Neutral Citation Number: [2021] EWHC 1655 (Admin)

Case No: CO/3691/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

Before:

LORD JUSTICE MALES
and
MR JUSTICE CHAMBERLAIN

- -

Between:

HAMBURG LANDGERICHT (GERMANY)	**Respondent**
- and -	
JOHN PARKES	**Appellant**

- -
- -

Rupert Bowers QC and **Kate O'Raghallaigh** (instructed by **National Legal Service, Solicitors**) for the **Appellant**
Rosemary Davidson (instructed by the **Crown Prosecution Service Extradition Unit**) for the **Respondent**

Hearing date: 15th June 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 21st June 2021

Lord Justice Males:

1. On 2nd October 2020 District Judge Godfrey ordered the extradition of the Appellant, John Parkes, to Germany where he faces an allegation of tax evasion contrary to Article 370 of the German Fiscal Code. He appeals against this order, with the permission of Mr Justice Julian Knowles, on three grounds as follows:

   (1) that extradition would be contrary to his rights under Article 8 ECHR (Extradition Act 2003, section 21);

   (2) that it would be unjust or oppressive to extradite him by reason of his physical or mental condition (section 25); and

   (3) that the District Judge was wrong to rely on an unsigned proof of evidence submitted by the Appellant, who did not give oral evidence at the hearing before him.

2. At the hearing below the Appellant also resisted extradition on the grounds that this would be disproportionate in view of the availability of less coercive measures (section 21A) and that the issue of the European Arrest Warrant amounted to an abuse of process. Those grounds are no longer pursued.

The background

3. The Appellant is 65 years old. As a young man he worked as a fireman until he fell from a roof and suffered spinal injury which has resulted in back problems and the development of arthritis. Since then he has worked as a lorry driver and in the office organising the logistical management of transport businesses. He is separated from his wife, but has a partner whom he met online in 2017.

4. The EAW pursuant to which the Appellant's extradition is sought was issued on 18th February 2020. It is an accusation warrant which alleges that the Appellant committed tax evasion in his capacity as the *de facto* managing director of a company called Blossom Capital GmbH in Hamburg, by failing to submit a tax return for the year 2012 to the competent tax office, despite the company having issued invoices for the sale of copper cathodes to a company called Mila AG based in Duisberg. The tax evaded is said to amount to €3,508,569.88. The offence carries a maximum penalty of 10 years' imprisonment.

5. In the proof of evidence whose status is in issue on this appeal the Appellant gives an account of the circumstances in which he became involved with Blossom Capital GmbH. In outline, he says that he was offered a job by a contact of a friend that he knew from working in the transport industry and that he made a substantial investment in purchasing the company. The job was to run the company organising transport throughout Europe. For this purpose he took an office in Hamburg but, he says, he became suspicious that his associates were keeping things from him and eventually he discovered that they were conducting a VAT fraud. He wanted nothing to do with this and decided not to return to Germany. He was repaid some of the money which he had invested, but was left substantially out of pocket. He was effectively locked out of the company, whose email passwords and phone numbers were changed.

6. The Appellant says that some years later, after extradition proceedings commenced, he was shown documents from the company's accountants, Hansa Partners, which purported to bear his signature and to date from the period after he had ceased to be involved with the company, but these were forgeries. Similarly, the bank account opened in his name at Commerzbank after he had left Germany had nothing to do with him. He contacted Hansa Partners and Commerzbank to ask for copies of these forged documents, but they refused to provide them. The Appellant says that this is because they knew that they had not done proper due diligence and had thereby facilitated a fraud by not checking with whom they were dealing.

7. The EAW is the second such warrant to have been issued. An EAW relating to the same conduct was issued on 26th October 2015. The Appellant contested his extradition on numerous grounds, but on 1st December 2016 District Judge Zani ordered him to be extradited. Permission to appeal to the High Court was refused on the papers, but was subsequently granted in order to enable the Appellant to surrender voluntarily. On 9th June 2017 the German Judicial Authority confirmed that his extradition was no longer sought and he was discharged on 20th June 2017. In the course of the proceedings on this first EAW the Appellant submitted a proof of evidence, which he confirmed on oath, which gave a materially different account of the circumstances in which he had become involved with Blossom Capital GmbH. In short, this account asserted that the Appellant never conducted any business for this company and that he resigned from it in January 2012.

8. A hearing took place in the Hamburg court on 7th June 2017 which the Appellant attended. It appears to be common ground that the Appellant's German lawyer entered a guilty plea on his behalf, but the Appellant says in his current proof that this was done without his knowledge or approval and that his lawyer (whom he does not name) told him that this was necessary in order to get a suspended sentence, and that it was too late to do anything about it. It appears that the Appellant also provided a bail security in the sum of €20,000 and gave written authorisation for his German lawyer to receive summonses on his behalf.

9. The Appellant says that thereafter he telephoned his German lawyer many times and sent even more emails to him to find out about the proceedings, but that the lawyer's only response was to ask for more money from time to time, although the Appellant did meet him on a few occasions when the lawyer travelled to London. It was at one of these meetings that he learned of the existence of the supposedly forged documents held by the German authorities.

10. Further Information from the Judicial Authority dated 8th July 2020 states that the Appellant was summoned on 16th August 2019 to attend a hearing on 15th November 2019 and was informed that failure to comply with this summons could result in a warrant being issued for his arrest. The Appellant, however, says that he only heard about this hearing in November 2019 when he got a text from the German lawyer saying that he needed to be in court in Hamburg in three days' time. He says that by this point his physical and mental health had deteriorated, so he asked his GP to write a letter to explain that he was not fit to travel. The GP's letter, dated 12th November 2019, reads in its entirety as follows:

> "I confirm that I am the General Practitioner for Mr Parkes. He is suffering with severe Osteoarthritis and Anxiety with Depression. I do not feel he is able to travel or attend court."

11. We have before us, although it was not before the District Judge, a statement from the German lawyer, Mr Axel Bertram, confirming that he faxed this letter to the Hamburg court on 13th November 2019, together with a request for an adjournment of the hearing fixed for 15th November 2019. Mr Bertram confirms also that he has represented the Appellant since 15th August 2016. He must, therefore, be the same German lawyer who, according to the Appellant, entered a guilty plea without the Appellant's knowledge or approval, failed to do anything about it when told that the Appellant did not agree to enter such a plea, repeatedly ignored the Appellant's telephone calls and emails seeking further information about the proceedings, and failed to give him proper notice of the hearing on 15th November 2019. Unfortunately, however, Mr Bertram does not address any of these matters in his statement and it is not apparent whether he is even aware of the Appellant's serious allegations against him.

12. At the hearing on 15th November 2019 the Hamburg court did not accept that the Appellant had a valid reason for his non-attendance and issued a warrant for his arrest. The Appellant appealed that decision to the Regional court but his appeal was dismissed on 30th January 2020. This was followed by the issue of the current EAW on 18th February 2020.

The decision of the District Judge

Service of the Appellant's proof of evidence

13. An initial hearing took place before District Judge Zani on 18th May 2020. In accordance with standard practice in extradition cases, District Judge Zani gave directions for the service of a proof of evidence and for skeleton arguments. The Appellant filed the proof of evidence to which I have referred, which was unsigned and contained no declaration of truth. The proof of evidence, together with a skeleton argument signed by the Appellant's solicitor Mr Noam Almaz who represented him at the hearing, was included in the bundle provided to the court for the purpose of pre-reading.

14. The Appellant attended the final hearing on 9th September 2020, but was not called to give oral evidence and, as a result, did not formally adopt his proof or confirm its contents on oath. This was because Ms Rosemary Davidson appearing for the JA had indicated that the Appellant's credibility was in issue on a number of points. She made clear that the Appellant's account in his proof of the reasons for his failure to attend the hearing in Hamburg on 15th November 2019 was not accepted. Nor was what he said about his health or his claim in this proof to have been attacked and stabbed in December 2018 by two men of Eastern European appearance who threatened him that, if he did not stop talking to the German authorities, they would hurt his family. Ms Davidson made clear that she proposed to cross-examine the Appellant about these matters and also about the disparities in his account of his involvement with Blossom Capital GmbH in the two proofs of evidence which he had provided which, she said, undermined his credibility on the extradition issues which the District Judge had to decide.

15. This led to an application by Mr Almaz that cross-examination should not extend to the inconsistencies between what was said in the Appellant's two proofs of evidence. District Judge Godfrey rejected that application, ruling that this would be a legitimate area for cross-examination because the Appellant's credibility was in issue. He made clear, however, that while the cross-examination could extend to exploring the disparities in the Appellant's proofs, it should not be concerned with whether the Appellant was guilty or innocent of the charges against him in Germany. In the light of that ruling, which has not been appealed, the Appellant decided not to give oral evidence.

The District Judge's findings on credibility

16. It appears that there was thereafter no consideration at the extradition hearing of the status of the Appellant's proof, in particular of whether in the light of the Appellant's decision not to give oral evidence his proof formed part of the evidence before the District Judge. There was no suggestion that the proof should be removed from the bundle or that the District Judge should put out of his mind what he had been invited to read. So far as we can tell, the point was not mentioned further.

17. Giving judgment, District Judge Godfrey said that he had considered the Appellant's proof as part of the evidence in the case, but that he found it not worthy of belief. I should quote the following passages from his judgment:

> "12. There is no question of any adverse inference being drawn such as might be appropriate in an English criminal prosecution. However, the weight that I can attach to the content of the RP's proof is liable to be reduced by reason of his failure to adopt it under oath or to submit to cross-examination.
>
> …
>
> 24. The RP's account in his proof asserts that he has been the victim of a series of unfortunate events. First, he was duped by a group of criminals who took his money and used his identity in furtherance of a tax fraud. Quite how they did this and more to the point why they chose to involve an innocent third party, in the shape of the RP, in their maleficent activities remains unclear. Plainly Mr Haberlin and his confederates risked what in fact transpired on the RP's account -- discovery of their criminal scheme by the RP. Secondly, the lawyer who represented the RP in Germany turned out to be incompetent, or worse, since he made a confession on the RP's behalf, without his authorisation, in legal proceedings. Thirdly, Commerzbank, rather than investigating the RP's allegations of fraud, refused to do so because of their own lack of due diligence which they recognised meant they had culpably facilitated the fraud. Fourthly, in December 2018, the RP was the victim of the stabbing, during which threats were made about his co-operation with the German authorities and for which he blames Haberlin, but this was not reported to the police and the RP did not seek medical attention. I observe that, as a result, there is no contemporary evidence to

> support the RP's assertion that this incident ever took place. To similar effect, the RP does not say in his proof that he ever alerted the authorities to the criminal activity he had discovered, upon deciding to part company with those responsible.
>
> 25. Furthermore, the RP gave what Ms Davidson correctly refers to as a materially different account in his Proof of Evidence for the proceedings relating to the first EAW. …
>
> The court's finding as to the RP's credibility
>
> 26. The RP's decision not to give evidence in the proceedings before me detracts significantly from the weight I can attach to anything he says in writing in a Proof.
>
> 27. In all the circumstances, I have not found the account given by the RP in his Proof for the present proceedings to be at all credible. For the reasons I give above at paragraph 24, it lacks credibility as a freestanding account. The RP's credibility is further undermined by his materially different account in the original proceedings. …
>
> 29. Whilst I have concluded that the RP makes statements that are not worthy of belief, I should make it clear that I have not attempted to form anything approaching a conclusive view as to his guilt or innocence in the criminal proceedings for which extradition is sought. As I have said, that is not my function in these proceedings and, in any event, I have minimal knowledge of the evidence in the case and no knowledge of what must be proved to establish guilt of the offence contrary to German law."

18. It is worth noting that the District Judge's principal reason for rejecting the Appellant's evidence was that it was inherently incredible (as he put it, "it lacks credibility as a freestanding account") because of the implausible chapter of misfortunes summarised at [24] of the judgment. The fact that the Appellant had given a materially different account in the original proceedings was essentially a subsidiary point ("further undermined by his materially different account …").

The medical evidence

19. The District Judge then turned to the medical evidence before him. This included a report from Dr Craig McNulty, an independent clinical psychologist, whose evidence had not been challenged. Dr McNulty's conclusion was that the Appellant was suffering from a Major Depressive Disorder with Anxiety, which was well documented in his medical records and which included thoughts of suicide. In addition, Dr McNulty said that the Appellant suffered from many features of Post Traumatic Stress Disorder and that it was highly likely that he was suffering from this, although this view was based on the Appellant's account of having been attacked and stabbed. He concluded:

> "9.6 The continuing legal proceedings, in which he is at risk of extradition and imprisonment, are likely, in my opinion, to

> continue to represent a major source of psychological distress. His history of thoughts of self-harm / suicide, together with the fact that, as he told me in my interview, he had actively considered different locations locally where he might actually try to commit suicide, suggest a strongly elevated risk of serious self-harm in the future. If these proceedings are prolonged for a significant time there is, in my opinion, a serious risk of a chronic deterioration in his mental state with, as I note above, a significantly elevated risk of suicide."

20. The District Judge accepted Dr McNulty's evidence that the Appellant was suffering from a Major Depressive Disorder with Anxiety. However, because he had not accepted the Appellant's account of the attack upon him, he did not find that the Appellant suffered from PTSD:

> "35. In these circumstances, notwithstanding my reservations about the RP's credibility generally, I proceed on the basis that the RP does suffer from a Major Depressive Disorder with Anxiety. Given my finding with regards to the alleged stabbing incident, I do not find that the RP suffers from PTSD."

21. The District Judge accepted other evidence from doctors treating the Appellant: that he had mobility problems, related to his degenerative lumbar spine condition, and osteoarthritis; and that he had had suicidal thoughts.

Article 8 ECHR

22. Turning to the issues for decision, District Judge Godfrey dealt first with Article 8 ECHR. He referred to the well-known cases of *Polish Judicial Authority v Celinski* [2015] EWHC 1274, (Admin), [2016] 1 WLR 551 and the Supreme Court cases which preceded it, *Norris v Government of the United States of America (No 2)* [2010] UKSC 9, [2010] 2 AC 587 and *H(H) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2013] 1 AC 338 and continued:

> "43. I adopt the 'balance sheet' approach in accordance with the judgment in *Celinski*. The fundamental question under Article 8 which I must answer is whether the interference with the private and family life of the RP is outweighed by the public interest in extradition. The test is not exceptionality, but it is likely that the public interest in extradition will outweigh Article 8 unless the consequences of the interference with family life will be exceptionally severe, per Lady Hale at para 8 of *HH*."

23. Applying this approach, the judge identified the factors on each side of the balance sheet. He held that the weightiest factors militating against extradition were the Appellant's mental and physical health and the effect of extradition on his partner, but concluded that the factors favouring extradition outweighed these.

Proportionality / less coercive measures

24. The next issue was the proportionality of extradition. The Appellant did not dispute that the offence was serious, carrying as it did (and as it would in this country) a substantial custodial sentence. The issue was the possibility of the JA taking less coercive measures, which it was not prepared to do. Its view set out in the Further Information of 15th June 2020 was that:

> "the defendant's behaviour with regard to his non-appearance at the trial on 15 November 2020 does not make it seem promising at present … to agree to another trial date with the defendant … for the execution of which the arrest warrant could then be suspended again … Indeed the submission of non-credible excuses and the submission of meaningless medical letters by the defendant argue against the defendant voluntarily standing trial."

25. The Appellant submitted that the JA had acted unreasonably in rejecting his case that he failed to attend his trial due to ill health when he had attended the hearing on 7th June 2017 voluntarily and had provided security for his attendance, and had also provided evidence from his GP that he was unfit to attend on 15th November 2019. The District Judge did not accept the Appellant's evidence in his proof that he had only three days' notice of the trial date and concluded that there was no possibility of less coercive measures than extradition being taken. Such measures had been taken and had failed. The District Judge understood the JA to be saying that the medical evidence provided had been insufficient to support an argument that the Appellant could not attend court in Hamburg and agreed with that view.

Oppression

26. Finally the District Judge dealt with the question of oppression. Accepting Dr McNulty's evidence that the Appellant suffered from Major Depressive Disorder with Anxiety, he concluded that nevertheless his health had not deteriorated to the extent that it would be oppressive to extradite him. He had regard to the "imperative of extradition" (as Lord Kerr put it in *Norris*) and accepted that the German authorities could be expected to allow the Appellant to receive appropriate and sufficient medical treatment in Germany. Accordingly he rejected this ground of challenge also.

The status of the Appellant's unsigned proof

Submissions

27. Although it is the third ground of appeal, it is convenient to deal first with the status of the Appellant's unsigned proof of evidence. This is for two reasons. First, this issue took up most of the parties' written submissions and all of their oral submissions at the hearing before us. Second, Mr Rupert Bowers QC for the Appellant acknowledged that, if the proof formed part of the evidence which the District Judge was entitled to take into account, no valid criticism could be made of the way in which the District Judge had evaluated the various factors which were relevant for the purpose of Article 8 ECHR and the issue of oppression. His submission was that the proof did not form part of the evidence before the District Judge. Accordingly ground 3 is the decisive issue. If that ground fails, the other grounds have no independent life.

28. For the Appellant, Mr Bowers submitted that (1) an unsigned and unsworn statement in a proof of evidence which does not contain a statement of truth is not automatically admissible against him in extradition proceedings and (2) a District Judge is not entitled to draw an adverse inference against a requested person who chooses not to give evidence after filing such a proof. He developed these submissions by pointing out that extradition proceedings are criminal proceedings which have to be conducted "as nearly as may be" as if they were committal proceedings before magistrates, applying the normal rules of criminal evidence and procedure (*R v Governor of Brixton Prison, ex parte Levin* [1997] AC 741 per Lord Hoffmann at 746-7; *R (Government of the United States of America) v Bow Street Magistrates Court* [2006] EWHC 2256 (Admin), [2007] 1 WLR 1157 at [75] and [76] per Lord Phillips CJ; and *R (B) v Westminster Magistrates Court* [2014] UKSC 59, [2015] AC 1195 at [19] per Lord Mance).

29. Mr Bowers submitted that an unsigned proof of evidence containing no statement of truth is not generally admissible in extradition proceedings unless it is adopted by the maker of the statement in oral evidence. Although directions for the filing of such proofs are routinely given, there is no requirement to file them and no sanction in the Criminal Procedure Rules for failing to do so. But if the requested person decides not to give oral evidence, even after filing such a proof, it does not become automatically admissible. Any party wishing to rely upon it must make an appropriate application to do so in accordance with the applicable rules in the Criminal Justice Act 2003 as to the admission of hearsay evidence. In the present case the Appellant had not relied on his proof after the decision was made that he would not give oral evidence in the light of the District Judge's ruling about cross examination and the JA had made no application to rely on the proof either. Accordingly it did not form, or at any rate should not have formed, any part of the evidence before the District Judge. Mr Bowers accepted that, if an application to rely on the proof had been made, the application might have succeeded, but this had not been done and it was important in criminal proceedings (including extradition) to maintain a rigorous approach to the admission of evidence.

30. Further, the rules about the drawing of adverse inferences when a defendant does not give evidence are contained in section 35 of the Criminal Justice and Public Order Act 1994 and paragraph 26P.1 of the Criminal Practice Direction VI. These require a formal warning to be given to a defendant that a failure to give evidence or to answer questions without a good reason may lead to an inference being drawn against him and a careful direction about the circumstances in which an inference may be drawn. No such warning had been given here and accordingly it was not open to the District Judge to draw inferences against the Appellant based on his decision not to give oral evidence at the extradition hearing.

31. Mr Bowers submitted that this is what the District Judge had done. His view of the Appellant's lack of credibility was based on the content of his proof and led him to reject Dr McNulty's evidence that the Appellant was suffering from PTSD. However, because Dr McNulty had not been cross-examined, it was not open to the District Judge to reach this conclusion. If, as he ought to have done, the District Judge had accepted that the Appellant was suffering from PTSD in addition to a Major Depressive Disorder, that would have altered the balance decisively for the purpose of the issues arising under Article 8 ECHR and oppression.

32. For the JA, Ms Davidson submitted that the applicable rule is that contained in section 202(5) of the Extradition Act 2003, and that (leaving aside evidence going to the issue

whether there is a *prima facie* case against a requested person for the purpose of Part 2 of the Act where a more strict approach applies) the court is entitled to adopt a flexible approach to the admission of evidence which depends on the nature of the evidence in question and the issue to which it goes. Unlike a criminal trial where a jury will be faced with a hard-edged question of fact (did the defendant do the act with the necessary intent?), extradition proceedings involve a more evaluative and predictive approach, for example as to whether extradition would infringe a requested person's human rights or would be oppressive. The cases which have suggested a strict approach in accordance with criminal rules of evidence have been concerned with whether a *prima facie* case is established and not with the evaluative and predictive question which arises in cases like the present. They recognise that the strict rules of evidence applicable to criminal proceedings do not apply to all issues arising in extradition cases and, in particular, do not apply to human rights issues where greater latitude is afforded to the admission of evidence (*R (B) v Westminster Magistrates Court* at [21] to [23] per Lord Mance).

33. In any event, Ms Davidson submitted that it would have made no difference to the District Judge's decision if the Appellant's proof had been excluded. He had, in fact, accepted Dr McNulty's primary conclusion of a Major Depressive Disorder with suicidal thoughts. That was not sufficient to outweigh the public interest in extradition for the purpose of Article 8 ECHR or section 25 of the Extradition Act 2003 when there was no evidence that Germany would not provide appropriate medical care. It would have made no difference if the District Judge had accepted that in addition the Appellant had been suffering from PTSD.

Decision

34. The powers of the High Court on an appeal under Part 1 of the Extradition Act 2003 are set out in section 27. That section provides, so far as relevant in the present case, that an appeal may only be allowed if the District Judge ought to have decided a question before him at the extradition hearing differently and that, if he had done so, he would have been required to order the requested person's discharge. I agree with Ms Davidson that it is a short but complete answer to this appeal that there is no reason to think that it would have made any difference to the District Judge's decision if he had accepted that the Appellant was suffering from PTSD in addition to suffering from a Major Depressive Disorder which had led him to have thoughts of suicide. The District Judge put the Appellant's mental and physical health into the scale against extradition when evaluating the factors relevant to Article 8 and oppression, but concluded that this was outweighed by the "imperative of extradition" in circumstances where the German authorities could be expected and trusted to allow the Appellant to receive appropriate and sufficient medical treatment in Germany.

35. Moreover, I can see no difference of substance on the facts of this case between a decision that the Appellant's proof would form no part of the evidence before the District Judge (which is what Mr Bowers says should have happened) and a decision that his proof would form part of the evidence but would be rejected as incredible (which is effectively what happened, allowing for the fact that the District Judge was not asked to make any decision about the status of the proof after the Appellant decided not to give oral evidence). Mr Bowers accepted, or at any rate did not contend otherwise, that if the proof formed part of the evidence, the District Judge was entitled to reject it as incredible, not least in circumstances where the decision not to give oral

evidence had been made in full knowledge of the fact that the Appellant's account of having been attacked was disputed.

36. But even if the proof had been formally excluded from evidence, the District Judge would still have been entitled to proceed on the basis that the factual foundation for any diagnosis of PTSD (i.e. the fact that the Appellant had been attacked) was not established. Whether the Appellant had been attacked was a disputed question which it was for the District Judge as the tribunal of fact to determine. It was not a question for Dr McNulty who, in fairness to him, did not suggest that it was. He explained that he was proceeding on the basis of what he was told by the Appellant, and he did what he could to test its veracity, but the reliability of that information was not for him to determine. In these circumstances the fact that Dr McNulty was not cross-examined about what the Appellant told him does not mean that his diagnosis of a likelihood of PTSD had to be accepted. On the contrary, even if the proof had been formally excluded, the District Judge would have been entitled to conclude that, even though the Appellant had been prepared to tell Dr McNulty about an attack which had not been reported to the police and for which he had not sought hospital treatment, his claim to have been attacked should be rejected if he was not prepared to be cross-examined about it.

37. It is in any event highly artificial to say that the District Judge ought to have excluded the Appellant's proof from evidence when he was not asked to give any such ruling and when there was no reason for Mr Almaz, who represented the Appellant, to ask him to do so. On the contrary, the content of the proof was important evidence for the Appellant on (at least) the issue of less coercive measures, as it contained his explanation for not attending his trial in Hamburg on 15th November 2019. Without that evidence his case on this issue, which was only finally abandoned at the hearing before us, was decidedly thin. The obvious course for Mr Almaz was to place what reliance he could on the content of the proof, recognising (as no doubt he did) that it would carry less weight without the Appellant having submitted to cross-examination.

38. I would reject the submission that the District Judge erred in drawing an inference against the Appellant similar to the inference which may be drawn against a defendant in criminal proceedings who exercises his right not to give evidence. The District Judge made clear at [12] of his judgment that he was doing no such thing. There is a distinction between drawing an inference in this way on the one hand and deciding to give no weight to a proof on which a witness is not prepared to submit to cross-examination on the other.

39. In my judgment, therefore, there is no question which the District Judge ought to have decided differently and, even if he ought to have excluded the Appellant's proof from evidence, he would not have been required to order the Appellant's discharge.

40. While this is sufficient to dispose of this appeal, it may be helpful to say something about the status of the Appellant's proof. It is obviously convenient for directions to be given in extradition cases for proofs of evidence and skeleton arguments to be served, and for these documents to be included in the bundle which the judge will be invited to read in preparation for the extradition hearing. The use of a model directions form as a basis of case management in extradition cases in order to ensure that the issues are identified in advance was warmly commended in *Puceviene v Prosecutor's Office of*

the Republic of Lithuania [2016] EWHC 1862 (Admin), [2016] 1 WLR 4937 at [33] to [36].

41. Usually the inclusion of such a proof in the hearing bundle will cause no problem. The requested person will confirm the content of his proof in oral evidence and no question about its evidential status will arise. Sometimes the JA will not need to cross examine or will have no basis for doing so, for example if the evidence is confined to the circumstances of the requested person's family or private life. That situation gives rise to no difficulty either. The issue only arises in the present case because the Appellant chose to give a detailed account of why he says that he is not guilty of the offence of which he is accused, which was inconsistent with an account which he had given in an earlier proof which he had confirmed on oath. That is likely to be an unusual situation, not least because guilt or innocence (or even the existence of a *prima facie* case) will be irrelevant in proceedings under Part 1 of the 2003 Act and requested persons will generally wish to keep their powder dry on that issue. It must be an even more unusual situation for a requested person to argue that his own evidence is inadmissible.

42. Be that as it may, it is always open to the parties to agree that evidence can be admitted. I would suggest that once a proof of evidence is included in a hearing bundle which the judge is invited to read, the judge is entitled to treat the parties as having agreed that the proof forms part of the evidence on which the case is to be determined, at any rate if nothing is said to the contrary. If the JA wishes to object to the admission of the proof if the requested person does not give oral evidence, it can be expected to say so. Similarly, if the requested person, having decided not to give oral evidence, wants the District Judge to put what he has read out of his mind and to exclude the proof from evidence, the onus is on him to make this clear. In either case, the District Judge will then have to rule on the status of the proof if the parties cannot agree. What ruling is appropriate is likely to depend on the particular circumstances of the case, including the extent to which the proof has already been deployed in submissions, the nature of the issues with which it deals and the overall interests of justice.

43. I add that I should not be taken to endorse Ms Davidson's submission that section 202(5) of the 2003 Act gives the court power to admit any document in evidence. That subsection merely ensures that the preceding subsections (which deal with receiving duly authenticated documents in evidence) do not have the effect of preventing a document which is not duly authenticated from being so received. But it remains necessary, where there is a dispute about admissibility, to find a basis on which a document may be admitted, although what will suffice may depend on whether the document goes to an issue where strict rules of evidence apply or to an issue, such as human rights, on which greater latitude is permitted.

44. I doubt whether it would be helpful to go further than this in the present case where it is not necessary to do so.

Disposal

45. I would dismiss the appeal.

Mr Justice Chamberlain:

46. I agree.

Order

UPON HEARING counsel for the Appellant and Counsel for the Respondent at the Royal Courts of Justice at the Strand, on 15 June 2021, it is ordered that:

1. The Appellant's appeal is dismissed.

2. There be assessment of the Appellant's publicly funded costs.