Neutral Citation Number: [2018] EWHC 1480 (Admin)

Case No: CO/3911/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
ON APPEAL FROM WESTMINSTER MAGISTRATES COURT
District Judge Margot Coleman

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/2018

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RT HON THE LORD BURNETT OF MALDON
and
THE HON MR JUSTICE DINGEMANS

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Between:

Roger Alan Giese	**Appellant**
- and -	
The Government of the United States of America	**Respondent**

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- -

Alex Bailin QC and Aaron Watkins (instructed by **Bindmans LLP**) for the **Appellant**
Toby Cadman (instructed by the **Crown Prosecution Service)** for the **Respondent**

Hearing date: 3 May 2018

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Approved Judgment

Lord Burnett of Maldon CJ:

Introduction

1. This is the judgment of the court to which we have both contributed.

2. The appellant is wanted to stand trial in California for sexual offences. On 14 August 2017, pursuant to the Extradition Act 2003 ["the 2003 Act"], District Judge Margot Coleman sent his case to the Secretary of State for her decision whether he should be extradited. The respondent, the Government of the United States of America ["the Government"], resist the appeal. The appellant appeals with leave on three grounds:

    i) The extradition proceedings are an abuse of process following the failure of earlier extradition proceedings;

    ii) Given the nature of the alleged offending, were the appellant convicted there is a risk that he would be subject to "civil commitment" at the end of his sentence, which would give rise to a flagrant denial of his rights guaranteed by article 5(1) of the European Convention on Human Rights ("the Convention"). Assurances given by the Government that he will not be subject to that process are inadequate;

    iii) There are substantial grounds for believing that, if convicted, he would be subjected to violence at the hands of other prisoners in the Californian penal estate, from which the authorities would be unable adequately to protect him. In the result his extradition would violate article 3 of the Convention.

3. The judge found against the appellant on all three points. For reasons which we elaborate below, we conclude that her decision to do so in each respect is unassailable and we dismiss the appeal.

The alleged conduct and proceedings in the USA

4. In September 2002 a complaint was made that the appellant, then a singing instructor for a choir, had carried out sexual assaults on a chorister on numerous occasions when the complainant was aged between 13 and 17 years. A search warrant was executed and relevant items and photographs of the complainant were recovered. The appellant was arrested, interviewed and then released on bail.

5. On 20 September 2002 a "felony complaint" was filed in Orange County Superior Court in California. There were initially six counts of sexual assault. Further counts were added on 17 March 2003 and on 2 March 2004. In the end the appellant was due to stand trial on nineteen counts of sexual assault.

6. The appellant was arraigned on 2 March 2004 and granted bail. After various adjournments, his trial was fixed for 12 March 2007. He did not appear for trial. A warrant for his arrest was issued.

7. In December 2011 anonymous information suggested to the American authorities that the appellant might be in the United Kingdom. That was indeed to where he fled after he became a fugitive from justice. A request for extradition was made, following which he was arrested on 4 June 2014.

Procedural history

8. The appellant contested this first set of extradition proceedings on the basis that if he was convicted and served a sentence of imprisonment, there was a real risk that he would be subjected to civil commitment. This is a form of indeterminate preventative detention imposed in civil proceedings in many American states on persons convicted of certain sexual offences and who are deemed to be mentally ill and dangerous. It was contended that the civil commitment in Orange County would amount to a flagrant breach of the rights protected by article 5(1) of the Convention with the result that his extradition was barred by section 87 of the 2003 Act.

9. There was a hearing before the judge on 9 and 10 March 2015. Judgment followed on 21 April 2015 upholding the article 5 argument. The judge noted that no assurance had been provided that the procedure would not be applied to the appellant, and ordered his discharge.

10. The Government appealed, contending that there was no real risk that the appellant would be subject to a civil commitment order, and that, even if he were subject to such a risk, an order for civil commitment would not infringe his rights under article 5 of the Convention. The appeal was dismissed by the Divisional Court on 7 October 2015, [2015] EWHC 2733 (Admin), which has been referred to as *Giese (No.1)*. In paragraphs 68 to 70 of the judgment Aikens LJ, giving the judgment of the Court, upheld the findings of the judge and recorded that "if things remain as they are, the appeal would have to be dismissed". He noted that the Government sought Mr Giese's extradition not to impose a civil commitment order, but to try him for serious sexual offences. Therefore "the Government should be given a further opportunity to decide whether or not it will offer a satisfactory assurance that, should Mr Giese be found guilty of any offences charged, there will be no attempt to make him the subject of a civil commitment order". The Government were given 14 days to state whether such an assurance would be given.

11. An extension of time for providing the assurance was obtained, and by letter dated 27 October 2015 the acting Director of the United States Department of Justice recorded that

> "the Orange County District Attorney's Office … has confirmed that it will not seek to subject Mr Giese to a civil commitment order … The Orange County District Attorney's Office has concluded, based upon a review of the facts of the case and its experience with the above-described legal procedure, that there is little or no likelihood that Mr Giese would be referred for commitment by the State of California."

12. The Court indicated that it was minded to accept the assurance unless there was an objection; but an objection was made. The appellant contended that the assurance was not a sufficient safeguard with the result that there was a further hearing before the Divisional Court. In a judgment dated 21 December 2015, [2015] EWHC 3658 (Admin), [2016] 4 WLR 10, which has been referred to as *Giese (No.2)*, the court held that the assurance was not a sufficient safeguard. The Government's appeal was dismissed.

13. The Government sought to reopen the appeal pursuant to Criminal Procedure Rule 50.27, which allows such a course in very limited circumstances when the interests of justice require. The Government argued that when the court first received the assurance it had indicated to the parties that it was minded to accept it, with the consequence that in the proceedings which followed the Government had not had an opportunity to meet any residual concerns about the substance of the assurance. The Government also sought a certificate that the cases raised a point of general public importance and permission to appeal to the Supreme Court. The Divisional Court, in a judgment dated 26 February 2016, [2016] EWHC 365 (Admin), which has been referred to as *Giese (No.3),* refused permission to reopen the appeal and refused to certify a point of general public importance. In dismissing the application under rule 50.27 the court observed in paragraph 18 that,

> "the reality of this application, contrary to the submissions of the Government, is that it is an attempt to "have a second go", so as to be able to put forward a revised form of assurance … That is not a proper use of rule 50.27".

The further assurances

14. The Government secured two further letters of assurance. The first from the Orange County District Attorney was dated 24 August 2016. The second from the Director of the US Department of Justice was dated 13 September 2016. In his letter the Orange County District Attorney assured

> "the United States Department of Justice and the United Kingdom that, should Roger Giese be convicted of any offences charged … we will not seek civil commitment … This assurance is binding on any and all present or subsequent individuals holding the position of District Attorney, or any other relevant office holder who has the power to decide upon the commencement of civil proceedings in the Orange County District Attorney's Office …".

15. In the letter from the Department of Justice it was said,

> "First, we take note and accept the decision of the High Court. Second … the Orange County District Attorney's Office has confirmed and continues to confirm that it will not seek to subject Mr Giese to a civil commitment order … if he is convicted … the Orange County District Attorney's office re-affirms that this undertaking is binding on any subsequent District Attorney and any official with the power to consider implementing the civil commitment procedure,"

and the assurance from the District Attorney was enclosed.

The second request to extradite and proceedings before the judge

16. The Government made a fresh request to extradite the appellant on 11 October 2016. That request was certified by the Secretary of State on 8 December 2016. On 11

January 2017 the appellant voluntarily surrendered to Westminster Magistrates' Court and was granted conditional bail on the same day. The issues identified were those set out in paragraph 2 above.

17. The judge heard and dismissed the argument on abuse of process on 5 May 2017. The remaining challenges were heard on 31 July 2017. In a written judgment dated 14 August 2017 the judge set out her reasons for sending the case to the Secretary of State.

The judgment below

18. In a careful and comprehensive judgment, the judge set out the relevant background and recorded that the formalities had been satisfied. In relation to abuse of process she summarised the arguments of both sides, and referred to the approach to abuse of process arguments set out in *R (Government of the United States of America) v Bow Street Magistrates' Court* [2006] EWHC (Admin) 2256; [2007] 1 WLR 1157. The judge held that the procedural history did not reflect particularly well on the Government and that the first assurance should have been more carefully considered and drafted, but

> "nonetheless, I do not accept that by issuing a repeat request to extradite the defendant to stand his trial in California, the Government of the USA has demonstrated any bad faith … nor has it sought to manipulate the Court's process. There is nothing … which is an affront to the rule of law or use of the process of the court for an improper purpose or motive. Quite the contrary."

19. The judge then noted that the complainant had been waiting for a trial and that there was a public interest in the surrender of the appellant. She added that the appellant may well have been persuaded that the second request was unfair but much more was required to show abuse of process; and the judge did not consider the extradition to be oppressive. She accepted that there "has not been a change of circumstances" but nonetheless was not satisfied that the case came close to the rare circumstances in which a court ought to stay proceedings.

20. So far as prisoner violence was concerned the judge set out the relevant expert evidence from Mr Subia on conditions in prisons in California. She recorded that "in my first judgment I described Californian prison conditions as grim and it would seem that the situation has not improved" before noting that the challenge was not to prisons condition but the risk of intra prisoner violence. The judge noted that in such a case the requested person would need to show a real risk of serious harm and a failure by the state to provide reasonable protection. She concluded that the evidence fell far short of the high threshold required.

21. So far as the further assurances were concerned the judge noted the evidence of Jeffrey Lowry, a deputy public defender in the San Bernadino County, California who had extensive experience of civil commitment work. Mr Lowry identified various reasons why the assurance was not enforceable. The judge analysed the assurances and concluded that they were sufficient. She recorded that the USA was a democratic state governed by the rule of law and that "we operate on a system of mutual trust and recognition" noting the USA's record of abiding by similar assurances. She said that the intention of the assurance was absolutely clear. Specific points made by Mr Lowry

were addressed and the judge concluded "I am satisfied that the Californian authorities will abide by its very clear and stated intention".

Abuse of process

22. The Court has power to prevent its process being abused in extradition proceedings. This power exists outside the confines of the 2003 Act, see *Tollman* (supra) at [80] to [82], although the question whether abuse is demonstrated has to be "asked and answered in light of the specifics of the statutory regime", see *R (Bermingham) v Director SFO* [2006] EWHC 200 (Admin); [2007] QB 727 at [98]. As was recognised in the *Tollman* case at [80] there are various bars to extradition found in the 2003 Act which would be reflected in the abuse jurisdiction in ordinary domestic cases, including motivation by "extraneous circumstances". Others might be covered by the human rights bar. At [82] an example of abuse recognised in the domestic criminal jurisdiction, namely where "a prosecutor may be manipulating or using the procedures of the court in order to oppress or unfairly prejudice a defendant before the court" was applied to extradition cases; and extended to such conduct by a judicial authority.

23. In the domestic criminal context, proceedings will amount to an abuse of process if either it is impossible to provide a fair trial or where it is necessary to protect the integrity of the criminal justice system (see, *R v Maxwell* [2010] UKSC 48; [2011] 1WLR 1837 per Lord Dyson at [13] and *R v Crawley* [2014] EWCA Crim 1028 per Sir Brian Leveson P at [17] – [18]). In extradition proceedings there are statutory bars in the 2003 Act to prevent an extradition to an unfair trial, and in a range of other circumstances. For these reasons most issues of abuse of process arising in extradition proceedings relate to the protection of the integrity of the system.

24. There is no doctrine of *res iudicata* or issue estoppel in extradition proceedings, see *Auzins v Prosecutor General's Office of the Republic of Latvia* [2016] EWHC 802 (Admin); [2016] 4 WLR 75 at [36]. This means that the institution of a second set of extradition proceedings following the failure of the first will not necessarily amount to an abuse of process, see *R (Kashamu) v Governor of Brixton Prison* [2001] EWHC 980 Admin; [2002] QB 887 at [34].

25. The scope of the abuse jurisdiction in extradition proceedings has recently been considered in *Auzins* between [43] and [47] and in *Camaras v Baia Mare Local Romania Court* [2016] EWHC 1766 (Admin) between [13] and [35]. Both discuss an earlier decision of this court in *Hamburg Public Prosecutor's Office v Altun* [2011] EWHC 397 (Admin). That was a case where, exceptionally, albeit in *obiter dicta*, the court indicated that there was an abuse of process in the German authorities bolstering their evidence in support of a second extradition request to resist a double jeopardy argument they had lost in the first. In my judgment in *Auzins* at [44] I indicated that,

> "The underlying purpose of the abuse jurisdiction in extradition cases is to protect the integrity of the statutory scheme of the 2003 Act and the integrity of the EAW system, as well as to protect a requested person from oppression and unfair prejudice. These purposes are more fully discussed in *R (Bermingham and others) v Director of the Serious Fraud Office* ...at [97]; *in Belbin v the Regional Court of Lille, France* [2015] EWHC 149

> (Admin) at [59]; and in *Italy v Barone* [2010] EWHC 3004 (Admin) at [81]."

In the paragraph to which I referred in *Belbin* Aikens LJ said:

> "We wish to emphasise that the circumstances in which the court will consider exercising its implied "abuse of process" jurisdiction in extradition cases are very limited. It will not do so if, first, other bars to extradition are available, because it is a residual, implied jurisdiction. Secondly, the court will only exercise the jurisdiction if it is satisfied, on cogent evidence, that the Judicial Authority concerned has acted in such a way as to "usurp" the statutory regime of the EA or its integrity has been impugned. We say "cogent evidence" because, in the context of the European Arrest Warrant, the UK courts will start from the premise, as set out in the Framework Decision of 2002, that there must be mutual trust between Judicial Authorities, although we accept that when the emanation of the Judicial Authority concerned is a prosecuting authority, the UK court is entitled to examine its actions with "rigorous scrutiny". Thirdly, the court has to be satisfied that the abuse of process will cause prejudice to the requested person, either in the extradition process in this country or in the requesting state if he is surrendered."

26. *Auzins* had been discharged in earlier extradition proceedings on the basis that it would be oppressive to extradite him given the lack of availability of medication in Latvia necessary for his survival. In the three years between the first proceedings and the second the availability of treatment in the Latvian prison system had improved. The appellant placed reliance on the judgment of Ouseley J in *Altun* to suggest that the second attempt at extradition was an abuse of process.

27. In *Altun,* Ouseley J recognised that issue estoppel and *res judicata* did not apply in extradition proceedings. He applied an observation of Gibson J in *R v Governor of Pentonville Prison ex p Tarling* [1979] 1 WLR 1417 (a *habeas corpus* case where those rules similarly do not apply) that it may be an abuse of process to raise is subsequent proceedings matters which should have been raised in the first proceedings. This was an application of the so-called rule in *Henderson's Case* (1843) 3 Hare 100. The issue of double jeopardy had been in issue in the first set of proceedings. The German authorities should have marshalled all their evidence in the first set of proceedings. The observations made by Ouseley J were *obiter* and expressly "provisional" because the appellant German judicial authority had succeeded on the abuse point before the judge. They lost on a different issue which they failed to reverse in the appeal. The abuse argument was resurrected by the requested person without a respondent's notice or any proper warning at all.

28. In *Auzins* the circumstances were different. They concerned a state of affairs which by its nature could change, namely the availability of medical treatment. Other examples given in paragraph [46] were cases where the physical or mental condition of the requested person had resulted in a failure to secure extradition, but had improved; cases where the conditions supporting a successful human rights challenge to an extradition request had changed for the better; and cases where changes in the personal

circumstances of a requested person undermined an earlier successful reliance on article 8 of the Convention. But, with respect to Ouseley J, he should not be taken as having sought to lay down a principle (albeit *obiter*) that if a requesting state could have deployed evidence successfully to secure extradition at the first attempt, but failed to do so, it is an abuse of process to do so in a second set of proceedings. So much is clear from his judgment in *Camaras* where he said at [26],

> "I feel no particular loyalty to my observations, nor do I read *Auzins* as an endorsement of them."

29. He went on to say in [27] that "it is neither principled nor practical to apply the principle in [*Henderson's case*] in a straightforward manner to extradition warrant decisions" and added:

> "27. … Extradition involves the issuing of a warrant by a foreign authority which engages the UK's international obligations as well as its domestic legislation. Statutory bars have been enacted which reflect those arrangements, whether Treaty or Framework Decision. There is no scope for more than a residual jurisdiction to preclude the extradition of someone who falls outside the scope of the statutory bars. That is the residual jurisdiction envisaged in the line of cases leading to *Belbin*, where the contention is that the prosecutor or judicial authority has acted in bad faith, deliberately manipulating proceedings, undermining the statutory regime to the unfair prejudice of the defendant. Such a jurisdiction is consistent with those international obligations only because it is obvious that no prosecutor or issuing authority should behave in the manner described in *Belbin* as an abuse of the court's process; it is necessarily implicit in the arrangements, and accepted by all participants, that they would not be allowed to do so.
>
> 28. Any extension of that jurisdiction however would undermine the statutory process itself and the international arrangements to which they give effect. I do not consider that the residual jurisdiction should be expanded to embrace the *Henderson* ... principle. If no bar is made out, it is difficult to see why a person who faces no bars to extradition should then not be extradited, other than as a sanction imposed on the requesting authority for not complying with directions or not getting its case in order. Such an approach, which may run contrary to the overall public interest in any given case, and which may be inconsistent with the primary purpose of extradition arrangements, cannot be extracted from the Framework Decision nor the Act."

30. It should not be overlooked that in a case governed by the Framework Decision and the European Arrest Warrant procedure, the requested person would be liable to arrest in, and extradition from, any member state to which he travelled. Abuse of process arguments of a *Henderson* nature based upon an earlier failure to secure extradition from another state would be unlikely to prevail. Similarly, in a case governed by treaty

and Part 2 of the 2003 Act, the failure to secure extradition here would be unlikely to hold sway in another country.

31. There will be cases where a judicial authority has, for example, failed to comply with court orders in the first extradition proceedings, where a question of abuse of process may arise for consideration in connection with a second set. Similarly, where in the first set of proceedings the requesting state has abjectly failed to get its evidential house in order. But a mechanistic approach to abuse is inappropriate. As Ouseley J observed in *Camaras* at [32],

> "Whether the attempted enforcement of a further EAW, in circumstances which fall short of *Belbin* abuse of process, so undermines the interest of the statutory scheme in speedy finality, and in upholding the decisions and orders of the courts, that enforcement should be denied, cannot be answered without consideration of all the circumstances."

32. The key, in our judgment, to cases where it is said that the requesting state failed in the first set of proceedings such that the second set are an abuse of process is to make a "broad, merits-based judgment which takes account of the public and private interest involved and also takes account of all the facts of the case", see *Johnson v Gore Wood* [2002] 2 AC 1 at [31] and *Arranz v High Court of Madrid* [2016] EWHC 3029 (Admin) at [32] and [33]. Such a broad, merits-based judgment should take account of the fact that there is no doctrine of *res iudicata* or issue estoppel in extradition proceedings.

33. Underlying extradition are important public interests in upholding the treaty obligations of the United Kingdom; of ensuring that those convicted of crimes abroad are returned to serve their sentences; of returning those suspected of crime for trial; and of avoiding the United Kingdom becoming (or being seen as) a safe haven for fugitives from justice. The 2003 Act provides wide protections to requested persons through the multiple bars to extradition Parliament, originally and through amendment, has enacted. There are likely to be few instances where a requested person fails to substantiate a bar but can succeed in an abuse argument.

34. Mr Bailin QC submits that the Government should have appreciated long before it received the draft judgment in *Giese (No.1)* that it might be necessary to procure an assurance to neutralise a putative finding of a breach of article 5 of the Convention. It is no excuse that it was seeking to establish (a) that there was no real risk of civil commitment and (b) that even if wrong on that, extradition would not amount to a flagrant denial of the rights guaranteed by article 5 of the Convention. It was then given an opportunity to provide an assurance and, once it was clear that its first attempt was not accepted as sufficient by the appellant, should have refined it. He adds that the Government could, but did not, ask for a further adjournment to improve its assurance before judgment was given in *Giese (No. 2).* They chose instead the rule 50.27 route, coupled with an attempt to take the case to the Supreme Court, and failed. He submits that this is a classic case of regrouping and trying again in circumstances in which there was every opportunity to get it right first time round. As such it is an abuse of the process of the court and an attempt to outflank the decision in *Giese (No.3).*

35. The practical difference between the instant proceedings and the earlier extradition proceedings is the content of the assurances relied upon by the Government to neutralise

the article 5 argument. They do not seek to reargue the two points lost in *Giese (No.1)* - namely that there was no real risk of civil commitment and, even if there was, it did not give rise to an article 5 bar to extradition.

36. Before returning to consider the appellant's arguments, it is convenient here to foreshadow the issues on the content of the assurances because of the need to take account of all factors when considering abuse arguments.

Principles relating to assurances

37. If there are substantial grounds for believing that there is a real risk of impermissible treatment contrary to the Convention following extradition, the requesting state may show that the requested person will not be exposed to such a risk by providing an appropriate assurance. In extradition proceedings there has been a long history of the United Kingdom seeking and being provided with assurances that a requested person will not be subject to the death penalty if convicted. Assurances are commonly given in respect of conditions of detention and may be provided in connection with article 5 and article 6 concerns. Such assurances form an important part of extradition law, see *Shankaran v India* [2014] EWHC 957 (Admin) at [59].

38. The principles relating to the assessment of assurances were summarised by the European Court of Human Rights in *Othman v UK* (2012) EHRR 1 at [188] and [189]. The overarching question is whether the assurance is such as to mitigate the relevant risks sufficiently. That requires an assessment of the practical as well as the legal effect of the assurance in the context of the nature and reliability of the officials and country giving it. Whilst there may be states whose assurances should be viewed through the lens of a technical analysis of the words used and suspicion that they will do everything possible to wriggle out of them, that is not appropriate when dealing with friendly foreign governments of states governed by the rule of law where the expectation is that promises given will be kept. The principles identified in *Othman*, which are not a check list, have been applied to assurances in extradition cases in this jurisdiction. A court is ordinarily entitled to assume that the state concerned is acting in good faith in providing an assurance and that the relevant authorities will make every effort to comply with the undertakings, see *Dean (Zain Taj) v Lord Advocate* [2017] UKSC 44; [2017] 1 WLR 2721 at [36].

39. The court may consider undertakings or assurances at various stages of the proceedings, including on appeal, see *Florea v Romania* and *Giese (No.2)*, and the court may consider a later assurance even if an earlier undertaking was held to be defective, see *Dzgoev v Russia* [2017] EWHC 735 at [68] and [87].

No abuse of process to make the further request

40. The judge concluded that the second set of extradition proceedings did not amount to an abuse of process. In our view, she was entitled to come to that conclusion; indeed, on the material available that was the obviously correct conclusion. The underlying consideration is the strong public interest in upholding our international obligations and in delivering for trial those accused of serious criminal wrongdoing. A strong feature in this case is that the appellant is a classic fugitive from justice – he broke his bail conditions and fled the jurisdiction. The offences for which he is wanted are serious. The circumstances are far removed from private litigation in which there is little or no

public interest. There is no question of any bad faith on the part of the Government in bringing the second set of proceedings. The Government were entitled to argue in *Giese (No.1)* that there was no serious risk of an order for civil commitment being made, and that if made it would not infringe the appellant's Convention rights. Having rejected those contentions, the court was right to seek a satisfactory assurance. The fact that the assurance offered turned out to be inadequate, contrary to the preliminary thoughts of the court itself, does not in this case prevent a better assurance being provided in subsequent proceedings. The question of an assurance arose late in the first proceedings and was dealt with in accordance with a demanding timetable. The Government thought that the assurance provided was entirely satisfactory and, as we have seen, was willing to improve the content of the assurance to secure the return of the appellant to California. One should bear in mind that the provision of assurances, particularly if as here it involves more than one agency, may reasonably take some time.

41. The Court in *Giese (No.3)* was not able not to reopen the appeal because rule 50.27 of the Criminal Procedure Rules is not there to permit a second go; but that decision does not provide an answer about whether a further request with further assurances would amount to an abuse of process.

42. The Government have not ignored the previous decisions in *Giese (Nos 1, 2 and 3)* but has recognised them with the further assurances. The further assurances go to the risks of the appellant being subjected to impermissible treatment. In our view, the Court should examine them. There is no unfairness to the appellant in allowing the second extradition request to proceed. There is no basis for suggesting that the failure of the first set of extradition proceedings in some way immunised the appellant from standing trial in California, or that it is oppressive that he should be extradited for trial. The starting point is that he should stand trial unless there is a bar to his doing so. Accepting assurances which sufficiently mitigate the risk would vindicate his Convention rights and also ensure that the strong public interest in upholding extradition arrangements is recognised. If the assurances were not to prove adequate, similarly his Convention rights would be protected.

43. These proceedings are not an abuse of process, essentially for the reasons given by the judge.

The adequacy of the further assurances

44. The next issue is whether the further assurances were adequate. Mr Bailin referred to the detail of Mr Lowry's evidence. It is apparent that Mr Lowry has much practical experience of the way in which civil commitment works in California. It is also apparent that he has properly identified on behalf of Mr Giese matters which needed to be considered when assessing the further assurances.

45. Mr Lowry's evidence shows that the legislation permits either the District Attorney or County Counsel to be designated as the person to apply for a civil commitment order. There is a general designation that the process rests with the District Attorney and there is no suggestion that it has swapped between the two officials over time, nor is there any indication that a change is in contemplation. Nonetheless, Mr Lowry's evidence suggests that it is legally possible that the County Counsel might be designated in the future in substitution for the District Attorney. The County Counsel has not provided

an assurance and is not strictly covered by the language of the assurance given by the District Attorney.

46. Mr Lowry also questions whether the District Attorney has the power to bind a future District Attorney under the laws of Orange County, despite the clear statement in the assurance itself. He speculates that the appellant might be convicted of other offences which he committed in the past and that civil commitment orders might be sought in consequence of them. He suggests that the appellant might commit other offences in the future and be subjected to the jurisdiction of another County District Attorney. He raises questions about the chronology of civil commitment and hypothesises that the administrative process might start in ignorance of the District Attorney's assurance with the result that the appellant might be detained for some period before the District Attorney intervened. He draws attention to another order available under mental health legislation in California which has not been the subject of any consideration in these proceedings.

47. The issues were all properly addressed by the judge. We start by reminding ourselves that the United States of America, and its constituent states including California, is a mature democracy governed by the rule of law. 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. Assurances have been accepted routinely from the Government and the promises made have been honoured. The stated intention of the further assurances is clear, namely that the appellant will not be subjected to an order for civil commitment if convicted of the crimes for which his extradition is sought.

48. The specific weaknesses in the assurance analysed in *Giese (No.2)* have been addressed. In particular, that part of the assurance which sought to contradict the finding of the Court in *Giese (No.1)* that there was a real risk that the appellant would be subject to an order for civil commitment has been removed. The judgments of the Court have been recognised.

49. The judge considered the further points made by Mr Lowry. There is nothing to suggest that the Californian authorities would seek to circumvent the intent of the assurance by appointing County Counsel to deal with civil commitment orders; or that were the arrangements to change for administrative reasons that those who took over would ignore the assurance. The good faith of the Department of Justice and the District Attorney are not in doubt. In evaluating the assurances two questions should be borne in mind. Why would anyone seek to go behind them and what would happen in they did? The District Attorney has stated unequivocally that his successors will be bound by the assurance and nothing produced by Mr Lowry comes close to showing that is wrong. But even if a current District Attorney cannot strictly bind his successors, the intention of the assurance is clear, namely that no one will seek a civil commitment order against the appellant. The appellant will have the assurance and would flourish it were any attempt to circumvent it made by anyone. It is scarcely conceivable that the authorities in California or the Department of Justice would stand idle were an official to ignore an assurance solemnly provided between friendly nations.

50. Mr Giese has specialty protection in respect of past offences which prevents prosecution for other offences already committed in the United States. There is no evidence that he is wanted for such offences nor does he suggest that he has committed

any. Mr Bailin reminds us that the United Kingdom could waive specialty in certain circumstances and, at least in theory, without insisting on an assurance. This whole argument illustrates the entirely artificial and speculative nature of much of the debate about these assurances. It is also speculative to suggest that the appellant might commit further offences and thereby expose himself to civil commitment but, in any event, that would be nothing to the point. It would not be his extradition that put him in jeopardy of civil commitment but his commission of offences after his return to the United States. It is also speculated that the law of California might change in some unspecified way in the future and expose the appellant to a risk of detention which would involve a flagrant denial of the protections provided by article 5 of the Convention. But that is far too remote and theoretical a possibility to undermine the assurances provided.

51. There is nothing in the evidence to support the proposition that the appellant would be subjected to any other process which would put in jeopardy his rights under article 5 of the Convention. Mr Lowry's rather vague references to such proceedings under mental health legislation do not get close to establishing a risk of a flagrant denial of article 5 standards in this appellant's case.

Prison violence

52. Mr Bailin submits that there are substantial grounds for believing that there is a real risk that the appellant would suffer from intra-prisoner violence in the Californian prison estate. Reliance is placed on the evidence from Mr Subia about prison conditions for vulnerable prisoners and conditions in "Sensitive Needs Yards". There are concerns about killings, including killings in cells, the targeting of prisoners convicted of sex crimes and the presence of gangs in the special yards. That there have been instances of such violence is not in doubt, although its extent is disputed in the materials available. Mr Cadman, on behalf of the Government, noted the evidence that by the time of the judge's judgment in July 2017 there had been only one homicide in a Sensitive Needs Yard in the year, and that there was nothing to indicate that the high threshold required to rely upon article 3 to inhibit removal could be satisfied.

53. When considering violence from non-state actors the correct test is whether the state can provide reasonable protection against such violence, see *R (Bagdanavicius) v Secretary of State for the Home Department* [2005] 2 AC 668 and *Dean v Lord Advocate* (supra) at [26]. Two factors must be considered. First, the objective risk of attack run by the individual in question and secondly the extent to which the authorities take steps to protect from that risk.

54. There is nothing about this appellant which would make him more vulnerable that any sex offender to violence in prison. Regrettable though any attack is (and our prisons are not immune from them) the evidence does not support the proposition that there are substantial grounds for believing that this appellant would be at real risk of attack. Still less is there any basis for suggesting that the authorities do not take appropriate steps to protect their prisoners, including those accused or convicted of sex crimes, of which they are many thousands in California. Article 3 does not require a guarantee of safety. In our judgment the judge was right to find that the evidence fell far short of showing that the Government would not provide reasonable protection against violence. The evidence showed that reasonable protection was offered by a system of Sensitive Needs Yards and sheriffs. We reject this ground of appeal.

Conclusion

55. For the reasons we have given we consider that none of the grounds of appeal succeeds. The appeal against the decision to send the appellant's case to the Secretary of State is dismissed.