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Case No. CO/3090/2014

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

Royal Courts of Justice
Strand
London WC2A 2LL
18 November 2014

B e f o r e :

LORD JUSTICE AIKENS
MR JUSTICE NICOL
Between:

Between:

DOMMINICH SHAW **Appellant**

-v –

GOVERNMENT OF THE UNITED STATES OF AMERICA **Respondent**

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Mr Ben Brandon (instructed by Hodge Jones & Allen LLP) appeared on behalf of the Appellant
Miss Adina Ezekiel (instructed by the Crown Prosecution Service) appeared on behalf of the Respondent

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HTML VERSION OF JUDGMENT (APPROVED)

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1. LORD JUSTICE AIKENS: This is an appeal by Domminich Shaw ("the appellant") in relation to his proposed extradition to the United States of America, which is a category 2 territory to which Part 2 of the Extradition Act 2003 ("the EA") applies. The appeal is brought, under section 103 of the EA, from the Ruling and order of District Judge Nicholas Evans, dated 6 May 2014, whereby he ordered that the case be sent to the Secretary of State for the Home Department ("the SSHD") for her decision on whether to order the extradition of the appellants to the USA. On 20 June 2014, the SSHD did order the appellant's extradition and he was so informed on 24 June 2014.

2. The appellant is a UK citizen and is now aged 34. The extradition request is in respect of an indictment filed by a grand jury before the US District Court of the Southern District of Indiana on 23 February 2011. The indictment contains 29 counts, of which the appellant is charged on 26. All relate to child pornography. Count 1 is a charge of conspiracy to distribute and receive child pornography. Count 2 is

a charge of conspiracy to commit the sexual exploitation of children. Counts 2 to 22 are charges of the distribution of child pornography. Counts 25 to 29 are charges of the sexual exploitation of children.

3. In relation to the two conspiracy counts, there are six alleged co-conspirators.

The Factual Background to the Charges

4. The charges, and those against various co-defendants, arose out of an international police operation conducted by the United States, the United Kingdom and various other European police authorities known as "Operation Bulldog". This was described as a "large, international effort to investigate and dismantle those involved and associated with [a] child pornography distribution ring".

5. On 17 November 2010, a search warrant was executed at the address of Mr David Bostic, a United States citizen who lived in Indiana. Investigations and the interview of Mr Bostic followed and established that he possessed and had distributed large quantities of child pornography. Mr Bostic admitted searching for, downloading and distributing child pornography and also producing child pornography involving children under the age of 5 years and, in many cases, under the age of 2 years. Some of these matters involved babies of only 1 or 2 months old. Investigation of his email account indicated that he had distributed child pornography to others on a worldwide scale, through being part of an email group containing several dozen members. The administrator of this group was the appellant.

6. On 17 December 2010, the US District Court in Indiana issued a search warrant, which was served on the appellant's email provider in the United States. The stored content of the appellant's email account was disclosed to the US investigators on 3 January 2011. This revealed some 3000 emails which evidenced conduct by the appellant, and can be summarised as follows:

> "(i) Since June 2009, the Appellant had communicated with several individuals concerning a sexual interest in children, often trading in child pornography with them.
>
> ii) By October 2009, the Appellant was communicating with several dozens of people in the same vein, in particular on 8 October 2009.
>
> (iii)Up until January 2011, the Appellant was receiving email communications from members of the Appellant's email group attaching pornographic images of children and concerning the trading of similar files.
>
> (iv) Between 8 October 2009 and 17 January 2011, the Appellant had sent and received dozens of email communications and on at least 24 occasions, there were exchanges between members of the Appellant's email group involving the Appellant either sending or receiving an email which:
>
> > (1) attached child pornography,
> >
> > (2) contained hyperlinks to locations [on the Internet],
> >
> > (3) or sought and offered to distribute and receive child pornography in the future.
>
> (v) Almost all of the images shared between members of the appellant's email group depicted children under 5 years and (usually between O-2 years) engaged in sexually explicit conduct."

7. On 28 January 2011, the appellant was arrested at his home in London and a search warrant was executed at his home address. A number of digital storage devices were taken. An examination of some of this material showed that it contained a large number of indecent images of children, totalling about 18,000. There were also images of deceased and mutilated infants. That material has not, I understand, been provided to the United States authorities.

8. At the time of his arrest, on 28 January 2011, the appellant was on licence, having been sentenced to a 5-year prison sentence at Maidstone Crown Court in November 2005 for offences of indecent assault

on a female under the age of 14, contrary to the Sexual Offences Act 1956. In June 2011 the appellant was arrested on a warrant issued pursuant to section 71 of the EA. The extradition proceedings were adjourned at the time because the appellant was still completing the licence part of his sentence of imprisonment.

9. On 21 December 2011, DC Caroline Bartle of the Metropolitan Police Service (MPS) wrote to the appellant's then solicitors and informed them that no further action would be taken against the appellant in the UK in relation to the images discovered on the devices found at his London home. The letter stated: "the evidence we hold will be supplied to the American authorities for [the appellant] to be prosecuted in the US, alongside their matter, once extradition to the US takes place".

10. The extradition request was made by the USA on 19 May 2011 and was supported by an affidavit sworn on 28 April 2011 by Mr A Brant Cook, an Assistant US Attorney for the Southern District of Indiana. This gave details of the analysis of the appellant's email account that I have attempted to summarise earlier in this judgment.

11. There is now some additional information before the court in a letter dated 6 November 2014, which has obviously been adduced since the extradition hearing before District Judge Evans. In essence, this emphasises the fact that it is alleged that the appellant routinely encouraged members of his email group, including Mr Bostic, to produce child pornography and that the appellant would either keep this material for himself or distribute it to others. It is also alleged that this material demonstrates that the appellant encouraged others sexually to abuse children and to create images of the abuse. It is further said that this material demonstrates that the appellant communicated with group members and discussed other potential offences, such as kidnapping children for sexual abuse, abusing children known to group members or finding children in a neighbourhood in order to abuse them. It is said that the appellant acted as the leader of the group and offered suggestions on how to get access to children for the purpose of sexually abusing them and providing images of the abuse to the group. It is suggested that the appellant knew, based on email traffic, that Mr Bostic resided in the United States and that the children Mr Bostic sexually abused also lived in the United States.

The start of the extradition proceedings

12. The SSHD has certified, under section 70 of the EA, that the request for extradition from the United States had been made in the approved way.

13. On 16 April 2013, the Appellant's solicitors wrote to DC Bartle and asked her to confirm who made the decision to take no further action against the appellant, and whether such a decision was made in accordance with the Attorney General's 2007 "Guidance for handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States of America", or whether or not such a decision was made. DC Bartle replied on 30 April 2013. She confirmed the name of the CPS lawyer who had authorised that no further action be taken against the appellant, and stated that the person had since retired. DC Bartle also confirmed that "no evidence has actually been supplied to the US at the present time".

14. In an undated letter, Mr Andrew Hadik, a Specialist Casework Lawyer at the CPS, wrote to the appellant's solicitors stating that the reviewing lawyer who had dealt with the appellant's matter had retired some months earlier. Mr Hadik said:

> "I have looked at the papers currently available to me. The CPS after conducting a careful review determined that it would forgo prosecution of [the Appellant] in connection with his possession of indecent images of children, in favour of [the Appellant's] prosecution by the US authorities."

15. On 28 May 2013, the extradition proceedings were opened and adjourned.

16. With regard to the co-accused of the appellant in the Indiana proceedings, since the date of the request for the appellant's extradition, several have appeared before the US District Court for the Southern District of Indiana. The cases of the co-accused have been dealt with (in summary) as follows: Bostic has received 60 years' imprisonment, Kuykendall has received 25 years' imprisonment, Szulborski has received 15 years' imprisonment, Javahn Algere has received 12 years' imprisonment, Jeremy Labrec has received 27½ years' imprisonment, Danny Druck has received 8 years' imprisonment, Chris Reid has received 35 years' imprisonment, Todd King has received 8 years' imprisonment and Nicholas King has received 8 years' imprisonment.

The decision of District Judge Evans

17. Before District Judge Evans ("DJ") it was accepted that all the offences for which the appellant's extradition was sought constituted extradition offences within the EA. The two challenges to extradition argued before the DJ were, first, that the sentence that would be imposed, were the appellant to be extradited and convicted, would be so long that it would be "grossly disproportionate", and therefore extradition would be in violation of the appellant's rights under Article 3 of the European Convention on Human Rights. Accordingly the DJ should have discharged the appellant under section 87(2) of the EA. Secondly, it was submitted that the appellant's extradition was barred by virtue of the so-called "Forum Bar", which had been introduced as section 83A of the EA by virtue of the Crime and Courts Act 2013. In fact that provision came into force in the middle of the extradition hearing. The extradition hearing was adjourned in order that the appellant could take that point and it was dealt with by DJ Evans.

18. In the event, the DJ rejected both submissions.

The Article 3 argument

19. Article 3 of the ECHR provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". Over a long series of cases the European Court of Human Rights (ECtHR) has held that if a Contracting state extradites a person to a non-contracting state where he faces a real risk of being sentenced to a term of imprisonment, that is "grossly disproportionate" to the offence for which he is extradited, that may involve a breach of the extraditing state's duty not to subject the extradited person, or requested person, to inhuman or degrading punishment. However, the ECtHR has emphasised that each case has to be decided on its facts. It has set the bar for what constitutes a "grossly disproportionate" sentence very high. It has said that it is likely that this test will be satisfied only on "rare and unique" (sic) occasions.

20. The ECtHR has also held, in another series of cases, that an issue under Article 3 may be raised in a case where a person is extradited from a Contracting state and there is a real risk that the person extradited will face a sentence of life without parole, which is de jure and de facto, 'irreducible', that is to say it cannot, at any stage, be reduced by some review mechanism to test whether or not continued incarceration is penologically justified on any rational basis. This principle applies even if it cannot be said that a particular "whole life" sentence is not, by itself, "grossly disproportionate'. This topic has been most recently considered, in the context of extradition of a Contracting state (Belgium) to the USA, in the case of Trabelsi v Belgium [2014] ECHR 893. That decision, which was handed down only on 4 September 2014, was therefore not one that the DJ could consider to in his ruling.

21. The DJ concluded that the appellant would not be likely to receive a life sentence for the extradition offences if he were to be found guilty by the Indiana court. The DJ also concluded that the appellant would receive a determinate sentence which might be very substantial, but yet one markedly less than the 60 years received by the co-accused, Mr Bostic. The DJ regarded the sentencing exercise as "complicated" and one of which it was difficult to predict the outcome. But, at paragraph 16 of his Ruling, he concluded that it was likely that, in practice, the appellant would serve 37 years in prison if sentenced to a term of 60 years. He found that such a sentence did not "shock the conscience" or seem "grossly disproportionate" given the facts of the case.

22. Before this court, both sides have put in further evidence concerning the likely sentence that the appellant would receive were he to be convicted of the charges for which his extradition is sought. The appellant relies on an affidavit of Mr James B Craven III, dated 14 October 2014. That is in addition to the two reports that Mr Craven produced for the hearing before the DJ.

23. The respondent relies, in particular, in a letter from the United States Department of Justice, dated 6 November 2014. I understand that Master Gidden gave permission for this new material to be adduced, in the sense that he gave permission for Mr Craven's affidavit and for the respondent to put in any material to respond to that. Mr Craven's affidavit of 14 October 2014 states that the appellant is facing a sentence of at least 35 years and perhaps a total of 60 years. Mr Craven concludes overall that if the appellant were to enter guilty pleas to all charges, and assuming that he were not able to offer substantial assistance to the US Government about other offenders or offences, then the appellant would be likely to be sentenced to life imprisonment.

24. In response the letter of 6 November 2014 from Mary D Rodriquez, Acting director of the US Department of Justice, Office of International Affairs, Criminal Decision, states that the cases of the appellant and Mr Bostic, who received A 60-year sentence, are dissimilar. It is said that this is so

because Mr Bostic was charged with an additional 30 counts of producing child pornography. In addition, it is said that Mr Bostic sexually abused children some 36 times over the course of several years. Ms Rodriquez states that the 35-year minimum sentence quoted by Mr Craven is "entirely incorrect", as is his suggested maximum of 600 years. Ms Rodriquez does not hazard the sentence that the appellant might receive for the offences for which his extradition is sought.

25. In oral submissions Mr Ben Brandon, on behalf of the appellant, took us through the evidence of Mr Craven to demonstrate why his views on the sentence that is likely to be imposed were correct. He also referred us to the US sentencing guidelines and the way in which the sentence can be calculated. He submits that it is highly likely that the sentence that would be imposed on the appellant would be much longer than that imposed on Mr Bostic. He informed us that the sentence on Mr Bostic, in respect of the other charges that are not involved in this indictment, were imposed separately. He submits it is unlikely that the sentence for the charges on the present indictment regarded those as an aggravating factor, otherwise it would amount to double counting.

26. On behalf of the respondent, Ms Ezekiel adopts the points made in the letter of 6 November, to which I have referred.

27. In my judgment, it is important to recall three principles that the ECtHR has emphasised now more than once. The first is that the ECtHR does not impose Convention Standards on non-contracting states. The second is that sentencing policies of different states are bound to differ and that such differences will, for the most part, be entirely legitimate. The third principal is that it is only on "rare and unique" occasions that the Strasbourg Court would hold that a sentence to be imposed by a requesting state on an extradited person is to be regarded as "grossly disproportionate", such that to extradite that person to face such a sentence would amount to a breach of the person's Article 3 rights by the extraditing state.

28. In this case I regard it as particularly difficult to envisage precisely what sentence the appellant might face if he were to be convicted of the offences of which he is charged. It will depend, in practice, on whether he pleads guilty, on whether he decides to give, or can give, any substantial information to the authorities that might be an aid in relation to combating this type of offence, or in investigating others involved in these or other offences. It will depend on how the judge views the conduct of the appellant's offending and other factors in an overall sense.

29. I accept that we must not assume, for the purpose of the Article 3 argument, that the appellant would be guilty or will ameliorate his position by giving substantial information. That might preclude his right to a fair trial on the substance of the charges. Even taking that point into account, however, I remain far from convinced by the evidence of Mr Craven that, upon a contested trial, the appellant is bound to be sentenced to a term overall of 60 years or more on the charges of which he is accused. It seems to my mind that it is at least conceivable that it will be less than that. It also appears to be accepted, on all sides, that the appellant, if sentenced to a determinate term of years, would have his sentence reduced by 15% if he was of good behaviour whilst in prison.

30. It is well-known that sentences imposed by US courts are, generally, considerably more severe than those imposed by UK courts and in many other Council of Europe countries. That difference is, in general, entirely legitimate and should not be the subject of adverse criticism. In my judgment, this is not one of those "rare and unique" occasions where it can be said that the likely sentence would be so "grossly disproportionate" that to extradite the appellant would breach his Article 3 rights.

31. The next argument that the appellant wishes to make under the general heading of "Article 3" is that there is a real risk that he will be sentenced to life imprisonment, and that this sentence would be effectively without parole and irreducible so that extradition in those circumstances would also breach his Article 3 rights. That argument was not advanced before the DJ. It is only now being run because of the very recent ECtHR decision in Trabelsi v Belgium The basic principle, which was reaffirmed by the ECtHR in Harkins and Edwards v UK (2012) 55 EHRR 19, is not in dispute. If a life sentence is imposed that is de jure and de facto "irreducible", then this may raise an Article 3 issue. Once again, the occasions when the ECtHR has actually found a breach of Article 3, in the extradition context, are small. Trabelsi was such a case, but the facts were striking. They involved alleged international terrorist offences and, unfortunately, the applicant had actually been extradited by Belgium, despite a Rule 39 order from the ECtHR that Belgium should not extradite him pending the determination of his case.

32. However, for present purposes I am going to assume that there is a "real risk" or a "real possibility" that the appellant might be subject to a life sentence that is without parole. I will also assume that I should

follow what is stated by the ECtHR in Trabelsi, which itself followed the earlier Grand Chamber decision in Vinter v United Kingdom (2012) 55 EHRR 34, although that case was not an extradition case. I will assume, therefore, that in order that Article 3 is not to be breached in an extradition case where the requested person is likely to be sentenced to life without parole, it has to be demonstrated that there is a form of "dedicated review mechanism" available. This means that the issue of whether continued incarceration for the whole of the original sentence is still "penologically justified" can be considered and, if a decision made that it is not, then there will either be a release or at least a reduction of the sentence, or the possibility of such.

33. The position, as set out in Mr Craven's affidavit of 20 October 2014, is as follows:

> "The BOP [Bureau of Prisons] has the authority to release any guest (sic) 70 years old who has served at least 30 years, upon a certification that he "is no longer a danger to the safety of any other person or the community," 18 USC 3582(c)(1)(A)(iii). I have been unable to find any reported case on this statute, enacted in 1984. I have never known of this statute being involved, nor can I imagine that BOP making the required certification in the case of any sex offender, let alone this case."

Mr Craven then goes on to give a specific example within his knowledge.

34. I do not attach much weight to the fact, if it be so, that there have been no releases under the provision of the 1984 Act. That could be for a number of reasons. The Act might only apply to sentences imposed after it came into force and it has only now been in force for about 30 years. (There were apparently parole provisions applicable to federal offences up until 1987). It may be that there are no suitable prisoners who have reached the age of 70 years yet. We do not know and counsel have not been able to give us any more information on this point.

35. In this case the appellant knows now what he has to do in order to obtain his early release, or at least its possibility. First, he has to reach aged 70; secondly, he has to have served at least 30 years of his sentence. Thirdly, he has to satisfy the Bureau of Prisons that he is no longer a danger to any other person or the community. To my mind, those requirements are clear and easy to understand. I would say, therefore, that these provisions of US law meet any test that is set out in the most recent ECtHR case of Trabelsi Accordingly I would dismiss the appeal on the Article 3 points.

Forum Bar

36. The "Forum Bar" provisions were introduced into both Parts 1 and 2 of the EA by virtue of Schedule 20 of the Crime and Courts Act 2013. The new provisions came into effect on 14 October 2013. Section 83A of the EA provides:

> "83A Forum
>
> (1)The extradition of a person ("D") to a category 2 territory is barred by reason of forum if the extradition would not be in the interests of justice.
>
> (2)For the purposes of this section, the extradition would not be in the interests of justice if the judge—
>
> (a) decides that a substantial measure of D's relevant activity was performed in the United Kingdom; and
>
> (b) decides, having regard to the specified matters relating to the interests of justice (and only those matters), that the extradition should not take place.
>
> (3)These are the specified matters relating to the interests of justice—
>
> (a) the place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur;
>
> (b) the interests of any victims of the extradition offence;

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

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

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

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

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

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

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

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

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

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

37.The equivalent provision to section 83A, that is in Part 1 of the Act, is section 19B. The terms of the two sections are identical. In Dibden v Tribunal de Grande Instance de Lille, France **[2014] EWHC 3074 (Admin), this court considered section 19B. Simon J, who gave the judgment of the court in that case, made some important general remarks about section 19B, with which I respectfully wholly agree and which, in my view, apply equally to section 83A.**

38. Simon J said at paragraph 18 of the judgment**:**

"Five initial points may be noted:

First, the ultimate test is whether the extradition would not be in the interests of justice (see section 19(B)(1). Secondly, there is a threshold or qualifying condition that a substantial measure of a defendant's relevant activity was performed in the United Kingdom (see section 19B(2)(a)). Thirdly, the section is not concerned with a case where a defendant has been charged with an offence in the United Kingdom. That situation is covered by section 22 of the Act which requires the adjournment of an extradition hearing, as happened in the case of Joseph Harrison. Section 19B is concerned with a case where there is a possibility of a prosecution in this country. Fourthly, where the court finds that the threshold or qualifying condition is satisfied, the court must go on to consider the six specified matters which relate to the interests of justice, which are set out in sub-section 3(a) to (g) and 'only those matters' see (2)(b). Fifthly, the terms of section 19B contain no further guidance as to the weight to be given to the specified matters which should be taken into account. The relative importance of each matter will vary from case to case, and the weight to be accorded to the specified matters may also vary. The court will be engaged in a fact-specific exercise in order to determine whether the particular extradition would not be in the interests of justice."

39.In this case Ms Ezekiel accepts that the threshold requirement set out in section 83A(2)(a) of

the EA is satisfied. In short, she accepts that a "substantial measure" of the appellant's activity which is material to the commission of the extradition offence alleged to have been performed by the appellant was performed in the UK. Therefore, the court has to decide whether it is "in the interests of justice that the extradition should not take place", having regard, but having regard only, to the specified matters set out in section 83A(3).

40. It is, in my view, important to remember two things in connection with the section 83A(3) factors. First, the words "having regard" in section 83A(2)(b) is an important expression. It means that the judge has to bear in mind each of the specified matters (and not any others). However, it may be that in the particular case being considered, one factor is irrelevant, or not present, or of little weight, or alternatively of great importance. That is for the appropriate judge to decide in the first place. Nonetheless, the judge must, in my view, have regard, ie bear in mind, each of the specified matters individually, because only in that way can it be said that he will have properly done what the statute says must be done before making the decision on whether it is in the interests of justice that the extradition should not take place.

41. Secondly, the test is not, as Mr Brandon appeared to suggest at one point in his submissions, whether the appellant should be tried in the requesting state or in the United Kingdom. The question is whether, in the interests of justice, there should not be an extradition to the requesting state. That is an entirely different test.

42. In this case the judge did go through each of the specified matters set out in section 83B(3). He reached what can be called a "value judgment" on whether it was in the interests of justice that the extradition should not take place. There is therefore a threshold question on an appeal concerning a Forum Bar issue: on what basis can this court interfere with the judge's "value judgment"? Plainly, if the judge has erred in misconstruing the statutory wording of one of the specified matters, or if he has failed to "have regard" to a specified matter or he has had regard to other matters, or lastly if his overall "valued judgment" is irrational or unreasonable, this court, as an appellate court, can interfere. If this court decides that the DJ has erred in any one of those ways, that must, in my view, invalidate the DJ's "value judgment". In those circumstances this court would have to re-perform the statutory exercise and reach its own "value judgment".

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

<u>The principal argument on Forum Bar: section 83A(3)(c)</u>

44. In this case the argument before the DJ and before us has particularly revolved around subparagraph (c): viz. "any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence".

The facts before the DJ, as summarised by him at paragraph 21(c) of his Ruling, were as follows:

> "...Prior to the forum bar provisions coming into force the views of the CPS were sought and by an undated letter (some time after 16th April 2013) sent by Mr Hadik to Mr Shaw's solicitors it is recorded "The CPS after conducting a careful review determined that it would forgo prosecution of Mr Shaw in connection with his possession of indecent images of children, in favour of Mr Shaw's prosecution by the US authorities." Subsequently, after the forum bar came into force, the matter has been re-visited by the CPS. [Counsel for the USA] has informed the court that the matter has been carefully considered at the highest level within the CPS and with the assistance of leading counsel advising, an unnamed Senior Crown Prosecutor 'believes England & Wales is not the most appropriate jurisdiction in which to prosecute Mr Shaw in respect of the conduct constituting the extradition offence'."

45. The DJ then referred to paragraphs that are later on in his Ruling, which deal, in some more detail, with some of the arguments that were raised.

46. Then at paragraph 32 of his Ruling the DJ records what he was told by Ms Ezekiel (counsel for the USA) was the basis for the prosecutor's belief, which the judge had recorded earlier in his judgment and to which I have just referred. The judge said:

> "Ms Ezekiel told me that the prosecutor's belief was based on the following:
>
> (1) The District Court in the Southern District of Indiana is already dealing with the criminal proceedings in relation to Mr Shaw and other defendants, some of whom have already pleaded guilty and have been sentenced. The proceedings are at an advanced stage as indeed are these extradition proceedings.
>
> (2) As of now the evidence for use in Mr Shaw's prosecution is currently in a trial ready state in the US and that evidence is not currently available to the CPS.
>
> (3) A decision was made in 2011 under the then prevailing protocol, the AG's 2007 guidelines, that Mr Shaw should be prosecuted in the US and nothing other than the newly introduced section 83A has changed.
>
> (4) Any prosecution of Mr Shaw in the UK would not adequately reflect the criminality alleged against him."

47. Before the DJ Mr Ben Brandon, who appeared for the appellant below as well as before us, criticised the position with regards to the CPS's view. He submitted that there had to be evidence about the "prosecutor's belief" that was capable of being tested, principally by cross-examination. The DJ rejected that submission. At paragraph 28 of his ruling the stated:

> "I am not satisfied that Parliament intended that the only way for the prosecutor's belief to be conveyed to the court was by the provision of a statement from a Crown Prosecutor who might thereafter be required to give evidence and be cross-examined. Such an approach would likely take up a disproportionate amount of court time which would be unlikely to be justified in terms of cost and assistance to the court. The issues the court is required to consider when making its assessment of the interests of justice are set out in section 83A(3)(a) to (g) and I have provided the court's observations on each of those identified topics."

48. In my view, the correct construction of section 83A(3)(c) is, for present purposes, as follows: first, it is important to note the word "any" at the start of the paragraph. There may or may not be a belief that is stated to the court in some form or another. It is only if there is one that this factor is going to be relevant. The judge has to ask whether there is a belief; but if there is not, then he cannot have any further "regard" to this factor. Secondly, the key-word is "belief". It is not "decision" or some similar word. A "belief" in this context is more akin to a point of view or a conclusion based upon certain facts and other considerations. Thirdly, for these purposes, "a prosecutor" must mean a domestic prosecutor within the UK: see the definition in section 83E(2). In England and Wales this means someone within the domestic branch of the CPS, rather than the separate and independent branch of the CPS, called the CPS Extradition Unit, which deals with extradition matters.

49. Fourthly, the "belief" has to be a firm one in the sense that the prosecutor has to have concluded that the UK is "not the most appropriate jurisdiction in which to prosecute" the person whose extradition is sought. Note the words "the most appropriate"; therefore, it might be an appropriate jurisdiction but not necessarily "the most appropriate". Fifthly, it is important to note what precisely is the subject of the prosecution "belief". It is that the prosecution of the requested person for an offence (or offences) "in respect of the conduct constituting the extradition offence" is not the most appropriate in the UK. In other words, the prosecutor has to consider the conduct that founds the alleged extradition offence itself, not other offences or other conduct that might be involved.

50. Sixthly, paragraph (c) says nothing about how this "belief" is to be presented to the court. We were informed by counsel that there is nothing specifically in the EA, or in the Criminal Procedure Rules, that deals with how this "belief" is to be presented to the court at an extradition hearing, once the "Forum Bar" issue has been raised by the requested person at the initial hearing before the DJ. We understand from Mr Brandon that the issues to be raised at an extradition hearing will usually be identified by those acting on behalf of the requested person filling in a form, which indicates what points are being taken in challenging the proposed extradition.

51. To my mind, there is a possibility that the "fact of the belief" could be adduced by a statement from a prosecutor, indicating the belief as to the issue in the formula used in section 83A(3)(c) and also indicating the basis for that belief. Extradition proceedings are "quasi-criminal" in nature, and a statement is one proper way to set out this belief. I accept, as Simon J said at paragraph 35 of Dibden, that this is not likely to be challengeable, unless on "irrationality" grounds. Therefore, unless the good faith or rationality of the statement is challenged (which is not likely to be the case) this is not something on which the maker could be cross-examined.

52. The belief, on the other hand, could be set out in a letter given with reasons. This is apparently what was contemplated as being the likely procedure in the evidence that was given by the CPS to the House of Lords committee investigating extradition at a hearing on 15 October 2014. At that hearing both Nick Vamos, Head of Extradition of CPS Special Case Work in London and Sue Patten, Head of the Specialist Fraud Division of the CPS, indicated that that was the practice that was currently being followed.

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

54. It is important to note also that under section 83A(5), a prosecutor can apply to be joined to the extradition proceedings. The judge must join the prosecutor if the judge concludes that the prosecutor has considered the offences for which the requested person could be prosecuted within the UK "in respect of the conduct constituting the extradition offence". There was no such application by the prosecutor in this case. Furthermore, there was no prosecutor's certificate, pursuant to the provisions set out in section 83C.

55. The submission of Mr Brandon, in relation to the facts of this case, is that it was important that the only material that the judge had before him was effectively that of a letter written by Mr Hadik, which had reported on the decision of another CPS employee, who had by then retired. Furthermore, Mr Brandon emphasises the fact that Mr Hadik had only reconstructed how Mr McCabe (the retired CPS employee) had made the decision on the basis of the papers currently available to him, ie Mr Hadik. Moreover, Mr Hadik himself had not expressed a view on the appropriateness of a prosecution of the appellant in the UK. No reasons were given at that stage as to why the UK was not the most appropriate jurisdiction in which to try the appellant; it was simply stated that the CPS would "forgo" prosecuting the appellant in the light of the proceedings in the USA. Lastly, Mr Brandon pointed out that the subsequent information that was given by Ms Ezekiel to the court was all done on instructions, was given orally, and that there was no detail as to the basis for the decision or the belief that was expressed to the court.

56. In my judgment, the position of the CPS on the facts of this case is not satisfactory. The original consideration was plainly given upon the wrong basis and not upon the statutory finding. It was then reviewed in the light of the statutory wording, but it was done on what can only be described as a rather unsatisfactory and "non-transparent" basis. The person who actually made the decision was not then identified and no statement from the decision maker was given, nor was there any other document setting out the decision and the basis for it.

57. There is, in my view, very little weight to be attached to the "belief" in these circumstances. It is not clear to me how much weight, if any, the DJ attached to this factor, but in my judgment the weight to be attached to it is comparatively small, if any at all.

58. We have been asked by both counsel if we could give some guidance as to what we think the practice should be for dealing with this factor in the future. This is, I must emphasise, undoubtedly preliminary guidance. Guidance will inevitably evolve as more of these "Forum Bar" cases come before this court. My guidance, at present, is as follows: first it is for the requested person to identify "Forum Bar" as an issue that is to be raised in the extradition hearing before the DJ. Secondly, if the requesting state wishes to adduce material as to the "belief" of the UK prosecutor, then that should be done in a document, something akin to a "decision letter", that is so well-known in immigration proceedings. In that document the reasons for the belief should be given; and the "prosecutor" who has the belief should be identified in the document. Thirdly,

this material need not be in a statement form. However, it should be if it seems that under the circumstances of the case that is the appropriate way to deal with it.

Fourthly, it is for the DJ to decide at a case management hearing, or equivalent, what the timetable should be for the production of material relating to this issue and any response to it, and also how that material is to be adduced at the extradition hearing. Fifthly, it is for the DJ to decide how the material concerning the belief and the challenge to it, if there is one, is to be dealt with at the extradition hearing.

59. We note and emphasise, once again, the limited basis upon which there can be a review of the prosecutor's belief, as set out in paragraph 35 of Simon J's judgment in Dibden We agree with that approach and we again emphasise that section 83A(3)(c), like section 19B(3)(c), is not intended to invite a debate with demands for documents justifying the belief in any except exceptional cases.

60. The DJ considered the other factors set out in section 83A(3). He said that factor (a) was not a "completely straightforward issue". I agree with the judge. Whereas the word "loss" might be attached to a particular victim who has, eg, lost money or goods, "harm" can be associated with both victims and others. Here the "victims" are the children and infants who have been abused and whose images have been sent around the world to be viewed by subscribers to the Internet circle set up for this pernicious purpose. But there is a less concrete but more pervasive "harm" associated with the distribution of this material which, as the judge recognised, "perpetuates and encourages the trade in it" (see paragraph 21(3) of his ruling). "The place" where the harm occurred to the children may well have been concentrated in the USA, although not necessarily exclusively so. The more general "harm" resulting from the extradition offence was worldwide.

61. As to the second factor, "the interests of any victims of the extradition offence", the DJ seems to have construed "interests" as meaning the views of victims as to where the trial should take place. With respect, that is too narrow an interpretation. "The interest of any victims" is a more objective matter, which has to be assessed by the appropriate judge. Where, in the court's view, would the best interests of the victims be served by having a trial? In general, their interests will be in having a trial at a place where, if they do give evidence or wish to be present, they can be so. In this case, the interests of the victims are simply to have any perpetrators of the crimes of which they are alleged to be brought to justice.

62. As to factor (d), which asks whether "evidence is available or could evidence be available to prosecute D in the UK", it is again important to note the all important words "for an offence which corresponds to the extradition offence". I should note that there has been no concerted attempt by either side to set out, (in evidence or otherwise), where all this material is or could be. It does seem to me that in a case such as the present, where this could be an important factor, the parties should marshal their facts in some document that can be examined by the other side before the extradition hearing so that argument can be made upon it at the extradition hearing.

63. In the case of the requesting state, a responsible person concerned with the extradition can produce such a document (if he is able to do so bearing in mind section 83A(4)). He can also deal with the question of whether or not the evidence could be made available to the UK. Ultimately the judge has to evaluate what material he has on this point, or if there is no material at all he has to do the best he can on his own assumptions.

64. The main evidence against the appellant in respect of the extradition offence is in the United States. It is the material discovered upon his Google account being seized. There is material from other sources, eg the statements of Mr Bostic, implicating the appellant as the administrator of the email distribution group. It could all be made available in the UK, I expect. There is material in the UK as a result of the seizure of the appellant's computer and other devices in January.

65. However, the extradition offences, particularly those in counts 1 and 2, go much wider than the material found on the appellant's computer, etc, at his house in the UK and indeed his Google account, even assuming that could be made available in the UK. The totality of the evidence against him in the US is considerable.

66. The other factors that the judge considered are those set out in paragraphs (e) to (g) of section 83A(3). There is a particular criticism that the judge referred to costs under the heading of paragraph (e), which may have been wrong, as that paragraph is concerned only with delay. However, it seems to me that costs necessarily is a factor when considering the practicality of all prosecutions relating to the

extradition offence taking place in one jurisdiction, having regard to the matters that are set out in paragraph (f) of section 83A(3).

Conclusion on "Forum Bar"

67. Taking all these factors into account, and even though I take the view that the judge may have placed more weight than was appropriate on the factor of the "belief of the prosecutor", I have come to the conclusion that the judge's overall view, that it was not in the interests of justice that there should not be extradition in this case, was a correct conclusion. Accordingly I would dismiss that ground of appeal.

68. In the circumstances the appeal overall should, in my view, be dismissed.

69. MR JUSTICE NICOL: I agree.

70. LORD JUSTICE AIKENS: Thank you both very much.

71. MR BRANDON: One matter arises.

72. LORD JUSTICE AIKENS: Nicol J rightly points out that I did not specifically deal with whether or not you could have permission to amend your grounds of appeal. I have dealt with it in substance, so I think the answer must be "yes", but it is dismissed.

73. MR BRANDON: I follow that. Thank you, my Lord.

74. LORD JUSTICE AIKENS: I am sorry Mr Brandon, you said you had an application.

75. MR BRANDON: I just wonder whether we might have an expedited transcript. I do not know whether that can happen. It is not something --

76. LORD JUSTICE AIKENS: Will you not have to pay for it? You can have one.

77. MR BRANDON: Would you forgive me (Takes instructions)

78. LORD JUSTICE AIKENS: I think that is the normal rule.

79. MR BRANDON: Yes, we may have to pay for it, but we would like to ask for it.

80. LORD JUSTICE AIKENS: On that basis you would like a transcript. You will have to wait until I have corrected it, but on that basis, unless