IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

CASE NO: 06385/2017

IN THE MATTER OF AN APPEAL FROM THE MAGISTRATES' COURT IN CAUSE #06385 of 2017

BETWEEN:

IAIN NIGEL MACKELLAR

Appellant

and

THE UNITED STATES OF AMERICA

1st Respondent

and

H.E. THE GOVERNOR OF THE CAYMAN ISLANDS

2nd Respondent

Appearances:

Mr. Edward Fitzgerald Q.C. instructed by Mr. James Austin Smith of Campbells for the Appellant

Mr. James Lewis Q.C. instructed by Ms. Toyin Salako of the ODPP for the 1st Respondent

Mr. David Perry Q.C. instructed by Ms. Reshma Sharma of the Attorney General's Chambers for the 2nd Respondent

Before: **Dame Linda Dobbs**

Heard: **18th – 21st November 2019**

HEADNOTE

***Criminal Law – Application for Leave to Appeal** – Order for Extradition.*

INTRODUCTION

1. The Appellant, Dr MacKellar, suffers from end stage liver disease. He is in an immune-compromised state. This means that he has a much higher risk of developing common bacterial infections. The prognosis is that Dr MacKellar is likely to die within the next 12 months if he does not receive a liver transplant. There is no facility to carry out liver transplants in the Cayman Islands. There is an urgency for this judgment to be handed down as quickly as possible.

2. The appeal commenced on 18th November 2019 and concluded on 21st November 2019. For sake of efficiency, it was agreed that the case should be dealt with as a "rolled up" hearing. All relevant papers have been read. Absence of reference to a particular document, authority or every point made, does not denote that they have not been considered.

3. It should be noted however, as will be explained later, that the court has been waiting for further submissions from the Appellant and First Respondent before the judgment could be finalised.

BACKGROUND

4. The Appellant is charged on a 12 count indictment filed on 9th July 2015 in the US District Court for the Southern District of Texas. The offences are in summary: conspiracy or aiding and abetting wire fraud, mail fraud, the use of counterfeit labels bearing registered marks on Frontline veterinary products, trafficking in counterfeit labels, documentation and packaging, and smuggling.

5. The timeline of significant events is as follows:

27th November 2017	Request to HE Excellency the Governor of the Cayman Islands from the USA.
6th December 2017	Request certified by the Governor and transmitted to the Magistrate of the Summary Court.
20th December 2017	Preliminary hearing before the Magistrate.
30th April – 3rd May 2018	Extradition hearing before the Magistrate.
24th September 2018	Magistrate's ruling and transmittal to the Governor.
5th October 2018	Notice of Application for leave to appeal.
19th October 2018	Representations to the Governor on behalf of Dr MacKellar.
18th January 2019	The Governor sends the extradition Order to Dr MacKellar.
30th January 2019	Dr MacKellar asks the governor for reasons.
4th February 2019	The Governor provides reasons for his decision.
6th February 2019	Amended Notice for leave to appeal.
8th November 2019	Declarations of Brent Newton (dated 25.9.2019), Mike Babcock (7.11.2019), Eric Lewis (8.11.2019) and Professor Moore (8.11.2019) served by the Appellant.
10th November 2019	Appellant indicates that he proposes to call Professor Moore and Eric Lewis. Declaration of Dr Finkelberg (8.11.2019) served.
18th – 21st November 2019	Application for leave to appeal hearing.

6. There are two applications for leave to appeal against:

   a. The Ruling of the Magistrate; and

   b. The decision of the Governor to order extradition.

The appeals will be dealt with separately.

THE MAGISTRATE'S RULING

PROCEEDINGS BEFORE THE MAGISTRATE

ISSUE ONE: ABUSE OF PROCESS.

7. There were two bases to the argument. They can be stated shortly. Firstly, that the conduct was not a offence in the US and secondly, that the statements in "The Request" were confusing and misleading, such as to amount to an abuse of process.

ISSUE TWO: EXTRADITION OFFENCE

8. The Prosecution submitted that the conduct set out on the Extradition Request ("The Request") disclosed a number of offences under Caymanian Law. These were offences under:

   a. s.3(1) and s.3(2) of the ***Merchandise Law*** – namely forgery, application of false trademark labels and selling merchandise with forged labels;

   b. s.53 of the ***Customs Law*** – smuggling;

   c. s.247 of the ***Penal Code*** – obtaining property by deception and finally, conspiracy to defraud.

9. The Appellant submitted, relying on the evidence of a US attorney, that in respect of the packaging of the goods, there was no offence in law either in the US or the Cayman Islands and that therefore it was an abuse to extradite. Alternatively, there were misstatements in "The Request" which misrepresented the true position. The elements of conspiracy to defraud were not made out because there was no evidence of agreement nor were customers exposed to any actual or potential loss because they received the authentic product, albeit in different external packaging. So far as

obtaining by deception was concerned – there was no material deception or evidence of dishonest intent. Regarding the forgery offences, there was no false description as the contents were authentic. Finally, in respect of the Customs Law, there was nothing clandestine about the manner in which the authentic goods were imported. Moreover, they were exempt from duty.

ISSUE THREE: UNJUST AND OPPRESSIVE TO EXTRADITE

10. The Appellant relied on s. 91 of the ***Extradition Act 2003*** which is incorporated into the Cayman Law by virtue of Schedule 3 of the ***Extradition Act (Overseas Territories) Order 2016*** to submit that it would be unjust and oppressive to extradite Dr MacKellar because of his severe medical condition.

THE MAGISTRATE'S DECISION

11. The Magistrate rejected the Appellant's submissions, finding that:

    a. there was no abuse,

    b. the extradition offences were made out and

    c. it was not unjust or oppressive to extradite Dr MacKellar.

Her reasons will be examined when considering the grounds of appeal.

THE APPEAL AGAINST THE MAGISTRATE'S RULING

THE GROUNDS OF APPEAL

12. The original grounds before the Magistrate are repeated. There is a "sub" ground of appeal under s.91, namely that the Magistrate erred in declining to receive up to date medical evidence of Dr MacKellar's condition in light of the deterioration in his

health following the hearing in the court below and before the Magistrate had delivered her decision.

13. There are two new grounds put forward, that:

a. The Appellant will be exposed to a "flagrant denial of justice" if he is extradited, because he can be sentenced on the basis of additional allegations which did not form the basis of the extradition offences; and

b. His extradition is barred under s.81(b) of the 2016 Order because he will be prejudiced in his trial in the US on grounds of his foreign nationality.

14. In addition to the new grounds, the Appellant also sought to have fresh evidence admitted from Brent Newton, Mike Babcock, Eric Lewis, Professor Moore and Dr Finkelberg. The First Respondent objected to the admission of the new evidence save for parts of Professor Moore's evidence where he deals with the updated medical condition of Dr MacKellar and similarly, Dr Finkelberg. In order to save time, it was agreed that the evidence would be admitted "de bene esse" and that the court would determine what, if any, weight was to be given to the evidence.

THE CONDUCT

15. In order to put the first two grounds in context, it is necessary to set out the relevant "conduct" alleged. This can be found at Paragraph 5 of the Magistrate's ruling.

> "As *part of his business, MacKellar created boxes with counterfeit labels and packaging that bore "Frontline Plus" marks that are identical to or substantially indistinguishable from the authentic Frontline Plus trademark registered on the U.S. Patent and Trademark Office's Principal Register - the same trademark that is placed on genuine packaging made for sale of Frontline products in the United States. MacKellar then placed either counterfeit veterinary pesticide product or veterinary pesticide product not manufactured for sale in the United States or approved by the U.S. Environmental Agency ("EPA"; into the boxes*

bearing the counterfeit Frontline Plus labelled boxes he created to falsely represent that the Frontline Plus products inside such boxes conformed to the specification for the United States version of these products and had been approved by the EPA, when in fact those products were manufactured for sale outside the United States. MacKellar through companies under his control then shipped these "re boxed" veterinary products to co-conspirators in the United States.

Merial Pharmaceutical Company ("Merial") owns the Frontline Plus trademark. Neither MacKellar nor his co-conspirators were authorized by Merial to manufacture or use labels bearing the Frontline Plus mark. MacKellar intentionally trafficked in and sold Frontline Plus products manufactured for sale overseas in boxes with labels bearing counterfeit Frontline Plus marks for the purpose of deceiving US retail stores and consumers in believing that the Frontline Plus products obtained therein were in fact manufactured for, and approved for sale in, the United States. Finally, MacKellar sold such Frontline Plus products with counterfeit labels for private financial gain to various places, including the Houston, Texas area.

On or about May 4, 2015, a *shipment of reboxed Frontline Plus labelled veterinary product manufactured for the foreign market purchased from MacKellar was received in Houston, Texas, and prescription veterinary drugs Comfortis and Trifexis manufactured for* a *foreign market were also received. The indicated shipper, "HUMANE RESCUE" came from an address in the United Kingdom. In fact, MacKellar was the shipper. The contents of the shipment were declared as "PC PRODUCTS' enclosed letter that stated that the products were* a *donation as* a *result of hurricanes when, in fact, the letters were used as* a *tool by MacKellar to evade seizure by United States Customs officials".*

16. In Paragraph 6 of her Ruling, the Magistrate set out further particulars of the conduct:

"The counterfeit boxes and packages used false and fraudulent lot numbers. These lot numbers are significant as they allow federal agencies such as EPA and FDA and consumers to trace the origin of the goods in the event they are defective or cause harm. Some of the false and misleading information applied to the counterfeit boxes included:

- *Fraudulent EPA labels indicating that the goods were approved for administration to the United States consumers by the EPA*
- *False lot numbers that were inconsistent with the lot numbers affixed to the product inside of the counterfeit boxes, and*
- *References to weight in ounces on the counterfeit labels that were inconsistent with the weight references on the products, which was in millilitres"*

17. The Magistrate summarised the conduct at Paragraph 7:

"(1) The defendant created false labels and trademarks bearing the Frontline Plus mark without Merials' authorization. These labels were placed on boxes by the defendant which he produced which was identical to the federally registered Frontline Plus trademark owned by Merial;

(2) The defendant placed either counterfeit veterinary pesticide product or veterinary pesticide product not manufactured for sale in the United States or approved by the EPA into boxes bearing the counterfeit Frontline Plus marks;

(3) The defendant applied the EPA registration number to the counterfeit Frontline Plus labelled boxes he created to falsely represent that the Frontline Plus products inside such boxes conformed to the specification for the United States version of the products and had been approved by the EPA, when in fact the products were manufactured for sale outside of the US;

(4) The defendant intentionally trafficked in and sold Frontline Plus products manufactured for sale overseas in boxes with labels bearing counterfeit Frontline Plus marks for the purpose of deceiving US retail stores and consumers into believing that the Frontline Plus products contained therein were in fact manufactured for, and approved for sale in, the United States;

(5) The defendant applied fraudulent EPA labels indicating that the goods were approved for administration to United States consumers by the EPA;

(6) The defendant applied false lot numbers that were inconsistent with the lot numbers affixed to the product inside of the counterfeit boxes;

(7) The defendant intended to deceive or confuse the customers in the United States of America;

(8) The defendant imported these products into the USA for financial gain;

(9) The defendant falsely represented to the US customs that the goods were donated as humanitarian aid to help Humane Societies owing to the hurricanes."

SUBMISSIONS OF THE PARTIES

Abuse

18. The main thrust of the Appellant's submission on appeal focussed on the alleged misleading statements in "The Request". In particular, it was contended that "The

Request" had misrepresented the position by alleging that counterfeit product had been supplied when the highest the First Respondent could put its case was that there had been mispackaging of genuine products. The latter did not constitute an offence. A number of extracts were cited to make the point about confusion.

19. In court, Mr Fitzgerald submitted that there needed to be more clarity in the particulars; had they been clearer, the Magistrate would not have made her decision on the basis that "either it was counterfeit product, or it was counterfeit packaging and labelling". Without clarity, it was difficult to deal with the extradition offences. He proposed a form of positive assertions which he said would cure the confusion.

20. Mr Lewis, appearing on behalf of the First Respondent, submitted that the abuse of process jurisdiction conferred a residual discretion once the bars to extradition had been considered and would only occur in exceptional cases where the prosecutor was acting in bad faith. There was clear evidence that the prosecution could succeed. The pleas of guilty of the co-defendants who, it is said, will be witnesses against the Appellant, were evidence of that. Moreover, a Grand Jury had issued an Indictment against the Appellant and a warrant was issued as a result of the Indictment.

21. As for the alleged misleading statements, Mr Lewis submitted that the particulars in "The Request" are clear. There **was** evidence of a consignment of counterfeit goods, which is why both allegations were included. However, in order to simplify proceedings, the Prosecution chose only to pursue the counterfeit packaging allegations.

Extradition offences

22. ***Forgery***. The Appellant submits that the Magistrate erred when she found that the offence of forgery was made out, because forgery is territorial. This point was not made in the court below.

The First Respondent concedes that the offences under s.3(1) of the ***Merchandise Marks Law*** are territorial and that no offence is made out under them. However, the First Respondent relies on the provisions of s.3(2) which would have been available to the Magistrate to be satisfied by the particulars in "The Request".

23. ***Customs offence.*** The Appellants point is a short one. It is that the Magistrate made a finding of a Customs offence, but this is dependent on the finding of forgery which would make the goods liable to forfeiture. If there is no forgery, there can be no Customs offence. Moreover, it is submitted that the goods were not imported clandestinely.

The First Respondent contends that the Magistrate could have relied on s.3(2) of the ***Merchandise Marks Law*** and thus the error would not have led to discharge of the Appellant. The goods were clandestinely imported by virtue of the deceitful letter written by the Appellant giving the impression that the goods were a donation to assist in Humane Rescue following a hurricane. If it is an offence under s.3(2) of the ***Merchandise Marks Law,*** then it is prohibited under s.12(1(c)of the ***Customs Law***.

24. ***Deception.*** The Appellant points to the fact that the only evidence of any money received by the Appellant was from the co-conspirators. The evidence shows that they were perfectly aware of what was being sold to them. It is a substantive offence

and not a conspiracy. The Appellant was not party to any of the transactions between the wholesalers, retailers or consumers.

The First Respondent relies on joint enterprise to make good the allegation, pointing to the particulars of The Request which state that Target stores and customers were sold the products and deceived.

25. ***Conspiracy to defraud.*** No economic harm was alleged to have been suffered by any of the recipients of the products, the Appellant submits. No proprietary rights were put at risk. No allegation was made that the goods were liable to seizure and there was no sustained allegation that there was anything wrong with the product.

There **was** an agreement to deceive retail stores and consumers as to the authenticity of the representations on the packaging, namely, that they were approved for sale in the US and conformed to EPA standards. The Request so states, says the First Respondent. Moreover, there was a risk to the interests of the retailers who stood to lose their reputation and the goods, should they have been discovered in possession of them.

Unjust and Oppressive to extradite

26. The Appellant submits that the Magistrate erred in finding that it was not unjust or oppressive to extradite Dr MacKellar due to his serious medical condition. The evidence showed that he suffered from end stage liver disease; his prospects of survival without a liver transplant are very limited and he is at risk of life-threatening complications which would require immediate and continuous specialist care. There was no guarantee that he would receive the necessary treatment in the USA.

27. Criticism was made of the vagueness of the evidence of Phillip Allen of the Federal Bureau of Prisons whose evidence the Magistrate accepted, who, it was said, only focussed on post-trial detention.

28. Reliance was placed by the Appellant on the evidence of Philip Wise, a former Deputy Head of the Federal Bureau of Prisons, who indicated that there was a real risk of detention in a non-federal county jail pre-trial; that the level of care in a federal facility pre-trial would be basic and that there would be no assurance of placement in a specialist facility. Moreover, the Bureau of Prisons had only conducted one liver transplant in its history. Dr MacKellar's prospects of receiving even an evaluation for a transplant was highly unlikely.

29. Michael Wynne, a former Assistant US Attorney for the Southern District of Texas, also relied on by the Appellant, concluded that it was highly likely that the US prosecutors would seek Dr MacKellar's detention and that any magistrate in the Southern District of Texas would order Dr MacKellar to be detained pending trial. As will be seen later, the former assertion is incorrect.

30. The Appellant also submitted that the evidence of Mr Allen was limited to post conviction only and that therefore the court was in no position to be satisfied as to the facilities available in local prisons pre-trial because pre-arrangements came under a different jurisdiction.

31. Mr Lewis, on behalf of the First Respondent, citing the case of ***Dewani v Government of the Republic of South Africa***[1], reminded the court that the hurdle was a high one. Regard was to be had to all the circumstances which would vary

[1] (2012) EWHC 842 (Admin) at Paras 73-4

from case to case. Citation of cases which rehearse the test or apply the test to the facts of those particular cases was to be strongly discouraged.

32. The First Respondent submits that the Magistrate's decision was unimpeachable; she took into account all the evidence of the experts. Mr Lewis pointed out that the court needed to focus on the word "oppressive" as "unjust" referred to the trial process which was not relevant in this case.

Flagrant denial of justice

33. This is a new ground for which permission is needed. The First Respondent objects to permission being granted. There was agreement however that full submissions should be made rather than seek piecemeal rulings from the Court.

34. The Appellant submits that the US court's sentencing practice of taking into account "relevant conduct" not proved at trial to increase the sentence was manifestly unfair because:

a. of the lower burden of proof,
b. acquitted conduct can be taken into account;
c. hearsay may be taken into account;
d. there is no safeguard of a jury; and
e. no right to confront the witness.

The statements of Eric Lewis and Brent Newton are relied in support of the contention.

35. Relying on the case of ***Othman v UK***[2], the Appellant submits that although the test in respect of "a flagrant denial of justice" is a high one, the risk of suffering a greatly increased sentence on the basis of unproven conduct without safeguards, justifies refusal of extradition on Article 6 "Fair Trial" grounds.

36. The First Respondent submits that, if the approach taken by the US courts does not breach the specialty rule, which the case of ***Welsh v SSHD***[3], held that it did not, there can be no "flagrant denial of justice". The court was asked to note that ***Welsh*** has been consistently approved, for example, in ***Barnes v US***[4]. Reliance is also placed on the case of ***EM (Lebanon) v SSHD***[5], where Lord Bingham cites with approval a passage from the case of ***Mamatkulov and Askarov v Turkey***[6], in support of the proposition that the test is whether "there is a real risk that the defendant's right to a fair trial will be completely denied or nullified".

Prejudice on grounds of foreign nationality

37. This new ground also needs permission. The Appellant's submission can be shortly stated. Section 81(b) of the 1972 Treaty provides a bar to extradition if the Requested Person might be prejudiced at his trial or punished or detained or restricted in his persona liberty by virtue of his nationality. The declaration of Michael Wynne states that the mere fact that the Appellant is a foreigner who has resisted extradition will greatly prejudice his chances of release on bail and increase the likelihood of pre-trial incarceration. Additionally, as a foreigner, it is said that the Appellant will be less likely to receive compassionate early release.

[2] (2012) 55 EHRR 1,
[3] [2007] 1 WLR 1281
[4] [2011] EWHC 2218 (Admin)
[5] [2009] 1 AC 1198 (Paras. 34 and 35)
[6] (2005) EHRR 494 at Para O-11114

38. The First Respondent objects to permission being granted, but by way of response contends that refusal of bail would not be on the basis of being a foreign national, but because of lack of community ties and thus considered a greater flight risk.

THE LAW: TEST ON APPEAL

39. **Court's powers on appeal under Section 103 of the *Extradition Act 2003 (Overseas Territories) Order 2016.***

"*Section 104 – Court's powers under s.103*

(1) On an appeal under section 103 the Supreme Court may—
- *(a) allow the appeal;*
- *(b) direct the judge to decide again a question (or questions) which he decided at the extradition hearing;*
- *(c) dismiss the appeal.*

(2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.

(3) The conditions are that—
- *(a) the judge ought to have decided a question before him at the extradition hearing differently*
- *(b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.*

(4) The conditions are that—
- *(a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;*
- *(b) the issue or evidence would have resulted in the judge deciding a question before him at the extradition hearing differently;*
- *(c) if he had decided the question in that way, he would have been required to order the person's discharge.*

(5) If the court allows the appeal it must—
- *(a) order the person's discharge;*
- *(b) quash the order for his extradition.*

(6) If the judge comes to a different decision on any question that is the subject of a direction under subsection (1)(b) he must order the person's discharge.

(7) If the judge comes to the same decision as he did at the extradition hearing on the question that is (or all the questions that are) the subject of a direction under subsection (1)(b) the appeal must be taken to have been dismissed by a decision of the Supreme Court".

40. Important points to note are that the scheme allows for an appeal on law or fact, but only with leave. The relevant decisions under the Order are s.78(4)(b) of the Order (Extradition Offence) and s.91 of the Order (Physical or Mental Condition). The test under s.104 is a two-part test. The court must be satisfied that the Magistrate ought to have decided the extradition case differently and, if it had been decided differently, discharge would be ordered. Only conduct relied on in "The Request" can be looked at: ***Office of the King's Prosecutor, Brussels v Armas and others***[7]. Moreover, the information contained in the warrant must be taken at face value: ***Zakrzewski v Regional Court in Lodz***[8].

DISCUSSION AND DECISION

Abuse

41. In her Ruling the Magistrate set out counsel's competing arguments; she considered a number of authorities before setting out the hurdles which have to be overcome before an argument of abuse can arise, as identified in the case of ***Zakrzewski v Poland***[9]. Her reasons for dismissing the abuse argument are set out in Paragraph 47 of the Ruling.

> *"In relation to the abuse argument, the narrow issue is whether or not the description of the conduct is inaccurate or misleading such that it amounts to an abuse of process. There is no question that the goods were not manufactured for the USA and that it did not have EPA approval and that the packaging was misleading. This is the conduct relied on.*
>
> *I do not accept that the conduct described is false and misleading, nor do I accept that the statement by the DPP in bail proceedings creates further ambiguity. Ms Lowery clearly stated that "all veterinary products sold by defendants were either counterfeit or authentic products manufactured for foreign markets but repackaged with counterfeit labels to look like the domestic EPA – or FDA approved version."*

[7] [2005] UKHL 67 at Para.16
[8] [2013] 1 WLR 324 at Paras. 6 and 8
[9] [2013] 1 WLR 324

I do not accept the argument put forward by counsel for the defendant that the facts are inaccurate and misleading and the people were not deceived. The request is clear that persons were deceived."

42. I deal with the first issue raised in the original submissions for sake of completeness. David Gerger, acting for the Appellant and involved in discussions with the US prosecutor, in his declaration dated 20th December 2017, relying on a number of US cases which he drew to the Prosecutor's attention, contends that re-boxing of genuine product is not an offence in the US. It is trite to state however that each case has to be considered on its own facts. In this case there is clear evidence of relevant offences involving repackaging, not least by virtue of the pleas of guilty of the co-conspirators and the decision of the Grand Jury. The details in "The Request" clearly point to relevant offences in the US.

43. The allegation of misleading and confusing particulars focussed criticism on the Prosecution putting the case on two bases – namely, actual counterfeit goods or counterfeit packaging, when it is contended that this is a packaging case.

44. Mr Fitzgerald acknowledged the high hurdle to be overcome in abuse of process submissions and although he did not explicitly abandon the ground, the very fact that he proposed a formula of words to correct the confusion in itself speaks volumes as to whether this really is an abuse argument.

45. The first iteration proposed by him to cure the confusion was a series of positive assertions – namely that i) the pesticide contained in the vials were made by Merial; that the pesticide therein was chemically identical to that approved for sale in the US; that the vials were of the same size and volume however expressed; that the only difference were the lot numbers on the outside of the package and that the outside packaging was not identical to the packaging produced by Merial.

46. During legal submissions the court pointed out that such an approach was impermissible, in light of the authorities, namely, that the particulars of "The Request" have to be taken at face value. Mr Fitzgerald then suggested a different formula. This was that the particulars did not allege that a) the liquid was counterfeit, b) the lot numbers on the vials and blister packs were not genuine; c) the wholesalers (the co-conspirators) who received the packages were deceived.

47. Whilst Mr Fitzgerald was able to point to one or two passages where the language was arguably ambiguous, standing back and looking at the conduct as a whole[10], there can be no uncertainty as to what the allegations were.

48. The Appellant has pointed to no clear examples of bad faith, manipulation or abuse of process. That is because there are none. On the contrary, the First Respondent took a pragmatic approach for simplicity's sake by only proceeding on the packaging allegations, despite the fact that there **is** clear reference in "The Request" of counterfeit products being discovered in one consignment seized.

49. In summary, I find:

a. That there was evidence of offences triable in the US;

b. There was no bad faith on the part of the First Respondent; and

c. The descriptions of the offences in "The Request" are not confusing.

There is no merit in the criticism of the Magistrate's findings and consequently leave to appeal on this ground is refused.

[10] (*see Para. 15 above*)

Extradition offences

FORGERY

50. Paragraph 49 of the Magistrate's ruling covers the false packaging allegations. The Magistrate does not deal with the jurisdictional point as it was not raised before her. She concluded that forgery of a trademark applies in the Cayman Islands and that it comes under the Merchandise Marks Law, in particular s.3(1)(a) which deals with forgery of a trade mark and s.3(1)(b) which deals with the application of a false trade mark to goods. She did not mention s.3(2) of the Law, despite it being set out in the skeleton argument of the First Respondent at Paragraph 24(3).

51. The First Respondent concedes that the forgery offences are territorial in application and that the Magistrate was in error. The issue therefore is whether the error would have led to a different conclusion and consequently discharge by the Magistrate. In my judgment it would not. Section 3(2) of the same law creates an offence of selling, exposing or having in a person's possession for sale or any purpose of trade or manufacture any goods or things to which any forged trademark or false trade description as to be calculated to deceive has been applied.

52. I do not accept the submission of the Appellant that s.3(2) is parasitic on the preceding provisions relied on by the Magistrate. It is the selling or having for sale which is the territorial point. As a matter of common sense, if the Appellant's submissions were correct, it would mean that counterfeit goods could be traded lawfully in the Cayman Islands so long as they came from abroad. That cannot have been the intention of the legislation; if it had been, one would expect specific provision about the territorial limits. Although not entirely on the point, this would

offend the spirit of s.14 and s.15 of the same Law. I find that although part one of the test is satisfied, part two is not.

CUSTOMS OFFENCE

53. As the Magistrate concluded at Paragraph 50 of her Ruling that the forgery of the trademark applies in Cayman, she held that the Customs Law provisions applied and found that the goods were "prohibited goods" under s.53(a) and liable to forfeiture because of the forged trademarks.

54. The Magistrate found that the fact that the goods were zero rated was irrelevant because Customs law requires fair and accurate declarations of the goods which they were not; additionally, they were clandestinely imported because of the misleading letter addressed to US customs in relation to the hurricane relief. She also found that there was clear evidence of dishonesty and intend to defraud or misrepresent to the Customs authorities.

55. Section 53(a) of the Customs Law reads:

> "***Smuggling 53.***
> *A person who-*
> *(a) clandestinely brings into the jurisdiction prohibited, restricted or any other description of goods (other than goods exempt from the Customs process);*
> *commits the offence of smuggling such goods into or out of the Islands, as the case may be.*"

56. It is conceded by the First Respondent that the Magistrate erred in her finding that Customs Law applied by virtue of her findings in relation to the forgery. The same question arises therefore. Would the error have led to a different conclusion and therefore discharge? In my judgment it would not, because the Magistrate could have relied on s.3(2) which creates an offence which renders the goods prohibited. The

evidence of the misleading letter was sufficient to satisfy the "clandestinely" imported provision.

DECEPTION

57. The Magistrate deals very briefly with this offence in Paragraph 51. She refers to Paragraph 11 of the Indictment indicating that the scheme was to defraud and obtain money by deception. Paragraph 11 of the Indictment set out the particulars of the conspiracy which involved a number of different offences, including the obtaining of money by making false representations.

58. As a result of this brevity, the Magistrate failed to give close scrutiny to basis of the First Respondent's case, namely, joint enterprise – although it is not clear that this was spelled out in the Court below. If she had done, she would have identified a number of problems with this approach. The particulars of "The Request" do not spell out that the Appellant aided and abetted the obtaining of the money by the co-conspirators by deception. It merely asserts that retailers and customers were deceived. The substantive offence against the Appellant would have to show that he obtained money by a false representation. There is force therefore in the Appellant's argument that those from whom he obtained money, namely the co-conspirators were not deceived. This is clear from the particulars in "The Request". Nor could a chain of causation be shown which linked any operative deception that the Appellant may have been a party to and any obtaining by him.

59. During submissions the court asked whether the Appellant conceded that there was evidence of a conspiracy to obtain property by deception. Mr Fitzgerald made no concession. He submitted that the specific allegation of conspiracy was not made out and that the court should not infer a conspiracy from the particulars.

60. I disagree. There is clear evidence of a conspiracy to obtain property by deception, a statutory conspiracy which is available in the Cayman Islands. I find therefore that although the Magistrate erred in finding that there was a substantive offence disclosed, the outcome would not have been different, as it was open to her to find a statutory conspiracy from the particulars.

CONSPIRACY TO DEFRAUD

61. In Paragraphs 51 – 2 the Magistrate dealt with conspiracy to defraud.

62. As noted above, she referred to Para 11 of the Indictment noting that the scheme was to defraud as well as obtain money by false pretences. She said further:

> *"I accept that there must be a risk to a person's economic interest. I reject the defendant's argument that no one suffered and there was no risk to the consumer. I cannot accept the simplified statement that "after all they got medicine for their cats and dogs and are not bothered about packaging and approvals"*
>
> *There was plainly a risk to the economic interest of the US retail stores who sold the goods believing that they were good authorised for sale in the USA. I doubt that Target would have exposed themselves to seizure of goods and loss of stock and possible injury to reputation. Consumers were also put at economic risk, because their product could also be seized and their consumer rights to complain would be at risk because the batch could not be traced because of the fraudulent lot numbers.*
>
> *I accept Counsel for the Crown's submissions that these are not grey market goods sold in the USA, People would know if they were grey market products because of the markings. In this scenario, the defendant knew he could not sell grey market goods in the USA. So a cheat or deception was necessary. It is not correct that an EPA stamp of approval can be put because "it would have gotten EPA approval" The fact is that they were not approved. The boxes were stamped with a counterfeit EPA stamp so persons would be deceived."*

63. In my judgment, the Magistrate's conclusions and reasoning cannot be faulted. So far as this ground of appeal is concerned, whilst there were errors, the errors were not material because they did not satisfy both parts of the test for appeal. There is no

reasonable prospect of success on appeal and accordingly leave to appeal is refused on this ground.

Flagrant Denial of Justice

64. I turn to deal with the two new grounds raised before dealing with Ground Three "Unjust and Oppressive". Relying on the evidence of Brent Newton a former Deputy Director of the US Sentencing Commission) and Eric Lewis (attorney) for which permission to adduce is sought, the Appellant submitted that the sentencing regime following conviction in the US, means that Dr MacKellar's sentence could be more than double the sentence he would receive for an individual offence.

65. Mr Fitzgerald concedes that the point was not thought of until consideration was being given to the issue of specialty under the Governor's appeal. However, he submits that if there is a reasonably arguable case, then the fact it was not raised previously is irrelevant. He accepts that the case of ***Welsh v SSHD***[11] is against him. He reminds the court that it is not bound by Welsh. He contends that even if Welsh found that the US sentencing regime did not breach specialty, there could still be a real risk of a flagrant denial of justice. Mr Fitzgerald further argued that the case of Welsh was wrongly decided, and that leave should be given to allow the Appellant to test the point in a higher court. Mr Fitzgerald furnished the court with a copy of Counsel's submissions in that case to the House of Lords, which, it should be noted, refused to certify a point of law of public importance.

66. In ***Welsh***, the appellants were ordered to be extradited on the basis of a number, but not all, of the 88 offences identified under UK law. Money laundering was not

[11] [2007] ! WLR 1281

included as it did not satisfy the double criminality test. The appeal centred on the contention that the Appellants, once in the US, would be dealt with in breach of the specialty rule by further indicting and trying them for offences which did not form part of "The Request" for which they could not have been extradited. Moreover, the Prosecutor would use evidence relating to non-extraditable offences to prove the extraditable offences and, following conviction, to justify increasing the sentence.

67. The Divisional Court found inter alia that:

a. the speciality rule did not limit the evidence which could be admitted to prove the extradition offence; that the rules of evidence were those of the Requesting State and that the specialty rule would not be breached if the US courts allowed an extradition offence to be proved by evidence relating to offences upon which the extradition had been expressly refused; (Paras. 89 and 99).

b. in relation to extradition and punishment under Section 95 of the Extradition Act 2003, a purposive and flexible approach should be taken which must be capable of accommodating the reasonable range of sentencing practices and values which other countries adopted; (Para. 136)

c. whilst the US practice might range more widely than would the United Kingdom in dealing with a convicted person, it still did not amount to punishing him otherwise than for the crime of which he had been convicted. (Para.139).

68. Mr Fitzgerald drew the court's attention to a couple of examples to show, that although it is said that no one ever wins on the stringent test of "flagrant denial of

justice", more recent cases show a shift of approach. The cases cited were ***Othman v UK***[12] and ***Government of Rwanda v Nteziryayo and others***[13].

69. The Applicant in the case of Othman was born in Jordan and was given refugee status in the UK. However, when he applied for indefinite leave to remain, he was arrested under Anti-Terrorism legislation as he had been convicted in Jordan in his absence of a terrorist offence. The Home Secretary served notice of intention to deport. The case eventually went to the European Court of Justice, the issues being inter alia, whether return to Jordan would subject Othman to inhuman or degrading treatment or punishment, breach of fair trial rights and right to liberty and security. The Divisional Court found that the Applicant should not be returned to Jordan because there was compelling evidence before the court that the Applicant's co-defendants had been tortured.

70. At Paragraph 258, the court highlighted that its approach to "flagrant denial of justice" had been synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein. Examples of such cases were given. The examples are a long way from the facts of this case. At Paragraph 260, it was noted that the examples given served to underlie the Court's view that the "flagrant denial of justice" is a stringent test of unfairness, going beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 in the Contracting state itself. What is required is a breach of the principles of Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence of the right guaranteed by the article.

[12] (2012) 55 EHRR 1
[13] [2017] EWHC 1912(Admin)

71. The case of ***Nteziryayo*** was an appeal by the Rwandan government against the decision of Deputy Senior Judge Arbuthnott declining to order the extradition of the five Appellants to Rwanda on the grounds that their Article 6 rights would be breached. The appeal failed on the basis of the inadequacy of arrangements for defence, coupled with a jurisdiction where judicial independence is institutionally weak and has been compromised in the past and where there is fear by witnesses not all of which can be countered. All this could lead to serious miscarriages of justice.

72. The test set out in *Othman* on "flagrant denial of justice" is a very stringent one. So far as specialty is concerned, the case of *Welsh* and those following it plus cases in the US have considered the issue of sentencing. They are all against the Appellant. I apply the principles in those cases.

73. It is important to identify what a US judge has to be satisfied of before sentence can be increased. First of all, the judge can only take into account "relevant conduct". This chimes with the comments of Lord Justice Laws in the case of ***Barnes***[14] who, at Paragraph 11 of the Judgment, noted that there should be a reasonable nexus between the extradition crime and the extraneous behaviour sought to be relied on for the purposes of sentencing; such behaviour exacerbating the gravity of the extradition offence because it may demonstrate propensity, planning, professionalism or sheer determination. This first hurdle it seems to me necessarily limits the ambit of evidence that can be considered.

74. Secondly, the US judge can only do so on "the preponderance of the evidence using information that has sufficient indicia of reliability". So there is another safeguard,

[14] [2011] EWHC 2218 (Admin)

in that the judge has to look at the reliability of the evidence, albeit on the civil, not the criminal, standard of proof.

75. What safeguards does the Appellant have? He has counsel who can:

a. negotiate with the Prosecution to persuade them not to lead evidence of other conduct;

b. make objection to the admission of the evidence by demonstrating the unreliability of the evidence – such as in this case, the evidence of the co-conspirators and their motive to lie and put the blame on the Appellant;

c. test and probe what evidence is put forward by the prosecution even if not live evidence d) present evidence to rebut the prosecution or other evidence and

d. make final submissions in relation to what mitigation might be available.

These are all safeguards one would expect under Article 6 fair trial rights.

76. In my judgment the facts of this case come nowhere near establishing a real risk that the Appellant's Article 6 rights would be nullified under the sentencing regime in the US. Mr Fitzgerald's plea that leave should be given in order for the point to be taken to a higher court, sits uneasily with the need for a speedy determination of the Appellant's case in light of his serious medical condition. I have implicitly allowed the ground to be argued fully, albeit it was a point that could have been argued at the Magistrate's court. The fact that it was not, may in itself be telling. I find that the ground has no reasonable prospect of success and accordingly leave is refused.

Prejudice on Grounds of Nationality.

77. The second new ground raised is a short one, namely that the Appellant will be prejudiced by virtue of his nationality in relation to bail and serving of his sentence should he be convicted.

78. A US judge when considering bail, will, like in the UK consider flight risk. No community ties in the particular state, city or town is likely to be found to increase the risk of flight, however, no doubt a similar approach would be taken to an individual from another US state if they had no community ties. In my judgment, it is the lack of ties which is the deciding factor, not nationality.

79. So far as the evidence of Mr Wynne that there would be no commutation of sentence, it was confirmed in court that there are special extradition arrangements in place whereby the Appellant, were he to be convicted, could serve a significant portion of his sentence in the Cayman Islands should he so wish. I find therefore that this ground has no merit. There is no good reason why it could not have been taken at the Magistrate's court. Accordingly, permission to advance it is refused.

"Unjust and Oppressive"

80. I deal with this ground last for reasons which will become apparent. The Magistrate dealt with her findings from Paragraphs 54 – 58. Her reasons are as follows:

> *"54. I now turn to the s.91 argument. I have been pressed by the defence to find that because of the defendant's critical condition, I should adjourn the matter and that I should find that it is unjust and oppressive not to extradite the defendant.*
>
> *Let me state clearly my findings as to his medical condition.*
>
> - *I accept that he is suffering from end stage liver disease*

- *I accept that his prognosis is that he will eventually need a liver transplant – not available here*
- *I accept that he will require specialised treatment – treatment not available here*
- *I do not accept that he will not be able to access the medical treatment he needs. In fact Ms Lowery stated that his medical condition would be given special consideration when making determinations as to detention. Dr Beraha herself has confirmed that whilst she is his primary caregiver here, the transferral of his case would not be a hurdle. Indeed, it is often the case in this jurisdiction that cases are transferred easily when care is transferred. As such, I reject the argument that he needs to be with persons who know his care treatment. Dr Beraha also conceded that if Dr Allen is correct in his statement as to treatment and care access then he would not be any less off there than here".*

55. *Defence Counsel has submitted that there is a real risk that he will deteriorate in the pre-trial period with less control of his physical and mental functions if he is in unfavourable conditions. As is known, the test is not the risk of prejudice. The test is if it would be impossible for him to have a fair trial.*

I find that there are sufficient safeguards in place in the USA to ensure that the defendant gets treatment - indeed far more than available here. I also find that there are safeguards as to the possibility of a fair trial. The matter has been known and being challenged since 2015 by the defendant. I do not accept the he will not be able to instruct attorneys and prepare for his case should he be returned to the USA, The matter is not new to the defendant. His co-conspirators have all been sentenced. He has the resources to attend to his medical and legal issues.

56. *I realise that is may appear harsh that a man in his condition should be extradited. But I consider if in his medical condition he would be prosecuted in the Cayman Islands for offences which whilst not at the gravity of murder (as his Counsel submits) is still a serious crime, and where profit was made due to acts of forgery and deception and where others have been sentenced. If he would or might be prosecuted in the Cayman then it cannot be oppressive to extradite him unless it is clear his medical condition cannot be or adequately treated in the US, I conclude that s.91 would only become relevant if I was satisfied that the US Court could not act properly. I find that the US can properly manage seriously ill defendants.*

57. *Further I find that there is no point in an adjournment as without a liver transplant the defendant would not be in a better position than he is in now. He cannot get one in Cayman. He can in the USA, I cannot see how it would be oppressive to extradite him where he is able to access treatment.*

In conclusion I find that the medical evidence does not reach the high threshold of unjust and oppressive."

81. The main thrust of the submission is that Magistrate erred in her findings by ignoring the evidence given on behalf of the Appellant and also giving no proper consideration to the pre-trial custodial position which is under a different jurisdiction, not the Bureau of Prisons which is the only aspect Mr Allen dealt with. Mr Wise was at complete odds with the evidence of Dr Allen. He gave evidence that it was highly unlikely that Dr MacKellar, even if housed in a Bureau of Prisons Federal prison, would receive an evaluation for a liver transplant. There was also criticism of the Magistrates' failure to consider the updated medical condition of Dr Mackellar following the deterioration of his condition in July 2019.

DISCUSSION AND DECSION OF THE MAGISTRATE'S FINDING

82. The Magistrate, when coming to the conclusion that there were sufficient safeguards in place in the USA to ensure that Dr MacKellar would receive medical treatment, gave no reasons for preferring the evidence of Mr Allen over Mr Wise. This is important when there is a conflict in the evidence. Moreover, in Paragraph 55 of her decision, although she referred to the "pre-trial period," she only dealt with the Dr MacKellar's ability to have a fair trial. This related to his ability to properly prepare for his trial in custody. She did not deal with the issue raised about the difference between pre-trial and post- conviction detention. She was wrong not to have done so given the submissions made. I will deal with the effect of this error when I consider the up-to-date medical evidence.

83. As already noted, a related issue raised by the Appellant, is that of the Magistrate's decision declining to consider new medical evidence on Dr MacKellar's condition in light of his deterioration since the end of the extradition hearing and before the Magistrate had handed down her decision. In a note at the beginning of her decision,

the Magistrate apologised for the delay in issuing her decision which was due to illness and previous commitments. Her decision was ready for handing down on 30th August, but Counsel for Dr MacKellar had commitments. She noted that Dr MacKellar's health had not been stable and said that there had not been an opportunity to explore the reasons for it and so restricted her decision to the evidence before the court at the time of the hearing.

84. Such decisions are for the exercise of the court's discretion, but the discretion has to be exercised appropriately and with foundation, especially, as here, the decision could have been determinative of the case.

85. Although she gave no reasons for why there was no opportunity to explore the reasons for Dr MacKellar's deterioration, the Magistrate may have had concerns about the cost and practicalities of all parties convening in the Cayman Islands for a hearing. In fact it is not unusual for hearings in the Cayman Islands to be conducted using the Zoom or other facility. This means that leading Counsel and any expert from the UK could attend by Video conference, witnesses could be called and submissions made. Dr Finkelberg is a regular visitor to the Cayman Islands as Dr MacKellar's treating physician. He could have given evidence in person or remotely. Additionally, and importantly, it should be noted that there had been no challenge of substance to the evidence about Dr MacKellar's actual medical condition. It was unlikely therefore, that there would to be any need to testing the new evidence. (There has been none subsequently). In those circumstances, written evidence and submissions would have sufficed. In my judgment the Magistrate's decision not to consider the updated medical evidence was wrong.

THE EVIDENCE ON APPEAL

86. However, things have moved on since the Magistrate handed down her decision. Dr Mackellar's condition has, as predicted, worsened. It is agreed that the court on appeal, when considering whether it would be "oppressive" to extradite Dr MacKellar, can consider the medical evidence of Dr MacKellar's current condition. I now turn to that evidence.

87. Professor Moore is Professor of Hepatology at University College London, Royal Free campus. He gave evidence both before the Magistrate and at the Appeal hearing.

88. Professor Moore told this court that Dr MacKellar has advanced cirrhosis of the liver known as end stage liver disease. He is on a cocktail of medication. He has, since early 2018 when the condition was diagnosed, developed complications, including ascites (which is fluid in the abdomen) oesophageal varices (dilated veins in the oesophagus), 2 episodes of hepatic encephalopathy in July 2018 (toxins bypassing the liver causing sleepiness, confusion, and ultimately coma and death) and chronic kidney disease. The July incidents were indicators of the severity of his condition and a sign that the liver disease is getting worse.

89. Dr McKellar is in an immuno-compromised state. This means he carries a much higher risk of developing common bacterial infections than normal. Professor Moore stated that Dr MacKellar's health is in a precarious state. He described Dr MacKellar as "walking on a knife edge". Any simple knock such as a bacterial infection is likely to push him into a spiral of acute on chronic liver failure (this is the term for patients with chronic liver disease who develop rapid deterioration of liver function and high short-term mortality after an acute insult). This has a 50% 3-month mortality rate.

90. Based on tests in August 2019, Dr MacKellar has a 18-20% risk of death at 12 months without a liver transplant. His condition will gradually worsen over time with a shortened life expectancy.

91. Dr MacKellar is presently receiving regular reviews by Dr Finkelberg every 3-4 weeks. 6 monthly scans are needed and regular blood tests to check kidney function. Anything less intense than the present regime would result in complications, the main risks being bacterial infection. The complications need to be attended to immediately as they could lead to death.

92. Professor Moore's statement dated 16th November which he adopted in evidence, deals with Dr MacKellar's recent presentation to hospital on 8th November 2019 with a fever and painful red right leg. The diagnosis was cellulitis. The results of the blood tests showed an increase in the MELD test, (a widely accepted score of mortality for this condition) to 17 and UKELD score, another measure, to 54.

93. Professor Moore drew the court's attention to some research done of some patients in hospital which showed that those with a MELD score of 17 but no evidence of bacterial infection had a 29% mortality rate at 1 year and 59% mortality rate at one year with a documented bacterial infection. Dr MacKellar, with his bout of cellulitis now falls into the latter category.

94. Professor Moore also noted that patients with cirrhosis are 5 times more likely to pick up an infection in hospital. The risks of living in close proximity with a lot of people would increase the risk. He would consider that there was a similar increased risk of developing an infection in prison. If Dr MacKellar were to get another infection, the risk of death is high.

95. Professor Moore's prognosis is that Dr MacKellar is likely to die in the next 12 months unless he receives a liver transplant. If he were to receive a liver transplant, he would need a care package lasting several months. The risk of developing post-operative infections is particularly high in the first few months and then it gradually reduces over about 12 months. One to two years after the transplant, the risk of developing infections is considerably lower. The minimum period before Dr MacKellar could return to an environment where there was an increased risk of infection is 6 months but, ideally, not before a year. He confirmed that Dr MacKellar would be eligible for a transplant on medical grounds.

96. Professor Moore had spoken to Dr Finkelberg who had said he would list Dr MacKellar for transplant. However, it was not practically feasible for Dr Finkelberg to prepare for the transplant in custody given the battery of different tests to be done and specialists Dr Mackellar would have to see.

97. Dr Finkelberg was first instructed to conduct an assessment by the Cayman Island's office of the DPP acting on behalf of the US government. He is now Dr MacKellar's treating physician and visits the Cayman Islands from the US every 3-4 weeks to see Dr Mackellar. His conclusion is that Dr Mackellar's present state of health is concerning. Further deterioration of the disease is expected in the near future as medical and behavioural treatment options have now been exhausted. He noted that any interruption in the medical care of Dr MacKellar would likely result in rapid and possible fatal deterioration of his end stage disease. Incarceration is likely to cause further decline. He considered the acute duodenal ulcer to have been caused by stress as other risk factors were ruled out, so recurrence of ulceration was also of concern in addition to the other risks. He also noted that US correction centres have the ability to provide basic care and follow up on medical issues, but patients with advanced

liver disease who are at risk for rapid decompensation remain vulnerable. Cases of inmates being granted liver transplants are very rare in the US. He is of the same opinion as Professor Moore that the risk of dying without a transplant is high.

THE UNDERTAKING

98. Before turning to consider the court's decision, mention needs to be made of an event which changed the focus of the Appeal. On the first day of the hearing, the First Respondent told the court that it was prepared to give an undertaking in relation to Dr Mackellar making an application for bail if extradited. The court asked for a copy of the undertaking. At that stage nothing had been drafted. A first draft was produced the same day. The court expressed concern that the undertaking did not cover each stage from arrival in the US in custody to production before a magistrate, nor did it actively support Dr MacKellar's application for bail. It was expressed in terms that it would not oppose it.

99. The First Respondent agreed to amend the application. The position now is that it now will now support any application for bail with conditions. The final version is reproduced below.

DOJ UNDERTAKING

1. *Upon surrender to the USA Dr. MacKellar will be accompanied by US Marshals and returned to Houston.*
2. *Upon arrival in Houston he will appear in the United States Magistrate Court (within three days of his first appearance before the Magistrate Court a bail and detention hearing must be heard).*
3. *If Dr. MacKellar has approval for a liver transplant either in the Cayman Islands before his surrender to the USA, or in the USA after his surrender,*

the DOJ will support bail on suitable conditions for the period pending, during and for reasonable recovery after the transplant procedure.

4. *The conditions that the DOJ expect to be included in any package are as follows:*
    i. *House arrest;*
    ii. *GPS monitoring;*
    iii. *Third party custodian (a person responsible for his whereabouts and will be responsible for the bond if he does not appear); and*
    iv. *Substantial cash bond of US$1 million.*
5. *At the conclusion of the recovery period Dr.MacKellar will return to the Magistrate Court; and detention and bail will be re-determined.*
6. *In the event Dr. MacKellar has not received approval for a liver transplant the normal procedure will be followed and the DOJ reserve the right to object to bail.*
7. *For the purposes of this Undertaking, 'approval for a liver transplant' means that a registered medical practitioner has certified that Dr. MacKellar is suitable for a liver transplant and is listed within the first 10% of prospective recipients.*

100. Mr Fitzgerald complained that the Undertaking given by the First Respondent was sprung on the Appellant on the first day of the hearing without warning. He also queried both the wording and the genuineness of the undertaking pointing to cases in which he says undertakings given by the US authorities were found to be unreliable, in particular, the Abu Hamza case. He submits that the Undertaking should be worded to deal with all the risks from the moment the Appellant is handed into the custody of the US authorities.

101. It was also submitted that the Undertaking completely changed the case the Appellant had to meet. It meant the Appellant had to consider what needed to be done to deal with the change of circumstances. The other point made on behalf of the Appellant, was that even if the First Respondent does support the Appellant's application for bail and the carrying out of a liver transplant, there is a serious risk that the judge will refuse as s/he is not bound by the Undertaking.

102. The following morning, Professor Moore made another statement based on information he had gleaned from the internet and from other professionals, including in the US. The thrust of the evidence was that even though Dr MacKellar would qualify for a liver transplant in the US, the waiting times were such, 18 months or so, that there was a significant risk that Dr MacKellar would die before obtaining the transplant. Professor Moore pointed to the fact that a transplant could be obtained in the UK more quickly – within a few months.

103. The First Respondent objected to this evidence, challenging Professor Moore's expertise to give such evidence. As a result, the Appellant obtained a statement from Dr Alexander Gimson who compared the chances of Dr MacKellar getting a liver transplant in the US and the UK, in other words the relative waiting periods. The conclusion was similar to Professor Moore.

104. The figures were not accepted by the First Respondent and objection was taken to the evidence. This was the response.

> "*We don't accept [Dr Gimson's evidence], in fact we've had an email this mor ning saying that these figures are wholly unrealistic, and, I think 'fanciful', I th ink was the email in relating [sic] to Dr Gimson's report*".

105. In light of the prognosis, namely the significant risk of mortality without a transplant, the importance of having an accurate assessment of Dr MacKellar's chances of receiving a liver transplant became a live issue. Accordingly, the court gave the First Respondent time to consider and comment on the statistics provided by both Professor Moore and Dr Gimson and to call evidence if so advised. The court would be willing to re-convene whether in person or via Zoom, but only if strictly necessary given the court's own caseload, and if so, no later than 20th December 2019. The court encouraged Counsel to deal with the evidence/issue by way of written submissions.

106. The Applicant (not at the court's invitation) submitted further evidence and submissions on 10th December 2019. The First Respondent objected to the evidence and submitted that if the court was minded to accept the evidence, it wished to instruct an expert. Although efforts had been made to instruct an expert, due to governmental red tape, it had not been possible to do so. The First Respondent asked for submissions and evidence to be submitted by 24th January.

107. The Court, in a note, dated 19th December 2019, expressed its concern at the slow pace of the First Respondent, pointing out that the ruling on 20th November had been made for the benefit of the First Respondent, who, apparently, was in a position to rebut the evidence of Professor Moore and Dr Gimson. It was noted that the recent statements served by the Appellant, albeit more refined, made essentially the same point as Professor Moore and Dr Gimson.

108. The following directions were made. The First Respondent was given until 17th January 2020 to file any evidence and submissions. The court suggested that an obvious line of enquiry was with Dr Finkelberg, the treating physician, who could give such

evidence. The First Respondent was also directed to address the issue raised by the Court during the hearing about the relationship between Homeland Security (responsible for bringing the Appellant to the US in the event of extradition) and the First Respondent and to identify any limitations such a relationship would have on the effectiveness of the Undertaking. The Appellant was given until 31st January to respond.

109. On 19th January 2020, 2 days after the deadline, the First Respondent filed its submissions. They can be stated shortly. The First Respondent objected to the issues raised, arguing that they were not related to the updated medical condition of the Appellant. The First Respondent had been unable to locate and finalise a suitable medical expert to deal with the evidence in the time available. It was contended that the issue of the transplant should have been taken in the court below and that the undertaking should be taken as being given in good faith. The Appellant had put up smoke and mirrors. The court should stand back and say that it cannot be unjust and oppressive to extradite him to a country where he can get a liver transplant. Any attempt by the Appellant to leave the Cayman Islands would cause the undertaking to be withdrawn and would no doubt result in Dr MacKellar's incarceration in a foreign jurisdiction pending extradition to the US. The Magistrate's decision that it was not unjust and oppressive to extradite Dr Mackellar should stand.

110. Submissions were received from the Appellant's lawyers in time. They submitted that the failure of the First Respondent to obtain any medical evidence within the 10 weeks which had elapsed, could only lead to one conclusion – that the First Respondent was unable to find an expert who would contradict the evidence submitted by the Appellant. This failure had led the First Respondent to fall back on

formal and technical objections to prevent the court from taking into account the true factual picture with the regard to the availability of liver transplants in the US.

111. The court was reminded that the issue arose because of the change of approach by the US Government, (the proceedings in the court below concentrating solely on treatment in custody), there being no undertaking forthcoming from the First Respondent at that time.

112. The Appellant also takes issue with the Undertaking and highlights the direction of the court which, it is submitted, has been breached by the First Respondent's failure to respond.

DISCUSSION AND DECISION

113. The court has already found that the Magistrate erred in her consideration of the issue in a number of ways: – i) she failed to give reasons for why she was satisfied that sufficient safeguards were in place in the light of conflicting evidence; ii) did not consider the different regimes which exist pre-trial and post-conviction, the former of which was not addressed by the evidence adduced by the First Respondent; she conflated the pre-trial issues namely access to medical treatment during pre- trial custody and ability to prepare for trial whilst in custody into a fair trial issue. The court also found that the decision not to receive the further evidence of Dr MacKellar's medical condition was wrong, in light of the fact that it could have been decisive to the issue of whether it was "Unjust and Oppressive" to extradite.

114. For the sake of clarity, I do consider the evidence relating to the updated medical condition of Dr MacKellar and the uncontroverted evidence of his chances of receiving a liver transplant in good time to be relevant and admissible. The

suggestion that this evidence should not be admitted as being a new issue not related to Dr MacKellar's current medical condition is risible. The developments both during and after the hearing lie squarely at the First Respondent's door. The offering of the Undertaking was clearly in order to pull the rug from under one of the Appellant's submissions. Such a change of heart, from the refusal at the Magistrate's court to give an Undertaking, coupled with the discourtesy of not giving the Appellant's lawyers adequate notice of this fundamental change of approach, is to be deprecated.

115. I turn to the question for this court in light of the updated medical evidence, namely, if it is "unjust and oppressive" to order the Appellant's extradition to the US? I focus on the word "oppressive" as "unjust" refers to process which is not relevant here. In my judgment it would be "oppressive" for the following reasons.

116. The Undertaking is accepted as being in good faith and to be taken at face value. However, on closer examination, the Undertaking is not as fulsome as might appear to be the case. Under paragraph 2, there is the issue of what happens to the Appellant on his arrival in the US? It is quite clear that the Appellant will be in the custody of Homeland Security who, the evidence shows, routinely oppose bail with little push back from the courts. This court asked the First Respondent specifically about the relationship between the two bodies and whether the Undertaking would be honoured by Homeland Security, both in court and in the directions of 19th December 2019, to be met with a deafening silence. The lack of response, apart from being discourteous, leads the court to infer that the First Respondent's Undertaking does not bind Homeland Security, nor would it have any influence on the Department of Homeland Security's normal approach to extradition cases. The evidence in front of the court from the US experts is that Dr Mackellar is unlikely to get bail due to the

intervention of Homeland Security. This significantly weakens the value of the Undertaking.

117. In paragraph 3, the Undertaking refers to pre-approval for a liver transplant in the Cayman Island or in the USA. So far as the approval in the Cayman Islands is concerned, that is a non-starter. He cannot be approved in the Cayman Islands for treatment in the US. As for approval in the US, if Dr MacKellar is in custody, there is evidence from three witnesses, including Dr Finkelberg that this is impractical given the battery of tests and different specialists who need to be seen. Paragraph 3 also refers to "a reasonable recovery period" without setting out some parameters of what it is accepted would be such a reasonable period.

118. In paragraph 5 of the document, the First Respondent gives no undertaking to support bail once the recovery period is over and the Defendant has to prepare for trial. In paragraph 6, the First Respondent reserves it right to object to bail in the event that Dr Mackellar has not received approval for a liver transplant. The only likely scenario for Dr MacKellar to be refused a liver transplant is that he is too ill to be operated on or as per Paragraph 7, if he is not placed in the first 10% of prospective recipients. On the evidence before the court, he is highly unlikely to be in the top 10% and in any event, the evidence suggests that there is no system which determines when a person reaches the first 10% of prospective recipients.

119. The evidence before the court, which was not contradicted, is that Dr MacKellar is unlikely to receive a timeous liver transplant if extradited to the US. Even if he were a US citizen, the evidence is that he would have a higher chance of dying than of receiving a transplant in the coming 365 days. This is a significant factor. Moreover, on his arrival in the US, he will be in custody. It is not clear how long he will be in

custody before the Undertaking, were it satisfactory, would kick in. In custody, he is at greater risk of infection and consequently, death. (It is to be noted that he was admitted to bail in the Cayman Islands because of his worsened condition and susceptibility to infection in custody).

120. The conditionality of the Undertaking is such that Dr MacKellar faces uncertainty as to whether he would be granted bail in the event that he is either not fit for transplant or is not amongst the top 10%. If he is not granted bail, he remains in custody knowing that, of all the transplants that have taken place in Bureau of Prisons custody, only one has ever been a liver transplant. The position therefore is this. Dr MacKellar, if extradited to the US, has no guarantee or assurance that he will receive a transplant in time to save his life, whilst knowing that he could get a timely life-saving transplant in the UK. Add to this the stress of being in a foreign country and facing criminal proceedings which carry an inevitable custodial sentence (given the sentences of the co-defendants) – all of which could have an impact on his recovery.

121. The Appellant raises for the first time, the issue that the bail conditions are too onerous. This was not raised in court. It could have been. The court has not taken this into account therefore. Also, the court does not accept Mr Fitzgerald's description of the offences as being regulatory in nature. On the face of the papers, the First Respondent has a strong case. However, the offences, although serious do not achieve the level of seriousness of offences which involve heavy violence, loss of life, serious sexual harm, terrorism, drug smuggling people trafficking and the like.

122. The First Respondent made it clear that extradition proceedings would be pursued against Dr MacKellar in other jurisdictions. It is not clear what the relevance of this statement was meant to be. It is not something which the court can take into account.

Whether extradition proceedings are instituted in the UK or elsewhere is a matter solely for the First Respondent.

123. Returning to the decision of the Magistrate. This court has found that it would be oppressive to extradite Dr MacKellar. That is the end of the matter. However, for sake of completeness, in the court's judgment, had the Magistrate addressed the identified issues correctly and given of the updated uncontroverted medical evidence, she would have reached the same conclusion and would have been required to order the Appellant's discharge. It follows from the above, that leave to appeal is granted, the appeal is allowed and the Appellant is discharged.

POST SCRIPT: THE SECOND APPEAL

124. The second Appeal was against the decision of the Governor to order extradition. In light of the decision on the first appeal, it is common ground that the appeal against the Governor's order falls away. There is no need for the court to address it. However, the court did consider and draft a judgment for the second appeal. As a courtesy to the hard work of the relevant parties, this is a very short summary of the court's findings.

125. There were originally three grounds of appeal. One of the grounds is not now pursued in light of a concession made by the Second Respondent.

126. The original grounds of appeal are two-fold therefore:

i. That the Order violates the requirements of the Anglo-US Treaty 1972 ("the 1972 Treaty") because the US failed to provide a "prima facie" case as required by Article VII(3) and IX(1) of the 1972 Treaty;

ii. The Governor wrongly rejected the representations made to him that adequate arrangements were in place with the US to guarantee that the principle of specialty would be respected in the Appellant's case. In particular there was a real risk that the Appellant would be punished for "relevant conduct" that was not the subject of the extradition request.

iii. (During the hearing on the final day, the Appellant introduced another ground namely): That the Order which gave effect to the 1972 Treaty has been revoked and thus there is no valid authority for the Governor to extradite.

GROUND ONE: "PRIMA FACIE" EVIDENCE

127. The Appellant submits that the Governor is bound by the 1972 Treaty and the 1976 Exchange of Notes which extends the application of the Treaty to the Cayman Islands which provided that the Requesting State must provide a "prima facie" case in the form of "such evidence as would justify committal for trial," In contrast, the 2016 Extradition Order (s.84(7)(a)) has dispensed with this requirement. All that is needed under the Order are the documents specified in s.78(4). As a result, there is an inconsistency between the requirements of the Treaty and the Order. The Appellant submitted that where such a tension exists, the Requested Person is entitled to the fuller protection of whichever instrument provides the most generous safeguards, in this case, the provisions of the 1972 Treaty. The Treaty thus trumps the legislation.

128. The Second Respondent accepted that s.84 of the 1976 Order preserves the requirement for the Requesting State to present "prima facie" evidence, but submitted that this requirement does not apply where the Requesting Category 2 Territory has been designated by the Secretary of State in an order made under s.84(7). The US is a designated territory under the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003 ("Designation Order") and thus is not subject to the "prima facie" requirement.

129. The court agreed with the Second Respondent and following the case of ***Norris*** found that the provisions of the Treaty do not trump the legislation. The cases cited by the Appellant did not assist his argument. Leave to appeal was refused on this ground.

GROUND TWO: SPECIALTY

130. The Appellant advanced nothing new. Bearing in mind the cases of ***Bermingham v. Director of the SFO***[15], and ***Welsh*** which found that the US sentencing scheme did **not** offend specialty under s.93 of the ***Extradition Act 2003*** which the Extradition Act Order replicates, the court found that this ground was without merit and leave to appeal was refused.

GROUND THREE: NO VALID AUTHORITY TO EXTRADITE

131. Mr Fitzgerald's point was a short one. The 1976 Order which gave effect to the 1972 Treaty was revoked by Schedule 5 of the 2016 Order. The Treaty still exists, but the Order giving effect to the Treaty has been revoked. As a result, the Governor can do nothing as there is no valid authority to extradite from the Cayman Islands.

[15] [2007] QB 727

132. This point, as noted by the Second Respondent, shows a misunderstanding of the statutory provisions and for the reasons set out by the Second Respondent, has no merit. In passing it should be noted, that this submission, logically, should be the Appellant's first submission, because, if successful, there would be no need to argue the other two grounds, which Mr Fitzgerald has not abandoned. To the contrary, when addressing the first submission, he explicitly relied on the fact that the Treaty was still in force. Leave to appeal was also refused on this ground.

Dated this the 9th March 2020

Dame Linda Dobbs
Acting Judge of the Grand Court