APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 29
HCA/2023/10/XM
HCA/2023/9/XM

Lord Justice General
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD PENTLAND

in

the appeals against decisions of the Sheriff of Lothian and Borders at Edinburgh and the Scottish Ministers in the application for the extradition of

SARAH LYNN TWEEDIE or MORROW

Appellant

against

HIS MAJESTY'S ADVOCATE

and

THE SCOTTISH MINISTERS

Respondents

Appellant: Mackintosh KC; Dunne Defence, Edinburgh
Respondent (Lord Advocate): Frain-Bell; the Crown Agent (representing the American Authorities)
Respondent (The Scottish Ministers): McGuire; Scottish Government Legal Directorate

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4 August 2023

Introduction

[1] The United States of America has requested the extradition of the appellant to stand

trial on indictment in the state of Missouri. She is accused of defrauding her former employer of $165,239.25. The appellant resists extradition on the grounds that it would be: (1) oppressive due to the passage of time since commission of the alleged offences; (2) contrary to her right under Article 3 of the European Convention on Human Rights not to be subjected to inhumane and degrading treatment in view of the alleged prevalence of sexual abuse of female prisoners in US federal prisons; and (3) contrary to her Article 6(2) right to the presumption of innocence, on the basis that, if she is convicted, the US sentencing judge will consider other conduct, for which she has not been convicted by the jury, when determining the appropriate sentence and that such a determination will be made applying the civil rather than the criminal standard of proof.

[2] The sheriff held that there was no bar to the appellant's extradition and, in line with the statutory scheme, sent the matter to the Scottish Ministers to determine whether the appellant ought to be extradited. The Scottish Ministers ordered her extradition. The appellant argues that, because her extradition would be incompatible with her rights under the Convention, the decisions of the sheriff and the Scottish Ministers are unlawful and *ultra vires*. She seeks leave to appeal against both decisions under sections 103 and 108 of the Extradition Act 2003.

The alleged crimes

[3] The indictment against the appellant, as returned by the Federal Grand Jury, details three counts of mail fraud (Title 18, United States Code, section 1341), five counts of wire fraud (Title 18, United States Code, section 1343), and two counts of aggravated identity theft (Title 18, United States Code, section 1028A). The allegations arise from the appellant's employment as a financial controller by a business in St Louis, Missouri, referred to as LF. It

is alleged that the appellant devised a fraudulent scheme whereby she: (i) made a number of unauthorised purchases using two company credit cards, one in her own name, and one in the name of a former employee of LF; (ii) purchased Amazon gift vouchers using LF's corporate account; (iii) accessed LF's payroll system fraudulently to increase her salary, which resulted in her being paid more than she was due; and (iv) used the payroll system to cause LF to pay her illegitimate and unapproved expenses. According to the narrative in the indictment, LF's total losses as a result of the fraudulent scheme amount to $165,239.25. Ten counts relating to specific acts alleged to have been committed by the appellant in pursuance of the scheme are then detailed. Counts 1 – 8 are said to account for $8,357.10 of the total losses alleged. At trial, the US Government will require to prove these ten counts to the US criminal standard of proof, namely, beyond all reasonable doubt. Although the jury will only be asked to return a verdict on the ten counts, the US Government intends to lead evidence to support the total loss alleged in the narrative.

[4] Kyle Bateman, Assistant US Attorney for the Eastern District of Missouri, provided an affidavit in support of the indictment. The affidavit contained reference to an additional investigation into similar fraudulent acts allegedly committed by the appellant against a second former employer, referred to as IR. None of these acts is detailed in the indictment.

The evidence

Oppression: impact on the appellant's family

[5] The sheriff heard oral evidence from the appellant and her husband, Matthew Morrow, regarding their relationship and family circumstances. The appellant began a long-distance relationship with Mr Morrow in 2015. At the time, the appellant was living in the US, and Mr Morrow was living in Scotland. They became engaged in March 2017. The

appellant began working for LF in April 2017. She was granted a UK fiancée visa in November 2017, and moved in with Mr Morrow and his two children in Scotland in December 2017. After that, she did not return to work at LF. The alleged offences are said to have been committed between July and December 2017.

[6] Since moving to Scotland, the appellant has held employment. On 26 February 2018 she and Mr Morrow were married. The appellant has been granted two spousal visas to remain in the UK. She has made friends in this country. She is stepmother to Mr Morrow's children. She has provided care to them and has lived with them. Mr Morrow gave evidence that his life would crumble if the appellant were extradited.

Article 3 and US federal prison conditions: sexual abuse of female prisoners

[7] The sheriff heard evidence regarding a staff report issued in December 2022 by the US Senate Permanent Subcommittee on Investigations into sexual abuse of female prisoners in the custody of the Federal Bureau of Prisons. In 2003, the US Congress had passed the Prison Rape Elimination Act to eradicate prisoner rape in all types of correctional facilities. The Act required federal prisons to adopt policies and practices designed to mitigate the risk of sexual abuse, track allegations of such abuse and protect potential victims. The findings set out in the US Senate Subcommittee's report included that the Bureau had failed to implement the 2003 Act. Bureau employees had sexually abused female prisoners in 19 of the 29 federal prisons which held women during the past decade. In at least four of the facilities, including Federal Correctional Institution Dublin, which was a prison in which the appellant might be housed if convicted, female prisoners had endured ongoing sexual abuse for months or years. The Subcommittee found that the Bureau had failed to detect, prevent and respond to sexual abuse and to hold employees accountable for related misconduct. It

found, however, that the Bureau had taken some steps to deal with the issue, including updating its employee handbook, the training for inmates on how to report sexual abuse and the posters displayed throughout its facilities designed to explain to prisoners how to report abuse. The Bureau reorganised its chain of command so that reports of sexual abuse were no longer made to facility wardens, but to the Central Office of the Bureau Office of Internal Affairs. The Department of Justice had set up a working group to review the DOJ's approach to rooting out and preventing sexual misconduct.

[8] The sheriff heard parole evidence from Deborah Golden, a prisoners' rights attorney based in Washington DC, and Reality Winner, a female former US prisoner, who served time in both county and federal prisons. Ms Golden considered that there was systematic sexual abuse of female prisoners in Bureau prisons. She described the low conviction rate for sexual crimes in the US and the difficulties that victims of abuse faced in vindicating their rights. She accepted that some had been able to obtain damages from the US Government. In her view, any changes made by the Bureau since the Senate report had been minimal, although she accepted that the Bureau had "stepped up" since the sexual abuse scandal at FCI Dublin had been uncovered and that there was a positive statement of intent from the Bureau that it would protect prisoners from sexual abuse.

[9] Ms Winner described the conditions she experienced in three county facilities and one federal facility, Federal Medical Center Carswell. None of the facilities in which Ms Winner was housed during her sentence were facilities where the appellant was likely to be detained if extradited. Ms Winner described how her mental health was adversely affected by her time in prison. She experienced one incident of sexual abuse by a prison guard in FMC Carswell. She reported the abuse to the Office of the Inspector General, which is responsible for the investigation of such complaints, in March 2020, but never

received an acknowledgment. An investigation was not commenced by the OIG until January 2021. In the intervening period, Ms Winner was threatened by a prison guard about her complaint.

[10] The sheriff heard evidence regarding the Office of the Inspector General's October 2022 Memorandum, "Notification of Concerns Regarding the Federal Bureau of Prisons' Treatment of Inmate Statements in Investigations of Alleged Misconduct by [Bureau] Employees". The OIG made a series of recommendations to the Bureau in October 2022 about the Bureau's handling of inmate testimony in internal investigations into allegations of misconduct involving abuse. The OIG recommended that the Bureau remove the prohibition on substantiating complaints against employees based on inmate testimony and instead move to a case-by-case approach to the available evidence. It recommended that the Bureau create a policy to that effect and provide training to their staff as to the handling of inmate testimony. The Bureau indicated that it would implement two out of three of these recommendations. Other steps taken included: (i) the closing of Federal Correctional Complex Coleman to female prisoners; (ii) the criminal prosecution of numerous Bureau employees for abuse; (iii) the substantiating of numerous misconduct allegations involving sexual abuse of female prisoners against Bureau employees by the OIG; and (v) reforms made to the complaint screening practices within the OIG, which included setting up the DOJ's Working Group.

[11] The sheriff was provided with a letter dated 19 December 2022 from Timothy Rodrigues, Deputy Associate Counsel, Legislative and Correctional Issues Branch for the Bureau, in which assurances regarding the risk of sexual assault in federal facilities were given. Mr Rodrigues explained that Bureau staff have an obligation to report sexual misconduct. They are trained on the importance of reporting, and how to make a report.

Inmates can make use of computer suites to report questions or concerns to any department within their facility, and have daily access to staff of all ranks if they wish to discuss anything. All referrals for misconduct are reviewed and responded to by the warden within 20 days. The OIG or FBI investigates criminal allegations. Employees who are prosecuted may be subject to disciplinary action. US Attorney's Offices have been directed to prioritise the prosecution of criminal misconduct within the Bureau. Additional personnel have been recruited to ensure timely review of misconduct cases. Mr Rodrigues summarised his views by saying that the Bureau was committed to protecting the safety and security of those in its care, and to holding accountable those who violate the law.

Article 6(2) and the US sentencing regime

[12] The sheriff heard oral evidence from Bruce Maloy, a US attorney based in Atlanta. Mr Maloy gave evidence on the trial and sentencing processes in the US. The sheriff's findings as to the processes were largely based on Mr Maloy's evidence. If the appellant were to be convicted of each of the charges on the indictment, the maximum sentence she would face is 164 years' imprisonment. A US sentencing judge is obliged to follow the US Sentencing Guidelines. For the sentencing of fraud offences, criminal history and relevant conduct are factored into the assessment of the appropriate sentence. Those with no, or few, previous convictions will attract shorter sentences. Relevant conduct requires the judge to determine the amount of loss caused by the convicted person's fraudulent actions. The sentencing judge, as opposed to the jury, will determine the loss amount. The judge will require to be satisfied that the loss amount is proved according to the US civil standard of proof, namely a preponderance of the evidence. Relevant conduct includes all acts and omissions committed, aided, abetted, counselled, commanded, induced, procured, or

wilfully caused by the convicted person. It includes any acts and omissions of others which were committed in furtherance of criminal activity, jointly undertaken with the convicted person, that were reasonably foreseeable and were part of the same course of conduct or common scheme or plan as the offence of the conviction. It includes acts on the indictment for which the convicted person was acquitted on the criminal standard of proof as well as any acts which were dismissed as part of a plea agreement. That is the case so long as those acts were proved on the civil standard of proof.

[13] In addition to his affidavit, Kyle Bateman provided a letter dated 23 December 2022 containing assurances regarding the appellant's concerns about her Article 6(2) rights. Mr Bateman explained that the appellant will be presumed innocent in relation to each of the ten charges, and that the US will require to prove each count beyond all reasonable doubt. In relation to the total loss of $165,239.25, the US Government would lead evidence in support of this. It would disclose that evidence to the appellant in advance of trial to enable her to counter the alleged loss. The sentencing judge would require to determine whether the loss had been proven on the civil standard of proof. Federal judges in the Eastern District of Missouri are highly-qualified and well-suited to making factual findings in connection with sentencing. There were procedural safeguards in place to prevent unreasonable sentences. Mr Bateman provided assurance that the US Government had no intention to prosecute the appellant for fraud committed against IR. Unless a waiver of the rules of speciality was sought, the appellant would only be tried for the offences detailed on the indictment.

The sheriff's decision

[14] The starting point for consideration of the appellant's resistance to extradition was

the fundamental assumption that the requesting state was acting in good faith. That assumption may be contradicted by evidence. Where the requesting state was one with which the UK had for many years enjoyed general good relations, and with which it had entered into successive bilateral treaties which had been consistently honoured, such as the US, the evidence would have to possess special force in order to displace that assumption (*Ahmad and Aswat* v *The Government of the United States of America* [2006] EWHC 2927 (Admin), Laws LJ at para 101).

[15] The appellant did not meet the extremely high test for oppression by reason of the passage of time (*Lagunionek* v *Lord Advocate* 2015 JC 300, Lord Menzies delivering the opinion of the court at paras [12] – [17]). There was no evidence to suggest that there had been any culpable delay on the part of the US. The passage of time between the earliest date on which the alleged offences took place (*Lagunionek*, para [24]), in July 2017, and the extradition hearing in early January 2023 had had a demonstrable effect on the appellant. She had made a new life for herself in Scotland. There was no doubt that the appellant's extradition would cause hardship to Mr Morrow, the appellant and the children. Even so, the indictment libelled serious offences concerning fraud valued at $165,239.25, and the personal or family hardships likely to be suffered were not greater than the inevitable and inherent hardship caused by any extradition for a criminal trial in another country.

[16] The appellant had not shown that in her particular case there were substantial grounds for believing that she faced a real risk of being sexually abused and thereby subjected to treatment contrary to Article 3 if she were extradited (*Dean* v *Lord Advocate* 2018 SC (UKSC) 1, Lord Hodge at para 25). There was a distinction to be drawn between extraditions within contracting states and those involving non-contracting states, such as the US (*Amnott* v *United States* 2022 SLT 456, Lord Justice General Carloway delivering the

opinion of the court at para [38]). The Senate report should be given weight. The key findings of the report set out a concerning position regarding the sexual abuse of female inmates by male Bureau employees over the past decade, and on aspects of the Bureau's approach to that abuse. There were particular difficulties at four facilities, including FCI Dublin, where the appellant might be housed if convicted. There was, however, no evidence that there were particular problems present at FCI Dublin since the prosecution and conviction of a number of the employees there. There was no evidence that there had been recent, particular problems with sexual abuse at any of the other four prisons that the appellant was likely to be housed in if convicted. A number of steps had been taken in response to the abuse. The Office of the Inspector General's October 2022 Memorandum provided detail as to those steps. The publication of the Senate report itself showed that the issue was being scrutinised at the highest level. The Rodrigues letter made it clear that the Bureau was committed to protecting the safety and security of those in its care, combatting sexual misconduct in its prisons and holding its employees accountable for violating the law. The appellant's argument that the risk was such that no woman could be extradited to the US if she were to be housed in a federal facility fell to be rejected.

[17] The appellant had failed to prove her contention that she would be held in overcrowded and inappropriate conditions, and thus that she faced a real risk of being subjected to treatment contrary to Article 3 if she was extradited. Ms Winner had not given evidence about overcrowding and in any event, had not been held in any of the three prisons in which the appellant was likely to be held pre-trial. The evidence regarding those three prisons did not suggest that the cell personal space or the other physical conditions of detention (*Mursic* v *Croatia* (2017) 65 EHRR 1 at para 139) were inappropriate. As for the five federal prisons in which the appellant was likely to be housed if convicted, the evidence

showed that in each of those, there was cell personal space per inmate of 3m² to 4m², and there was nothing to suggest that the other physical conditions of detention in any of the five prisons were inappropriate.

[18] The sheriff rejected the appellant's argument that her right to be presumed innocent under Article 6(2) would be breached by the US sentencing process. The right under Article 6(2) arose only in connection with the particular offence charged (*Phillips* v *United Kingdom* 11 BHRC 280, para 35). Once an accused had properly been proved guilty of that offence, Article 6(2) had no application in relation to allegations made about the accused's character and conduct as part of the sentencing process, unless such accusations were of such a nature and degree as to amount to the bringing of a new charge within the autonomous Convention meaning. The onus of proving the loss amount was on the prosecutor. The appellant would be able to lead evidence to rebut any particular loss during the trial and at the sentencing stage. Therefore the judge would only use established facts to select sentence. The judge would not punish the appellant for these established facts in themselves, rather he or she would only punish the appellant for any of the counts on the indictment of which she was convicted by a jury to the criminal standard (*Engel and Others* v *Netherlands* 1 EHRR 647). The US sentencing process required to be viewed in light of the importance of the principle of sovereignty. The ECHR should not be used as a means of imposing the criminal justice values of contracting states on non-convention countries (*Welsh and another* v *Secretary of State for the Home Department and another* [2007] 1 WLR 128, Ouseley J at paras 136 and 137; *Amnott*, Lord Justice General Carloway at para [40]).

[19] The US sentencing regime was not contrary to the speciality rule under section 95 of the Extradition Act 2003 (*Welsh*, Ouseley J at paras 100 to 148). The Bateman letter made clear that the appellant would not be separately prosecuted in respect of the allegations in

relation to IR. The speciality rule would prevent the US from prosecuting the respondent in respect of that matter. Nor was there any suggestion that the prosecutor would seek to prove that the loss amount was other than the total loss of $165,239.25. When viewed in their entirety, the US trial and sentencing processes did not give rise to substantial grounds for believing that the appellant would be exposed to a real risk of being subjected to a flagrant denial of justice if extradited.

[20] The sheriff concluded that it would not be unjust or oppressive to extradite the appellant due to the passage of time (sections 79 (1) and 82 of the Extradition Act 2003). He held that there were no substantial grounds for believing that the appellant faced a real risk of being subjected to treatment contrary to Article 3 or to a flagrant denial of justice if extradited. The sheriff dismissed the devolution minute.

Submissions

Appellant

[21] The driving factors in any assessment of whether extradition would be oppressive by reason of the passage of time were how much time had passed and the seriousness of the alleged offences. Regarding the passage of time, it was agreed that the appellant was not a fugitive. The sheriff ought to have assessed the seriousness of the offences differently. The only allegations which the US prosecutor intended to put to the jury and prove to the criminal standard of proof were those detailed in the ten counts in the indictment. The sheriff therefore ought only to have had regard to those allegations, being the only allegations which the US prosecutor intended to prove in a manner which was compliant with the appellant's Article 6(2) rights. The ten counts had a loss amount of only $8,357.10, as opposed to the total loss amount of $165,239.25 narrated in the indictment. These were

not gross offences like those in *Amnott*. Had the sheriff assessed the gravity of the allegations appropriately, this would have changed the balance, and he would have required to order the appellant's discharge. The ties which the appellant had formed with her husband, children and friends created the oppression.

[22] The UK was under a general obligation to protect the appellant from a real risk of sexual violence (*N* v *Sweden* [2010] (Application 23505/09), para 51; *Opuz* v *Turkey* (2010) 50 EHRR 28, para 159). When the court was considering whether there was a real risk of breach of a Convention right in an extradition, it was not a matter of finding facts in the traditional manner. Instead the correct approach was to look for substantial sources of evidence. There was therefore no good reason for the sheriff to give priority to the Rodrigues letter over the US Senate Subcommittee report. The Scottish courts and the Scottish Ministers were required to give equal respect to the letter and the report. The sheriff did not treat the Senate report with respect (*Aranyosi and Caldararu* [2016] 3 WLR 807, para 99). The sheriff required to examine whether there were serious grounds to believe that the appellant would face a real risk of being subjected to treatment contrary to Article 3. Serious grounds meant strong grounds (*Rae* v *United States of America* [2022] EWHC 3095 (Admin), para 64). The question was not whether the Senate report was wrong, but whether it constituted serious evidence.

[23] There being serious evidence that there was a real risk of a breach of Article 3, the sheriff required to assess whether the assurances provided in the Rodrigues letter were sufficient to remove any real risk of ill-treatment (*Othman (Abu Qatada)* v *United Kingdom* (Application No. 8139/09 (2012) 55 EHRR 1, paras 183 – 189). Real risk was to be assessed according to both the risk of being subjected to ill-treatment and the extent to which that treatment would fall below the Article 3 minimum standard (*Rae*, para 76). The assurance in

the Rodrigues letter was insufficient. The letter failed to address the Senate report. It was general and vague in its assurances about the Bureau's actions regarding sexual assault. There was little material suggesting that the Bureau had an effective system of prevention in place. The risk of serious sexual violence was more significant when it occurred in conditions of limited personal space, even where that space was not so limited as to give rise to an Article 3 breach in itself. The sheriff's conclusion that there were no substantial grounds for believing that the appellant would face a real risk of sexual violence was not rationally supported by the evidence. The Senate report was clear that there was not yet a consensus within the Bureau that this was a systemic problem, as opposed to the actions of some "bad apples". The report was sceptical that enough was being done by the Bureau. The Rodrigues letter failed to dispel these doubts. As the assessment was one of future risk, the proper approach would have been to find that, given the serious, life-changing consequences of sexual abuse and rape, the risks found in the report were sufficiently real for the sheriff to seek meaningful assurances.

[24] The right to be presumed innocent was fundamental to Article 6. That right encapsulated a standard of proof beyond reasonable doubt. The US sentencing procedure enabled the sentencing judge to use unproved allegations of criminal conduct not detailed in the ten counts so as to determine the appropriate sentence to impose. Those allegations would not be put to the jury and the judge would apply the civil standard of proof to them. That would deprive the presumption of innocence of its substance. It would result in a longer prison sentence being imposed on the appellant for harm that she had not been properly convicted of. It amounted to the bringing of a new charge within the meaning of Article 6(2) (*Phillips* v *United Kingdom*). This approach had its roots in pre-American revolution English law and was in marked contrast to the modern law in Scotland and

elsewhere in the United Kingdom. It was not an approach taken by the Scottish courts. The High Court had expressly reserved its opinion in *O'Leary* v *HM Advocate* 2014 SLT 711 on whether it was permissible for a sentencing judge to take unproven allegations of criminal conduct into account when deciding whether to impose an Order for Lifelong Restriction. To do so was a breach of the appellant's Article 6(2) right to the presumption of innocence and was a flagrant denial of justice (*Soering* v *United Kingdom* (1989) 11 EHRR 439, para [113]; *Othman*, paras 259 - 260).

[25] The decision of the Scottish Ministers was separately challenged because the appellant could not realistically criticise the sheriff's decision without dealing with the ultimate decision to extradite her. The Ministers were not entitled to order the appellant's extradition. They should have concluded that extradition would amount to a breach of her Convention rights. They had no power to do any act in so far as it was incompatible with a Convention Right (section 57(2) of the Scotland Act 1998). Their decision was *ultra vires* and unlawful. The Lord Advocate had acted incompatibly in conducting the extradition proceedings, which in turn infected, tainted and vitiated the sheriff's decision.

Lord Advocate

[26] The appellant's passage of time argument must fail. There was always going to be familial hardship caused by the extradition of any person. There was no basis for the court to find that there was hardship which was out of the ordinary in the appellant's case. There had been no delay or inactivity on the part of the US following the discovery of the alleged fraud in February 2018 (*Lagunionek* v *Lord Advocate*). The extradition request was made just over a year later, after the required domestic court steps had been taken. The sheriff took the correct approach to the question of oppression, including to the gravity of the offence.

The appellant's approach, which objected to the factors which may be taken into account by a US sentencing judge when selecting the appropriate sentence, was misconceived.

[27] The sheriff did not prefer the contents of the Rodrigues letter over that of the Senate report. He considered the two together. He did not use the letter to undermine the report. On the contrary, he found that the report had identified significant failings. He found, from the contents of the letter, that those failings were now being addressed. Having heard all of the evidence, the sheriff was entitled to conclude that it would be unlikely that the Bureau would not follow the recommendations of the Senate subcommittee. The appellant's position appeared to be that the sheriff ought not to have considered any of the remedial steps that the Bureau claimed to have adopted. Even Ms Golden had acknowledged that the Bureau was taking steps. The sheriff had found her evidence to be credible, reliable and of considerable assistance. He took a holistic approach to the evidence (*Dean* v *Lord Advocate*). He found that he did not consider the Bureau's remedial steps to be minimal, or that it tolerated employee misconduct. He was entitled to find that there was no real risk of sexual abuse to the appellant, standing the Bureau's system of protection and its refusal to tolerate such abuse. *Othman* did not apply as no real risk of ill-treatment existed. The appellant's ground of appeal in relation to an alleged breach of her Article 3 rights was unfounded and ought to be refused.

[28] The appellant's contention that the US approach to sentencing amounted to the bringing of a new charge in terms of Article 6(2) was unsound. The well-established sentencing procedures in the US were not of such a nature and degree as to amount to the bringing of a new charge (*Phillips* v *United Kingdom* at paras 28 – 36; *R* v *Bagnell* [2012] EWCA 677 at paras 18 – 21; The Proceeds of Crime Act 2002, s 92) and did not violate the speciality rule (*Barnes* v *Government of the USA* [2011] EWHC 2218 (Admin); *The Attorney*

General v *Marques and anr* [2016] IECA 374). The ten counts were essentially sample charges; the US Government intended to lead evidence at trial that would support the whole loss narrated. It was clear that the appellant would have every opportunity to rebut any material provided by the prosecutor during the sentencing hearing prior to any determination being made regarding sentence. The Convention should not be used as a means of imposing the criminal justice values of contracting states on non-Convention countries (*Amnott*, Lord Justice General Carloway at para [40]). The Scottish courts would require some obvious and serious proof that a person would be exposed to a real risk of being subjected to a flagrant denial of justice in the US if he or she was to be extradited (*Amnott*). The risk would have to be seismic or egregious. No such risk existed in the present case. There would only be a sentencing hearing if the appellant was convicted by a jury following a trial in relation to the indictment. The appellant's ground of appeal in relation to Article 6 ought to be rejected. Nor was there a basis for the appellant's contention that it was *ultra vires* for the Scottish Ministers to order her extradition.

The Scottish Ministers

[29] Leave to appeal against the decision of the Scottish Ministers to order the appellant's extradition ought to be refused. The appellant had not advanced any arguable grounds of appeal (*Czerwinski* v *HM Advocate* 2015 SLT 610, para [11]). *Esto* leave to appeal was granted, the appeal should be refused. The Ministers were entitled to rely upon the sheriff's decision that the appellant's extradition to the US would not breach her Convention rights. They were not obliged to reach their own decision as to that question (*BH* v *Lord Advocate* 2012 SC (UKSC) 308, Lord Hope at para 26). The Ministers were required by section 93(4) of the 2003 Act to order the extradition. The appellant had failed to advance any arguable basis on

which it could be said that the Ministers ought to have decided the matter differently in terms of section 93(2). Representations were made to the Ministers on behalf of the appellant regarding the issue of speciality. The Ministers had considered these and concluded that no issue of speciality arose. That was the correct decision. The Ministers had properly carried out their functions under section 93. In doing so, they did not act unlawfully or incompatibly with the appellant's human rights. It was not their duty to review the sheriff's decision. That decision could be reviewed by the High Court on appeal if leave were granted. It was not arguable that the Ministers ought to have decided a question before them differently (2003 Act, s 109(3)(a)). An appeal under section 108 was not the appropriate route of appeal in circumstances where the focus of the appeal was the sheriff's decision that the extradition would be compatible with Convention rights.

Decision

[30] It is convenient to deal first with the issues arising under the Convention and then to address the appellant's other arguments. By way of introduction to the Convention issues it is important to reiterate that a distinction must be drawn between extraditions within contracting states and those involving non-contracting states. It is emphatically not for contracting states to seek to impose Convention standards on non-contracting states. It will require strong and cogent evidence of likely mistreatment to amount to a bar on extradition to states, such as the US, with a long history of respect for democracy, human rights and the rule of law. See generally *Amnott* v *United States* 2022 SLT 456, Lord Justice General Carloway delivering the opinion of the court at para [38]).

Article 3

[31] The court is satisfied that the sheriff was entitled to hold, on the basis of the evidence he heard, that the appellant had not shown that there was a real risk of her being subjected to inhumane or degrading treatment in the US prison system. This is an assessment that falls to be made on the basis of the whole evidence placed before the court. The European Court of Human Rights made this clear in *Saadi* v *Italy* 2009 49 EHRR 30, at paragraphs 128 and 129. It involves a fact-sensitive decision that can only properly be made in the light of the totality of the evidence before the court. Contrary to the appellant's argument the sheriff did not inappropriately confer priority on the Rodrigues letter. The sheriff evaluated the entirety of the evidence thoroughly in a comprehensive and balanced judgment.

[32] The thrust of the appellant's argument was that the court should begin with the Senate report, proceed to hold on the basis of the report alone that a serious risk existed, and after that move on to examine what were said to be assurances given in the Rodrigues letter. Such an approach to the evidence is unrealistically technical and artificial.

[33] Viewed as a whole, the evidence showed that the problem of sexual abuse of female inmates in US prisons had been identified at a high level and was being seriously addressed by the appropriate authorities. In her evidence Ms Golden accepted that the Rodrigues letter amounted to a clear declaration of intent by the Bureau to protect female prisoners against sexual abuse. She acknowledged that a number of the initiatives being pursued by the Bureau to tackle the issue, such as reorganising the system of internal investigations, were positive.

[34] The court proceeds on the basis that the Rodrigues letter was provided in good faith. The views expressed should be treated with respect by the court as, of course, should those of the Senate sub-committee. The letter made clear that the Bureau of Prisons was taking

meaningful action to prevent, detect and respond to sexual abuse of female prisoners. FCC Coleman had been closed to female inmates. Numerous Bureau employees had been prosecuted and in some cases convicted for sexually abusing female prisoners. The steps adopted included improved staff training, better ways of enabling inmates to report abuse, and supporting criminal prosecutions of abusers. The sheriff found that the Bureau was committed to protecting the safety and security of female prisoners and holding its employees accountable for misconduct towards prisoners. It was unlikely that the Bureau would not respond appropriately to the Senate report and follow its recommendations.

[35] Moreover, there was no evidence before the court that there had been recent particular issues with sexual abuse at four of the five prisons where the appellant was likely to be held if convicted. As regards FCI Dublin, there was no evidence that particular problems had persisted after the prosecution and conviction of a number of Bureau employees who had worked there.

[36] The overall picture which emerged from the evidence was that the US authorities do not tolerate sexual abuse of female prisoners and are committed to eradicating the problem from the penal system by putting in place a range of measures to address it. The court acknowledges that it may never be possible for any system to eliminate the risk of abuse completely. The existence of a general risk is not the issue, however. The appellant must show that there are substantial grounds for believing that she faces a real risk of being subjected to treatment contrary to Article 3 if she is extradited. Having considered all the evidence the sheriff concluded that the appellant had failed to do so. The court agrees with his judgment on the issue.

Article 6

[37] The court does not consider that any aspect of the US sentencing process, as described in the evidence, amounts to the bringing of a new criminal charge for the purposes of Article 6(2). The evidence showed that under US law and procedure the sentencing stage was entirely distinct from the preceding process of establishing guilt. The determination of the loss amount and the consideration of any uncharged analogous allegations stand apart from the issue of conviction or acquittal. Instead they are matters that fall within the scope of the sentencing exercise and concern the appropriate sentence to be imposed for the offences of which the offender has already been convicted at trial.

[38] Article 6(2) deals only with the proof of guilt and not with the kind or level of punishment (*Engels* v *The Netherlands (No 1) (1976)* 1 EHRR 647, para 90). In *Phillips* v *UK* 11 BHRC 280, para 31 the European Court identified three criteria for deciding whether in the course of confiscation proceedings the applicant had been charged with a criminal offence: the classification of the proceedings under national law; their essential nature; and the type and severity of the penalty that the applicant risked incurring.

[39] In the present case there is no doubt that US law would not classify the sentencing stage of the prosecution in a case such as the present one as amounting to the bringing of a stand-alone charge. The essential nature of that stage is that it is concerned with determination of the appropriate sentence to impose on a convicted person. The penalty could be substantial if justified on the evidence, but that factor alone is not sufficient to transform the distinct sentencing process into a separate criminal proceeding involving the appellant being accused of a different criminal charge to the counts that feature on the indictment.

[40] It is important also to recall that the prosecution charges the appellant with perpetrating a fraudulent scheme, of which the particular counts set out in the indictment may be seen as some of the component parts. When the nature of the case is understood in that way, it makes no sense to say that the sentencing of the appellant on the basis of evidence relating to the underlying scheme entails her being confronted with new and different charges standing apart from those on which she is to be tried by the jury.

[41] The court is satisfied that the process of setting the loss amount and the consideration of any material considered to be relevant for the purposes of that exercise does not constitute the bringing of a criminal charge for the purposes of Article 6. It follows that the appellant's contention that her Article 6 rights will be breached because the presumption of innocence is infringed if she comes to be sentenced on the indictment is misconceived and must be rejected. Since Article 6(2) is not engaged, it is unnecessary to address the question as to whether extradition would involve a flagrant denial of justice.

Passage of time and oppression

[42] The sheriff did not misdirect himself as to the gravity of the allegations against the appellant. He correctly understood that the indictment set out a case based on the proposition that the appellant devised and carried through to fruition a fraudulent scheme causing total losses to her former employers of about $165,239.25. The Bateman letter made plain that the prosecution would lead evidence at the trial to support a loss of that order of magnitude and that if convicted the appellant would be sentenced on the basis that she had brought about a loss of that amount.

[43] Obviously a fraudulent scheme involving financial losses on that scale cannot be regarded as anything other than serious. So far as the progress of the present proceedings is

concerned, the Federal Grand Jury returned the indictment on 21 June 2018. The appellant's extradition was requested on 29 April 2019. The Cabinet Secretary for Justice confirmed the validity of the request on 26 June 2019 and the appellant was arrested in this country on 9 July 2019 on which date she appeared in court and was liberated on bail.

[44] It can thus be seen that there has been no unreasonable delay or inactivity on the part of the requesting state following the discovery of the alleged fraudulent scheme in February 2018. The request for extradition was made some 14 months later, after the necessary domestic steps had been properly taken. The period of time between (a) the discovery of the alleged crime and the making of the request for extradition on the one hand and (b) the hearing before the sheriff on the other are not attributable to any delay by the US.

[45] The sheriff was right to conclude that the appellant did not meet the extremely high test for oppression by reason of the passage of time (*Lagunionek* v *Lord Advocate* 2015 JC 300, Lord Menzies delivering the opinion of the court at paras [12] – [17]). As already mentioned, there was no culpable delay on the part of the US. The sheriff recognised that the passage of time between the earliest date on which the alleged offences took place (*Lagunionek*, para [24]), in July 2017, and the extradition hearing in early January 2023 had had a significant impact on the appellant in view of her new lifestyle in Scotland. Inevitably hardship would be caused by her extradition to her new family. Even so, the indictment charged serious offences concerning a fraudulent scheme valued at $165,239.25. Any personal or family suffering was no more severe than the inevitable hardship inherent in extradition for a criminal trial in another country.

[46] At the end of the day, the court considers that there is no merit in the passage of time argument.

Devolution issue

[47] The appellant's agents made representations to the Scottish Ministers by letter dated 3 March 2023. The points made largely repeated the arguments made to and rejected by the sheriff. On 18 April 2023 the Ministers ordered the appellant's extradition.

[48] There is nothing in section 57(2) of the Scotland Act 1998 to prevent the Ministers from relying on the sheriff's decision that the appellant's extradition would not infringe any of her Convention rights. The Ministers have properly carried out their functions under and in terms of the Extradition Act 2003. No separate point arises in relation to the Ministers' discharge of their statutory duties.

Disposal

[49] For these reasons the court concludes that there is no merit in any of the appellant's arguments. It follows that leave to appeal under sections 103 and 108 of the Extradition Act 2003 must be refused.