Neutral Citation Number: [2022] EWHC 3281 (Admin)

Case No: CO/288/2022
CO/317/2022
CO/357/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2022

Before :

LADY JUSTICE NICOLA DAVIES DBE
MR JUSTICE CHOUDHURY

- -

Between :

The King, on the application of: **[1] Joe Anthony CHAPPELL** **[2] Daniel Lee KELLY** **[3] Kaine Lee WRIGHT**	**Claimants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
- and -	
THE GOVERNMENT OF JAPAN, REPRESENTED BY THE CPS	**Interested Party**

- -
- -

Mark Summers KC and George Hepburne-Scott (instructed by **Foxes Solicitors**) for the **The First Claimant**
Jonathan Hall KC and Alex Tinsley (instructed by **Foxes Solicitors**) for the **The Second Claimant**
Edward Fitzgerald KC and Sam Blom-Cooper (instructed by **Carson Kaye Solicitors**) for the **The Third Claimant**

Clair Dobbin KC and Rebecca Hill (instructed by **Government Legal Department**) for the **Defendant**
Ben Keith and Georgia Beatty (instructed by **CPS Extradition Unit**) for the **Interested Party**

Hearing date: 22 November 2022

- -

JUDGMENT

Lady Justice Nicola Davies, Mr Justice Choudhury:

Introduction

1. The Claimants challenge the Secretary of State's ("SSHD's") certification, under s.70 of the *Extradition Act 2003* ("the 2003 Act"), of the first ever extradition request to the UK from Japan. There is no extradition treaty between the UK and Japan. The extradition proceedings in respect of each of the three Claimants arise under 'special extradition arrangements' within the meaning of s.194 of the 2003 Act as set out in a Memorandum of Cooperation between the two nations dated 6 July 2021 ("the MoC"). The Claimants' challenge, in essence, is that the SSHD's certification was unlawful as the request emanated not from the Government of Japan ("GoJ") as required by the MoC, but from the National Police Agency of Japan ("the Police"). The SSHD's response (supported by the GoJ) is that the request for extradition quite plainly has been made by the GoJ.

Factual Background

2. The extradition request is made in respect of the three Claimants, who were allegedly involved in a violent robbery of a jewellery store in Tokyo in 2015. The specific crimes alleged are "intrusion upon building" and "robbery resulting in injury". It is alleged that the three Claimants posed as customers to gain entry to the jewellery store, whereupon one of them punched a security guard causing injury to his face. The Claimants are alleged to have then smashed display cases in order to make off with jewellery to the value of 106,272,000 yen (approximately £630,000 at current exchange rates).

3. The investigations in Japan led to the identification of the Claimants as suspects. On 28 March 2018, the Police addressed a letter directly 'To the competent authorities of the United Kingdom (…)'. The letter states: 'The National Police Agency of Japan, respectfully requests the competent authorities of the United Kingdom (…) to extradite the above-mentioned suspects to Japan'. The Police's letter enclosed correspondence from the Tokyo Metropolitan Police Department, documents setting out the offences in question and the supporting evidence. We refer to this letter and the supporting documents and evidence as "the Police Documents".

4. On 3 April 2018, the UK Central Authority ("UKCA"), part of the International Criminality Directorate of the Home Office, received a 'Note Verbale' (a form of communication used by a Head of Mission: see Satow's *Diplomatic Practice* at paragraph 6.7) from the Embassy of Japan in the following terms:

> "1. The Embassy of Japan in the United Kingdom of Great Britain and Northern Ireland presents its compliments to the Home Office of the United Kingdom of Great Britain and Northern Ireland and has the honour to request the extradition to Japan of Daniel Lee KELLY, Kaine Lee WRIGHT, and Joe Anthony CHAPPELL for the offences of "intrusion upon building" and "robbery resulting in injury" that occurred in Japan.
>
> 2. Please find enclosed the request for Extradition from the National Police Agency of Japan to the competent authorities of the United Kingdom of Great Britain and

Northern Ireland (Japanese/English). Please note that the English translations were produced by the National Police Agency of Japan.

3. The Embassy of Japan in the United Kingdom of Great Britain and Northern Ireland avails itself of this opportunity to require to the Home Office of the United Kingdom of Great Britain and Northern Ireland its assurance that this serious matter will be given its highest consideration."

5. We shall refer to this Note Verbale as "the April 2018 Note". At that stage there were no established means by which either country could make an extradition request to the other, there being no extradition treaty between them. However, it is open to the SSHD, pursuant to s.194 of the 2003 Act, to enter into special extradition relations with countries with which no treaty exists, the effect of which would be to allow requests to be certified by the SSHD as if the request had been made by a country under Part 2 of the 2003 Act. Accordingly, negotiations commenced between the UK and Japan on agreeing the terms of the special arrangements. The resulting MoC (the full title of which is the "Memorandum of Cooperation between the Government of the United Kingdom and Northern Ireland and the Government of Japan concerning the extradition of the persons sought") was agreed on 6 July 2021. It is notable that the MoC is concerned only with the extradition of the three Claimants, who are expressly named in the recitals to, and in the body of, the MoC; it does not authorise extradition requests in respect of any other persons. Indeed, it is stated under the 'Definitions' section of the MoC that:

"For the purposes of this Memorandum:

(a) "Extradition" means the surrender to the jurisdiction of Japan of [the Claimants] who are wanted by the competent authorities in that jurisdiction for the purposes of prosecution;

(b) "Judicial Authority" means the judicial authority which is charged under the law of the United Kingdom with the duty of considering requests for extradition;

(c) "Requested Participant" means the Government of the United Kingdom of Great Britain and Northern Ireland;

"(d) "Requesting Participant" means the Government of Japan; and

"(e) "the persons sought" means [the Claimants]…" (Emphasis added)

6. Paragraph 2 of the MoC provides that the UK "will extradite the persons sought to the Requesting Participant in accordance with the measures outlined in this Memorandum".

7. Paragraph 6 of the MoC sets out the 'Extradition Procedures' and provides:

"1. The request for extradition of any of the persons sought will be made in writing to the Secretary of State for the Home Department through the diplomatic channel".

8. On 2 August 2021, the SSHD issued a certificate pursuant to s.194 of the 2003 Act certifying that special arrangements had been made between the countries. On the very next day, 3 August 2021, the UKCA received a further Note Verbale HO/P/01/2021 from the Embassy of Japan ("the August 2021 Note") in the following terms:

> "1. The Embassy of Japan … presents its compliments to the Home Office … and, with reference to Note Verbale HO/P/001/2018 dated 03/04/2018, has the honour to request the extradition of [the Claimants] from the UK to Japan to proceed."

9. As with the April 2018 Note, this one was sealed with the official seal of the Embassy of Japan. We refer to the April 2018 Note and the August 2021 Note together as "the Embassy Notes".

10. On 4 August 2021, the then head of extradition at the UKCA, Mr Julian Gibbs, issued a certificate pursuant to s.70 of the 2003 Act in respect of each Claimant in the following terms:

> "… the Secretary of State hereby certifies that the request from Japan for [the relevant Claimant], which is the subject of special arrangements made pursuant to section 194 of the Act and a certificate issued under that section, is valid and has been made in the approved way."

11. It is these s.70 certificates that are the subject of challenge in this application. On the same date, UKCA sent an email to Westminster Magistrates' Court International Jurisdiction Office enclosing: the August 2021 Note, the certificate issued under s.194 of the 2003 Act, the certificates issued under s.70 of the 2003 Act in respect of each Claimant, and the Police Documents (the latter being referred to in the email as "a copy of the extradition request").

12. On 17 August 2021, District Judge Zani issued arrest warrants under s.71 of the 2003 Act ("the domestic warrants") in respect of the Claimants. In each case, the District Judge found that 'the offence in respect of which extradition is requested' is an extradition offence.

13. On 22 September 2021, the First Claimant (Mr Chappell) was arrested under the domestic warrant in his name. Upon arrest, he was provided with the relevant s.70 certificate, the s.194 certificate and the Police Documents. He was not provided with either of the Embassy Notes. On 23 September 2021, Mr Chappell was produced before Westminster Magistrates' Court and was remanded into custody. The matter was adjourned to 14 October 2021 for a case management hearing intended to be before the Senior District Judge.

14. On 27 September 2021, the Second Claimant (Mr Kelly) was served with the same documents (the s.70 certificate in his case being the one relevant to him) and subsequently arrested on 28 September 2021 at HMP Pentonville, where he was in custody serving a sentence of imprisonment on other matters. As Mr Kelly was a serving prisoner, and then stood charged with a domestic offence, his case was adjourned and he was remanded in custody. His case was also adjourned to 14 October 2021.

15. Those representing Mr Chappell and Mr Kelly wrote to the CPS seeking sight of the MoC, which was the subject of the s.194 certificate. On 6 October 2021, the CPS refused the request stating that the MoC "…is not part of the [s.194] certificate".

16. A further request to see the MoC was made thereafter directly to Mr Gibbs. Mr Gibbs had by then retired from the Home Office and that request was not responded to.

17. The hearing of Mr Chappell's and Mr Kelly's cases on 14 October 2021 was relisted for 4 November 2021.

18. On 22 October 2021, the Third Claimant, (Mr Wright) surrendered to Charing Cross Police Station and was arrested on the basis of the domestic warrant in his name. He was provided with the same documents as had been provided to the other Claimants (the s.70 certificate in his case being the one relevant to him), but was also provided with the August 2021 Note. Mr Wright was brought before the Magistrates' Court and was granted conditional bail, although he was not released from custody until 26 October 2021 after the CPS's appeal against the grant of bail had been dismissed.

19. At a hearing before the Senior District Judge on 4 November 2021, all three Claimants applied for and obtained an order that the CPS provide the MoC. The MoC was served on all parties by the CPS on 10 November 2021.

20. Pre-action correspondence from those representing the First and Second Claimants commenced on 12 November 2021. The response to that correspondence from the Government Legal Department ("GLD"), dated 7 December 2021, made reference to the Embassy Notes, although copies were not provided at that stage. Copies were sought and, after further correspondence in December 2021 and January 2022, the Embassy Notes were provided to the Claimants on 11 January 2022.

21. Proceedings were issued by all three Claimants on 27 January 2022. This was almost 6 months after the date of the s.70 certificates under challenge. This delay gives rise to a time point which is considered below.

22. The application for permission to seek judicial review was considered by Griffiths J on the papers on 24 May 2022. Griffiths J directed that there be a rolled-up hearing to consider permission and, if permission is granted, the substantive claim. In so directing, Griffiths J observed that "the substantive grounds appear to be arguable but there is also an issue about limitation which is not suitable for determination on the papers."

Legal Framework.

23. Section 194 of the 2003 Act provides:

> "194 Special extradition arrangements
> (1) This section applies if the Secretary of State believes that—
> (a) arrangements have been made between the United Kingdom and another territory for the extradition of a person to the territory, and
> (b) the territory is not a category 1 territory or a category 2 territory.
> (2) The Secretary of State may certify that the conditions in paragraphs (a) and (b) of subsection (1) are satisfied in relation to the extradition of the person.

(3) If the Secretary of State issues a certificate under subsection (2) this Act applies in respect of the person's extradition to the territory as if the territory were a category 2 territory.
(4) As applied by subsection (3), this Act has effect—
(a) as if sections 71(4), 73(5), 74(11)(b) 74A to 74E, 84(7) and 86(7) were omitted;
(b) with any other modifications specified in the certificate.
(5) A certificate under subsection (2) in relation to a person is conclusive evidence that the conditions in paragraphs (a) and (b) of subsection (1) are satisfied in relation to the person's extradition." (Emphasis added)

24. Thus, once certified by the SSHD pursuant to subsection (2), the 2003 Act is to apply to the extradition in question as if it were to a category 2 territory. The s.194 certificate in this case, which is not the subject of challenge, did not set out any modifications on the face of the certificate itself.

25. As s.70 of the 2003 Act is central to this claim, we set it out in full:

"**70 Extradition request and certificate**
(1) The Secretary of State must (subject to subsection (2)) issue a certificate under this section if he receives a valid request for the extradition of a person to a category 2 territory .
(2) The Secretary of State may refuse to issue a certificate under this section if–
(a) he has power under section 126 to order that proceedings on the request be deferred,
(b) the person whose extradition is requested has been recorded by the Secretary of State as a refugee within the meaning of the Refugee Convention, or
(c) the person whose extradition is requested has been granted leave to enter or remain in the United Kingdom on the ground that it would be a breach of Article 2 or 3 of the Human Rights Convention to remove him to the territory to which extradition is requested.
(3) A request for a person's extradition is valid if—
(a) it contains the statement referred to in subsection (4) or the statement referred to in subsection (4A) , and
(b) it is made in the approved way.
(4) The statement is one that–
(a) the person is accused in the category 2 territory of the commission of an offence specified in the request, and
(b) the request is made with a view to his arrest and extradition to the category 2 territory for the purpose of being prosecuted for the offence.
(4A) The statement is one that–
(a) the person has been convicted of an offence specified in the request by a court in the category 2 territory, and
(b) the request is made with a view to his arrest and extradition to the category 2 territory for the purpose of being sentenced for the offence or of serving a sentence of imprisonment or another form of detention imposed in respect of the offence.
(5) A request for extradition to a category 2 territory which is a British overseas territory is made in the approved way if it is made by or on behalf of the person administering the territory.

> (6) A request for extradition to a category 2 territory which is the Hong Kong Special Administrative Region of the People's Republic of China is made in the approved way if it is made by or on behalf of the government of the Region.
> (7) A request for extradition to any other category 2 territory is made in the approved way if it is made—
> (a) by an authority of the territory which the Secretary of State believes has the function of making requests for extradition in that territory, or
> (b) by a person recognised by the Secretary of State as a diplomatic or consular representative of the territory.
> (8) A certificate under this section must—
> (a) certify that the request is made in the approved way, and
> (b) identify the order by which the territory in question is designated as a category 2 territory.
> (9) If a certificate is issued under this section the Secretary of State must send the request and the certificate to the appropriate judge.
> (10) Subsection (11) applies at all times after the Secretary of State issues a certificate under this section.
> (11) 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." (Emphasis added)

26. It can be seen that the issuing of a s.70 certificate is mandatory in the event of receiving a valid extradition request: s.70(1). An accusation extradition request is valid if it meets the two requirements specified in subsection (3): the first is that it contains the statement referred to in subsection (4), that is to say that the person is accused of an offence specified in the request and the request is made with a view to his arrest and extradition for the purposes of prosecution; the second is that the request is made in the approved way as set out under subsection (7).

Grounds for Judicial Review

27. The Claimants contend that the SSHD's decision to certify the request pursuant to s.70 of the 2003 Act was unlawful. There are three grounds of challenge to that decision:

    i) Ground 1 – The Claimants contend that the request for extradition was issued and made by the Police and not (as required by the MoC) by the GoJ, and its 'diplomatic transmission' does not alter that. As such, the SSHD erred in certifying the request as valid;

    ii) Ground 2 – If the Claimants are right that the request for extradition does not satisfy the terms of the MoC, then it is not open to the SSHD to rely on the terms of s.70(7)(b) of the 2003 Act to circumvent that non-compliance;

    iii) Ground 3 – Even if s.70(7)(b) of the 2003 Act were applicable, the SSHD misdirected herself in treating the request, which was from the Embassy and not any identified individual, as being from a "person recognised by the SSHD as a diplomatic or consular representative", and thereby acted unlawfully.

28. Each of these grounds involves, to varying degrees, reliance on a particular interpretation of the relevant provisions of the 2003 Act. A question arises as to the

approach to be taken by the Court to questions of interpretation in this context. In general, the Claimants contend that strict compliance with the provisions of the 2003 Act is required, whereas the SSHD submits that a broader purposive approach to interpretation is appropriate. It is convenient therefore, before dealing with each ground of challenge in turn, to consider the proper approach to the interpretation of extradition legislation.

The Court's approach to interpretation

29. In *Cartwright v Superintendent of HM Prison* [2004] 1 WLR 902, the Privy Council had to consider whether the Court of Appeal of The Bahamas had been correct to entertain an appeal by the USA against a decision granting the two applicants' habeas corpus applications and ordering their release, in circumstances where the legislation only provided for an appeal against the refusal of habeas corpus, and not against the granting thereof. The Privy Council, by a majority, held that there was jurisdiction to entertain the appeal on the basis that the decisions below had effectively been judicial review decisions in respect of which a right of appeal did exist. In reaching that conclusion, which involved a strained construction of s.17(3) of the *Court of Appeal Act* of The Bahamas, Lord Steyn said as follows as to interpretation:

> "14. In extradition law the court must adopt a balanced approach. Throughout extradition law there are two principal threads. First, in exercising powers of extradition courts of law must, as Isaacs J observed, be vigilant to protect individuals from the overreaching of their rights by the government. Justice to the individual is always of supreme importance. Secondly, the Board considers that it is imperative of legal policy that extradition law must, wherever possible, be made to work effectively. There was some controversy about this point. It is, therefore, necessary to explain the position.
> 15. Crime and criminals have always traversed national boundaries. But in the modern world advances in technology and means of communication have enormously increased this phenomenon, notably in the fields of financial crimes, drugs offences and terrorism. It is, therefore, of great importance that extradition law should function properly. For the applicants Mr Fitzgerald accepted on the authority of *R v Governor of Ashford Remand Centre, Ex p Postlethwaite [1988] AC 924* , 946–947, that extradition treaties, being contracts between sovereign states, should be purposively and liberally construed. But he argued that a different approach is necessary in regard to domestic extradition legislation. He made a comparison with criminal statutes and submitted that an approach of strict construction is necessary. The Board would reject this submission. Even in regard to criminal statutes the presumption in favour of strict construction is nowadays rarely applied. There has been a shift to purposive construction of penal statutes: see *Cross, Statutory Interpretation* , 3rd ed (1995), pp 172–175. In any event, it is a well settled principle "that a domestic statute designed to give effect to an international convention should, in general, be given a broad and liberal construction": *The Antonis P Lemos [1985] AC 711* , 731. The same must be true of a statute passed pursuant to a bilateral treaty. Moreover, in *In re Ismail [1999] 1 AC 320* the House of Lords in a unanimous judgment commented on the need to bring suspected criminals, who have fled abroad, to justice through the extradition process. In that case I observed, at p 327:

> "There is a transnational interest in the achievement of this aim. Extradition treaties, and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permit it in order to facilitate extradition…"
>
> As the final court of The Bahamas the Board is in no doubt that it must adopt, where the Extradition Act 1994 permits it, a purposive or dynamic interpretation to make extradition work effectively." (Emphasis added).

30. The minority (Lord Hoffmann and Lord Rodger of Earlsferry) in a strongly dissenting opinion, said as follows:

> "…But equally, if not more important, is the rule of law. People facing extradition, however unmeritorious they may be, are entitled to the law. If Parliament has made no provision for appeal against an erroneous order for their release, they are entitled to the benefit of that order. It is not the function of judges to become legislators and remedy what they perceive as a defect in the law by giving a far-fetched construction to what we are bound to say are the extremely plain and simple words of section 17(3)."

31. It is notable that, whilst the minority disagreed with the "far-fetched" construction adopted by the majority in that case, there was no express dissent from the general approach to construction adumbrated by Lord Steyn at paragraph 15 of *Cartwright*.

32. The applicants in *Cartwright* were two out of three individuals who had been the subject of an extradition request from the USA. All three had been granted habeas corpus, but only two were re-arrested following the appeal against that decision. The third of the three (Gibson) had been at liberty at the time of the decision in *Cartwright*. Upon his re-arrest in February 2005, he raised the same arguments against jurisdiction as in *Cartwright*. That matter also reached the Privy Council in *Gibson v USA* [2007] 1 WLR 2367, in which the Judicial Committee had to consider whether the majority decision in *Cartwright* had been correct. The Privy Council unanimously concluded that the minority in *Cartwright* had been correct and accordingly overruled the decision of the majority. In doing so, Lord Brown said of Lord Steyn's opinion in *Cartwright*:

> "15. With the utmost respect to that opinion their Lordships cannot see how it meets the decisive objection noted by the minority: the fact that, whether or not the judge also made an order for certiorari or a declaration, he undoubtedly made an order for habeas corpus and against that particular order there was no appeal. Para 41 of the minority's opinion encapsulates the essential difficulty in the majority's view:
>
> > "The interpretation given by the majority to the judgment of Isaacs J means that not only did he (presumably on the authority of Moliere) make a declaratory order and order of certiorari without realising that he was doing so, but that he did nothing else. The notional orders are conjured up in order to be set aside on appeal and, this being accomplished, the actual order against which there was no appeal vanishes in a puff of smoke.""

33. The basis for overruling the decision in *Cartwright* was thus the fact that the majority had disregarded the actual order made and against which there was no right of appeal. There was no criticism or qualification, express or implied, of the general approach to construction of extradition statutes set out by Lord Steyn at [15] of *Cartwright*.

Instead, the criticism was that the majority in *Cartwright* had in effect 'gone too far', and in doing so had constructed a scenario that did not in fact exist.

34. The passage from *In re Ismail* [1999] 1 AC 320, 327, cited by Lord Steyn in *Cartwright* in support of the purposive approach to the construction of extradition legislation was (amongst others) considered in *R (Bleta) v SSHD* [2005] 1 WLR 3194 by Crane J, who said, "*I fully accept, in the light of those authorities, that a purposive construction should be adopted in construing the 2003 Act*."

35. That passage from *Ismail* was also considered by Lord Hope in *Office of the King's Prosecutor, Brussels v Cando Armas* [2006] 2 AC 1 at [24]:

> "24. In *R v Governor of Ashford Remand Centre, Ex p Postlethwaite [1988] AC 924* , 947 Lord Bridge of Harwich said that the court should not apply the strict canons appropriate to the construction of domestic legislation to extradition treaties. In *In re Ismail [1999] 1 AC 320* , 327 Lord Steyn, noting that there was a transnational interest in bringing those accused of serious crime to justice, said:
>
> > "Extradition treaties, and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permit it in order to facilitate extradition."
>
> These passages describe the approach to the issues of statutory construction that have been raised in this appeal. But the liberty of the subject is at stake here, and generosity must be balanced against the rights of the persons who are sought to be removed under these procedures. They are entitled to expect the courts to see that the procedures are adhered to according to the requirements laid down in the statute. Unfortunately this is not an easy task, as the wording of Part 1 of the 2003 Act does not in every respect match that of the Framework Decision to which it seeks to give effect in domestic law. But the task has to be approached on the assumption that, where there are differences, these were regarded by Parliament as a necessary protection against an unlawful infringement of the right to liberty." (Emphasis added).

36. In a subsequent passage in *Cando Armas* rejecting an argument that in order to comply with statutory requirements, an arrest warrant had to contain the actual words of the statute, Lord Hope said that, "*The purpose of the statute is to facilitate extradition, not to put obstacles in the way of the process which serve no useful purpose but are based on technicalities*."

37. Lord Hope went on to consider Crane J's decision in *Bleta* and agreed with him that in the context of construing whether information provided satisfied the requirements of the 2003 Act, "*if there is a gap in the information, it ought not to be filled by mere guesswork*".

38. In the light of those authorities, we cannot agree with Mr Fitzgerald KC's proposition that the overruling of *Cartwright* by *Gibson* relegated the broad and purposive approach to construction set out in *Cartwright* to history. The *Cartwright* approach was itself based on earlier authority such as *In re Ismail,* and the overruling of *Cartwright* did not involve any criticism or qualification of Lord Steyn's statements of principle in this respect. Such qualification as does exist arises from Lord Hope's opinion in *Cando Armas* that the generosity of that approach must be balanced against the rights of the individual whose liberty is at stake.

39. Drawing the statements from the various authorities cited to the Court together, it seems to us that the following reflects the proper approach to the construction of extradition legislation:

    i) It is well-established that a generous and purposive approach is to be taken to the construction of extradition treaties and statutes: *Antonis P Lemos* at p.731*; In re Ismail* at p.327; *Cartwright* at [15]; *Bleta* at [10];

    ii) However, that generosity is to be balanced against the rights of the requested person, who is entitled to expect the courts to ensure that the requirements of the 2003 Act are strictly adhered to: *Cando Armas* at [24]; *Khubchandani* at p.243; *Von Der Pahlen* at [13];

    iii) It should be borne in mind that the purpose of the 2003 Act is to facilitate extradition, and not to place obstacles, based on technicalities, in the way of the process: *Cando Armas* at [45];

    iv) The broad and purposive approach to construction should not lead to the Court filling in gaps in information by guesswork: *Bleta* at [32]; *Cando Armas* at [48].

40. With that approach in mind, we turn to the three grounds of challenge and take each in turn.

Ground 1 – Was the extradition request issued and made only by the Police?

Submissions

41. Mr Summers KC, who appears with Mr Hepburne-Scott for the First Claimant, led on this issue on behalf of the Claimants. Mr Summers submits that the extradition request is pivotal to and determinative of what happens in the course of extradition proceedings. He highlights the fact that, once certified, the request and certificate must be sent to the appropriate judge (s.70(9)), the judge's power to issue a warrant for arrest arises once those documents, including the request, are sent, and that the judge is duty-bound (pursuant to s72(7)(a)) to inform the requested person of the contents of the request. In the present case, however, Mr Chappell was not, upon his arrest, or before the Magistrates' Court, served with the Embassy Notes now relied upon by the SSHD as comprising the extradition request. Instead, Mr Chappell was served only with the relevant s.70 certificate and the Police documents. Mr Summers further submits that it is the Police (through the CPS) who are providing the materials considered by the Magistrates' Court rather than the GoJ. These matters, in conjunction with the SSHD's own repeated references to the Police Documents as "the extradition request", lead, in Mr Summers' submission, inexorably to the conclusion that the only extradition request at play was that contained in the Police Documents.

42. As to the SSHD's contention that the certification was in respect of a request embodied within the Embassy Notes, Mr Summers points out that there is no evidence before the Court as to what Mr Gibbs had in mind when issuing the certificates. In any case, the August 2021 Note, far from containing any extradition request, was merely a request that a *pre-existing* request should proceed. The April 2018 Note is

inherently self-contradictory in that it purports to be a request for extradition but goes on in the second paragraph to refer to having "enclosed the request for Extradition from the [Police]…". Mr Summers submits that the only reasonable conclusion to draw from that is that the first paragraph of the April 2018 Note really means that the Embassy has the honour to "convey or transmit" the request as provided for in the MoC, consistently with extradition practice more generally, whereby such requests are conveyed via diplomatic channels. It is contended that the SSHD's position confuses the substantive act of issuance / authorship of such a request with the administrative act of its diplomatic transmission.

43. The Embassy Notes are, in any event, deficient as requests on their face, submits Mr Summers, because they do not contain the statements required by s.70(4) of the 2003 Act specifying the offence and that the requested person is to be prosecuted. Mr Summers submits that it is necessary for such statements to be the subject of separate consideration and authorship by the GoJ to ensure that it has 'addressed its mind', as Mr Summers puts it, to the substantive issues behind the request and that it is not merely recycling or transmitting a request made by an authority not deemed competent by the terms of the MoC. That the Embassy Notes do no more than transmit the requests from the Police is confirmed by the SSHD's own description of the Embassy Notes as "*Diplomatic correspondence from the Japanese Embassy transmitting the extradition request*".

44. Ms Dobbin KC, who appears with Ms Hill for the SSHD, submits that it is artificial to contend that the request was not made by the GoJ. That is particularly so given that the latter has gone so far as to enter into a specific agreement under international law with the UK to seek the Claimants' extradition. Furthermore, the terms of the Embassy Notes themselves refer expressly to making a request for extradition. The Claimants' attempt in these circumstances to reduce the status of the Embassy Notes to mere 'cover letters', with the sole function of "transmitting" the request in the Police Documents, is not sustainable. Ms Dobbin submits that the Court is entitled to have regard to all of the materials sent in support of the request in ascertaining whether it ought to be certified and that there is no basis for seeking to "decouple" the requests in the Embassy Notes from the Police Documents in support. All of the Claimants' submissions as to what happened after certification are of little or no consequence given that the challenge is to the lawfulness of the decision to certify.

45. Mr Keith, who appears with Ms Beatty for the GoJ, adopts Ms Dobbin's submissions. He further submits that, contrary to the Claimants' contention, the GoJ has been closely involved in the entirety of the proceedings and highlights the fact that different members of the Ministry of Justice of Japan and the Police have provided a report and some of them gave evidence before the Magistrates' Court.

Ground 1 - Discussion

46. Section 70(3) of the 2003 Act provides that a "request for a person's extradition is valid if (a) it contains the statement referred to in subsection (4) [i.e. that the person is accused of the commission of a specified offence, and that the request is made with a view to his arrest and extradition to the territory for the purposes of being prosecuted for the offence], and (b) it is made in the approved way." If those conditions are met, the SSHD must certify the request as valid.

47. The question that arises here is whether the Embassy Notes can amount to the making of a request for extradition notwithstanding the fact that the substantive material in support of the request emanates from the Police. In our judgment, the Embassy Notes quite clearly can and do so amount. There are several reasons for so concluding.

48. First, as a matter of plain and ordinary language, the Embassy Notes expressly contain a request for the extradition of the named individuals. Thus the April 2018 Note states that the Embassy "has the honour to request the extradition to Japan of [the Claimants]." That is an unambiguous statement that a request for extradition is being made by the GoJ through its Embassy in the UK. The fact that the April 2018 Note goes on to refer to the "*enclosed request*" from the Police does not undermine or negate that statement. There is nothing to prevent the GoJ from making a request for extradition (as it has done here) in circumstances where the material in support of the request has been prepared by another agency (in this case the Police). It is neither incorrect nor contradictory for the April 2018 Note to refer to the Police Documents as "the enclosed request": quite clearly, the enclosed letter from the Police dated 20 March 2018 is headed "Request for extradition of the [Claimants]…". The description of what is attached is therefore correct. However, by describing the attached material as such, the Government is not disavowing its own request made in unambiguous terms in the first paragraph of the April 2018 Note. Had the intention been simply to transmit the request, as the Claimants submit, the Note could simply have stated that Embassy has the honour to refer the UK to the attached request for extradition. That it did not do so speaks to a deliberate desire on the part of the GoJ to adopt that request as its own and to make the request itself.

49. The August 2021 Note states that the Embassy "… with reference to the [April 2018 Note] has the honour to request the extradition of [the Claimants] from the UK to Japan to proceed". Mr Summers submits that this cannot be a request for extradition because it is simply referring to a *pre-existing* request - namely the request referred to in the Police Documents - "to proceed". We do not accept that argument. The August 2021 Note refers back to the April 2018 Note (not the Police Documents), which, as we have found, contains an unambiguous request for extradition from the Government. As at April 2018, that request could not be acted upon because of the absence of any treaty arrangements between the two countries. The MoC was thus entered into for the specific purpose of extraditing these Claimants. This was followed shortly thereafter by the s.194 certificate on 2 August 2021 and immediately after that on 3 August 2021 by the August 2021 Note. It is in that context that the August 2021 Note must be viewed. In our judgment, it is plain beyond peradventure that, in sending the August 2021 Note, the GoJ was making the request for extradition which had been enabled by the certified MoC. That the GoJ did so by requesting that the extradition is "to proceed" signifies nothing more in this context than that the extradition, which the GoJ had first requested back in April 2018, should formally commence in light of the newly agreed MoC. Even if it were to be construed, as the Claimants submit, as an attempt to restart a pre-existing request, it does not prevent the August 2021 Note from amounting to a request on its own terms. There is nothing to preclude a request being made simply by reiterating or renewing a request already made.

50. Second, the Claimants' suggestion that the Embassy Notes are deficient as they do not contain the statements required by s.70(4) of the 2003 Act is untenable. That

submission relies on the proposition that one cannot make a request within the meaning of s.70 if one seeks to rely on substantive material prepared by another. There is nothing on the face of s.70 to support that approach. Indeed, by s.70(3), a request for a person's extradition is valid if it "contains the statement referred to in subsection (4)…" On a plain and ordinary reading of that phrase, the required statements may be contained in a request if they are included by cross-reference and/or attachment. Furthermore, as Ms Dobbin has pointed out, there are numerous authorities confirming the permissibility of looking at a request *and* the supporting documents in order to ascertain whether the required statements are present. In *R (Bleta)*, the issue was whether a request for extradition in a conviction case was valid in circumstances where neither the request nor the SSHD's certificate contained the required statement that the requested person was unlawfully at large. At [13] to [14], Crane J said as follows:

> "13. The submissions on behalf of the Secretary of State and the Government of Albania are that even if there is no equivalent statement or a statement in the actual words of the Act, the Secretary of State is entitled to look at the request, together with the documents incorporated in it by reference, in order to determine whether the request is in effect stating that the claimant is unlawfully at large following a conviction.
> 14. Those latter submissions on behalf of the Secretary of State and the Government of Albania, I accept in principle. Even if the actual words of the Act are not incorporated in the request, and even if there is no equivalent wording, in my view, at least in a clear case, it is permissible for the Secretary of State to look at the request itself and its supporting documents to see whether the matter is clear. Adopting a purposive interpretation of the 2003 Act, it seems to me that that is, in effect, an examination of whether the request contains the necessary statement." (Emphasis added).

51. In *R (Akaroglu) v SSHD & Romania* [2007] EWHC 367 (Admin), Scott Baker LJ sitting in the Divisional Court had to consider whether a request had made it clear that the requested person was being sought as an accused rather than a convicted person. At [16], Scott Baker LJ held:

> "16. For my part, I have little difficulty in concluding that the request itself makes clear that the appellant is accused rather than convicted. I regard the statement that the warrant for arrest could not be enforced because the appellant "eluded criminal prosecution by leaving our country" as virtually determinative. I am conscious, however, that one must be astute to possible defects or ambiguities in translation. The standard of translation leaves a good deal to be desired. It seems to me therefore necessary to look not only at the request but also at all the accompanying documents that were sent to the Secretary of State. Having done so, I have no difficulty at all in accepting the submission of Mr Hardy, who has appeared for the Government of Romania, that it is overwhelmingly obvious that the accused was being sought as an accused rather than a convicted person. Quite apart from anything else the Romanian authorities enclosed a warrant for the appellant's arrest but no certificate of conviction. The high-water mark of Mr Smith's argument, and the only matter that really gives rise to any question at all, is the persistent reference to the appellant and his co-defendants as convicts. It may well be that the use of that word is a product of erroneous translation, but it is perfectly plain from looking at the whole of the

documents before the Secretary of State that the appellant's extradition was not being sought as a convicted person."

52. In our judgment, it is clear from these authorities (which are consistent with the approach to interpretation of the legislation in this context: see above) that the Court can have regard to not only the Embassy Notes but also to the supporting Police Documents in determining whether the SSHD was correct to treat the request for extradition as valid. The Police Documents were expressly enclosed with the April 2018 Note and were incorporated by reference in the August 2021 Note. There is no dispute that the Police Documents include the required statements. The offences of "intrusion into building" and "robbery resulting in injury" are clearly specified in those documents, as they are in the body of the April 2018 Note itself. It is also clear from the Police Documents that the request for extradition is made with a view to the "suspects' " arrests for the purposes of prosecution. This is not, therefore, a case where there is any gap to be filled: the required information is expressly included within the body of material supplied with the request.

53. It is also relevant to note that it is not only the Police Documents that contain the required information. As noted above, a statement of the specified offences, as required by s.70(4)(a) of the 2003 Act, is included in the April 2018 Note itself. Furthermore, the statement required by s.70(4)(b) of the 2003 Act, namely that the request is made with a view to the Claimants' arrest and extradition to Japan for the purposes of prosecution, is included in the MoC. Paragraph 1 of the MoC defines the "Extradition" for these purposes as "the surrender to the jurisdiction of Japan of [the Claimants] who are wanted by the competent authorities in that jurisdiction for the purposes of prosecution." There is therefore sufficient compliance with s.70(4) of the 2003 Act even without reference to the Police Documents.

54. There is nothing under s.70 of the 2003 Act or the terms of the MoC that requires the GoJ to have "authored" the request in the sense of having itself investigated and/or come to a conclusion based on its own researches. A request may be made by a party where the request is one that has been prepared by another and given the appropriate imprimatur by that party. The effect of the imprimatur is that the latter adopts the request as its own even if it played no separate role in "authoring" the request. The 2003 Act does not seek to lay down any minimal standard that a request must meet in terms of the processes giving rise to it before it can be certified. That is not surprising given that different States will have different approaches to the making of extradition requests. Some countries, particularly those where there is no separation between the police and the prosecuting authority, may rely entirely on the police to formulate the request before adopting it, without any further independent assessment, as a request made by the State. Others may have more sophisticated procedures involving some governmental-level assessment of the underlying investigation/information before proceeding to make a request.

55. The requirements for a request to be valid are those set out in s.70(3) of the 2003 Act. If those modest requirements are fulfilled, the SSHD must certify, and it would not be open to her to go behind, e.g. statements as to the specified offence, to ensure there was some independent governmental scrutiny of the underlying investigation before making the request.

56. The terms of the MoC stipulate that the Requesting Participant is the GoJ. Mr Summers submits that that implies some requirement of independent authorship of the request by the Government and precludes mere reliance on the Police Documents. Not only is that interpretation not supported by any of the express terms of the MoC, but it is also one that would involve a clear and substantial modification of s.70(3) of the 2003 Act. Such modifications have not been contended for by the Claimants. To take a different example, if the competent authority for this purpose had been identified in the MoC as the Police, there would be no reason why the Police could not, in making the request, simply adopt the investigative material and request proposed by a local police force. That is in fact what occurred in the present case, whereby the Tokyo Metropolitan Police Department made the initial request and enclosed a "draft letter of request" to the UK, which the Police appear to have used without any substantive amendment. It could not be suggested in those circumstances that the request was not in accordance with the terms of the MoC merely because the Police had done little more than give their imprimatur to a request that was to all intents and purposes entirely formulated by the local police force.

57. Even if all of that is incorrect and the MoC did require the GoJ to have "addressed its mind", as Mr Summers puts it, to the underlying merits of the request contained in the Police Documents before issuing a request, it can undoubtedly be inferred from the circumstances of this case that the GoJ did precisely that. The chronology is significant here. The April 2018 Note could not be acted upon as there was no treaty or arrangement between the countries at that time. The MoC took a considerable period to agree and was only concluded in July 2021. It was certified by the SSHD as a special extradition arrangement on 2 August 2021. The August 2021 Note was issued on the very next day, and expressly referred back to the April 2018 Note, the inefficacy of which led to the MoC being agreed. When asked by the Court whether, in those circumstances, it might be inferred that the GoJ *had* addressed its mind to whether the extradition should go ahead, Mr Summers agreed. However, he submits that whilst it is accepted that the GoJ must have been cognisant of the request in the Police Documents, the only inference that flows from the fact of the MoC having been agreed is that the GoJ considered that request to be inadequate and that something more, in the form of a request made by Government, was required. We are not persuaded that any such inference can be drawn from the terms of the MoC. It is not in any way surprising for the GoJ to be identified in the MoC as the Requesting Party. That does not of itself imply that the GoJ considered the Police Documents to be in any way inadequate such that they could not simply be adopted by the GoJ as forming the basis for a request in its name. In any case, Mr Summers' argument in this regard fails for the simple reason that, contrary to the Claimants' case, and for the reasons already discussed, there was in this case an express and unambiguous extradition request from the GoJ in each of the two Embassy Notes. This is not, therefore, a case where the Government merely sought to 'transmit' the request of another entity.

58. In view of the above, the Claimants' reliance on ex-post facto descriptions of the Embassy Notes and/or the Police Documents does not advance their case. The decisions under challenge are the decisions to certify the request under s.70 of the 2003 Act. That decision was made on 4 August 2021. What occurred thereafter, in circumstances where there is no specific challenge before the Court either as to the adequacy of material sent to the Magistrates' Court or the Claimants, or as to the

District Judge's approach to that material, is of little consequence in determining whether the SSHD erred on 4 August 2021 in issuing those certificates. Mr Summers relies on several instances in the correspondence from which it would appear that the extradition request being referred to is that contained in the Police Documents. An example is the SSHD's Pre-Action Protocol response letter dated 7 December 2021, in which the chronology refers at "3 April 2018" to "*Diplomatic correspondence from the Japanese Embassy transmitting the extradition request*". Mr Summers submits that this amounts to clear evidence that the Embassy Notes merely 'transmitted' the actual request which was made by the Police. We reject that argument. The chronology entry must be read in context. In the same letter, the SSHD goes on to say that "*The request in the instant case was made by the Japanese diplomatic representative at the Japanese Embassy in London by correspondence dated 3 April 2018 which was renewed on 3 August 2021*." Thus, the reference to "transmitting" the request was intended to signify nothing more than that the request was "sent". A document transmitting a request can also contain the request itself; 'transmission' is not synonymous only with the passive act of passing on a request made by another. It is clear from the context in this case that the SSHD intended by her reference to "transmitting the extradition request" to refer to the request embodied within the Embassy Notes. We need not deal expressly with all of Mr Summers' other examples, which are in a similar vein. Suffice it to say that, although there are some references in the correspondence that are ambiguous and which could, in isolation, be read as if the request in question was that contained in the Police Documents, it is perfectly plain from viewing the whole of the material considered by the SSHD that the request was that of the GoJ as set out in the Embassy Notes.

59. For these reasons, Ground 1 of the claim fails and is dismissed. The extradition request in this case was made by the GoJ.

Ground 2: The purported extradition request does not satisfy the terms of the Memorandum, and the SSHD could not rely on s.70(7)(b) to circumvent that non-compliance.

Submissions

60. Mr Hall KC, who appears with Mr Tinsley for the Second Claimant, led the Claimants' submissions on this ground. He submits that the effect of the s.194 certificate, by virtue of s.194(4)(b), is that the 2003 Act has effect subject to the modifications in the Memorandum. The relevant modification here is said to be that the request can only be made by the GoJ as stipulated in the MoC. Mr Hall's submission, if we understand it correctly, is that as the MoC stipulates who can make the request, the only route available to the SSHD to certify validity in this case is under s.70(7)(a) of the 2003 Act; that is, if the SSHD believes that the Japanese authority with the function of making extradition requests - in this case the GoJ - has made one. By contrast, submit the Claimants, the s.70(7)(b) route, whereby any person recognised by the SSHD as a diplomatic or consular representative of Japan can make an extradition request, is necessarily excluded by the terms of the MoC and unavailable.

61. The SSHD contends that this ground does not arise on the facts because the request was made by the GoJ, and the use of diplomatic channels to communicate that request was consistent with the MoC.

Ground 2 - Discussion.

62. Section 70(7) of the 2003 Act provides that a request for extradition to any other category 2 territory is made in the approved way if it is made – (a) by an authority of the territory which the SSHD believes has the function of making requests for extradition in that territory, or (b) by a person recognised by the SSHD as a diplomatic or consular representative of the territory. Mr Hall's argument is based on the premise that these two routes are always and necessarily mutually exclusive. However, it is not difficult to envisage situations where that may not be so. If, for example, the SSHD had reason to believe that a state prosecuting authority had the function of making requests for extradition, it would be open to her to treat as valid a request emanating instead from the Ambassador of the requesting State. Such a request would be from a person recognised as a "diplomatic or consular representative of the territory" within the meaning of s.70(7)(b) of the 2003 Act. It would be surprising if the SSHD were obliged in these circumstances to reject the request from the representative of the Head of State on the basis that it did not emanate from the prosecuting authority. There may be situations where the treaty or special arrangements between the UK and the other State do expressly stipulate that *only* a particular agency of the State could make such a request to the exclusion of the State itself. However, there is nothing on the face of s.70(7) of the 2003 Act which requires such an approach.

63. In the present case, the MoC stipulates that the Requesting Party is the GoJ. As further stipulated in the MoC, any such request would be made in writing through the diplomatic channel. In other words, the GoJ's request would be communicated by a diplomatic representative. Such a request could be regarded as valid both under sub-subsection (a) of s.70(7), as the Government would be the authority with the function of making such requests; or under sub-subsection (b) as having been made by a person recognised as a diplomatic or consular representative of Japan.

64. Mr Hall's argument, however, is that in such circumstances the Ambassador could not make the request. The fallacy at the heart of that argument lies in the notion that the Ambassador's acts in this context are independent of those of the GoJ. They are not. As stated in Oppenheim's *International Law*, Ninth edition, Vol 1, paragraph 483:

> "A head of a permanent diplomatic mission represents his home state in the totality of its international relations with the state to which he is accredited. He is the mouthpiece of the Head of his home state and its Foreign Minister, for communications to be made to the state to which he is accredited. He likewise receives communications from the latter, and reports them to his home state."

65. The Ambassador does not therefore make requests in some personal capacity unconnected with his status as Head of Mission; he makes them on behalf of the State in his capacity as "*the mouthpiece of the Head of his home state*". (See also *Ahmad v USA* considered under Ground 3 below). Accordingly, a request made by him as diplomatic representative of Japan is synonymous with a request by the GoJ. A request for extradition in these circumstances may therefore be treated as valid under either sub-subsection (a) or (b) of s.70(7). The effect of the MoC is not therefore to exclude a request being made by a person recognised as a diplomatic or consular representative of Japan.

66. On the basis of the above analysis, the MoC does not modify the 2003 Act at all and Ground 2 does not get off the ground. In these circumstances, it is not strictly necessary to deal with the arguments before us as to whether any modifications have to be set out in the s.194 certificate itself (as the SSHD contends) or whether they could (as Mr Hall contends) be "specified" by a general reference to the MoC. However, for the sake of completeness, we deal with the argument briefly.

67. Where a s.194 certificate is issued, the 2003 Act applies in respect of the person's extradition as if the territory with whom the special arrangements were made were a category 2 territory. Furthermore, by subsection (4), the 2003 Act has effect "…(b) with any other modifications specified in the certificate." (Emphasis added). Mr Hall argues that it is sufficient that the s.194 certificate refers to the MoC for the terms of the MoC to modify the 2003 Act. Ms Dobbin's response is that any such modifications have to be expressly set out in the body of the certificate itself.

68. There is no dispute that the effect of s194(4) is far reaching. As stated by Lloyd Jones J (as he then was) in *R (Brown) v Governor of Belmarsh Prison* [2007] QB 838 at [14]:

> "It is of course a striking feature of paragraph (b) that it confers a general power of modification which is not subject to the safeguards of the affirmative resolution procedure in accordance with section 223(5) of the 2003 Act. However, to my mind that is the clear effect of the words used in section 194 of the 2003 Act".

69. In that case, the modification related to the required period under s.74(11)(a) of the 2003 Act within which the s.70 certificate and request must be provided before the Judge must order the person's discharge. The initial s.194 certificate in *Brown* merely stated, as required by s.194(2) of the 2003 Act, that special arrangements have been made in respect of each of the applicants as set out in the relevant memorandum of understanding and that Rwanda is not a category 1 or category 2 country. It was in a further certificate that "*the Secretary of State… certified that the 2003 Act will apply to the extradition with the modification that in section 74(11)(a) the required period of 45 days is replaced by one of 95 days*."

70. Ms Dobbin points to this example of modifications being expressly included in the certificate as indicative of the correct approach, as required by the terms of s.194(4) (b) which require the modifications to be "*specified in the certificate*". Mr Hall submits that the fact that that approach was taken by the SSHD in *Brown* does not mean that it is a requirement in every case. We were not taken to any instances where modifications were identified by a generalised reference to the document embodying the special arrangements.

71. In our judgment, the requirement under the 2003 Act that the modifications be "specified" is significant. As a matter of ordinary language, that imposes a need for specificity or particularisation that would not result from a generalised cross-reference to a document that contained many provisions, only a few of which might arguably be said to modify the 2003 Act. To find otherwise would be to introduce considerable uncertainty in the application of the 2003 Act. The power to make modifications is, as we have said, a far-reaching one, and it is necessary that any intended modifications are set out with sufficient specificity by reference to the particular provisions of the 2003 Act affected to avoid doubt as to the 2003 Act's application. The 2003 Act sets

out procedural safeguards in relation to extradition of requested persons; those safeguards should not be susceptible to modification (and potential erosion) that are not clearly and unambiguously specified.

72. Section 194(4)(b) requires that the modifications be specified "in the certificate". Does that mean that the modifications have to be included within the document issued as a certificate pursuant to subsection (2)? In our judgment, reading s.194 as a whole, that is the effect of the provision. Subsection (3) refers to the issuing of "*a certificate*" under subsection (2). Furthermore, by subsection (5) "*[a] certificate under subsection (2) is conclusive evidence that the conditions in … subsection (1) are satisfied*". In other words the certificate so issued stands on its own as verification that the conditions are satisfied without the need for the document setting out the special arrangements being attached. The effect of s.194, read as a whole, is that the "certificate" is a standalone document containing all of the information required to trigger the application of the 2003 Act in respect of the person's extradition. In that context, the requirement that any modifications be specified "in the certificate" is, in our judgment, a requirement that they be set out, with specificity, in that standalone document.

73. This reading of s.194 is not at odds with the approach to be taken to extradition requests, whereby (as discussed above, under Ground 1) the Court can have regard to all materials supplied with the request to ascertain whether the required statements under s.70(4) are present. The difference with s.194 lies in the clear statutory requirements relating to the issuing of a certificate by the SSHD and its effect. By contrast with s.194, there is no suggestion under s.70 that a request is of itself conclusive evidence of anything or that it should be a standalone document. Furthermore, under s.70, a request for a person's extradition is valid if it "*contains*" the required statements; there is no requirement that the required statements be set out "*in the request*".

74. There were no specified modifications in this case whether on the face of the certificate or elsewhere. The effect of that, in our judgment, is that it was not the intention of the parties to the MoC that the 2003 Act was to apply with any modifications.

75. For these reasons, Ground 2 fails and is dismissed.

Ground 3 – Did the SSHD misdirect herself by treating as valid a request emanating from the Embassy rather than a person recognised as a diplomatic or consular representative of Japan?

Submissions

76. Mr Fitzgerald KC, who appeared with Mr Blom-Cooper for the Third Claimant (Mr Wright), led the Claimants' submissions on this Ground. Mr Fitzgerald submits that the requirement under s.70(7)(b) that the request be made by a "*person*" indicates that the request should come from an individual and identifiable person who "*is recognised by the Secretary of State as a diplomatic or consular representative*" of the territory. This requirement is not satisfied, submits Mr Fitzgerald, if the request emanates from a diplomatic or consular institution, such as the Embassy.

77. Mr Fitzgerald highlights the fact that neither Embassy Note identifies the issuing officer or any particular individual. The requirement for an "identifiable" person is said to be supported by the terms of the *Diplomatic Privileges Act 1964* (which incorporates the *Vienna Convention on Diplomatic Relations 1961*), which do not provide for the recognition of the Embassy or Mission as some form of body corporate. The privileges and immunities under the 1964 Act are only enjoyed by specific persons.

78. Mr Fitzgerald submits that to treat the Embassy Notes as if emanating from the Ambassador would be to put a gloss on the requirements of the 2003 Act and would not be consistent with the need for such provisions to be construed strictly: Reliance is placed on the dicta of Kilner Brown J in *R v Pentonville Prison, ex parte Khubchandani* (1980) 71 Cr App R 241 that:

> "In cases where extradition is sought, words in the relevant act must be strictly construed and no gloss be put upon them."

79. Particular reliance is also placed on a decision of Peart J of the Irish High Court in *Attorney General v Q* [2006] IEHC 414. The issue in that case was whether an extradition request from "the British Embassy" complied with the requirement under s.23 of the *Extradition Act 1965* ("the 1965 Act") of Ireland that the request be *"... communicated by - (a) a diplomatic agent of the requesting country, accredited to the State ..."*. Peart J held that the request did not comply with s.23:

> "It seems clear that where the letter from "The Embassy" makes no reference to it being from the ambassador, or any of the other potential appropriate persons in the embassy, it is necessary to conclude by a strict interpretation and by reference to the plain and ordinary meaning to be given to the words used in the section, that there has not been compliance with the requirement regarding the communication of the request to the Minister. Section 23(a) specifies clearly by whom the request is to be communicated, and this has not been done."

80. Mr Fitzgerald submits that, although not binding on this Court, *Q* is a decision directly on point and which ought to be followed.

81. Ms Dobbin submits that the communications from the Embassy (which has no personality separate from the State) contained as they were in 'Notes Verbales', with an official seal and in the usual form for such Notes, can be regarded as speaking for the State of Japan. It is fanciful to suggest that the Embassy Notes were issued without the authority of the Ambassador given the fact the GoJ had entered into the MoC for the specific purpose of extraditing these individuals. Ms Dobbin relies on the decision of Laws LJ in *Ahmad & Aswat v USA* [2006] EWHC 2927 (Admin) confirming the important legal status of Diplomatic Notes. In these circumstances, Ms Dobbin submits that the Embassy Notes can and should be viewed as having been sent with the authority of the Ambassador, and that, as such, the SSHD was entitled to consider that the requirements of s.70(7)(b) of the 2003 Act had been met.

Ground 3 - Discussion

82. The requests are contained in the Embassy Notes, which, as we have said are known as 'Notes Verbales'. Such notes have a particular status under International Law as

considered by Laws LJ in *Ahmad*. In that case, the issue was whether an assurance in a Diplomatic Note from the American Embassy not to apply "Military Order 1" (which would subject the applicant to military proceedings and detention at Guantanamo Bay) was binding on the American Government. Laws LJ identified the question for the Court in that case as follows:

> "The real question is whether in all the circumstances, against the background of relevant international law and practice, this court should accept the Notes as being in fact effective to refute, for the purposes of the 2003 Act, the claims of potential violation of Convention rights and associated bars to extradition."

83. It was clear, therefore, that the Notes in question could, if binding, confer a fundamental safeguard against potential violations of the requested person's rights. The Notes in *Ahmad* were in the following format:

> "The Embassy of the United States of America at London, England, presents its compliments to Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs and has the honor to refer to Note No.100 dated November 15 2004, requesting the extradition of Babar Ahmad to the United States of America…"

84. Aside from the American spelling for "honour", the Notes in *Ahmad* are in precisely the same format as the Embassy Notes in the present case. This format, incorporating standard paragraphs whereby the Mission "*presents its compliments*" and "*has the honour*" to do something (in this case, request extradition) is usual in such Notes: see Satow's *Diplomatic Practice*, 7th edition, paragraph 6.8. In a section of the judgment in *Ahmad* entitled "*Legal Status of Diplomatic Notes*", and in considering an argument that the Notes in question were *ultra vires*, Laws LJ said as follows:

> "58 Nor is it, I think, suggested that this ultra vires argument is supported by any notion that the Notes were in some sense unauthorised by the President or the United States government. Nor could it be. The Notes, as I have said, were issued by the United States Embassy in London. The Ambassador "is the mouthpiece of the Head of his home State and its Foreign Minister, for communications to be made to the State to which he is accredited" (Oppenheim's International Law, Ninth Edition, Vol 1, paragraph 483). Mr Keith in his skeleton argument in Mr Aswat's case at paragraph 2.18, citing authority of the International Court of Justice (Advisory Opinion as to the Customs Arrangements between Germany and Austria, 5 September 1931: Series A/B 41, p.47), correctly submits that international law recognises the use of Diplomatic Notes as a means of recording binding engagements between States. In the eye of international law such a Note is regarded as binding on the State that issues it. This, and this only, is the sense in which the Notes are indeed "binding"." (Emphasis added).

85. We agree with Ms Dobbin's submission that, as the analysis in *Ahmad* makes clear, where a Diplomatic Note of this nature is issued by the Embassy then it can be taken as coming from the Ambassador, the "mouthpiece" of his Head of State. Mr Fitzgerald argued that *Ahmad* does not assist as it was not concerned with the specific provisions of s.70(7)(b) of the 2003 Act and only establishes that such a Note can bind the Government on whose behalf it is issued. We find, however, that *Ahmad* is relevant: the analysis of Laws LJ confirms the important legal status of such Notes, as

well as the fact that, although issued by "the Embassy", the Note can be relied upon as emanating from the Ambassador who is the representative of the Head of State. If an Embassy Note can, in such circumstances, be treated as emanating from the Ambassador and be effective to bind the Government of the USA to an undertaking not to apply aspects of US domestic legislation, it would be odd to treat a request for extradition in a similar Note as if not made by the Ambassador merely because his or her name does not appear on the face of the document.

86. That approach does not put a gloss on the statutory requirement or seek to fill a gap in the information by guesswork: there is an identifiable person, namely the Ambassador and no guesswork is required to identify that person. The above approach merely recognises that, although not expressly mentioned by name, such Notes from the Embassy are those of the Ambassador, whose statements can bind his Head of State. One cannot, in these circumstances, treat the Embassy Note as not having come from an identifiable person. Moreover, to accept Mr Fitzgerald's analysis would be putting an obstacle in the way of the operation of the 2003 Act by reliance on a technicality, an approach which was, in the context of extradition, deprecated by Lord Hope in *Cando Armas* (at [45]).

87. The decision of Peart J in *Q*, by contrast, does not assist for a number of reasons:

    i) First, the analysis in that case made no reference to International Law and gave no consideration to the fact that Notes Verbales or Diplomatic Notes have a particular status under International Law. Had it done so, a different conclusion might well have been reached given that the request in that case came from "the British Embassy";

    ii) Second, the legislative scheme being considered was different. Section 23 of the 1965 Act makes express reference to the request being "communicated by a diplomatic agent of the requesting country, accredited to the State". There is no such requirement under the 2003 Act. Instead, the request may be sent by a person "recognised by the Secretary of State as a diplomatic or consular representative". In the context of a formal Note Verbale from the Embassy, and under International Law, the SSHD is entitled to treat that as a request from the Ambassador, who clearly is "recognised" by the SSHD as a diplomatic representative of the requesting state;

    iii) Third, the decision in *Q* is not binding, although clearly if the first two points did not apply, then it would have been highly persuasive.

88. Mr Fitzgerald submitted that one cannot always treat Notes Verbales from the Embassy as a communication from the Ambassador as they can sometimes be used for more mundane purposes, such as communicating an invitation to dinner, and that context is important. It is not clear to us why, if the content is something less profound than an assurance not to apply an aspect of domestic law or a request for extradition, the same assumption, namely that the communication is from the Ambassador, should not apply. The choice of using the formal Note Verbale as the means of communication would be sufficient for the assumption to operate. However, even if Mr Fitzgerald is correct that the context is relevant to ascertaining the issuer of the relevant Note, the context here is not that of the mundane, but that of a request that follows almost immediately after the certification by the SSHD of the MoC

entered into by the GoJ for the specific purpose of extraditing the Claimants. That context confirms, if confirmation were required, that the request is being made by the GoJ, through the diplomatic channel, i.e. by the Ambassador. Thus, even if, contrary to our view, the approach in *Ahmad* were not applicable, the particular context in which the August 2021 Note was issued would entitle the SSHD to treat the request as having been made by the Ambassador on behalf of the GoJ. To take any other approach would not only be to disregard entirely the context of the MoC, but would also be contrary to the principles of comity. It is unlikely to be conducive to comity to spend many months negotiating a MoC with another State only to reject the expected extradition request from that State on account of the technical objection that the August 2021 Note from the Embassy did not expressly name the Ambassador or some other diplomatic representative.

89. For these reasons, we consider that the SSHD did not err in treating the request as having been made in the approved way. Ground 3 fails and is dismissed.

Conclusion on the merits.

90. Whilst the Grounds of Challenge are, to varying degrees, arguable, none of them succeeds on the merits. The application for judicial review is therefore dismissed.

Delay

91. As identified by Griffiths J, there is a limitation issue to be considered. It is common ground that the relevant three-month period started to run on 4 August 2021 when the SSHD issued the s.70 certificates.

Submissions

92. Mr Summers (who also led for the Claimants on this issue) submits that although that is the date when grounds for bringing the claim first arose, the Claimants were unaware of the s.70 certificates at all until their respective arrests in September (First and Second Claimants) and October 2021 (Third Claimant). Thereafter they sought to obtain the MoC, as until they had sight of that they would have had no way of knowing whether the special arrangements permitted a request by the Police as appeared to them to be the case based on the material so far served. The Claimants tried to obtain the MoC from Mr Gibbs, not appreciating that he had, by then, retired.

93. It is also common ground that it was not until 10 November 2021 that the Claimants received a copy of the MoC pursuant to a Court order. Mr Summers says that it was only upon sight of the MoC that the Claimants could have known that only the GoJ was authorised to issue extradition requests for Japan. PAP correspondence was commenced on behalf of the First and Second Claimants on 12 November 2021. This correspondence was again directed to Mr Gibbs even though no response had been received to earlier correspondence. With no reply forthcoming, the PAP correspondence was sent to GLD directly on 30 November 2021. A response was received on 7 December 2021. Mr Summers submits that it was only upon sight of that response that the Claimants became aware that the SSHD was in fact relying on the Embassy Notes as comprising the extradition request. However, these were not provided and it took a further 5 weeks before the SSHD disclosed the Embassy Notes on 11 January 2022. The claims were issued on 28 January 2022, the intervening 17

days having been spent preparing the claim and obtaining emergency legal aid funding.

94. The position of the Third Claimant is slightly different in that upon his arrest on 22 October 2021, he was in fact provided with the August 2021 Note. PAP correspondence on his behalf was not commenced until 5 January 2022 with a response being received on 19 January 2022. Proceedings were also lodged in Mr Wright's case on 27 January 2022.

95. Mr Summers submits that, given the above chronology, there was no failure of promptness and/or there is an objective justification for the timing of the application. Much of the delay was down to the SSHD's failure to disclose critical material. He further submits that, in accordance with the guidance laid out by Maurice Kay J in *R v Secretary of State for Trade and Industry ex p Greenpeace* [2000] Env L.R. 221, no damage in terms of hardship or prejudice to any third party or any detriment to good administration would result from granting an extension of time, and that the public interest requires that the application should proceed. The public interest here lies in obtaining clarity as to the operation of s.70 in cases involving special arrangements and in particular in relation to this the first ever extradition request from Japan.

96. Ms Dobbin submits that an extension of time should be refused for lack of promptitude. The Claimants' claim is that the Police made a request when the MoC required the Government to make the request. That claim could and ought to have been brought promptly after receipt of the MoC on 10 November 2021. The Claimants were already more than three months out of time and ought to have acted with expedition; they are not in Ms Dobbin's submission entitled to rely on the fact that they sought more information from the SSHD. Furthermore, there is detriment to good administration in granting permission in that much time and money has been wasted on ongoing proceedings in the Magistrates' Court. Ms Dobbin points out that even since the issuing of proceedings, expedition has been lacking.

Delay - Conclusions

97. On this issue, we consider that Mr Summers' submissions prevail.

98. Whilst there is an obligation to act promptly, it can, depending on the circumstances, be sensible to seek information before issuing a claim: see *R (Macrae) v County of Herefordshire District Council* [2012] EWCA Civ 457 at [12]. We reject Ms Dobbin's contention that the Claimants had all they needed to bring the claim as at 10 November 2021. A claim at that stage would have been against the wrong target because the request for extradition relied upon by the SSHD and which was the subject of certification was contained in Embassy Notes which had not been provided. These did not appear, as far as the First and Second Claimants were concerned, until 6 January 2021. Thereafter, there was sufficient promptitude before the claims were issued.

99. In these circumstances, although the delay is significant, there was objectively good reason for it. Had there been merit in the claim, an extension of time would have been granted to the First and Second Claimants. As however, the claims have failed on the merits, an extension of time is without purpose and is not granted.

100. The position is slightly different for the Third Claimant, who was provided with at least the August 2021 Note at the time of his arrest on 22 October 2021. In our view, whilst it is arguable that the Third Claimant had sufficient information as at 10 November 2021, once provided with the MoC, to issue proceedings at that stage, it was not unreasonable in the particular circumstances of this case, for the Third Claimant to await clarification from the GLD as to the basis on which the impugned certification was issued. As with the other Claimants, that clarification was not available until early January 2022, after which time, the Third Claimant's actions were more or less in step with those of the others. As such, if there had been any merit in his claim, an extension of time would have been granted in his case too.

Conclusion

101. For the reasons set out above, this claim fails and is dismissed. We would like to express our gratitude to all Counsel and their respective legal teams for their submissions and, in particular, for ensuring that these were concluded within the time allotted.