Neutral Citation No: [2021] NIQB 36	*Ref:* **McC11464**
	ICOS No:
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **31/03/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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IN THE MATTER OF AN APPLICATION UNDER THE EXTRADITION ACT 2003

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BETWEEN:

JONAH HORNE

Appellant;

-and-

UNITED STATES OF AMERICA

(No.2)

Respondent.

_____

Before: McCloskey LJ and McFarland J

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Representation

Appellant: Mr Frank O'Donoghue QC with Mr Sean Doherty of counsel, instructed by Gillen & Co Solicitors
Respondent: Mr Tony McGleenan QC with Mr Stephen Ritchie of counsel, instructed by the Crown Solicitor

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McCloskey LJ (giving the judgment of the court)

Preface

This is the ruling of the court determining the appellant's application to have fresh evidence admitted in these appellate extradition proceedings.

The Proceedings

[1] The Requesting State is the USA. Pursuant to a warrant dated 12 November 2016 issued by the Fifteenth Judicial Circuit Court the extradition of Jonah Horne (*"the appellant")* on the charge of second degree murder with a firearm is sought. It is alleged that on 7 June 2016 in the context of a drugs dispute, the appellant shot and mortally wounded Jacob Walsh (*"the deceased")* when in the passenger seat of a vehicle at Boca Raton, Florida, USA.

[2] The appellant's resistance to his extradition is based on three grounds:

(i) While the maximum sentence in the State of Florida for second degree murder with a firearm is life imprisonment, it is contended that there is a real risk that if extradited the appellant will be charged with first degree murder on the same alleged facts and subjected to the death penalty if convicted, in contravention of his rights under Article 2 and Article 3 ECHR.

(ii) Secondly, although it is accepted that the imposition of a sentence of life imprisonment on an adult offender is not, in itself, prohibited by any article of the Convention, it is submitted that the real possibility of an irreducible life sentence is incompatible with his Article 3 Convention rights. For a life sentence to remain compatible with Article 3, there must be both a prospect of release and a possibility of review. It is submitted that no review mechanism exists.

(iii) Thirdly, it is submitted that the conditions in Florida prisons are such that there is a real risk that he would be subjected to torture, inhuman or degrading treatment if returned which would be incompatible with his Article 3 Convention rights.

[3] In [4] – [11] following we gratefully adopt the narrative in the judgment of the single judge, Colton J.

[4] The matter first came before Her Honour Judge Smyth (*"the judge")* on 29 August 2018. In a detailed written judgment, she dealt with each of the issues raised by the applicant. In relation to the first issue, she determined that in the absence of an adequate assurance within 14 days that the applicant would not be charged with first degree murder, or that, in the event of his conviction for that offence, the death penalty would not be sought, the applicant would be discharged.

[5] In relation to the second objection, the judge concluded that the arrangements within the Requesting State for clemency or commutation of a life sentence were not

Article 3 compliant. She did provide the Requesting State with an opportunity to provide an adequate assurance which would safeguard the applicant's Convention rights in the event of his conviction and the imposition of a life sentence. Unless an assurance was received within 14 days, she ordered that the requested person would be discharged.

[6] In relation to prison conditions, the judge rejected the applicant's submissions and she concluded that:

> "*I therefore am not satisfied that extradition would not be compatible with the defendant's Article 3 rights on the grounds of prison conditions in the Requesting State.*"

[7] Following the receipt of further assurances, the appropriate judge delivered an addendum judgment on 8 March 2019. She was satisfied that the assurances regarding a potential death sentence were such as to mitigate the relevant risks and the applicant's submission on this ground was rejected.

[8] However, the judge remained dissatisfied with the assurances given in relation to the potential sentence of the applicant in the event of his conviction. She therefore required the Requesting State to provide an assurance within 14 days that the applicant would not be imprisoned for more than 40 years, regardless of whether a longer sentence is imposed, otherwise he would be discharged. The requesting authority declined to give such an assurance and the judge therefore made an order discharging the applicant.

[9] The Requesting State appealed the order of discharge. The appeal was allowed by a Divisional Court of the High Court on 20 December 2019, which pursuant to section 106 of the 2003 Act quashed the order for a discharge, remitted the case to the judge and directed her to proceed as she would have been required to do if she had decided the question differently at the extradition hearing.

[10] The matter was listed again before the judge on 24 January 2020 who in accordance with section 87 of the Extradition Act 2003 and the decision of the Divisional Court directed the case to be sent to the Secretary of State for a decision as to whether the applicant should be extradited and remanded the applicant in custody.

[11] A letter was received from the Home Office on behalf of the Secretary of State, dated 9 March 2020 in which it is outlined that the Secretary of State was of the opinion that she was not prohibited from ordering the applicant's extradition on any of the grounds set out in section 93(2) of the Extradition Act 2003. As a result, the Secretary of State ordered Mr Horne's extradition to the United States pursuant to section 93(4) of the Extradition Act 2003 on 8 March 2020.

[12] On 20 March 2020, the applicant lodged a notice of appeal challenging both the decision of the judge and the order of the Secretary of State.

The Relevant Statutory Provisions

Section 103 of the Extradition Act 2003

[13] Under sub-section (1):

> "*If a judge sends a case to the Secretary of State under this part for his decision whether a person is to be extradited, the person may appeal to the High Court against the relevant decision*."

Sub-section (3) explains the relevant decision being the decision that resulted in the case being sent to the Secretary of State. Sub-section (4) states that an appeal under this section may be brought on a question of law or fact but "*lies only with leave of the High Court*". Sub-section (9) provides:

> "N*otice of Application for leave to appeal under this section must be given in accordance with rules of court before the end of the permitted period, which is 14 days starting with the day on which the Secretary of State informs the person under Section 100(1) or (4) of the order he has made in respect of the person.*"

Section 108 – Appeals against an Extradition Order

[14] Under this section if the Secretary of State orders a person's extradition the person may appeal to the High Court against the order. Sub-section (3) provides that an appeal under this section may be brought on a question of law or fact but "*but lies only with leave of the High Court*".

Grounds of Appeal

[15] The grounds of appeal to this court are:

(i) The judge and the Secretary of State by accepting the assurances provided by the State Attorney and the diplomatic note regarding the death penalty as sufficient erred in law and fact. The assurances do not sufficiently militate against the risk as in particular they do not bind elected successors at the State Attorney's Office. Given the importance of the protection afforded by the ECHR regarding the death penalty the court should proceed with caution and request assurances of a nature that had been provided in relevant and comparable previously adjudicated cases in the UK.

(ii) The judge and the Secretary of State erred in their determination that the speciality arrangements are adequate for the purposes of section 95 of the Act. In the particular circumstances of this case the speciality arrangements as disclosed in Article 18 of the Treaty are not adequate for the purposes of 95(4)(b) and that they would not prevent the prosecution of the appellant on account of first degree murder.

(iii) The judge and the Secretary of State erred in the determination that the appellant's extradition would not be incompatible with his rights as per Article 3 of the Convention as a consequence of prison conditions in the State of Florida. It is submitted that the material conditions alone, with most prisoners housed in over-crowded dormitories without air conditioning do not meet the minimum requirements as per the ECHR jurisprudence. In the absence of any appropriate assurances required in relation to such conditions the appeal should be allowed and the appellant discharged.

First Ground of Appeal – Death Penalty Assurances

[16] At [16] – [22] of his judgment Colton J rejected this ground in the following terms:

> *"It is clear from the Judge's judgment that she considered the appropriate case law and took into account the relevant considerations. This ground turns on whether or not the assurances provided both to the Appropriate Judge and the Secretary of State were adequate. The Appropriate Judge was clearly alive to the risk of a death penalty being imposed which would have required the applicant on his extradition being charged with a different offence from the one upon which he was extradited. She took the precaution of seeking further assurances failing which she indicated that she would discharge the applicant.*
>
> *In response to this request the Requesting State furnished a diplomatic note dated 10 September 2018 with two letters attached dated 7 September 2018 from the State Attorney's Office of Palm Beach County in which assurances were received. The diplomatic notes states:*
>
> > *'The Government of the United States assures the Government of the United Kingdom that a sentence of death will neither be sought nor imposed on Horne should he be extradited to the United States. The United States is able to provide such assurance*

> *as Horne is not charged with a death penalty eligible offence, and the Prosecutor's Office for the State of Florida has provided an assurance that he will only be tried for the offence of second-degree murder for which he is presently charged and for which his extradition is sought …'"*

A letter from the State Attorney, dated 7 September 2018 also gave an assurance that:

> *"The defendant will not be tried for any offence other than the one for which he is presently charged and for which extradition is sought. The State of Florida will not seek the death penalty in this case nor will the death penalty be imposed. This assurance is binding on all future prosecutors in the State of Florida."*

Further in a letter dated 9 March 2020 outlining the decision of the Secretary of State it is stated:

> *"There is no instance of any assurance given by the United States, as the Requesting State pursuant to an extradition treaty, having been dishonoured."*

In the judge's addendum judgment she states at paragraph [15]:

> *"Given the long history of reliable assurances from the Requesting State, I am satisfied that the assurances regarding a potential death sentence is such as to mitigate the relevant risks sufficiently."*
>
> *It is also clear that similar assurances were persuasive when the issue of the length of the Appellant's sentence was considered by the Divisional Court.*
>
> *Clearly the Judge and the Secretary of State were entitled to rely on these assurances as being adequate in the words of the 2003 Act and sufficient to guard against any risk of a breach of the applicant's Article 2 or Article 3 Convention rights in terms of the imposition of the death penalty should the applicant be convicted. I do not consider that any error of law or fact in relation to either the decision of the Appropriate Judge or the Secretary of State has been demonstrated."*

Second Ground of Appeal – Speciality Arrangements

[17] Section 95 of the Extradition Act 2003 requires that the Secretary of State must not order a person's extradition to a category territory if there are no speciality arrangements within the category 2 territory (the USA is a category territory for the

purposes of the Act). The speciality arrangements between the UK and the USA are set out in Article 18 of the Extradition Treaty dated 31 March 2003. Article 18 states:

> "*(1) A person extradited under this Treaty may not be detained, tried, or punished in the Requesting State except for:*
>
> *(a) Any offence for which extradition was granted, or a differently denominated offence based on the same facts as the offence on which extradition was granted, provided such offence is extraditable, or is a lesser included offence*."

[18] The appellant contends that the Extradition Treaty would not prohibit his prosecution in the State of Florida for the offence of first degree murder as it would be a "*differently denominated offence based on the same facts upon which extradition was granted, provided such offences extraditable*." Therefore, the argument runs, the speciality arrangements that exist between the UK and the USA do not meet the requirements of section 95 as they do not prohibit the prosecution of an extradition offence disclosed by the same offence in respect of which a sentence of death could be imposed.

[19] Colton J noted that the judge had sought appropriate assurances. The judge had also considered the judgment of the Lord Chief Justice of England and Wales in the case of ***Roger Alan Giese v The Government of the United States of America*** [2018] EWHC 1480 (Admin). Paragraphs [37] – [39] of that judgment are in these terms:

> *"37. In extradition proceedings there has been a long history of the United Kingdom seeking and being provided with assurances that a requested person will not be subject to the death penalty if convicted. Assurances are commonly given in respect of conditions of detention and may be provided in connection with Article 5 and Article 6 concerns. Such assurances form an important part of extradition law …*
>
> *38. The overarching question is whether the assurance is such as to mitigate the relevant risks sufficiently. That requires an assessment of the practical as well as the legal effect of the assurance in the context of the nature and reliability of the officials and country giving it. Whilst there may be states whose assurances should be viewed through the lens of a technical analysis of the words used and suspicion that they will do everything possible to wriggle out of them, that is not appropriate when dealing with friendly foreign governments of states governed by the rule of law where the expectation is that promises given will be kept. The principles identified*

> *in **Othman**, which are not a check list, have been applied to assurances in extradition cases in this jurisdiction. A court is ordinarily entitled to assume that the state concerned is acting in good faith in providing an assurance and that the relevant authorities will make every effort to comply with the undertakings …*
>
> *39. The court may consider undertakings or assurances at various stages of the proceedings, including on appeal, see **Florea v Romania and Giese (No.2)** and the court may consider a later assurance even if an earlier undertaking was held to be defective."*

[20] The judge found the assurances provided by the US Government on the death penalty issue satisfactory. On the issue of speciality, the judge noted the Secretary of State's statement in her letter that "… *the US authorities considered themselves bound by the special provision."* The judge then considered two decisions of the English High Court, namely *Welsh and Thrasher v SSHD/Government of USA* [2006] EWHC 156 (Admin) and *Bermingham and Others v SSHD/Govt of USA* [2006] EWHC 200 (Admin). In those cases, the court found nothing to indicate that the speciality doctrine is not applied by the USA or that the arrangements with the USA required by section 95 are not in place.

[21] The appellant's case was that the factual situation was different in those cases, in which it was argued on behalf of the requested persons that there was a risk of superseding indictments alleging crimes for which extradition had not been ordered or in respect of which extradition had been refused. His case in essence was that the Treaty is inadequate as it would not preclude his trial for an offence of first degree murder thereby exposing him to the risk of the death penalty. Such a prosecution would be lawful within the terms of the Treaty but contrary to section 95(4)(b) of the 2003 Act which provides:

> "*(1) The Secretary of State must not order a person's extradition to a category 2 territory if there are no speciality arrangements with the category 2 territory (USA is a category territory for the purpose of the Act) - …*
>
> *(4) The offences are –*
>
> *… (b) an extradition offence disclosed by the same facts as that offence, other than one in respect of which a sentence of death could be imposed*."

[22] Colton J rejected this ground of appeal at [36], in these terms:

"It seems to me that similar to the considerations in relation to Ground 1 this matter has to be looked at in the context of the very specific assurances which have been given by the authorities in the Requesting State and by the considerations set out by the Lord Chief Justice in the ***Giese*** *case. These matters have clearly been considered by the Appropriate Judge and by the Secretary of State and I do not consider that any error of fact or law can be established in relation to their decision on this issue."*

Third Ground of Appeal – Prison Conditions

[23] Colton J, at [38] ff, dismissed this ground in the following terms:

"On this issue the Appropriate Judge has considered the relevant case law and carefully considered all the evidence that was placed before her. The Appropriate Judge also had the benefit of oral evidence on this point…

She acknowledged the difficulties in assessing this argument in the absence of a similar organisation such as the Committee on the Prevention of Torture and Inhuman Treatment (CPT) which deals with similar issues in relation to prisons in Europe…

She also expressly considered the individual circumstances of the applicant and his history of mental illness which might make him more vulnerable to solitary confinement and attack in prison…

In her conclusion she accepts that prison conditions in Florida are harsh. She was well placed to make an assessment on the Article 3 arguments on this issue. She accepted that there had been improvements in the prison regime there and that the affidavit from prison officials set out the standards now expected within the system. Whilst she accepted that concerns may continue to exist she concluded that a court is ordinarily entitled to assume that the State concerned is acting in good faith when it provides evidence of the steps it takes to safeguard the health and welfare of prisons. She was satisfied in light of the affidavit submitted by the Requesting State that there was no basis for suggesting that it did not take appropriate steps to protect its prisoners…

On this issue the Secretary of State paid due weight to the assessment of the Appropriate Judge and concluded that no

> *prohibition arises in relation to the applicant's extradition on this issue…*
>
> *In light of the Appropriate Judge's careful consideration of the authorities and the material submitted by the parties I do not consider that any error of law or fact can be established either in relation to her decision or that of the Secretary of State."*

The Renewed Application for Leave to Appeal

[24] The appellant, exercising his statutory right, has renewed his application for leave to appeal. During the case management phase, some regrettable delay has arisen associated with a change of legal representation and the discrete issue with which this judgment is concerned.

[25] The court proactively identified an issue, preliminary and procedural in nature, arising out of the appellant's proposed reliance on certain new evidence, namely a report, in the format of a "*declaration*" of one Paul Wright. The appellant seeks to invoke this report as expert evidence. The primary question for the court is whether Mr Wright has the credentials of an expert witness.

The Adduction of Fresh Evidence

[26] The procedural arrangement devised for the purpose of determining this issue had several features. First, the parties exchanged helpful written submissions. Second, the court provided the parties with an excerpt from its draft judgment in the case of *Dusevicius and Michailovas v Lithuania* dealing with the relevant provisions of the Extradition Act 2003, i.e. sections 26 and 27, which regulate the topics of appeals against extradition orders and this court's powers on appeal respectively. (In passing, the constitution of the court in both cases is the same.) Thirdly, the court convened a live link hearing at which Mr Wright gave evidence. He was examined in chief under affirmation, cross examined and questioned by the court. This hearing was attended by *inter alios* members of the family of the deceased.

[27] The central purpose of the said hearing was to determine whether Mr Wright's report should be admitted as expert evidence. This telescoped further to the question of whether Mr Wright has the credentials of an expert witness vis-à-vis the contents of his report.

[28] Mr Wright was engaged by the appellant's solicitors for the purpose of bolstering the third of the grounds of appeal rehearsed in [2] above, namely the Article 3 ECHR ground focusing on the appellant's predicted conditions of incarceration in the event of his extradition to the State of Florida and ensuing trial and conviction of the alleged murder. One notable feature of the context in which he was thus engaged is that at the first instance hearing giving rise to the original

appeal to this court, expert evidence from a different person, one Professor Ross of the University of Baltimore, was adduced.

[29] The application to adduce Mr Wright's report in evidence has evolved. In its original incarnation, it consisted solely of the report. Mr Wright's report has the following features:

(i) It discloses no academic qualifications of any kind.

(ii) It contains no expert's declaration.

(iii) It discloses nothing about Mr Wright's experience as an expert witness in other cases or contexts, with the exception of a couple of bare and unparticularised assertions.

Omission (iii) was purportedly rectified at a late stage.

[30] In his report, Mr Wright avers that he holds a BA degree in Soviet History and Government. He was imprisoned between 1987 and 2003 for first degree felony murder. He served his sentence in a penitentiary in the State of Washington. He founded "Prison Legal News" ("PLN") during this period. He avers that he has conducted thousands of radio and television interviews, both national and international. He has been a frequent speaker at conferences and workshops in the US and Canada. He further avers:

> "*Over the past 30 years I have testified via affidavit, deposition and in person in hundreds of court proceedings including trials around the United States in state and federal courts in matters related to conditions of confinement around the United States …*
>
> *While I am an expert on prison and jail systems throughout the United States I am extremely knowledgeable about the Florida state prison system. I was born and raised in Florida and have lived in Florida as a full-time resident since 2013. I have written and published extensively on the* [FDOC] *….*
>
> *The observations and statements contained in this declaration are based on my first-hand experience with the* [FDOC] f*rom 1990 to the present; corresponding and speaking with dozens of prisoners who have been imprisoned within the Florida prison system and conditions in that system* [sic]*; reading thousands of articles, court opinions, legislative reports, audits and similar documents related to issues and conditions within the prison system and 30 years of reporting on those conditions in PLN and other media and platforms. I have also interacted with*

> *FDOC officials and their attorneys professionally over the past 20 years.*"

[31] Mr Wright's report has some 500 pages of attachments. Many of these are articles published in PLN, a publication founded by him in 1990 and of which he is the editor. The selection of PLN articles exhibited indicates the broad spectrum of its coverage. Most of the other exhibits consists of articles published in sundry state newspapers and other outlets. The exhibits also include a decision of the US Supreme Court, *Farmer v Brennan*, 511 US 825 (1994). All of these materials, in one way or another, relate to conditions in various prisons throughout the US and describe allegations of *inter alia* violence and rape among inmates, prison warden brutality, deaths in prison (including suicide), deplorable cell conditions and inadequate facilities generally.

[32] One discrete section of the exhibits documents awards received by Mr Wright for his journalism and prisoner rights advocacy. These materials describe Mr Wright as the founder and Executive Director of the "Human Rights Defence Centre" (HRDC") the co-author of three PLN anthologies and the author of articles which have appeared in over 80 publications. Within these materials, one of the descriptions of Mr Wright is "*… a journalist and prisoner rights advocate …* [who] *… has worked to battle censorship efforts to ensure incarcerated people receive access to* [PLN] *and its many resources*". This court has noted, in this context, the successful legal challenge brought by PLN against the Florida Department of Corrections ("*FDOC*").

[33] In substantive terms, Mr Wright's report asserts the following about the Florida prison system: widespread violence; medical neglect and inadequate mental health treatment; abnormally high rates of fatalities from murder, suicide and medical neglect; disproportionately high numbers of Covid 19 sufferers coupled with inadequate preventive and treatment measures; inadequate activities and programmes for inmates; high levels of physical and sexual assault; "*a rampant culture of murder and brutality by guards*", with associated impunity; inadequate staffing; religious and racial discrimination; excessive solitary confinement; forced labour; limited legal and constitutional redress; and the recruitment of unlicensed medical practitioners.

[34] Mr Wright's report concludes in the following terms:

> "*In summary, Mr Horne faces substantial risk of inhuman and degrading treatment, to include physical violence, sexual assault, solitary confinement and discrimination if he is imprisoned in the FDOC* [which] *is both incapable and unwilling to guarantee the safety of any of the prisoners in its care and custody and the State governors office and legislature are equally unconcerned about this state of affairs which has festered for decades and, if anything, worsened as prison employees have grown accustomed to total impunity and zero*

> *accountability regardless of what happens to prisoners in their care and custody …*
>
> *Florida State prisons have high levels of physical and sexual violence and cannot guarantee the physical safety of the prisoners in their care and custody nor their medical care. This assumes Mr Horne has no physical illnesses or mental health issues requiring treatment while he is incarcerated."*

[35] The following matters in particular emerged out of Mr Wright's evidence under affirmation to this court:

(i) He has never been an inmate in a penitential institution of the FDOC.

(ii) He is not the author of any academic works or publications.

(iii) PLN is not a peer reviewed academic journal.

(iv) There are no academic contributors to the PLN articles contained in his bundle of exhibits.

(v) He has not published anything resulting from or relating to original, empirical or statistical research.

(vi) He is not aware of any research material relating to FDOC prison conditions.

(vii) He has never held an academic position.

(viii) During a period of many years he has been frequently consulted by national and international media about issues pertaining to the US criminal justice system.

(ix) He offered no explanation for containing no commentary on the report of Professor Ross in his report.

(x) He has never been inside a FDOC prison, whether as an observer or otherwise.

(xi) His last experience inside a prison was in a Massachusetts state establishment around ten years ago.

[36] Mr Wright also answered some questions from the court relating to the formalities concerning his declaration. He did not explain why, on its face, it was "*sworn*", in circumstances where his evidence to this court was on affirmation rather than under oath at his choice. Although the "swearing" occurred (again on its face)

as recently as 3 February 2021, his description of how this occurred was at best bare. He confirmed that the Notary Public whose stamp and apparent signature appear on the final page of the document did not read it to him, nor was it read by him to her. He was distinctly uncertain about whether he had emailed the document to this person in advance. He confirmed that this person had not questioned him about any of the contents. He made no mention at all about the 500 page bundle of exhibits on the occasion of the "swearing." He stated that the identified Notary Public is a paralegal who has been employed in his organisation for some five or six years and that she has been involved in this exercise with him around a dozen times altogether.

[37] The court paid particular attention to one question to Mr Wright, which had to be repeated, in examination in chief by Mr O'Donohue QC. The question related to a further document compiled by him providing particulars of legal proceedings in which he has given evidence. He was asked whether he had given such evidence as a witness of fact or witness of opinion. He was unable to answer the question initially and it had to be repeated. The essence of his answer then was that he had done so primarily as a witness of fact. He provided no elaboration. It appeared to both judges that Mr Wright did not really understand the distinction – which, we would add, had quite properly been raised in Mr O'Donohue's question.

[38] Mr Wright has abundant confidence in his credentials *qua* expert witness. In his declaration he avers, for example, that he is -

> "*… considered to be one of the most knowledgeable experts on prison issues and conditions in the United States.*"

The topics upon which he asserts that he has testified before State legislatures (unidentified) and federal regulatory agencies (again unidentified) are "*government transparency, press freedom, medical care for prisoners …* [and] *… the communication rights of prisoners and their families.*" The topics upon which he has spoken to "*hundreds"* of conference *et al* are "*criminal justice related issues*", unparticularised and unevidenced in the 500 page bundle of exhibits. The subjects of his "*thousands of radio interviews, television interviews and appearances*" he describes as "*issues related to prison conditions, human rights and the American criminal justice system*". The kind of litigation which HRDC has brought is described as cases "*… relating to freedom of speech, transparency issues as well as wrongful death and physical injury cases.*" The testimony which he claims to have given in "*hundreds of court proceedings*" relate to "*conditions of confinement around the United States*", again unparticularised.

[39] It is necessary to examine one of his particular claims with a little care. One of the paragraphs in his declaration begins with the averment:

> "*While I am an expert on prison and jail systems throughout the United States* ***I am extremely knowledgeable about the Florida state prison system****."*

[Our emphasis.]

The supporting averments are: he was born and raised in Florida; this state has been his permanent residence since 2013; he has written and reported extensively on the FDOC; and HRDC has twice sued the FDOC for the censorship of its publications. The limitations of all of these averments require no elaboration.

[40] Furthermore, there is a striking error in his averment about the litigation brought by HRDC. In making this averment Mr Wright refers specifically to the "*judgments at pages 107 – 165 of the bundle*". These are judgments in cases against the FDOC brought by PLN. This is no minor or casual error. In his declaration, Mr Wright has made a very clear distinction between the two entities. Furthermore, these judgments are remote from the issues in the present appeal. Finally, though cross-examined by Mr McGleenan QC about this specific topic, Mr Wright attempted no rectification or elaboration.

[41] Other averments made by Mr Wright in his declaration are, as a minimum, puzzling. His "super expertise" (the court's phrase) relating to the Florida State Prison System is based on having lived in the State of Florida for eight years since his release from prison, what he has written about the FDOC and his claim that HRDC has twice sued FDOC for the censorship of its publications: see paragraph 27 of the declaration. To these credentials he adds, in paragraph 28, his unspecified "*interaction*" with FDOC officials and their attorneys, his conversations with unspecified prisoners on unspecified dates, his reading of "*thousands of*" unspecified documents relating to "*issues and conditions within the prison system*" (note: not the Florida prison system) and his extensive writings in PLN. He then claims that his experience with the FDOC is "*first-hand*", without elaboration.

[42] The court is also concerned that there is no attempt in Mr Wright's declaration to discriminate between bare assertion and proven or demonstrable fact. Most of his assertions and descriptions are couched in the most general terms. Furthermore, there is not the slightest critical engagement with the exhibited sources of what he puts forward as supporting evidence, in his 500 page bundle. Nor is there any engagement with the substantial affidavit evidence, all of it bearing on the issues raised in his declaration and exhibits and much of it contradicting his claims and assertions, generated in the lengthy history of these appeal proceedings.

[43] We have already drawn attention to the manifest lack of particularisation, specificity and elaboration in Mr Wright's declaration. This is the very antithesis of what one would expect to find in the report of an expert. Other hallmarks of an expert's report are nowhere identifiable: objectivity, detachment, moderate language, analysis and critical engagement with all of the supporting material. Furthermore, the declaration is replete with hyperbole. Arguably the stand out illustration of this is his bare claim that every one of the 320 "*natural*" deaths in the FDOC prison system in the fiscal year 2019/2020 was due to "*medical neglect.*" This is

an extraordinary claim in the absence of a scintilla of supporting evidence. Mr Wright's reason for making this unsupported claim is evidently his related claim – also unsupported and unparticularised - in the following terms:

> "*The prison system is notorious for employing doctors with suspended licences or no licences who have killed and sexually abused their patients to the point that only the prison system will hire them as doctors.*"

While this claim appears inherently improbable, if it has any semblance of accuracy, substantiating it with appropriate supporting medical or other evidence is what this court would have expected: there is none. Furthermore, Mr Wright makes this claim in the context of conflating it with something entirely different, namely "*… hundreds of well documented instances where Florida prisoners have died horrific deaths or been severely injured due to the medical neglect and mistreatment they have suffered at the hands of* ***prison officials.***"

[Emphasis added.]

Legal Framework

[44] The duties of every expert witness were considered in *MOJ & Ors (Return to Mogadishu) Somalia CG* [2014] UKUT 00442 (IAC) at [23]–[27], reproduced in the appendix to this judgment. They were summarised at [25] thus:

> "(i) *to provide information and express opinions independently, uninfluenced by the litigation;*
>
> *(ii) to consider all material facts, including those which might detract from the expert witness' opinion;*
>
> *(iii) to be objective and unbiased;*
>
> (iv) *to avoid trespass into the prohibited territory of advocacy;*
>
> *(v) to be fully informed;*
>
> *(vi) to act within the confines of the witness's area of expertise; and*
>
> *(vii) to modify, or abandon one's view, where appropriate.*"

[45] In *Kennedy (Appellant) v Cordia (Services) LLP (Respondent) (Scotland)* [2016] UKSC 6, the Supreme Court approved the following guidance in *R v Bonython* (1984) 38 SASR 45 per King CJ at pp 46-47:

> *"Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court."*

The Court added at [48]:

> *"An expert must explain the basis of his or her evidence when it is not personal observation or sensation; mere assertion or "bare ipse dixit" carries little weight, as the Lord President (Cooper) famously stated in Davie v Magistrates of Edinburgh 1953 SC 34, 40. If anything, the suggestion that an unsubstantiated ipse dixit carries little weight is understated; in our view such evidence is worthless. Wessels JA stated the matter well in the Supreme Court of South Africa (Appellate Division) in Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH 1976 (3) SA 352, 371:*
>
> > *'[A]n expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.'"*

As Lord Prosser pithily stated in *Dingley v Chief Constable, Strathclyde Police* [1998] SC 548, 604: "*As with judicial or other opinions, what carries weight is the reasoning, not the conclusion.*"

[45] There are no hard and fast legal rules and principles relating to the credentials required for an expert witness. Only the court can confer this accolade. Precedent has no role in this exercise and every case is fact sensitive. It has been said that in each case the decision will be one of fact and degree: see *R v Sommers* [1963] 3 All ER 808. The common law tradition has consistently entailed paying close attention to the inter-related questions of whether a person truly is an expert in the relevant field and whether the purpose for which it is sought to adduce the evidence is one requiring specialist knowledge. This is explicable on the basis that expert evidence ranks as an exception to the prohibition against opinion evidence. One of the factors which the court will take into account is membership of a recognised organisation which offers accreditation and training to its members. These include, in the United Kingdom, the Expert Witness Institute, the Academy of Experts and the Society of Expert Witnesses. Other material factors include court codes of guidance and experts' declarations. The court will also take into account indications of whether the expert appreciates that his overriding duty is owed to the court and not the client.

Conclusion

[46] Standing back, having regard to all of the matters highlighted in paragraph [35]–[43] and giving effect to the principles rehearsed in [44] – [45] above, this court's unhesitating conclusion is that in the context of these proceedings and for the purpose of adducing the evidence contained in his declaration, Mr Wright must be declined the accreditation of expert witness. The court's reasons for thus concluding are based on the multiple flaws, limitations and other features detailed in the aforementioned paragraphs of this judgment. Properly analysed, the "evidence" which Mr Wright would propose to give through his declaration consists of a series of hearsay allegations, claims and assertions accompanied by no – or hopelessly inadequate - particularity and specificity.

[47] Linked to this is the court's assessment that, duly analysed, Mr Wright's declaration contains no <u>opinion</u> evidence at all. Real expert witnesses express opinions having first defined the relevant topic with precision and having then identified everything material pertaining thereto, including elements pointing in different directions, before expressing a balanced, reasoned conclusion. There is none of this in Mr Wright's declaration. Furthermore, Mr Wright has opted for hyperbole in preference to moderation of language, objectivity and detachment. In addition, neither his declaration nor his evidence under affirmation discloses the slightest indication of understanding his duty to the court. Moreover, his report is in this court's estimation pure advocacy, that is to say an instrument devised for the sole purpose of securing a satisfactory result for the party on whose behalf Mr Wright has been instructed.

[48] Mr Wright is in this court's view, an advocate and activist and not an expert witness. He is an advocate for the appellant and an advocate and activist for prisoners generally. It is in these capacities that he has gained recognition and secured awards in the US. Many would regard Mr Wright's activities as socially admirable. This court would not disagree and this judgment is not to be interpreted as questioning this in any way. Mr Wright's asserted status and acceptance as an expert witness in other jurisdictions, in particular the US, lies well beyond the purview of this court. It carries, at most, minimal weight in these proceedings, given our analysis above.

[49] We have taken some care to formulate our conclusion in considered terms: *This court concludes that Mr Wright does not have the status of expert witness for the purpose of adducing the evidence contained in his declaration dated 3 February 2021 in the context of these proceedings.* Further this judgment does not venture.

[50] Finally, the court would have been minded to conclude that Mr Wright's declaration did not satisfy the requirements of s 27(4)(a) of the 2003 Act. However, this issue has been rendered moot by our central conclusion above.

[51] The court has promulgated this decision on 31 March 2021. The next landmark in these proceedings will be the hearing of the appellant's renewed application for leave to appeal, on 15 April 2021.

APPENDIX

MOJ & Ors (Return to Mogadishu) Somalia CG [2014] UKUT 00442 (IAC), paras [23]-[27].

The duties of the expert witness

23. We consider it appropriate to draw attention to this subject, given the prevalence and importance of expert evidence in Country Guidance cases. Mindful that substantial quantities of judicial ink have been spilled on this subject, we confine ourselves to highlighting and emphasising what appear to us to be amongst the most important considerations. The general principles are of some vintage. In National Justice CIA Naviera SA v Prudential Assurance Company Limited [1993] 2 Lloyds Reports 68, Cresswell J stated, at pp 81 – 82:

> "*The duties and responsibilities of expert witnesses in civil cases include the following:*
>
> *1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation ….*
>
> *2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise ….*
>
> *An expert witness in the High Court should never assume the role of an advocate …*
>
> *3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion. ….*
>
> *4. An expert witness should make it clear when a particular question or issue falls outside his expertise.*
>
> *5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained*

> *the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report ….*
>
> *6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report, or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.*"

This code was duly approved by the Court of Appeal: see [1995] 1 Lloyds Reports 455, at p496. It has been considered in a series of subsequent report cases: see, for example, Vernon v Bosley (No 2) [1997] 1 All ER 577, at page 601. In the latter case, Evans LJ stated, at page 603:

> "*…. Expert witnesses are armed with the court's readiness to receive the expert evidence which it needs in order to reach a fully informed decision, whatever the nature of the topic may be. But their evidence ceases to be useful, and it may become counter-productive, when it is not marshalled by reference to the issues in the particular case and kept within the limits so fixed.*"

Judicial condemnation of an expert who does not appreciate his responsibilities is far from uncommon: see, for example, Stevens v Gullis [2000] 1 All ER 527, where Lord Woolf MR at pp.532-533 stated that the expert in question had:

> "*… demonstrated by his conduct that he had no conception of the requirements placed upon an expert under the CPR …..*
>
> *It is now clear from the rules that, in addition to the duty which an expert owes to a party, he is also under a duty to the court.*"

24. The requirements of CPR 31 also featured in Lucas v Barking Hospitals NHS Trust [2003] EWCA Civ 1102, where the emphasis was on CPR 31 and CPR 35. These provide (*inter alia*) that:

(i) a party may apply for an order for inspection of any document mentioned in an expert's report which has not already been disclosed,

(ii) every expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written, and

(iii) such instructions are not privileged against disclosure.

Laws LJ made the following noteworthy observation:

> "*[42] As it seems to me the key to this case …. is the imperative of transparency, a general theme of the CPR but here specifically applied to the deployment of experts' reports. Thus the aim of rule 35.10(3) and (4) is broadly to ensure that the factual basis on which the expert has prepared his report is patent.*"

25. Thus in the contemporary era the subject of expert evidence and experts' reports is heavily regulated. The principles, rules and criteria highlighted above are of general application. They apply to experts giving evidence at every tier of the legal system. In the specific sphere of the Upper Tribunal (Immigration and Asylum Chamber), these standards apply fully, without any qualification. They are reflected in the Senior President's Practice Direction No 10 (2010) which, in paragraph 10, lays particular emphasis on a series of duties. We summarise these duties thus:

(i) to provide information and express opinions independently, uninfluenced by the litigation;

(iii) to consider all material facts, including those which might detract from the expert witness' opinion ;

(iii) to be objective and unbiased;

(iv) to avoid trespass into the prohibited territory of advocacy;

(v) to be fully informed;

(vi) to act within the confines of the witness's area of expertise; and

(vii) to modify, or abandon one's view, where appropriate.

26. In the realm of expert testimony, important duties are also imposed on legal practitioners. These too feature in the aforementioned Practice Direction. These duties may be summarised thus:

(i) to ensure that the expert is equipped with all relevant information and materials, which will include information and materials adverse to the client's case;

(ii) to vouchsafe that the expert is fully versed in the duties rehearsed above;

(iv) to communicate, promptly, any alterations in the expert's opinion to the other parties and the Tribunal, and

(v) to ensure full compliance with the aforementioned Practice Statement, any other relevant Practice Statement, any relevant Guidance Note, all material requirements of the Rules and all case management directions and orders of the Tribunal.

These duties, also unqualified in nature, are a reflection of the bond between Bench and Representatives which features throughout the common law world.

27. The interface between the role of the expert witness and the duty of the Court or Tribunal features in the following passage in the judgment of Wilson J in Mibanga v Secretary of State for the Home Department [2005], EWHC 367:

> "[24] It seems to me to be axiomatic that a fact finder must not reach his or her conclusion before surveying all the evidence relevant thereto….
>
> The Secretary of State argues that decisions as to the credibility of an account are to be taken by the judicial fact finder and that, in their reports, experts, whether in relation to medical matters or in relation to in-country circumstances, cannot usurp the fact finder's function in assessing credibility. I agree. What, however, they can offer is a factual context in which it may be necessary for the fact finder to survey the allegations placed before him; and such context may prove a crucial aid to the decision whether or not to accept the truth of them. ……
>
> It seems to me that a proper fact finding enquiry involves explanation as to the reason for which an expert view is rejected and indeed placed beyond the spectrum of views which could reasonably be held."

To this we would add that, as the hearing of the present appeals demonstrated, this Tribunal will always pay close attention to the expert's research; the availability of empirical data or other information bearing on the expert's views; the quality and reliability of such material; whether the expert has taken such material into account; the expert's willingness to modify or withdraw certain views or conclusions where other evidence, or expert opinion, suggests that this is appropriate; and the attitude

of the expert, which will include his willingness to engage with the Tribunal. This is not designed to be an exhaustive list.