SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2021] SC EDIN 50

E89/18
E90/18
E91/18

JUDGMENT OF SHERIFF N A ROSS

in the cause

LORD ADVOCATE on behalf of the Government of the United States of America

Applicant

against

VALERIE PERFECT HAYES, GARY REBURN AND JENNIFER AMNOTT

Respondents

Applicant: Wilson, procurator fiscal depute;
Respondents: McCall QC, Harvey (for Hayes); McCluskey, Miller (for Reburn); Mitchell QC, Henry (for Amnott);

EDINBURGH, 30 JULY 2021

The Sheriff, having resumed consideration of the cause, finds in fact as follows:

1. Ms Hayes has a history of physical ill health, including cancerous growths. The full extent of her physical ill health is not proved. She requires medication to manage her condition, and ongoing medical monitoring twice per year. She will receive appropriate adequate medical care for her physical health if imprisoned in a US federal prison.

2. Ms Hayes is justifiably diagnosed as suffering from Post Traumatic Stress Disorder, possibly as a result of an abusive domestic relationship. It is not proved that her mental health had any bearing on the offences alleged. Any suicidal ideation, if it exists, is within

her voluntary control. She would receive appropriate treatment for her mental health in a US federal prison.

3. Ms Hayes has four children, three of whom reside in Scotland in foster care. They are flourishing socially and academically, and are likely to continue to do so in the event of her extradition. They do not depend on Ms Hayes for their care. They have a family life with their present foster carers. They are settled in Scotland. The eldest child is independent and lives in the USA.

4. Mr Reburn has no history of involvement with criminality. There are adequate safeguards to protect Mr Reburn's safety and wellbeing, and that of the other respondents, while serving a sentence in the US federal prison system. These safeguards include policies, security designations and physical living conditions.

5. None of the respondents has health problems which would not be adequately and appropriately treated within a US federal prison. They will receive adequate and appropriate medication, treatment and monitoring for their present medical conditions.

6. There is no undue risk of sexual assault by staff against any of the respondents in a US federal prison. The US authorities regard such behaviours as criminal and take reasonable precautions against such assaults. They robustly prosecute offenders where there is sufficient evidence.

7. The US federal prison system now provides adequate care and precautions in relation to the transmission and treatment of Covid-19. None of the respondents will be placed at undue risk from Covid-19 in a US federal prison.

8. The mandatory life sentences faced by all the respondents in the event of their conviction on the extradition offences are not grossly disproportionate to the crimes alleged.

9. Any federal inmate serving a mandatory life sentence is able to apply to a court for compassionate release. They are able to apply for the exercise of executive clemency. They are able to do so on more than one occasion during their incarceration. The applicant has formal procedures to respond to and progress such applications. There have been successful applications in recent years.

10. The criteria for granting compassionate release are regulated by statute and case law precedent, which are publicly available. It is a judicial process.

11. The respondents would be able to apply for a reduction of any mandatory life sentence they may receive in the US, by way of compassionate release or by executive clemency. Such remedies would be de facto and de jure available to them. Such mandatory life sentences are not irreducible.

12. It is not possible to predict within which prisons in the US federal system the respondents are likely to be incarcerated. These institutions are distributed throughout the USA.

13. Conditions within the US federal prison system are challenging but the safety of each of the respondents would be adequately protected commensurate with a prison environment. That system takes proportionate and adequate steps to protect inmates against violence by other inmates, and against sexual assault by staff.

Finds in fact and law that:

1. The requirements of section 78 of the 2003 Act are satisfied.

2. No bars to extradition under s79 of the 2003 Act apply to the respondents. In particular, the mandatory life sentences faced on count 2 are not irreducible or shown to be grossly disproportionate.

3. The extradition of each of the respondents would be compatible with their Convention rights within the meaning of the Human Rights Act 1998. It would not be unjust or oppressive to extradite any of the respondents by reason of their physical or mental condition.

NOTE

[1] The Government of the United States of America (the "applicant") requests the extradition of Valerie Perfect Hayes, Gary Blake Reburn and Jennifer Amnott (together, the "respondents") from the United Kingdom, by reference to mutual treaty obligations. The request is governed by the Extradition Act 2003 (the "2003 Act"). The USA is designated as a Category 2 territory under the 2003 Act. The respondents are resident in Scotland. On 21 February 2019 the Scottish Ministers certified that this request is valid and made in the approved way.

Background to request/the alleged crimes

[2] The request is made on the basis of warrants dated 16 January 2019 issued by the US District Court for the Western District of Virginia. These warrants remain valid and are based on criminal complaints against the respondents which include: Count 1: Conspiracy to commit kidnapping involving children; Count 2: Conspiracy to kill witnesses with intent to prevent communication to a Federal law enforcement officer; Count 3: Kidnapping; Counts 4 to 8: Attempted kidnapping of a child (relating to five individual children); Counts 9 to 12: Attempted killing of witnesses (relating to four individual parents) with intent to prevent communication to a Federal law enforcement officer; Counts 13 to 24; Brandishing a firearm during commission of a crime of violence. The applicant undertakes

(Kavanaugh letter of 26 October 2020) that the applicant will not proceed with prosecution on counts 13 to 20, owing to recent developments in US law.

[3] The application is supported by an affidavit dated 18 January 2019 by Christopher R. Kavanaugh, Assistant US Attorney, sworn before a US magistrate judge. He sets out the allegations against the three respondents, and further detail is given in a supporting criminal complaint. The respondents are alleged to have formed a criminal conspiracy between March 2018 and July 2018 to abduct two young children from a family in Virginia, and a further three children from another family in Virginia. In both cases the abduction was intended to include armed home invasion and murder of the biological parents.

[4] The application alleges that the respondent Amnott and her husband ("Frank Amnott") met Hayes in 2015. They became close friends. The couple had several failed pregnancies and were desperate to start a family. Hayes told them that she had secured a child for them to adopt. She also told them that she was carrying the child herself, but had lost it following an assault, and then later that she had three of her own children who had been captured and were living in the custody of two families in West Virginia. She told them that if they helped her recover them, they could keep one of those families' other children. The three then enlisted the help of the respondent Reburn, who was Hayes' then boyfriend. The respondents and Frank Amnott formed a plan, described in detail, to involve extensive surveillance of the houses, picking children's names, preparation of transport and firearms, armed entry at an opportune time, securing the children and subsequent murder of the parents by shooting them in the head. They put the plan into action and carried out various preparations.

[5] The application alleges that on 29 July 2018 the group approached the house of the first family. They surreptitiously entered it while the family were at church, and

familiarised themselves with the layout, before leaving. That evening they waited until darkness and approached the house. Two of them were armed. The father opened the door, observed the firearms, and attempted to close it. The group entered the house by force and abducted the father, taking him to the basement. The mother managed to escape and contacted the police. On police arrival, only Frank Amnott remained in the house with the father and children, and he was arrested. The three others had left. Within days they had fled to Scotland. Arrest warrants were issued based on criminal complaints. Following the filing of superseding criminal complaints, further amended arrest warrants were issued on 16 January 2019. The applicant has filed this request for the extradition on those warrants of all three respondents, who are all presently on remand in Scotland.

Issues for decision

[6] Under section 78 of the 2003 Act I am satisfied that the documents sent to the court are those specified in section 70(9). I am satisfied that the respondents' details are in each case correct, that there is sufficient certainty about the charges and that a warrant for arrest has been issued in each case. I am satisfied that the persons appearing were those requested, that the offences are extradition offences, and that copies have been duly served. No challenge was made by any party.

[7] None of the bars to extradition under section 79 of the 2003 are said to apply, and I find they do not apply. Reference must be had to section 84. For the purposes of section 84, the US is designated by the Secretary of State. It is therefore not competent to address issues of evidence in the US courts, and the court must proceed under section 87.

[8] Section 87 is relied on by all the respondents, in several respects. Although their interests are not identical, they raise many of the same issues. All submit that their Art 3

rights would be infringed in a number of distinct ways. In addition, Ms Hayes asserts that her Art 8 rights will be breached.

[9] Further, section 91 provides a bar to extradition where the court is satisfied that the physical or mental condition of the person is such that it would be unjust or oppressive to extradite them. Ms Hayes relies on section 91 in relation to her physical and mental health. Ms Amnott also initially raised section 91 issues about Covid-19 vulnerability, but it is agreed by joint minute that she is now vaccinated and the point was not pressed. Counsel for Hayes presented a similar argument by reference to Article 3, and drew no distinction between the principles applicable to the Art 3 case, and the sec 91 case.

Evidence led

[10] These proceedings are regulated by section 77(2) of the 2003 Act. As in summary criminal proceedings, there is no separate record of evidence given. I will therefore set out a brief summary of the evidence I heard. Much of the expert evidence was in the form of reports. To minimise repetition I will refer to reports which are lodged, and record only the oral evidence.

[11] Evidence was led from Ms Hayes and Mr Reburn. Ms Amnott did not give evidence. Expert evidence was led from (i) Dr Alex Quinn (for Hayes); (ii) Dr Marcello (for Hayes); (iii) Tara Plochocki (for Hayes); (iv) Prof Mushlin (for Amnott); (v) David Barlow (for Amnott); (vi) Mr Snook (for Reburn); and (vii) Maureen Baird (for all three witnesses). Two joint minutes were lodged.

Bars to Extradition

[12] The parties all relied on alleged breaches of Article 3. All face the prospect of a life sentence without parole. They rely on Article 3 specifically in the following respects: the risk of being subject to a disproportionate sentence of imprisonment; the risk of being subjected to prison conditions contrary to Article 3; the irreducibility of a sentence of life without parole; for Hayes and Amnott, specific submissions on the risk of sexual assault; for Reburn, specific submissions on his vulnerability to mistreatment by other prisoners; for Hayes and Amnott, specific submissions on deficient treatment for their mental and physical health conditions.

[13] For the avoidance of doubt, some points were raised in the cases and arguments or in evidence, but not insisted in in submission. These included: that a life sentence without parole would not be justified, at least at the point of imposition (as long as it was not irreducible); that there is any material difference in effect between a sentence of life imprisonment without parole and a sentence which is grossly disproportionate: the conditions of pre-trial detention; the likelihood of bail; coercive plea-bargaining, or asylum claims.

[14] The reliance placed on section 91 (oppression) by Hayes and Amnott focused principally on specific system failures in relation to their own medical needs rather than on general system failures. Counsel treated the s 91 and Art 3 points as indivisible in these respects. Hayes' Art 8 submission is an additional issue. At the outset, it is necessary to record the evidence, as follows:

Evidence relating to Valerie Hayes' medical and family circumstances

[15] Valerie Hayes gave evidence. She is a 40 year-old US citizen. Professionally she is a behavioural analyst, with a background of gathering human intelligence for state or military purposes. She formerly lived in the state of Virginia with a husband who worked at Quantico. She refused to name her former employer, hinting that her employment was classified. She was born and raised in the USA and first came to the UK in about 2014. Her medical and other historic records are largely in the USA but some UK records were available.

[16] On her testimony, she has a variety of significant medical conditions. She claimed to have Lynch's Syndrome, a genetic condition which predisposes her to suffer cancerous growths. These tend to develop in the colon, brain and uterus. She had colon cancer in 2007 aged 28. She underwent chemotherapy, and part of her large intestine was surgically removed. She had uterine cancer in 2012, and underwent a hysterectomy. She currently has several lesions in the pelvis, not showing malignancy.

[17] Her bowel surgery has left ongoing difficulties. She requires medication daily to avoid up to 35 bowel movements a day. The medication is occasionally ineffective. She is left with abdominal pain at the site of the bowel surgery. She has ongoing monitoring by colonoscopy once a year, and blood testing twice a year for cancer. She was able to sit throughout five days of proceedings, however.

[18] The records note hemiplegic migraines, from which she still suffers. These can paralyse the right side of her body for a period. She has required hospitalisation from prison in Edinburgh for this, as it can cause headache, nausea and vomiting. This is all a consequence of the treatments for Lynch Syndrome.

[19] She spent time in Belfast and these records are lodged (p1005). She underwent investigation for small bowel obstruction, found to be lesions related to her surgery.

[20] She provided copy US medical records. I note in particular a letter (p1105) dated 29 March 2017 and a subsequent discharge diagnosis, which tend to partially confirm Ms Hayes' condition. Some records of the Western General Hospital, Edinburgh, are available (p1113 -17). These show colonoscopy and assessment in February 2020. She reattended in July 2020 to investigate a palpable abdominal mass (p1293). She has further appointments there for monitoring.

[21] Her family circumstances are that she has four children. Her son was born in 1999 and is presently in the US military. She conceived him at age 19 as, she said, a result of rape. She underwent 18 months of psychological treatment, which successfully addressed the trauma of her experience. Her daughters were born in 2002, 2005 and 2006. She met their father in 2003 and cohabited with him from 2004. The relationship ended in late 2007. Ms Hayes moved with the children to Maryland.

[22] In 2009 she met Robert Hayes, and they cohabited from 2010, with her four children. This relationship ended in 2014 as a result of severe domestic abuse. She moved to the UK in 2014 and claimed asylum, in part related to protection from Mr Hayes. The children stayed with their grandparents, but she kept in frequent touch with them. She stayed in the UK until 2018.

[23] She returned to the USA, to Florida, in 2018. She was, she said, working for the UK Foreign Office by then. The three girls came to live with her. Later in 2018, in August, she returned to the UK, to Belfast and later to Scotland, and the girls accompanied her. Ms Hayes was by then accompanied by Mr Reburn. She was the girl's primary carer until November 2018 when she was arrested on the current matters. The girls were taken into

care by Glasgow City Council, where they remain in foster care. She remains in frequent contact with them, and they can now visit her in custody. The girls wish to remain with their mother and not to return to the USA. They are doing very well in school and college. Their relationship with their father, is poor. He has raised an action in a Scottish sheriff court for various family orders, and Ms Hayes has been sisted as a party. If Ms Hayes were extradited, they would not return to the US with her. They regard Scotland as their home.

[24] Ms Hayes spoke about her mental health. It is severely affected by her relationship with Robert Hayes. They lived near Quantico, Virginia, and he worked for the US Intelligence Office, Department of Defence. He had high-level security clearance, which Ms Hayes identified in detail. Their relationship was normal to the outside world, but severely abusive. Mr Hayes had worked as a senior interrogator. He used, she said, many such techniques on her. He affixed GPS trackers to her phone and car. He would punish her if late home. Violence was extreme and committed once or twice per week, in order to control her. She left in 2012 without telling him. He located her and forced to return at gunpoint, with an associate. He water boarded her and cut her with a knife, on her back. They got married later that year, after threats if she did not. He raped her. She tried to report the abuse. She reported matters to his identified senior officer, but nothing was done. They informed Mr Hayes, who punished her further.

[25] She obtained a Preliminary Protective Order from a US court. It prevented Mr Hayes from contacting her. A copy is lodged (pp1251 to 6). It notes a history of violence consistent with her oral testimony. She moved away.

[26] Several weeks later Mr Hayes broke into her home at night, at gunpoint. He tied her up and cut her with a knife. She was sexually assaulted with an implement. She produced photographs, self-taken some time later. [p1266] These show many cuts to the back, and the

word "relentless" cut into her collarbone. She was left tied up, and after two hours managed to get to a hidden phone, where she dialled. The police attended and cut her free. The police report is dated 8 February 2014 and is lodged (at p1274). It identifies a history consistent with her oral testimony.

[27] Mr Hayes was charged and indicted by a Grand Jury, but later she was summoned to a meeting with the local prosecutor and the lead detective. The latter was, she said, an associate of Mr Hayes. She was informed they were dropping the charges. He faced no prosecution. She decided within 24 hours of that meeting to travel to the UK. She travelled to the UK via Turkey so she could not be tracked by Mr Hayes.

[28] She identified these events as when she first developed Post Traumatic Stress Disorder. She initially managed the symptoms with yoga, meditation and other self-help remedies. She later received treatment from Dr Quinn, a psychiatrist in Edinburgh. She discussed the various medications, and her varying symptoms of flashbacks, anxiety, insomnia and dissociation. She cannot take showers as the water on her face reminds her of waterboarding.

[29] Her symptoms are presently under control. She retains a fear of return to Virginia, where she would be remanded in the area where Mr Hayes still lives. She believed that he was able to influence others, and would try to harm her by proxy by other prisoners. She would take her own life if she were returned to Virginia. She stated that the evidence in the case, for which she faces extradition, was fabricated, and that this reflected that she would receive no fair trial.

[30] She was cross-examined only by the procurator fiscal. She was confident her daughters' evidence would be consistent with her own. She had claimed asylum the minute she landed in the UK, on 8 April 2014. She had to undergo initial restrictions on movement.

She had entered employment with the UK Foreign Office and had signed the Official Secrets Act, so could not discuss what she did thereafter. She had returned briefly to the USA in November 2014, but this was under the Foreign Office "protection", although she could not explain what such protection comprised. She had not been granted asylum, but her case remains live. She had met her daughters there. She chose not to involve them in the current case. She remained about one year in Glasgow, employed by the Foreign Office.

[31] Her children came across with their father, together with Gary Reburn and Mr Reburn's then partner. The father then departed after a period, and later raised the sheriff court action.

[32] She agreed as a behavioural analyst she was taught how to analyse behaviour, and had received 6 years' intensive training. She had a masters degree in forensic psychology and a doctorate in abnormal psychology. She agreed that she would be able to malinger, but not to reproduce physiological symptoms such as sweats, goose bumps or change of colour – these had been identified by her psychiatrist, Dr Quinn. Her physical symptoms related to Lynch Syndrome were well managed at present.

[33] She had written a letter to Dr Quinn, in about January 2021 (production 26). She did so when she realised her symptoms were "nothing compared to her likely condition in a US prison". She had decided to take her own life if extradited, as she feared her husband could get to her in prison. She was aware in general of US prison conditions as she had been a prison visitor. She was not exaggerating symptoms, or manipulating people.

[34] I record that Ms Hayes presented as an intelligent, careful and articulate witness, who was ostensibly balanced in the evidence she gave. Her history is an extreme one, and much of it difficult to take on trust, particularly given her claimed psychological training. Her mental health symptoms are almost entirely self–reported, and therefore vulnerable to

exaggeration. She has an extremely pressing interest in not being extradited. Some of her evidence, for example working in a classified role for the UK Foreign Office, was too fantastical to accept. I take the same view as Dr Quinn (report 6 June 2019) that "The story which Valerie Perfect Hayes gives at interview…is fantastical and strange", and he points out inconsistences and a medical file that does not corroborate her story. I did not accept her evidence except where independently vouched. I accept that she suffered an abusive relationship of some description with Mr Hayes. I accept that she was left with the marks which are shown in the photographs. I accept the history of events set out in the police report dated 8 February 2014, referred to above. I also accept the medical history of surgery for cancerous growths which is vouched by the medical records from the USA, from Belfast and from Edinburgh, but not that she has Lynch's syndrome. These all point to events which are capable of founding the diagnoses spoken to by Dr Quinn, below. I can also accept that she is genuine in her fear of extradition to the USA, but that is attributable to the prison conditions. I do not accept that she has a reasonably-based apprehension that her ex-husband can harm her in prison. I do not accept that in fact he can do so. In any event, while she would be held on remand in Virginia, upon conviction she would be in the US federal system, which could be anywhere in the US. In summary, I view Ms Hayes' evidence as substantially manipulative, incredible and unreliable. I have accepted only those parts which are independently vouched, as set out above.

[35] **Dr Alexander Quinn** treated Ms Hayes in Edinburgh. He is a consultant in forensic psychiatry at the Royal Edinburgh Hospital. He compiled three reports, numbers 7, 8 and 9 of the productions for Ms Hayes. These reports reflect his continuing assessment of Ms Hayes, and are dated 6 June 2019, 15 September 2019 and 17 October 2020. He has concluded that she suffers from Post Traumatic Stress Disorder.

[36] He gave oral evidence. He explained the process of Ms Hayes being seen by colleagues, and had access to previous records from Belfast, as well as primary material referred to by her, all as listed in his third report. The history taken from Ms Hayes was consistent with her oral evidence in court. The reports are available in process and I refer to them for brevity.

[37] I accept his evidence and his opinion that Ms Hayes exhibits the symptoms of PTSD. He readily accepted that he was largely dependent on what Ms Hayes told him, but he had approached the case with appropriate scepticism. I do not accept the history which she gave to Dr Quinn is true, but I do accept that she is properly diagnosed as suffering from Post Traumatic Stress Disorder, because Dr Quinn was able to make certain objective checks. These primarily were his observation of physiological changes, which are impossible to fake. These included skin pallor, goose-bumps and retinal changes, which coincided with her speaking about trauma. Dr Quinn had access to the photographs and medical reports mentioned above. It is on this basis I accept that the symptoms justify a diagnosis of PTSD.

[38] He had received the subsequent undated letter (page 1333) from her, in early 2021, and accepted her suicidality was consistent with the diagnosis. He was concerned her mental health would worsen upon extradition. Although in evidence there was some detailed questioning about medication, this point was not ultimately founded upon in submissions, and I find that it is not proved that appropriate medication for PTSD is not available in the US federal prison system.

[39] Dr Robert Marcello gave evidence by video link from Virginia, USA. He is a licensed clinical psychologist, and I accept he is an appropriate expert to speak about PTSD and treatment. He prepared a report, number 4 of process (pp328 to 338), plus appendices. I did not find his evidence to assist in advancing matters. In relation to the PTSD diagnosis, he

had not treated or seen Ms Hayes, and his evidence added little to that of Dr Quinn, except to act as an approval of Dr Quinn's methods and reasoning. He was equally concerned about a material worsening of Ms Hayes mental health when confronted with the poor conditions in a US prison. His report covered the likelihood of adequate treatment in a federal prison. His evidence was not of assistance, as it was almost entirely deduced from the evidence of Ms Baird and Mr Irby, or open-source materials. He is not an expert on medical treatment in federal prisons and I reject his evidence on this.

[40] I accept that Ms Hayes is justifiably diagnosed as suffering from Post Traumatic Stress Disorder, and that her extradition to a US Federal Prison is likely to affect her mental health to some extent, even to the point of suicidal ideation, but that is not as a result of prison conditions. Her threats of suicide are voluntary, and not shown to be compelled by any underlying mental health condition.

Evidence relating to Gary Reburn's personal circumstances

[41] **Gary Reburn** gave evidence, in brief terms. He is a 58 year-old US citizen. He was formerly in a relationship with Valerie Hayes. His evidence was that he had never been in trouble with the law. His father was a police officer. Mr Reburn was formerly a chief financial officer. He holds two degrees, in accounting and economics, and has worked since university. He lived a middle-class professional life, and was married for 25 years. He has 8 children in total, two with his wife and six with a former partner Madeline Davidson. He had lived a crime-free life. He is presently in HMP Addiewell. He had suffered an assault there, for reasons he had no explanation for, and is held in protective custody. He has no connection with or knowledge of gang culture. He was not cross-examined.

Evidence relating to Jennifer Amnott's circumstances

[42] She did not give oral evidence. The only evidence is in the first joint minute at paras 15 and 16, and in the second joint minute. The former records certain health matters. The latter records that she has had one Covid-19 vaccination. Ultimately, none of the parties founded upon Covid-19 points, as this is a resolving position, and the respondents are or will be vaccinated.

Evidence relating to US federal prison conditions

[43] This evidence was relied upon by all three respondents. The relevant evidence comprised: oral evidence and reports from Maureen Baird, who is a former US prison governor; letter dated 26 October 2020 by Christopher Kavanaugh, Assistant District Attorney; two written statements by Paul Irby, senior counsel at the Department of Justice both dated 21 October 2020. No significant distinction was drawn between prison conditions for males and females.

[44] **Maureen Baird** gave evidence by video link from Connecticut, USA. Her report dated 26 August 2020 (prepared primarily for Hayes) is lodged at p829 of the productions. I record that she has prepared a further report dated 24 October 2020, prepared primarily for Amnott, but this was not separately put to her by counsel so I have not included it. Its contents appear to be largely repetition or to have been superseded.

[45] She is 59 years old and spent 28 years with the Department of Justice, Federal Bureau of Prisons. She was Warden of a Federal Correctional Institute in Connecticut, and later Warden of the Metropolitan Correctional Center in New York City and Warden of the US Penitentiary at Marion, Illinois. There she led more than 300 staff and was responsible for more than 1200 inmates. Her resume is lodged in the Reburn supplementary list and I

accept it is correct. She retired in October 2016. She has maintained contacts with former colleagues, kept abreast of new policies and laws and has worked as an independent consultant since 2017. She has given evidence in approximately 25 cases, including 8 to 12 UK/US extradition cases.

[46] She gave evidence on the structure and conditions within the Federal Bureau of Prisons ("BOP"). These are set out in her report, which she adopted as her evidence. I will therefore limit discussion of this evidence. The report considers a number of issues.

[47] There are 110 federal prisons housing approximately 156,000 inmates. Post-conviction housing for inmates is impossible to predict with any certainty, and is based on the offence, citizenship, prior history, flight risk, sentence length and some other factors. Attempts are made to house within 500 miles of residence, but this is not always possible. Ms Hayes may be classified as a low risk female offender, but may be sent to a high security medical centre.

[48] She was asked about sexual assaults by staff on female inmates. Ms Baird's report addresses sexual assaults in one NY facility. There, three staff members were convicted of multiple assaults. She had knowledge of several assaults on female inmates. Sexual contact was never regarded as consensual, and is punishable by a lengthy prison sentence. She was involved in the prosecution of several staff. Other staff who fell under suspicion would often resign. She cited an example of a lawsuit by seven women in a Florida prison, alleging years of sexual assault. She gave 18 specific examples of sexual offending, throughout the US, over the period ranging from 2006 to 2017. Although disturbing, I note that these cases occurred over a range of 11 years, and cover the whole of the US, where she said 29 institutions house female offenders.

[49] Ms Baird was asked about medical care in federal prisons. Her opinion is that Ms Hayes, for her physical condition, would receive appropriate medication. While Ms Hayes is unlikely to receive benzodiazepines, other medication will be considered by Health Services staff. If her present medications were not available, these would be substituted with a BOP formulary drug. She may be placed on a chronic care assignment, which ensures regular monitoring for specific chronic conditions, to provide changes of care as needed. These clinics appear to provide the required monitoring for the majority of the time, but there have been some recorded failures. Failures in care are frequently down to poor choices by the inmate, or disruption of appointments.

[50] She was asked about mental health care in federal prisons. BOP Psychology Services is available to all inmates, with a "great team of professionals", as she put it. This service is stressed with an enormous workload and frequent staff shortages.

[51] Staff shortages amongst correctional officers frequently mean a policy of "augmentation" is operated. All staff, including medical, teaching, secretarial and others, can be required to fill in for supervisory roles, on an ad hoc basis. This can mean that core medical and other tasks are not carried out when staff are absent on other duties. It creates a backlog of cases. There is also a general difficulty in recruiting medical and other staff. These two features can lead to a detrimental effect on services. Ms Baird did not go as far as to say medical services would not be delivered, only that they may be subject to delay and backlog.

[52] Ms Baird's report refers to an Office of the Inspector General's report dated 2019, which raises several concerns, but Ms Baird's report does not comment further. I am unable to accept that the OIG report adds anything to her evidence. She also refers to the effect of Covid-19 in recent months. As neither of these points was pressed in submissions I will not

discuss these further. In my view Covid-19 can be expected to be of decreasing importance, particularly where vaccines are now readily available to the three respondents.

[53] Ms Baird was directed to a critique of her evidence in the written evidence for the applicant, namely a letter dated 26 October 2020 (the "Kavanaugh letter") by Christopher R. Kavanaugh, Assistant US Attorney, and two statements by Paul Irby, senior counsel for BOP (the "Irby statements"). These covers a number of the same topics.

[54] The Kavanaugh letter deals with Ms Baird's evidence from page 12 onwards. It does "not take issue with her expertise". It claims biased advocacy and inaccuracy. Ms Baird, in turn, accepted much of what the Kavanaugh letter says about institutional structures, but her evidence was that this was theory only, but did not take place in practice. There was more staff interaction in female prisons, but this was not camaraderie.

[55] On medical care, her evidence was that mental health depended heavily on self-disclosure. Another mechanism for detecting problems was staff observation, but this was of limited use where one correctional officer had a large number of inmates to supervise. It would be difficult to detect, for example, change of mood in a particular prisoner. As for medication, although prisons try to wean prisoners off benzodiazepines, she agreed with the Irby statements that they would be received if prescribed by BOP.

[56] She noted that the Irby statements said prison population had declined, to 155,033. This was true, but there was still a big challenge to staff this, and the system was struggling. The BOP is desperately trying to hire more staff. The staff shortage causes a lot of concern. Augmentation was necessary, every day, with the knock-on effect on services. An inmate would, however, continue to receive prescription medication. Whether regular medical screening would be delayed would be case-specific, but would be accommodated.

[57] She noted the comments on compassionate release in the Irby statements. She agreed that rights had been statutorily changed. Her assessment, that compassionate release would not be granted in this case, was based on the severity of the charges. Compassionate release was now considered by a judge of the sentencing court, rather than the warden, so was a judicial decision. She was not aware of the 50/50 doctrine. Compassionate release assessment, which she had carried out as warden, "absolutely" took into account the original offence. In her experience, such severe offences would never lead to compassionate release. She'd never seen it for a life prisoner.

[58] An assessment for compassionate release would also take into account health, progress in rehabilitation and change in the prisoner, and age. Previous convictions would be considered, as would victim statements. The prisoner's plan for release would be a "huge part of it". In her view, the magnitude of the offence is the overriding factor (I note that such decisions are no longer for a warden to take, but for a court, under the First Steps Act).

[59] Ms Baird identified that the nature of the charges, involving children, would make Ms Hayes a target in prison. The Irby statements disagree. She pointed out that Mr Irby was an attorney, so he did not have her perspective, and she was in a better position to know. He was partly correct, but she had seen assaults based on lots of reasons. Ms Hayes faced the risk of threats, or ostracism. Ms Baird could not recall specific instances. While BOP had facilities to protect prisoners, it could never be guaranteed.

[60] In relation to sexual assaults, the BOP try to do their best, but it "was not good enough". For a prosecution of staff, there had to be enough evidence. BOP was happy to prosecute. She thought sexual assaults happened "all the time". She had seen numerous examples. Evidence was the problem, which was a frustration. The word of an inmate was

usually not enough. Cells were usually shared, and showering communal. Only special housing had its own facilities.

[61] She agreed that Mr Reburn, with his background and charges, faced risk from his fellow inmates. In isolation, he would be a low-risk prisoner, but the charges would make him high-security, as would a sentence over 30 years. He would be housed in a penitentiary, of which there are 15 or 18 in the US. Most inmates have histories of serious crime and violence. It would be a very difficult time for Mr Reburn. Gang culture was fairly prevalent. Gangs had their own agendas of violence and were a menace in prison. Reburn would be shunned, and a target, particularly once the inmates learned his crime involved children, which would be assumed to be a sexual crime. Inmates "find out everything", including that he has financial resources, which would make him a target for extortion. A lot of inmates are on life sentences, have nothing to lose, and carry weapons. There is regular violence, with scope for fatal injuries.

[62] The Public Safety Factors ('PSF') mechanism would not be used for Reburn, at least at the start. He would go to a penitentiary. He would always have to watch his back. The charges would make him an outcast. It was an inherently dangerous environment for him. The BOP had exclusive jurisdiction over where an inmate was housed, and could ignore a judge's recommendation. He did not qualify for certain sex-offender or gang-leaver units, which might be safer. He might be housed in special housing by himself. It is normal to be incarcerated 23 hours a day. It is close to solitary confinement. Ms Baird confirmed similar factors would apply to Ms Amnott.

[63] She refuted the Kavanaugh letter accusation that her evidence was biased. She was not an advocate for anybody. Her reports were based on experience over 27 years. She had done high-profile trials, such as the Assange deportation, but did not give interviews.

[64] On challenge on behalf of the applicant, she confirmed she had given evidence on behalf of the government, and had stayed current on policy changes. She was confined to open-source material, but still got information from staff still employed.

[65] She agreed that ensuring safety of inmates was a fundamental duty. Staffing problems were managed by mandatory overtime and augmentation. She had complained, as had all the wardens. It was a long-standing problem, and staff still speak about it currently.

[66] Communications were better in female facilities than male facilities, but it didn't always happen, and less so in high security facilities. She would lead by example and interact with inmates, but it could not be forced. It was inmates who told her when people were being targeted or ostracised – if she thought this true, she would immediately place the inmate in special housing.

[67] She confirmed she could not give statistics on sexual assaults. Her views were based on her experience of allegations not resulting in criminal charges. Such concerns were shared by her regional director.

[68] On compassionate release, she accepted that her prediction was speculative. The First Step Act had an effect, and she could not refute the Kavanaugh letter when it claimed 150% rise in successful applications. She accepted that each of the requested persons could apply, and receive an assessment from a judge. She could not contradict legal evidence on likely sentences.

[69] On Covid-19, she accepted that the number of positive tests was now way down, and the situation was getting better. Social visits had started in October last year, and most prisons had opened up, with protocols in place.

[70] On medical facilities, she accepted that if a mental condition worsened, a higher level of care was available. Mental health units were available, but only if mental health problems were so significant they could not be managed in the regular prisons. Suicide attempts would, if care not available in regular prisons, be sent to mental health units. She agreed that suicide prevention programmes were effective, but they were not fool proof. They did a good job, but some inmates fall through the cracks.

[71] My assessment of Ms Baird's evidence is that she presented as speaking from genuine experience, was balanced in her evidence and accepted fair challenge. Her evidence was challenged on the basis of lack of current knowledge, her last prison employment being in 2018, but I accept her evidence that she continues to monitor conditions through open source materials and continuing discussions with former colleagues. Her evidence was, however, somewhat vague and anecdotal. She justified this by the fact that there is no prison inspectorate, and no official source of statistics. I do not criticise her for that. The effect is, however, that there is insufficient factual material to meet the high standards required in extradition cases. I cannot accept that her evidence amounted to the necessary standard and quality of evidence which is necessary to demonstrate that the US federal prison system fails to meet standards which comply with Art 3. I discuss these below.

Evidence for the applicant on prison conditions

[72] For the applicant, no oral evidence was led. There are only the Kavanaugh letter and the Irby statements, which I refer to for their terms. These were not discussed in detail. The main points can be summarised as:

[73] The applicant's evidence denies that the respondents cannot be imprisoned safely. In relation to Mr Reburn, an inmate who can function with relatively less supervision can be

housed in lower security institutions (Kavanaugh letter, page 12). A full array of technologies assists with security. Constructive and frequent interaction between staff and inmates is encouraged. Unit management is the BOP philosophy, facilitating inmate access to staff. There are regular meetings with work supervisors, teachers and psychologists, and issues can be raised with them. There is oversight by the Inspector General, as well as at a high political level.

[74] The Irby statements point out that the prison population has shrunk from 219,298 in 2013 to 155,033 today. There are 37,400 staff. Inmates are designated to BOP facilities according to security and programme needs. There are procedures to ensure inmate safety, such as assignment to an appropriate housing unit. PSFs may mean a higher security classification, but these can be waived if the level of security does not reflect the inmate's security needs. Certain high security institutions contain inmates who might feel unsafe elsewhere. There is an initiative to assign lower security accommodation to avoid the need for protective custody in a higher security institution. The practice is not uncommon. Mr Irby's sworn testimony is that he is of the view that Reburn would be appropriately incarcerated, with regard to his security, programming and health needs. In relation to Hayes, the facility designated would depend upon security, programming and health needs. If there were concerns about safety, then designation and housing assignments would be reassessed. Medication would be prescribed as appropriate.

[75] The Kavanaugh letter and the Irby statements amount to formal assurances on behalf of the applicant. The Kavanaugh letter is a formal letter of the US Department of Justice, and encloses "on behalf of the United States" the Irby statements. They were both expressly prepared as responses to Ms Baird's report, as well as those of Ms Plochocki and Mr Snook. They address the significant points made, but do not bear to be "an attempt to respond to

each and every factual error, misstatement or conclusion" made by them. I accept them as assurances formally and properly given by the applicant. I take them into account as discussed below.

Evidence on US legal system

[76] Each of the respondents founds on identified faults in the US legal system, based on the following evidence:

[77] Tara Plochocki gave evidence. She is 40 and a partner in a Washington DC law firm. She has prepared two reports, lodged at pages 1 to 31 in the Hayes productions, and she adopted these as her evidence. A lot of supportive material was also lodged, but this was not referred to in any detail. Her experience is set out in her reports, and was not challenged. I accept she was able to give accurate and expert advice on federal criminal law. She was referred to the Kavanaugh letter.

[78] She said that pre-trial detention would depend on the risk to the community, ties with the community, flight risk and the like. With Hayes' record, she had no mitigating factors and would be highly likely to be refused bail. The Kavanaugh letter, which relied on the case of *US* v *Slatten*, was misleading, because the accused were contractors who under US law were treated as soldiers, and therefore stood a high chance of proving reasonable use of firearms in Iraq, and who were not flight risks or risks to the community. None of these points applied to the requested persons.

[79] She noted that the US would not proceed on charges 13 to 20. The respondent nonetheless faced, upon conviction, a sentence of life plus 28 years (the latter being four firearm-aggravated crimes which each carry a mandatory minimum of 7 years). While

technically conviction was not certain, convening a Grand Jury with charges was a clear indication of a strong case. They would receive a fair trial but not a fair sentence.

[80] In this case, because a co-conspirator, Frank Amnott, had already pled guilty, there was a strong chance of conviction. On a plea of guilty, his evidence would have been recorded under oath, to avoid denial later, and treated as true. This evidence was now available against the requested persons at their trials (a copy of that statement is lodged). It admits conspiracy to murder acting with others.

[81] Each of the requested persons faces a mandatory life sentence on charge 2, for the reasons set out at pages 3 and 4 of her report. The other charges carry terms of years, as more particularly set out in her report. All three respondents will, upon conviction, "definitely" get a life sentence.

[82] The charges will stand or fall together. The Kavanaugh letter at page 7, para 3, does not fairly represent her evidence. An appeal will not assist on sentence, as it is fixed by statute. While technically possible to rely on the 8th amendment to the US Constitution, to argue cruel and unusual punishment, the use of *US* v *Slatten* is misleading and should not be mistaken for the rule.

[83] Reduction in sentence is possible where assistance is rendered. However, that was unrealistic in this case where the co-conspirator had already provided full assistance. It was also unrealistic where the requested person had fled the jurisdiction and had resisted extradition, so had actively impeded the course of justice.

[84] Compassionate release was discussed by reference to section 3582 of the US code (Applicant's production 4, page 15). Entitled "Imposition of a sentence of imprisonment", the statute sets out the rules (a) to (e) for the court to follow. Rule (c) provides:

> "The court may not modify a term of imprisonment once it is imposed except that (1) in any case (A) the court, upon motion…may reduce the term of imprisonment… after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that (i) extraordinary and compelling reasons warrant such a reduction…and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission".

[85] The first step is to consult section 3553(a) (lodged at page 52). That sets out various criteria, such as seriousness of offence, deterrence and protection of the public. It also ((a)(5)) refers to any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28 of the US Code. Reference to section 994 (page 64) shows (994(t)) that the Sentencing Commission are required to state any "extraordinary and compelling reasons" for sentencing reduction. Expressly, "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason".

[86] There is also a statement in the "guideline manual" lodged, which promulgates only such factors as age, family circumstances, terminal illness and the like.

[87] This evidence was taken at speed. While I note that, strictly speaking, section 994 regulates what should be in policy statements, and does not bear directly to tell the judge what extraordinary and compelling reasons amount to, Ms Plochocki's evidence was that section 994 imposes a statutory limitation on regarding rehabilitation as a reason to reduce a sentence, which no federal judge can overcome.

[88] Her evidence was clear. Rehabilitation is not a ground to reduce a sentence. Changes in individuals are not recognised. "Compassionate release" is a misnomer in her view.

[89] Her position was these provisions, taken together with the fact that section 3553(a) requires reference to the original offence, the continuing need for the sentence to reflect seriousness, deterrence and protection, and the sentencing range for the original offence,

mean that compassionate release may be refused even in the case of terminal illness or catastrophic event. Ms Plochocki had never seen compassionate release granted for murder or kidnapping. She noted Mr Kavanaugh supplied no examples. A reduction in sentence is a reimposition of sentence, so the original criteria must be considered again. A further difficulty is comparative justice which must be taken into account: under s.3553(a)(6), if there are other, unrelated, inmates who are serving life sentences, there must be a justification to treat them differently. Further, the need to provide restitution to the victims must not be forgotten (s.3553(7)).

[90] On this basis, the requested persons would not be eligible for compassionate release. In the light of all these factors, early release was "inconceivable" to her. Rehabilitation was nowhere defined in the guidelines. In her experience, sentence reduction was simply not granted in cases of murder, kidnapping or violent crime, even in the case of 80 year-olds. In effect, compassionate release was only useful for drug crimes, to mitigate racist penalty discrimination, for example in sentencing for cocaine versus crack cocaine offences.

[91] She was taken to the First Step Act. She could not comment on its effect, as no numbers were given, and therefore 150% uplift referred to by Kavanaugh was meaningless. The Covid policy referred to in the Irby statements will end when the pandemic ends.

[92] Executive clemency was not a realistic remedy, and there is no possibility of a commutation of a mandatory life sentence (second report, paragraph 10). A big problem is the lack of proportionality (para 11) between crime and mandatory punishment. Even the 8th amendment to the US Constitution is insufficient to remedy this lack of proportion (para 14 to 19).

[93] She confirmed that these factors would apply to all three requested persons. She confirmed she agreed with the expert evidence of Lloyd Snook.

[94] In relation to Ms Plochocki, and also in relation to Mr Snook and Mr Barlow (below) I accepted her expertise and accuracy in describing features of US federal law. None of them was challenged by the Crown as to their expertise or accuracy. I accept they all gave expert evidence on the matters they covered, and that their opinions are genuinely held. Their perspectives are as defence attorneys, and I do not consider that theirs are the only supportable opinions on the effect of the law, and I discuss this below. I do accept, however, that they correctly discussed the law, and their views are properly supportable from the statutes and precedents cited.

[95] **Lloyd Snook** gave evidence very briefly. It consisted of confirming that his evidence was set out in his report dated 9 October 2020 lodged on behalf of Mr Reburn, which he did. He was briefly cross-examined, and his evidence did not differ from his report. In brief summary, he is an attorney in Virginia and specialises in major federal felonies. He confirmed that no parole is available in the federal system. A good conduct allowance, generally available, is not possible in a life sentence. The full sentence is served without discount. Much of his report dealt with the hypothesis that the mandatory sentence is not imposed due to plea-bargaining or other reason. I, however, cannot proceed on that assumption. For that reason his report is of limited utility, and counsel did not refer to it in detail. His view on disproportionality was that "In recent years the US Supreme Court has upheld against constitutional attack sentences that most places in the world would regard as barbaric". My observations on his credibility and reliability are as stated above.

[96] David Barlow gave evidence, also in extremely brief terms. He is a Texan attorney who prepared a report dated 18 October 2020 which is lodged. He confirmed that this was his evidence. He had read the reports of Ms Plochocki and Mr Snook, and agreed with them, describing the authors' conclusions as well reasoned and unassailable. He is of

the view on Count 2 that Ms Amnott will spend the remainder of her life as an inmate, never being released prior to her death. He analyses compassionate release in similar terms to the other legal witnesses, setting out the criteria which would apply. The application of these to Ms Amnott are "difficult to legally determine". He was not cross-examined. My view of his credibility and reliability are as stated above. Counsel did not suggest his evidence was any different in effect or added to that of Ms Plochocki or Mr Snook.

[97] Professor Michael B. Mushlin gave evidence by live link from New York. He is a professor of law at Elisabeth Haub School of Law at Pace University in White Plains, New York. He has prepared a report dated 27 October 2020 and an update report dated 30 May 2021, the day before proof commenced, and they are lodged. The main report sets out his background and qualifications. These include authorship of "Rights of Prisoners", a text-book now in its fifth edition, described as a four-volume treatise about prison law in the US, and cited by courts and scholarly journals. I accept that he is genuinely expert on the academic study of prisons throughout the US. He did not claim to have significant or recent personal contact with prisons, although he had visited many. His expertise relies on academic sources rather than any significant personal experience.

[98] His October 2020 report deals with three main topics, both on a general level and with such information as is available about particular conditions in the likely remand and federal jail facilities for Central Virginia. These are (i) whether there is effective oversight of US prisons; (ii) the extent of preventative mechanisms to protect from human rights abuses, and (iii) the impact of Covid-19 on prisoners in the US, and remedies. The supplementary report of 30 May 2021 provides updated information on Covid-19 statistics, and an update on recent PRLA litigation. He adopted these as his evidence and they are lodged and available to read. I did not find his evidence on issues (i) and (iii) to be of assistance.

Oversight is relevant to the entire system, rather than the specific effects on these respondents, and lack thereof is not by itself evidence of human rights abuses or oppression. Covid-19 is a resolving problem, and there is nothing preventing these respondents from being fully vaccinated.

[99] He discussed Central Virginia Regional Jail (irrelevant for present purposes as not a federal institution), but more widely describes the courts as the place to seek any remedy. He described access as "not impossible", but made harder by statute and by judicial decision. The Prison Litigation Reform Act, signed 1996, significantly reduced access to the courts. It introduces a number of hurdles for prisoners. These include: the requirement to exhaust all administrative remedies; that redress is only available for physical injury, not including mental or emotional injuries; a "three strikes" rule exists; a requirement to pay court fees in full; limitation of attorneys' fees; threat of sanction of losing prison credits, and others.

[100] I accept Professor Mushlin's evidence is expert and authoritative on the remedies, and limitations thereon, available to prisoners. His evidence was not challenged and I accept that federal prisoners do face a number of practical hurdles in raising court actions. His evidence did not, however, go as far as to say there was no remedy, or that no remedy was ever obtained in practice. As such, his evidence was not sufficient, in my view, to show that the US federal prison system denies remedies to its inmates.

Evidence for the applicant about US legal system

[101] The Crown evidence comprised: (a) declaration of Philip Syms, US Marshall Service; (b) two Declarations (both dated 21 October 2020, one relating to Gary Reburn, the other to Valerie Hayes) of Paul Irby, Senior Counsel of the US Department of Justice, Federal

Bureau of Prisons (the "Irby statements"); (c) Letter dated 26 October 2020 by Christopher R. Kavanaugh, Assistant US Attorney, Western District of Virginia (the "Kavanaugh letter"). As these are available I will not set these out in full, and will discuss these under the appropriate headings below. I can at the outset leave to one side the evidence of Mr Syms, directed as it was against pre-trial detention conditions, against which no complaint is now made. Mr Syms in any event describes an unexceptional regime which would not prevent extradition.

[102] No oral evidence was lead, and the documents were not spoken to. It is important to note that they are reactive to the criticisms on behalf of the respondents, rather than an exhaustive discussion of every aspect of the US federal prison system, and the Kavanaugh letter makes that point.

Parties' submissions on bars to extradition

[103] As all counsel adopted the written submission presented on behalf of Ms Hayes by Mr Harvey, I will discuss the submissions under the headings presented, with the addition of specific points for Reburn and Amnott where required.

[104] Article 3 of the European Convention of Human Rights provides: No one shall be subject to torture or to inhuman or degrading treatment or punishment. Section 91 of the 2003 Act I have set out above.

[105] The respondents submit that extradition should not be ordered because of (i) risk of sexual assault to Ms Hayes (Art 3); (ii) risk to physical and mental health (Art 2/3) of Ms Hayes and Mr Reburn; (iii) the nature of the sentences faced by all three respondents (Art 3); (iv) disproportionate interference with private and family life of Ms Hayes (Art 8);

(v) that Ms Hayes' physical and mental condition is such that it would be oppressive to extradite her (section 91).

[106] Counsel submitted that under Article 3, where the risk is from state authorities the test is "whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3" (*Dean* v *HM Advocate* 2018 SC (UKSC) 1 at para para 9, 25). Where the risk is from non-state actors, the test is whether the state has failed to provide reasonable protection (*ibid* at para 26). Under s.91 of the 2003 Act, the test for oppression is whether it appears to the judge that "the physical or mental condition of the person is such that it would be unjust or oppressive to extradite him". The term "unjust or oppressive" requires regard to be had to all the relevant circumstances, which will include the fact that extradition is ordinarily likely to cause stress and hardship (*Surico* v *Italy* [2018] EWHC 401 (Admin)). The court must take into account whether there are sufficient safeguards in place in the requesting state (*South Africa* v *Dewani (no 2*) [2014] 1 WLR 3220 at [50]), including proper and timely treatment for any specific treatment needs (*Zelenko* v *Latvia* [2019] EWHC 3840 (Admin) at 24). These principles were not disputed on behalf of the applicant. Counsel in discussing prison conditions did not make a distinction between Art 2 and Art 3 points. I will therefore not discuss Art 2 separately.

[107] I require, in terms of section 87(1) of the 2003 Act, to decide whether extradition would be compatible with Convention rights. In so doing, I have individually considered all of these points. I will deal with the respondent-specific points first, so these are (i) Ms Hayes' mental health; (ii) Ms Hayes' physical health; (iii) Ms Hayes' Art 8 argument; (iv) Ms Amnott's physical health; (v) Mr Reburn's vulnerability argument. I will then progress to deal with the points about prison conditions and the US legal system. Under prison conditions, I will discuss; (i) lack of medical treatment; (ii) risk of sexual assault;

(iii) violence of inmates; (iv) Covid-19 precautions; (v) lack of oversight; (vi) lack of remedies for inmates. Thereafter I will discuss US legal points, being (i) grossly disproportionate sentencing; (ii) legitimate penological reasons for incarceration; (iii) by far the most extensive topic, the irreducibility of mandatory life sentences.

Ms Hayes' mental health

[108] Section 91 of the 2003 Act states:

> "(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 is would be unjust or oppressive to extradite him…"

[109] The Crown cited the following cases: *R (on the application of Griffin)* v *City of Westminster Magistrates Court* [2011] EWHC 943 (Admin); *Howes* v *HMA* [2010] SLT 337; *Polish Judicial Authority* v *Wolkowicz* [2013] EWHC 102 (Admin); *USA* v *Assange* (unreported) 4 January 2021.

[110] In *Polish Judicial Authority* v *Wolkowicz* the High Court discussed suicide cases. It approved a summary as follows:

> (1) The court has to form an overall judgment on the facts of the particular case;
>
> (2) A high threshold has to be reached in order to satisfy the court that a requested person's physical or mental condition is such that it would be unjust or oppressive to extradite him;
>
> (3) The court must assess the mental condition of the person threatened with extradition and determine if it is linked to a risk of a suicide attempt if the extradition order were to be made. There has to be a "substantial risk that [the appellant] will commit suicide". The question is whether, on the evidence the risk of the appellant

succeeding in committing suicide, whatever steps are taken is sufficiently great to result in a finding of oppression;

(4) The mental condition of the person must be such that it removes his capacity to resist the impulse to commit suicide, otherwise it will not be his mental condition but his own voluntary act which puts him at risk of dying and if that is the case there is no oppression in ordering extradition;

(5) On the evidence, is the risk that the person will succeed in committing suicide, whatever steps are taken, sufficiently great to result in a finding of oppression?

6) Are there appropriate arrangements in place in the prison system of the country to which extradition is sought so that those authorities can cope properly with the person's mental condition and the risk of suicide?

(7) There is a public interest in giving effect to treaty obligations and this is an important factor to have in mind.

[111] As the court in *Howes* v *HMA* observed, the court requires to form a judgment on the facts of the particular case, and so previous cases are illustrative rather than definitive. In refusing the appeal the court regarded the availability of appropriate measures in the US to protect safety, and the availability of facilities for assessment and treatment of mental health issues as important factors. It also placed weight on an absence of history of self harm or attempted suicide. It took into account that symptoms may worsen upon extradition being ordered.

[112] I have recorded Ms Hayes' evidence about her mental health. I have discussed my acceptance of Dr Quinn's evidence as a justified expert diagnosis of PTSD. Dr Marcello's evidence is really secondary evidence that he agrees that Dr Quinn's diagnosis is

supportable. Dr Marcello described the prison setting as not an appropriate setting if her symptoms were to deteriorate. His view, however, was founded on the assumption that the federal system would not provide appropriate treatment. He observed that she may not have the resilience necessary to deal with heightened fears or triggers. In my view Mr Marcello's evidence amounted to an appropriate reaction by a caring professional, but not to any firm evidence of deterioration in Ms Hayes' condition, or want of facilities in the US prison system. It was necessarily speculative, as was Dr Quinn's evidence. Their evidence did not provide any reliable foundation for a finding that there was a substantial risk of suicide. There was no evidence which considered the likely need for treatment in the context of the likely facilities to deal with that need. There is no evidence of any previous suicide attempts. Their evidence was responsibly given, but ultimately it gave insufficient factual material to meet the high test imposed in extradition proceedings.

[113] There was some detailed discussion with Dr Quinn about types of appropriate medication, and whether these would be available in the US. He was not able, understandably, to give any definitive answer. Dr Marcello, a US practitioner, was concerned about a worsening of her condition, but was unable to say that the likely prison regime would result in her not being properly treated.

[114] In my view there is insufficient evidence to conclude that Ms Hayes would not be appropriately monitored or treated in a federal prison. Maureen Baird did not support any proposition that PTSD would not be treated successfully in a federal prison. Her evidence was that the system is stressed with an enormous workload and frequent staff shortages, but they are a "great team of professionals". If benzodiazepines were prescribed by BOP then they would be received. It was clear she was describing a system with considerable challenges, but no more than that. Mental health treatment would still be given.

[115] Ms Hayes' evidence concluded with reference to an undated letter, sent in early 2021 to Dr Quinn (lodged at page 1333) which discusses her suicidal thoughts. These thoughts are said to be triggered by the idea of physical proximity to Mr Hayes. She describes that Mr Hayes will be able to harm her by proxy, notwithstanding that she is in a federal prison. There is no evidence to support that her fears are rational. I do not place reliance on this letter. I cannot be satisfied that it is not self-serving in its terms. In oral evidence, she was adamant that she would commit suicide if she was extradited. I note that this stops well short of the type of condition described in *Wolkowicz* (above) or in the Assange case (*USA* v *Assange*, 4 January 2021, Westminster Magistrates Court).

[116] Maureen Baird's evidence was that high level of care was available if a mental condition worsened, and mental health units were available where such problems could not be managed in ordinary prisons. Suicide prevention programmes were effective but not fool proof.

[117] With regard to the *Wolkowicz* principles, the evidence here was insufficient in quality and quantity to decide that there was a substantial risk of suicide, even on a balance of probabilities. I cannot conclude, on what is little more than Ms Hayes' word, that there is a substantial risk of suicide. The evidence certainly does not reach the "high threshold" necessary. Even if I were wrong on these points, there is no evidence that Ms Hayes' mental condition is such as to remove the capacity to resist. The evidence is consistent with it being an entirely voluntary act, and the threat somewhat manipulative. I cannot therefore find that any risk, such as it is, meets the test of oppression. Perhaps mindful of this, counsel submitted that the risk of suicide is not the only consideration. It was submitted that it would be enough if deterioration of mental health could not be treated. In my view there is simply insufficient evidence of deterioration. The medical practitioners mentioned their

apprehension, but that stopped short of giving evidence that deterioration would occur to the point where it raised Art 3 concerns. Such concerns could be cited in any extradition case. Further and in any event, I accept the evidence that there is an adequate system to allow the US authorities to cope properly with any mental condition or deterioration thereof. I can accept there are criticisms and reservations about the quality of the service, but in my view Ms Baird's evidence does not support any more fundamental proposition. Further, I accept the assurances in the Kavanaugh letter and the Irby statements (below) that appropriate medical care would be given. In all these circumstances, I reject the submission that extradition is barred by section 91 by reason of Ms Hayes' mental health, or that her Art 3 rights would be infringed in this respect.

Ms Hayes' physical health

[118] This point is based on s91, but also Art 2 and Art 3. For the reasons discussed they fall to be treated as a single topic.

[119] I have set out Ms Hayes' evidence on her physical health. I have accepted it to the extent set out in the medical records, which are the US records (page 1106 onwards), the Belfast records (page 1005 onwards) and the Lothian NHS records (page 113 onwards), but no further. Her condition is one which requires monitoring and treatment from time to time.

[120] The submission founded on a combination of both the relatively high level of physical monitoring and intervention required, and the systemic problems of the federal system in providing such a service, primarily due to staff being constantly removed to perform other duties under the "augmentation" policy. It was submitted that this increases the likelihood that the BOP will not be able to provide the full panoply of treatments.

[121] I was not referred to any authority which recognised "increased likelihood" as a sufficient test for whether the high threshold has been reached to satisfy the court that it would be unjust or oppressive to extradite her (from *Wolkowicz*, above). It provides no base value of likelihood. It really is no more than a possibility.

[122] I do not find that any deficit in treatment has been established in the evidence. The only direct source of evidence was Maureen Baird. Her evidence is, at its highest, that there are practical problems with the delivery of medical services, whether for physical or mental health. Her evidence did not support any proposition that adequate treatment would not be given. I accept the evidence of the Irby statements (re Hayes at para 15) that appropriate medication is available. I accept the assurances in the Kavanaugh letter at page 13B to 15, which sets out at length the medical facilities available to all of the respondents. Ms Baird's evidence amounted to no more than identifying practical difficulties, which is insufficient to displace the assurances, and falls short of the "minimum level of severity" (see *Ahmad* v UK (2013) 56 EHRR 1) necessary to show a breach of Art 3 and the "high threshold" that has to be reached to show oppression (*Howes* v *HMA* [2010] SLT 337 at para 13; *Wolkowicz* above). Ms Hayes has not discharged the onus of showing she will not get appropriate medical treatment in a US federal prison. This point therefore fails as a bar to extradition.

Hayes – breach of right to family life

[123] It was submitted that the best interests of children have a very real and important part to play in extradition, and that there are no grounds for treating extradition cases as a special category which diminishes this focus (*BH* v *Lord Advocate* 2012 SC (UKSC) 308 at para 48). I accept that proposition.

[124] The evidence, however, is manifestly insufficient to sustain such a submission. On the limited evidence, Ms Hayes' daughters are presently in successful foster care placements in Scotland. They are aged between 15 and 19. She has been remanded since November 2018 and her input into their care necessarily very limited as a result. They are doing well in school and college. They do not want to return to the USA. She previously left them in the UK for many months in 2014 when she returned to the US. During that time her ex-partner was primarily the care giver. She is not their current care giver and they have thrived outwith her care. They were not called to give evidence.

[125] The issues raised by Art 8 considerations in extradition cases have been discussed authoritatively in *Norris* v *The Government of the United States of America (no 2)* [2010] 2 AC 487 and *HH* v *Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, and expounded in *Polish Judicial Authorities* v *Cielinski and ors* [2015] EWHC 1274 (Admin). These cases were cited by the Crown and the principles not disputed by the respondents.

[126] *Cielinski* summarised the approach of a court. The question, following *HH*, was whether the interference with private and family life of the person was outweighed by the public interest in extradition. There was a constant a weighty public interest in extradition that those accused of crimes should be brought to trial; that those convicted should serve their sentences; and that the UK should honour its international obligations and that UK should not become a safe haven. The public interest would vary according to the nature and seriousness of the crime involved.

[127] In carrying out a weighing exercise of the type envisaged in *Cielinski*, the public interest in extraditing Ms Hayes is very high. The crimes alleged are of an extremely serious nature, involving criminal conduct over a lengthy period of time and with intent to abduct children and murder their parents. The evidence relating to the effect on Ms Hayes children,

on the other hand, was very limited in extent and quality. All came from Ms Hayes herself. Even on her evidence, the children are successfully placed with foster families. The eldest is now in further education. I have no direct evidence from the children, even though they are young women now and capable of giving their views. Ms Hayes said she did not want to involve them. That would not have prevented them being asked to give affidavits. In the deliberate absence of evidence I cannot assume their evidence would have come out in Ms Hayes' favour. They are not said to depend on Ms Hayes for their continued wellbeing. I was given only sketchy information about the family history between Ms Hayes and her children. While it is highly likely that any children will suffer from the removal of their mother to a foreign country, there is no evidence in this case that such harm is any more than is inevitable in extradition proceedings, or that in fact it would interrupt their development. I was not told of any reason they could not travel to the US should they wish to. The weighing exercise is heavily weighed against Ms Hayes.

[128] I conclude that extradition would not amount to a breach of Ms Hayes' Art 8 rights, nor those of her children.

Reburn - vulnerability in prison

[129] The general issue of prison violence is discussed in more detail under prison conditions (below). Specific to Mr Reburn, his counsel founded on his vulnerability in prison. I have summarised Mr Reburn's evidence. He is a 58 year-old professional, university-educated man who has never been in trouble with the law. He is vulnerable, it is claimed, to extortion and violence, because he will be seen as wealthy and the present charges will be assumed by other inmates to involve sexual abuse of children. On Ms Baird's evidence he will face a very unpleasant time in prison.

[130] Counsel relied on the figures given by Ms Baird, that there had been 40 homicides and 107 suicides in 4 years (Baird second report dated 24 October 2020). He submitted that ill-treatment required to meet a minimum level of severity, which is a relative test and depends on the facts of each case. Although depriving a person of liberty may often involve an element of suffering or humiliation, the state must ensure that the prisoner is not subject to distress or hardship exceeding the unavoidable level of inherent suffering, and his health and well-being must be adequately secured (*Ahmad* at para 201, 202).

[131] He recognised the tension between two principles (see, for example, *Richards* v *Ghana* [2013] EWHC 1254 (Admin) at para 57, 58): the first is that the requirements of Art 3 are absolute; the second is that what amounts to inhuman or degrading punishment is sensitive to context, and that the Convention is not a means whereby Convention countries may impose their standards on other states (*Harkins and Edwards* v *UK* (2012) 55 ECHR 19 at para 129). The tension is resolved by requiring very strong grounds before concluding the prison conditions in a non-Convention country attain the level of severity that amounts to inhuman or degrading punishment contrary to Art 3.

[132] When it came to non-state actors, such as the actions of other prisoners, he submitted there is still a need to provide reasonable protection (*Dean* v *Lord Advocate* [2017] UKSC 44; *R (Bagdanavicius)* v *Secretary of State* [2005] 2 AC 668).

[133] I accept these principles, but in my view, the evidence for Mr Reburn is inadequate to show strong grounds that he will suffer inhuman or degrading punishment contrary to Art 3. As violence is a potential issue for all three respondents, I have discussed this below.

[134] Specifically to Mr Reburn, the submission comes close to saying that professional middle class finance directors should never be placed in a US federal prison. I accept that he will find conditions harsh, but that is unavoidable in the context of imprisonment (*Giese* v

USA [2018] 1480 EWHC (Admin) at 54). More fundamentally, Ms Baird's evidence was that there is suitable accommodation within the federal estate, whether by downgrading his violence status or by special housing units. These have their own problems, but they are a means of mitigating any threats of violence. The Irby statements state that he will be kept safe. There is insufficient in Ms Baird's evidence for me to reject that assurance. Her evidence in my view supports only that there is some possibility of violence, and stops well short of showing that there is a "real risk", and her evidence is necessarily speculative. If further evidence were needed for this, Mr Reburn spoke to having been assaulted in HMP Addiewell, for reasons he did not know. No suggestion is made that HMP Addiewell is not Art 3 compliant in this respect. Ms Baird did not dispute that the US federal prison system takes appropriate precautions to avoid violence between inmates. I accept Mr Irby's assurance, which is given (see Kavanaugh letter, page 1) on behalf of the United States. In my view Mr Reburn's Art 3 rights will not be violated in this respect.

Ms Amnott – physical health

[135] Ms Amnott alleges breach of section 91 in respect that she is medically vulnerable. She did not give evidence, and no further medical evidence was led. The medical references in the second Baird report of 24 October 2020 were not followed up. In the first joint minute, paragraphs 15 and 16, it is agreed that she suffers from rheumatoid arthritis and asthma, which are chronic conditions. She requires to take immunosuppressant medication to treat the symptoms of the arthritis, in the form of methotrexate. The National Health Service has categorised individuals who suffer from a condition which requires them to take such medication as 'clinically extremely vulnerable' and therefore at high risk of severe illness

should they contract Covid-19. Individuals who are asthmatic are clinically vulnerable and at a moderate risk of severe illness should they contract Covid-19.

[136] The second joint minute records that she received the first dose of Covid-19 vaccination on 30 April 2021. As of 2 June 2021 she is not aware of when she will receive the second dose.

[137] These factors are not enough to show that Ms Amnott is at such risk that extradition would infringe her Art 3 rights. There is no expert medical information about her vulnerability after either the first or second vaccination. All of the evidence about Covid-19 precautions is historic. Ms Baird and Professor Mushlin agree that precautions are now being taken, and that infection rates are significantly reduced. As for rheumatoid arthritis and asthma, no evidence was led about increased vulnerability in prison, or that appropriate medication would not be available to her.

[138] I therefore find section 91 is not infringed in respect of Ms Amnott. No Art 3 point arises from these same issues.

Prison conditions - topics

[139] A number of related issues were raised in evidence. These include (i) treatment for medical and physical health issues; (ii) risk of sexual assault by staff; (iii) risk of violence from inmates; (iv) Lack of Covid-19 precautions; and (v) lack of oversight. The test is "whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3" (*Dean* v *HMA* 2018 (UKSC) 1, paras 9, 25).

Prison conditions – lack of medical treatment

[140] This point was taken for Hayes and Amnott. Counsel's submissions treated these issues as indivisible from issues under section 91. I have discussed them under the relevant headings above. I conclude that it is not shown that any of the respondents will not receive such medical treatment as is necessary to treat any of their medical conditions. This ground therefore fails.

Prison conditions – risk of sexual assault by staff

[141] This issue was spoken to by Maureen Baird. I have summarised her evidence above, and her report is lodged. I accept that Ms Baird's evidence was credible and knowledgeable about the running of federal prison facilities. I accept that her evidence is reliable in indicating that there is some level of risk of sexual assault. However, I do not accept that her evidence is sufficient for me to conclude that substantial grounds have been shown for believing there is a real risk of sexual assault.

[142] I do not doubt Ms Baird's good faith and diligence in giving evidence based on the information available to her. She described the difficulties in obtaining hard data in a regime which does not make such information readily available. I can, however, only make an assessment on the results. These results were too vague and unsupported for me to accept that a real risk has been made out.

[143] As observed already, the only statistics she provided related to 18 examples of sexual offending over a period of 11 years. This covered 29 female facilities. While every assault is a matter of concern, these do not by themselves amount to substantial grounds that demonstrate a real risk. Beyond those figures, Ms Baird was unable to provide figures for sexual assaults. She explained the evidential and other difficulties in pursuing cases. She

was involved in investigating and prosecuting staff while in Danbury and New York. Her most outspoken statement was that there is a "staggering number of sexual abuse crimes committed against female inmates" (report at 849). She is clearly passionate about the safety of female inmates.

[144] It is very difficult, however, to place any quantitative assessment on this evidence. For the applicant, the Kavanaugh letter of 26 October 2020 describes this as "biased advocacy", and that it "does not discuss at all the policies and procedures in place that demonstrate that the BOP is completely capable of handling the custody of Hayes, Reburn and Amnott in a safe and humane manner." (p 11). In my view the evidence, apart from those few reported cases, is anecdotal only. Ms Baird's evidence is unsupported by any other source. Her sources of fact, on whom she now depends, are vulnerable to accusations of special pleading, as she described that they include families and prisoners, who unavoidably have a personal interest in finding fault. Her evidence did not address the procedures in place for dealing with such incidents. Implicit in her evidence is a recognition that there is a robust approach to such offending, and she accepts perpetrators receive lengthy custodial sentences. Sexual contact is never viewed as appropriate or consensual. These are points which are consistent with a regime which treats such allegations seriously and punishes them appropriately.

[145] The Kavanaugh letter provides assurances about safe, humane, cost-efficient and secure accommodation, and that staff are expected to conduct themselves in a manner that creates and maintains respect for the BOP and others. The Irby declarations state that the safety of staff, inmates and the public is the highest priority for BOP. Mr Irby contradicts Ms Baird's assessment that Ms Hayes would be at high risk of harm from inmates. His view is that the BOP can appropriately incarcerate the respondents.

[146] I accept Ms Baird's evidence that there is some level of sexual assault in prisons. Her evidence, however, is not sufficient to show "substantial grounds" or that there is a "real risk". For the reasons set out, her evidence is incomplete, largely unsupported by objective data, vulnerable to criticism and vehemently denied on behalf of the applicant. The applicant is well aware of its responsibilities towards female prisoners. I find that this ground of alleged infringement of Art 3 is not proved. I accept the assurances of Mr Kavanaugh on behalf of the applicant.

Prison conditions – risk of violence from inmates

[147] I have to some extent covered this in relation to Mr Reburn (above). Ms Baird's view that he, and to some extent Ms Hayes and Ms Amnott, would have a very difficult time in custody, due to their background and the nature of the alleged crimes. Again, I can accept that she has a justified level of concern.

[148] The applicant's evidence affirms that the respondents can be imprisoned safely. The Kavanaugh letter states that an inmate who can function with relatively less supervision can be housed in lower security institutions. A full array of technologies assists with security. Constructive and frequent interaction between staff and inmates is encouraged. Unit management is the BOP philosophy, facilitating inmate access to staff. There are regular meetings with work supervisors, teachers and psychologists, and issues can be raised with them. There is oversight by the Inspector General, as well as at a high political level.

[149] The Irby statements point out that the prison population has shrunk from 219,298 (in 2013) to 155,033 today. There are 37,400 staff. Inmates are designated to BOP facilities according to their security and programme needs. There are procedures to ensure inmate safety, such as assignment to an appropriate housing unit. Public Safety Factors ('PSFs')

may mean a higher security classification, but these can be waived if the level of security does not reflect the inmate's security needs. Certain high security institutions contain inmates who might feel unsafe elsewhere. There is a BOP initiative to assign lower security accommodation to avoid the need for protective custody in a higher security institution. The practice is "not uncommon". Mr Irby's sworn testimony is that he is of the view that the respondents would be appropriately incarcerated, with regard to their security, programming and health needs.

[150] Mr Kavanaugh provided a further report dated 30 June 2020 (productions p1235), which also sets out the provisions for waivers of PSFs. The BOP retains a discretion to address any security concerns. He points to Mr Irby's evidence about initial screening for risks and allocation to suitable housing accommodation.

[151] I accept the principles are as set out by counsel for Mr Reburn. I have summarised these above. Assessing the evidence, I do not find that Ms Baird's evidence reaches the standards of "substantial grounds" or "real risk" of breach of Art 3. While I can accept that there are grounds for concern, her evidence on this point suffers from the same problem as for sexual assaults, in that it is unsupported by objective data, unsupported by other testimony, based on sources of fact who might be expected to lack objectivity, and is unspecific. A further difficulty is that this submission comes close to suggesting that someone of the respondents' background, particularly that of Mr Reburn, should never be imprisoned in, and can never be extradited to, a US federal prison.

[152] The insufficiency of evidence, both in quality and quantity, means this ground must fail. Moreover, taking into account the sworn testimony of Mr Kavanaugh and Mr Irby, I have no grounds for preferring Ms Baird's evidence over theirs, particularly as her direct

experience is increasingly historic. I accept their evidence and assurances. I find that the evidence is insufficient to satisfy the test for a breach of Article 3 on these grounds.

[153] In any event, following *Dean* v *Lord Advocate* (above), violence by inmates involves 'non-state actors', and prison conditions can only be said to infringe Art 3 if there is a failure to take reasonable precautions against such violence. Art 3 does not mean a guarantee of safety. For the reasons set out by Mr Kavanaugh and Irby, I find there is no such failure.

Prison conditions – risk from Covid-19 pandemic

[154] Professor Mushlin devotes much of his first report to discussing Covid-19 statistics and remedies. His second report brings statistics up to date. He notes in the latter that the mortality rate is twice the rate as it is for the general population. However, he notes that a greater percentage of prisoners have received at least one dose of vaccine compared to the general population. Ms Baird's evidence accepted that the number of positive Covid-19 tests were dramatically reduced, and that most prisons had opened up, with protocols in place.

[155] It is joint minuted that Ms Amnott has received one dose of vaccine in April 2021. The issue was not pressed for the other respondents. This issue is clearly diminishing with time. The issue was not discussed in detail or pressed in submissions. I do not accept she is at undue risk from Covid-19

[156] Professor Mushlin's and Ms Baird's evidence is of increasingly historical relevance only, and does not support a submission that Covid-19 precautions will be insufficient after the inevitable delay of extradition, preparation for trial (remand being in state jail) or by the time of any conviction. I conclude that there is insufficient evidence that level of Covid-19 precautions is such as to present a bar to extradition. I would in any event accept Mr Kavanaugh's assurances on this.

Prison conditions – lack of oversight

[157] Professor Mushlin's first report considers the issue of oversight in US prisons. He deals with pre-trial detention facilities, but this was not an issue pressed in submissions and can be disregarded. As to post-conviction federal facilities, he notes that the Office of the Inspector General of the Department of Justice is charged with oversight, and has a "solid reputation for integrity and independence" (page 10 of his report). Their work is hampered by a lack of reliable data kept by BOP. To rectify this problem, a bill has been announced to create an oversight body for BOP. This is not yet law.

[158] Although counsel for Amnott did refer in submissions to the want of effective oversight, she could not say it was more than a "concern". That is an insufficient basis to amount to a bar to extradition. It does not follow that want of oversight proves that conditions are non-Art 3 compliant. It is irrelevant in this context. I find this ground not established as an infringement of Art 3.

Prison conditions – lack of remedy for non-compliant conditions

[159] This point did not form a significant part of submissions. It is based on the evidence of Professor Mushlin, which I have summarised above. I accept that the evidence shows that inmates have significant constraints on their ability to raise legal actions to address any violations of Art 3. This results largely from the Prison Litigation Reform Act, which was brought into force specifically to limit the number of actions raised by serving prisoners.

[160] There are nonetheless legal remedies available to prisoners. Prisoners do have access to the courts to raise grievances. They also have the ability to apply for compassionate relief through the courts, and to apply for executive clemency by another route. The existence of

limitations for a prisoner on the rights enjoyed by ordinary citizens does not by itself show that conditions are not Art 3 compliant. There is no adequate evidence on this point to support this as a bar to extradition.

Decision on prison conditions

[161] I have rejected all of the grounds founded upon which relate to the conditions to be found in the US federal prison system. The quality and quantity of the evidence led for all the respondents was insufficient for the purpose. It hinges almost entirely on the evidence of a single witness, Ms Baird, who was unable to provide sufficient objective material to allow me to accept the position as proved. This is particularly important in cases relating to Art 3, which requires evidence which is "objective, reliable, specific and properly updated on the detention conditions prevailing" (*Aranyosi* v *Caldararu* [2016] QB 921; *Sanchez* v USA [2020] EWHC (Admin) 508 at para 66). In my view, Ms Baird's testimony was honestly given, but it was not sufficiently vouched by data, and was unspecific both to the identity of the prisons and the conditions to be met in any given prison. I conclude prison conditions are not proved to be such as to constitute barrier to extradition.

Non-compliant aspects of the US legal system

[162] Separately from prison conditions, all three respondents relied on various aspects of the US legal system as amounting to infringements of their Art 3 rights. These concerns were set out in the evidence of Ms Plochocki, Mr Snooks and Mr Barlow, which I have set out above. These include: grossly disproportionate sentencing; insufficient regard to legitimate penological grounds for continued incarceration; and irreducible sentences.

US legal system - grossly disproportionate sentencing

[163] Each of the respondents faces a mandatory life sentence on count 2 (Conspiracy to kill witnesses with intent to prevent communication to a Federal law enforcement officer). Counsel submitted that this was grossly disproportionate, and therefore a breach of Article 3. While the ECtHR has found that mandatory life sentences for murder are not grossly disproportionate (*Harkins and Edwards* at para 139; *Ahmad* para 244), it has not extended this principle further. It was accepted that there may be wholly exceptional cases where a whole-life sentence is appropriate for non-murder cases, but it was submitted that this case is not in that category. It was particularly relevant that mitigating factors, such as mental health conditions, could not be taken into account in sentencing.

[164] The applicant submits (Kavanaugh letter, p 11) that the mandatory life sentence for conspiracy to kill witnesses "represents the legislative judgment of a criminal law effectuated by the United States Congress". Killing a human being to prevent their communication to law enforcement is the "ultimate perversion of the course of justice". The applicant will not proceed on counts 13 to 20. The minimum sentence if convicted on all remaining counts is life plus 28 years (Kavanaugh letter, p6).

[165] The applicant submitted that on the case law, the ECtHR accepts that in principle matters of sentencing largely fall outside the scope of the ECHR, but a grossly disproportionate sentence could amount to ill-treatment contrary to Article 3. It is, however, a "strict test", and it will only be on "rare and unique occasions" that the test will be met (*Ahmad* v *UK* (2013) 56 EHRR 1, para 237). The ECtHR recognises that the ECHR does not purport to be a means of requiring the contacting states to impose Convention standards on other states. Due regard must be had to the fact that sentencing practices vary greatly between states and that there will often be legitimate and reasonable differences between

states as to the length of sentences which are imposed. The ECtHR "therefore considers that it will only be in very exceptional cases that an applicant will be able to demonstrate that the sentence…would be grossly disproportionate…" (*Ahmad*, para 238). That case post-dates *Harkins and Edwards* v *UK* (2012) EHRR 19, where a 20 year old with some mitigating mental health problems failed to prove such a case. While the ECtHR noted that the facts of the case must be considered, the existence of mitigating factors, insufficient to indicate a significantly lower level of culpability, was found not to be enough.

[166] In my view, the robust terms set out in *Ahmad*, above, show that this is a particularly difficult hurdle for the respondents to surmount. Counsel's submission founded on dicta in murder cases, and sought to draw a distinction with the present case which involved no completed killing. I do not accept that I can draw any such distinction. To do so would be to stray into sentencing policy of a country which has respect for the rule of law, and would represent this court in effect reviewing a law which "represents the legislative judgment of a criminal law effectuated by the United States Congress", as Mr Kavanaugh puts it. That in my view goes beyond my legitimate involvement. As *Ahmad* recognises, that is not a purpose of the ECHR. Only if this were a "rare and unique occasion" could the submission be sustained. The fact that there is no ECtHR case directly approving a mandatory life sentence in a non-murder case does not make this case either rare or unique, and does not prove that the ECtHR limits approval only to murder cases.

[167] Counsel relied on what was described as the "powerful mitigation" arising from Ms Hayes' mental health. I reject that submission. There is no evidence that Ms Hayes' mental state was relevant to the commission of the crime itself. The evidence of Dr Quinn and Dr Marcello did not address, far less support, that mental illness was a factor in the alleged offences. I have no grounds to assume that such mitigation could be advanced.

[168] The cases on Art 3 emphasise that the specific facts must be taken into account. Here, no evidence was given about the offences themselves. I can only consider the allegations on the facts as presented. The allegations set out in the initial request are extremely serious. I accord due respect to the evidence of Mr Kavanaugh, on behalf of the applicant, that:

> "In this case, it is hard to imagine a more egregious set of facts. The defendants sought to eliminate the parents of young children as witnesses so they could successfully escape with their kidnapped children…But for the quick thinking of one of the victims…five innocent children would have been kidnapped and four innocent parents would have been murdered" (Kavanaugh letter, p 11).

[169] That view cannot be said to be manifestly unreasonable. Even if I had locus to comment on US sentencing policy, I do not consider that the existence of a mandatory life sentence on count 2 could be said, at the stage of extradition, to be a grossly disproportionate sentence in the event of conviction. In my view, standing the extreme nature of the allegations, such a sentence is quite capable of being regarded as representing a legitimate and reasonable difference between state sentencing practices.

[170] In my view, the evidence on excessiveness is fundamentally lacking in quality and quantity to show that the likely sentences, at least on Count 2, are grossly disproportionate. I find the respondents have not proved breach of Art 3 on this ground. This finding also has consequences for questions of irreducibility, discussed below.

Legitimate penological grounds for continued detention

[171] In submission, this point was not considered separately. Counsel accepted that there would be, at least initially, legitimate penological grounds for imposing a mandatory life sentence. It was submitted that the real issue is the following one, into which consideration of legitimate penological grounds is subsumed, namely:

Irreducible sentence

[172] This ground was the subject of most discussion and citation of authority. The respondents claim that the mandatory life sentences are irreducible in fact, and therefore Art 3 is infringed at the point of extradition. The applicant's position is that the life sentences are reducible, on the basis of (i) assistance which may be given to the prosecution; (ii) compassionate release, or (iii) executive clemency. The respondents claim that none of these factors mitigates the position.

The evidence

[173] I have set out the outline of Ms Plochocki's evidence. In relation to compassionate release, her evidence on the legal provisions (with which Mr Barlow and Mr Snooks agreed) was helpfully summarised by counsel as follows:

[174] The provisions of US Code 3582 regulate compassionate release. They have to be read, however, with three other provisions, namely USC 3553 (factors in imposing a sentence), USC 994(t) (the statutory prohibition on rehabilitation alone amounting to a sufficient basis for compassionate release), and the US Sentencing Commission's Guideline/policy statement. USC 3582(c)(1)A provides:

> "the court…may reduce the term of imprisonment…after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that:
>
> (i) extraordinary and compelling reasons warrant such a reduction; or
>
> (ii) the defendant is at least 70 years of age, has served at least 30 years in prison…and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person in the community…; and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

[175] Under section 3553(a) the relevant factors in this case are (1) the nature and circumstances of the offence and the history and characteristics of the defendant; (2) the need for the sentence to reflect the seriousness of the offence, to promote respect for the law, and to provide just punishment for the offence; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offence.

[176] The Application Notes drafted by the US Sentencing Commission (the "applicable policy statements" under USC 3582) define "extraordinary and compelling circumstances". In short, this includes medical condition (terminal or serious physical or cognitive condition or age-related deterioration, all such as to diminish the defendant's ability to care for himself in prison); age of defendant (65 years, plus serious health deterioration, plus serving a minimum of 10 years or 75 per cent of the sentence); family circumstances (death or incapacitation of caregiver to minor child, or defendant is only caregiver for incapacitated spouse); or other reasons.

[177] This is limited by 28 USC 994(t) which expressly provides: "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason". The Sentencing Guidelines state that rehabilitation is not, by itself, an extraordinary and compelling reason (FSG application notes, para 3).

[178] The BOP requires to determine whether to support an application for compassionate release. Their Program Statement 5050.50 directs that the following should be considered: nature and circumstances of the inmate's offence, criminal history, comments from victims,

unresolved detainers, supervised release violations, institutional adjustment, disciplinary infractions, personal history, length of sentence and time served, current age, age at the date of the offence, inmate's release plan and whether release would minimise the severity of the offence.

[179] Counsel submitted that the foregoing did not meet the reducibility requirement under Article 3. Consideration of extraordinary and compelling reasons does not involve any assessment of legitimate penological grounds for continued detention. Release on the basis of terminal illness or physical incapacitation does not amount to a "prospect of release" under ECHR law. Recent releases of inmates, spoken to by Ms Plochocki, are not of assistance, as they were temporary measures to deal with the Covid-19 pandemic. The possibility of release being earned by rehabilitation is expressly excluded by 28 USC 994(t). The fact that the original offences must be taken into account is Art 3 incompatible as it does not allow an assessment that continued detention can no longer be justified on legitimate penological grounds.

[180] All of these points, it was submitted, meant that the US system never moves away from the original aim of punishment, no matter what progress be made to rehabilitation. Ms Plochocki's evidence was that the original offence is always given significant, if not greatest, weight. Neither she nor Ms Baird had seen compassionate release for inmates having committed offences such as these.

[181] Further, matters are made even more restrictive by the requirement to have regard to comparative justice (with other inmates with similar offences and records) and the need for restitution to victims. These are immutable factors.

[182] Accordingly, counsel submitted, the system which applies highly restrictive meaning to "extraordinary and compelling reasons"; which makes the original offences always

relevant; which requires reference to other inmates and to the victims; and which specifically excludes rehabilitation as a sufficient reason, is incompatible with Art 3.

[183] In relation to executive clemency, Ms Plochocki's evidence was that this is available in theory. She described this as not a realistic remedy. Counsel submitted that this was not compatible with Art 3, as it did not involve any consideration of justification on legitimate penological grounds; involved unspecified criteria; involved no process of reasoning; did not inform a prisoner what they must do to qualify for clemency and under what conditions, and had no procedural safeguards such as judicial review. It amounted to no more than the "modern-day equivalent of the Royal prerogative of mercy" (*Matiosatis and others* v *Lithuania* (no 22662/13, 23 May 2017 at 169 ff).

[184] Ms Plochocki's evidence on the applicable law was not challenged. I therefore accept it is correct on the law, that it represents her genuine opinion formed on the basis of her own experience, and represents a respectable body of opinion on the effect of that law. It does not preclude that other views on the effect of the law are legitimately supportable. I discuss this below.

[185] Mr Snook's evidence is also available, in report form, dated 9 October 2020. He gave brief oral evidence, but did not innovate on his report. The report discusses several aspects which were not founded upon, such as the sentencing if charge 2 were not proceeded with. It was not suggested that this was a likely outcome. His evidence appears directed mainly against the length of sentence, but this is only relevant for a submission of grossly disproportionate sentencing, which I have dealt with above. At para 31 he discusses mitigation of a mandatory life sentence. He agrees that reduction for assistance is unlikely, because a co-conspirator has already pled guilty and provided co-operation. Mr Barlow's evidence adds little to this.

[186] The Kavanaugh letter responds to this. As appears to be practice in extradition proceedings, the Crown did not rehearse any part of the letters in evidence or in submission. In summary:

[187] Mr Kavanaugh maintains there are many opportunities for the respondents to avoid a life sentence (I set aside his observations on plea negotiations, acquittal or appeal, as not relevant to the consequences of conviction). He notes, firstly, that federal rules allow reduction of sentence for assistance given. A sentence can be reduced below a mandatory minimum to reflect the value of that assistance.

[188] He then notes that compassionate release is available, and refers to the same provision as Ms Plochocki. He does not discuss the detail of the restrictions on that release. He notes that application can now be made for a judicial decision, rather than what historically was a prison warden's decision, under the First Step Act passed in 2018, which has led to 150% more applications being granted in the subsequent six-month period.

[189] Mr Kavanaugh then notes that executive clemency is available. A request must be filed, and can be filed annually thereafter. The merits are evaluated by the Office of the Pardon Attorney, to include expressions of remorse, acceptance, undue severity, disparity, critical illness and other factors. He describes a "multitude of ways" that the respondents can reduce their sentences. It appears, however, that he relies to some extent on plea negotiation, defence, and appeal points, which again are irrelevant to mitigation of a life sentence.

[190] Paul Irby's statement mentions the compassionate release mechanisms, but does not discuss the limitations mentioned by Ms Plochocki.

[191] In assessing all of this evidence, I accept counsel's first point, that reduction of sentence for assistance given, is not a relevant response to an Art 3 argument which focuses

on post-sentence reduction for rehabilitation. It relates to the pre-sentence process, not post-sentence. On the facts, it appears unlikely that that any such reduction will be forthcoming, not least because Ms Hayes will refuse to co-operate, according to her counsel. I do not make any finding in fact on this, because it is irrelevant to post-sentence reduction.

[192] In relation to the evidence on compassionate release, I have no reason to dispute the careful analysis of the law presented by Ms Plochocki, and with which Mr Barlow and Mr Snooks agree. The Crown did not seek to lead any further evidence to rebut this, and Mr Kavanaugh does not mention these subsidiary points. I therefore accept that the grounds for seeking compassionate release from a mandatory life sentence are considerably constrained in legal terms. They are, however, available, and the process is a judicial one. In addition, repeated applications are possible.

[193] In relation to executive clemency, I similarly accept that this is a process which does not ostensibly involve any consideration of justification on penological grounds, that it has unspecified criteria for award, that it involves no issue of reasons, that it does not inform a prisoner what they must do to qualify for clemency and under what conditions, and has no procedural safeguards such as judicial review. It is, however, available, there is a structure for such applications and repeated applications are possible. It is necessary to have regard to the authorities.

The current law on irreducibility of sentences

[194] All counsel submitted that the mandatory life sentences, faced by all the respondents on Count 2, were irreducible, which meant that their Art 3 rights were infringed. It was therefore a bar to extradition. In so submitting, they relied on a developing line of ECtHR cases. These were discussed by Mr Harvey. Submissions recognised that there are recent

English High Court decisions which did not follow these cases. It was submitted that these UK cases had been overtaken by the developments in human rights law, and should not now be followed.

[195] The Crown tendered a number of authorities and invited me to follow the UK case law. No analysis or contradiction of counsel's submissions on the ECtHR authorities was attempted.

The ECtHR authorities

[196] The law on what comprises a breach of Art 3 has undoubtedly developed in the ECtHR in recent years. In *Harkins and Edwards* v *UK* (Nos 9146/07 and 32650/07) 17 January 2012, the Court accepted that, while in principle matters of sentencing largely fell outside the ECHR, a grossly disproportionate sentence could amount to ill-treatment contrary to Article 3. Whether a sentence was grossly disproportionate was a high test, and would only be met on "rare and unique occasions" (at para 133). It was necessary to have regard to varying sentencing practices. The ECtHR found that, in the case of a mandatory life sentence without parole, such a sentence would not necessarily be incompatible with Article 3, although it was against the European trend in such cases (para 138). It would be struck down if grossly disproportionate, or if it could be shown that continued detention was not justified on legitimate penological grounds, or if the sentence was irreducible de facto and de jure. The Court was prepared to find extradition to the US to face murder charges would not violate Article 3.

[197] In *Ahmad* v *UK* (2013) 56 EHRR 1 the fifth applicant faced 269 counts of murder and, upon conviction, multiple mandatory sentences of life imprisonment without the possibility of parole. The Court did not find such sentences to be grossly disproportionate. He had not

shown that such sentences would not serve any penological purpose. There was no violation in his case.

[198] *Vinter* v *UK* (Nos 66069/09, 130/10 and 3896/10, 9 July 20130 involved an English sentence of mandatory life imprisonment with a whole life order, which allowed release only on executive discretion, in turn only exercisable on terminal illness or incapacity. The ECtHR reaffirmed that no Art 3 infringement would occur if there was a right to be considered for release from a life sentence. For a life sentence to remain compatible with Art 3 there must be both a prospect of release and a possibility of review (at para 110). It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention (para 111). While such grounds include punishment, deterrence, public protection and rehabilitation, the balance between these justifications is not necessarily static. What may be the primary justification for detention at the start of the sentence may not remain so after a lengthy period. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated (para 111). Without prospect of release or review, there is a risk that the prisoner can never atone for his offence, and the punishment becomes greater with time. It was noted that the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence (para 115). The ECtHR concluded that, in general, Art 3 required reducibility of a life sentence, in the sense of a review of progress to ascertain whether there remained legitimate penological grounds for detention. While the form of review was not prescribed, it noted that 25 years was supported as the maximum period before such review (para 120). It would be capricious to expect the prisoner work toward rehabilitation without knowing whether release would be considered, and so he is entitled to know this at the start of his sentence (at paras 119, 120).

Release based on terminal illness or incapacitation does not quality as a "prospect of release" for these purposes (para 127). On this basis the ECtHR found the requirements of Article 3 were not met.

[199] In *Ocalan* v *Turkey* (no 2) (nos 24069/13 and others, 18 March 2014), the ECtHR made similar observations in finding that the life sentence was not reducible where there was no prospect of applying for release. It reiterated that, notwithstanding the particularly serious nature of the crimes in that case, Art 3 allows for no derogation to the absolute prohibition on inhuman or degrading treatment (at para 204).

[200] In *Magyar* v *Hungary* (no 73593/10, 28 May 2014) the possibility of presidential clemency, by itself, was found not to not meet the necessary standard, because it did not require the president to assess whether continued detention was justified on legitimate penological grounds (paras 57, 58).

[201] *Harakchiev and Tolumov* v *Bulgaria* (nos 15018/11 and 61199/12, 8 July 2014) continued this line of reasoning. It noted that the ECHR does not guarantee a right to rehabilitation, and does not impose an absolute duty on the state to provide rehabilitation or reintegration programmes and activities. It does, however, require that life prisoners be given "a chance, however remote, to someday regain their freedom". For that chance to be genuine and tangible, the authorities must also give life prisoners a real opportunity to rehabilitate themselves (para 264). Recognising that states have a wide margin of appreciation, the court could not regard the particular regime and conditions as a matter of indifference (265).

[202] *Trabelsi* v *Belgium* (2015) 60 EHRR 21 involved an extradition request from the US for terrorism charges. Notably, the US provided no assurance that a mandatory life sentence would not apply, or that on such sentence there would be any reduction or commutation of sentence. Assurances about US legislation on sentence reduction and presidential pardons

were "very general and vague and cannot be deemed to be sufficiently precise". (para 135). The ECtHR assessed the central issue as being whether the US legislation governing the possibilities for reduction of life sentences and Presidential pardons fulfil the criteria for conformity with Art 3 (para 136). It concluded that none of the procedures provided for amounted to a review mechanism to assess whether the prisoner had "changed and progressed" so that continued detention could no longer be justified on legitimate penological grounds (para 137).

[203] In *Murray* v *Netherlands* (2017) EHRR 3, the Court restated and applied the same principles (para 100). In order for a life sentence to be reducible, a review should permit the authorities to assess any changes in the life prisoner and any progress made towards rehabilitation (para 101). The national authorities should, without guaranteeing a right to rehabilitation, nonetheless give life prisoners a real opportunity to rehabilitate themselves (103).

[204] In *TP and AT* v *Hungary* (Nos 37831/14 and 73986/14, 4 October 2016) a 40-year wait to be first considered for clemency was found to fall outside any acceptable margin of appreciation (para 45). Such a period unduly delayed the review of whether any changes in the life prisoner are so significant, and such progress towards rehabilitation had been made, that continued detention could no longer be justified on legitimate penological grounds (applying v*inter*, above at para 48). That, together with a lack of assessment when considering clemency, meant that Art 3 was violated.

[205] *Hutchinson* v *UK* (No 57592/08, 17 January 2017) summarised and applied the developing law, at para 42, with its emphasis on rehabilitation and reintegration. Sufficient safeguards were found to be in place.

[206] *Matosaitis and ors* v *Lithuania* (nos 22662/13, 23 August 2017) reiterated that release on grounds of terminal illness cannot be considered a prospect of release (162), nor could amnesty (163), and nor could a presidential pardon which was no more than a modern equivalent of the royal prerogative of mercy (173). The ECtHR has "constantly held" that a prisoner's right to a review entails an actual assessment of the relevant information to decide whether continued imprisonment was justified (174). The Court considered the prison inspection reports and concluded, on the facts, that the deleterious effects of the regime seriously weakened the possibility of reform and real hope of reducing their sentence by demonstrating progress (179).

[207] *Petukhov* v *Ukraine* (no 41216/13, 9 September 2019) examined clemency under the same criteria, and concluded insufficient procedural guarantees were attached. Prison conditions were insufficient to promote the aim of rehabilitation. *Dardanskis* v *Lithuania* (no 74452/13, 11 July 2019) applied the same criteria. v*ella* v *Malta* (no 14612/19, 12 December 2019) confirmed that the period of twenty-five years before reconsideration ran from the date of the judgment, not the date of arrest.

[208] *Bodein* v *France* (no. 40014/10, 13 February 2015) involved a sentence of life imprisonment without any prospect of sentence reduction or prospect of release, save through Presidential pardon. Article 720-4 of the Code of Criminal Procedure permitted the sentencing court to initiate proceedings likely to rescind the court decision not to grant any sentence adjustment measure. The mechanism operated after 30 years' imprisonment had been served. The ECtHR summarised what had been stated by the Grand Chamber in v*inter*. The imposition of an irreducible life sentence on an adult may raise an issue under Art 3. Where national law affords "a prospect of review of a life sentence with a view to its commutation, suspension, termination or the conditional release of the prisoner, this will be

sufficient to satisfy Article 3". For life sentences, Article 3 must be interpreted as requiring that the sentence be reducible. Reducible means "i.e. subject to review allowing domestic authorities to consider whether any changes in the life prisoner are so significant, and progress towards rehabilitation…are of such significance as to mean that continued detention can no longer be justified on legitimate penological grounds." Furthermore, the prisoner is entitled to know at the start of their sentence how review might be achieved. If there is no prospect of release, the breach of Art 3 occurs at the moment of sentence. *Bodein* noted the "clear trend in comparative and international law" for the institution of a special mechanism guaranteeing a review no later than twenty-five years after imposition. It rejected a "mere prospect" of release, such as a Presidential pardon, or on humanitarian grounds (para 58), as efficient mechanisms for sentence review. The prisoner had to know what he had to do to be considered for release. These did not equate to the notion of "prospect of release" on legitimate penological grounds.

[209] In v*iola* v *Italy (no 2)* (no. 77633/16, 13 June 2019) the applicant was sentenced to life imprisonment, with review only possible upon "cooperation with the judicial authorities". The court stated "European criminal justice policies now emphasis the objective of resocialisation pursued by detention…[which] is reflected in international regulation and is today recognised in the case-law of the Court" (para 108). It stated, again under reference to v*inter*, "The Court further recalls having affirmed that the principle of "human dignity" prevents a person from being deprived of his freedom by force without at the same time working towards his rehabilitation and without giving him a chance to one day regain that freedom. It specified that:

> "a prisoner sentenced to life imprisonment has the right to know… what he must do in order for his release to be considered and what the conditions are…It also ruled that the national authorities must give prisoners sentenced to life imprisonment a

> real opportunity for rehabilitation…This is clearly a positive obligation of means, and not of result, which necessitates ensuring for these prisoners the existence of prison regimes which are compatible with the objective of reform and which allow them to progress on this path" (para 113).

[210] Counsel referred to *Attorney General's References (Nos 688 of 2019 and another*) [2021] 4 WLR 3, but I have not found this to develop the foregoing principles.

The UK authorities

[211] The Crown tendered several recent UK authorities. In *Regina (Wellington)* v *Secretary of State for the Home Department* [2009] 1 AC 335 ('*Wellington'*), the House of Lords considered a US application for extradition on murder charges. The appellant raised the issue of an irreducible sentence. In considering the effect of a mandatory life sentence;

> "The mandatory nature of the life sentence would only bring the sentence into the inhuman and degrading category if the sentence were to "appear so grossly disproportionate to the circumstances of the crime as to offend ordinary notions of fairness and justice." (L. Scott of Foscote at para 45).

[212] Three of the judgments (Lord Carswell, Lord Hoffman, Baroness Hale) quoted substantially the same passage from Soering v UK (1989) 11EHRR 439 that:

> "[I]nherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases."

[213] Presciently, Baroness Hale noted (para 49) that the ECtHR had not yet said that all irreducible life sentences breach Article 3 but "There may come a time when it will do so

and we shall then have to have regard to that view." Notably, that does not undertake to follow such a view.

[214] The court held that, in the context of extradition, a mandatory life sentence was not irreducible where the State governor had the power to pardon or to commute a sentence. That was not affected by the power being rarely exercised in fact. Further, such a sentence did not contravene Art 3 if it could not be said to be grossly disproportionate to the offence. The relativist approach meant that an accused was not entitled to remain in the UK as a fugitive from justice.

[215] In *R (Harkins)* v *Secretary of State for the Home Department and another (no 2)* [2015] 1 WLR 2975 was a decision of the Queen's Bench Division which applied the tests of gross disproportionality and irreducibility. The court was not satisfied on the evidence that life without parole would be an irreducible sentence for Convention purposes. The court rejected (at 69) a proposition that v*inter* developed the law, holding instead that it was a clarification of recognised principles. Submissions that the prisoner is not obliged to await the passage of time before challenge, and that review of some sort was necessary, were not considered "new" (paras 69 to 71). The court then analysed *Trabelsi*, and noted "We find this difficult to square with what the GC had so carefully said in v*inter* 34 BHRC 605, para 120 that it was not for the ECtHR to dictate either the form or the timing of any "review mechanism" (para 119). It went on:

> "More fundamentally, neither…is there any explanation of why any principles laid down in relation to Article 3 and life sentences in contracting states be translated, wholesale, to the extradition context. In our view statements that the requirements in Article 3 are absolute and that the issue is whether the extraditing state has complied with its Article 3 duties to the requested person do not meet the point. This is because they fail to deal with two principles frequently made in previous ECtHR judgments…that in the extradition (or expulsion) context the bar for establishing a violation of Article 3 is very high; and secondly that the court has been very cautious in finding that removal from the territory of a contracting state

> would be contrary to Article 3. And, as the court stated at para 131 in *Harkins* v *United Kingdom* 55 EHRR 561, save for death penalty cases, the ECtHR has 'even more rarely found that there would be a violation of Article 3 if an applicant were to be removed to a state which had a long history of respect for democracy, human rights and the rule of law'. The USA is, without doubt, pre-eminently such a state."

[216] In *Hafeez* v *Government of the United States of America* [2020] EWHC 155 (Admin), the English High Court considered the developing law on life imprisonment without parole. The court recognised a factual and legal position very similar to the present case. A life sentence in a federal court has no provision for parole. There are two routes to obtain a reduction, namely by compassionate release under USC 3582 (now, following the First Steps Act, made to a court, not a warden), or executive clemency. The court recognised also the limitations on what comprises extraordinary and compelling reasons, including the exclusion of rehabilitation by itself as a reason, although it noted that rehabilitation was still relevant as a reason (para 44). Executive clemency was noted to be an extraordinary remedy, rarely exercised, with no provision for judicial review. The court noted that executive clemency was an acceptable method of review (para 58). Unlimited applications could be made. That, and the transparent nature of the process, meant there was no violation of Art 3.

[217] The court reviewed ECtHR cases, starting from *Kafkaris* v *Cyprus* (2008) 48 EHRR 35 and noted the principles had not been departed from. They are set out in para 48, summarised as "All that was required was that the life sentence should be de jure and de facto reducible". It reviewed *Harkins*, v*inter*, *Trabelsi*, *Murray*, all considered above. It declined to follow *Trabelsi* as it ignored the basic principles of *Kafkaris*, repeated in v*inter*. It was also unreasoned on the matter of review (para 56). There was no support for the equivalence between violations in convention states and violations in extradition.

[218] The last case was *Sanchez* v *Government of the United States of America* [2020] EWHC 508 (Admin), again of the Divisional Court, and a recent decision. The court noted a series of complaints about the US federal prison system, many of which are rehearsed in the present case. On the question of life sentences, the district judge had followed *R (Harkins)* v *Secretary of State* (above). The Court discussed the authorities, commencing:

> "It is well settled in the domestic context that the courts of England and Wales are bound, unless there are exceptional circumstances, to follow decisions of the House of Lords (or of the Supreme Court) not of the ECtHR." (para 36).

[219] It reviewed the authorities. It noted that in *Wellington* the majority, having considered *Kafkaris*, considered that in an extradition context Art 3 applied in a modified form which took account of the desirability of arrangements for extradition. *Harkins* v *UK* [2012] EHRR 19 saw the ECtHR note that the ECHR was not a tool whereby contracting states could require non-contracting states to adopt the ECHR. While a grossly disproportionate sentence could violate Art 3, that test would only be met on "rare and unique" occasions. The Court noted its own decision of *Hafeez*, and the criticisms of *Trabelsi* made in that case. The Court summarised its decision shortly. It was bound to follow *Wellington*. Even if not bound, it would follow its own decisions in *Harkins no 2* and *Hafeez*, both of these being "plainly right". The Court was not bound to follow *Trabelsi*, which it considered to be an unexplained departure from the existing approach of ECtHR. It approved the reasoning at para 58 of *Hafeez*.

Submissions on irreducibility

[220] Counsel submitted that there was, contrary to what is said in *Hafeez* and *Sanchez*, a clear and constant jurisprudence of the ECtHR that compassionate release and executive clemency of the kind found in the US federal system do not meet the requirements of Art 3.

[221] These grounds for release do not appear to involve any consideration of legitimate penological grounds for detention (*Petukov*). Release on grounds of terminal illness is not a 'prospect of release' (*Vinter*, *Ocalan*, *Murray*). Current Covid-19 releases are not representative of general practices. Reducibility involves the existence of a possibility of release when rehabilitation has been achieved (*Vinter*, *Murray*), which is expressly precluded by 28 USC 994(t). The need to always have regard to the original offence is incompatible as it impedes consideration of legitimate penological grounds (*Vinter*, *Harakchiev and Tolumov*, *Matiosaitis*). The same point arises in relation to the need to consider disparities with others, and restitution to victims. All these factors serve to further restrict the already restricted category of "extraordinary and compelling" circumstances, rendering the process incompatible with Art 3.

[222] The Crown did not address these cases, but submitted that this court is bound to follow the UK authorities, which did not preclude extradition for those reasons.

The applicable principles on irreducibility

[223] I accept the submission for the respondents that the ECtHR jurisprudence has developed in recent years, and that many developments post-date *Wellington*. I note that *Trabelsi* decided that the remedies available under US federal law of compassionate release and executive clemency did not meet the requirements of Art 3. It cited pre-existing general requirements for Art 3 cases and applied them equally to extradition cases. The significant developments include the following:

[224] Rehabilitation has become an increasing focus, and "it is here that the emphasis of European penal policy now lies" (*Hutchison* at para 42 ff). Rehabilitation and reintegration is a "mandatory factor". Notwithstanding that the Convention does not guarantee a right to

rehabilitation, the Court's case law presupposes that convicted persons should be allowed to rehabilitate themselves (*Murray*). A life prisoner must be realistically enabled to make such progress towards rehabilitation that it offers them the hope of being eligible for parole. States have a duty to make it possible for such prisoners to rehabilitate themselves (at para 104). It is an obligation of means, not of result. A failure to provide a life prisoner with such opportunity may render the life sentence irreducible (para 112).

[225] Review on compassionate grounds is not sufficient, if it does not involve assessment of progress towards rehabilitation. For a life sentence to be de jure and de facto reducible, there must be both a prospect of release and a possibility of review. The basis of such a review must extend to assessing whether there are legitimate penological grounds for continued incarceration. The grounds include punishment, deterrence, public protection and rehabilitation. The balance between them is not necessarily static and may shift during the course of a sentence (*Hutchison*, reviewing the principles at para 42).

[226] Clemency requires sufficient procedural safeguards to avoid a sentence being considered irreducible (*TP and AT*). The question of the adequacy of presidential pardon was further considered in *Matiosaitis and others*, and *Petukhov*, and found to be insufficient. These cases, *Dardanskis* and v*ella* reiterated the importance of a possibility of commutation being earned by reform. A de facto time limit of 25 years (with margin of appreciation) before being eligible to apply for release was introduced in these cases (*Vella*). Almost all of these cases concern states which are signatory to the ECHR.

[227] Counsel submitted that that these developments amounted to a clear and constant jurisprudence of the ECtHR, and that this court, in the absence of special circumstances, should follow it (*Manchester City Council* v *Pinnock* [2011] 2 AC 104 at para 48).

[228] It is clear that, in contrast, the law in the UK courts has not developed in the same respects. The preponderance of the case law is from England and Wales, but they interpret the 2003 Act which, in the relevant aspects, applies equally to Scotland.

[229] In *Harkins* at para 69 the High Court rejected a proposition that v*inter* developed the law, holding instead that it was a clarification of recognised principles. *Hafeez* duly considered these principles anew. Importantly, it noted (para 55) that the ECtHR had not, in any case subsequent to *Trabelsi*, repeated that no distinction should be drawn between removal and extradition cases and cases involving the criminal justice system of a contracting state. In *Sanchez*, the Divisional Court noted ten propositions set out by the district judge (para 23), and appears to have accepted these as accurate. It reviewed the case law to date. It reached the same decision as *Hafeez*.

[230] It is submitted that *R (Harkins)* and *Hafeez* were wrongly decided, as they did not recognise the "clear and constant" jurisprudence since *Trabelsi*. Counsel relied in part on failure to recognise that a violation can occur at the start of the sentence and that a person must know at the start of the sentence what he must do to obtain release. These, however, are recognised in points (viii) and (ix) of the summary of the law in *Sanchez* (above) and the court had these in mind. Counsel submitted that the Divisional Court in *Hafeez* and *Sanchez* had failed to take into account the developing jurisprudence since *Harkins and Edwards*. The courts did not have the benefit of citation of the cases cited here. These decisions, it was submitted, were wrong and should not be followed.

[231] In my view some divergence between UK and Strasbourg jurisprudence from time to time is to be expected, as ECtHR case law is "constantly evolving" (*Harkins* v *UK* (2018) 66 EHRR SE5 at para 56). In my view none of these ECtHR principles is inconsistent with the principles listed in *Sanchez* at para 23, although they represent a development of them.

[232] It appears that the tension between the UK and Strasbourg has developed primarily as a result of differing views on whether the developing jurisprudence on Art 3 should be applied without discrimination between extradition and non-extradition cases, or between Contracting and non-Contracting states. *Harkins* identified that in the extradition context, the bar for establishing a violation of Article 3 is very high, and that the court has been very cautious in finding that removal from the territory of a contracting state would be contrary to Article 3. Importantly, the court identified that the ECtHR has "even more rarely found that there would be a violation of Article 3 if an applicant were to be removed to a state which had a long history of respect for democracy, human rights and the rule of law", of which the USA was a pre-eminent example.

[233] I have been assisted by, and agree with, the approach in *Hafeez* and *Sanchez* which, though not binding on this court, is persuasive when dealing with a UK-wide statute. The High Court started from the position that it was obliged to follow House of Lords or Supreme Court decisions over the ECtHR jurisprudence. It found that the ECtHR has not shown a consistent approach that general Art 3 principles are applied with equal rigour to extradition cases involving non-Contracting states, a fortiori where the state respects human rights, democracy and the rule of law. It found that *Trabelsi*, which heralded the equal application of these principles to non-Convention states, has not been shown by subsequent ECtHR judgements to form part of a clear and constant jurisprudence.

[234] I am bound, in exactly the same way as the High Court in England in *Sanchez* considered itself bound, to follow decisions of the House of Lords or Supreme Court. I accept that the ECtHR authorities cited appear to develop the case law which was considered in Hafeez and Sanchez, but that is not a relevant consideration in a situation where UK authority has precedence.

Decision on irreducibility

[235] The respondents have the burden of proving that extradition is incompatible with their Art 3 rights. In my view they have failed to discharge that burden.

[236] The evidence of Ms Plochocki and Mr Snooks was not contradicted. I have summarised this above. However, despite the several limitations on the exercise of compassionate release and executive clemency which they discussed, neither of them excluded the availability of these remedies as de facto and de jure available in this case. In my view, much of their evidence strayed over into consideration whether these respondents had a realistic prospect of release. I have no difficulty accepting that it is true to say these respondents will face considerable difficulty in obtaining either of these remedies. However, that is not relevant, because their difficulty stems entirely from the nature of the alleged crimes:

> "But the requirement that the sentence must be reducible de facto cannot mean that the prisoner in question must have a real prospect of release. Otherwise the more horrendous the crime, the stronger would be the claim not to be extradited. It must mean that the system for review and release must actually operate in practice and not be merely theoretical." (per L.Hoffman in *Wellington* at para 34)

[237] In my view, de facto availability does not apply to the specific circumstances of the respondents, but to whether the remedies are available at all. The evidence was plainly that they are, in a limited number of cases. The BOP granted 150% more applications (albeit from an unknown starting figure) of the compassionate release applications filed in 2018/2019, compared to the preceding year (Kavanaugh letter, page 10). A total of 1,866 inmates have received compassionate release since December 2018 (Irby statement para 10). None of the witnesses contradicted this. I accept that evidence. The remedies are de facto available. They are de jure available.

[238] The applicant has given assurances that compassionate release and executive clemency are features of the US legal system, and are exercised in the regulated manner, overseen either by the judiciary or by executive office, in the manner described by the Kavanaugh letter (pages 9 and 10). Compassionate releases are granted, and is the subject of a specific BOP policy (Irby statement paras 9 to 11). I accept those assurances.

[239] In accepting assurances from Mr Kavanaugh and Mr Irby, as in the rest of this opinion, I have proceeded on the basis that:

> "the assurance given by the District Attorney has been transmitted by the Department of Justice as a solemn promise between friendly states who have long enjoyed mutual trust and recognition" (*Giese* v *United States* [2018] EWHC 1480 (Admin)).

[240] I have accepted that the assurances are such as to mitigate the relevant risks (those founded on by the respondents) sufficiently, based on assessment of the practical as well as the legal effect of the assurance (*Othman* v *UK* (2012) EHRR 1 at paras 188, 189).

[241] Even if these assurances were not available, I would be bound to follow the approach of the House of Lords. I am bound by the principles in *Wellington*, and have followed the principles in *Hafeez* and *Sanchez* as persuasive. *Wellington* decided that, even if a sentence were irreducible, it would only be a contravention of Art 3, at least in the context of extradition, if the likely sentence were grossly disproportionate. As I have discussed already, I have no grounds to regard the likely sentences on Count 2 as grossly disproportionate, for the reasons set out in the Kavanaugh letter. Whether or not it is irreducible is therefore not relevant. That is sufficient to repel this point as bar to extradition.

[242] Further, in my view the mandatory life sentences are not irreducible. Taking the same approach as *Wellington*, the existence of the compassionate release provisions provides

a means de facto and de jure of reducing the mandatory life sentences. The evidence that this remedy may be available only sparingly (although arguably 1,866 successful applications in two years is a significant number) is not sufficient to show that it is de facto not available. The respondents cannot found on the serious nature of the alleged offences to show that the remedy is not de facto available in their cases, for the reasons discussed in *Wellington*. I find that compassionate release is de jure and de facto available under US law. That is sufficient to establish that the mandatory life sentences are not irreducible.

[243] The same point can be made in relation to executive clemency. While I can accept that it is highly unlikely that in fact a Presidential pardon will be administered in this case, that does not remove the fact that de jure the remedy is available. The same points about de facto availability arise. That also establishes that such sentences are not irreducible.

[244] Even if I was not bound to follow *Wellington*, I would in any event follow the reasoning in *Sanchez*, and find that the ECtHR decision in *Trebelsi* is properly to be regarded as an exceptional case, and does not form part of a clear and constant jurisprudence, on the central issue: whether the Art 3 jurisprudence as developed by the ECtHR must apply equally to non-Convention states in extradition cases. I agree with the analyses in *Hafeez* and *Sanchez* that the subsequent ECtHR jurisprudence does not do so. To do so would be in direct contradiction to the principles set out in *Kafkaris*, recognised by the House of Lords in *Wellington*, that: "punishment which counts as inhuman and degrading in the domestic context will not necessarily be so regarded when the extradition factor has been taken into account". (per L.Hoffman at para 24). In the absence of such a clear and constant jurisprudence, I am not bound to apply the ECtHR cases cited for the respondents (*Manchester CC* v *Pinnock*, above).

[245] For completeness, I note the observations of the Supreme Court in *Dean* v *Lord Advocate,* which was dealing with prison conditions. The Supreme Court noted that, while the strong public interest in extradition has no paramountcy:

> "in my view it is incumbent on a court, which is addressing an Art 3 challenge, to make such an assessment in the context of an extradition; and the existence of the extradition agreement is a factor in that assessment (per Lord Hodge at [37]."

[246] Accordingly there is no reason to anticipate that the distinction between extradition and non-extradition cases will be abandoned in UK jurisprudence.

[247] Lastly, counsel sought support from applications for interim relief in cases presently before the ECtHR, three of which involve extradition to the US. These are *McCallum* v *Italy* (no 20863/21), *Antic* v *Serbia* (no 41655/16), *Sanchez-Sanchez* v *UK* (no 22854/20) and *Hafeez* v *UK* (no 14198/20). I was invited to consider these as evidence that the ECtHR was to apply the developing Art 3 jurisprudence to extradition cases, including to the US. I decline to do so. These are interim applications which contain no more than a summary of the domestic cases. They are not themselves reasoned decisions. In any event, an interim measure inevitably raises purely practical issues, such as preservation of the status quo while the matter is litigated. They do not have any persuasive status for present purposes, in my view.

[248] I find that there is no bar to extradition based on the irreducibility of the mandatory life sentence which may be imposed on Count 2 of the US indictments.

Disposal

[249] No reference was made to the devolution minutes and no order is required.

[250] I have already dealt with the preliminary questions under the 2003 Act. On the remaining question (section 87(1)) as to whether the extradition of each of the respondents

would be compatible with their Convention rights, I find that it would be compatible in relation to all three of the respondents. I have not found it necessary to seek further assurances to those given already. I find that there is no contravention of section 91 in relation to any of the respondents. In doing so, I note that extradition is no longer sought on Counts 13 to 20, so I discharge each of the respondents from the warrants only so far as they relate only to Counts 13, 14, 15, 16, 17, 18, 19 and 20. Thereafter, I must (section 87(2)) send the case to the (section 141) Scottish Ministers for their decision whether each of the respondents is to be extradited, which I do.

[251] In terms of section 92, there is a right of appeal to the High Court. If any of the respondents exercise that right the appeal will not be heard until the Scottish Ministers have made their decision.