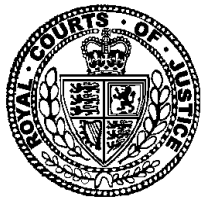

Neutral Citation Number: [2014] EWHC 153 (Admin)

Case No: CO/9046/2011

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/01/2014

Before:
THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(Lord Thomas of Cwmgiedd)

MR JUSTICE OUSELEY
and
MR JUSTICE BLAKE

- -

Between:

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

- -
- -

Clare Montgomery QC and **Mark Summers** (instructed by **Corker Binning**) for the **Appellant**
Hugo Keith QC and **Ben Watson** (instructed by **CPS**) for the **Respondent**

Hearing date: 13 December 2013

- -

Approved Judgment

Lord Chief Justice of England and Wales:

This is the judgment of the Court to which we have all contributed

(a) The murder of the appellant's wife, Anni Hindocha

1. On 29 October 2010 the appellant married Anni Hindocha. They went to South Africa on honeymoon. On the evening of 13 November 2010, Anni was murdered with a single gunshot wound to the head.

2. On 10 January 2011 the Respondent (the Government) sought the extradition of the appellant so that he could be tried for the murder of Anni Hindocha.

(b) The proceedings in 2011

3. On 10 August 2011 the Senior District Judge heard evidence and submissions at the extradition hearing. It was clear that the appellant suffered from Post Traumatic Stress Disorder (PTSD) and a depressive illness. He was unfit at that time to stand trial. The Senior District Judge dismissed all the objections to his extradition and sent the case to the Secretary of State. On 28 September 2011 the Secretary of State ordered the appellant's extradition. An appeal was made to this court by those acting on behalf of the appellant on two issues:

   i) Whether the appellant's mental condition and the attendant risk of suicide were such that he should not be extradited.

   ii) Whether the prison conditions which he would experience in South Africa were such that it would be a breach of Articles 2 and 3 of the European Convention on Human Rights (ECHR) to extradite him.

4. This court held in a judgment handed down on 30 March 2012, [2012] EWHC 842 (Admin), that, in the light of the undertakings given by the Government of South Africa, there would be no violation of Articles 2 and 3 by reason of the prison conditions in South Africa. However in the light of his medical condition the court concluded that it would be unjust and oppressive to order his extradition by reason of the provisions of s.91 of the Extradition Act 2003 (the 2003 Act). That section provides:

> **Physical or mental condition**
>
> (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.

5. The court held that the Senior District Judge should have exercised his powers under s.91(3)(b) of the 2003 Act to adjourn the extradition hearing. In the light of the court's conclusion on s.91, the court did not determine what the position would be if at a subsequent stage the appellant still remained unfit to plead or stand trial (see paragraph 85 of the judgment).

6. Under s.104 of the 2003 Act, the powers of the court are very limited as the court can only:

> (a) allow the appeal;
> (b) direct the judge to decide again a question (or questions) which he decided at the extradition hearing;
> (c) dismiss the appeal

We therefore directed the judge to decide the question under s.91 again.

(c) The further proceedings

7. The appellant remained in detention under s.3 of the Mental Health Act first at the Fromeside Clinic and then at Blaise View. The move to Blaise View and a change of medication had some impact on his mental condition.

8. The extradition proceedings resumed before the Senior District Judge in May and June 2013.

(d) The medical evidence

9. The Senior District Judge heard further evidence from Professor Nigel Eastman (who was instructed on behalf of the appellant) and Dr Ian Cumming (who was instructed on behalf of the Government of South Africa).

10. They were agreed that the appellant continued to suffer from PTSD (Professor Eastman regarding it as severe and Dr Cumming regarding it as moderate/severe) and from a moderate to severe depressive illness; that there was a real risk of self-harm and suicide, but it was not immediate; that he was unfit to plead under English law; if extradited at that time, it was highly likely that there would be the need for a fitness to plead process in South Africa. Neither expected a full recovery from his disorders; any improvement was likely to be extremely slow and the end point was uncertain. Extradition would worsen his symptoms, but this could be managed during travel and in South Africa.

11. Professor Eastman said in his evidence that he believed that the appellant was a long way from being fit to plead. At the time the appellant could not, in his opinion, instruct counsel or solicitors or follow the course of the proceedings; any attempt to give an account of what had happened to his lawyers or at trial would enhance his PTSD. He considered that the prospects for achieving fitness to plead were very poor if the appellant was extradited immediately, but improvements would be maximised

by continuation of treatment in the UK for a further 6 months. If there was no improvement in 6 months, then he considered that there would be no advantage in further delay. His view was that if the appellant had not improved in 6 months, then the prognosis was very poor, though he added that things could happen in South Africa which he could not predict. If the appellant went to South Africa and did not improve, he was at risk of being chronically severely ill and chronically unfit to plead.

12. Dr Cumming in his evidence considered that the extradition proceedings were a factor helping to maintain the appellant's illness. Delaying extradition would not, in his opinion, help. There were advantages in progressing extradition and a trial. It was less likely that he would recover if he remained in the UK. Although the appellant understood the charge against him, he was unfit to stand trial and would remain so for some time at least. The main issue as to his fitness for trial was his hyperacusis and problems with concentration; the position was more marginal than before. He was not willing to prejudge the outcome of a fitness to plead process.

(e) The decision of the Senior District Judge

13. On 24 July 2013 he handed down a judgment in which he concluded:

i) Dr Cumming's report showed that the facilities at Valkenberg Hospital were sufficient to treat the appellant's illnesses and afford him a good quality of care.

ii) If the appellant was extradited, he would be either granted bail or remanded to Valkenberg Hospital; there was no doubt that he would be well cared for there and have his needs met.

iii) If the appellant was found unfit to plead and became a state patient in South Africa, his case would be kept under review.

iv) It was not possible to decide which of the medical experts was right as to the prognosis on fitness to plead. The arguments were finely balanced.

> "So the evidential position is that extradition now may mean that an opportunity for recovery is missed. It may mean that recovery is simply set back temporarily. It may mean that there are advantages in pressing on with extradition now rather than delaying any further.

v) In summary:

> "There has been a recovery but it has been slow. It may be a long time before Mr Dewani is fit to plead, but he may be close to that point. It is not impossible that if returned now, then after a reasonable period of further treatment and assessment he will be found fit to plead and a trial can take place. The evidence is that Mr Dewani will receive the care he needs in South Africa… There remains a real risk of suicide, but also confidence that in South Africa, as here, there are systems in place to try to minimise that risk. Mr

> Dewani remains seriously ill, but the prognosis is uncertain. Although the evidence is that Mr Dewani is unfit to plead now, he may or may not become fit to plead in the foreseeable future. It is far from certain that he will recover more quickly if he remains here, and there is some evidence that delaying extradition may make the clinical toll worse so there are some advantages in moving on…. Balancing the evidence that has been put before me, I find that the condition in s.91 (2) of the Extradition Act no longer remains satisfied."

14. In the period between that hearing and the hearing before us, the medical condition of the appellant was unchanged.

(f) The procedure before the Divisional Court

15. The powers of the Court to decide what should happen after the hearing of the appeal are highly restricted under the 2003 Act; this court does not have its usual power to do what is in the interests of justice. The powers are set out in s.104 of the 2003 Act. Under s.104(7), if after the further hearing directed by the court, the judge comes to the same conclusion as he did at the original extradition hearing, the appeal must be taken to have been dismissed by a decision of the High Court.

16. An application was made to this court on behalf of the appellant therefore to certify points of law of general public importance for the purposes of an application for leave to appeal to the Supreme Court from the decision in 2012 and to re-open the appeal under the provisions of CPR 52.17. There was also an application for judicial review.

17. We considered that it was in the interests of justice for us to determine that which we had declined to decide at the last occasion, namely what the position would be if at the resumed extradition hearing the position was that he remained unfit to stand trial. That issue involved two questions

    i) Is a person who is currently unfit to plead "an accused" for the purposes of s.70(4)(a) of the 2003 Act, if he is being extradited in circumstances where he may remain unfit to plead?

    ii) Is it unjust or oppressive to extradite a person who is agreed at the time of the determination to be unfit, whatever the prognosis? In answering that question, are the procedures in the requesting state in relation to fitness to plead relevant?

    We therefore directed that the appeal be re-opened so that we could address these two questions. Each question approached the same issue as to how unfitness to plead should be addressed under different sections of the 2003 Act.

18. We directed that the application for certification of points of law of general public importance and for leave to appeal to the Supreme Court should await our decision on the two questions.

19. Before turning to each of the questions it is convenient to refer to three previous decisions of this court where the issues of unfitness arose. All turned on the issue of whether it was unjust or oppressive to extradite the requested person.

i) *In re Alfred James Davies* (27 July 1997, unreported). The requested person had been charged in Canada with causing death by dangerous driving in November 1989. His extradition was ordered and proceedings under the Extradition Act 1989 had concluded by December 1995. In February 1996 the requested person applied for a writ of habeas corpus on the basis that his clinical depression made him unfit to plead. The court (Hobhouse LJ and Moses J) accepted that the determination of whether a person was fit to stand trial was part of the processes of a criminal trial and therefore within s.1 of the Extradition Act 1989; that section provided that the purpose of extradition was to return an accused to face trial. However the court concluded it would on the facts be oppressive to extradite him; there was no evidence that he would recover or how long it would take before trial.

ii) *R (Warren) v Home Secretary* [2003] EWHC 1177 (Admin). The requested person was charged with fraud in the USA. Under the Extradition Act 1989 the Home Secretary could decline to order surrender if it would be wrong, oppressive or unjust to do so. The requested person submitted to the Home Secretary that he should not be extradited because of his unfitness to stand trial. The Home Secretary's refusal was reviewed by this court. Moses J said at paragraphs 26 -7:

> "26. The starting point, in my view, must be the proposition that it is part of the trial process that there should be a determination, where such an issue arises by the court, of the question whether a defendant is fit to be tried….
>
> 27. In the context of extradition proceedings, it is for the courts of the requesting State to determine those issues. They are questions of fact relevant to the issues of fitness of trial, which are for the courts of the requesting State to determine. Such a determination is not for the executive or for doctors, but are matters appropriate for judicial determination, just as other questions of fact are for the courts of the requesting State."

On the facts there were genuine issues as to the claimant's fitness and in the circumstances it was not unjust or oppressive to extradite him. Hale LJ agreed. At paragraph 42, she said:

> "It will not generally be unjust to send someone back to face a fair process of determining whether or not he is fit to face trial. I accept that it may be wrong or oppressive to do so if the inevitable result will be that he will be found unfit. But even in those circumstances, there may be countervailing considerations. For example, if there is the counterpart of our process in the other country, where a person may be found to have committed an act which would otherwise have been a

> serious crime, particularly if it were to be a crime of violence involving risk to the public, and if it would then be appropriate to detain the person for medical treatment, it could be in the public interest to enable that process to take place. That is not this case, but I would not wish to accept that it is inevitably going to be oppressive to return somebody in such circumstances".

iii) *Government of the USA v Tollman* [2008] EWHC 184, [2008] 3 All ER 150. The District Judge found that one of the requested persons, Mrs Tollman, was unfit to plead. There was evidence that she might never recover and her mental condition was deteriorating fast. The judge thought it was unlikely that she would recover in the near future. He concluded it would be unjust and oppressive to extradite her. This court (Moses LJ and Ouseley J) held that it was for the UK court to reach its own view in the light of all the circumstances, including the process in the requesting state, to determine whether it would be unjust or oppressive under s.91 of the 2003 Act to extradite the person because of her mental condition (see paragraphs 163-6). There was nothing that showed that the judge had approached s.91 wrongly.

20. We turn to each of the two questions.

Question 1: Is a person who is currently unfit to plead an 'accused' for the purposes of s.70(4)(a) of the 2003 Act if he is being extradited in circumstances where he may remain unfit to plead?

(a) The provision in s.70(4) of the 2003 Act

21. A request for a person's extradition is valid under s.70(3) of the 2003 Act if it contains a statement under s.70(4):

> "(a) that the person is accused in the category 2 territory of the commission of an offence specified in the request, and (b) the request is made with a view to his arrest and extradition to the category 2 territory for the purpose of being prosecuted for the offence."

22. Miss Montgomery QC, acting on behalf of the appellant, contends that where a person is currently unfit to plead in a criminal trial it cannot be said that the request is made for the purpose of being prosecuted for the offence and the requested person is also therefore not "an accused" within the meaning of the Act. It was said that this conclusion follows first by the application of the principles in the decision of the House of Lords in *R v H* [2003] UKHL 1; [2003] 1 WLR 411 to extradition and second by considering the term "accused" through cosmopolitan eyes as the House of Lords had said in *Re Ismail* [1999] 1 AC 320.

(b) The nature of fitness to plead proceedings

23. In *R v H* it was held that where a person has been found to be unfit to plead, the procedure applied in England and Wales under s.4A Criminal Procedure (Insanity) Act 1964 (as amended) to establish whether that person had done the acts charged did

not involve the determination of a criminal charge within the meaning of Article 6 of the ECHR and therefore did not involve criminal standards of fair trial.

24. Lord Bingham with whom all other members of the appellate committee agreed examined the issue by applying the guidance of the Strasbourg Court in *Engel v Netherlands (No 1)* (1976) 1 EHRR 647. He said at 678-679 :

> "16. It is first necessary to know how the issue is classified in domestic law. …. But this is the starting point, and it is clear that the domestic law of England and Wales does not treat the section 4A procedure as involving the determination of a criminal charge. When a finding of unfitness is made it is provided that the trial (meaning the criminal trial) "shall not proceed or further proceed". Section 4A(2) is expressed in terms which make clear that the task of the jury is not that carried out by a jury in a criminal trial: for reasons already given, the jury have power to acquit but they have none to convict. … There can be no punishment. … .. [Counsel for the appellant] came very close to accepting that, in domestic law, the section 4A procedure was not criminal.
>
> …….
>
> 18. It would be highly anomalous if section 4A, introduced by amendment for the protection of those unable through mental unfitness to defend themselves at trial, were itself to be held incompatible with the Convention. It is very much in the interest of such persons that the basic facts relied on against them (shorn of issues concerning intent) should be formally and publicly investigated in open court with counsel appointed to represent the interests of the person accused so far as possible in the circumstances. The position of accused persons would certainly not be improved if section 4A were abrogated. In my opinion, however, the argument is plainly bad in law. Whether one views the matter through domestic or European spectacles, the answer is the same: the purpose and function of the section 4A procedure is not to decide whether the accused person has committed a criminal offence. The procedure can result in a final acquittal, but it cannot result in a conviction and it cannot result in punishment. … The section 4A procedure lacks the essential features of criminal process as identified in *Customs and Excise Commissioners v City of London Magistrates' Court* [2000] 1 WLR 2020 at 2025.
>
> 19. The third *Engel* test was expressed by the European Court in this way ((1976) 1 EHRR 647 at 678-679, paragraph 82):
>
> > "However, supervision by the court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a

> society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so."
>
> Mr Smith for the appellant accepted that he could not rely on this test, because he accepted that the orders which the court could make on a finding by the jury adverse to the accused under section 4A were none of them punitive. But the fact that the procedure cannot culminate in any penalty is not neutral. The House was referred to no case in which the European Court has held a proceeding to be criminal even though an adverse outcome for the defendant cannot result in any penalty. It is, indeed, difficult if not impossible to conceive of a criminal proceeding which cannot in any circumstances culminate in the imposition of any penalty, since it is the purpose of the criminal law to proscribe, and by punishing to deter, conduct regarded as sufficiently damaging to the interests of society to merit the imposition of penal sanctions."

25. The law in South Africa under ss.77-79 of the Criminal Procedure Act 1977 is broadly the same. If a person is deemed unfit to stand trial, but is held to have committed the act, his detention is not detention after conviction, but civil detention by reason of the person's mental condition: see *State v Ramokoka* (unreported, 25 April 2006, High Court of South Africa, Witwatersrand Local Division). If the person is found to have committed the act, he becomes a state patient and is liable to be detained for life unless released by a judge in chambers under the Mental Health Care Act 2002.

(c) The submissions of the appellant

26. It was submitted by Miss Montgomery QC on behalf of the appellant that by parity of reasoning in an extradition case, where a requested person was currently unfit to be tried and there was a realistic prospect that if extradited he could remain unfit, there was accordingly a realistic prospect that if extradited to the requesting state he would remain unfit; accordingly he would not be prosecuted or tried for the offence. If the legal system of the requesting state provided that a person remaining unfit would be detained, the requested person would be at risk of detention other than by a criminal procedure; such a person was not therefore an "accused person".

27. Examination of whether he had committed the acts under the South African equivalent of the procedure under the Criminal Procedure (Insanity) Act 1964 was not a trial where punishment might result, but a civil inquiry into whether preventive detention was needed. A person would only be an "accused person" whose extradition was required for the purposes of prosecution if that person, at the point of time when he was to be extradited, was either fit to be tried or his fitness legitimately

disputed. In the present case it was common ground that he was not fit to be tried at the point of time at which he would be extradited.

28. Miss Montgomery QC in advancing this core submission on behalf of the appellant developed her argument by the following ancillary submissions:

i) The South African procedure for determining whether an unfit defendant did the act set out in the charge is a particularly fragile means of adjudication. The case law suggests that the decision is reached on the civil balance of probabilities and there is no requirement for the prosecution to satisfy the judge to the civil standard by adducing evidence; indeed a summary procedure based on a prosecutor's assurance is possible: see Criminal Procedure Act 1977 (South Africa) s.77 and 78 (as amended) and the cases of *S v Sithole* (2005) (1) SACR 311 at pp 314-5; *S v Matu* (2012) (1) SACR 68 at [20] ; and *S v Dewhurst* (2012) (1) SACR 637 at [5].

ii) Detention of a person with a mental disorder pursuant to Article 5 (1)(e) of the ECHR is preventive and not punitive or criminal in nature. It cannot form the basis of a legitimate extradition request under the 2003 Act.

iii) In this case the appellant is a British citizen with no links to South Africa other than his visit there during his honeymoon. It would be wholly inappropriate for him to be returned to indefinite preventive detention in South Africa separated from his family, doctors and support network. Foreign criminals who are unfit to plead and cannot be returned under extradition arrangements in principle could be removed under Immigration Act powers.

(d) The submissions of the Government of South Africa

29. The Government of South Africa contended that the submission advanced by Miss Montgomery QC, though novel, was misconceived:-

i) It has always been clear that the South African authorities wanted to prosecute the appellant for the offence of murder. The fact that in the course of the proceedings an issue as to his present fitness to plead may arise does not alter the fact that he is accused of the offence and the request is made for the purpose of being prosecuted for an offence. The conditions in s.70(4) were not merely satisfied by the statement to that effect in the extradition request, but that was also the actual position.

ii) No complaint was made before the Senior District Judge that South African law and procedure with respect to unfit defendants was defective or represented a human rights bar to the appellant's return. Some of the criticisms mounted before us were misconceived.

iii) The question of whether a person is unfit to plead is in principle a matter for the courts of the requesting state. This is not a case where it is inevitable that the appellant will be unfit by the time he stands trial after an appropriate period has been provided to recover from the fact of return itself.

iv) In an appropriate case, where future unfitness is inevitable or highly likely, proper protection for the accused is provided by the test of oppression (which we consider as question 2) and/or any undertakings that the requesting state may provide in the event of a durable unfitness finding being made, rather than by removing the case from the ambit of extradition altogether.

(e) The common ground between the parties

30. There was and could be no dispute that the meaning of 'accused person' in the 2003 Act (which was intended to give effect to international treaties for the surrender and return of criminal suspects) requires a broad and purposive interpretation to give effect to wide differences in national arrangements: *Re Ismail* [1999] 1 AC 320 per Lord Steyn at 326F-327G.

31. Under the law of South Africa and the law of England and Wales a procedure to determine fitness to stand trial does not constitute the determination of a criminal charge and the resulting detention is not punishment. It has long been accepted that a person cannot be extradited to facilitate civil detention or for any civil process: *Pooley v Whetham* (1880) 15 CH D 435. Moreover, South Africa is a state party to the European Convention on Extradition 1957 Article 14 (1) of which provides:

> "A person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom, except in the following cases:
>
> a. when the Party which surrendered him consents. …..
>
> b. when that person, having had an opportunity to leave the territory of the Party to which he has been surrendered…"

32. It is therefore accepted that a request made simply for the purpose of subjecting a person to indefinite preventive detention as a mentally disordered person permanently unfit to stand trial would fall outside the 2003 Act, as the extradition was not for the purpose of prosecuting that person for a criminal offence.

33. The real issue is, in our view, whether the possibility of future long term unfitness to plead resulting in detention is sufficient to take a case out of the 2003 Act procedures into which it clearly falls at the outset.

(f) Our conclusion in relation to the general approach

34. Issues of fitness to plead are, in our judgment, issues that arise in the course of criminal proceedings which have been instituted with a view to prosecution, to determining guilt and, where guilt is established, to imposing punishment. The potential application of procedures for examining whether a person is mentally unfit to stand trial and, if so, whether it is established that he did the acts alleged against him in the criminal charge, does not mean that a criminal prosecution and subsequent trial is not sought at the point of extradition. Nor does such an eventuality create

some new substituted and impermissible purpose for the request for the person's return.

35. The fact that part of criminal proceedings may be concerned with investigation of issues of unfitness and collateral questions of whether acts were done does not determine whether a person is accused of the commission of an offence for the purpose of section 70 of the 2003 Act or whether he is requested for the purposes of a criminal prosecution. Nor does the fact that the resolution of such issues is not itself the determination of a criminal charge with the higher standards of fairness which are expected in that context.

36. To construe the Act so that a request for return successively fell in and out of the statutory scheme according to the state of medical evidence as to present unfitness and future prospects would be contrary to the purposive reading of the section in accordance with *Re Ismail* principles. The proper place for protecting the interests of the requested person are the other parts of the Act providing the accused with a basis to resist return if his human rights were to be breached (no longer in issue in this case) or more broadly whether return would be oppressive (considered in question 2).

37. In our judgment therefore the risk that on return and due inquiry a person might be found to continue to be unfit to stand trial does not mean that he is not an accused person or that the request for his return is made for any purpose other than that of being prosecuted for the offence. Nor does the fact that he may presently be unfit have that consequence, provided that there is a real prospect that the unfitness is not permanent. We consider, as envisaged in *Ismail,* that in each case there must be an intense focus on the facts to determine the purpose for which the requested person is being extradited.

(g) The approach applied to the appellant's case

38. There is no reason to doubt in our view that:

    i) The Government of South Africa genuinely seeks the appellant's return for the purpose of prosecution.

    ii) There is a well-developed procedure under the law of South Africa to ensure both a fair trial and fairness to a person charged with a crime who is alleged to be unfit to face trial.

39. We accept the submission of the Government of South Africa that this is not a case where the future prospects of the appellant being fit to stand trial are so negligible as to be unrealistic. He does not suffer from some incurable and permanent condition. There has been some response to the treatment he has received in the United Kingdom. There is some reason to believe that the continued uncertainty as to whether he can be returned may operate to deter his future rehabilitation. If returned to South Africa now, the Government of South Africa has given undertakings as to his place of detention and appropriate treatment is available there to promote his progress to fitness.

40. The submissions made on behalf of the appellant by Miss Montgomery QC receive no support by reference to the case law in South Africa as to how s.77(6) of the South

African Criminal Procedure Act operates. The proper determination of the section is for the South African courts that are in turn subject to appellate review and scrutiny for constitutional propriety. However, it appears to us that none of the cases cited were ones where the accused person himself wanted a full inquiry into whether he did the acts done, although we do not underestimate the problems involved where an unfit person cannot give evidence in his own defence and may not be able to give instructions to enable inculpatory evidence to be undermined in cross-examination. The fact that a civil standard is used in such proceedings does not make the procedure unfair; indeed the very point made in *R v H* was that the international standards of fair trial in a criminal context do not need to be deployed. At no point in the proceedings below or before this court has the appellant submitted that he faces a flagrant violation of his right to liberty and security of the person on the basis of the fitness to plead procedure such that extradition should be refused on human rights grounds.

41. We recognise that it is comparatively unusual for extradition to be effected in respect of a person who it is currently agreed by the medical experts is currently unfit to plead and has been for some time. In the event that the return was effected and after an appropriate passage of time and treatment it was determined after appropriate inquiry that this condition remained, and the appellant then faced indefinite detention without conviction, the question of what then could or should be done may give rise to serious issues.

42. We consider this issue in the context of the second question in relation to oppression under s.91 of the 2003 Act, as it properly arises in relation to that issue. S.70(4) is concerned with the examination of the request in accordance with the statutory criteria; issues relating to fairness and oppression in due course in the requested state are properly dealt with under s.91 of the 2003 Act.

43. We therefore consider that the appellant is an accused under s.70 (4) and is being extradited for the purposes of prosecution. The appeal on this question therefore fails.

Question 2: Is it unjust or oppressive to extradite a person who is agreed at the time of the determination to be unfit, whatever the prognosis? In answering that question, are the procedures in the requesting state in relation to fitness to plead relevant?

44. It was common ground that there had been no case where a person had been extradited where it was accepted that he was unfit to plead at the time he was to be extradited and it was uncertain as to when he would be fit to plead.

(a) The relevance of the procedure in South Africa in relation to fitness to plead

45. As we have set out the procedure in South Africa to determine whether a person is fit to stand trial is a process distinct from the criminal trial; it is a civil process. As we have also set out there was some dispute as to the procedure in South Africa, but we can proceed on the basis favourable to the appellant that:

    i) A court would determine on the balance of probabilities whether or not a person unfit to stand trial committed the act.

    ii) The court could rely on information supplied by the prosecution; the prosecution did not have to call evidence.

(b) The submissions of the parties

46. On behalf of the appellant Miss Montgomery QC submitted:

i) S.91 should be interpreted in the light of two reports. First that of the Joint Committee on Human Rights dated 22 July 2002 on the bill that became the 2003 Act. At paragraph 6 the committee proposed that the bill be amended so that the court would be required to consider whether the requested person had the mental and physical capacity to stand trial, and if he did not, that should be a bar to extradition. Second the report of the Home Affairs Committee agreed with that proposal: see its report of 28 November 2002 at paragraphs 132-5.

ii) S.91 looked at oppression and hardship at the time of extradition and to what would happen if the requested person was to be extradited. It was not merely directed as to what would happen at the trial. Amongst the considerations were whether extradition would worsen the person's medical condition, what safeguards were in place, and all issues relevant to the requested person's health and future welfare.

iii) If it was uncertain whether there would or would not be a trial as it could not be determined on the medical evidence whether the requested person would become fit, then he should remain in the UK until it was clear whether he would be fit, unless the condition making him unfit was anxiety about extradition.

iv) That was because it would be unjust and oppressive to return a person to a foreign state where there was a risk that a court might determine he was unfit and so keep him in "preventative detention" indefinitely.

v) In the present case the proper course was to remit the case to the Senior District Judge and the proper course was for the judge to adjourn the proceedings further under s.91 of the 2003 Act until it was determined whether he would recover.

47. Mr Keith QC submitted on behalf of the Government of South Africa:

i) An inquiry directed at the specific facts of each case had to be undertaken. It was necessary to look at the whole process which would be involved taking into account all relevant circumstances. The court was not confined to looking at matters as they stood at the extradition hearing; future safeguards and future likelihoods were relevant factors.

ii) It was only where a finding of unfitness was inevitable that a court should on the basis of the three cases to which we referred at paragraph 19 refuse to extradite.

(c) Our approach

48. At paragraphs 63-74 of the judgment of March 2012, the court set out its views on the approach that should be taken to the construction of s.91.

49. Our attention was helpfully drawn by Miss Montgomery QC to an explanatory report on the 1957 European Convention on Extradition where at paragraphs 13-14, it was recorded that a reservation was formulated to enable states to qualify their agreement to extradite on humanitarian grounds if the extradition of a person might cause "consequences of an exceptional gravity for the person sought particularly by reason of his age or state of health". About 20 states parties to the Convention have made reservations in these or similar terms.

50. We therefore accept, as was submitted by Miss Montgomery QC, that the breadth of the factors to be considered under s.91 include looking at the question of whether it was unjust or oppressive to extradite the person at the time the request was being considered as well as looking forward to what might happen in the proceedings in South Africa if he was extradited. We must take into account all such matters, including the consequences to the requested person's state of health and age. We accept that this entails a court taking into account the question as to whether ordering extradition would make the person's condition worse and whether there are sufficient safeguards in place in the requesting state (as the Privy Council held was necessary in *Knowles v Government of the USA* [2007] 1 WLR 47 at paragraph 31).

51. We do not, however, accept that there are any hard and fast rules; that would be inconsistent with the position that each case must be specifically examined by reference to its facts and circumstances. The only situation in which a court would most probably say it would be oppressive and unjust to return him is where it is clear that he would be found by the court in the requesting state to be unfit to plead. That follows from the decisions to which we have referred at paragraph 19. However, such a case would, as Mr Keith QC accepted, be in many respects analogous to a case where a UK court concludes it is inevitable that a court in the requesting state will conclude that a fair trial is not possible. In such a case it would be unjust and oppressive to return that person: see *Woodcock v Government of New Zealand* [2004] 1 WLR 1979 at paragraph 20, *Knowles* at paragraph 31 and *Gomes v Government of Trinidad and Tobago* [2009] 1 WLR 1038 at paragraphs 31-36.

(d) Position if the court in the requesting state decided the requested person was unfit

52. In a careful and clear judgment the Senior District Judge considered the application of s.91 in his second judgment. Subject to the issue we raise at paragraphs 53-61 below, we consider that he took into account all the relevant circumstances and made no error of law. It would therefore be difficult to see, save in relation to that one issue, how there can be any criticism of the Senior District Judge's conclusion that it was not in the circumstances unjust or oppressive to extradite the appellant.

53. One consideration that the Senior District Judge did not take into account was what would happen to the appellant if he was found unfit to plead; that was the issue which we reserved in the judgment of March 2012.

54. It seems clear on the evidence that:

    i) If the court in South Africa were to conclude that he was unfit to plead, then the court would proceed to determine whether he did the act.

ii) If it determined he did not do the act, then there would be nothing to prevent his return to the UK.

iii) If, however, it was found that he did the act, then he would be detained in South Africa.

55. In *Warren* an undertaking was given that if the defendant was not found fit to stand trial and was not treated successfully within a matter of months, he would be returned to the UK (see paragraph 31 of the judgment). No such undertaking has been given in this case, but Mr Keith QC accepted that in a case where the accused might never be fit, it would be sensible in principle to require an undertaking that he be returned.

56. Mr Keith QC submitted, however, that it was not open to the court in re-opening the appeal it had heard in 2012, to take the course of asking for an undertaking as the court was deciding as a matter of principle the question whether a person could be extradited, if he was unfit at the time of the extradition hearing whatever the prognosis might be. The time for seeking such an undertaking had passed, as there was under s.107 no appeal possible from the second decision of the Senior District Judge.

57. We cannot accept that submission. It seems to us clear that, as Mr Keith QC submitted, s.91 requires that the circumstances in each case must be specifically examined. In circumstances where a person who has no connection with the requesting state save for a brief visit, is currently unfit at the time of the extradition hearing, the prognosis is uncertain and there is a real possibility that he might never be fit, one of the circumstances that has to be taken into account in determining whether it would be unjust and oppressive to return the requested person, is whether an undertaking is offered to permit his return to the UK in the event it is found, after a reasonable time for further treatment in the requesting state, that he is likely to remain unfit.

58. No consideration was given to the requirement of an undertaking as part of the circumstances to be considered. In the judgment of March 2012 we did not deal with the issue of what the position would be if the appellant remained unfit to plead. In the course of re-opening the appeal, we have determined that one of the circumstances to be considered is whether an undertaking should be offered.

(f) Conclusion

59. We therefore answer the second question as follows: it might be unjust and oppressive to order the return of a person who was agreed to be currently unfit and where there was a prospect that he might remain permanently unfit without considering whether an undertaking should be required from the requesting state.

60. The circumstances of this case are such that we consider on the findings made by the District Judge, it would be unjust and oppressive to return him without such an undertaking. It must be for the Government of the Republic of South Africa to decide whether it wishes to give such an undertaking to the following effect. In the event of the appellant being found unfit to be tried, he will be free to return to the UK, unless there is found to be a realistic prospect of his being tried within a year (or other stated reasonable period) of that finding and the trial takes place within the period. In any

event the appellant must be free to return in the event a Court in South Africa, having found him unfit to be tried, embarked on the process of determining under the Criminal Procedure Act 1977 whether he did the act.

61. If such an undertaking was given, then it would not be oppressive or unjust. A similar course was suggested in *Sullivan v United States* [2012] EWHC 1680 (Admin) in a case where one possible eventuality was that the requested person would be liable to an order of civil commitment in flagrant denial of his Convention rights.

62. We reject Miss Montgomery QC's submission that we should direct the judge to adjourn the matter further. There may be cases where that is appropriate, but even if we have jurisdiction, in the light of the provisions of s.104 of the 2003 Act, this is not such a case. The death of the appellant's wife Anni occurred over three years ago. The interests of justice, including the interests of her family who like other families of murdered persons wish to see a trial take place as soon as is practicable, require expedition and that there should be no further delay, provided that proper protection is afforded to the appellant in the manner we have set out.