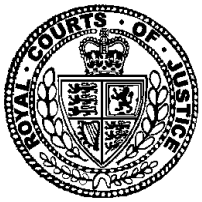

Neutral Citation Number: [2021] EWHC 1956 (Admin)

Case No: CO/3575/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2021

Before :

THE HON. MR JUSTICE LANE

- -

Between :

JACK PERRY	**Appellant**
- and -	
THE GOVERNMENT OF THE UNITED STATES OF AMERICA	**Respondent**

- -
- -

James Lewis QC, David Williams (instructed by **Sonn MacMillan Walker**) for the **Claimant**
Peter Caldwell, Benjamin Seifert (instructed by **The Crown Prosecution Service**) for the **Defendant**

Hearing date: 24 June 2021

- -

Approved Judgment

Mr Justice Lane :

1. The respondent seeks the extradition of the appellant to face trial in California for offences of kidnap, threats to kill and associated conduct in respect of offences against the person. On 25 August 2020, District Judge Goozée sent the appellant's case to the Secretary of State for the Home Department for her decision on whether to order the appellant's extradition. On 23 September 2020, the Secretary of State ordered his extradition to the United States.

2. Before the District Judge, the appellant sought to rely upon sections 78 and 137 of the Extradition Act 2003 ("the 2003 Act") in support of his submission that certain of the charges made against him in California do not amount to extradition offences for the purposes of Part 2 of the 2003 Act; in particular, count 1 (kidnapping), and count 2 (child stealing). The appellant also contended that his extradition would not be compatible with his Article 3 ECHR Rights, owing to the alleged inhumane and degrading prison conditions to which he would be subjected if extradited, particularly in the light of Covid-19.

3. The District Judge found against the appellant on all issues. Permission to appeal was granted by Swift J at a renewed permission hearing on 12 March 2021. The Grounds upon which permission was granted concern the findings of the District Judge in respect of the section 137 issue. Permission was refused in respect of the Ground concerning Article 3 of the ECHR.

4. The hearing of the substantive appeal took place before me on 24 June 2021. I am grateful to counsel for the clear and detailed nature of their respective submissions.

The Californian charges and the conduct to which they relate

5. Count 1 alleges that on or about 24 December 2015 in the County of Los Angeles, the appellant kidnapped his two-year old daughter, L; and that she was kidnapped and carried away with intent to permanently deprive the parent and legal guardian of custody of L. That parent is E, who is L's mother.

6. Count 2 alleges that on or about 24 December 2015 in Los Angeles the appellant committed the crime of child stealing, in that he unlawfully, maliciously and not having a right of custody, took, enticed away, detained and concealed L with intent then and there to detain and conceal her from E, the person having lawful charge of L.

7. The relevant provisions of the California Penal Code concerning kidnapping and child stealing are as follows:-

> "**California Penal Code, section 207(a) Kidnapping Defined**
>
> "(a) every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, or into another part of the same guilty, is guilty of kidnapping.

...

(e) For purposes of those types of kidnapping requiring force, the amount of force required to kidnap an unresisting infant or child is the amount of physical force required to take and carry the child away a substantial distance for an illegal purpose or with an illegal intent.

…

California Penal Code, section 208. **Punishment of Kidnapping**

(a) Kidnapping is punishable by imprisonment in the state prison for three, five, or eight years.

California Penal Code, section 667.85. Kidnapping Child Under Age of 14 years; **Additional Terms**

Any person convicted of a violation of Section 207… who kidnapped or carried away any child under the age of 14 years with the intent to permanently deprive the parent or legal guardian custody of that child, shall be punished by imprisonment in the state prison for an additional five years.

California Penal Code, section 278. **Non Custodial Persons**; **detainment or concealment of child from legal custodian; punishment**

Every person, not having a right to custody, who maliciously takes, entices away, keeps, withholds, or conceals any child with the intent to detain or conceal that child from a lawful custodian shall be punished… by imprisonment pursuant to subdivision (h) of s.1170 for two, three or four years, a fine not exceeding ten thousand dollars ($10,000) … or both that fine and imprisonment".

8. The conduct which is said to give rise to the offences of kidnapping and child stealing is set out in the affidavit of Tal Kahana, a Deputy District Attorney in the Los Angeles County District Attorney's office. Her factual summary states that on 24 December 2015, during a monitored visit with L in Los Angeles, the appellant abducted L. The appellant and L were with a hired monitor, Ms V, at a crowded outdoor mall enjoying Christmas activities. They had arrived at the mall via UBER. The appellant directed the UBER driver to wait for them and left L's car seat in the car. While walking around the mall, Ms V turned around and found the appellant and L had disappeared into the Christmas crowd. Hotel records later confirmed that the appellant and L checked into a nearby Beverley Hills hotel, shortly after Ms V noticed that the appellant and L were gone.

9. On 26 December 2025, the appellant called a private driver to the hotel and hired him to drive the appellant and L to Palm Springs, a city several hours away. Using an account that was identified as being in the name of L, the appellant rented an Air Bnb, comprising an apartment in Palm Springs. The real estate representative there who met the appellant testified that the appellant introduced himself as "Luke" and paid cash, claiming that he had lost his ID and credit cards.

10. On 28 December 2015, the appellant texted the same private driver and asked for a quote to drive the appellant and L from Palm Springs to Phoenix, Arizona, the following day. Also on 28 December, the real estate representative received a Facebook notification that had "gone viral". It was originally posted by E and then re-posted by E's friends. The Facebook post had photographs of both the appellant and L and stated that L had been abducted by the appellant. The real estate representative called the Palm Springs Police Department, who went to the Air Bnb apartment shortly thereafter, where they arrested the appellant and recovered L.

11. In the apartment, officers found the appellant's passport, large suitcases, and an iPad. When he was "booked", the appellant specifically requested that L's iPad "be given to L". The officers released L into the care of her mother along with the iPad. E, not recognising the iPad as belonging to L, turned it over to the LAPD detectives, who searched the iPad and found a series of text messages between the appellant and his father. In those texts, the appellant "outlined his plans for an escape and relocation to China" with L.

12. Counts 3 to 8 concern threats and breaches of court orders. Count 3 alleges that on or about 21 October 2015, in the county of Los Angeles, the appellant committed the crime of "criminal threats, in violation of Penal Code Section 422(a)" in that he "did wilfully and unlawfully threatened to commit a crime which would result in death or great bodily injury to Deborah Maguire with the specific intent that the statement be taken as a threat". It was further alleged that the threatened crime was, on its face, unequivocal, unconditional, immediate and specific such as to convey to Ms Maguire a gravity of purpose and an immediate prospect of execution; and that Ms Maguire was reasonably in sustained fear of her safety.

13. The relevant provision of the California Penal Code is section 422(a): Criminal threats – elements of offense; Punishment. This provides that any person who wilfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate and specific as to convey to the person threatened the gravity of purpose and an immediate prospect of execution of the threat, and which thereby causes the person reasonably to be in sustained fear for her own safety or for that of his or her immediate family, shall be punished by imprisonment in a state prison.

14. On count 3, the factual statement says that on 21 October 2015, detectives who were investigating the appellant, the allegations that he had gone to E's place of work, in breach of a restraining order preventing him from contacting E, asked to interview the appellant. When the appellant understood why the detectives had contacted him, he sent several threatening text messages to Deborah Maguire, the manager of the club that employed E, accusing her of taking sides and threatening to do her and her family harm. The statement describes the appellant as sending texts which included "I will hurt ur family", "Deb watch Ur back!!! You are in trouble u cunt.", "now it's urs [family] that's in danger" and "watch yourself". He also threatened to kill Ms Maguire and the latter's mother. The messages "scared and upset Maguire, making her fear for her life and the safety of her family".

15. The appellant does not dispute that the particulars just described, if proved, constitute a criminal offence under the law of England and Wales; namely, the making of threats to kill, contrary to section 16 of the Offences against the Person Act 1861.

16. In counts 4, 5 and 6, it is alleged that the appellant on or about May 19, 2015, (count 4), on or about 2 June 2015 (count 5) and on or about 3 September 2015 (count 6) committed the crime of "disobeying domestic relations court order", in that he knowingly and intentionally violated a court order obtained under the provisions of the California Family Code; namely, a domestic violence restraining order.

17. Section 273.6(a) of the California Penal Code provides that any intentional or knowing violation of a protective order (which includes that with which we are concerned) is a misdemeanour, punishable by a fine or by imprisonment for not more than one year, or both.

18. In respect of count 4, the factual summary states that the court ordered the appellant not to drive L in any motor vehicle. This followed the appellant's convictions in 2008, 2012 and 2016, of driving under the influence of drugs or alcohol. After E had seen the appellant driving L in his car in violation of the order, the appellant sent E numerous texts messages asking her not to report the violation to the Family Court. On 19 May 2015, shortly after the appellant took custody of L for a scheduled visitation, he sent E another text, stating that E would have to contact the British embassy if she wanted to see L . That day, the appellant did not return L at the appointed time and did not do so until law enforcement intervened.

19. The particulars of count 5 describe how the Family Court, on 2 June 2015, reduced the appellant's visitation with L as a result of his violations of the court order. After the family court hearing, the appellant left E approximately 43 voice and text messages, revealing that he knew E's home address. E testified that she was terrified as she had just moved to the new address.

20. The factual summary relating to count 6 describes how on 3 September 2015 the appellant sent several texts to Ms Maguire in which he said that he wanted to come to the club at which E worked. Ms Maguire, who was aware of the restraining order, responded that E was working and that the appellant should not come. The appellant nevertheless went to the club where he found E in a small side office. He proceeded to scream at E and at Ms Maguire, who reported the appellant's actions to law enforcement. It was following this reporting that the appellant is alleged to have committed the offence described in count 3.

21. Count 7 concerns Chapin Melcher, a former business associate of the appellant. Count 7 alleges that on or about 26 November 2015, in the county of Los Angeles, the appellant committed the crime of criminal threats by unlawfully threatening to commit a crime which would result in death or great bodily injury to Mr Melcher, with a specific intent that the statement be taken as a threat. The threat was of such an unequivocal, unconditional, immediate and specific nature as to convey to Mr Melcher the gravity of purpose and an immediate prospect of execution, contrary to section 422(a) of the California Penal Code.

22. The factual summary in respect of Count 7 states that in late November 2015 the appellant threatened Mr Melcher, after the latter had filed a civil suit against the

appellant, seeking the recovery of $22,500 which the appellant owed him. Mr Melcher's wife had remained close friends with E and Mr Melcher's son, who was approximately the same age as L. When the appellant found out that E and L had attended a birthday party for Mr Melcher's son, the appellant "became enraged, accused Melcher of taking sides and threatened Melcher's family". On 26 November 2015, while outside the USA on business, Mr Melcher received a series of threatening messages:-

> "…through a mutual friend. The Facebook messages relayed through the mutual friend stated in part "make sure you tell Chapin that if he comes to LA that he is a dead man, I'll cut him and his family…"… "Melcher was in fear for his safety and the safety of his family".

23. Mr Melcher reported the appellant's actions to law enforcement and sought a civil restraining order against the appellant which was granted.

24. Count 8 alleges that on or about 8 December 2015 in the county of Los Angeles, the appellant committed the crime of disobeying a court order, in violation of section 166(a)(4) of the California Penal Code, in that the appellant "did unlawfully commit contempt of court by wilful disobedience of a process and order lawfully issued by a court, to wit, Temporary Restraining Order".

25. Section 166(a)(4) of the California Penal Code provides that wilful disobedience of the terms of a court order is a misdemeanour. Unlike the punishment for violation of a protective order which, albeit that it is a misdemeanour, carries the maximum sentence of imprisonment of one year, punishment for an offence under section 166(a)(4) is subject to section 19 of the California Penal Code, whereby a misdemeanour not subject to a specific punishment, is "punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars ($1000), or by both".

The factual summary in respect of count 8 states that after Mr Melcher obtained Civil Restraining Order against the appellant, the latter sent Mr Melcher threatening calls, texts and emails. This was in breach of the order that prohibited the appellant from contacting Mr Melcher.

Legal Framework

26. Section 78(4)(b) of the 2003 Act requires the judge to decide whether the offence specified in the request for extradition is "an extradition offence". By section 78(6), if the judge decides that question in the negative "he must order the person's discharge".

27. So far as relevant, sections 103 and 104 provide as follows:

> "**103 Appeal where case sent to Secretary of State**
>
> (1) If the judge sends a case to the Secretary of State under this Part for his decision whether a person is to be extradited, the person may appeal to the High Court against the relevant decision.
>
> …
>
> (3) The relevant decision is the decision that resulted in the case being sent to the Secretary of State.

(4) An appeal under this section -

(a) may be brought on a question of law or fact, but

(b) lies only with the leave of the High Court.

…

104 Court's powers on appeal under section 103

(1) On an appeal under section 103 the High Court may—

(a) allow the appeal;

(b) direct the judge to decide again a question (or questions) which he decided at the extradition hearing;

(c) dismiss the appeal.

(2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.

(3) The conditions are that—

(a) the judge ought to have decided a question before him at the extradition hearing differently;

(b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.

(4) The conditions are that—

(a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;

(b) the issue or evidence would have resulted in the judge deciding a question before him at the extradition hearing differently;

(c) if he had decided the question in that way, he would have been required to order the person's discharge.

(5) If the court allows the appeal it must -

(a) order the person's discharge;

(b) quash the order for his extradition.

(6) If the judge comes to a different decision on any question that is the subject of a direction under subsection (1)(b) he must order the person's discharge.

(7) If the judge comes to the same decision as he did at the extradition hearing on the question that is (or all the questions that are) the subject of a direction under subsection (1)(b) the appeal must be taken to have been dismissed by a decision of the High Court.

> (8) If the court makes a direction under subsection (1)(b) it must remand the person in custody or on bail.
>
> (9) If the court remands the person in custody it may later grant bail."

28. Section 137 sets out whether a person's conduct constitutes an "extradition offence" for the purposes of Part 2. For our purposes, the relevant conditions that must be satisfied, in order for that conduct to constitute "an extradition offence" are those set out in section 137(3)(b) and (c); namely:-

> "(b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment if it occurred in that part of the United Kingdom;
>
> (c) the conduct is so punishable under the law of the category 2 territory."

29. Section 137(7)(A) provides that references to "conduct" are to the conduct specified in the request for the persons extradition. For present purposes, that is the conduct described in the affidavit of Tal Kahana, the Assistant Deputy District Attorney.

30. In Norris v Government of the United States of America [2008] 1 AC 920, the House of Lords was concerned with the interpretation of section 137(2)(b) of the 2003 Act, which is the "means by which Parliament gives effect to the policy that, before there can be extradition, there should have been criminality according to both the law of the requesting state and English Law" (paragraph 94). The House approved the approach of Duff J in the Canadian case of In Re Collins No. 3 (1905) 10 CCC 80, in which he held that attention must be focused "not upon the adventitious circumstances connected with the conduct of the accused, but upon the essence of his acts in their bearing upon the charge in question". (Paragraph 97). Thus, "the mere fact that the result of the investigation in Mr Norris's case was a charge of simple price fixing, which does not constitute an offence under English law, is no reason to hold that it would not have been an offence under English law to obstruct the progress of an equivalent investigation by the appropriate body in this country". (Paragraph 100). Accordingly:-

> "101. Approaching the matter in that way, we are satisfied that, if, Mr Norris, had done in England what he has alleged to have done in counts 2 with the intention of obstructing an investigation being carried out into possible criminal conduct, in regards to fixing prices in the carbon products industry, by the newly pointed body in the United Kingdom, he would indeed have been guilty of offences of conspiring to obstruct justice or of obstructing justice, which could have attracted a sentence of 12 months' imprisonment. It follows that offences 2-4 on the indictment are "extradition offences" in terms of section 137 (2)(b) of the 2003 Act".

31. In Mauro v Government of the United States of America [2009] EWHC 150 (Admin), Maurice Kay LJ said:-

> "8 Much of the hearing before us was taken up with a debate about a passage in the judgment of Auld LJ in *Norris*. He said (at paragraph 124):
>
> > "… it is immaterial whether dishonesty was a necessary constituent of the offence in the United States constituted by the conduct there, if the conduct alleged included acts or omissions capable of amounting to dishonesty here." (My emphasis).
>
> 9. Mr Watson takes issue with the words "capable of". He suggests that they dilute what is required and claims to derive support from the subsequent decision of the House of Lords in *Norris* [2008] UKHL. I am bound to say that I find this to be a somewhat sterile debate. It is the language of the statute that matters. The court has to be satisfied (to the criminal standard: section 206) that "the conduct would constitute an offence" under the law of England and Wales: section 137(2)(b). This does not mean that the requesting state must prove the guilt of the person in English law. That would be absurd and would be a higher test than the *prima facie* case which had to be established under earlier legislation. The words "would constitute an offence" simply mean "would, if proved, constitute" the English offence. I have no doubt that that is what Auld LJ meant. It is also what he actually said at an earlier stage of his lengthy judgment: paragraph 31. Because the appeal to the House of Lords was on a different point, none of this received direct consideration there but, to my mind, the position is clear"

32. Where the law of England and Wales requires proof of a factual element which is not required by the law of the requesting State in order to ground criminal liability in that State, the description of the accused's conduct provided by that State in the extradition proceedings must be such as to impel the inference that the additional element required for the offence to be committed in this jurisdiction is present. As the President of the Queen's Bench Division stated in Assange v the Swedish Prosecution Authority [2011] [EWHC 2849] (Admin):-

> "Otherwise, a Defendant could be convicted on a basis which did not constitute an offence under the law of England and Wales, and thus did not satisfy the dual criminality requirement. For example, an allegation that force or coercion was used carries with it not only the implicit allegation that there was no consent, but that the Defendant had no reasonable belief in it. If the acts of force or coercion are proved, the inference that the Defendant had no reasonable belief in consent is plain" (Paragraph 57).

33. As Holgate J observed in Cleveland v Government of the USA [2019] 1 WLR 4392, it is only:

> "Where the offence in a foreign state does not include an element (e.g. *mens rea*) essential to establishing criminal liability under English law, where's that [that] element may be inferred provided that it is an inevitable corollary of, or necessarily implied from, the conduct which will have to be established in that foreign jurisdiction." (Paragraph 83)

Counts 1 and 2: Kidnapping and child stealing

34. In the present case, the District Judge agreed with the respondent that the conduct of the appellant described in the affidavit of the Deputy District Attorney constituted, beyond a reasonable doubt, the English common law offence of kidnapping; alternatively, that it constituted the offence of attempted child abduction, contrary to section 1 of the Child Abduction Act 1984 and the Criminal Attempts Act 1981.

35. Before me, the respondent puts forward a further alternative; namely, the common law offence of false imprisonment. Mr Lewis QC advances a jurisdictional objection to the false imprisonment submission but says that, in any event, the conduct described does not constitute that offence.

Kidnapping

36. The leading modern case on the crime of kidnapping in England and Wales is R v D [1984] AC 778. The relevant facts are set out in the judgment of Watkins LJ in the Court of Appeal. In the autumn of 1978, D enlisted the assistance of "two violent men named Hunter and Aherne" and on 13 December 1978 the three men pushed their way into the flat where the mother of D's two-year old child, E, was watching television. The mother told Hunter and Aherne that E was a ward of court but they were indifferent to this, as was D. "Frightened out of her wits", the mother woke E up and dressed her. D then took E away, "she showing no signs of distress she went". The mother eventually regained custody of E, returning with her to the United Kingdom from New Zealand (where D had taken E).

37. In February 1979, E and her mother were living in Peterborough. E entered the home "seized E and pushed the mother into some bushes". D was seen rushing away "with E still in her pyjamas, struggling and screaming, into a waiting car which was quickly driven away".

38. The Court of Appeal allowed D's appeal against the conviction for kidnapping, holding that there was no such offence in respective of a child under the age of 14 and that the offence of kidnapping could not be committed by a parent against his own unmarried minor child. The House of Lords allowed the appeal of the Crown, holding that the common law offence of kidnapping in relation to children under 14 had remained unaffected by Parliament's enactment in the nineteenth century of the offence of child stealing; in particular, section 56 of the Offences against the Person Act 1861.

39. Lord Brandon, having reviewed the authorities on the common law of kidnapping, categorised the nature of the offence as "an attack on, and infringement of, the personal liberty of an individual." He held that the offence contains 4 ingredients:

(1) the taking or carrying away of one person by another;

(2) by force or by fraud;

(3) without the consent of the person so taken or carried away; and

(4) without lawful excuse. (page 800G-H).

40. The House of Lords, however, held that as a matter of general policy it was desirable that parents who snatched their own children in defiance of a court order should be dealt with in civil proceedings for contempt of court, save in exceptional cases where the parents conduct was so bad that an ordinary right- thinking person would unhesitatingly regard it as conduct of a criminal nature. D's conduct amply justified the decision to prosecute him (pp796F-797a, 805 G-H, 806 E-H, 807 A-C.

41. At page 806 C-E, Lord Brandon said that, in relation to the kidnapping of a child, there is no good reason why "it should not in all cases be the absence of the child's consent which is material, whatever its age may be". If the child were very young, it would not have the understanding or intelligence to give consent. This meant that the absence of consent would be a necessary inference from the child's age. But in the case of an older child, Lord Brandon considered that it must be a question of fact for a jury whether the child concerned had sufficient understanding and intelligence to give consent.

42. In the present case, attention focuses on the first and second of the four ingredients of kidnapping, as articulated by Lord Brandon in D. Separating the first element of taking or carrying away from the second element of force or fraud makes clear that the mere fact of taking or carrying away is insufficient: there also needs to be force or fraud.

43. In Re HM (Vulnerable Adult: Abduction) [2010] 2 FLR 1057, Munby LJ, sitting as a judge in the Family Division, was concerned with the case of a young adult female, lacking capacity to consent, who had been removed by her father from the jurisdiction, without giving prior notice to the court. At paragraph 59, Munby LJ considered it "doubtful whether the criminal law provides any very obviously effective remedy where someone in HM's position is abducted. Three offences may be considered":-

> "The first is the common-law offence of kidnapping. As defined in R v D [1984] AC 778, one of the ingredients of the offence is the use of force or fraud sufficient (see Smith and Hogan at para 17.12.2.1) to overcome the victim's will or vitiate her consent. But if the victim is a compliant young child (or an adult functioning in the same way as a child) who is being taken away by a familiar parent, it may be difficult to establish that either force or fraud needed to be used to achieve the perpetrator's objective: see Smith and Hogan at para 17.12.2.3 citing Glanville Williams, Can Babies be Kidnapped? [1989] Crim LR 473."

44. In November 2014, the Law Commission presented to Parliament its report entitled *Simplification of Criminal Law: Kidnapping and related offences*. Although not, of course, binding on me, the report is, nevertheless, helpful in that it begins with an analysis of what the Commission considers to be the present state of the law. Having noted at paragraphs 2.29 and 2.30 that Lord Brandon's ingredient of "taking or carrying away" is almost certainly a mistake for "taking and carrying away" (as to which, nothing turns for present purposes), the report turns to the meaning of force or fraud:-

> "2.34 From the cases, it appears that the offence extends, at least, to situations where V's movements are brought about by:
>
> (1) the physical overpowering of V;
>
> (2) coercion by the threat of force; or

> (3) deception leading V to believe that he or she is lawfully taken or detained or (possibly) that he or she cannot physically escape".

45. At 2.35, as an example of force, the report cites case of D, where the defendant "pulled his infant daughter out of her mother's arms and took her away with him".

46. At 2.37, the report considers the consequence of the dual requirement that the taking be both "by force or fraud" and "without consent". The consequence is that "the offence will not always cover a case where the person taken (V) lacks capacity to consent. In such cases D may take or carry V away without using force or fraud because, given this vulnerability, there is no need to". The report notes that, in the case of a child lacking capacity, "this lacuna is addressed by the offences in the Child Abduction Act 1984". Vulnerable adults, who lack capacity to consent, are not covered by the 1984 Act with the result that, as Munby LJ identified in HM, despite the fact that there can be no valid consent "it may be impossible to secure a conviction for kidnapping because there is no evidence of force or fraud" (2.40).

47. At 2.51, beginning its analysis of the effect of deception, the report states that the "question here is in what circumstances consent is vitiated by a mistake on the part of V, or by a deception by D". The so-called "traditional rule" is described in 2.52 as the requirement that consent to any act is vitiated if, and only if, V is deceived as to the nature of the act which V supposedly consents or the identity of the person performing that act. 2.54 explains the logic of the traditional rule as being that, if V is deceived as the nature of the act or the identity of the person performing it, then V has not consented to the thing that actually happened.

48. Mr Lewis relies on these passages as a high-level recognition that the common law offence of kidnapping requires the force or fraud to be perpetrated on the victim. The particulars of the offences within counts 1 and 2 do not, Mr. Lewis says, disclose any force or fraud by the appellant on L.

49. Mr Caldwell submits that the "force" element of Lord Brandon's second ingredient for the offence of kidnapping has to be interpreted in the light of the judgments of the Court of Appeal in R v Lawrence and O'Brien 2000 WL 1213006.

50. In that case, paragraph 15 of the judgment of Latham LJ describes how the victim, having been threatened with violence, felt that he had no alternative but to leave and get into a car, in which he was taken off. The jury convicted O'Brien of kidnapping. Before the Court of Appeal, his case was that no force or fraud had been used against the victim, in order to get him to enter the car.

51. The Court of Appeal's response to that submission was as follows:-

> "55. However it seems to us that the essence of defence is contained in the matters identified as (1), (3) and (4) by Lord Brandon. That emerges from the earlier decision of this Court in the case of *R v Wellard* (1978) 67 CR App R 364 where at page 367 Lawton LJ, giving the judgment of the Court, said this in relation to kidnap:

> 'All that has to be proved is the false imprisonment, the deprivation of liberty coupled with a carrying away from the place where the victim wants to be.'
>
> 56. In our judgment that is a statement which identifies the true nature of the offence of kidnapping and differentiates it from the offence of false imprisonment. The features are that somebody should have been taken away without their consent, without lawful excuse. The second ingredient referred to by Lord Brandon seems to us to be simply identifying generally the means by which consent can be overborne for the purposes of the offence of kidnapping. What, in our judgment, should not be done is to take the words "by force" literally. The House of Lords did not have to consider the ambit of the second of the two ingredients identified by Lord Brandon. We do not consider it should be taken that where the word "force" was used what was intended was the manhandling of the victim. We can see no logical or proper justification for not extending the concept of the deprivation of consent by force to circumstances where consent has been overborne by the threat of force.
>
> 57. In our judgment any other conclusion would be wholly unsatisfactory. It would lead to distinctions which could not be justified as a matter of common sense or logic between the situation where a person is threatened that if he does not get into a motor car he will suffer injury from a situation where he in fact is manhandled into the motor car. Any such distinction would, it seems to us, be one which the public would find difficult to understand. It follows that, in our judgment the submission of Mr Ventham is not well founded in law."

52. I do not consider that Lawrence is authority for the proposition that Lord Brandon's second element is otiose or that it is to be subsumed within the first element in such a way as to deprive it of significance. Were the position otherwise, Munby LJ would not have spoken as he did in HM. It would also mean that the Law Commission's exposition of the existing state of the common law is fundamentally wrong. The *ratio* of Lawrence is merely that the requirement of force can be met by proof of "coercion by the threat of force".

53. We have seen that section 207(E) of the California Penal Code provides that, for those types of kidnapping requiring force, the amount of force required to kidnap an unresisting child is the amount of physical force required to take and carry the child away a substantial distance for an illegal purpose or within the legal intent. Mr Caldwell submits that, in effect, Lawrence demonstrates that the English common law is to the same effect. I do not accept that is so. Whether or not the Californian court would interpret section 207(e) in such a way that the consensual walking off together of the appellant and L, and their subsequent car journeys, amounted to "physical force", there is nothing in the domestic case law to suggest that such a view could be taken of this conduct, if it occurred in England and Wales.

54. I should mention in this regard that the case of Wellard [1978] 1WLR 921, referred to in Lawrence. The defendant posed as a police officer searching for drugs and instructed the victim to accompany him to his car, some 100 yards away. The victim did so and sat in the defendant's car until some friends arrived, when she went away with them.

The issue was whether there had been sufficient deprivation of liberty to constitute the offence of kidnapping. So far as Lord Brandon's second element was concerned, that would plainly appear, on the facts, to have been met by the defendant's fraud on the victim, who was persuaded to get into the car because she thought he was a police officer.

55. Although it was not cited to me in this context, the importance of Lord Brandon's second element – the use of force or fraud – was authoritatively confirmed by the Court of Appeal in R v Kayani [2012] 1 WLR 1927. Giving judgment Lord Judge CJ, referring to R v D and Lord Brandon's four elements said "the problem with the charge of kidnapping is the difficulty of proving the ingredients of the offence" He continued as follows:

> "15. It is not open to this court to redefine the ingredients of the common law offence of kidnapping, at any rate, by extending its ambit. In the present and similar cases, even if by reason of their age alone sufficient evidence to infer the absence of consent were available, there is, and would be unlikely to be any evidence that force or fraud was used on the children to achieve their removal from their mother's care. Such evidence is a prerequisite to a conviction."

56. That is precisely the position here. I agree with Mr Lewis that the factual summary in the assistant District Attorney's affidavit does not disclose any indication (let alone an inevitable inference) that the appellant exerted any force on L, whether at the mall on Christmas Eve when the pair "disappeared into the Christmas crowd" or, for that matter, at any other point up to the appellant's arrest on 28 December.

57. Mr Caldwell submits that Lord Brandon's second element is, nevertheless, met because the appellant employed fraud. The appellant deceived L in that, by his conduct, he represented to L that she could freely leave with the appellant, when the effect of the court order was otherwise. There is, however, nothing in the evidential materials relied upon by the respondent to permit such a finding. Even if there were, I could not be satisfied so that I was sure that L had sufficient capacity to be deceived in this regard.

58. Mr Caldwell submits that the professional monitor, Ms V, was deceived by the defendant; and that the appellant's deliberate removal of L constituted a fraud on the court's supervision of L. There are two difficulties with this submission. First, I am not satisfied that the common law enables the requirement of deception to be satisfied in respect of a third party, rather than the victim. Secondly, even if that were possible, the factual summary discloses no deception of the monitor. She merely "turned around" to find that the appellant and L "had disappeared into the Christmas crowd". The fact that the appellant had directed the UBER driver to wait for them and had left L's car seat in the vehicle cannot , on its face, constitute evidence to found a conclusion to the criminal standard that the monitor was, thereby, materially deceived. There is, for example, nothing to suggest that, as a result of the car seat being left, the monitor was any less vigilant than she otherwise would have been. Furthermore, it is unclear whether the defendant left the car seat because he intended to use the same vehicle to transport him and L to the hotel in Beverly Hills.

59. For these reasons, the conduct relied upon by the respondent, if proved, would not constitute the offence of kidnapping under the law of England and Wales.

Attempted child abduction

60. I must next consider whether that conduct would constitute the offence of attempted child abduction. By section 1 of the Child Abduction Act 1984, subject to exceptions which are not here relevant, a person connected with a child under the age of 16 commits an offence if he or she takes or sends the child out of the United Kingdom without the appropriate consent. The appellant is a person connected with a child for the purposes of section 1 because he is L's parent (section 1(2)(a)). In the present case, "the appropriate consent" means the consent of E, as L's mother, as well as the leave of the Family Court which awarded custody to her (section 1(3)(a)(i) and (c)).

61. A person guilty of an offence under section 1 shall be liable, on conviction on indictment, to imprisonment for a term not exceeding 7 years. Although section 4(2) provides that no prosecution for an offence under section 1 shall be instituted except by or with consent of the Director of Public Prosecutions, the parties are agreed that the requirement is irrelevant for present purposes.

62. The parties are also agreed, and I find, that for the purposes of section 137, the section 1 offence would be completed if the appellant had taken L out of the USA, rather than merely out of the state of California.

63. The defendant, however, did not leave the USA with L. As we have seen, he was arrested in Palm Springs on 28 December.

64. Section 1(1) of the 1981 Act provides as follows:-

> "If, with intent to commit an offence to which applies, the person does an act which is more than preparatory to the Commission of the offence, he is guilty of attempting to commit the offence."

65. Since the offence under section 1 of the 1984 Act is triable in England and Wales as an indictable offence, and is not within the exceptions set out in section 1 of the 1981 Act, the offence of child abduction is one to which section 1 of the 1981 Act applies.

66. The issue, therefore, is whether the appellant committed acts that were more than merely preparatory to taking L out of the USA. There is no dispute as to his intention in this regard. His intended aim was to go with L to China. Accordingly, the appellant had the necessary *mens rea*.

67. In paragraph 45 of his decision, the District Judge found that the conduct described in the extradition request, if proved, made it evident that the appellant "had embarked upon the crime proper", in the words of Lord Lane CJ in R v Gull 1990] 3 All ER 882. According to the District Judge, the appellant:-

> "…may not have reached the point of no return in respect of the full offence of Child Abduction, but I reject submissions made on behalf of the [appellant] that the conduct described was simply at the stages of planning and therefore insufficient to establish a criminal attempt. [L] had been removed from the shopping mall from the supervision of the monitor and taken covertly by the [appellant] to Beverley Hills and then Palm Springs and he planned to then head to Phoenix, Arizona. His passport was found in his possession

> by the Police. His expressed intention, as demonstrated by the text messages to his father found on the iPad, was to take [L] out of the country to China." (paragraph 45)

68. Whether or not he meant to do so, the inclusion in paragraph 45 of the reference to the appellant's express intention, articulated in text messages, to take L to China suggests the District Judge placed weight on that intention in determining whether the appellant's actions were more than merely preparatory to that aim. If so, the District Judge was in error.

69. As the Divisional Court held in Mason v DPP [2009] EWHC 2198 (Admin), "*mens rea* absent sufficient *actus reus* is not enough to constitute guilt" (paragraph 20). In Mason, the defendant had been drinking. He opened the door of his Landrover, intending to drive it home. Indeed, he described his intention as being that "I was wanting to get in the car and drive home drunk, but, like, I didn't because it got taken off". What the defendant meant was that, as he opened the door of his car, a man with a knife demanded that the defendant hand over the keys to the Landrover. He did so and the robber drove off in the defendant's vehicle. When the defendant reported the matter to the police, he was arrested and charged with attempting to drive a motor vehicle after consuming so much alcohol that the proportion of it in his breath exceeded the proscribed limit.

70. Giving the judgment of the court, Nicol J referred to the case R v Tony Campbell [1991] 93 Cr App R 350. There, the appellant had been charged with attempting to rob a sub-post office. He was seen earlier, lurking in the vicinity, wearing a crash helmet and sunglasses. He was later seen found carrying an imitation gun and also a threatening note, which he intended to pass over to the cashier as part of a demand for money. He got within one yard of the post office when he was arrested. He admitted his intention to rob. His appeal against conviction, was, however, allowed on the basis that his acts were no more than preparatory. Watkins LJ held that a number of acts remained undone and that the series of acts already performed, including dismounting from the cycle and walking towards the post office door, were indicative of mere preparation. Since the appellant had not even gained entrance to the place (viz the post office) where he could be in a position to carry out the offence, it was extremely unlikely it could be said that he had performed an act which would properly be said to be an attempt (page 355).

71. Nicol J then held:-

> "19. In this case, the substantive offence, or the "full offence", as it is referred to in the 1981 Act, is driving. In my view the appellant could not be said to have embarked on the "crime proper", in the language of Lord Lane, until he did something which was part of the actual process of putting the car in motion. Turning on the engine would have been such a step, but starting to open the door of the car in my view was not capable of being so.
>
> 20. The line is fine, but so it was in Tony Campbell. As in this case, what the appellant did was no more than an act preparatory. In Campbell, as in this case, the appellant certainly had the necessary *mens rea.* There the appellant admitted his intention to rob a post office. Here the appellant admitted his intention to drive the car, but *mens rea* absent sufficient *actus reus* is not enough to constitute guilt."

72. Since the District Judge in the present case relied upon the judgment of Lord Lane in R v Gullefer [1990] 1 WLR 1063, it is necessary to examine that judgment. The appellant was convicted of attempted theft. During the last race of the day at the Romford Greyhound Racing Stadium, as the dogs rounded the final bend, the appellant climbed the fence onto the track in front of the dogs, waving his arms and attempting to distract them. His efforts were only marginally successful, and the stewards decided that it was unnecessary to declare "no race". Had they made such a declaration, however, the bookmakers would have been obliged to repay the amounts wagered on dogs in the race. The appellant admitted that he had attempted to stop the race because the dog on which he had staked £18 was losing. He therefore hoped by his actions that the stewards would declare "no race" and that he could recover his stake from his bookmaker.

73. Lord Lane held that the appellant was not guilty of an attempt: "In our view there was insufficient evidence for it to be said that [the appellant] had, when he jumped onto the track, gone beyond mere preparation". Lord Lane then considered the effect of the 1981 Act on previous case law, including DPP v Stonehouse [1978] AC 55, where Lord Diplock held that in order to constitute an attempt "the offender must have crossed the Rubicon and burnt his boats". Lord Lane held that "the words of the Act of 1981 seek to steer a mid-way course" and that it was unnecessary to show that a defendant "must have reached a point from which it was impossible for him to retreat before the *actus reus* of an attempt is proved". What the words of the 1981 Act did was to give as clear guidance as possible on the point in time at which a relevant "series of acts" begins: "It begins when the merely preparatory acts come to an end and the defendant embarks upon the crime proper. When that is will depend of course upon the facts in a particular case" (1066C-D).

74. Mr Caldwell submits that, in the present case, the appellant had "embarked on the offence proper". By removing L from the current supervision of her mother and the court, the appellant had put his plan into action. His conduct was more than merely preparatory. When arrested, the appellant had been anxious that the iPad not be seized. When examined, the iPad disclosed the email correspondence with the appellant's father regarding the plan to go to China. The District Judge had correctly described L's removal from the shopping mall as "covert" and correctly found that the appellant had "deliberately sought to avoid the monitor". The only possible inference, therefore, was that the appellant knew about the importance of the text messages on the iPad and sought to deceive the detectives so that they would not seize it. The appellant had taken L, had packed large suitcases, had his passport with him, had moved a considerable distance from Los Angeles, had enquired about the cost of a journey to Phoenix, and had told his father of his intentions. All this, according to Mr Caldwell, "indicates that he was about to take {L] out of the country". Whether or not the appellant might ultimately have succeeded is not relevant. Whether or not the appellant's attempt would be rendered doomed to failure or even impossible because he was not in possession of L's passport does not determine whether an offence of attempt might nevertheless have been committed.

75. Whilst fully conscious of the fact-sensitive nature of the requisite assessment and of the need to avoid mechanistic comparisons with the facts of other cases, I am in no doubt that the case law on section 1 of the 1981 Act is such as to preclude a finding to the criminal standard that the appellant's alleged conduct, if proved, would constitute the offence of attempted child abduction. There is more than a reasonable doubt that the

series of actions relied upon by the respondent are not such as to show that the appellant, where arrested, had embarked on the "crime proper". True, he had taken a number of steps that were plainly necessary if he were to cause L to leave the USA. He had removed her from E's custody and control and was concealing himself and L from E and the authorities. But there were many things that still remained to be done before the appellant could remove L from the jurisdiction. He needed to obtain passport documentation for her, or to devise the means of enabling her to leave the USA without it. The factual summary does not indicate that the appellant's suitcases contained anything other than his own clothes and other possessions. He was not at, or even near, an international transport hub. He had not obtained any travel tickets. Gullefer and Mason show just how temporally and physically close one needs to come to the completed act before a criminal attempt may occur. The appellant was far removed in both respects.

76. In his oral submissions, Mr Caldwell raised the possibility that the appellant could have taken L to Mexico, which is relatively near to Palm Springs. The factual summary, however, discloses no suggestion of such a plan or of any step taken to move towards the US/Mexico border. The submission is, I consider, demonstrative of the fact that the appellant had simply not, at the time of his arrest, taken sufficient steps to satisfy section 1 of the 1981 Act.

77. I accordingly find that the conduct relied upon is not such as to be capable of a finding to the criminal standard that the appellant would have committed the offence of attempted child abduction under the law of England and Wales.

False imprisonment

78. The final submission of the respondent in respect of the conduct to which counts 1 and 2 relate is that that conduct constitutes the offence of false imprisonment. As I have already mentioned, Mr Lewis raises a jurisdictional objection to this submission. He submits that, on appeal, this court's powers are circumscribed by sections 103 and 104 of the 2003 Act in such a way as to prelude a finding at this stage that false imprisonment can be the relevant domestic criminal offence.

79. I do not accept this submission. Section 103 merely provides that if a judge sends a case to the Secretary of State under Part 2 for her decision on whether a person is to be extradited, that person may appeal to the High Court against the "relevant decision", which is defined in section 103(3) as "a decision that resulted in the case being sent to the Secretary of State". In the present case, that is the decision of the District Judge. Section 104(2) and (3)(a) provide that the court may allow an appeal against the decision of the District Judge only if satisfied that he or she ought to have decided "a question before" him or her "at the extradition hearing differently". The proposition that the "question" at issue is, here, only whether the conduct amounts to kidnapping or attempted child abduction under the law of England and Wales cannot be right. It would mean that this court may dismiss the appeal only if satisfied that the actual basis upon which the judge reached his or her decision was correct, with the corollary that this court would have to allow the requested person's appeal, even if there is another legal basis that makes it perfectly plain the judge's decision would have to have been to find against the appellant.

80. I agree with Mr Caldwell that the correct way of analysing the matter is to begin with section 78 of the 2003 Act. Assuming, as I do, that the question in section 78(2) regarding documents is answered in the affirmative, the judge must proceed to section 78(4). Here, the relevant provision is subsection (4)(b), which requires the judge to decide whether "the offence specified in the request is an extradition offence". As we have seen, section 137 explains what is meant by an extradition offence. In the present case, we are concerned with whether the appellant's conduct would constitute an offence under the law of England and Wales, punishable with imprisonment, etc for a term of twelve months or more, if it occurred in the United Kingdom. That was the "question" before the District Judge. Thus, the "question" for the purposes of section 104 is whether the conduct constitutes an extradition offence for the purposes of section 137. If, as a matter of law, the answer is in the affirmative, the appeal does not fall to be allowed merely because the judge's reasoning did not encompass the criminal offence under the law of England and Wales, which makes the conduct an "extradition offence".

81. There is, accordingly, no jurisdictional bar to me considering whether the conduct to which counts 1 and 2 relate would, if it occurred in England and Wales, constitute the offence of unlawful imprisonment, which is a common law offence, carrying a maximum penalty of life imprisonment.

82. In R v Rahman (1985) 81 Cr. App. 349, the appellant abducted his 15 year old daughter against her will with the intent to take her to her country of origin, Bangladesh. She was bundled into a car but, screaming for help from the car window, she was rescued by two police officers. Lord Lane CJ defined false imprisonment as "the unlawful and intentional or reckless restraint of a victim's freedom of movement from a particular place. In other words it is unlawful detention which stops a victim moving away as he would wish to move". He observed that a parent would very seldom be guilty of the offence of false imprisonment in relation to his or her own child because the "sort of restriction imposed upon children is usually well within the realms of reasonable parental discipline and is therefore not unlawful". However, as observed in Agar-Ellis v Lascelles (1883) 24 CH. D. 317, once it becomes obvious that the rights of the family are in fact being abused to the detriment of the child, "then the father shows he is no longer the natural guardian – that he has become an unnatural guardian – that he has perverted the ties of nature for the purpose of injustice and cruelty". Lord Lane held that amongst the ways in which the prosecution may prove unlawfulness was the existence of a court order, showing that parental control had by order been given to someone other than the parent himself and that the detention by the parent was contrary to that order (pages 353-354).

83. Mr Caldwell submits that, in the present case, the appellant's taking of L was unquestionably contrary to the Family Court order, giving custody of L to E and giving the appellant only limited rights of access to L. Whilst that is true, the absence of legal justification is a necessary but not a sufficient requirement to establish the offence of false imprisonment. There must still be an actual restraint on the victim's freedom of movement, "which stops the victim moving away as he would wish to move". In Rahman it was quite evident that the teenage victim did not wish to be taken in the car. In the present case, by contrast, there is nothing in the conduct alleged to show that L was anything other than content to move around with the appellant and to stay with him in Beverley Hills and Palm Springs.

84. In R v Bournewood Community and Mental Health NHS Trust ex parte L [1999] AC 458, an autistic and profoundly mentally retarded man aged 48, living with paid carers, became agitated at a day centre and was taken to hospital, where his consultant decided that his best interests required re-admission to the hospital's behavioural unit, with a view to stabilising his condition. Although the consultant considered applying for an order under section 3 of the Mental Health Act 1983 for compulsory detention, since L was compliant and had shown no desire to leave the unit, she decided to admit him as an informal patient. He was kept in an unlocked ward but the consultant would have detained him compulsorily had he sought to leave.

85. The carers made an application for judicial review and an order of *habeas corpus*, together with damages for false imprisonment and assault. The Court of Appeal held that L's re-admission had amounted to detention, which could not be justified, awarding nominal damages for false imprisonment. The House of Lords allowed the Trust's appeal. Although L had lacked capacity to consent, he had not manifested any objection to being in the behavioural unit. The decision that he should remain there after re-admission did not amount to actual detention. The possibility that he might have been restrained as he sought to leave did not give rise to his detention.

86. Bournewood provides support for the appellant's proposition that, even though the appellant took L contrary to the Family Court order and was, therefore, at all material times acting without lawful authority, it nevertheless needs to be proved that L was being held by the defendant in such a way as to prevent L from acting as she would wish. As I have said, there is nothing in the alleged conduct to show that L had been unhappy being with the defendant. Given her age, that is, perhaps, understandable. L's age is not, however, a reason to give the offence of false imprisonment an ambit that it otherwise lacks. On the contrary, just as with the offence of kidnapping, the correct conclusion to be drawn is that there are difficulties applying these common law offences in the case of very young children.

87. For these reasons, I find I cannot be satisfied so that I am sure that the conduct within counts 1 and 2, if proved, would constitute the offence of false imprisonment.

Counts 4, 5 and 6: breaches of court orders

88. On 13 March 2015, E obtained a restraining order against the appellant. It prohibited him from harassing, attacking, striking, threatening or assaulting E; from contacting her either directly or indirectly; and from taking any action directly or through others to obtain her address. There was an exception for "brief and peaceful contact" with E. The order warned the appellant that if he did not obey it "you can be arrested and charged with a crime".

89. As it was before the District Judge, the respondent's case is that the conduct alleged in respect of counts 4, 5 and 6, which I have already detailed, would, if committed in England and Wales, constitute an offence contrary to section 3(6) of the Protection from Harassment Act 1997. Section 1 of that Act prohibits harassment. Section 3(6) provides that where the High Court or a county court has granted an injunction for the purposes of restraining a defendant from pursuing conduct which amounts to harassment and, without reasonable excuse, the defendant does anything which he is prohibited from doing by the injunction, the defendant is guilty of an offence. Section

3(9) provides that, on conviction on indictment, the defendant is liable to imprisonment for a term not exceeding five years, or a fine, or both.

90. Section 3(7) provides that a person convicted of an offence under section 3(6) is not punishable for contempt of court, in respect of the same conduct. Correspondingly, section 3(8) provides that a person punished for contempt of court in respect of any conduct cannot be convicted of an offence under section 3(6) in respect of that conduct.

91. Before the District Judge and before me, Mr Lewis cited the judgments of the Supreme Court in SFO v O'Brian [2014] AC 1246 and the judgment of Sir James Munby P in Egeneonu v Egeneonu [2017] 4 WLR 100. The thrust of these judgments is plain. Breach of a court order, giving rise to successful proceedings for contempt, is not to be equated with a criminal offence. The relevance of these authorities is, however, negated by the respondent's stance, which is that the respondent does not contend a civil contempt of court is a criminal offence, as a matter of English law. Rather, the respondent's case is that conduct which is punishable as a contempt may also be an offence contrary to criminal law. That, the respondent says, is the position here. The appellant's conduct, in breaching the restraining order, would, if committed in the United Kingdom, amount to a criminal offence under section 3(6) of the 1997 Act.

92. The District Judge accepted that submission and so do I. Norris is not authority for the proposition that an offence cannot qualify as an extradition offence for the purposes of section 137 of the 2003 Act if, in practice, the conduct in question would normally be dealt with as a contempt of court, rather than by prosecution pursuant to section 3(6). There is simply no justification for reading section 137 in that way. Parliament has ordained that the conduct, if proved, must constitute a criminal offence under the law of England Wales, not whether it would be likely to be prosecuted as such. To entertain such a consideration would, in any event, be a recipe for confusion and uncertainty.

93. For these reasons, like the District Judge, I am satisfied so that I am sure that the conduct to which counts 4, 5 and 6 relate would, if committed in the United Kingdom, amount to an offence under section 3(6) of the 1997 Act.

Although, it is unnecessary to so find, I also agree with the District Judge that, given the order was made by a Family Court, it would equate to a non-molestation order under section 42 of the Family Law Act 1996. The provisions of the 1996 Act are the same as in the 1997 Act, both in terms of proving the commission of the offence, once the order is in place, and as to the "double jeopardy" provisions described in paragraph 90 above. The sentencing powers are also identical.

Count 7: threats

94. As I have already observed, count 3, which relates to threats to E's manager, Ms McGuire, is accepted by the appellant as constituting an extradition offence. His position is, however, otherwise in respect of count 7, which concerns the appellant's alleged threats to kill made in respect of Mr Melcher, the appellant's former business associate.

95. Section 16 of the Offences against the Person Act 1861 provides that "a person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried out, to kill that other or a third person shall be guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years". Section 16 was substituted in this form by the Criminal Law Act 1977.

96. The appellant's case in respect of count 7 is that the relevant conduct relied upon in the factual summary involves Mr Melcher receiving threatening text messages from the appellant "through a mutual friend". These were Facebook messages "relayed through a mutual friend", telling the latter to inform Mr Melcher that he will be a "dead man" if he came to Los Angeles and that the appellant would "cut him and his family". Mr Lewis submits that the stated conduct, even if proved, is not such as to be able to satisfy me to the criminal standard that the mutual friend, who is the "other" for the purposes of section 16, "would fear [the threat] would be carried out".

97. I do not accept this submission. I agree with Mr Caldwell that the word "through" in the factual summary enables me to be sure of two matters; namely (a) that the messages went to the mutual friend, who communicated them to Mr Melcher; and (b) that the appellant's intention was that the mutual friend would fear the threats would be carried out. The entire point was to put Mr Melcher in fear. That depended on the mutual friend being persuaded to communicate the threats to Mr Melcher. The appellant had to intend the mutual friend to fear the threats would be carried out, else the mutual friend would not be likely to warn Mr Melcher.

98. Mr Melcher's state of mind, as disclosed in the factual summary, was that he was in fear for his safety and the safety of his family, as a result of the threats. That shows the appellant's scheme worked and underscores the existence of appellant's intention that the mutual friend would also fear that the threats would be carried out.

99. I therefore find that the conduct to which count 7 relates would, if it occurred in England and Wales, constitute the offence of threats to kill, contrary to section 16 of the 1861 Act.

Count 8: breach of court order

100. The temporary restraining order in favour of Mr Melcher was made on 7 December 2015. It prohibited the appellant from harassing, intimidating, molesting, attacking, striking, stalking, threatening, assaulting and abusing Mr Melcher; from contacting him either directly or indirectly; and from taking any action to obtain Mr Melcher's address or location. Contacts via a lawyer or a process server, etc were stated not to violate the order. The order also states:-

> "If an officer has probable cause to believe that the restrained person had notice of the order and has disobeyed the order, the officer must arrest the restrained person … a violation of the order may be a violation of penal code section 166 or 273.6 …"

101. As previously observed, section 273.6(a) of the California Penal Code concerns punishment for violation of a protective order, temporary restraining order or injunction. Any intentional or knowing violation is a misdemeanour punishable by imprisonment in a county jail for not more than one year (and also by fine). Section

166(a)(4) provides that wilful disobedience of the terms of a court order is a misdemeanour. By reason of section 19, such a misdemeanour is punishable by imprisonment in the county jail not exceeding six months (and/or by fine).

102. Like the District Judge, I am satisfied so that I am sure that the conduct set out in the factual summary, if proved, constitutes a breach of the temporary restraining order, in that the appellant responded to that order by sending Mr Melcher threatening calls, texts and emails saying, amongst other things "you got yourself involved in my family, and I am going to get myself involved with yours". As with counts 4, 5 and 6, this conduct, if it occurred in the United Kingdom, would constitute an offence contrary to section 3(6) of the 1997 Act.

Section 137(3)(c) of the 2003 Act requires the conduct to be punishable by imprisonment etc for a term of twelve months or greater, in the category 2 territory. Although Mr Lewis did not seek to raise it before the District Judge or me, I consider that, for completeness, I should mention the following. Count 8 refers to section 166(a)(4) of the California Penal Code. As we have seen, this misdemeanour is not punishable by imprisonment of twelve months or greater. The conduct in question, however, is unquestionably such as to constitute, if proved, an offence under section 273.6(a), which is so punishable. If support were needed for that, it can be found in the passage from the temporary restraining order that I have set out above. Section 137(3)(c) focuses attention on conduct that is "so punishable" under (here) the law of California. The existence of section 276.6(a) means that the conduct is unarguably punishable by the requisite term of imprisonment.

Conclusions

103. I allow the appellant's appeal, in that the District Judge ought to have decided differently the question under section 78(4)(b) of whether the offences within counts 1 and 2 (kidnapping/child stealing) were extradition offences for the purposes of section 137; and, if the District Judge had decided that question in the way he ought to have done, he would have been required to order the appellant's discharge in respect of those offences. Pursuant to section 104(5), I accordingly order the appellant's discharge in respect of those offences and quash, to that extent, the order for his extradition.

104. I dismiss the appellant's appeal in respect of counts 4 to 8.

105. I invite counsel to submit a draft order that reflects the above.