**IN THE WESTMINSTER MAGISTRATES' COURT**

**B E T W E E N :**

**GOVERNMENT OF THE UNITED STATES OF AMERICA**

**Requesting State**

**-v-**

**AMIT FORLIT**

**Defendant**

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# DEFENCE SKELETON ARGUMENT

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## A. INTRODUCTION

1. Amit Forlit is the subject of an extradition request issued by the Government of the United States of America (**the Requesting State**), on charges arising out of an investigation into alleged computer hacking. Mr Forlit is not the principal in that investigation, but is accused of having "*procured, assisted and/or encouraged*" the hacking,[1] during the period 2012 to 2019. The conduct on which the charges are based was multi-jurisdictional. The alleged hackers operated out of New Delhi, India.[2] The targets of the hacking operation are said to have been based in the United States.[3] Mr Forlit was at all relevant times a citizen and resident of Israel.[4]

2. The Requesting State has yet to file an opening note and draft charges, despite two written requests by the defence that it do so, in accordance with the High Court's guidance in *Biri*

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[1] CPS letter to Corker Binning, 20 December 2024
[2] US indictment, §3
[3] US indictment, §§6-9
[4] US indictment, §1

*v Hungary* [2018] EWHC 50 (Admin) at §§28-42. The first such request was as long ago as 16 August 2024 – see §4 of the Statement of Issues.

3. In order for the defence to make meaningful submissions on the question of extradition offences (a matter on which the Requesting State bears the burden, to the criminal standard), it is essential that a properly pleaded case is served which addresses both territorial jurisdiction and dual criminality, accompanied by draft English 'charges' as is entirely orthodox practice in Part 2 cases. Once received, the defence will be in a position to indicate whether any issue is taken under s.78(4)(b) of the 2003 Act.

4. This skeleton argument sets out Mr Forlit's defence to extradition on the following grounds:
   i. **Issue One** – extraneous considerations by reason of political motivation (s.81(a) and (b) of the 2003 Act);
   ii. **Issue Two** – extraneous considerations by reason of nationality (s.81(b) of the 2003 Act) / flagrant breach of fair trial rights (Article 6 ECHR and s.87 of the 2003 Act);
   iii. **Issue Three** – injustice by reason of the passage of time (s.82 of the 2003 Act);
   iv. **Issue Four** – prison conditions (Article 3 ECHR and s.87 of the 2003 Act).

## B. ISSUE ONE – EXTRANEOUS CONSIDERATIONS (POLITICAL OPINION)

**Introduction**

5. Climate policy is a politicised topic in many jurisdictions, but perhaps none more so than the Requesting State. For the reasons expanded upon below, it is submitted on behalf of Mr Forlit that the criminal prosecution brought against him is but one piece within a complex matrix of ongoing litigation on climate issues in the United States, which can only sensibly be seen as politically motivated, in the sense of being brought to pursue and further specific political agendas. His extradition is therefore barred by reason of extraneous considerations, under s.81 of the 2003 Act.

**Legal framework**

6. Section 81 of the 2003 Act provides:

***81 Extraneous considerations***

*A person's extradition to a category 2 territory is barred by reason of extraneous considerations if (and only if) it appears that—*
*(a) the request for his extradition (though purporting to be made on account of the extradition offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or*
*(b) if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions.*

7. There are two distinct limbs to the extraneous considerations test.

8. Extradition will be barred pursuant to s.81(a) if it appears (on the balance of probabilities) that the request has been made to prosecute or punish the requested person on any of the prohibited grounds, rather than on an evidence-led prosecutorial basis. There has to be a causal link between the issue of the request and one of the stated grounds (*Hilali v Central Court of Criminal Proceedings Number 5 of the National Court of Madrid* [2006] EWHC 1239

(Admin)). This is a backward-looking question, which calls for an assessment of the state of mind of the authority which issued the extradition request.

9. The test under s.81(b) is forward-looking, requiring the Court to consider what may happen in the future if the defendant is extradited. Extradition will be barred if there is a reasonable chance (alternatively expressed as reasonable grounds for thinking, or a serious possibility) of the prohibited consequences (prejudice at trial or detention, punishment or restriction in liberty) occurring and of the causal link between those consequences and the political opinions of the accused: *Hilali* at §62.

10. A broad purposive construction should be given to the 'political opinions' ground. In particular, it is not necessary to show political action or activity; political opinions can be those held by the person or those imputed to him; and it is not appropriate to maintain a rigid distinction between political opinions on the one hand and economic opinions on the other (*Emilia Gomez v Secretary of State for the Home Department* [2000] INLR 549).

11. This broad construction has been applied by the current Senior District Judge in the most recent decisions on Russian extradition requests, in which he held that "*the [extraneous considerations] bar encompasses cases where the requested person may not have personally given 'political opinions' but includes cases where the confluence of the motive behind the request and political pressure, or as in some previous Russian cases where the interests of the State, big business and influential businessmen are so inseparable as to be in effect one [and] the same thing*" (*Government of the Russian Federation v Lyashenko,* 29 November 2021; see to like effect *Government of the Russian Federation v Malyshev*, handed down on the same date).

12. In *Cabal v United Mexican States* [2001] FCA 427, the Federal Court of Australia held (in the context of its materially similar bar to extradition) that in carrying out an assessment whether an extradition request has been made on account of extraneous considerations, the proper approach is to assume that there is *prima facie* evidence of guilt. This follows from the principle (endorsed by the English courts in *Emilia Gomez*, *supra*), that it is not necessary to show that political persecution is the prosecutor's <u>only</u> motivation; it is sufficient if political reasons form <u>part</u> of their motivation.

13. The mischief against which s.81(a) seeks to guard is a request being made because of political opinions. This is in no way inconsistent with the offence having been committed. It is of course acknowledged that if a *prima facie* case of the extradition offence is shown it assists the Court in evaluating whether the request is made because of political opinions. This is because the converse is often determinative of the matter (*Asliturk v Government of Turkey* [2002] EWHC 2326 (Admin), at §§24 and 26). Nonetheless, it is by no means a complete answer under section 81(a) for a requesting state to adduce evidence said to point to guilt.

**Submissions**

14. It is important for the criminal allegations against Mr Forlit to be sited within their proper context. He stands charged with a conspiracy to carry out computer hacking against individuals and entities involved in (or directly associated with) environmental activism. The hacking is alleged to have been commissioned by DCI Group, a lobbying firm[5] representing ExxonMobil, one of the world's largest fossil fuel companies.[6]

15. ExxonMobil is a target of civil investigations and litigation launched by attorneys general (**AGs**) in numerous (Democrat) states, principally alleging that it is responsible for spreading climate disinformation. This campaign of litigation is acknowledged in the extradition request, with the moniker "*the 'Climate Change Litigation'* ".[7] The prosecution of Mr Forlit is therefore inextricably linked with the Climate Change Litigation faced by ExxonMobil;[8] litigation which is – in the polarized world of US party politics – unquestionably political.

16. This is why, in the unusual circumstances of this case, it is accordingly submitted that both limbs of the extraneous considerations test are made out:

[5] DCI Group is "*an independent public affairs firm specializing in strategic communications, coalition management, ally engagement, media relations, and digital advocacy*".

[6] Ciphers are used in the US indictment, but for the purpose of the political motivation argument it is important for the Court to know and understand at least the key parties and their roles. In any event, most if not all of those parties have already been identified in reporting surrounding the case.

[7] Affidavit of AUSA Zverovich in support of the extradition request, §10

[8] It is alleged that some of the 'hacked' documents were relied upon by Exxon in its defence to the Climate Change Litigation brought by the AGs: " *Exxon's lawyers cited media articles based on the stolen emails to parry investigations by U.S. state attorneys general*" - https://www.reuters.com/world/us/mercenary-hackers-stole-data-that-exxon-later-cited-climate-lawsuits-us-2023-10-12/

i. As to s.81(a), it is the defence case that one of the reasons underpinning the prosecution is to advance the politically-motivated cause of pursuing ExxonMobil, with Mr Forlit a form of collateral damage in that endeavour.

ii. As to s.81(b), it is submitted that (by the same analysis) there is a serious possibility that Mr Forlit might be punished, detained or restricted in his personal liberty by reason of his position as a person caught in the political web of the Climate Change Litigation.

17. Climate policy in the Requesting State is an inherently political issue. A report on climate change attitudes, published by the Pew Research Center in August 2023, illustrated the depths of polarisation along partisan lines, with 78% of Democrats (up 20 percentage points from a decade ago) describing climate change as "*a major threat to the country's well-being*", a statement with which only 23% of Republicans agreed. For Democrats, addressing climate change fell in the top half of priority issues, and 59% called it a top priority. Among Republicans, it ranked second to last, with just 13% describing it as a top priority.[9]

18. Scott Walter is president of a US think tank which specialises in studying the persons and institutions (particularly non-profits) that influence US public policy. He formerly served in the George W. Bush administration as Special Adviser to the President for Domestic Policy. His affidavit identifies and draws together a wide range of open-source materials which establish, beyond doubt, the powerful and entrenched connections and overlap between, on the one hand, major actors in the environmental and climate movement and, on the other hand, the Democratic Party. Similar links can be drawn on the other side of the political divide (see, for example, the appointment by President Trump of Rex Tillerson – former CEO of ExxonMobil – as Secretary of State in the period 2017-2018).

19. The Requesting State is a famously litigious society, and it is uncontroversial to note that its courts can be and have been deployed as political battlegrounds (the issues of abortion rights and the scope of presidential immunity being but two clear recent examples). It is also critical to the submissions which follow to underline that US state AGs are elected

[9] Walter, fn1

positions, with successful candidates appointed after campaigning on openly political platforms.

20. The public records and media reports produced by Mr Walters highlight the overtly political origins of the Climate Change Litigation. It has its genesis in a series of meetings held in LaJolla, California in 2012, which took the form of 'workshops' on "*Climate Accountability, Public Opinion and Legal Strategies*". A report of those workshops was published,[10] setting out what has become known as the "*LaJolla Strategy*". The LaJolla Strategy explicitly sought to:

    i. Adopt an approach to climate action inspired by that which was deployed against the tobacco industry, namely strategic litigation.[11]
    ii. Exploit the value of "*bringing internal industry documents to light*", using the same tactics as in the Philip Morris case, in which "*the legal discovery process ultimately brought some 35 million pages of industry documents to light*". This should be viewed as "*an objective independent of the litigation, or else the most valuable documents are not likely [to] be made public*." [12]
    iii. Address the issue that "*any legal strategies involving court cases require plaintiffs, a venue, and law firms willing to litigate – all of which present significant hurdles to overcome*."[13] One means of overcoming this obstacle was to identify "*sympathetic*" state AGs, since they "*can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light*."[14]

21. The LaJolla strategy was duly put into effect. Climate activists (and their heavyweight financial and political backers – as to which, see further below) targeted and lobbied (only) Democrat AGs,[15][16] pressing them to deploy governmental litigation powers against fossil fuel companies, notably ExxonMobil.

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[10] *Walter*, §§36-42 and fn44 (**LaJolla Report**)
[11] LaJolla Report, section 2: "*Lessons from Tobacco Control: Legal and Public Strategies*"
[12] Ibid., and see also section 3: "*Climate Legal Strategies: Options and Prospects*"
[13] Ibid., section 2
[14] Ibid., section 3
[15] *Walter*, §42
[16] In response, a group of 19 Republican AGs filed a motion to the US Supreme Court, seeking a cessation order on the cases filed by the Democrat AGs - https://apnews.com/article/climate-change-lawsuits-oil-states-234edc15b4045ecb9eff0b5e27ca0aa5#

22. The Attorney General of New York (**NYAG**), in the period 2011 to 2018, was Eric Schneiderman. He spent ten years as a New York State Senator (Democrat) before being elected NYAG. The Climate Change Litigation was formally launched with the NYAG's subpoena of ExxonMobil in November 2015.[17]

23. It is only very recently that the political lobbying which underpinned that act has been laid bare, by the disclosure of a tranche of public records in November 2023. As Mr Walters explains at §§43-46 of his affidavit, the US District Court for the Southern District of New York granted leave for Energy Policy Advocates (**EPA**) (a non-profit which campaigns on governmental transparency in energy policy) to file an *amicus curiae* brief in the NYAG's case against ExxonMobil.[18] That brief, which attaches and analyses the disclosed public records, reveals the extent of the role played by the Rockefeller Family Fund (**RFF**) – one of the Democratic Party's most longstanding and significant donors[19] – in working with climate activists to push the NYAG into launching the litigation.

24. EPA summarised its argument in this way in the *amicus* brief:

> "*If public records revealed that the origin of governmental litigation against a high-profile private individual was lobbying or otherwise outside pressure — by an ideological advocacy group and/or representatives of a political party, even with the assistance of national media outlets — this surely would prove the basis for a media attention, and cries of political and legal scandal. Yet documents prove that this is indeed how a massive national litigation campaign, of which the instant matter is a part, came into being... According to public records, the objective underpinning these 'climate' prosecutions of varied sorts is to obtain changes to national policy, changes which have eluded the proponents of the litigation through the proper means.*"

25. The litigation brought against ExxonMobil by state AGs have not fared well on their merits. For example, in 2019 a New York judge dismissed with prejudice all causes of action brought by the NYAG in a claim alleging that ExxonMobil had issued materially misleading statements to investors on the risks of climate change and their impact on its business.[20] Following a 21-day trial, Judge Ostrager held that the Office of the Attorney

[17] *Walter*, §§43-44
[18] *Walter*, fn50-52
[19] *Walter*, §47 and fn55
[20] *Walter*, §48 and fn56

General had failed to prove that ExxonMobil made any material misstatements or omissions about its practices and procedures that misled any reasonable investor. The Judge's summary of the evidence – including that of the NYAG's own witnesses – points to a case which was deeply flawed from the start; nonetheless (in a telling detail which speaks to the influence of the LaJolla Strategy), the litigation triggered pre-trial discovery "*that required ExxonMobil to produce millions of pages of documents and dozens of witnesses for interviews and depositions… [including] reams of proprietary information relating to its historic and contemplated investments*." Judge Ostrager also placed on record the existence of "*certain politically motivated statements by former New York Attorney General Eric Schneiderman*", and criticised the NYAG's Complaint as "*hyperbolic*".

26. Whether or not in response to the lack of success for the Climate Change Litigation at state level, campaigners have also turned their sights to the Department of Justice (**DoJ**). Much as the DoJ is required to be functionally independent, no secret is made of its powers being adopted for political ends or priorities. The Guardian newspaper reported on 2 August 2024 that "*[f]or years, climate advocates and some lawmakers have said that the Department of Justice should file a similar case*" to those brought by the states against big oil, quoting the reasoning of one president of a climate non-profit: "*The DoJ is a completely different animal. Its power is far greater than any attorney general's office in a state…They have the FBI, they have a lot more investigative resources and they've got a lot more authority than a state attorney general is ever going to have*".

27. In an indication of how the US administration's choice of attorney general shapes law enforcement policy, the article went on to report that Jamie Henn (director of the "*climate accountability non-profit*" Fossil Free Media) had called on (then presidential candidate) Kamala Harris to "*make climate accountability a priority*", including by "*appointing an attorney general who is willing to lead a new lawsuit on behalf of the Department of Justice (though the agency operates independently from the White House)*". That such a call can be made entirely openly gives the lie to any suggestion by the Requesting State that the DoJ's law enforcement priorities are solely evidence-led.

28. A yet further facet of the political influence at play in the prosecution of Mr Forlit is the simple fact that many of the identified targets of the alleged hacking scheme are themselves figures with a political profile and/or strong links to the Democratic Party. For

example, Tom Steyer (who is understood to be the individual referred to in the US indictment as "*Victim 1*") is a billionaire who has been described as the top "*all-time Democratic donor*" by OpenSecrets, a non-profit which researches federal political spending in the Requesting State.

29. In July 2019, Mr Steyer declared as a candidate for the 2020 Democratic Party presidential nomination. During the 2018 to 2024 election cycle, he made political donations totalling $476.4 million, of which $317.9 million served to support his own campaign.

30. He has established a number of non-profits under the umbrella banner 'NextGen', a California-based NGO which support the policies and election of Democrats. Next Gen is understood to be the organisation referred to in the US indictment as "*Victim Organisation 1*".

31. The document entitled 'Appendix A', attached to the affidavit of Mr Walters, draws on open-source and public records to analyse the political affiliations of, and political support provided by, other entities and individuals who are understood to be alleged victims of the hacking scheme with which Mr Forlit stands charged. It is submitted, in short, that the entire premise of the case against Mr Forlit is that he (together with others) targeted figures who were supporters and allies of a political project.

**Conclusion on Issue One**

32. The context summarised above provides ample grounds for believing that the prosecution of Mr Forlit is politically motivated and/or that he might, if extradited, be punished, detained or restricted in his personal liberty on politically motivated grounds. A person caught in the crosshairs of a political battle may invoke the statutory bar, irrespective of whether or not they personally hold political opinions which would trigger persecution. It follows that the lack of any investigation into Mr Forlit's personal political opinions[21] is entirely irrelevant to the test.

33. As foreshadowed at §§12-13 above, it is no answer in those circumstances to contend that there may be evidence of an offence. Nor is the Requesting State's bare assertion that Mr

[21] Zverovich declaration, §32

Forlit is not being prosecuted for political reasons and that the charges have a proper objective basis[22] sufficient to rebut the grounds advanced above.

34. The Court is accordingly invited to discharge Mr Forlit, pursuant to s.81 of the 2003 Act.

[22] Ibid., §31(a)

## C. ISSUE TWO - EXTRANEOUS CONSIDERATIONS (NATIONALITY) / ARTICLE 6 ECHR (SELF-INCRIMINATION)

**Introduction**

35. On 19 October 2021, FBI agents interviewed Mr Forlit as a suspect in its investigation into the alleged computer hacking conspiracy in respect of which he now stands indicted (**the FBI interview**). The interview took place at the American Embassy in London, Mr Forlit having been lured there under entirely false pretences, purportedly the culmination of some months of intermittent discussion between him and the FBI on an entirely unrelated topic.

36. The FBI interview proceeded without: (i) notification to Mr Forlit that he was a suspect, (ii) notification of his right to remain silent, (iii) notification of his right to consult a lawyer, or (iv) offering him an opportunity to leave when the true purpose of the interview was made clear.

37. The defence have filed expert evidence to the effect that, in those circumstances, Mr Forlit has a credible claim under US law that his *Miranda* rights were violated and that the statements he made during the interrogation (on which the Requesting State places great weight in its prosecution and extradition request) should be excluded at trial. <u>However</u>, the same expert evidence also concludes that, as a foreign national, Mr Forlit is at real risk of being precluded under US law from invoking his *Miranda* rights.

38. As a matter of extradition law, therefore, the potential inability of Mr Forlit to challenge the use against him of statements he made during the FBI interview constitutes:
    i. Prejudice at trial by reason of his nationality, thereby barring extradition pursuant to s.81(b) of the 2003 Act; and/or
    ii. A flagrant breach of his right to a fair trial under Article 6 of the ECHR, thereby requiring his discharge pursuant to s.87 of the 2003 Act.

**Legal framework**

***(i) Extraneous considerations by reason of nationality – s.81 of the 2003 Act***

39. The provisions of s.81 of the 2003 Act, and the approach to their application, are dealt with at §§6-9 above.

40. The non-availability to a non-US national of a legal argument at trial which would be available to a US national, would constitute prejudice by reason of nationality for the purposes of s.81(b) of the 2003 Act: *Government of the United States of America v Assange* [2024] EWHC 700 (Admin) at §§172-180.

41. It is trite that questions of foreign law fall to be determined as issues of fact, on which expert evidence is usually required: *Assange* at §174; *Suppipat v Narongdej* [2023] EWHC 1988 (Comm), at §908.

***(ii) Fair trial – Article 6 ECHR / s.87 of the 2003 Act***

42. Extradition will be incompatible with Article 6 of the ECHR in circumstances where there is a real risk[23] of a flagrant denial of justice in the requesting state (*Soering v United Kingdom* (1989) 11 EHRR 439). This goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if they occurred domestically. The breach(es) must be "*so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article*" (*Othman v United Kingdom* (2012) 55 EHRR 1).

43. Article 6 of the ECHR provides (so far as relevant):

*1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*

…

*3. Everyone charged with a criminal offence has the following minimum rights:*

[23] The 'real risk' threshold has been held to be met on percentage terms of somewhere between 5% and 13%: *Rae v United States of America [2022] EWHC 3095 (Admin)* at §37

...

*(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require*

44. Article 6 applies to any person subject to a criminal charge, which is defined by the Strasbourg jurisprudence as existing from "*the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him*": *Ibrahim v United Kingdom* No. 50541/08 at §249 (emphasis added).

45. Whilst not explicitly mentioned in Article 6, the right to remain silent and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the concept of a fair trial as guaranteed under Article 6(1), as the caselaw of the ECtHR confirms.

46. A person "*charged with a criminal offence*" for the purposes of Article 6 (see above) has the right to be notified of his or her privilege against self-incrimination: *Ibrahim v United Kingdom* No. 50541/08 at §272.

47. The use by law enforcement authorities of subterfuge to elicit information that they were unable to obtain during questioning has been held to constitute a form of compulsion which breaches the protection against self-incrimination: *Allan v United Kingdom*, No. 48359/99; cf *Bykov v Russia*, 4378/02 at §§101-102.

48. In *Salduz v Turkey*, No. 36391/02, the ECtHR held that "*[t]he rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.*" In subsequent judgments, this was clarified as not imposing an absolute rule; however the absence of compelling reasons for the restriction on access to a lawyer will weigh heavily in the balance when assessing the overall fairness of the criminal proceedings. Where a suspect is not notified of the right to legal assistance, or of the privilege against self-incrimination and the right to remain silent, it will be even more difficult for the Contracting State to show that the proceedings as a whole were fair: *Ibrahim* at §273.

49. Other questions relevant to the overall fairness assessment include how important the incriminating statements are to the case against the defendant, and whether the defendant has an opportunity to challenge the authenticity of the statements and oppose their use at trial: *Ibrahim* at §274.

**Submissions**

***(i) Relevant evidence***

50. The evidence filed by the defence in support of its arguments on this issue comprises:
    i. The proof of evidence of Mr Forlit;
    ii. The affidavit of Eshed Shvero;
    iii. The affidavit of Elan Baret;
    iv. The expert report of Dr Roy Schondorf, on relevant aspects of Israeli law; and
    v. The expert reports of Barry Pollack, on relevant aspects of US law.

51. A preliminary issue arises as to the admissibility of the evidence relied upon by the Requesting State in response. On 20 December 2024, the CPS filed and served an unsworn 'declaration' of AUSA Olga Zverovich dated 19 December 2024 (**the Zverovich declaration**). It is accepted that the declaration is signed by an officer of the Requesting State, and is therefore duly authenticated for the purposes of s.202(2) of the 2003 Act.

52. However, the fact that the Zverovich declaration may be a receivable document does not make its contents admissible in evidence. That is because the appropriate judge in extradition proceedings is required to apply the ordinary rules of criminal evidence, "*as nearly as may be*" as if these were summary proceedings for an offence (see s.77(1) of the 2003 Act, as construed by Lord Mance in *R (B and others) v Westminster Magistrates' Court and others* [2014] UKSC 59; see also *R (Government of the United States of America) v Senior District Judge, Bow Street Magistrates' Court* [2006] EWHC 2256 (Admin) at §76).

53. Objection is taken on two grounds to the contents of the Zverovich declaration:
    i. Insofar as AUSA Zverovich purports to give evidence about matters of fact concerning the arrangements leading up to, and the conduct of, the FBI interview,

that evidence is hearsay, since she was not involved in the arrangements nor present at the interview. Whilst the Court has a discretion to admit hearsay evidence in extradition proceedings, it should decline to do so in circumstances where the sources of the evidence are not identified (see *Prendi v Government of the Republic of Albania* [2015] EWHC 1809 (Admin), cf. *Friesel v Government of the United States of America* [2009] EWHC 1659 (Admin)).

ii. Separately, insofar as AUSA Zverovich purports to give evidence about matters of United States law, it is submitted that she is not competent to do so, given her patent lack of independence in these proceedings.

54. Without prejudice to the above objections, and in order to assist the Court in the event it prefers to consider the Zverovich declaration *de bene esse* and rule on its admissibility as part of judgment on the merits, its content is nonetheless addressed as part of the submissions which follow.

***(ii) Factual background***

55. There appears to be limited factual dispute regarding the background to the FBI interview.

56. Mr Forlit is an Israeli citizen, who served with Shin Bet (Israel's internal security agency) from 1990 to 1997. On leaving, he founded a private investigations firm called Gadot Information Services (**Gadot**), which offers tailor-made security (both physical and electronic) to its clients and provides complex cross-border investigative services including asset tracing, litigation support and lawful surveillance. Gadot's clients include top-tier law firms, lobbying companies and hedge funds.

57. In the course of his professional activities, Mr Forlit came into possession of information and data from very valuable sources (**the Disclosures**), which he recognised as relevant to investigations of the highest level of importance to the US Department of Justice, US State Department and to the White House.[24] In May 2021, Mr Forlit arranged to have the content of the Disclosures verified by a retired Israeli senior police officer, Hezi Leder,

[24] Whilst further detail is disclosed in the extradition request, the sensitivity of the information is such that Mr Forlit is not in a position to elaborate further in public documents or in open court, save to confirm that the Disclosures had no connection at all to the subject-matter of what later transpired to be the charges against him.

who had FBI contacts having previously acted as a US liaison officer. Mr Leder then set up a meeting in Tel Aviv between Mr Forlit and an FBI representative (identified to him as 'Rusty').

58. The meeting took place on 2 June 2021. Mr Forlit provided the FBI officer with a copy of a report containing an initial analysis of the Disclosures and 'Rusty' promised he would deliver this to FBI headquarters and that, if the FBI had follow-up questions, they would be in touch. Passing mention was made by Mr Forlit that he was acquainted with Aviram Azari (**AA**), who had been arrested and detained in New York on computer hacking charges, but AA was not the subject of the meeting.

59. Mr Forlit was subsequently contacted via WhatsApp by two other FBI agents, Shane Crumlish (**SC**) and Matthew Sheasby (**MS**). MS met with Mr Forlit twice in Israel (on 24 August and 1 September 2021), to discuss the contents of his report concerning the Disclosures. The meetings in Israel were not – as the Requesting State now appears to contend – 'interviews'. They were not arranged as such or conducted as such. After the second meeting, MS indicated that his team wished to set up a further meeting in a third party country.

60. SC then contacted Mr Forlit via WhatsApp, suggesting a meeting in London on 13 October 2021. Mr Forlit was busy with work meetings that day and instead suggested travelling to Greece or Dubai on 14 October; however SC was keen to meet in London and so it was ultimately agreed that the meeting would take place on 19 October 2021.

61. The Zverovich declaration refers to and attaches some of the WhatsApp messages. At no point do they give any indication that the purpose of the meeting in London would be anything other than a continuation of discussions concerning the FBI's interest in the Disclosures.

62. Mr Forlit expressed reluctance to meet in the American Embassy and proposed an alternative venue; however, SC stated that he would need approval from the UK government to hold a meeting in any other venue. It is not clear on what basis this representation was made, or whether it was believed to be true by the FBI agent presenting it. In response to Mr Forlit asking for written assurance that he would be free to return to

Israel on the day of the interview, SC suggested this would be difficult to produce in the timeframe, but undertook that the interview would be "*entirely voluntary*" and Mr Forlit "*would be able to leave at any time during and after*". He explained that he had no authorisation to detain Mr Forlit and did not intend to seek any.

63. Mr Forlit stated that he wished to work with the FBI "*as partners*". This was a clear reference to their collaboration with respect to the Disclosures. In response, SC stated: "*I think we're on the same page.*" On that basis, Mr Forlit agreed to attend the meeting at the American Embassy without written reassurance that he would be free to leave.

64. On 19 October 2021, Mr Forlit attended the American Embassy, accompanied by Eshed Shvero, an intelligence analyst with whom he worked. The sole purpose of Mr Shvero's attendance (which had been approved by the FBI in advance) was to assist in the explanation of the contents of the Disclosures; in other words, his very presence is evidence of Mr Forlit's ongoing understanding – based on all the prior discussions with the FBI agents – as to the purpose of the meeting.

65. The pair were met by two FBI agents on arrival at the Embassy. They were both searched by armed security and required to surrender their electronic devices. They were then escorted to a conference room by the FBI agents.

66. At the very outset of the meeting, SC apologised for not disclosing the real reason for wanting to speak with Mr Forlit in advance of him attending. He revealed that in fact the FBI were not there to discuss the Disclosures or any future cooperation regarding the information they contained. The meeting instead proceeded as an interview of Mr Forlit about matters to do with AA and the computer hacking investigation. Mr Eshed was only asked one question (whether he had ever met AA).

67. On the true purpose of the interview being revealed, Mr Forlit was not:

    i. informed that he was a suspect in the computer hacking investigation;
    ii. informed of his right to silence;
    iii. informed of his right to consult with a lawyer;
    iv. asked to confirm if he was still willing to continue with the interview;
    v. given an opportunity to leave.

68. The interview lasted around three hours, during which time the door remained shut and no food or drink was offered. It has now been confirmed by the Requesting State that, despite Mr Forlit being told the interview was not being recorded, one of the FBI officers did in fact take notes of his answers.

69. It is submitted that any reasonable person in Mr Forlit's position would have considered themselves constrained to stay and answer the questions put to them. Taking into account (i) that the interview was taking place in US government premises; (ii) that Mr Forlit had travelled there from his home country; (iii) that he had been searched by armed guards on arrival; (iv) that his phone and other belongings had been taken from him by those guards; (v) that he had been accompanied at all times whilst inside the premises; (vi) that the interview took place over the course of three hours, (vii) in a room with the door closed; and that, (viii) <u>crucially</u>, when the entire purpose of the interview was revealed to have changed, at no point was Mr Forlit offered the opportunity to leave – this can only sensibly be characterised as an interview held in circumstances of compulsion.

70. That conclusion is reinforced by the (uncontested) evidence that, had the FBI sought to interview Mr Forlit as a suspect without resorting to subterfuge – in other words, had it sought the permission of the Israeli authorities to conduct an interview of an Israeli resident under the applicable MLA provisions – Mr Forlit would have been entitled to procedural safeguards of precisely the type denied to him at the FBI interview.

71. Under Israeli law, these include: (i) notification of the person's status as a suspect in a criminal investigation; (ii) notification of their right to silence (subject to the potential for such silence to be taken into account by a court); (iii) disclosure of the central facts substantiating the suspicion underpinning the interview; and (iv) notification of/giving

effect to their right to consult with a lawyer. An additional protection of the rights of a suspect lies in the obligation for any interrogation of a suspect to be documented in writing and – in cases involving allegations of offences punishable by ten years' imprisonment or more – by audio-visual recording. [25]

72. That the FBI was seeking by underhand means to procure from Mr Forlit statements against his interests, for use in bolstering its otherwise threadbare case, is reinforced by the circumstances surrounding his deposition in civil proceedings in 2022. The context is addressed at §§42-49 of Mr Forlit's proof of evidence, as corroborated by the affidavit of his civil attorney, Elan Baret.

73. Mr Forlit was deposed in Israel in July 2022, pursuant to a court order made by a Florida court in civil proceedings brought by an individual named Farhad Azima (**FA**) against Gadot and other companies. In that context he was compelled to answer questions not in his personal capacity but as Gadot's representative. In fact, it became increasingly clear that FA's lawyer was seeking to elicit information from Mr Forlit (i) in his personal capacity and (ii) on topics which had no connection to the subject-matter of the Florida case. The lines of questioning were strikingly similar to those deployed in the FBI interview. Moreover, there were details underpinning the questions which FA's legal team could not have known without access to the FBI's investigation materials.

74. In short, it can only be inferred that the FBI were liaising with FA's legal representatives to elicit information from Mr Forlit in a compelled context, for use in its case against him. This contention – squarely put in the defence evidence – is studiously side-stepped in the Zverovich declaration, which responds that the "*<u>prosecution team</u> on this case had no involvement in, and has no <u>personal</u> knowledge of, the Azima matter*" (emphasis added).[26] That is nothing to the point (nor is the highly caveated suggestion that Mr Forlit's deposition is not "*presently*" intended to be used against him in the computer hacking case). The importance of the FA deposition is that it is a further example of the FBI's abusive attempts to procure admissions from Mr Forlit, in a manner entirely consistent with – and therefore corroborative of – its behaviour concerning the FBI interview.

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[25] *Schondorf*, §§49-70. Dr Schondorf notes at §67 that, whilst there is no Israeli caselaw regarding the application of the Investigation of Suspects Law to interrogations conducted pursuant to a request for mutual assistance, to do so is consistent with the provisions of sections 8(a) and 8(b) of the Legal Assistance Law.

[26] Zverovich declaration, '*Other Responses*'

75. By luring Mr Forlit to the American Embassy in London, rather than seeking to interview him as a suspect in accordance with internationally-established MLA procedures, the Requesting State engineered the bypassing of basic legal protections which form essential components of the protection against self-incrimination under Article 6 of the ECHR.

***(iii) Importance of the FBI interview to the prosecution case***

76. The statements made by Mr Forlit in his FBI interview on 19 October 2021 do not include any admission of criminal conduct. They are nonetheless statements which fall squarely within the legal definition of 'self-incrimination', being matters which may assist the prosecution in establishing aspects of its case against him. In fact it is clear that they form a central plank – indeed, the cornerstone – of that case.

77. Much of the extradition request is given over to a summary of the alleged hacking conspiracy as a whole. The role said to have been played by Mr Forlit is succinctly set out at §11(2): "*FORLIT or [Co-Conspirator 4] provided lists of individuals or accounts of interest to the D.C. lobbying firm to Aviram Azari, the principle and owner of an Israel-based private investigation and intelligence firm*."

78. However, this case theory does not appear to be supported by any independent evidence, as is clear from the footnote which accompanies §11(2). This explains that "*the investigative team lacks copies of direct communications from FORLIT or [Co-conspirator 4] to Azari identifying particular victims for hacking*", and explains that the evidence is instead limited to proof of "*ties between the Firms and Azari*", taken together with an inference invited from what is said to be a coincidence in timing at the outset of the alleged hacking.

79. <u>Importantly</u>, the same footnote then continues: "*In addition, as described below, FORLIT participated in a voluntary interview with the FBI in October 2021, during which he admitted that he passed email accounts to AZARI and asked Azari to run those accounts through Azari's database of hacked materials*."

80. In other words, despite investigators having gained access to email accounts said to be associated with Mr Forlit, no content from any of those accounts is cited in the extradition

request as evidence that he identified targets to AA and tasked the latter to carry out computer hacking. Instead, the key evidence cited in support of that case theory is the FBI interview (see §§43, 56(3) and 59(1) of the extradition request).

81. In a request for further information, the DoJ was asked by the CPS to "*identify what evidence exists that proves the extradition offences occurred that is independent of the responses Mr Forlit gave in his interviews with law enforcement. Please provide as much detail as possible.*"[27] It is telling that not one single piece of additional evidence was identified in response, the Zverovich declaration simply referring to the entire description of conduct presented in the extradition request (at §§4-42) and to two further paragraphs which reference Mr Forlit's statements in the FBI interview (§§56 and 59).

***(iv) The position under US law***

82. The defence rely on two expert reports prepared by Barry J. Pollack, a US attorney of over 30 years' standing. Mr Pollack – who is independent of Mr Forlit's defence team – is admitted to practise law in the State of Maryland, the District of Columbia and the State of New York. His private practice has focused on criminal defence; alongside which he has served as President of the National Association of Criminal Defense Lawyers and President of the Mid-Atlantic Innocence Project. He is a Fellow of the American College of Trial Lawyers and a Fellow of the American Board of Trial Lawyers; as well as a recipient of numerous honours and awards. He is an Adjunct Professor at the prestigious Georgetown University Law Center, where he teaches a course entitled "*Anatomy of a Federal Criminal Trial*".[28]

83. Mr Pollack has a depth of experience before federal and state courts at first instance, and before the appellate courts. This has included many cases raising issues related to rights under the US Supreme Court case, *Miranda v Arizona*, 384 U.S. 436 (1966). His reports address whether there is a risk that, as a foreign national, Mr Forlit might be treated differently than a United States citizen would be treated with respect to his *Miranda* rights; and whether the circumstances of the FBI interview are capable of giving rise to a claim

[27] CPS RFFI, undated
[28] *Pollock 1*, §§1-7

that Mr Forlit's *Miranda* rights were violated, such that any statements made by him during that interview should be excluded at trial.[29]

84. Put simply, *Miranda* rights are those which the US Supreme Court has held an individual must be apprised of before being subjected to custodial interrogation. They include the right to remain silent, notice that any statements made could be used against the individual, the right to speak with an attorney and, if the individual cannot afford an attorney, the right to have an attorney appointed for them at the government's expense. A violation of an individual's Miranda rights is a basis to have the statements excluded from the prosecution's evidential case.

85. In the expert opinion of Mr Pollack,[30] there is a real risk that *Miranda* rights could be held not to apply to foreign nationals interrogated abroad. At present, the leading authority which discusses this issue is a decision of the United States Court of Appeals for the Second Circuit.[31] This assumes, without deciding, that the *Miranda* framework "*generally governs the admissibility in our domestic courts of custodial statements obtained by U.S. officials from individuals during their detention under the authority of foreign governments".* However, the issue remains unresolved. By contrast, US nationals may invoke *Miranda* rights irrespective of where the interrogation takes place, because their citizenship allows them to retain many constitutional and other rights even when they travel abroad.

86. Mr Pollack's second report responds to the arguments set forth in the Zverovich declaration (should the latter be considered by the Court, whether *de bene esse* or substantively). None of those arguments cause him to revise his opinion. In summary:
    i. AUSA Zverovich's arguments concerning the ability of a foreign national tried before a US court to invoke the Fifth Amendment as part of his procedural trial rights are simply irrelevant to the (legally distinct) question at issue, namely whether *Miranda* rights applied to his prior interrogation on foreign soil; and
    ii. The suggestion by AUSA Zverovich that "*the prosecution will not dispute that FORLIT is entitled to invoke the Miranda framework*"[32] is meaningless, since no individual AUSA is empowered to bind the prosecuting authority (the United

[29] *Pollock 1*, §§8-13
[30] *Pollack 1*, §§16-19
[31] *In re Terrorist Bombings of US Embassies in E Afr,* 552 F.3d 177 (2d Cir.2008)
[32] Zverovich declaration, fn2

States Attorney's Office for the Southern District of New York). More fundamentally, questions of law are for the court and not the prosecution to determine. Whatever the view of AUSA Zverovich, since the legal issue remains unresolved, it would plainly be open to the trial judge to rule that Mr Forlit – as a foreign national – did not enjoy the benefit of *Miranda* rights for the purposes of the FBI interview.

87. The second question addressed by Mr Pollack's expert evidence is whether Mr Forlit would have a credible claim that his *Miranda* rights had been violated – leaving aside the question of the applicability of those rights to foreign nationals interrogated abroad. This question arises <u>only to the extent that</u>, if there is no conceivable merit to such a claim, whether he would be shut out by reason of his nationality from raising it at trial becomes academic. Or, put another way, neither the test of 'reasonable chance' or 'serious possibility' that he would be prejudiced at trial (s.81(b)), nor the test of a 'real risk of a flagrant denial' of his fair trial rights (Article 6 ECHR / s.87) would be met.

88. That nuance is important, because it is not for this Court to seek to adjudicate in the abstract on evidential admissibility applications governed by foreign law. The sole issue arising for present purposes is whether a claim that the FBI interview violated the rights protected by *Miranda* is <u>arguable</u>, or merely <u>fanciful</u>. For the reasons explained in Mr Pollock's two reports, it is submitted that the claim is plainly arguable.

89. *Miranda* rights are only engaged if an individual is subjected to custodial interrogation. There is no dispute that Mr Forlit was interrogated, but there may be a dispute as to whether he was in custody. As Mr Pollock explains, the courts in the Requesting State look to the totality of the circumstances to determine whether a reasonable person under the circumstances would have believed that he was free to leave.[33] After reviewing the relevant facts,[34] he concludes that:

> "*considering the totality of the circumstances of his interrogation by United States law enforcement agents – both the circumstances set forth in the Proof of Evidence and the affidavit of Mr. Shvero – a reasonable person would not have felt free to leave and he was therefore in*

[33] *Pollock 1*, §22
[34] *Pollock 1*, §§23-27

*custody when he was interviewed without being apprised of his rights as required by the Miranda decision*."

90. Mr Pollock's second report responds to the counter-arguments of AUSA Zverovich on the question whether a reasonable person in Mr Forlit's circumstances would have felt free to leave.[35] As he rightly notes, the analysis in the Zverovich declaration is partial and selective, omitting salient features which do not fit the Requesting State's conclusion. In any event, it is submitted that there are ample grounds to conclude that Mr Forlit has a more than 'merely fanciful' claim of a *Miranda* violation under US law.

91. If, therefore, the Court accepts Mr Pollock's analysis that there is a reasonable chance or serious possibility that Mr Forlit might, by reason of his nationality, be precluded from asserting that claim before the trial court in the requesting state, it follows that extradition is barred pursuant to s.81(b) of the 2003 Act.

92. If, in the alternative, the Court were to find that there is real risk of Mr Forlit being precluded from asserting any claim of a *Miranda* violation for some reason <u>other</u> than his nationality, it is submitted that this would instead found a finding that he is at real risk of a flagrant denial of his fair trial rights under Article 6 of the ECHR (specifically, his right to the protection against self-incrimination as guaranteed by the Strasbourg jurisprudence highlighted at §§43-49 above).

**Conclusion on Issue Two**

93. For the reasons outlined above, the Court is invited to discharge Mr Forlit pursuant to s.81(b), alternatively s.87, of the 2003 Act.

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[35] Zverovich declaration, §§26-30

## D. ISSUE THREE - PASSAGE OF TIME

**Introduction**

94. The extradition of Mr Forlit is submitted to be barred under s.82(a) of the 2003 Act, because it would be unjust or oppressive by reason of the passage of time.

95. A short chronology of the Requesting State's investigation and prosecution is provided below. The key period of delay relied upon by the defence is the wholly unexplained delay between the indictment and arrest of Mr Forlit's co-accused, AA, and his own indictment and arrest on this extradition request. It is during that period that Mr Forlit was lured to the FBI interview, and denied his basic rights as a suspect, in the circumstances described under Issue Two above. That is both a clear injustice to Mr Forlit and an oppressive change in circumstances, resulting directly from the Requesting State's delay in progressing its case against him. The passage of time bar therefore applies.

**Legal framework**

96. Section 82 of the 2003 Act provides (so far as relevant):

***82 Passage of time***

*A person's extradition to a category 2 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have–*
*(a) committed the extradition offence (where he is accused of its commission)…*

97. The definition of "*unjust or oppressive*" remains that of Lord Diplock in *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779 at 782-3, where he said:

*" 'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship of the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair."*

98. There is no minimum time period required for the statutory bar to be engaged, nor any threshold period at which extradition will either automatically or presumptively be barred. Each case turns on its own facts.

99. The correct approach to the 'injustice' test was further considered in *Gomes v Government of Trinidad and Tobago* [2009] 1 WLR 1038, in which the House of Lords held at §§3-34 that:

    i. If, because of the passage of time, a fair trial is now impossible, it would clearly be unjust to order extradition;
    ii. A court should, however, be very slow to come to such a conclusion where the state making the request is one that is shown to have, or may be presumed to have, appropriate safeguards to protect the defendant against unfairness resulting from the passage of time in the trial process;
    iii. The possibility or otherwise of a fair trial is not the only relevant consideration, as the question is not whether it would be unjust or oppressive to try the accused but whether it would be unjust or oppressive to extradite him.

100. Culpable delay on the part of a requesting state is usually only relevant as a factor of itself where it tips the balance in an otherwise borderline case. However, it may be relevant to whether a person was entitled to believe that they would not be the subject of enforcement: *Jeremy Eason v Government of the United States of America* [2020] per Leggat LJ (as he then was) at §35.

**Submissions**

101. The relevant chronology is as follows:

| | |
|---|---|
| **2012-2019:** | Period of alleged conduct |
| **March 2018:** | DoJ investigation begins |
| **27 August 2019:** | AA indicted |
| **29 September 2019:** | AA arrested |
| **19 October 2021:** | FBI interview of AF at the American Embassy in London |
| **20 April 2022:** | AA pleads guilty |
| **30 November 2022:** | Grand jury indictment against AF and arrest warrant issued |
| **16 November 2023:** | AA sentenced to 80 months' imprisonment |
| **30 April 2024:** | AF arrested in the UK, but discharged having not been brought to court as soon as practicable |
| **23 May 2024:** | AF surrenders by arrangement to extradition request and granted bail |

102. In *Kakis*, the delay at issue was a period of some four and a half years (April 1973 to December 1977). The key events on which the appellant's claim to injustice and oppression were founded occurred within an even shorter timeframe. Lord Scarman said at 790:

"*It is not permissible, in my judgment, to consider the passage of time divorced from the course of events which it allows to develop. For the purposes of this jurisdiction, time is not an obstruction but the necessary cradle of events, the impact of which upon the applicant has to be assessed.*"

103. The passage of time at issue in this case is up to 13 years (the conduct having allegedly begun in 2012). The key 'cradle of events' in Mr Forlit's case is the period of over four and a half years between the start of the DoJ investigation (March 2018) and the issuing of the grand jury indictment and arrest warrant against him (November 2022).

104. Within that period, it is submitted that there was culpable delay on the part of the Requesting State from at least August 2019 to November 2022 (more than three years). There is no apparent reason why the case against Mr Forlit lagged so far behind the case

against his co-accused AA, nor why the DoJ was not in a position to issue its indictment and arrest warrant against Mr Forlit much sooner after AA's indictment and arrest.

105. It was during that period of unexplained delay that the FBI engaged with Mr Forlit in the manner described at §§55-75 above, culminating in its scheme to lure him to the American Embassy in London for an interview carried out under wholly false pretences and in breach of Mr Forlit's fundamental due process rights.

106. The simple submission made on behalf of Mr Forlit is that, but for the delay in indicting him and seeking his arrest, the FBI interview would not have taken place and the flagrant unfairness described under Issue Two above would not have occurred. Instead it would have been necessary for the DoJ to follow proper procedures and request Mr Forlit's extradition (from Israel or elsewhere) or arrest him upon entry into the United States (as it did with AA). In either case, he would have to have been afforded proper due process rights.

107. The following points are important in this analysis:

    i. The injustice culminating in the FBI interview, and the prosecution's reliance against Mr Forlit on evidence it thereby obtained, is not one which the trial process in the Requesting State is capable of curing, for all the reasons outlined under Issue Two above.
    ii. In any event, it is not necessary under the 'injustice' limb of s.82 to show that Mr Forlit could not have a fair trial, rather that it would be unjust to extradite him. The conduct of the FBI during the period of time under consideration is submitted to amply meet that test.
    iii. The oppressive consequence here is the obtaining by the FBI of what it portrays as the cornerstone of its case against Mr Forlit. By delaying his formal arrest as a suspect, the prosecution induced him to act to his detriment.
    iv. Mr Forlit informed the FBI officers he met in Israel that he knew AA and was aware of his arrest in the Requesting State. That the FBI at that stage appeared only interested in the Disclosures and made no attempt to question him about anything related to the computer hacking investigation, is directly relevant to his state of mind when agreeing to meet with them in London. He had – no doubt deliberately – been lured into a false sense of security by the time which had passed between

AA's indictment and arrest. Not only had no action been taken against him during the ensuing three years, but (i) he was in direct contact with FBI agents, (ii) he had told them of his link to AA and (iii) they had – or so he believed – no interest in that matter and were focused on collaborating with him in respect of the Disclosures.

**Conclusion on Issue Three**

108. For the reasons outlined above, it is submitted that the passage of time has given rise to injustice and/or oppression, such that the extradition of Mr Forlit is barred under s.82 of the 2003 Act. The Court is invited to discharge him accordingly.

## E. ISSUE FOUR – INHUMAN AND DEGRADING TREATMENT CONTRARY TO ARTICLE 3 ECHR

**Introduction**

109. The extradition of Mr Forlit would be incompatible with his rights under Article 3 of the ECHR, by reason of the conditions of detention in which he would be held pending trial.[36]

110. There is only one federal detention facility in New York: the Metropolitan Detention Center in Brooklyn (**MDC**). It is notorious for the appalling conditions in which it houses inmates, as described in excoriating terms by numerous US District Court Judges throughout the last year alone. "*Disgusting, inhuman*", "*dangerous, barbaric*" are just some of the epithets applied by the New York courts to the conditions of confinement at MDC. As addressed in further detail below, and in the evidence of the defence expert witnesses, the inhuman and degrading treatment to which MDC inmates are subjected touches every aspect of their experience of detention: from the physical infrastructure to the crisis of understaffing and officer misconduct; from inter-prisoner violence and abuse to dangerously inadequate healthcare provision.

111. Such is the volume and consistency of complaints of inhumane treatment at MDC (described by one US judge as a "*steady drumfire*"[37]) that many prosecutors no longer even dispute that the state of affairs is unacceptable.[38] The Requesting State's Bureau of Prisons (**BOP**) recently stopped designating convicted prisoners to serve their sentences at MDC (a fact strikingly omitted from the letter signed in December 2024 by BOP Senior Counsel in support of these extradition proceedings, the admissibility of which is addressed further below).

112. Moreover, there is clear and compelling evidence that conditions at MDC are getting worse, not better. Insofar as any attempts are now being made by the Requesting State to halt the decline, these are too little and too late to yield any material effect. By any measure,

[36] The defence evidence and submissions are focused on pre-trial detention, since under the US system of post-conviction 'designation' it is impossible at this stage for the defence to identify the facility or facilities in which Mr Forlit might serve any sentence if convicted. This is particularly so for foreign prisoners, given their lack of geographical ties within the Requesting State: *Hurwitz*, §10; *English*, §11.
[37] *United States v Colucci* (5 August 2024)
[38] *United States v Chavez* (January 2024)

there is accordingly a real risk that Mr Forlit would, if extradited, be detained in conditions which are incompatible with his rights under Article 3 of the ECHR.

**Legal framework**

113. Article 3 of the ECHR provides: "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*."

114. The prohibition is absolute. It can therefore engage the responsibility of the United Kingdom as requested state in extradition proceedings, where there are serious grounds to believe that a person would face a real risk of being subjected to Article 3 ill-treatment in the requesting state. Importantly, this is not to impose on the requesting state ECHR obligations by which (as in the case of the United States) it may not itself be bound. Rather, any liability under the ECHR is incurred by the requested state if, by extraditing an individual, it exposes them to proscribed ill-treatment: *Saadi v Italy*, No. 37201/06 at §130.

115. It is in principle for a defendant to adduce evidence capable of proving that there are substantial grounds for believing that, in the event of extradition, they would be exposed to a real risk of being subjected to treatment contrary to Article 3. Where such evidence has been adduced, it is for the requesting state to dispel any doubts raised by it: *Saadi*, § 129.

116. It is well-established that persons detained lawfully will suffer a violation of Article 3 if they are subjected to hardship exceeding the unavoidable level of suffering inherent in detention: *Helhal v France* No. 10401/12 at §63. This has been construed as imposing minimum standards of detention conditions, including as to the space afforded each inmate, the use of solitary confinement, the provision of appropriate healthcare, and the respect of human dignity by law enforcement officials.

**Submissions**

117. It is anticipated not to be in dispute that there is a real risk in this case of Mr Forlit being detained in pre-trial custody if extradited. The Requesting State could have given an assurance that it would not object to his release on bail (not least given his longstanding compliance with all bail conditions in this jurisdiction). It has chosen not to do so; indeed

the materials it has filed in response to the defence evidence are entirely (no doubt deliberately) silent on its position as to bail. In those circumstances, there is plainly a substantial risk that, if extradited, Mr Forlit would be remanded in custody to await his trial.

118. In correspondence dated 2 September 2024, the CPS informed the defence that the "*US authorities*" had identified as "*possible prisons*" for Mr Forlit's pre-trial detention, MDC, Westchester County Department of Corrections and Essex County Correctional. The correspondence between the CPS and the Requesting State has not been disclosed, and it is therefore not clear in what circumstances or by whom it is said (if it still is) that Mr Forlit might be detained not in a federal facility but in a local institution not operated by BOP. The defence evidence unambiguously points to the most likely place of detention being MDC, which is the default prison facility for pretrial detainees in the Southern and Eastern Districts of New York;[39] and no materials or assurances have been filed by the Requesting State to displace that default position. On the contrary, it is expressly accepted in the Zverovich declaration that "*[t]ypically, federal detainees in the New York area are housed at the Metropolitan Detention Center in Brooklyn*".

119. For that reason, the defence expert witnesses focus their evidence on conditions at MDC. However, Ms Shroff also has first-hand experience of both Westchester and Essex County jails, which she describes as sharing "*many of the same problems and issues [as MDC and the larger prison system across the United States], such as staffing shortages, lack of basic medical care [and] healthy diet, and extreme violence.*"[40] That local jails have generally been perceived to be as or more dangerous than federal prisons is echoed by a report dated December 2023 published in the Federal Times.[41]

120. Three reports have been filed by the defence, each prepared by an eminent independent expert witness with detailed and direct knowledge of the conditions at MDC:

    i. ***Hugh Hurwitz*** is a prison management and reform consultant. He retired in 2021 from 16 years as an administrator with BOP, including a term of service as its Acting Director from May 2018 to August 2019 and two Assistant Director roles.[42]

[39] *Shroff*, §3; see also *English*, §§8-9
[40] *Shroff*, §9
[41] *Hurwitz*, fn31
[42] *Hurwitz*, §§1-3

He concludes that concerns about staffing, medical care, abuse and misconduct "*have reached a crisis state at MDC Brooklyn*", and that BOP has made little progress in addressing these problems which, if anything, "*seem to be worsening*", raising "*serious concerns about [BOP's] ability to safely detain and provide for those in its care and custody*".[43]

ii. ***Nicole English*** is a corrections consultant, and a specialist on all aspects of the federal prison system. She worked for BOP for 31 years in various capacities, culminating as Regional Director in the Northeast Region (which includes New York), managing 20 institutions and respective wardens. She had previously served as Warden or Assistant Warden in five different facilities, and as Assistant Director over the Health Services Division.[44] She summarises the reputation of MDC Brooklyn "*with both staff and external stakeholders as a place that is stark, violent and poorly-run*".[45] Like Mr Hurwitz, Ms English describes a worsening picture, with "*the poor medical care, terrible physical state of the facility, and general cultural problems involving misconduct of both staff and inmates mak[ing] MDC Brooklyn a dangerous place to reside*".[46]

iii. ***Sabrina Shroff*** is a criminal defence attorney, admitted to practise in the State of New York, in the US District Courts for the Southern and Eastern Districts of New York, and in the United States Court of Appeals for the Second Circuit. She spent 12 years (to 2019) as an Assistant Federal Defender for the Federal Defenders Office for the Southern District, before and since which she has had her own criminal defence practice, representing individuals accused of serious offences, from terrorism, kidnapping and murder to white collar and regulatory offences to theft of state and trade secrets. Since most of her clients are prosecuted in the Southern and Eastern Districts of New York, she attends prison meetings at facilities in New York and New Jersey multiple times a week.[47] Her report on MDC highlights the inordinate amount of time spent by inmates in isolation on 'lockdown';[48] grossly inadequate medical care;[49] severe physical problems including overflowing toilets, contaminated drinking water, vermin, broken emergency call buttons,

[43] *Hurwitz*, §46
[44] *English*, §§1-3
[45] *English*, §35
[46] *English*, §§47-49
[47] *Shroff*, §§6-10
[48] *Shroff*, §§17-23
[49] *Shroff*, §§24-26

temperature and ventilation failings and power outages;[50] as well as a culture of endemic violence and "*general lawlessness*", with "*corrections officers incapable of protecting the inmates*".[51] She describes the conditions at MDC being "*as dire as those that existed at the M[etropolitan] C[orrectional] C[enter]*" (the only other federal facility in New York, which had to be shut down completely in 2021 due to life safety concerns).[52]

121. A number of consistent themes emerge from the expert evidence, with the following identified as categories of notable dysfunction and risk.

122. ***First***, infrastructure: MDCs were designed for short stays, but in reality inmates' placements can last years.[53] Across the BOP estate, the prison infrastructure is aged and inadequately maintained, given it is required to operate in the harshest conditions and subjected to extreme abuse.[54] Limited funding and a backlog in repairs leads to ever-increasing disrepair, with BOP only able to spend money on emergent life safety issues.[55]

123. In 2019, MDC lost power for eight days "*in the dead of winter during a polar vortex, leaving inmates shivering in their bunks under dangerous conditions*". Citing this and numerous other physical issues (including black mould, extensive water damage, overflowing cell toilets and broken emergency call buttons), the Federal Defenders of New York sued BOP over the conditions at MDC in 2021. In the summer of 2023, BOP settled a class action lawsuit, "*agreeing to compensate 1600 inmates a total of approximately $10 million for enduring the frigid and inhumane conditions resulting from the power outage*."[56]

124. ***Second,*** food and drink: the tap water at MDC is contaminated and unsafe to drink, yet bottled drinking water is in short supply. The food provided to inmates is often unavailable or inedible/expired, with regular complaints (including from staff) about

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[50] *Shroff*, §§27-29
[51] *Shroff*, §34
[52] *Shroff*, §16
[53] *English*, §§9-10. This is borne out by AA's pre-trial detention in MCC, then (post-closure) MDC, from his arrest in September 2019 until his sentencing in November 2023.
[54] *Hurwitz*, §14, *English*, §38
[55] *Hurwitz*, §§15-17, *English*, §§36, 38
[56] *Shroff*, §27 and fn13; see also *Hurwitz*, §18

insect and maggot infestations. A client of Ms Shroff's is described as having lost 40lb in custody due to the quality of the food.[57]

125. ***Third***, staffing shortages: the staffing crisis at MDC is of long standing, and is described by Ms English as an "*acute*" example of the "*staggering*" crisis across BOP.[58] It spans all job types and levels of seniority: there have been eight Wardens and Acting Wardens at MDC between June 2019 and January 2024, with no-one staying in post more than a few months; meanwhile, at a supervisory level there is a "*frightening staff-to-inmate ratio*".[59] Even after the 2024 staffing 'surge' (so-called), MDC is still operating at 30% understaffed[60], with 157 positions still vacant.

126. The root causes for the staffing crisis are identified as pay (which inadequately reflects the New York cost of living),[61] and the "*somewhat notorious nature of the facility*" putting off seasoned BOP staff from working there.[62]

127. In consequence, MDC relies on 'augmentation' (the process of staff covering vacancies in positions not their own) and overtime, both of which have a direct negative impact on the conditions of detention and the treatment of detainees, leading to safety concerns and lowered discipline, work quality and morale.[63]

128. In *United States v Chavez*, District Judge Furman quoted Union President Rhonda Barnwell as complaining to the BOP Regional Director that the MDC staffing crisis meant one correctional officer had to maintain three housing units in a single shift, with little to no sleep. In an October 2023 memo decrying the shortages and dangerous conditions faced by correctional officers at MDC, Ms Barnwell demanded in stark terms: "*What are you waiting for, another loss of inmate life?*"

129. ***Fourth***, staff misconduct: there is evidence of a widespread culture of misconduct and abusive behaviour by correctional staff at MDC, the most egregious examples of which have made for lurid headlines.[64] In 2024 a correctional officer was sentenced to

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[57] *Shroff*, §§28-29
[58] *English*, §48
[59] *United States v Chavez*; see also *Hurwitz*, §§22-23
[60] *Shroff*, §30 and fn16
[61] *Hurwitz*, §25; *English*, §41; *Shroff*, §35;
[62] *English*, §42
[63] *Hurwitz*, §§24-25 and fn10, fn11; *English*, §41; *Shroff*, §35
[64] *Hurwitz*, §§26, 35-38

imprisonment for accepting bribes of more than $20,000 since 2020 in order for contraband drugs and cellphones to be smuggled into the facility.[65] In September 2023 another on-duty officer shot at a car, injuring the driver, during an unauthorised high-speed chase.[66]

130. The Department of Justice Office of the Inspector General (**OIG**) has made trenchant criticisms of BOP's routine refusal to rely on any inmate testimony in disciplinary proceedings against staff, finding that the agency's handling of misconduct allegations is contrary to both federal regulations and BOP policy, that it enhances the likelihood of employees avoiding accountability and is likely to embolden miscreant staff.[67] These findings chime with Ms Shroff's observations that inmates are not believed or protected when making allegations against correction officers, and even face retaliation for doing so.[68]

131. Ms English notes that, during her tenure as BOP's Northeast Regional Director, the staff culture issues endemic at MCC (where negligence, misconduct and outright job performance failures were held to have led to the suicide of Jeffrey Epstein, to cite but one highly-publicised safety breach) also existed at MDC, and that many displaced staff transferred from the former to the latter, "*compounding the existing problems there*."[69]

132. ***Fifth***, inter-prisoner violence and abuse: "*simply put, the BOP is unable to keep its inmates safe at MDC*".[70] On 30 September 2024, Associated Press News published an article with entitled "*Murders, mayhem and officer's gunfire lead to charges at Brooklyn jail where 'Diddy' is held*".[71] It reported on nine MDC inmates charged between April and August 2024 in connection with a "*spate of attacks*" within the prison, including two murders and an attack with a makeshift icepick, in addition to the high-speed gun chase carried out by an MDC correctional officer (considered at §129 above).

133. Lest it be thought the press was sensationalist in its reporting, if anything an even darker portrayal of the situation is to be found in the judgment of District Judge Brown in *United States v Colucci*, handed down on 5 August 2024. In reaching his decision that, in the event

[65] *Hurwitz*, fn28
[66] *Hurwitz*, fn24
[67] *Hurwitz*, fn29
[68] *Shroff*, §§34-35
[69] *English*, §§21-28, §32, §43, §45
[70] *Shroff*, §30; and see more generally §§32-34
[71] *Hurwitz*, fn38

the defendant were designated to serve his sentence at MDC, the term should be converted to home detention instead, Judge Brown conducted a damning review of what he described as "*catastrophic violence*" at the facility in (just) the five months prior to the hearing. His chronology of events, beginning at page 10 of the judgment, was introduced with a passage which bears repeating in full:

> *" 'Chaos reigns, along with uncontrolled violence.' [United States v] Griffin, 2024 WL 2891686 at *3 (describing rampant 'violence and the threat of violence' at MDC). Through review of sealed documents, official government statements, judicial opinions and news media reports, this Court has identified shocking instances of brutal violence within the facility. This review is necessarily limited, as the Court's access to relevant information was exceptionally narrow. In other words, there were, most certainly, other incidents not collected during this Court's review. Nevertheless, the results are staggering.*
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> *Each of the five months preceding this opinion was marred by instances of catastrophic violence at MDC, including two apparent homicides, two gruesome stabbings and an assault so severe that it resulted in a fractured eye socket for the victim. One knife attack was captured on a surveillance video producing images that are horrifying beyond words. The activities precipitating these attacks are nearly as unthinkable and terrifying as the ensuing injuries: drug debt collection, fights over illegal narcotics, resisting an organized gang robbery, internecine gang disputes and as-yet-unidentified 'brawls.' "*

134. He concluded that, "*Taken together, these incidents demonstrate a woeful lack of supervision over the facility, a breakdown of order and an environment of lawlessness within its confines that constitute unacceptable, reprehensible and deadly mismanagement*." The timing of his review, and of the instances of violence it encompassed, is submitted to be important when assessing the apparent contention of the Requesting State that significant improvements have been made at MDC as a result of the staffing 'surge' from January 2024. Such a position simply cannot stand alongside the findings in *Colucci.*

135. Mr Hurwitz highlights criticisms of BOP in late 2023 for failing to keep high-profile inmates safe, noting that Mr Forlit's background may make him more of a target than the average inmate.[72] It is of note, however, that in any event the targeting of high-profile

[72] *Hurwitz*, §39

inmates at MDC now sits alongside the breakdown of order and environment of lawlessness as laid bare in *Colucci*.

136. ***Sixth***, failings in the provision of medical care: the nature of detention centres creates an enhanced risk of the spread of infectious diseases.[73] The health risks are exacerbated by a lack of specialised or urgent medical services in detention centres (even less than in designated facilities intended to house serving prisoners).[74] Self-evidently, the severe staffing shortages among BOP medical personnel have a further direct detrimental impact on inmate medical care.[75] This leads to an over-reliance on community medical appointments (external to BOP facilities), which then imports logistical failures of timing, transport, and availability of accompanying officers, leading to missed appointments and care denied.[76]

137. These issues are endemic at MDC and have had grave, even life-threatening consequences. District Judge Furman in *Chavez* recorded a litany of examples of inadequate care and refusals to take inmates to hospital, in support of his conclusion that MDC was "*notoriously and, in some instances, egregiously slow in providing necessary medical and mental health treatment to inmates*".[77] The specific cases of Mssrs Goulbourne, Wise and Pickett – all MDC inmates whose unmet medical needs came before the New York courts in 2024 alone – are considered further below. Ms Shroff notes that this pattern of failures is echoed in her own experience of representing clients detained at MDC:

> "*I have personally represented inmates that, because of delayed or botched treatment, have suffered sinus abscesses (robbing him of the ability to speak clearly), blindness, and the growth of cancers. Even basic medical care is arbitrarily denied inmates. For example, one of my clients was denied a medical asthma inhaler for weeks for no apparent reason, despite my (and his) efforts to get him one.*"[78]

138. ***Seventh***, ill-treatment through isolation and solitary confinement: whilst the general population at MDC is housed in shared cells, it is Ms Shroff's experience that most inmates

[73] *Hurwitz*, §34; *English*, §§31, 37
[74] *Hurwitz*, §31
[75] *Hurwitz*, §27; *English*, §29 and fn5
[76] *Hurwitz*, §§28-30; *English*, §44
[77] *Shroff*, §24 and *United States v Chavez* (Shroff Exhibit B)
[78] *Shroff*, §24; see also *Shroff*, §25 and *Hurwitz*, §§32-33

will at one time or another find themselves in the special housing unit (SHU), whether for discipline or safety purposes. Those detained in SHU cells (comprising a concrete slab to function as a bed and seat, with a combination sink and toilet) are locked up for 23 hours a day. The current BOP director has herself admitted that single-celling is associated with a higher risk of suicide.[79] In addition, Ms English highlights incidents of MDC inmates being kept in "*phone booth sized holding cages for over 24 hours*", in violation of their civil rights.[80]

139. The most widespread risk at MDC, which applies to those housed in the general population as well as those in SHU, is posed by the "*near perpetual lockdowns (no longer explained by Covid 19)*", for which the facility has been repeatedly criticised.[81] Lockdowns (during which inmates are locked in their cells, prohibited from leaving for visits, calls, showers, classes, or exercise) are extensively used at MDC to compensate for staff shortages, or for security reasons.[82] For example, at the time of the decision in *Chavez*, inmates had been on 22-hour lockdown for most of the previous three weeks, following an assault on staff. However, lockdowns are commonly imposed without any prior incident, Judge Furman noting in *Chavez* that they were particularly frequent on weekends (Friday, Saturday and Sunday) and holidays; and that one inmate who had kept a log had recorded lockdowns imposed for more than 50% of his 247 days at MDC. Judge Furman described the MDC lockdowns as "*tantamount to solitary or near-solitary confinement, a practice that is increasingly viewed as inhumane*." [83]

140. Indeed, as Ms Shroff notes, the deleterious effects of this practice are well-documented. At §18 of her report, she cites a 2017 study which found that solitary confinement "*is psychologically painful, can be traumatic and harmful, and puts many of those who have been subjected to it at risk of long-term damage. . . There is not a single study of solitary confinement wherein non-voluntary confinement that lasted for longer than 10 days failed to result in negative psychological effects*." Those effects are not compensated by occasional contact with prison guards or legal representatives,[84] a fact recognised in the definition of 'solitary

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[79] *Hurwitz*, fn2
[80] *English*, §45
[81] *United States v Chavez* (*Shroff* Exhibit B)
[82] *Hurwitz*, §40
[83] *Shroff*, §17 and *United States v Chavez* (*Shroff* Exhibit B)
[84] *Shroff*, §20

confinement' in the United Nations' Nelson Mandela Rules.[85] It is settled law that the use of solitary confinement can meet the minimum threshold of severity for a violation of Article 3, with the relevant principles summarised in *R (AB) v Secretary of State for Justice* [2021] 3 WLR 494 at §§26 and 40-45.

141. The inordinate use of lockdowns at MDC has a negative impact on inmates' access to legal visits, with Ms Shroff observing that visits have been cancelled more frequently in the last 18 months than previously.[86] Even in the absence of lockdowns, non-US residents such as Mr Forlit are isolated by reason of the stringent and curtailing rules on family visits, which are limited to one hour per week including for those who have travelled from abroad. Restrictions on the timing of international phone calls likewise imposes a discriminatory barrier on family communications for non-US residents.[87]

142. The expert opinions filed in these proceedings, from which the above summaries of the deplorable conditions and ill-treatment of inmates at MDC are drawn, are submitted to be authoritative, meticulously-sourced and measured. They are, however, not the sole benchmark available to the Court for use in its Article 3 determination. As foreshadowed in the preceding submissions, there have been multiple judgments handed down by District Judges sitting in the Southern and Eastern Districts of New York which specifically address the inhumane treatment of detainees at MDC.

143. The sheer number of those judgments issued in the last year alone, taken together with the consistency of their findings, illustrates the scale, pervasiveness and perniciousness of the problems at the facility. They give the lie to any suggestion on the part of the Requesting State that only in cases involving elderly prisoners with pre-existing medical conditions have the New York judiciary taken the extreme step of prohibiting detention at MDC or that such decisions are the result of an outlier judge.[88]The summary which

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85 https://documents.un.org/doc/undoc/gen/n15/443/41/pdf/n1544341.pdf UN Resolution 70/175, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules),* 17 December 2015. Rule 44 defines solitary confinement as "*the confinement of prisoners for 22 hours or more a day without meaningful human contact*". Rule 43 classifies both indefinite and prolonged solitary confinement (the latter lasting in excess of 15 days) as forms of torture or cruel, inhuman or degrading treatment or punishment.

86 *English*, §40; *Shroff*, §22

87 *Hurwitz*, §§41-42; *Shroff*, §21 and fn9

88 As argued in the BOP letter: "*Judge Furman is only one of dozens of federal judges in New York who rule on pretrial detention*".

follows seeks to highlight, in chronological order, some of the key judicial findings from the past year.

144. **4 January 2024 - *United States v Chavez:***[89] District Judge Furman held that the conditions in MDC constituted 'exceptional reasons' why Mr Chavez, convicted of distributing and possessing with intent to distribute a substance containing fentanyl, should be granted bail pending his sentencing hearing ('exceptional reasons' being the legal threshold to displace a statutory presumption of detention).

145. Judge Furman drew on prior judgments of the District Courts and other sources of evidence to emphasise the lengthy history of reported concerns regarding conditions at MDC. Describing the current situation as an "*ongoing tragedy*", he identified three factors in particular in support of his decision. First, the inordinate time which inmates spend on lockdown. Secondly, that MDC is "*notoriously and, in some instances, egregiously slow in providing necessary medical and mental health treatment to inmates, especially where such care requires the attention of outside providers*". Here he cited one case from December 2023 (*Young*), in which MDC repeatedly defied court orders to transfer a defendant with MRSA infection to a medical facility (instead "*mistakenly*" transferring him into the SHU); and another from July 2023 (*Acosta*) involving the facility's failure to treat an inmate's broken cheek for so long that it ultimately had to be re-broken before being treated. Thirdly, he surveyed graphic reports of the physical conditions at MDC going back to 2016. These included the 2019 power outage in freezing temperatures; four days of "*planned maintenance*" to the electrical system in 2021 which involved a four-day lockdown with no power and no water, resulting in overflowing toilet buckets in inmates' cells; and a letter from Loretta E. Lynch (former US Attorney General) recording that as of late 2023, many if not most of the emergency call buttons at MDC were broken ("*even though those buttons are the only way (other than yelling and banging) to call an officer in emergency situations during a lockdown*").

146. Judge Furman quoted the remarks of District Judge McMahon in *United States v Days* (April 2021): *"It is the finding of this Court that the conditions to which [the defendant] was subjected are as disgusting, inhuman as anything I've heard about any Colombian prison, but more so because we're supposed to be better than that… I think you've suffered triply as a result."*

[89] *Shroff*, Exhibit B

147. The physical conditions at MDC were held by Judge Furman to be, of themselves, 'exceptional reasons' why the detention of Mr Chavez pending sentence would not be appropriate. In other words, his determination was expressly not reached on the basis of the defendant's age and ill-health (albeit he added that conditions at MDC in combination with those personal factors plainly satisfied the test "*in any event*").

148. Moreover, his opinion was deliberately framed to be of wide application. Citing with approval the decision of District Judge Engelmayer in May 2023 to similar effect, he said (emphasis added): "*Judge Engelmayer concluded, as the Court does here, that 'until the . . . Bureau of Prisons really can get its act together . . . , where a defendant is not a risk of flight, is not a danger to the community, and there aren't special reasons for them to be remanded, avoiding putting a defendant in conditions like that qualifies as an exceptional reason under 3145(c).'* "

149. **April 2024, *United States v Wise*:**[90] District Judge Gujarati heard that the failures by MDC medical staff to receive and review a CT scan, over a two-month period, resulted in the doubling in size of an inmate's lung tumour.

150. **1 May 2024, *United States v Golbourne*:**[91] District Judge Hall convened a hearing to address MDC's failure to treat the defendant's complaints of severe abdominal pain and vomiting, culminating in his collapse and hospitalisation with a ruptured appendix. At page 14 of the transcript, she highlighted what she perceived to be a pattern of failures in medical care at MDC:

> "*What this sounds like to me is that the MDC has come up with a post hoc rationalization for not providing this man with the appropriate medical care. This is not an anomaly. I am tired of hearing the defendants that are held at the MDC are not being provided with the necessary medical treatment. I just got off the phone with Judge Irizarry and, you know what, she, too, was not surprised to hear that I was holding a hearing concerning the medical treatment of an individual held at the MDC. And what makes it worse is that it appears to me that at least in this case there is a pattern of misrepresentations to defense counsel and the Court.*"

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[90] Considered in *United States v Pickett*, Shroff Exhibit C
[91] *Hurwitz*, fn32

151. **10 June 2024, *United States v Griffin*:**[92] District Judge Komitee granted a motion for compassionate release based primarily on the conditions at MDC for a defendant serving time for violating supervised release.

152. **July 2024, *United States v Nordlicht*:**[93] District Judge Cogan indicated that he might have sentenced an offender to incarceration "*if not for the length of the sentence landing him in the Bureau of Prison's Metropolitan Detention Center in Brooklyn*".

153. **5 August 2024, *United States v Colucci*:**[94] Judge Brown introduced his sentencing remarks in a significant tax fraud case (with nearly $1 million diverted from tax authorities in breach of trust) by noting the complicating effect of "*an extrinsic factor that looms large in nearly every bail and sentencing determination made in this judicial district: the dangerous, barbaric conditions that have existed for some time at the Metropolitan Detention Center ('MDC') Brooklyn*".

154. Like Judge Furman in *Chavez* <u>eight months</u> earlier,[95] Judge Brown's ruling quotes Union President Barnwell's call to action on the conditions at MDC: "*What are you waiting for, another loss of inmate life?*" He describes this as a "*prophetic inquiry*", there having been at least two further inmate deaths in the ensuing period. As indicated by the question, nothing in Judge Brown's detailed ruling suggests that by August 2024 any material action – still less improvement – was in evidence. On the contrary: "*Allegations of inhumane treatment at MDC continue… and judges in this district are subject to a steady drumfire of such charges, often uncontested by prosecutors.*"

155. The Judge cited a letter sent to him by a defence attorney about a diabetic client losing consciousness in a cell at MDC. Another inmate had to spend the night nursing him back to health with cold towels and sweets, supervising him until morning because no corrections officer could be summoned and the panic button was found to be broken. Judge Brown commented: "*While these conditions – prisoners locked down in housing units without any guards present combined with inoperable panic buttons – may seem unimaginable, it is well established that such deficits have been (sic) long persisted at MDC.*"

[92] Cited in *United States v Colucci*
[93] Cited in *United States v Colucci*
[94] *Shroff*, Exhibit D
[95] See §32 above

156. Turning to the endemic violence and lawlessness within MDC, Judge Brown described the US Government's evidence adduced in a prosecution of gang members detained there. Their criminal conduct whilst in custody was flagrant and brazen, parading their impunity by using contraband phones to post images of themselves to the very same social media account through which they had previously sold stolen opioids before their arrest. As noted at §§133-134 above, the Judge went on to produce a chronology of known incidents of inter-prisoner violence at MDC in the period March to June. These highlight both the scale and depravity of the attacks and the total lack of any effective oversight or protection on offer. A victim of a repeated stabbing attack received no medical care for the wounds to both arms, his abdomen and knee: instead, he was locked in a cell in the SHU for 25 days. Another inmate was stabbed 44 times in a brutal attack, carried out in an entirely unsupervised open area of the prison, which the perpetrators videoed.

157. Judge Brown emphasised that the examples cited in his chronology were likely to be the tip of the iceberg: "*While evidence of failures at MDC continues to accumulate, there is no complete public record of the problem, and the available information is contained in judicial opinions from two districts and sporadic media reports. In the pages that follow, the Court has endeavored to highlight some matters that have come to light recently to make determinations in connection with the sentencing in this case. The list is far from comprehensive; in fact, this Court lacks visibility into the overall issues. Furthermore, as another judge has previously observed, "there are far too many cases to cite*." He noted that, so commonplace have complaints about the deplorable conditions at MDC become, they are often reduced to shorthand, with the facility simply referred to as a "*national disgrace*").

158. Although the Judge did weigh Mr Colucci's age and health into consideration, he emphasised that the trigger for treating the case differently from a sentencing exercise involving any other prison in the Requesting State was MDC itself: "*the present conditions at MDC make such a sentence materially different than one served at a jail or prison elsewhere in the United States that is appropriately managed. A sentence served at MDC is materially different and necessarily disparate from one served elsewhere*."

159. **22 August 2024, *United States v Parish***:[96] the defendant was granted a reduction in sentence on the basis of (amongst other things) the conditions of detention he had endured

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[96] *Shroff*, §30

at MDC during 2021 and 2022. District Judge Torres held, citing *Chavez* and *Colucci*, that "*Courts in this Circuit recognize that the harsh conditions of confinement at the area's jails counsel in favor of a shorter overall sentence*."

160. **16 / 25 September 2024, *United States v Pickett*:**[97] this case, presided over by District Judge Morrison, concerned a 24-year-old inmate whose repeated complaints of "*excruciating agonizing pain*" in his leg, and inability to walk properly, were ignored by MDC medical staff over a six month period. Only when he fell and could not get up was he finally assessed in hospital, whereupon the visible tumour in his leg was diagnosed as cancerous.

161. Mr Pickett's sick call requests were described by Judge Morrison as "*stomach turning to read, given the frequency and the degree of pain that Mr Pickett was in, not just for a short period of time, but for months*". Yet each of those calls was treated by MDC staff as if a first complaint, with no reference back to his history.

162. The Judge's inquiry into the circumstances of MDC's failures took place against the backdrop of the Terence Wise case (see above), in which an inmate's lung tumour doubled in size during the period of delay by MDC in receiving and review a CT scan. Despite this involving some of the same medical staff, and despite the court hearing in the Wise case taking place a month before Mr Pickett's symptoms arose, it appears that no lessons were learned by the MDC medical or administrative staff. On the contrary, the hearing transcripts exhibited to the expert report of Ms Shroff disclose an extraordinary defensiveness on the part of BOP staff who attended to explain what had happened (including refusals to answer basic questions about what could have been done differently; a refusal to entertain any questions about the Terence Wise case, despite his explicit consent for his experience to be considered; Judge Morrison repeatedly warning the BOP attorney to stop feeding answers to the medical personnel; and confirmation that as at September 2024, no changes to systems or processes had been made to mitigate the risk of yet further repetition). Mr Pickett's attorney summarised the position pithily: "*So until the MDC is willing to recognize the issues, the systemic issues with the medical care at the MDC, this is going to continue to happen, and as we can see in the case of Mr. Pickett, it can have catastrophic, life-changing results.*"

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[97] *Shroff*, §26 and Exhibit C; see also *Hurwitz*, §33

163. **16 October 2024, *United States v Nunez*:** having already taken into account the "*uniquely harsh conditions*" the defendant experienced in MDC at sentencing, District Judge Torres held that she could and should invoke the same reason for ordering a six-month reduction of his sentence on compassionate grounds (with childcare responsibilities also a factor taken into account). She found that, since sentencing, "*conditions inside MDC have worsened to such a degree that the BOP has recently ceased designating prisoners to serve their sentences at MDC altogether*," noting reports of multiple inmates murdered at the facility in the summer of 2024.

164. That the authorities in the Requesting State are maintaining their refusal to recognise the issues at MDC is clear beyond doubt from the response which has been filed to the defence evidence in these proceedings.

165. On 20 December 2024, the CPS filed and served a letter dated 19 December 2024 from Timothy Rodrigues, Senior Counsel in BOP's Office of General Counsel (**the BOP letter**). The defence object to the admissibility of the BOP letter in these proceedings, under the same principles outlined at §52 above.

166. The BOP letter is emphatically not presented as a set of diplomatic assurances guaranteeing the treatment which would be afforded Mr Forlit in the event of extradition. The Requesting State could have filed such assurances; it has elected not to. Rather, the BOP letter purports to adduce opinion evidence (e.g. "*the MDC is capable of safely housing a prisoner fitting Mr Forlit's profile*"), when on any view a Senior Counsel for BOP is not independent on questions as to the conditions in a BOP facility. Had the Requesting State wished to instruct an independent expert to assess the conditions at MDC, it could and should have done so. Having not done so, a letter setting out partisan, unsourced assertions of opinion by someone so clearly *parti pris* should not be admitted into evidence.

167. Without prejudice to the above objection, and in order to assist the Court in the event it prefers to consider the BOP letter *de bene esse* and rule on its admissibility as part of judgment on the merits, the following submissions are made as to its content.

168. **First**, it confirms that MDC is a potential detention location for Mr Forlit in the event of extradition. It follows there can be no dispute that he is at real risk of being held there (the

sole question under s.87 of the 2003 Act therefore turning on whether there is a real risk of the conditions to which he would be exposed being in violation of Article 3 of the ECHR). Notably, it does not name any other candidate facility.

169. **Secondly**, to read the BOP letter is to be given the impression that MDC is a detention facility functioning entirely normally. No quarter is given to any hint of problems, issues or complaints. Even when addressing supposed "*positive changes*" since *Chavez*, there is no recognition of why change was (and remains) desperately called-for.

170. **Thirdly,** it is simply incorrect for the BOP letter to state that the rulings in *Chavez* and *Colucci* turned on their specific facts and, in particular, on the personal circumstances of those two defendants. Not only does that fly in the face of what Judges Furman and Brown themselves said, it ignores the litany of other cases (too many to count, per Judge Brown) in which the same and similar findings have been made. That some other judges may have applied the legal test of 'exceptional circumstances' differently is irrelevant to the reason for the defence citation of the decisions summarised at §§144-163 above; namely, the observations and findings recorded therein as to the deplorable state of MDC and the danger it poses to inmates.

171. **Fourthly**, although no specific dates are provided for the so-called positive changes implemented by BOP in response to the ruling in *Chavez*, it seems likely that many if not all of the rulings in *Wise*, *Golbourne*, *Griffin*, *Nordlicht*, *Colucci*, *Parish, Pickett* and *Nunez* post-date those changes, suggesting that the measures have had no material impact on the inmate experience at MDC. Certainly, it may be observed that the installation of new "*telehealth equipment*" in the Spring of 2024 (BOP letter, p3) had no positive impact on the ability of MDC medical staff to treat the excruciating pain of which Mr Pickett was complaining from that time onwards, nor to recognise and have assessed the fast-growing cancerous tumour in his leg. Nor did the increased staffing levels and higher rates of pay impact upon correctional officers' ability to protect inmates from the wave of violence in the summer of 2024, as recorded in Judge Brown's chronology in *Colucci*.

172. **Fifthly**, the contents of the letter are undermined by evidence which actually points to a worsening, not improving, picture (as found in October 2024 by District Judge Torres in *Nunez*, above). Former senior BOP administrators Mr Hurwitz and Ms English both cast

doubts over the likely impact of the reported staff increases.[98] Ms Shroff concurs, noting that the 'hiring surge', which still leaves 157 vacant positions at MDC, is too little too late to meet the needs of a "*years long chronic manpower shortage*."[99] The 'interagency operation' at MDC at the end of October 2024[100] – striking by its omission from the BOP letter – is a clear indicator that drastic interventions continue to be necessary to meet the dangerous, lawless, inhuman and degrading conditions at MDC.

**Conclusion on Issue Four**

173. For the reasons outlined above, the Court is invited to hold that Mr Forlit's extradition would be incompatible with his rights under Article 3 of the ECHR, and accordingly to order his discharge pursuant to s.87 of the 2003 Act.

**RACHEL SCOTT**
**Three Raymond Buildings**

**8 January 2025**

[98] *Hurwitz*, §§44-45; *English*, §49
[99] *Shroff*, §36
[100] *Shroff*, §37