Prison conditions, HIV and mental illness as a bar to extradition: South Africa again in the crosshairs

Government of South Africa (Appellant) v Shrien Prakash Dewani (Respondent) [2010] EWHC 3398 (Admin);
and
The Government of South Africa v Shrien Dewani, City of Westminster Magistrates' Court, sitting at Belmarsh Magistrates' Court 10 August 2011;
and
The Government of the Republic of South Africa and Shrien Dewani 2012 EWHC 842 (Admin)

Introduction: Extradition arrangements between South Africa and the United Kingdom

As a British colony, subsequently a British Dominion, and finally an independent Republic,[1] South Africa for many years owed most of its extradition arrangements to succession to treaties concluded by Britain and extended to South Africa as a British 'possession'. As a British possession, extradition between the United Kingdom and South Africa was governed, up

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[1]For a full exposition of the status of extradition between the United Kingdom and South Africa during these periods see Botha 'The history, basis and current status of the right or duty to extradite in public international and South African law' LLD thesis (Unisa) 1992 Chapter II 43 119.

to South African independence, not by treaty, but by the British Fugitive Offenders Act 1881 a piece of British municipal legislation.[2]

This meant that when South Africa achieved republican status in 1961 and moreover, left the Commonwealth, there was in effect no mechanism by which extradition between the two countries could be managed. Although the South African Extradition Act 67 of 1962, allowed for extradition in the absence of a treaty,[3] this possibility depended on Britain being prepared to act reciprocally, something that was at that stage not possible under British law.[4] International sentiment against being seen to support apartheid South Africa also complicated matters. In fact, when approached by the South African authorities in the early 1970s as to the possibility of concluding extradition arrangements, the British Ambassador declared that it was unlikely that Britain 'would be anxious to move in a favourable direction in respect of extradition, at least for the foreseeable future'.[5]

This foreseeable future came some twenty-six years later after the dawn of a democratic South Africa in 1994. In 1995 South Arica again joined the Commonwealth of Nations and subscribed to the Commonwealth Scheme for the Rendition of Fugitive Offenders 1990 (the so-called 'London Scheme')[6]. Although this cleared the way for extradition between South Africa and a number of Commonwealth countries – including Britain[7] – who had been reluctant to 'deal' with the apartheid government, many of the country's European extradition arrangements remained tenuous and uncertain, based as

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[2]Fugitive Offenders Act 1881 44 & 45 Vict c 69 (Britain). The Act was preceded by the Fugitive Offenders Act 1847 6 and 7 Vict c 34 (Britain)

[3]In terms of s 3(2) of the Act which specifically provides for extradition to countries with which the Republic does not have an extradition treaty, where the President certifies that the person sought is 'liable to be extradited'.

[4]See Botha n 1 above 163 164 and the British cases of *Lett* 1965 *British Digest* 455; the *Creole* 1965 *British Digest* 456; and *James Thornley* 1965 *British Digest* 460.

[5]Letter from British Ambassador 27 June 1972, SA Department of Justice, Extradition File 9/11/2.

[6]For a discussion of the importance to South Africa and an analysis of the London Scheme, see Botha 'The Commonwealth Extradition Scheme and Law Commission Working Paper 56' (1995) 20 *SAYIL* 412. The South African Extradition Act 67 of 1962 was amended by Act 87 of 1996 to reflect the requirements of the London Scheme.

[7]As previously indicated, 'rendition' between South Africa and the United Kingdom had been a matter of municipal law. In terms of the London Scheme, states are 'designated' by other Commonwealth states party to the Scheme. The designation certifies that the two states' municipal laws governing extradition are sufficiently concordant for extradition between two to be effected through the use of their municipal law provisions. South Africa's Extradition Act was amended in 1996 particularly as regards human rights safeguards in the extradition process to bring it in line with the standards set in the London Scheme. Britain was proclaimed a 'designated state' (together with Namibia and Zimbabwe) on 13 February 1998 in *GG* 18663 of the same date. Extradition between Britain and South Africa was therefore on track.

they were on nineteenth century (and even some earlier)[8] treaties concluded by Britain and extended to the erstwhile Union of South Africa.

In 1998, at the invitation of the European Union in terms of article 30[9] of the European Convention on Extradition 1957, South Africa became party to the European Convention so launching its extradition arrangements with Europe – including those with the United Kingdom – into the twentieth century, in one fell swoop.

We therefore have the position where South Africa has moved from no extradition arrangements with its erstwhile 'mother state', to veritable surfeit of possibilities! The permutations of these possibilities have been canvassed elsewhere,[10] suffice it to say that South Africa would appear to have opted for the European Convention route in its extradition dealings with the United Kingdom as is evidenced by the *Dewani* case, the most high-profile extradition case between South Africa and the United Kingdom to date.

The 'facts' in Dewani

Newlyweds Shrien and Anni Dewani's South African honeymoon to the Western Cape in November 2010 ended tragically when Anni was kidnapped and murdered in Gugeltu, a notorious 'township' on the outskirts of Cape Town. After dining at a restaurant in the Strand, the Dewanis, allegedly at Anni's behest, engaged a taxi driven by Zola Tongo to 'tour' the township. The taxi was allegedly hijacked by two armed men who removed Tongo. The couple were driven around the township by the kidnappers who told them that they only wanted the car. After driving for some twenty minutes, Shrien was thrown out of the back window of the moving taxi. He managed to stop a passing car and contacted the police. On 14 November, Anni Dewani was found shot dead in the back of the taxi in Lingelethu West. Police later confirmed that Anni's wristwatch, a white-gold and diamond bracelet, her handbag, and her BlackBerry mobile phone, were missing, presumed stolen.

The taxi driver admitted guilt to the charge of murder and was sentenced on 7 December 2010 to eighteen years in jail. Two further defendants, Xolile

[8]For a full list of these treaties and their status in South Africa at the time of South Africa's accession to the European Convention, see Botha 'Strange bedfellows: South Africa and accession to the European Convention on Extradition 1957' (1998) 23 *SAYIL* 247.

[9]Article 30 of the European Convention provides that: '(1) The Committee of Ministers of the Council of Europe may invite any State not a member of the Council to accede to the Convention, provided that the resolution containing such invitation receives the unanimous agreement of the members of the Council who have ratified the Convention. (2) Accession shall be by deposit with the Secretary General of the Council of an instrument of accession, which shall take effect 90 days after the date of its deposit.'

[10]See Botha n 6 above for an analysis (and certain misgivings) of the possibilities.

Mnguni, 23, and Mziwamadoda Qwabe, 25, face charges of murder, aggravated robbery and kidnapping. In his statement admitting guilt, Tongo alleged that Shrien Dewani had offered him a sum of R15 000 to murder his wife. The South African government requested the extradition of Shrien Dewani, a British national, to stand trial in South Africa on the basis of the two countries' membership of the European Extradition Convention.

Mr Dewani was arrested in the UK on a provisional warrant with a view to ultimately facilitating his extradition to South Africa to face a charge of conspiracy to murder. He was granted conditional bail by Senior District Judge Riddle. In considering the basis on which he should approach the granting of bail, Riddle pointed out that South Africa as the requesting state, had to satisfy him that there were substantial grounds to believe that Mr Dewani would not attend his extradition hearings.[11] Although the European Convention does not require that the requesting state show a *prima facie* case before extradition can be ordered the strength of the case may indeed be considered in deciding the likelihood of Dewani's attending the relevant hearings.[12] In this regard the District Judge pointed to the possibility that the defendant would be acquitted at any trial.[13]

In a prosecutor's appeal against the decision to grant conditional bail, it was contended that substantial grounds did indeed exist for believing that Dewani would not attend the hearing.[14] In deciding the appeal, Justice Ouseley first considered Mr Dewani's record of cooperation with the investigation and his genuine hope that the investigation would clear his name. Secondly, the strong ties of Dewani's family with Bristol, the location of the family business in which he is engaged, together with his lack of previous convictions, intelligence, and professional qualifications all made it improbable that he would abscond. In addition, his face had become so well known that it would be difficult for him to leave the UK or go underground without being recognised.[15]

Accordingly, on 10 December 2010, Justice Ouseley dismissed the appeal, having satisfied himself that the conditions, subject to minor amendments set out by the District Judge, were adequate to secure his attendance as and when required. The conditions were that his passport would be retained by the police, he was prohibited from applying for international travel documents, he

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[11]On 10 Dec 2010 in *Case between Government of South Africa (Appellant) v Shrien Prakash Dewani (Respondent)* 2010 EWHC 3398 (Admin) par 2.
[12]At par 4 of the judgment.
[13]*Id* at par 5.
[14]*Id* at par 2.
[15]*Id* at pars 8, 9 and 10.

would live at his parents' address, and a cash security of £250 000 would be deposited before release.[16]

South Africa requested Dewani's extradition in order to prosecute him for murder, kidnapping, robbery with aggravating circumstances, conspiracy to commit murder, and obstructing the administration of justice. On 10 August 2011, the City of Westminster Magistrates' court, sitting at Belmarsh Magistrates' Court, decided on the application by the South African government under part 2 of the Extradition Act 2003.[17] After establishing that the required documentation was in order, the court turned to the resolution of the three questions under section 78(4) of the Act.[18] The questions – whether the person appearing before the court is the person whose extradition is requested; whether the specified offences are extradition offences; and whether copies of the relevant documents had been served on the person – were not disputed. In addition the court found that none of the bars to extradition set out by section 79 was either argued or found.[19] The defence, however, argued that the proceedings represented an abuse of the process of the court, that extradition would constitute a breach of Dewani's human rights (particularly in terms of arts 2 and 3 of the European Convention on Human Rights[20]), and that extradition is barred by section 91 of the Extradition Act 2003.

Section 91 proved pivotal in the case. This section provides:

> (1) This section applies if at any time in the extradition hearing it appears to the judge that the condition in subsection (2) is satisfied.
> (2) The condition is that the physical or mental condition of the person is such that it would be unjust or oppressive to extradite him.
> (3) The judge must
> (a) order the person's discharge, or
> (b) adjourn the extradition hearing until it appears to him that the condition in subsection (2) is no longer satisfied.

When the hearing took place during May and June 2011, Dewani was being

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[16] At par 18.

[17] http://www.bailii.org/ew/cases/Misc/2011/11 Part 2 of the Act is headed 'Extradition to Category 2 Territories' and category 2 territories are territories designated under the Act s 69.

[18] Section 78(4)

[19] Section 79 bars extradition in the event of double jeopardy (s 79(1)(a)); extraneous considerations (s 79(1)(b)); passage of time (s 79(1)(c)); or hostage taking considerations (s 79(1)(d)), none of which applied in the present case.

[20] The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) signed at Rome 4.11.1950 and entered into force on 3.09.1953. Article 2 of the ECHR provides, in relevant part: '(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty iis provided by law. ...'; while art 3 provides: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

detained under the (UK) Mental Health Act 1983 and was excused from attending. The court heard evidence on prison conditions at the facilities named in the undertakings given by the South African government. South African prisons were described as seriously overcrowded resulting in a lack of facilities, staff and contributing to the spread of disease. The rate of HIV/Aids infection among prisoners and neglect of those with mental health care needs received considerable attention. The situation was, it was claimed, aggravated by gang activity and sexual violence in prisons – especially those in the Western Cape. It was suggested that these conditions hold specific risk for Dewani as he would fit the profile of someone who is particularly vulnerable to abuse.[21]

South African Judge Deon van Zyl, Inspecting Judge in the Judicial Inspectorate of Correctional Services in South Africa, testified in person. Despite at times being critical of prison conditions in South Africa, Judge van Zyl expressed confidence that suitable treatment would be available to Dewani at any of the three institutions indicated by the South African authorities.[22]

The court also heard evidence from a consultant forensic psychiatrist, Dr Cantrell, responsible for treating Dewani, and from other medical experts. Depite the fact that Dewani had no history of mental health problems before December 2011, it was agreed that he was now suffering from a severe depressive illness and post-traumatic stress disorder. Dewani also experienced a problem with elevated levels of a muscle enzyme, creatine kinase (CK), which made pharmacological treatment too risky. In addition, Dewani suffers from profound psycho-motor retardation which led Dr Cantrell to describe him as 'severely disabled'. He has a very impaired ability to listen to evidence. Medical experts agreed that his current risk of self-harm or suicide was real and significant, and he was seen as unfit to plead at the time of the proceedings, leave alone travel to South Africa.

Fitness to plead was considered in terms of the 'Pritchard' or 'Davies tests'. In the light of a possible earlier suicide attempt, he would be re-traumatised if returned to South Africa which would increase the risk of suicide.[23] Added to this, Dewani has a 'hyper-perception of threat' and would 'undoubtedly feel at great risk in a South African prison'. It was pointed at that if the defendant were extradited there would be a significant risk of relapse into psychosis.

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[21] Three examples of the anti drunk driving campaign advertisements which caused an uproar in the country through their implications and which featured in the case against Dewani's return to South Africa for trial, appear at the websites http://www.iol.co.za/news/south africa/western cape/rape in jail ad too shocking for some 1.1003729; http://www.iol.co.za/news/crime courts/drink drive campaign gets ugly 1.950728; http://www.2oceansvibe.com/2012/02/28/a sequel to the infamous papa wag vir jou drunk driving campaign is out video/.

[22] These are the Goodwood, Malmesbury Medium A, and Brandvlei Correctional Centres.

[23] The court stated at 19 that 'Mr Dewani is less likely to kill himself in England'.

Medical experts speculated on whether his health would improve even if he remained in England, and the prognosis was described as uncertain.[24]

Allegations of abuse of process made by the defendant, were then considered by Judge Riddle. The first instance referred to the unfortunate statement by the then South African National Commissioner of Police, General Bkehi Cele, who, in an interview on the case, declared: 'A monkey came all the way from London to have his wife murdered here. Shrien thought we South Africans were stupid when he came all the way to kill his wife in our country. He lied to himself.'[25] The court found that this did not amount to an abuse of the process of the court as 'such a belief carries no weight for the prosecution' and 'it would not make the court more likely to convict'.[26] The judge continued to state that 'In South Africa any trial of these allegations will be heard by a judge ... [and] ... it is common ground that South Africa provides a fair trial process'.[27] The complaint was dismissed as baseless.

The second allegation by the defence was that the South African authorities had threatened to reveal the motive for the killing if Dewani contested extradition. This, it was claimed, had the potential of humiliating Dewani 'beyond that warranted by a mere exposition of the case against him'.[28] The court took this issue more seriously and indicated that there were indeed instances in which 'the application of pressure' could amount to a procedural irregularity fatal to the case. Here the court referred to the Canadian case *United States of America v Cobb*,[29] where the Canadian judge found that a threat that resisting extradition would result in the imposition of the maximum 'jail time' allowed, amounted to an abuse of process or an unacceptable level of pressure, and refused the extradition.[30]

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[24]At 15 of the judgment.

[25]For a full report on the incident see http://www.iol.co.za/news/crime courts/dewani monkey slur rocks case 1.999750 (accessed August 2012). General Cele was subsequently relieved of his duties.

[26]At 21 of the judgment.

[27]*Ibid.*

[28]At 21 of the judgment. Despite the judges very careful 'egg dance', it is clear that General Cele's 'threat' referred to allegations which later emerged of Dewani's alleged homosexual activities (see, eg, http://www.theweek.co.uk/people news/dewani murder/3997/dewani denied his wife sex claims c4 film#). This leads to the somewhat alarming conclusion that the South African authorities despite the equality clause in the country's Constitution consider allegations of homosexuality as more 'humiliating' than allegations of premeditated murder a point which was not lost on Judge Riddle see judgment at 22 3. He pointed out that Cele's stament was 'no more than a statement of fact' and that he (Cele) was not in a position to influence what evidence would be introduced at trial at 23 of the judgment.

[29]2001 SCC 19, [2001] 1 SCR 587.

[30]It is interesting to note that here too there were veiled threats that uncooperative fugitives would be subject to homosexual rape in prison see headnote to the case. See too, the Canadian case *USA v Tollman* 2006 OJ no 3672 where extradition was also denied on the ground of abuse

Finally, reference was made to the South African prosecutor who prejudged the guilt of the defendant in an interview. This was likewise not regarded as founding an abuse of the process of the court in that the court would reach a decision on the evidence before it. The judge concluded: 'the interview does not offend against a sense of natural justice, still less come close to establishing an abuse of the process of the court'.[31]

With regard to prison conditions in South Africa evidence was led to indicate that Dewani's personal characteristics make him a particularly vulnerable prisoner. Riddle J found, based on reports of experts before the court, that prison conditions are unlikely to reach the ECHR article 3 threshold. The National Commissioner of the Department of Correctional Services, speaking on behalf of the Republic of South Africa in a series of undertakings, confirmed that Dewani would only potentially be detained in one of the following facilities:[32]

- if remanded in custody pending trial, at the Goodwood Correctional Centre in a single cell in the sick bay area;[33]
- if convicted, sentenced to a term imprisonment and classified as 'medium security risk', at Malmesbury Medium A Correctional Centre in a single cell with a flush toilet and hot and cold water;[34] and
- if convicted, sentenced to a term imprisonment and classified as 'high security risk', at Brandvlei new Correctional Centre in a separate cell with a flush toilet and hot and cold water.[35]

Judge van Zyl, who testified at the request of the Director of Public Prosecutions of the Western Cape, described each of the mentioned correctional centres as 'suitable and appropriate for the purpose', compatible with Dewani's rights under the ECHR. The judge reiterated that Dewani would undoubtedly receive

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of process in a case where Tollman was wanted in the United States for tax evasion and the, with the knowledge and assistance of Canadian immigration officials, the United States attempted to evade the extradition process and secure Tollman's delivery while he was on a visit to Canada from the United Kingdom.

[31] At 24 of the judgment.

[32] At 21 of the judgment.

[33] Built in 1997, this facility meets the United Nations Minimum Standards. Apart from a sick bay and clinic, it has two full time psychologists and a doctor visiting three times a week. Private psychiatric care is available at own cost. The prison was 'in a class of its own and a centre of excellence...'. At par 26(i) of 2101 EWHC 842 (Admin.)

[34] Also built in 1997, this facility is under populated and boasts a well maintained hospital. Mental health problems are assessed by a visiting psychiatrist and referred where necessary. There have been few assaults. At par 26(ii) of 2101 EWHC 842 (Admin.)

[35] Currently under renovation, the facility will meet the UN international minimum standards. The other facility mentioned which is under construction, will, once completed, compare with 'the best in the world'. At par 26(iii) of 2101 EWHC 842 (Admin.)

appropriate health care and treatment.[36] These assurances were accepted by Judge Riddle who also pointed to the fact that South Africa as a well established democracy upholding the rule of law, had explicitly adopted all relevant international treaties, and is bound by its Constitution which includes a Bill of Rights.[37] In addition Judge Riddle was satisfied that the authorities would take all reasonable steps to protect Dewani against assault.

Riddle focused specifically on articles 2 and 3 of the ECHR which deal with the protection of life, and the prohibition of torture, cruel and inhuman punishment, respectively. A high threshold is required in terms of article 3: the defence must show that there is a real risk of torture in the receiving state, and where such risk emanates from non-state agents, that the state provides reasonable protection.[38] The court found that the the risk of suicide does not render extradition a violation of the right to protection of life under article 2 of the Convention.[39] Again, referring to the assurances given, Riddle accepted that long or indefinite custody would not amount to cruel and inhuman punishment: 'Taken as a whole, the assurances are sufficient to persuade this court that the South African state will comply with its positive duty to provide reasonable protection against criminal acts directed at Mr Dewani'.[40] The appeal to articles 2 and 3 of the ECHR was consequently rejected.

Finally, the court considered whether extradition would be barred by the additional protection provided by section 91 of the British Extradition Act 2003.[41] A finding of 'unjust or oppressive' can only be attained by applying a high threshold which the court illustrated by reference to *Tajik v USA*:[42]

> a high threshold has to be reached in order to satisfy the court that a requested person's physical or mental condition is such that it would be unjust or oppressive to extradite him.

The court also referred to *Spanovic v Croatia*[43] where it was said that 'the graver the charge, the higher the bar' because there is 'a heightened public interest in

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[36] At 21 of the judgment.
[37] At 23 of the judgment. Chapter 2 of the Constitution of the Republic of South Africa 1966 embodies the Bill of Rights. The rights of arrested, detained and accused persons appear in s 35 and include under s 35(2)(e) the right to 'conditions of detention that are consistent with human dignity, including at least exercise and provision at state expense, of adequate accommodation, nutrition, reading material and medical treatment'; and, under 35(2)(f), 'to communicate with, and be visited by, [the detained person's] ...(iv) chosen medical practitioner'.
[38] At 45 of the judgment.
[39] At 24 of the judgment.
[40] *Ibid*.
[41] See above.
[42] 2008 EWHC 666 (Admin) at 25
[43] 2009 EWHC 723 (Admin)

the alleged offender being tried'. Riddle J added that there is 'a strong public interest in honouring our extradition treaty obligations'. He found that there was no bar to extradition and directed that the case be sent to the Secretary of State for the final decision on whether Dewani was to be extradited.[44]

Following Judge Riddle's decision, British Secretary of State, Theresa May, signed an order for Dewani's extradition to South Africa on 28 September 2011.

The South Africa authorities must, at this stage, have heaved a collective sigh of relief. Despite various officials' 'best efforts'[45] to scupper the chances of Dewani's extradition, the first hurdle had been overcome.

The case was of some importance to South Africa from a perspective wider that purely the prosecution of a criminal, serious though this remains. The area in which the crime was committed, namely the Western Cape, is one of South Africa's premier tourist hubs. In the wake of the hosting of the Soccer World Cup by South Africa, and with the government heavily punting the country as a tourist destination, the random killing of precisely the type of tourist the country is courting could have proved disastrous. If, however, the murder were shown to be part of an orchestrated 'hit', the damage could be contained.

More importantly, from the legal point of view, to have denied extradition on the basis of conditions in South African courts and prisons, would have opened the door to a dangerous (for South Africa) precedent and be seen as a vote of no confidence in the country's penal system as a whole. This has already occurred in an isolated case in Australia where in *De Bruyn v Minister for Justice and Customs*[46] the court refused extradition on the basis that it would be unjust, oppressive or incompatible with humanitarian considerations to be returned to South Africa given the risk of HIV infection in the country's correctional facilities. To date, this case does not appear to have found resonance with other Australian courts or with Commonwealth countries to which both South Africa and Australia are linked through the Commonwealth Scheme for the Extradition of Fugitive Offenders.

The position with Britain, however, is somewhat unique given the strong traditional strong ties between the two countries. It is exacerbated when one remembers that the application was brought under the provisions of the European Convention on Extradition which since South Africa's accession,

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[44]In terms of s 93 of the Extradition Act, once an individual has been found extraditable, the final decision rests not with the courts but with the Secretary of State, Theresa May.
[45]See the regular 'foot in mouth' statements and withdrawal of statements referred to above at nn 21 and 25 above.
[46]2004 FCAFC 334.

forms the basis for most of South Africa's extradition arrangements with Europe. Based as it is on reciprocity, this would have had serious implications not only for South Africa's ability to bring those who commit serious crimes in the country to book, but would also have opened the door to both South Africa and European states who felt the precedent should be followed, being regarded as 'safe havens' for fleeing criminals.

The relief was, however, to be short lived. As was to be expected, those acting for Dewani,[47] lodged an appeal against the judgment to the Queen's Bench.

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Dewani abandoned the abuse of process arguments raised before the court *a quo* in his appeal and relied solely on whether his mental condition, and in particular the risk of his committing suicide, should preclude extradition; and on the claim that the South African prison conditions would violate his rights under articles 2 and 3 of the ECHR.[48]

Justice Ouseley deal first with the prison conditions. The judge president considered two aspects in this regard: the risk of HIV infection and violence from other inmates. In this regard it was argued that Riddle J had been wrong to accept the assurances provided by the South African authorities as these would not 'specifically' protect Dewani. It should also be pointed out that the assurances are somewhat unusual in that while general assurances of the observance of the rule of law and of compliance with a country's duties under its Bill of Rights might be provided when necessary,[49] to provide such detailed information covering all stages of the trial process and extending even to a prison still under construction, appears somewhat excessive (dare one say overly 'defensive'). Furthermore, the legally binding nature of such undertakings is not above question.[50]

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[47]The appeal was brought by what the judge terms 'those acting for him' as it was claimed that he was 'not in a position to give instructions' at par 10 2012 EWCH 843 (Admin).

[48]At par 12 of the judgment.

[49]Although one must concede that this is itself unusual when dealing with recognised democracies where the court will generally take this as read in a 'recognised' legal system. See eg, the response of the South African court to a similar appeal in the case of *Robinson v Minister of Justice and Constitutional Development* 2006 6 SA 214 (CPD). Here, in an application for extradition to Canada, Robinson claimed that he suffered from extreme claustrophobia and would suffer unduly if confined in a Canadian goal. The court per Davis J required no assurances from the Canadian government in this regard see 233G H.

[50]As acknowledged by the court, and by Van Zyl J who delivered the undertakings on behalf of the South African prison authorities, and also undertook to ensure that they would be honoured, at par 15 of the judgment.

Ouseley then considered the facts. He relied on testimony from two South African researchers into criminal justice and prison reform who testified to severe overcrowding, sexual violence coupled with inadequate research into HIV infection in prisons, and limited health care, particularly for mental illness. They, however, also conceded that the severity of these problems varied from prison to prison and on whether the detainee occupied a communal or a single cell. Dewani, they felt, was 'particularly vulnerable' as he was 'youthful, good looking and lacked "street wisdom"'.[51] The part of the 'assured' incarceration which concerned the researchers was, apparently, the times when Dewani would be out of his cell. They, however, also admitted to having no knowledge of conditions in the prisons specified in the South African undertaking. Against this, Ouseley had to balance the testimony of judge Van Zyl who after investigation, had reported that each of the specified prisons was 'suitable and appropriate'.[52] Justice Ouseley found that Van Zyl was independent and a man of integrity. His was motivated by 'a strong sense of justice, a concern for what was fair and reasonable and for fundamental values ... His evidence was independent and he had not been influenced by pressure'.[53] Van Zyl pointed out that his office could monitor Dewani and arrange 'private medical care and access to psychiatrists' and that there would be 'virtually no chance of gang or sexual violence' involving [Dewani] as he would be in a single cell.[54] Justice Ouseley, referring pointedly to the free press and democracy in South Africa, concluded that if there had indeed been significant problems in the specified prisons, this would have emerged between May and July to counteract judge Van Zyl's views.[55]

Having considered these circumstances, Ouseley concluded that there was no reason to call judge Van Zyl's evidence into question. Although the court emphasised the dangers – particularly of sexual violence – facing a prisoner held in a communal cell in South Africa, it found this uncompelling in the light of the assurance provided that Dewani would be held in a single cell and judge Van Zyl's assurance of the monitoring of Dewani. It was further prepared to accept the assurances (although not legally binding) given by both by Van Zyl and the South Africa authorities. It therefore concluded that the 'dangers' facing Dewani in the event of his return to South Africa to face trial, did not compromise his rights under articles 2 and 3 of the ECHR.[56]

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[51] At pars 17 18 of the judgment.
[52] At par 20 of the judgment.
[53] *Id* at par 21.
[54] *Id* at par 23.
[55] See nn 30 32 above.
[56] At pars 31 35 of the judgment. In assessing the standards required, the court referred to *R (Wellington)* 2009 1 AC 335 and the Strasbourg judgment in *Harkins and Edwards v UK* app 9146/07 and 32650/07 delivered on 17 January 2012.

Having dealt with possible physical threats facing Dewani, the court turned to his physical and mental health. The judge pointed out that Dewani's mental health had deteriorated after his arrest, culminating in a suicide attempt to avoid the extradition proceedings. As a condition for the grating of bail, he was transferred to a hospital and subsequently, after further deterioration, to a low security psychiatric institution and then a medium secure unit.[57] This scenario was assessed against section 91 of the Extradition Act 2003[58] and the court *a quo*'s findings. It was argued that Dewani should be discharged under section 91(3)(a), alternately that the hearing should be adjourned under section 91(3)(b).

Reviewing the evidence before Riddle J, the court referred to agreement between the Dewani and SA government's psychiatrists that he was suffering from severe depression and post traumatic stress disorder (PTSD); was a suicide risk – and that this would in all likelihood intensify were he returned; and that he could currently not validly plead in that although he understood the charges, he could not concentrate on detail.[59]

Here is where things became complicated. Treatment for mental disorders in the Western Cape in South Africa, would need to be at Valkenberg Hospital – if not offered in the prison hospital which one expert described as 'totally inadequate' in that Dewani would be seen only every two weeks. Unlike his incarceration, there was no undertaking from the SA government that he would be admitted to Valkenberg.[60] A psychiatrist at Valkenberg, however, testified that if referred by the court, Dewani would be admitted to the institution. Again providing unenforceable assurances, the psychiatrist stated that 'Given the prominence this case has in the media, we would assure the court that we would admit [the appellant] to our facility on arrival in Cape Town'.[61]

Assessing the findings in the court *a quo* Ouseley pointed out that the tests applied to determine fitness to plead in South Africa and the United Kingdom largely correspond. However, this did not necessarily mean that a way would not be found for Dewani to stand trial – this was a matter for the South African courts. Riddle J found that although the care then available to Dewani in the UK was arguably better than that available in South Africa for an individual in his circumstances, the care available would be 'appropriate'. He would be able to apply for bail and this would be decided independently. He would in all

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[57]See pars 36 and 37 of the judgment.
[58]The section is cited in full above. Section 91(2) deals with the situation where the potential extraditee's physical or mental condition is such that it would be 'unjust or oppressive' were he to be handed over.
[59]Paragraphs 41 43 of the judgment.
[60]At par 44.
[61]Paragraphs 47 and 48 of the judgment.

likelihood end up in Valkenberg where the judge described the conditions as 'not unacceptable'.[62] Despite the risk of suicide, there would appear to be no real and immediate risk to life – as required by article 2 of the ECHR Similarly, article 91 of the Extradition Act 2003 was not a bar to his extradition.[63]

Ouesley continued to detail medical evidence that had emerged after Riddel's decision. In September Dewani's attending doctors reported an improvement in his depression level and a reduction in his suicide risk. It was no longer either necessary or desirable that he be detained under the Mental Health Act. His detention in hospital served no purpose and was in fact a 'barrier to his progress'.[64] The hospital detention order was nonetheless extended in November, and in December a new psychiatric report was submitted. Despite his September report, the attending psychiatrist now advocated continued detention under the Mental Health Act, although he did report a slow but steady improvement in both Dewani's PTSD and depression. The report concluded that Dewani 'remained unfit to plead through his inability to concentrate, but he would in due course recover to become fit to plead'.[65]

Citing the *Tollman* case,[66] Ouseley pointed out that, as judge of appeal, he was required to consider independently whether it would be unjust or oppressive to extradite Dewani. Riddle's decision in the court *a quo* should be 'accorded the greatest respect', but was not cast in stone. Riddle's decision was attacked by Dewani's team as having erred as regards fitness to plead, the suicide risk, and treatment at Valkenberg. Ouseley then considered the elements of the appeal independently.

Section 91 of the Extradition Act 2003

Section 91 – and Part 1 section 25 – of the Extradition Act places the responsibility of deciding on the ill health (mental or physical) of the person sought and how this affects the extradition request on the court. To determine what qualifies as 'unjust or oppressive' under section 91(2), the judge cited Lord Diplock in *Kakis v Government of the Republic of Cyprus*[67] in which Diplock linked 'unjust' to prejudice at trial, and 'oppressive' to changes in the person sought's circumstances during the process. The two may, however, overlap and the bottom line is that the section covers 'all cases where to return

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[62]Paragraphs 54 and 55 of the judgment.
[63]Paragraphs 55 and 56 of the judgment.
[64]Paragraph 58.
[65]Paragraph 60.
[66]Note 30 above.
[67]1978 1 WLR 799 cited at par 67. Although this case predates the 2003 Act, the same phrase was used in the then current legislation.

the person sought would not be fair'.[68] It was argued for Dewani that section 91 should be read with article 23.4 of the European Arrest Warrant Framework Directive.[69] The Framework article reads:

> Surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example, if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health.

Justice Ouseley found that sections 91 and 25 set out the relevant test. This is a 'statutory test' linked to the specific case before the court. For this reason the judge cautioned strongly against a comparative case law exercise in coming to a finding. He stated:

> ... [I]t is not likely to be helpful to refer a court to observations that the threshold is high or that the graver the charge the higher the bar ... We would observe that the citation of decisions which do no more than restate the test under section 91 or apply the test to the facts is strongly to be discouraged.[70]

Applying the test to section 91, Ouseley concluded that Riddle had been correct in not discharging Dewani under section 91(3)(a) as there was every prospect of his recovery. Section 91(3)(b), however, allows for the adjournment of the hearing 'until it appeared that [Dewani's] mental condition was such that it would no longer be unjust or oppressive to extradite him'.[71] The judge weighed up the interests of justice and the delay in extradition. Where, for example, one is dealing with a physical illness or acute injury where recovery is assured, both justice and the interests of the individual would be served by a short delay to allow recovery. However, as in Dewani's case where 'the quantification of the degree of risk to life is less certain and the prognosis is also less certain' things become more difficult. As Dewani's article 2 and 3 rights under the ECHR were not threatened, the judge found that 'it is plainly in the interests of justice that [he] be tried in South Africa as soon as he is fit to be tried'.[72]

However, given the medical evidence – which was accepted by both the South African authorities and Dewani's defence team – immediate extradition would 'present a real and significant risk to the life of the appellant' and exacerbate and prolong his inability to plead. This would be against the interests of justice which demand as speedy a trial date as possible. The judge was also not

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[68] *Ibid*.

[69] Council Framework Decision on the European arrest warrant and the surrender procedures between Member States issued by the Council of the European Union at Brussels 7/6/2002, 7253/02, Interinstutional file 2001/0215 (CSN), COPEN 23, CATS 9.

[70] Paragraph 73.

[71] Paragraph 75. It would therefore appear that Dewani will, in principle, face extradition to South Africa. The question is when rather than whether and this depends on his mental condition.

[72] Paragraphs 76 78.

entirely convinced that Dewani would receive the necessary treatment at Valkenberg and pointed to a lack of assurances from the South African government in this regard as opposed to those provided for incarceration. Considering all Dewani's circumstances, Ouseley found that Riddle had erred in not finding that it would be unjust or oppressive to extradite him at this stage. Interestingly, the judge specifically downplayed the role the risk of suicide had played in his decision.[73]

The appeal was allowed.

Having succeeded in his appeal, one might be forgiven for thinking that Dewani has 'won the day'. In terms of the judgment delivered by Judge Riddle and certified by Theresa May, Dewani was subject to immediate extradition to stand trial in South Africa. In the judgment of Justice Ouseley, on the other hand, he was not to be extradited at this stage. It is, however, a Phyrric victory. Weighing the two judgments against one another, it is clear that both judges regarded Dewani as 'extraditable' the difference came in the timing. Where does this leave Dewani and South Africa?

Dewani is left in limbo. For as long as he remains depressed and traumatised, he is safe from return to South Africa. When he improves, he will be extradited – hardly a prospect designed to lift depression. Dewani is subject to regular hearings in the UK court to assess progress in his recovery and in between he is held under the Mental Health Act so hardly wandering the streets or living any semblance of a normal life.

For South Africa, too, things are not all positive. While it is reassuring that both courts found that South Africa's prison system – though far from ideal – meets the minimum international standards required by the United Nations, to have decided otherwise would have been disastrous for the country. On the other hand, South Africa has finalised the cases against Dewani's 'co-accused' one of whom is seriously ill. The longer Dewani avoids prosecution before the South African courts, the more difficult – evidence wise – it will be for the authorities to secure a conviction. It should also not be forgotten that when his extradition is eventually ordered, as the judges appear confident it will be, he will in all likelihood appeal to the ECHR and so prolong the process still further.

Michele Olivier
Reader in Law, University of Hull, UK
Neville Botha
Professor of International Law, University of South Africa

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[73]Paragraph 83.