Neutral Citation Number: [2014] EWHC 1886 (Admin)

Case No: CO/12120/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/06/2014

Before:
LORD CHIEF JUSTICE OF ENGLAND AND WALES
and
MR JUSTICE CRANSTON

- -

Between:

David McIntyre	**Appellant**
- and -	
Government of the United States of America	**Respondents**
and	
The Home Secretary	

- -

Edward Fitzgerald QC and Ben Cooper (instructed by **Kaim Todner Solicitors Limited**) for the **Appellant**
Toby Cadman (instructed by the **CPS**) for the **Government of the United States of America**
Ben Watson (instructed by the **Treasury Solicitor**) for the **Secretary of State for the Home Department**

Hearing date: 18 March 2014

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Approved Judgment

Lord Thomas of Cwmgiedd, CJ:

This is the judgment of the court.

1. There is before the court an appeal under s. 108(5)-(8) of the Extradition Act 2003 (the 2003 Act); these provisions were inserted into the 2003 Act by the Crime and Courts Act 2013 (the 2013 Act).

2. It is common ground that under the transitional provisions of the Act, these new provisions apply to this appeal. Before turning to the specific circumstances of the appeal, it is necessary to set out the approach that we will take to the new provisions. The background is as follows.

(a) The Human Rights jurisdiction of the Home Secretary

3. The 2003 Act has always provided that in relation to extradition under Part 2 of the 2003 Act to category 2 territories (which include the USA), there must be an extradition hearing before a District Judge in respect of the requested person. If the conditions in the Act are satisfied, the District Judge then sends the case to the Home Secretary to decide whether to order extradition. If that decision is made and so ordered, then the requested person may appeal to the High Court against the decision of the District Judge and the Order of the Home Secretary.

4. If the appeal failed, then under the law as it had developed prior to the amendment to the 2003 Act effected by the 2013 Act, the requested person could seek to invite the Secretary of State to withdraw the extradition order on the basis that new circumstances had arisen which would put the Secretary of State in breach of her obligations as a public authority under s.6 of the Human Rights Act if the extradition proceeded. That jurisdiction, sometimes referred to as the *McKinnon* or "long stop" human rights jurisdiction, was explained in decisions of this court in which the court was asked to set aside by way of judicial review the decision of the Home Secretary refusing to withdraw the extradition order: see *McKinnon v The Government of the USA* [2007] EWHC 762 (Admin) at paragraphs 61-63 and *McKinnon v The Home Secretary* [2009] EWHC 2021 (Admin) at paragraphs 64-5.

(b) The proposals for reform

5. In the review of the UK's extradition arrangements conducted under the chairmanship of Sir Scott Baker in September 2011 recommendations were made that the human rights issues arising at the end of the extradition process should be dealt with by the courts: see paragraphs 9.32-40 and 11.71-2 of the report of the review. The recommendation was that any supervening human rights issues arising after the conclusion of the appeals should be addressed by re-opening the appeal, as the High Court had held could be done in Part 1 cases: see *Ignaoua and Others v The Judicial Authority of the Courts of Milan and Others* [2008] EWHC 2619 (Admin). In the proceedings relating to *Abu Hamza* [2012] EWHC 2736 (Admin), this court pointed out the serious delays that were occasioned by invoking this jurisdiction at the end of the extradition process in the courts.

(c) The new provisions

6. To give effect to these recommendations the 2003 Act was amended by the Crime and Courts Act 2013.

   i) S.70 (10) and (11) were added; they provide that the Secretary of State is not to consider whether extradition would be compatible with the requested person's human rights under the Convention at any time after the issue of the certificate under s.70 that there is a valid extradition request.

   ii) s.108 was amended to insert s.108 (5) –(8). S. 108 (5) and (6) provide that, if the permitted period for bringing an appeal of 14 days from the date of the decision of the Secretary of State has expired and the requested person has not been extradited (as is the case here), the person can only appeal on human rights grounds. S.108 (7) provides:

   > "Where notice of an appeal is given in accordance with sub-sections (5) and (6) the High Court is to consider the appeal only if it appears to the High Court that –
   >
   > (a) the appeal is necessary to avoid real injustice, and
   >
   > (b) the circumstances are exceptional and make it appropriate to consider the appeal."

   The effect of these amendments has been to divest the Secretary of State of her human rights jurisdiction under the so called *McKinnon* or "long stop" jurisdiction.

7. The Extradition Appeals (England & Wales and Northern Ireland) Order 2013 (S.I. 2013/2384) made on 19 September 2013 further amended the 2003 Act in respect of the interrelationship of the new provisions and s.109 of the 2003 Act by making it clear that the court can allow or dismiss an appeal where the Home Secretary did not consider human rights issues because of the effect of the modifications to s.70(11).

8. The terms of s.108(7) (a) and (b) of the 2003 Act are identical to the conditions set out in (a) and (b) of the Rule 52.17(1) of the Civil Procedure Rules which provide for the re-opening of final appeals and which currently govern appeals in extradition cases:

   > "(1) The Court of Appeal or the High Court will not re-open a final determination of any appeal unless –
   >
   > (a) it is necessary to do so in order to avoid real injustice
   >
   > (b) the circumstances are exceptional and make it appropriate to re-open the appeal; and there is no alternative effective remedy.
   >
   > (c) there is no alternative effective remedy."

   The Rules governing extradition appeals later this year, probably from 6 October 2014, will be contained in the Criminal Procedure Rules; the corresponding provision to CPR 52.17(1) will be Crim PR 17.27.

(d) The submissions of the parties

9. The contentions of the parties on the proper approach to the operation of the new provisions can be briefly summarised.

   i) Mr Fitzgerald QC on behalf of the appellant accepted that there generally had to be some supervening development after the conclusion of the appeal for the court to be able to exercise the jurisdiction under s.108 (5)-(8). However the court should not be prescriptive beyond this; it should look to the justice of the case. A supervening event could take the form of new evidence which had not been before the court on a previous occasion and there was good reason to consider it. The court should not import the requirement that the requested person had acted with reasonable diligence. It should look simply to the avoidance of injustice.

   ii) Mr Watson, who appeared for the Home Secretary, submitted that as the new provision followed the terms of CPR 52.17 (1) (a) and (b), the court ought to interpret the provisions in the light of the case law in respect of CPR 52.17 together with that concerning the Home Secretary's former *McKinnon* or "long stop" human rights jurisdiction. He referred us to the decisions in *Ignaoua*, *McKinnon* and *Navadunskis v Serious Organised Crime Agency* [2009] EWHC 1292 (Admin).

(e) Our conclusion on the applicable principles

10. As with any new statutory provision which reflects some part of existing practice, there is an inevitable temptation to set about imposing on the new provision the case law that was decided before the provision was enacted.

11. However, as this court made clear in *Dewani v Republic of South Africa* [2012] EWHC 842 (Admin), [2013] 1 WLR 82 at paragraphs 72 and 73, we consider that the court be firmly fixed on the statutory language; the citation of cases which gloss the language or illustrate its application to the circumstances of a case are strongly to be discouraged. The courts will otherwise fall into similar errors to those to which Lord Judge CJ referred in *R v Erskine* [2009] 2 Cr App R 29, [2009] 2 Cr App Rep 29, [2009] EWCA Crim 1425, [2010] Crim LR 48. The court should simply give effect to the statutory language having regard to its statutory context and purpose:

   i) It is well established that all issues relating to the extradition of a requested person under Part 2 of the 2003 Act should be raised at the extradition hearing before the District Judge.

   ii) On any appeal to the Divisional Court the court only considers such issues as have been raised, subject to s.106(5) (a) and (b) of the 2003 Act, as explained by Sir Anthony May PQBD in *Hungarian Judicial Authorities v Fenyvesi* [2009] EWHC 231 (Admin) at paragraphs 32-35 in relation to the equivalent provision in Part 1 (s.29(4) (a) and (b)).

   iii) The decision on the extradition hearing (if there is no appeal) or of the Divisional Court or Supreme Court (if there is an appeal) is intended to bring finality to the extradition proceedings; the Home Secretary is thereafter under an obligation to extradite within strict time limits.

iv) Exceptionally events can occur after the decision on the extradition hearing (if there is no appeal) or of the Divisional Court or of the Supreme Court (on any appeal) which would make extradition incompatible with the requested person's human rights.

v) It was determined by Parliament that it is not apposite that the jurisdiction to determine these issues should remain with the Home Secretary.

vi) The provisions of s.108 (5)-(8) are therefore intended to permit the determination of such issues by the courts by way of an appeal. The express language of the new provisions makes it clear a court can only consider such an appeal if it is both necessary to avoid a real injustice and the circumstances are exceptional and make it appropriate to consider the appeal.

vii) It is not necessary to embellish that language. It is evident from the statutory purposes that a requested person will ordinarily have to establish that the issue arises as a result of a supervening development or event. It will also be necessary to provide a reasonable explanation why the issue was not anticipated at the extradition hearing or on any appeal.

viii) Any application under s.108 (5) - (8) must be brought promptly. The evidence relied on should be filed with the application or within a period immediately thereafter to be measured in days, not weeks. The court must make arrangements for the rapid hearing of the application. It may be desirable for appropriate directions to be given immediately in writing by the Master of the Administrative Court. Strict compliance with the directions must be observed (or a variation sought from the court). The matter should generally be determined at a single hearing to avoid delay. However, though such applications will be rare, the practice we have outlined should be reviewed in the light of experience.

ix) Applications under the new provisions must not be used to bring about undue delay to the process of extradition.

12. If a supervening event arises which does not give rise to issues relating to human rights, then in cases where there has been an appeal to the Divisional Court, there is the possibility of making an application to re-open the appeal under CPR 52.17, - see the observations of Moses LJ in R (*Tajik) v Westminster Magistrates Court* [2013] 1 WLR 2283 at paragraphs 64-5 and the decision in *Dewani v Republic of South Africa* [2014] EWHC 153. It is not necessary for us to decide whether such an application can be made and we do not do so. However, CPR 52.17 cannot be used to raise issues in respect of human rights in Part 2 extradition cases, as the existence of the remedy under s.108 (5)–(8) of the 2003 Act prevents this given the terms of CPR 52.17(1) (c): *cf* the judgment of Richards LJ in *Taylor v Governor of HMP Wandsworth* [2009] EWHC 1020 (Admin).

13. We therefore turn to the circumstances of the present appeal. It is first necessary to set out the history of the course of the proceedings in relation to the extradition of the appellant.

The extradition hearing and the appeal in 2012-3

(a) The appellant

14. The appellant is a citizen of the United Kingdom who was born in April 1971. He served in the Territorial Army before joining the Queen's Lancashire Regiment in 1996; he served in Bosnia and Northern Ireland and became a non-commissioned officer in the Royal Military Police. He left the army in 2002 and set up a security company, Quantum Risk Ltd, providing security to US clients in Iraq. He ended this business in 2009 and then enrolled again in the Royal Military Police.

15. At the time of the extradition hearing and thereafter he has been working in a sales role for a company specialising in vehicle tracking equipment; he lives with his partner and two young children.

(b) The US criminal proceedings

16. On 30 September 2011 a Grand Jury in the District of Columbia returned an indictment against the appellant on the basis that he had conspired with the Chief of Party of the United States Institute of Peace in Iraq to defraud that Institute by obtaining in 2009 an inflated contract for the appellant's company, Quantum Risk Ltd, to provide lodging and security services and by agreeing to pay a gratuity to the Chief of the Institute in connection with the award of the contract. It was alleged that the appellant's company was paid $365,000 under the contract and that he paid $20,000 to the Chief of the Institute.

17. On 17 January 2012 the United States' Department of Justice certified a request for extradition based on an affidavit setting out the relevant matters upon which the Government of the United States of America relied. On 3 February 2012 the Secretary of State issued a certificate pursuant to s.70 of the Act.

(c) The extradition hearing

18. The City of Westminster Magistrates' Court issued an arrest warrant on 25 June 2012. The warrant was executed on the appellant's return from a tour of duty in Afghanistan on 6 July 2012. He appeared that day at the City of Westminster Magistrates' Court.

19. On 12 September 2012 at the extradition hearing District Judge Nicholas Evans ordered that the appellant's case be sent to the Secretary of State. The judge refused a request for an adjournment for a psychiatric assessment on the basis that the appellant might be suffering from PTSD. The District Judge subsequently gave a written judgment in which he explained his reasons. He pointed out there was no evidence of the appellant's psychiatric difficulties, that the application was made only because there might be a need for a psychiatric assessment as he might be suffering from PTSD. This court subsequently held that was clearly an insufficient basis for an adjournment and the District Judge rightly refused it.

20. On 28 September 2012 Dr Humphreys, a general practitioner at a medical centre in Hyde, Cheshire sent the appellant's former solicitors a report on his medical condition. He described the appellant's low mood; he noted that the appellant was

referring himself to Combat Stress, the UK Armed Forces Charity, and that he had requested an assessment by the community mental health team.

21. On 4 October 2012, the appellant attended at a military reserve centre for a mental health assessment; advice was sought regarding his treatment. In November 2012 he saw Colonel McAllister, a Fellow of the Royal College of Psychiatrists and the British Army's only consultant forensic psychiatrist who was stationed at Catterick barracks. According to Colonel McAllister's report of 1 March 2013 to which we refer at paragraph 33 below, the appellant was assessed using the PCL Scale for PTSD with its threshold of 44. He had a score of 51.

22. On 10 November 2012 the Secretary of State ordered the extradition of the appellant under s.93 (4) of the 2003 Act. The Secretary of State noted that concerns had been raised as to whether the appellant might be suffering from PTSD. The letter pointed out that if the appellant wished to contest his extradition on health grounds the correct course was to exercise his right of appeal to the High Court.

(c) The events leading to an appeal to the Divisional Court

23. On 22 November 2012 the appellant filed a notice of appeal; the notice of appeal, though in terms far from easy to understand, raised the appellant's psychiatric condition. A representation order was granted on 7 December 2012. On 10 December 2012 the appellant's then solicitors sought further information from Dr Humphreys; he replied on 15 December stating that the appellant was stressed and anxious, but there did not appear to be any signs of mental illness. He stated that the appellant had been attending at Catterick; it would be helpful to obtain information from the psychiatrist at Catterick.

24. On 16 January 2013 the appellant was given an appointment to see Colonel McAllister on 11 or 22 February 2013.

25. On 14 January 2013 the hearing of the appeal was fixed for 19 February 2013. On 16 January 2013 Master Egan, the Master of the Crown Office held a case management hearing pursuant to CPR Part 52 PD 22.6A(11). The appellant sought time to obtain psychiatric evidence in relation to his contention he was suffering from PTSD.

26. Master Egan made case management orders in the appeal that:

    i) The appellant's evidence should be lodged by 29 January 2013.

    ii) Any evidence from the Government of the United States should be provided by 5 February 2013.

27. Those then acting for the appellant tried, but failed to get the appointment with Colonel McAllister brought forward. Instead it seems to have been moved back to 29 February 2013, for that was when he was seen by Colonel McAllister. No attempt was made to apply to the court to vary its orders and to put the hearing of the appeal back for a short time.

28. The former solicitors instead contacted Dr Duff-Miller, a consultant psychiatrist to the West London Mental Health Trust; he saw him on 5 February 2013 at the City of

Westminster Magistrates Court where he worked as part of the psychiatric court diversion team.

29. In his report of 15 February 2013 Dr Duff-Miller concluded that the appellant was suffering from a mild to moderate depressive illness complicated by a pattern of problem drinking. There was no evidence of PTSD. He concluded that the appellant was not too ill to be extradited and the treatment he required could be provided in prison, whether this be in the US or the UK. He also concluded that the current risk of self-harm or suicide was low to moderate.

(d) The dismissal of the appeal by the Divisional Court on 19 February 2013

30. The court was told by counsel then acting for the appellant on the hearing of the appeal on 19 February 2013 that the report on the appellant's psychiatric condition was not favourable; it was not shown to the court (though it was made available to us as we have set have out at paragraph 29 above). Instead the appellant sought an adjournment to obtain further evidence.

31. The court refused the request for an adjournment and dismissed the appeal. Moses LJ observed in the judgment of this court ([2013] EWHC 453 (Admin) that case management hearings were an essential part of many extradition hearings:

> "6. … These are important proceedings in the Divisional Court, and for that matter in relation to Administrative Court matters generally, because they provide an opportunity for controlling what would otherwise be the slow, wandering process leading up to a hearing. They are orders made by Master Egan in order properly to control proceedings in this court. When, following such a hearing, orders are made, they are orders of the court and they are to be obeyed. Failure to obey them will no doubt lead to the end of the case.
>
> "7. … These were important directions, vital for the proper conduct of this case. They were disobeyed. It is with some dismay that I observe that the solicitors, no doubt under pressure from the appellant, took the view that, rather than obey those directions, rather than apply to Master Egan for a variation, they could leave the matter until the hearing of the case today. That was far too late."

32. On 22 March 2013 the Divisional Court refused to certify a point of law of general public importance.

The events leading to the present appeal

(a) The report of Colonel McAllister in March 2013

33. In a report dated 1 March 2013 Colonel McAllister produced a report in which he concluded that the appellant fulfilled the diagnostic criteria for PTSD; that he had depressive symptoms and there was a high suicide risk. The PTSD arose out of the time he had been in Iraq and the events that he had witnessed there. He said that if the

appellant was given leave to remain in the UK, he would be in a position to offer him treatment for his PTSD. The report noted that he had seen the appellant in November 2012 as we have set out at paragraph 21 above.

34. In a follow up report on 9 April 2013 Colonel McAllister noted that the appellant's condition had deteriorated and he presented a high risk of suicide.

35. There is some further support for the condition diagnosed by Colonel McAllister in a report from the Pennine Care NHS Foundation Trust in respect of an emergency referral of the appellant on 27 February 2013.

(b) The application to the Home Secretary

36. The appellant instructed new solicitors. Between March 2013 and July 2013 there was correspondence between those solicitors and the Home Secretary in which it was agreed that she would consider representations made on behalf of the appellant and defer extradition until those representations had been considered and a decision made.

37. On 15 July 2013 the Home Secretary gave her decision. As the appellant's mental health had been an issue since September 2012, there had been ample time to obtain psychiatric evidence. There was therefore no new or supervening issue or fundamental change of circumstances and so the jurisdiction of the Secretary of State was not engaged. Assuming that the jurisdiction was engaged, notwithstanding the reports of Colonel McAllister, the appellant's extradition would not be incompatible with his Convention rights under Articles 2, 3 and 8.

38. There was then further delay while the solicitors sought assurances that the appellant would not be extradited whilst the appellant considered whether he would seek judicial review of the Home Secretary's decision; the Home Office granted an assurance that no action would be taken to extradite the appellant until the end of August.

(c) The bringing of the present appeal

39. At the end of August 2013 the appellant issued an appeal under s.108 (50-(8), as it was common ground that the provision applied under the transitional provisions of the Act. It was contended on behalf of the appellant that the circumstances fulfilled the statutory criteria set out in s.108 (7). It would be a real injustice for him to be extradited with a high risk of suicide and untreated PTSD when the issue had not properly been put before the court.

(d) The case management hearing in November 2013

40. On 27 November 2013 Master Gidden, the Master of the Administrative Court, ordered the appellant to serve any evidence upon which he intended to rely from a British Army psychiatrist and a Mr Sickler, an experienced US criminologist, by 24 December 2013 and serve a skeleton argument by 28 January 2014. The order also provided an opportunity for the Secretary of State and the Government of the United States of America to file their evidence in response.

(e) The service of the evidence

41. Only the report of Mr Sickler was served on time, namely on 24 December 2013. The medical evidence, a further report by Colonel McAllister (who had retired from his post in the Army), was served on 28 February 2014; the skeleton argument was served on 6 March 2014.

42. A detailed explanation for the delay was set out for us. Colonel McAllister had been instructed, but he had left HM Armed Forces on 16 December 2013 and was due to establish himself in practice at the beginning of 2014. He had asked for an extension till 10 January 2014 to prepare a report. Although Colonel McAllister provided a draft of his report, he did so without seeing either the appellant or the report of Mr Sickler. As Colonel McAllister was employed at the St Andrew's Health Care Consultancy, new administrative arrangements had to be made. Colonel McAllister saw the appellant on 21 January 2014 and provided a report dated 28 February 2014. The solicitors explained their failure to seek the court's variation of its order on the basis that when they had made applications in the past, the office of the court had queried whether such an application was necessary as the time of the judge might be wasted if the report had in fact been served.

43. The Home Secretary and the Government of the United States of America did not respond to the appellant's evidence. As the intervention of the Home Secretary was essentially to assist the court on the issues of law, it would have been for the Government of the United States of America to respond. The Government of the United States of America did not do so on the basis that it was awaiting the report of Colonel McAllister before responding to the report of Mr Sickler and there had been insufficient time to respond. It relied on the evidence provided to this court in *Savage v United States of America* [2012] EWHC 3317 as to the facilities available in United States prisons to cope with depressive illness and the risk of suicide.

44. The court regards the appellant's failure to comply with its orders and a failure to seek an extension from the Master of the Administrative Court as a serious matter. As Moses LJ pointed out in his judgment in February 2013 in this very case, the proper and orderly conduct of business in the courts requires compliance with the orders of the court or an application to the court to seek a variation. We return to that issue at paragraphs 65-67.

Has the appellant met the conditions set out in s.108 (7)?

(a) The evidence of Colonel McAllister

45. Colonel McAllister's further report of 28 February 2014 was based on his examinations of the appellant, the last of which was on 21 January 2014. He remained of the view that the appellant continued to suffer from PTSD as he had not been able to commit to or engage in treatment; he had failed to attend 5 sessions. Colonel McAllister considered that the risk of suicide was very high if an unchallengeable decision was made to extradite him; he would then need to be held immediately in custody under close and rigorous observation. At the time the risk of suicide was low to moderate as the appellant was optimistic about the outcome of the proceedings.

46. In the light of the report of Mr Sickler there could be no guarantee of protection from the risk of suicide during transfer to the United States of America or in the United States of America.

(b) The evidence of Mr Sickler

47. Mr Sickler, a criminologist of some 30 years' experience, is head of the Justice Advocacy Group, a consortium of criminal justice professionals who provides research and advice for lawyers and judges on United States Federal sentencing and penal issues. His evidence is summarised in the following paragraphs.

48. If the appellant was extradited, he would be taken to the United States of America by United States Marshals; he would be restrained and shackled during transport; leg irons and a body chain were used on most occasions. Assurances as to the ability of the Marshals to provide a proper level of medical care should be carefully scrutinised.

49. It was unlikely that a United States Court would grant the appellant bail. He was likely to be held at the Central Detention Facility in south east Washington. There was significant evidence of neglect of inmates with mental conditions and of a number of suicides occurring at that facility.

50. His trial might not start for a year given the psychiatric issues and the potential complexity of the evidence. He faced under the United States Sentencing Guidelines a sentence within the range of 51 to 63 months. He would serve further time in detention of up to 6 months awaiting deportation. It was unlikely that he would be transferred to the UK to serve any part of the sentence because of the nature of the crime.

51. It was unlikely that the Federal Bureau of Prisons (BOP) would provide the same level of medical care which he was receiving in the UK. Although the BOP asserted otherwise, it was unable or unwilling to provide appropriate specialised care for persons who had the condition diagnosed by Colonel McAllister. It was likely to be months before the appellant would begin medical treatment; he would not receive the kind of medication prescribed by Colonel McAllister as the BOP exercised stringent cost controls. If his condition worsened, there was a real likelihood of electroconvulsive therapy. Considerable detail was provided as an evidential basis to establish the inadequacy of the provision that would in fact be made by BOP for the appellant.

52. If convicted it was likely that the appellant would not be imprisoned in a minimum security prison camp as he was a foreign national, but in a so called "low security" correctional institution. These were harsh institutions.

53. In the light of the appellant's suicide risk, the appellant might be designated upon conviction as warranting designation to a Federal Medical Centre in an emergency and being placed on a suicide watch programme, known as the "Inmate Companion Program". This was a programme of surveillance by fellow inmates with minimal training. It did not encompass any provision to address underlying mental conditions.

(c) The submissions of the parties

54. Mr Fitzgerald QC submitted on behalf of the appellant:

    i) In the present case no argument or submissions had been made to a court in relation to the appellant's PTSD, the risk of suicide and the conditions to

which he would be subject in the United States of America. There was a good explanation as to why this had not been put before the court, as the diagnosis of PTSD was supervening – it had not been made until 1 March 2013 which was after the dismissal of the appeal on 19 February 2013.

ii) On the evidence provided as to conditions in the United States of America and the high risk of suicide, there were substantial grounds for believing, applying the case law in relation to suicide set out in *Richen Turner v USA* [2012] EWHC 2426 (Admin) at paragraph 28, that the extradition of the claimant to the United States of America would give rise to a real risk of inhuman or degrading treatment in the United States of America of such severity as to put the UK in breach of its obligations to the claimant under Article 3.

iii) Furthermore, in all the circumstances extradition would not be proportionate under Article 8, given the circumstances, particularly the risk of suicide and the fact that the appellant could be tried in the UK

55. Mr Watson on behalf of the Home Secretary and Mr Cadman on behalf of the Government of the United States of America both contended that the appellant had had ample opportunity to provide evidence in the original appeal, there was no supervening event and that the evidence relied on by the appellant was in any event insufficient to support a violation of Articles 2, 3 or 8 of the Convention.

(d) Our conclusion

56. It is clear that from at least September 2012 there was an issue in relation to the extent to which the appellant was suffering from PTSD, the availability of treatment for his PTSD in the USA, the risk of suicide and the steps that could be taken to prevent it.

57. Although there was no proper explanation as to why these issues were not raised at the extradition hearing before the District Judge, it is clear that this court was prepared to consider these issues in the appeal brought in November 2012. Although it was obviously important to obtain both the evidence of Colonel McAllister and evidence as to how the USA would deal with treatment of the appellant and the risk of suicide, no proper steps were taken to obtain the evidence or to obtain a variation of the timetable for the service of evidence, prior to the hearing of the appeal on 19 February 2013. We have set out the circumstances in some detail, but these do not amount to a reasonable explanation for the failures.

58. Furthermore it cannot be properly said that the report of Colonel McAllister made on 1 March 2013 represented a change of circumstances or supervening event. He had been treating him for some time. He had made earlier assessments in relation to PTSD; the risk of suicide was known. What was new was that those acting for the appellant had then obtained the evidence. On its own that made no difference, as no steps had been taken to obtain any evidence of how his condition would be treated in the USA and what preventative measures would be taken to address the risk of suicide.

59. In the circumstances in our judgment there was nothing that could not and should not have been raised during the appeal. There was no reasonable explanation why they were not raised as the issues were so obvious. In our judgment there were therefore no

exceptional circumstances in relation to matters that should have been raised. We are therefore satisfied that there is no injustice.

60. Even though that is sufficient to determine this appeal, we do not consider that the evidence of Mr Sickler and Colonel McAllister would have enabled the appellant to establish a breach of Article 3.

61. We would, if we had been considering the issue under Article 3, have accepted that the appellant is suffering from PTSD and that he will be at a real risk of suicide when a final decision to extradite him is communicated to him, although we would have wanted to consider the extent to which his own behaviour in failing to attend sessions for treatment (as set at in paragraph 45 above), if unexplained, had any bearing on his Article 3 rights.

62. However, as was set out in *Polish Judicial Authority v Wolkowicz* [2013] 1 WLR 2402, [2013] EWHC 102 (Admin) at paragraph 10, the court has to consider the risk of suicide against the tests set out in *Richen Turner* at three stages, namely whilst the appellant is in the UK pending extradition, during transfer to the United States of America and when in the United States of America.

63. In this case, it is obviously necessary that:

i) The Home Secretary or those responsible for the appellant ensure that full and proper steps are taken to put proper preventive measures in place to address the risk of suicide from the time a decision to extradite him is communicated to him. We would have had no doubt that such steps could be taken prior to the decision being communicated to him. We would have therefore restricted the manner in which this draft judgment could be used and we so restrict it, but give liberty to apply immediately if the intervention of the court is required.

ii) We note the concerns that have been expressed by Mr Sickler about transfer to the United States of America; such concerns have been expressed in other cases and have not always been addressed by the United States authorities. It must be and is the responsibility of the Home Office (or other UK authorities acting on behalf of the Home Office) to satisfy themselves that in the arrangements made for transfer from the UK to the United States of America proper preventive measures are in place to address the risk of suicide during the journey to the United States of America and that the medical records and reports accompany the appellant. This is not a matter solely for the United States authorities. We would therefore have been satisfied that the issues on transfer could have been addressed and will be addressed by the Home Office.

iii) After arrival in the United States of America, we do not consider the evidence before us would have given rise to a real risk of inhuman or degrading treatment in the United States of such severity as to put the United Kingdom in breach of its obligations to the claimant under Article 3. The evidence does not establish either that the risk of suicide cannot be properly addressed by the United States authorities or that the treatment that will be afforded to him would fall below a standard that might put the UK in breach of its obligations under Article 3.

64. Furthermore, we would not have considered that extradition would be disproportionate or be a breach of the appellant's Article 8 rights. There is nothing in this case approaching what is required by the decisions in *Norris v Government of the USA (No 2)* [2010] 2 AC 487, [2010] UKSC 9 and *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2013] 1 AC 338.

Observation: The importance of compliance with the Orders of the court.

65. In the judgment of this court to which we have referred at paragraph 31, Moses LJ made clear the orders of the court were to be obeyed and failure to do so might lead to the case being brought to an end.

66. We wish to make it clear that orders of the Court made in respect of the hearing of an appeal in extradition cases as to the service of evidence and skeletons must be strictly obeyed. If supervening circumstances make compliance impossible, an application must be made to the court prior to the date specified in the order with a proper explanation as to why additional time is needed and any effect it will have on the hearing date. Failure to do so may well result in the court refusing to permit (1) the evidence to be relied on at the hearing or (2) the arguments that should have been outlined in the skeleton to be made at the hearing.

67. The type of excuses proffered in this appeal will no longer be accepted.