Neutral Citation Number: [2012] EWHC 842 (Admin)

Case No: CO/9406/2011

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/03/2012

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
And
MR JUSTICE OUSELEY

- -

Between :

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	**Respondent**
- and -	
SHRIEN DEWANI	**Appellant**

- -

Clare Montgomery QC and Julian Knowles QC (instructed by **Hickman and Rose**) for the **Appellant**
Hugo Keith QC and Ben Watson (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 13-14 December 2011

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Approved Judgment

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION:

This is the judgment of the court.

1. The appellant appeals against the decision of the Chief Magistrate, Senior District Judge Riddle, dismissing all the grounds on which those acting for him sought to oppose his extradition to South Africa to face the charge of murdering his wife and other related charges. Although we were provided with 80 authorities, the issues are specific to the appellant's mental state and the prison conditions in South Africa which would be applicable to him if extradited.

The case against the appellant

2. The appellant, a British citizen, married Anni Hindocha on 29 October 2010 in Mumbai. They went on honeymoon to South Africa. On 12 November 2010, they arrived for the second part of the honeymoon at Cape Town. They hired a taxi driver, Mr Zola Tongo, to act as their driver and tour guide whilst there.

3. On the late evening of 13 November 2010, Mr Tongo drove the appellant and his wife back from a seaside restaurant in his taxi. He left the motorway and drove into the township of Gugulethu. The car was stopped by two men; the appellant's account was that he was forced from the car at gun point and the car was driven off. His wife's body was found in the car the next morning. She had been killed by a single gunshot to the neck. The appellant returned to the UK on 16 November 2010.

4. As a result of police investigations, a Mr Qwabe was arrested on 18 November 2010. He explained that he had been hired by Mr Tongo after an introduction by Mr Monde Mbolombo, a hotel receptionist. He also provided information which led to the recovery of the cartridge case and the firearm linked to the murder.

5. Mr Tongo was arrested on 20 November 2010 after his lawyer had said he would hand himself in. He was charged with conspiracy to murder. As part of a plea agreement made on 5 December 2010, Mr Tongo made a statement in which he said that the appellant had in effect asked him to arrange for the murder of a "client" for 15,000 Rand (approximately £1,375); he then hired Mr Xoile Mngeni and Mr Qwabe through Mr Mbolombo to stage the kidnapping and robbery. Mr Mbolombo's account was that he put Mr Tongo in touch with Mr Xoile Mngeni and Mr Qwabe. Mr Tongo pleaded guilty on 7 December 2010 and was sentenced to 25 years' imprisonment, with 7 years suspended. Mr Tongo and Mr Mbolombo have agreed to give evidence for the prosecution.

6. The prosecution also relies on other evidence, including CCTV evidence of the appellant leaving the hotel to meet Mr Tongo, mobile phone records of Mr Mbolombo and Mr Tongo and independent statements said to support the account given by Mr Mbolombo, Mr Tongo and Mr Qwabe.

The extradition proceedings

7. Although the appellant had no history of mental illness, he began to exhibit symptoms of depression and post traumatic stress disorder (PTSD) on his return. The appellant

was arrested on 7 December 2010 under a provisional arrest warrant under s.73 of the Extradition Act 2003 (the 2003 Act). He was remanded on conditional bail.

8. On 10 January 2011, the respondent (the Government of South Africa) sought the extradition of the appellant to South Africa under Part 2 of the Extradition Act 2003 (the 2003 Act) on charges of murder, kidnapping, robbery with aggravated circumstances and obstructing the administration of justice arising out of the murder of his wife. The request was certified by the Secretary of State on 12 January 2011.

9. The extradition hearing took place before the Senior District Judge in May and July 2011. Under the 2003 Act, the court was not required to consider whether was there was a case to answer. The appellant's extradition was contested on the grounds that:

   i) The extradition proceedings were an abuse of process.

   ii) His extradition would breach the appellant's rights under Articles 2 and 3 of the ECHR.

   iii) The appellant's extradition was barred by s.91 of the 2003 Act or alternatively the proceedings should be adjourned.

   It was not contended that he would not receive a fair trial.

10. On 10 August 2011 the Senior District Judge dismissed all of the objections and sent the case to the Secretary of State. On 28 September 2011, the Secretary of State ordered his extradition. The appeal was brought to this court on behalf of the appellant by those acting for him, as the view has been taken that he is not in a position to give instructions. The ground relating to abuse of process has not been pursued.

11. There were two issues in the appeal: (1) whether the appellant's mental condition and the attendant risk of suicide were such that he should not be extradited and, (2) if so, whether the prison conditions which he would experience in South Africa were such that it would be a breach of Articles 2 and 3 the Convention to extradite him. It is convenient to consider the issue in relation to prison conditions first.

I: The Prison conditions to which the appellant would be subject

(a) *The appellant's contention on the appeal and our approach to this issue*

12. It was the contention advanced on behalf of the appellant that the appellant's rights under Articles 2 and 3 would be violated as prison conditions combined with circumstances specific to the appellant (his mental health, media profile and vulnerability) meant that there was a real risk of a violation of Articles 2 and 3. Reliance was placed not only on the effect of his extradition on his mental illness and the lack of facilities for its treatment, but also on the high risk of HIV/AIDS infection and attack, particularly sexual violence, from other inmates.

13. Although reliance was placed by Miss Montgomery QC on the effects of his mental illness, the lack of facilities for its treatment and the risk of suicide, it is convenient to consider that separately which we do under the second issue. We will consider under this issue the risk of HIV/AIDS infection and violence to him from other inmates. It

was the broad contention advanced that the Senior District Judge had been wrong to accept the undertakings from the Government of South Africa and that the undertakings could not specifically protect the appellant.

(b) The undertakings

14. The National Commissioner of Correctional Services gave undertakings on behalf of the Government of South Africa that the appellant would be held at the Goodwood Correctional Centre in a single cell in the sick bay area when on remand. If convicted, sentenced to imprisonment and classified as a medium security risk, he would be held at the Malmesbury Medium A Correctional Centre in a separate cell with a flush toilet and hot and cold water. If convicted, sentenced to imprisonment and classified as a high security risk, he would be held at the Brandvlei New Correctional Centre; he would then be moved to the Brandvlei Maximum Correctional Centre following its completion and held there in similar circumstances.

15. The evidence of Judge van Zyl (to which we refer at paragraph 20) was that, although the undertakings were not legally binding, he would expect them to be honoured. He gave an assurance to the Senior District Judge that the Inspectorate would personally ensure the undertakings would be complied with. The Senior District Judge concluded that the undertakings would be fulfilled.

(c) The evidence before the Senior District Judge about prison conditions

16. The Senior District Judge heard evidence called by the appellant from Miss Amanda Dissel and Miss Sasha Gear who were heard together by video link from South Africa. Both specialised in criminal justice and penal reform in South Africa. Miss Gear also specialised on issues of sexual health and sexual violence in men's prisons.

17. Their evidence, which is set out in detail in the judgment of the Senior District Judge and in their reports and transcripts of their oral evidence provided to us, was to the effect that there was serious overcrowding (164,000 prisoners in a system with a capacity for 118,000). That had particularly adverse consequences for the availability of health care and the treatment of those with mental illness. Even though prisoners were entitled to obtain private medical treatment at their own expense, it was not always possible to secure such treatment. There was very little understanding of or research into HIV/AIDS in prisons. Prisons in the Western Cape had a significant gang problem with non members bearing the brunt of gang violence, including rape, and intimidation. Conditions differed from prison to prison; what happened in communal cells differed markedly from the position of a person in a single cell.

18. They thought that there were specific risks for the appellant in relation to HIV and sexual violence, as he fitted the profile of someone who was particularly vulnerable. He was youthful, good looking and lacked "street wisdom". Even if he was the occupant of a single cell, he would be vulnerable to assault when out of his cell or at night when there were insufficient guards on duty. As to the prisons specified in the undertakings, they considered more information was required about the protection he would be afforded when out of his cell; they had not had the opportunity of conducting their own research nor of speaking to the Independent Visitors at the three prisons. They had been denied access to these and to statistics.

19. The judge also had written materials, including specific threats that had been made by those in prison in South Africa to harm the appellant.

20. The Government called Judge Deon van Zyl, Head of the Judicial Inspectorate of Correctional Services of South Africa. He had been a Judge of the High Court from 1985 to 2008 when he was appointed Head of the Judicial Inspectorate. Following visits by the Inspectorate in April 2011 to each of the three prisons named in the undertakings, he provided a report on 18 April 2011 which concluded that each of the prisons was suitable and appropriate. He gave evidence in the hearings in May and July 2011.

21. Although the Senior District Judge considered that the appellant's experts should have had access to information about the three prisons named in the undertaking, he rejected the contention made on behalf of the appellant that Judge van Zyl was not reliable. He was sure of his integrity and independence. He concluded he was motivated by a strong sense of justice, a concern for what was fair and reasonable and for fundamental values. He had not hesitated to criticise prison conditions when appropriate. Some of his comments in his evidence were considered to be outspoken criticism; he had, for example, pointed out that assaults, deaths and suicides were not being adequately investigated or addressed. His evidence was independent and he had not been influenced by pressure.

22. He explained that the *Jali Report* of 2005 which pointed out serious problems of corruption, maladministration, gang control and other abuses related to the position in and before 2005. His view was that what was stated in that report did not reflect the position in prisons he had found since his appointment in 2008. Nonetheless, current conditions in some prisons were unacceptable and improvements should be made. There was gang activity in virtually all prisons, but he did not accept the report of the Parliamentary Monitoring Group of May 2010 that gangs had control of prisons; he was not aware of one prison where a gang had control. Sexual violence by gangs occurred in communal cells; such violence was underreported; overcrowding led to violence. There were serious issues with regard to HIV/AIDS, as many prisoners arrived with HIV/AIDS.

23. He considered that the three prisons referred to in the Government's undertaking would each accommodate the appellant in compliance with his Convention rights. His office could monitor the appellant. He undertook that the appellant would have full access to the Inspectorate. There would be no difficulty in making special arrangements for private medical care and access to psychiatrists. He was confident that the appellant would receive whatever treatment he needed. It would be highly exceptional for a prisoner to be assaulted on the way to court. Although each of the three prisons had gang problems in the past, none had been brought to his attention when an Inspector. Although sexual assaults did take place, there was no reason to believe that the appellant would be subject to such assaults. The recent reports showed that at Goodwood there had only been 35 complaints of assaults and none in the area where the appellant would be housed; the record of assaults and violence at Malmesbury was low. Between the May and July hearings he had asked his officials to visit the three prisons; the reports he had received had been positive. He was sure that there would be virtually no chance of gang or sexual violence involving the appellant as he would be detained in a single cell. He would be under close

supervision when moved into a communal area and the fact that he would be a high profile prisoner did not mean that he would be exposed to risk.

(d) The findings and conclusions of the Senior District Judge

24. The Senior District Judge concluded that there was very little difference between Judge van Zyl and Miss Dissel and Miss Gear on significant general matters. There was obvious informed concern about prison conditions in South Africa.

25. The Senior District Judge was satisfied that the appellant would be held in accordance with the undertakings to which there would be adherence in all but the most extreme circumstances. What was material were the conditions in the three prisons where the appellant would he held. Judge van Zyl had given evidence about those conditions in May. Although it was most unfortunate that Miss Dissel and Miss Gear had not been given the material in relation to them prior to writing their report, he had no doubt that given the free press in South Africa and the existence of a democracy, significant evidence would have been forthcoming by July 2011 to contradict that evidence if it had been available. Although there had been some, none of it cast doubt on Judge van Zyl's evidence.

26. He was therefore able to conclude:

i) Goodwood was built in 1997 and met the UN Standard Minimum Rules. Its occupancy rate in April 2011 was 113%. There was a clinic and sick bay; it had two full time psychologists and a doctor who visited three times a week. An inmate could be seen by his own psychiatrist at his own expense. He could be visited by his family. Although there had been 35 assaults in 2010/11, two had been sexual in nature and none had occurred in the sick bay. It was in a class of its own and a centre of excellence in the system.

ii) Malmesbury was built in 1997. It was under populated. There was a well maintained hospital. Those with mental health problems were referred for assessment by a visiting psychiatrist and arrangements were possible for transfer to hospital. There had been 25 assaults in 2010/11, four of a sexual nature.

iii) Brandvlei New Correctional Centre was being upgraded. Brandvlei Maximum Correctional Centre was being built. When that was complete, it was expected to comply with International Standard Minimum rules. There had been 67 inmate on inmate assaults in 2010. He accepted Judge van Zyl's view that on completion, Brandvlei Maximum would compare with the best in the world.

iv) The appellant would be held in a single cell, reasonable steps would be taken to protect him and the risk of assault, including sexual assault would be reduced very considerably, including the risk of assault from gangs or whilst in transit to prison.

27. In addition to the assurances, the Senior District Judge was able to rely on the fact that South Africa had adopted all relevant international treaties, it had its own Bill of Rights, the rule of law was upheld and it had a free press.

28. On the findings of fact, the Senior District Judge concluded that there would be no breach of Articles 2 or 3. Although there was a risk of attack by other prisoners when outside his cell or in hospital or in transit to court for the reasons advanced on behalf of the appellant, the Senior District Judge found that the assurances from the Government were sufficient to persuade him that the State would comply with its positive duty to protect the appellant from criminal acts directed at him. Although some prison officers had stated that it was unfair to accord the appellant special treatment, he did not think any officer would act contrary to the instructions given.

(e) The contentions as to a violation of Articles 2 and 3

29. Miss Montgomery QC on behalf of the appellant, although describing the state of the South African prison system as appalling, did not on the appeal advance a case that the general prison conditions were such that the imprisonment of an ordinary prisoner would be a violation of Articles 2 or 3. The case made on behalf of the appellant was that his vulnerability would have the consequence that he would be subjected to the risk of infection from HIV/AIDS and of violence from gangs and individuals, particularly sexual violence. It was submitted that the Government had done nothing effective to get prison officers to deal with the problem; the extent could be gauged from the evidence of Judge van Zyl that the appellant would require an escort when in communal areas and in transit to prison.

30. It was also submitted that the South African Government had contributed to the risk by statements in relation to the case of murder against the appellant made by senior officials of the police and prosecuting authorities.

(f) Our conclusions on Articles 2 and 3

31. We have very carefully examined the evidence in relation to the risk of infection from HIV/AIDS and the risk of violence both by individuals and gangs, including sexual violence, at the hands of other inmates. There were powerful written materials placed before the court on behalf of the appellant, particularly the evidence before the Parliamentary Monitoring Group and its report in May 2010. As against that there was the evidence of Judge van Zyl. Although some criticism can be made of his evidence in that he was not able to explain what precise steps had been taken to remedy the deficiencies found by the Jali Commission and because of his failure to provide to the appellant's experts the necessary information relating to Goodwood, Malmesbury and Brandvlei, his evidence dealt specifically with the conditions at the three prisons at the present time.

32. We see no basis for differing from the findings of fact and conclusion of the Senior District Judge in relation to Judge van Zyl's evidence on the adequacy of the conditions under which the appellant would be held. We cannot accept that there was any merit in the continued calling into question of Judge van Zyl's independence and impartiality. He was a witness called by the Government of South Africa, but that did not, in our judgment, affect the impartiality and independence of his evidence.

33. There are plainly risks of violence, particularly sexual violence, to a prisoner held in a communal cell in South Africa, though it is not necessary for us to quantify those risks as applicable to the appellant. That is because the Government of South Africa has given clear undertakings that the appellant would be held in a single cell. As Miss

Dissel and Miss Gear accepted, what happens in a single cell bore no relation to what happened in communal cells. We consider the Senior District Judge was entitled to accept the undertakings given by the National Director for Correctional Services and that he was right to hold that they would be followed. South Africa has now a material track record of respect for democracy, human rights and the rule of law. Those are highly material factors to the court's acceptance of the undertakings and the conclusion that they meet the conditions set out in *RB(Algeria) v Secretary of State* [2010] 2 AC 110 at paragraph 23.

34. Further reassurance was given in the course of his evidence by Judge van Zyl in his capacity as Inspector; although these did not have the formal character of undertakings, we have taken them into account as further evidence that the undertakings will be monitored and followed.

35. In the light of the undertakings which we also accept will be honoured, we are sure on the facts that there would be no violation of Articles 2 and 3 by reason of the risk of infection by HIV/AIDS or of attack by fellow prisoners. In reaching that conclusion we have not had to rely on the approach to extradition cases set out in the judgment of Lord Hoffman in *R (Wellington)* [2009] 1 AC 335. We would have reached the same conclusion if we had applied the approach to Article 3 in an extra territorial context set out at paragraphs 119-131 of the decision of the Strasbourg court in *Harkins and Edwards v UK* (application number 9146/07 and 32650/07) given on 17 January 2012.

II The appellant's physical and mental health

(a) The deterioration in the appellant's mental state

36. The appellant's depression and PTSD worsened after his arrest on 7 December 2010. On 20 February 2011, he took an overdose. He was admitted to the Bristol Royal Infirmary; he told the staff in the A&E department that he did not want to live, but denied to others that this was a suicide attempt. The Senior District Judge found that it was a deliberate overdose to avoid engaging with the extradition proceedings.

37. He was discharged, as a condition of his bail, to the Priory Hospital as an in-patient. On 11 April 2011, there was a further deterioration in his condition following the onset of suspected serotonin syndrome or neuroleptic malignant syndrome. He developed psychotic symptoms and was transferred to a low secure psychiatric unit at Kewstoke. On 23 April 2011 he was admitted to the Fromeside Clinic, Bristol under s.3 of the Mental Health Act 1983; his bail conditions were varied so that he resided at the medium secure unit. The consulting psychiatrist treating him has been Dr Paul Cantrell, consultant forensic psychiatrist with the West of England Mental Health Services.

(b) The reliance before the District Judge on s.91 of the 2003 Act and the appellant's Convention rights

38. It was contended on behalf of the appellant before the Senior District Judge that he should order the appellant's discharge under s.91(3)(a) or at least adjourn the hearing under s.91(3)(b) of the 2003 Act:

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

39. It was also contended that extradition of the appellant given his mental condition would be a breach of his Convention rights by reason of the high risk of suicide and the wholly inadequate facilities in South Africa for treating him and minimising the risk of suicide.

(c) The evidence of the psychiatrists before the Senior District Judge

40. The Senior District Judge heard evidence from two very eminent and well known psychiatrists, Professor Nigel Eastman of St George's Hospital (instructed and called on behalf of the appellant) and Professor Michael Kopelman of St Thomas' Hospital (instructed and called by the Government of South Africa). Dr Cantrell also gave evidence. The judge also received written evidence from Dr Dedman (who had treated the appellant at the Priory) and Dr Martin Eales a Consultant Psychiatrist at the Kewstoke Hospital.

41. Prior to the hearing, Professor Eastman and Professor Kopelman agreed in a joint statement dated 14 July 2011 that:

i) The appellant was suffering from two mental disorders - depressive illness and PTSD; each was severe in degree.

ii) There was a real and significant risk of suicide or self harm, but it was not immediate.

iii) He was currently unfit to plead. That was because, although he understood the charge, he would be unable to follow the detail of the evidence or to instruct his advocates.

iv) He was also unfit to travel to South Africa. There was a significant risk of a further relapse into psychosis and, if that occurred, his unfitness to travel would be greater.

v) In the event of an order being made for his extradition, his mental disorders would worsen further and his risk of suicide become even higher.

vi) They were not in agreement as to the prognosis; Professor Kopelman was more optimistic than Professor Eastman who believed that recovery would require anti-depressant medication.

42. Dr Cantrell in his oral evidence agreed with the joint statement. He believed the appellant when he said he would kill himself if sent to South Africa. The risk of suicide was high. The appellant had very high CK (creatine kinase) levels and suspected serotonin syndrome or neuroleptic malignant syndrome which prevented the use of medication. His view was that real improvement might take many months; the appellant might then become fit to plead. The prognosis was good and in time the appellant would be likely to make a recovery.

43. Professor Eastman's oral evidence confirmed his view that prognosis was very difficult. It was unusual to have depression and PTSD to such a severe degree. There was at present an unacceptable risk of suicide which would increase if he was returned to South Africa; this was a quantitative assessment of risk without attributing percentages to the risk. In his oral evidence, Professor Kopelman confirmed that the appellant was still at significant risk of suicide which was unacceptably high. Fears of what might happen to him in South Africa were very real for the appellant. If he was sent to South Africa, it would be harder for him to recover to a point where he was fit to plead. He was optimistic that the doctors would be able to get Mr Dewani into a state where he would be fit to plead.

(d) The evidence in relation to psychiatric treatment in South Africa: Valkenberg

44. There was evidence that the secure psychiatric hospital to which the appellant could be admitted, if not treated in a prison hospital, was Valkenberg Hospital which was a teaching hospital for the University of Cape Town. The Government of South Africa had, in contradistinction to the prisons, given no undertakings in respect of the appellant being held there.

45. Professor Kopelman's evidence was that the psychiatric care offered at the three prisons named in the undertakings was totally inadequate for the appellant's condition, as there would only be twice monthly visits.

46. Professor Sean Kaliski (a psychiatrist at the Valkenberg Hospital in the Western Cape) and Dr Larissa Panieri-Peter, a specialist psychiatrist in South Africa both provided written evidence, particularly in relation to Valkenberg.

47. Professor Kaliski stated in his letter to the court dated 13 July 2011 that there would be no obstacles to admitting the appellant to the medium secure unit there. Although there was a waiting list, it was very likely that a court would on the appellant's return refer him under s.79 of the Criminal Procedure Act. That hospital had 2 psychologists, an occupational therapist, a registrar and a consultant psychiatrist. If the appellant was seriously ill, then he would remain in the ward at the hospital until he was triable or might be certified and remain indefinitely. Professor Kaliski added:

> "Given the prominence this case has in the media, we would assure the court that we would admit [the appellant] to our facility on arrival at Cape Town."

Dr Panieri-Peter accepted that it was likely he would be sent there for observation.

48. Judge van Zyl described Professor Kaliski as a man of great experience with a strong staff. He accepted that there had been a shortage of forensic psychiatrists, a waiting list for Valkenberg and a problem with delay. He also accepted that the three named prisons had one psychiatrist who visited once a month and there was a general shortage of forensic psychiatrists in South Africa. Although he was unable to give direct evidence of current conditions there, he had heard nothing negative in the past three years. Judge van Zyl considered that the appellant would have no difficulty in making special arrangements for private care and access to psychiatrists.

49. Dr Larisa Panieri-Peter, who had worked from 2002 to 2009 as one of the two psychiatrists responsible for assessment of offenders at Valkenberg, referred to its negative press. She said that Professor Kaliski had been quoted as describing poor conditions in the unit. An article in the South African Medical Journal in 2005 bore this out. Her evidence was that it was very difficult to arrange private psychiatric treatment because private psychiatrists were not prepared to work in prisons; access to psychiatric care was more theoretical than real. Professor Kaliski's evidence was that conditions in the secure ward had been abject and often criticised in the media. The ward had been substantially renovated, and whilst not luxurious or comparable to the best in the UK were habitable.

(e) The findings of the Senior District Judge

50. The Senior District Judge accepted that the appellant suffered from two severe and incapacitating mental illnesses. There was a real and significant risk of suicide which would increase if he was extradited and he would suffer real harm and distress if extradited. The prognosis was uncertain.

51. The test for fitness to plead in South Africa was almost identical to the test in England and Wales. Mr Hugo Keith QC, on behalf of the Government of South Africa, although conceding that the appellant was unfit to plead in the light of the agreed evidence, contended that it was not inevitable that the trial court in South Africa would reach that conclusion if the appellant was extradited. The Senior District Judge concluded that the appellant was an intelligent man and the court might be able to explore ways to enable the trial to proceed and evidence given despite the appellant's condition. This was a case where a court might differ from the psychiatrists. Nonetheless a court would be likely to conclude he was unfit to plead, but that was not inevitable then or in the future.

52. The medical evidence was agreed that there was a high risk of suicide and that degree of risk could not be refined further. He did not consider the experts had explained why the risk of suicide would increase if the appellant was extradited. He would not have to visit the scene of the kidnapping and his family would be permitted access. However, the Senior District Judge accepted that the appellant had real fears of what might happen in South Africa and the flight to South Africa would make matters

worse. Overall he accepted that the risk of suicide would be made worse if he was extradited.

53. Mr Keith QC had conceded on behalf of the Government of South Africa that medical care in a prison in South Africa would not be as good as his current care or as good as in a UK prison. That was not the question. The question was whether the level of care would be appropriate. The Senior District Judge was satisfied that the appellant would receive psychiatric treatment and there would be no difficulty in arranging private care for which his family had the means of paying.

54. If returned to South Africa, the Senior District Judge considered it likely that the appellant would be produced to the court where bail would be considered. That would be a decision he was sure would be taken independently. It was a real possibility that the appellant would be held at Valkenberg either by direct transfer or by court decision. He had no reason to believe that conditions there were unacceptable.

(f) The conclusion of the Senior District Judge on Articles 2 and 3

55. The risk of suicide was not uncommon in extradition cases. The Senior District Judge referred to the cases in this court where the court had recorded the evidence as to the degree of risk and described it in various terms: *Jansons v Latvian Judicial Authority* [2009] EWHC 1845 (Admin), *R(Prosser) v Secretary of State for the Home Department* [2010] EWHC 845 (Admin), *Wrobel v Poland* [2011] EWHC 374 (Admin), *R (Griffin) v City of London Magistrates Court* [2011] EWHC 943 (Admin). The risk of suicide did not mean that extradition would be a breach of Articles 2 and 3. Bearing in mind the assurances given and the facilities available, there was no real and immediate threat to life if he was extradited.

(g) The conclusion of the Senior District Judge on s.91

56. The Senior District Judge accepted that s.91 provided additional protection but concluded that the bar under s.91 was high. Each case was fact specific and it was not helpful to consider the facts of the other cases. There was no doubt that the appellant has two severe mental illnesses; they were genuine and he was not faking them. The prognosis was speculative and uncertain. The existence of the proceedings would be a maintaining factor for his condition, but there were reasons for optimism. Most people with his condition improved and there was every reason to believe that he would receive good medical care in South Africa, even though the Government accepted that he would be better in the UK. Although there was an attractive view (advanced by Professor Kopelman) that the appellant should continue to receive his current treatment until he was better and fit to plead, the test in s.91 was not met. Although there was hardship, it fell short of oppression. There was a strong public interest in honouring extradition treaties. The case coming to trial and the facts being determined (not least in the interests of the family of the victim) outweighed the hardship to the appellant.

(h) The medical evidence after the judgment of the Senior District Judge

57. We were provided with evidence relating to the condition of the appellant after the hearing before the Senior District Judge.

58. On 27 September 2011, Dr Tomison, the Medical Director for the NHS Trust responsible for the care of the appellant wrote to the City of Westminster Magistrates' Court to inform that court that Dr Cantrell had advised there was some improvement in the appellant's depressive illness and a reduction in the risk of suicide. In consequence, it was no longer appropriate to detain him under the Mental Health Act. Dr Cantrell was of the view that detention in hospital was serving no meaningful purpose and indeed forming a barrier to his progress. Dr Cantrell offered to provide a report. No action was, however, taken on behalf of the appellant as a consequence of the letter.

59. On 10 November 2011, the appellant was made subject to a further order under s.3 of the Mental Health Act. Dr Amos, the experienced consultant psychiatrist who signed the order, set out conclusions very similar to those which were the subject of agreed medical evidence before the Senior District Judge. The solicitors for the appellant wrote to the City of Westminster Magistrates' Court on 22 November 2011 to inform the court of that Order.

60. At the conclusion of the hearing in this court we were provided with a psychiatric report by Dr Cantrell dated 14 December 2011. The appellant was reported as making slow but positive progress. He continued to suffer from severe depression and PTSD, but the improvement in his condition was reflected in the fact that both illnesses were closer to being moderate in degree. There was good reason why the appellant had declined medication, but he had recovered from the side effects of the previous medication. Dr Cantrell supported the decision of Dr Amos that the appellant should be held under the provisions of the Mental Health Act, as he was entering the most dangerous phase in recovering from severe depression. He remained a high risk of suicide. He remained unfit to plead through his inability to concentrate, but he would in due course recover to become fit to plead.

(i) The contentions made on behalf of the appellant on the appeal

61. On behalf of the appellant, it was contended that the extradition of the appellant to South Africa would by reason of his mental illness and the high risk of suicide be a breach of Articles 2 and 3. The general provision of facilities was inadequate for the appellant and there were no undertakings directed at the measures to minimise the risk of suicide or to treat his illness.

62. It was also contended that his discharge should be ordered under s.91 or alternatively his extradition postponed. We will consider that contention first.

(j) The approach to s.91and the contentions of the parties

63. On the appeal, we are required by the terms of s.103 and s.104 to consider ourselves whether his mental condition was such that it would be unjust or oppressive to extradite him: see *Government of the United Sates v Tollman* [2008] EWHC 184, [2008] 3 All ER 350 at para 95 and *Howes v Her Majesty's Advocate* [2009] SCL 341 at para 91. Although we did not have the benefit of hearing the witnesses, Professor Eastman and Professor Kopelman were both eminent psychiatrists and the disagreement between them was a disagreement of degree. Thus although we should hesitate before reaching a contrary conclusion on findings of fact and the decision of the Senior District Judge is to be accorded the greatest respect, we are free to depart

from his conclusion if on the evidence we consider that the extradition of the appellant would be unjust or oppressive.

64. Forceful criticism was made of the findings of the Senior District Judge by Miss Montgomery QC; for example his conclusion which we have set out at paragraph 51 as to fitness to plead was criticised in the light of the concession made by the Government of South Africa, and the agreement amongst the psychiatrists of the well known distinction and expertise of Professor Eastman and Professor Kopelman that he was not presently fit to plead. The Senior District Judge's conclusion on suicide set out at paragraph 52 was said to demonstrate that he had misunderstood the evidence. His findings in respect of the suitability of facilities at Valkenberg for the treatment of the appellant in his current condition and the availability of private care were also criticised.

65. Mr Keith QC on behalf of the Government of South Africa maintained that given the agreement of the doctors as to the limited basis on which he was unfit to plead and the prospects of the appellant's recovery, the Senior District Judge had been correct in concluding that a judge in South Africa might find that he was fit to plead. The Senior District Judge was also correct in his conclusion on the risk of suicide; there had only been one episode of self harm and the experts had not been able to calibrate the risk of suicide more precisely than saying it was high. The facilities at Valkenberg were adequate.

(k) Our conclusion on s.91

66. S.91 and its equivalent in Part I, s.25, were provisions introduced into extradition procedure to give the court, as opposed to the Secretary of State, the duty to make the decision in cases of ill health. In the proceedings relating to General Pinochet, the Secretary of State had had to make a decision on fitness to plead which had then been the subject of judicial review (*R v Secretary of State for the Home Department ex p the Kingdom of Belgium*, 15 February 2000). It was considered an inappropriate procedure.

67. The section uses the terms "unjust or oppressive" which were used in previous statutes. In *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 799, Lord Diplock, explained the terms in a well known passage in his speech at p.782:

> ""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."

68. In *Gomes and Goodyear v Trinidad* [2009] 1 WLR 1038 the House of Lords reconsidered this in the context of s.82 of the 2003 Act. In considering the requirement of oppression, hardship was not enough.

69. It was contended on behalf of the appellant that different considerations applied to s.91. S.25 gave effect to Article 23.4 of the Framework Decision of 13 June 2002 on the European Arrest Warrant which provides:

> "Surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example, if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health"

In accordance with well established authority, s.25 should therefore be construed to give effect to the provisions of Article 23.4. S.91 could not bear a different meaning and thus should be construed in the same way. Adopting this approach, the court should, it was submitted, consider the terms "unjust or oppressive" in the context of the Framework Decision's requirement of serious humanitarian reasons, such as endangering the person's health.

70. It was also submitted on behalf of the appellant that, as s.91 was a free standing provision in addition to the provisions of s.87 barring extradition if a breach of the appellant's Convention rights, the section ought to be construed independently. In particular, it was not appropriate to carry out the balancing exercise required by *R (Wellington) v Secretary of State*. It was a temporary bar, lasting only as long as the condition persisted.

71. The Government of South Africa submitted that the court should keep its eye firmly on the test set out in s.91 and that it was necessary to take into account all the relevant surrounding circumstances.

72. We were referred to a number of decisions of this court on s.91 and s.25 including, *Bhoudiba v Central Examining Court No 5 of the National Court of Justice, Madrid, Spain* [2006] EWHC 167 (Admin), *Prancs v Latvia* [2006] EWHC 2573 (Admin), *Government of Croatia v Spanovic* [2007] 1770 (Admin), *Government of the United States v Tollman, Tajik v USA* [2008] EWHC (Admin), *Rot v District Court of Lublin* [2010] EWHC 659, *Wrobel v Poland, R(Griffin) v City of Westminster Magistrates Court* and *Mazurkiewicz v Rzeszow Circuit Court* [2011] EWHC 659 (Admin). We were referred to the decision of the High Court of Justiciary in *Howes v HM Advocate (No.2)* [2010] HCJAC 123. We were also referred to the decision of the High Court of the Republic of Ireland in *Minister of Justice and Equality v L* [2011] IEHC 248 where the provisions of the European Arrest Warrant Act 2003 more closely mirrors Article 23(4) of the Framework Decision.

73. In our view, the words in s.91 and s.25 set out the relevant test and little help is gained by reference to the facts of other cases. We would add it is not likely to be helpful to refer a court to observations that the threshold is high or that the graver the charge the higher the bar, as this inevitably risks taking the eye of the parties and the court off the statutory test by drawing the court into the consideration of the facts of the other cases. The term "unjust or oppressive" requires regard to be had to all the relevant circumstances, including the fact that extradition is ordinarily likely to cause stress and hardship; neither of those is sufficient. It is not necessary to enumerate these circumstances, as they will inevitably vary from case to case as the decisions listed at paragraph 72 demonstrate. We would observe that the citation of decisions which do no more than restate the test under s.91 or apply the test to facts is strongly to be

discouraged. There is a real danger that the courts are falling into a similar error as courts fell into in relation to s.23 of the Criminal Appeal Act 1968 and as described by the Lord Chief Justice in *R v Erskine* [2009] 2 Cr App R 29, [2009] 2 Cr App Rep 29, [2009] EWCA Crim 1425, [2010] Crim LR 48.

74. The only issue that could arise is whether the words "unjust or oppressive" are to be read in the sense used in cases such as *Kakis* or to be read in the context of Article 23.4. We agree with the observations of Maurice Kay LJ in *Prancs* at paragraph 10 that the words are plainly derived from *Kakis.* The Parliamentary history of the Extradition Bill suggests that the provision was introduced into what is Part II for the reasons we have given at paragraph 67 and then the Bill was amended to add the provision to Part I. Although that may not assist in determining whether s.25 (and hence s.91) is to be read as reflective of Article 23.4, the use of the term "unjust or oppressive" plainly indicates that Parliament intended its own test.

75. In the light of the psychiatric evidence before the Senior District Judge this was not a case where there was unlikely to be a recovery within a reasonable time; indeed the evidence pointed to a recovery within a reasonable time. The Senior District Judge was therefore correct to conclude that the appellant's discharge under s.91(3)(a) should not have been ordered. This was a case where the issue arose under s.91(3)(b), that it is to say whether the hearing should be adjourned until it appeared that the appellant's mental condition was such that it would no longer be unjust or oppressive to extradite him.

76. In such a case what is unjust or oppressive is fact sensitive. Take the case of a person who is recovering from an acute injury or physical illness where the prognosis for recovery is certain. In such circumstances, making an immediate order would be unjust or oppressive if there was a real risk to life and a short delay would obviate the risk. There is virtually nothing by way of detriment to the interests of justice in such a delay.

77. The test is more difficult to apply where the quantification of the degree of risk to life is less certain and the prognosis is also less certain. In such a case, the interests of justice in seeing that persons accused of crimes are brought to trial have to be brought into account.

78. In the present case, given the findings which we have upheld that extraditing him to South Africa would not violate Articles 2 and 3 of the Convention on the basis of the prison conditions in South Africa, his mental illness apart, it is plainly in the interests of justice that the appellant be tried in South Africa as soon as he is fit to be tried.

79. The strength of the psychiatric evidence was a striking feature of this case. Not only were the principal witnesses called by the appellant and the Government of South Africa psychiatrists of great eminence and distinction, but their evidence before the Senior District Judge was essentially agreed, as we have set out. The opinion of the consultant treating him was to the same general effect.

80. In our view, the medical evidence as to the unusual combination of PTSD and depression to such a severe degree and the appellant's other conditions was clear that extradition would present a real and significant risk to the life of the appellant. We attach considerable significance to the evidence of Professor Kopelman on 19 July

2011 that extradition would worsen his condition and make it more difficult to get him into a position where he was fit to plead. It must be an exceptional case where the expert called on behalf of the requesting Government is of the view that extradition at the present time would jeopardise the present treatment and the prospects of recovery Increasing the prospects and speed of recovery are in the interests of justice, as they will increase the prospects of a trial being held sooner rather than later.

81. It is likely that, if returned, he would be sent to Valkenberg pending his recovery or a decision on his fitness for trial. There was, however, no undertaking that he would be held there. It was not clear whether this was because once surrendered it would be for the court in South Africa to determine whether it should order he should be referred to a secure hospital or, if the decision was that of the Government of South Africa, it was not prepared to give such an undertaking. There was some evidence that the facilities at Valkenberg were satisfactory, though not as good as those the appellant currently enjoys. Nonetheless questions remained as to whether he would be held in an individual room and, if not, whether the protection afforded to him would be adequate. There was also uncertainty as to the availability of the necessary amount of psychiatric care or access to private psychiatric care.

82. It was unfortunate, given the way in which the hearing developed before the Senior District Judge that Professor Kaliski did not give evidence at that hearing by video link upon which he could be cross examined. The experts based in London did not have first hand knowledge of what was available in Valkenberg and there was powerful evidence from Dr Larissa Panieri-Peter which raised issues that required answers that were fuller than those set out in Professor Kaliski's letter which was before the Senior District Judge. We were provided by the Government of South Africa after the conclusion of the hearing with a letter from Professor Kaliski dated 15 December 2011; this dealt with the provision of care on the basis the appellant was not charged on return or was charged and remanded to the secure ward at Valkenberg. Objection was taken to its admissibility. It did provide some further details, but it would not be just to take the further letter into account without affording the appellant the opportunity to challenge the evidence. That evidence should have been adduced and that opportunity should have been afforded at the hearing before the Senior District Judge.

83. Thus balancing his unfitness to plead, the risk of a deterioration in the appellant's condition, the increased prospects of a speedier recovery if he remains here and, to a much lesser degree, the risk of suicide and the lack of clear certainty as to what would happen to the appellant if returned in his present condition, we consider that on the evidence before the Senior District Judge it would be unjust and oppressive to order his extradition. Despite the highest respect in which we hold decisions of the Senior District Judge, we consider that he erred and should have exercised his powers under s.91(3)(b) and ordered that the extradition hearing be adjourned.

84. Although we have reached that decision on the basis of the evidence before the Senior District Judge, we also have had the benefit of the further medical evidence and the opinion of Dr Cantrell from which it is apparent that the appellant is making a slow recovery under his current treatment regime. That confirms the view we had reached on the evidence before the Senior District Judge that the Senior District Judge should have adjourned the extradition hearing.

85. We do not consider that we should determine, as the position currently stands and in the light of our decision in relation to s.91, what conclusion on the issue of fitness for trial might be open to the court in South Africa at an appropriate time, given the limited nature of the respects in which the appellant is unfit to stand trial and the prospects of the appellant's recovery: (cf *Re Davies* (transcript, 30 July 1997), *R(Warren) v Secretary of State for the Home Department* [2003] EWHC 1177 Admin at paragraphs 26-28, *United States of America v Tollman* [2008] 3 All ER 150 at paragraphs 162-172 and *Lynch v The High Court in Dublin* [2010] EWHC 109). It may be necessary for this to be done at a later stage of these proceedings, if there is disagreement as to the extent of the appellant's recovery. If that question arises, then it may also be necessary to determine the merit of the argument advanced on behalf of the appellant that fitness to plead proceedings in South Africa (where the law is the same as in *R v H* [2003] 2 Cr App R 2) are not criminal proceedings and will not result in a conviction. It is said by Miss Montgomery QC to follow that he is therefore not "accused" within the meaning of s.70(4) nor accused of conduct punishable with more than 12 months imprisonment and so not accused of an extradition offence under s.78.

86. We do not consider it right in the circumstances of uncertainty relating to the appellant's mental condition to set out our conclusions on the facilities at Valkenberg. That might be necessary in the future, but as conditions at Valkenberg may also change, it would not be appropriate to do so now. Nor have we considered other aspects of the adequacy of the care that could be provided to provide sufficiently for the risk of the appellant's suicide. What is required must depend on the appellant's mental condition at that time. Although it is our provisional view, in the light of the authorities and the six factors enumerated by Dyson LJ in *J v Secretary of State* [2005] EWCA Civ 629, that there are significant difficulties in the appellant's case under Articles 2 and 3 in relation to suicide, it would not be appropriate to express any concluded view in contradistinction to the concluded view we have expressed at paragraph 35 on the risks from HIV/AIDS and assault.

Conclusion

87. We will consider submissions from counsel as to the Order we should make given the terms of 2003 Act and what directions, if any, we should make as to keeping the progress of the appellant under review or as to the timing of the further hearing in the Magistrates' Court. At such a hearing or any further hearings, the position may be that there is a dispute as to whether the appellant has made a sufficient recovery that the condition in s.91(2) is no longer satisfied. Subject to any submissions counsel may wish to make to us, it is our present view that in such circumstances it will be open to the appellant not only to rely on s.91, but also to rely on Articles 2 and 3 in so far as any violation would be attributable to the lack of facilities in relation to the then state of his mental illnesses.