Neutral Citation Number: [2020] EWHC 3145 (Admin)

Case No: CO/3332/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

20th November 2020

Before :

MR JUSTICE FORDHAM

- -

Between :

GYULA PETROVICS	**Appellant**
- and -	
PROSECUTOR GENERALS OFFICE OF HUNGARY	**Respondent**

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- -

Saoirse Townshend (instructed by Oracle Solicitors) for the Appellant
Alexander dos Santos (instructed by the Crown Prosecution Service) for the Respondent

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Hearing date: 11th November 2020

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FINAL JUDGMENT

Covid-19 Protocol: This Judgement was handed down by circulation to the parties' representatives by email and release to Bailii. The date and time for hand- down will be deemed to be 10:00 am on 20/11/2020. A copy of the judgement in final form as handed down can be made available after that time, on request by email to the administrativecourtoffice.listoffice@hmcts.x.gsi.gov.uk

MR JUSTICE FORDHAM :

Introduction

1. This is an extradition appeal which came before me as a 'rolled up' hearing, ordered by Holman J on 23 January 2020. The Appellant is 35 and is wanted for extradition to Hungary. That is in conjunction with a conviction European Arrest Warrant (EAW) issued on 11 November 2013. The aggregated custodial sentence is 2 years 4 months and 15 days. The Appellant was on qualifying remand between 19 December 2017 and 3 July 2018 (28 weeks) meaning that he has 1 year 9 months left to serve. The offending to which the EAW relates included the following: use of a false document to obtain a loan on 23 July 2004; attempted burglary on 2 February 2005; burglaries on 5 August

2005 and 9 September 2005; and assaults with threats to kill while incarcerated between 24 and 30 November 2009. The 2009 offences led to a 12 month custodial sentence but also to the activation of previous sentences (cumulatively 2½ years) in relation to the other offences. The aggregate of 3½ years custody in due course became, as I have said, a re-aggregated 2 years 4 months and 15 days.

2. Extradition was ordered by DJ Griffiths on 17 August 2018 after an oral hearing on 18 July 2018. Ultimately, three grounds of appeal have been advanced before this Court: Article 3 ECHR, Article 8 ECHR and section 25 Extradition Act 2003 (oppression based on mental and physical condition). The Article 3 ground of appeal was stayed and still is, pending resolution of issues of principle relating to prison conditions and the reliability of assurances. Holman J directed that the Article 8 and section 25 issues be determined on a 'rolled up' basis (permission to appeal, if granted, to be followed immediately by the substantive appeal) at this oral hearing. Holman J also gave permission to rely on certain fresh evidence and permission to add the section 25 ground. Further fresh evidence was before me and I have considered all the material. I am satisfied that the grounds of appeal cross the reasonable arguability threshold and so I grant permission to appeal. I consider all the fresh evidence, for which permission has not already been granted, in order to see whether it is capable of being decisive. I will deal with all the arguments on their substantive legal merits.

Mode of hearing

3. This was a remote hearing by BT conference call. Both Counsel were satisfied, as was I, that the interests of the parties were not prejudiced by this mode of hearing. A remote hearing was, in my judgment, necessary, appropriate and proportionate. The open justice principle was secured. The case together with its start time were published in the cause list, with an email address usable by any member of the public or press who wished to be able to observe the hearing.

The Appellant's case based on section 25 and Article 8

4. At the heart of the appeal before me is evidence relating to the Appellant's mental and physical health and the implications of extradition. Reliance was placed on these sources in particular: (1) three statements from the Appellant's partner; (2) medical records; and (3) a report (4 March 2020) and addendum report (30 October 2020) of Dr Pankaj Agarwal, a Consultant Forensic Psychiatrist who conducted an assessment interview with the Appellant and his partner on 5 February 2020. The expert reports were provided pursuant to Orders of this Court extending the representation order but were only in the event served on the Respondent on 3 November 2020. A witness statement explaining why was put before me. Both Counsel were able to address me fully on the basis of the materials currently before the Court, including on the subject of whether – depending on this court's conclusions – there ought to be any opportunity for any further response from the Respondent.

5. Ms Townshend submitted, by reference to the authorities, in essence as follows. (1) This Court should adopt the approach in Cash v Court of First Instance, Strasbourg, France [2018] EWHC 579 (Admin) at paragraph 13 where Julian Knowles J said this: "where fresh evidence is relied upon, as it is in this case, I can make my own evaluation of the evidence in considering whether it would be unjust or oppressive to extradite the Appellant by reason of his mental health, and thus when the District Judge should have

decided that question differently". (2) This Court should apply the scrutiny described by Julian Knowles J in Magiera v District Court of Kraków, Poland [2017] EWHC 2757 (Admin) at paragraph 32: "there must be an intense focus on what [the] medical condition is and what it means for [the Appellant] in terms of his daily living, so that a proper assessment can be made of what effects upon him and his condition extradition and incarceration would have. Once that exercise has been carried out the court must assess the extent to which any adverse effects or hardship can be met by the requesting state providing medical care or other arrangements. Once that has been done, then the court must finally make the assessment required by Article 8 and section 25 in the manner described in the authorities… to determine whether the bar is made out". (3) This Court, having done so should arrive at the same conclusion as did Julian Knowles J in Debiec v District Court of Piotrkow Trybunalski, Poland [2017] EWHC 2653 (Admin) at paragraph 44: "to extradite [the Appellant] in his current state of health would violate Article 8 of the ECHR and his extradition is currently barred by section 25 because of his mental illness". (4) That is because there is in this case what was described by the Divisional Court in Bobbe v Regional Court in Bydgoszcz, Poland [2017] EWHC 3161 (Admin) at paragraph 62: "evidence of an 'objective character' which is capable of showing 'the particular seriousness of his mental health and the significant and irreversible consequences to which his transfer might lead'", in respect of which no response currently before the Court from the Respondent serves to "eliminate [the] serious doubts concerning the impact of the transfer".

6. It was common ground that the authorities placed before me are ultimately working illustrations in an area where the application of legal principles is 'intensely fact-specific' (see Debiec at paragraph 45). In Debiec it was "plain on the evidence that [the Appellant was] currently seriously mentally ill and receiving treatment, the interruption of which by extradition would place his recovery in jeopardy and would or at least might result in a marked deterioration which might be permanent", based on expert reports expressing that as a "clear conclusion" (see paragraphs 42 and 43). In that case, there were serious concerns about fitness to fly, in circumstances where the Appellant was "so ill as to need special respiratory protection and special emergency measures to be put in place in order to be flown abroad". In Magiera the Respondents evidence was "wholly insufficient to meet the very real concerns which [had] been expressed by the doctors in the medical evidence", relating in particular to the appellant's "stoma and what he needs to do to manage that in a hygienic and dignified way". The Respondents in that case in relation to that specific and serious concern had given no "explanation of what concrete steps they would put in place" (see paragraphs 37 and 39).

7. There was common ground as to the essential approach to be taken by this Court so far as section 25 and oppression is concerned. Ms Townshend agreed with Mr dos Santos that this Court should ask this question:

> Would the hardship to the Appellant resulting from extradition, by reason of his medical condition, make extradition oppressive?

This reflects the statutory language in section 25 and is adapted from the well-known formulation of oppression from the section 14 'oppression by reason of the passage of time' context (Kakis v Government of the Republic of Cyprus [1978] 1 WLR 799 at 782: cited in Magiera at paragraph 29). The following points were also common ground: that there must be a 'nexus' between the hardship and the extradition; that oppression requires regard to be had to all the relevant circumstances, including the fact

that extradition is ordinarily likely to cause stress and hardship, neither of those being sufficient (Dewani v Government of the Republic of South Africa [2012] EWHC 842 (Admin) at paragraph 73: Magiera at paragraph 28); that "the court has to form an overall judgment on the facts of the particular case" and "a high threshold has to be reached in order to satisfy the court that a requested person's physical or mental condition is such that it would be oppressive to extradite them" (Turner v Government of the USA [2012] EWHC 2426 (Admin) at paragraph 28); and that "it will ordinarily be presumed that the receiving state within the European Union will discharge its responsibilities… in the absence of strong evidence to the contrary… In the absence of evidence to the necessary standard that calls into question the ability of the receiving state to discharge its responsibilities or a specific matter that gives cause for concern, it should not be necessary to require any assurances from requesting states within the European Union. It will therefore ordinarily be sufficient to rely on the presumption" (Wolkowicz v Polish Judicial Authority [2013] EWHC 102 (Admin) at paragraph 10(iii)). It was also common ground that, in assessing the question of oppression, the court considers the comparison between the circumstances as they would be following extradition and the circumstances as they would be following discharge. So, the case law does not sanction an approach which posits a comparison between extradition to face custody in the requesting state and the serving of an equivalent custodial sentence in the United Kingdom: I accept Ms Townshend's submission that if such a comparison were in principle a good idea, somebody in the caselaw would surely have thought of it and said so by now.

8. Ms Townshend accepts that she is not in a position to impugn the ability of the Hungarian authorities to 'discharge their responsibilities' and provide in a Hungarian custodial facility such arrangements as would discharge their human rights responsibilities to the Appellant if extradited. She submits, rather, that by reason of the Appellant's high dependency on support for basic day-to-day functioning, in the light of the marked deterioration in his physical and mental health and his lack of communication, and in the light of his distressing physical condition (incontinence), such would be the implications of incarceration in Hungary – when compared by being at home in the United Kingdom and cared for by his partner – in terms of dignity, vulnerability, mental health deterioration and personal care and hygiene, that extradition would cause such hardship as to constitute oppression, and moreover that it would in the light of the other circumstances of this case be Article 8 disproportionate.

9. In support of those submissions Ms Townshend relies on the various materials before the Court. First, there are the three statements from the Appellant's partner. The first (20 August 2019) says, in particular: "Because of his mental state, I do everything for him. This includes changing his nappies". It adds that the Appellant is "very minimalistic in his communication" which has become "worse since he heard he was going to be extradited". The second (15 January 2020), in particular, describes the Appellant's condition as having "deteriorated" so that: "he now requires constant physical support in every aspect of his life. He does not have the ability to carry out normal daily activities. His condition is so severe that I can no longer take care of him by myself any more. His family help me out in taking care of him". It also says: "he wears nappies 24/7 and is unable to control his bladder during the day or during the night. This began around 2017 when [he] was in prison". The third (23 September 2020) states, in particular, that "his condition has not improved".

10. Next, Ms Townshend relies on the medical records. Among the contents of those records are the following, in particular. (1) On 19 October 2018 Miss Emma Sweeney (Psychological Well-being Practitioner) conducted a 90-minute initial assessment which the Appellant attended with his partner and one of their children. A telephone interpreter was used. Ms Sweeney recorded the Appellant reporting long-standing difficulties with his mood since childhood, attending a special school and requiring support through childhood, reporting having been beaten in prison in Hungary, reporting poor sleep and sleep incontinence and blackouts, and stating that he would like medication to help with sleep and sleep incontinence. (2) On 28 November 2018 Dr Ugo Umeadi wrote a referral letter to a psychiatrist which described the Appellant's partner as having reported that the Appellant "has long-standing difficulties since childhood and has actually attended a specialist school due to difficulties with reading and writing", that he was currently "very low in mood" and "not sleeping" and that "he is refusing to communicate with anybody, and even when he attended surgery today with his partner he refused to say anything to me". At that stage he was prescribed medication, the dosage for which was increased in January 2019. (3) In around September 2019 Dr Umeadi wrote a referral letter to a Consultant Neuropsychiatrist stating that the Appellant's "main problem is depression and mutism. This has become increasingly worse since he went to jail in 2017. I have seen him several times in the surgery and cannot really communicate with him even with his relatives or with interpreters. He hardly speaks to his partner. He has now started being incontinent of urine both day and night… It is really really difficult to get through to him as he hardly makes any eye contact and does not say any words whatsoever". (4) On 10 November 2019 Dr Varduhi Cahill (Consultant Neurologist) wrote a letter describing the Appellant as currently under evaluation for active psychiatric disorder. (5) On 15 November 2019 Ms Sweeney – whose note reflected that when she assessed the Appellant in October 2018 he had been able to communicate well through the interpreter – recorded that he had attended with his partner; that he "did not speak for the duration of the appointment and required a lot of prompting from his partner to enter the room and set"; that the Appellant's partner "spoke on his behalf… And states he has deteriorated in the last 18 months but could not identify a trigger"; Ms Sweeney advised the Appellants partner to seek support from the GP or attend A&E if the Appellant deteriorated further or presented as a risk to himself or others. (6) On 18 September 2020 Dr Hackett (Consultant Neuropsychiatrist) wrote confirming that Dr Cahill had seen the Appellant and had "tried hard to carry out an assessment" and had "elicited a history of progressive social withdrawal and lack of communication over the last 18 months". Dr Hackett considered it "unlikely… that he has significant pre-existing learning difficulties", adding in conclusion: "He doesn't appear to have a significant neurological disorder either. The question then would be when he has a psychiatric disorder or a personality disorder. I am sure the psychiatrists have tried hard to clarify this though if a patient cannot give a clear account of his internal experiences and motivations it can be impossible to arrive at a conclusion. It does appear that he is being looked after by his partner. I find it difficult to see how I am able to take things forward".

11. Ms Townshend relies on the two reports of Dr Agarwal. In particular, there are in those reports the following key points. (1) The Appellant presents with a moderate degree of cognitive impairment and meets the criteria for a diagnosis of moderate learning disability. His relevant history includes that: "Since his early childhood, he has needed support to maintain his daily functioning" and "historically limited social and

occupational skills". He presented with "long-standing cognitive impairment of a moderate degree, which has been present since his early childhood", which "impacts upon his ability to function independently". His "intellectual disability is a lifelong condition", which "attenuates his capacity to comprehend and process emotions "and limits "his ability to cope with day-to-day stressful life events". He has "anxiety… precipitated by overwhelming stressful life events". (2) The Appellant's "behaviour has deteriorated significantly following his release from prison [in July 2018]… He struggles to communicate and interact effectively with his family members and others. He is unable to express his needs… It is likely that his mental state has deteriorated due to the psychological stress of being subject to extradition proceedings". (3) He needs to "continue with his current medication regime" and requires "a supportive environment where [he] can live a safe and healthy life". He "presents with significant communication difficulties… [and] is currently receiving support and care from his family in order to be able to maintain his daily lifestyle". (4) If the Appellant "were to be extradited, the symptom manifestation of his learning difficulties is likely to exacerbate in the absence of the continued support from his family. Furthermore, [the Appellant] would experience significant anxiety due to the overwhelming stressful life events that he is likely to encounter in the absence of continued support. Based on the available information, I find it difficult to envisage that he would be able to cope with the symptom manifestation arising out of his learning difficulties, overwhelming him with anxiety in the absence of support and care from his family and his General Practitioner, which, in my opinion, are protective factors". (5) the Appellant "is extremely vulnerable due to the nature of his moderate learning disability" and "requires significant support from his family to maintain his self-care and self-hygiene… Therefore, it is my opinion that in the event of [the Appellant] being extradited to Hungary, the symptom manifestation of his learning difficulties, typified by poor problem-solving skills and poor communication skills, is likely to exacerbate his overwhelming anxiety, impairing his ability to communicate effectively, thereby exacerbating his vulnerability… [H]is mental disorder is likely to exacerbate significantly to an extent that he would present with a risk to his own health and safety by virtue of the symptom manifestation of his learning disability". That description of "risk to … health and safety" was clarified in the second report as follows: "his risk to his own health and safety is likely to exacerbate due to limited functioning whereby he is unable to communicate effectively, leading to poor self-care and self-hygiene, thereby leading to further deterioration of his physical health. He would be more vulnerable in prison due to his poor self-care, and therefore he is more likely to be subjected to bullying due to his behaviour". (6) Further diagnosis would require a further assessment which "will only be of value if [the Appellant] is willing/able to engage in the assessment".

12. Based on that material Ms Townshend submits that I should conclude that the physical and/or mental condition of the Appellant is such that it would be oppressive to extradite him; and that I should conclude that extradition would be disproportionate with the Appellant's Article 8 ECHR rights. On the Article 8 aspect of the case Ms Townshend submits that the balancing exercise performed by the District Judge should be reopened in the light of the material relating to medical and physical condition and impact of extradition in the light of those. She also submits that the District Judge did not give the relevance and weight to the lapse of time (tending to lessen the public interest in favour of extradition and increase the impact upon private and family life: HH v Deputy

Prosecutor of the Italian Republic, Genoa [2012] UKSC 25 at paragraph 8(6)); nor to the significance of the 28 weeks served by the Appellant on qualifying remand.

The Respondent's propositions (1) to (3)

13. Mr dos Santos for the Respondent advanced three propositions. (1) The evidence on which reliance is placed is demonstrably inherently unreliable and I should place no or little weight on it, with the consequence that the appeal must fail. (2) Even if the evidence relied on were taken at its highest, extradition would neither be oppressive nor Article 8 disproportionate, with the same consequence. (3) Should the Court be unpersuaded at this hearing by propositions (1) and (2), then the Court should identify its concerns and give the Respondent an opportunity to respond to them.

14. Proposition (3) was supported by the citation of Bobbe at paragraph 62 (describing the situation where the onus shifts to the Respondent to eliminate any serious doubts concerning the impact of the transfer), Magiera at paragraph 35 (describing the situation where "more detail may be required before the court considering matters… can be satisfied that concerns arising from the defendant's medical condition have been met such that there are no bars to extradition") and Alexander v Public Prosecutor's Office, Marseilles District Court of First Instance, France [2017] EWHC 1392 (Admin) at paragraph 54 (describing the Court's duty to make enquiries where there is a 'lacuna'). Mr dos Santos emphasised that the expert reports dated 4 March 2020 and 30 October 2020 were provided to the Respondent only on 3 November 2020, and that section 25 is a wholly new issue raised for the first time on appeal, and on fresh evidence.

Proposition (2)

15. I accept the Respondent's proposition (2). I look at the comparison between the circumstances as they would be following extradition and the circumstances as they would be following discharge, making my own evaluation of the evidence, focusing on what I am told about the Appellant's condition and what it means for his daily living. I look at the effects that extradition and incarceration in Hungary would have and the extent to which adverse effects or hardship can be met by Hungary providing suitable care and arrangements, discharging its responsibilities to do so. I bear in mind that extradition is ordinarily likely to cause stress and hardship. Having done, my overall conclusion having regard to all the circumstances – and taking at its highest all the evidence that I have discussed – I conclude that the objective evidence does not show such significant or irreversible consequences of transfer involving hardship to the Appellant resulting from extradition, by reason of his medical condition, meeting the high threshold of making extradition oppressive.

16. The comparison with the position described at home looked after by his partner is important. The evidence is of a condition of dependency as regards his basic functions of daily living, where he is essentially uncommunicative and struggles to interact. No further diagnostic step is suggested. He relies on medication. The most important features are that he is at liberty, at home, in a familiar environment, cared for by those who love him. The comparison with incarceration in Hungary, but with the Hungarian authorities 'discharging their responsibilities' is important. As I have said, Ms Townshend accepts that she has no basis for contesting that the Hungarian custodial and healthcare authorities within the Hungarian prison system would discharge their responsibilities. Those responsibilities are important. They arise in the context of needs

for care and support in day-to-day functioning, care and support in relation to mental and physical health, continued medication and the addressing of a distressing incontinence condition in a manner securing basic dignity. He would be in a condition of dependency as regards his basic functions of daily living, and essentially uncommunicative and struggling to interact. He would be reliant on medication. The most important features are that he would no longer be at liberty, would not be at home, not in a familiar environment, cared for by those who love him; rather, he would be in prison, among other prisoners, and cared for by the custodial and healthcare authorities, albeit properly discharging their responsibilities to a prisoner with his mental and physical condition and his day to day needs.

17. Ms Townshend submits that, when incarceration in Hungary is compared with being cared for by his partner in his home setting, the consequences – in terms of dignity, the deterioration of mental health, the isolation of being cut off from loved ones acting as carers – involves hardship of a nature and degree as constituting oppression. I cannot accept that submission. The exacerbation in his symptom manifestation, his increased anxiety and coping difficulties, would all be properly addressed through the discharge of relevant responsibilities. Discharging applicable responsibilities would mean appropriate medication being administered and reviewed. It would mean incontinence needs being properly addressed. That is important, because the relevant "health and safety" concerns arise from poor self-care and self-hygiene. Vulnerability to bullying in prison is also something involving appropriate responsibilities, being discharged.

18. Taking the entirety of the evidence relied on at its face value, the comparison between the Appellant having his needs addressed within a Hungarian custodial setting and his having them addressed within his home setting does not cross the threshold of constituting hardship of such a nature as to render extradition oppressive. I do not doubt that the care and support of loved ones for the basic functioning described in the Appellant's partner's witness statements and in Dr Agarwal's reports, has a very significant value. I accept that the description in the evidence would involve hardship causally linked to the extradition, by comparison with being discharged, by reason of mental and physical health. What I cannot accept is that it is hardship of such a nature as renders extradition oppressive. Nor, in my judgment, do the nature of the health and welfare implications – when put alongside the other circumstances of the case – render extradition a disproportionate interference with Article 8 ECHR rights. The District Judge properly conducted the balance sheet exercise required by Article 8. She rightly rejected the argument that extradition would be incompatible with Article 8 in this case. The new evidence, together with the criticisms which are made, cannot support the conclusion that the outcome was the wrong one.

Propositions (1) and (3)

19. I have approached this appeal on the basis of taking the evidence relied on by the Appellant at its face value and at its highest. I have concluded, that even doing so, the appeal on section 25 and Article 8 ECHR falls to be dismissed. I will, however, explain what the parties, positions are on the Respondent's proposition (1) and what I would have done about it and proposition (3).

20. In his report of 4 March 2020 Dr Agarwal stated explicitly that his investigation of the background history was based on relying on what the Appellant's partner told him. He explained that the only facts which he had with those obtained by gathering information

from her. He described these as "assumed facts" and said this: "New or more accurate information may need to change in my opinion and conclusions. Ultimately, the reliability of the witnesses a matter for the court". In his second report he said this of the partner's account: "I am unable to confirm with absolute certainty that what she was saying was factually incorrect". That was in response to the question: "Was there anything [the partner] said that gave you cause to concern/not to believe her? Was there any evidence that [the Appellant] was malingering?"

21. Mr dos Santos submits that there is a very serious problem with the expert evidence put before this Court in this appeal and the premise which it adopted.

i) The first expert report recorded: "[the partner] told me that [the Appellant] has never been able to obtain gainful employment… He never worked". That is very striking. This links to a description of a need for "support to maintain his daily functioning", "since his early childhood", with his "historically limited social and occupational skills", as a "lifelong condition".

ii) At the oral hearing on 18 July 2018 the Appellant gave evidence through an interpreter and was cross-examined. He adopted his proof of evidence. A statement from his mother was also placed before the court and relied on. The District Judge recorded the evidence. That included that the Appellant had worked on the family farm in Hungary between leaving school age 15 until he was 23 years old when he went to prison. Having served a four-year sentence for burglary he was released and continue to work on the family farm. He came to the United Kingdom in April 2013 with his partner. He then soon found work and was working as a kitchen porter before being arrested in December 2017. After release in July 2018, in the weeks before the hearing on 18 July 2018, he was working as a cleaner in a restaurant and helping to look after his mother. Her statement explained that the Appellant was currently working night shifts so as to be able to help his mother during the day. The Appellant was asked questions at the oral hearing and the District Judge recorded in the judgment the contents of key questions. The Appellant told the District Judge that as July 2018 he was working as a cleaner for 3 hours a day 3 days a week. That was the evidence before the court.

iii) Based on this evidence, and having heard live evidence from the Appellant with cross-examination, the District Judge found as a fact that: (1) the Appellant has worked in the United Kingdom since he arrived in April 2013; (2) that he currently works 3 days per week as a cleaner in a restaurant; and (3) that he cares for his mother. The District Judge also took into account in the balance sheet as a factor against extradition that the Appellant was employed as a cleaner and would lose his employment if extradited.

iv) The District Judge's judgment was never brought to the attention of the expert. Dr Agarwal was not made aware of the fact that the Appellant had given oral evidence in Court proceedings and was cross-examined on 18 July 2018. Dr Agarwal was not made aware of the evidence relating to the Appellant's employment history, which the District Judge had accepted and which had underpinned findings of fact, on points raised by the Appellant as points counting against extradition. Nobody has ever told Dr Agarwal any of this. And all of this is notwithstanding that Dr Agarwal was making explicit, from 4 March

2020 onwards, his complete reliance on the factual narrative that he described expressly and attributed to what he had been told by the Appellant's partner.

v) This problem permeates and persists and Dr Agarwal was not put in the picture when asked to provide his addendum report dated 30 October 2020. Ms Townshend accepts, rightly, that on this appeal there are findings of fact by the District Judge which she is not able to impugn: that the Appellant has an employment history and was working as recently as 18 July 2018.

22. I put to Ms Townshend that there appeared to be two possibilities here: one is that the Appellant's partner has been untruthful with Dr Agarwal; the other is that the Appellant and his mother were untruthful with the District Judge. I also put to her that, in the light of the District Judge's finding of fact – which she accepts she cannot impeach on this appeal – the basis for the expert evidence cannot be accepted. Ms Townshend submitted that there is a third possibility: namely 'crossed wires' between Dr Agarwal and the Appellant's partner. She submits that the report is not undermined, even if it started from an unreliable place, and that what it says about the Appellant's decline, current position and future position remained reliable and should be accepted.

23. Mr dos Santos maintains that no – or very little – weight can be placed on the evidence of Dr Agarwal. He emphasises that the case history is obviously highly important to the assessment, and that Dr Agarwal is very explicit about that. Mr dos Santos says that if the partner was willing to construct – and leave intact – a false narrative about the Appellant having never worked, when in fact he worked all those years on the farm in the Czech Republic and (to her certain knowledge) all those years in the United Kingdom, as part of a narrative about lifelong reliance on others for basic functioning, then that makes sense only as part of a general desire to exaggerate and overstate functional dependence so as to try to resist extradition. Mr dos Santos submits, moreover, that there are other features of dissonance between the District Judge's factual findings on the evidence before her, and the narrative relied on by Dr Agarwal. An example is whether incontinence is relatively recent (as the District Judge was told) or very longstanding (as Dr Agarwal was told). Mr dos Santos submits that these concerns, moreover, need to be put against a timeline in which the Appellant was able to give oral evidence with cross-examination on 18 July 2018, was able to be fully engaged over a 90 minute consultation with a clinician on 19 October 2018 and yet had become totally uncommunicative with all clinicians ('refusing to speak') from 28 November 2018 onwards. This, he says, is to be put alongside the entry in the medical records which records the Appellant's partner as having told Mrs Sweeney on 15 November 2019 that the Appellant's condition had deteriorated in the last 18 months but she "could not identify a trigger". Mr dos Santos, citing Bobbe at paragraph 60 and 64 emphasised the "rigorous… Approach to the evaluation of evidence" which the court needs to adopt, remaining "conscious that those opposing removal might exaggerate their conditional make statements to medical expert designed to generate the evidence needed to defeat the threatened removal".

24. In all the circumstances, I am quite sure that it was appropriate to focus on proposition (2). I took the evidence at its highest. I have summarised the key points from all key sources – the partner, the medical records and Dr Agarwal. I have treated them all as reliable evidence. I have evaluated the case on that basis, to address proposition (2).

25. Had I been against Mr dos Santos on his proposition (2) – and so had I concluded that the evidence relied on by Ms Townshend taken at its highest was capable of crossing the threshold of oppression and/or Article 8 disproportionality – I would not have proceeded to determine this appeal on the section 25 and Article 8 issues. I would not have rejected Dr Agarwal's evidence or given it 'no or little weight'. I would not have reached any adverse inference against the Appellant or his partner. I would have raised in a short judgment some questions for Dr Agarwal, together with any necessary extension of the representation order, with a timetable to allow the Respondent to adduce any material in response. I might have also made directions for oral evidence and cross-examination. Ms Townshend is right to submit that there could be a misunderstanding here, between the partner and Dr Agarwal, that this may relate only to one aspect (employment) which may be of limited materiality. She is also entitled to say that Dr Agarwal, even from his 'lifelong condition' starting point described a recent deterioration. She can also point to the fact that Dr Agarwal quotes from the 15 November 2019 medical record where Ms Sweeney stated that when she assessed the Appellant in October 2018 he had been able to communicate well through the interpreter. That point did not seem to surprise Dr Agarwal or undermine his assessment. I have reached no views or provisional views on any of this. I would not do so without a further process.

Conclusion

26. For the reasons which I have given – based solely and squarely on my acceptance of the Respondent's proposition (2) – the appeal on section 25 and Article 8 ECHR grounds, although I have granted permission to appeal, is dismissed. The further fresh evidence before me is incapable of being decisive and I refuse permission to rely on it. As I said at the outset, the Article 3 ECHR ground of appeal remains stayed.