Neutral Citation Number: [2022] EWHC 2224 (Admin)

Case No: CO/1828/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 August 2022

Before :

THE HONOURABLE MR JUSTICE MURRAY

- -

Between :

DF **Appellant**

- and -

AMTSGERICHT NÜRNBERG, GERMANY **Respondent**

- -
- -

Mr James Stansfeld (instructed by **Tuckers Solicitors**) for the **Appellant**
Mr Stefan Hyman (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing date: 1 December 2021

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down are deemed to be 25 August 2022 at 10:30 am.

Mr Justice Murray :

1. This is an appeal from the order of DJ(MC) McGarva dated 18 May 2021 ("the Order"), ordering the extradition to Germany of the appellant, DF, under section 21A(5) of the Extradition Act 2003 ("the 2003 Act"). His reasons for making this order are set out in his judgment dated 18 May 2021 ("the Judgment").

2. The respondent judicial authority is the Amtsgericht Nürnberg, Germany.

3. DF brings this appeal under section 26 of the 2003 Act, leave to appeal having been granted by Dove J on 7 October 2021.

Grounds of appeal

4. DF appeals the Order on the following grounds:

   i) The judge was wrong to conclude that extradition would not be unjust and/or oppressive by reason of the passage of time pursuant to section 14 of the 2003 Act.

   ii) The judge was wrong to conclude that extradition amounts to a proportionate interference with DF's and his family's right to a private and family life pursuant to Article 8 of the ECHR.

Anonymity of the appellant, his sister, and her children

5. DF has applied for anonymisation of the appellant, his sister and her four children. The application was made for the protection of the children. Mr James Stansfeld, counsel for DF, submitted that it is necessary to anonymise the appellant's sister's name and the appellant's name in order for the protection of the children to be effective. DF does not seek any reporting restrictions. He seeks only that the identities of the children be protected by not publishing them in this judgment.

6. Mr Stansfeld drew the court's attention to the judgment of Lane J in *BM v Ireland* [2020] EWHC 648 (Admin), in which Lane J made an order for the identity of the appellant and his children, T and M, to be withheld from publication in the judgment. No further derogations from the principle of open justice were sought. In that case, T suffered from a serious, life-limiting congenital medical condition.

7. As will be seen, the four children at the centre of this case range in age from 3 to 8 years old. Each suffers from severe learning difficulties, with accompanying behavioural issues of varying degrees of severity. These learning difficulties and behavioural issues present considerable challenges for their care and management. Their mother has significant physical and mental health problems. The children's father left home about two years prior to the appeal hearing following separation from their mother and their subsequent Islamic divorce. He provides no practical or financial support for the children. It is not disputed that for some years (since roughly 2016), and to an enhanced degree over the past few years since their father's departure, the appellant has been heavily involved in the care and management of the children.

8. The respondent does not oppose the anonymity application.

9. I note the particular importance of open justice in the area of extradition. Lane J observes in *BM v Ireland* that the mere existence of children as part of the circumstances of a case where a person's extradition is sought, having been convicted of a criminal offence abroad, is unlikely to be sufficient to justify anonymisation of that person in a judgment. A very good case, indeed, will need to be made. He was satisfied that *BM v Ireland* was such a case.

10. In this case, the appellant has not been convicted in Germany. His extradition is sought so that he can stand trial. *A fortiori*, the principles summarised by Lane J apply. I am satisfied that there is a very good case for withholding the appellant's name in this judgment, as well as those of his sister and her four children, in order to protect his sister's children.

11. In this judgment, I will refer to the appellant as "DF" and his sister as "CG". The four children are:

    i) a boy, "MG", born in 2011;

    ii) a girl, "NG", born in 2012;

    iii) a girl, "OG", born in 2015; and

    iv) a boy, "PG", born in 2018.

12. CG is two years younger than DF. DF has two other sisters who play a role in the circumstances of this case, and it is necessary to anonymise them in order to protect the identity of CG and her children. I will refer to the elder sister of DF and CG as "BF". The other sister is younger than CG. I will refer to her as "EH".

Introduction of new evidence

13. DF has applied for new evidence not before the judge at the extradition hearing to be admitted on this appeal, namely:

    i) a letter dated 16 November 2021 from Ms Lyann Fergus, a social worker in the City of Westminster's Disabled Children's Team, who has been involved with CG and her children, concerning the potential impact of the extradition of DF on CG's children and on CG and her ability to care for her children;

    ii) a witness statement of CG (her third in these proceedings, the copy in the appeal bundle being undated and unsigned), together with two exhibits:

        a) a letter dated 2 November 2011 from Ms Aimee Di Marco, a consultant endocrine surgeon at Hammersmith Hospital, Department of Thyroid and Endocrine Surgery, to CG's NHS general practitioner (GP) regarding CG's medical condition;

        b) a letter dated 5 August 2021 from Ms Valia Chatzichristou, an IAPT Step 3 Counsellor at the charity Mind in Brent, Wandsworth and Westminster, concerning CG's mental health;

iii) a witness statement of DF (his second in these proceedings, the copy in the appeal bundle being undated and unsigned); and

iv) a letter dated 19 November 2021 from CG's NHS GP summarising CG's medical history and, more briefly, medical problems affecting each of her children.

14. The principles that apply to the admissibility of new evidence on appeal in the context of extradition appeals are, unsurprisingly, similar to the principles that apply in other contexts. The principles applicable in this context were set out by the Divisional Court in *Hungary v Fenyvesi* [2009] EWHC 231 (Admin), [2009] 4 All ER 324 (QBD).

15. In *Fenyvesi* at [4], the Divisional Court described the underlying policy as being that "fresh evidence may be received when it is just to do so; or perhaps when it would be unjust not to do so". In respect of evidence "that was not available at the extradition hearing", the Divisional Court held at [32] that a requested person must demonstrate that:

> "… the evidence … either did not exist at the time of the extradition hearing, or … was not at the disposal of the party wishing to adduce it and which he could not with reasonable diligence have obtained."

16. As to the general approach to be taken, the Divisional Court in *Fenyvesi* gave the following guidance at [35]:

> "Even for defendants, the court will not readily admit fresh evidence which they should have adduced before the district judge and which is tendered to try to repair holes which should have been plugged before the district judge, simply because it has a human rights label attached to it. The threshold remains high. The court must still be satisfied that the evidence would have resulted in the judge deciding the relevant question differently, so that he would not have ordered the defendant's discharge. **In short, the fresh evidence must be decisive.**" (emphasis added)

17. In *Zabolotnyi v Hungary* [2021] UKSC 14, [2021] 1 WLR 2569 (SC), the Supreme Court affirmed the *Fenyvesi* principles at [56]-[61].

18. I have read the additional evidence *de bene esse*. I assume that signed and dated copies of the third witness statement of CG and the second witness statement of DF have been filed and served. I will return to the additional evidence at the end of this judgment.

The factual background – the alleged offence

19. I will first summarise the factual background to the alleged offence in 2002 regarding which the respondent is seeking DF's extradition to Germany. I will then summarise the factual background of DF's history since 2002 and his current family circumstances to the extent that they are relevant to his grounds of appeal.

20. DF is accused of being the man who, on 17 November 2002 at about 9:45pm, after having paid for and had sexual relations with a prostitute in her room at a property in Frauentormauer in Nürnberg and immediately before leaving, assaulted her by punching her in the face with both fists, causing her to fall back on the bed. He then demanded his money back. When she tried to stand up, he hit her with a bottle causing her to lose consciousness. He then stole €265 in cash from her suitcase. The complainant suffered a triple fracture of her lower jaw, a massive haematoma on her left cheek, and an injury of about 4cm to her head.

21. The offence that DF is accused of having committed is classified in the European Arrest Warrant (EAW) issued on 15 October 2020 as "aggravated robbery in unity with dangerous bodily harm" (*besonders schwerer Raub in Tateinheit mit gefährlicher Körperverletzung*).

22. The complainant, then 37 years old, was interviewed on the day of the assault. She provided a description of her attacker. She told police that he was English-speaking and that he had told her that he lived in England. Two suspects were arrested that day and brought before her for identification, but she did not identify either as her attacker. Forensic evidence in the form of fingerprints and DNA, including traces of sperm on a condom and paper tissues, were collected at the scene.

23. Analysis of the DNA was ordered by the local court in Nürnberg on 21 February 2003, but German databases yielded no hits for the traces of the fingerprints and DNA. An identikit picture was also created. A search for the attacker announced in the regional and national press on 26 November 2002, including the identikit picture, yielded no results.

24. On 7 July 2003, the Public Prosecutor's Office of Nürnberg-Fürth suspended further investigation of the case as the attacker had not been identified and there were then no further leads.

25. On 4 October 2019 (erroneously recorded as 4 October 2020 in the respondent's supplemental information dated 28 December 2020), the Bavarian State Office of Criminal Investigation notified the Nürnberg public prosecutor that, in the European database set up under the Prüm Convention, there had been a hit matching the DNA collected in this case by the German police in 2002 with two DNA samples recorded on the UK database. The two UK DNA samples were linked to DF. His personal information, including a photograph, were sent by the UK authorities to the German authorities.

26. On 15 June 2020 the Institute for Forensic Medicine (*Institut für Rechtsmedizin*) in Erlangen compared the UK and German DNA samples, on the basis of which the German authorities concluded that the samples matched. They were also of the view that the photograph sent by the UK authorities bore a resemblance to the identikit image of the attacker that had been created in 2002 with the assistance of the complainant.

27. The German authorities noted that DF was recorded as having been convicted of various offences in the UK between 2001 and 2017. They also determined that DF had entered Germany on 7 November 2002 and that he had been registered at the immigration office in Fürth as a resident of Roßtal, a town in the district of Fürth in

Bavaria close to Nürnberg, where he started but never completed an application for permanent residence, which therefore lapsed in January 2003.

28. The German authorities did not have a record of when DF left Germany. He was still registered as resident at an address in Roßtal when a letter was sent to that address due to the UK's exit from the European Union in October 2019. A person then resident at that address rang the immigration office in Fürth to say that DF did not live there and was not known to anybody at that address.

29. The complainant was contacted by the German authorities, and on 21 September 2020 she confirmed her willingness to give evidence in relation to the attack in 2002. On 1 October 2020, a request was issued for a national arrest warrant in Germany in relation to DF and subsequently for the EAW.

The factual background – DF's history since 2002 and current family circumstances

30. DF was 19 years old at the time of the alleged offence. He is now 38 years old. He was born in Eritrea and came to the UK at the age of 7. He became a UK citizen in 1995.

31. DF has three sisters, a sister who is a couple of years older than him, whom I will refer to as "BF", and a sister who is four years younger than him, whom I will refer to as "EH". CG is two years younger than DF.

32. DF's father has passed away, and his mother is in poor health following a kidney transplant in 2009 for which CG donated a kidney.

33. DF's most important family relationship is with his sister, CG, and her four children. Each of those children suffers from particular difficulties. In summary, they are as follows:

    i) MG suffers from global developmental delay (GDD) and has been diagnosed as meeting the criteria of autistic spectrum disorder (ASD). He has significant delay in language and social interaction skills and severe sleep difficulties. He exhibits a number of challenging behaviours, including loud screaming, banging his head on the wall, hitting his siblings, soiling his bed, requiring supervision and assistance while using the toilet, fussiness regarding food he will eat, and inability to use a knife and fork. He also has a number of health difficulties and has suffered from unexplained pain in his abdomen, headaches, and high fever. At the time of the hearing before the judge, MG was being investigated for leukaemia.

    ii) NG also suffers from GDD and has been diagnosed as meeting the criteria of ASD. She has difficulty with speech production and has been receiving speech and language therapy (SALT). She has significant difficulties with attention and in social interaction. She has language problems, and her attention and concentration have been poor. She is solitary, cannot initiate activities, is clumsy, and has accidents. At the time of the hearing before the judge, she was being investigated for epilepsy and attention deficit disorder (ADD). She is very sensitive to light. She is in mainstream school but on the school's special educational needs (SEN) register. She does not present with behavioural

difficulties at school, but her GDD and ASD appear to be affecting her learning and relationships. She has difficulty following instructions and communicating.

iii) OG shows poor attention and delayed listening skills. In 2018 she was also diagnosed as meeting the criteria of ASD. She wets the bed frequently. She has coordination problems, is clumsy, and has no awareness of risk or danger. She struggles with noise and her concentration, reading, and writing are poor. She cannot manage in a large group at school. She requires assistance to focus on, process and retain information and learns best in a 1:1 situation.

iv) PG was formally diagnosed with autism before the hearing below. As of March 2021, he was assessed as having significantly delayed language and an attention span of less than one minute to adult-led activities. While he starts a request verbally, this quickly escalates to screaming, hitting, and biting, and it can take up to 45 minutes to calm him down. He, too, has no awareness of danger. He requires a particularly high level of supervision. He has sleep difficulties and tends to be aggressive.

34. CG is a sole parent, her former husband having left the family home two years before the hearing below, following their separation and subsequent Islamic divorce. He provides no practical or financial support for the children.

35. CG's ability to care for the four children has been compromised by multiple health issues of her own. After donating one of her kidneys to her mother in 2009, she has suffered problems with her remaining kidney, leading to an operation in 2014 and a gastric by-pass. She currently suffers from urea leakage in her kidney. The pains in her stomach make eating difficult. She is anaemic with iron deficiency and suffers from fatigue. CG also suffers from stomach reflux syndrome, migraine headaches, stress incontinence, nerve pains in her toes up to her back and shoulder blades since the birth of PG, and was under investigation for other issues at the time of the hearing below. (Some of the new evidence that DF seeks to adduce provides an update on CG's medical condition.)

36. DF began assisting CG with the care of her children while CG was still married. To compensate for CG's husband's frequent absence due to alcohol use and gambling issues, DF began to provide additional care for CG's four children. Since CG's husband's departure from the family home two years prior to the hearing below, DF has become a principal carer for the children along with CG. He is viewed by them as a father figure. He is their registered carer, receives a carer's allowance, and is paid by Social Services to provide 18 hours of care per week to the children. He is also a legal guardian of the children.

37. Prior to his arrest on the EAW, DF would sleep at the address where the children were living approximately four nights per week so that he could help care for the children if they woke up during the night and in the morning. On nights when he had not slept over, he would attend by 7:00am to help with the morning routine and get them ready for school. He has continued to do the latter since his arrest.

38. Once the three older children are at school, DF has been assisting with the care of PG at home. After school on Tuesday, Wednesday, and Friday of each week, the children

attend the Tresham Centre for Disabled Children & Young People ("the Tresham Centre"), which provides specialist provision for children with disabilities and special needs. They also attend two Saturdays per month between 10:00am and 4:00pm. The afternoon care provision was disrupted for a time during the lockdowns caused by the Covid-19 pandemic.

39. The three older children either return home from school at 4:00pm or from the Tresham Centre at 6:30pm. DF is almost always there when the children arrive. He helps to settle them in, and assists with their dinner and homework. Given the various difficulties of the children, it is necessary for DF to assist with getting each of the four children settled and in bed. NG, in particular, requires up to two hours of soothing and an adult's physical presence before she is able to go to sleep.

40. Because of their various difficulties, the children have been assessed by various professionals. This was dealt with in the evidence that was before the judge, which also considered the role that DF plays in the lives of the children. It was noted by some of the professionals that the children appear to respond more readily and more obediently to DF than to CG or other adults.

41. DF has 10 convictions in the UK for 13 offences, to all but two of which he pleaded guilty:

    i) On 4 June 2004, at the age of 21, he pleaded guilty to possession of a firearm with intent to cause fear of violence, for which he was given a community order requiring him to do 200 hours of unpaid work.

    ii) There were subsequent convictions for:

        a) possession of controlled drugs (three Class B and one Class C) between 2006 and 2013;

        b) driving while under the influence of alcohol in 2014, for which he was fined and disqualified from driving for six months; and

        c) assaulting a constable in 2013, for which in 2014 he received a suspended sentence of 4 months' imprisonment and 80 hours of unpaid work.

    iii) DF's last conviction was on 18 July 2017 in relation to four offences committed on 8 January 2016, namely:

        a) one count of possession with intent to supply Class B drugs to which he pleaded not guilty; and

        b) three counts of possession of controlled drugs (one Class A and two Class B) to which he pleaded guilty,

        for which he received a suspended sentence of 9 months with a rehabilitation activity requirement of 35 days.

    iv) DF's last offence was committed on 21 June 2016, namely, being in charge of a motor vehicle while above specified limit for controlled drugs, for which on

12 September 2016 he received a community order with an unpaid work requirement and his licence was endorsed with 10 penalty points.

The Judgment

42. At the extradition hearing on 30 April 2021, which lasted most of the day, the judge heard evidence from DF, CG and Dr Sharon Pettle, a consultant clinical psychologist and trained family therapist, who specialises in the field of child and adolescent mental health. Dr Pettle had been instructed by Tuckers Solicitors, DF's solicitors, to assess the consequences for the children of DF being extradited to Germany. Her report is dated 29 March 2021.

43. DF also provided the judge with a number of documents to accompany Dr Pettle's report, including reports prepared by various professionals relating to CG's children and educational and medical records relating to CG and her children.

44. The judge heard the oral evidence of Dr Pettle first and summarised it in some detail in the Judgment. He noted that Dr Pettle had interviewed DF, CG, and other people who knew the children well, although she did not speak with Ms Fergus, the allocated social worker. Dr Pettle had reviewed various documents concerning additional support for CG in caring for her children. Dr Pettle noted that the professionals she spoke with were consistent in their view of DF's positive contribution to the stability of the children. She arranged to observe CG and her children when DF was present and also when he was absent. She observed a difference, with the children more unsettled in DF's absence.

45. The judge noted Dr Pettle's view that the demands of the children were "pretty relentless" and that it was hard for a single adult to cope with them, which had also been observed by the children's school and by the social worker. MG, in particular, was very difficult and required a lot of individual attention. Dr Pettle observed that the relationship between the children and DF was a "warm and connective" one and that he had a calming effect on them. The other sisters, BF and EH, had their own families and could not offer the level of support to CG and her children that DF did. The wider family were not aware of the extent of the children's needs. Although Dr Pettle had not spoken with Ms Fergus, she had read Ms Fergus's written assessment of the likely impact of DF's extradition on the CG's children. Dr Pettle noted that support for CG and her children from the local authority had improved since Ms Fergus's involvement. The local authority would not, however, have the resources to replace the intensive level of support for CG and her children provided by DF.

46. The judge accepted Dr Pettle's evidence about the importance of DF in the lives of the children and that he made a discernible positive difference.

47. The judge then summarised the evidence of DF. He had stopped working in 2016 as he spent more time caring for his family because his father was ill. That is when he first became properly involved with CG's children and started claiming the carer's allowance. The judge noted that DF got support from Social Services to provide 18 hours of outdoor care for the children. DF was due to marry his partner, but this would not affect the level of care he provided to the children. DF gave evidence regarding his interaction with each of the children. He was with them virtually all of the time when they are not in school. MG, the oldest child, is violent and hyperactive

when subjected to change. DF was better at setting boundaries for him than CG or his other sisters.

48. The judge noted that DF accepted that he had a number of convictions in the UK, most recently in 2017. DF accepted that he had been in Germany in 2002 or 2003 for two months maybe. He left Germany because he had only gone there to see his aunt. He went back to Germany in 2016 for his aunt's funeral.

49. The judge noted DF's evidence that if he was extradited the critical care gap would be outside school times, particularly at night. He had been unable to stay over at night since his arrest, being on tagged curfew, but he arranged to be with the children from 6:00 to 9:00am and from 3:00 to 11:00pm. DF was worried that the children, each suffering some degree of autism, would not be able to build the same relationship with an outside carer that he had with each of them.

50. At paragraph 20 of his judgment, the judge concluded:

> "I accept [DF] makes a significant and positive contribution to the care of the children but I feel the extent of it may be overstated in the context of [DF's] natural wish not to be extradited."

51. The judge then summarised CG's evidence concerning the children's disabilities, her health issues, her living arrangements, the difficulties of caring for the children, and the importance of DF in relation to caring for the children. He noted that CG said that the children behaved "perfectly" when DF was there, and DF was the only one that PG responded to. The judge noted her view that she would not be able to cope without DF's help and her fear that the children would be taken from her. CG had been advised that "in the worst-case scenario" the children might have to be taken into care because the local authority could not provide 24/7 support. The local authority were currently giving the family the maximum level of assistance available, so there would be no additional support if DF were not there. The local authority had indicated to CG that it might not be feasible for her to care for the children in DF's absence.

52. The judge found CG to be a genuine witness and accepted that she was concerned about how she would cope without DF's assistance. He concluded, however, at paragraph 25 of the Judgment that:

> "… [a]s with [DF] without doubting the significant contribution the Requested Person makes to the care of the children I feel there may be a degree of over statement. I do accept it will be more difficult for her to manage the children in [DF's] absence but I do not accept it would be impossible. It is important to note that the support from outside sources such as the Tresham Centre which has been offered during lockdown has been reduced and it is reasonable to infer that as lockdown eases this support will be once more available."

53. The judge noted that he had read the bundle of documents provided by DF to support Dr Pettle's report, and two additional documents, a letter from Ms Fergus dated 27 April 2021 and a therapy goal sheet for PG. The judge noted that in DF's bundle,

there were three letters from the Westminster Child and Adolescent Mental Health Service expressing concerns about CG's fragility due to various issues.

54. The judge also reviewed various documents provided by the respondent, which included, among other things:

    i) the EAW, the certificate issued by the National Crime Agency on 30 October 2020 in relation to the EAW, and the supplemental information from the respondent dated 28 December 2020 setting out the factual background of the alleged offence and subsequent investigation, and further supplemental information from the respondent dated 29 March 2021 confirming that a decision to charge DF has been made by the German public prosecutor, subject to giving DF the opportunity to give an account of what happened;

    ii) a German document dated 30 October 2020 indicating that DF has no criminal convictions in Germany; and

    iii) DF's criminal record in the UK dated 10 November 2020 showing convictions for possession of a firearm with intent to cause fear of violence in 2004, a number of convictions for possession of cannabis, a number of convictions for drink driving, and a conviction for possession of cannabis with intent to supply for an offence in January 2016.

55. The judge considered the EAW at paragraphs 33-35 of the Judgment and concluded that it was valid, complying with sections 2, 10 and 64 of the 2003 Act.

56. The judge noted at paragraph 36 of the Judgement that the two principal objections raised by DF to the EAW were that:

    i) his extradition was barred under section 14 of the 2003 Act on the basis that it would be unjust or oppressive to extradite him by reason of the passage of time since the offence that he is alleged to have committed; and

    ii) extradition would infringe the rights to a private and family life of DF and members of his family under Article 8 of the European Convention on Human Rights (ECHR).

57. The judge considered that DF was not a fugitive from Germany. DF only became aware of the proceedings in Germany when he was arrested by the police in 2020. He was never questioned in Germany or subject to any pre-charge bail conditions or restrictions. There is no basis for concluding that he left Germany to avoid an investigation into the alleged offence or otherwise to escape the German criminal justice system.

58. At paragraph 38 of the Judgment, in light of the objections raised by DF to his extradition, the judge turned to consider three issues, namely:

    i) the seriousness of the allegation to be prosecuted;

    ii) the age of the allegation and the delay by the German authorities in pursuing it; and

iii) the impact of the extradition on DF and innocent members of his family.

59. The judge's conclusion on the first of these issues, set out at paragraph 39 of the Judgment was that the alleged offence was extremely serious, involving the use of a weapon and very significant force to commit it, which under the Sentencing Council guideline for the corresponding offence in the UK would merit a starting point for sentence of 5 years' imprisonment, with a range of 4 to 8 years' imprisonment.

60. In relation to age of the alleged offence and delay by the German authorities, the judge concluded at paragraph 40 of the Judgment that the matter was promptly reported, and the German authorities began their investigation promptly in November 2002. Through no fault of the German authorities, a dead-end was reached. Once a match with DF's DNA was made on the Prüm database on 4 October 2020, the German authorities acted "with the utmost expedition". The judge did not know why there was a 17-year delay between the occurrence of the alleged offence and the match on the Prüm database given that DF's DNA sample would have been on UK DNA databases from 2004 at least given DF's conviction in that year for a firearms offence. The judge was not, however, able to conclude that the delay was culpable on the part of the German authorities, but he recognised that the delay was substantial and represented a significant proportion of DF's life.

61. In relation to the impact of extradition on DF and innocent members of his family, the judge set out a number of conclusions on the evidence at paragraph 41 of the Judgment:

i) DF's family in the UK includes his mother, three sisters, and eight nephews and nieces.

ii) DF is very close to CG, who is a single parent bringing up four challenging children, while facing a number of health issues and being emotionally vulnerable. She is the main carer for the children, with the support of DF.

iii) CG's children each have behavioural difficulties and other issues such as ASD and developmental delay. They "can best be described as a real handful", demanding and competing for constant attention and only with difficulty accepting boundaries. The children's conditions make it difficult for them to adapt to change. They have lost two important role models, namely, their grandfather (who has died) and father (who is absent), leaving DF as their only male role model. They will be upset if DF is extradited and will find it difficult to adapt to change and be supported by different carers.

iv) DF has a good way with the children and is better at getting them to accept boundaries than the other family members.

v) The children's grandmother provides some support to CG, but that support is limited by her age and frail physical health.

vi) CG's sisters, BF and EH, provide some help, but their ability to do so is restricted by their own commitments, BF having a young baby and EH having three children of her own.

62. The judge's conclusions, drawn from that and other evidence, are set out at paragraph 41(l)-(o) of the Judgment. Given their importance to the appeal, I set them out *verbatim* below:

> "…
>
> [l] … [T]he impact [on CG's children] of the loss of [DF] should not be overstated. [DF] has been more involved in recent years. The children in addition to the support provided by [DF] benefit from intensive support at [their] school and very extensive support at the Tresham centre 3 days per week. They have had to manage without the Tresham centre during lockdown and appear to have done so without any substantial adverse effects. They have also had to make do with less input from [DF] due to his bail conditions but again have done so without any apparent ill effects.
>
> [m] The children will suffer some upset if they are separated from [DF] by extradition. This is true in all extradition cases where the Requested Person is a carer. [DF] however although a significant carer he is not a sole carer; and although I judge things will be more difficult for the family the problems are not likely to be insurmountable.
>
> [n] I accept the Local Authority will have to reassess [CG's] ability to cope with the four children. I accept that the evidence confirms that there are reservations about her ability to cope and that in the worst-case scenario that could lead to the separation of the children with some placed in foster care or residential care which would be disastrous to them. However, it is impossible to quantify the likelihood of the worst-case scenario occurring. The highest I can assess the position is that [CG] would be reassessed. The Local Authority would be obliged to provide support although I agree with Dr Pettle that the Local Authority could not provide a like for like replacement for [DF] due to lack of resources.
>
> [o] The starting point has to be that [CG] would be assessed by the Local Authority and they would look at her ability to meet the children's needs with the support of her family network but without [DF]. The Local Authority has a duty to support [CG] in her care of the children. Although separation of the children is a possible outcome it is only one possible outcome and it would be the last resort. [DF] is not a sole carer and we are not in a situation like that described in the case of *A B v Hungary* [2013 EWHC 3132 ADMIN] where

> the extradition of sole carers would lead to 10-day deadline for making satisfactory arrangements for the children. The Requested Person's sister has quite a wide family network who probably could work together to plug the gap left by [DF]."

63. The judge then turned, at paragraphs 43-46 of the Judgment, to his conclusions on the first of DF's two principal objections to extradition, namely, his argument based on section 14 of the 2003 Act. He began by noting that the delay was very long, a significant part of DF's life, "given that he was 18 at the time of the alleged offence". (Strictly speaking, he was 19 years old, but that makes no material difference.) DF was not a fugitive and therefore he could fully rely on the delay, as he was not responsible for it. Equally, however, the judge had already concluded that the German authorities were not culpable for the delay.

64. The judge noted that DF was arguing that extradition would be oppressive (rather than unjust) for purposes of section 14 of the 2003 Act. The judge, relying on the speech of Lord Diplock in *Kakis v Republic of Cyprus* [1978] 1 WLR 779 (HL) at pp782H and 784G-H, said at paragraph 45 of the Judgment that "[t]he gravity of the offence is a key factor in determining the issue of whether extradition would be oppressive."

65. At paragraph 46 of the Judgment, the judge concluded that, had the offence been less serious, he might have decided that extradition would be oppressive. In this case, however, given the very serious offence of robbery where the complainant was attacked with a weapon and suffered a triple fracture of the jaw, the substantial delay did not outweigh the weighty and constant public interest in extradition. Although extradition would have "profound effects on [DF's] nephews and nieces … the severity of the accusation means that the delay does not make extradition oppressive".

66. The judge then considered, at paragraphs 47-62 of the Judgment, DF's objection to extradition based on the Article 8 ECHR rights of DF and innocent members of DF's family. He noted that the Supreme Court in *HH v Italy* [2012] UKSC 25, [2013] 1 AC 338 (SC) had cautioned against the application of an exceptionality test in cases where extradition would affect innocent members of a requested person's family but had also observed that cases where extradition was found to be disproportionate were likely to be exceptional on their facts. The judge acknowledged, at paragraph 47 of the Judgment, that when dealing with the impact of extradition on innocent children, "their welfare must always be a primary consideration". Following the guidance of the Divisional Court in *Poland v Celinski* [2015] EWHC 1274 (Admin), [2016] 1 WLR 551 (Admin), the judge carried out a balancing exercise in relation to the factors for and against extradition.

67. The judge found the following factors in favour of extradition:

    i) the constant and weighty public interest in the UK honouring its international treaty obligations and showing mutual recognition and respect to other sovereign states;

    ii) the powerful public interest in the UK not becoming known as a safe haven for criminals;

iii) the seriousness of the alleged offence, involving violence and the use of a weapon to inflict significant harm, which on a conviction would attract a substantial prison sentence; and

iv) DF's not having lived a blameless life in the UK, having been convicted here of a number of offences, some of which are serious.

68. The judge found the following factors against extradition:

i) the alleged offence took place 19 years ago, so on any basis there has been substantial delay;

ii) DF plays a major role as a co-carer for four children aged between 9 and 2 years who have profound needs, with significant behavioural issues, and has shown that he has a positive influence on their care;

iii) DF has no links with Germany, but long-standing links with the UK, to which he first came in 1990, becoming a citizen in 2002, where all of his family live;

iv) although DF has not lived a blameless life here, he has also done some acts significantly to his credit, including giving evidence at a murder trial at a real risk to himself and playing a positive role in the lives of CG's children and having indicated willingness to help other children with similar difficulties at the Tresham Centre.

69. I note, regarding [68.(iii)] above, that DF, in fact, became a UK citizen in 1995. He first obtained a UK passport in 2002. This factual error in the Judgment makes no material difference.

70. In addition to these factors, the judge bore in mind that CG's children would suffer a real sense of loss at losing a third important male role model. The children, due to their special needs, would find it difficult to adapt to the resulting change. The children had, however, adapted to various changes over the years, including losing their grandfather to death, losing their father to divorce, seeing less of DF due to the restrictions imposed on him following his arrest, and losing access to the Tresham Centre for a time due to Covid-19 pandemic restrictions.

71. The judge recognised that if DF were extradited, CG would lose a major source of support of her care for the children. He also considered that there was a "small risk" of the children being separated, with some of them being placed in foster care or residential care. He considered that it was not possible to quantify that risk nor was there any further information he could seek that would assist in that regard. The risk of the children being removed from CG had been described by the allocated social worker as a "worst-case scenario", that would follow a reassessment of CG's ability to meet their needs. It would be a last resort. All other options would need to be considered first. CG had a developed family network in the UK, which would be considered before the option of removal into care.

72. The judge found this to be a difficult case and accepted that the impact in this case of the extradition of DF to Germany would be greater than in a normal case. He considered that, although he treated the welfare of the children "as the primary factor"

in his consideration of the case, this was nonetheless a case where the impact on the children did not outweigh the public interest in extradition in a particularly serious case involving violent offending.

73. As DF was only accused and not convicted in Germany, the judge considered the proportionality of extradition under section 21A of the 2003 Act. Having regard to the factors specified at section 21A(3), and only those factors (as required by section 21A(2)), he concluded that extradition of DF to Germany would not be disproportionate. Accordingly, under section 21A(5), he ordered that DF be extradited to Germany.

Legal principles

74. This court's powers on an extradition appeal are set out in section 27 of the 2003 Act, which provides that the court may allow the appeal if the court is satisfied that either (i) or (ii) is true, namely:

    i) the district judge ought to have decided a question before him differently, and, had he done so, he would have been required to order the requested person's discharge; or

    ii) an issue is raised that was not raised at the extradition hearing, or evidence is available that was not available at the extradition hearing, and that issue or evidence, had it been before the district judge, would have resulted in the district judge answering a question before him differently such that he would have been required to order the requested person's discharge.

75. The test on appeal is whether the district judge's decision was wrong, namely, whether the district judge erred in such a way that he ought to have answered the statutory question differently: *Surico v Italy* [2018] EWHC 401 (Admin) at [30]-[31]. Having regard to *Surico*, it is clear that this test applies to both grounds of appeal in this case.

76. One of the cases considered in *Surico* was the decision of the Divisional Court in *Love v United States of America* [2018] EWHC 172 (Admin), [2018] 1 WLR 2889 (DC). In that case, the Divisional Court at [26] expressed the appellate court's task as follows:

> "The true approach is more simply expressed by requiring the appellate court to decide whether the decision of the district judge was wrong. What was said in the *Celinski* case and *In re B (A Child)* are apposite, even if decided in the context of article 8. In effect, the test is the same here. The appellate court is entitled to stand back and say that a question ought to have been decided differently because the overall evaluation was wrong: crucial factors should have been weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed."

77. Section 14 of the 2003 Act provides in relevant part that:

> "[a] person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have –
>
> (a) committed the extradition offence (where he is accused of its commission) … ."

78. DF relies on the argument that extradition would be oppressive in this case, given the delay and the exceptional impact that his extradition to Germany would have on CG's four disabled children. The meaning of "unjust" and "oppressive" in this context was set out by Lord Diplock in *Kakis* at pp782H-783A in relation to section 8(3)(b) of Fugitive Offenders Act 1967 (which set out substantially the same rule as that in section 14 of the 2003 Act):

> " 'Unjust' I regard as primarily directed to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they cover all cases where to return him would not be fair."

79. In *Gomes v Trinidad and Tobago* [2009] UKHL 21, [2009] 1 WLR 1038 (HL) at [31], the House of Lords confirmed the applicability of this interpretation to the terms "unjust" and "oppressive" in section 82 of the 2003 Act, which mirrors, in relation to extradition to a category 2 country, the rule in section 14. In *Gomes* at [31], the following passage in Lord Diplock's speech in *Kakis* (at p784G) was highlighted in relation to the test of oppression:

> "The gravity of the offence is relevant to whether changes in the circumstances of the accused which have occurred during the relevant period are such as would render his return to stand his trial oppressive …."

80. Commenting on that passage, the House of Lords in *Gomes* at [31] said:

> "That said, the test of oppression will not easily be satisfied: hardship, a comparatively commonplace consequence of an order for extradition, is not enough."

81. In *Kakis*, there was a difference of view between Lord Diplock (with whom Lord Russell of Killowen and Lord Scarman agreed) and Lord Edmund-Davies in relation to the effect of delay where the delay was not the fault of the requested person, as in this case. Lord Diplock's view, at p783C-D, was that, in such a case, the question where responsibility lies for the delay is not generally relevant. What matters is the effect of the delay, not the cause. Lord Edmund-Davies' view, at p785B-E, was that where responsibility lies for the delay may have a direct bearing on the issues of injustice and oppression, since the fact that the requesting government may have been "inexcusably dilatory" in taking steps to bring the requested person to justice may establish the injustice or oppressiveness of ordering his extradition.

82. This difference of views was discussed in *Gomes* at [20]-[29], although the principal focus of the discussion was the situation where the requested person and the requesting state were each arguably at fault for the delay, rather than a case, such as this one, where the requested person was not responsible for the delay. The House of Lords in *Gomes*, however, appears to accept at [27] that in "borderline cases, where the accused himself is not to blame", culpable delay by the requesting state can tip the balance.

83. In *La Torre v Italy* [2007] EWHC 1370 (Admin) at [37], the Divisional Court said:

> "… All the circumstances must be considered in order to judge whether the unjust/oppressive test is met. Culpable delay on the part of the State may certainly colour that judgment and may sometimes be decisive, not least in what is otherwise a marginal case (as Lord Woolf indicated in [*R v Governor of Brixton Prison, ex p Osman (No 4)* [1992] 1 All ER 579]). And such delay will often be associated with other factors, such as the possibility of a false sense of security on the extraditee's part. The extraditee cannot take advantage of delay for which he is himself responsible (see Lord Diplock in *Kakis* at 783). An overall judgment on the merits is required, unshackled by rules with too sharp edges."

84. The House of Lords in *Gomes* discussed this passage at [25]-[26]. It deprecated the final sentence but only to the extent that it was intended to dilute what Lord Diplock had said in *Kakis* at pp782-783 (referred to as "Diplock paragraph 1" in *Gomes*), with the unanimous support of the other members of the Appellate Committee. As I have already noted, that passage does not apply in this case, given the judge's clearly correct conclusion that the delay was not DF's fault.

85. In *Eason v United States of America* [2020] EWHC 604 (Admin) at [44]-[45] and [48], the Divisional Court affirmed the principle that the impact on family members forms part of the assessment of hardship caused by extradition and held that evidence of serious hardship forms an important part of the background against which the test of oppression must be assessed.

86. Principles regarding the application of Article 8 in extradition proceedings were set down in *Norris v United States of America (No 2)* [2010] UKSC 9, [2010] 2 AC 487 (SC) and *HH*. In *HH* at [8], Baroness Hale set out seven conclusions to be drawn from *Norris*, of which the following are of particular relevance in this case:

    i) The question is always whether the interference caused by extradition with the private and family lives of the extraditee and his family is outweighed by the public interest in extradition.

    ii) The public interest in extradition will always carry great weight, but the weight to be attached to it in the particular case varies according to the nature and seriousness of the crime.

    iii) The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life.

    iv) It is likely that the public interest will outweigh the Article 8 rights of the family unless the consequences of the interference with family life will be

exceptionally severe.

87. In *Belbin v France* [2015] EWHC 149 (Admin), the Divisional Court (per Aikens LJ) at [66] gave the following guidance on the correct approach of the appellate court to an extradition appeal:

> "… If, as we believe, the correct approach on appeal is one of review, then we think this court should not interfere simply because it takes a different view overall of the value-judgment that the District Judge has made or even the weight that he has attached to one or more individual factors which he took into account in reaching that overall value-judgment. In our judgment, generally speaking and in cases where no question of 'fresh evidence' arises on an appeal on 'proportionality', a successful challenge can only be mounted if it is demonstrated, on review, that the judge below: (i) misapplied the well established legal principles, or (ii) made a relevant finding of fact that no reasonable judge could have reached on the evidence, which had a material effect on the value-judgment, or (iii) failed to take into account a relevant fact or factor, or took into account an irrelevant fact or factor, or (iv) reached a conclusion overall that was irrational or perverse."

88. In *Celinski*, decided a few months after *Belbin*, the Divisional Court (per Lord Thomas of Cwmgiedd CJ) summarised the general principles arising out of *Norris* and *HH* at [5]-[13]. At [15]-[17], the Divisional Court indicated that the judge hearing a case where reliance is placed by a requested person on his or her Article 8 rights should adopt a "balance sheet" approach, setting out the factors for and against extradition together with his reasoned conclusions. The judge in this case quite properly took that approach.

89. The Divisional Court in *Celinski* then considered at [18]-[24] the proper approach of the appellate court to an appeal against a district judge's decision on an Article 8 ground of opposition to extradition. During the course of that discussion, it quoted at [21] the following passage from the judgment of Lord Neuberger PSC in *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911 (SC) at [93]-[94] regarding how an appellate judge might approach the appellate review of the trial judge's conclusion on proportionality:

> "93. There is a danger in over-analysis, but I would add this. An appellate judge may conclude that the trial judge's conclusion on proportionality was (i) the only possible view, (ii) a view which she considers was right, (iii) a view on which she has doubts, but on balance considers was right, (iv) a view which she cannot say was right or wrong, (v) a view on which she has doubts, but on balance considers was wrong, (vi) a view which she considers was wrong, or (vii) a view which is unsupportable. The appeal must be dismissed if the appellate judge's view is in category (i) to (iv) and allowed if it is in category (vi) or (vii).

> 94. As to category (iv), there will be a number of cases where an appellate court may think that there is no right answer, in the sense that reasonable judges could differ in their conclusions. As with many evaluative assessments, cases raising an issue on proportionality will include those where the answer is in a grey area, as well as those where the answer is in a black or a white area. An appellate court is much less likely to conclude that category (iv) applies in cases where the trial judge's decision was not based on his assessment of the witnesses' reliability or likely future conduct. So far as category (v) is concerned, the appellate judge should think very carefully about the benefit the trial judge had in seeing the witnesses and hearing the evidence, which are factors whose significance depends on the particular case. However, if, after such anxious consideration, an appellate judge adheres to her view that the trial judge's decision was wrong, then I think that she should allow the appeal."

90. After considering, among other things, the above passage from *Re B*, the Divisional Court in *Celinski* at [24] summarised the approach the appellate court should take when considering a ground of appeal alleging error by the district judge in determining the Article 8 issue:

> "The single question therefore for the appellate court is whether or not the district judge made the wrong decision. It is only if the court concludes that the decision was wrong, applying what Lord Neuberger PSC said, as set out above [in *Re B* at [93]-[94]], that the appeal can be allowed. Findings of fact, especially if evidence has been heard, must ordinarily be respected. In answering the question whether the district judge, in light of those findings of fact, was wrong to decide that extradition was or was not proportionate, the focus must be on the outcome, that is on the decision itself. Although the district judge's reasons for the proportionality decision must be considered with care, errors and omissions do not of themselves necessarily show that the decision on proportionality itself was wrong."

Submissions

91. In relation to the first ground of appeal, Mr Stansfeld submitted that the judge made two important errors in his analysis of the issue of oppression by reason of passage of time for the purposes of section 14 of the 2003 Act:

    i) he treated gravity of the offence as a "key factor" (paragraph 45 of the Judgment) when it was merely a relevant factor, therefore giving it disproportionate weight; and

ii) he failed to find that the German authorities were not culpable for the delay between 2004 and 2020.

92. Mr Stansfeld submitted that, in relation to the first error, the judge effectively treated the gravity of the offence as determinative of the question of oppression. If that were the case, however, a number of recent cases where extradition was held to be oppressive would have been decided the other way. For example, in *Koc v Turkey* [2021] EWHC 1234 (Admin), the court held that extradition of the requested person to Turkey would be oppressive and was therefore barred under section 82 of the 2003 Act despite the fact that the requested person had been convicted and sentenced in Turkey for offences of robbery and kidnapping.

93. In *Koc* at [24]-[25], Fordham J made it clear that the gravity of the offence is not determinative of the question of oppression. In other words, it does not operate as a bar to raising a section 14/82 defence based on injustice or oppression. The gravity of the offence is a "highly significant" feature "in the evaluative exercise of considering oppression by reason of the passage of time". It is part of the court's exercise of evaluation to consider the strength of each relevant factor, including the gravity of the offence, and give it an appropriate evaluative weight in the overall assessment. It is the combined effect that produces the correct outcome.

94. Mr Stansfeld submitted that, applying the approach described by Fordham J in *Koc*, the judge should have found that balancing the gravity of the offence with the length of the delay (for which DF was not responsible), and the exceptionally severe impact of DF's extradition on CG's children led necessarily to the conclusion that extradition would be oppressive and that therefore DF should be discharged.

95. In relation to the judge's second error, Mr Stansfeld submitted that the evidence before the court was that the complainant had informed the police that her attacker had said he normally resided in England. The judge had concluded that DF's DNA profile would have been on the UK databases from 2004 (paragraph 40(d) of the Judgment). Despite this, the German authorities made no contact with the UK authorities before 2020 after a match had occurred on the Prüm database in 2019. No explanation has been given for the failure of the German authorities to send their DNA samples collected in 2002 to the UK to be checked against the UK database. That lack of explanation means that the judge was wrong to conclude that the German authorities were not culpable for the delay.

96. Mr Stansfeld submitted that, due to the judge's errors in relation section 14 of the 2003 Act, this court may make the assessment of oppression *de novo*, applying the correct legal principles. The extradition of DF to Germany would be well beyond "the usual hardship" and would amount to "oppression", having regard to all the relevant factors and the evidence, given:

i) the length of the delay, which represents half of DF's lifetime;

ii) the fundamental changes in DF's life since he was 19 years old, including the development of his role as one of the two principal carers, along with CG, of CG's children;

iii) all of the evidence before the judge that DF's removal from the family unit would be catastrophic for the family and, in particular, CG's children; and

iv) the real risk that, without DF in the picture, CG will be found by the local authority to be unable to provide a safe environment for her children, some, if not all, of whom will therefore have to be removed from her and placed in care.

97. In relation to the second ground of appeal, Mr Stansfeld submitted that the judge erred in his approach to the Article 8 balancing exercise as follows:

i) he failed to recognise in his analysis that the length of the delay can significantly reduce the public interest in extradition (*HH* at [8(6)] and [46]);

ii) he failed to identify the evidential basis for his conclusion that the risk of the children being separated was "small" (paragraph 59 of the Judgment);

iii) he chose not to seek a report under section 7 of the Children's Act 1989 in relation to CG's children in order to assess the ability of the wider family network to provide replacement care if DF were extradited but still concluded, without any evidential basis, that such care would be available from the wider family network;

iv) he relied on his conclusion that the children had coped with seeing less of DF following the restrictions placed on him due to his arrest, without taking into account that DF continued to provide extensive care to CG's children despite the restrictions;

v) he relied on his conclusion that the children had coped with their loss of access to the Tresham Centre for a time during the pandemic lockdowns, without taking into account that it was DF's extensive care that significantly mitigated the impact of that loss of access;

vi) he relied on his conclusions that the children had "faced change before and got through it without being removed from their mother" (paragraph 61 of the Judgment) in relation to the loss of their grandfather through death and the loss of their father through divorce, without taking into account that it was DF's extensive care that significantly mitigated the impact of each of those losses.

98. Mr Stansfeld noted that there is an overlap between the test of oppression under section 14 of the 2003 Act and the test of interference with Article 8 ECHR rights, but the threshold for disproportionality in the latter case is lower: see *Lysiak v Poland* [2015] EWHC 3098 (Admin) at [33]. Also, the focus must be firmly on the children.

99. Finally, Mr Stansfeld submitted that the judge's failure properly to assess:

i) the risk of the children being removed from their mother in the event of DF's extradition;

ii) the "acute distress" that would be caused to them by the extradition according to Dr Pettle; and

iii) inability of the family network to replace the level of care provided by DF to CG's children,

means that DF's extradition would be a disproportionate interference with DF's, CG's and CG's four children's rights under Article 8 ECHR.

100. Mr Stefan Hyman, counsel for the respondent, accepted that, as the judge acknowledged at paragraph 61 of the Judgment, this was a "difficult case". Nonetheless, he submitted, this court should accept that the judge adopted the correct approach, did not err in his assessment of the evidence, and reached conclusions that were open to him on the key issues of delay and oppression in relation to section 14 of the 2003 Act and on the balancing of the relevant factors in relation to Article 8 ECHR. Furthermore, the fresh evidence that DF seeks to adduce is not decisive and therefore should not be admitted: *Fenyvesi* at [35].

101. In relation to the judge's approach, Mr Hyman submitted that the court should bear in mind that the judge had the benefit of lengthy written and oral submissions from counsel for each party and the hearing before him occupied most of the day. The judge gave careful thought to the case. Mr Hyman submitted that, as this is a statutory appeal, the court should be slow to interfere with the judge's determinations on the evidence or his exercise of discretion, bearing in mind that he had the benefit of hearing and observing witnesses give evidence. In this regard, Mr Hyman drew the court's attention to the Divisional Court's guidance in *Belbin* at [66] and *Celinski* at [20(ii)] and [24].

102. Mr Hyman submitted that the judge took careful note and summarised accurately in the Judgment the evidence adduced by DF and by the respondent. In his summary, the judge paid careful attention to the needs of each of CG's children and to DF's role in the family home. The judge made findings of fact about the seriousness of the offence and the delay. It was open to the judge to conclude that the delay was "substantial" but not "culpable". The judge carefully assessed the impact that DF's extradition would have on DF and his family.

103. Mr Hyman submitted that, in relation to the section 14 challenge and the Article 8 challenge, the judge rehearsed the relevant legal authorities and applied the correct legal standards, making his determinations on the facts before him. In particular, in relation to Article 8, he conducted the appropriate balancing exercise and gave reasons for his conclusion that extradition would not be disproportionate. It is clear that the judge bore in mind Baroness Hale's observations in *HH* about the impact of extradition on innocent children being "always … a primary consideration".

104. Mr Hyman submitted that the parties largely agree on the relevant legal principles. The appeal is based on an attack on the judge's determinations on the evidence. While it is true that neither counsel for the respondent nor the judge expressly put it to DF or to CG that, in order to avoid DF's extradition, they were deliberately overplaying the degree of care given by DF to the children, the judge was entitled to draw inferences from the evidence heard. His observation that their evidence in relation to the care given by DF to the children may have been overstated simply reflected his assessment of each of DF and CG as witnesses.

105. Mr Hyman submitted that it is not correct to say that the judge treated the seriousness of the offence as a trump card in relation to the issue of oppression. The judge was, however, entitled to give the seriousness of the offence substantial weight.

106. In relation to delay, Mr Hyman submitted that the judge was not wrong to have decided that the German authorities were not culpable. To have determined that the delay was culpable would have necessitated an investigation and assessment that the judge was not in a position to make. There was, for example, no evidence as to when DF's DNA was captured by the UK authorities or how the Prüm database operates. Following Lord Diplock's guidance in *Kakis*, the judge correctly focused on the effect of the delay rather than on determining culpability.

107. In relation to the judge's Article 8 balancing exercise, Mr Hyman submitted that the judge was entitled to conclude that the public interest in extradition had not been much lessened by the delay given (i) the seriousness of the offence and (ii) the fact that the appellant has offended in the UK since the alleged offence in Germany in 2002.

108. Mr Hyman submitted that the judge was not required to make a positive finding as to what would happen to CG's children if DF was extradited. Neither DF nor the respondent adduced evidence from Social Services in this regard. As such, the judge was not in a position to reach a firm conclusion either way and was correct to conclude that it was "not possible to quantify [the] risk" that the children would be separated (paragraph 49 of the Judgment). The judge was entitled to rely on the fact that the local authority would make provision should the need arise and that Ms Fergus had described the prospect of separation as a last resort, albeit Mr Hyman accepted that Ms Fergus in her letter of 16 November 2021, which DF seeks to adduce at this appeal, suggests that "there is a significant possibility" that any reassessment will result in a child being placed into foster or residential care.

109. Finally, Mr Hyman submitted that the new evidence that DF seeks to adduce at this appeal is not decisive and therefore should not be admitted. It is consistent with the evidence that was before the judge but does not materially alter the position.

Discussion and conclusions

110. I agree that this is a difficult case. The Judgment is detailed, careful and thorough. As Mr Hyman noted, there was little disagreement between the parties on the legal principles that apply in this case in relation to the section 14 and Article 8 grounds of objection to extradition. Accordingly, the appeal ultimately turns on whether the judge erred in his assessment of the evidence before him and/or in the determinations he reached based on that evidence.

111. I bear in mind the principles that apply on an extradition appeal and the deference that an appellate court should show to the factual findings of a first instance judge, particularly in relation to witnesses whom he has had the chance to hear and observe.

112. In this case, however, I note that there is little, if any, dispute as to the evidence given by the three live witnesses, DF, CG, and Dr Pettle. In relation to DF and CG, the judge felt that there was a degree of overstatement of DF's role, but his careful summary of each of these witnesses shows that he otherwise accepted their evidence.

113. In light of the fact, accepted by the respondent, that neither DF nor CG were challenged by counsel for the respondent or by the judge that they were exaggerating the extent of DF's involvement in the care of the children, it is fair to assume that the judge gave relatively little weight to his perception that the degree of DF's involvement in the care of the children was overstated.

114. Although it is apparent from the Judgment that Mr Hyman, cross-examining Dr Pettle on behalf of the respondent, explored a number of issues with her, it appears that her evidence was largely, if not wholly, accepted by the judge, who described her "as an experienced witness whose expertise is not in question" (paragraph 14 of the Judgment).

115. In light of that, this is not a case, in my view, where at the appellate stage the court is at a significant disadvantage relative to the trial judge in assessing the evidence and testing whether that evidence justifies the determinations reached.

116. In addition to the witness statements of each of DF and CG, I have Dr Pettle's detailed report dated 29 March 2021, which was before the judge, together with the bundle of documents provided by DF at the hearing below, including reports prepared by various professionals relating to CG's children and educational and medical records relating to CG and her children.

117. At paragraph 1.3 of her report, Dr Pettle lists the various documents that she reviewed while preparing her report. She summarises the reports that she reviewed in relation to each of CG's children. At paragraph 1.4 she notes that she interviewed DF on two occasions and CG on two occasions, she attempted video observations of the children at home with and without their uncle, she conducted a home visit to CG's children, and she liaised with the children's school and the Tresham Centre.

118. Dr Pettle summarised in part 4 of her report detailed information from the school and the Tresham Centre regarding the older three children. Dr Pettle made various observations about DF's role and the impact of his presence and absence on the manageability of the care of the children. At paragraphs 7.13 to 7.16 of her report, Dr Pettle sets out her conclusions on the impact of the extradition of DF on the children.

119. Turning to the first ground of appeal, I do not consider that the judge was wrong to refer to the gravity of the offence as "a key factor". It is undeniable that it is a relevant and important factor. I note that in *Koc*, Fordham J referred to the seriousness of the offence as a "highly significant" factor. The judge did not say that it was "the key factor", nor did he say that he considered it determinative in the sense that a finding that a requested person is responsible for the delay "by fleeing the country, concealing his whereabouts or evading arrest" is determinative ("save in the most exceptional circumstances") that section 14 is not available, as held by the House of Lords in *Kakis* at p783A-B.

120. As noted by the Divisional Court in *Lysiak* at [23], the House of Lords confirmed in *Gomes* that a requested person may rely upon delay which has occurred in the prosecution process where he is not responsible for the delay. It is not a pre-condition to that reliance that the delay by the requesting authority should be culpable. See *Gomes* at [28]. What matters for the purpose of determining whether extradition would be "oppressive" is the extent and impact of the delay. It seems to me that the

judge would have been entitled to conclude that the delay was culpable given the lack of an explanation for the failure of the German authorities to contact the UK authorities once they had their DNA evidence given that they had evidence from the complainant that her attacker was English-speaking and that he had told her he resided in England. While it is true that we do not know when DF's DNA was first recorded on the relevant UK database, it is likely to be have been no earlier than 2004 given his offending history. But that does not explain why the German authorities appear to have made no effort to contact the UK authorities before the case was suspended on 7 July 2003.

121. Regardless of whether the delay is "culpable", it is relevant that it is substantially unexplained, that between 17 and 18 years elapsed, representing nearly half of DF's lifetime, during which his life had radically changed, he had assumed heavy co-parenting obligations, and, in terms of impact on DF personally, during which he had no reason to believe that he was under investigation for any crime in Germany or at risk of being sought for extradition.

122. In light of the foregoing, I am satisfied that the judge was wrong to conclude in this case that extradition of DF to Germany would not be oppressive in all the circumstances of this case, the most important factor, in my view, being the exceptionally severe impact of his extradition on CG's children, having regard to all of the evidence and, in particular, the factors that I will highlight below in relation to the second ground of appeal.

123. In reaching this view, I have taken account of the gravity of the alleged offence and DF's offending history in the UK. In relation to the latter, I note that it is not an attractive history, but it is also not at the most serious end of the spectrum. While I have only DF's PNC record to judge by, it appears that there is nothing in DF's UK record comparable in seriousness to the alleged offence in November 2002, which is confirmed by the sentences imposed. It is also relevant that, although his last conviction was in 2017, that was for offences committed in January 2016. His last offence, a road traffic offence, was committed in June 2016, which was about the time he became involved full-time in caring for, first, his father during his final illness and subsequently CG's children, particularly after CG's divorce from her husband roughly two years before the hearing below. Furthermore, as noted by the judge in the Judgment at paragraph 57, although DF had not lived a blameless life in the UK, he had done some things significantly to his credit, including giving evidence at a murder trial at real risk to himself, playing a positive role in the lives of CG's children, and indicating a willingness to help other children with similar difficulties at the Tresham Centre. DF's evidence regarding the murder trial given in his first witness statement was that in 2004 he had given evidence at the Central Criminal Court against someone accused of a triple murder, as a result of which later that year he was shot.

124. Accordingly, the first ground of appeal succeeds.

125. As the second ground of appeal was fully argued and, as already noted, there is an overlap between the grounds, I will turn to that now. Having regard to the whole of the evidence before the judge, and bearing in mind the deference owed to the factual findings of the first instance judge, I am satisfied that the judge was wrong to conclude, from the evidence as he found it, that DF's extradition to Germany would not have exceptionally severe consequences for CG's four children. He was therefore

wrong in my judgment to conclude that, in this case, the public interest in extradition outweighs the Article 8 rights of his family, specifically, CG and her four children.

126. That is my view reached having regard to the evidence as a whole, but I would highlight the following:

i) the substantial delay of some 18 years between the alleged offence in November 2002 and the issue of the EAW in October 2020, which significantly lessens the public interest in extradition notwithstanding the seriousness of the alleged offence and DF's offending in the UK;

ii) CG's various medical and mental health issues and the impact of those on her ability to care for her four children;

iii) the fact that CG has not one but four very young children each with more or less severe and challenging developmental difficulties affecting behaviour, understanding, and communication, which makes the care of each child individually very demanding and the care of the four children collectively even more so;

iv) DF's involvement in the care of all four of CG's disabled children, which began in 2016 and has reached a high level since CG's husband left the family home in or about 2019, such that he is effectively co-parenting with his sister, CG, and the fact that he is both a registered carer for and a legal guardian of the children; and

v) the lack of any evidential basis for concluding that either the local authority or the family network could come close to replacing the level of care that DF currently provides to CG's children in order to mitigate the effect of DF's extradition on their care.

127. In relation to delay, it is important to consider the impact on DF and his family. Among other aspects to consider, DF's age at the time of the alleged offence, his subsequent offending in the UK, the development of his family and of his role in the life of each of CG's children, and the deterioration of CG's health necessarily form part of the assessment of the impact.

128. In light of the conclusions that I have reached, it is not necessary formally to admit the additional evidence. I have, however, as I noted earlier in this judgment, read it *de bene esse*, and I consider that it strengthens the conclusions that extradition of DF to Germany would, in all the circumstances of this case, notwithstanding the seriousness of the alleged offence in November 2002, be oppressive under section 14 of the 2003 Act and would be disproportionate having regard to the Article 8 ECHR rights of DF, his sister, and his sister's four children.

Conclusion

129. For the foregoing reasons, this appeal is allowed. DF is discharged.