Neutral Citation Number: [2019] EWHC 62 (Admin)

Case No: CO/3110/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/19

Before :

LORD JUSTICE HICKINBOTTOM
and
MRS JUSTICE SIMLER

- -

Between :

THE PUBLIC PROSECUTOR'S OFFICE OF LANDSHUT, GERMANY

Appellant

- and -

HARJIT SINGH

Respondent

- -
- -

Gemma Lindfield (instructed by **Crown Prosecution Service Extradition Unit**)
for the **Appellant**
Catherine Brown (instructed by **Tuckers Solicitors LLP**) for the **Respondent**

Hearing date: 17 January 2019

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Approved Judgment

Lord Justice Hickinbottom :

Introduction

1. This is an appeal under section 28 of the Extradition Act 2003 ("the 2003 Act") against the decision of District Judge Baraitser of 2 August 2018 to discharge the Respondent from an accusation European Arrest Warrant ("EAW") issued by the Appellant German Judicial Authority on 5 February 2014 and certified by the National Crime Agency ("the NCA") on 24 March 2017. The Appellant seeks the Respondent's extradition to face an apparently single but multi-limbed charge, categorised in the EAW as "kidnapping, illegal restraint and hostage-taking" and "racketeering and extortion".

2. Germany is a category 1 territory, and thus Part 1 of the 2003 Act applies. All statutory references in this judgment are to the 2003 Act.

3. The District Judge discharged the Respondent under section 21A(4) because she concluded that, for the purposes of section 21A(1)(b), his extradition would be incompatible with article 8 of the European Convention on Human Rights ("article 8"). The Appellant contends that that conclusion was wrong.

The Facts

4. The Respondent was born in Jalandhar, Punjab Province, India. In 1992, when he was about 27 years old, he left India, travelling through Kenya to Germany where he obtained permission to work and was employed in various farms and factories.

5. The charge arises out of the following alleged incident which occurred whilst he was living in Germany. At about 9.15pm on 25 May 1993, the Respondent and a man called Vinat Singh went to the apartment of the complainant, Schramm Pawanteep, where, without any justification, they demanded DM6000. The Respondent's wife and one-year old son ("X") were present in the flat. The Respondent threatened that, if Mr Pawanteep did not pay the money, he would kill X. He went into X's room where he took X out of his cot and, taking a knife from his coat, he aimed it at the child's chest. Mr Pawanteep tried to free his son, who fell on the floor. There, Vinat Singh knelt over X, and held the knife to his chest, whilst the Respondent hit Mr Pawanteep. The child's mother managed to grab X, and take him from the room. The Respondent took a sabre off the wall and aimed a blow at the complainant, which Mr Pawanteep managed to parry centimetres from his head. The Respondent then repeatedly hit Mr Pawanteep with a stick, leaving him with bruising.

6. The Respondent was interviewed by the authorities on the day of the offence, and again on 28 July 1993. He was eventually charged as follows:

> "Taking hostage in coincidence with attempted serious blackmail and use of force or threats against life or limb with dangerous bodily harm, each offence committed in joint perpetration, according to sections 239(b)(1), 253(1), 255, 250(1) No 2 and No 3, 232(1), 223(1), 223a(1) of the German Criminal Code…".

7. Two applications that the Respondent be remanded in custody were refused. On 31 May 1994, at a hearing at which he was legally represented, he pleaded not guilty. The trial was listed for 9 June 1994. The Respondent was aware of the date, but he did not attend. The hearing appears to have been adjourned until 13 June 1994, when again he did not attend and a domestic warrant for his arrest and pre-trial detention was issued. On 20 June 1994, a national alert was issued. On 1 July 1994, an international alert was issued. There was no response to either alert.

8. Meanwhile, knowing that he faced the charge in Germany, the Respondent travelled to France and from there, covertly in the back of a lorry, to the United Kingdom where he arrived in about June 1994. On his own account, he left Germany permanently and had no intention of returning; and the District Judge found that he had left Germany in order to evade justice. The Respondent does not now seek to contend otherwise.

9. After his arrival in the United Kingdom, the Respondent applied for asylum. He was granted indefinite leave to remain, and, in about 2013, he was granted British citizenship. He has been married for 15 years, and has three children aged between eight and thirteen, all born in the United Kingdom. They have lived at the same address in rented property for the last 14 years. The Respondent works as a cleaner, morning and evening, six days a week – not on Saturdays – for a net monthly wage of £650. He has had his current employment for four years. His wife does not work. She occasionally suffers from depression. The Respondent himself has high cholesterol and blood pressure, and diabetes, which are controlled by medication. He has one minor unrelated conviction in this country.

10. On 27 January 2014, at the Appellant's request, a new domestic arrest warrant was issued by the German authorities, because parts of the offence had become statute barred; and, on 5 February 2014, an EAW was issued. At that time the German authorities still did not know the place or even the country where the Respondent was living. We understand that the EAW was circulated in German, and an English translation was not provided. The Respondent's name and date of birth were different in the EAW from those in his formal British documents such as his passport. However, the NCA certified that warrant on 24 March 2017.

11. The Respondent was arrested in the United Kingdom on 10 April 2018. The circumstances of the arrest are described by the arresting police officer, PC John Evans. He was made aware that the Respondent was travelling to Birmingham Airport from Delhi, and that he was wanted under an EAW. It is uncertain how and when the person with the passport in a different name and with a different birthday was identified with the subject of the EAW. In any event, the Respondent was arrested, and identified as the subject of the EAW by his fingerprints. He was remanded on conditional bail. On 1 June 2018, a defence application to adjourn the hearing was refused; and, on 11 July 2018, the extradition hearing took place before District Judge Baraitser.

12. On 2 August 2018, as I have described, the District Judge gave judgment discharging the Respondent on the basis that surrender would be incompatible with the rights of the Respondent and his family members under article 8.

13. She rejected all other grounds of appeal, including the submission that surrender of the Respondent was barred under section 14 because it would be unjust or oppressive to extradite him by reason of the passage of time. In doing so, she applied the well-established proposition derived from such cases as Kakis v Government of Cyprus [1978] 1 WLR 779, Gomes and Goodyer v Government of Trinidad and Tobago [2009] UKHL 21; [2009] 1 WLR 1038 and, more recently, Wisniewski v Poland [2016] EWHC 386 (Admin) that, where a person has knowingly places himself beyond the reach of legal process, he cannot invoke the passage of time resulting from such conduct on his part to support the existence of a statutory bar to extradition. As Lord Diplock said in Kakis (at page 783A-C):

> "Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied upon as a ground for holding it to be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of his defence in consequence of the delay due to such causes are of his own choice and making. Save in the most exceptional circumstances it would be neither unjust nor oppressive that he should be required to accept them.
>
> As respects delay which is not brought about by the acts of the accused himself, however, the question of where responsibility lies for the delay is not generally relevant. What matters is not so much the cause of such delay as its effect; or, rather, the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promptitude."

In this case, as I have already indicated, the District Judge, applying Kakis, found that the Respondent had deliberately placed himself beyond the reaches of the Appellant Judicial Authority in order to evade justice – and was thus a fugitive – and, for the purposes of section 14, there were no exceptional circumstances such that delay would render extradition "oppressive". That is not the subject of any appeal.

14. An appeal was lodged by the Appellant on 7 August 2018, on several interrelated grounds. It is said that, in circumstances in which the Respondent was a fugitive and the German authorities did not know where he was living, the District Judge erred in finding that there had been "culpable" delay in issuing and certifying the EAW. She also erred in failing to address the matters raised by Lord Thomas of Cwmgiedd LCJ in, or perform the proportionality balancing exercise as required by, Polish Judicial Authority v Celinski [2015] EWHC 1274 (Admin); [2016] 1 WLR 551 notably at [9]-[15]. Reflecting that failure, it was submitted that she wrongly found that the delay in issuing and certifying the EAW "overrides" the otherwise strong public interest in extraditing those charged or convicted of criminal offences.

15. Permission to appeal was granted by King J on 5 November 2018, with the observation that there is "clearly an arguable issue on the way that the judge approached the issue of delay in the context of article 8, on the evidence before her". Thus, the appeal is before us.

The Law

16. The focus of this appeal is section 21A(1)(a), which was the basis upon which the District Judge ordered the Respondent's discharge; and article 8.

17. Under the heading "Person not convicted: human rights and proportionality", section 21A, so far as relevant to this appeal, provides

> "(1) If the judge is required to proceed under this section…, the judge must decide both of the following questions in respect of the extradition of the person ("D")—
>
> (a) whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998;
>
> (b) whether the extradition would be disproportionate.
>
> (2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); but the judge must not take any other matters into account.
>
> (3) These are the specified matters relating to proportionality—
>
> (a) the seriousness of the conduct alleged to constitute the extradition offence;
>
> (b) the likely penalty that would be imposed if D was found guilty of the extradition offence;
>
> (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D.
>
> (4) The judge must order D's discharge if the judge makes one or both of these decisions—
>
> (a) that the extradition would not be compatible with the Convention rights;
>
> (b) that the extradition would be disproportionate.
>
> (5) The judge must order D to be extradited to the category 1 territory in which the warrant was issued if the judge makes both of these decisions—
>
> (a) that the extradition would be compatible with the Convention rights;

> (b) that the extradition would not be disproportionate…".

18. In this case, the District Judge found that, taking into account only those factors set out in section 21A(3), the Respondent's extradition would not be disproportionate for the purposes of section 21A(1)(b). However, under section 21A(1)(a), she concluded that it would be incompatible with article 8.

19. Article 8, "Right to Respect for Private and Family Life", provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

20. It is well-settled that extradition engages article 8 because of its potential to interfere with the family and private life rights of both the individual and his family. The extradition process involves the fulfilment of international obligations and the pursuit of the public interest in extraditing individuals to face charges made against them or to serve lawful sentences for offences they have committed, such that any interference with those rights is in accordance with the law and has a legitimate aim. The crucial exercise is therefore that required by article 8(2) of balancing the interference with article 8 rights which would result from the extradition on the one hand, and the identified public interest on the other, which determines the article 8(2) question of whether the interference is "necessary in a democratic society".

21. The correct approach to that exercise has been considered in a number of authorities to which we have been referred. In HH v Deputy Prosecutor of the Italian Republic, Genoa [2012] UKSC 25; [2013] 1 AC 338 at [8], Baroness Hale of Richmond JSC (as she then was) drew together and approved the following propositions drawn from Norris v Government of the United States (No 2) [2010] UKSC 9; [2010] 2 AC 487:

> "(1) There may be a closer analogy between extradition and the domestic criminal process than between extradition and deportation or expulsion, but the court has still to examine carefully the way in which it will interfere with family life.
>
> (2) There is no test of exceptionality in either context.
>
> (3) The question is always whether the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition.
>
> (4) There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to

> trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back.
>
> (5) That public interest will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved.
>
> (6) The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life.
>
> (7) Hence it is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe."

The District Judge indicated that she was applying the principles set out in Norris and HH (see paragraph 41 of her judgment).

22. In Celinski, in respect of a challenge to a District Judge's conclusion on a proportionality balancing exercise required by article 8(2), Lord Thomas emphasised that this court has to consider just one question, namely, did the District Judge make the wrong decision. I shall return to that concept shortly. However, the court stressed the very strong public interest in ensuring extradition arrangements are honoured particularly in Part 1 cases, where the principle of mutual confidence and respect between EU territories which underpins the arrangements must be recognised and acted upon, such that it will be a rare case in which article 8 rights outweigh the state's international treaty obligations to extradite (see [9] and [10]). Of similarly powerful public interest is the discouraging of persons seeing the United Kingdom as a state willing to accept fugitives from justice (see, again, [9]).

23. Lord Thomas also commended, as "essential", a structured approach of balancing pros and cons of extradition on a "balance sheet" basis (see [14(ii)] and [15]). He made clear that the exercised involved not only listing the relevant pros and cons, but balancing them with a reasoned conclusion. This reflects the fact that, of course, the factors relevant to the balancing exercise are not equally weighted. The weighting of specific factors is quintessentially a matter for the District Judge as guided by the authorities, although he or she is required to explain any particular weight being given to a factor (see TZ (Pakistan) v Secretary of State for the Home Department [2018] EWCA Civ 1109 at [35] per Sir Ernest Ryder SPT).

24. So long as the balancing exercise is substantively performed, there is no obligation to structure the decision-making in any particular way – but the use of an effective structure is likely to render a conclusion robust and avoid further challenges (*ibid*). In most cases, whether in the context of extradition or otherwise, there is no reason to depart from the structure suggested in Celinski, and that structure should generally be adopted by those performing the article 8 proportionality balancing task.

25. Where the conclusion of such an assessment is challenged, the role of the appellate court was considered by Lord Thomas in Celinski at [20] and following. He considered earlier authorities, which emphasised that the correct approach is one of review rather than as a fresh determination of necessity or proportionality and, at [21] and [24], cited and approved the approach advocated by Lord Neuberger of Abbotsbury PSC in In re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33; [2013] 1 WLR 1911 at [93]-[94]:

> "93. There is a danger in over-analysis, but I would add this. An appellate judge may conclude that the trial judge's conclusion on proportionality was (i) the only possible view, (ii) a view which she considers was right, (iii) a view on which she has doubts, but on balance considers was right, (iv) a view which she cannot say was right or wrong, (v) a view on which she has doubts, but on balance considers was wrong, (vi) a view which she considers was wrong, or (vii) a view which is unsupportable. The appeal must be dismissed if the appellate judge's view is in category (i) to (iv) and allowed if it is in category (vi) or (vii).
>
> 94. As to category (iv), there will be a number of cases where an appellate court may think that there is no right answer, in the sense that reasonable judges could differ in their conclusions. As with many evaluative assessments, cases raising an issue on proportionality will include those where the answer is in a grey area, as well as those where the answer is in a black or a white area. An appellate court is much less likely to conclude that category (iv) applies in cases where the trial judge's decision was not based on his assessment of the witnesses' reliability or likely future conduct. So far as category (v) is concerned, the appellate judge should think very carefully about the benefit the trial judge had in seeing the witnesses and hearing the evidence, which are factors whose significance depends on the particular case. However, if, after such anxious consideration, an appellate judge adheres to her view that the trial judge's decision was wrong, then I think that she should allow the appeal."

Where the District Judge has erred in his or her approach, then this court itself will engage in that balancing exercise afresh.

26. We were referred to a number of other authorities; but these did not go to the applicable principles themselves, only to their application. I respectfully agree with the observations of Burnett LJ (as he then was) in Kortas v Regional Court in Bydgoszcz, Poland [2017] EWHC 1356 (Admin) at [37]: the applicable principles are apparent from Norris, HH and Celinski, and there will rarely be any need to refer to any other authority on the point. I did not find any of the other authorities to which we were referred of any significant assistance.

The District Judge's Decision

27. The District Judge considered the article 8 ground, under the heading "Factors for and against extradition", in paragraphs 42 and following of her judgment. She did so in three parts.

28. First, in paragraphs 42-46, she dealt with five specific factors, as follows:

    i) The District Judge said that, since his arrival in the United Kingdom nearly 25 years ago, the Respondent's circumstances "have changed beyond recognition" (paragraph 42). She briefly set out those circumstances, which I have already described (see paragraph 9 above).

    ii) Of delay, she noted the following (at paragraph 43):

> "a. Whereas a national arrest warrant was issued in 1994 and a 'national alert' was issued on 1 July 1994, an EAW was not issued until 5 February 2014.
>
> b. On 27 January 2014 it was discovered by the German authorities that some of the offences alleged had become statute-barred and as a result a 'new adjusted arrest warrant' was issued. I have no evidence for why an EAW was issued very shortly afterwards but given the timing, it is reasonable to infer this related to the adjusted warrant. By that time twenty years had passed. There is no explanation for why the EAW was not issued earlier.
>
> c. It is likely that a timely issuing of the EAW would have led to [the Respondent's] discovery in the UK. He has necessarily been in close contact with the UK authorities regarding his status here. He claimed asylum in 1994/95, he was granted indefinite leave to remain and British citizenship in 2013/14 and he has travelled in and out of the UK on approximately four occasions using his British passport.
>
> d. The EAW was not certified by the NCA until 24 March 2017. There is no explanation for the delay between issue and certification of this warrant.
>
> e. In my view the delay since these allegations have arisen has both diminished the weight to be attached to the public interest and increased the impact upon [the Respondent's] private and family life."

    iii) The District Judge acknowledged the gravity of the offence charged, and set out the specific aggravating features in some detail (paragraph 44).

iv) She acknowledged that the Respondent was, as she had found, a fugitive (paragraph 45).

v) She acknowledged the "constant and weighty public interest in extradition", and in the honouring of international obligations (paragraph 46).

29. Second, in paragraphs 47 and 48, the District Judge listed factors in favour of and those against extradition. Three of the six factors on the latter list were that there had been significant delay of 24 years, the Appellant Judicial Authority was culpable in waiting 20 years to issue an EAW, and there was no explanation for the delay in certifying the EAW once issued. The others were that the Respondent and his family had had a settled life in the United Kingdom for 24 years, and his extradition would cause them financial hardship and emotional harm.

30. Third and finally, the District Judge drew matters together in paragraph 49, as follows:

> "I have taken account of these competing considerations in order to determine whether the public interest in extradition outweighs the interference with the article 8 rights of [the Respondent] and his family. In my judgment, the delay in issuing and certifying this EAW overrides the otherwise strong public interest in extradition. It diminishes the weight to be attached to the public interest and has increased the impact upon [the Respondent's] private and family life."

The Grounds of Challenge

31. Ms Lindfield submitted, first, that the District Judge erred in concluding that the Appellant Judicial Authority and the NCA were guilty of culpable delay, particularly as she concluded that the period of the culpable delay was 20 years.

32. I consider there is force in that submission. Whilst it does not relieve state parties of any parallel culpability, on the judge's own findings the Respondent was culpable for the delay because he had left Germany in order to defeat the criminal proceedings against him there, without making enquiries of those proceedings or giving any idea as to where he was living, inside or outside Germany. Had he not done so, he would have been tried in June 1994. Having fled Germany to avoid the trial, he had no intention of ever returning and did not make any attempt to find out what had happened to the criminal proceedings or to engage with them in any way.

33. Following a national alert, an international alert was issued promptly on 1 July 1994, but without any response. Ms Brown submitted the alert could have been reissued from time-to-time to try and prompt a response; but the German authorities did not know whether the Respondent was in Germany or somewhere else in Europe or somewhere else in the rest of the world, and an international alert was still extant. As Wangiel v Local Court in Strzelce, Poland [2018] EWHC 3370 (Admin) (see especially at [10]) illustrates, the extent of any obligation on state parties to search for fugitives is a fact-specific question. In this period, I find it difficult to accuse the German authorities of being unreasonable in not reiterating the alerts; and there is no certainty that such alerts would have met with more success than the extant alert,

given that the name and date of birth being publicised was apparently different from those under which the Respondent was living in the United Kingdom.

34. The EAW Framework Decision came into effect in 2004. The District Judge was, of course, wrong to say that the Appellant had delayed 20 years in issuing an EAW, as EAWs were not available to Germany until 2004, so that the delay in issuing the EAW was no more than 10 years. But I accept that that is still a lengthy period.

35. I accept that there is little direct evidence as to why an EAW was not issued when it became available, or until 2014. However, the 1994 international alert was still in place. More importantly, the evidence clearly shows that the German authorities did not know where the Respondent was living, even as late as 2014 when the EAW was issued. They did not know he was living in the United Kingdom. They did not know whether he was living outside Germany, or indeed outside Europe. That was the fault of the Respondent himself who had fled to the United Kingdom as a fugitive from justice and, even if he did not deliberately adopt a false identity, he was living under a different name and date of birth from those shown in the EAW. Therefore, whilst the District Judge found – and I accept her finding – that, had an EAW been issued earlier, the Respondent would in fact have been located and served with it sooner and sooner by some years, I do not accept that the German authorities acted culpably in not issuing an EAW sooner. In coming to that conclusion, I note the authorities to which we were referred which make clear that unexplained delay is not necessarily to be assumed to be "culpable" (see La Torre v Republic of Italy [2007] EWHC 1370 (Admin) at [37] per Laws LJ, and Zielinski v District Court, Legnica [2007] EWHC 2645 (Admin) at [13] per Richards LJ).

36. I also accept that there is little direct evidence as to why it took the NCA three years to certify the EAW once it had been issued. However, the same factors apply. It is not known when either of the state authorities became aware that the Respondent was living in the United Kingdom. They did not know in 2014 when the EAW was issued. It seems that they knew in 2017 when the EAW was certified by the NCA. Again, I am unpersuaded that the delay at the hands of the NCA in this period was culpable, even in parallel with the Respondent's own culpability.

37. Therefore, even with the caveats expressed in Celinski and the other authorities about the caution with which an appeal court should interfere with a District Judge's findings, I have been persuaded that the District Judge did err in concluding that, in respect of any of the delay, the state authorities were culpable. For the reasons I have given, the District Judge was clearly wrong in proceeding on the basis that any such delay could have been 20 years, as opposed to ten years.

38. Delay lay at the heart of the District Judge's judgment; and, in my view, these errors are sufficient to require us to perform the proportionality balancing exercise afresh.

39. However, even if one of the state authorities had been marginally culpable, that would not be the end of the story. Some culpability on the part of the state authorities is not necessarily determinative. It has to be considered, together with all other relevant factors in the article 8 proportionality balancing exercise.

40. As a further ground, Ms Lindfield submitted that the District Judge failed to perform that exercise properly: paragraph 49, she submits, betrays that the judge simply

regarded the delay as determinative, i.e. a knock-out blow. Whilst it is important not to impose too great a reasons burden on District Judges, I agree that paragraph 49 shows an error in approach.

41. The District Judge appears to have considered that that delay was determinative of the proportionality issue; but I do not consider that to have been the case. First, set against any culpability of the state authorities, undoubtedly the Respondent was culpable in respect of the entire delay: it was he who fled Germany to avoid facing the criminal proceedings about which he well knew. He was, and is, a fugitive from justice. Second, and more importantly, as I have indicated, the focus of the article 8 balancing exercise is not upon simply the length of any delay, but rather its effect on the article 8 rights of relevant people, including the Respondent's wife and children; and the effect of the delay on the public interest in extraditing him.

42. Despite the paragraphs that precede it – which deal with all of the matters relevant to a proper balancing exercise – it seems to me that in paragraph 49 the District Judge then failed properly to balance the various factors or adequately explain why the delay (whether culpable or not) meant that the article 8 balance fell on the side of not extraditing the Respondent. Simply saying that delay diminished the weight to be attached to the public interest and increased the impact on the Respondent's private and family life – without giving at least brief reasons why it had the effect of changing a balance so heavily in favour of extraditing to one in favour of not extraditing – was, in my view, patently inadequate. In my view, this was another material error in approach.

43. As a result of these errors, it is incumbent on this court to perform the proportionality balancing exercise itself. I therefore turn to that exercise.

44. In respect of the factors that go into the balance in favour of the Respondent, i.e. against extradition, of course, I accept that he has built up a family life and private life in the over 20 years he has been in the United Kingdom and, indeed, in the years since the availability of an EAW. As the District Judge observed, since 1994, his circumstances have changed "beyond recognition". He has a wife of 15 years, and three children. He has a settled job, and is the family bread-winner, his wife not working. His wife and children share in that stable family life.

45. However:

    i) So far as at least the Respondent is concerned, that family life has been built up whilst he has been in full knowledge of the outstanding serious charge against him in Germany.

    ii) Whilst the separation necessarily implicit in his extradition to Germany to face this charge would no doubt be distressing for him and his family, the evidence in relation to their family and private life is thin.

    iii) His wife does not work, and he works in the mornings and evenings six days per week. His wife appears to play the major part in the children's care; and, as the District Judge found (see paragraph 47 of her judgment), if the Respondent were extradited, there is no reason to suppose that she would not continue to care for the children. Whilst extradition would mean that he would

not be earning, the family income is not high (£650 per month net), and his wife would be entitled to benefits. As the District Judge said (again, paragraph 47), the state is capable of providing for families who are left in need due to extradition: indeed, it has an obligation to make provision. Despite the finding of the District Judge, there is simply no evidence that the loss of his earnings, whilst he faces the charge in Germany, would be cause real financial hardship for his family.

iv) The evidence from the Respondent and his wife is that she suffers from bouts of depression, but there is no medical evidence to suggest that these are debilitating or require medication or that they would be significantly worse if he were extradited.

v) Of course, the best interests of the children are a primary consideration. It is, no doubt, in their best interests for their father not to be extradited. However, there is no evidence that the Respondent's children would be adversely affected any more than the temporary removal of a parent to face criminal charges abroad would inevitably cause. The same applies to his wife. Ms Brown frankly accepted that to be the case.

46. In respect of the public interest, again I accept that the passage of time reduces the public interest in the Respondent's extradition. However, the following matters weigh in favour of extradition even at the cost of some interference with the relevant article 8 rights:

i) The District Judge, rightly, recognised the particularly serious nature of the allegations against the Respondent. It is said that the Respondent with another man entered the complainant's home and threatened his baby with a knife, the baby was dropped on the floor and the complainant was himself both threatened with a knife, attacked with another bladed weapon and beaten with a third a second weapon. Where, as here, the alleged offence is particularly serious, the public interest starts at a particularly high level.

ii) There is the public interest in the state fulfilling its international obligations, and in extraditing individuals to face charges in other countries. Those are always a factor of some considerable weight, but (as emphasised in Celinski: see paragraph 22 above) particularly in Part 1 cases, where the principle of mutual confidence and respect between EU territories is especially strong.

iii) The Respondent has been a fugitive from justice since he failed to attend his trial in June 1994. As Ms Lindfield put it, he has since then been keeping his head down. As Lord Thomas made clear in Celinski (at [48(iii)]), where delay in extradition is attributable to flight and fugtivism (especially when under a different name and date of birth), that significantly reduces the weight that can be given to any private or family life acquired in the UK. Here, the Respondent was not only a fugitive, but was in fact living in the UK under a different name from that in the EAW and with a different asserted date of birth.

iv) The Respondent has a conviction in this country, albeit of a minor nature. This is clearly of little, if any, weight.

47. In paragraphs 47 and 48 of her judgment, the District Judge set out each of these factors. However, in paragraph 49, as I have found, when she came to the core of the exercise, it seems to me that she erred in her treatment of delay. But, whether or not she fell into that error in approach, I have come to the clear view that, despite the substantial passage of time in this case and the settled family life enjoyed by the Respondent and his family, the balance is overwhelmingly in favour of extradition. The article 8 claim is thinly evidenced and far from strong, whilst the public interest in extraditing the Respondent to face the serious charge made against him remains very strong. Delay simply did not have the effect on this case that the District Judge considered it to have. This is not one of the rare cases in which the interference with article 8 rights outweighs the public interest in extraditing the respondent.

48. In coming to that conclusion, I make clear that I have taken into account, in favour of the Respondent, that the best interests of his children are a primary consideration; that the District Judge heard evidence (notably from the Respondent himself) and, in making the required assessment, she was therefore in a particularly good position to gauge the adverse impact on him and his family; and that, in making the assessment, there was a significant margin of appreciation or "discretion". Despite all those matters – and adopting the guidance of Lord Neuberger in Re B (see paragraph 25 above), I have come to the clear conclusion that the finding that the extradition of the Respondent to face the relevant charge in Germany would be incompatible to the article 8 rights of him and his family members was wrong.

Conclusion

49. For those reasons, subject to my Lady, Simler J, I would allow the appeal. In accordance with section 29(5), I would quash the order discharging the Respondent, and remit the case to the court below with a direction to proceed as it would have been required to do if it had decided the article 8 question differently and correctly.

50. Finally, may I emphasise my earlier observation. Had the District Judge in this case correctly followed the guidance as to approach found in Celinski, in my view, it is highly unlikely that any challenge could have been made to her decision on the article 8 issue. I strongly commend that approach to all decision-makers, courts and tribunals who are required to consider and determine whether a particular decision or course of action is "necessary in a democratic society", i.e. is proportionate in article 8 terms.

Mrs Justice Simler:

51. I agree for the reasons given by my Lord that this appeal should be allowed, and the matter remitted to the District Judge on the basis he has indicated.

52. The fundamental feature of this case is that the Respondent is a fugitive from justice on a very serious criminal charge. The lengthy delay that has resulted from his evasion of justice can of course reduce the weight to be attached to the public interest in surrendering him for prosecution; and on the other side of the balance, it may have an impact on the nature and extent of the family and private life developed by him in this country.

53. But the delay on the part of the state authorities, whether or not culpable, is not a trump card, however long. Its effect must be considered in the context of the particular facts of the case, and the question that must be addressed by a District Judge is how and to what extent delay impacts on the two aspects to which I have just referred. That analysis was not done or not done properly here, as paragraph 49 of the impugned judgment reflects.

54. The seriousness of the charge in this case makes the public interest (in all its aspects) in extradition particularly strong. To the extent that delay since 2004 has diminished that to some extent, I consider the diminution to be limited for all the reasons given by my Lord. On the other side of the scale, there is little evidence of how or to what extent the delay has impacted on the Respondent and his family's Art 8 rights, established in precarious circumstances as a fugitive evading justice. As the District Judge found, the children will continue to be cared for by their mother; and the family will be financially provided for by the state. There will be emotional distress and disruption for the Respondent and this family consequent on the separation that is inevitable if extradition is ordered. However, there is no evidence that the potential interference with article 8 rights is any more than with any other case, even taking the effects of delay into account. I can see no basis in the evidence or the District Judge's findings for concluding that the delay here has had such an impact as to render extradition disproportionate in this case. Far from it.