Neutral Citation Number: [2025] EWHC 449 (Admin)

Case No: AC-2023-LON-000514

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2025

Before :

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION,
THE RT HON. LORD JUSTICE HOLROYDE
THE HON. MRS JUSTICE STEYN DBE

- -

Between :

SANJAY BHANDARI	**Appellant**
- and -	
GOVERNMENT OF INDIA	**Respondent**

- -
- -

Edward Fitzgerald KC, James Stansfeld and Robbie Stern (instructed by **Janes Solicitors LLP**) for the **Appellant**
Ben Keith and Alex du Sautoy (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing dates: 10, 11 & 12 December 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 28 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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ATTACHMENT H

Lord Justice Holroyde and Mrs Justice Steyn:

Introduction

1. The Government of India ('the respondent') seeks the extradition of Mr Bhandari ('the appellant') to India pursuant to two extradition requests. The first request was issued on 15 April 2020 and certified by the Secretary of State for the Home Department ('the Secretary of State') on 16 June 2020 ('Request 1'). It concerns an allegation of money laundering, contrary to s.3 of the Prevention of Money Laundering Act 2002 ('the PMLA'). The second request was issued on 2 June 2021 and certified by the Secretary of State on 18 June 2021 ('Request 2'). It concerns an allegation of wilfully attempting to evade a tax, penalty or interest chargeable or imposable under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act 2015 ('the BMA'), contrary to s.51 of that Act. Both the PMLA and the BMA are statutes enacted and in force in India.

2. The extradition hearing before District Judge (MC) Michael Snow ('the District Judge') took place over eight days on 3-4 and 7-9 March, 29 September and 3-4 October 2022. On 7 November 2022, the District Judge handed down judgment, whereby he sent the appellant's case to the Secretary of State under s.87 of the Extradition Act 2003 ('the 2003 Act'). On 12 January 2023, the Secretary of State ordered the appellant's extradition to India pursuant to s.93 of the 2003 Act.

3. This is an appeal against the District Judge's judgment, brought with leave pursuant to s.103 of the 2003 Act, on the grounds that the District Judge erred in concluding that:

   i) the offences in both requests are extradition offences pursuant to s.78(4)(b) of the 2003 Act;

   ii) there is a *prima facie* case for each offence in both requests pursuant to s.84 of the 2003 Act;

   iii) extradition is compatible with the appellant's rights under article 3 of the European Convention on Human Rights ('ECHR'), on the basis of the assurances given by the respondent in respect of (a) detention in Tihar prison and (b) treatment by the police or other investigative bodies;

   iv) extradition is compatible with the appellant's rights under article 6 of the ECHR, notwithstanding the terms of s.54 of the BMA and s.24 of the PMLA in respect of burden and standard of proof in the criminal trials;

   v) delays in the criminal justice system in India are not such as to render the appellant's extradition incompatible with article 5 of the ECHR; and

   vi) the appellant does not face a statutory prohibition on the grant of bail such as to render his extradition pursuant to Request 1 incompatible with article 5 of the ECHR.

4. This is the judgment of the court. It has been written by Steyn J, with whom Holroyde LJ agrees. The parties helpfully agreed a list of issues which we have set out below, when addressing each ground. Mr Edward Fitzgerald KC and Mr Ben Keith, leading

Counsel for the appellant and respondent respectively, addressed us orally on grounds 3-6; and Mr James Stansfeld and Mr Alex Du Sautoy, junior Counsel for the appellant and respondent respectively, made oral submissions on grounds 1 and 2. We are grateful to all Counsel for their excellent written and oral submissions.

The Requests

5. The offence of money laundering (alleged in Request 1) is predicated on commission of the offence of tax evasion contrary to s.51 of the BMA (alleged in Request 2). Accordingly, as the District Judge did, and the parties have done, we address Request 2 first.

The alleged offence under s.51 of the BMA (Request 2: tax evasion)

6. The conduct underlying the allegation of tax evasion is primarily summarised for the respondent in the affidavit of Vivek Jumar Gupta, Additional Director of Income Tax, Income Tax Department, dated 13 April 2021 ('V.J. Gupta'), made in support of Request 2. However, it is also addressed in the affidavit of Mahesh Gupta, Deputy Director, Directorate of Enforcement, dated 25 February 2020 ('Mahesh Gupta'), made in support of Request 1; and we note the respondent relies on all the evidence it has adduced in respect of both Requests.

7. The affidavit of V.J. Gupta states that, in addition to the offence under s.51 of the BMA, the appellant is being prosecuted for two other offences pursuant to s.50 of the BMA and s.277 of Income Tax Act 1977. V.J. Gupta states that the prosecution pursuant to s.50 of the BMA "*deals with failure to furnish any information about foreign assets or foreign income in the return of income filed in India*" (§7.1); while the s.277 Income Tax Act prosecution "*deals with offences related to making false statements in verification etc.*" (§7.2) However, in Further Information from the Income Tax Authorities dated 28 February 2022, the respondent clarified that the current extradition request pertains only to the alleged offence under section 51(1) of the BMA.

8. V.J Gupta states that a Prosecution Complaint under s.51(1) of the BMA (no. 2121/2019) was filed by the Income Tax Authorities against Mr Bhandari before the Court of Ld. Additional Chief Metropolitan Magistrate, Tis Hazari, New Delhi on 24 December 2018 ('the Prosecution Complaint').

9. The appellant was an Indian resident at the relevant time, as reflected in his income tax returns (V.J. Gupta, §4.1). As an Indian resident, his global income was liable to be taxed in India, and he was required to declare his global income and assets by s.6 of the Income Tax Act 1961 (V.J. Gupta, §4.1; Further Information regarding *prima facie* case, §V.1). In his income tax returns for the assessment years 2012-13 to 2015-2016, the appellant declared in Schedule FA of ITR-4 that he had "*Nil*" foreign assets, and thus, it is alleged, wilfully not disclosing the "*huge foreign assets*" he had amassed (V.J Gupta, §4.1; Complaint, §3).

10. A significant number of undisclosed foreign assets, both moveable and immoveable, are alleged to have been acquired by the appellant from undisclosed foreign income. The assets allegedly obtained by the appellant are identified by V.J. Gupta at paragraph 4.6 of his affidavit as including the following immoveable properties:

i) Flat C-303, Maurya Grandeur, Palm Jumeirah, Dubai, UAE, held in the appellant's name.

ii) Flat 6, Grosvenor Hill Court, Bourdon Street, London, owned by the appellant through a corporation, Shamlon Gros-1 Inc, which had been incorporated under the laws of Panama.

iii) 12 Bryanston Square, London, a property bought by the appellant in December 2009 for approximately £1.9 million, by acquiring 100% shareholding in Vertex Management Holdings Ltd (a BVI-based company), and sold for approximately £1.9 million in June 2010.

iv) Flat 2414, Burj Khalifa, Dubai, held in the appellant's name.

11. In addition, V.J. Gupta identifies six companies alleged to be owned (in whole or in part) by the appellant, namely, Offset India Solutions FZC, Santech International FZC, Serra Dues Technologies Ltd, Petro Global Technologies FCZ and Santech International LLC (all incorporated in UAE) and Shamlon-Gros-1 (incorporated in Panama). He also identifies 19 undisclosed foreign bank accounts alleged to be held by the appellant or his companies.

12. From 27 to 30 April 2016, the Income Tax Authorities conducted a search at Mr Bhandari's home. On 27 April 2016, "*when asked about details of his foreign assets during examination on oath u/s 132(4) of the Income-tax Act, the assessee initially specifically denied having any foreign asset*" (V.J. Gupta, §4.7 and Assessment Order dated 23.3.20, p.4). The statement dated 27 April 2016 records in manuscript:

> "Q.46 Please furnish the details of your assets, bank accounts and business interest outside the country?
>
> Ans.- I have no any asset, bank accounts outside India but I have business relation with companies outside India for technology transfer only."

13. On 29-30 April 2016, the appellant was confronted with documentary evidence of his ownership of several foreign assets, which he admitted. In particular:

i) The appellant stated that he was a director/manager of Santech International FZC and sole director of Offset India Solutions, companies which were incorporated in the United Arab Emirates in 2007 and 2010, respectively (Assessment Order 23.3.20, pp.5-6).

ii) He said that he is the beneficial owner of Serra Dues Technologies, which was incorporated in the RAK Free Trade Zone, UAE (Assessment Order 23.3.20, p.33).

iii) The appellant said that he had two bank accounts in the Emirates Bank, Dubai: one in the name of Santech International was opened sometime in 2007 and closed before 2013 and the other, in the name of Offset India Solutions, was opened sometime in 2010 and closed in 2014-2015 (Assessment Order 23.3.20, p.28).

iv) In respect of immoveable properties:

a) The appellant said that Shamlan Gros-1 Inc owned Flat 6, Grosvenor Hill Court, Bourdon Street, London, and in 2013 he bought all the shares in that company using funds generated through Dubai-based companies (Assessment Order 23.3.20, p.35).

b) The appellant said that Vertex Management Holdings Ltd held a property at 12 Ellerton House, Bryanston Square, London, W1H 2DQ, and that he purchased the holding company, making the payment from the bank account of Santech International, Dubai (Assessment Order 23.3.20, pp.33, and 42-43). The Assessment Order states that he sold 12 Ellerton House on 17 June 2010 (p.44).

c) The appellant admitted that he had purchased Flat C-303, Maurya Grandeur Residences, Palm Jumeirah, Dubai (Assessment Order 23.3.20, pp.47-50).

14. None of these matters had been accounted for by the appellant for tax purposes.

15. The hiding of 'black money' abroad by those seeking to evade tax has been a matter of "*deep concern*" to the Indian authorities over recent years (Mahesh Gupta, §5.1). In recognition of "*the limitation of existing legislation to deal with undisclosed assets and income stashed away abroad*", the Indian Parliament passed the BMA on 11 May 2015, and it received Presidential assent on 26 May 2015. The BMA came into force on 1 July 2015 (Further Information regarding prima facie case, §V.1; *Union of India v Gautam Khaitan* (2019) 10 SEC 108, [6]).

16. Section 3 of the BMA provides:

> "(1) There shall be charged on every assessee for every assessment year commencing on or after the 1st day of April, 2016, subject to the provisions of this Act, a tax in respect of his total undisclosed foreign income and asset of the previous year at the rate of thirty per cent. of such undisclosed income and asset.
>
> Provided that an undisclosed asset located outside India shall be charged to tax on its value in the previous year in which such asset comes to the notice of the Assessing Officer.
>
> (2) For the purposes of this section, 'value of an undisclosed asset' means the fair market value of an asset (including financial interest in any entity) determined in such manner as may be prescribed." (emphasis added)

17. In accordance with this provision, an Indian resident who acquired foreign income or assets prior to 1 July 2015 (whether or not still held on that date), and failed to disclose such assets as required by the Income Tax Acts, became liable on the commencement of the BMA to a discrete tax under s.3 of the BMA.

18. Section 59 of the BMA provides:

> "Subject to the provisions of this Chapter any person may make, or after the date of commencement of this Act but on or before a date to be notified by the Central Government in the Official Gazette, a declaration in respect of any undisclosed asset located outside India and acquired from income chargeable to tax under the Income-tax Act for any assessment year prior to the assessment year beginning on 1st day of April, 2016-
>
> (a) for which he has failed to furnish a return under section 139 of the Income-tax Act;
>
> (b) which he has failed to disclose in a return of income furnished by him under the Income-tax Act before the date of the commencement of this Act;
>
> (c) which has escaped assessment by reason of the omission or failure on the part of such person to make a return under the Income-tax Act or to disclose fully and truly all material facts necessary for the assessment or otherwise."

19. Section 59 of the BMA provided a one-time compliance window from 1 July 2015 to 30 September 2015 for declaration of undisclosed foreign income and assets, whether alienated by the resident or still in his possession (Further information regarding prima facie case, §V.1). A person who made a declaration pursuant to s.59 of the BMA became liable to the 30% tax imposed by s.3 and to a 30% penalty (amounting in total to 60% on the value of the undisclosed asset), payable by 31 December 2015. Whereas a person who failed to make a declaration during the compliance window would be liable to a 90% penalty, in addition to the 30% tax (amounting in total to 120% on the value of the undisclosed asset).

20. V.J. Gupta states that the appellant "*chose deliberately not to avail the one time opportunity from 1.7.2015 to 30.9.2015 to declare all his undisclosed foreign assets*" (V.J. Gupta, §4.2). To similar effect, Mahesh Gupta states at §6.2:

> "Sh. Sanjay Bhandari being an Indian resident having undisclosed foreign assets chose deliberately not to avail the opportunity and declare his undisclosed foreign income & assets and thus wilfully made an attempt to evade taxes on his undisclosed foreign income & assets."

21. Instead, it is said that the appellant sought to ensure that any overseas assets remained hidden and undisclosed. Specifically, it is alleged that, being on notice of the investigation into his tax affairs, Mr Bhandari "*attempted to alienate his undisclosed foreign assets by back-dating and fabricating documents in collusion with his close relative and associate Mr. Sumit Chadha, his Accountant Mr. Sanjeev Kapoor and his lawyer Mr. Anirudh Wadhwa*" (V.J. Gupta, §4.10; Mahesh Gupta, §§6.6-6.7).

22. Section 51 of the BMA provides:

> "(1) If a person, being a resident other than not ordinarily resident in India within the meaning of clause (6) of section 6 of the Income Tax Act, wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under this Act, he shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to ten years and with fine.
>
> …
>
> (3) For the purposes of this section, a wilful attempt to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof shall include a case where any person-
>
> (i) has in his possession or control any books of account or other documents (being books of account or other documents relevant to any proceeding under this Act) containing a false entry or statement; or
>
> (ii) makes or causes to be made any false entry or statement in such books of account or other documents; or
>
> (iii) wilfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or
>
> (iv) causes any other circumstances to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under this Act of the payment thereof." (emphasis added)

23. In parallel with the prosecution, on 22 September 2016, the office of Joint Commissioner of Income Tax issued a notice to Mr Bhandari under s.10(1) of the BMA, and on 23 March 2020 an assessment order was made against him, under s.10(4) of the BMA, in respect of the Assessment Year 2017-18.

24. The Income Tax Department determined the total value of the appellant's undisclosed foreign income and assets as 6,656,215,760 Indian rupees ('INR'), and on 23 March 2023 a demand was made for tax payable under s.3 of the BMA in the sum of INR 1,977,092,396 (V.J. Gupta, §4.16; assessment order). The District Judge gave the relevant values in sterling, stating, that it "*is alleged that the undisclosed foreign income amounted to approximately £64,857,062 and that the tax evaded amounted to approximately £19,558,295*" (Judgment, [51]). The assessment order made clear that the demand did not include any penalty, and that separate penalty proceedings were being initiated.

The alleged offence under s.3 of the PMLA (Request 1: money-laundering)

25. The conduct underlying the allegation of money laundering is summarised for the respondent in the affidavit of Mahesh Gupta, Deputy Director, Directorate of Enforcement, dated 25 February 2020.

26. Section 3 of the PMLA provides:

> "**Offence of money-laundering**.–Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected to proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering."

27. The term "*proceeds of crime*" is defined to mean "*any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a schedule offence or the value of any such property*": s.2(1)(u) PMLA. The s.51 BMA offence of wilful attempt to evade any tax, penalty or interest is "*covered under Part C of the Schedule appended to the PMLA*" (Mahesh Gupta, §6.8). Thus the "*foreign assets and foreign income on which Sh. Sanjay Bhandari has wilfully evaded the tax, penalty or interest chargeable under the provisions of Black Money Act, 2015 is in fact 'Proceeds of Crime' within the meaning of Section 2(1)(u) of PMLA*" (Mahesh Gupta, §12.1). The further information states, at V.3, that the Income Tax Department has determined the total value of undisclosed foreign income and assets as INR 6,556,215,670 (which equated to more than £64.8 million: see paragraph 24 above), and the Directorate of Enforcement has so far identified proceeds of crime to the tune of INR 5,357,617,865.

28. The offence of money-laundering is "*punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine*" (save that the sentence may extend to ten years if the proceeds of crime relates to an offence specified under paragraph 2 of Part A of the Schedule): s.4 PMLA.

The court's powers on appeal and the applications to admit fresh evidence

29. Extradition between the United Kingdom and India is governed by the provisions of Part 2 of the 2003 Act and the Extradition Act 2003 (Designation of Part 2 Territories) Order (S.I. No. 3334/2003) as amended.

30. Section 104(2) of the 2003 Act provides that the court may allow an appeal brought under s.103 only if the conditions in subs. (3) or subs. (4) are satisfied. Those subsections provide:

> "(3) The conditions are that-
>
> (a) the judge ought to have decided a question before him at the extradition hearing differently;
>
> (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.
>
> (4) The conditions are that-

> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the judge deciding a question before him at the extradition hearing differently;
>
> (c) if he had decided the question in that way, he would have been required to order the person's discharge."

31. For the purposes of s. 104(3), the test on appeal is whether the District Judge's decision was wrong: see *Love v Government of the United States of America* [2018] EWHC 172 (Admin), [2018] 1 WLR 2889, Lord Burnett CJ and Ouseley J, [26]; *Surico v Italy* [2018] EWHC 401 (Admin), Julian Knowles J, [30]. Whereas, in relation to a ground on which fresh evidence has been admitted, the court makes its own *de novo* assessment, having considered the totality of the evidence and the assurances: *Josza v Tribunal of Szekesfehervar, Hungary* [2023] EWHC 2404 (Admin), Julian Knowles J, [17]-[19].

32. Section 104(4) establishes conditions for allowing the appeal, not for admitting evidence. Nonetheless, an important consideration when exercising the court's inherent jurisdiction to control its own procedure is the policy underpinning that provision that "*extradition cases should be dealt with speedily and not delayed by attempts to introduce on appeal evidence which could and should have been relied upon below (Fenyvesi* [[2009] 4 All ER 324]*, paras 32-33)*": *Zabolotnyi v Hungary* [2021] UKSC 14, [2021] 1 WLR 2569, Lord Lloyd-Jones JSC, [57], discussing the policy underpinning sections 26-29 of the 2003 Act, in the context of Part 1 extradition cases.

33. In this case, both parties seek to admit fresh evidence which, with the agreement of both parties, we considered *de bene esse*. Specifically:

    i) In his Perfected Grounds, the appellant sought permission to rely on the second statement (and exhibits) of Mr Robert Berg, his solicitor, dated 17 October 2022, which the District Judge refused to admit after the extradition hearing had concluded;

    ii) By an application notice dated 3 April 2023, the appellant sought to rely on the witness statement of Alex Chapman (his solicitor) of the same date, and five exhibits, providing an update on conditions in Tihar prison, New Delhi.

    iii) By an application notice dated 7 June 2023, the appellant sought to adduce evidence regarding the murder of Mr Tillu Tajpuria on 2 May 2023 in Tihar prison and further material relating to conditions in Tihar prison.

    iv) By an application notice dated 10 September 2024, the respondent seeks to rely on a letter from the Government of India dated 7 September 2023, and annexes, responding, in part, to the appellant's fresh evidence.

    v) During the hearing, in compliance with the duty of candour, the respondent disclosed further fresh evidence, in the form of a statement from an extraditee,

> Harvinder Singh, dated 23 October 2024, video footage, and a request for further information made of the Government of India, all in the context of an extradition hearing in Westminster Magistrates' Court in respect of Mr Arora.

34. At the close of the hearing, we directed the respondent to file and serve on the appellant its response to the Request for Further Information issued by District Judge Sternberg in the separate case of *Government of India v Arora*. Following an extension of time, both parties filed submissions on the *Arora* further information on 17 January 2025, the appellant filed further submissions on 31 January 2025, following the respondent's disclosure of appendices, and the respondent disclosed further responses given in *Arora* on 10 February 2025.

35. For the reasons given in paragraph 221 below, we refuse permission to rely on the second statement of Mr Berg. It is common ground that all the other material, which post-dates the judgment below, should be admitted on appeal, save for two exceptions arising from the material filed by the respondent after the appeal hearing. The appellant objects to the admission of a document titled, "*Assurances in reference to the issues raised on 11.12.2024 for extradition of accused Praveen Kumar Arora from United Kingdom to India*", on the grounds it is undated and unsigned, and so it is not duly authenticated for the purposes of s.202(3)-(4) of the 2003 Act. He also objects to the admission of eight photographs of Tihar prison, on the grounds there is no exhibiting statement confirming when the photographs were taken, or where in the prison they were taken. We agree that, for those reasons, that document and those photographs should not be admitted, and note in any event that they would not be decisive.

Ground 1 – Extradition Offence

36. Section 78(4)(b) of the 2003 Act required the District Judge to decide to the criminal standard, among other things, "*whether … each offence specified in the request is an extradition offence*". In a case where the requested person is accused of "*an offence constituted by the conduct*" in a category 2 territory (such as India), an "*extradition offence*" is defined by s.137 of the 2003 Act. The relevant subsections provide:

> "(2) The conduct constitutes an extradition offence in relation to the category 2 territory if the conditions in subsection (3), (4) or (5) are satisfied.
>
> (3) The conditions in this subsection are that—
>
> (a) the conduct occurs in the category 2 territory;
>
> (b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment if it occurred in that part of the United Kingdom;
>
> (c) the conduct is so punishable under the law of the category 2 territory.
>
> …

> (7A) References in this section to "conduct" (except in the expression "equivalent conduct") are to the conduct specified in the request for the person's extradition."

37. The District Judge ruled that the offending alleged in Requests 1 and 2 occurred within India for the purposes of s.137(a), and that the conduct is punishable under the law of India with imprisonment for a term of more than 12 months, satisfying s.137(3)(c). There is no challenge to those conclusions. The key question is whether he was wrong to conclude, for the purposes of s.137(3)(b), that the conduct specified in each Request would constitute an offence in this jurisdiction.

38. In determining this question, the District Judge had to, first, identify the "*essence of the conduct*" alleged in the Requests, and then determine, upon the assumption that the relevant conduct had occurred in this jurisdiction, whether that conduct would be an offence under English law: *Devani v Kenya* [2015] EWHC 3535 (Admin), Sir Richard Aikens (giving the judgment of the court), [47]. For the purposes of the second step, the respondent identified "*notional English charges*".

Request 2: s.51 BMA

39. For Request 2, the agreed issues arising in respect of ground 1 are:

> (1) Was the District Judge wrong to be satisfied that the offence contrary to s.51 BMA is an extradition offence because the conduct would constitute an offence contrary to s.2 Fraud Act 2006 in this jurisdiction?
>
> a. Did DJ Snow err in identifying the essence of the conduct for the offence contrary to s.51 BMA? In particular, is the essence of the conduct a false representation, or is it an omission to make a declaration and/or pay tax under s.3 BMA?
>
> b. Was he required to be satisfied that there was an equivalent tax in this jurisdiction?
>
> c. Should DJ Snow have concluded that the tax under s.3 BMA is not the equivalent to income tax in this jurisdiction?

40. Before the District Judge, the respondent maintained that the conduct set out in Request 2 would amount to a number of offences contrary to English law, including eight notional offences which the respondent identified in draft charges. However, the respondent invited the District Judge to focus for the purpose of dual criminality on fraud by false representation, contrary to s.1 of the Fraud Act 2006. The draft charge for this offence stated:

> "Between 1 July 2015 and 7 February 2017, Sanjay Bhandari dishonestly made a false representation to the Income Tax Authorities, namely that he did not have any income or assets outside India, knowing this to be untrue and intending thereby to make a gain for himself."

41. Having reminded himself that the test is based upon the conduct described rather than upon the elements of the foreign offences, the District Judge ruled:

> "57. I am required to identify the essence of the conduct alleged. I am satisfied that the Government do not intend to prosecute the Defendant for evading an asset tax. The affidavit of Vivek Gupta summarises the case that the Defendant, as an Indian resident was liable to be taxed on his global income. He did not disclose that income (or his assets) with the intent to avoid paying tax on that undisclosed income. He used his undisclosed foreign income to acquire foreign assets. His undisclosed income is detailed at page 63 of Mr Gupta's affidavit. It is alleged that the undisclosed foreign income amounted to approximately £64,857,062 and that the tax evaded amounted to approximately £19,558,295. It is alleged that the Defendant falsely informed the Income Tax Authorities that he had no foreign income. I have no doubt that it can be properly inferred that he intended to make a gain by doing so.
>
> 58. The Defendant's failure to take advantage of the amnesty window provided by s.59 BMA meant that he was also liable to a penalty charge for failing to disclose his overseas assets. I am satisfied that the levy is not the essence of the conduct alleged. The period for its calculation and payment is not relevant to my consideration. I do not accept there is a link between s.10 and s.51 of the BMA.
>
> 59. Mr Stansfeld's analysis of the BMA has not made me doubt that the Defendant is sought for making a false representation to the income tax authorities namely that he did not have an income outside India which he knew to be untrue with intent to make a gain for himself.
>
> 60. I am satisfied that the key features of the conduct alleged:
>
> a. The defendant was resident in India for tax purposes.
>
> b. He was in receipt of income into foreign bank accounts.
>
> c. He owned a number of assets overseas which he had purchased using the income from his undisclosed foreign bank accounts.
>
> d. He failed to declare his overseas income and assets.
>
> e. He falsely represented that he did not have overseas income or assets.
>
> f. He benefited from the income and assets that had not been declared.

…

64. Dishonest behaviour would be the inevitable corollary of proving the matters alleged to constitute the foreign offence.

65. I am satisfied so I am sure that the GOI have proved that the conduct in the request is capable of satisfying the requirements of the notional English offence, if proved." (Emphasis added.)

42. The appellant contends that the District Judge misidentified the essence of the conduct. The appellant relies on analysis of the BMA, the Supreme Court of India's judgment in *Union of India v Khaitan*, and certain passages of the respondent's evidence and information, in support of the contention that the essence of the conduct alleged against the appellant is an omission, specifically, the failure to disclose his foreign income and assets during the compliance window provided by s.59 of the BMA.

43. Mr Stansfeld submits that if conduct described in the request is not a matter that the prosecution would have to prove in India, in order to establish the offence, then it is "*mere narrative background*" (*Norris v Government of the United States of America* [2008] UKHL 16, [2008] 1 AC 920, [91]) or "*factual context*" (*Berko v United States of America* [2024] EWHC 1392 (Admin), Bourne J, [72]); it is not (part of) the essence of the conduct. If the law were otherwise, a requested person would be at risk of being extradited on the basis of conduct, described in the request, which goes beyond what the prosecution would have to prove at trial in the foreign state.

44. In *Khaitan*, the Supreme Court of India held at [20]:

> "The penal provisions under Sections 50 and 51 of the Black Money Act would come into play only when an assessee has failed to take benefit of Section 59 and neither disclosed assets covered by the Black Money Act nor paid the tax and penalty thereon."

So, the appellant submits, the s.51 offence of wilful evasion of the s.3 tax can either be committed by failing to take the benefit of s.59, by omitting to make a declaration in the compliance window, or by failing to pay the tax and penalty, once it has become due (which cannot be before the end of the compliance period). A false representation does not have to be proven to make out the offence under s.51 of the BMA, and so any allegations that the appellant made false representations can form no part of the essence of the conduct.

45. The appellant relies on the respondent's *Further Information regarding prima facie case* (which addresses the money laundering offence) at V.6, where the respondent stated, having identified the compliance window provided by s.59 of the BMA:

> "If the resident India did not avail this opportunity despite having the undisclosed foreign assets, this necessarily leads to a conclusion that Indian resident has willfully evaded tax, penalty or interest on such undisclosed foreign assets and thus violated the provisions of Black Money Act and liable for prosecution under Black Money Act, 2015 including section 51 of the Black

> Money Act, 2015. The offence of willful attempt to evade tax, penalty or interest referred to in section 51 of Black Money Act, 2015 is a scheduled offence under PMLA, 2002. Entire undisclosed foreign income and assets are the proceeds of crime committed and defined under Black Money Act, upon failure of resident Indian to disclose it in the Income Tax Return and the compliance window provided under section 59 of Black Money Act, 2015. Acquisition of property prior to coming into force of the Black Money Act is of no consequence since it became the property generated from the crime the moment accused failed to disclose during the window of opportunity provided under the Black Money Act. The non-declaration or inaction of the Resident Indian is a willful intent to evade Tax, Interest or penalty on such undisclosed foreign assets."

46. In the same document, the respondent stated, having cited *Khaitan*:

> "there is no reason or requirement under the law to set out any indictment period so long as the opportunity to disclose undisclosed foreign asset under section 59 of the Black Money Act is not availed and no such declaration being there, the penal provisions under 51 of the Black Money Act would come into play."

Therefore, the appellant submits, the alleged offence under s.51 of the BMA was complete on 30 September 2015, when the compliance window closed. The false representations are said to have been made after that date, and so after the s.51 offence is alleged to have been committed.

47. Even if that is wrong, the appellant submits that the District Judge erred in finding that the essence of the conduct would constitute the offence of fraud by false representation given that he did not identify the false representation in his judgment.

Ground 1 (request 2) discussion

48. Dealing first with the last point, the District Judge identified that the defendant is alleged to have committed the offence, inter alia, "*by falsely informing the Income Tax Authorities that he had no foreign income or assets*" (Judgment, [32], [57] and see [15]). The District Judge found that these false representations were evidenced by "*his tax returns and admissions*" (Judgment, [150]). We do not accept that the District Judge was required to do more to identify the false representations in respect of the s.51 offence.

49. With respect to the appellant's tax returns, the affidavit of V.J. Gupta stated that the appellant wilfully did not disclose his foreign income and assets in the income tax returns that he filed (V.J. Gupta, §4.1). V.J. Gupta exhibited the Prosecution Complaint which recorded not only that prior to 1 July 2015 the appellant had repeatedly filed income tax returns in which he had declared he had "*Nil*" foreign income and assets (triggering liability to the s.3 tax when the BMA came into force), he had also filed an income tax return on 30 March 2016 ('the 2015/16 tax return'), after the BMA had

come into force, in which he had represented that he had "*Nil*" foreign income and assets.

50. The fact that there is a separate offence of making false representations in tax returns is of no consequence: the same conduct may amount to or be part of more than one offence. The false representation in the 2015/16 tax return is not a trigger for liability to the s.3 tax: such liability had already been triggered by the pre-commencement tax returns. Nor is it of any consequence that it was a return made under the Income Tax Acts rather than the BMA. Section 51(3)(ii) of the BMA makes plain that one of the ways in which wilful evasion may be committed is by making a false representation in an accounting document (see paragraph 22 above).

51. As regards the appellant's admissions, the District Judge recorded (Judgment, [16]):

> "It is the Government's case that during a search conducted at the premises of the defendant on 27 April 2016 by the Income Tax Authorities, the defendant denied having owned any foreign assets. Various documents were found relating to foreign income and assets which were not declared by the defendant to the tax authorities. He later admitted ownership of such undisclosed assets before the Income Tax Authorities."

This reflected the affidavit of V.J. Gupta in which he stated that the appellant was recorded on oath on 27 April 2016 denying having owned any foreign assets, but then, on 29-30 April 2016, admitted such ownership when confronted with seized documents (V.J Gupta, §4.7; and the exhibited statement and records of interview).

52. Turning to the appellant's primary submission, we do not accept that the essence of the conduct will necessarily be confined to matters without which the offence would be incapable of being proved. For example, to prove an offence of robbery in a requesting state might require the prosecution (as in this jurisdiction) to establish that immediately before or at the time of stealing, the accused used force on any person or put or sought to put any person in fear of being then and there subjected to force. A request may allege that the requested person, while stealing the victim's wallet, threatened the victim with a knife and then stabbed him. The robbery offence would, in principle, be capable of being established based on the acts of threatening the victim and stealing his wallet, without the prosecution needing to establish the wounding of the victim. It could therefore be said that proof of wounding would go beyond what the prosecution would have to prove at trial to establish the offence. But, in this example, the wounding of the victim would obviously be part of the essence of the *conduct* described in the request. It cannot be said that allegation of wounding would have no impact on whether the robbery offence would be established. In accordance with s.137(7A) and *Norris*, the focus must be on the conduct specified in the request for the person's extradition.

53. In *Khaitan*, the Supreme Court of India determined that when the Government of India, by a "*notification/order notified on 1 July 2015*", substituted the commencement date of 1 July 2015 (in place of 1 April 2016) in s.1(3) of the BMA, it did not make the penal provisions retrospectively applicable. The change was made "*only for the purpose of enabling the assessee(s) to take benefit of Section 59 of the Black Money Act*" (*Khaitan*, [6], [20]).

54. The effect of the passage relied on by the appellant is that the offence under s.51 can only be committed *once* the s.59 compliance window has closed without the assessee taking the benefit of it by disclosing assets or paying the tax and penalty. That was a question of timing, which was the matter in issue. The Supreme Court of India did not hold that an attempt to wilfully evade s.3 tax is only capable of being committed by failing to make a declaration pursuant to s.59 or, thereafter, failing to make the relevant payment. Indeed, any such conclusion would have been flatly inconsistent with the terms of s.51 of the BMA.

55. The essence of the offence is tax evasion. Where liability under s.3 of the BMA has arisen, the s.51 offence is capable of being established by reference to omissions (i.e. non-declaration pursuant to s.59 and non-payment). Such conduct by omission is alleged against the appellant in the request and is correctly encompassed within the key features of the conduct identified by the District Judge. But the offence of wilfully evading tax is a continuing one, encompassing any alleged acts to evade, or attempt to evade, the tax. The respondent alleges that the appellant has also attempted to evade tax by making false representations to the Income Tax Authorities in his 2015/16 tax return and in a statement made on oath on 27 April 2016. The District Judge made no error in finding that the allegation that the appellant falsely represented that he did not have overseas income or assets was a key feature of the conduct described in the request.

56. In our judgment, the second sentence of issue 1(a) presents a false dichotomy. The essence of the conduct described in Request 2 encompasses the positive act of making false representations and the omission to declare his foreign income and assets. For the reasons we have given, we reject the contention that the District Judge made any error in identifying the essence of the conduct for the offence contrary to s.51 of the BMA. The appellant is facing prosecution for making a false representation to the tax authorities with an intent to gain.

57. Having determined the essence of the conduct, the District Judge had to decide whether, upon the assumption that the relevant conduct had occurred in this jurisdiction, that conduct would be an offence under English law. The appellant submits that in determining that question the District Judge was required to be satisfied that there was an equivalent tax to that imposed by s.3 of the BMA in this jurisdiction.

58. The principal foundation for this submission is *Hertel v The Government of Canada* [2010] EWHC 2305 (Admin). Canada sought Mr Hertel's extradition to stand trial for offences contrary to the Canadian Income Tax Act. It was alleged that a payment made by a company (IEC) of which Mr Hertel was the President and directing mind to another company (Eurocana), which was owned by his brother, gave rise to a charge to tax against Mr Hertel, but this liability was dishonestly concealed from the Canadian revenue authorities. Canada's case was that "*the conduct on which it relies would, if it was perpetrated in England, constitute the common law offence of cheating the Revenue*" ([25]). Laws LJ rejected the contention that "*asking whether there would have been a UK tax liability is the wrong approach*", holding that a failure or omission to pay tax due needed to be proved to establish liability, "*since if the conduct relied on does not disclose such an unmet liability, the Revenue would have been cheated of nothing*" ([27]).

59. Canada advanced three categories of tax charge which, it was submitted, arose on the facts alleged, so as to give rise to a UK tax liability of which the Revenue would have been defrauded. Laws LJ held at [46]:

> "In relation to all three scenarios the respondent has not in my judgment established (certainly not to the standard required) that the conduct alleged, if transposed to the United Kingdom, would involve or generate a charge to tax whose concealment by the appellant would then amount to the offence of cheating the Revenue."

60. At [48], Laws LJ addressed a submission advanced by the Secretary of State for the Home Department:

> "It is said that given the conduct test approved in *Norris*, 'it is irrelevant whether or not the alleged transactions would give rise to personal liability for income tax under UK tax law'. It is enough … that the conduct alleged demonstrates the making of false statements in an income tax return, and evading the payment of tax, purely in the context of the tax law of Canada, once it is shown that such misstatements or evasion would, in a purely English context, amount to cheating the Revenue. I think this misunderstands the conduct test. For the reasons I have given it is not shown that the conduct, transplanted here, would constitute the *actus reus* of the UK law offence of cheating the Revenue."

61. The appellant also relies on *Badre v Court of Florence, Italy* [2014] EWHC 614 (Admin) in which the requested person faced a charge of unauthorised financial activity. McCombe LJ observed that there was no charge alleged of failing to register under the money laundering legislation. The conduct alleged encompassed:

> "31. …trading without having satisfied the rigorous requirements of Articles 5 to 10 of the Directive (and the Italian equivalent), which led to 'authorisation'. The conduct of the business in the UK, without having gone through those hoops, would not necessarily constitute an offence under the law of England and Wales. Accordingly, it seems to me that the court could not be satisfied, to the requisite standard, that section 64(3)(b) of the Act was satisfied."

62. In *Berko,* the United States sought the requested person's extradition for six offences, none of which were revenue offences. Under US law there was an obligation to declare foreign bank accounts ([63]), and Bourne J considered that the "*essence of the conduct relevant to counts 4-6 is a failure to declare the balances of foreign bank accounts*" ([70]). At [69], Bourne J observed, applying the conduct test:

> "The circumstances must be translated, so far as possible, from the US context to an English context. So, a failure to declare a bank account to the US authorities must be treated as if it were a failure to declare a bank account to the English authorities. But

> obligations under US law are not to be translated. The relevant obligation must exist in English law. Otherwise extradition will expose the requested person to the risk of conviction for conduct that is not a crime in this jurisdiction."

63. The appellant submits that the conduct test requires the circumstances that give rise to the offence in India to be transposed to this jurisdiction. Thus, failure to declare to the Indian tax authorities is transposed as being a failure to make a declaration to HMRC. But the relevant legal obligation to pay tax under s.3 of the BMA is not transposed. The appellant contends that the obligation to pay tax is no different to the obligation to register (in *Badre*) or the obligation to declare bank accounts (in *Berko*). The court has to be satisfied that there is an equivalent tax liability in this jurisdiction to that imposed by s.3 of the BMA.

64. Mr Stansfeld draws attention to the statutory exception to this principle for revenue cases provided by sections 64 and 65 of the 2003 Act which provide that "*it does not matter whether the law of the relevant part of the United Kingdom imposes the same kind of tax or duty or contains rules of the same kind as those of the law of the category 1 territory*". Importantly, he submits, the exception only applies to Part 1 cases. There is no such exception in Part 2 of the 2003 Act. This is not surprising given that historically offences under enactments relating to tax were not extradition offences: *R v Chief Metropolitan Stipendiary Magistrate* [1988] 1 WLR 1204, 1218F-G.

65. The correct analysis, in our view, is that the District Judge was not required to be satisfied that there is a tax in this jurisdiction which is equivalent to that imposed by s.3 of the BMA. In *Hertel*, the court held that it was necessary, in order to establish the *actus reus* of the notional charge of cheating the public revenue, to establish that the conduct alleged, if transposed to this jurisdiction, would have given rise to a UK tax liability. The court did not hold, and it is not the law, that *whenever* the conduct arises in a revenue context, irrespective of the notional charge(s) in issue, an equivalent UK tax liability must be established.

66. The *actus reus* of the offence of fraud by false representation "*consists solely of making a false representation, either to another person or (by subsection (5)) to a 'system or device'. No deception need result from such a representation, and no gain or loss need result*": Blackstone's Criminal Practice, B5.15. Here, the representations to the Indian tax authorities were that the appellant had no income or assets outside India, which was false. Transposing that conduct to this jurisdiction involves representations being made to the Revenue that the appellant had no income or assets outside the UK, and treating income and assets he held outside India as being held outside the UK. In this case, the *actus reus* of the notional offence is established without any need for the court to be satisfied that there was an equivalent tax in this jurisdiction.

67. The *mens rea* of the offence of fraud by false representation is made up of the requisite knowledge, dishonesty, and intention. The District Judge found ([64]), and it has not been contested, that:

> "Dishonest behaviour would be the inevitable corollary of proving the matters alleged to constitute the foreign offence."

68. Accordingly, the answer to issue 1(b) is 'no' and so issue 1(c) does not arise. It is unnecessary for us to address the question how direct the equivalence would need to be between the foreign and UK taxes, where a tax obligation in this jurisdiction has to be established.

69. The District Judge was satisfied to the criminal standard that the conduct described in Request 2, if it were established, and transposed to this jurisdiction, would constitute the offence of fraud by false representation. For the reasons we have given, he made no error in reaching that conclusion. Indeed, he was right to find that the requirements of s.137 of the 2003 Act are met in respect of Request 2.

Request 1

70. For Request 1, the agreed issues arising in respect of ground 1 are:

> (2) Was DJ Snow wrong to be satisfied that s.3 PMLA is an extradition offence because the conduct would constitute offences contrary to ss.327, 328 & 320 Proceeds of Crime Act 2002 ('POCA') in this jurisdiction?
>
> a. Was DJ Snow wrong to conclude that Mr Bhandari's assets became criminal property on 1 July 2015, when the BMA came into force?
>
> b. Was DJ Snow wrong to conclude that the property said to have been owned after 1 July 2015 would have been criminal property pursuant to s.340 of POCA?

71. The respondent invited the District Judge to focus, for the purpose of dual criminality, on offences contrary to s.327(1)(a) and (d) (concealing criminal property), s.328(1) (entering into or becoming concerned in a money laundering arrangement) and s.329(1) (possessing criminal property) of the POCA.

72. The District Judge ruled:

> "77. I am satisfied that the essence of the allegation is that the foreign assets became criminal property when the defendant had avoided tax liability regarding those assets, which began when the BMA 2015 came into force in 2015. By not declaring foreign assets the defendant obtained a benefit, or the undeclared assets represented such a benefit (s.340 POCA 2002). S.340(6) POCA provides that if a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.
>
> 78. I identify the essence of the conduct as being that the defendant committed money laundering offences in relation to that property:

> a. By continuing to posses the property that ought to have been taxed;
>
> b. By concealing the property by making false representations that he did not have any foreign assets; and
>
> c. By entering or becoming concerned in a money laundering arrangement, and/or transferring the property, through the purported transfer of his properties through a trust."

73. The documentary evidence showed that the appellant continued to possess the alleged criminal property after 1 July 2015. The District Judge was sure that the conduct in Request 1 would constitute each of the offences of possessing and concealing criminal property, and money laundering under ss.329, 327 and 328 of POCA.

74. In his oral submissions, Mr Du Sautoy sensibly conceded issue (2)(a). We agree that the District Judge erred in concluding that the appellant's assets became criminal property on 1 July 2015. First, although the legal obligation to pay tax under s.3 of the BMA arose on that date, when the BMA came into force, commission of the s.51 offence could not be complete before the compliance window closed on 30 September 2015 (see paragraph 54 above). Secondly, in any event, as the notional Request 2 offence on which the notional POCA offences are predicated is fraud by false representation, the appellant's assets became criminal property for the purposes of s.340 of POCA only when a false representation relied on was first made.

75. Mr Du Sautoy put forward the false representations made on 30 March 2016, when the appellant filed the 2015/16 tax return, and on 27 April 2016 when the appellant made a statement on oath. The respondent submits, in effect, that we should uphold the District Judge's decision that the conduct for which the appellant is sought in Request 1 is an extradition offence for (in part) different reasons.

76. The respondent had maintained, in its skeleton argument for this hearing, that the District Judge was correct to conclude the foreign assets became criminal property on 1 July 2015. The appellant submits that this exceptionally late change of case is procedurally unfair. The fact that the respondent has now put forward two representations, and so alternative dates on which the assets are alleged to have become criminal property - which are themselves different to the date put forward in Mahesh Gupta's affidavit - demonstrates that the respondent is still unsure of the conduct it will rely on to prove the offence, and therefore cannot discharge the burden to the criminal standard.

77. The appellant calls attention to the fact that the court has not received submissions from the respondent as to what evidence the respondent relies on to show assets were still owned by the appellant on 30 March 2016 or 27 April 2016. There is an overlap here with the *prima facie* case requirement which is the subject of ground 2.

Ground 1 (request 1) discussion

78. We agree with Mr Stansfeld that the respondent's change of case, during oral submissions, was so late that it would be unfair to uphold it for different reasons. In our view, subject to our conclusions on the other grounds, the appropriate course would be to direct the District Judge, pursuant to s.104(1)(b) of the 2003 Act, to decide again the question whether the conduct specified in Request 1 constitutes an extradition offence and the related question whether the respondent has established a *prima facie* case in respect of the s.3 PMLA offence. However, as we have determined that the appellant must be discharged on grounds 3 and 4, it is unnecessary to make such a direction.

Ground 2 – Prima facie case

79. The agreed issues in respect of ground 2 are:

> (3) Was DJ Snow required to identify the exact evidence in each Request which establishes a *prima facie* case?
>
> (4) Was DJ Snow wrong to have concluded to the criminal standard, that there is a *prima facie* case for each extradition offence?
>
> **Request 2**
>
> (5) Was DJ Snow wrong to have concluded that there is sufficient admissible evidence to establish a *prima facie* case of an offence contrary to s.2 Fraud Act 2006?
>
> (6) Was DJ Snow wrong to conclude that there is sufficient admissible evidence of 'income' which would have been subject to income tax in this jurisdiction?
>
> (7) Was DJ Snow wrong to have concluded that the copies of bank statements would be admissible under Criminal Justice Act 2003 ('CJA 2003')?
>
> (8) Was DJ Snow wrong to have concluded that any 'admissions' by Mr Bhandari in interviews ought not to be excluded under s.78 Police and Criminal Evidence Act 1984 ('PACE')?
>
> **Request 1**
>
> (9) Was DJ Snow wrong to have concluded that there is sufficient admissible evidence to establish a prima facie case of offences contrary to ss.327, 328 or 329 POCA?
>
> (10) Was DJ Snow wrong to have concluded that there is sufficient admissible evidence to establish a *prima facie* case of criminal property pursuant to s.340 POCA?
>
> (11) Was DJ Snow wrong to have concluded that the letter of 3 November 2016 was admissible evidence?

80. Given our conclusion at paragraph 78 above, it is only necessary to address this ground in relation to Request 2; and as the District Judge was not required to be satisfied that there was an equivalent tax in this jurisdiction (for the reasons we have given above), issue (6) does not arise.

81. Section 84(1) of the 2003 Act provides: "*If the judge is required to proceed under this section he must decide whether there is evidence which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him.*" Accordingly, having identified the essence of the conduct constituting the charge alleged, and determined that it is an extradition offence, the judge then had to determine whether the requesting state "*has proved, on the basis of all admissible evidence … there is sufficient evidence to substantiate the conduct alleged*": *Devani*, [47].

82. In determining whether evidence is admissible, the judge will have regard to s.84(2)-(4) of the 2003 Act which provide:

> "(2) In deciding the question in subsection (1) the judge may treat a statement made by a person in a document as admissible evidence of a fact if—
>
> (a) the statement is made by the person to a police officer or another person charged with the duty of investigating offences or charging offenders, and
>
> (b) direct oral evidence by the person of the fact would be admissible.
>
> (3) In deciding whether to treat a statement made by a person in a document as admissible evidence of a fact, the judge must in particular have regard—
>
> (a) to the nature and source of the document;
>
> (b) to whether or not, having regard to the nature and source of the document and to any other circumstances that appear to the judge to be relevant, it is likely that the document is authentic;
>
> (c) to the extent to which the statement appears to supply evidence which would not be readily available if the statement were not treated as being admissible evidence of the fact;
>
> (d) to the relevance of the evidence that the statement appears to supply to any issue likely to have to be determined by the judge in deciding the question in subsection (1);
>
> (e) to any risk that the admission or exclusion of the statement will result in unfairness to the person whose extradition is sought, having regard in particular to whether it is likely to be

> possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings.
>
> (4) A summary in a document of a statement made by a person must be treated as a statement made by the person in the document for the purposes of subsection (2)."

83. Section 84 of the 2003 Act provides its own code for the admissibility of evidence, in particular hearsay evidence, when determining whether there is a *prima facie* case. In *Patel v Government of India* [2013] EWHC 819 (Admin), Kenneth Parker J (with whom Moses LJ agreed) observed, at [45], that statements authenticated in accordance with s.202 of the 2003 Act are not, as such, treated as hearsay:

> "Such statements may, of course, contain hearsay material, and such material was not previously admissible (unless there was a relevant domestic exception), so that, for example, in *R v Governor of Pentonville Prison, ex parte Kirby* [1979] 1 WLR 541, the out-of-court statement of an accountant witness was inadmissible to the extent only that it referred to, but did not properly exhibit, primary company reports whose accuracy could be supported only by the evidence of other persons. Section 84(2)-(4) would now render such material admissible in principle, thus extending … the scope of admissible evidence under section 84, in line with the modern approach to the admissibility of hearsay evidence, as expressed in the applicable provisions of the Criminal Justice Act 2003."

84. That is the approach the District Judge took, properly directing himself as to the applicable principles at paragraphs 84 to 97 of his judgment.

85. On the question of admissibility of evidence, the District Judge heard evidence from Mr Harpreet Giani, called by the appellant, and he gave his assessment of his evidence at [114]-[121]. There is no challenge to those conclusions. The District Judge gave reasons for his rulings on the admissibility of the material before him at [124]-[149]. The appellant challenges his admissibility ruling in relation to (a) bank statements, and (b) the appellant's statement made to the tax authorities on 27-30 April 2016.

86. The District Judge noted at [14]:

> "The Indian Authorities have obtained various bank statements in the name of the defendant and his companies from the UAE. On 12 April 2017 the UAE Ministry of Finance provided details of four accounts in the defendant's name. Two of those accounts had money being transferred in and out: account no. 1014302546601 between 2011 and 2017, and account no. 1024302546602 between 2012 and 2016."

87. The bank statements were exhibited to the witness statements of Mahesh Gupta and Anita Meena (Additional Commissioner of Income Tax), both dated 28 February 2022. Those statements made clear that the documents had been obtained by letters of request

to the Ministry of Finance in the United Arab Emirates (as demonstrated by the letter from that Ministry that accompanied the bank statements).

88. The District Judge rejected a "*repeat challenge*" to the admissibility of the bank statements, based on the lack of an "*exhibiting statement from the relevant bank*", stating at [127]:

> "I am satisfied that Mahesh Gupta, Vitek Gupta and Anita Meena are entitled to produce the documents provided following a letter of request. No issue has been raised regarding the authenticity or accuracy of those documents. In any event those documents would be admissible in this jurisdiction pursuant to s.117 Criminal Justice Act 2003."

89. The appellant submits that the statements of Mahesh Gupta and Anita Meena proved only that the bank statements had been received in the investigation. In circumstances where they are being adduced to show the truth of their contents, the appellant submits they are inadmissible without a statement from the relevant bank. In our judgment, there is no substance to this point. The District Judge made no error in determining that the bank statements, which had been supplied by the UAE to the respondent, were admissible in accordance with the provisions and principles he had identified.

90. The District Judge addressed the challenge to the admissibility of the appellant's statement at [138]-[149]. He observed:

> "146. The first question that I ask myself is, what is the status of the answers given by the Defendant? I note that the defendant was asked questions under oath. I am satisfied given the nature of the questioning and the fact that it was given under oath it would amount to an interview in this country. During his interviews he made admissions that he had immovable properties outside India, 2 foreign bank accounts, that he had incorporated 2 companies outside India and that the income from neither company was reflected in his tax returns. I am satisfied that those answers amount to a confession.
>
> 147. Whilst the bald facts of timing and location are known, there is no evidence of the manner of the questioning, whether informal breaks were given etc. The Government's evidence was that the defendant's statement was recorded by the Deputy Director of Income Tax (Inv.) in his capacity as authorised officer, in the presence of two independent witnesses, and recorded as stated by him, as such details were only within his personal knowledge. At the end of the statement, the defendant has written in his own handwriting that he has read over the statement and found it to be correctly recorded, and he has given it out of his own free will 'and without any pressure, fear, threat or coercion', It is denied that he was made to sign the statement without reading it. The defence have produced no evidence to contradict these statements but, in effect ask me to speculate on what may have happened.

> 148. There is no evidence of the defendant being offered an inducement or being subject to oppression. I decline to exclude it pursuant to s76 of the Police and Criminal Evidence Act 1984.
>
> 149. The circumstances of the interview give me concern given their length and the absence of legal advice. However, the defendant has failed to provide any detailed evidence which could justify a conclusion that to admit it would have such an adverse effect on the fairness of the proceedings that I should not admit it. The defendant has fallen far short of persuading me that it should be excluded because of the way in which it has been obtained 'outrages civilised values' both in its own right and in the light of the Allen judgment." (Emphasis added.)

91. The appellant submits that the District Judge was wrong not to exclude, under ss.76 and 78 of the Police and Criminal Evidence Act 1984, what he considered to be evidence of confessions by the appellant, given the circumstances in which the interviews were conducted. The interviews were conducted at the appellant's home, during a "*search and seizure action*", over the course of 27-30 April 2016. The appellant was not legally represented. The times on the interview on 28 April 2016 indicate that it began at 10.30am and ended at 10pm, with a two-hour break. The interview on 29 April 2016 commenced at an unknown time but continued through the night, with the interview being conducted between 8.30pm and 10.30pm, resuming at 12.30am to 1.30am, and again at 2.30am until an unknown time.

Ground 2 discussion

92. It is common ground that the District Judge applied the correct test, namely, whether the admission of the evidence "*outrages civilised values*": *R v Governor of Brixton, ex p. Levin* [1997] AC 741, Lord Hoffmann, 748F. We are not persuaded that the District Judge made any error in his decision to admit the statements made by the appellant on 27-30 April 2016. The appellant was not legally represented, but the appellant put forward no positive case that he had asked for legal representation. There was no evidence of oppression, and the appellant's signed statement asserted to the contrary. The statement records breaks being taken at the appellant's request (with nothing to suggest such any request was refused), as well as several questions and answers such as:

> "Have you slept properly and do you want to continue your statement?
> Yes, I have taken rest properly and I am feeling perfectly fine. I would like to continue my statement."
>
> "How are you feeling? Do you want to take any rest?
> Sir, I am feeling perfectly ok and I would like to continue my statement."
>
> "How was the behaviour of search party during the entire proceedings?

> The behaviour of members of the search party was very good they were nice to me and towards my Family. And I really thank them for the same."

93. As the District Judge rightly emphasised, the times given for the interviews were of concern. But the evidence falls far short of what the defendant needed to adduce to establish that admission of his statement would outrage civilised values.

94. The District Judge addressed the question whether there is a *prima facie* case for Request 2 in the following terms:

> "150. The conduct that I have identified is:
>
> (i) The defendant was resident in India for tax purposes.
> **Evidenced by his tax returns and the affidavits.**
>
> (ii) He was in receipt of income into foreign bank accounts.
> **Evidenced by the foreign material and his admissions.**
>
> (iii) He owned a number of assets overseas which he had purchased using the income from his undisclosed foreign bank accounts.
> **Evidenced by the foreign material.**
>
> (iv) He failed to declare his overseas income and assets.
> **Evidenced by his tax returns, Assessment Order and admissions.**
>
> (v) He falsely represented that he did not have overseas income or assets.
> **Evidenced by his tax returns and admissions. Mens rea confirmed by Kapoor's statements and the evidence to conceal his assets.**
>
> (vi) He benefited from the income and assets that had not been declared.
> **A reasonable jury can properly infer benefit from his undeclared income and purchase of substantial assets overseas.**
>
> 151. I am satisfied that there is a prima facie case in respect of the second request." (Original emphasis.)

95. The appellant submits paragraph 150 is wholly insufficient. The District Judge failed to identify the precise evidence from the 3,050 pages in Request 2, and the 2,450 pages in Request 1, that would substantiate the conduct alleged. He was required, the appellant contends, to identify any specific document he relied on as proof of a specific point, and to give reasons why he determined it was admissible. In the absence of reasons, the appellant submits this court must investigate the matter.

96. Mr Stansfeld focused on paragraph 150(v). He submits that the pre-2015 tax returns cannot be evidence of false representations as those are the trigger for liability to tax

under s.3 of the BMA. He contends the 2015/16 tax return cannot be evidence of a false representation as the return is not relevant to the s.3 BMA tax or the offence under s.51. In support of this contention, Mr Stansfeld relies on a Circular issued by the Ministry of Finance on 6 July 2015 which includes the following question and answer at number 17:

> "***A person has some undisclosed foreign assets. If he declares those assets in the Income-Tax Return for assessment year 2015-16 or say 2014-15 (in belated return) then should he need to declare those assets in the voluntary tax compliance under Chapter VI of the Act?***
>
> As per the Act, the undisclosed foreign asset means an asset which is unaccounted/ the source of investment in such asset is not fully explainable. Since an asset reported in Schedule FA does not form part of computation of total income in the Income-tax Return and consequently does not get taxed, mere reporting of a foreign asset in Schedule FA of the Return does not mean that the source of investment in the asset has been explained. The foreign asset is liable to be taxed under the Act (whether reported in the return or not) if the source of investment in such asset is unexplained. Therefore, declaration should be made under Chapter VI of the Act in respect of all those foreign assets which are unaccounted/ the source of investment in such asset is not fully explainable."

97. Mr Stansfeld contends that as a late declaration of foreign assets in the appellant's 2015/16 tax return would not have absolved the appellant of liability to tax under s.3 of the BMA, or of committing an offence under s.51, that document is not capable of establishing a prima facie case of fraud by false representation.

98. The District Judge also relied, in paragraph 150(v), on "*admissions*". The respondent, in its skeleton argument, refers to admissions made by the appellant in interview, giving a cross-reference to admissions by the appellant that he had certain foreign assets and that the income accrued from Santech International FZE and Offset India Solutions was not reflected in his income tax returns. The appellant submits that those are not *false* representations: they are admissions as to ownership of property.

99. We shall first address subparagraphs (i)-(iv) and (vi) of paragraph 150 of the District Judge's judgment before turning to subparagraph (v), on which Mr Stansfeld focused his submissions:

    i) Paragraph 150(i) is not controversial: it was not disputed that the appellant was resident in India for tax purposes. In any event, that is evidenced by his tax returns and the affidavits of V.J. Gupta and Mahesh Gupta. There was no need for the District Judge to identify the evidence more precisely.

    ii) We agree with Mr Du Sautoy that, while it might have been helpful if the District Judge had been more explicit in paragraph 150(ii), by this point in his judgment he had summarised the conduct and the evidence, and so we can readily understand his reference to "*the foreign material*" which shows receipt of

income into foreign bank accounts as meaning the bank statements provided by UAE. The reference to "*his admissions*" clearly means the statements made by the appellant on 27-30 April 2016 (summarised in paragraph 13 above).

iii) Similarly, in paragraph 150(iii), it can be inferred that in referring to "*foreign material*" showing that the appellant owned a number of assets overseas, he was particularly referring to the title deeds for Flat C-303 and Flat 2414 Burj Khalifa (provided by UAE) and the Land Registry title documents for Flat 6 Grosvenor Hill Court and Flat 12 Bryanston Square (provided under cover of a letter from HMRC).

iv) Paragraph 150(iv) states in clear terms the evidence relied on to show he failed to declare his overseas income and assets: his tax returns, his admissions, and the Assessment Order ('AO'). We reject the contention that the AO provides no such evidence. Paragraph 2 of the AO provides details of the returns the appellant filed during assessment years 2011-12 to 2018-19, and states foreign assets declared "Nil" for every year (save the first where it is recorded as "NA"). Paragraph 3 of the AO states that the appellant "*has not declared any information relating to any foreign asset … located outside India for A.Y. 2012-13, 2013-14, 2014-15, 2016-17 & 2017-18*". In any event, the tax returns and admissions provide sufficient evidence.

v) The assessment that a reasonable jury can properly infer benefit ([150(vi)]) cannot be faulted. It is a natural inference.

100. Turning to paragraph 150(v), there is no difficulty understanding the documents that the District Judge was referring to when he identified the appellant's tax returns and admissions. As we have said when addressing ground 1, we agree that the pre-2015 tax returns are the trigger for liability to tax under s.3 of the BMA. The same cannot be said of the 2015/16 tax return, filed after the BMA had come into force. That is evidence of a relevant false representation. It is no answer that making a declaration of his foreign assets in the 2015/16 tax return would have been an insufficient step to absolve the appellant. As we have said, evasion of tax is a continuing act, and the representation in his 2015/16 tax return that he had no foreign assets is prima facie evidence of a false representation made to attempt to evade the s.3 tax.

101. There was ample credible and admissible evidence to establish a *prima facie* case of an offence of fraud by false representation, identified adequately by the District Judge. For the reasons we have given, we dismiss ground 2 insofar as it relates to Request 2.

Ground 3 – article 3 ECHR

102. The agreed issues arising in respect of ground 3 are:

> (12) On the evidence before DJ Snow and the fresh evidence, does detention in Tihar prison give rise to a real risk of an article 3 ECHR violation due to the combination of overcrowding, extortion, and/or violence by prisoners and staff?
>
> (13) Does the September 2022 assurance meet the established risk under article 3 ECHR?

> (14) Was DJ Snow wrong to have concluded that the October 2022 Assurance does provide sufficient protection against the risk of Mr Bhandari being subjected to torture and/or inhuman and degrading treatment by the police or other investigative authorities?

103. It is unlawful for the United Kingdom to extradite a person where they will be at real risk of being subjected to treatment contrary to the right in article 3 of the ECHR not to "*be subjected to torture or to inhuman or degrading treatment or punishment*" ('proscribed treatment').

104. Even where there is evidence that there is a real risk of proscribed treatment, the requesting state may nevertheless show that the requested person will not be exposed to such a risk by providing an assurance that the individual will be held in particular conditions which are compliant with the rights guaranteed by article 3. Such assurances form an important part of extradition law: see *Shankaran v Government of India* [2014] EWHC 957 (Admin), Sir Brian Leveson P, [59] and *Government of India v Chawla (No.1)* [2018] EWHC 1050 (Admin), Dingemans J (giving the judgment of the court), [29]-[33].

105. We have set out the terms of each of the four assurances given by the respondent in the Appendix to this judgment.

106. There are two aspects to ground 3. Taking them in the order in which we were addressed orally, the first concerns the risk of proscribed treatment by the police or other investigative bodies (Issue (14)). The second concerns conditions in Tihar prison, most notably, having regard to the level of overcrowding and understaffing, the risk the appellant will be subjected to physical mistreatment and extortion (Issues (12) and (13)).

Ground 3 – article 3 – issue (14)

107. The appellant's short point in respect of the first aspect is that the District Judge found that he "*faces a real risk of article 3 non-compliant treatment if he is detained in a police station or at the premises of other investigatory bodies*" (Judgment, [222]). There is no appeal against that finding. Despite making that finding, it is submitted that the District Judge wrongly found that this risk, which arose from the likely conduct of the police or other investigatory body, was adequately addressed by the October assurance that the appellant would not be removed from prison for questioning. The District Judge did not give any reason for considering that the risk of proscribed treatment by the police or other investigatory body was dependent on *where* they undertook their questioning.

108. An ancillary procedural fairness point arises. Prior to handing down his judgment, the District Judge reached the conclusions that he expresses at [221]-[223], namely:

> "There are at least 3 on-going enquiries against him. Those enquiries are likely to involve substantial amounts of material. I am satisfied that there is a real risk of the defendant being removed from prison for questioning.

> I am satisfied that the defendant faces a real risk of article 3 non-compliant treatment if he is detained in a police station or at the premises of other investigatory bodies.
>
> I am concerned that the assurances do not specifically exclude the real risk of the defendant being transferred to a police station or other investigating bodies premises on a temporary basis, where he faces a real risk of Article 3 non-compliant treatment."

109. Consequently, the District Judge wrote to Counsel on 11 October 2022, communicating those findings, and stating:

> "Applying Aranyosi I urgently request the government to confirm whether they will provide an assurance that, if the defendant is refused bail, he will not be removed from prison unless:
> He is granted bail.
> Requires medical treatment in a hospital.
> For appearances before a court.
> Alternatively an assurance that he will not be removed from prison for questioning unless he is accompanied at all times by a lawyer of his choice.
>
> I will assess any assurance received without further representations unless I require them."

110. On 31 October 2022, the respondent provided to the judge the October 2022 Assurance, giving an assurance in the first of the alternative terms requested by the District Judge (see the Appendix). A short time later the District Judge provided Counsel with his embargoed judgment. Counsel for the appellant wrote to the District Judge on 1 November 2022 asking for an opportunity to make representations on the adequacy of the October 2022 Assurance. The District Judge refused that application and gave judgment on 7 November 2022.

111. The respondent concedes that procedural fairness required that the appellant should have been given an opportunity to advance representations as to the efficacy of the October 2022 Assurance. We agree. In principle, the requested person ought to have an opportunity to 'test' any assurance provided by the requesting state: see *United States v Assange* [2022] 4 WLR 11, [45]. It follows that in considering whether the October 2022 Assurance is sufficient to remove the established real risk of proscribed treatment by the police or other investigative bodies, it is necessary for us to conduct our own fresh analysis.

112. Nevertheless, as the starting point is the District Judge's unchallenged conclusion that the appellant would face a real risk of proscribed treatment at the hands of the police or other investigatory bodies, if detained by them for questioning, it is important to consider the key evidence underlying his finding:

i) The Government of India has failed to ratify the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment ('UNCAT').

ii) "Since at least 1997, the Supreme Court has confirmed the existence of torture and ill-treatment, in *D.K. Basu v State of West Bengal* (1997) 1 SCC 416, the Court '*lamented the growing incidents of torture and deaths in police custody*' (Verma §17). In 2017 in its judgment in *Re Inhuman Conditions in 1382 Prisons* (2017) 10 SCC 658, the Court held that:

> 'There are several such cases – documented and undocumented – all over the country where the court awarded compensation for custodial deaths, but in spite of this there seems to be no let up in custodial deaths. This is not a sad but a tragic state of affairs indicating the apparent disdain of the State to the life and liberty of individuals, particularly those in custody.' (§49)"

iii) In October 2018, Justice (Ret'd) A.P. Shah, the former Chairman of the 20th Law Commission of India condemned the "*tacit acceptance*" of torture, stating that: "*Some judges are convinced that without torture, evidence-gathering and subsequent conviction is not possible. This acceptance of torture in India is an open secret and [torturous] treatment meted out to certain communities is accepted as par for the course for 'justice and safety' of the country*": *Commonwealth Human Rights Initiative: Report on conference on strengthening legal protection against torture in India*, 28 October 2018.

iv) CNN reported on 2 December 2020 that the National Human Rights Commission of India ('NHRC') had reported that "*since start of 2019, at least 194 people died in police custody in India, where police violence is a daily reality, ranging from the use of batons for crowd control to fatal custodial beatings*". The National Campaign Against Torture ('NCAT') documented the death of 125 persons in police custody in 2019, recording that 93 of these deaths (74.4%) were "*due to alleged torture/foul play while 24 persons (19.2%) died under suspicious circumstances*".

v) In the 2 December 2020 article, CNN reported,

> "India's over-burdened police force has 158 police officers for every 100,000 people. That lack of manpower, coupled with inadequate investment in modern investigation techniques and political pressure to get results, means confessions under torture are often simply the quickest, or only, way to resolve crimes – even if they come at deadly costs."

vi) In its *India: Annual Report on Torture 2020*, dated 18 March 2021 ('NCAT's 2020 Report'), NCAT documented the deaths of 111 named persons in police custody across India in 2020, reporting that,

> "Out of the 111 deaths in police custody in 2020 documented in this report, 51 persons died due to alleged torture, 35 persons died in alleged suicide, eight persons died due to suspected foul play, five due to alleged sudden illness, two

> while attempting to flee, while others died due to various reasons."

vii) NCAT's 2020 Report also suggests that the number of custodial deaths caused by torture in 2020 was an underestimate because,

> "In India, custodial deaths have become synonymous with suicide. Often victims are tortured to death and police claim that the victims have committed suicide… However, in a number of cases either being unable to bear further torture or to escape from humiliation including in front of the family members, victims commit suicide."

viii) The United States Department of State's Country Report on Human Rights Practices for India, 2021 ('US State Department Report 2021'), found that there were "*credible reports of: unlawful and arbitrary killings, including extrajudicial killings by the government or its agents; torture and cases of cruel, inhuman or degrading treatment or punishment by police and prison officials; harsh and life threatening prison conditions…*" (US State Department Report 2021, executive summary and sections 1(a) and (c)). In the same report, the US State Department noted in section 1(c):

> "The law does not permit authorities to admit coerced confessions into evidence, but nongovernmental organizations (NGOs) alleged authorities used torture to coerce confessions. Authorities allegedly also used torture to extort money or as summary punishment."

ix) "The Home Office's Country and Information Note dated January 2019 records that '*[a]ll over India, custodial killings and police abuse, including torture and rape during custody, are commonplace*'".

x) The United Nations Working Group on Arbitrary Detention ('UNWGAD') reported regarding the treatment of a British citizen, Mr Christian Michel. So far as relevant to the issue of treatment by the police and other investigative bodies, UNWGAD reported, as summarised by the District Judge at [190] (references omitted):

> "I. On 4 December 2018, Mr. Michel was blindfolded, handcuffed and flown on a private jet from Dubai to India, preventing him from challenging the extradition decision.
>
> II. He was initially detained for questioning by the CBI, initially for five days but which was extended to 14 days. During that period he was not allowed to sleep, with interrogations lasting 14 hours without breaks. He was interrogated every day for up to 21 hours and threatened with violence. He was kept under the constant surveillance of three

> officers, denying him any privacy. He was allowed to sleep three hours at night, at the most.
>
> III. On 19 December 2018, he was transferred to Tihar Jail where he shared a cell for three nights with 40 other inmates.
>
> IV. On 22 December 2018 he was transferred to the premises of the Enforcement Directorate to be questioned on money laundering for 14 days.
>
> V. Following over 600 hours of questioning over 30 days, he was again detained in Tihar prison…
>
> VIII. The UNWGAD noted that the GoI did not dispute that British consular officials had not been given access to Mr. Michel for more than a year and found that the visits that had taken place had been continuously interrupted by ED or CBI officers, in violation of the Vienna Convention on Consular Relations."

xi) UNWGAD also reported regarding the treatment of another British citizen, Mr Jagtar Johal. So far as relevant to the issue of treatment by the police and other investigative bodies, UNWGAD reported, as summarised by the District Judge (references omitted):

> "191. It is claimed that shortly after his wedding Mr. Johal was abducted from the street on 4 November 2017 by 15 unidentified men. He was hooded and pulled into an unmarked police car in front of numerous witnesses, including his family. Between 5 and 14 November 2017 he was held incommunicado at undisclosed locations with no access to lawyers, his family or consular assistance. Multiple charges have been laid against Mr. Johal, nine of which carry the death penalty (UNWGAD Opinion, dated 4 May 2022, pg.1).
>
> 192. Mr. Johal has been detained under anti-terror laws for more than four years during which time he has been tortured to sign a blank confession and record a video which was then broadcast on Indian TV. He described the torture in a written letter dated November 2017, which was subsequently reported by the BBC:
>
> > 'Multiple shocks were administered by placing (the) crocodile clips on my earlobes, nipples and private parts. Multiple shocks were given each day. Two people would stretch my legs, another person would slap and strike me from behind, and the shocks were given by the seated officers. At some stages I was left unable to walk and had to be carried out of the interrogation room.'

> 193. He is currently detained in the maximum security jail in Tihar prison, and often forced to stay in solitary confinement.
>
> 194. His case was investigated and adjudicated by UNWGAD, who noted in its opinion that Mr. Johal is currently the subject of nine cases being investigated by the National Investigation Agency and one by the Punjab Police. Despite Mr. Johal having been in custody for over 3½ years, the Agency had not commenced any trials and had not produced any admissible evidence.
>
> 195. In April 2019 in a case brought by the Punjab police in court, the investigating officer admitted under cross-examination that there was no evidence save for Mr. Johal's confession extracted under torture. Despite that evidence, as of UNWGAD's findings on 4 May 2022, the trial had not made any progress and had been the subject of repeated adjournment applications by the Punjab police.
>
> 196. The UNWGAD found his detention to be arbitrary (§99), and that there have been multiple violations of Mr Johal's right to a fair trial through total, or partial non-observance of international norms. Critically, despite clear allegations of torture, the GoI has simply denied they are true without undertaking any investigation. The UNWGAD found that the GoI had failed to prove that the statements had been given freely and that Mr. Johal had been repeatedly interrogated in the absence of legal counsel and in incommunicado detention. Despite being a British citizen, Mr. Johal has been denied consular assistance."

xii) Data from the National Crime Records Bureau in 2020 evidence that no police officer had been convicted of any offence in respect of any deaths in custody since 2011, and in respect of other human rights violations, only three officers had been convicted despite there being almost 500 cases of human rights violations such as torture, illegal detention and extortion.

113. Against this background, the District Judge heard the expert evidence of Dr Alan Mitchell. Dr Mitchell is a licensed medical practitioner whose experience includes having been the Head of Healthcare within the Scottish Prison Service. In 2015 he was appointed by the Scottish Parliament as a Commissioner to the Scottish Human Rights Commission, and his role includes that of Chair of the Independent Monitoring Advisory Group for His Majesty's Chief Inspector of Prisons for Scotland. He has been instructed as an expert in many extradition cases, including 12 involving India, most notably in *Chawla*. The District Judge observed that his evidence deserved "*considerable weight*" given his experience and the "*calm, reasonable and objective way in which he gave evidence*" (Judgment, [210]), and it is implicit in his finding at [222] that he accepted Dr Mitchell's evidence on this issue.

114. Dr Mitchell's opinion on this issue was largely based on open-source reporting. In addition, during a visit to West Bengal, India, in 2015, he had "*spoken to former very*

senior officials of various law enforcement agencies, who reported the frequent use of torture of criminal suspects".

115. Dr Mitchell referred to what he described as an important report entitled 'Torture in India' published by the Asian Centre for Human Rights in 2011 which begins:

> "from 2001 to 2010, the National Human Rights Commission (NHRC) recorded 14,231 … persons died in police and judicial custody in India. This includes 1,504 deaths in police custody and 12,727 deaths in judicial custody from 2001-2002 to 2009-2010. A large majority of these deaths are a direct consequence of torture in custody. These deaths reflect only a fraction of the problem of torture in custodial deaths in India. Not all the cases of deaths in police and prison custody are reported to the NHRC. … Further, the NHRC does not record statistics of torture not resulting in death. **Torture remains endemic, institutionalised and central to the administration of justice and counter terrorism measures**. India has demonstrated no political will to end torture.'" (Dr Mitchell's emphasis; Dr Mitchell's Report, §7.2.)

116. Dr Mitchell stated that a 2018 update from the Asian Centre for Human Rights cites an answer given by the Minister of State for Home Affairs in responding to a parliamentary question on 14 March 2018, indicating that from 1 April 2017 to 28 February 2018 the National Human Rights Institution had registered a total of 1674 cases of custodial deaths (which we take to cover prison as well as police custody). Dr Mitchell noted that this figure was a significant increase on the figures to 2001-2010 (Dr Mitchell's Report, §7.3).

117. Dr Mitchell stated:

> "It is of grave concern that the National Human Rights Commission has recorded that a large majority of this huge number of deaths is as a direct result of torture in custody. The National Human Rights Commission is an autonomous public body responsible for the protection and promotion of human rights in India by virtue of the Protection of Human Right Act 1993. The report sets out that 'torture of the victims during interrogation is common across India. There is no scientific method of investigation. Torture remains integral to investigation to obtain confessions from suspects' and goes on 'torture being a common practice is the primary reason why police stations and prison cells are feared. **It would be hard to find any police station or jail** where the inmates are not subjected to torture and other cruel, common, inhuman or degrading treatment or punishment'" (Dr Mitchell's emphasis).
>
> (Dr Mitchell's report, §7.4)

118. In his report and oral evidence, Dr Mitchell expressed his belief that if the appellant were transferred into police custody in India, "*there is a real risk that he would suffer*

violence at the hands of the police" (Dr Mitchell's report, §12.6(a)). Dr Mitchell's evidence was that the CCTV surveillance in prison provided "*very little reassurance*". What mattered was whether it was "*working and monitored*", and there was no evidence of that.

119. At [179q], the District Judge recorded Dr Mitchell's evidence that:

> "In 2018, following a direction by the High Court for the Central Bureau of Investigation (CBI) to investigate the allegations of assault and physical torture on several prisoners lodged in the high-risk ward, counsel for the Delhi Government informed the bench that 'while excesses were committed by jail staff and personnel of Tamil Nadu special police, criminal proceedings may not be instigated given that jail officials were working under stressful conditions in an overcrowded prison'."

120. The evidence was to the effect that there is "*a pervasive risk of torture and ill-treatment by the police and the investigative bodies, which is still on going, made clear by the cases of Christian Michel and Jagtar Johal*" (Judgment, [185(e)]).

121. The respondent acknowledged that, in addition to the matters that are the subjects of the two Requests, the appellant was "also being investigated for other allegations:

> a) Delhi police for offences under the Official Secrets Act 1923
>
> b) CBI for two cases of criminal conspiracy, cheating and 'acceptance of illegal gratification'.
>
> c) Enforcement Directorate for two money laundering cases arising from the CBI investigation."

122. The appellant submits that the restriction of police questioning to a prison location provides no safeguard whatsoever. It was wholly unreasonable to conclude that the risk from personnel with a predilection for mistreatment as an investigatory technique would be forestalled if those same personnel were required to undertake their questioning of the appellant in prison. The appellant draws attention to UNWGAD's findings that Mr Michel was seriously mistreated by the Central Bureau of Investigation ('CBI') and the Enforcement Directorate, then the mistreatment continued in Tihar prison prior to further interrogation. UNWGAD records that the Government of India did not contest that "*the detention regime inflicted on Mr Michel [was] aimed at forcing him to confess*" (UNWGAD's Opinion No.88/2020, §109). The resort to questioning Mr Johal in the absence of legal counsel was a regular practice, which could just as easily be achieved in prison as in police custody.

123. The appellant submits that whereas it might be said, if the appellant was going to be placed in a prison with an impeccable record of investigating and preventing any abuse, that the location of questioning by investigative bodies might offer some protection, Tihar prison does not have such a record. Most notably, neither CCTV nor the oversight of senior officials afforded any protection to Mr Tillu Tajpuriya, who was murdered, in a sustained and violent attack, by other prisoners in Tihar prison on 2 May 2023. His murder was captured on two videos. The second video shows at least eight prison

guards stand back and watch as Mr Tajpuriya's assailants took turns to repeatedly stab him and stamp on his head. The prison guards, who significantly outnumbered the assailants, did nothing but watch until, eventually, they gently ushered the assailants away.

124. Following Mr Tajpuriya's death, the Hindustan Times reported on 2 May 2023 that the "*16 jails in Delhi's three central prison complexes have over 22,000 inmates though they are designed to accommodate 10,200 inmates*". The newspaper recounted that, when talking about maintaining order inside prisons, the Director General of Prisons, Sanjay Baniwal, said:

> "These jails are also short-staffed. As per the jail manual, there should be one warder for eight inmates. But in reality one warder keeps an eye on almost 700 inmates here. As far as availability of improvised weapons with the gangsters is concerned, we regularly conduct thorough checking of the inmates. But checking over 22,000 inmates every day is impossible."

News18 reported, on 5 May 2023, that "Former Punjab DGP [Director General of Prisons] Shashikant said, '*The prison administration system has collapsed*'".

125. The appellant also questions the adequacy of the October 2022 Assurance on the basis that it is not clear that it covers the multiple agencies that are investigating the appellant. The assurance was provided by M.K. Chakhar, the Under Secretary to the Government of India, "*on the basis of assurance provided by the investigation agency*" (emphasis added). The specific investigating agency that provided the assurance is not identified, and there is no confirmation that all the relevant investigating agencies have given the same assurance that the appellant will not be removed from the prison for questioning.

126. The respondent submits that the October 2022 Assurance removes the real risk that the District Judge found. The risk was of mistreatment in police (or another investigative body's) custody and that is dealt with by the assurance that the appellant will not be detained in police (or any other investigative body's) custody, only in Tihar prison.

127. The respondent asserts that at Tihar Prison there is much greater oversight, and while there have been "*sporadic instances*" of inter-prisoner violence, the respondent states:

> "there is no real risk of custodial violence torture and inhuman treatment to SB as the cell in which he would be incarcerated is under CCTV surveillance and CCTV cameras are operational and with guards deployed around the jail premises." (Further Information, 24 September 2022, §8.2)

128. The Office of the Director General of Prisons provided the response of Delhi Prisons to Dr Mitchell's report, stating:

> "The cases of torture in Delhi Prisons, as alleged in the attached report are totally denied.
>
> Delhi, being the capital city, has large concentration of media, local, national and international. There are no chances of torture

> of prison inmates in view of firm vigilance by prison officers, CCTV monitoring, transparency in grievance redressal and visit of civil society persons in jail."

The respondent points out that there are 7,500 CCTV cameras in Tihar prison complex, as well as a three-tier security system with "*specialized police forces*".

129. The respondent states that the murder of Mr Tajpuriya in Tihar prison was a result of "*rival gang-wars between two notorious criminal gangs active in Delhi*". An investigation is being conducted and is before the Delhi High Court. A non-judicial inquiry was in progress to suggest remedial measures to prevent such incidents in future. And eight prison personnel were "*suspended as they were found guilty of dereliction of duty*". Mr Keith did not seek to minimise the gravity of that violent incident but submits that the respondent acted in the way any government should act, by disciplining those who were found guilty of dereliction of duty and seeking to learn lessons from what occurred.

130. The respondent can, he submits, be trusted to comply with the assurances it has given. Indeed, the appellant does not challenge the respondent's good faith, only whether, in practice, it can deliver on those assurances. The four assurances provided in this case are even more detailed than those given in *Chawla* which satisfied the Divisional Court: *Government of India v Chawla (No.2)* [2018] EWHC 3096 (Admin).

131. As to the question whether the October 2022 Assurance covers all investigative organisations, the respondent submits that it clearly does so. It is the Government of India that has provided the assurance that, if the appellant is refused bail, he will not be removed from prison, save in the three specified circumstances.

Ground 3 (part 1) discussion

132. We agree with the respondent that, insofar as the challenge to the adequacy of the October 2022 Assurance is based on the reference to an assurance provided "*by the investigation agency*", it is without merit. First, as the District Judge rightly observed, applying *Giese v USA* [2018] EWHC 1480 (Admin), [2018] 4 WLR 103, Lord Burnett CJ (giving the judgment of the court), [38], the court should not view the respondent's assurances "*through the lens of a technical analysis of the words used"* or approach them with suspicion that the government *"will do everything possible to wriggle out of them*". Secondly, and in any event, it is of no consequence which agency provided an assurance *to* the respondent, or whether the respondent sought an equivalent assurance from each agency that may wish to question the appellant. The assurance that matters is the one provided by the respondent to His Majesty's Government, and there is no carve out within that assurance which would enable, say, the CBI or the Income Tax Department to remove the appellant from prison for questioning.

133. However, in our judgment, on this first limb of ground 3, the appellant's argument succeeds: the answer to issue (14) (see paragraph 102 above) is 'yes'. The extensive evidence which persuaded the District Judge that there were strong grounds to believe that the appellant would face a real risk of proscribed treatment at the hands of the several bodies engaged in investigating him, did not focus or depend on the *location* at which such questioning occurs.

134. The evidence is that the use of proscribed treatment to obtain confessions is commonplace and endemic. The evidence indicates that the focus on obtaining confessions flows from being under-resourced, lacking modern investigation techniques or sufficient personnel; and from the lack of will to stamp out the use of torture, reflected in the failure to ratify UNCAT. Those factors would be unaffected by whether investigating bodies have the opportunity to question the appellant in their own detention facilities or can only do so at Tihar prison. In addition, there is some (albeit more limited) evidence of the use of violence by investigation officers, against those under investigation, to extort money. The latter motive would be unaffected by the location of questioning, and the appellant is likely to be at increased risk of extortion because he is, or would be perceived to be, a wealthy man.

135. The assurance regarding the appellant's location would only remove the established real risk of proscribed treatment, or lessen it to such an extent that it does not meet the threshold, if those involved in investigating the appellant would be inhibited by the location from acting in the way that the District Judge found there is otherwise a real risk they would do. In determining this question we have taken into account all the evidence we have received regarding Tihar Prison, including that which we have addressed above and below (some of which has only come into existence since the District Judge gave judgment).

136. The picture is of an extremely overcrowded and understaffed prison. The evidence provides no grounds to have any confidence that prison staff would have the time to monitor the conduct of investigating officers, or the inclination or aptitude to step in to protect the appellant from proscribed treatment at their hands. The behaviour of not just one or two prison officials, but a large group of them, in standing by, casually and unconcernedly, while a prisoner was murdered by other prisoners mere feet away from them, renders implausible the contention that prison officials would intervene to protect the appellant from the use of proscribed treatment by an investigating officer. The officials who failed to protect Mr Tajpuriya have been suspended, but there is no evidence that they have faced any more serious consequences. In any event, it is apparent that the acceptance in India of torture or other serious mistreatment as a method of evidence-gathering extends beyond the police and investigating bodies, such that it is unlikely that the appellant could look to prison officials for protection from the organisations that are engaged in investigating him.

137. We note that the District Judge recorded that in cross-examination Dr Mitchell accepted that his conclusion at 12.6(a) – that if the appellant were to be held in police custody in India there is a real risk he would suffer violence at the hands of the police – "*did not relate to police violence in prison*" (Judgment, [180(p)]). For the avoidance of doubt, it is clear that Dr Mitchell was merely accepting that his evidence as to the likelihood of the appellant suffering proscribed treatment at the hands of the police was not a strand of evidence supporting his separate opinion that the appellant would be at risk of such mistreatment in Tihar prison.

138. It follows that on ground 3, irrespective of the answer to issues (12) and (13), the appellant must be discharged pursuant to s.87(2) of the 2003 Act. Nevertheless, we will address those issues.

Ground 3 – article 3 – issues (12) and (13)

139. The primary focus of this aspect of ground 2 is on the conditions in which the appellant will be held in Tihar prison, and the risk that he will be subjected to violence or extortion by other prisoners or prison staff, having regard to the assurances provided by the respondent. The District Judge addressed the applicable principles at [157] to [165], and no criticism is made of his self-direction on the law. We note, in particular, that extradition will be prohibited if there are substantial grounds for believing that there is a real risk of treatment which violates article 3. In *Elashmawy v Court of Brescia, Italy* [2015] EWHC 28 (Admin), Aikens LJ observed at [49] that, "*in general, a very strong case is required to make good a violation of Article 3*". When the real risk of violence emanates from non-state actors, such as other prisoners, the question is whether there are strong grounds for believing there is a real risk that the state will fail to provide reasonable protection to the requested person: *R (Bagdanavicius) v Secretary of State for the Home Department* [2005] UKHL 38, [2005] 2 AC 668, Lord Brown, [24].

140. As Dingemans J observed in *Chawla (No.1)* at [35], it is established that when considering what approach to take to a challenge to a District Judge's findings about real risks of infringement of human rights the Court must have "*a very high respect for the findings of fact*", and respect the District Judge's evaluation of the expert evidence. That is the approach that we take. But, as identified by the respondent, as this is a fresh evidence case, we must make our own *de novo* assessment having considered all the evidence and the assurances: paragraph 31 above.

141. The backdrop to these issues is the case of Mr Chawla, whose extradition was sought by the Government of India in respect of allegations that he acted as a conduit between bookies who wanted to fix cricket matches and Hansie Cronje, then captain of the South African cricket team. The magistrates' court, having considered conditions in Tihar prison, where Mr Chawla was likely to be held, (including by reference to reports from Dr Mitchell dated 13 November 2016 and 26 February 2017), and an assurance from the government about his future treatment, concluded that there was a real risk of a breach of article 3.

142. The government's appeal first came before the court in May 2018: *Chawla (No.1)*. The court considered further evidence, particularly regarding overcrowding; intra-prisoner violence in high security wards; concerns that CCTV recordings from Tihar prison were not available to Delhi courts investigating outbreaks of violence at the prison; and that the prison board of visitors had not made required visits ([50]). The court also considered a second assurance from the government which was unclear in many respects ([52]). The court concluded that there remained a real risk of inhuman or degrading treatment contrary to article 3 because of conditions in Tihar prison ([53]), but stayed the appeal to allow the government the opportunity to provide a further assurance to meet the risk ([54]-[55]).

143. In November 2018, in *Chawla (No.2)*, having considered all the information available about Tihar prison, and a third assurance provided by the government, the court concluded that the terms of the third assurance were sufficient to show that there would be no real risk that Mr Chawla would be subjected to impermissible treatment in Tihar. The court had identified a risk of intra-prisoner violence in high security wards but the assurance showed that Mr Chawla would not be accommodated in such a ward. We note that one of the two designated wards in which Mr Chawla was potentially going to be held was Ward 4 of Central Jail No.3 (i.e. the ward in which the appellant will be held, if extradited) (*Chawla (No.2)*, [15]).

144. However, as the court observed in *Chawla (No.1)* at [34], "*[p]rison conditions are unlikely to be static and to make a conclusion about the real risk of impermissible treatment the Court has to examine the present and prospective position as best as it can on the materials available*".

145. As Mr Keith acknowledged, he cannot go behind the District Judge's finding that but for the assurances the appellant would be at real risk of proscribed treatment in Tihar prison. But he submits that the respondent can be trusted to comply with the four assurances it has given (see Appendix), and those remove any real risk the appellant might otherwise face.

146. The District Judge found, and the appellant does not dispute, that India is a friendly Government. India has a robust and independent judiciary, and he was "*quite satisfied that India is governed by the rule of law*" (Judgment, [219]-[220]). If extradited, the appellant will be held as the sole occupant of a cell measuring 15.6m^2 (with access to a toilet within the cell) in Ward No.4, within Central Jail No.3, in Tihar prison.

147. The District Judge found:

> "224. Tihar is overcrowded. It currently houses prisoners at approaching 300% capacity. I accept Dr Mitchell's evidence that overcrowding increases pressure on all prison services, exacerbates tension and frustration among prisoners, which can make it more difficult for staff to maintain control.
>
> …
>
> 227. Tihar prison is a complex that consists of nine central jails which in 2019 held 12,106 prisoners (the numbers have since increased). I have been provided with a schedule, on behalf of the defendant, which details deaths and incidents of torture in all Tihar prisons, with an indication of whether they were perpetrated by staff or other prisoners, the evidence having largely been obtained from open-source material. Dr Mitchell's evidence was that this demonstrates a culture which exists across all Tihar prisons from which the defendant cannot be protected. I do not accept that the evidence relied upon is cogent and that it does establish a culture as opposed to sporadic individual events. Further, the evidence is that the courts have subsequently ordered enquiries into those events and that prosecutions have followed. This satisfies me that the Government of India will prosecute such behaviour when it can be properly identified.
>
> 228. The three assurances set out the general conditions, healthcare and general regimes which satisfy me that there is no real risk of the defendant being subjected to inhuman or degrading treatment as a result of those factors.
>
> 229. The risk of violence from staff or other prisoners is addressed in the document from the Office of Director of Prisons where he states that 'The proposed ward is guarded 24 x 7 by

> guarding staff and has proper CCTV surveillance by senior officers of jail. The ward is under supervision of Assistant Superintendent of Prisons who takes rounds of the ward and ensures security and safety of all inmates of the ward'.
>
> 230. The defendant raises concern about the efficacy of this protection citing 4 occasions between 2020 and 2022 when prisoners were killed despite the existence of CCTV. Sadly, no system can be full proof so far as inter prisoner violence is concerned. The test is whether the State is unable or unwilling to act to protect the defendant. Here the State has confirmed that guards will be present and that the defendant's ward has 'proper' CCTV surveillance undertaken by senior officers. I am satisfied that these arrangements meet the test.
>
> 231. I have already rejected the assertion that there is a culture of violence and extortion by staff against prisoners in Tihar. I am satisfied that the assurance provides a system to protect the defendant against such acts.
>
> …
>
> 235. The combined Assurances satisfy me that there is no real risk of the defendant being subjected to Article 3 non-compliant treatment." (Emphasis added.)

148. The appellant contends that the District Judge wrongly rejected the expert evidence of a culture of violence and extortion at Tihar prison, and in any event the fresh evidence (together with the evidence before the District Judge) shows there is such a culture. First, the appellant emphasises the evidence of overcrowding. In view of the assurance that the appellant will be held as the sole occupant of a cell measuring 15.6m^2, personal space is not an issue. But the District Judge accepted Dr Mitchell's evidence as to the pressures created by overcrowding, and the impact in terms of exacerbating tensions and frustrations among prisoners (paragraph 147 above). If it is harder for prison staff to maintain control, as the District Judge accepted, "*as a result there is an increased risk of inter-prisoner violence and indeed prisoner-staff violence*" (Dr Mitchell, §9.2).

149. Further information provided by the respondent since the hearing, on 7 September 2023, states:

> "Delhi Prisons comprises of 16 Central Jails (9 Jails in Tihar Prisons Complex, 1 Jail in Rohini Prison Complex and 6 Jails in Mandoli Prison Complex) and has a sanctioned capacity to lodge 10026 prisoners in these jails. As on 31.08.23, there were 20214 prisoners comprising 19465 males and 749 female prisoners. There are dedicated jails for lodging convict prisoners, first timer and repeater under trial prisoners, female prisoners, adolescent prisoners and High Security Prisoners." (Emphasis added.)

150. We note that the overall *capacity* of Delhi Prisons was the same on 31 August 2023 as it was in the evidence before the District Judge ([183(b)], [185(f)]), as well as when

Chawla was determined: *Chawla (No.1)*, [11][1]. However, the number of prisoners in Delhi Prisons has significantly increased over the last eight years (albeit not uniformly), including since the hearing before the District Judge:

i) **14,027** on 30 November 2016: *Chawla (No.1)*, [11];

ii) **15,161** on 4 May 2018: *Chawla (No.2)*, [3] and fn.1 above;

iii) **17,534** in December 2019: Judgment, [185(f)];

iv) **15,995** in December 2020: Judgment, [183(b)];

v) **16,772** on 28 May 2021: Comments of Delhi Prisons (§2) attached to a letter dated 31 May 2021 from the Office of the Director General of Prisons;

vi) Around **19,500** in April 2023: statement of Alex Chapman, 3 April 2023, exhibiting a copy of the "About Us" page from the official website for Tihar prison; and

vii) **20,214** on 31 August 2023: Further information, 7 September 2023.

151. Paragraph (f) of Annexure-I to the September 2021 Assurance states that on 28 May 2021 the total number of inmates lodged in Central Jail No.3 was 2121. Central Jail No.3 has capacity to detain 740 prisoners (Judgment, [185(h)]), meaning, as the District Judge found, that it was housing prisoners at "*approaching 300% of capacity*" (Judgment, [224]). There is no updated information for Central Jail No.3, but between 28 May 2021 and 31 August 2023 the number of inmates in Delhi Prisons rose by 3,492 (a 20.5% increase). If the population of Central Jail No. 3 grew by 20.5% in the same period, it would have been accommodating around 2,556 inmates by August 2023 (approximately 345% of capacity).

152. Second, the appellant relies on the related matter of the level of staffing in the prison. In *Chawla (No.1)* the court had before it the following assurance from the respondent: "*in relation to prison staff/guard numbers, the location of Mr Chawla's cell and exercise areas are, and will remain, sufficiently staffed to provide appropriate and effective levels of security and protection for inmates*" (*Chawla (No.1)*, [51]). When the court considered the third assurance, there was evidence that there would be "*a ratio of 1 guard to 59 prisoners*" on duty in Ward 9 (*Chawla (2)*, [17]). In contrast, the appellant draws attention to the lack of detail in this case as to the staffing levels, or any assurance that sufficient staff will be provided.

153. The evidence before the District Judge as to staffing levels was as follows:

> "In Delhi, in 2020, there were 2,336 'jail staff' with 914 vacancies, providing a theoretical one jail official for every nine

[1] We note the suggestion in *Chawla (No.1)* that the "*capacity for Tihar prison*" was 10,026 ([38], rather than 6,250 as found by the district judge), but the most recent further information from the respondent makes clear (in similar terms to the evidence cited in *Chawla (No.1)*, at [11]) that the figure of 10,026 is the capacity of all 16 central jails in Delhi, not just the 9 jails within the Tihar complex.

> inmates, if all staff were working 24 hours a day, seven days a week."

(Judgment, [183(c)]; Prison Statistics 2020 published by the National Crime Records Bureau (Ministry of Home Affairs), and exhibited by Justice Verma.)

> "In 2020, there were 61,296 staff in all prisons across India, 26,665 short of the required strength. The average inmate to staff ratio was 7:1, but the CHRI records that that statistic is not reflective of the actual number of staff available, for it includes staff posted to headquarters, training institutes and those who are suspended or on leave.
>
> In 2020 there were a mere 789 correctional staff (probation, welfare officers and social workers) across the entire Indian penal estate, which results in an average of 1 correctional staff for 619 inmates."

(Judgment, [185(l)-(m)], citing Commonwealth Human Rights Initiative – Ten Things You Should Know About Indian Prisons 2020.)

154. Dr Mitchell gave evidence, derived from the Delhi Government's website regarding staffing at Jail No.3 of Tihar prison, as of 31 December 2019: 19 of 31 assistant superintendent posts were vacant (61%) while 47 of 105 warder posts were unfilled (45%). Since the proceedings below, the Director General of Prisons is reported to have said that there should be one warder for eight inmates but "*in reality one warder keeps an eye on almost 700 inmates here*": see paragraph 124 above. The appellant submits that adequate staffing is even more important given the level of overcrowding.

155. Third, in addition to the evidence we have cited in paragraphs 115-117 above, Dr Mitchell gave evidence, as summarised by the District Judge, that "*Tihar prison is chronically overcrowded and unsafe. Violence and extortion is regularly committed by both prisoners and prison guards*" (Judgment, [179(a)]). Tihar prison is "*a complex where instances of ill-treatment of prisoners both by prison staff and other prisoners [are] all too common*" (Judgment, [179(g)]). "*In July 2019, a judicial officer who was tasked with investigating allegations of inhumane behaviour to inmates found that jail officials took bribes to provide basic amenities, such as one hour release per day, or to avoid torture*" (Judgment [179(s)]). Dr Mitchell described the respondent's claim that there are no cases of torture in Tihar prison (Comments of Delhi Prisons provided under cover of the letter of 30 May 2021) as "*fanciful in the extreme*" (Judgment, [179(z)]).

156. The District Judge recorded at [198]:

> "Dr Mitchell spoke to former very senior officials of various law enforcement agencies, who reported the frequent use of torture of criminal suspects and young men being physically abused in prison and rich prisoners being extorted. Further, two officers talked about prison staff being open to bribes and trafficking in mobile phones and that corruption was endemic (Mitchell, §§10.7-8)."

157. The District Judge accepted Dr Mitchell's evidence in relation to the risk of physical mistreatment in police custody. The appellant submits that his evidence was just as cogent and compelling on the culture of violence and extortion in Tihar prison, and the District Judge did not explain why he rejected it.

158. Justice Verma gave evidence (footnotes omitted) that:

> "Several news reports corroborate that incidents of violence and extortion are unfortunately common and quite frequent in the Indian prison system, especially in Tihar Jail, New Delhi. At this stage, it is pertinent to refer to Prison Statistics, 2020 by National Crime Records Bureau, (Ministry of Home Affairs), Government of India:
>
> Deaths and Illness in Prisons:
>
> | Year | Total No. of Deaths in Prisons | No. of Natural Deaths | No. of Un-natural Deaths (incl. Suicide) |
> |---|---|---|---|
> | 2018 | 1,839 | 1,638 | 144 |
> | 2019 | 1,764 | 1,538 | 160 |
> | 2020 | 1,887 | 1,642 | 189 |
>
> As per the report, out of the 189 un-natural deaths of inmates- 156 inmates committed suicide, 8 inmates died in accidents, 8 inmates were murdered by inmates, 5 inmates died due to firing, 4 inmates were executed, and 3 inmates died due to assault by outside elements during 2020. For a total of 56 inmate deaths, cause of the death is yet to be known. Further a total of 160 clashes/group clashes inside jails were reported during the year 2020. Highest of such clashes were reported by Delhi (54) followed by Punjab (43) and Madhya Pradesh (36). A total of 166 persons consisting of 154 prisoners and 12 jail officials were injured in such clashes and 4 prisoners died in such clashes."

159. The District Judge found that Justice Verma, a former Justice of the Supreme Court of India, was "*a more combative witness"* than Dr Mitchell, and *"on occasions he became an advocate for the defendant rather than an objective independent expert witness*". But this evaluation does not affect the statistics that he provided.

160. Fourth, the appellant relies on several specific cases. In *Saroj Rani v Govt. of NCT of Delhi* 2010 SCC Online Del 2215, the Delhi High Court, while awarding compensation to the family of the deceased undertrial (i.e. remand) prisoner in Tihar prison, observed that, "*Custodial deaths in Tihar Jail are not an uncommon phenomenon*" (Verma, §19). For the observation of the Supreme Court of India in *Re Inhuman Conditions in 1382 Prisons* that there "*seems to be no let up in custodial deaths*", see paragraph 112 above.

161. *Geeta & ors v State & ors* (2021) SCC OnLine Del 4297 concerned what the High Court of Delhi described as the brutal and fatal beating, on the night of 3-4 August 2021, of Ankit Gujjar, a prisoner held on remand in Jail No.3 (i.e. the part of Tihar prison in which the appellant will be placed, if extradited). The High Court of Delhi stated:

> "17. A perusal of the post-mortem report of the deceased Ankit belies the version of the Deputy Superintendent, Narender Meena and other staff that a scuffle took place in which both Narender Meena and Ankit received injuries. From injuries noted above, it is evident that deceased was brutally beaten …Not only did Narender Meena and others assaulted [sic] the deceased mercilessly, the Jail doctor on duty also failed to perform his duty when he examined Ankit at 1.00 AM in night and administered the injection, as he neither informed senior officers of the condition of Ankit nor referred Ankit to the Hospital. It is unfathomable that when the Jail doctor on duty visited at the midnight, he did not see the multiple injuries on Ankit."

162. The Petitioners (family members of the deceased) sought an order directing the CBI to take over the investigation from Delhi Police. They alleged that Mr Gujjar was "*beaten because he failed to comply with the demands of money of the Deputy Superintendent Narender Meena*" (*Geeta*, [14]). They alleged "*the deceased was long being harassed by the officials of the Tihar Jail as he was unable to meet the regularly increasing demands of money made by them*" (*Geeta*, [2]); and they provided evidence of the accounts (said to be held by "*associates/known persons of Narender Meena*") to which Mr Gujjar had transferred money (*Geeta*, [19]). The Petitioners alleged that there was "*ample material on record that there was a systematic destruction of evidence and extortion being carried out by the jail officials*" (*Geeta*, [2]). The High Court of Delhi observed that, "*in case the allegations made by the petitioners are correct, it is a very serious offence which requires in depth investigation to unearth the manner in which alleged extortion is carried out in the prison*" (Geeta, [19]).

163. An in-house inquiry by the prison had "*found the complicity of one Deputy Superintendent, two Assistant Superintendents and a Warder who have been suspended*", but, the High Court of Delhi stated, the "*DIG Prisons failed to notice the connivance/laxity of Deputy Superintendent Vinay Thankur*" who denied the police entry to the jail, on the night of 3/4 August, before Mr Gujjar died, which the police sought in order to investigate reports by Mr Gujjar's family of the commission of a cognizable offence (*Geeta*, [18]).

164. A statement from the Director General, Prisons, informed the High Court of Delhi that on the night in question CCTV was not available for Ward 5A (where Mr Gujjar was initially held) or Ward 1 (to which he was transferred that evening), or for Wards 2, 3 and 4, as they were offline due to work being undertaken by the agency engaged in installing CCTV. The High Court of Delhi observed:

> "This case also calls for immediate remedial actions by the State and Director General, Prison so that unscrupulous officers at the Jail do not take advantage of knowledge of the non-working of the CCTVs so that they can get away by doing any illegal act/offences."

165. On 8 August 2022, the CBI charged the Deputy Superintendent of Tihar prison, Narender Meena, with culpable homicide. As of that date, five other prison officials (two Assistant Superintendents, a Head Warder and two Warders) had been arrested

and charges were expected. The CBI charge sheet reportedly alleges that Mr Gujjar was paying Mr Meena for "*small favours*" such as the facility to use a mobile phone. When Mr Gujjar refused to pay Mr Meena Rs 25,000 (half the sum he had demanded), this "*resulted in increased harassment of the undertrial*", the CBI alleged. The denial of money angered Mr Meena, and following a confrontation with Mr Gujjar, he "*assembled jail personnel outside the ward of Gujjar who was lodged along with Gurjeet and Gurpreet. Six jail personnel started mercilessly beating Gujjar, Gurjeet and Gurpreet with polycarbonate lathis*" for nearly half an hour.

166. The District Judge addressed the evidence regarding Mr Gujjar at [183(e)], [184(k)] and [184(jj)-(ll)], stating at [218]:

> "Whilst I accept that the Indian court has apparently made some preliminary findings in the Geeta case, it is important to note that the consequence of the judgment was to set up an enquiry. An enquiry which has led to the prosecution of those involved in the violence and extortion of Mr Geeta including the Deputy Superintendent involved."

167. The appellant submits that it is difficult to conceive of a more serious set of circumstances than senior officials in the very prison in which the appellant will be detained being accused of extorting a prisoner and beating him to death when he refused to pay, and purposely doing so in an area not covered by working CCTV. The appellant submits that it is indicative of the culture in the prison. The respondent has not addressed this case.

168. On 23 August 2022, in *Sukash Chandra Shekhar v Union of India*, the Supreme Court made an order for the petitioners (including Mr Chandra Shekhar) to be moved from Tihar Prison to Mandoli Prison. The Supreme Court stated:

> "The broad thrust of the petitioners' argument is that jail officials were extorting amounts on a monthly basis, for allegedly providing security. On the other hand, the respondents broadly urged that the petitioners were using the jail officials in the passing of documents and for their own extortion or other illegal/illicit business purposes.
>
> It appears that the respondents have taken action against several jail officials and personnel as a consequence of these proceedings. Whether this bears out the petitioners' allegations or independently substantiates the respondents' allegations that they were using the jail as a hub for their questionable activities is not a matter for this Court to investigate; it is best left for the concerned authorities to do so."

169. Mr Keith submits this is a case of Mr Chandra Shekhar bribing jail officials for his own benefit. Whereas Mr Fitzgerald contends that on the prisoners' or the authorities' version of events, it is evidence of extortion being an all-too-common occurrence within Tihar prison (and more widely in Delhi Prisons), whether in this instance prison officials initiated it or aided and abetted the actions of prisoners.

170. The further information provided by the respondent on 7 September 2023 states that "*action against the erring prison officials has been taken by the law enforcement agencies of India. The Police has arrested eight prison officials who allegedly provided unauthorised facilities to Sukash Chandrashekhar in jail*" (§2.4). Three of these eight prison officials have also been arrested under the PMLA in respect of allegations of being "*involved in activities and processes relating with the proceeds of crime*". The further information emphasises that the article in the *Hindustan Times* on 19 April 2023, which referred to an "*extortion racket being run from Rohini jail*", wrongly equated Rohini Prison with Tihar Prison. They are separate prisons in Delhi. It appears that the action which has been taken is against prison officials from Rohini Prison, where Mr Chandra Shekhar was detained from July 2020 to August 2021.

171. The respondent's information states of Mr Chandra Shekhar:

> "He is habituated to filing false and frivolous applications in different courts from Trial court to Supreme Court making wild and baseless allegations of extortions and torture against all prison officials, Senior Government Officers, Ministers, Judges etc. In every case of complaint received from the courts qua jail officials, the Prison Department always conducts high level enquiry and files the factual reports in the Courts. The Hon'ble courts, now, have understood the modus operandi of this prisoner and his arm-twisting tactics and so, of late, have started closing his complaints after receipt of factual reports from the jails. In so many allegations of extortion, only one complaint of Sukesh was found correct and appropriate disciplinary and criminal action has been taken against the guilty prison staff, those were found complacent with prisoner."

172. However, on the respondent's case, Mr Chandra Shekhar was moved to Tihar Prison in August 2021 due to his involvement in extortion and other illicit activities with prison officials in Rohini Prison. The Supreme Court of India's order supports the appellant's submission that the problem did not resolve in Tihar Prison. The Supreme Court ordered the petitioners' transfer on the basis that a move out of Tihar Prison to Mandoli Prison was necessary because either prison officials were subjecting the petitioners to extortion or they were facilitating extortion and other illicit activities by the petitioners. Even if the former allegation is assumed to be "*wild and baseless*", the latter was the Government of India's case before the Supreme Court.

173. We have already referred to UNWGAD's findings as to the treatment of Mr Michel by the police and investigating bodies in the context of the first limb of this ground: paragraphs 112(x) and 120 above. The District Judge recorded that Mr Michel was detained in Tihar Prison, first in Jail No.7, then he was transferred on 18 February 2019 to the high security building, where he was placed in total isolation, and then later transferred to Jail No.2. The District Judge stated at [190]:

> "VI. In Tihar prison he was in solitary confinement for more than a month, being continuously monitored and subjected to cell and body searches several times a day. He had a mattress and a blanket and the light in the cell was kept on day and night. He

> was not permitted to leave the cell. He lost more than 7kg and developed kidney stones because of the lack of access to water.
>
> VII. On 19 March 2019, a judge ordered his immediate end to his segregation but it is said that he remained in de facto solitary confinement, having to rely on other inmates to purchase food for him by giving them his card through the bars to his cell."

174. In the context of this case, the respondent has not addressed the treatment of Mr Michel. But the appellant emphasises, as stated by UNWGAD, that the respondent did not contest that the detention regime inflicted on Mr Michel was aimed at forcing him to confess. That regime was inflicted, in part and in combination with the investigating bodies, by officials of Tihar prison.

175. We have addressed the UNWGAD's findings as to the treatment of Mr Johal: paragraphs 112(xi), 120 and 122 above. The torture he is said to have endured is described as having occurred during the more than four years he had been detained under anti-terror laws. He was detained in the maximum security jail in Tihar prison, and often forced to stay in solitary confinement. Mr Johal had been repeatedly interrogated in the absence of legal counsel, held in incommunicado detention and he had been denied consular assistance, despite being a British citizen. In the context of this case, the respondent has not addressed the treatment of Mr Johal. UNWGAD found that the Indian authorities failed to investigate the credible claims of torture made by Mr Johal: they simply denied it happened.

176. We have also addressed the fresh evidence of the murder of Mr Tajpuriya in Tihar prison on 2 May 2023 in the context of the first limb of this ground: paragraphs 123, 129 and 136 above. The respondent states that:

> "Even though sporadic incidents of fights/brawls do occur in Delhi prisons, it cannot be said that it is comparatively more unsafe than any other prison in the world. In the year 2023, two incidents of murders took place in two different jails – one of accused Prince Tewatia in Jail No.3 and the other of accused Sunil @ Tillu Tajpuria in jail no.8. Both the murders were result of gang wars."

Central Jail No.8 in Tihar prison is a High Security Ward. The murder of Mr Tajpuriya was the "*result of rival gang-wars between two notorious criminal gangs active in Delhi*". A four-member non-judicial inquiry into the incident is in progress and, as noted above, eight prison personnel were suspended as they were found in dereliction of duty. (Further Information, 7 September 2023, Annexure-A)

177. The respondent states that there is no risk of any prisoner being tortured in view of "*firm vigilance by prison officers*", CCTV monitoring, the grievance process, prison visits by civil society, and the three-tier security system: paragraph 128 above. The appellant points out that CCTV had been installed by the time Mr Gujjar was killed, but was evaded by prison officials; and it was of no assistance, albeit it was working, when Mr Tajpuriya was killed. Nor did prison officials come to either man's aid. Prison officials killed Mr Gujjar, and they stood by and watched Mr Tajpuriya's murder.

178. Fifth, the appellant relies on allegations made by Mr Harvinder Singh, an extraditee, in the context of proceedings before Westminster Magistrates' Court in the case of Arora. There is a pending issue before that court as to the credibility of the witness which we cannot resolve, and in circumstances where we do not consider that it adds significantly to the case, it is unnecessary to address the post-hearing material.

179. The respondent submits that the assurances show that the appellant will be provided with more than sufficient personal space and bedding; he will have proper ventilation and hygienic conditions; he will have access to clean water and food; he will have access to natural light, clean sanitary facilities, and outdoor exercise; and he will be provided with necessary medical care.

180. As regards security, the respondent emphasises that the appellant's ward will be guarded 24 hours a day, 7 days a week, and there will be CCTV monitoring by senior officials of the jail. The individual examples of violence within the prison system to which the appellant is able to point are insufficient to displace the assurances provided by the Indian authorities. The assurances go further than those provided in *Chawla*. The District Judge was entitled to conclude they were sufficient to satisfy him that there was no real risk that the appellant would be subjected to proscribed treatment, and the fresh evidence should not lead to a different conclusion.

Ground 3 (part 2) discussion

181. In our judgment, having regard to all the evidence and information provided on this ground, including the fresh evidence, we conclude that in Tihar prison the appellant would be at real risk of extortion, accompanied by threatened or actual violence, from other prisoners and/or prison officials. The nature of the allegations against him, and the publicity in relation to them in India, are such that he would be perceived (at least) to be a very rich man and therefore a prime target for extortion. In view of the extreme overcrowding and very significant level of understaffing in Jail No.3, Tihar prison, it would be very difficult for even the most conscientious of prison officials to protect the appellant from extortion and mistreatment at the hands of other prisoners, including gang members. Add to that the compelling evidence that incidents of prison officials, including senior officials, taking bribes, engaging in, and facilitating, extortion, occur all too commonly, it is clear that this appellant would face a real risk of proscribed treatment.

182. We accept that the murder of Mr Tajpuriya was a consequence of violence between rival gangs, and the appellant would not be at real risk of being killed in such a clash. But, together with the brutal beating and killing of Mr Gujjar by prison officials in Jail No.3, the behaviour of prison officials when Mr Tajpuriya was murdered seriously undermines the respondent's reliance on the protection afforded by the vigilance of officials or the presence of CCTV. The real risk that the appellant would face is not removed by the assurances the respondent has given.

183. Finally, although our conclusion on this ground is not based on the state of the prison, and we accept the good faith of the respondent, we cannot leave this ground without registering our concern that the September 2022 Assurance states explicitly that the cell in which the appellant will be held, if extradited, is "*provided with …a wash basin with a constant supply of water*" (§III, Appendix), whereas the information provided by the respondent following the hearing states emphatically, "*No individual wash basins/sinks*

is provided in any of the cells of Delhi Prisons" (Assurances in reference to the issues raised on 11.12.2024 for extradition of accused Praveen Kumar Arora from United Kingdom to India, §4). The latter statement is consistent with the video of the cells provided by the respondent during the hearing that we admitted in evidence. It is of vital importance that a sovereign state should ensure any assurances that are given are accurate.

184. For the reasons we have given in respect of both aspects of ground 3, we conclude the appellant must be discharged pursuant to s.87(2) of the 2003 Act. In light of our conclusion on ground 4, it is unnecessary to address the question whether there are any further assurances the respondent could be invited to give that would be capable of removing the real risks we have identified.

Ground 4 – article 6 ECHR (reverse burden of proof/standard)

185. In respect of Request 2, the sole agreed issue is:

> Was DJ Snow wrong to have concluded that Mr Bhandari does not face a flagrant denial of his rights under article 6 ECHR due to the fact that Mr Bhandari would have to disprove *mens rea* on his part beyond reasonable doubt under s.54 of the BMA?

186. Section 54 of the BMA provides:

> "**Presumption as to culpable mental state.**–(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
>
> *Explanation. –In this sub-section, 'culpable mental state' includes intention, motive or knowledge of a fact or belief in, or reason to believe, a fact.*
>
> (2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."

187. The respondent has provided the following information with respect to s.54 of the BMA:

> "… even for Section 54 of BMA, 2015 to come to play first the prosecution / complainant (Income Tax Department in this case, hereinafter referred as Revenue) has to lead pre-charge evidence i.e. provide relevant cogent evidence, material in the nature of document(s) besides oral depositions, statements relied upon (if any) recorded under special statute or under the Income Tax Act. The same have to be first convincing enough to prima face make

> an attribution w.r.t. alleged offence, so as to enable the Special Court to presume the culpable mental state in terms of section 54 of BMA, 2015. Only then, the stage of reverse burden comes to play.
>
> At the stage of pre-charge evidence, the witnesses as produced by the Department in context of the complaint and annexures relied upon are subject to cross-examination by the accused / his counsel in order to test the veracity of their testimony besides taking other legal objection(s) regarding admissibility and mode of proof of document(s). It is only after this state, the charges will be framed against the accused. It is emphasized that the Revenue while filing the prosecution complaint under Section 51 of the BMA has to prove that sufficient evidence exists indicating the assessee's wilful attempt to evade tax. Once the burden to prove the culpable mental state is discharged while filing the complaint under Section 51 of BMA by the Revenue, only then the Court is required to presume the culpable mental state as per Section 54 of the BMA."
>
> (Further Information, 24 September 2022, p.22)

188. The respondent further states (albeit in the context of addressing s.24 of the PMLA) that "*at the charge stage only prima facie case is to be proved and for framing charges, grave suspicion is sufficient*" (Further Information, 24 September 2022, §1.14, p.3).

189. To similar effect, the respondent's Reply to Request for Further Information dated 14 August 2023 states at §6.8:

> "Under Section 54 of BMA, the existence of mental state will be presumed by the court only after the facts regarding undisclosed income & assets are proved beyond reasonable doubt by the prosecution."

190. The District Judge found that the offence under the BMA was introduced by the respondent "*to align with international standards and to address the significant criminality arising from tax avoidance*" (Judgment, [288]). The appellant will be "*tried by an independent and impartial judge*" (Judgment, [289]). He is "*presumed to be innocent*" (Judgment, [290]). "*It is only after the prosecution have established a prima facie case that the charges are framed*" (Judgment, [292]). And,

> "294. In the BMA case it is only after the prosecution have established a prima facie case (including of the defendant's culpable mental state) that the burden passes (although in that case the burden is [to] the criminal standard).
>
> 295. The existence of a reverse burden in these circumstances does not offend international norms."

191. In light of these findings, the District Judge ruled, shortly, that he did not accept that the provisions of the BMA "*amount to a complete reversal of the burden of proof*", and

the appellant failed to show that "*he risks suffering a flagrant denial of justice in India*" (Judgment, [296]-[297]).

Ground 4 discussion

192. It is evident from the terms of s.54 of the BMA, and Justice Verma confirmed in the evidence he gave in the court below, that Mr Bhandari will bear the burden of proving that he did not have the necessary mental state to commit the alleged offence, that is, any attempt to evade any tax, penalty or interest chargeable or imposable under the BMA was not *wilful*. Moreover, the appellant will have to disprove the existence of the necessary mental state beyond reasonable doubt: s.54(2) BMA.

193. The respondent's information does not suggest otherwise. What is said is that before the charges can be framed, the prosecution will have to establish a *prima facie* case that the appellant, being ordinarily resident in India for the purposes of the Income Tax Act, attempted to evade any tax, penalty or interest in respect of his foreign assets and income, and that he did so wilfully.

194. The question is whether the burden and standard of proof imposed on the appellant by s.54 of the BMA would give rise to a flagrant denial of justice. The House of Lords considered the flagrancy test in *Othman v Secretary of State for the Home Department* [2009] UKHL 10 [2010] 2 AC 110. Referring to the meaning of flagrancy adopted by the Special Immigration Appeals Commission of "*a complete denial or nullification of the right to a fair trial*", Lord Phillips observed at [136],

> "That phrase cannot require that every aspect of the trial process should be unfair. A trial that is fair in part may be no more acceptable than the curate's egg. What is required is that the deficiency or deficiencies in the trial process should be such as fundamentally to destroy the fairness of the prospective trial."

195. In *Rwanda v Nteziryayo* [2017] EWHC 1912 (Admin), the Divisional Court (Irwin LJ and Foskett J) considered whether the problems identified were sufficient to establish "*a real risk of a truly serious or flagrant denial of justice*", holding that they were, bearing in mind the likelihood of such a fundamental breach leading to "*serious miscarriages of justice*" ([379]). Whatever the precise terms in which it is formulated, the test is, as Mr Fitzgerald acknowledged, very high.

196. Lord Woolf, giving the opinion of the Privy Council, addressed the permissibility of reverse burdens of proof in *Attorney-General of Hong Kong v Lee Kwong-Kut* [1993] AC 951. He acknowledged at 969D-E that:

> "There are situations where it is clearly sensible and reasonable that deviations should be allowed from the strict applications of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt."

197. Lord Woolf continued at 969G-970A:

> "Some exceptions will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it

> remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which article 11(1)[2] enshrines. The less significant the departure from normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable. In deciding what are the essential ingredients, the language of the relevant provision will be important. However what will be decisive will be the substance and reality of the language creating the offence rather than its form. If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless, as was pointed out by the United States Supreme Court in *Leary v United States* (1969) 23 L.Ed. 2d 57, 82, 'it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend'." (Emphasis added.)

198. In *R v Lambert* [2001] UKHL 37 [2002] 2 AC 656, Lord Clyde observed that reasons could be adduced to support the imposition of the burden of proof in that case, namely that the question whether the accused was ignorant or had no reason to suspect that what he possessed was a controlled drug was a matter very much within his own knowledge, the proof may be relatively easy for him, the unlawful distribution of controlled drugs is a grave social evil, and the defendant's knowledge of the nature of what he possessed is not an ingredient of the offence but a defence. Nevertheless, he held at [154] and [156]:

> "But while it might seem reasonable for such considerations to let the accused bear the burden of proof I do not consider that such a result can be justified when one weighs the considerations of what is, or at least may be, at stake for the accused and the interests of the public. As I have already noted (paragraph 150), in order to be acceptable a presumption must fall within limits which 'take into account the importance of what is at stake and maintain the rights of the defence': *Salabiaku v France,* at p 33, para 28. If the matter is approached as one of generality one can make no useful distinction here between the various classes of drugs which may be involved. In the most serious cases the accused may face a sentence of life imprisonment. A strict responsibility may be acceptable in the case of statutory offences which are concerned to regulate the conduct of some particular activity in the public interest. The requirement to have a licence in order to carry on certain kinds of activity is an obvious example. … These kinds of cases may properly be seen as not

[2] Article 11(1) of the Hong Kong Bill of Rights Ordinance 1991 provided, in similar terms to article 6 ECHR: "*In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law*" (see *AG of Hong Kong v Lee Kwong-Kut* at 965F-G).

> truly criminal. Many may be relatively trivial and only involve a monetary penalty. …
>
> While it may be that offences under section 5 of the Misuse of Drugs Act 1971 may be described as regulatory they can lead to the most serious of consequences for the accused. Of course trafficking in controlled drugs is a notorious social evil, but if any error is to be made in the weighing of the scales of justice it should be to the effect that the guilty should go free rather than that an innocent person should be wrongly convicted. By imposing a persuasive burden on the accused it would be possible for an accused person to be convicted where the jury believed he might well be innocent but have not been persuaded that he probably did not know the nature of what he possessed. The jury may have a reasonable doubt as to his guilt in respect of his knowledge of the nature of what he possessed but still be required to convict. Looking to the potentially serious consequences of a conviction at least in respect of class A drugs it does not seem to me that such a burden is acceptable." (Emphasis added.)

199. The appellant submits that wilfulness is an essential part of the offence. The prosecution do not bear the burden of proving that essential ingredient. At an early stage, when the charges are framed, the prosecution have to establish grave suspicion. But thereafter there is a presumption of wilfulness that the defendant has to disprove beyond reasonable doubt. Mr Fitzgerald informs us that, so far as he is aware, s.54 of the BMA is a unique provision. There are, in this jurisdiction, and elsewhere, certain offences which contain reverse burdens of proof, requiring the defendant to prove certain matters on the balance of probabilities. But a presumption of the *mens rea* (wilfulness) that the defendant has to disprove *beyond reasonable doubt* appears to be unprecedented in the Commonwealth. The context is not regulatory; it is a serious offence for which up to 10 years' imprisonment may be imposed (in addition to a huge fine). That is, he submits, fundamentally unjust and results in a flagrant denial of justice.

200. Mr Keith emphasises that the presumption of wilfulness is not irrebuttable. While the standard of proof may not be one that would be imposed on a defendant in this jurisdiction, he submits that it would not even breach article 6, still less amount to a nullification of the right to a fair trial or flagrant denial of justice. Moreover, the reverse burden only arises if the prosecution has, first, put forward sufficient evidence to establish a *prima facie* case to enable charges to be framed.

201. In our judgment, the District Judge was with respect wrong to conclude that s.54 of the BMA does not have the consequence that Mr Bhandari faces a flagrant denial of his rights under article 6. The combination of the reverse burden, together with the extraordinary imposition of a requirement on the accused to disprove *mens rea* to the criminal standard of proof, that is beyond reasonable doubt, fundamentally destroys the fairness of the prospective trial, and it is likely that such a fundamental breach of article 6 would lead to serious miscarriages of justice.

202. It is no answer that the prosecution has to establish a *prima facie* case, and/or grave suspicion, before charges can be framed.[3] The effect of s.54 of the BMA is that at trial, it would be possible for the appellant to be convicted of the offence under s.51 of the BMA even if the jury believe that he *probably* (or even *very probably*) did not have the requisite *mens rea* and so he is *probably* (or even *very probably*) innocent of the offence. It is hard to see how requiring the accused to disprove an essential ingredient of the offence beyond reasonable doubt could ever be acceptable. But, in any event, the criminal standard of proof in s.54 is all the more difficult for the appellant to discharge because he would have to prove a negative i.e. that he did not act wilfully (which is not fully defined in s.51, but in the circumstances of this case appears to mean deliberately or intentionally). Given the potentially serious consequences of conviction of tax evasion contrary to s.51 of the BMA, the reverse burden and standard of proof in s.54 results in a flagrant breach of article 6.

203. We note that the Supreme Court of India has not had occasion to consider the constitutionality of s.54 of the BMA. However, the possibility that the Supreme Court may, if the opportunity arises to consider the constitutionality of that provision in some future litigation, rule that it is unconstitutional, cannot alter the conclusion we have reached. Nor did the respondent contend otherwise. As matters stand, if extradited, the appellant will have to disprove the existence of the necessary mental state beyond reasonable doubt.

204. Accordingly, our conclusion on ground 4 is that, in respect of Request 2, the appellant must be discharged pursuant to s.87(2) of the 2003 Act. As the offence of money laundering is predicated on establishment of the offence of tax evasion, the effect of discharging the appellant on Request 2 is that (irrespective of the issues addressed on ground 2) there is no *prima facie* case on Request 1.

205. The appellant raised the separate question whether the District Judge was wrong to have concluded that the appellant does not face a flagrant denial of his rights under article 6 due to the reverse burden of proof under s.24 PMLA. Section 24 of the PMLA creates a presumption, in the case of a person charged with the offence of money laundering under s.3, that the proceeds of crime are involved in money laundering. The accused therefore bears a burden of rebutting that presumption, but the standard of proof he has to meet is the balance of probabilities. We were not persuaded that the District Judge's conclusion that s.24 of the PMLA does not give rise to a flagrant denial of justice was wrong. But it is unnecessary to address this issue further, first, because Mr Fitzgerald, on behalf of the appellant, wisely conceded the issue. Secondly, in any event, for reasons we have given, Request 1 necessarily falls with Request 2, in light of our conclusion regarding the reverse burden and standard in s.54 of the BMA.

Ground 5 – article 5 ECHR (delay)

206. Grounds 5 and 6 are both based on article 5 of the ECHR. Article 5 provides, so far as material:

[3] The evidence and submissions were not entirely clear as to which threshold (*prima facie* case or grave suspicion) applied to each of the initial stages, that is, the court taking cognisance of the prosecution complaint and then the framing of charges, following a hearing at which the accused has an opportunity to test the evidence. But this is of no consequence. We have determined this ground on the understanding that in the initial stages the prosecution has to demonstrate that the case surpasses the requirement of grave suspicion and establishes a *prima facie* case.

> "(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> …
>
> (3) Everyone arrested or detained in accordance with the provisions of paragraph (1)(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> …"

207. The single agreed issue in respect of ground 5 is whether the District Judge should have concluded that Mr Bhandari faces a flagrant denial of his rights under article 5 because of the chronic delays in the Indian criminal justice system. There is no dispute that, for the purposes of both grounds 5 and 6, the District Judge's identification of the test as requiring Mr Bhandari to show a *flagrant denial* of his article 5 rights was correct; and *Othman* applies in respect of article 5 as it does in respect of article 6 (see paragraph 194 above).

208. Nor is any criticism made of the District Judge's summary of the relevant principles derived from the case law of the European Court of Human Rights on the issue of delay. We note, in particular, that the time to be assessed is from the date of charge until any appeals are exhausted; detention in custody requires particular diligence on the part of the courts dealing with the case to administer justice expeditiously; no reproach can be levelled against a defendant for exercising rights to challenge evidence or proceedings, and the consequent delay that involves, where "'*one of the principle causes of such delay is to be found in the manner in which the judicial authorities conducted the case'*: *Eckle v Germany* (1983) 5 EHRR 1 at [82] and [86]"; and the court will consider the complexity of the case, what is at stake for the appellant, his conduct and the conduct of the administrative and judicial bodies.

209. The appellant acknowledges that the District Judge accurately summarised the general evidence of systemic delay in the Indian criminal justice system as follows:

> "254. In 2020 India had the sixth highest number of prisoners detained on remand out of 218 countries, 82% of its prison population.

> 255. Of the 82% on remand, by 2020, 4,125 had been detained for more than 12 months, 1,889 had been detained for more than two years, and 580 had been detained, without trial, for more than 4 years.
>
> 256. The CHRI recorded that 4.5% of prisoners on remand in India had been in detention for 3-5 years, with 1.9% for more than five years. The CHRI noted that this was the highest proportion since 2010.
>
> 257. Justice Verma's evidence was that in Delhi, there are 14,080 men awaiting trial, 590 of whom have been waiting more than 5 years with 1,472 inmates having been detained for 2-5 years without trial.
>
> 258. Justice Verma in his second report reports the statistics from the National Judicial Data Grid that 25% of criminal cases in the Indian District Courts have been pending for more than 5 years and overall more than **31 million** criminal cases are pending in the District Courts. In the High Courts, **1,657,655** criminal cases are pending and more than 40% have been pending for more than five years.
>
> 259. In 2020, the Supreme Court noted that over 14,000 criminal cases have been pending in the High Court for more than 30 years with 33,045 pending for between 20-30 years. The figure rises to 235,914 criminal appeals pending determination between 10-20 years."

210. The District Judge found that the "*prosecution case is ready for trial*". He accepted that there is "*likely to be a delay in the trial of his case*", which he described as "*complex*", and there is a real risk the appellant will be refused bail (Judgment, [264]-[268]). The District Judge observed that the burden was on the appellant "*to establish the extent of that delay*" and found that "*[g]lobal figures are of limited assistance where the defendant's case is trial ready and where it will be heard by a Special Court*" (Judgment, [268]). The District Judge concluded that the appellant had not met the burden of establishing a flagrant denial of his article 5 rights by reason of the likely extent of delay.

211. The appellant submits, *first*, that the District Judge's interpretation of the evidence on systemic delay is unsustainable, and *second*, that he took an erroneous approach in considering the delay that has already occurred in the criminal proceedings in India in this case.

212. The appellant's arguments underlying the first of those submissions are:

i) The District Judge's reliance on the fact that the appellant will be tried by a special court, in dismissing the "*global figures*" as of limited assistance, was misplaced given the statistics provided by the Enforcement Directorate "*paint the very same picture of chronic delay*". The Enforcement Directorate asserts that out of the 31 million pending criminal cases, 120,125 pending in courts in

Central District are the most relevant. Out of those cases 24,593 (20.47%) have been pending for 3-5 years, with 12,918 pending for 5-10 years, and 1,349 and 111 cases pending for 10-20 and 20-30 years, respectively (Further Information, 24 September 2022, §3.5 and graphics thereunder).

ii) He failed to engage with the specific evidence of delays in the trials of Mr Christian Michel and Mr Jagtar Johal. Mr Michel, according to UNWGAD, was "*arguably rendered to India from Dubai*" on 4 December 2018 in respect of allegations of bribery of Indian officials, and he was later questioned by the Enforcement Directorate regarding alleged money laundering. More than six years after his "*forced transfer*" to India, Mr Michel has yet to be tried. Mr Johal still awaits trial, more than seven years after he is said to have been unlawfully detained on 3 November 2017, having been detained (at least for part of that period) under anti-terror legislation. Both men have been in custody throughout.

iii) In finding that the prosecution case is ready for trial, the District Judge overlooked the fact that the appellant is sought for two separate trials, which cannot be heard together as they must be heard in different special courts. Only the Enforcement Directorate, which has responsibility for prosecuting PMLA offences, has asserted it is ready for trial. The Income Tax Department, which has responsibility for prosecuting BMA offences, has made no such assertion.

213. The appellant notes that in these proceedings the decision of the Adjudicating Authority not to confirm the Provisional Attachment Order was made on 17 November 2017, yet it took until 6 July 2023 for the appeal which overturned that decision to be determined. He submits the District Judge's finding that the appellant was responsible for the significant delay in resolving that application is wrong, as he would have recognised if he had admitted the reply evidence of Mr Berg, attaching the chronology of the proceedings.

214. The appellant draws attention to *Shankaran* in which proceedings were described as having moved at a "*sluggish pace*", with it taking "*around six years … for the other Indian defendants to secure bail*" ([15]). The district judge considered there had been an unacceptably long delay in the determination of their applications for bail. The risk that Mr Shankaran would also be remanded in custody over too many years would have resulted in a flagrant breach of his rights under article 5. But there was no such breach because the respondent gave undertakings not to oppose bail or apply for it to be revoked ([54], [69]). The Divisional Court upheld the district judge's conclusion, Sir Brian Leveson P observing at [65] that although the decision to grant bail would require "*an exercise of judicial judgment based on all the relevant factors*",

> "I have no doubt that the fact that the prosecution does not object to bail in principle and the fact that these assurances were considered critical to the decision of the English court to order extradition, would be considered very carefully and accorded appropriate respect by the Indian court seized of the matter."

215. The appellant contrasts this case in which not only has the respondent given no assurances that it will not object to bail (or seek revocation if bail is granted), but also the District Judge found, on the facts, that there was a real risk that the court would exercise its discretion to refuse the appellant bail.

ATTACHMENT H

216. Against this background, the appellant contends that it is wholly unrealistic to consider that the Indian judicial system will be able to try Mr Bhandari, and reach a final verdict, within a reasonable time, given the complexity of the matter, and the delays already evident in the proceedings. In the absence of any prospect of bail, the claimant faces a lengthy period on remand, giving rise to a flagrant denial of his article 5 rights.

217. The respondent draws our attention to the observation of the European Court of Human Rights in *Othman v United Kingdom* (2012) 55 EHRR 1, having ruled that a Contracting State would be in violation of article 5 if it removed an applicant to a state where he was at real risk of a flagrant breach of that article:

> "However, as with art.6, a high threshold must apply. A flagrant breach of art.5 would occur only if, for example, the receiving state arbitrarily detained an applicant for many years without any intention of bringing him or her to trial. A flagrant breach of art.5 might also occur if an applicant would be at risk of being imprisoned for a substantial period in the receiving state, having previously been convicted after a flagrantly unfair trial." (Emphasis added.)

218. As the Grand Chamber has repeatedly stated, there is no fixed time-frame for pre-trial detention, as the question whether or not a period of detention is reasonable cannot be assessed in the abstract but must be assessed in each case according to its special features: *Labita v Italy* (2008) 46 EHRR 50, GC, [152]; *McKay v United Kingdom* (2007) 44 EHRR 41, GC, [45]; and *Idalov v Russia* (appl. 5826/03), GC, [139].

219. The respondent submits that the District Judge was entitled to make the factual findings that he did; it cannot be said they are unsustainable. He properly referred to and took into account all the evidence before him.

220. The respondent's further information dated 24 September 2022 explained that there are special designated courts for money laundering offences and scheduled offences (i.e. including under s.51 of the BMA), so statistics for courts in general were not relevant (§3.4). The further information stated that to date the appellant had approached various judicial forums and his applications had been disposed of swiftly, citing three applications in which the appellant was granted relief within 10, 2 and 5 days, respectively; and his application to quash the Provisional Attachment Order was dealt with "*within reasonable time*" (second of two paragraphs numbered 3.5). With respect to the latter, the respondent submits that the District Judge was entitled, as a matter of case management, to refuse to admit the second statement of Mr Berg, dated 17 October 2022, attaching a chronology of the proceedings in India, and in any event, if he had admitted it, he would still have been bound to find that the appellant was at least partly responsible for the delay. The further information also explained that the prosecution had produced all the evidence for the proceedings and when the appellant is present in India the trial can commence (§§2.2 and 2.4).

Ground 5 discussion

221. In our judgment, the District Judge was not wrong to refuse to admit Mr Berg's second statement. Mr Berg's *first* statement was made on 4 October 2022, the final day of the hearing. The District Judge admitted that late statement and permitted the respondent

to provide a response the following day, 5 October 2022. His decision not to admit Mr Berg's *second* statement, for which he had given no permission, and which the appellant sought to adduce nearly two weeks after the final day of this lengthy hearing, was not unfair and in our view cannot properly be criticised. Accordingly, we refuse permission to rely on Mr Berg's second statement as late evidence.

222. In any event, having considered that statement and the exhibited chronology *de bene esse*, it is plain that the appellant bears a substantial part of the responsibility for the proceedings in respect of the Provisional Attachment Order not concluding much earlier, as he requested adjournments or re-listing of hearings on eight occasions; albeit on several occasions adjournments were sought by the Enforcement Directorate, and a substantial part of the delay was due to the Covid-19 pandemic.

223. The delay in the individual cases of Mr Michel and Mr Johal, although disturbing, does not undermine the District Judge's conclusions on this issue. It is not possible to extrapolate from the particular circumstances of those two cases, which are very different to the position of the appellant, in respect of whom a prosecution complaint has been filed and evidence produced to the court, that there would be unreasonable delay in his case.

224. The District Judge recognised that the statistics in respect of criminal proceedings, generally, in India show chronic delay. But it was open to him, in our judgment, to conclude that the appellant had failed to establish the extent of delay that he was at risk of, in the context of proceedings before special courts; or that such delay would amount to a flagrant denial of justice. There were no statistics before the court which focused on the time taken to conclude special court criminal proceedings. The statistics provided by the Enforcement Directorate include "*data for Special Court, PMLA in Rouse Avenue Court*" (§3.5), but they also cover all criminal cases pending before courts in the Delhi Central District. They are part of the "*global figures*" regarding delay that the District Judge found to be of limited assistance.

225. The District Judge was entitled to reject the allegation that the proceedings against the appellant would be so unreasonably delayed as to amount to a flagrant breach of article 5 in circumstances where, (i) the evidence did not demonstrate that the chronic delay in general criminal proceedings extended to the special courts; (ii) there was evidence before him that several of the appellant's applications had been dealt with speedily; (iii) one application had been seriously delayed, but the appellant bears a substantial part of the responsibility for that delay (and to the extent that the pandemic was a factor, that is no longer the case); (iv) there was evidence of the laying of a prosecution complaint and summonses, the special court having "*already seen all the material produced by the Prosecution*" in the appellant's case, and evidence that "*proceedings would commence the moment he is extradited*" (2.2.4). While the latter information was provided by the Enforcement Directorate, it is clear that paragraphs 2.2.1 to 2.2.4 of the Further Information dated 24 September 2022 address "*proceedings under PMLA and Black Money Act*" (§2.2.2, emphasis added).

226. Accordingly, we dismiss ground 5 of the appeal.

Ground 6 – article 5 ECHR (bail)

227. This ground is raised only in respect of Request 1. The single issue to which the ground gives rise is whether the District Judge was wrong to have concluded that Mr Bhandari does not face a flagrant denial of his rights under article 5 ECHR because of a presumption against bail under the PMLA.

228. The appellant cites *Caballero v United Kingdom* (2000) 30 EHRR 643, as did the District Judge, in which the Grand Chamber held that pursuant to article 5, and having had a person brought before him promptly:

> "43. … that judge, having heard the accused himself, must examine all the facts arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the presumption of innocence, a departure from the rule of respect for the accused's liberty. Those facts must be set out in the decision on the application for release. For example, the danger of an accused's absconding cannot be gauged solely on the basis of the severity of the sentence risked. As far as the danger of re-offending is concerned, a reference to a person's antecedents cannot suffice to justify refusing release.
>
> 44. Thirdly, the judge must have the power to order an accused's release."

229. The appellant contends that the position on bail in relation to Request 1 is inconsistent with the presumption of innocence as, on the face of s.45 PMLA the court must refuse bail unless the appellant can persuade the court that there is no genuine case against him. The respondent's position is that, in reality, the court retains a discretion to grant bail, and regularly does so.

230. Section 45 of the PMLA provides so far as material:

> "**Offences to be cognizable and non-bailable. –**
>
> (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of (174), no person accused of an offence under this Act shall be released on bail or on his own bond unless-
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and
>
> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence whilst on bail:
>
> Provided that a person who is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the special court so directs:
>
> …

> (2) The limitation on granting of bail specified in sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.
>
> *Explanation*. – For the removal of doubts, it is clarified that the expression 'Offences to be cognizable and non-bailable' shall mean and shall be deemed to have always meant that all offences under this Act shall be cognizable offences and non-bailable offences notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1973 (2 of 1973), and accordingly the officers authorised under this Act are empowered to arrest an accused without warrant, subject to the fulfilment of conditions under section 19 and subject to the conditions enshrined under this section." (Emphasis added.)

231. The Supreme Court of India considered the constitutionality of an earlier version of s.45 PMLA in *Shah v Union of India* (2018) 1 ALD (Crl.) 212 (SC). The provision was found to be unconstitutional, but only because it applied to specific offences. In *Shah*, the court described s.45 as a "*drastic provision which turns on its head the presumption of innocence*". Following an amendment which had the effect of applying s.45 to all offences under the PMLA, the Supreme Court of India upheld the constitutionality of the amended provision in *Choudhary v Union of India* (2022) SCC OnLine SC 929.

232. In *Choudhary*, the Supreme Court observed:

> "400. It is important to note that the twin conditions provided under Section 45 of the 2002 Act [i.e. the PMLA], though restrict the right of the accused to grant of bail, but it cannot be said that the conditions provided under Section 45 impose absolute restraint on the grant of bail. The discretion vests in the Court which is not arbitrary or irrational but judicial, guided by the principles of law as provided under Section 45 of the 2002 Act. While dealing with a similar provision prescribing twin conditions in MCOCA, this Court in *Ranjitsing Brahmajeetsing Sharma*, held as under:
>
> > '44. **The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act.** … Such cannot be the intention of the legislature. **Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of a trial.** …' (emphasis supplied)
>
> 401. We are in agreement with the observation made by the Court in *Ranjitsing Brahmajeetsing Sharma*. The Court while dealing with the application for grant of bail need not delve deep

> into the merits of the case and only a view of the Court based on available material on record is required. The Court will not weigh the evidence to find the guilt of the accused which is, of course, the work of Trial Court. The Court is only required to place its view based on probability on the basis of reasonable material collected during investigation and the said view will not be taken into consideration by the Trial Court in recording its finding of the guilt or acquittal during trial which is based on the evidence adduced during the trial. As explained by this Court in *Nimmagadda Prasad*, the words used in Section 45 of the 2002 Act are 'reasonable grounds for believing' which means the Court has to see only if there is a genuine case against the accused and the prosecution is not required to prove the charge beyond reasonable doubt."

233. Before the District Judge, the appellant relied on the evidence of Justice Verma on this issue. However, as the appellant accepts on this appeal, and as the District Judge noted, Justice Verma gave contradictory evidence as to whether the court retained a discretion to grant bail.

234. The District Judge accepted the respondent's evidence that not only is a discretion to grant bail vested in the court, but bail has in fact been granted by the Special Court in 283 out of 468 cases, that is, about 60% of cases. The District Judge found that the fact that bail was "*clearly being granted by the courts in a significant proportion of cases … strongly suggests that the courts are interpreting the provision in a manner that allows them to grant bail*".

235. The appellant maintains that, applying the clear wording of s.45 of the PMLA, Mr Bhandari has no prospect of bail unless he can persuade the court that there is not a genuine case against him. He submits the court should take no comfort from the statistics given the plain meaning of the statute.

Ground 6 discussion

236. In our judgment, this ground has no merit. The District Judge made no error in concluding on the evidence before him that s.45 of the PMLA would not give rise to a flagrant breach of article 5. It is manifest from the *Choudhary* judgment, and the evidence of the substantial proportion of cases in which bail has in fact been granted by the Special Court, that the courts of India have construed and applied s.45 of the PMLA in a way that ensures independent, impartial and rational judges have a discretion to grant bail, without the need to make a positive finding that the applicant for bail has not committed the alleged offence.

Conclusion

237. For the reasons we have given, we allow the appeal on grounds 3 and 4, dismiss grounds 1 and 2 (for Request 2), 5 and 6, and order the appellant's discharge.

Appendix: The Assurances

(1) THE SEPTEMBER 2021 ASSURANCE

The first "*Letter of Assurance*" from the Government of India, in relation to the extradition of the appellant on both Requests, is dated 16 September 2024, and was sent to the CPS under cover of a letter from the High Commission of India on 29 September 2021. It states, so far as material:

> "3. The Government of India, on the basis of report from Tihar Prison Authorities, New Delhi, assures that Mr Sanjay Bhandari will be held at Ward No.4, Central Jail No.3, Tihar Jail Complex, in New Delhi, if extradited. The detailed legal and factual framework to show how the terms of assurance would be delivered in practice is enclosed with this letter of assurance [Annexure-I].
>
> 4. If Mr. Sanjay Bhandari is extradited to India and his case is acceded to for lodging in the Tihar Jail Complex in New Delhi by the Competent Authority/Government, the Government of India, on the basis of information received from the Government of NCT of Delhi and the Director General of Prisons, Delhi State, solemnly assures that all such facilities available in the Tihar Jail Complex in New Delhi shall be provided to him without any discrimination, as per the lodging policy in vogue. This assurance is a sovereign assurance by the Government of India in consultation with the State Government concerned and the Tihar Prison Authorities, New Delhi.
>
> **Annexure-I**
>
> **The detailed legal and factual framework to show how the terms of assurances would be delivered in practice.**
>
> **a. Information regarding basic amenities provided to economic offender/extradited person**
>
> The extradited person will be provided all basic amenities as per Delhi Prison Rules, 2018. The place of lodgment such as cells/barracks has proper ventilation and hygienic conditions. The clean and potable drinking water is available to all prisoners through RO plants installed in each jail. Additionally, access to natural light, clean sanitary facilities, outdoor exercises, sports & recreational activities, security surveillance through CCTV monitoring and other mechanisms, medical care and liberty to religious practice in a violence free environment will be duly ensured. The inmates are provided nutritious food (having requisite calorie for a human being) as per menu decided by a Committee of officers consisting Dietician and doctor and other prison officers.
>
> **b. Information regarding prison visits, including detainee's family.**
>
> Every prisoner is allowed reasonable facilities for seeing or communicating with, his family members, relatives, friends and legal advisers twice in a week. The prison inmates is afforded opportunity as prescribed in the rules, to have reasonable contract including visits, telephone contact, electronic communication contact, interviews through videoconferencing and correspondence with the family inside the prison. The Inmate Phone call systems are functioning in all the jails so that a prisoner may

communicate with his family members through telephone. The telephone facilities will be available to all the inmates. During the Covid period the family members/advocates are allowed interview through video conferencing as per rules.

c. Information regarding medical facilities available within jail campus to handle medical emergency and systems put in place for ensuring supply of medicines being taken by inmate for ailments like diabetes, hypertension etc.

…

d. Information regarding the measures that have been taken and are in place to deal with situation that has arisen due to COVID-19 pandemic within the prison and also provide the figures as to the current rate of COVID-19 with the prison.

…

e. Information regarding mechanisms through which the detainee can make any complaints about the conditions of his detention and how any such complaints are administered.

It will be worthwhile to mention that there is an exclusive Grievance Redressal Mechanism working in Delhi Prisons which plays a very important role in maintaining and establishing the human rights in prison. Each and every complaint/grievance of the inmate is taken on record and every best effort is exercised to resolve such issue. It is then informed to the complainant / inmate.

- The prisons in Delhi are being regularly visited by Inspecting Judges of rank of Addl. Session Judges and hear the problems of prisoners and issue directions to the jail authorities for necessary resolution/redressal of the grievance. A report on his visit is being forwarded by him to the Hon'ble High Court of Delhi and the Government of NCT of Delhi. The Prison Department also submits a compliance report thereof.

- Apart from the inspection by Jail visiting Judges there are also notified NGO's, NHRC officials, Official Visitors/Non Official Visitors by the Government of NCT of Delhi etc.

In addition, complaint boxes in the name of visiting Additional Sessions Judge and Superintendent jail have been put up in each ward of the jail. These are opened by the visiting Additional Sessions Judges and Jail Superintendent on their visit to wards. The Petition Box in the name of Director General (Prisons) is being rotated in each jail, on daily basis on which the prisoners can put in their grievances. Senior officers regularly and routinely visit the jails to interact with the prisoners and to hear their problems.

f. Information regarding the prison in which the fugitive/economic offender are usually kept and the number of inmates in that prison at present.

The fugitives are generally lodged in Central Jail No.3, Tihar where the Central Jail Hospital is also located. The total number of inmates lodged in Central Jail No.3 is 2121 as on 28.05.2021.

g. Information regarding the barrack/cell in which Sh. Sanjay Bhandari will be kept, if extradited to India (both during pre-trial and post-trial if convicted). Also information regarding the capacity of such barrack/cell along with number of inmates in that barrack/cell at present.

Mr Sanjay Bhandari, if extradited to India, will be kept in the Cells of the Ward No. 4 at Central Jail No.3, Tihar. Normally, three inmates can be lodged in a single cell of ward No.4, Tihar. However, in the case of Sh. Sanjay Bhandari, he may be kept alone in the cell." (Emphasis added.)

(2) THE SEPTEMBER 2022 ASSURANCE

On 28 September 2022, the Government of India provided a "*Letter of Assurance*" in respect of the extradition of the appellant, which states so far as material:

"The Government of India, on the basis of report received from the Government of National Capital Territory of Delhi / Tihar Prison Authorities, New Delhi, assures as follows:-

I. Dimension of the cell-

In Delhi Prisons, sufficient personal living space per inmate is provided in each Barrack/Cell of jail. Measurement of Cell is approximately 21x8x11 feet in dimension i.e. around 15.6 square meters for four prisoners, thus minimum living space requirement of 3 square meters is available to each prisoner. Additionally, the cells/barracks have access to natural light, ventilation, clean sanitary facility, outdoor exercises, sports and recreation activities are duly ensured in Delhi Prisons.

II. Sanjay Bhandari will be kept alone in the cell meaning thereby he would have space of 15.6 square meters to himself.

III. He will be provided well-lit and ventilated cell and access to toilet inside his cell. The cell will be well maintained and clean. Daily cleaning will be carried out within the cells and in the external areas of the Cells/Barrack. Hygiene products and cleaning materials are provided/made available to inmates at Govt. cost. The pest control teams are regularly visiting and fumigate the jail to keep them free from mosquitoes. Cell is provided with a flush toilet and a wash basin with a constant supply of water.

IV. He will be provided with proper bedding by the jail authority and also allowed to take their beddings/bed sheets from their visitors through physical mulakat (As per jail rules). The facility of washing plant is available in jail to ensure proper cleanliness and hygiene in the cells.

V. He will have access to safe, clean and potable drinking water as available to all prisoners through RO (Reverse Osmosis) plant installed in jail. The mineral

water bottles are also available through jail canteen, he may purchase the same. Considering the safety and security of the prisoners, a mobile canteen is also rotated in the wards (in the morning as well as in the evening) for the sale of biscuits, wafers, water bottles, patties etc.

VI. He will have access to fresh air and open space for exercise. He can move out of cell as soon as after day break, as possible. He will have enough space in front of his cell for walking purpose to maintain his health. The prisoners are locked-up for the night at the time of sun set (usually at dusk time). During the course of the day the prisoners are allowed to do prayer, yoga, meditation, physical exercise, to brisk walking, to attend medical OPD, to attend educational classes and vocational courses, sports etc. The prisoners get sufficient time for their activities under proper security.

VII. The prison staff for his security will be available round the clock. The proposed Ward is guarded 24x7 by guarding staff and has proper CCTV surveillance for monitoring by senior officers of jail. The ward is under supervision of Assistant Superintendent of Prisons who takes rounds of the ward and ensures security and safety of all inmates of the ward.

VIII. He will be provided medical facility as need based in Jail OPD, Central Jail Hospital and outside referral hospitals as per referral by the concerned doctors. He may be referred to Super Specialty Hospital if required.

The Central Jail Hospital is located in same jail with sufficient numbers of doctors round the clock, physiotherapy centre, and mental health unit.

The following medical facilities are available in Delhi Prisons:

Inmates (both under trial and convicted) are provided round the clock medical attention in Delhi Jails for which there is a 120 bedded hospital, known as Primary Health Care Unit in Central Jail No.3, Tihar, New Delhi and dispensaries equipped with MI Rooms in all other jails. The first referred hospital for Jails in Tihar Prison Complex is DDU Hospital, Hari Nagar. The main features of health facilities in Delhi prisons are as follows:

…

IX. He will be provided other facilities such as library, dry canteen, recreational facilities for his overall wellbeing.

Four meals will be provided to him as provided to other inmates per day namely (i) Breakfast (ii) Lunch and (iii) evening tea and biscuits (iv) dinner. The meals provided are having sufficient and adequate nutritional contents. The meals are daily examined by the Duty Doctor as well as by the Duty officer of the Jail to check the quality of the food. The canteen facility will be also available to him in jail from where the inmate can purchase daily use item as per their need.

X. The prison staff is vaccinated against Covid-19. If the SB is not vaccinated then he will be vaccinated

ATTACHMENT H

…

XI. Pressure Swing Adsorption (PSA) oxygen production plant:

…

XII. He will be provided Inmate telephone call facility to communicate with their family through Inmate Calling System as per rules.

XIII. There is provision of Video conferencing facility for court matters and Mulaqats (interview) of prisoners with family and advocates. He will be provided the same wherever required.

…

Information with regard to reformation activity in Delhi Prisons is as under:

1. Yoga, Meditation & Spiritual Courses

Yoga, meditation and spiritual activities form an important component of reformation and rehabilitation policy of Delhi Prisons which bring qualitative change in the life of prisoners. A number of Non-Governmental organizations are helping the Jail administration in carrying out various activities and augment religious preaching to inmates. Some of these are Art of Living, Raj Yog, Sahaj Yoga and Satsang.

2. Recreational activities

Recreational activities are carried out routinely in all the jails to channelize the energy of prisoners in a positive direction. Television set is provided in all the wards which are fitted with cable network. The TV facility is provided in cells also. The facility of newspapers, magazines, library etc. is provided. FM Radio is provided in jails and one inmate acts as Radio Jockey and music is played on requests also.

3. Educational Facilities

Educational activities are an integral part of the daily routine of the prisons in Delhi. Study Centers of the Indira Gandhi National Open University (IGNOU), New Delhi and National Institute of Open Schooling (NIOS), Delhi are established at Delhi prisons. The facility is available free of cost to all willing inmates. Apart from it the basic elementary education is also provided through Padho Aur Padhao scheme.

4. Computer Centers in Jail

…

5. Scheme for the Welfare of Children of Incarcerated Parents

…

6. Music Rooms in Jails

…

ATTACHMENT H

7. Art Gallery/Fine Arts

…

8. Grievance Redressal Mechanism

The Prison Administration fully ensures that there is no violation of rights of prisoners. In case of complaints of prisoners, Grievance Redressal Committees are constituted in all Jails to redress their complaints/grievances partially. This Committee is chaired by Superintendent Jail and includes other officers of the Prisons.

The inmate can drop their complaints in complaint boxes of jail Superintendents, Jail Visiting Judges and mobile complaint box of DG Prisons. These complaints are seen by the officers themselves and appropriate decision is taken to dispose of their complaints/grievance. Further the inmate can also approach to the jail visiting judge/trial courts for their unresolved complaints. Usually considering the substance of the complaint, an independent inquiry is done by the Senior Officers of the Jail and appropriate action is taken accordingly.

9. CCTV Cameras Surveillance for better monitoring

CCTV cameras have been installed in all jails of Delhi Prisons for better surveillance and better prison management. Presently, total 7549 CCTV cameras are installed in all Jails of Delhi Prisons i.e. Tihar Complex, Rohini and Mandoli Jail Complex. The recording of these cameras is preserved for 1 month. These CCTV cameras are found very effective since most of the happenings in the Jails are recorded and the truth is known without any delay.

10. Body Worn Camera used by Prison Staff

Delhi Prison Department is presently having 525 Body Worn Cameras which are used for various purposes like at the time of conducting search, dealing with unruly inmates etc. These cameras are useful for the purpose of Vigilance also.

11. Security gadgets used for maintaining security management

…" (Emphasis added.)

(3) THE OCTOBER 2022 ASSURANCE

On 31 October 2022, the Government of India provided a further Letter of Assurance (dated 28 October 2022) in relation to the extradition of the appellant, which states so far as material:

"3. In view of the facts of this case in the extradition matter and specific assurances to this effect sought by the District Judge Snow, the Government of India, on the basis of assurance provided by the investigation agency, assures as follows:-

'If Mr. Sanjay Bhandari is refused bail, he will not be removed from prison unless:

- He is granted bail.
- Requires medical treatment in a hospital.
- For appearances before a court.'"

(4) THE SEPTEMBER 2023 ASSURANCE

On 7 September 2023, the Government of India provided a further assurance to the United Kingdom following the appellant's application for permission to appeal and to adduce fresh evidence:

"Accordingly, the Government of India, on the basis of confirmation provided by the Government of National Capital Territory of Delhi/Delhi Prisons Department, hereby confirm that the previous assurances provided by the Government of India in the year 2022 will still remain in force. The Government of India, also confirm that the concerns of the defendant regarding his safety, arising from the fresh news reports attached with UK Request for Further Information [RFFI], can be met by the assurances already provided."

The letter attached a letter dated 5 September 2023 from the Government of National Capital Territory of Delhi to the Ministry of Home Affairs, providing confirmation in the same terms that the earlier assurances remain in force and concerns regarding the appellant's safety can be met by those assurances.