowing any details about the fraud that Mr. Hussain and other former members of senior Autonomy management orchestrated (which, indeed, took years to uncover fully), the media lambasted HP and its management, calling HP the 'world's biggest deflater' and stating that its handling of the acquisition was 'the worst, most value-destroying deal in the history of corporate America.' At the time, the media also ridiculed HP for its explanation that Autonomy's accounting improprieties were to blame for the write-down. Even though Mr. Hussain's trial has now vindicated HP by showing that HP was, in fact, the victim of a sophisticated and carefully-plotted scheme to defraud, the damage has already been done. The fallout caused immediate harm to HP's reputation."

113. The district judge quoted part of this letter at [124] in relation to reputational harm to HP, and also quoted HP's General Counsel who said, inter alia, the following: 'In fact, in order to protect himself… Dr Lynch, began a smear campaign against us in an effort to undermine the truth …'.

114. The reference to the smear campaign was not significant in the overall scheme of things. We reject Mr Bailin's suggestion that the only harm the district judge was referring to was that alleged smear campaign and that he therefore erred. In [124] the district judge was plainly referring to HP's reputational harm caused by the fraud conspiracy. The

reference to the alleged smear campaign was, at most, a reference to what the Applicant was allegedly doing to protect himself and was not intended as a description of the reputational harm to HP.

115. The harm from the cover-up conspiracy took place in, and was felt entirely or nearly almost entirely in, the US, which is where justice was said to have been obstructed in relation to Counts 1-16 through secreting proceeds, lying to investigators, destroying evidence, and paying off witnesses (Indictment, [34]).

116. We therefore find no arguable flaw in the district judge's treatment of s 83A(3)(a), which is a 'weighty' one in the overall assessment: see *Love*, [28].

Section 83A(3)(b) (interests of any victims)

117. The district judge dealt with this factor at [128]-[132] of his judgment:

> "128. I have found most of the financial and reputational loss that fell on HP and its predominately US based shareholders.
>
> 129. I agree that HP and its US investors have an interest in securing local criminal justice 'according to their own local laws and procedures', per *Love* at §29, and as quickly as possible. As the High Court held in *Wyatt v USA* [2019] EWHC 2978 (Admin) at §15:
>
> > '...The interests of the victims of an alleged extradition offence include the convenience of giving evidence but are not limited to that ... the victims of a crime have an interest in the legal proceedings beyond the narrow compass of being a witness and giving evidence. They should, if they wish, be able to attend a trial. They should be in a position to have continuing contact with the prosecuting authorities. They are likely to wish a prosecution to take place in the jurisdiction where they suffered the harm relied upon, subject to their domestic legal order culminating, if there is a conviction, in an appropriate local sentence. This case involves corporate victims, although acting through individuals and owners... The judge cannot be faulted for having considered this to be a statutory factor which weighed in favour of extradition, nor for thinking it an important matter...'
>
> 130. I am satisfied that the fact that the civil proceedings had to be brought in this country as a consequence of a clause in the contract does not lessen the interests of the victims in having the criminal charges tried in their jurisdiction. I agree that their interests will not be satisfied by the outcome of a civil claim that the Defendant has vigorously defended and the outcome of which he is likely to appeal.
>
> 131. I agree that their interests are not satisfied by the conviction of Mr Hussain as it is alleged that the defendant was the Chief

> Executive Officer of Autonomy and leader of the conspiracy who, after the purchase, "conduct a smear campaign [against HP] to undermine the truth". There is a clear public interest in the trial of the CEO of a major public company, who was responsible for an alleged fraud causing very significant losses.
>
> 132. The interests of the victims strongly favour trial in the USA."

118. Mr Bailin criticised the district judge's treatment of this factor on the basis that he did not follow the approach in *Scott* on the relevance of the UK civil trial to alleged victim's interests, and that the district judge's analysis of shareholder losses was flawed.

119. He referred to what the Lord Chief Justice said in *Scott*, [41]-[45], and emphasised [43]-[45] in particular:

> "41. The judge dealt with this factor by saying that, although it would be more convenient for Cairn's witnesses to give evidence in the United Kingdom, there was no evidence that travelling to the United States to give evidence in the Johnson trial was causing significant problems. He appears, therefore, to have treated this as a factor telling marginally against extradition.
>
> 42. Convenience of witnesses is one element to be considered in determining where the interests of any victims lie. However, that is only a relevant element when the question is whether the trial should take place in the requesting state or in this country. When, as is this case, the practical reality is that no investigation or prosecution is likely in this jurisdiction, the relative convenience for witnesses can be of no more than hypothetical interest. It carries no real weight.
>
> 43. As indicated in *Love's* case [2018] 1 WLR 2889, para 29, victims of crime may have an interest in having the case tried according to their own local laws and procedures, and in any sentence being imposed following conviction reflecting the values of their own legal system, 'But their interest in having a trial at all is the more important'. Although that was said in the context of a case where the risk was that there might be no trial in the United States in the event of extradition because the requested person might commit suicide (see further at para 33), the point is of more general application. If the choice is between a trial in one jurisdiction and no trial in the other jurisdiction, the interests of victims are likely to favour trial in the jurisdiction where a trial will take place.
>
> 44. In the present case the only jurisdiction in which a trial is likely to take place is the United States. But there are two factors which affect the victim's interests in this case. First, as we were informed, Cairn has reached a settlement with HSBC as a result of which HSBC has paid to Cairn the sum of US $8m. It appears, therefore, that Cairn has been properly compensated for the loss which it has

> suffered as a result of any wrongful conduct on the part of the appellant. That does not affect the wider damage done to the integrity of the currency exchange market. Secondly, Mr Johnson has been prosecuted to conviction in New York. To the extent that an identifiable victim may take comfort from the prosecution of a wrongdoer, that has been possible as a result of the earlier prosecution.
>
> 45. In these circumstances the interests of the victim tend towards a trial in the United States rather than no trial at all, but not with such weight as would attach if the proposed trial in the United States were the only mechanism of redress available."

120. Mr Bailin put it like this in [29] of his Skeleton Argument:

> "29. The judge gave brief and erroneous treatment to this important factor. First, the judge failed to apply the approach in Scott at [44]-[45], that the existence of another 'mechanism of redress' necessarily lessens the interests of victims in having a criminal trial in the requesting state. Here, there has been a lengthy and detailed civil trial of the issues in this jurisdiction, and the allegations made against the Appellant in the civil case are substantially the same as those comprising the allegations in counts 1-16 of the extradition request, but the judge failed to treat that as a material factor against extradition. Rather, at [130]-[131] … he held that the victims' interests would not be satisfied by the civil trial. In taking this stance, the judge directly conflicted with the High Court's treatment of the same issue in Scott …, but gave no reasons as to how he distinguished Scott to reach a contrary conclusion."

121. Mr Summers submitted that the assessment of this factor is linked to s 83A(3)(a) above. He said that once it was recognised that the district judge was correct in his analysis that the primary 'loss or harm' was the 'titanic' financial and reputational loss that fell on HP in the US (as Mr Summers says he was), the district judge was necessarily also correct to hold that HP and its US shareholders were the collective 'victims' of the fraud not, as Mr Summers put it, 'some Dutch shell SPV or the amorphous UK financial market' (Skeleton Argument, [30]).

122. Firstly, contrary to Mr Bailin's submissions, we do not read *Scott* as laying down any general propositions of law. It was a case on its own facts, and the facts were different. In that case there had been a single victim of the alleged fraud, Cairn. There been a *settlement* in which that single victim had been 'properly compensated', and there had also been a prosecution.

123. Second, in the present case, there are unknowable - but very large - numbers of victims in the US, including shareholders in HP. There has not been any settlement. The victims have not yet been properly compensated. We do not know the extent to which the civil litigation will compensate them. Some may never be compensated. The civil proceedings have not concluded, and no doubt will continue to be hard fought, including on appeal. Any money from it may be a long time in coming. The district judge was therefore entitled to give the civil proceedings little or no weight. They also

cannot compensate HP for the reputational harm it suffered as a result of the alleged fraud.

124. Furthermore, in this case, as in *Scott*, there has been damage to the integrity of the financial markets in the US and the UK caused by that alleged fraud.

125. We consider that Mr Summers was essentially right. Once the proper scope of the victims involved in this case is appreciated, and that the greater loss and harm happened in the US where those victims were located, then it is obvious, as the district judge rightly concluded, that this factor strongly favours a trial in the US.

126. For completeness, we note that the fact that Mr Hussain has been convicted in the US, and that Mr Chamberlain will be tried there, also carries little or no weight in deciding whether the Applicant should be extradited under this factor. The US victims are entitled to see, and have an interest in seeing, the Applicant stand trial in the US. He is alleged to have been the prime mover behind the fraud. He personally benefitted from the sale in the amount of about $800 million which came about as a result of his alleged fraud. It should also be recalled that he is alleged to have caused serious reputational harm to HP, the employer of many thousands of US citizens. That only adds to the victims' interests in seeing the Applicant stand trial in the US.

127. The district judge's assessment of this factor was not arguably wrong.

Section 83A(3)(c) (prosecutor's belief)

128. The district judge dealt with this factor at [133]-[136]:

> "133. The SFO is a designated prosecutor for the purposes of s 83A (SI 2013/2388). The SFO investigated this matter in 2013-2015 and ceded its investigation to the USA based on the evidence and information then available.
>
> 134. Ronan Duff, a solicitor with the SFO has issued a detailed and reasoned statement of belief that the UK is not the most appropriate forum for this prosecution. He stated, inter alia, that:
>
> i) In March 2014 the SFO decided that there was insufficient evidence to continue their investigation (the equivalent of the threshold test was applied).
>
> ii) Before announcing its decision it communicated it to the US investigators. They then shared information that they had obtained from a number of co-operating witnesses in the US. The SFO considered that the disclosures were primarily of evidence to the VAR issue and did not materially change the picture in relation to the hardware deals. It also noted that the witness disclosures would not have constituted admissible evidence for the English courts. Further enquiries followed. The SFO then carefully applied the guidance on concurrent jurisdictions. It decided in December 2014 to cede jurisdiction to the US on the VAR issue and to close its investigation into the hardware deals. Its reasons for doing so are

set out in paragraph 15 of Mr Duff's statement. I place great weight on the statement that factors that led to the ceding included:

a) "The extent to which any prosecution would need to rely on the evidence of the US cooperating witnesses, their testimony providing key evidence of dishonesty which was otherwise difficult to prove

b) The likely difficulties in securing the evidence of the US cooperating witnesses in admissible form for the purposes of prosecution before the English courts

c) The anticipated difficulties in securing all relevant unused material ……for the purposes of discharging the SFO's disclosure duties…

d) The delay which the above difficulties-assuming they were surmountable-would cause to the charging and trial timetable for any SFO prosecution.

iii) Mr Duff conducted his review approaching the question of jurisdiction afresh. He concluded that England and Wales is not the most appropriate jurisdiction in which to prosecute the Defendant. He accepted that a prosecution in this jurisdiction was not impossible but his belief is that the USA is the more appropriate jurisdiction. He formed that belief because:

1) He placed significant weight on all the prosecutions taking place in one jurisdiction.

2) The alleged conduct resulted in harm in both jurisdictions, but with identifiable victims being predominately in the USA.

3) Complications in securing admissible evidence from the US based witnesses. "The specific complication arising …from the Requesting State's reliance on co-operating witnesses". He "can state on the basis of US Witness Disclosures, that the evidence of the cooperating witnesses in question is highly probative of the question whether the arrangements….were dishonest. Were such evidence not available to an English court, any prosecution of this aspect of the case …would…be considerably weakened, if not wholly undermined".

4) Very significant delay would result from a prosecution in this jurisdiction. The US prosecutors are ready to proceed.

135. I agree that the Act was 'not intended to invite a review of the prosecutor's belief as to the more appropriate jurisdiction on grounds short of irrationality...' (*Dibden* at §35; *Shaw* at §§51, 59). Mr Duff's belief is not irrational, it is considered and reasonable.

> The Administrative Court gave the following guidance at paragraphs 18-20 of *Wyatt v USA*:
>
> > '...It is almost inevitable that a prosecutor will take into account
> >
> > the statutory factors found in section 83A(3) in forming a belief. It would be very odd not to do so. Factors such as the interests of the victims, the availability of evidence, the location of harm, delay, the defendant's connections with the United Kingdom and the prospect of multiple prosecutions could be influential in forming a belief. The prosecutor is not, however, limited by the statutory factors in the same way that the judge is. He may take anything that rationally bears on the question into account. Obvious examples would include the dynamics of a trial and the practical implications of having to investigate alleged offences and prosecute them here, including resource implications. There may also be differences between the legal regimes in the requesting state and England and Wales which could have an impact on admissibility of evidence or raise other legal issues...Thus, the judge is required to have regard to the prosecutor's belief; and that may be based largely on the statutory factors or may extend well beyond them. Yet the prosecutor's belief is an independent factor that weighs in the balance. It may be, for example, that the judge's provisional view having regard to all factors except the prosecutor's belief would be not to favour extradition. Then, taking into account the prosecutor's belief the balance may tip the other way. Whether or not that is the case, the belief must weigh in the balance...'
>
> 136. There is nothing irrational about Mr Duff's belief. His belief strongly favours trial extradition."

129. Mr Bailin criticised the district judge's conclusion on this factor on the broad basis that he did not consider any of the defence arguments that the prosecutor's belief should attract minimal weight.

130. Mr Bailin accepted that here there was a prosecutor's belief that England and Wales was not the most appropriate jurisdiction for a prosecution, and that *prima facie* at least, that belief favoured extradition. However, he said that on proper analysis, the basis on which the prosecutor had formed his view was flawed, and so this factor should have been given minimal weight. He also said that the district judge erred in referring to rationality when, as Mr Bailin would have it, he should have conducted a weight analysis. Developing this submission, Mr Bailin said the district judge should have delved into the prosecutor's reasons and decided for himself whether they were right or wrong, rather than simply determining that the prosecutor's overall conclusion was not irrational.

131. Mr Summers submitted the district judge's approach was correct and in accordance with settled authority on s 83A(3)(c). Mr Duff's statement of belief was detailed and reasoned and therefore entitled to significant weight. Moreover, in this case the SFO had investigated the case in 2013-4 and decided on a considered basis to cede jurisdiction to the US to investigate and prosecute the case. The SFO was able, therefore, to corroborate its belief.

Discussion

132. The factor in s 83A(3)(c) of the EA 2003 is 'any belief of a prosecutor that the United Kingdom …. is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence'. Here the prosecution believed that the UK was not the most appropriate jurisdiction to prosecute the Applicant. The district judge carefully considered that belief. He considered that the belief 'was not irrational' but was 'considered and reasonable', and strongly favoured extradition. Mr Bailin's criticisms have no substance. It is obvious that the district judge did weigh this factor, as *Wyatt v Government of the United States of America* [2019] EWHC 2978 (Admin), [18]-[19], requires him to do, and that he concluded that it told in favour of extradition.

133. We reject Mr Bailin's suggestion that a district judge hearing a forum bar argument and considering the prosecutor's stated belief, is then required to go into the reasons for that belief and decide for themselves whether those reasons are right or wrong, and whether they do or do not support the prosecutor's conclusion – in other words, we reject the argument that the court is required to form *its own* belief. In *Dibden v Tribunal de Grande Instance de Lille, France* [2014] EWHC 3074 (Admin), the Court said at [35] in respect of the equivalent provision to s 83A in Part 1 of the EA 2003:

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

134. Here, the district judge was entitled simply to set out the prosecutor's belief, and his reasons for that belief, consider them, and conclude that those were not irrational. The district judge was not arguably wrong.

Section 83A(3)(d) (whether evidence could be made available in the UK)

135. The district judge dealt with this factor at [137]-[149] of his judgment. We will not set out this long passage verbatim, but in summary, the district judge focussed on the position of co-operating witnesses in the US. He said at [147] that it was 'far from clear that the entire *corpus* of US evidence would be transferable to the UK' and cited *Ejinyere v Government of the United States of America* [2018] EWHC 2841 (Admin), [29] that he was:

> '… entitled … to recognise that adducing live evidence in the UK would be less straightforward than in the US, to note the fact that the documentary evidence was extensive and to conclude that the

> process of obtaining the evidence was likely to be less certain than in the US ...'

136. He therefore concluded that this factor strongly favoured extradition.

137. Mr Bailin criticised the district judge's conclusions on the basis that he did not perform his own assessment (for example by considering witness statements) of the significance of co-operator evidence and wrongly adopted the prosecutor's views; and was wrong to conclude the co-operators could not be compelled to give evidence in a UK prosecution. Mr Bailin submitted primarily that witnesses whose evidence was said to be necessary to prove the criminal case were not, in fact, necessary, and that in any event there were mechanisms under US law by which they could be made to give evidence in the UK if they were required to do so as prosecution witnesses. He took us to excerpts from the civil trial to try and made good his point on necessity, in particular by reference to a Mr Egan, Autonomy's Head of Sales in the United States. It is not necessary to set out all the detail.

138. Mr Summers submitted that the 'essential problem' with this factor lay in the fact that the US criminal prosecution rests in significant part upon co-operating witnesses, whose evidence could not be guaranteed to be available in any UK prosecution. He referred to Mr Leach's declaration at [128]:

> "128. Relatedly, the prosecution against Dr. Lynch will include testimony from cooperating witnesses, each of whom already is or will at the time of trial be located in the United States. These are witnesses who can give first hand evidence of inter alia dishonesty on the part of Dr. Lynch and his conspirators. As noted above, for example, Mr. Egan, Autonomy's Head of Sales in the United States, has entered into a deferred-prosecution agreement with my Office, and will testify at the trial against Dr Lynch. Another witness, Antonia Anderson, a former Deloitte manager and Autonomy employee, entered into an agreement to cooperate with my Office whereby she agreed to "testify completely and truthfully before any grand jury and at any hearing or trial at which she is requested to testify by this Office." Deloitte and certain of its partners entered into an agreement to cooperate with my Office and appear in person at any trial or other proceeding in the United States as requested by the Office and testify truthfully and completely. As also stated above, the agreements that Mr. Egan and other witnesses have entered into with the United States Attorney's Office require their cooperation with the United States Attorney's Office and the Federal Bureau of Investigation. Mr. Egan would not be compellable by, for example, the Serious Fraud Office ("SFO"). The agreement with Mr. Egan does not expressly provide for Mr. Egan to testify in foreign proceedings outside the United States, nor when the parties entered into the agreement did the Government anticipate it would require Mr. Egan to appear in a criminal trial in a foreign country. In my experience, I am not aware of situations where the Government has required a defendant, as part of his cooperation agreement such as this, to provide foreign evidence in

> a tribunal that does not apply the same rules on, for example, privilege and self-incrimination."

139. He said that contrary to the Applicant's assertions, the district judge rightly recognised and engaged with the two essential questions for him to answer: (a) was there evidence before him that these witnesses 'give evidence necessary to prove the offence' (judgment, [137]) ? (b) if so, are there real as opposed to fanciful concerns about the potential availability of that evidence to a UK trial (judgment, [142]) ?

Discussion

140. We are not persuaded there was any flaw in the district judge's approach. The way this argument was advanced before the district judge was through the Applicant's solicitor, Mr Nicholls, who analysed the evidence in the civil trial. The district judge, having heard Mr Nicholls, was largely unimpressed by him, commenting at [139] that:

> "I have already noted my concerns about Mr Nicholl's lack of independence. I find his assessment of the importance of evidence given in a civil trial to which the Government was not a party, to be unpersuasive."

141. The first part of this paragraph was a reference back to [70]-[71], where the district judge had said:

> "70. Mr Nicholls is a solicitor acting for the defendant in both the civil and extradition proceedings where he has an interest in the litigation outcome. I have concerns about whether it is appropriate for him to be a witness on his client's behalf. My concerns deepen as there has been a clear blurring of the lines between factual statements and advocacy …
>
> 71. My concerns are deepened by Mr Nicholl's approach on receipt of the Government's evidence …"

142. On well-established principles, these are findings of fact by a first instance judge which we are bound to respect: see *Government of Rwanda v Nteziryayo* [2017] EWHC 1912 (Admin), [21]; *Wiejak v Olsztyn Circuit Court of Poland* [2007] EWHC 2123 (Admin), [23]. In the latter case Sedley LJ said:

> "The effect of sections 27(2) and (3) of the Extradition Act 2003 is that an appeal may be allowed only if, in this court's judgment, the District Judge ought to have decided a question before her differently. This places the original issues very nearly at large before us, but with the obvious restrictions, first, that this court must consider the District Judge's reasons with great care in order to decide whether it differs from her and, secondly, that her fact-findings, at least where she has heard evidence, should ordinarily be respected in their entirety."

143. Fundamentally, we reject the forensic technique adopted by Mr Bailin of pointing to what witnesses had said in selected passages from the English civil trial (often quoted

out of context, or without the full context) and then seeking to equate that to what they would say in an English criminal trial. The one does not follow from the other. They may, or they may not. Further, as was pointed out in argument, some of the answers we were shown from the civil trial were carefully worded – and sometimes guarded - and related to witness statements which we had not seen. If the witnesses were able to be interviewed by the SFO for the purposes of giving witness statements, further or different detail might emerge. We simply do not know, and we are not prepared to assume this issue in the Applicant's favour whatever may have been said in the course of evidence before Hildyard J. Furthermore, as the district judge rightly noted at [139], Mr Nicholls had not seen important evidence when he made his witness statement, including the evidence which had been given to the Grand Jury.

144. As to whether the witnesses in question *could* be compelled to give evidence in the UK, we were taken by Mr Bailin to the evidence of Mr Morvillo, of Clifford Chance US LLP, who advanced various bases on which he argued that they could be compelled to do so.

145. Having considered this evidence, and Mr Bailin's submissions, we consider that, on the material before us, the position is unclear, and we regard it as unrealistic to have expected the district judge to have arbitrated on opaque issues of US criminal law and procedure. There are arguments both ways. The district judge was therefore amply justified in his conclusions when he said:

> "145. Mr Morvillo posited that novel and untried procedures are available to secure immunity for the witnesses to obtain immunity from prosecution in the US for evidence given in the UK. Procedures exist to allow the SFO to apply for the witnesses to be given immunity from prosecution in the UK. Neither Mr Leach nor Mr Morvillo were aware of such procedures being used previously.
>
> 146. The reality of the position is that it is unclear whether the witnesses would cooperate and if not whether they could be compelled by US prosecutors to give evidence in the UK. The procedures to obtain their cooperation (mutual legal assistance, the use of 1782 and 6003 [US legal provisions] process in the US and the use of s71 of SOCPA in the UK), will undoubtedly lead to significant delay.
>
> 147. I agree with Mr Duff when he stated that 'Seeking to 'convert' such witnesses into witnesses for the Crown in an English criminal proceeding would give rise to considerable complexity and uncertainty of outcome'. It is far from clear that the entire corpus of US evidence would be transferable to the UK."

146. The district judge was not arguably wrong on this factor. Mr Bailin's submissions were hopeless.

Section 83A(3)(e) (delay resulting from trial in one jurisdiction rather than another)

147. We need not take time over this factor because the district judge was right that there would be considerable delay if there were a prosecution in this country (not least

because the authorities here have not been involved in this case since 2015, and would need considerable time to investigate and re-acquaint themselves with the relevant material, whereas the authorities in the United States are ready for trial). The contrary is not arguable.

148. The district judge correctly concluded at [150]-[154]:

> "150. Mr Morvillo was of the opinion that any trial in the USA is unlikely to proceed until the summer or fall of 2023.
>
> 151. The DoJ investigation has been underway for over eight years. It is wide-ranging and complex, and involves predominantly US-based witnesses. Evidence has been gathered in a way that ensures compliance with rules of evidence that are specific to US court proceedings. An indictment has been issued. The US is trial ready.
>
> 152. The SFO's involvement in the case ceased in 2015. Proceedings in the UK would require UK investigators and prosecutors to acquaint themselves with, investigate, and prepare this matter for trial in order to arrive at the position in which the US prosecutor presently stands. This would involve consideration of a huge volume of material. Including, for example, the transcripts and nuances of Mr Hussain's 37-witness trial. Disclosure alone in that trial involved the Defendant's solicitors employing 12-14 lawyers to work exclusively on it for 12 months. Disclosure in the criminal trial in the USA runs to at least tens of millions of documents, documents that the SFO are likely to be required to consider if it is to meet its disclosure obligations. Preparing for trial in this jurisdiction would inevitably be an 'enormously' lengthy process which 'would severely undermine the efficiency of the proceedings'. I agree with Mr Duff's assessment 'Significant delay' would be 'inevitable' if the trial were conducted in this jurisdiction. In addition the SFO would be required to consider the material provided in the civil proceedings in this jurisdiction.
>
> 153. I am satisfied that the SFO would take considerable time before it was able to make a decision to charge, further substantial delays would follow before a trial could commence in this jurisdiction. I am satisfied that any trial in this jurisdiction would result in considerable additional delay.
>
> 154. This factor strongly favours trial in the USA."

Section 83A(3)(f) (desirability and practicability of all prosecutions taking place in one jurisdiction, etc)

149. The district judge dealt with this at [155]-[166]. In summary, he held that it was strongly preferable that all prosecutions be pursued in one jurisdiction ([156]). He also said that s 83A required him to consider a wider question than that of all the co-conspirators being tried at the same time, and referred to *Ejinyere*, [38]:

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

150. At [158] he said that even where joint trials are not possible s 83A(3)(f) remains a 'weighty' factor in favour of extradition: *Ejinyere*, [46]; *Government of the United State of America v McDaid* [2020] EWHC 1527 (Admin), [45], [49]. At [159] he said that Mr Chamberlain will be tried on the same counts in the US and that Judge Breyer, the trial judge, has indicated that he wishes to try Mr Chamberlain and the Applicant jointly.

151. The district judge went on to note the possibility that the Applicant would apply for severance, and referred to the evidence of Mr Morvillo on this point (at [161]). However, he said the possibility was no more than theoretical at this stage.

152. At [163] the district judge referred to the Applicant's argument to the effect that there is or would be an inequality of arms because prosecution witnesses have been granted immunity whereas immunity has not been granted to defence witnesses. However, he concluded:

> "164. It is apparent from Mr Morvillo's evidence that the Judge has the power to grant defence witnesses immunity if a defendant can satisfy the court that a refusal to do so would result in distorted fact finding. Mr Hussain was unable to meet the test, as a consequence the application was refused.
>
> 165. I am satisfied that the Defendant is able to make an application to the court for defence witness immunity which will be granted if he can satisfy the test. I do not accept that any injustice follows from this procedure or that any inequality of arms results."

153. Hence, the district judge concluded at [166] that this was a 'weighty' factor in favour of extradition.

154. We conclude the district judge was not arguably wrong. Indeed, he was obviously right in relation to this factor.

Section 83A(3)(g) (connection with the UK)

155. The district judge accepted at [168] that the Applicant's ties to the UK are strong and long-standing and were an important factor against extradition. He listed the various ties between the Applicant and the UK in [167]:

> "(a) The defendant is a UK national.
>
> (b) He is married. His wife was a citizen of the US but is now solely a British citizen.
>
> (c) He has two daughters now aged 15 and 17 years.

(d) He owns property in the UK. He does not own property in the USA.

(e) He is a fellow of the Royal Society.

(f) He is a fellow of the Royal Academy of Engineering.

(g) He has been an advisor to a Prime Minister.

(h) He is the Deputy Lieutenant of Suffolk.

(i) He has been a board member at the Crick Institute, a non-executive director of the BBC, a trustee at Kew and the National Endowment for Science.

(j) He was awarded an OBE.

(k) He receives treatment in the UK for his health issues.

(l) He is a consultant to a company called Invoke."

156. Mr Bailin criticised the district judge's approach because he said that he accepted with 'hesitation' the evidence about the Applicant's ties, even though it was not challenged. We do not regard this criticism as valid. The fact is that the district judge correctly identified the Applicant's ties and accepted they were strong and long-standing. Whether he should have had any hesitation in doing so is irrelevant. The fact is that he did accept them and gave them appropriate weight. The district judge weighed this factor in the Applicant's favour and he was right to do so.

Our conclusion on forum

157. We have found no flaw in the district judge's approach to any of the statutory factors in s 83A(3). It follows there is no basis for us to reach the conclusion he was arguably wrong in his overall evaluative assessment of the interests of justice because of an error in relation to any of the statutory factors. Further, there is no other arguable basis for considering that his overall assessment that extradition to the US was in the interests of justice was wrong. He considered that all the factors (save for one, the Applicant's ties to the UK) strongly favoured trial in the US. He concluded that the preponderance and collective weight of the specified matters satisfied him that extradition was in the interests of justice. He was not even arguably wrong in reaching that conclusion. Indeed, we consider that he was correct in his conclusion.

158. We therefore refuse permission to appeal on this ground of appeal.

(ii) Dual criminality

159. Having heard Mr Bailin's argument we are satisfied that the two broad episodes of conduct narrated in the extradition request (namely the fraud conspiracy, and the cover-up conspiracy) are extradition offences, and we reject Mr Bailin's arguments to the contrary. We did not require Mr Summers to address us on this ground of appeal.

160. In summary, whilst unusual in terms of its size, the alleged fraud in this case is a relatively common example of transnational fraud offending, with overt acts having taken place in different jurisdictions, including the requesting state, making it a territorial crime in that state and thus, in equivalent circumstances, a territorial conspiracy which would be triable in England and Wales.

161. The district judge addressed the Applicant's dual criminality arguments at [47] and following under the heading 'Are the offences extradition offences ?' His ruling can be summarised as follows.

162. He said that authorities such as *Office of the King's Prosecutor, Brussels Belgium v Cando Armas* [2006] 2 AC 1, [35] and *R (Bermingham) v Director of the Serious Fraud Office* [2007] QB 727, [83]-[86], establish that conduct is regarded in law as having happened 'in' the US for the purposes of s 137(3)(a) if its harmful effects were felt there.

163. At [51] he recorded the Applicant's challenge in relation to Counts 1-16 as being that the conduct did not occur in the US and that the offences are not extradition offences. It was also submitted that the conduct in Count 17 would not be an offence in this jurisdiction.

164. He said that Mr Nicholls, the Applicant's solicitor, had confirmed in cross-examination that the Applicant had been in the US when the following acts took place which the Government say were in furtherance of the fraud conspiracy: (a) when an email was sent in March 2010; (b) when there was an earnings call in April 2010; (c) an Oracle meeting on 8 April 2011; (d) a meeting between the Applicant and the CEO of HP on 12 April 2011.

165. At [61]-[66] the district judge said this:

> "61. Mr Leach states that 'Dr Lynch committed multiple overt acts in furtherance of the alleged conspiracy while in the United States'. He sets out meetings that took place in the USA, in furtherance of the conspiracy, on:
>
> • 1 April 2011.
> • 8 April 2011.
> • 12 April 2011.
>
> 62. He also detailed numerous acts by Mr Hussain in the United States in furtherance of the conspiracy. He stated that 'Dr Lynch negotiated with HP representatives in the United States'.
>
> 63. On Mr Leach's most conservative estimate, HP had been deceived by at least $1.7 billion. The US District Court has recognised that the loss was 'enormous'. Moreover at Mr Hussain's sentencing hearing General Counsel for HP stated that the purchase price was 'not merely theoretical dollars paid out by some faceless corporation. It's real money in every respect and it deprived the company of the ability to pursue other opportunities ... [the

> defendant] robbed HP of those opportunities, and we will never know the full extent of that loss ...' .
>
> 64. He described how the financial loss extended far beyond the money it paid for Autonomy; it includes the costs of the purchase of Autonomy, and after the fraud was uncovered, defending lawsuits, assisting multi-jurisdictional investigations; etc all of which 'forced [HP] to divert resources away from business operations'. Moreover, 'The company has expended tremendous resources to shine a light on the truth and achieve justice', including by bringing civil proceedings [Leach §115]. 'The amount of time, resources, and energy that the company devoted to the Autonomy investigation and all the aftermath, it is staggering ...'
>
> 65. Mr Leach described how the intended loss was aimed at HP's predominantly US-based investors.
>
> 66. Mr Leach described how the 'harm' caused to HP by the fraud in counts 1-16 was significant. He provided the following statement from HP's General Counsel at Mr Hussain's sentencing hearing: It 'has inflicted immeasurable harm to us, to our reputation, and to our brand. Founded almost 80 years ago, HP is an iconic institution in Silicon Valley and we spent decades earning the trust of our [349,000] employees and our customers and our investors … The aftermath of the acquisition and the disclosure of the fraud, public reaction to HP's write-down of Autonomy was swift and harsh. In fact, to protect himself ... Dr Lynch, began a smear campaign against us in an effort to undermine the truth ...The Autonomy fraud has cast a long shadow on our company ..."

166. As we made clear during the hearing, and mentioned earlier, we pay no regard to the allegation of a 'smear campaign'. True or not, it does not constitute an extradition offence and is irrelevant to our task.

167. Taking the fraud conspiracy first, this was a straightforward territorial conspiracy in the US, because some overt acts in furtherance of the conspiracy took place there. Its effects were felt in the US. On well-established principles, therefore, it is to be regarded as having happened 'in' the US for the purposes of s 137(3)(a).

168. Turning to s 137(3)(b), when the conduct is transposed to England and Wales, it becomes a territorial conspiracy in England and Wales which would be triable here, and so s 137(3)(b) is also satisfied.

169. The district judge correctly said this at [82]-[85] of his judgment:

> "82. Transposing this conduct to England and Wales: (a) a conspiracy planned and perpetrated entirely abroad to defraud (transposed) English victims constitutes an offence under English law. (b) As regards fraud by false representation contrary to ss. 1 and 2 of the Fraud Act 2006, multiple acts of misrepresentation occurred in the (transposed) UK by the defendant, his co-accused

> and agents, as well as the intention to expose to loss (transposed) UK companies. (c) As regards false accounting contrary to s.17 of the Theft Act 1968, it is alleged that the defendant and his co-accused and agents made use in the (transposed) UK of Autonomy's financial statements which the defendant knew were materially false, misleading or deceptive. (d) Both of these statutory offences are 'Group A' offences pursuant to s.1(2) CJA 1993 and s.2(3) provides that an English court has jurisdiction to try a Group A offence where any one of the constituent elements of the offence occurs in England and Wales. In respect of statutory fraud, this will include, if the fraud involved an intention to cause a loss or to expose another to a risk of loss and the loss occurred, that occurrence (s.2(1A)(b)).
>
> 83. Mr Bailin submitted in respect of count 17 that there is no evidence that the conduct described in paragraph 34 of the superseding indictment would amount to an offence at all.
>
> 84. However, I am satisfied that the paragraph cannot be considered in isolation but needs to be put in the context of the two preceding paragraphs. I am satisfied that paragraphs 32 and 33 set out the nature of the offending and its' objectives. Paragraph 34 provides details of the acts that make up the offending and cannot be properly understood in isolation.
>
> 85. The Government's allegation in count 17 is that the defendant did and caused to be done various acts tending and intended to conceal his unlawful conduct (the antecedent fraud) and this concerned efforts to derail and divert US-based investigations and potential proceedings. Had such acts been done with the intention of obstructing an investigation by a duly appointed body in the United Kingdom the defendant would be guilty of the offence of perverting (and of conspiring to pervert) the course of justice. English common law does not require proceedings to be pending or to have commenced for a defendant to be guilty of perverting: *Sharpe and Stringer* (1938) 26 Cr App R 122; Wilde [1960] Crim LR 116; *R v Rafique* [1993] QB 843; R v T [2011] EWCA Crim 729. Nor does it require that the defendant was aware of the particular investigation in question or its scope: *USA v Dempsey (No 1)* [2018] 4 WLR 110 at §§33-34. Perverting by interfering with a potential witness can be committed where there is no evidence of any bribe, threat, undue pressure or other unlawful means: *R v Toney* [1993] 1 WLR 364 at p368B."

170. Therefore, in our judgment, the district judge did correctly apply the correct principles on transposition and came to the correct conclusion at paragraph [82] of his judgment in relation to counts 1 to 16.

171. We are also satisfied the cover-up conspiracy is an extradition offence. It plainly occurred in the US, and so was a territorial offence for the purposes of s 137(3)(a), because things were done there pursuant to it.

172. In relation to s 137(3)(b), Mr Bailin made a discrete point in relation to Count 17 on the Indictment. He submitted that some at least of the acts identified at [34] of the Indictment did not constitute an offence at all. We reject this. The relevant parts of the Indictment have to be read as a whole. Paragraphs 32 and 33 set out the conduct complained of, namely knowing involvement in the conspiracy and they paragraph sets out the acts evidencing the conspiracy. As the district judge said at [84], [34] of the Indictment 'cannot be considered in isolation but needs to be put in the context of the two [preceding] paragraphs' and it 'provides details of the acts that make up the offending'. The description of the conduct would in equivalent circumstances amount to a criminal offence in England and Wales if done with the intention of obstructing a criminal investigation by a duly appointed body in the UK. We agree: see *Norris* v *Government of the United States of America* [2008] 1 AC 920, [101].

173. It follows from all of this that we are satisfied that the conduct narrated in the extradition request - namely both conspiracies - constitute extradition offences. The district judge did not make any arguable error in relation to section 137 of the EA 2003. This ground of appeal is not arguable. We therefore refuse permission to appeal in relation to it.

(iii) Passage of time

174. The district judge addressed the passage of time bar at [88]-[109] of his judgment. In summary, he concluded that: (a) time started to run for the purposes of s 82 from the end of the cover-up conspiracy (namely, November 2018), and not some earlier date, as contended for by the Applicant ([88]-[94]); (b) in any event, the Applicant had hidden his offending during that time and so, for that reason alone, could not rely on it; (c) given the complexity of the case, the time taken by the Government to pursue it could not be criticised ([98]-[99]); (d) the Applicant had provided no evidence of injustice. He was able to give evidence for 20 days in the civil trial without any problem, and had not suggested he could not prepare a defence to the criminal charges ([100]); (e) the Government had gained no unfair advantage from knowing, on the basis of the civil case, what the Applicant's defence would likely be ([103]); and (f) there would be no oppression in extraditing the Applicant for health, family or any other reasons ([107]-[109]).

175. Before us, Mr Bailin submitted that the district judge's primary errors had been (a) he declined to treat the more than 10-year delay by the USA since the allegations as culpable even though it arose from a tactical decision to attempt to procure Hussain as a cooperator; (b) he treated the delay instead as materially arising from the conduct alleged under Count 17, even though the evidence shows that Count 17 cannot have been the cause of the delay; and (c) he treated Count 17 (which ends more recently than Counts 1-16) as effectively curing the impact of the passage of time on the original counts by substantially reducing the relevant 'delay'. We did not call on Mr Summers to address this issue.

176. The question for us is whether the district judge arguably misapplied the statutory test. We are unpersuaded that he did.

177. The principles governing delay as a bar to extradition are well-established. The leading cases are *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779 and *Gomes v Government of the Republic of Trinidad and Tobago* [2009] 1 WLR 1038. It is to be recalled the statutory words are 'unjust' and 'oppressive'.

178. In the former case, Lord Diplock said at p782-783:

> "'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair. Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied upon as a ground for holding it to be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of his defence in consequence of the delay due to such causes are of his own choice and making. Save in the most exceptional circumstances it would be neither unjust nor oppressive that he should be required to accept them."

179. In the latter case, Lord Brown discussed at [34]-[36] the approach to injustice and said that if the domestic law of the requesting state carries protections against unfair trials based upon the passage of time then extradition would not be unjust. The headnote accurately summarises the position:

> "… the test of oppressiveness and of the likelihood of injustice would not easily be satisfied; that oppressiveness was more than mere hardship; that whether the passage of time had made it unjust to extradite the fugitive depended upon whether a fair trial would be impossible, for which purpose regard was to be had to the domestic safeguards in the requesting state; that Trinidad and Tobago was to be assumed to have the necessary safeguards against an unjust trial; and that, accordingly, the extradition of the fugitives could not be regarded as unjust or oppressive."

180. The US has a sophisticated legal system with constitutional protections for defendants' rights. The Applicant is well-resourced in terms of lawyers, and they can be relied upon to take any conceivable point on his behalf (as they have in the proceedings before us). We are not remotely convinced there is any risk of an unfair trial. Mr Hussain has been convicted on similar charges and his conviction upheld without any suggestion of unfairness due to the passage of time.

181. As to oppression, this is a high bar, and the Applicant has not crossed it. Mr Bailin emphasised what he said was the Government's unfair advantage arising from the civil proceedings, and seeing in advance the Applicant's defence. Again, we are sure that the trial process in the US will cater for any suggested unfairness by way of, for example, excluding evidence.

182. In those circumstances, it is not strictly necessary to deal with whether the time starts to run from the end of the alleged cover-up or earlier as, in either case, there would be no injustice or oppression. For completeness we note that we are of the view that, in the light of *FK v Stuttgart State Prosecutor's Office, Germany* [2017] EWHC 2160

(Admin), on the facts of this case the Applicant would not be able to rely on the passage of time during periods when he was involved in concealing his allegedly fraudulent conduct.

(iv) Article 3

183. The district judge addressed this argument at [172]-[191] of his judgment and we agree with his reasoning and conclusions. There is no arguable basis for challenging his decision.

184. The test in relation to Article 3 is well settled and has been rehearsed in many cases. In *Dempsey v Government of the United States of America (No 2)* [2020] 1 WLR 3103, [43], the Court said the test was whether there were:

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

185. In *Hafeez v Government of the United States of America* [2020] 1 WLR 1296, [66], the Court said:

> "Strong evidence is required to establish a violation of Article 3 by reference to prison conditions when the requesting state is a well-established democratic country."

186. The district judge cited both of these decisions (at [174]) and there is, accordingly, no doubt that he directed himself correctly on the law.

187. The basis of the Applicant's argument are several medical conditions which he suffers from which he says would not be adequately or properly addressed or treated in prison in the US absent a specific assurance, thus giving rise to the real risk of an Article 3 violation. The district judge set out these conditions in some detail. Mr Bailin referred us to the medical evidence but, because of some of the intimate details, did not refer to specifics in open court. For the avoidance of doubt we have read the evidence, but it is unnecessary for us to refer to it in any further detail.

188. We are only concerned with matters post-conviction should the Applicant be convicted and imprisoned. The Respondent has undertaken not to oppose the Applicant's release on bail (with restrictions) pre-trial, and we were told that there was effectively an order from Judge Breyer to that effect.

189. At [180] the district judge expressly accepted that the Applicant suffers from the conditions described in the medical evidence, although he noted the Applicant had not himself given evidence about them. Mr Bailin said the district judge had been unduly sceptical because of that failure, and that this undermined his decision, but we do not agree. The district judge in terms accepted the medical evidence.

190. At [181] the district judge referred to the written evidence of Dr James Pelton, on behalf of the Respondent, who is the Western Regional Medical Director for the United States Department of Justice, Federal Bureau of Prisons. He is responsible for overseeing

delivery of medical care in the Region. Dr Pelton said that it was not possible to predict which prison the Applicant would be sent to but that:

> "(e) Designation of the defendant's prison-level will be tailored to reflect his security and program needs, any safety concerns, and medical needs. All that can be said with certainty is that, in view of his medical complaints the defendant will most likely be designated as a 'Care Level Three' inmate (i.e. 'outpatients who have complex, and usually chronic, medical or mental health conditions and who require frequent clinical contacts to maintain control or stability of their condition, or to prevent hospitalization or complications'), he will be monitored for his chronic medical conditions.
>
> (f) The BOP can provide appropriate care to him. BOP institutions classified as Level-3 institutions 'manage inmates with potentially unstable medical problems."

191. The district judge then considered the evidence of the Applicant's witness, Mr Sickler, who gave live evidence. He maintained the Applicant would not be properly treated in prison.

192. We think that it is a fair observation that the district judge was not impressed with Mr Sickler. Indeed, he expressly said so:

> "187. I was unimpressed by the sources of Mr Sickler's information which are unnamed, generalized and presented in a misleading way. I have significant doubts that he is an expert. His first report was prepared in a casual way which overlooked the central issue, he confidently identified prisons in that report where the defendant would serve that sentence, an opinion that he completely changed in his second report. He accepted that at least one statement that he made in Mr Hussain's sentencing report was incorrect (others were contested by Mr Ligwag [the Government's witness]). He demonstrated hostility to the criminal justice system in the USA when he said that he was 'skeptical of the courts being prepared to listen to prisoner's complaints'. At one point he suggested that prison staff regard prisoners as 'sub-human'.
>
> 188. I am satisfied that Mr Sickler was an unreliable partisan witness who has exaggerated his evidence that he has presented, on occasions in a misleading way."

193. The district judge set out his findings at [189] et seq. At [189] he said:

> "The USA is a well-established democratic country. Dr Pelton's evidence is entirely credible and leaves me in no doubt that the Defendant will serve any sentence in a level 3 prison whose purpose is to care for the chronically ill."

194. This, and the findings about Mr Sickler's evidence, were findings of fact made by the district judge after he had heard live evidence and seen Mr Sickler be cross-examined.

Hence, the approach we take to them is that which we set out earlier in respect of the district judge's findings about Mr Nicholls and his evidence.

195. The district judge said at [190]:

> "190. The Defendant's evidence, unsupported by independent non-governmental reports or adverse judicial findings, does not lead me to conclude that there are substantial grounds for believing that the Defendant faces a real risk of him being subjected to Article 3 non-compliant treatment."

196. That observation was correct.

197. It follows that we do not agree with Mr Bailin's submission that absent an assurance about specific facilities being available to the Applicant (for one of his conditions in particular), there is a risk of an Article 3 violation. The district judge was entitled to accept the evidence of Dr Pelton that the Applicant will be housed in a suitable institution and be properly treated.

198. We therefore refuse permission to appeal on this ground of appeal.

(v) Abuse of process

199. The district judge dealt with the Applicant's abuse argument at [192]-[210]. The argument was framed in this way:

> "192. The defendant's submission is found on an assertion that the Request contains material misrepresentations and omissions of facts relevant to the substance of the extradition request. It relies on the 'wholesale avoidance of the [on-going] civil trial' which 'has resulted in the Government advancing a case in the extradition proceedings which is inconsistent with the case advanced by HP and the evidence before the High Court'.
>
> 193. He specifically complains of:
>
> i) Material misrepresentations and omission as to the location and nature of conduct relevant to this Court's assessment of the forum bar".
>
> ii) Material misrepresentations as to the location and nature of loss and harm relevant to the forum bar.
>
> iii) The existence of the SFO's concurrent investigation.
>
> iv) The Government's claim for jurisdiction. The Defendant sought to rely on the evidence of a retired US District Judge to evidence this challenge. This issue had been aired before Judge Breyer during the Hussain trial, Judge Breyer rejected both challenges and ruled that the charges were not time barred and that the court had jurisdiction. Mr Hussein appealed to the US Court of Appeal for the 9th Circuit which upheld his rulings. A second report by Judge

> Scheindlin sought to challenge those rulings suggesting that they needed to be resolved in the Supreme Court (Mr Hussain has not renewed his appeal). I was satisfied that I was being invited to rule upon a clear dispute regarding the interpretation of US law both in relation to both of these issues and the suggestion that count 17 is duplicitous."

200. The district judge's reasons for rejecting this argument were, in summary: (a) there was no allegation of bad faith ([195]); (b) 'there is no juridical basis to consider defence evidence as part of this challenge' ([199]); (c) the extradition request was not required to address the forum bar, which is a matter of domestic law not to be found in the UK-US Extradition Treaty and was a matter to be raised by the Applicant, which he did, and to which the Government then responded (in Mr Leach's declaration) ([200]); (d) the abuse jurisdiction based on mis-statements is limited to mis-statements in relation to 'statutory particulars', ie, the information required to be contained within an extradition request and necessary to enable the Court to decide one of the mandatory statutory questions upon which the burden of proof rests with the requesting state. The district judge said he was satisfied that the alleged abuse was outside the jurisdiction set by *Zakrzewski v Regional Court of Lodz* [2013] 1 WLR 324 ([202]); (e) the approach of trying to show that allegations in the request were wrong by reference to evidence adduced in the civil claim was an impermissible attack on the merits of the Government's factual allegations. Issues of guilt or innocence are exclusively matters for the courts of the requesting state. 'Extradition proceedings are not a criminal trial … guilt or innocence will not be decided' (*R (B) v Westminster Magistrates' Court* [2015] AC 1195, [66]) ([202]); (f) the abuse challenge was being used as an indirect way of mounting a contentious challenge to the factual or evidential basis for the conduct alleged in the warrant, this being a matter for the requesting court ([203]); (g) the statutory particulars were not wrong or incomplete ([205]); (h) the suggested inconsistencies were disputed and not clear or agreed ([206]); (i) the Government's conduct of the criminal proceedings is not bound by the way the Claimant chose to run its civil suit, to which the Government was not a party ([207]); (j) any suggested errors did not go to the validity of the warrant ([208]); and (k) there was no abuse ([209]-[210]).

201. Before us, Mr Bailin submitted that the extradition request was an abuse of the court's process, and the district judge was wrong to conclude that it was not. The Government's presentation of the case was materially misleading in respect of important particulars. Mr Bailin focussed on four matters which he described as misstatements. We will give just one example. In relation to Count 13, it was said in the table of wire fraud communications in the Indictment to which we referred earlier that the communication giving rise to that count had been an email sent by 'an Autonomy employee in the United Kingdom', when in fact it had been sent by a trainee solicitor. The other suggested misstatements in the request were equally minor or immaterial. In no way did they come to close to undermining the validity of the extradition request in a way that could properly trigger the exceptional jurisdiction to stay extradition proceedings as an abuse.

202. We are unpersuaded there is anything in this ground of appeal. The district judge was correct in his analysis and conclusions.

Conclusion

203. For these reasons, none of the grounds of appeal are arguable. It follows that this application for permission to appeal is refused.