Neutral Citation Number: [2023] EWHC 1878 (Admin)

Case No: CO/1435/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2023

Before :

LORD JUSTICE HOLROYDE
(Vice-President of the Court of Appeal, Criminal Division)

MRS JUSTICE STACEY

- -

Between:

JOSEPH ABDUL-NOUR EL-KHOURI	**Appellant**
- and -	
THE GOVERNMENT OF THE UNITED STATES OF AMERICA	**Respondent**

- -
- -

Clair Dobbin KC (instructed by **Stokoe Partnership Solicitors**) for the **appellant**
Benjamin Seifert (instructed by **Crown Prosecution Service, Extradition Unit**) for the **respondent**

Hearing dates: 30 November 2022, 19 May 2023, 13 July 2023

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Approved Judgment

Lord Justice Holroyde and Mrs Justice Stacey:

1. On 18 February 2021 District Judge (Magistrates' Courts) Baraitser (now Her Honour Judge Baraitser, and here referred to for convenience as "the DJ") sent the case of Joseph El-Khouri ("the appellant") to the Secretary of State for a decision as to whether he should be extradited to the United States of America ("the USA") to face trial on charges of fraud and conspiracy to commit fraud. The Secretary of State subsequently decided that he should be extradited. Pursuant to s103 of the Extradition Act 2003 ("the 2003 Act"), and with leave granted by Dove J, the appellant now appeals against the DJ's decision. This is the judgment of the court.

The alleged offending:

2. In September 2019 a grand jury in New York City returned an indictment against the appellant charging him with 17 offences: one of conspiracy to commit securities fraud and fraud in connection with a tender offer; one of conspiracy to commit wire fraud and securities fraud; six of securities fraud; two of fraud in connection with tender offers; six of wire fraud; and a further offence of securities fraud.

3. In the following month, the USA requested the arrest of the appellant in relation to those charges. He was arrested on 21 October 2019 and made his first appearance before the Westminster Magistrates' Court later that day. Save for an initial period of two weeks when he was remanded in custody, the appellant has been on bail throughout the extradition proceedings.

4. In view of the issues raised by this appeal, it is unnecessary to go into detail about the circumstances of the alleged offending. We summarise the key features of the conduct alleged in the indictment and in the USA's request.

5. The appellant is accused of conspiring with four others, referred to as CC1 to CC4. During the relevant period, CC1 worked as an analyst in the London office of an investment bank which also had offices in the USA. He was in a relationship with, and lived with, CC2, who was an analyst in the London office of a different investment bank which also had offices in the USA. In the course of their employments, CC1 and CC2 each had access to confidential information – referred to as "material non-public information" or "MNPI" – about prospective mergers involving corporate clients of their respective banks. Those clients were companies with their headquarters in the USA or whose shares traded on US stock exchanges.

6. It is alleged that CC1 and CC2 passed MNPI to CC3 and CC4, said to be middlemen who "spent time in London, Paris and elsewhere". CC3 and CC4, who are brothers, are alleged to have made substantial payments for this information.

7. CC4 was a friend of the appellant. It is alleged that in 2015 he provided the appellant with inside information about merger negotiations involving six different companies based in the USA. In return, the appellant is said to have agreed to provide the payments made to CC1 for the information, and to pay CC4 a proportion of the profits which the appellant made by making use of the MNPI.

8. The appellant is alleged to have taken advantage of the MNPI to buy and sell contracts for differences ("CFDs") based on movements in the prices on the New York Stock

Exchange of shares in the six companies concerned. He is alleged to have used a broker based in the United Kingdom ("the UK") to effect these transactions. By doing so, he is said to have made profits amounting in total to nearly US$2 million. He is said to have made substantial payments to CC4 in respect of holidays and entertainment. In particular, it is alleged that in about March 2015 the appellant travelled with CC4 to New York, where he paid more than US$6,000 for CC4's hotel room and associated charges. In December 2015 the appellant paid a further US$7,000 for CC4's accommodation at the same hotel.

9. Evidence before the DJ showed that a person who trades in CFDs does not buy or sell shares in the company concerned. Rather, he purchases a financial instrument tied to the share price of that company. The broker opens an account; the trader deposits a proportion of the purchase cost of the shares; if the share price rises, the broker credits the account with the increase; if the share price falls, the trader's account is debited with the loss. The account is continuously credited and debited whilst the trade continues. The broker, who is at risk of making a loss if the share price continues to rise, may hedge his exposure in various ways. The involvement of insiders selling MNPI may reduce confidence in the market concerned, and may be a deterrent to legitimate traders.

The criminal proceedings:

10. The alleged conspiracies were investigated on both sides of the Atlantic.

11. CC4, when interviewed by the FBI, admitted that he had obtained MNPI from CC1 and CC2 and sold it to persons including the appellant.

12. The prosecution authorities in the USA have entered into agreements, including non-prosecution agreements, with persons involved in the insider dealing. Those persons would be available to give evidence against the appellant if he is tried in the USA. The authorities there do not intend to prosecute anyone other than the appellant.

13. In this country, an investigation was carried out by the Financial Conduct Authority ("FCA"). Ms Robson, a prosecution lawyer employed by the FCA, considered the available evidence and took advice from counsel. It was concluded that there was insufficient evidence to prosecute the appellant in this country, in particular because there was no evidence from any participant who could provide a narrative of how the insider dealing scheme operated, and there were weaknesses in the available circumstantial evidence.

14. It is submitted by the respondent that the conduct alleged against the appellant, if proved, would amount to a conspiracy to commit insider dealing offences contrary to s52 of the Criminal Justice Act 1993 ("the 1993 Act"). The appellant accepts that that is so. However, the evidence before the DJ included a statement by Ms Robson of her belief that the UK was not the appropriate jurisdiction in which to prosecute the appellant. Her reasons for that belief included, in summary, the following: the mergers and acquisitions involved USA companies; the stolen data was held in the USA; the victims of the breaches of trust by CC1 were based in the USA; the companies at risk of direct harm from the appellant's alleged unlawful trading were based in the USA and listed on the USA market; the vast amount of evidence was held in the USA and would require formal international cooperation or witnesses giving evidence from the USA; there were few witnesses based in the UK; there was insufficient evidence to charge the

appellant with an offence in the UK, and the evidential insufficiency would not be overcome by the sharing of documentary evidence by the US authorities; the key witnesses who could provide direct evidence of the insider dealing scheme were outside the UK and cooperating with the US authorities; the US authorities were able to enter into cooperation agreements with those witnesses and to obtain testimony from them; a prosecution in the USA was ready, whereas reopening of the FCA investigation would cause delay; and the appellant would have a right to the speedy trial provisions which were available to him in the USA, but there were no corresponding provisions in the UK.

The extradition hearing:

15. At the extradition hearing, the appellant resisted extradition on two grounds. First, pursuant to s78(4)(b) of the Extradition Act 2003 ("the 2003 Act"), he submitted that the offences were not extradition offences. Secondly, if they were extradition offences, he submitted, pursuant to s83A of the 2003 Act, that extradition was barred by reason of forum.

16. The DJ rejected those arguments. Before summarising her reasons for doing so, it is convenient to set out the relevant statutory provisions.

Relevant provisions of the 1993 Act:

17. These are to be found in Part V of the Act and, so far as is material for present purposes, are as follows:

> "**52 The offence**
>
> (1) An individual who has information as an insider is guilty of insider dealing if, in the circumstances mentioned in subsection (3), he deals in securities that are price-affected securities in relation to the information. …
>
> (3) The circumstances referred to above are that the acquisition or disposal in question occurs on a regulated market, or that the person dealing relies on a professional intermediary or is himself acting as a professional intermediary.
>
> …
>
> **54 Securities to which Part V applies**
>
> (1) This Part applies to any security which
>
> (a) falls within any paragraph of Schedule 2; and
>
> (b) satisfies any conditions applying to it under an order made by the Treasury for the purposes of this subsection;
>
> and in the provisions of this Part (other than that Schedule) any reference to a security is a reference to a security to which this Part applies. …

55 'Dealing' in securities

(1) For the purposes of this Part, a person deals in securities if –

(a) he acquires or disposes of the securities (whether as principal or agent); or

(b) he procures, directly or indirectly, an acquisition or disposal of the securities by any other person.

(2) For the purposes of this Part, 'acquire', in relation to a security, includes –

(a) agreeing to acquire the security; and

(b) entering into a contract which creates the security.

(3) For the purposes of this Part, 'dispose', in relation to a security, includes –

(a) agreeing to dispose of the security; and

(b) bringing to an end the contract which created the security. …

56 'Inside information', etc

(1) For the purposes of this section and section 57, 'inside information' means information which –

(a) relates to particular securities or to a particular issuer of securities or to particular issuers of securities and not to securities in general or issuers of securities in general;

(b) is specific or precise;

(c) has not been made public; and

(d) if it were made public would be likely to have a significant effect on the price of any securities. …

57 'Insiders'

(1) For the purposes of this Part, a person has information as an insider if and only if –

(a) it is, and he knows that it is, inside information,

(b) he has it, and knows that he has it, from an inside source.

(2) For the purposes of subsection (1), a person has information from an inside source if and only if -

(a) he has it through – …

(ii) having access to the information by virtue of his employment, office or profession; or

(b) the direct or indirect source of his information is a person within paragraph (a).

…

59 'Professional intermediary'

(1) For the purposes of this Part, a 'professional intermediary' is a person –

(a) who carries on a business consisting of an activity mentioned in subsection (2) and who holds himself out to the public or any section of the public (including a section of the public constituted by persons such as himself) as willing to engage in any such business; or

(b) who is employed by a person falling within paragraph (a) to carry out any such activity.

(2) The activities referred to in subsection (1) are –

(a) acquiring or disposing of securities (whether as principal or agent); or

(b) acting as an intermediary between persons taking part in any dealing in securities. …

60 Other interpretation provisions

(1)For the purposes of this Part, 'regulated market' means any market, however operated, which, by an order made by the Treasury, is identified (whether by name or by reference to criteria prescribed by the order) as a regulated market for the purposes of this Part. …

61 Penalties and prosecution

(1) An individual guilty of insider trading shall be liable –

(a) on summary conviction, to a fine not exceeding the statutory maximum or to imprisonment for a term not exceeding six months or to both; or

(b) on conviction on indictment, to a fine or imprisonment for a term not exceeding ten years or to both.

(2) Proceedings for offences under this Part shall not be instituted in England and Wales except by or with the consent of –

(a) the Secretary of State; or

(b) the Director of Public Prosecutions.

…

62 Territorial scope of offence of insider dealing

(1) An individual is not guilty of an offence falling within subsection (1) of section 52 unless –

(a) he was within the United Kingdom at the time when he is alleged to have done any act constituting or forming part of the alleged dealing;

(b) the regulated market on which the dealing is alleged to have occurred is one which, by an order made by the Treasury, is identified (whether by name or by reference to criteria prescribed in the order) as being, for the purposes of this Part, regulated in the United Kingdom; or

(c) the professional intermediary was within the United Kingdom at the time when he is alleged to have done anything by means of which the offence is alleged to have been committed.

...

Schedule 2 Securities

…

7 Contracts for differences

(1) Rights under a contract which does not provide for the delivery of securities but whose purpose or pretended purpose is to secure a profit or avoid a loss by reference to fluctuations in – (a) a share index or other similar factor connected with relevant securities; (b) the price of particular relevant securities …

(2) In sub-paragraph (1), 'relevant securities' means any security falling within any other paragraph of this Schedule."

Relevant provisions of the 2003 Act:

18. The USA being a category 2 territory, these are to be found in Part 2 of the Act. So far as is material for present purposes, they are as follows:

"**78 Initial stages of extradition hearing**

(1) This section applies if a person alleged to be the person whose extradition is requested appears or is brought before the appropriate judge for the extradition hearing. …

(4) … [the judge] must decide whether - …

(b) the offence specified in the request is an extradition offence; …

(5) The judge must decide the question in subsection (4) on a balance of probabilities.

(6) If the judge decides any of the questions in subsection (4) in the negative he must order the persons discharge.

(7) If the judge decides those questions in the affirmative he must proceed under section 79."

"**83A Forum**

(1) The extradition of a person ("D") to a category 2 territory is barred by reason of forum if the extradition would not be in the interests of justice.

(2) For the purposes of this section, the extradition would not be in the interests of justice if the judge –

(a) decides that a substantial measure of D's relevant activity was performed in the United Kingdom; and

(b) decides, having regard to the specified matters relating to the interests of justice (and only those matters), that the extradition should not take place.

(3) These are the specified matters relating to the interests of justice –

(a) the place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur;

(b) the interests of any victims of the extradition offence;

(c) any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence;

(d) were D to be prosecuted in a part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence necessary to prove the offence is or could be made available in the United Kingdom;

(e) any delay that might result from proceeding in one jurisdiction rather than another;

(f) the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard (in particular) to –

(i) the jurisdiction in which witnesses, co-defendants and other suspects are located, and

(ii) the practicability of the evidence of such persons being given in the United Kingdom or in jurisdictions outside the United Kingdom;

(g) D's connections with the United Kingdom.

…

(6) In this section, 'D's relevant activity' means activity which is material to the commission of the extradition offence and is alleged to have been performed by D."

"**137 Extradition offences: person not sentenced for offence**

(1) This section sets out whether a person's conduct constitutes an 'extradition offence' for the purposes of this Part in a case where the person –

(a) is accused in a category 2 territory of an offence constituted by the conduct …

(2) the conduct constitutes an extradition offence in relation to the category 2 territory if the conditions in subsection (3), (4) or (5) are satisfied.

(3) The conditions in this subsection are that –

(a) the conduct occurs in the category 2 territory;

(b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or to a greater punishment if it occurred in that part of the United Kingdom;

(c) the conduct is so punishable under the law of the category 2 territory.

(4) The conditions in this subsection are that

(a) the conduct occurs outside the category 2 territory;

> (b) in corresponding circumstances equivalent conduct would constitute an extra-territorial offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or to a greater punishment if it occurred in that part of the United Kingdom;
>
> (c) the conduct is so punishable under the law of the category 2 territory. …
>
> (7A) References in this section to 'conduct' (except in the expression 'equivalent conduct') are to the conduct specified in the request for the person's extradition."

19. Sections 103-104 of the 2003 Act, so for as material, make the following provisions in respect of appeals to this court:

> "**103 Appeal where case sent to the Secretary of State**
>
> (1) If the 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. …
>
> (3) The relevant decision is the decision that resulted in the case being sent to the Secretary of State.
>
> (4) An appeal under this section –
>
> (a) may be brought on a question of law or fact; but
>
> (b) lies only with the leave of the High Court. …
>
> **104 Court's powers on appeal under section 103**
>
> (1) On an appeal under section 103 the High Court may –
>
> (a) allow the appeal;
>
> (b) direct the judge to decide again a question (or questions) which he decided at the extradition hearing;
>
> (c) dismiss the appeal.
>
> (2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.
>
> (3) The conditions are that –
>
> (a) the judge ought to have decided a question before him at the extradition hearing differently;

> (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.
>
> (4) The conditions are that –
>
> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the judge deciding a question before him at the extradition hearing differently;
>
> (c) if he had decided the question in that way, he would have been required to order the person's discharge.
>
> (5) If the court allows the appeal it must –
>
> (a) order the person's discharge;
>
> (b) quash the order for his extradition. …"

20. We turn to the DJ's ruling on the issues identified in [15] above.

Extradition offences?

21. In relation to the first issue, the respondent submitted that, in determining (for the purposes of s137(3)(a) of the 2003 Act) whether the appellant's conduct occurred in the USA, the tests are whether the effects of his actions were felt there, or whether the relevant conduct substantially took place there or elsewhere: see *Scott v USA* [2018] EWHC 2021 (Admin).

22. The DJ accepted that the effects of the appellant's alleged conduct were felt in the USA. She held, first, that the CFDs entered into by the appellant related to shares in companies which traded on American stock exchanges and which were either based in the USA or (in one case) engaged in negotiations for the purchase and acquisition of a USA-based company. The appellant's trades were therefore directly linked to share prices of companies trading on a USA market, and his profit or loss depended entirely on their rise or fall. The DJ accepted evidence that movement of share prices on that market could be affected by the broker's purchase or sale of shares in the companies concerned, and the presence of insiders using MNPI reduced confidence in the market and could be a deterrent to other traders.

23. Secondly, the DJ held, it was reasonable to assume that the stolen MNPI was located in the USA, where the merger negotiations relevant to the companies concerned were likely being conducted. If information was stolen from the USA offices of the investment banks concerned, then it was their USA offices which suffered the harm caused by that theft.

24. Thirdly, she held, part of the appellant's alleged conduct took place in the USA: in March 2015 he was in New York at the same time as CC4 and paid for his hotel room and services.

25. The DJ went on to accept the submission of the respondent that the appellant's conduct, if proved, would amount to a conspiracy to commit insider dealing offences. In doing so, she rejected the submission of the appellant that his alleged conduct, if transposed to the UK, would fall outside the territorial limitations of s52 of the 1993 Act. The DJ held that by making his trades using inside information relating to the affairs of the companies concerned, the appellant was an individual whose trading occurred on the same regulated market as those companies, and so was caught by s52(3) of the 1993 Act. At [62] she said:

> "… although Mr El-Khouri did not himself engage in dealing on a US market in the sense that he bought or sold shares in those companies, his trades were directly linked to the share prices of US companies which were trading on this market. His CFD would have been priced by reference to the companies' share prices, and his profit and loss depended entirely on their rise or fall. The companies were listed on the Nasdaq, a regulated market, and traded their shares on this market. Mr El-Khouri, by making his trades using inside information relating to the affairs of those companies, was an individual whose trading occurred on the same regulated market as those companies. In this way his conduct is brought within the terms of section 52(3) of the 1993 Act."

26. The DJ further held that the effect of s62 of the 1993 Act was that a person can commit a s52 offence even though he is not physically in the UK, provided that the market on which the dealing occurs is regulated in the UK. Thus a person in the USA who engaged in insider dealing in the shares of a company quoted on the London Stock Exchange would commit such an offence. The DJ held that, on transposition, the appellant would have been in the USA when he traded CFDs but would have been trading in the shares of companies trading on a regulated market in the UK. He would thus come within the scope of s52 of the 1993 Act by virtue of s62(1)(b) of that Act.

27. The DJ accordingly held that the offences were extradition offences.

Forum bar?

28. The DJ reminded herself, by reference to *Love v USA* [2018] EWHC 172 (Admin), [2018] 1 WLR 2889 at [22], that the purpose of s83A of the 2003 Act is to provide a safeguard for requested persons: it aims to prevent extradition where the offences can fairly and effectively be tried here, and where, having regard to the specified matters identified in s83A(2)(b), it is not in the interests of justice that the requested person should be extradited. She noted the concession of the respondent that a substantial part of the appellant's alleged activity was performed in the UK, and that he had been present in the USA only during an unspecified period in March 2015. She accepted the unequivocal statement of Ms Robson that the appellant would not face prosecution in this country, and concluded that the choice was therefore between prosecution in the

USA or no prosecution at all. In that regard, she referred to the observation in *Scott*, at [35], that –

> "A number of the factors set out in section 83A(3) invite comparison between the positions arising in the event of a prosecution here, as compared with the requesting state. There would be an air of unreality about making a solemn comparison between two states of affairs, one of which has been discounted as a possibility, without taking that into account in assessing the weight (if any) to attach to the outcome of the comparison."

29. The DJ addressed each of the seven matters specified in s83A(3)(a)-(g). In relation to (a) she found that US financial markets could suffer direct and indirect harm as a result of the conduct alleged, but regarded this as a neutral factor because the harm was "largely indirect and unquantifiable". Similarly, she regarded (b) as a neutral factor because she found there was no easily identifiable factor. As to (c), she found Ms Robson's detailed statement of belief to be a factor in favour of extradition. On the basis of Ms Robson's evidence, she made similar findings in respect of (d) and (e). She found that (f) did not arise, because extradition would not result in the appellant being jointly tried with anyone else. Finally, in relation to (g), the DJ accepted that an important factor against extradition was that the appellant has strong connections to the UK and has no links to the USA. The DJ noted the composition of the family, and referred to the appellant's diabetes problems and a health issue affecting a child other than L. She summarised the written evidence of the appellant's daughter, who described him as a warm and loving father who provided financial support for the family, and said that she would find his extradition to be unbearable. She noted, however, the absence of evidence from the appellant's partner and former wife; the long periods the appellant had spent living outside of the UK; and his relatively recent return to a settled life with his family in the UK. She added that the child whose medical problem had been raised was "happily back at school and managing very well with the practical aspects" of his condition. She had earlier said that she had no reason to believe that appropriate support for that child could not be provided by his mother, the appellant's partner.

30. Having evaluated those factors, the DJ concluded that the forum bar did not operate to prevent the appellant's extradition in the interests of justice.

31. The DJ dealt finally with some subsidiary points, about which we need say no more. She then sent the case to the Secretary of State for a decision as to whether the appellant be extradited to the USA.

The grounds of appeal:

32. The appellant advances three grounds of appeal. He contends that the DJ erred, first in finding that the alleged conduct, if it had occurred in England, would have constituted an offence contrary to s52 of the 1993 Act; secondly, in her approach and conclusion in relation to the forum bar; and thirdly, in her approach to the evidence relating to the forum bar.

33. Each of those grounds is opposed by the respondent. We shall briefly summarise the competing submissions.

Ground 1:

34. Ms Dobbin KC submits for the appellant that the DJ was required, by s137(3)(b) of the 2003 Act and the decisions of the House of Lords in *R (Al Fawwaz) v Governor of Brixton Prison* [2001] UKHL 69, [2002] 1AC 556 ("*Al-Fawwaz*") and *Norris v Government of the United States of America* [2008] UKHL16 ("*Norris*"), to substitute England for the requesting state wherever the name of the requesting state appears in the indictment, and to treat as having occurred in this jurisdiction only the acts which took place in the USA. She contends that, in contrast to the usual position of extradition being sought for conduct which took place in the requesting state, most of the alleged conduct in this case occurred in this country. She points out, in this regard, that CFDs are not traded in the USA.

35. Ms Dobbin submits that when the essence of the alleged conduct is appropriately transposed, the position would be as follows: the appellant would be a foreign national residing outside the UK; CC1 and CC2 would live abroad and work in banks abroad; they would access MNPI abroad relating to UK companies whose shares were traded in the UK; CC3 and CC4 would provide information to the appellant abroad; the appellant would use a professional intermediary abroad to enter into CFDs abroad, such contracts not being traded in the UK; and the CFDs would not involve ownership of a security, but would instead involve speculation on the price of a security. That transposed conduct, she submits, would not constitute an offence contrary to s52 of the 1993 Act. Ms Dobbin makes two points. First, the acquisition of CFDs does not amount to dealing on a regulated market: see the decision at first instance in *Patel v Mirza* [2013] 2 P & CR DG23, which on this point was not overturned on appeal. Secondly, for the purposes of transposition, the appellant must be treated as having acquired the CFDs outside the UK, through a professional intermediary who was also outside this jurisdiction. In those transposed circumstances, Ms Dobbin submits, the territorial limitation in s62 of the 1993 Act would bite. She submits that the DJ fell into error by treating the acquisition of a CFD as being the same as acquiring shares on a regulated market. She accepts that the alleged conduct could be the subject of a prosecution in this country, but submits that the DJ was wrong to find it amounted to an extradition offence.

36. For the respondent, Mr Seifert submits that the transposition suggested by the appellant is misconceived. He argues that the decisions in *Al-Fawwaz* and *Norris* require that no more should be changed than is necessary to give effect to the fact that the court is dealing with an extradition case rather than a domestic one, and so did not require the DJ to assume that conduct which had in fact occurred in the UK had occurred abroad. He submits that the judge was correct to find, on transposition, that if the appellant had been in the USA when he traded CFDs relating to the shares of companies trading on a regulated market in the UK, he would commit an offence under s52 of the 1993 Act.

Ground 2:

37. Ms Dobbin submits that this is a clear case for applying the forum bar. She contends that the DJ wrongly treated as neutral a number of the statutory considerations which should have been treated as favourable to the appellant, and therefore based her overall evaluation on incorrect considerations. As to the matters mentioned in paragraphs (a) and (b) of s83A(3) of the 2003 Act, she submits that the absence of any evidence of specific harm in the USA or of any identifiable victims in the USA were factors

weighing against extradition, as was the possibility of harm in the UK. As to (c), Ms Dobbin mounts a detailed attack on every aspect of the DJ's treatment of the evidence of Ms Robson. As to (d), she submits that much of the evidence was in fact gathered in the UK; and as to (e) and (f), she submits that delay was not a significant factor, and that the absence of any co-accused militated against extradition. As to (g), it is submitted that the DJ failed to give appropriate weight to the appellant's connections with the UK. Finally, Ms Dobbin criticises the DJ's use of the phrase "the overall balance" as the sub-heading to the section of her judgment setting out her conclusions as to the specified matters. She submits that the DJ failed to make a proper evaluation of the matters which weighed against extradition.

38. In response, Mr Seifert points out that the DJ had considered all the evidence at a contested hearing. He submits that the DJ considered in detail each of the matters specified in the statute, making findings which in some respects were generous to the appellant, and that her overall evaluation was not wrong.

Ground 3:

39. Related to the second ground of appeal, Ms Dobbin submits that the DJ wrongly held against the appellant the absence of evidence from his former wife and current partner. She further submits that the DJ erred in her treatment of the evidence about the non-prosecution agreements into which CC3 and CC4 have entered with the USA authorities. In this regard, she relies on evidence adduced on the appellant's behalf which she submits showed that CC3 and CC4 were required by their agreements to cooperate with the USA authorities and could therefore be required to give evidence in the UK.

40. Mr Seifert responds that the appellant's evidence dealt only with the usual position in relation to non-prosecution agreements in the USA, and did not address the specific agreements relating to CC3 and CC4. He submits that there was no evidence that the witnesses concerned could be compelled to give evidence in an English court or were willing to do so voluntarily. In those circumstances, he submits, the DJ was entitled to proceed on the basis that key witnesses were outside the UK and would not give evidence against the appellant if he were prosecuted in this country.

The respondent's application:

41. The respondent seeks to adduce evidence which was not before the DJ, on the ground that it is further information answering certain questions which the DJ had raised during the extradition hearing. The respondent first sought to adduce this evidence in an application made to the DJ after the extradition hearing. The DJ refused that application, on two grounds: first, that she had merely sought clarification of certain points and had not made a formal request for further information; and secondly, that the time for serving evidence in accordance with the court's directions had long passed.

42. The respondent now makes further application to this court to adduce this further evidence. The application is opposed by the appellant, who contends that this is not an application to adduce fresh evidence but, rather, an attempt to adduce late evidence after the hearing had concluded. Ms Dobbin submits that the DJ rightly refused to consider it, there being no basis on which she could properly do so, and that this court should similarly refuse the application.

43. We are grateful to counsel for the submissions which we have summarised, above, which were made at the initial hearing of the appeal. Our analysis of them is as follows.

Analysis:

44. We consider first the respondent's application to adduce further evidence. We can deal with it briefly. In our view, the DJ was correct to refuse the application made to her, for the reasons which she gave. For the same reasons, we refuse this application.

45. It is convenient to consider next the second and third grounds of appeal. Each of those grounds relates to the DJ's evaluation of the evidence relating to the matters relating to the interests of justice which are specified in s83A(3) of the 2003 Act. The correct approach for this court to take to these grounds of appeal is set out in *Love* at [25]-[26], emphasising that s104(3) of the 2003 Act only permits this court to allow an appeal if the DJ ought to have decided a question before her differently, and would have been required to discharge the appellant if she had decided that question as she ought to have done:

> "25. … The appeal must focus on error: what the judge *ought* to have decided differently, so as to mean that the appeal should be allowed. Extradition appeals are not re-hearings of evidence or mere repeats of submissions as to how factors should be weighed; courts normally have to respect the findings of fact made by the district judge, especially if he has heard oral evidence. The true focus is not on establishing a judicial review type of error, as a key to opening up a decision so that the appellate court can undertake the whole evaluation afresh. …
>
> 26 The true approach is more simply expressed by requiring the appellate court to decide whether the decision of the district judge was wrong. … The appellate court is entitled to stand back and say that a question ought to have been decided differently because the overall evaluation was wrong: crucial factors should have been weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed."

46. In relation to ground 2, Ms Dobbin has skilfully mounted an extensive challenge to the DJ's approach and conclusion, but her submissions at the initial hearing do not persuade us that the DJ should have weighed crucial factors significantly differently or that her overall evaluation was wrong. In our view, the DJ carried out a careful assessment of each of the matters specified in s83A(3), made findings about them which were properly open to her on the basis of the evidence and argument at the extradition hearing, and made an overall evaluation which – on that basis – was not only open to her but was correct.

47. We do not accept the appellant's submission that the DJ was wrong to treat factors (a) and (b) as neutral: in the circumstances of this case, we agree with Mr Seifert that her findings to that effect were, if anything, somewhat generous to the appellant. As to (a), the harm which she identified, albeit "largely indirect and unquantifiable", would occur in the USA, not in the UK. It follows, in relation to (b), that any victims would be in

the USA. It would therefore have been open to the DJ to find that each of those specified matters carried at least some weight against a conclusion that extradition would not be in the interests of justice.

48. Specified matter (c) required the DJ to consider "any belief of a prosecutor", and the DJ was plainly entitled to give considerable weight to Ms Robson's clear statement of belief. The DJ was also entitled to find on the evidence as a whole that CC3 and CC4 could not be compelled to give evidence against the appellant in this country and that there was no basis for thinking either of them would do so voluntarily. With all respect to the appellant's submissions in this regard, there was in our view an air of unreality about them.

49. As to (d), the appellant is correct to point out that Ms Robson's statement showed that much evidence had been gathered in this country; but Ms Robson also explained in her statement why the absence of a witness who could act as "narrator" would be a serious deficiency in the prosecution case if the appellant were charged in this country. The DJ was entitled to reach the conclusion she did in relation to this matter, and in relation to specified matters (e) and (f). In relation to (g), the DJ accepted that the appellant had strong ties to this country, but was entitled to point out a number of respects in which those ties were less strong than the appellant asserted. We do not accept that the DJ took into account unfair or irrelevant considerations.

50. As to the DJ's overall evaluation, we accept that the DJ was in error in giving this part of her judgment the sub-heading "The overall balance"; but we do not accept that she in fact adopted a wrong approach. On the contrary, her opening words in the paragraph which immediately follows that sub-heading show plainly that she rightly made an evaluation of all the specified matters in order to decide whether extradition would not be in the interests of justice. She thus approached her task in accordance with the principles stated in *Scott* and *Love*. The phrase which she used in her sub-heading was in our view an imprecise reference to the correct process rather than an indication that the DJ applied a wrong test: compare *Government of USA v McDaid* [2020] EWHC 1527 (Admin) at [44].

51. We also accept Ms Dobbin's submission that the DJ's finding, that there would be no prosecution of the appellant in this country, did not relieve her of the duty to consider all other relevant factors. Nor did it dictate a conclusion that it would not be contrary to the interests of justice for the appellant to be extradited. As Ms Dobbin points out, the High Court in *Scott* concluded, on consideration of the specified matters in that case, that extradition was not in the interests of justice even though there would be no prosecution in this country. But in the circumstances of this case, and in the light of the evidence and argument at the extradition hearing, the DJ was in our view entitled to reach her overall conclusion as to the interests of justice.

52. In relation to ground 3, it seems to us that the criticisms of the DJ's approach are in substance a disagreement with her findings and an attempt to reargue submissions which were unsuccessful at the extradition hearing. The DJ was entitled to identify the various respects in which the evidence relied on by the appellant was deficient, and to reach the conclusions she did. We see no basis on which this ground of appeal could succeed.

53. We turn finally to the issues raised by the first ground. These make it necessary to consider in particular the passage which we have cited (in [24] above) from the DJ's judgment at [62], and the correct approach to transposition in the circumstances of this case.

54. At [62] of her judgment, the DJ held that the appellant's "trading" occurred on the same regulated market (namely, the Nasdaq) as the companies who traded their shares on that market. If that approach were correct, it would avoid any obstacle to extradition arising from the transposition exercise. However, with all respect to the DJ, we accept Ms Dobbin's submission that the approach was not correct. It wrongly conflated trading in CFDs with trading in the actual shares listed on the US stock market, and wrongly treated the acquiring of a CFD as being the same as the acquiring of shares on a regulated market. True it is that a CFD is a security listed in Schedule 2 to the 1993 Act; but paragraph 7 of that Schedule makes clear that a CFD confers rights under a contract "which does not provide for the delivery of securities". In *Patel v Mirza* at first instance, on which Ms Dobbin relies, the court was concerned with spread betting on listed shares. The court at [9] analysed such a spread bet as a CFD, based on movements in the quoted share price over a specified period. At [25], it held that bets placed with a spread betting company are not themselves dealing on a regulated market within the meaning of s55 of the 1993 Act. We respectfully agree with that decision. Mr Seifert seeks to distinguish that decision on the basis that the present case is not concerned with spread betting. That is, of course, correct as far as it goes; but in view of the analysis in *Patel v Mirza* of the nature of such spread betting, and the reference in that decision to paragraph 7 of Schedule 2 to the 1993 Act, we cannot regard it as a material distinction. Nor can we accept Mr Seifert's further submission that the term "dealing" in s52 of the 1993 Act should be given a wide meaning capable of including the appellant's alleged conduct in entering into CFDs with his broker. Without seeking to define the boundaries of "dealing" in this context, it seems to us that the conduct alleged here cannot properly be regarded as acquiring or disposing of securities on a regulated market.

55. We therefore accept Ms Dobbin's submission that the DJ fell into error in this regard. She wrongly found that s52(3) of the 1993 Act was satisfied because the appellant dealt in securities on a regulated market and, for the same reason, fell into error in her approach to transposition. The DJ, in the terms of s104(3) of the 2003 Act, ought to have decided a question before her at the extradition hearing differently.

56. However, the appellant dealt in securities using a professional intermediary, namely the broker based in this country. Subject to the issue of transposition, the DJ would therefore have been entitled to find that s52(3) of the 1993 Act was satisfied on the basis that the appellant relied on a professional intermediary. If that is so, then – notwithstanding the DJ's error – the DJ would not have been required to discharge the appellant. The consequences of the error therefore depend on the issue of transposition, to which we now turn.

57. Both parties made submissions about the two leading cases in this context, namely the decisions of the House of Lords in *Al-Fawwaz* and *Norris*.

58. In *Al-Fawwaz*, a case decided on the basis of provisions of the Extradition Acts 1989 and 1870, the USA had requested the applicants' extradition on a charge of conspiracy to murder. It was held that references to "jurisdiction" in the relevant statutory

provisions were references to both the territorial and the extraterritorial jurisdiction of the state concerned. It was therefore not necessary that the acts alleged to constitute the extradition crime were committed within the territory of the USA: it was sufficient that the offence for which extradition was sought was triable within the USA and an equivalent offence would be triable in the United Kingdom ("UK"); that the offences alleged against the applicants would, if transposed to England, be triable in England; and that accordingly the applicants were liable to extradition to the USA if (as the magistrate had found) a prima facie case of murder was established.

59. Lord Slynn of Hadley, at [25], identified the principal issue as being whether the relevant treaty between the USA and the UK permitted extradition –

> "… only in respect of crimes committed and acts done exclusively in the territory of the requesting state, and whether it is only acts done in that state which are transposed to the United Kingdom in order to decide whether the facts would constitute a crime triable in the United Kingdom."

60. At [32] Lord Slynn answered that question as follows:

> "In most cases which approach is adopted may not matter. If only the events occurring in the United States are transferred to England and the other events occurring outside the USA are regarded as still occurring outside England, in asking whether the crime would be triable in England, it seems likely that the English courts would have extraterritorial jurisdiction. I tend to the view that this is the right approach but I recognise the force of the argument that all events are transposed to England."

61. Lord Hutton, at [77], said:

> "In the present case it is common ground that the United States of America has extraterritorial jurisdiction over the alleged offence and that the United Kingdom also has extraterritorial jurisdiction over the alleged offence. Therefore, in my opinion, no difficulty arise in respect of transposition. The offence is triable within the jurisdiction of the United States of America and, as transposed, is triable, as section 26 of the 1870 Act requires, 'within English jurisdiction'."

62. Lord Millett began his speech, at [94] and [95], as follows:

> "94. My Lords, the double criminality rule lies at the heart of our law of extradition. It is a precondition of extradition that the offence for which extradition may be ordered should be within the criminal jurisdiction of both the requesting and the requested state. The question for decision in the present case is whether this means the territorial jurisdiction of the states concerned or embraces their extraterritorial jurisdiction also.

> 95. In considering this question it is important to bear the objects of the double criminality rule in mind, for its two requirements serve different purposes. The first requirement, that the offence for which extradition is ordered should be within the jurisdiction of the requesting state, serves a purely practical purpose. There is no point in extraditing a person for an offence for which the requesting state cannot try him. The second requirement, that the offence should also be within our own criminal jurisdiction, serves to protect the accused from the exercise of an exorbitant foreign jurisdiction. Views as to what constitutes an exorbitant jurisdiction naturally differ; the test adopted by our own law has been to accord to other countries the jurisdiction which we claim ourselves but no more. …"

63. A little later in his speech, Lord Millett stated his opinion that "jurisdiction" in this context extended to extraterritorial jurisdiction. He gave a number of reasons, including the following at [105(2)]:

> "The only reason for distinguishing between one type of jurisdiction and another is the need to protect the accused from the exercise of an exorbitant foreign jurisdiction. But there is no justification for classifying as exorbitant a jurisdiction which, mutatis mutandis, we claim for ourselves. The thinking behind this part of the definition is that we should not extradite for an offence which, in the corresponding circumstances, we could not try ourselves."

64. Lord Millett later referred to case law which required the extradition court to treat as having taken place in England all the acts which had in fact taken place in the requesting state (see *R v Governor of Pentonville Prison, ex parte Osman* [1990] 1 WLR 277) and continued at [109] and [110] as follows:

> "109. For my part, and subject to one point which I will mention in a moment, I think that is the correct way to effect the transposition. The principle at work is mutatis mutandis. Given that the court is concerned with an extradition case, the crime will not have been committed in England but (normally) in the requesting state. So the test is applied by substituting England for the requesting state wherever the name of the requesting state appears in the indictment. But no more should be changed than is necessary to give effect to the fact that the court is dealing with an extradition case and not a domestic one. The word 'mutandis' is an essential element in the concept; the court should not hypothesise more than necessary.
>
> 110. The one point to which I would draw attention is that it is not sufficient to substitute England for the territory of the requesting state wherever that is mentioned in the indictment. It is necessary to effect an appropriate substitution for every circumstance connected with the requesting state on which the jurisdiction is founded."

65. In *Norris* the appellant was wanted for trial in the USA on four charges: conspiracy to enter into a price fixing agreement or cartel (count 1), and conspiracy to obstruct justice (counts 2, 3 and 4). The House of Lords allowed his appeal against extradition on count 1, on the ground that the relevant conduct at the material time did not constitute a criminal offence in this country. Their Lordships went on to address issues under s.137 of the 2003 Act in relation to the other three charges. They observed, at [88], that the underlying rationale of the double criminality rule is that a person's liberty is not to be restricted as a consequence of offences not recognised as criminal by the requested state. They held that the reference in s137 to "the conduct" required a comparison between the conduct alleged against the requested person abroad and an offence in this country, rather than a correspondence between the legal ingredients of the alleged offence abroad and an offence here. They concluded, at [91], that –

> "… the conduct test should be applied consistently throughout the 2003 Act, the conduct relevant under Part 2 of the Act being that described in the documents constituting the request (the equivalent of the arrest warrant under Part 1), ignoring in both cases mere narrative background but taking account of such allegations as are relevant to the description of the corresponding United Kingdom offence."

66. The House then considered the construction of s137(2)(b) of the 2003 Act, noting at [94] that an exercise in transposition was the means by which Parliament gave effect to the policy that extradition required criminality according to both the law of the requesting state and English law. They referred to the approach explained by Lord Millett in the passage which we have cited from [109] and [110] of his speech in *Al-Fawwaz*, and approved the statement made by a Canadian judge (Duff J in *In re Collins (no 3)* (1905) 10 CCC 80) that it is necessary to focus upon the essence of the acts of the accused, in their bearing upon the charge in question, rather than upon "the adventitious circumstances connected with [his] conduct". They concluded, at [99] –

> "If, then, we ignore the adventitious circumstances connected with the conduct alleged against Mr Norris on counts 2-4 of the indictment and concentrate instead on the essence of his alleged acts, the substance of the criminality charged against him is not that he obstructed the criminal investigation into price fixing in the carbon products industry being carried out by the Pennsylvania grand jury, but that he obstructed the criminal investigation into that matter being carried out by the duly appointed body. Making the necessary changes, we would have to translate counts 2-4 into counts of obstructing in England a criminal investigation into price fixing in the carbon products industry being conducted by the appropriate investigatory body in this country."

67. Their Lordships then rejected, at [100], the argument of the appellant that, because price fixing did not in itself constitute an offence under English law, there could never have been a criminal investigation into price fixing in this country and therefore there could have been no offence of obstructing justice by interfering with such an investigation. They held that price fixing, if combined with other elements such as deliberate misrepresentation, could lead to offences such as fraud or conspiracy to defraud:

> "So the mere fact that the result of the investigation in Mr Norris' case was a charge of simple price fixing, which does not constitute an offence under English law, is no reason to hold that it would not have been an offence under English law to obstruct the progress of an equivalent investigation by the appropriate body in this country."

The House held, accordingly, that counts 2-4 were extradition offences in the terms of s137(2)(b) of the 2003 Act.

68. The principles stated in those cases are clear, but their application to the circumstances of an individual case may be difficult. It may in particular be difficult to identify the "circumstances connected with the requesting state on which the jurisdiction is founded" so as to determine which are the "appropriate substitutions" which must be effected in accordance with Lord Millet's speech in *Al-Fawwaz* at [110].

69. In the passages which we have cited from his speech in *Al-Fawwaz*, Lord Millett referred to the normal situation of the requested person being a fugitive wanted for a crime committed in the requesting state. He was, we think, principally contemplating conduct abroad which would not in itself be an offence under the UK's domestic jurisdiction, but which upon transposition *mutatis mutandis* would amount to an offence within our extraterritorial jurisdiction. In *Norris*, similarly, the relevant conduct occurred abroad.

70. In the present case, in contrast, much of the relevant conduct is said to have occurred in the UK, albeit that its effects were felt in the USA. The essence of the appellant's alleged conduct is that he conspired with others to profit from MNPI corruptly obtained from USA companies whose shares were traded on the New York Stock Exchange, and, through a professional intermediary based in the UK, he acquired CFDs linked to the movements on the New York Stock Exchange of shares in those companies. It is common ground between the parties that the alleged conduct, if prosecuted in this country and proved, would in itself be an offence under our domestic jurisdiction. Ms Dobbin accepts that by virtue of s62(1)(c) of the 1993 Act, it would come within the territorial scope of the offence of insider trading because the appellant acquired securities through a professional intermediary in the UK. It follows that, if proved, the relevant conduct would (in the words of Lord Millett cited at [62] above) fall "within the criminal jurisdiction of both the requesting and the requested state".

71. In such circumstances, what are the "appropriate substitutions" which must be effected?

72. We have summarised, in [35] above, Ms Dobbin's submission as to the substitutions which she contends must be made in respect of every feature of the alleged conduct. On that approach, she submits that the appellant must be treated as a foreign national resident outside the UK, using a professional intermediary who was also outside the UK. If the approach is correct, then Ms Dobbin is correct in her submission that s62(1)(c) of the 1993 Act could not apply, because the professional intermediary was not within the UK at any relevant time, and so the charges would not be extradition offences.

73. Ms Dobbin's submissions require that conduct which in fact occurred in the UK, and which amounts to a criminal offence in this jurisdiction and so is within the territorial

ambit of s62 of the 1993 Act, must be treated as having occurred abroad, thus leading to the result that it is treated as outwith the UK's extraterritorial jurisdiction. We do not accept that the principles stated in *Al-Fawwaz* and *Norris*, properly applied to the circumstances of this case, dictate that result. We accept Mr Seifert's submission that the appellant's argument requires the court to hypothesise more than is necessary. The argument requires the court, moreover, to apply the approach to transposition necessary where the extraterritorial jurisdiction of this country had to be considered, in circumstances where the alleged conduct would in itself be a crime within our domestic jurisdiction.

74. We are unable to accept Ms Dobbin's argument that transposition of every circumstance connected with the alleged conduct is necessary in order to protect the appellant against exposure to an exorbitant foreign jurisdiction. On the contrary, the appellant's argument seeks, by what we regard as a wholly artificial chain of reasoning, to prevent his being extradited for alleged conduct including conduct in the UK which would in itself be a crime in the UK, the effects of which are felt in the USA. The same artificiality of approach would require the court to overlook the important feature of the alleged conduct that the appellant travelled to the USA to reward CC4 by paying large sums for his hotel accommodation and services.

75. The correct analysis, in our view, is that the DJ should have found that the alleged conduct would be an offence contrary to s52(1) & (3) of the 1993 Act, and would be within the territorial scope of that offence by virtue of s62(1)(c). If the DJ had so found, she would have sent the case to the Secretary of State.

A further application:

76. The court reserved judgment on the issues considered above. The case then took an unusual course. The appellant's representatives asked the court to adjourn the handing down of the judgment so that investigations could be made into an urgent concern which had arisen as to the mental health of one of the appellant's children. We shall refer to the child concerned as "L". After further correspondence and a short hearing, the court granted that adjournment.

77. The appellant subsequently applied to admit as fresh evidence a report by Dr Susan Walker, a consultant child and adolescent psychiatrist. The appellant seeks to rely on this for two purposes: first, to add to and strengthen his second ground of appeal, on the basis that the report provides additional evidence of his strong connection with the UK; and secondly, as the basis for a freestanding additional ground of appeal, that his extradition would be incompatible with article 8 of the European Convention on Human Rights.

78. The respondent accepts that Dr Walker's report could not have been adduced before the DJ or at the initial hearing of this appeal, but resists the applications. A further hearing was necessary, and we have again been assisted by the written and oral submissions of counsel.

The proposed fresh evidence:

79. Dr Walker's report records that L, now aged 15, lives with her parents and siblings. On the occasion of the appellant's birthday in April 2023, L argued with her parents, telling

them that she was feeling suicidal, did not want their help and did not want to live with them any more. The appellant and his partner called the police, who took L to a hospital. L reported a low mood (3/10), low energy levels and inconsistent sleep patterns. She was assessed and discharged on the following day.

80. Seven days later, L attended a follow-up appointment at the hospital. She was accompanied by the appellant but not by her mother. She reported that she had always had a good relationship with her family and was especially close to her father. There had been no previous concerns about L's mental health and no involvement with mental health services. The risk of self-harm was assessed as low to medium.

81. Dr Walker recorded that L had had fleeting suicidal thoughts for the past three years. L had disclosed one occasion of self-harm through cutting her leg the previous year, and an occasion of taking a paracetamol overdose on impulse the previous year. L explained that she and her sister were unhappy because in 2021, for financial reasons, they were moved from a private school to a state school, which involved lengthy travel each day and which they both hated. She had not made friends, and her previously-excellent attendance and performance had dwindled. For a period she had smoked cannabis with other pupils, but had not done so recently and had not self-harmed recently. There had been one occasion in May 2023 when she shouted at her parents that she wanted to kill herself after her father had told her she could not do something that she wanted to do, but the incident was short-lived and the family were able to resolve it between themselves without too much difficulty.

82. Dr Walker noted that L had stopped caring about things she used to enjoy, felt tired, found it difficult to concentrate on her school work and wanted to sleep all the time. She was in bed and sleeping for much of the day, particularly since finishing her GCSE exams. Dr Walker diagnosed L as suffering with a moderate Major Depressive Disorder ("MDD") meeting six of the recognised symptoms. She noted that L had been exposed to a number of adverse childhood experiences, with her father being arrested and held in custody for a month when she was aged 12. The family had been unable to go on holiday together because of the tag which her father was required to wear as a condition of his bail; there had been a loss of financial security, a feeling of shame and self-imposed isolation from friends and an unwelcome change of school; and L had experienced bullying from peers and had been the victim of an unpleasant and distressing incident on a bus.

83. L described her father as holding the family together, providing both emotional and practical support. She described herself as now being closer to her father, having previously been closer to her mother. L has become very fearful of what might happen to her father if he is extradited and concerned that she may not see him again. Dr Walker considers that L's constant worry about her father's safety is adding to her own mental health difficulties, which will impact on her ability to benefit from treatment for her MDD. L is also fearful of how the family will cope financially and emotionally. Dr Walker advised that if L is able to remain in a safe and stable environment with the support of her father, and is able to access evidence-based treatment for her depression in a timely manner, then her prognosis for recovery from MDD would be likely to be good. L's mother had not attended the consultation, although invited to do so, and had not provided any evidence or information to Dr Walker.

84. L is currently awaiting the results of her GCSE exams and of her applications to sixth form schools and college to study the A level subject which she has chosen.

Further submissions:

85. We have considered Dr Walker's report *de bene esse*. On the basis of it, the parties make the following submissions, additional to those advanced at the initial hearing.

86. First, Ms Dobbin KC submits that the report strengthens her submissions (summarised in [37] above) as to the forum bar, in particular in relation to the matter specified at s83A(3)(g) of the 2003 Act, the appellant's connections with the UK. Relying on *Love* at [41], Ms Dobbin KC submits that L's mental health is bound up in the nature and strength of the relationship with her father, and the prospect of that tie being broken amounts to a connection within the scope of that subsection. She argues that L's recently-discovered mental health issues add a different dimension to s.83A(3)(g): firstly, because that subsection encompasses consideration of the effect that parental extradition might have on the child: and secondly, because it also permits consideration of the impact upon a parent who is detained abroad being separated from his child, unable to play a part in the child's day to day life, and unable to provide the support and care needed by their child. Ms Dobbin KC emphasises the family's financial dependence on the appellant and their inability to afford the cost of visiting him in the US, even if they were able to obtain visas. She submits that the risk of deterioration to L's mental health, and potential increase in suicidal ideation, is a factor which – whether considered either alone or with the other factors relied on in respect of ss.83A(3)(g) – decisively tips the overall interests of justice against extradition.

87. Mr Seifert in response accepts that the appellant provides significant emotional support to L, but points out that the appellant has spent considerable periods of time working abroad, and did not return to live full time on the UK until 2016. He submits that there is no reason why the presence of L's mother cannot be a protective factor for her, and points out that Dr Walker (who had not interviewed or received any information from L's mother) had not considered the prognosis for L with her mother's support in the absence of her father. Mr Seifert submits that L's current fears for the future are based on speculation as to how matters might play out, when it is not known what might happen if the appellant is extradited and how L might respond. He submits that there is no reason to assume the appellant would be refused bail if extradited, and suggests that the family would be able to visit the appellant in the USA if necessary.

88. At the extradition hearing the appellant did not argue that his extradition would be incompatible with his Convention rights. The DJ's conclusion in relation to s87 of the 2003 Act, human rights, was that extradition was both necessary and proportionate. On the basis of Dr Walker's report, however, Ms Dobbin KC now submits secondly that the new evidence as to L's mental health makes it necessary to weigh the public interest in extradition against the private and family lives of the appellant and his family members, and in particular the primary consideration of the best interests of L and her siblings. She submits that, applying the balance sheet approach recommended in *Polish Judicial Authorities v Celinski* [2015] EWHC 1274 (Admin), [2015] 1 WLR 551, the factors militating against extradition now outweigh the important public interest in extradition. The profound effect that the prospect of the appellant's extradition has had on his daughter's health carries with it the very real risk of trauma, further deterioration in her mental health and an increased risk to herself. In support of her argument, Ms

Dobbin KC points to a number of other factors which she submits weigh against extradition: the absence of an identifiable victim; the nature of the offence, which is not at the most serious end of the criminal spectrum; the passage of time since the alleged conduct occurred some eight years ago, and the delays in the extradition proceedings caused by the Covid-19 pandemic and other factors that were not the fault of the appellant; the fact that the appellant's family life exists entirely in the United Kingdom, his family is wholly financially dependent on him and there is no prospect of his family moving to the United States; the fact that he is not a citizen of the requesting state and has no nexus to it save for the allegations against him (most of which are alleged to have occurred in this country); and that the family's precarious financial circumstances mean that they will be unable even to travel to visit him in the United States.

89. Mr Seifert, in response, readily accepts that it will usually be better for children not to be separated from their parents, but points out that such separations are a sad but inevitable consequence of extradition. He submits that if the DJ had been required to draw up a *Celinski* balance sheet, taking account of Dr Walker's evidence, the balance would still be heavily in favour of extradition. L's mother will be able to care for her and protect her; they will be entitled to assistance from the local Child and Adolescent Mental Health Service; there is no reason why they would not be able to obtain visas to visit the appellant in the USA; and features of the case suggest that they would be able to finance such visits. Mr Seifert further submits that the alleged offending is serious. He reiterates his argument that Dr Walker had not considered the prognosis for L if her mother assumes the protective role and if L were amenable to treatment in her father's absence. He suggests that L's fear and anxiety at the prospect of her father's extradition may abate once a decision has been made, and that the contemplation may be worse than the actuality.

Conclusions:

90. We have reflected on these further submissions, and have considered the effect of them on our earlier views. Our conclusions are as follows.

Ground 1:

91. We have accepted that the DJ ought to have answered a question before her at the extradition hearing differently, in that she ought not to have found that the appellant was dealing on a regulated market when he acquired the CFDs. However, if she had answered that question correctly, she would not have been required to order the appellant's discharge, and her decision to send the case to the Secretary of State would still have been correct. The appellant is therefore unable to satisfy the condition in s104(4)(c) of the 2003 Act, and his first ground of appeal must fail.

Ground 2, and the proposed additional ground::

92. We accept that L's mental health issues only came to light this year, and therefore could not have been raised at the extradition hearing, or indeed at the initial appeal hearing. We have considered Dr Walker's report *de bene esse* because we must decide whether it would have resulted in the DJ deciding a question before her at the extradition hearing differently and, if she had decided the question in that way, whether she would have been required to order the appellant's discharge (s104(2) of the 2003 Act). We have

considered the report both as an additional factor in the matters raised in the initial appeal hearing and also as the basis of a prospective freestanding additional ground of appeal.

93. We accept that Dr Walker's report increases the significance of the appellant's connections to the UK because of his daughter's ill health. Those connections, however, are but one of the factors to be considered in accordance with s.83A(3) of the 2003 Act. L has been diagnosed with moderate MDD and has struggled with the family's change of fortunes and the prospect of her father's extradition. However if Dr Walker's report had been before the DJ, L's illness, when set alongside the specified matters at s.83A(3)(a)-(f) discussed above, would not in our view have carried sufficient weight to tip the balance for the DJ to conclude that extradition would not be in the interests of justice.

94. In relation to the proposed additional ground relying on article 8, the question which we must consider is whether the totality of the points which could have been raised before the DJ, together with Dr Walker's report, would make a critical difference to the *Celinski* balance sheet exercise which the DJ would have been required to undertake. There is inevitably some overlap with ground 2 in the matters to be considered under the proposed new ground of appeal under article 8, and we do not repeat our analysis at [45-51] above.

95. The principal factor in favour of extradition is the constant and weighty public interest in extradition: that people accused of serious crimes should be tried, and that the UK should honour its treaty obligations to other countries. Although the DJ found that the harm was unidentified and unquantifiable, it does not follow that the harm was not serious: the loss to the reputation and integrity of the financial markets, for example, may be impossible to quantify, but it does not mean that it is insignificant. The alleged offences are of significant gravity.

96. Ms Dobbin sought to rely on *Unuane v United Kingdom* (80343/17) (2021) 72 E.H.R.R. 24, which concerned the deportation of a foreign national offender, to draw a contrast between financial crime and violence and drug-related offences, in support of her argument that the alleged crimes were not especially serious. We cannot accept her arguments. As has been frequently observed, deportation and extradition are not analogous and serve different functions and purposes (see, for example *Norris v Government of the United States of America (No 2)* [2010] 2 AC). Extradition is part of the process for ensuring the prevention of disorder and crime and that those reasonably suspected of crime are prosecuted and, if found guilty, duly sentenced. Deportation, in cases such as *Unuane*, concerns the expulsion of foreign national offenders who have been convicted and punished for their crimes. Decisions to expel or exclude are taken essentially in the interests of a sovereign state's right to regulate the entry and expulsion of aliens. Whilst article 8 arguments may be raised in both situations, the public interests under consideration are therefore different. Although of a different nature to drug and violence related crimes, insider trading can involve serious offences which undermine confidence and trust in the financial markets, and which can have wide ranging consequences.

97. The relevant domestic prosecuting authority has indicated its belief that England and Wales is not the most appropriate jurisdiction in which to prosecute the appellant because of an "absence of evidence of passage of information" from CC1 and CC2 to the appellant. The evidential difficulty had been overcome in the USA because of the

cooperation of CC3 and CC4, who are able to provide the overarching narrative as key participants and have the benefit of non-prosecution agreements in the USA. We are satisfied that there would be substantial difficulties in securing the availability in this jurisdiction of the evidence of CC3 and CC4.

98. We accept that Dr Walker's report raises, or adds to, factors which militate against extradition. We recognise that separation from the appellant will affect all the children for whom he cares and to whom he provides emotional as well as financial support; and we accept that the separation will be most keenly felt by L, because of her MDD and the protective role played by the appellant within the family. We understand, and sympathise with, her position. Mr Seifert is, however, correct to point that the public interest in extradition often does result in the separation of one member of a family from other members.

99. Further, we accept that the absence of links between the appellant and his family, and the USA, will make extradition harder for him and for his family. They may be able to visit him in the USA, but we accept Ms Dobbin KC's submission that it is unrealistic to think that the family could relocate to the USA.

100. We also accept that the passage of time since the extradition proceedings were commenced is no fault of the appellant's, and is a factor which has weighed heavily upon him and his family. The stress and anxiety of such a long period of uncertainty is not to be underestimated, though this is not a case in which there was substantial delay between the time when the alleged offences were committed and the time when the extradition proceedings were commenced: the alleged offending took place between 2015-2016 and the indictment was returned by a grand jury in New York City in September 2019.

101. However, even giving full weight to those factors in the appellant's favour, we are unable to accept either of the two arguments which Ms Dobbin KC puts forward in reliance on Dr Walker's report. In relation to ground 2, we consider that even if the evidence of Dr Walker had been available to the DJ when considering the application for extradition, the DJ would not have decided the forum bar question before her differently. Even if Dr Walker's report were taken into account, extradition would be in the interests of justice.

102. As to the proposed fresh ground relying on article 8, having considered the balance sheet which the DJ would have been required to draw up if Dr Walker's report had been before her, we accept Mr Seifert's submission that the balance would still come down firmly in favour of extradition. The impact of extradition on the appellant's family and private life, and in particular on L, coupled with the delay in the extradition proceedings, is not so excessive as to render extradition disproportionate to the public interest in the prevention of crime. Sympathetic though we are to L's position, we conclude that the DJ would have found that the appellant had not established that the consequences of the interference with family life would be exceptionally severe and would not have ordered the appellant's discharge.

103. In those circumstances, we decline to admit the report of Dr Walker as fresh evidence, on the ground that it fails to satisfy the criteria set out in *Szombathely City Court v Fenyvesi* [2009] EWHC 231 (Admin). It follows that we must also refuse leave to amend the notice of appeal by adding the proposed additional ground of appeal.

104. We accordingly consider ground 2 on the basis of the submissions made to us at the initial hearing of this appeal. In the circumstances of this case, the DJ was in our view entitled to reach her overall conclusion as to the interests of justice, and we see no basis on which this court could properly interfere with that conclusion.

Ground 3:

105. For the reasons set out at [52] above, we see no reason to interfere with the findings of fact made by the DJ.

Overall conclusion:

106. This appeal therefore fails and must be dismissed.