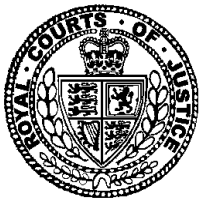

Neutral Citation Number: [2022] EWHC 1662 (Admin)

Case No: CO/1245/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/06/2022

Before:

LORD JUSTICE HOLROYDE
MR JUSTICE JAY

- -

Between:

DEREK BROCKWELL **Claimant**

- and –

(1) WESTMINSTER MAGISTRATES COURT
(2) CROWN PROSECUTION SERVICE **Defendants**

- -
- -

Malcolm Hawkes (instructed by **Hadgkiss Hughes & Beale**) for the **Claimant**
The First Defendant was neither present nor represented
Laura Herbert (instructed by **CPS Extradition Unit**) for the **Second Defendant**

Hearing date: 15 June 2022

- -

Approved Judgment

LORD JUSTICE HOLROYDE and MR JUSTICE JAY:

Introduction

1. This is the judgment of the Court.

2. Mr Derek Brockwell ("the Claimant"), currently imprisoned in HMP Frankland, is the subject of two indeterminate prison sentences. Given his criminal record, he accepts (at least for present purposes) that his release on licence may well be many years hence. He is also the subject of an European Arrest Warrant issued by the Irish judicial authorities in September 2017 ("the index EAW"). The index EAW has been duly certified by the NCA and executed on the Claimant's arrest in prison in November 2017, but for reasons which we will come to explain he cannot be extradited to Ireland until his release on licence in this jurisdiction. The extradition proceedings in the Westminster Magistrates' Court have been repeatedly adjourned at six-monthly intervals since the first hearing in that court, in purported exercise of power under s. 8B of the Extradition Act 2003 ("the 2003 Act").

3. In these judicial review proceedings, for which permission was granted by Swift J on 3rd August 2021, the Claimant challenges the decision of District Judge Marie Mallon ("the District Judge") given on 11th January 2021 to adjourn the extradition proceedings for a further six months. It is contended on his behalf that the Claimant should either have been extradited to Ireland or discharged, and that the decision to adjourn, in reality indefinitely, causes him irremediable prejudice. The existence of these extradition proceedings precludes his transfer to Scotland where he was born and brought up.

4. Westminster Magistrates' Court, in accordance with its usual practice, has played no part in these proceedings. The defence of the District Judge's decision has been undertaken by the Crown Prosecution Service ("the CPS") acting in the interests of the Irish judicial authorities. The Secretary of State for Justice, who has a separate interest in this matter, has not intervened in these proceedings.

The Facts

5. The Claimant was born in Glasgow on 5th March 1961. He has a lengthy and complex criminal record which for present purposes may be summarised as follows.

6. On 21st January 2000 at the Central Criminal Court the Claimant received 22 concurrent discretionary life sentences for numerous offences of robbery and possession of firearms. The information on the police national computer does not specify the minimum term but the material before the District Judge indicates that it was one of six years, which has long since expired. The Claimant remains imprisoned under these life sentences until the Parole Board of England and Wales decides that the risk which he poses to the public has been reduced to a level at which it is safe to release him on licence.

7. In 2012 the Claimant was transferred from HMP Frankland to an open prison, and then was released on temporary licence. On 27th February 2012 he absconded to Ireland and between August and October of that year committed three offences of robbery and one of possession of a firearm or imitation firearm with intent to commit an indictable

offence. On 12th June 2013 he received a total sentence of seven years' imprisonment for these offences. The Claimant has served approximately three years of that sentence.

8. In 2013 the UK judicial authorities issued a conviction EAW to their Irish counterparts for the Claimant to be extradited to complete the sentence imposed in January 2000.

9. Before the Claimant's extradition could be effectuated, on 17th February 2015 he escaped from prison in Ireland whilst being transferred to hospital for treatment for diabetes. The Claimant is alleged to have brandished a knife when he was taken to the toilet at the hospital and to have used it to stab one prison officer in the stomach and to cut another's hand. The Claimant made good his escape on the back of a waiting motorcycle. These comprise the accusation matters in the index EAW.

10. On 18th February 2017 the Claimant committed two robberies in Northern Ireland. He was arrested on the same day and on 6th September 2017, following his trial, he was convicted and sentenced in Northern Ireland to an Indeterminate Custodial Sentence ("ICS") with a minimum tariff of eight years, subsequently reduced on appeal to five years. That tariff will expire on 6th September 2022.

11. The Claimant was subsequently transferred to HMP Frankland to serve both his life sentence imposed in 2000 and his ICS, presumably pursuant to powers conferred by the Crime (Sentences) Act 1997. The precise mechanics have not been set out in the available materials and do not matter for present purposes.

12. The index EAW was issued by the Irish judicial authorities on 22nd September 2017 (an earlier EAW issued by them in August 2015 had been withdrawn, partly on the basis of a recognition that the Claimant was at that time serving a substantial custodial sentence in the UK). It is a mixed conviction and accusation warrant. The convictions were those imposed on 12th June 2013 (in relation to which there remains about four years left to serve); the accusations concern what happened on 17th February 2015. The Claimant concedes that if he were ever tried for these latter offences and convicted, the sentences would be substantial.

13. The Claimant was arrested pursuant to the index EAW at HMP Frankland on 29th November 2017. Initially, he contested extradition to Ireland, but at one of the adjournment hearings which took place on 13th May 2019 he indicated that he would consent to extradition were the hearing to be opened. In June 2019 the Irish authorities stated that they intended to await the Claimant's completion of the custodial element of his sentence in the UK "prior to extradition being considered" and that they could not seek the Claimant's temporary surrender to Ireland for trial (on the basis that he was thereafter be returned here) because Article 24.2 of the Council Framework Decision of 13th June 2002 ("the Framework Decision") has not been transposed into their domestic law. The UK authorities had sought an undertaking from their Irish counterparts to that effect, but in the absence of domestic enactment in Ireland of Article 24.2 it could not be given.

14. Following this revelation, the Claimant then applied to be transferred to a Scottish prison to serve out the period when he must remain in custody pursuant to his indeterminate sentences. In July 2019 it was, however, confirmed to him that the existence of the outstanding extradition proceedings rendered what was described as the "repatriation" option impossible. However, even were that obstacle to be removed

it is clear from the website, "Supporting Families in Scotland", that there are other criteria that would have to be met. Similar criteria apply to the authorities in England and Wales.

15. From the perspective of those with knowledge of the legal and practical realities, the Claimant's prospects of release on licence in the foreseeable future may well be bleak. It is unlikely that the Parole Board would conclude that a Category A prisoner no longer represents a risk to the public. We have been told that the Parole Board has recently recommended that the Claimant remain in closed conditions. Given the expiry of his ICS tariff in less than three months' time, his case must be considered by the Parole Commissioners for Northern Ireland at or shortly before that point, but a favourable outcome appears unrealistic.

The Hearings before the District Judge

16. There was a contested hearing before the District Judge on 12th September 2019. She reserved her judgment until 1st November 2019 after receiving further documentary evidence and submissions from the parties.

17. It was submitted before the District Judge that the repeated s. 8B adjournments created an untenable state of anxiety which impacted directly on the Claimant's article 8 and article 6 rights, and that the extradition request also amounted to an abuse of process. As for article 8, the existence of these proceedings prevented the Claimant's transfer to a Scottish prison where he would be closer to his immediate family (his daughter and grand-daughter), who live over 4½ hours away from HMP Frankland, as well as his friends and associates. As for article 6, it was said that the Claimant's fair trial rights were prejudiced by the indefinite delay. As for abuse of process, the Claimant's argument was that the Irish judicial authorities could not properly maintain their extradition request "in the full knowledge that … there is no realistic prospect of securing [the Claimant's] extradition within any reasonably foreseeable time-frame".

18. In a clear and well-constructed ruling, the District Judge rejected these arguments. Her reasons were as follows.

19. First, she held that the discretion in s. 8B was wide and was not subject to any qualification of reasonableness or anything similar.

20. Secondly, although she accepted that it "may well be the case" that the Claimant would not be released for 10-20 years, "at this stage, [that] can only amount to speculation". For example, "there could also arise a situation … where, for health reasons, [the Claimant's] parole application is heard considerably sooner".

21. Thirdly, given that the Irish judicial authorities are unable to give the undertaking that would be necessary for a temporary surrender, there could be no suggestion of bad faith.

22. Fourthly, although the District Judge accepted that the lengthy journey to HMP Frankland makes personal visits "very difficult", she had grave doubts about the strength of the family or community ties that were being invoked. The District Judge pointed out that between 2000 and 2015 no application had been made for a transfer to Scotland.

23. Fifthly, and finally:

> "Turning to the merits of the question as to whether or not to further adjourn pursuant to section 8B, I note that it is likely that such adjournments will continue for a long time. They will require the production at court of [the Claimant] every 6 months. The only alternative is to move to consent. Given the extremely serious nature of the offences both in the UK and Ireland, reflected by the long sentences, it is entirely appropriate both that [the Claimant] serve his sentences here and be returned for trial and sentence to Ireland in due course (either with his consent or by the determination of these proceedings, should [the Claimant] change his mind on consent, bearing in mind it is not yet formally being put). To do so will not bring the administration of justice into disrepute; on the contrary, it demonstrates the high public interest in the UK complying with its international extradition treaty obligations and reflects the mutual confidence and respect that should be given to a request from the JA of a Member State. The court hearings will be extremely short and any disruption to [the Claimant's] prison regime will be mitigated by his appearing over a video link from prison."

24. After the hearing the Claimant's solicitors commissioned a psychiatric report from Dr James Stoddart, MRCPsych. He was able to interview the Claimant only via video-link facility and the limitations inherent in that process should be borne in mind. In Dr Stoddart's report dated 3rd June 2020 the Claimant was diagnosed as suffering from an adjustment disorder and PTSD. The former was likely the consequence of "the current impasse with respect to his Court proceedings and his (understandable) concerns regarding how his case will be concluded". The former was the legacy of the Claimant's exposure to criminal violence during the "drugs wars" in Paisley in the 1990s.

25. In Dr Stoddart's opinion, the Claimant's adjustment disorder would eventually dissipate were he moved to a Scottish prison as he seeks. His PTSD symptoms are more chronic but could be treated with medication and psychological therapies were he a willing patient. Overall, these extradition proceedings were having an adverse impact on the Claimant's wellbeing and mental state. He was described as being:

> "… an elderly man who is approaching his seventh decade and has quite marked physical health problems due to his diabetes and as stated above at least two psychiatric diagnoses …"

The District Judge was later to take issue with the use of the adjective "elderly" – in the context of a man who was 59 at the time - but very little turns on this.

26. Dr Stoddart also asked the Claimant about his preferred place of imprisonment. His answer was as follows:

> "He thought that this was what had "propelled me to do what I did". He continued, "I don't mind taking my chances in Ireland". He informed me that the reason his legal team were trying to get the warrant "lifted" was so that [the Claimant] could go back to

> the Scottish prison. This is his most preferred outcome – "to serve out the rest of my sentence in Scotland". He explained that he would get more visits if he was back in Scotland as friends don't want to come to meet him in HMP Frankland. He put this down to the reception that the staff give such visitors in an English category A institution. He also talked of another visit where the officers had made him sit with sex offenders."

27. Finally, Dr Stoddart addressed the Claimant's prognosis on the premise that he were not moved to Scotland. He said this:

> "This is a difficult question to answer as part of at least one of [the Claimant's] psychiatric conditions (his adjustment disorder) is directly related to the nature of extradition proceedings. Put quite simply, until these issues are resolved I would not be entirely optimistic about psychological and/or physical treatments completely ameliorating [the Claimant's] current mental health difficulties. His symptoms may improve on treatment … but until his extradition situation is resolved then I am of the opinion that he would continue to have at times quite disabling psychiatric symptomatology."

28. Following the District Judge's first judgment, there were further s. 8B hearings, and on at least one occasion the Westminster Magistrates' Court declined to hear substantive argument. Directions were then given for skeleton arguments to be filed and served, and for the next adjournment hearing to be determined on written submissions alone. The District Judge handed down her judgment on 11th January 2021.

29. The Claimant's written submissions largely repeated what had been said before, although the article 8 case was now fortified by the psychiatric evidence. The Claimant maintained, unrealistically in our view, that his case came close to engaging article 3. The CPS's position was that this further evidence did not alter the position. The point was taken that the Claimant had failed to adduce any evidence about visits by family members, in particular their frequency and timing. The District Judge was invited to draw an adverse inference.

30. In her second ruling the District Judge considered that it was significant that no such evidence had been presented to her notwithstanding that this deficiency had been identified in her first ruling. On the basis of Dr Stoddart's evidence, she concluded that "it is abundantly clear that the reason [the Claimant] is not receiving visits is because of his perception of the regime at HMP Frankland rather than the distance involved in travelling".

31. The District Judge accepted Dr Stoddart's evidence as to the two psychiatric diagnoses. Her interpretation of Dr Stoddart's prognosis - on the footing that these extradition proceedings were not resolved favourably from the Claimant's perspective - was that it was "heavily qualified".

32. Overall, the District Judge's conclusions were unchanged. As for the psychiatric evidence, she said this:

> "I accept that [the Claimant's health] can be taken into account when determining the Article 8 point. It is clear that he suffers from an adjustment disorder and PTSD. Both conditions are said to be treatable. The former is said to be attributable to his current situation in which the ongoing extradition proceedings constitute a bar to his being transferred to a Scottish prison to serve the balance of his sentence. The key issue is that the conditions are treatable if [the Claimant] chooses to engage, which he has previously declined to do. Moreover, Dr Stoddart's conclusions are qualified ... Weighed against this is the extremely serious nature of the claimant's offending both in the UK and the Republic of Ireland and the public interest in the UK upholding its international extradition treaty obligations. Here. the latter far outweighs the former."

The Legal Framework

33. Article 24 of the Framework Decision provides:

> "**Postponed or conditional surrender**
>
> 1. The executing judicial authority may, after deciding to execute the European arrest warrant, postpone the surrender of the requested person so that he or she may be prosecuted in the executing Member State or, if he or she has already been sentenced, so that he or she may serve, in its territory, a sentence passed for an act other than that referred to in the European arrest warrant.
>
> 2. Instead of postponing the surrender, the executing judicial authority may temporarily surrender the requested person to the issuing Member State under conditions to be determined by mutual agreement between the executing and the issuing judicial authorities. The agreement shall be made in writing and the conditions shall be binding on all the authorities in the issuing Member State."

34. Section 8 of the 2003 Act provides, in material part:

> "**Remand etc.**
>
> (1) If the judge is required to proceed under this section he must—
>
> (a) fix a date on which the extradition hearing is to begin;
>
> (b) inform the person of the contents of the Part 1 warrant;
>
> (c) give the person the required information about consent;
>
> (d) remand the person in custody or on bail.

(2) If the person is remanded in custody, the appropriate judge may later grant bail.

(3) The required information about consent is—

(a) that the person may consent to his extradition to the category 1 territory in which the Part 1 warrant was issued;

(b) an explanation of the effect of consent and the procedure that will apply if he gives consent;

(c) that consent must be given before the judge and is irrevocable.

(4) The date fixed under subsection (1) must not be later than the end of the permitted period, which is 21 days starting with the date of the arrest referred to in section 7(1)(a) or (b).

(4A) But if proceedings in respect of the extradition are adjourned under section 8A or 8B, the permitted period is extended by the number of days for which the proceedings are so adjourned."

35. Section 8A of the 2003 Act provides:

"**Person charged with offence in United Kingdom before extradition hearing**

(1) This section applies if—

(a) a person has been brought before the appropriate judge under section 4(3) or 6(2) but the extradition hearing has not begun; and

(b) the judge is informed that the person is charged with an offence in the United Kingdom.

(2) The judge must order further proceedings in respect of the extradition to be adjourned until one of these occurs—

(a) the charge is disposed of;

(b) the charge is withdrawn;

(c) proceedings in respect of the charge are discontinued;

(d) an order is made for the charge to lie on the file, or in relation to Scotland, the diet is deserted *pro loco et tempore*.

(3) If a sentence of imprisonment or another form of detention is imposed in respect of the offence charged, the judge may order further proceedings in respect of the extradition to be adjourned

until the person is released from detention pursuant to the sentence (whether on licence or otherwise)."

36. Section 8B of the 2003 Act, inserted into that statute by ss. 69 and 116 of the Policing and Crime Act 2009, provides:

> "**Person serving sentence in United Kingdom before extradition hearing**
>
> (1) This section applies if—
>
> (a) a person has been brought before the appropriate judge under section 4(3) or 6(2) but the extradition hearing has not begun; and
>
> (b) the judge is informed that the person is in custody serving a sentence of imprisonment or another form of detention in the United Kingdom.
>
> (2) The judge may order further proceedings in respect of the extradition to be adjourned until the person is released from detention pursuant to the sentence (whether on licence or otherwise).
>
> (3) In a case where further proceedings in respect of the extradition are adjourned under subsection (2)—
>
> (a) section 131 of the Magistrates' Courts Act 1980 (remand of accused already in custody) has effect as if a reference to 28 clear days in subsection (1) or (2) of that section were a reference to six months;
>
> (b) Article 47(2) of the Magistrates' Courts (Northern Ireland) Order 1981 (period of remand in custody) has effect as if a reference to 28 days in—
>
> (i) sub-paragraph (a)(iii), or
>
> (ii) the words after sub-paragraph (b),
>
> were a reference to six months."

37. Section 131 of the Magistrates' Courts Act 1980 provides:

> "**Remand of accused already in custody**
>
> (1) When a magistrates' court remands an accused person in custody and he is already detained under a custodial sentence, the period for which he is remanded may be up to 28 clear days.
>
> (2) But the court shall inquire as to the expected date of his release from that detention; and if it appears that it will be before

28 clear days have expired, he shall not be remanded in custody for more than 8 clear days or (if longer) a period ending with that date."

38. Section 37 of the 2003 Act provides in material part:

"**Undertaking in relation to person serving sentence in United Kingdom**

(1) This section applies if—

(a) the appropriate judge orders a person's extradition to a category 1 territory under this Part;

(b) the person is serving a sentence of imprisonment or another form of detention in the United Kingdom, either—

(i) in custody, or

(ii) on licence.

...

(3) The judge may make the order for extradition subject to the condition that extradition is not to take place before he receives an undertaking given on behalf of the category 1 territory in terms specified by him.

(4) The terms which may be specified by the judge in relation to a person within subsection (1)(b)(i) who is accused in a category 1 territory of the commission of an offence include terms—

(a) that the person be kept in custody until the conclusion of the proceedings against him for the offence and any other offence in respect of which he is permitted to be dealt with in the category 1 territory;

(b) that the person be returned to the United Kingdom to serve the remainder of his sentence on the conclusion of those proceedings.

…

(6) Subsections (7) and (8) apply if the judge makes an order for extradition subject to a condition under subsection (3).

(7) If the judge does not receive the undertaking before the end of the period of 21 days starting with the day on which he makes the order and the person applies to the appropriate judge to be discharged, the judge must order his discharge.

…"

39. During the course of argument the parties drew our attention to further legislative provisions which will be addressed at the appropriate time.

The Claimant's Submissions

40. The headline submission of Mr Malcolm Hawkes for the Claimant was that it was wrong in principle, and inherently unreasonable, for the District Judge to adjourn these proceedings for, in effect, an indefinite period. Not merely was the Claimant still serving the minimum term of his ICS, the fact remains that it is highly unlikely that he would be released on licence until many years after the tariff had expired (the minimum term of the Claimant's discretionary life sentences expired as long ago as 2006, and yet he remains a Category A prisoner). Mr Hawkes submitted that it was the combined effect of the indeterminate nature of the Claimant's two sets of sentences and the inability of the Republic of Ireland to give the requisite undertaking contemplated by Article 24.2 of the Framework Decision which created the intrinsic unreasonableness in this case. The way he put the point in oral argument was that the system breaks down in the face of the Republic of Ireland's inability to deploy Article 24.2.

41. In support of this submission Mr Hawkes relied on the policy and object of both the Framework Decision and the 2003 Act, which was to achieve the extradition of requested persons as soon as possible and without delay. He accepted in oral argument that the power under s. 8B of the 2003 Act could be deployed more than once, and he also accepted that there was a distinction in principle between even lengthy determinate sentences and indeterminate sentences, whether the latter be discretionary life sentences or ICSs. The Claimant had no foreseeable release date and it was not a speculative exercise to predicate possible release only many years hence. Indeed, the exercise pressed on the District Judge by the Second Defendant made a mockery of the system.

42. Mr Hawkes further submitted that at the time the 2003 Act was enacted Parliament could not have had in mind the IPP sentence brought into being by the Criminal Justice Act 2003, the relevant provisions of which came into force in April 2005.

43. Mr Hawkes submitted in the alternative that the District Judge should have considered ordering the extradition of the Claimant on the basis of an assurance from the Irish judicial authorities rather than a formal undertaking; and, in the further alternative, without any form of undertaking or assurance at all. There was nothing in the provisions of s. 37 of the 2003 Act which prevented this course.

44. In the alternative to his overarching points of principle, Mr Hawkes made a number of detailed, case-specific submissions on the approach taken by the District Judge to the evidence and to the governing legal framework.

45. First, he submitted that the District Judge was wrong to state that the s. 8B power was not subject to any qualification of reasonableness: all statutory discretions are subject to such an implied constraint. Secondly, he submitted that the District Judge misinterpreted and wrongly characterised the evidence of Dr Stoddart: this led her erroneously to conclude that the interference with the Claimant's article 8 rights was other than serious and disproportionate. The case came close to section 25 oppression and a violation of article 3. Thirdly, he submitted that the District Judge should have concluded that the indefinite adjournment of these proceedings amounted to an interference with the Claimant's article 6 rights. Given that it was highly likely that the

Claimant would remain incarcerated in the United Kingdom for many years, it is equally likely that the delay would prejudice his right to a fair trial in the Republic of Ireland. Fourthly, he submitted that the issue of the index EAW amounted to an abuse of process: given that it is apparent that the Claimant would not be released on licence for the foreseeable future, and that the Irish judicial authorities ought at the very least to have anticipated the deleterious impact these proceedings would have on the Claimant in terms of his mental health, they ought to have abstained from initiating this process until the Claimant's release became a viable possibility. By withdrawing the 2015 EAW the Irish judicial authority appear to have accepted this, and nothing had changed between then and 2017.

The CPS's Submissions

46. Ms Laura Herbert submitted that s. 8B of the 2003 Act conferred a broad and general discretion and was not subject to any time limit. The purpose of the section was to transpose into the law of England and Wales the equally broad and general provisions of Article 24.1 of the Framework Decision. There was no merit in the submission that Parliament could not have contemplated indeterminate sentences when the 2003 Act was being debated. Life sentences, being inherently indeterminate, have long pre-dated the entry into force of the 2003 Act; and in January 2000 the Claimant received a discretionary life sentence, not an IPP, which was not available at that time.

47. Ms Herbert submitted that the purpose of s. 8B was to enable an issuing judicial authority to seek the extradition of a serving prisoners at any stage during the currency of their sentence but on the footing that the necessary steps which were the preconditions to surrender would not be initiated until the custodial element of that sentence had been served. Practical difficulties would be created if the issuing judicial authority were compelled to wait until the requested person was close to release, particularly in circumstances where that person was serving an indeterminate sentence. Inquiries would have to be made as to progress before the Parole Board, and it would be unduly complicated if not invidious to have to predict whether release on licence was on the cards.

48. Ms Herbert further submitted that there was no indication in s. 8B that the adjournment power could be used only once. There is power to adjourn "until the person is released from detention", and many sentences well exceed the six-month adjournment period.

49. As for the Claimant's fact-specific arguments on *Wednesbury* unreasonableness and proportionality, Ms Herbert's contended that it simply could not be said that the District Judge's assessment of the merits was perverse, reminding us as she was entitled to that the threshold for judicial intervention was a high one. The District Judge's factual findings undermined the case under article 8; the article 6 case was premature; and the abuse of process argument added nothing to Mr Hawkes' primary submission.

Analysis and Conclusions

50. It is common ground that s. 8B confers a broad and general power which reflects the policies and objects of Article 24.1 of the Framework Decision. The language of this article is open-ended, and there is no express prohibition against an issuing judicial authority making an extradition request at any stage of a requested person's sentence. The existence of a power to adjourn is in recognition of what must be the general

principle: that the executing Contracting State will ordinarily require the requested person to complete his sentence in that state before extradition elsewhere. The articulation of this general principle does not derogate from overarching considerations of mutual trust and confidence. On the other hand, it is capable of yielding to arrangements made in individual cases under procedures contemplated by Article 24.2, should these be available.

51. It is not clear why s. 8B was enacted as late as 2009, and no submissions were directed to that issue. Under the 2003 Act as originally passed a District Judge had the same powers as a Magistrates' Court exercising its ordinary criminal jurisdiction including a power to adjourn extradition proceedings. The scope of these more general powers need not be investigated. What is clear is that s. 8B introduced an express power to adjourn in these particular circumstances as well as a requirement that the matter return to court after a maximum of six months. In our judgment, this latter requirement – going as it does further than Article 24.1 – was enacted in order to bring extradition proceedings explicitly in line with s. 131 of the Magistrates' Court 1980 (with adjustments as to the time limits) and with the overall policy underlying it, and as a safeguard to the requested person. The mere transposition of Article 24.1 without such a safeguard would have enabled a Magistrates' Court to adjourn the proceedings just once and potentially for many years, without any possibility of review in the meantime.

52. Two additional considerations flow from the above. First, it is clear that the power to adjourn may be exercised more than once. Mr Hawkes fairly accepted that this has been the practice of district judges sitting at Westminster for 18 years now, and in our view that practice has a solid legal foundation. The presumption within s. 12 of the Interpretation Act 1978 is that statutory powers may be exercised from time to time unless the contrary indication appears. Here, there is no such indication. Indeed, as Ms Herbert rightly submitted, Parliament must have contemplated successive adjournments in cases where the requested person's sentence exceeded six months. First, the express language of s. 8B – "until the person is released from detention" – impliedly recognises that the adjournment power might have to be exercised on successive occasions. Secondly, the purpose of the adjourned hearings is to enable consideration to be given to any change in circumstances or to any compelling reasons why the overall interests of justice require the person's discharge.

53. Ms Herbert was also correct to submit that the adjournments are not "indefinite"; they are for a six-month period, on the unspoken premise that the next adjournment, if made, will be likewise. Mr Hawkes' submission is better advanced in terms that a six-month adjournment is entirely pointless because there is no prospect, either within that period or for any foreseeable period thereafter, of release from custody. Nonetheless, a formulation in such terms must recognise that the issue is ultimately one of fact and degree rather than of principle; and at this stage of the analysis it is the issue of principle which is under scrutiny.

54. We also cannot accept Mr Hawkes' submission that Article 24.2 bears on the issue of principle. It is true that the Republic of Ireland has not transposed this sub-article into its domestic legislation, but that is a matter for it. Neither paragraph of Article 24 is cast in mandatory terms. Continuing to analyse this question at a high level of principle, the Article 24.1 power falls to be exercised independently of any considerations arising under Article 24.2. All that might properly be said is that, if temporary surrender were either refused or were not an option, the requested person would remain in custody.

There may well be case-specific reasons why an executing judicial authority might not wish to countenance temporary transfer even with intergovernmental safeguards. It would not be for a district judge to evaluate their reasonableness in the context of the decision that is required to be made under Article 24.1.

55. It follows that Mr Hawkes' contention that the "system breaks down" on account of the Republic of Ireland's failure to implement Article 24.2 has no force. For such a submission to succeed, there would have to be some indication within Article 24 read as a whole that the operation of sub-article 1 is contingent on the application of sub-article 2; and there is not.

56. There is, however, more force in Mr Hawkes' submission that s. 8B does not confer a power that is entirely without proper legal parameters. The District Judge was correct in observing that the section is not subject to any express qualification of reasonableness (or, we would add, proportionality), and we cannot think that she intended to imply that the power to adjourn could properly be exercised even if it were wholly unreasonable to do so. But the fact remains that the District Judge *did* consider matters of reasonableness and proportionality.

57. In our view, it is important to use these terms precisely in a public law context such as this. There are two stages to be undertaken. The first stage focuses on the inquiry undertaken by the District Judge; the second stage engages the approach of this Court to its review of the District Judge's inquiry and evaluative assessment. The second stage generates less difficulty than the first, and we may deal with it out of turn. It is axiomatic in judicial review proceedings that this Court may intervene only if there were some error of principle (sc. illegality), irrationality (importing a higher threshold than Mr Hawkes' looser invocation of "unreasonableness"), or identification of an erroneous conclusion by the court below in relation to the breach of a Convention right and any necessary proportionality assessment (as to this last matter, see Lord Neuberger PSC in *Re B (a child)* [2013] UKSC 33; [2013] 1 WLR 1911).

58. What are the considerations relevant to the proper exercise of the s. 8B power at the first stage? Mr Hawkes advanced a complex series of submissions directed in the main to the overarching proposition that the District Judge should have considered all possible options, including inviting the Republic of Ireland to give an assurance as opposed to a formal undertaking or ordering extradition without an assurance at all. We accept that Mr Hawkes did raise the first of these issues before the District Judge at the first hearing, but the focus of these judicial review proceedings is her second judgment. It is far from clear that the second of these issues was ever raised. Be that as it may, we will address these submissions on their merits recognising that the District Judge did not. In our judgment, however, they lead nowhere.

59. The Republic of Ireland has not given an undertaking in the context of temporary surrender because it considers that it is unable to do so. There is no evidence to undermine the correctness of the Republic of Ireland's assessment of what its own law does not permit it to do, and there is also no evidence that it could give an "assurance" (which in any event is a form of undertaking using a different term) under its domestic equivalent of the 2003 Act or more generally. When the United Kingdom seeks the extradition of persons to this jurisdiction, there is express power to give an undertaking: see ss. 153A-D of the 2003 Act. It is far from clear what the position would be in the absence of these provisions but it is a plain inference that there are no equivalents in

the Republic of Ireland. As for the option of extradition without an undertaking at all, it would be surprising if the authorities here would be comfortable with the notion that a man subject to two indeterminate sentences might be surrendered even on the temporary basis to a friendly neighbouring state before the Parole Board has determined that he no longer represents a risk to the public, and additionally without guarantees as to his return.

60. In the light of these conclusions, it is unnecessary to express a definitive view as to the true construction of s. 37 of the 2003 Act. Our provisional conclusion is the section contemplates a situation where it is anticipated that an undertaking will be given but there are delays in finalising it. Parliament did not intend that a district judge should be required to exercise the power where there was no evidence that the relevant governments either wished to or were able to provide any undertaking.

61. On the twin premises that the issuing judicial authority has not given an undertaking and that this failure cannot be brought into question by the requested person in the context of the exercise of the s. 8B power, the considerations relevant to the proper exercise of that power must predicate a binary choice: either to adjourn, or to order discharge. Mutual trust and respect is a strong factor in all extradition cases, tempered somewhat by the fact that in the present situation the discharge of the Claimant would not preclude the Republic of Ireland issuing a further EAW at some later stage: this is not all or nothing. In exercising her discretion on ordinary judicial principles, a district judge will clearly wish to consider all the circumstances of the case, including the wider public interest that applies in all extradition cases and any prejudice to the requested person. In this context, the following additional observations should be made.

62. Mr Hawkes submitted that there is no point whatsoever in an extradition request being made and then adjourned for six months where there is absolutely no prospect of surrender either within that period or for the foreseeable future. Undoubtedly, this was Mr Hawkes' strongest point in this application for judicial review, and – subject to what we will have to say about the facts of his client's case – its force must be recognised. Analysing the submission as one of principle, we consider that it should make no difference whether the requested person is serving a lengthy determinate sentence and the EAW were issued at an early stage during its course, or whether he is serving an indeterminate sentence. Mr Hawkes' contention that a distinction between the two types of sentence should be made because IPPs did not exist when the 2003 Act was passed ignores the obvious point that Parliament must have been aware of discretionary life sentences. In any case, in both situations it could be said that surrender could not occur for the foreseeable future.

63. Ultimately, though, Mr Hawkes' submission does not raise a point of principle. Any judicial assessment as to whether an EAW has any practical utility raises matters of fact and degree for evaluation by the district judge upon a consideration of all the available evidence. Except in the clearest cases, different district judges could properly reach different decisions on the same evidence. Had these judicial review proceedings been brought after the first adjournment in 2017 we might have hesitated had an adjournment been ordered, but the current litigation is directed to a decision made in January 2021 some 20 months before the expiry of the tariff of the Claimant's ICS. We reject Mr Hawkes' contention that as a matter of principle it had to be unreasonable to adjourn in such circumstances. Instead, he is reduced to having to argue that it was irrational for the District Judge to make the decision she did.

64. Ms Herbert was right to submit that the practical difficulties facing an issuing judicial authority should be borne in mind by district judges in cases such as this. The issuing judicial authority may fear that, if compelled to wait to close to the last moment, there is a risk that the requested person may be released without its knowledge and then be at large. Furthermore, it is neither reasonably practicable nor appropriate to require of issuing judicial authorities and district judges with expertise in extradition cases to have to make some sort of prediction, inevitably on imperfect evidence, of the chances of release on licence in any case where that is not automatic under the statutory scheme. Release decisions are for the Parole Board upon a consideration of all the available evidence, and cannot be the subject of speculation. The possibility that those representing the Claimant before the Parole Commissioners for Northern Ireland will be pressing hard for his release on licence cannot be discounted. The fact that this Court may be in a position to make a realistic prediction of the likely outcome is nothing to the point.

65. There is no authority directly bearing on the question this Court has to decide. In *Polomski v Westminster Magistrates' Court* [2013] EWHC 1893 (Admin) Cranston J, applying a *Wednesbury* test, upheld the decision of the district judge to order the claimant's temporary surrender to Poland. That case does not assist in a situation where the temporary surrender opinion is not available. In *Augusciak v District Court of Jelena Gora, Poland* [2014] EWHC 420 (Admin), Collins J considered that adjournment under s. 8B may be a sensible option where the precise release date was not known. Ms Herbert suggested that this authority lent general support to the proposition that uncertainty as to a release date warranted the exercise of the power to adjourn, but Collins J was addressing a very different type of case from the present. In *Augusciak* there was no question of likely numerous successive adjournments over a potentially lengthy period. Reference was made by Mr Hawkes to further authority but that did not assist.

66. We have already said that it is incumbent on the District Judge, if the issue were raised, to consider within the context of s. 8B the impact on the requested person of the adjournment sought and any disproportionate interference with his Convention rights. In most cases the impact will be close to nugatory, inhering merely in a degree of uncertainty surrounding the extradition request and judicial consideration of it at six-monthly intervals. Beyond that, the existence of the extradition proceedings would make next to no difference to the quality of the requested person's incarceration. Furthermore, the modest degree of uncertainty we have mentioned should not be overstated because even were the requested person to be discharged the EAW could, and almost certainly would, be reissued later.

67. In our judgment, on the twin assumptions that it cannot be demonstrated that there was no purpose whatsoever in seeking extradition at this stage and that Article 24.2 considerations are not in play, it would only be in exceptional cases that a district judge should conclude that extradition proceedings should not be adjourned, either on account of unreasonableness or disproportionate interference with human rights. The principle of mutual respect, confidence and trust applies in connection with adjournment decisions as it does elsewhere. The possibility that real prejudice might flow from the extradition proceedings can usually be discounted. In the context of a requested person's article 8 rights, the balance will almost always favour the public interest in preserving the EAW rather than his private rights: the instant case is *a fortiori* the

approach of the Supreme Court to article 8 factors in the context of proposed extradition as explained in *H (H) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25; [2013] 1 AC 338. Mr Hawkes is, of course, entitled to submit that his client's case is unusual; but it remains incumbent on him to demonstrate some particular reason why the index EAW should not remain in place.

68. It was pointed out to Mr Hawkes during oral argument that the present situation is not analogous to the liberty of the subject cases arising under schedules 2 and 3 of the Immigration Act 1971. The earliest case on that topic is *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704 where Woolf J, as he then was, explained that these powers of executive detention were subject to four implied reasonableness constraints. If, for example, the detainee could not be removed or deported within a reasonable time, it would be unlawful to continue to hold him in custody. The ascertainment of a reasonable time is a matter of fact and degree for the court, but an objective assessment would be possible. Whereas it remains the case that the s. 8B adjournment power may only be exercised reasonably, a consideration of the statutory scheme provides no further assistance as to what that may mean on any given facts. Further, the context of *Hardial Singh* is rather different, not least because the court is able to identify a series of objectively applicable, implied constraints and at the heart of the issue of reasonableness in that context lies the liberty of the subject.

69. The upshot, in our judgment, is that a district judge exercising the power to adjourn under s. 8B of the 2003 Act must carry out a fair assessment of all the available evidence and in that context determine whether adjournment, as opposed to discharge, is an appropriate and reasonable course. The district judge must decide whether the proceedings serve any purpose whatsoever. If they do, the district judge must go on to decide whether, in the light of a requested person's particular circumstances in custody, including his Convention rights, it would, exceptionally, be unreasonable to adjourn the extradition proceedings for six months. Provided that the district judge follows these broad and general principles, her decision may only be assailed on irrationality grounds.

70. The District Judge in this case did not articulate all the stages of the approach we have identified. Even so, she came sufficiently close to doing so that intervention by this Court in the context of an application for judicial review is not warranted.

71. We now turn to consider Mr Hawkes' narrower, fact-specific arguments.

72. The two planks of the District Judge's decision on article 8 were that the Claimant had failed to adduce sufficient evidence of the nature and extent of the visits he was receiving from family and friends, and that the psychiatric evidence did not support the contention that, unless transferred to Scotland, the consequences for him would be severe.

73. The District Judge accepted that personal visits from family and friends from the west of Scotland were very difficult. According to his witness statement filed for the purposes of the proceedings below, the Claimant receives visits from his daughter and three friends. No further details are provided. The Claimant receives no visits from his grand-daughter whom, we deduce, he has never met. In her first judgment the District Judge observed that this evidence was inadequate, and that deficiency was not remedied by the time she came to give her second judgment. Moreover, the Claimant had not been asking for a transfer to a Scottish Category A prison before 2015, and we might

add that his willingness to be extradited to the Republic of Ireland is not altogether consistent with the suggestion that he could only properly enjoy his right to private and family life if transferred to Scotland.

74. The District Judge accepted that the Claimant had two psychiatric diagnoses and that, were he transferred to Scotland, both were eminently treatable. Our interpretation of Dr Stoddart's report is that, if the Claimant remained at HMP Frankland, these conditions would be susceptible to treatment, although the prognosis is somewhat guarded and would in any case depend on the Claimant's willingness to engage. That interpretation is consistent with the District Judge's. By implication she accepted that the Claimant would have a better prognosis were he transferred to a Scottish prison.

75. The District Judge accepted that the existing extradition proceedings were a bar to transfer to Scotland but she did not consider, because she was not asked to, whether there were other hurdles that the Claimant would have to surmount.

76. In our judgment, the District Judge's conclusion that it was the Claimant's perception of the regime at HMP Frankland rather than any practical difficulties in travelling from Scotland to that institution which was the real reason for his not receiving visits was somewhat harsh. However, a harsh conclusion falls short of being an irrational one, and in our view it was open to the District Judge to conclude that the Claimant should have adduced better evidence of the private and family life he claimed to be enjoying through prison visits. The District Judge drew an adverse inference in her first ruling, and the Claimant had the opportunity to improve his case in this respect. He did not avail himself of that opportunity, and the District Judge's conclusion was not perverse.

77. It is certainly arguable that the District Judge was unsympathetic to the Claimant's mental health problems, and insufficiently receptive to the proposition that his adjustment disorder in particular would respond to treatment more quickly in an environment where he would be, as Mr Hawkes put it, in a better place mentally. As against that, it could fairly be said that the Claimant's PTSD flowed from his own criminal activity, that he had taken no steps to seek psychiatric help at HMP Frankland, and that Dr Stoddart was far from ruling out a favourable response to treatment, assuming that the Claimant was a willing patient, even in his present circumstances. Again, the District Judge's overall assessment was not perverse.

78. Ms Herbert's submission that it is unclear that the Claimant would be transferred to Scotland even were the bar constituted by these extradition proceedings removed also has some force. The District Judge did not consider this question, but it is far from obvious that the Scottish authorities would be prepared to accept the transfer of a prisoner, with a record such as the Claimant's, who has absconded on two occasions in the past, on the second occasion, it is alleged, using extreme violence.

79. Overall, the Claimant has been able to show a modest degree of prejudice flowing from the existence of these extradition proceedings, but he falls well short of the level of interference with his article 8 rights that would be required to justify discharge. The District Judge's conclusion on article 8 was not irrational, and this ground of challenge fails.

80. The article 6 ground is not arguable. Whether the Claimant can be tried fairly in Ireland is an issue which falls to be addressed at a full hearing at the time of his surrender to

the issuing judicial authority, which will not be until the Parole Board and the Parole Commissioners conclude that it would be safe to direct his release. The article 6 issue does not merit consideration at this stage, still less on an entirely hypothetical basis. It should also be pointed out that the same article 6 issue would arise at a later stage on a reissued EAW even if discharge were ordered. In any event, the delays in this case have been brought about by the Claimant's own criminality, forming as it does the subject-matter of two indeterminate sentences.

81. The abuse of process ground does not add to the Claimant's submissions directed to the issue of principle. If adjournment were wrong in principle, the Claimant would be entitled to be discharged regardless of abuse of process; but, if not, the exercise of the power to adjourn could not logically amount to an abuse of process. A further difficulty from the Claimant's perspective is that the Irish judicial authorities would not necessarily be aware of the workings of the parole system in the United Kingdom, nor – it might be added – would the District Judge.

Disposal

82. The District Judge's decision of 11th January 2021 cannot be impugned, and this application for judicial review must be dismissed.