Michaelmas Term
[2014] UKSC 59
On appeal from: [2014] EWHC 889 (Admin)

JUDGMENT

VB, CU, CM and EN (Appellants)

v

Westminster Magistrates' Court (Respondent)

and

The Government of Rwanda (Respondent)

and

The Crown Prosecution Service (Respondent)

and

CMK (Interested Party)

before

Lord Neuberger, President
Lord Mance
Lord Reed
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

5 November 2014

Heard on 11 and 12 June 2014

Appellant (VB)
Alun Jones QC
Sam Blom-Cooper
(Instructed by Frank Brazell & Partners)

Appellant (EN)
Diana Ellis QC
Joanna Evans
(Instructed by Clifford Johnston Solicitors)

Appellant (CM)
Tim Moloney QC
James O'Keeffe
(Instructed by O'Keeffe Solicitors)

Appellant (CU)
Edward Fitzgerald QC
Rachel Kapila
(Instructed by Hallinan Blackburn Gittings & Nott)

Respondents
James Lewis QC
Gemma Lindfield
(Instructed by Crown Prosecution Service)

Intervener (CMK)
Helen Malcolm QC
Mark Weekes
(Instructed by Bindmans LLP)

LORD MANCE (with whom Lord Neuberger and Lord Reed agree)

Introduction

1. The Supreme Court has before it appeals by four individuals, VB, CU,CM and EN, whose extradition is requested by the respondent, the Government of Rwanda ("GoR"), so that they may stand trial in Rwanda for crimes allegedly committed during the civil war which took place between April and July 1994. Memoranda of Understanding dated 8 March 2013 were made between the United Kingdom and Rwanda in respect of the four appellants and a certificate issued by the Secretary of State under section 194 of the Extradition Act 2003. Consequently, Part 2 (contained in sections 69 et seq) of the 2003 Act applies to the relevant extradition proceedings.

2. The main issues are whether, in the absence of any relevant statutory power, it is open to the district judge hearing the extradition proceedings (a) to use a closed material procedure to receive evidence which the appellants wish to adduce, or (b) in the alternative in relation to some of such evidence to make an irrevocable non-disclosure order providing for the disclosure of such evidence to the Crown Prosecution Service ("CPS"), but prohibiting its disclosure to the GoR. A subsidiary point is whether in relation to some of the evidence it would be possible to make an anonymity order, either under the Coroners and Justice Act 2009, section 87, or otherwise.

3. The GoR has sought previously, in 2007, to obtain the extradition of the appellants. The district judge was satisfied that there was a prima facie case of involvement in genocide and crimes against humanity, but in April 2009 the High Court discharged the appellants on the ground that the appellants faced a real risk of a flagrant denial of justice if returned to Rwanda to stand trial: *VB and others v Government of Rwanda* [2009] EWHC 770 (Admin).

4. Since 2009 there have been changes in Rwanda, including the introduction of facilities for witness protection, video-conferencing and the possibility of using international judges to try cases of alleged genocide, and in the light of these changes a number of national and international courts have held that other persons wanted for trial in Rwanda would receive a fair trial there. The appellants' case is that the risks remain, at least in relation to them and some of the Rwandan-based witnesses whose evidence they wish to adduce; that they themselves would as a result suffer a flagrant denial of justice, in breach of article 6 of the Human Rights Convention, or even torture or mistreatment

in breach of article 3, if extradited to Rwanda; that the evidence to demonstrate the existence of such risks requires, by the very nature of the risks, either to be received in closed session or to be disclosed only to the CPS; and that witness anonymity would, at least in relation to much of such evidence, offer no solution, since the content of the evidence is such as would necessarily disclose the identity of the witness giving it. None of this means that there is not and will not also be other evidence before the district judge, and some of it has already been called.

The extradition proceedings to date

5. The current extradition proceedings have been proceeding before District Judge Arbuthnot. The Government of Rwanda's evidence to establish a prima facie case has been read, and the District Judge has already heard, in open court, various witnesses called by the appellants. Among them is Ms Scarlet Nerad, co-founder of Centre for Capital Assistance and founder of Community Resource Initiative. She had investigated in Rwanda witnesses giving evidence for the GoR against CU and attested to meeting one of them, who had been tortured during the period ending in 2000 and remained too frightened of being tortured again to give evidence unless its disclosure was limited to the CPS, and to believing that others were in similar position. The appellants also called an expert, Professor Filip Reyntjens. Two further experts are scheduled to give evidence later in the proceedings, Dr Phil Clark to be called by the Government, who will it appears take issue with points made by Professor Reyntjens, and Professor Timothy Longman to be called by the appellants.

6. It is common ground that in relation to issues of extraneous circumstances (section 81), human rights (section 87) and abuse of process, it is established practice to allow extensive relaxation of the ordinary rules of evidence in extradition proceedings. However, the closed material which the appellants wish to adduce is, they say, factual and specific evidence which would not otherwise be capable of being adduced.

7. The issues thus arising regarding use of a closed material procedure were argued before District Judge Arbuthnot. She on 28th January 2014 gave a judgment in which she held herself bound by authority to hold that it would be unlawful to sit in private. However, during a case management hearing in December 2013 from which she excluded the Government of Rwanda's representative, those representing VB gave her a file of the proposed evidence and in January 2014 those representing CU sent her another file, not for disclosure to the Government. The District Judge recorded in her judgment (para 5) that she had read both files, and was "for the purpose of

this argument only prepared to accept they contain important and material evidence which is relevant to the issues I have to decide". After concluding that the applications to rely on the material in a closed hearing must fail, she also added (para 23):

> "I have concerns that there may be a risk of serious prejudice to the defence in making that decision but in all the circumstances I do not consider I have any choice. For that reason with some reluctance I refuse the application."

That was a comment which she made without the Government of Rwanda having had the opportunity to make submissions on, or to explore the accuracy of, the material in question. Unless and until the District Judge reached a conclusion on the permissibility of a closed material procedure opposite to that which she in fact reached, the right course would have been not to see or read the files.

8. In the course of her judgment, District Judge Arbuthnot also considered whether (if and to the extent that the substance of any of the proposed evidence could be disclosed) a witness anonymity order could be made under section 87 of the Coroners and Justice Act 2009. She thought not, in view of the requirement under section 87(3) that, in the case of an application by a defendant, the defendant must inform the prosecutor as well as the court of the identity of the witness.

9. The four appellants challenged the District Judge's judgment by judicial review, identifying the Westminster Magistrates' Court as defendant, the Government of Rwanda as first interested party and the CPS as second interested party. By judgment dated 27 March 2014, the Administrative Court (Moses LJ and Mitting J) granted permission, but dismissed the challenge to the District Judge's refusal to admit evidence that was not disclosed to the Government of Rwanda. The Administrative Court, effectively of its own motion, raised the question whether section 87 of the Coroners and Justice 2009 applied, and in its judgment expressed the view that it would enable the appellants to apply for a witness anonymity order in respect of any evidence the substance of which they were willing to disclose. The Court reached this conclusion on the basis that, although the appellants were defendants and the proceedings were criminal proceedings within the meaning of the 2009 Act, neither the CPS nor the Government of Rwanda was a prosecutor within the definition in that Act. There was thus no requirement under section 87(3) to disclose the identity of the relevant witnesses to anyone save the court.

10. On appeal to the Supreme Court, the main burden of the appellants' submissions has been taken by Mr Alun Jones QC for VB and by Mr Edward Fitzgerald QC for CU. Both endorse each other's submissions. They submit that under the previous legislative scheme the Secretary of State had a role which enabled him to decide whether extradition was appropriate in the light of material which the requesting state did not see, and that under the 2003 Act the courts must have been intended to inherit a similar role or freedom. They submit that extradition proceedings are not classic adversarial or criminal proceedings, but sui generis. They rely upon the established practice to relax the normal rules of evidence in relation to certain issues capable of arising in extradition proceedings (para 6 above).

11. These submissions all contribute to the further principal submissions, that the courts should recognise in respect of extradition proceedings a third exception to the normal rule identified in *Al Rawi*, that absent Parliamentary authority justice should be open as between all the parties to litigation; or that, alternatively and by analogy with the position in asylum proceedings (cf *W (Algeria) v Secretary of State for the Home Department* [2012] UKSC 8, [2012] 2 AC 115), the courts should recognise the GoR as a special kind of party and restrict disclosure to the CPS.

12. Mr Fitzgerald supports this last submission with the argument that, if an order for extradition were to be made on the basis of the open material alone, it would still be open to those appellants who are not United Kingdom citizens to apply for asylum, which application could be decided, both by the Secretary of State and (since there is a statutory scheme in place for use of a closed material procedure in asylum cases) by the courts, on the basis of both open and closed material. The resulting anomaly would be compounded by the possibility that those appellants who are United Kingdom citizens would, because they could not make an asylum claim, be worse off than those who were not (although the appellants also submit that their United Kingdom status might give them corresponding protection by a different route).

The Extradition Act 2003 - analysis

13. The 2003 Act was framed to provide a clear structure for decision-making. The Secretary of State's role was carefully delimited and section 70(11) now provides, by amendment made in 2013, that she "is not to consider whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998". Once an extradition request has been received and certified, and the person sought has been arrested under a provisional warrant and the appropriate judge has received the relevant

documents under section 70, the extradition hearing will be fixed to commence under section 76. At that hearing, according to section 77(1):

> "the appropriate judge has the same powers (as nearly as may be) as a magistrates' court would have if the proceedings were the summary trial of an information against the person whose extradition is requested".

14. Assuming that the District Judge is satisfied as to certain important preliminaries, she must then proceed under section 79 to consider whether any one of five potential bars to extradition applies. They are the rule against double jeopardy (section 80), extraneous considerations (section 81), the passage of time (section 82), hostage-taking considerations (section 83) and (since 14 October 2013) forum (section 83A-E). Section 81 provides:

> "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."

15. Assuming that none of the five bars applies, the judge must proceed under section 84 which provides:

> "(1) If the judge is required to proceed under this section he must decide whether there is evidence which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him.

(2) In deciding the question in subsection (1) the judge may treat a statement made by a person in a document as admissible evidence of a fact if -

(a) the statement is made by the person to a police officer or another person charged with the duty of investigating offences or charging offenders, and

(b) direct oral evidence by the person of the fact would be admissible

(3) In deciding whether to treat a statement made by a person in a document as admissible evidence of a fact, the judge must in particular have regard -

(a) to the nature and source of the document;

(b) to whether or not, having regard to the nature and source of the document and to any other circumstances that appear to the judge to be relevant, it is likely that the document is authentic;

(c) to the extent to which the statement appears to supply evidence which would not be readily available if the statement were not treated as being admissible evidence of the fact;

(d) to the relevance of the evidence that the statement appears to supply to any issue likely to have to be determined by the judge in deciding the question in subsection (1);

(e) to any risk that the admission or exclusion of the statement will result in unfairness to the person whose extradition is sought, having regard in particular to whether it is likely to be possible to controvert the statement if the person

making it does not attend to give oral evidence in the proceedings

(4) A summary in a document of a statement made by a person must be treated as a statement made by the person in the document for the purposes of subsection (2)."

16. If the judge decides under section 84(1) that sufficient evidence exists, she must then under section 87:

"decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998"

If she does so decide, she must send the case to the Secretary of State for her decision whether the person is to be extradited, informing the person of his right to an appeal to the High Court (which will not however be heard until after the Secretary of State has made her decision). The Secretary of State's role in respect of any case so sent her is closely circumscribed by section 97, which limits it to considering whether she is prohibited from ordering the extradition sought by section 94 (death penalty), section 95 (speciality), section 96 (earlier extradition to the UK from other territory or section 96A (earlier transfer to the UK by the International Criminal Court). If none of those sections applies, then (unless the request for extradition has been withdrawn or the person is discharged in the light of competing extradition requests or claims or on national security grounds), the Secretary of State must under section 93(4) order extradition.

17. The specific scheme introduced by the 2003 Act is not consistent with the appellants' submission that the court has simply acquired the like powers to any which the Secretary of State might have exercised prior to the Act. The scheme involves a tight delineation of the respective roles and powers of the Secretary of State and the courts, by reference to which the present appeals must be decided. The extradition process is now substantially judicialised. But the previous legislation also gave courts a significant substantive role in relation to the extraneous considerations now covered by section 81of the 2003 Act: see section 6(1) of the Extradition Act 1989; prior to that, it had a similar role, as regards any request made with a view to trial or punishment for an offence of a political character: see section 3(1) of the Extradition Act 1870, considered in *R v Governor of Brixton Prison, Ex p Schtraks* [1964] AC 556. Outside the express statutory scheme, the court can however consider whether an extradition request involves an abuse of process by the

requesting state: *R (Government of the USA) v Bow Street Magistrates' Court ("Tollman No. 1")* [2006] EWHC 2256 (Admin), [2007] 1 WLR 1157. None of these circumstances provides any support for the appellants' submission that any wider powers previously possessed by the Secretary of State must now by implication be exercisable by the courts.

18. The appellants' submission that extradition proceedings are not conventional criminal proceedings is correct, up to a point. They do not lead to conviction, but they are brought to obtain surrender for the purpose of trial abroad. They are an important aspect of enforcement of the rule of law worldwide. The jurisdiction of a magistrate in extradition proceedings is derived exclusively from statute: *In re Nielsen* [1984] AC 606, p 623D-E, per Lord Diplock. The 2003 Act prescribes that the district judge's powers are the same "as nearly as may be" as those possessed by a magistrate on a summary trial and that the judge's role is to "decide whether there is evidence that would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him": see sections 77(1) and 84(1) of the 2003 Act cited in paras 13 and 15 above. The appellants submit that section 77(1) is not to be read as covering evidential matters; on their case, it deals only with other matters such as powers over witnesses and the conduct of proceedings. The powers of a magistrates' court on a summary trial and of a District Judge under the 2003 Act are however statutory, and the natural effect of section 77(1) is to provide for all aspects of their exercise, including the admission and admissibility of evidence.

19. Both the general correctness of treating extradition proceedings as criminal proceedings, albeit of a very special kind, and the correctness of understanding section 77(1) in its natural sense as embracing evidence and procedure, are confirmed under the parallel provision in the previous legislation, the Extradition Act 1989, by *R v Governor of Brixton Prison, Ex p Levin* [1997] AC 741. In that case, Lord Hoffmann, in a speech with which all other members of the House concurred, said, at pp 746-747:

> "Finally, I think that extradition proceedings are criminal proceedings. They are of course criminal proceedings of a very special kind, but criminal proceedings nonetheless.
>
> Both case law and the terms of the Extradition Act 1989 point to extradition proceedings being categorised as criminal. First, the cases. In *Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] A.C. 147 this House approved the decision of the Court of Appeal in *Ex parte Alice Woodhall* (1888) 20 Q.B.D. 832 that the refusal of an

> application for habeas corpus by a person committed to prison with a view to extradition was a decision in a 'criminal cause or matter.' It would seem to me to follow a fortiori that the extradition proceedings themselves are criminal proceedings and in *Amand's* case Viscount Simon L.C. said, at p 156, that the cases demonstrated that 'the matter in respect of which the accused is in custody may be "criminal" although he is not charged with a breach of our own criminal law.'
>
> Secondly, the Extradition Act 1989. Section 9(2) and paragraph 6(1) of Schedule 1 require that extradition proceedings should be conducted "as nearly as may be" as if they were committal proceedings before magistrates. Committal proceedings are of course criminal proceedings and these provisions would make little sense if the metropolitan magistrate could not apply the normal rules of criminal evidence and procedure. The suggestion of counsel in *Ex parte Francis* that extradition proceedings were 'sui generis' would only make matters worse, because it would throw doubt upon whether the magistrate could apply the rules of civil evidence and procedure either."

20. The appellants submit that contrary indication is to be found in established case law and the provisions of section 202 of the 2003 Act. Section 202(3) providing that a document issued in a category 2 territory may be received in evidence in extradition proceedings if duly authenticated - which by section 202(4) means that it purports to be signed by a judge, magistrate or officer of the territory, or to be authenticated by the oath or affirmation of a witness. The purpose of section 202(3) is clearly to permit the use of such documents as evidence of the matters stated therein, about which oral evidence would otherwise have to be called. Section 202(5) goes on to provide that this does not prevent a document which is not duly authenticated from being received in evidence in proceedings under the Act. On its face, this simply extends the power to admit a document as evidence of its contents to unauthenticated documents. But it is unnecessary on these appeals to decide finally that this is as far as it goes, since it clearly cannot be read as addressing the issues whether any form of closed material procedure is permissible, now before the Supreme Court.

21. The parties to this appeal agree that, as a matter of established practice, the normal rules of evidence are relaxed on issues arising under the heads of extraneous considerations, human rights and abuse of process in extradition proceedings. At the root of their agreement on this point is the decision in *Schtraks*. There the House of Lords was considering the courts' role under

section 3(1) of the Extradition Act 1870, which prohibited surrender if the person requested

> "prove to the satisfaction of … the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character"

The House reasoned that, since the Secretary of State could not have been intended to be bound by the strict rules of evidence, the court could not have been intended to be.

22. In *Lodhi v The Governor of Brixton Prison* [2001] EWHC 178 Admin, para 89, and *Hilali v The Central Court of Criminal Proceedings No 5 of the National Court, Madrid* [2006] EWHC 1239 Admin, the Divisional Court was concerned with an issue of "extraneous circumstances" arising under, respectively, section 6(1) of the 1989 Act and section 13 of the 2003 Act. Making express reference to *Schtraks v Government of Israel* [1964] AC 556, it said (in paras 89 and 63 respectively) that it was, in this context, "common ground …. that the court is not restricted to considering 'evidence' in the strict sense" and "long …. established that the Court … is not bound by the ordinary rules of evidence; the appellant may rely on any material in support of a submission based on section 13".

23. The legislation has changed since *Schtraks v Government of Israel* [1964] AC 556, but it is unnecessary on this appeal to say anything more about the established practice on which the parties are agreed. Whatever its admissible scope, the Supreme Court understands it to be common ground that it does not extend beyond the areas of extraneous considerations, human rights and abuse of process; in particular, it does not apply to other issues such as whether a prima facie case has been shown under section 84(1). Under the current legislation, the better analysis may be not that the ordinary rules of evidence are suspended in the areas to which the practice is agreed to apply, but that a broad approach is taken to the nature and basis of the expert evidence that is admissible. In any event, any relaxation in the areas of extraneous considerations, human rights and abuse of process cannot affect the normal rule that applies to a witness called to give evidence before a court, viz that his or her evidence must be given and be capable of being tested *inter partes*. Any relaxation, on whatever basis, does not therefore help on the present issue whether the district judge can operate a closed material procedure without any statutory authority.

24. Reliance was also placed on a procedure accepted by the Divisional Court in *Tollman No. 1* [2007] 1 WLR 1157 (para 16 above), whereby a judge, before whom reason was shown to believe that an abuse of process had occurred, could call upon the requesting authority to provide whatever information or evidence he or she might require in order to adjudicate upon the issue so raised. Such information and evidence should normally be made available to the defendants, because (para 90)

> "Equality of arms requires that, in normal circumstances, the party contesting extradition should be aware of, and thus able to comment on, the material upon which the court will be basing its decision".

25. However, the Divisional Court in *Tollman No. 1* indicated that it was not open to the district judge to order the production of the material. If the requesting government was unwilling for it to be seen by a defendant, but prepared to allow the judge to see it, then the judge could evaluate its significance. If the judge concluded that its disclosure was in fairness required, the requesting government could be given a further chance to disclose, failing which disclosure the appropriate course would be to dismiss the extradition request as an abuse. The Divisional Court would by implication presumably also have regarded dismissal as appropriate if the requesting authority refused to allow the material to be seen even by a judge before whom reason had been shown to believe that an abuse of process had occurred.

26. *Tollman No. 1* is of no real assistance on the issue now before the Supreme Court. It concerns circumstances where a prima facie case of abuse of process is shown and the requesting authority cannot rebut that case without disclosing to the defendant material which it has. In such a case, it may well be appropriate to put the requesting authority to its election - to disclose such material or in effect abandon its request. The present appeal concerns circumstances where a defendant wishes, in support of its case, to rely on material which he has, without showing such material to the requesting government. Far from promoting the "equality of arms", of which the Divisional Court spoke in *Tollman No. 1*, the appellants' case involves departing significantly from it.

27. At the core of the appellants' case is the submission that extradition proceedings are special in a sense which justifies or calls for a further qualification of the principle of open justice, beyond any recognised in *Al Rawi v Security Service* [2011] UKSC 34. In *Al Rawi* and, more recently, in *R (British Sky Broadcasting Ltd) v Central Criminal Court* [2014] UKSC 17,

the courts were concerned with the question whether they could, without any statutory basis, use closed hearing procedures to enable public authorities to avoid disclosure to individual litigants of allegedly sensitive security material, including the identity of the witness providing it. This Court declined any general power to do so, and in *Al Rawi* at paras 63-65, per Lord Dyson, identified only two categories of potential exception to the normal rule: (a) child welfare cases where "the whole object of the proceedings is to protect and promote the best interests of the child" and (b) intellectual property cases where full disclosure would undermine the whole object of the proceedings (to protect intellectual property), so that "confidentiality rings" are permissible, at least at the interlocutory stage.

28. The appellants point to the underlying rationale of those cases, that "a departure from the normal rule may be justified by special reasons in the interests of justice": para 63, per Lord Dyson. In their submission, a further departure is justified in the present case by the protective nature of the bars to extradition which exist in cases of extraneous circumstances, potential human rights violations and abuse of process; and, if a closed material procedure is necessary in order to be able to demonstrate the existence of one or more of these bars, a closed material procedure must be permissible. The appellants submit that this is reinforced by a "triangulation of interests" present where public interest considerations militating in favour of extradition and trial are matched by the need to protect not only the appellants but also independent witnesses from risks of persecution, human rights violations and abuse of process. The phrase comes from Lord Woolf's speech in *R (Roberts) v Parole Board* [2005] UKHL45, [2005] 2 AC 738, para 48.

29. A principal difficulty about accepting these submissions is that they assume what they set out to prove. The appellants already have the benefit of expert evidence and such factual evidence as they are able to call without a closed material procedure. Expert evidence customarily includes material of which there is no direct proof, and it is, as stated, common ground on this appeal that the strict rules governing the adducing of factual material will not be applied to the relevant issues. It is inevitably only speculation that any material which the appellants might adduce in a closed material procedure would be relevant, truthful or persuasive, and the very nature of a closed material procedure would mean that this could not be tested. The same applies to any material which might be ordered to be adduced to the CPS on the basis that it would not be further disclosed to the GoR. The appellants are inviting the Court to create a further exception to the principle of open *inter partes* justice, without it being possible to say that this would be necessary or fair.

30. The two exceptions identified in *Al Rawi* differ from the further exception now advocated. In the first, the paramount object of the proceedings is not the resolution of an inter partes dispute, but the protection of a third party, the child. In the second, the object, to protect intellectual property belonging to one party, would be frustrated if the intellectual property were disclosed. Even then, in giving this example, Lord Dyson at para 64 made clear that its focus was on the interlocutory stages of proceedings; the trial could be expected to proceed on a fully *inter partes* basis, without use of the intellectual property as such in evidence.

31. *Roberts* was explained in this Court in *Al Rawi* as turning on the existence of an express statutory power to adopt a closed material procedure: para 55, per Lord Dyson. But, in any event, there is in the present case no "triangulation of interests" parallel to that identified by Lord Woolf in *Roberts*. The witnesses whose evidence the appellants wish to adduce are on no basis at risk. If a closed material procedure (or, where relevant, a limitation of disclosure of their evidence to the CPS) were ordered, they would not be at risk. But, equally, if a closed material procedure or such a limitation is refused, the appellants will not adduce their evidence at all. There is therefore a two-sided issue between the GoR and the appellants alone, not a triangulation.

32. As to the appellants' reliance on the special nature of extradition proceedings (para 19), the public and international interest in bringing potential offenders to trial is significant. So too of course is the public and human interest in ensuring that individuals are not surrendered to places where they will suffer risks of human rights or other abuses. But the assessment of each of these potentially competing factors falls to be determined on an *inter partes* basis between, in this case, the GoR and the appellants. It is an assessment subject to the clearly established statutory procedure in the 2003 Act, and it is one which, so far as appears from that Act, can and should be performed in the ordinary way by the adducing of evidence on the relevant issues on each side.

33. For good measure, I note that it was also a balance struck in relation to surrender to Rwanda for trial by the High Court in VB and others v Government of Rwanda [2009] EWHC 770 (Admin) (refusing surrender), but that there have been a number of subsequent decisions concluding that fair trial was possible in Rwanda - notably by the ICTR Referral Chamber on 28 June 2011 in respect of Mr Uwinkindi, the Oslo District Court on 11 July 2011 in respect of Mr Bandora, the European Court of Human Rights on 27 October 2011 in respect of Mr Ahorugeze, the ICTR Appeals Chamber upholding the Referral Chamber in respect of Mr Uwinkindi on December 2011 and the ICTR Referral Chamber on 22 February 2012 in respect of Fulgence Kayishema. The nature of the issues and procedures involved in

these cases has not however been the subject of any close examination on this appeal.

34. In these circumstances, I see no basis on which this Court would be justified in recognising or creating in the present circumstances a closed material procedure as a new exception to the principle of open *inter partes* justice recognised in *Al Rawi*.

35. The appellants' fall-back case in respect of some of the relevant material is that the district judge should be recognised as having power to limit disclosure to the CPS and to prohibit further disclosure to the GoR. In extradition proceedings under the 2003 Act the CPS acts on behalf of a requesting state or authority, although owing duties to the court, as explained in *R (Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72, [2008] QB 836. In relation to the possibility of a non-disclosure order, the appellants rely on *W (Algeria) v Secretary of State for the Home Department* [2012] UKSC 8, [2012] 2 AC 115. There, the Home Secretary had given each appellant notice of the intention to deport him to Algeria on the basis that his presence in the United Kingdom was not conducive to the public good on grounds of national security. Each asserted before the Special Immigration Appeals Commission ("SIAC") that he would be likely on return to Algeria to suffer ill-treatment contrary to article 3 of the Human Rights Convention. One of them wished to adduce evidence from a source who required an absolute and unconditional guarantee of permanent confidentiality as a precondition to giving evidence. It was common ground (para 27) that SIAC had under the Special Immigration Appeals Commission (Procedure) Rules 2003, rules 4, 39(1) and 43 power to make such an order against the Home Secretary, with the effect of precluding any disclosure of the evidence to Algeria.

36. Lord Brown and Lord Dyson, in judgments with which the other members of this Court agreed, held that, although "such orders come perilously close to offending against basic principles of open justice" and although it would mean that "the Home Secretary will be largely unable to investigate [the evidence] and will find it difficult, therefore, to explain or refute it" (paras 16 and 17, per Lord Brown), nonetheless such an order was in the circumstances justified. Lord Dyson noted that:

> "36. Regrettably, …. the circumstances of a case sometimes call for unusual and undesirable remedies. Ultimately, the court has to decide what is demanded by the interests of justice. In weighing the prejudice that the Secretary of State may suffer in the appeal process as a result of an irrevocable non-disclosure

> order, it should not be overlooked that the appeals themselves will be conducted entirely inter partes. In particular, no material that is placed before SIAC by the appellants will be withheld from the Secretary of State. She may be able to demonstrate that the claimed need for confidentiality is without foundation and to persuade SIAC to give the evidence little or no weight for that reason alone. She may also be able to test the evidence of the witness(es) effectively even though she has been unable to discuss it with the AAs. For example, she may be able to show on the basis of objective general material about the conditions in Algeria that the evidence of the witness is unlikely to be true; and even where the evidence is more specific, she may be able to obtain information from the AAs which will enable her to rebut the evidence without divulging the name or identity of the witness or saying anything which might lead to his or her identification. It will, of course, depend on the nature of the evidence to be given by the witness. I do not wish to suggest that the effect of an irrevocable non-disclosure order may not inhibit the ability of the Secretary of State to resist the appeals. In some cases, such an order will undoubtedly have that effect. But it cannot safely be said that it is bound to do so in every case."

37. The circumstances in *W (Algeria)* differ very significantly from the present. The issue there was between the Secretary of State and Algerian nationals, who the Secretary of State was seeking to remove from the jurisdiction. Algeria had no interest in claiming or receiving the return of W or his fellow Algerians, perhaps the contrary. Algeria was not party to the proceedings brought by the Algerian nationals against the Secretary of State to challenge the order for their removal. SIAC had express statutory power to make the non-disclosure order sought. In contrast, the present appeals are taking place on an inter partes basis between the appellants and the GoR, which has a real and direct interest in their pursuit and in obtaining the surrender of the appellants. The CPS are merely representing the legal interests of the GoR. Further, even if these factors were not by themselves conclusive, the district judge has no special statutory power which could enable her to make a non-disclosure order in relation to the GoR.

38. This brings me to two final points made by the appellants. First, VB has since 2001 or 2002 been a United Kingdom citizen. Relying on *Halligen v Government of the USA, sub nom. Pomiechowski v Poland* [2012] UKSC 20, [2012] 1 WLR 1604, Mr Jones submits that he enjoys a common law right of residence in the United Kingdom, and that article 6 applies to the determination of extradition proceedings which engage that right. Accepting

the premise, I am unable to draw from it any conclusion that article 6 requires the district judge to discard the ordinary principles of open inter partes justice, contrary to *Al Rawi* and to the conclusions that I have reached up to this point.

39. The other point, advanced forcefully by Mr Fitzgerald, relates to the other appellants who are foreign nationals. If they are unable to adduce evidence under a closed material procedure or to obtain a non-disclosure order, and extradition orders are made against them, then they will claim asylum, says Mr Fitzgerald. On an asylum claim, the issue will be between them and the United Kingdom authorities. They will be able under the relevant rules, in particular AIT (Procedure) Rules 2005 rules 45(1) and 45(4)(i), to invite the First Tier Tribunal to make directions relating to the conduct of the proceedings and, more particularly, to issue directions making provision to secure the relevant appellants' anonymity. The Tribunal would, if necessary, also be able under rule 54(3) to exclude the public in order to protect such appellants' private lives or under rule 54(4), in exceptional circumstances and if and to the extent strictly necessary, to ensure that publicity does not prejudice the interests of justice. Mr Fitzgerald submits that the Tribunal's rules are sufficiently analogous with those of SIAC for it to be able, like SIAC, to make a non-disclosure order such as was permitted in *W (Algeria)*. (Since the present cases do not appear to engage interests of public order or national security, the further provisions of rule 54(3) addressing those interests appear irrelevant, and, for the same reason, it appears that any asylum claim by the present appellants would come before the Tribunal, rather than SIAC.)

40. When the Convention relating to the Status of Refugees (1951) (Cmd 9171) was agreed, the answer to any such claim for asylum as Mr Fitzgerald suggests may have been conceived as lying in article 1F(b), which provides that:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> > (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) that he has been guilty of acts contrary to the purposes and principles of the United Nations.2"

41. Regulation 2 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006/2525) (transposing into United Kingdom law Council Directive 2004/83) provides that "'refugee' means a person who falls within article 1(A) of the Geneva Convention and to whom regulation 7 does not apply". Regulation 7(1) states that "A person is not a refugee, if he falls within the scope of article 1D, 1E or 1F of the Geneva Convention".

42. In *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2010] UKSC 15, [2011] 1 AC 184, Lord Brown recorded (para 2) that

> "It is common ground between the parties (i) that there can only be one true interpretation of article 1F(a), an autonomous meaning to be found in international rather than domestic law; (ii) that the international instruments referred to in the article are those existing when disqualification is being considered, not merely those extant at the date of the Convention; (iii) that because of the serious consequences of exclusion for the person concerned the article must be interpreted restrictively and used cautiously; and (iv) that more than mere membership of an organisation is necessary to bring an individual within the article's disqualifying provisions."

43. In *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54, [2013] 1 AC 745, the Supreme Court considered the standard of proof required to bring a case within article 1F(c) and held (para 16)

> "The article should be interpreted restrictively and applied with caution. There should be a high threshold 'defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security'. And there should be serious reasons for considering that the person

> concerned bore individual responsibility for acts of that character."

44. Since criminal proceedings against Mr Al-Sirri had been dismissed on the ground that no reasonable and properly directed jury could on the evidence available convict him (*Al-Sirri*, para 23), it is not entirely clear why it was necessary to attempt to define the relevant standard of proof in that case. Adopting the approach in *Al-Sirri*, article 1F(b), appearing between the two articles considered in these two authorities, covers "serious non-political crime" which may, nevertheless, not always reach the standard of seriousness envisaged in articles 1F(a) and (c). But it seems reasonably clear that a similar approach must apply under all three articles. On that basis, the prima facie proof of involvement in the crimes committed during the Rwandan civil war, which the GoR seeks to adduce against these appellants, may not be sufficient to bring any of the articles in article 1F into play. It is therefore conceivable that, if the present proceedings lead to extradition orders against all four appellants, the three appellants who are not United Kingdom nationals will be able to seek to claim asylum, and in the course of so doing before the First Tier Tribunal to seek some form of order which would have the effect of precluding disclosure to the GoR of evidence which they wish to call but cannot call if its author or contents will or may thereby become known to the GoR - whereas VB as a United Kingdom citizen will not be able to do this and will be liable to immediate surrender.

45. A number of observations may be made on this possibility. First, it may of course be that the nature of the evidence adduced before the District Judge in the present proceedings and before the First Tier Tribunal on any asylum claim may satisfy SIAC even to the higher standard which *Al-Sirri* indicates to be required. Second, it is relevant to recognise the normal reason for which a court or tribunal would decide to exercise its discretion to give directions for anonymity or to exclude the public in asylum proceedings. This is not related to the reasons for seeking such a procedure in the present case - in other words, it is not to expand the nature of the evidence admissible in asylum proceedings. Rather, it is to protect the asylum seeker him- or herself, as well as others, particularly any dependants and family members in his or her home country, from persecution or other harm, which might result from knowledge of the asylum proceedings. This is now reflected in a European Union context in article 22 of Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status. In the present case, that reason could have no application. The GoR is well aware of the appellants' position, knows where they are and is seeking their return. It now also knows of the possibility that some of them may be eligible to make and may well make asylum claims in the United Kingdom. Other grounds on which an anonymity or exclusion order might be sought, as

contemplated in Presidential Guidance Note No 2 of 2011 issued by the President of the FTT on 14 February 2011 and revised 7 July 2011 appear equally irrelevant. The appellants may well therefore be unable to obtain any anonymity or exclusion order. However, the further power which was recognised in *W (Algeria)* was to restrain the Home Secretary from disclosing to the relevant foreign government evidence relating to risks which the asylum seeker claimed that he would face in the foreign country, which evidence he would otherwise have been unable to adduce. Assuming the First Tier Tribunal to have a like power under its rules, as Mr Fitzgerald submits, the reasoning in *W (Algeria)* lends support to the appellants' case that they might be able in asylum proceedings before the Tribunal, to which the GoR is not party, to adduce evidence from witnesses which they cannot adduce in the present proceedings to which the GoR is party.

46. Third, assuming that the (on the face of it somewhat anomalous) scenario indicated in the preceding paragraphs is a possible one, and that the appellants might in fact also be able to obtain permission to obtain from the First Tier Tribunal some form of order which would prevent disclosure of material evidence to the GoR, this would be the consequence of a variety of factors: the possession by the appellants of different nationalities; different standards of proof involved in extradition and in asylum proceedings; and different statutory regimes. It cannot in my view distort or alter the clear conclusions which I have arrived at in relation to the extradition proceedings, which are all that are currently before the Supreme Court.

Section 87 of Coroners and Justice Act 2009

47. I add a brief word on the application of section 87 of the Coroners and Justice Act 2009, on which the Administrative Court expressed views, as set out in para 9 above. The Divisional Court concluded that the term "defendant" in section 87 was wide enough to include the appellants, but that the term "prosecutor" was incapable of covering a requesting state. That would appear unsustainable on any view. However, before the Supreme Court, it was in the event common ground that section 87 has no relevant application to extradition proceedings at all.

48. The reasons were explained by Mr James Lewis QC for the GoR as follows:

    a. Section 87 only applies where there is a defendant charged with an "offence to which the proceedings relate": section 97(1). That, on a true construction, does not embrace extradition proceedings with a view to a trial abroad.

b. By the same token, a foreign state requesting surrender should not be treated as prosecutor, even though extradition proceedings are criminal proceedings of a special kind.

c. The Extradition Act 2003 itself is careful to refer to the person "whose surrender is requested" as such, rather than to the defendant, and it makes specific provision when the concept of "defendant" is intended to include such person as well as when the concept of "prosecutor" is intended to include a requesting authority: see e g section 205(3). One might have expected similar caution in the 2009 Act, had section 87 been intended to cover extradition proceedings.

49. Lord Hughes has in his judgment examined the position regarding the 2009 Act in detail and reached the conclusion that it does not apply for fuller reasons, with which I agree.

50. Assuming section 87 to be inapplicable, there is authority that anonymous evidence may be admissible in certain circumstances in extradition proceedings: *R (Al-Fawwaz) v Governor of Brixton Prison* [2001] UKHL 69, [2002] 1 AC 556. In the light of the requirement in section 84 of the Extradition Act 2003 that there should be "evidence …. sufficient to make a case requiring an answer if the proceedings were the summary trial of an information", that conclusion cannot be justified on a simple basis that extradition proceedings are not themselves criminal proceedings. Equally, it is no longer possible to justify the reasoning in *Al-Fawwaz* in so far as it endorsed the approach to anonymous evidence taken at common law in *R v Taylor and Crabb* [1995] Crim LR 254, prior to the House's decision in *R v Davis* [2008] UKHL 36; [2008] 1 AC 1128. But, since the enactment of the Criminal Evidence (Witness Anonymity) Act 2008 and now sections 86-97 of the Coroners and Justice Act 2009, anonymous evidence may under statutory conditions be admitted at trial, and, without going further into this aspect, in those circumstances at least the requirements of section 84 of the Extradition Act 2003 will be capable of being met. Again, I have read and agree with Lord Hughes' analysis of the law in this respect.

Conclusion

51. For the reasons given in paras 1 to 46, I would dismiss the appellants' appeals.

LORD HUGHES (with whom Lord Neuberger and Lord Reed agree)

52. I very largely agree with the conclusions set out in Lord Mance's judgment and need not repeat what he so clearly sets out. It is clear to me that the extradition court ought never to embark upon closed material procedures, hearing evidence on behalf of the person whose surrender is sought, but altogether withholding that evidence from the other party, the Requesting State, so that the latter not only cannot respond to it, but does not even known what it is to which response is called for. I deal here only with two issues:

(i) the impact (if any) of our decision upon procedure to be adopted in any subsequent asylum or human rights claims which might be made by any of the appellants, or by people in a similar position; and

(ii) the separate question whether an extradition judge conducting proceedings under the Extradition Act 2003 has the power to receive evidence from a witness who is anonymous, that is to say whose identity is withheld from one or other party to the proceedings. That is of course not the same as a closed material procedure, where evidence is received which is altogether withheld from one or other party. A witness who is anonymous is heard by all parties. All parties have the opportunity to agree or contradict what he says and his evidence can be tested by cross examination, albeit the extent of cross examination may be limited by his anonymity.

(i) Subsequent immigration or human rights claims

53. The possible relevance of subsequent proceedings developed as a potential issue in the present case in the course of oral argument before this court. Before the courts below, and in written argument for this court, the argument advanced on behalf of the persons whose surrender is sought was that immigration proceedings, and particularly asylum claims, provided an analogy, which should be adopted by extradition courts. In asylum claims, it was correctly pointed out, an immigration judge has power to sit in private, in order to protect the confidentiality of the applicant and in particular in order to deny access by the state from whom protection is claimed to the fact that an allegation of danger of persecution is made and to any evidence which may demonstrate that danger, lest reprisals follow. Hence, it was submitted, an extradition court should also by analogy deny a requesting state access to evidence that it would infringe the Convention rights of the person sought, in

case the requesting state might use the evidence to ill-treat either the person sought or others, such as witnesses. A similar and alternative argument was advanced that an extradition court should in appropriate cases make an irrevocable non-disclosure order by analogy with the procedure permitted to SIAC in exceptional circumstances by *W (Algeria) v Secretary of State for the Home Department* [2012] UKSC 8; (2012) 2 AC 115.

54. However, as the oral argument proceeded, the submission made on behalf of the persons sought expanded beyond suggested powers in the extradition court found by way of analogy with immigration proceedings. It became the more striking submission that unless the extradition court has the powers claimed (to conduct closed material procedures and to make irrevocable non-disclosure orders) there would be likely to follow asylum claims by the persons sought, in which different procedures would apply. Said Mr Fitzgerald QC, the applicants whom he represents, who have hitherto been granted leave to remain without dispute and who have never made any kind of asylum claim, might now make such a claim. If they do, he submitted, they ought to be permitted by the Immigration Judge in the First Tier Tribunal to adduce the evidence on which they wish at present to rely before the extradition court, in order to demonstrate that they would be at risk of persecution in Rwanda. And, he submitted, they ought to be permitted to adduce this evidence in a private hearing from which the Government of Rwanda and its representatives are excluded, and to have that evidence relied upon by the Immigration Judge in deciding the asylum claim. Moreover, he submitted, they ought similarly to be permitted to obtain from the First Tier Tribunal an irrevocable non-disclosure order preventing the Secretary of State, as the other party to the asylum appeal, from ever disclosing the evidence to Rwanda. The consequence may well be, he submitted, that the Immigration Judge may accept the refugee status of the persons sought, in effect contrary to the findings of the extradition court.

55. Mr Fitzgerald offered the further argument that, if this scenario were to come to pass, there would ensue an unfair distinction between, on the one hand, a person sought who was a foreign national, and thus able to apply for asylum, and, on the other, a British national who is sought. As it happens, one of the present appellants is a British citizen.

56. These arguments call for some consideration of the inter-relation of asylum or immigration proceedings on the one hand and extradition proceedings on the other. Is there a prospect of inconsistent findings of fact, or (worse) of inconsistent orders? The court is significantly inhibited in deciding these questions by the late appearance of the arguments, and by their resulting incomplete content. It is likely that if the suggested scenario should come to

pass, further full consideration will be essential. It may help, however, to identify at least some signposts.

57. The first and principal reason why an immigration judge may exercise the power to sit in private in an asylum case is to satisfy the international duty of confidentiality towards asylum claimants. This is now well recognised, in particular in Europe by article 22 of Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, which provides:

> "Article 22
>
> **Collection of information on individual cases**
>
> For the purposes of examining individual cases, Member States shall not:
>
> (a) directly disclose information regarding individual applications for asylum, or the fact that an application has been made, to the alleged actor(s) of persecution of the applicant for asylum;
>
> (b) obtain any information from the alleged actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant and his/her dependants, or the liberty and security of his/her family members still living in the country of origin."

58. The purpose of this duty of confidentiality is to protect the asylum claimant and/or his family from any risk of reprisals for having made allegations against his home State. For the reasons Lord Mance explains at paragraph 45, this can have no application where the State accused, here Rwanda, knows full details of the persons sought, and indeed has been informed in open court of the suggested possibility of asylum applications. It follows that there would be no reason for any immigration judge to accede to an application to hear any asylum claim in private on this, the common, ground, nor on this ground to hear evidence which Rwanda is prevented from hearing.

59. A second, distinct, possible scenario is afforded in limited circumstances by the decision in *W(Algeria) v SSHD* (supra). This court there concluded that there could be circumstances in which justice required that, in order to determine whether or not deportation to a particular State would infringe the article 3 (or, it must follow, the article 2) rights of the individual concerned, a court could receive evidence on terms that the other party (the Secretary of State) is ordered not to disclose it to anyone else, including the State to which return is under consideration. That is possible, it was held, where the evidence would otherwise be withheld for fear of reprisals. *W(Algeria)* was a strong case. The proposed State of return was known to practice torture, which would ordinarily have been a bar to return on article 3 grounds. The evidence went to whether assurances offered by that State to the Secretary of State could be relied upon. The judgments of both Lord Brown and Lord Dyson make it clear that the procedure contemplated was wholly exceptional, because it infringes ordinary principles of natural justice by impairing the ability of one party, the Secretary of State, to challenge and test the evidence. They also make it clear that such a procedure could be expected to be justified only when article 3 rights, not to be the subject of torture or inhuman or degrading punishment, was in question. If other rights were in question, the balance would be likely to fall against so unusual a procedure.

60. There is no question of *W (Algeria)* authorising the receipt by an extradition judge of evidence of the kind here sought to be adduced. The proceedings in *W (Algeria)* were deportation (immigration) proceedings, to which the parties were the individual and the Secretary of State, but not Algeria, the proposed State of return. The claimant was at pains to disclaim any argument that the Secretary of State, as a party to the proceedings, should be unable to hear the evidence in question. The order sought, and granted, was one preventing the Secretary of State from passing the evidence on, by way of enquiry or otherwise, to Algeria. In extradition proceedings, the proposed State of return, here Rwanda, is a party.

61. However, the exceptional procedure thus sanctioned in *W (Algeria)* needs to be considered in context when the relationship of asylum or deportation to extradition is in question. The terms of the Extradition Act make it clear that extradition is subject to the non-infringement of the Convention or refugee rights of the individual sought. For Part I extraditions, to European States, section 39 provides that a European arrest warrant is not to result in extradition whilst a claim for asylum is pending. The present case falls under Part II, via section 194. In the context of Part II extraditions, to non-European States, the process of extradition begins when the Secretary of State certifies that a valid request for an individual has been received: see section 70. Under section 70(2)(b) and (c) the Secretary of State need not certify if either the individual has been accepted as a refugee or he has been granted leave to

remain in this country on the grounds that removal to the requesting State would involve infringement of his article 2 or article 3 rights. Ordinarily, it may well be that any person sought for serious crime would be excluded from refugee rights by article 1F(b) of the Refugee Convention, set out by Lord Mance at paragraph 40, and it seems to me to follow that the scope for a finding that there is a prima facie case justifying extradition but no serious reasons for thinking that he is guilty of such a crime is likely to be narrow. But Convention rights, as extended by the *Soering* principle, may well be more extensive than refugee rights. The Act appears to contemplate that any asylum claim will be made before any extradition proceedings, and it goes on to provide in section 70(11) that once the Secretary of State has issued the section 70 certificate all questions of human rights are for the extradition judge, who is required by section 87 to halt the sequential process provided for by the Act, and to discharge the person sought, if breach of such rights (not limited to articles 2 or 3) would be the result of extradition. That makes it clear that the extradition process is, once the section 70 certificate is issued, an entirely judicialised one. Once the judicial ruling for extradition has been made, the Secretary of State is bound by section 93 of the Extradition Act, to give effect to it unless specified reasons (death penalty, specialty, earlier extradition into the UK or transfer to it by the ICC) apply. Whether there remains room for a *subsequent* application, outside the extradition process, for asylum, or (absent any asylum or refugee claim) for a decision by the Secretary of State (or immigration judge on appeal) that removal to the requesting State would involve infringement of article 2 or 3 rights, appears to remain unexplored. But if there is room for such, then it would appear to follow as a possibility that a *W (Algeria)* non-disclosure order might be open for consideration in such proceedings. It would be a material consideration that the application was made late, and in a form which in effect mounted a collateral challenge to an earlier ruling of the extradition judge that the individual is to be extradited.

(ii) Anonymity of witnesses

62. The Divisional Court itself raised the possibility that an extradition judge could hear an anonymous witness. Having done so, it held that such a power did exist and that it derived from sections 86-97 of the Coroners and Justice Act 2009 ("the 2009 Act"), or the equivalent provisions of its predecessor, the Criminal Evidence (Witness Anonymity) Act 2008 ("the 2008 Act"). It described the application of those Acts to extradition as "adventitious".

63. Closer examination demonstrates that the Divisional Court was right to say that an extradition judge has power, if justice calls for it, to receive the evidence of a witness who is anonymous to one or all parties, but not to derive this power from either the 2008 or the 2009 Act.

64. The 2008 Act was passed to give a criminal court the express power, in defined conditions, to allow a witness (by whomever called) to remain anonymous to the defendant and/or to co-defendants. The principal conditions are that such a course of action must be found to be necessary on specified grounds, which include preserving the safety of the witness, and that the court must be satisfied that the trial can nevertheless be fair. The Act was passed against the background of growing concern about witness intimidation and the reluctance of potential witnesses to crime, for fear of reprisals, to be seen to be co-operating with a police investigation. In the years before 2008 courts hearing criminal trials in England and Wales had from time to time permitted witnesses to give evidence anonymously where satisfied that the evidence would not otherwise be given, or effectively given, owing to genuine fear, and that the defendant was not disabled from properly challenging it. However, in *R v Davis* [2008] UKHL 36; (2008) 1 AC 1128 the House of Lords held that this was not permissible because at common law the rights of a defendant in a criminal case to know and confront his accuser had to prevail. The House held that if a power was to be created to hear evidence in a criminal case from a witness who remained anonymous to a defendant, that could only be done by statute. The 2008 Act was the immediate Parliamentary response. It was enacted after a greatly attenuated legislative timetable, with the agreement of all major parties. It was expressly stipulated to have a short life, so that further consideration could be given to the principle to which it gave effect. After such further consideration, the 2009 Act re-enacted its provisions in substantially the same terms.

65. In the present case the Divisional Court held that these provisions applied. Its reasoning was as follows (by reference to the 2009 Act):

(i) the Act applies to "criminal proceedings"; these are defined in section 97(1) as those in a Magistrates' court, Crown court or the Court of Appeal (Criminal Division) in England and Wales which are:

> "criminal proceedings consisting of a trial or other hearing at which evidence falls to be given";

(ii) extradition proceedings are a kind of criminal proceeding within that definition, and extradition was described as a form of criminal proceeding by Lord Hoffmann in *R v. Governor of Brixton Prison Ex parte Levin* [1997] AC 741 at 746 F-G;

(iii) the present appellants, whose surrender was sought by Rwanda, were "defendants" for the purpose of the 2009 Act because they had been charged with offences (in Rwanda);

(iv) although section 87(3) requires a defendant who applies for a witness anonymity order to disclose the identity of the proposed witness to "the prosecutor", as well as to the court, this presented no obstacle because that term is defined in section 97 as "any person acting as prosecutor, whether an individual or a body"; a requesting State making an application for extradition is not acting as a prosecutor; either it, or some other body may in due course, if extradition is granted, take up the role of prosecutor at the subsequent trial, but that stage has not yet been reached;

(v) although the Crown Prosecution Service ("CPS") generally conducts extradition proceedings on behalf of the Requesting State, and does so in this case, it, like the State, is not acting as a prosecutor when it does so.

66. There is no difficulty with propositions (iv) and (v). Extradition proceedings are not a criminal trial. The person whose extradition is sought is not in peril in them of conviction, and his guilt or innocence will not be decided. The issue is whether he should be surrendered to the Requesting State for the purpose of *subsequent* trial. The Requesting State is not prosecuting him before the English court; it is asking the UK to surrender him. The CPS generally acts as the advocate or agent of the Requesting State; that its principal role in England & Wales is to prosecute allegations of crime does not mean that it does not have this separate and different function in extradition proceedings. Its role in extradition proceedings is made clear by section 190 of the Extradition Act 2003. That amends section 3(2) of the Prosecution of Offences Act 1985, which ascribes various functions to the CPS, chief of which is to "take over the conduct of all criminal proceedings…" (with specified exceptions). The amendment made by section 190 of the Extradition Act inserts a new additional function, namely:

"(2)(ea) to have the conduct of any extradition proceedings"

That, however, is made subject to the specific exception that the CPS is not to do so when requested not to by the Requesting State. This makes clear the advocacy or agency role of the CPS in extradition proceedings. [It ought to be noted that the CPS may separately fulfil a different function under

section 83A and following of the Extradition Act where forum proceedings fall to be determined, but these do not affect the foregoing propositions.]

67. The difficulty lies in propositions (i) to (iii). There cannot be the slightest doubt that the 2008 and 2009 Acts were passed in order to deal with criminal prosecutions in England, Wales and Northern Ireland. They were a direct response to *R v Davis* which itself was concerned with such prosecutions and with no other form of proceeding. The modest extension afforded by the definition section (section 97) to other hearings "at which evidence falls to be given" is plainly intended to encompass the kind of ancillary application or proceeding which may attend a criminal prosecution either in advance of the trial or after it has finished. Many possible examples might be envisaged. They might include, in advance of trial, case management hearings at which a fear of witness intimidation falls to be considered or where rulings as to the giving of evidence are to be considered, and, after trial, hearings relating to such matters as sentencing or the making of protective orders like Sexual Offences Prevention Orders or Serious Crime Prevention Orders. In the days when magistrates conducted committal proceedings to hear the Crown evidence and to determine whether there was a case to answer, those would no doubt have fallen within the definition, for such committal proceedings were an integral part of the prosecution process and the parties were the same as they would be at trial in the Crown Court, namely a prosecutor and the defendant. But one cannot treat extradition proceedings as a part of a criminal prosecution in England and Wales. Even though, in the case of some (but by no means all) Part II territories, it may be necessary for the Requesting State to establish a prima facie case, the proceedings are not a prosecution but, rather, concerned solely with the issue of surrender. Any prosecution is yet to come; it may or may not ensue and if it does it will not be under English rules.

68. It is true that in *Ex p Levin* Lord Hoffmann, giving the sole speech in the House of Lords, described extradition proceedings as criminal proceedings for the purpose of the application of the evidential rules contained in the Police and Criminal Evidence Act 1984. In the end, the observation was obiter, because the issue in the case was the admissibility of certain bank records and since they were held to be real evidence rather than hearsay their admissibility did not depend on that Act at all. But Lord Hoffman did accept that the Act would apply to extradition proceedings, and indeed that so had the power of the court under section 78 to exclude prosecution evidence on the ground that it would have an unfair effect on the proceedings, until the amendment of that section to except committal proceedings. It does not, however, follow that extradition proceedings can be equated to a criminal prosecution or that they are "criminal proceedings" for all purposes, still less that they are "criminal proceedings" for the purpose of the 2008 and 2009

Acts. On the contrary, it is clear that neither proposition is correct. That appears from any or all of the following considerations.

(i) Lord Hoffmann explicitly described extradition proceedings as "criminal proceedings of a very special kind" (at 746F).

(ii) The application to extradition proceedings of English rules of criminal evidence (including those in the Police and Criminal Evidence Act 1984) was clear in any event, then as now. At that time the relevant provision was paragraph 7(1) of Schedule 1 to the Extradition Act 1989, which provided that the prospective defendant was to be remanded in custody for the decision of the Secretary of State upon surrender if

> "such evidence is produced as . . . would, according to the law of England and Wales, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England or Wales…"

Now, the same result follows from section 84(1) of the Extradition Act 2003, read with section 77. Section 84(1) requires the appropriate judge to determine whether:

> "there is evidence which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him" ,

whilst section 77 provides that he shall have the same powers "as nearly as may be" as he would have in summary proceedings for an offence.

(iii) Lord Hoffmann recognised that even if section 78 did apply to extradition proceedings, it would do so only by way of the (then) rule that evidence was to be considered as if at English committal proceedings. He specifically identified the special nature of extradition proceedings and held that section 78 would require to be modified in its application to them so that what fell for consideration was not any unfair effect on any

subsequent trial but unfair effect on the extradition hearing itself: see 748A, where he underlined the fact that at the extradition hearing it ought ordinarily to be assumed that if the prospective defendant is surrendered local procedures in the Requesting State will ensure fairness there. That is a clear recognition of the essential difference between extradition proceedings on the one hand and a criminal prosecution and trial on the other.

(iv) Section 87 of the 2009 Act provides for applications for witness anonymity orders to be made either by "the prosecutor" or by "the defendant". Where the application is made on behalf of a defendant, section 87(3) requires the identity of the witness to be revealed not only to the court but to the prosecutor. As the Divisional Court correctly held, there is no prosecutor in an extradition hearing. The notion of criminal proceedings existing without a prosecutor is difficult enough on any view; but even if such a thing can for any purpose be imagined, it is clear that the 2009 Act, and its predecessor the 2008 Act, are confined to prosecutions, with prosecutors.

(v) It is also doubtful that the person whose extradition is sought falls within the definition of "defendant" for the purposes of the 2009 Act. "Defendant" is defined by section 97 in terms which are plainly appropriate to a person facing trial in England and Wales, but may not be to someone whose surrender is sought for potential trial elsewhere:

> "the defendant", in relation to any criminal proceedings, means any person charged with an offence to which the proceedings relate (whether or not convicted)"

Extradition proceedings under Part II of the Extradition Act 2003 depend upon a request to the UK by the Requesting State. For the very detailed process of the Act to begin, the Secretary of State must certify under section 70 that she has received a valid request. A valid request is one which states, inter alia, that the person sought:

> "is accused in the category 2 territory of the commission of an offence specified in the request".

The use of the word "accused" would appear to be deliberate. The person concerned may or may not have been charged in the Requesting State, according, no doubt, among other things, to that State's practice in relation to absent persons. It is to be observed that the Extradition Act 2003 generally refers to the person who is the object of extradition proceedings as "the person whose extradition is sought", rather than as "the defendant", and that in certain places where it wishes to apply other statutory references to a 'defendant' to this person, it says so expressly. An example is section 205(3) which provides:

> "(3) As applied by subsection (1) in relation to proceedings under this Act, section 10 of the Criminal Justice Act 1967 and section 2 of the Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968 have effect as if -
>
> (a) references to the defendant were to the person whose extradition is sought (or who has been extradited);
>
> (b) references to the prosecutor were to the category 1 or category 2 territory concerned; …"

(vi) Lastly, it is by no means clear that the place of an extradition hearing is within the definition of "court" for the purposes of the 2009 Act. Section 97 provides that for the purposes of a witness anonymity order:

> "court" means -
>
> (a) in relation to England and Wales, a magistrates' court, the Crown Court or the criminal division of the Court of Appeal……"

> Those are, of course, the courts in which prosecutions in England and Wales are conducted. Extradition hearings under the Act of 2003 are held before what that Act calls "the appropriate judge" - in relation to Part II see section 70(9) and following. The "appropriate judge" is, by section 139, a District Judge (Magistrates' Courts) specially nominated by the Lord Chief Justice. The fact that the nomination has fallen upon certain District Judges (Magistrates' Courts) who ordinarily sit at Westminster Magistrates' Court does not mean that they are sitting in that capacity when conducting an extradition hearing, nor that such hearing is held in a Magistrates' Court. Consistently with this, section 77 provides that in an extradition hearing, the appropriate judge:
>
> > "has the same powers (as nearly as may be) as a magistrates' court would have if the proceedings were the summary trial of an information against the person whose extradition is requested."

69. It is not, however, necessary to force extradition proceedings into the 2008 or 2009 Acts in order to justify the receipt of evidence from a witness whose anonymity is protected. The jurisdiction to receive evidence on this basis which was discussed in *R v Davis* derived from the inherent powers of the court to control its own procedure. What *Davis* decided was that this power did not extend, in a criminal prosecution, to hearing a witness whose identity was not disclosed to the defendant. Statutory sanction was called for. Statutory sanction has now been given for the paradigm case of an English criminal prosecution. The inherent power of the court to admit such evidence in extradition proceedings remains, and can properly be exercised by analogy with the statutes. Indeed, at the time of *Davis*, there was existing House of Lords authority in *R (Al-Fawwaz) v Governor of Brixton Prison* [2001] UKHL 69, [2002] 1 AC 556 for the proposition that anonymous evidence was indeed receivable in extradition proceedings, and in *Davis* Lord Bingham endorsed this decision. As Lord Mance observes at paragraph [50] this endorsement may not have given full consideration to the reliance in *Al Fawwaz* upon the cases in which English criminal courts had admitted anonymous evidence, such as *R v Taylor and Crabb* [1995] Crim LR 254, nor did it refer to the requirement that a prima facie case be adduced in extradition proceedings. However, I agree with Lord Mance that even if these considerations weaken the authority of the endorsement of A*l Fawwaz* in *Davis*, the subsequent passage of the 2008 and 2009 Acts clearly shows that anonymous evidence may be received in English criminal cases, providing the statutory safeguards are met, and it follows that such evidence is equally admissible in extradition proceedings.

70. In the present appeal, Mr Lewis QC for the Government of Rwanda conceded that in relation to some parts of an extradition hearing there could be no objection to the hearing of evidence from a witness who remained anonymous. His concession was confined to issues arising under sections 81 (extraneous considerations) or 87 (human rights barriers to surrender) and was made on the basis that the ordinary rules of evidence do not apply on those issues. That approach enabled him to submit that the persons whose extradition is sought in this case could not rely on witnesses on the issue of prima facie case unless their identity was disclosed to all parties. The practice in relation to material going to section 81 or 87 issues is, however, as Lord Mance says, probably better analysed as a relaxed approach to expert evidence. Experts are generally entitled to give evidence based upon a background corpus of knowledge. What appears to happen on these issues, as in immigration cases, is that there is a relaxed readiness to permit experts to give evidence of opinion as to prevailing circumstances in the foreign State which is based upon information gathered from unnamed and sometimes unknown sources. To that extent, such sources are likely to remain unknown not only to the other party, but to the court. Any possible unreliability of such sources falls to be assessed by the court as part of its overall evaluation of the evidence. Receipt of evidence of this kind is clearly different from hearing a witness who is present but whose identity is known to the court but not to one party.

71. In the present proceedings, the persons whose extradition is requested seek to adduce evidence not only of this expert variety but also from witnesses of fact who are said to be in genuine fear for the safety of themselves or their families if their identity is known to the Requesting State. The evidence in question (which this court has, correctly, not viewed) is said to go both to the question of whether there is or is not a prima facie case and to issues arising under section 81 and/or 87.

72. It is difficult to see why, if witness anonymity is in principle permissible in extradition proceedings, subject to its being fair to receive it, it should be confined to section 81 or 87 issues. In *Al Fawwaz* the evidence of the anonymous witnesses went to whether there was or was not a prima facie case, and was tendered on behalf of the requesting State. True it is that section 84 of the Extradition Act means that a prima facie case must be established by evidence which could establish it if the proceedings were a summary trial, but the 2009 Act makes it clear that in a summary trial a witness may be heard anonymously if the safeguards set out in that Act are in place.

73. An extradition judge will bear in mind that where the issue is the presence of a prima facie case, he is generally not concerned to assess the credibility of the witnesses relied upon, at least unless they are so damaged that no court

of trial could properly rely on them. Nevertheless, it is likely that any extradition judge will be more cautious in relation to the admission of anonymous evidence on the issue of prima facie case than in relation to section 81 or 87 issues, and the more cautious still where it is proffered by the requesting State. It is clear that the overriding principle is that such evidence can be admitted only when it is fair to all parties that it should be. It must remain an unusual exception to the general practice. That is likely to mean that an extradition judge will apply by analogy, so far as may relevant, the same principles as are stipulated in the 2009 Act for criminal prosecutions in England and Wales. He will need to be satisfied that there is genuine cause for anonymity, generally a justified fear for the safety of the witness or others which cannot otherwise be protected, and that justice requires that the evidence be given. It will also be likely to mean that a crucial factor in his decision whether to admit it will be the extent of the means available to the other party to challenge it. In considering this question he will no doubt want to consider whether the party tendering the witness has or has not provided the maximum possible information about the witness, short of identifying material, which could be deployed in challenging him. He will ordinarily require that the court itself is given the fullest information of identity. He will no doubt have in mind that anonymity may often weaken the weight which can be given to evidence given. Providing, however, he makes all relevant enquiries and admits the evidence of a person who is anonymous to a party only if satisfied that the proceedings are nevertheless fair, he has the power to hear such a witness.

LORD TOULSON

74. The form of Memorandum of Understanding ("MOU") under which the present extraditions are sought begins with three recitals. Two of them are in these terms:

> "HAVING DUE REGARD for human rights and the rule of law;
>
> MINDFUL of the guarantees under their respective legal systems which provide an accused person with the right to a fair trial, including the right to an adjudication by an impartial tribunal established pursuant to law;"

75. The MOU seeks to achieve the objective of ensuring protection of the appellants' human rights by providing in para 4(d) that extradition may be refused if

> "it appears to the Judicial Authority that extradition would be incompatible with [X's] human rights".

76. The "Judicial Authority" is defined in paragraph 1 as the judicial authority which is charged under the law of this country with the duty of considering requests for extradition. In other words it is the Magistrates' Court.

77. In her judgment dated 28 January 2014 on the appellants' application to adopt a closed hearing procedure to enable the appellants to place before the court evidence in the absence of the Crown Prosecution Service representing the Government of Rwanda, District Judge Arbuthnot recorded that she had read for the purposes of the application folders of evidence provided by Dr Brown's and Mr Ugirashebuja's lawyers. She was later provided with a folder by the lawyers acting for Mr Nteziryayo, but did not read it, and she was told that evidence on behalf of Mr Mutabaruka was in preparation.

78. The judge said that she was prepared to accept that the files which she read contained important and material evidence which was relevant in particular to the question whether the relevant appellants would receive an article 6 compliant trial if they were extradited. She held that she was bound by the decisions of this court in *Al Rawi* and the Divisional Court in *B Sky B* (later affirmed by this court) to refuse the applications. But she expressed concern that there may be a risk of serious prejudice to the defence in making that decision and for that reason it was with some reluctance that she refused the application.

79. Dr Brown's solicitor has made witness statements in which he says that he has visited Rwanda with leading and junior counsel and taken statements from four witnesses, who all say that they are not willing for their identities to be revealed to the Rwandan Government for fear that they and their families would be placed in serious danger. He states that the nature of their evidence makes them immediately identifiable to the Rwandan authorities and that any redaction that sufficiently protects their identity would make their evidence meaningless. It is said that the most important witness is either a present or former Rwandan prosecutor or police officer, a Rwandan judicial officer or a prosecution witness. It is said that he has given audio-taped and video-taped evidence to Dr Brown's lawyers about the fabrication of evidence against Dr Brown by state officials.

80. The court is in a cleft stick. On the one hand, Lord Mance says (at para 29) that the appellants' submission that the court should receive such evidence in a closed session assumes the truth of what they set out to prove; that it is only speculation that what they say would be relevant, truthful and persuasive; and that the very nature of a closed material procedure would mean that this could not be tested.

81. I think that we may take it that the material is relevant because the district judge has accepted that it is, but in any event that would not be difficult to assess. The real problem is whether it is truthful and how that is to be assessed. If it is truthful, then the refusal of the witnesses to allow their identity to be disclosed is not remarkable. (The English courts have experience of truthful witnesses who are too frightened to give evidence if their identity is to be revealed. In some circumstances, statute permits the prosecution to rely on evidence of witnesses whose identity is withheld from the defence.) I do not agree that the appellants' submissions assume that the evidence is truthful. Rather, they assert that it is potentially credible and that the court should be prepared to consider it.

82. It is said that if the court is prepared to look at such evidence, it will encourage others to manufacture false evidence. That is certainly a risk. The same objection was made to allowing people accused of serious offences to give evidence on their own behalf prior to the Criminal Evidence Act 1898. No doubt that Act has enabled some defendants to hoodwink juries by inventing false defences which the prosecution has been unable to disprove, but that is a less grave affront to justice than disallowing defendants from putting their evidence before the court on account of the attendant opportunities for abuse. In the present case two of the appellants have obtained evidence which the district judge considers relevant and important to their case, but those witnesses are beyond the protection of the United Kingdom and the appellants are unable to put their evidence before the court unless the court is prepared to consider it without disclosure to the requesting state. There is obvious prejudice to the requesting state if the court agrees to do so and obvious potential for abuse. That is one side of the picture, but there is another.

83. Just as the evidence cannot be assumed to be truthful, so it cannot be assumed to be untruthful. What if it is indeed the case that the prosecution's evidence has been fabricated and that those who have provided that information to the appellants' lawyers are genuinely frightened to reveal their identity on understandable grounds? If the United Kingdom authorities decline to look at the evidence unless it is disclosed to the requesting state - which it cannot be - the appellants are likely to suffer a denial of their human rights as a result of our shutting our eyes to that evidence. In my view that is unacceptable.

The evidential problem is very real, but it is not a satisfactory answer simply to apply a blindfold to the evidence. To refuse to consider it has the same practical effect as assuming the evidence to be untrue, which cannot be assumed.

84. I would hold that justice, and the respect for human rights on which the MoU was expressly predicated, require that at some stage in the process the evidence should be able to be considered. There are three ways in which this could occur.

85. The first is for the court to make an exception to the *Al Rawi* principle in this case. The exception would be based on the need to ensure that the court does not through blindness facilitate a foreseeable and potentially serious breach of human rights by ordering extradition to a foreign country, of which there is evidence that, by the very nature of the circumstances, cannot be disclosed to the requesting state.

86. If that approach is rejected, as it is by the majority in this case, I apprehend that it will be open to those appellants who are not British citizens to apply for asylum or humanitarian protection; and, on appeal against a refusal by the Home Secretary, they would be able to place before the immigration judge the material which the district judge was not permitted to consider, without that evidence being disclosed to the foreign state, since it would not be a party to the proceedings.

87. That avenue would not be available to the appellant who is a British citizen. It would be manifestly unacceptable that a non-British citizen should have greater means of protection of their human rights than a British citizen, and that cannot have been the intention of the government in entering into the MoU. I anticipate that it would be open to the British appellant to ask the government to apply the MoU in a way which would involve treating him no less favourably than it would a non-British citizen, on the ground that to do otherwise would be a (highly unusual) form of unjustifiable discrimination, and if necessary to bring judicial review proceedings.

88. In my view the first way would be the best. Under the MoU it was intended that determination of any human rights issues should be a matter for the judicial authority. The district judge has received and is due to hear general evidence on the subject. If the evidence which the appellants seek to introduce is to be considered by anyone, it would be best done by the same judge, who would evaluate to the best of her ability it in the context of all the evidence before her. The exercise would be similar to that performed by

immigration and asylum judges when considering asylum applications supported by evidence about alleged conduct of foreign authorities which will not have been disclosed to those authorities. Tribunal judges are used to scrutinising such evidence in the light of other objective evidence. It is not a perfect system but it is fair and workable.

89. The second way would avoid the problem of disclosure of the evidence to the foreign state, because the foreign state would not be a party to the application, any more than it would be in any other asylum application. There would be no question of withholding the evidence from the Secretary of State. On the contrary, the evidence would form the basis of the request to the Secretary of State, against which an appeal would lie. It would be contrary to the ordinary practice of the Secretary of State to disclose such evidence to the foreign authority, and it is difficult to imagine that there would be any question of disclosure of statements of witnesses which, if true, could place them or their families in jeopardy. But there are disadvantages to this way of proceeding.

90. First, to have two sets of proceedings with overlapping evidence is undesirable. I do not see that the asylum application could be dismissed as an abuse of process, on the ground that it amounted to a collateral attack on the findings in the extradition proceedings, in circumstances where the appellants would not have been able to present all relevant evidence to the magistrates' court. The United Kingdom has an international obligation to consider an application for asylum, and I cannot see that this responsibility could be said to have been fulfilled by an extradition hearing at which the court was precluded by its own rules from hearing evidence relevant to the asylum claim. (Nor do I think, with respect, that the tribunal judge could properly draw any adverse inference about the credibility of the evidence from the lateness of the asylum application, when the applicant on legal advice had sought to deploy the evidence at what was thought to be the appropriate stage.)

91. Secondly, there is the problem that an application for asylum or human rights protection would be open only to the appellants who are not British subjects. Such discrimination might be overcome in the way that I have mentioned, but that would potentially involve a further set of proceedings.

92. Thirdly, rights under the European Convention are not identical with rights under the Refugee Convention, although the overlap is such that in the present case there may well not be a practical problem.

93. Mention has been made by Lord Mance and Lord Hughes of the possibility that any asylum claim would be excluded by article 1F(a) of the Refugee Convention relating to war criminals. Lord Hughes suggests that the scope for a finding that there is a prima facie case for extradition. but no serious reason for applying the exclusion is likely to be narrow. However, there is a significant difference in the standard of proof. A prima facie case for extradition requires a much less high standard of proof than a decision that an applicant's rights under the Refugee Convention are excluded by article 1F(a): compare *R v Governor of Pentonville Prison Ex parte Alves* [1993] AC 284,290,292 and *Al Sirri v SSHD* [2012] UKSC 54, [2013] 1 AC 745. Moreover the evidence before the district judge and the tribunal judge would be different. I do not therefore consider, with respect, that article 1F(a) is relevant to the issue which this court has to decide.

94. The complications and delays which I foresee arising at the next stage or stages of legal proceedings, if in the circumstances of this case the district judge is not permitted to examine evidence of the kind with which we are concerned in a closed hearing, reinforce my view that the least unjust way to ensure proper protection of the appellants' human rights is to make the exception to the *Al Rawi* principle for which they contend.

95. I would therefore allow these appeals. On the separate question whether an extradition judge conducting proceedings under the Extradition Act 2003 has power to receive evidence from an anonymous witness, I agree with Lord Hughes.