Neutral Citation Number: [2024] EWHC 731 (Admin)

Case No: AC-2023-LON-000711

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 27th March 2024

Before:
FORDHAM J

- -

Between:

MICHAEL LOMAS — **Appellant**

- and -

(1) REPUBLIC OF SOUTH AFRICA
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT — **Respondents**
(No.2)

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- -

Ben Keith and Rebecca Thomas (instructed by Mullenders Solicitors) for the Appellant
Nicholas Dobbs (instructed by the CPS) for the First Respondent
Mark Smith (instructed by GLD) for the Second Respondent

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Hearing date: 26.3.24

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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FORDHAM J

FORDHAM J:

Introduction

1. This is an extradition case about fitness to fly, which raises questions about the roles and responsibilities of the relevant authorities and of the Court. The case first came before me at a hearing on 20 February 2024: see [2023] EWHC 388 (Admin) ("First Judgment"). I explained that the legal issues arose out of Article 3 ECHR, Article 8 ECHR and s.91 of the Extradition Act 2003 (First Judgment §3). The Appellant's four headline points (§5) were (i) the interrelationship between physical and mental health conditions; (ii) mental health and suicide risk; (iii) de facto solitary confinement; and (iv) health deterioration (§§6-9 and 11-14). I addressed a point about light and ventilation (§10). I explained why there was no reasonably arguable ground of appeal and declined an invitation to adjourn to allow an operation to take place (§14). In the context of health deterioration (§13), I recorded that consultant neurosurgeon Mr Ameen had stated his view that the Appellant was "not fit to fly because of his current neurological disabilities". I returned to that aspect (§15), explaining that I did not accept that it was a feature of the evidence which alongside the other evidence in the case could support an arguable appeal. I explained that I had raised with Counsel the approach illustrated by Arezina v Bosnia [2023] EWHC 1980 (Admin) at §§22-23 where, having rejected health-based grounds of appeal, Swift J adjourned the discrete issue of fitness to fly to allow further evidence; that the Appellant's Counsel did not invite an adjournment for this purpose; and that all Counsel recognised that fitness to fly would need to be assessed, prior to any act of extradition, as would any necessary adjustments. I explained that, in those circumstances, I was satisfied that there was no need for any adjournment or further direction so far as fitness to fly was concerned.

Arezina

2. What happened in Arezina is this. Swift J recorded the expert evidence that, pending a final diagnosis regarding a suspected heart failure, the Appellant was not fit to fly to Bosnia (§§9-10); an opinion which had appeared in 3 reports and which he could not ignore (§22); and so it would be appropriate to adjourn the appeal pending the provision of further evidence to clarify the position in relation to fitness to fly (§22). The sequel judgment [2023] EWHC 3242 (Admin) ("Arezina No.2") makes clear that the order made was a dismissal of the substantive appeal, but suspending the date on which the order would come into effect pending clarification of the medical circumstances (Arezina No.2 §1). At that adjourned hearing the update was that investigations were complete, and the Appellant did not suffer from heart failure which dealt with the concern (§1). But there was then a discussion of physical health and personal care needs including wheelchairs at each airport and arrangements during any flight (§2). Swift J was satisfied in relation to the wheelchair (§3) and the personal care needs (§§4-7), that appropriate arrangements could be made by those concerned and that the order for extradition should now come into effect in the usual way (§8). But he urged all concerned to make sure that steps were taken to ensure practical arrangements were clearly thought through (§9).

Reopening the Appeal

3. I next encountered this case in the form of an urgent application to reopen the appeal, invoking Crim PR 50.27: see [2024] EWHC 637 Admin ("Second Judgment"). I explained (Second Judgment §5) that the Appellant had joined the Home Secretary as a second respondent, based on the Home Secretary's direct role in extradition in non-EU country

cases. I explained that the NCA also featured, having notified the Appellant to surrender and having made written observations (§5), and that it was "possible that, whether formally or informally, it will assist for the NCA to have an opportunity to have its voice heard". For reasons which I explained, I granted permission to reopen the appeal for the narrow and very specific purpose of revisiting fitness to fly and §15 of the First Judgment (Second Judgment §6), with the consequence that the non-extendable s.118 window for removal would be displaced by an extant appeal (§7). In giving my reasons (§§9-14), I explained that there had been no assessment of fitness to fly by any of the authorities with a role in the case; that the basis on which all Counsel had addressed me had lost its solidity; that serious question-marks and uncertainties had arisen about how fitness to fly is to be dealt with in these cases; that the Home Secretary's position was that it was "the role of this Court to address fitness to fly"; that I was certain that the Court needed "to grapple – with the assistance of all relevant parties – with the question of who does consider that question and in what way". I explained that the matter had been promptly raised but had gone unanswered by any clear and satisfactory resolution. The Home Secretary (Second Respondent) had initially asked for the evidence. The NCA ultimately said fitness to fly was for the airline, with a dynamic assessment, with which the CPS for the First Respondent ("the Requesting State") agreed. I set a timetable with liberty to apply (§17).

Materials

4. So far as the expert medical evidence is concerned, the primary focus is now on the report of Mr Ameen dated 27th February 2024 (§24 below); and a further report of consultant spinal neurosurgeon Mr Ali Nader-Sepahi dated 28 February 2024 (§30 below). I have skeleton arguments on behalf of the Appellant, the Requesting State and the Secretary of State. I have received authorities and legal materials and have drawn the parties' attention to some further authorities. Since the observations relating to the NCA in the Second Judgment (§5) had not led to any further information or observations from the NCA, I raised by email this morning the question whether there might be an information gap. The CPS was promptly provided with information in the form of an email from the National Extradition Unit at the NCA ("the NCA Email": §28 below).

The "Legal Prism"

5. Everyone agrees that it is appropriate in all the circumstances for this Court to consider the question of fitness to fly, doing so through the prism of the two legally applicable tests: s.91 (injustice or oppression by reason of physical and/or mental condition); and Article 3 ECHR (real risk of torture, inhuman or degrading treatment or punishment). Everyone agrees that, in doing so, the appropriate threshold for today is the reasonable arguability test for permission to appeal. Everybody agrees that one option which I need to consider and, if appropriate, take is to adjourn this case again, for further information or steps revisiting the question of permission to appeal at a later stage having done so. Mr Keith and Ms Thomas submit that I should grant permission to appeal; or alternatively adjourn. Mr Dobbs says I should refuse permission to appeal; or alternatively adjourn. Mr Smith makes submissions limited to law and the role of the Home Secretary.

Statutory Adjournment and Oppression

6. So far as s.91 is concerned it is important to keep in mind that, where the court concludes that "it appears … that the requested person's physical or mental condition is such that it would be unjust or oppressive to extradite them", what may follow as being appropriate is

either (a) an order for discharge or (b) a statutory adjournment (s.91(3)(b)) "until it appears to the court that [that] is no longer the case".

No Freestanding Fitness to Fly Function

7. Nobody now submits that there is a freestanding function, independent of that legal prism, to evaluate "fitness to fly". The Home Secretary's previous submission that it is 'for the Court to address fitness to fly' has become refined into a joint recognition that the Court applies the legal prism; nothing more, and nothing less. As Swift J said in Arezina No.2 (§5): "Courts rarely prescribe the arrangements that are to be made for surrender and it is likely to be a very rare case indeed where the choice of arrangements would engage a person's legal rights and, for that reason, become the concern of the court". So, the "concern of the Court" is with the "legal rights". That means s.91 and Article 3.

Addressing the Functions of the Relevant UK Public Authorities

8. Before I address the application of the legal prism on the evidence in the present case (§§22-39 below), I will address functions of the UK public authorities including the Court (§§14-21 below). This case demonstrates how fitness to fly issues can come before the Court with very considerable urgency, needing to be addressed at great speed. That was the position before me at the oral hearing on 20 March 2024 (the Second Judgment). Where, at a later hearing, greater clarity is achievable, recording it promotes the interests of justice, the overriding objective and the public interest. Moreover, I made clear to everyone in the Second Judgment (§9) that I was certain that, in this case, the Court needed to grapple – with the assistance of all relevant parties – with the question of who considers the question of fitness to fly and in what way. I have had the advantage of written and oral submissions from the three parties. The Home Secretary's essential submission is that he does not have a relevant function and ought not to have been embroiled in this case at all. It is right that I should address that point. But before I turn to roles and responsibilities, there are some key points to make.

Three Fitness to Fly Scenarios

9. The first key point is this. Questions as to fitness to fly can arise in three scenarios: (i) when this Court is already seized of a case; or (ii) by reason of a change in circumstances after this Court has finished with the case; or (iii) by reason of a change of circumstances where this Court has never dealt with the case because no appeal was previously pursued. In the present case, as in Arezina, it was scenario (i). The point came up while I was seized of the case. When a point has come up when a court is seized of a case, the court can straightforwardly deal with the point, adjourning for further information if that is necessary. That was the Arezina solution, which I raised with the parties at the first hearing. It was also the correct procedural answer. Where it is scenarios (ii) or (iii), the question arises whether there is a route of access to the Court.

Longer-Term Focus and More Immediate Focus

10. The second key point is this. In applying the legal prism, relevant impacts and implications of fitness to fly may involve (i) a longer-term focus or (ii) a more immediate focus. The longer-term picture is exemplified by the discussion in Bobbe v Poland [2017] EWHC 3161 (Admin). That was a case about a requested person with mental health conditions. The Divisional Court recognised as "capable of providing relevant guidance to the extradition

regime" a Luxembourg judgment about Article 3 standards and Dublin III transfers of asylum-seekers, asking whether "the act of transfer will … result in a real risk of a significant and permanent worsening of the state of the relevant person's health" (Bobbe §54(viii)). In the present case there are points about potential serious long-term health effects of head and spine injuries. A more immediate picture case would be where a flight would be taking place in a manner and in circumstances so serious as to be "degrading treatment" in Article 3 terms. Mr Keith tells me there are prisoner transfer cases in Strasbourg of that type. It is sufficient for present purposes for me to remind myself that the test is reasonable arguability that there are substantial grounds for considering that there is a real risk of extradition involving Article 3 inhuman or degrading treatment.

Transfer as the "Second Stage"

11. The third key point is this. In applying the legal prism to the question of fitness to fly, the Court is addressing the distinct "second stage" question seen in the s.91 context (oppression) in Wolkowicz v Poland [2013] EWHC 102 (Admin) [2013] 1 WLR 242 at §10; applied in the Article 3 context in Bobbe at §70. Wolkowicz was a case about measures taken to deal with the prevention of suicide of a requested person with a mental illness. The Court identified three distinct stages of extradition: before; during and after. The transfer (flight) is within the second stage (during). It is when the requested person is being transferred to the requesting state, and arrangements are made by the relevant authority (there, the Serious Organised Crime Agency: SOCA) with the authorities of the requesting state, to ensure that during the transfer proper arrangements are in place; and where medical records should be sent with the requested person and delivered to those having custody during transfer (Wolkowicz §10).

Part 1 and 2 Extraditions

12. The fourth key point is this. A different statutory regime applies to extradition to category one (EU) countries (Part 1 of the 2003 Act) and extradition to category 2 (non-EU) countries (Part 2 of the 2003 Act). Wolkowicz and Bobbe are Part 1 cases. Arezina and the present case are Part 2 cases. Nobody would expect the Home Secretary to have any 'fitness to fly' role in a Part 1 case. Wolkowicz said the arrangements were a matter for SOCA with the Requesting State Authority. For a Part 1 extradition, the Extradition Arrest Warrant is certified by (now) the NCA, as the s.1 designated authority, and extradition is ordered by a district judge. For a Part 2 extradition, the Extradition Request is certified by the Home Secretary (s.70), and extradition is ordered by the Home Secretary, the case having been sent to the Home Secretary by the district judge (s.103). In a Part 2 case, the Home Secretary addresses prescribed questions (s.93) – like specialty – and there can be an appeal against the decision of the Home Secretary on those issues. Otherwise, the appeal in Parts 1 and 2 to this Court is from the district judge's decision. Counsel agreed that, at least in practice, the Home Secretary will or may become involved in a Part 2 case if there is an application for timed-out discharge, and "reasonable cause" needs to be shown (s.118(7)).

Rights of Access to the Appellate High Court

13. The fifth key point is this. Parliament and the rules of court have provided for a suite of rights of access to the High Court in its appellate capacity. In a Part 1 case there is the s.26 appeal; the s.26(5) late appeal; and the Crim PR 50.27 application to reopen an appeal. An illustration of a Part 1 case in which the Crim PR 50.27 route (formerly CPR 52.17) was deployed in the context of a change in circumstances is Ignaoua v Italy [2008] EWHC 2619

(Admin) at §§22 and 29. In a Part 2 case, there is the s.103 appeal (against the District Judge's decision); the s.108(5)-(8) late human rights appeal; the s.103(10) late appeal (mirroring s.26(5) in Part 1); the s.108 appeal (against the Home Secretary); and the Crim PR 50.27 application to reopen an appeal.

The Home Secretary's Function

14. Mr Smith submits that no function of assessing fitness to fly, and no relevant decision-making function, arises on the part of the Home Secretary. Mr Keith and Ms Thomas originally understood that such a role did exist, which was what lay behind their position at the first hearing (First Judgment §15). They now accept that that was mistaken. Mr Dobbs (who did not appear for the Requesting Authority at the first hearing) does not submit that the Home Secretary has any function of assessing fitness to fly, or any relevant decision-making function. I am satisfied that this new clarity and common ground is correct, for the reasons given by Mr Smith.

15. The position is as follows.

(1) Part 2 prescribes the questions for consideration by the Home Secretary in deciding whether to order extradition (ss.93-96A). The s.91 (oppression) question is not among them. That is a question allocated to the District Judge as "the judge" (s.91(1) and (3)), and then to this Court on appeal from the District Judge's decision (s.103(3)-(4)). So is the question of compatibility with ECHR rights (s.87). First CPR 52.17, and then Crim PR 50.27, are rules of court (s.103(9)), which allow a determined appeal to be reopened on satisfying threshold necessity criteria (in exceptional circumstances, to avoid real injustice).

(2) The Human Rights Act 1998 by s.6 imposes a statutory duty on a public authority not to act incompatibly with ECHR rights; and by s.3 imposes a statutory duty on courts – if possible – to interpret the 2003 Act to avoid ECHR rights violations.

(3) By 2011 the idea had been embraced that the Home Secretary – in a Part 2 extradition case – owed an implied duty, before the act of extradition, to consider the ECHR rights-compatibility of extradition in light of a relevant change of circumstances. McKinnon v USA [2007] EWHC 762 (Admin) (McKinnon (No.1)) explained (§63) that a human rights point which had failed on an extradition appeal could not be rerun as a judicial review challenge to action or inaction by the Home Secretary. However, a freestanding human rights judicial review claim could lie against the Home Secretary pursuant to HRA s.6 if "something arises between finality in [appeal] proceedings and actual removal to the requesting state – for example, supervening illness which impact on the subject's ability to travel to or face trial in the requesting state". In R (McKinnon) v Home Secretary [2009] EWHC 2021 (Admin) it was recorded (§64), and accepted by him, that the Home Secretary had an implied power based on HRA s.6, to withdraw any extradition order where something had arisen exceptionally between the exhaustion of statutory appeal and an actual removal. In that way, the Article 3 test was applied to the Home Secretary's conduct, in the light of a change of circumstances (§66).

(4) This idea was assessed to be unsatisfactory, and the primary legislation was changed to provide a different solution. The assessment was in the Scott Baker Report ("A Review of the United Kingdom's Extradition Arrangements, 30 September 2011") at

§9.17, concluding and recommending that the Home Secretary's involvement (see §§2.10, C.257) should be limited by removing consideration of human rights matters which should instead always be addressed directly by the Courts (§§9.24 and 9.29; §§11.71-11.72), using the CPR 52.17 necessity criteria (§9.36 and §C.111). This solution promoted speed and finality, placing human rights decision-making directly in the hands of the courts rather than having satellite litigation arising from decisions of the executive (§§9.26 to 9.30).

(5) The solution, by 2014 amendment, was the introduction of s.108(5)-(8). This mechanism allows a late Part 2 appeal, on human rights grounds, on meeting the CPR 52.17 (now Crim PR 50.27) necessity criteria. It has been treated as applicable where there has been no previous appeal, or where there is a previously determined appeal (McIntyre v USA [2014] EWHC 1886 (Admin) [2015] 1 WLR 507 at §12).

(6) All of which explains why Parliament was able, compatibly with the effective judicial protection (ECHR Article 13) embodied in the HRA, to provide (s.70(11)) that, "at all times" after certification of a Part 2 Extradition Arrest Warrant (s.70(10)):

> ***The Secretary of State is not to consider whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998.***

Human rights questions are squarely for the High Court, whether through an appeal, a late human rights appeal, or an application to re-open an appeal: see Bowen v SSHD [2016] EWHC 1400 (Admin) at §64.

16. This leaves some further points. (1) The Home Secretary is not statutorily-precluded from considering whether an extradition has become "oppressive", but that is a statutory question (s.91) asked only by "the judge" and not the Home Secretary (s.93), and HRA s.6 could not introduce it as a McKinnon implied duty. (2) Human rights protection was considered sufficiently broad for the safeguard of late access to the Court (s.108(5)-(8)) based on significant changes in circumstances (Baker Report §9.37). (3) The Home Secretary was described as having this important function (Baker Report §9.37): "if the Secretary of State became aware of developments after ordering extradition which she believed might, in the event of extradition, lead to a violation of a person's human rights, then we assume she would inform the person so that they could make an application to the court". Whether that function attracts public law duties is a question on which I did not hear argument. (4) It is the NCA, and not the Home Secretary, who is the public authority having the function of arranging the Part 2 extradition, just as the Part 1 extradition (§§18-20 below).

17. In the light of this analysis: (a) the Court should simply consider fitness to fly through the legal prism of Article 3 and s.91; (b) the Secretary of State has no decision-making function in either of those respects; (c) it was an error to have taken it that fitness to fly was a matter for assessment by the Home Secretary; and (d) it was an error to have joined the Home Secretary.

The NCA's Function

18. Mr Keith and Ms Thomas submitted – on the premise that the interweaving of the Home Secretary into a Part 2 case makes this extradition on a "diplomatic" plane – that the practical consequence is that "the Home Secretary makes the arrangements for surrender". Whatever the soundness of the premise, the practical consequence is not borne out my any materials

to which my attention was drawn. Mr Smith and Mr Dobbs submitted that it is the NCA, in conjunction with the Requesting State and the airline who makes the arrangements. Based on what I have read and heard, I agree.

19. Here are the key points. (1) The Baker Report (§9.37) described the Home Secretary as able to have "the last word" on a Part 2 extradition, but that was not a description of practical arrangements. (2) The evidence in the present case is that it was the NCA who had notified the Appellant as to the flight (Second Judgment §5), and I have received the NCA Email (§28 below) giving information about arrangements which are being put in train. (3) In Arezina – a Part 2 case – the Court wanted information about fitness to fly and received information "from the National Crime Agency or, via them, the Bosnian authorities, about arrangements that will be in place for the journey" (Arezina No.2 §3). Swift J spoke clearly of "the NCA responsible for the surrender" (§8) in speaking of "appropriate arrangements to be made by those concerned" as involving "the requesting … authority, the NCA responsible for the surrender and also the airline" (§8). There was no mention of the Home Secretary at all. (4) This means that there is a symmetry between Part 2 cases and Part 1 cases, so far as practical arrangements are concerned. In Bobbe – a Part 1 case – the Court said (at §67): "The NCA accepts and assumes responsibility for the transfer". In that case, it was the NCA who had given "specific assurances" (§27).

20. This leaves these further points. (1) There is no reason why the NCA should not act proactively and protectively, where some change of circumstances arises. The NCA is a public authority for HRA s.6 and public law duties, including any duties which may arise in the context of informing a requested person of their rights to apply to the High Court (§16(3) above). (2) Circumstances which the NCA considers justify a delay would, in principle, be candidate circumstances for the "reasonable cause" defence to a Part 2 discharge application (s.118(7)). (3) In Part 2 cases it was similarly understood that a change of circumstances – including as to fitness to fly – could be addressed by the UK authorities assisting the Requesting State Authority to ask the Court to agree to extend time (s.36(3)(b)). In Betlejewski v Poland [2010] EWHC 2117 (Admin) – a case about fitness to fly and a severe ear infection – the Divisional Court endorsed the position that if the requested person "is unfit to fly" then the "practice" was to make a s.36(3) application. That was the course taken in the context of suspected tuberculosis and fitness to fly in R (Kozlowski) v SOCA [2013] EWHC 1741 (Admin) at §4; and Kochanowicz v Poland [2013] EWHC 2593 (Admin) at §8. In Kochanowicz, the Court held that there was no need for an adjournment, because fitness to fly could not lead to discharge but could be a basis for SOCA to apply for a s.36(3) extension of time. That case is the closest fit for the position which Counsel adopted at the first hearing before me (First Judgment §15). (4) It does not follow that the Courts will be receptive to satellite judicial review challenges to actions or inactions by the NCA. An argument which can be advanced through a statutory appeal will not be rerun by judicial review of the NCA, any more than by judicial review of the Home Secretary (cf. McKinnon (No.1) §63). The statutory rights of access to the Court (§13 above) are likely to occupy the field. The possible protection gap for judicial review is a change of circumstances in a Part 1 extradition where no appeal was ever lodged with the High Court, given that s.26 has no equivalent to s.108(5)-(8). There is the duty to entertain a late appeal which "could [not] be given" earlier (s.26(5)). But if that sufficed, since it has a matching provision in Part 2 (s.103(10)), s.108(5)-(8) would then presumably be otiose.

The Court's Function

21. The High Court, in its extradition appellate function, acts as follows. (1) The Court will deal with an appeal, late appeal or application to reopen an appeal within the scheme of rights of access (§13 above). (2) If an issue relating to "fitness to fly" arises, the Court will determine the issue, applying the legal prism (ss.91/25 and Article 3). (3) If an adjournment is needed, to address an issue of fitness to fly – applying that legal prism – on a fair and properly informed basis, it can be granted.

The Present Case

22. In the circumstances, I am now in substantially the same position as if I had in fact taken the course of which I raised (First Judgment §15) of allowing a short Arezina adjournment, with an opportunity for further information and submissions on the topic of fitness to fly. Having first entertained an appeal at its permission stage, I am now doing so again, having acceded to the application to reopen the appeal. At least so far as human rights are concerned, the Appellant could have issued a fresh appeal notice using the late human rights appeal route (s.108(5)-(8)), according to McIntyre at §12. So, in light of the information now provided, I will revisit the legal prism, applying the reasonable arguability threshold for permission to appeal.

23. I can start by repeating my summary of the original principal line of argument advanced by Mr Keith and Ms Thomas, on "health deterioration". It was (First Judgment §13):

> ***As at October 2022 when the hearing before the Judge took place, the Appellant had complex physical conditions, was suffering from blackouts and had sustained injuries in a fall. In 2023, however, after an MRI there has been the diagnosis of a multilevel degenerative spine disease and an advanced right sided cervical myelopathy. Dr Mitchell sets out the medical conditions, and that the Appellant is particularly frail, with a balance which is poor and a tendency to falls. Mr Nader-Sepahi (Spinal Neurosurgeon) describes the spinal condition and identifies an operation which would help and may be appropriate. Mr Ameen (Consultant Neurosurgeon) who first reported in October 2021, describes the unsteady gait, poor balance, inability to walk confidently without a walking stick, and the objective abnormal neurological sign of the right upper limb muscle wasting and says: "I believe that Mr Lomas is not fit to fly because of his current neurological disabilities particularly the loss of balance and the right arm and hand weakness making him very accident prone and has a moderately high risk of sustaining serious head and spinal injuries in case he falls". This is arguably transformative evidence, at least absence further concrete assurances to address the newly diagnosed conditions, which provides an arguable basis for resisting extradition.***

Mr Ameen

24. The latest report dated 27 February 2024 of the consultant neurosurgeon, Mr Ameen, follows from his first report dated 4 October 2021. It describes the Appellant as a classic case of advanced right sided cervical myelopathy, whose "main current clinical problem" is the impairment of balance with "occasional falls that can potentially cause significant injuries, the most serious of which would be another head and/or spinal injury". The Appellant is described as unable to walk without a stick, who mobilises with the support of handrails and furniture. He has right sided arm and hand weakness. He has the diagnosed multilevel degenerative disc disease. His persistent spinal-cord compression and foraminal stenosis will not disappear without a surgical compression procedure. Mr Ameen then says this:

> ***Does Mr Lomas' spinal condition affect his fitness to fly? Response: (1) Yes, I believe that Mr Lomas is not fit to fly because of his current neurological disabilities particularly the loss of balance and the right arm and hand weakness making him very accident prone and has a moderately high risk of sustaining serious head and spinal injuries in case he falls. (2) Such incidents will be very disastrous,***

> ***life threatening, very frightening, and disruptive to the plane crew and other passengers on the plane let alone the non-existent of medical facilities to deal with such tragic incidents on the plane. I am confident that Mr Lomas will not be allowed to fly if the airport staff becomes aware of his risks.***

25. I agree with Mr Dobbs that the thrust of Mr Ameen's concerns relate to balance, the risk of falling and the risk of head and spinal injury from a fall. Mr Ameen's report gives further detail. He describes the Appellant's poor balance, that he "often stumbles and falls" which has "on several occasions" caused him cuts and bruises; that, when falling on his back, the strain on his neck causes "dizziness and nausea" and then it is very difficult to get upright; that "most of his falls happened indoors on carpeted areas"; but that he is "very scared of falling on hard/concrete floors with his damaged neck which would be extremely dangerous as it could result in serious head injury"; that his balance and coordination problems worsen when walking on a straight line; that looking down when going downstairs makes him dizzy; and that bending backwards causes him to lose balance and fall over on his back.

26. Mr Ameen's opinion is carefully worded. It is clearly describing a moderately high risk of sustaining serious head and spinal injuries if – the phrase is "in case" – the Appellant were to sustain a relevant fall. Mr Ameen also clearly describes the sort of fall which could result in serious head injury: namely, falling on hard/concrete floors. Mr Ameen does not identify what situation "on the plane" could possibly involve falling on a hard or concrete floor. There is the description of dizziness "going downstairs", and I can see the obvious possibility of a fall from stairs down from an aircraft onto a concrete or tarmac ground, but the stairs – if there are any – would be when entering or exiting the aircraft. That raises a question about a possible need to access a wheelchair, as was a feature of Arezina.

27. Other aspects of Mr Ameen's report assist. As the report recognises, the Appellant travelled from his home in Emsworth (near Portsmouth) to the face to face consultation in London SW15. He is able to get in and out of cars and travel on car journeys, though a car "journey any distance more than 2-3 hours" is described as "debilitating and painful". Mr Ameen's report also records these important facts: the Appellant lives by himself; he is looked after by a son who visits him "twice a week"; and he has a "helper" who comes "every Friday for a few hours". He functions in these circumstances, getting around the house using grab handles and has pillows for his neck.

The NCA Email

28. In the context I turn to the NCA Email. It is written by PC Gorby Singh, a police officer seconded to the NCA who deals with removal arrangements. It says this:

> ***In regards to fitness to fly if the court deem it that the subject is still fit to fly, in context to the defence's objections, [w]e would be requesting as a precaution the SA authorities bring with them a suitable medical Practitioner to fly back with Mr Lomas and cater for his medical condition. May I also confirm that the SA authorities were always taking Mr Lomas to a medical facility and [not] to any prison. Mr Lomas would be meeting UK Police and SA police two hours prior to departure at the specified airline flight that his return would be booked on. If the condition requires a wheel chair assistance, then this will be factored in with the airline for departure and arrival. Hope this clarifies our involvement in the Extradition removal from the UK for this case.***

29. This information tells me that NCA have been considering the practical arrangements. The matter is being properly considered, even if Mr Keith and Ms Thomas are right that the NCA were only alerted by Mr Keith's communication (on 19 March 2024) in the run up to the previous hearing before me. The Appellant will not be unaccompanied on the flight. If

wheelchair assistance is required, this will be factored in, and it will be factored in both for airline departure and airline arrival. That addresses the suggestion of a going down and stairs, and risks of falling onto a hard or concrete floor. There is also the identified precaution of the medical practitioner to fly back with the Appellant and cater for his medical condition. Taking the Appellant to a medical facility is entirely apt as part of proper and adequate arrangements for the transfer. It will allow prompt medical assessment on arrival.

Mr Nader-Sepahi

30. The latest report of consultant spinal neurosurgeon Mr Nader-Sepahi is dated 28th of February 2024. It describes the Appellant's worsened balance and the severe weakness of his right dominant hand. It describes the advice to have an operation to take pressure off his spinal and right C7 nerve root. That operation is described as aimed to prevent any further deterioration, whose outcome is impossible to predict.

31. Mr Nader-Sepahi says this about fitness to fly:

> ***Is Mr Lomas fit to fly? If not, why not? Needing an urgent operation for the above reasons is currently the contraindication for him flying and no insurance company under normal circumstances would provide him travel cover until his operation is carried out and its outcome is known. The flight to South Africa is around 12 hours and sitting in a position without being able to move very much continues and exacerbates the pressure on the spinal cord by extension of the neck. In addition any unpredicted turbulence or sudden movements can cause spinal cord damage to the point that patients that have compromise of their spinal canal … can suffer a condition called Central Cord Syndrome or bleeding in to the spinal cord if subject to sudden jolts or falls. This would disable him for life. I therefore think for this reason it is not advisable for him to fly.***

32. Here, the thrust is about sitting in the plane and the risks from unpredicted turbulence or sudden movements. Again, this expert evidence is, in my judgment, carefully expressed. It does not state the opinion that the Appellant is unfit to fly. It starts with "the contraindication" as being the operation. That is the operation which aims to prevent further deterioration, and whose prospects are impossible to predict. Then there are the points about sitting in the aircraft "without being able to move very much" and about unpredicted turbulence or sudden movements. Impacts and implications are described which could disable the Claimant for life. They are "sudden jolts or falls".

33. I need to put this alongside what Mr Ameen describes, about the Appellant travelling in a car, including for more than 2-3 hours (which becomes "debilitating and painful"). I also have Mr Ameen's description of the Appellant wearing a Cervical Collar if he travels on car journeys, and that the Appellant "still uses the neck collar when travelling", which is something he does "to minimise the harmful effect of any sudden jerky movement of his neck". Ultimately – and importantly – what Mr Nader-Sepahi actually says, in carefully chosen language, is that he regards flying as "not advisable".

Conclusions

34. Part of the responsibility of the Court is to apply what has been described as "a rigorous yet pragmatic and circumspect approach to the evaluation of the evidence" (Bobbe §60). I am not discharging a freestanding evaluation of "fitness to fly". I am looking at the evidence relating to the risks from flying, applying the legal prism of the oppression and Article 3 tests, to see whether there is a reasonably arguable claim. I accept that Article 3 is about "real risk", and that the Appellant only has to satisfy an arguability threshold.

35. Having done so, in light of what I have said about the evidence, I accept the submissions of Mr Dobbs. The case does not cross the arguability threshold and there is no proper basis for an adjournment. The evidence does not – reasonably arguably – provide a basis on which the concerns identified by Mr Ameen and Mr Nader-Sepahi mean the "second stage" transfer of the Appellant would reach the threshold of s.91 (oppression) or Article 3 (identifying, on substantial grounds, a real risk of inhuman or degrading treatment). The precautions available, beyond argument, are sufficient. The transfer, beyond argument, cannot be characterised as oppressive or resulting in a real risk of a significant and permanent worsening of the Appellant's state of health. Nor does a more immediate focus on the experience of flying, even arguably, give rise to oppression or a real risk of treatment which is inhuman or degrading.

36. I have explained that this is not a freestanding judicial function of evaluating fitness to fly (§7 above). It is the disciplined application of a legal prism (§5 above) in the exercise of the Court's function (§21 above). This is why it has never been the case that the fact of an expert report or reports expressing a view of "unfitness to fly" equates to satisfying the tests for s.91 or Article 3. A careful analysis of what is actually being said, and not said, in the context of what else is being said and not said, is appropriate. The legal prism must be faithfully applied. I will give two illustrative examples. In PP v Poland [2019] EWHC 1761 (Admin) a clinician had expressed the opinion that it would be extremely unwise and unsafe for the requested person to travel abroad in his current condition and his health would be significantly endangered (§20). On analysis, this element of the case fell short of s.25 oppression (§33). In Bobbe there were a series of reports stating opinions that the requested person was not fit to travel, even with medical assistance (§12(viii), 13(v), 14(viii)); but, on analysis, the Article 3 and s.25 arguments failed (§§67-71).

37. Following what is in effect the adjournment of the question of fitness to fly, and having revisited afresh the question of whether the evidence relating to the health conditions and the implications of the extradition transfer are capable of supporting a reasonably arguable s.91 or Article 3 appeal, I have come to the clear view that they cannot. It remains the case that a substantive appeal has no realistic prospect of success. Moreover, and like Swift J in Arezina, I am satisfied as to the appropriateness of arrangements being made. I am satisfied that any necessary adjustments have been recognised and that there is no basis for any adjournment or further direction.

38. Mr Keith and Ms Thomas emphasise the Appellant's upcoming operation. They say there is a viable s.91 argument, at least to secure the outcome of a statutory adjournment (§6 above). But I have already rejected the invitation to adjourn to allow time for that (First Judgment §14) and that is not part of the case on which I gave permission to reopen. If the evidence about unfitness to travel were a viable basis of appeal, I would be granting permission to appeal anyway. Since it is not, reliance on the upcoming operation cannot assist.

39. I will therefore refuse permission to appeal on both s.91 and Article 3, on the fitness to fly topic which I gave permission to reopen. I am grateful to all parties, and the experts whose reports I have considered, for their assistance. Echoing Swift J in Arezina No.2, I urge all concerned to make sure that steps are taken to ensure practical arrangements are clearly thought through.

27.3.24