



Neutral Citation Number: [2009] EWHC 2021 (Admin)

Case Nos.: CO/9914/2008 and CO/4801/2009

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**  
**DIVISIONAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 31/07/2009

**Before :**

**LORD JUSTICE STANLEY BURNTON**  
**MR JUSTICE WILKIE**

**Between :**

**THE QUEEN ON THE APPLICATION OF**

**GARY MCKINNON**

**Claimant**

**- and -**

**SECRETARY OF STATE FOR HOME AFFAIRS**

**Defendant**

**and between**

**THE QUEEN on the application of**

**GARY MCKINNON**

**Claimant**

**- and -**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**Defendant**

**Edward Fitzgerald QC and Ben Cooper** (instructed by **Kaim Todner LLP**) for the **Claimant**  
**Hugo Keith QC** (instructed by the **Treasury Solicitor**) for the **Secretary of State for Home Affairs**

**David Perry QC and Clair Dobbin** instructed by the **CPS** for the **Director of Public Prosecutions**

Hearing dates: 9, 10 June 2009; 14 July 2009

**Approved Judgment**

## Lord Justice Stanley Burnton :

### Introduction

1. In the first of these proceedings, the Claimant seeks judicial review of the decision of the Home Secretary made on 13 October 2008 to uphold his earlier decision to order his extradition to the United States of America on charges relating to his hacking into US Government computers. Permission to apply for judicial review was granted by the Divisional Court (Maurice Kay LJ and Simon J), limited to the claim that the Claimant's extradition would infringe his rights under Article 3 of the Convention, or, as I understand the claim, that the Secretary of State's decision that his rights under Article 3 would not be infringed was flawed and unlawful. The Court refused permission in respect of the claim that his extradition would infringe his rights under Article 8, on the basis that if he could not succeed under Article 3 he could not succeed under Article 8, doubtless by reason of Article 8.2. Before us, Mr Fitzgerald QC sought to renew the application for judicial review on the ground of the Claimant's Article 8 rights.
2. In the second proceedings, the Claimant seeks judicial review of the reiterated decision of the Director of Public Prosecutions in his letter dated 26 February 2009 not to prosecute him in this country.
3. We heard the application for judicial review against the Secretary of State on 9 and 10 June 2009. Mr Fitzgerald renewed his application for permission in relation to Article 8, but his major claim is under Article 3. One of the central contentions of Mr Fitzgerald QC, for the Claimant, was that the Claimant could, and if the alternative is extradition to the USA should, be prosecuted in this country for the offences constituted by his conduct that forms the basis of the charges he faces in the United States. By reason of the rule against double jeopardy, such a prosecution would preclude his extradition: section 80 of the Extradition Act 2003. In fact, the Director of Public Prosecutions had previously refused to prosecute the Claimant, and he reiterated his refusal in his letter dated 26 February 2009. On 18 May 2009 the Claimant had commenced proceedings seeking judicial review of the DPP's refusal. It did not seem sensible to us to determine the claim against the Secretary of State while there were proceedings impeaching the lawfulness of the DPP's refusal to prosecute, since if the claim against the DPP was unsuccessful, the contention that the Claimant could be prosecuted in this country would be at the very least weakened; whereas the success of that claim might be material to the merits of his claim against the Secretary of State. We therefore directed that the application for permission to apply for judicial review of the DPP's decision should be heard by us, in a "rolled-up hearing", so that if permission were granted the Court would proceed to determine the substantive application, with a view to judgment being given in both the claim against the Secretary of State and that against the DPP at the same time.
4. This is my judgment on both claims.

## The facts

5. The Claimant's challenge to his extradition has previously been before this Court, differently constituted, and the House of Lords, in his unsuccessful appeal under sections 103 of the Extradition Act 2003 against the decision of the District Judge to send his case to the Secretary of State for her to decide whether he should be extradited, and his similarly unsuccessful appeal under section 108 of the Act against the subsequent decision of the Secretary of State that he should be extradited to the United States. The allegations against him are set out in paragraphs 2 to 8 of the first judgment of the Divisional Court (Maurice Kay LJ and Goldring J) [2007] EWHC 762 (Admin) and in paragraphs 11 to 16 of the opinion of Lord Brown of Eaton-under-Heywood in the House of Lords [2008] UKHL 59. For convenience, I set out those paragraphs of Lord Brown's opinion below:

### *The appellant's alleged criminality*

11. Using his home computer the appellant, through the internet, identified US Government network computers with an open Microsoft Windows connection and from those extracted the identities of certain administrative accounts and associated passwords. Having gained access to those accounts he installed unauthorised remote access and administrative software called "remotely anywhere" that enabled him to access and alter data upon the American computers at any time and without detection by virtue of the programme masquerading as a Windows operating system. Once "remotely anywhere" was installed, he then installed software facilitating both further compromises to the computers and also the concealment of his own activities. Using this software he was able to scan over 73,000 US Government computers for other computers and networks susceptible to similar compromise. He was thus able to lever himself from network to network and into a number of significant Government computers in different parts of the USA.

12. The 97 computers the appellant accessed were: 53 army computers, including computers based in Virginia and Washington that control the army's military district of Washington network and are used in furtherance of national defence and security; 26 navy computers, including US Naval Weapons Station Earle, New Jersey, which was responsible for replenishing munitions and supplies for the deployed Atlantic fleet; 16 NASA computers; one Department of Defense computer; and one US Air Force computer.

13. Having gained access to these computers the appellant deleted data from them including critical operating system files from nine computers, the deletion of which shut down the entire US Army's Military District of Washington network of over 2000 computers for 24 hours, significantly disrupting

Governmental functions; 2,455 user accounts on a US Army computer that controlled access to an Army computer network, causing these computers to reboot and become inoperable; and logs from computers at US Naval Weapons Station Earle, one of which was used for monitoring the identity, location, physical condition, staffing and battle readiness of Navy ships, deletion of these files rendering the Base's entire network of over 300 computers inoperable at a critical time immediately following 11 September 2001 and thereafter leaving the network vulnerable to other intruders.

14. The appellant also copied data and files onto his own computers, including operating system files containing account names and encrypted passwords from 22 computers comprising: 189 files from US Army computers, 35 files from US Navy computers (including some 950 passwords from server computers at Naval Weapons Station Earle); and six files from NASA computers.

15. The appellant's conduct was alleged to be intentional and calculated to influence the US Government by intimidation and coercion. It damaged computers by impairing their integrity, availability and operation of programmes, systems, information and data, rendering them unreliable. The cost of repair was alleged to total over \$700,000.

16. Analysis of the appellant's home computer confirmed these allegations. During his interviews under caution, moreover, he admitted responsibility (although not that he had actually caused damage). He stated that his targets were high level US Army, Navy and Air Force computers and that his ultimate goal was to gain access to the US military classified information network. He admitted leaving a note on one army computer reading:

“US foreign policy is akin to government-sponsored terrorism these days . . . It was not a mistake that there was a huge security stand down on September 11 last year . . . I am SOLO. I will continue to disrupt at the highest levels . . .”

6. The Claimant was arrested on 19 March 2002 for offences against the Computer Misuse Act 1990 (“the 1990 Act”), interviewed and released on bail. In the USA, indictments were returned against him by grand juries respectively of the District of New Jersey on 31 October 2002 and the Eastern District of Virginia on 12 November 2002. In an undated letter to his solicitors sent in about September 2002, the National Hi-Tech Crime Unit stated that the US might be seeking to extradite him, but that he should be aware that if the US authorities did not request his extradition or if that request was unsuccessful, he might face charges in the UK.

7. The Claimant's solicitors wrote to the CPS on 9 October 2003. The letter referred to the decision that had been taken that he would not be prosecuted in this jurisdiction and that the Government of the United States would apply to extradite him, and continued:

Since that time I have been in discussion with the representatives of the US Federal Legal Department to discuss Mr McKinnon's position. Mr McKinnon has made a decision not to return voluntarily to the United [States] of America and therefore will contest extradition proceedings. This will clearly be time consuming and costly for all sides.

I have been following recently the case of Aaron Casfrey, presently proceeding at Southwark Crown Court. Mr Casfrey appears to have hacked into an American Government computer system and is charged with an offence under the Computer Misuse Act 1990.

I wonder, in order that I may explain it to my client, why Mr Casfrey has been chosen to be prosecuted within this jurisdiction, but Mr McKinnon has not.

It would seem to me that the Officers who arrested Mr McKinnon were perfectly able to deal with the evidence which they had found out and Mr McKinnon could be appropriately prosecuted within this jurisdiction. I would ask you to reconsider your position relating to Mr McKinnon's case.

8. The CPS replied by letter dated 15 October 2003, apparently not sent until 26 November 2003. They stated that the decision whether to carry out an investigation or to initiate proceedings against the Claimant had been made following discussions between them and the Department of Justice in the U.S.. They continued:

A number of factors were considered to be relevant to the decision as to the appropriate venue for prosecution. Whilst not an exhaustive list these factors include the location of witnesses and the location of real evidence, where the harm was done, the ability of the prosecution to frame charges that reflected the offenders criminality, the existence of unused material, access to unused material and the availability of the procedures to deal appropriately with it.

The NHTCU became involved at the request of the US authorities. The US authorities initiated the investigation. The investigation was likely to be complex with a large number of witnesses located throughout the United States and with a large number of computers that required examination also situated throughout the United States. McKinnon appears to have targeted systems owned by the military or by related organisations therefore in addition to the sheer practical

difficulties of UK police carrying out an investigation on this scale in the United States there were likely to be issues surrounding unused material and in particular unused material that might be considered sensitive.

9. There was then no challenge to the decision not to prosecute in this country. On 7 October 2004, the US Government requested his extradition.
  
10. By letter dated 16 June 2005 the Claimant's solicitors requested from the CPS the written reasons for the refusal to prosecute him within the jurisdiction. In the response dated 22 June 2005, Russell Tyner of the CPS stated that the factors taken into account included:
  - (i) The fact that the 'harm' occurred in the United States. The activity appeared to have been directed against the military infrastructure of the United States.
  - (ii) The investigation commenced in the United States. UK Police became aware of the investigation having received a request for legal assistance.
  - (iii) There were a large number of witnesses most of whom were located in the United States.
  - (iv) All of the 'real' evidence, save your client's computer was located in the United States. The task of gathering sufficient evidence to initiate proceedings in the UK would have been immense.
  - (v) The United States prosecutors were able to frame charges which reflected the extent of your client's criminality, whereas we were restricted in our choice of charge due to statutory time limits.
  - (vi) The bulk of the 'unused' material was located in the United States. Given the nature of the offences that material was likely to include material which might be considered sensitive and the United States Courts would be best placed for dealing with issues surrounding this material.

The letter concluded:

Although a decision was made not to commence a prosecution against your client in 2002, I am unable to give you an assurance that your client will never be prosecuted in respect of this matter.

11. A similar request for reasons sent by the Claimant's solicitors to the National Hi-Tech Crime Unit received a reply agreeing with the reasons given by the CPS.
12. On 10 May 2006 District Judge Evans in the Bow Street Magistrates' Court sent the Claimant's case to the Secretary of State to decide whether the appellant should be extradited. On 4 July 2006 the Secretary of State ordered his extradition.
13. The appellant appealed against the decisions both of the District Judge and of the Secretary of State to the Divisional Court, which on 3 April 2007 in its first judgment dismissed both appeals. The grounds of the Claimant's appeals included that the extradition proceedings were an abuse of process by reason of the pressure exerted by the US authorities in negotiations for a plea bargain, and that his extradition would infringe his rights under the European Convention on Human Rights, and specifically Article 8.
14. The Claimant appealed to the House of Lords. On 30 July 2008 the Appellate Committee dismissed his appeal.
15. In the normal course, the decision of the House of Lords would have been the end of any domestic challenge to the Claimant's extradition. However, in August 2008 his solicitors asked Dr Thomas Berney, a consultant in developmental psychiatry, to assess him with a view to determining whether he has a developmental disorder, and in particular Autism Spectrum Disorder ("ASD"), and if so to comment on the implications for his extradition. In his report dated 25 August 2008, Dr Berney's conclusions were as follows:

4.1 Mr. McKinnon's combination of difficulties with reciprocal social relationships and social communication, together with an unusually circumscribed interest and repetitive activity, amounts to a Pervasive Development Disorder. He is of normal intellectual ability and there was no delay in the development of good syntactical speech; these would indicate that he has Asperger syndrome (F84.5 in the Tenth Edition of the International Classification of Mental and Behavioural Disorders (ICD-10)) rather than Childhood Autism (F84.0), although both are part of the Autistic Spectrum of Disorder. In addition, he has characteristics suggesting other developmental disabilities, attentional problems and clumsiness. These characteristics, although not of central diagnostic value, are frequently associated with Autism Spectrum Disorder.

4.2 It would be consistent with this diagnosis that Mr. McKinnon does not appreciate the relative priorities of societal rules and so has difficulty in judging what is serious offence and what is minor and balancing this against the perceived rightness of his cause. The nature of Asperger syndrome is to hinder the development of the close, confiding relationship that

would allow him to test his perception of his activities and behaviour against the way that they might be seen by others. Although he does discuss the possibility of conspiracy, he is less able to accommodate conflicting opinions and to modify his views so leaving him with a rather black-and-white perception of his world.

4.3 The presence of an Autism Spectrum Disorder leaves Mr. McKinnon vulnerable to the stress of social complexity as well as anything that is unfamiliar or novel to him. Throughout his life, he has withdrawn from situations that he has been unable to deal with – by truanting from school, leaving jobs and avoiding social complexity (either by not attending social events or else turning to his computer and ignoring the people around him). This difficulty in coping with the wider world has limited his life markedly, impairing his ability to commit himself to substantial, equal, reciprocal relationships as well as to pursue a career. If he finds himself in circumstances where he is unable to withdraw from complex environments into something more autism-friendly, he is likely to develop a pathological anxiety state and, given the presence of the developmental disorder, he will be prone to develop an acute, psychotic disorder (F23 in ICD-10).

The emphases are in the original.

16. The Claimant filed a claim in the European Court of Human Rights, contending that his extradition would infringe his Convention rights and sought Rule 39 relief. On 27 August 2008, Dr Berney's report was submitted to the Court. On 28 August, the Court rejected the application.
17. On 29 August 2008, the Claimant's solicitors wrote to the Secretary of State asking her to consider fresh evidence as to his mental condition. The documents enclosed included Dr Berney's report of 25 August 2008. The letter contended that there was a real and substantial risk that if extradited to the USA the Claimant would be detained in a so-called supermax prison, in severe conditions without contact with his partner or family that would infringe his rights under Articles 3 and 8. In addition, the letter stated that there was no assurance that he would be repatriated to serve his sentence in this country, and it was asserted that the Secretary of State was under a duty to ascertain whether the Claimant would be repatriated to this country to serve his prison sentence here "to discover if his Article 8 Rights will be unlawfully interfered with". It was suggested that the Secretary of State should ask for assurances that he would be repatriated and that while detained in the USA his family and partner would be allowed to visit him. Lastly, his solicitors stated that he was willing to plead guilty to an offence under the Misuse of Computers Act in this country and to serve any sentence here, and submitted that this was the most appropriate course of action which the Secretary of State should consider.

The contentions in the letter as to detention in a supermax prison are no longer pursued.

18. The Claimant's solicitors then asked Professor Simon Baron-Cohen, a consultant clinical psychologist at the University of London, who is also a research scientist into ASD, to assess whether he has Asperger Syndrome ("AS") and how he would cope with extradition and imprisonment. In his report dated 8 September 2008, he stated that he had assessed the Claimant's Autism Spectrum Quotient, and found that he was in the very high scoring range in terms of the number of his autistic traits. His Empathy Quotient (EQ) suggested that he has extreme difficulties with social awareness and empathy. His score in the Childhood Autism Spectrum Test was consistent with his having had AS as a child, and his Adult Asperger Assessment confirmed the diagnosis of AS. Professor Baron-Cohen also stated:

ii. I talked to Mr McKinnon to establish his intent and motivation behind 'hacking' into the Pentagon. His reasons were three-fold: (1) He believed that the US Government were concealing information about clean-energy which it would be in the public interest and therefore ethical to reveal; (2) He believed that the US Government were concealing information about the existence of UFOs which again he felt it would be ethical to check and reveal; and (3) It became a personal challenge to him to succeed in cracking the security system, as a way of testing how secure it was. In my view his motivation was unrelated to any terrorist agenda, nor did he have any wish to cause harm, damage, or loss to the US as a nation or any individual.

...

iii. Mr McKinnon's current mental state is, from his parents' report, one of great emotional distress, fear and anxiety, and occasional depression. He fears he will be sent to prison, possibly in the US, and he has even felt suicidal. His parents report that he does not have the social skills to be able to cope with prison, which would be the most traumatic environment for a person with AS to be in.

Further, with such a low EQ, it is important to recognize that his emotional age or social intelligence is at the level of a child, even if his intelligence in systemizing is at an advanced level. His mother described him several years ago as "35, going on 12" in terms of his immaturity, and as an "innocent". In terms of criminal responsibility it might be more appropriate that he be judged as having the mind of a child who inadvertently breaks a rule doing what he thinks is for the greater good but which is in fact the result of poor social judgment, unaware of how his behaviour will be viewed by others.

It is my view that there is a high risk of serious deterioration of Mr McKinnon's mental health if he were to be incarcerated in the USA pre-trial or post-conviction. It is also important to bear in mind that if separated from his parents and partner and put into the traumatic environment of prison, there is a risk that he would attempt to take his own life.

iv. My recommendations are

(a) To avoid the terrifying process of extradition and instead allow the British legal system to prosecute him. The hope is that wherever he is tried, a punishment would be chosen that avoids imprisonment, as incarceration is likely to induce serious psychiatric problems. In my view Mr McKinnon actually poses no harm to society as he was motivated by an altruistic pursuit of truth. In any event he has undoubtedly now understood the consequences of his actions where he was unable to do so before and he has furthermore learnt an important lesson from the extent to which his life has been disrupted by protracted domestic legal proceedings such that there is (sic) no risk of re-offending.

(b) Mr McKinnon should be referred to a clinical psychologist to support him during his depression and anxiety, to help him develop social and communication skills, for mentoring, and to channel his talents into more socially appropriate directions. He could be usefully employed in testing security and other complex systems. The National Autistic Society in the UK runs an employment agency called *Prospects* which could help him back into work and help him keep a job when there are difficulties.

...

### **Asperger Syndrome**

Asperger Syndrome (AS) is a major subgroup on the autistic spectrum. The other major subgroup is classic autism. Both are diagnosed on the basis of difficulties in social and communication skills, from childhood onwards. Both also share the features of unusually narrow interests and strongly repetitive behaviour/resistance to change/need for sameness. These lead to what are called 'obsessions', though the term 'strong, narrow interests' is a preferred term. AS differs from classic autism in that the latter can include additional learning difficulties (below average IQ) and invariably includes a history of language delay, whereas the former does not. Both AS and autism are the result of atypical brain development, and the ultimate cause is largely genetic, though there may be an interaction with the susceptibility genes and some environmental factor(s).

19. Dr Berney was asked to enlarge on the likely effects of AS and did so in a report dated 9 September 2008. He said:

2. Throughout his life, Mr McKinnon has avoided those circumstances which, in the light of his Asperger syndrome, would present him with particular difficulty. He does not travel abroad not take part in informal social gatherings with unfamiliar people. He is able to cope with more formal encounters, where people have set roles and therefore relationships are more predictable – he knows what is likely to happen and how he should respond. However, informal encounters with unfamiliar people or people whose roles are unpredictable call for a greater degree of social understanding and ability and will be particularly demanding of, and stressful for, somebody with Asperger syndrome.

3. I would be concerned therefore about the degree of stress that would be inherent in imprisonment with its encounters with other people. Their roles and intentions would be unclear and would demand an intuitive knowledge of social rules and appropriate responses. These others, particularly fellow-prisoners, are unlikely to have much sympathy with Mr. McKinnon's innate difficulties. This experience would be difficult enough if in an English culture but, were it to occur in another culture (such as American), this would present a further layer of demand and, therefore, a high level of stress.

4. The experience is likely to be stressful for someone without this innate disability. Mr. MacKinnon's limited social awareness, social skills and experience mean that he is much more sensitive to such environmental pressure. In addition, the pressure of the developmental disorder means that he is more likely to be destabilised than most, taking him into a psychiatric state that may range from pathological anxiety through to psychosis, a shift that will produce long-standing deterioration in his mental health.

20. The Claimant's solicitors again wrote to the Secretary of State on 9 September 2008, enclosing the reports of 8 and 9 September and certain other documents, and inviting the Secretary of State to refuse his extradition on the ground of his health.
21. The decision letter dated 13 October 2008 was written by the Treasury Solicitor on behalf of the Secretary of State and is the subject of these proceedings. It stated:

28. ... although Dr Berney and Dr Baron-Cohen describe the stressful and destabilising effects of extradition, and the likely consequences on Mr. McKinnon's mental health, no explanation has been provided as to the comparative effect, on him of the undoubtedly stressful and destabilising events of his arrest, the extradition hearing, the appellate proceedings in the High Court and the House of Lords, the dismissal of his appeal and the rejection of his Rule 39 application to the European

Court of Human Rights. The Secretary of State is therefore unclear as to why it is said that proceedings in the United States are said to be of such a different order of magnitude in terms of their effect as to be likely to lead to a significant deterioration in his mental health.

29. The assumption appears to have been made (on the basis of the supplemental statement of Mr. Dratel dated 7<sup>th</sup> February 2007) that Mr. McKinnon has no realistic prospect of bail on his return. However, that assessment was made presumably without knowledge of his medical condition, which would undoubtedly be a relevant feature as to whether bail should be granted, pursuant to 18 USC #3142(e). It cannot therefore now be assumed that he would be detained in custody in light of his medical condition.

30. However, even on the basis that Mr. McKinnon is likely to be detained in custody, he is to be extradited to a country with a highly developed awareness of psychiatric illness and which has procedures for ensuring that those in custody receive appropriate care. Therefore, although the Secretary of State accepts that extradition to the United States will cause Mr. McKinnon certain stress and may exacerbate any illness from which he currently suffers, she does not accept that his condition cannot be appropriately treated.

31. The Secretary of State does not accept that the fact that an individual may become even severely depressed upon imprisonment in a foreign state can effectively preclude that individual's extradition, where such an illness would be treated and monitored. There is no suggestion, for example, that Mr. McKinnon is not fit to stand trial such that it would make it unjust to surrender him to the United States and the Secretary of State notes that the European Court of Human Rights declined his application for Rule 39 relief notwithstanding his medical condition.

The letter referred to the jurisprudence of the European Court of Human Rights on Article 3 and concluded that it “strongly suggests that a diagnosis of AS manifestly fails to come within the type of conditions that engage Article 3”. It considered and rejected the contention that the Claimant would be detained in a supermax prison, or that such detention would infringe Article 3. The letter rejected the contention that the Claimant’s rights under Article 8 would be infringed by his extradition. Paragraphs 70, 72 and 73 of the letter stated:

70. Given that the Secretary of State does not consider that Mr. McKinnon’s extradition would be incompatible with his Article 8 Convention rights, and given the evidence of Mr Wiechering, she does not regard it as necessary or appropriate to seek an

undertaking the Mr. McKinnon will be repatriated to the United Kingdom for the purposes of any sentence.

...

72. The Secretary of State does not consider that the material and evidence relied upon demonstrates that it would be incompatible with Mr. McKinnon's Convention rights to extradite him to the United States.

73. The Secretary of State is therefore obliged under the Extradition Act 2003 to give effect to her order for Mr. McKinnon's extradition.

22. The reference to the evidence of Mr Wiechering was to his affidavit of 22 August 2007 sworn in support of the request for the Claimant's extradition. Mr Wiechering, an Assistant United States Attorney and Chief of the Cyber Crimes Unit for the Eastern District of Virginia, is the lead prosecutor in the criminal case against the Claimant. In the affidavit he stated:

3. The U.S. Attorney's Office for the Eastern District of Virginia and the U.S. Attorney's Office for the District of New Jersey (the "Offices") will not oppose any prisoner transfer application that may be made by Gary McKinnon (if extradited and convicted) based, in whole or in part, on his refusal to waive or consent to extradition from the United Kingdom. Notwithstanding the foregoing, the Offices reserve the right to oppose any prisoner transfer application that may be made by Gary McKinnon based on any other grounds.

23. Professor Baron-Cohen produced a further report dated 4 December 2008. In it he commented, I think unwisely, on the allegations against the Claimant, stating, for example, that he had been careful to leave messages alerting the security teams that he had hacked into so that they might consider how to tighten up their security. The message he had left on one army computer "I am SOLO. I will continue to disrupt at the highest levels ..." indicates that Professor Baron-Cohen's understanding was wrong. So far as the Claimant's medical condition is concerned, the Professor stated:

His difficulties in relation to possible detention in prison may relate to his social awareness and empathy difficulties but in my mind they relate more to his current depression and anxiety. The latter centres on his fears of being raped by other prisoners of being physically assaulted by prison guards and he has talked about preferring suicide as an option rather than being put in such a threatening environment. It is not about the environment (I have no idea if his fears are based on any real risks of this) but about his perception of what prison would be like. My previous report identified that he is suffering from an anxiety disorder (panic attacks) over and above his AS. If Gary

were subject to long-term detention in solitary confinement it is my view that it will likely to exacerbate his depression and increase the risk of suicide.

I would also add that in my view Mr McKinnon does not have the social skills to cope with prison. He is unlikely to be able to negotiate his way through a social group of other prisoners in such a way as to be accepted. Nor is he likely to be able to make relationships, and may offend others through expressing his opinions in a very blunt and direct undiplomatic fashion. But as stated under point 2 above, I don't think it is his social skills that are the main risk factor for his mental health. Rather, his mental health is already very poor from having suffered from anxiety and depression over many years at not knowing what is going to happen to him. Dislocation from the support of his family and girlfriend may be other key risk factors that might exacerbate his already poor mental health.

I would anticipate that the particular features of a prison environment that would be traumatic for Mr McKinnon as a person with AS is that he would suffer from the following:

1. Aggression from other prisoners
2. Aggression from prison guards
3. Being expected to share a cell with someone
4. Loud noise and other forms of sensory overload which he would find aversive
5. Having to live in a large group of people when the natural state of people with AS is to withdraw

I also anticipate that if Mr McKinnon was presented with any sensory sensitivities then that would exacerbate the impact of prison conditions on him such as harsh lighting, loud noises etc.

I have a real concern that he would not survive a term of imprisonment. I am stating this as strong assertion because to put a vulnerable adult who has a disability into a situation of imprisonment when that adult has [stated] that suicide would be preferable, to avoid the suffering that he fears he will experience in a prison, is a decision that should carry with it some responsibility for any consequences. The courts for example, should not be able to claim that they were unaware of the risks prison might pose to Mr McKinnon if he suffers a complete psychiatric breakdown or commits suicide. The courts should have it on their record that if they order him to be detained, it is in the full knowledge that this outcome is a serious and dangerous possibility.

My impression is that even being put on a plane to stand trial in the US, even if he were not imprisoned, might be too traumatic for him to manage. Inevitably it would involve some detention whilst awaiting a court hearing in the USA, which may push his already high anxiety to intolerable levels.

24. There is evidence from the Claimant's family and his partner as to their means, essentially showing that they could only seldom visit him in prison in the USA. The loss of contact with his family would exacerbate his social isolation.
  
25. On 23 December 2008, some 4 months after Dr Berney's diagnosis and some three years after the last relevant communication between the Claimant's solicitors and the DPP, they sent a long letter to him inviting him to reconsider the decision made in 2005 not to prosecute the Claimant in this country. The letter enclosed a witness statement of the Claimant, and stated that he accepted that his computer hacking in 2001-2002 constituted offences under section 2 of the Computer Misuse Act 1990, and that he would accept criminal responsibility for his conduct before a UK court. Other enclosures included Dr Berney's report of 25 August 2008 and Professor Baron-Cohen's reports of 8 September and 4 December 2008. The letter relied on the Claimant's health, and in particular the diagnosis of AS, and set out large parts of the reports of Dr Berney and Professor Baron-Cohen. It asserted that there was "unequivocal evidence that he would not be able to withstand extradition to the US, pre-trial incarceration in the US or serve a lengthy sentence in a high security prison". It stated that in the US he faced a sentence of imprisonment for a term of 8 to 10 years in a supermax prison, which would be a disproportionately severe sentence, with no assurance that he would be repatriated to serve his sentence in this country. There would be no international monitoring of his conditions in prison, and no access to any international human rights body. Furthermore, the decision not to prosecute was inconsistent with decisions that had been made in other cases in which persons in the UK had hacked into American computers.
  
26. By letter dated 26 February 2009 delivered by hand to the Claimant's solicitors, Alison Saunders, the Director of the Organised Crime Division, of the CPS, replied to the letter of 23 December 2008. She stated that the Claimant's case had been reviewed in accordance with the Code for Crown Prosecutors. He had admitted to activity which would amount to an offence under section 2 of the Computer Misuse Act 1990. However, there was insufficient evidence to proceed in respect of an offence under section 3, because he had never accepted an intention on his part to cause any impairment or damage to the computer systems he is alleged to have accessed in the US. The conclusion had been reached that the evidence available to the CPS did "not come near to reflecting the criminality that is alleged by the American authorities. ... We would also need to be satisfied the prosecution would be able to discharge their duty in relation to unused material given the undoubted existence of sensitive material". In these circumstances, the public interest test did not arise.

27. A CPS press release of the same date quoted Alison Saunders, the Director of the Organised Crime Division, as saying that the CPS had reconsidered in which jurisdiction the case against the Claimant would best be prosecuted, and that that remained the US. Finally:

A consideration of how Mr McKinnon's diagnosis of Asperger's Syndrome would affect a UK prosecution would have been a factor under the public interest test had the evidential test been first met. All cases must first pass an evidential test and then the public interest test only if that test is satisfied. Because this stage was not reached, the public interest test does not therefore arise.

28. In a letter dated 23 January 2009, the Home Office sought assurances from the US authorities in relation to his medical care and treatment on extradition. The US Department of Justice replied by a letter dated 26 February 2009 from Mary Ellen Warlow, a Director of the Criminal Division. The assurances given in that letter are important, and I therefore set them out:

- (1) the USMS would send two Deputy U.S. Marshals to the United Kingdom to pick up Mr. McKinnon and transport him back to the United States;
- (2) the Deputy U.S. Marshals would (a) search Mr. McKinnon upon his surrender and seize any items Mr. McKinnon could use to hurt himself or others, and (b) monitor Mr. McKinnon at all times to ensure that he did not attempt to injure himself or others;
- (3) for security reasons, the USMS would not permit an outside medical professional to accompany Mr. McKinnon during his transport, but would provide a Deputy U.S. Marshal who was qualified as an emergency medical technician to do so, or alternatively, would provide a psychiatric professional if U.K. authorities agreed to bear the cost;
- (4) upon arrival in the United States, Mr. McKinnon would be transported to the Alexandria Adult Detention Center ("AADC"), a facility which has two psychiatrists, a psychologist, four licensed professional counsellors, and five licensed social workers on staff, where Mr. McKinnon would undergo a medical and mental-health examination;
- (5) if the medical and mental health examination indicated that Mr. McKinnon suffered from mental health issues, the AADC, which has a mental health staff on duty twenty-four hours a day, seven days a week, would provide Mr. McKinnon with appropriate care and

treatment (both pharmacological and therapeutic), and if the examination indicated that he posed a danger to himself or others, the AADC would segregate him from other inmates;

- (6) if U.K. authorities would provide U.S. authorities with Mr. McKinnon's medical reports, the U.S. authorities will provide those medical reports to the AADC, the U.S. Pretrial Service Office and Mr. McKinnon's court-appointed counsel. Naturally, Mr. McKinnon's counsel would be alert to the need to make any appropriate applications to the court arising out of any medical issues, including fitness to stand trial;
- (7) if Mr. McKinnon were to be found guilty of one or more offenses, the U.S. Probation Office would (a) prepare a pre-sentence report setting forth, among other things, information about Mr. McKinnon, including his family history, his prior criminal record or lack thereof, and his mental and physical health, and (b) provide the court with copies of Mr. McKinnon's medical reports and a recommendation regarding the appropriate sentence – based on advisory U.S. Sentencing Guidelines;
- (8) if Mr. McKinnon were sentenced to a term of incarceration, he would be transferred to the BOP which would, in turn, review Mr. McKinnon's medical records and conduct a preliminary medical screening to determine whether he had any medical issues, including mental health issues, which needed to be addressed;
- (9) The BOP, which has at least one physician and psychologist on staff at all of its facilities, would make arrangements for qualified medical practitioners, including a psychiatrist or other specialist, if necessary to provide Mr. McKinnon with appropriate medical care and treatment, including counseling and medication, for any medical and/or mental health conditions, including depression, anxiety and other conditions, like Asperger's Syndrome;
- (10) If Mr. McKinnon were to arrive at a BOP facility in, or subsequently suffer from, acute psychiatric distress, the BOP would provide him with immediate access to a psychiatrist and provide an appropriate level of supervision. If the BOP facility was unable to provide Mr. McKinnon with appropriate care and supervision, it would transfer him to another facility which would provide such care and supervision.

29. On 18 May 2009 the Claimant filed his claim for judicial review against the Director of Public Prosecutions.
30. Professor Baron-Cohen commented on Ms Warlow's letter of 26 February 2009 in a letter dated 21 May 2009. In summary, he stated that notwithstanding the assurances in Ms Warlow's letter he stood by his earlier assessment. He considered that although the conditions of detention in the USA were outside his knowledge, the fact of extradition and separation from his partner and family would give rise to a high risk that his mental health would deteriorate and that he might attempt suicide. He considered that there was a serious risk of self-harm and a high risk of a serious deterioration of mental health because of separation from his family and his fear of going abroad.
31. Dr Berney made a statement dated 26 May 2008 which, however, from its internal references must have been made on 26 May 2009. He referred to the letter from Ms Warlow dated 26 February 2009 and said that on the face of it it would appear to cover all eventualities, but that there were "several points that must give rise to substantial disquiet". Having made them, he summarised his views as follows:
- In summary, having read the letter from the USA, I am of the same opinion that I set out in my previous report of the 9 September 2008; that the process of extradition carries a substantial risk of producing a long-standing deterioration in Mr. McKinnon's mental health. I am concerned that managing this process outside the UK may well result in Mr. McKinnon being damaged by his pretrial experience and that, should he be convicted, the effect on his mental health is likely to make his punishment disproportionate to the court's intention.
32. By letter dated 5 June 2009, the Claimant made further representations and indicated that he would be willing to plead guilty to an offence under section 3 of the 1990 Act. Accordingly, the Director was invited to reconsider the decision not to prosecute, since the evidential test was now satisfied, having regard to the wider public interest which, it was asserted, pointed to a prosecution in the United Kingdom. The Director was further invited to "have full regard to Article 3 and Article 8 of the Convention".
33. The CPS responded by letter dated 8 June 2009. It refused to change its decision. The letter contended that:
- (a) the offer to plead guilty was simply a device by which the Claimant sought to avoid extradition.
  - (b) the invitation to prosecute the Claimant amounted to an impermissible collateral challenge to the extradition process.

- (c) the issue of whether it was compatible with the Claimant's Convention rights to extradite him to the US was an issue which fell to be determined within the extradition process.
- (d) the Director could not make a decision at the end of the extradition process which had the effect of undermining the decisions made by the domestic courts.
- (e) that a decision whether to prosecute an individual should not be the subject of negotiation, all the more so where prosecution is sought by a potential defendant as a means of avoiding extradition and where the domestic courts have rejected challenges to the extradition request.
- (f) that upon reflection the conclusion that the Claimant's admitted conduct gave rise to offences contrary to section 2 of the Computer Misuse Act 1990 had been too generous.

### **The contentions of the parties**

#### **(a) The claim against the Secretary of State**

- 34. Mr Fitzgerald's essential submission is that it would be unlawful for the Secretary of State to order the Claimant's extradition to the United States, where he would be detained in prison following his conviction, because by reason of his mental condition, his detention would involve inhuman or degrading treatment or punishment which would, if committed in this country, infringe Article 3 of the Convention. In addition, he would be subject to the stress involved in his detention and removal. It follows that his extradition would itself infringe his Article 3 rights.
- 35. In addition, Mr Fitzgerald submitted that in determining whether Article 3 would be infringed the Court should take account of the following matters:
  - (a) the fact that he could and should be prosecuted in this country; and
  - (b) the Secretary of State's refusal to seek undertakings that he would be granted bail in the United States until he was sentenced and that he would be repatriated to serve his sentence in the United Kingdom.

Mr Fitzgerald further submitted that these matters aggravated the treatment resulting from the Secretary of State's decision, and rendered that decision disproportionate as a response to his offending. The Secretary of State was and is under a positive duty under Articles 3 and 8 to seek assurances on bail and repatriation, which, if successful, would reduce the mental harm and suffering that the Claimant would

otherwise suffer and thereby the risk of his suffering treatment that would contravene Article 3.

36. The Claimant's case under Article 8 is based on the same factual contentions, but relies on the fact that treatment that does not reach the severity that engages Article 3 may nonetheless engage Article 8. It is contended that in this case his Article 8 rights are engaged and infringed. The issue of proportionality is particularly relevant in relation to Article 8, having regard to the Secretary of State's reliance on Article 8.2.
37. Lastly, if, contrary to Mr Fitzgerald's submissions, the Claimant does not establish on the evidence before the Court that his extradition would infringe his rights under Article 3 or Article 8, the Secretary of State's decision was nonetheless flawed. She underestimated the gravity of the Claimant's situation, and made no inquiries and sought no assurance as to bail before or repatriation after trial in the United States; she applied too high a test in assessing whether there would be a breach of Article 3 and Article 8, and thereby erred in law; and she failed to take account of the reasonable alternative of prosecution in this country.
38. For the Secretary of State, Mr Keith QC accepted that the Secretary of State had the power, and indeed the obligation, to decline to extradite the Claimant if his Convention rights would be infringed. However, he submitted that the evidence did not reach the high threshold required for a claim under Article 3, and that the claim under Article 8 was indeed unarguable. Much of the impugned decision letter had been concerned with the contention that the Claimant would be detained in a supermax prison. The Court had refused permission to apply for judicial review on the ground that he would be so detained, and the contention had been abandoned. In relation to the contention that the Secretary of State failed to take into account the possibility, indeed the preferability, of the Claimant's prosecution in this country, the fact was that the DPP had decided not to prosecute him, and so there was no such possibility. The letter contained no error of law and there were no grounds for interfering with the Secretary of State's decision.

**(b) The claim against the DPP**

39. I hope that I do not do Mr Fitzgerald's cogent submissions a disservice by summarising them as contentions that the DPP failed to take into account the fact that, due to his mental condition, the Claimant's Convention rights would be infringed by his extradition, and that he wrongly applied the evidential test for prosecution in this country. He submitted that the DPP was under a duty fairly to determine whether to concede jurisdiction to the US, and had not done so.
40. The submissions of Mr Perry QC were essentially as set out in the letters of 26 February 2009 and 8 June 2009. In addition, he submitted that the DPP was not under any duty to a suspected offender to institute criminal proceedings against him in this jurisdiction: any duty owed by him in deciding whether to prosecute in a particular case is owed to the public generally and to the victim and the family of the victim.

Where there is evidence to support an appropriate prosecution, the public interest test may lead to a decision not to prosecute, but it cannot require the DPP to prosecute in the interests of the suspected offender. In addition, he submitted that the proceedings against the DPP had not been commenced punctually as required by CPR Part 54.5.

## **Discussion**

### **The basis of the decision in these judicial reviews**

41. One element that is common to both of the claims before us is that they depend on the recent diagnosis of AS. The extradition request of the USA was considered by District Judge Nicholas Evans in May 2006 and upheld. The contention that the Secretary of State should not have ordered his extradition was upheld by the Divisional Court in April 2007 and by the House of Lords in its decision in July 2008. That the Secretary of State on the information before her in July 2006, when she made her decision, and the information then available to the Claimant, was entitled to order his extradition is *res judicata*.
42. Similarly, as long ago as 2002 the CPS decided not to prosecute the Claimant, on the basis that he would be extradited to and prosecuted in the USA. The decision was explained in the letter dated 15 October 2003. In 2005 his solicitors threatened judicial review proceedings to challenge that decision. The CPS summarised the reasons for its refusal to prosecute in the letter dated 27 June 2005. No judicial review proceedings were then brought. It is now far too late to challenge that decision, and the Claimant does not seek to do so. I would add that the decision as explained in those letters was in my judgment indubitably lawful, and could not have been successfully challenged.
43. The Claimant challenges the decisions contained in the letters of 26 February and 8 June 2009, but it seems to me that he can do so only on the basis of material that could not have been put before the DPP in June 2005. Again, that boils down to the diagnosis of AS and his expressed willingness to plead guilty to offences under the Computer Misuse Act. To put it differently, if the decisions made by the DPP in 2009 were quashed, the decision made in 2005 would stand, unless the Court ordered the DPP to reconsider it; and the only justification for doing so is that there is now information before him that was not before him when he made that decision.

### **The claim against the DPP**

44. Since much of Mr Fitzgerald's submissions centred on the proposition that the Claimant could and should be prosecuted in this country, it is convenient to consider first the challenge to the decision of the DPP.

45. As mentioned above, Mr Fitzgerald contends that the Claimant could and should be prosecuted in this country. Whether this country or the USA is (apart from considerations of the Claimant's Convention rights) the more appropriate forum for his prosecution was addressed by the Divisional Court in its first decision. Maurice Kay LJ said:

36. The third point raised by Mr Lawson is to the effect that it would be disproportionate to remove Mr McKinnon to face trial in the US when he could be tried for equivalent offences in this country and, if convicted, could be sentenced in a way which would not amount to such an interference with his Article 8 rights. Of this point the District Judge said:

“The CPS did consider whether to launch a prosecution in the UK and for good reason decided against it. The defendant intentionally targeted computers in the US; his actions resulted in criminal damage being suffered there, as well as causing very considerable disruption to the workings of those computers resulting in interference and disruption to military activities in the US. It is not my task to determine which state has the better right to prosecute, but for what it is worth my view is, unquestionably, if the defendant is to face prosecution, it should be in the US.”

37. We agree with that analysis. Submissions similar to those advanced by Mr Lawson were advanced on behalf of the appellant in *Birmingham*. There, neither the fact that the appellants were United Kingdom nationals nor anything else about their circumstances brought them within the scope of exceptionality. We agree with Mr Summers that, if anything, the US links in the present case are stronger than they were in *Birmingham* and the UK links are weaker. ...

46. With respect, I entirely agree. It is true that the Claimant's offending conduct took place in this country. However, it was directed at the USA, and at computers in the USA; the information he accessed or could have accessed was US information; its confidentiality and sensitivity were American; and any damage that was inflicted was in the USA. The witnesses who can address the damage done by his offences are in America. Moreover, because the information was sensitive, it will be far more difficult for it to be put before a judge in this country than before a US judge.

47. However, it is not for this Court to decide where he should be prosecuted. The decision is that of the DPP. As appears from the preceding paragraphs of this judgment, he cannot be faulted for considering that, other things being equal, the Claimant should be prosecuted in the USA. His opinion that the criminality of the Claimant's offending cannot fully be investigated here cannot be challenged: it is not said to be perverse, and I cannot see any basis on which it could be challenged as such.

48. Moreover, it would be manifestly unsatisfactory in the extreme for the Claimant to be prosecuted and sentenced on the basis of what he is prepared to admit in this country rather than on the basis of what could be proved in the USA. In this connection, it is noteworthy that the Claimant did not, in his solicitors' letter of 23 December 2008, admit any offence under section 3 of the 1990 Act. The allegations made in the US criminal proceedings do involve an intention to cause damage that is a constituent of the offence created by section 3 but not that created by section 2, to which the Claimant expressed a willingness to plead guilty. As correctly stated in the CPS letter of 26 February 2009, the Claimant was then denying any malicious intent or being responsible for causing any damage.
49. In her letter of 26 February 2009, Ms Saunders stated that the evidential test had not been met because the CPS was unable, on the material in its possession, to frame charges that fully reflect the totality of the Claimant's offending as alleged by the US authorities. That was in my judgment for the reasons set out in the letter a justifiable, if not inevitable, conclusion. Moreover, it is well established that judicial review of a prosecutorial decision is a highly exceptional remedy: see, e.g., *Birmingham* at [63] and *R (Ahsan) v Director of Public Prosecutions and Tajik v Government of the United States of America* [2008] EWHC 666 at [39].
50. The Claimant sought to meet the lack of any evidence in this country justifying a prosecution under section 3 of the 1990 Act by the submission, during the hearing of the application for permission to apply for judicial review of the DPP's decisions, of a further witness statement containing further admissions. Quite apart from the point that the decisions of the DPP cannot be challenged on the basis of facts or evidence that were not before him when he made the decisions under challenge, the production of this witness statement serves to emphasise that, as asserted in the letter of 8 June 2009, the proceedings against the DPP were being used in order to make a collateral challenge to the Secretary of State's extradition decision. The witness statement, dated 14 July 2009, contains admissions that the Claimant knew that his computer activities would have impaired the US computers he accessed, and that that would cause the temporary shutdown of those computers; he states that he did not intend to delete any files belonging to US computers. For present purposes, I assume that these admissions of knowledge of the consequences of his actions do amount to an admission of the specific intent required by section 3 of the 1990 Act.
51. In *Wright v Scottish Ministers* [2005] Scots CS CSIH 40, the Lord Ordinary said:
- Extradition does not and should not depend upon the ability or otherwise of the requested state to undertake its own investigations with a view to prosecuting the case within its own jurisdiction. Such an approach would involve unnecessary duplication of effort, would result in additional delays in the prosecution of suspected criminals and would have an adverse effect upon international relations and international co-operation in the prosecution of serious crime. In most, if not all, extradition cases the requested state would depend upon co-operation from the requesting state if the requested state were

to embark upon its own investigation and ultimate prosecution of the case.

52. This statement was cited with approval by Laws LJ (with whose judgment Ouseley J agreed) sitting in the Divisional Court in *R (Bermingham and others) v The Director of the Serious Fraud Office* [2006] EWHC 200 (Admin) at [126]. In that case too there was an attempt to avoid extradition by seeking investigation and prosecution in this country. Laws LJ said at [65]:

The request to investigate in effect invited the Director [of the Serious Fraud Office] to constitute himself the judge of the proper forum for the defendants' trial and to decide the issue in favour of trial here and not the United States: and thereby to pre-empt the statutory extradition process. Such a function cannot conceivably be found in s. 1(3) of the [Criminal Justice Act 1987].

In my judgment there is no conceivable relevant difference between the duty imposed by the 1987 Act on the Director of the Serious Fraud Office and the duties of the DPP.

53. Mr Fitzgerald sought to distinguish *Wright* and *Bermingham* on the basis that in those cases there had been no relevant criminal investigation, whereas in the present case there has been: the Claimant was interviewed and has made relevant admissions of criminal offences. The fact remains, however, that the full evidence of the Claimant's offending and its consequences is in the USA, not in this country, and in my judgment those cases are authority, with which I respectfully agree, for the proposition that the DPP can be under no duty to seek to investigate these matters further, assuming he could do so.
54. Was it appropriate for the DPP to have regard to the Convention rights of the Claimant? Where there is a significant issue that a prosecution of a defendant in this country would infringe his Convention rights, I would accept that that is a matter to which the DPP should have regard. I note that the Code for Crown Prosecutors at paragraph 10.7 mentions the fact that a defendant is suffering from significant mental or physical ill health as a consideration to be taken into account at the public interest stage that may lead to a decision not to prosecute in a case in which the offence is not serious. Equally, I would accept that the DPP must take into account the interests of the victim of an offence and, particularly where the offence has led to the death of the victim, his or her family, and is entitled to take into account their wishes, and that he must take into account the interests and Convention rights of those who may be the victims of further offending. But it is very different to require the DPP to consider the Convention rights of the offender himself when the DPP has decided, or is minded, not to prosecute him. In a wholly domestic case, I see no basis for such a duty. In argument, Mr Perry QC gave the example of a homeless person who commits an offence and seeks prosecution so that he may be given accommodation in a police cell or in a prison. I agree that the CPS owes such a person no duty to prosecute, even if the failure to prosecute will lead the offender to be homeless and destitute to such an

extent that his Article 3 rights would be engaged. The support of the homeless is not a duty of the DPP or the CPS, but of the public (principally local) authorities responsible for social care and social security.

55. In my judgment, the position is not different in the context of extradition. It is not for the DPP to take account of the Claimant's Convention rights: it is for the Secretary of State, and the Courts, as part of the extradition process under the Extradition Act 2003, in compliance with section 6 of the Human Rights Act 1998, to address those rights and to determine whether his extradition would infringe those rights. If his Convention rights would be infringed, he cannot be extradited; if not, there is no reason for the DPP to seek to prevent his extradition by prosecuting him here and he is under no relevant duty to do so. In *Birmingham*, Laws LJ said:

70. ... To the extent that action taken by [the Director of the Serious Fraud Office] might touch the Convention rights of any affected person – most obviously, anyone the subject of an investigation instituted by him – he was clearly right to do so. It is I suppose possible to envisage circumstances in which that would arise in practice, perhaps where the effects of an investigation upon an especially vulnerable person would be particularly severe. Indeed in such a case the Director's duty would not merely be to have regard to the ECHR but to take a decision which would vindicate the Convention right in question. I cannot, however, envisage any circumstances in which a decision *not* to investigate might offend the relevant person's Convention rights. At all events, given we are dealing only with *investigation*, I apprehend that cases in which the director's decision might touch Convention rights would be very rare, and exhibit very special facts. And this is not the basis of what is suggested here. My question can only be answered in the affirmative, and thus in the defendants' favour, if s.1(3) is construed so as to impose a positive obligation on the Director to embark upon an investigation so that he might pre-empt the potential trial venue in favour of this jurisdiction (by proceeding to prosecute here) if it appears that the Convention rights of a suspected person might be violated by trial elsewhere.

71. This would be an entirely fanciful construction of s. 1(3). It obviously cannot be got out of the subsection's words, which only confer a power to investigate. More than this: it would usurp the role of the District Judge under ss.21 and 87 of the 2003 Act. As I have shown those provisions impose on the judge an express obligation to decide whether the relevant person's extradition would be compatible with his Convention rights, and to order his discharge if he concludes that it would not. Thus Parliament has distinctly allocated the task of determining complaints under the ECHR to the courts. As is submitted at paragraph 1.5 of the skeleton argument for the Director prepared by Mr Burnett QC and Mr Perry, the

defendants' argument, if correct, "would enable a request to be made... when the extradition process was well advanced, with a view to halting it or interrupting it with collateral challenges to the decisions of investigating or prosecuting bodies". In my judgment that would be a wholly unacceptable state of affairs. I shall address s.87, and the judge's consideration of it in this case, when I come to the statutory appeals. But I may state at this stage that it is in the material provisions of the 2003 Act that all necessary protection of a defendant's Convention rights in the extradition context is in my judgment to be found.

56. True it is that, as mentioned above and as appears from what Laws LJ said, the Court in *Bermingham* was concerned with a case in which there had been no investigation in this country. For reasons I have given, that is not, in my judgment, a reason to treat his statement as inapplicable to the present case. What is particularly striking is that what Laws LJ described as "a wholly unacceptable state of affairs" is precisely the state of affairs in the present case, and to my mind it is indeed unacceptable.
57. The Claimant seeks to rely on the principle *aut dedere aut judicare* – extradite or prosecute. It is a principle of public international law, which cannot of itself confer a private right on the Claimant. It is applicable to specified offences under obligations accepted by this country under international treaties, and it is not clear that it is applicable to the Claimant's offending. In any event, however, the Secretary of State seeks to extradite, and if extradition proceeds, there can be no obligation to prosecute in this country. The principle is irrelevant.
58. In my judgment, the fact that different decisions were made by the DPP in other cases does not assist the Claimant: other cases, different facts. In any event, it is inherent in the concept of executive discretion that there may be different decisions in different cases.
59. In my judgment, for the reasons I have given above, the Claimant's challenge to the decision of the DPP is unarguable. It has no real prospect of success. The authorities referred to in paragraph 49 above fortify my conclusion. Having heard full argument, and with respect to all that has been so cogently and forcefully submitted by Mr Fitzgerald, I endorse what Maurice Kay LJ in the Divisional Court said when giving permission to apply for judicial review against the Secretary of State:

We regard as fanciful the suggestion that, in the circumstances of this case, the claimant might successfully challenge a decision not to prosecute him by way of an application for judicial review.
60. In the circumstances, it is unnecessary to consider whether, if the claim against the DPP were meritorious, the Claimant would be shut out from relief by reason of delay in commencing the second proceedings.

61. For these reasons, I would refuse permission to apply for judicial review of the DPP's decisions.

### **The claim against the Secretary of State**

62. This claim must be viewed in its legal context. As a result of the rejection of the Claimant's appeal by the House of Lords, the Secretary of State came under a statutory duty, under section 118 of the 2003 Act, to extradite the Claimant. Normally, the powers of the Secretary of State, even at the earlier stage when the District Judge sends a case to him for his decision whether a person is to be extradited, are limited by section 93, which requires him to order the person to be extradited unless one of the specified exceptions applies, none of which is relevant to the present Claimant. The issue whether the Convention rights of the person whose extradition is sought would be infringed by his extradition is normally determined by the District Judge at the first stage of the extradition process: see section 87.
63. The principal contention of the Claimant is that, because he suffers from Asperger Syndrome, his removal to the USA, his detention there pending trial and his detention under sentence will breach his rights under Article 3. If his diagnosis had been made earlier, that question would have been determined by the District Judge in May 2006.
64. The Secretary of State has accepted that he has an implied power to withdraw any extradition order where, as here, something new has arisen exceptionally between the exhaustion of the statutory remedies under the 2003 Act of the person whose extradition is sought and his actual removal. This proposition has the authority of the first judgment of the Divisional Court [2007] EWHC 762 (Admin) at [61] to [63]. The basis for this implied power is section 6 of the Human Rights Act 1998, which renders it unlawful for the Secretary of State, as a public authority, to act in a way which is incompatible with a Convention right. It follows that the "something new" must be evidence that that person's Convention rights would be infringed by his extradition. The Secretary of State also accepts that his decision in such circumstances is susceptible of judicial review.
65. The Divisional Court at the permission stage of the present proceedings rejected the contention that, apart from the power arising from section 6 of the 1998 Act, the Secretary of State has a general discretion not to effect extradition in the present circumstances. The Claimant has not sought to renew that contention as a ground for judicial review. In any event, I respectfully agree that any such discretion would be inconsistent with the provisions of the 2003 Act.
66. In my judgment, it follows from the basis of the implied power of the Secretary of State that is the subject of these proceedings that the question for the Court is not whether the Secretary of State properly exercised her discretion, or reached a sustainable decision, but whether objectively the evidence before the Secretary of State established a real risk that the Claimant's extradition would infringe his

Convention rights, and in particular his right not to be subjected to treatment that would contravene Article 3.

67. It is well recognised that Article 3 applies to conduct of the most serious and severe kind. It is particularly difficult for a person to establish a breach of his Article 3 rights where the conduct that is envisaged is, as in the present case, not the deliberate infliction of harm by agents of a foreign state but neglect or a lack of resources on the part of that state.
68. The severity required for treatment to infringe Article 3 is well demonstrated by the decision of the House of Lords in *N v Home Secretary* [2005] 2 AC 296, [2005] UKHL 31. N was a failed asylum seeker suffering from HIV. If returned to Uganda, her country of nationality, she would die in a matter of months by reason of the lack of appropriate medication; if she remained here, she could live for decades. Lord Hope summarised her condition:

20. The decision which your Lordships have been asked to take in this case will have profound consequences for the appellant. The prospects of her surviving for more than a year or two if she is returned to Uganda are bleak. It is highly likely that the advanced medical care which has stabilised her condition by suppressing the HIV virus and would sustain her in good health were she to remain in this country for decades will no longer be available to her. If it is not, her condition is likely to reactivate and to deteriorate rapidly. There is no doubt that if that happens she will face an early death after a period of acute physical and mental suffering.

Nonetheless, the House of Lords held that her removal to Uganda would not infringe Article 3. Baroness Hale put the matter shortly:

69. In my view, therefore, the test, in this sort of case, is whether the applicant's illness has reached such a critical stage (i.e. he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity. This is to the same effect as the text prepared by my noble and learned friend, Lord Hope of Craighead. It sums up the facts in *D*. It is not met on the facts of this case.

69. In *J v Secretary of State for Home Department* [2005] EWCA Civ 629, the Court of Appeal considered the case of a Tamil who threatened to commit suicide if returned to Sri Lanka. It had been accepted by the Home Secretary that he suffered from post traumatic stress disorder and depression. The medical evidence was that

His prognosis (was) presently extremely uncertain. ... he had attempted suicide. Though the shock of being refused asylum had been a precipitant, the significant predisposing factors relate to his traumatic experiences. These had then led to his depressive illness the onset of which could be established to the period when he was detained by the Sri Lankan army. ... He continues to present with a risk of suicide. This could be aggravated if he had to return to Sri Lanka. Such risk would be high as a result of his knowing that the Home Office would return him to Sri Lanka.

A later medical report stated:

if [J] is sent back to Sri Lanka the risk of exacerbating his existing suicidal ideation is greatly increased because he is likely to have lost all hope. Hopelessness has a serious, significant association with completed suicide.

In my opinion, if he does not manage to kill himself in the UK there is a high risk that he would try to commit suicide en route and may therefore pose a threat to other passengers in his desperation to kill himself.

If he is prevented from killing himself either in the UK or while being returned I think it is likely that he would commit suicide upon his arrival in Sri Lanka to avoid falling into the hands of the authorities from whom he perceives he is in mortal danger.

70. Despite these severe prognoses, the claim under Article 3 failed. Giving the judgment of the Court, Dyson LJ referred to so-called foreign cases, that is, cases in which it is not claimed that the state complained of has violated the applicant's Convention rights within its own territory, but where it is said that the conduct of the state in removing a person from its territory to another territory will lead to a violation of the person's Convention rights in that other territory: see Lord Bingham in *Ullah v Secretary of State for the Home Department* [2004] UKHL 26, [2004] 2 AC 323 at [7] and [9]; *J* at [16]. Dyson LJ said:

25. In our judgment, there is no doubt that in foreign cases the relevant test is, as Lord Bingham said in *Ullah*, whether there are strong grounds for believing that the person, if returned, faces a real risk of torture, inhuman or degrading treatment or punishment. It should be stated at the outset that the phrase "real risk" imposes a more stringent test than merely that the risk must be more than "not fanciful". The cases show that it is possible to amplify the test at least to the following extent.

26. First, the test requires an assessment to be made of the severity of the treatment which it is said that the applicant would suffer if removed. This must attain a minimum level of

severity. The court has said on a number of occasions that the assessment of its severity depends on all the circumstances of the case. But the ill-treatment must "necessarily be serious" such that it is "an affront to fundamental humanitarian principles to remove an individual to a country where he is at risk of serious ill-treatment": see *Ullah* paras [38-39].

...

28. Thirdly, in the context of a foreign case, the article 3 threshold is particularly high simply because it is a foreign case. And it is even higher where the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state, but results from some naturally occurring illness, whether physical or mental. This is made clear in para [49] of *D* and para [40] of *Bensaid*.

71. These statements of principle have obvious application in the present case.
72. More recently, the Court of Appeal considered a perhaps even more serious case in *RA (Sri Lanka) v Secretary of State for the Home Department* [2008] EWCA Civ 1210. The medical evidence relating to the appellant was summarised by Richards LJ as follows:

7. There was a body of evidence before the senior immigration judge on the subject of the appellant's mental health. It is sufficient to refer to a report by Dr David Bell, a consultant psychiatrist, who was in agreement with earlier diagnoses and gave a full assessment of the appellant's condition. Dr Bell said that the appellant was suffering from severe depressive disorder, with typical symptoms of objective features of depression, pervasive apathy, pervasive depressed mood, very poor appetite, guilt and self-blame, history of suicide attempts, disturbed sleep and morbid existential preoccupations. There were also typical symptoms of post-traumatic stress disorder, with a typical pattern of intrusive thought, noise sensitivity, flash-back phenomena, hallucinatory experiences, nightmares, avoidance of stimuli that might trigger anxiety attacks, and paranoid ideation.

A consultant psychiatrist had reported:

There is already a history of three suicide attempts and currently there is evidence of suicidal thinking. There is therefore a significant risk of suicide or self-harm currently, and I would regard that risk as moderate ....

... the threat of immediate return to Sri Lanka would bring about a "serious and precipitated deterioration" in the appellant's psychiatric state, ... The deterioration in his psychiatric state would be associated with an immediate change in the risk of self-harm/suicide, from moderate to being very high. The increased suicide risk would take place from the moment he heard of a negative determination [of his asylum claim] and would remain very high while he was awaiting removal, during removal and indefinitely thereafter.

... [the appellant] has formed very secure attachments to those immediately around him and these attachments are not of a promiscuous nature, and the figures supporting him could not be easily replaced.

... apart from the fact that appropriate psychiatric resources are not likely to be available in Sri Lanka, it is my view that [the appellant] would be most unlikely to be able to make use of them. This is because he is likely to view psychiatric personnel as agents of the state and therefore is likely to be distrustful of them.

... Given the degree of profound apathy and self-neglect that is a feature of his psychiatric state, it is also possible that in Sri Lanka his situation would deteriorate to a severe state of self-neglect and inanition and that he would die of some intercurrent infection (i.e. a less manifest suicide).

I have also been specifically asked if [the appellant] were returned to Sri Lanka whether he would be able to explain himself to the Sri Lankan authorities if he were questioned by them. It is clear to me that [the appellant] would be in such a deteriorated psychiatric state that he would be quite unable to explain himself and would also be likely to be extremely fearful of such authorities, indeed to be frankly paranoid. He would be likely to respond to questioning, however straightforward this is in reality, in an acutely paranoid way.

73. The Immigration Judge had in fact found that there would be appropriate psychiatric care for the appellant in Sri Lanka. Richards LJ addressed the requirements of Article 3 in paragraphs 47 and following of his judgment:

47. The senior immigration judge was also right to stress the particularly high threshold that has to be crossed for a claim of this nature to succeed under article 3. One of the cases to which she referred was *D v United Kingdom*, but since the date of her decision the principles in *D v United Kingdom* have been reaffirmed by the European Court of Human Rights in *N v United Kingdom* (application no. 26565/05, judgment of 27 May 2008), which was the Strasbourg follow-up to the decision

of the House of Lords in *N v Secretary of State for the Home Department* [2005] UKHL 31, [2005] 2 AC 296. The court in *N v United Kingdom* began its assessment as follows:

"29. According to the Court's constant case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 .... The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible ...."

After examining the previous case-law at some length, the judgment continued:

"42. In summary, the Court observes that since *D v United Kingdom* it has consistently applied the following principles.

Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling ....

45. Finally, the Court observes that, although the present application, in common with most of those referred to above, is concerned with the expulsion of a person with an HIV and AIDS-related condition, the same principles must apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduced life expectancy and require specialised medical treatment, which may not be so readily available in the applicant's country of origin or which may be available only at substantial cost."

49. There has been some debate in our domestic case-law as to the extent to which cases of mental illness, in particular where it is said that removal will give rise to a risk or increased risk of suicide, are analogous to cases of physical illness for the purposes of the application of article 3: see *J v Secretary of State for the Home Department* [2005] EWCA Civ 629, para

42; *R (Tozhlukaya) v Secretary of State for the Home Department* [2006] EWCA Civ 379, para 62; *AJ (Liberia) v Secretary of State for the Home Department* [2006] EWCA Civ 1736, para 15; and *CN (Burundi) v Secretary of State for the Home Department* [2007] EWCA Civ 587, paras 25-26. Mr Mackenzie contended that a material difference exists between the two types of case, since in the suicide risk case the very act of expulsion causes or may cause a deterioration in the applicant's condition whereas in the HIV/AIDS situation it is the loss of assistance or services currently enjoyed that gives rise to the issue under article 3. Whilst there may be factual differences between the two types of case, the passage I have quoted from *N v United Kingdom* makes clear, as it seems to me, that the same principles are to be applied to them both. Nor do I detect any important difference of approach in the domestic cases on suicide risk. In the present case the senior immigration judge relied both on the line of domestic authority beginning with *J v Secretary of State for the Home Department* and on the line of Strasbourg authority beginning with *D v United Kingdom*. In my view that resulted in a perfectly coherent approach, in line with the statement of principles now to be found in *N v United Kingdom*.

50. In any event I am satisfied that the senior immigration judge was entitled to conclude that the appellant's removal to Sri Lanka would not have such adverse consequences for the appellant's psychiatric condition as to reach the article 3 threshold: on her findings of fact, this could not be said to be a very exceptional case where the humanitarian grounds against removal are compelling. She was similarly entitled to conclude that his removal would not be in breach of article 8.

74. These cases were concerned with the expulsion of aliens, asylum seekers for whom this country had not accepted responsibility, rather than British nationals or residents, for whom the state does have responsibility. The position in the context of extradition was considered by the House of Lords in *R (Wellington) v Home Secretary* [2008] UKHL 72 [2009] 1 AC 335, in which the Appellate Committee considered the contention that the mandatory full life sentence faced by the claimant if extradited to the USA and convicted of the murder charges he faced there constituted inhuman or degrading punishment that would infringe Article 3 such as to make it unlawful for the Secretary of State to have ordered his extradition. The contention was rejected. Lord Hoffman, giving the leading opinion, said:

20. The next question is the application of this construction of article 3 to cases in which the whole life sentence is not imposed in the United Kingdom but is likely to be imposed in a country to which the prisoner is extradited. The leading authority on this question is the decision of the ECHR in *Soering v United Kingdom* (1989) 11 EHRR 439. That case concerned a decision by the Home Secretary to extradite the

applicant (a German citizen) to Virginia to face charges of capital murder, for which the penalty was death. The applicant did not submit that the death penalty was in itself a violation of article 3 (as the Court noted at paragraph 101, that would have been difficult to reconcile with the language of article 2(1)) but complained that the manner in which it was implemented in Virginia, namely, after long delays, was inhuman or degrading. The court accepted this submission. The Privy Council later reached a similar conclusion in *Pratt and Morgan v Attorney-General for Jamaica* [1994] 2 AC 1.

21. The United Kingdom nevertheless submitted that the Convention required it only to refrain from imposing inhuman or degrading punishments in the United Kingdom. It was not responsible for what happened in Virginia after the applicant's lawful extradition. The court accepted (in paragraph 86) that the engagement undertaken by a Contracting State was confined to securing Convention rights within its own jurisdiction and that it could not require a Contracting State, notwithstanding its extradition obligations, not to surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention:

"Indeed, as the United Kingdom Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention *and of Article 3 in particular.*" (emphasis added)

22. I have emphasised the last few words of this passage because they make it clear that in cases of extradition, article 3 does not apply as if the extraditing State were simply responsible for any punishment likely to be inflicted in the receiving state. It applies only in a modified form which takes into account the desirability of arrangements for extradition. The form in which article 3 does apply must be gathered from the rest of the judgment and subsequent jurisprudence.

23. In paragraph 88 the court distinguished between torture and other "inhuman or degrading treatment". Torture attracted such abhorrence that it would not be compatible with the values of the Convention for a Contracting State knowingly to surrender a fugitive to another State if there were substantial grounds for believing that he was in danger of being subjected to torture, "however heinous the crime allegedly committed". The position in relation to inhuman or degrading treatment is more complicated. What amounts to such treatment depends upon "all the circumstances of the case": paragraph 89. The court went on:

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

24. The passage makes it clear that the desirability of extradition is a factor to be taken into account in deciding whether the punishment likely to be imposed in the receiving state attains the "minimum level of severity" which would make it inhuman and degrading. Punishment which counts as inhuman and degrading in the domestic context will not necessarily be so regarded when the extradition factor has been taken into account.

25. The relevance of the desirability of extradition in deciding whether article 3 has been infringed is shown by the weight which the court attributed to the fact that Mr Soering, as a German citizen, could be tried in Germany. It said (at paragraph 110) that —

"[T]he Court cannot overlook either the horrible nature of the murders with which Mr Soering is charged or the legitimate and beneficial role of extradition arrangements in combating crime. The purpose for which his removal to the United States was sought, in accordance with the Extradition Treaty between the United Kingdom and the United States, is undoubtedly a legitimate one. However, sending Mr Soering to be tried in his own country would remove the danger of a fugitive criminal going unpunished as well as the risk of intense and protracted suffering on death row. It is therefore a circumstance of relevance for the overall assessment under Article 3 in that it goes to the search for the requisite fair balance of interests and to the proportionality of the contested extradition decision in the particular case."

26. The inference I would draw from this passage is that if Mr Soering could not have been tried in Germany and the court had been left with the stark choice of extraditing him to Virginia or allowing him to escape justice altogether, it would

not necessarily have decided that, in the context of extradition, the method of implementing the death penalty in Virginia made the punishment sufficiently severe to be inhuman or degrading treatment.

27. A relativist approach to the scope of article 3 seems to me essential if extradition is to continue to function. For example, the Court of Session has decided in *Napier v Scottish Ministers* 2005 SC 229 that in Scotland the practice of "slopping out" (requiring a prisoner to use a chamber pot in his cell and empty it in the morning) may cause an infringement of article 3. Whether, even in a domestic context, this attains the necessary level of severity is a point on which I would wish to reserve my opinion. If, however, it were applied in the context of extradition, it would prevent anyone being extradited to many countries poorer than Scotland, where people who are not in prison often have to make do without flush lavatories.

28. Treating article 3 as applicable only in an attenuated form if the question arises in the context of extradition or other forms of removal to a foreign state is consistent with the ECtHR's jurisprudence on the applicability of other Convention articles in a foreign context. These authorities were discussed at some length by the Lord Bingham of Cornhill in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 and led to his conclusion, at para 24, that

"While the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case."

....

35. ... even if the sentence is irreducible and might therefore contravene article 3 if imposed in the United Kingdom, there remains the question of whether it would contravene article 3 as interpreted in the context of extradition. In my opinion it would only do so if one would be able to say that such a sentence was likely, on the facts of the case, to be clearly disproportionate. In a case of extradition we are not concerned, as the Canadian Supreme Court was in *Smith v The Queen* [1987] 1 SCR 1045, with the constitutionality of the law under which the mandatory sentence is imposed. In such a case, it is sufficient to invalidate the law that it would be bound in some cases to produce disproportionate sentences. In extradition, however, one is concerned with whether in *this case* the sentence would be grossly disproportionate. The fact that it might be grossly disproportionate in other cases is irrelevant.

75. Baroness Hale and Lord Carswell agreed with Lord Hoffman's opinion that the desirability of extradition is relevant to the assessment of whether punishment will be such as would infringe rights under Article 3.
76. *Wellington*, and indeed *Soering*, are authority for the proposition advanced by Mr Fitzgerald that the possibility of prosecution of the present Claimant in this country is relevant to the assessment of the conditions he will face if extradited with his Convention rights. However, its relevance must be considered in the light of the decision of the DPP, which I consider to be both lawful and unchallengeable, not to prosecute him here, and the view of the DPP and indeed myself that the USA is the appropriate forum for his prosecution. Those facts, and the fact that his extradition would, subject only to his Convention claims, be in accordance with the extradition treaty between this country and the USA, mean that this case approaches the circumstances of *Wellington*. On the other hand, it would be unrealistic to assume that if the Claimant is not extradited, the DPP will not reconsider whether he should be prosecuted in this country. I propose to assume, therefore, that this is not a case in which the only possible prosecution of the Claimant would be in the USA. The USA is the preferable forum, but not the only forum.
77. I add that the distinction between extradition and expulsion cannot be taken too far. In *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, [2004] UKHL 26, Lord Steyn said:
33. Undoubtedly the purpose of the two procedures (extradition and expulsion) is different. The procedures serve different public interests. But in the context of the possible engagement of fundamental rights under the ECHR the Strasbourg court has not in its case law drawn a distinction between cases in the two categories: see *Cruz Varas v Sweden* (1991) 14 EHRR 1, 34, para 70. For my part I would also not do so.
- See too Lord Bingham at [33].
78. In considering the medical evidence concerning the Claimant's AS, it is important to place it in perspective. As the Secretary of State points out, despite having had AS in childhood his condition has, so far, not necessitated any type of treatment or medical intervention. He is aged 42. He faced arrest and interview by the police, arrest on an extradition warrant, an extradition hearing, the order for his extradition, and litigation in the High Court and House of Lords, all no doubt deeply stressful events without this leading to any acute events requiring intervention. Although the symptoms of his undiagnosed AS would have been manifested throughout the proceedings, there was no suggestion (until very recently) that the act of ordering, or effecting, extradition would give rise to any type of acute event (as has been the case in some of the cases dealing with severe depression). Neither the symptoms of his disorder, some of which were apparent to his close family and loved ones, nor his depression (which, according to his mother, was diagnosed "some time ago") have, until very recently, led to the Claimant being treated or to being the subject of investigation or of medical reports, let alone to an application under section 91 of the 2003 Extradition Act.

79. The difficulties encountered by the Claimant “not being able to cope with sharing a cell or fitting in with a group and being traumatised by the loud noise” apply to “many adults” with AS, yet they too may face the possibility of prison. According to the National Autistic Society, 1 in 100 children has ASD, and over 300,000 adults in the UK have ASD (which includes more serious disabilities than AS). The availability of appropriate expertise is patchy in this country, and it is not to be supposed that a prison sentence served by the Claimant in this country would not present him with difficulties. The availability of appropriate expertise here is described as “patchy”, and the same is probably true of the USA; and in both countries, it is likely that services in prison are not as well resourced as those in the community.
80. Furthermore, statements such as “suicide and self harm *can* be associated with the disorder” (see the witness statement of Mark Lever on behalf of the National Autistic Society at paragraph 20) go far short of establishing a risk of infringement of Article 3, or indeed of Article 2. Dr Juli Crocombe, a consultant psychiatrist with extensive knowledge of ASD, has made a witness statement in which she shares the concern of the NAS that the Claimant’s AS should be taken into account by the Court in these legal proceedings. She made her statement under the assumption that all or part of his sentence would be served in a supermax prison, which is not the case. What she says about the vulnerability, isolation, and the *possibilities* of his developing depression are relevant, but do not approach Article 3.
81. As the assurances from the DOJ expressly state, any sentencing court will be bound to have regard to the Claimant’s condition and to any appropriate recommendations. In an affidavit of 3 June 2009, Mr Michael Nachmanoff, a Federal Public Defender for the Eastern District of Virginia, states:

With respect to the likely sentence that Mr. McKinnon may face if convicted in the United States District Court for the Eastern District of Virginia, it is difficult to predict with certainty what the term of imprisonment would be. The court will sentence Mr. McKinnon pursuant to 18 U.S.C § 3553(a), which directs the Court to impose a sentence that is “sufficient but not greater than necessary” to comply with the purposes of sentencing. In determining the appropriate sentence, the Court is required to consider the nature and seriousness of the offense, the history and characteristics of the defendant, the need to avoid unwarranted disparities in sentencing, the United States Sentencing Guidelines, the need for protection of the public, deterrence, and rehabilitation of the defendant.

Apart from the reference to the US Sentencing Guidelines, these principles are not different from those that would apply in this country. There is no real doubt, in my judgment, that the sentence that will be imposed by the US Courts will take account of his diagnosis of AS and the difficulties that he will in consequence face in a US prison. In addition, if, as I assume, the US authorities will not agree to his repatriation, that is a matter that should be taken into account by the sentencing judge.

82. The Claimant submits that the delay in his extradition since 2002 is to be taken into account. However, that delay has largely been due to his own action in resisting extradition. While, of course, infringement of his Article 3 rights cannot be justified by delay, that delay cannot, in these circumstances, cause extradition that would not otherwise infringe his Convention rights to infringe those rights.
83. The evidence of Phillip S. Wise, a retired Assistant Director of the Federal Bureau of Prisons, in a statement dated 9 April 2009 filed on behalf of the Claimant, is also significant. He points out that there is no officially sanctioned specific protocol for the treatment of AS. He noted that neither Dr Berney nor Prof Baron-Cohen provided a treatment plan or outline of services that are now required by the Claimant or would be required by him when detained in the USA, and the somewhat variable nature of the evidence of the risks said to be engendered. Mr Wise gives considerable detail of the assistance that would be available. He said:

The mental health professionals on staff in other BOP facilities are generally doctoral level psychologists and/or treatment specialists associated with specific treatment programs. In addition, most facilities have access to psychiatrists through contract with local practitioners who are willing to treat inmates. Inmates are initially screened by medical staff within 24 hours of arrival at a facility, and if mental illness is apparent, are referred to psychology services. Within two weeks, new arrivals are screened by a member of the psychology services department. Bureau of Prisons policy requires that:

Psychology Services staff are responsible for the assessment and treatment of mentally ill inmates. This responsibility is shared with other trained mental health staff, such as a psychiatrist, if one is available. A treatment plan should be formulated and executed for all inmates diagnosed with significant mental disturbance.

(Bureau of Prisons Program Statement 5310.12 Psychology Services Manual, March 7, 1995)

Referring to the treatment for the Claimant in prison, he said:

Should Mr. McKinnon be committed to a Bureau of Prisons facility, he would arrive with the diagnosis of Asperger's Syndrome, which would be noted both at intake screening by medical staff and at screening by psychology staff within the first two weeks of incarceration. Though some initial assessment of his deficits is likely through document review and interview, it is unlikely that the full assessment as described by the Yale guidelines, including neuropsychological assessment and assessment by a communications special would be undertaken. A treatment plan providing for crisis intervention, brief counseling, and supportive assistance with

practical behavioural issues as they arise through the course of conferment is likely. Such intervention would be geared primarily to assisting with adaptation to the correctional environment specifically relating to institution rules, disruptive or potentially disruptive behaviour, and functioning within the prison culture, particularly communication issues within the prison setting. It may well be determined that Mr. McKinnon will need to learn a completely different set of communication strategies for the prison setting compared with the normal social setting.

84. The experience of Mr Bermingham, set out in his witness statement of 14 May 2009, must be taken as possibly qualifying that of Mr Wise. He states that during his detention in the Federal Correctional Institution in Lompoc, California, he was not aware of any inmate receiving treatment for medical or psychological conditions. Nonetheless,

... the common perception of murder, extreme violence and gang rape is not an accurate portrayal of Federal Prisons and particularly not at the lower end of the security spectrum. During my time in Lompoc I am not aware that any inmate was sexually assaulted and violent incidents were not commonplace.

He adds:

However, more than one inmate had to be placed in the Special Housing Unit for their own protection at various times.

85. We also have the evidence of Joel Sickler, an American criminologist working in the field of corrections. His cogent evidence would undermine the assurances given by Ms Warlow, but it is difficult to reconcile it with the evidence of Mr Wise. Perhaps more importantly, Mr Sickler's evidence was served too late for the Secretary of State to be able to respond to it.
86. In assessing, as Mr Fitzgerald asks us to do, whether the Claimant's extradition would risk his being subjected to treatment that would infringe his Article 3 rights, we must of course have regard to the likely length of his sentence if convicted, the possible circumstances of his incarceration, his health and mental condition, and the possibilities of the grant of bail pending trial and of repatriation after sentence to serve his sentence in this country, where he would be closer to family, friends and his partner. As to these, the House of Lords assumed a sentence following conviction of eight to ten years or more in a US high security prison with remission of only 15%. As I have mentioned, it is now accepted that he would not have to serve his sentence in a supermax prison. More importantly, it is by no means certain that if extradited the Claimant will not plead guilty to one or more of the charges against him. I accept that,

given his resistance to his extradition, this Court should assume that the Claimant would not be granted bail pending trial in the USA.

87. I also accept that the affidavit of Mr Wiechering does not contain any express assurance that the US authorities will agree to the Claimant's repatriation following conviction and sentence; and his repatriation would require their agreement, and not merely their lack of objection. Moreover, it does not exclude an objection being made to repatriation on grounds other than his refusal to consent to extradition. I think it may be over-cynical to read his affidavit as indicating that the US authorities will preclude repatriation by insisting that they only undertook not to object, and did not undertake to agree, to repatriation. Nonetheless, there is clearly a real risk that he will not be repatriated.
88. Despite the comments of Dr Berney and Mr Sickler, in my judgment the Court should treat the assurances given by the US Department of Justice in Ms Warlow's letter of 26 February 2009 as having substantial value. Certainly, the Secretary of State was and is entitled to do so. Of course, these assurances do not amount to cast-iron guarantees of appropriate care during the Claimant's sentence. But they are the considered assurances of a friendly state, indeed of a state with which this country has close relations. They are wholly inconsistent with his treatment approaching the severity to which Article 3 applies.
89. Ultimately, I have to weigh the impressive medical evidence adduced by the Claimant against the severity involved in Article 3. I have no doubt that he will find extradition to, and trial and sentence and detention in the USA, very difficult indeed. His mental health will suffer. There are risks of worse, including suicide. But if I compare his condition with those considered in the authorities to which I have referred above, even taking full account of the (in my view undesirable) possibility of his being prosecuted in this country, his case does not approach Article 3 severity.
90. There remains the question whether, as Mr Fitzgerald submits, the Secretary of State was and is under a duty to seek assurances from the US authorities as to the grant of bail pending trial and a clearer and more reliable assurance of repatriation after conviction. He submits that the Secretary of State is under that duty in order to reduce the risk of an infringement of Article 3 rights.
91. I readily accept that if it were shown that without an assurance of bail pending trial there would be a real risk of an infringement of Article 3, the Secretary of State would be under a duty not to extradite unless that assurance were forthcoming; and the same applies to repatriation. But I see no basis for a duty to seek an assurance which might or might not be forthcoming. And since I have concluded that even without bail and repatriation, there is no real risk of an infringement of Article 3, there is no basis for the duty contended for by Mr Fitzgerald.
92. In these circumstances, I do not consider that the Secretary of State's decision letter contained any error of law. As I have mentioned, much of the letter was in any event

concerned with the now abandoned contention that the Claimant would have to serve his sentence in a supermax prison.

## Article 8

93. The Divisional Court refused the Claimant leave to apply for judicial review on the ground of breach of Article 8. He seeks to renew that application. He has difficulties in doing so, for procedural reasons: he requires permission under CPR Part 54.15, which normally, but not necessarily, will be granted only if there has been a change in circumstances since the permission hearing: see *Smith v Parole Board* [2003] EWCA Civ 10. In any event, however, I agree with the conclusion of the Divisional Court on the permission application that, having failed under Article 3, the Claimant cannot succeed under Article 8, because his extradition is justified under Article 8.2 and is a lawful and proportionate response to his alleged offending. I am fortified in this conclusion by what was said by Lord Carswell (with whom Lord Steyn and Baroness Hale agreed) in *Ullah*:

68. The ECtHR has consistently stated that before any article of the Convention other than article 3 could be regarded as engaged, it would require an extremely serious breach of the provisions of that article. In *Soering v United Kingdom* it said at p 479, para 113 of its judgment:

"The Court does not exclude that an issue might exceptionally be raised under article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country."

69. The adjective "flagrant" has been repeated in many statements where the Court has kept open the possibility of engagement of articles of the Convention other than article 3, a number of which are enumerated in paragraph 24 of the opinion of Lord Bingham of Cornhill in the present appeal. The concept of a flagrant breach or violation may not always be easy for domestic courts to apply - one is put in mind of the difficulties which they have had in applying that of gross negligence - but it seems to me that it was well expressed by the Immigration Appeal Tribunal in *Devaseelan v Secretary of State for the Home Department* [2003] Imm AR 1 at p 34, para 111, when it applied the criterion that the right in question would be completely denied or nullified in the destination country. This would harmonise with the concept of a fundamental breach, with which courts in this jurisdiction are familiar.

See too Lord Bingham at [24].

94. The refusal of permission to apply for judicial review on the Article 8 ground would preclude any appeal to the Supreme Court (as it will be) on that ground. The grant of permission with a dismissal of the claim would permit the Claimant to apply to us to certify a point of law of general public importance and to apply to this Court or to the Supreme Court for leave to appeal. Since the hearing of the Claimant's application for judicial review the House of Lords has granted leave to appeal to Ian Norris, the claimant in *Norris v the Government of the USA and the Secretary of State for the Home Department* [2009] EWHC 995. The Divisional Court in that case had certified a point of law of general public importance, namely:

Is the public interest in honouring extradition treaties such as to require, in any extradition case, that an appellant must show 'striking and unusual facts' or reach 'a high threshold' if the Article 8 claim is to succeed?

95. But for the grant of leave to appeal in *Norris*, I would have refused to grant permission to apply for judicial review on the Article 8 ground. However, in these unusual circumstances, we propose to allow the parties to present further submissions on the question whether we should grant permission for judicial review on Article 8, while refusing judicial review on that ground.

### **Conclusion**

96. For the above reasons, I would dismiss the claim for judicial review of the Secretary of State's decision.

### **Mr Justice Wilkie**

97. I agree.