Neutral Citation Number: [2023] EWHC 1728 (Admin)

Case No: CO/1099/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/07/2023

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

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Between :

Sadar JABAR OSSO	**Appellant**
- and -	
Local Court of Regensburg, GERMANY	**Respondent**

- -
- -

Ben Joyes (instructed by **Taylor Rose MW**) for the **Appellant**
Amanda Bostock (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date: 27 June 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 12 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HEATHER WILLIAMS

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Introduction

1. This is an appeal pursuant to section 26 of the Extradition Act 2003 ("the 2003 Act") against the decision of District Judge Bristow given in a reserved judgment dated 23 March 2022, ordering the extradition of the Appellant to Germany.

2. The Appellant's extradition is sought pursuant to an arrest warrant ("AW") issued on 13 January 2022 and certified by the National Crime Agency on 14 January 2022. It concerns alleged offences of dangerous bodily harm and illegal trafficking in narcotic drugs (cannabis). He has been in custody since his arrest.

3. Two issues were raised by the Appellant in the documents submitted for the extradition hearing: (i) whether his extradition was compatible with his rights under Articles 2 and 3 of the European Convention on Human Rights ("ECHR") in light of the threat to his safety posed by non-State actors; and (ii) whether his mental condition was such that it would be unjust or oppressive to extradite him contrary to section 25 of the 2003 Act. In the event the Appellant declined to attend the extradition hearing on 23 March 2023 and the District Judge refused an application to adjourn.

4. An application for permission to appeal was lodged with this court on 29 March 2022. Perfected Grounds were served on 13 June 2022 raising one ground of appeal, namely that the District Judge erred in concluding that the Appellant's surrender would not be unjust or oppressive pursuant to section 25 ("the Oppression Ground"). An application to admit new evidence, largely pertaining to the Appellant's mental health, was granted by Bourne J on 28 November 2022 ("the Bourne Order").

5. On 16 February 2023, the Appellant served "Updated Perfected Grounds" which sought to add two new grounds: (a) that if extradited there was a real risk of a violation of his Article 3 ECHR rights; and (b) that his extradition would be disproportionate within the meaning of section 21A(1)(b) of the 2003 Act. On 21 February 2023, he applied for an extension of time and for permission to amend his grounds. He also applied to rely on additional fresh evidence.

6. On 15 March 2023, Andrew Baker J granted permission to appeal in respect of the Oppression Ground ("the Baker Order"). The Judge dismissed the applications for an extension of time and to amend the Perfected Grounds, on the basis that if the Oppression Ground failed, there was no prospect of the proposed new grounds succeeding. He also dismissed the application to adduce further evidence.

7. By an application dated 12 May 2023, the Appellant applied to adduce fresh evidence in the form of a letter from Mr Schug, the judge allocated to the Appellant's case in Germany, indicating that in the event of him admitting the offences, the court would impose an overall term of imprisonment of no more than three years and would decide that the remainder of his sentence (after allowance was made for the time already spent in custody), would be suspended and served on probation ("the Schug letter").

8. By an application dated 19 May 2023, the Appellant applied to amend his grounds of appeal out of time to rely on two new grounds. The first was that his extradition would be disproportionate within the meaning of s.21A(1)(b) of the 2003 Act ("the Disproportionality Ground"). The second was that his extradition would be incompatible with his rights under section 21A(4)(a) of the 2003 Act as it would constitute a disproportionate interference with his rights under Article 8 of the ECHR ("the Article 8 Ground"). Reliance was placed on the Schug letter. No attempt was made to resurrect the Article 3 argument.

9. By an application dated 3 June 2023, the Appellant applied to adduce further new evidence. Some of the material had been rejected in the Baker Order and some of it was entirely new.

10. The Appellant proposed that the three applications be determined at the same time as the appeal was heard and, accordingly, they came before me at the hearing on 27 June 2023. The Respondent did not object to the Court considering the Schug letter; although it disputed that it was decisive. The Respondent opposed the other applications (save that no objection was taken to the court considering the Appellant's updated medical records). In addition, the parties were not agreed as to the procedural provisions that applied to the application to amend to rely on the Disproportionality Ground, in light of the earlier Baker Order. I indicated at the outset of the hearing that I would hear all evidence and submissions *de bene esse* and then adjudicate upon all the disputed issues in my reserved judgment. Given the overlap in terms of the material that is relied upon, I will first consider the ground for which permission to appeal has been granted, the Oppression Ground, before addressing whether I should permit the Appellant to rely upon the Disproportionality Ground and/or the Article 8 Ground and, if so, my assessment of the ground/s. I will address the admissibility of the new evidence in the course of considering those matters.

11. The structure of this judgment is as follows:

- The material circumstances: paras 12 – 48;
- The legal framework: paras 49 – 82;
- The Oppression Ground: discussion and conclusions: paras 83 – 102;
- The Disproportionality Ground: discussion and conclusions: paras 103 – 115;
- The Article 8 Ground: discussion and conclusions: paras 116 – 130;
- Overall conclusions: para 131.

The material circumstances

12. The Appellant was born on 1 January 1996. He is a national of Iraq. He has six previous convictions in Germany for drug trafficking, theft and insulting behaviour for the period 2017 – 2018.

The extradition proceedings

13. I have already referred to the AW (para 2 above). It is signed by Judge Schug and is based on a domestic warrant issued on 20 March 2021. It relates to the following offences, both alleged to have taken place on 31 July 2018:

    i) Assaulting another by threatening to stab him in the stomach with a kitchen knife with a 20cm blade and through grabbing him by the neck;

    ii) Possession with intent to supply 817g of cannabis, which the Appellant attempted to hide from police by giving it to a co-accused when fleeing the scene.

14. The AW indicates that the maximum sentence which could be imposed is 15 years imprisonment.

15. Further Information dated 23 February 2022 states:

    i) The Appellant has been in pre-trial detention between 1- 6 August 2018 and 24 December 2018 – 18 June 2019 in Germany;

    ii) He was then released due to "violation of the principle of expedition in criminal proceedings";

    iii) The main trial was scheduled to take place on 19 August 2020, but the Appellant's whereabouts had been unknown since July 2020.

16. On 11 January 2022 the Appellant travelled by dinghy from Northern France to Kent. On arrival in the United Kingdom ("UK") he was detained as the subject of an Interpol Red Notice. He was arrested in relation to the extradition matter on 13 January 2022, whilst at Yarl's Wood Immigration Detention Centre. He first appeared before Westminster Magistrates' Court on 14 January 2022, when the extradition hearing was formally opened. The main hearing was set down for 23 March 2022 and the Appellant was remanded in custody.

17. On 21 March 2022, the Appellant applied to vacate the listed extradition hearing on the basis that a psychiatric report was being sought in relation to his mental health issues and suicide risk. The application was opposed and it was refused by District Judge Snow.

18. The extradition hearing came before District Judge Bristow on 23 March 2022. The Appellant did not appear from custody and the Disclaimer for refusal to attend Court form provided by HMP Wandsworth indicated that when asked for his reason for not wanting to attend court, the Appellant had stated: "I don't know. No reason". The District Judge refused Mr Joyes' application for an adjournment. He concluded that there had been sufficient time for the Appellant's lawyers to investigate any mental health issue that had arisen; the application was not substantially different from the one that had been refused two days earlier; and it appeared from his own witness statement, that the Appellant was not currently being treated for any mental health condition. The District Judge also granted the Respondent's application to proceed in the Appellant's absence, concluding that it was in the interests of justice to do so. Mr Joyes did not have

instructions to participate in the hearing in the Appellant's absence and remained in court simply to take a note.

19. There was no subsequent attempt to judicially review the refusal of the adjournment or the decision to proceed in the Appellant's absence. Those decisions cannot be impugned via the current appeal proceedings.

20. In the circumstances, the District Judge did not hear any oral evidence. He had a proof of evidence from the Appellant, but indicated that he attached "very little weight to it" given he had chosen not to attend and his account had not been subjected to cross-examination (para 28).

21. The District Judge made the following findings:

    i) The Appellant has not made a claim for asylum; there was no documentation to support this assertion (para 26);

    ii) He did not accept the Appellant's account that he had been stabbed in the back by an Albanian gang in Germany (paras 27, 29 and 35). Accordingly, he was not satisfied that there were substantial grounds for believing that he would be killed or would suffer inhuman or degrading treatment at the hands of the Albanian gang, or any other state actor in Germany (para 35). In any event, there were no grounds for believing that the German authorities would be unwilling or unable to provide sufficient protection against such a risk (para 36);

    iii) He did not accept the Appellant's account that he had a mental health condition, struggled in particular with anxiety and had attempted suicide in Germany (paras 27, 29 and 40). On his own account, HMP Wandsworth had declined to provide medication and, consequently, he was not being treated for a mental health condition in the UK (para 40). In any event, if a mental condition were present, he was satisfied that the Appellant would be adequately cared for in the UK and German prison systems and during any journey between the two. Both countries were signatories to the ECHR, and he could assume that they would comply with their obligations to provide adequate care, medication and treatment should such a need exist (para 41). Accordingly, he was satisfied it would not be unjust or oppressive to extradite him (para 42);

    iv) He was sure that the Appellant was a fugitive (para 30);

    v) The Appellant did not rely upon Article 8 ECHR. In any event, he was sure that extradition represented a proportionate interference with his right to respect for his private and family life. He noted that he had no evidence to indicate that there were factors that would outweigh the weighty and constant public interest in extradition (para 37). He was sure that his extradition would be compatible with his Convention rights within the meaning of section 21A(1)(a) of the 2003 Act (para 38); and

    vi) He was sure that his extradition would not be disproportionate within the meaning of section 21B(1)(b) of the 2003 Act; the alleged conduct was serious and the likely penalty would be a substantial sentence of imprisonment if he was found guilty of one or both of the offences. The Judicial Authority had not

answered a section 21B request, but the silence spoke for itself and the likelihood that it would consent to less coercive measures was remote (para 39).

22. The District Judge therefore ordered the Appellant's extradition to Germany, pursuant to section 21A(5) of the 2003 Act and ordered that he remain remanded in custody.

The appeal proceedings

23. The Appellant does not contend that the District Judge's reasoning or conclusions were wrong on the basis of the evidential picture as it was at that stage. The appeal is founded upon subsequently obtained evidence. It is said that this shows that the District Judge's conclusions in relation to the Appellant's mental health and in relation to oppression and disproportionality are wrong. There is no challenge to his finding that the Appellant is a fugitive or his conclusions in respect of non-State actors.

24. I have already referred to the institution of this appeal (para 4 above). The Oppression Ground identified at para 6 of the Perfected Grounds was that the District Judge "erred in concluding that the [Appellant's] surrender would not be unjust or oppressive by reason of his physical or mental condition pursuant to section 25" of the 2003 Act.

The first tranche of new evidence and the Bourne Order

25. The new evidence relied upon at that stage was as follows:

    i) An undated proof of evidence from the Appellant served on 14 June 2022 indicating that he did not attend the hearing on 23 March 2022 as he was feeling unwell. He also said that he had suffered from mental health issues for over a year, that he had been having suicidal thoughts ever since he had tried to kill himself in Germany and that "[b]eing in prison definitely makes my mental health much worse". He indicated that his mental health had been "very bad recently and I have been suffering from continuous suicidal thoughts". He then referred to his attempted suicide on 10 May 2022 (for which, see para 33(iii) below);

    ii) A second undated proof of evidence from the Appellant served on 14 August 2022 in which he referred to a suicide attempt on 16 March 2022 (which his solicitors had asked about after seeing reference to it in his medical records). The Appellant also described his earlier remand in custody in Germany. He said that during this time he was mistreated by prison officers and was placed in solitary confinement for three months, where he was stripped of clothing and made to sleep on the floor. He said that after three months he went crazy and was transferred to the prison hospital wing, where he stayed for a month and half, during which time his mental health did not improve;

    iii) Witness statements dated 28 April, 24 May, 10 June and 14 August 2022 from Viviane Bablin, a paralegal at Taylor Rose MW (the Appellant's solicitors). Her statements addressed the difficulties of obtaining an expert psychiatrist report in time for the 23 March 2022 hearing and the steps that had since been taken in that regard;

iv) A witness statement dated 10 June 2022 from William Bergstrom, solicitor at Taylor Rose MW, who represented the Appellant on 14 January 2022 when he first appeared at Westminster Magistrates Court. He explained the difficulties of taking full instructions on that occasion due to language difficulties;

v) A report dated 22 July 2022 from Dr Mark Bolstridge, a consultant forensic psychiatrist at HMP Wandsworth who was involved in treating the Appellant (summarised at paras 36 - 37 below);

vi) The Appellant's UK prison medical records (paras 33 - 34 below); and

vii) His German prison medical records (paras 27 – 32 below).

26. The material terms of the Bourne Order, dated 28 November 2022, were that:

i) The Appellant was given permission to rely upon the new evidence that I have listed in para 25 above. The Judge observed that ultimately he may not be able to show that the German authorities will not be able to provide appropriate psychiatric care, but that it was preferable for the permission application to be decided with the benefit of the full evidential picture (Reasons, para 1);

ii) The representation order was extended to enable the German medical records to be translated (para 3);

iii) The application to extend the representation order to obtain a report from an independent consultant psychiatrist, Dr Farnham was dismissed, but with liberty to restore (para 1). The application was refused on the basis that it was no longer necessary in light of the report from Dr Bolstridge.

27. The German medical records indicate that in 2017, the Appellant attempted to commit suicide "when he attempted to throw himself in front of a car".

28. Between 22 February 2018 and 6 March 2018, he was an inpatient at the Regensburg District Hospital, Centre for General Psychiatry. The Appellant complained of anxiety, sleep disorders, agitation and nightmares triggered by detention by the police in Regensburg. He was noted as saying that he "had been held in a single cell for 3 days, had had no contact with anyone and had not known whether it was day or night. Since then he had been suffering from nightmares about the police and the detention… The prospect of further detention had exacerbated the symptoms to the extent that [he] was now suffering from suicidal thoughts…"

29. On 5 March 2018, the Appellant was recorded as having experienced an "auto-aggressive crisis… cutting injuries on the wrist, multiple blows with the head against windows and doors". He was transferred to a "closed ward in the presence of police" and "was initially mechanically restrained…and subsequently unlocked in stages". Due to the fact that he began "throwing chairs and water containers" he was subjected to "mechanical restraint".

30. The Appellant was in pre-trial custody in respect of the AW offences initially from 1 – 6 August 2018. His personal detail sheet from Regensburg Prison records "risk of suicide" and "expressed suicidal ideation on 03.08.2018".

31. From 7 August 2018, the Appellant served a series of short prison sentences at Regensburg Prison in respect of convictions for theft and other offences. The Regensburg Prison record for 30 October 2018 noted: "Increasing suicidal thoughts for 1 week…". On 6 November 2018, the Appellant handed the prison guard "all his disposable razors and two broken razor blades, saying that he was not right in the head and would only use them to kill himself". On 10 November 2018, the Appellant was held on "the isolation ward".

32. Although there is a discrepancy in the records as to the dates, it appears that between 12 November and 20 December 2018, the Appellant was held in the Psychiatric Department of Würzburg Prison for treatment, where he received a diagnosis of "threats of suicide and auto-aggressive actions in Regensburg Prison, with the background of polytoxicomania".

33. The first tranche of the UK medical records covers the period 14 January 2022 to 23 November 2022. The Appellant was in HMP Wandsworth throughout this time. He is recorded as having attempted suicide on six occasions, as follows:

    i) On 16 March 2022, he was cut down by officers when he was found with a loose ligature around his neck. The following day he was noted as having a "strong sense of hopelessness ...this appear[s] to be in relation to his current circumstances, as opposed to a deterioration in an established mental health condition";

    ii) On 9 May 2022, a prison nurse recorded being asked to see the Appellant after he had tied a ligature;

    iii) On 10 May 2022, during a routine observation check the Appellant was found suspended from the ceiling and unresponsive. He was cut down and transferred to hospital, where he was placed in an induced coma and transferred to the ICU. He was returned to the prison on 19 May 2022, where he is recorded as telling a nurse that if he was put on constant observations he would try to "kill himself every single day but if he will return to his cell, he will be fine";

    iv) On 12 July 2022, during a routine check, the Appellant was found with bedlinen tied around his neck and to a ligature point. It was noted that Nurse Franklin who discovered him "reports that he was waiting to be discovered and had ligature loosely attached around his neck, no marks left on neck, did not consider that this was a genuine attempt". Dr Bolstridge went on to record that he considered "this attempt was really a means of communicating his distress and dissatisfaction about his predicament";

    v) An entry by Dr Bolstridge, on 25 September 2022, indicated he was informed that the Appellant had made a ligature over the weekend, but his cellmate had called for help. The Appellant told him: "he suddenly in the moment feels overwhelmed by emotions and thoughts about being removed to Germany, always unplanned and spur of the moment"; and

    vi) On 6 October 2022 the Appellant was discovered with a ligature tied around his neck in a cell on his own. The ligature was removed and he was fully conscious and responsive. The Appellant said he had acted "impulsively as he had several

> problems including immigration and not being let out for medication as there is a recount going on. He is also not happy with his regime and feels he should have a job".

34. The prison medical records also detail regular incidences of self-harm, including swallowing razor blades and stomach, neck, arm and wrist cutting in the period between 6 March 2022 and 7 September 2022

35. The primary purpose of obtaining Dr Bolstridge's report was to support an application for bail. Thus, there is a focus on the extent of the risk posed to the Appellant by his current detention and how his risk is being managed in HMP Wandsworth. It does not appear that Dr Bolstridge had access to his medical information beyond the HMP Wandsworth records.

36. In the report, Dr Bolstridge explained that he first learnt of the Appellant after his "serious attempt on his life" on 10 May 2022, which he said, "very nearly resulted in a fatal outcome". Since his return to the prison on 19 May 2022, he had been responsible for treating the Appellant's mental disorder and for managing the risk he posed to himself. He described the contact that he had with the Appellant as part of the Assessment, Care in Custody Teamwork ("ACCT") review and the monitoring arrangements that had been put in place. He indicated that his primary diagnosis was post-traumatic stress disorder ("PTSD"), secondary to the "trauma that he has suffered at the hands of the authorities in Germany". He said that his current condition was characterised by reliving the trauma in intrusive memories, nightmares, emotional blunting, avoidance behaviour, suicidal ideation with intent and insomnia. He noted that the Appellant:

> "...has repeatedly informed the team that he categorically intends to end his life due to the fear of being transferred back to Germany. He harbours some unusual beliefs associated with his time in Germany but without a collateral account I am unable to confirm whether his beliefs are correct. At the current time he believes that he was tortured, harassed, injected with drugs, tricked, cheated and subject to psychological warfare from the German authorities..."

37. Dr Bolstridge said that there had been some improvement since he first met the Appellant and that his clinical presentation was "prone to fluctuation". He referred to the incident on 12 July 2022, repeating the observation that I have noted at para 33(iv) above. He indicated that the Appellant had been referred to a psychiatric hospital after his return from hospital in May 2022, but this had been declined because the hospital clinicians considered that "his suicidal intent was within the context of being extradited and that there was no evidence of an underlying and treatable mental disorder". Following this, the Appellant had been transferred to the prison health care wing, where he remained at the time of the report. Asked to give his assessment of the likely impact of continued detention, Dr Bolstridge said:

> "It is the prospect of being returned to Germany and the associated uncertainty of whether this will actually come to pass that are far more likely to detrimentally impact upon his mental

> state. He has constantly said that he will end his life if he is returned to Germany..."

Amended grounds, the second tranche of new evidence and the Baker Order

38. As I indicated in the Introduction, the Appellant sought to amend his grounds of appeal in the Updated Perfected Grounds (para 5 above). He also restored the application to obtain a report from Dr Farnham, contending that Dr Bolstridge's report was out of date and had been obtained for the purposes of bail, so that a fuller report was required. Application was also made to rely on additional new evidence, as follows:

    i) Brief statements from Eda Ahmet dated 5 July 2022 and Sema Ahmet dated 17 August 2022, referring to a property that could be let to the Appellant if he was released on bail;

    ii) A statement from Kayleigh Thorpe referring to her friendship with the Appellant. (Ms Thorpe subsequently provided a fuller statement (para 44(v) below));

    iii) A brief statement from Hoshmalnd Jamil dated 17 August 2022, who became friends with the Appellant when they were both in Germany. He said that he was now in the UK and if the Appellant was released on bail he would help him to build a life in the UK;

    iv) A statement from Dr George Karl, the Appellant's German lawyer regarding the likely sentence that he would receive from the German court; and

    v) The "Report to the German Government on the periodic visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 1 to 14 December 2020" dated 14 September 2022 ("the CPT Report"). I refer to the detail of this document at paras 99 - 100 below.

39. The Baker Order included the following:

> "1. The application for permission to appeal is granted in respect of the single ground of appeal stated at paragraph 6 of the Perfected Grounds dated 13 June 2022. For the avoidance of doubt, those Perfected Grounds stand for the hearing of the appeal and the Updated Perfected Grounds dated 16 February 2023, permission for which is refused by paragraph 2 below, shall not be admitted at the hearing.
>
> 2. The applications made by an Application Notice (EX244) dated 21 February 2023 for (i) an extension of time to file updated perfected grounds of appeal, (ii) permission to adduce further fresh evidence, and (iii) permission to amend the perfected grounds are dismissed.

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4. The application made by an Application Notice (EX244) dated 28 February 2023 for an order extending the Representation Order to obtain a psychiatric report from Dr Farnham is dismissed.

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Reasons

(i) The evidence in the appeal, including the evidence admitted under the Order of Bourne J dated 28 November 2022, make it properly arguable, in my view, that DJ Bristow was wrong to consider that the Appellant had no mental health condition capable of engaging s.25 of the Extradition Act 2003. There is a real prospect of a finding, after full argument, that surrendering the Appellant to Germany pursuant to the arrest warrant in this case would be unjust or oppressive by reason of his mental condition.

.....

(iii) If the ground succeeds ... the Appellant will be discharged under s.25(3)(a) or the extradition process will be adjourned under s.25(3)(b). Either way, in that case, an extradition that would cause injustice or oppression will not occur.

(iv) If however that ground fails, then on the facts of this case, there is no prospect that a different ground of appeal, not raised by the Perfected Grounds, by reference to Article 3 ECHR or s.21A(4)(b) of the 2003 Act might succeed. The application to complicate the appeal by raising such new grounds is therefore refused.

(v) The yet further evidence the Appellant seeks permission to adduce is not reasonably required to determine the appeal, or likely to carry significant weight on the issue that matters, upon which with the evidence admitted under the Order of Bourne J provides a sufficient and fair basis for the appeal to proceed.

(vi) I encouraged the obtaining of updated medical records from custody on remand here, including an updated report from Dr Bolstridge or any other treating clinician at HMP Wandsworth, bearing in mind that the initial report provided by Dr Bolstridge was provided as long ago as July 2022. I envisage that there could be no

> objection to the Court having an up-to-date record in that regard when considering the appeal..."

Events since the Baker Order and the third tranche of new evidence

40. Dr Karl, the Appellant's German lawyer received a copy of the Schug letter, dated 28 April 2023. As material the translated version says:

> "Telephone conversation with chief public prosecutor Biermann.
>
> The chief public prosecutor, Mr Biermann, is informed that, in the event of an admission by the defendant, the court would view an overall term of imprisonment of no more than 3 years as appropriate to the severity of the offence and the degree of guilt. He is further informed that, in light of the lengthy incarceration of the defendant in Germany and England the court would decide that the rest of the sentence be served on probation and would accordingly suspend the rest of the sentence on probation.
>
> The chief public prosecutor, Mr Biermann, had no objection to this procedure."

41. The Schug letter was the subject of an application dated 12 May 2023 to admit this as fresh evidence.

42. At the appeal hearing, Ms Bostock indicated that the authenticity of the letter had been confirmed in an email sent by Judge Schug on 20 June 2023. It had not been possible to obtain an official translation of the email in the time available, but an informal translation indicated that the email also said that the penalties discussed in the letter could only be reached in the main hearing and required a willingness on the part of the Appellant to confess. The Judge also confirmed that extradition of the Appellant was still sought.

43. On 19 May 2023, the Appellant applied to amend the grounds of appeal out of time to add the Disproportionality Ground and the Article 8 Ground (para 8 above). The application notice said that it was made on the basis of new issues that arose from the Schug letter, as it indicated that due to the period of time the Appellant had already spent on remand, he would be released on probation immediately upon his surrender to Germany.

44. On 13 June 2023, the Appellant applied to admit new evidence as follows:

    i) The statements from Eda Ahmet, Sema Ahmet and Hoshmalnd Jamil which Andrew Baker J had refused to admit;

    ii) The CPT Report which Andrew Baker J had refused to admit;

    iii) The Appellant's updated medical records from HMP Wandsworth (see para 46 below);

iv) A further short witness statement from the Appellant, dated 12 June 2023, saying that he intended to plead guilty if he was returned to Germany "subject to the advice of my German lawyer";

v) A statement from Kayleigh Thorpe dated 13 June 2023, describing first meeting the Appellant two years ago in a refugee camp in Calais, where she was working for a charity and them becoming friends. She described the phone calls that they had had since that time and how she had visited him at HMP Wandsworth. She indicates that if the Appellant was released from prison she would continue to provide him with emotional support and friendship ; and

vi) A statement from the Appellant's immigration solicitor, Alex Dempsey of Duncan Lewis Solicitors, dated 13 June 2023, explaining that the Appellant has an outstanding asylum claim in the UK, having claimed asylum at Yarl's Wood Detention Centre on 10 January 2022. Mr Dempsey said that the Appellant has been granted immigration bail and that if he was released from his current detention, he would be unlikely to be detained under immigration powers.

45. The application stated that admission of the new evidence was sought in light of the new issues arising from the Schug letter and also in support of the Oppression Ground. It was said that the circumstances had changed since the Baker Order in light of the Schug letter.

46. The updated medical records cover the period 21 November 2022 to 12 May 2023. There are comments suggesting an improvement in the Appellant's mental state, but also further references to the risk he poses to himself as a result of his "impulsivity". There are additional comments from the Appellant to the effect that he would kill himself if he were to be returned to Germany. There are further incidents of self-harming, for example on 21 January 2023 he is noted as having cut his left forearm with a razor blade over an old scar. On 21 February 2023 the Appellant was found with a ligature around his neck and he indicated that he was annoyed that he had not been let out in the morning. On 17 April 2023, shortly after prison medical staff had considered discharging him from their care, the Appellant made a further suicide attempt, hanging himself with a ligature. He was treated in the ICU. He was noted to express thoughts of suicide and the risk to self was considered to be "very high".

47. No updated report from Dr Bolstridge or other treating doctor at HMP Wandsworth has been obtained, as contemplated by the Baker Order. Mr Joyes told me that Dr Bolstridge was no longer based at HMP Wandsworth and there was insufficient funding for him to prepare a report at the rate that was proposed. He did not suggest that attempts had been made to obtain a report from any other medical professional involved in the Appellant's care at HMP Wandsworth.

48. By the date of the appeal hearing, the Appellant had spent 530 days on remand in this jurisdiction. Adding this to the time that he spent on remand in Germany, gives a total figure of about 730 days. (I say "about" because there is some ambiguity over a period of 19 days that may have been spent in custody in Germany in relation to the drugs charge.)

The legal framework

The court's powers on appeal

49. As I have indicated at para 23 above, the Appellant does not challenge the conclusions of the District Judge reached on the basis of the evidence that was before him, the appeal is founded on fresh evidence. Accordingly, pursuant to section 27(2) of the 2003 Act, the court may only allow the appeal if the conditions specified in subsection (4) are satisfied, as follows:

> "(4) The conditions are that –
>
> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;
>
> (c) if he had decided the question in that way, he would have been required to order the person's discharge."

50. The principles regarding the application of this criteria identified by the Divisional Court in *Szombathely City Council v Fenyvesi* [2009] EWHC 231 (Admin), at pars 32 – 35, are well-known. In summary:

i) Evidence which was "not available at the extradition hearing" means evidence which either did not exist at the time of the extradition hearing, or which was not at the disposal of the party wishing to adduce it and which he could not with reasonable diligence have obtained;

ii) The court must be satisfied that if the evidence had been adduced, the result would have been different, resulting in the person's discharge; "in short, the fresh evidence must be decisive";

iii) The statutory test does not establish a condition for admitting the evidence, but a condition for allowing the appeal. As Laws LJ contemplated in *The District Court of Slupsk v Piotrowski* [2007] EWHC 933 (Admin) at para 9, the court may admit fresh material, but subsequently decided that the statutory criteria is not met. However, admitting evidence that would require a full rehearing in this court must be regard as quite exceptional; and

iv) There may occasionally be cases where what might otherwise be a breach of the ECHR could be avoided by admitting fresh evidence, which a strict application of the section would not permit.

The court's powers in relation to the application to amend the Perfected Grounds

51. Grounds of appeal may be amended up to 10 business days after the service of the appeal notice; thereafter the permission of the court is required to do so: The Criminal Procedure Rules 2020 ("Crim PR"), rule 50.20(5).

52. The discretion which the court has to permit amendment must be exercised in accordance with Crim PR 50.2, which provides:

> "When exercising a power to which this Part applies, as well as furthering the overriding objective in accordance with rule 1.3, the court must have regard to the importance of –
>
> (a) mutual confidence and recognition between judicial authorities in the United Kingdom and in requesting territories;
>
> (b) the conduct of extradition proceedings in accordance with international obligations, including obligations to deal swiftly with extradition requests."

53. As to the content of the grounds, Crim PR 50.20(6)(b) provides that:

> "if the grounds of appeal are that there is an issue which was not raised at the extradition hearing, or that evidence is available which was not available at the extradition hearing, the appeal notice must –
>
> (i) identify that issue or evidence,
>
> (ii) explain why it was not then raised or available,
>
> (iii) explain why that issue or evidence would have resulted in the magistrates' court deciding a question differently at the extradition hearing, and
>
> (iv) explain why, if the court had decided that question differently, the court would have been required not to make the order it made."

54. However, the parties were not agreed upon whether and, if so, under which provision, the court had power to permit the amendment of the Perfected Grounds to include the Disproportionality Ground, given that amendment had earlier been refused at para 2 of the Baker Order (para 39 above).

55. Counsel were agreed that as Andrew Baker J had refused permission to amend, rather than refused permission to appeal, in relation to the Disproportionality Ground, the provisions governing renewal of a permission application in Crim PR 50.22(4) and (5) did not apply. I mention for completeness that the Respondent did not suggest that the circumstances came within Crim PR 50.22(1)(b), given that Andrew Baker J did not refuse the application to add the Disproportionality Ground on the basis that the

application was made out of time (he did so because it did not add anything in the circumstances).

56. Counsel were also agreed that the general rule contained in Crim PR 50.17(1) that the High Court exercises its powers at a hearing in public did not apply, as the circumstances came within rule (1)(b), namely that this was "an application for the court to consider out of time an application for permission to appeal to the High Court".

57. Counsel informed me that there was no direct authority on the point, as far as they were aware.

58. Mr Joyes submitted that this aspect of the Baker Order was an exercise of the court's case management powers pursuant to Crim PR 3.5 and that accordingly an application could be made to vary his direction if the criteria in Crim PR 3.6 were met. Crim PR 3.6 states:

> "(1) A party may apply to vary a direction if –
>
> (a) the court gave it without a hearing;
>
> (b) the court gave it a hearing in that party's absence;
>
> (c) circumstances have changed.
>
> (2) A party who applies to vary a direction must –
>
> (a) apply as soon as practicable after becoming aware of the grounds for doing so; and
>
> (b) give as much notice to the other parties as the nature and urgency of the application permits."

59. Mr Joyes relied upon limb (1)(c), submitting that the Schug letter amounted to a material change of circumstances for these purposes and that the application had been made promptly thereafter. Ms Bostock disputed the applicability of Crim PR 3.5 and 3.6, submitting that the decision made by Andrew Baker J to refuse to permit the Appellant to amend his Perfected Grounds was a substantive decision, rather than a direction or other exercise of the court's case management powers.

60. The applicability of Part 3 Crim PR (which includes both rules 3.5 and 3.6) to extradition proceedings is addressed in terms at Crim PR 50.18 which is headed "Case management in the High Court". As material, it says:

> "(1) The High Court and the parties have the same duties and powers as under Part 3 (Case Management) subject to –
>
> (a) rule 50.2 (Special objective in extradition proceedings); and
>
> (b) paragraph (3) of this rule.
>
> .....

> (3) Rule 3.6 (Application to vary a direction) does not apply to a decision to give or to refuse –
>
> (a) permission to appeal; or
>
> (b) permission to reopen a decision under rule 50.27 (Reopening the determination of an appeal)."

61. The terms of this provision provide clear support for Mr Joyes' position. Crim PR 50.18(3)(a) would be entirely superfluous if decisions to give or refuse permission to appeal would not otherwise come within the Part 3 Case Management provisions. Decisions granting or refusing permission to amend are not similarly excluded and, on the face of it, are capable of coming within those provisions. As absent Crim PR 50.18 (3)(a), a grant or refusal of permission to appeal would be a case management direction for these purposes, it must follow that a decision to refuse leave to amend to include a new ground of appeal is also such a decision; no sensible distinction can be drawn for these purposes. Indeed, granting or refusing extensions of time and granting or refusing applications to amend are classic instances of the exercise of case management powers.

62. As I am satisfied that I have power to permit amendment to add the Disproportionality Ground pursuant to Crim PR 3.5 and 3.6, it is unnecessary for me to discuss the other alternatives that were canvassed by counsel during their oral submissions. I consider whether I should permit the amendment at para 105 - 107 below.

63. Counsel were agreed that the application to admit new evidence was properly before me, both in relation to the entirely new material and in respect of the documents that Andrew Baker J declined to admit. In *Paczkowski v Regional Court of Szczecin, Poland* [2023] EWHC 1489 (Admin), at paras 44 – 47, Morris J explained that by virtue of Crim PR 50.17(1) (para 56 above), the parties have the right to a public oral hearing in relation to an application to admit fresh evidence which has earlier been refused on the papers.

Section 25 of the 2003 Act

64. Section 25 of the 2003 Act provides:

> "(1) This section applies if at any time in the extradition hearing it appears to the judge that the condition in subsection (2) is satisfied.
>
> (2) The condition is that the physical or mental condition of the person is such that it would be unjust or oppressive to extradite him.
>
> (3) The judge must –
>
> (a) Order the person's discharge, or
>
> (b) Adjourn the extradition hearing until it appears to him that the condition in subsection (2) is no longer satisfied."

65. In terms of subsection (2), it is well established that "unjust" is directed to the risk of prejudice to the accused in the conduct of the trial itself; and that "oppressive" is directed to hardship to the accused resulting from changes in their circumstances that have occurred during the period to be taken into consideration: *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779, Lord Diplock at 782. In some cases there is room for overlap, but in this instance the Appellant only contends that his extradition would be "oppressive".

66. The following guidance was provided by the Divisional Court in *The Government of the Republic of South Africa v Dewani* [2012] EWHC 842 (Admin):

> "73. In our view, the words in ... s.25 set out the relevant test and little help is gained by reference to the facts of other cases...The term "unjust or oppressive" requires regard to be had to all the relevant circumstances, including the fact that extradition is ordinarily likely to cause stress and hardship; neither of these is sufficient."

67. The Court stressed that what is unjust or oppressive in a particular case is fact sensitive (para 76); and where the quantification of the degree of risk to life is less certain and the prognosis is less certain, "the interests of justice in seeing that person accused of crimes are brought to trial have to be brought into account" (para 77).

68. The Appellant relies upon his mental health condition, in particular the risk of him committing suicide, although also, the broader effects of his PTSD.

69. In *Turner v Government of the USA* [2012] EWHC 2426 (Admin) ("*Turner*") at para 28 Aikens LJ (giving the leading judgment, Globe J agreeing) reviewed the authorities and distilled the following propositions:

i) The court has to form an overall judgment on the facts of the particular case;

ii) A high threshold has to be reached in order to satisfy the court that an Appellant's physical or mental condition is such that it would be unjust or oppressive to extradite them;

iii) The court must assess the mental condition of the person facing extradition and determine if it is linked to a risk of a suicide attempt if the extradition order were to be made. There has to be a "substantial risk that [the Appellant] will commit suicide". The question is whether, on the evidence, the risk of the Appellant succeeding in committing suicide, whatever steps are taken, is sufficiently great to result in a finding of oppression;

iv) The mental condition of the person must be such that it "removes his capacity to resist the impulse to commit suicide, otherwise it will not be his mental condition but his own voluntary act which puts him at risk of dying and if that is the case there is no oppression in ordering extradition";

v) On the evidence, is the risk that the person will succeed in committing suicide, whatever steps are taken, sufficiently great to result in a finding of oppression;

vi) Are there appropriate arrangements in place in the prison system of the country to which extradition is sought so that those authorities can cope properly with the person's mental condition and risk of suicide; and

vii) There is a public interest in giving effect to treaty obligations and this is an important factor to have in mind.

70. In *Wolkowicz v Regional Court at Bialystok, Poland* EWHC 102 (Admin), [2013] 1 WLR 2402 ("*Wolkowicz*"), at para 9, the Divisional Court described the principles identified by Aikens LJ in *Turner* as a "succinct and useful summary of the approach a court should adopt to section 25". At para 11, the court emphasised that it would not ordinarily be necessary to refer to the facts of other cases. The court also addressed the approach to be taken to the existence of preventative measures:

> "10. ... It is helpful to examine the measures in relation to three stages: (1) First, the position whilst the requested person is being held in custody in the United Kingdom is clear. As Jackson LJ observed in *Mazurkiewicz v Poland* [2011] EWHC 659 (Admin) at [45], a person does not escape a sentence of imprisonment in the UK simply by pointing to the high risk of suicide. The court relies on the Executive branch of the state to implement measures to care for the prisoner under the arrangements explained in *R v Qazi (Saraj)* [2011] Cr App R (S) 32. (2) Second, when the requested person is being transferred to the requesting state, arrangements are made by the Serious Organised Crime Agency (SOCA) with the authorities of the requesting state to ensure that during the transfer proper arrangements are in place to prevent suicide in appropriate cases. As Collins J helpfully mentioned in *Griffin's* case [2012] 1 WLR 270, para 52, steps should ordinarily be taken in such cases to ensure that no attempt is made at suicide and proper preventative measures are in place. Medical records should be sent with the requested person and delivered to those who will have custody during transfer and in subsequent detention. (3) Third, when the requested person is received by the requesting state in the custodial institution in which he is to be held, it will ordinarily be presumed that the receiving state within the European Union will discharge its responsibilities to prevent the requested person committing suicide, in the absence of strong evidence to the contrary: see *Krolick v Regional Court in Czestochowa, Poland (Practice Note)* [2013] 1 WLR 490, paras 3 – 7 and the authorities referred to and *Roti's* case [2010] EWHC 1820 (Admin) at [10]–[11]. In the absence of evidence to the necessary standard that calls into question the ability of the receiving state to discharge its responsibilities or a specific matter that gives cause for concern, it should not be necessary to require any assurances from requesting states within the European Union. It will therefore ordinarily be sufficient to rely on the presumption. It is therefore only in a very rare case that a requested person will be likely to establish that measures to prevent a substantial risk of suicide will not be effective."

71. In *The Government of the United States of America v Assange* [2021] EWHC 3313 (Admin), [2022] 4 WLR 11, concerning the similarly worded section 91 of the 2003 Act, (applicable to extraditions within Part 2), the court observed that the law in this

area could be collected from the judgments in *Turner* and *Wolkowicz* and it would rarely be necessary to look outside of those two authorities for the applicable principles (para 63).

Section 21A(1)(b) of the 2003 Act

72. Section 21A of the Act provides, as relevant:

> "(1) If the judge is required to proceed under this section ..., the judge must decide both of the following questions in respect of the extradition of the person ("D")—
>
> (a) whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998;
> (b) whether the extradition would be disproportionate.
>
> (2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); but the judge must not take any other matters into account.
>
> (3) These are the specified matters relating to proportionality—
>
> (a) the seriousness of the conduct alleged to constitute the extradition offence;
> (b) the likely penalty that would be imposed if D was found guilty of the extradition offence;
> (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D.
>
> (4) The judge must order D's discharge if the judge makes one or both of these decisions -
>
> (a) that the extradition would not be compatible with the Convention rights;
> (b) that the extradition would be disproportionate."

73. Mr Joyes also emphasises that the principle of proportionality is recognised by Article 597, Part III, Title VII of the UK-EU Trade and Cooperation Agreement, which provides:

> "Cooperation through the arrest warrant shall be necessary and proportionate, taking into account the rights of the requested person and the interests of the victims, and having regard to the seriousness of the act, the likely penalty that would be imposed and the possibility of a State taking measures less coercive than the surrender of the requested person particularly with a view to avoiding unnecessarily long periods of pre-trial detention."

74. The proportionality test in section 21A(1)(b) only applies to accusation cases. The leading authority in relation to the application of this test is *Miraszewski v Poland* [2014] EWHC 4261 (Admin), [2015] 1 WLR 3929 ("*Miraszewski*"). Having considered the guidance issued by the Lord Chief Justice by means of Criminal Practice Directions Amendment No. 2 [2014] EWCA Crim 1569, Pitchford LJ (giving the leading judgment, Collins J agreeing), observed that the guidance was aimed at offences at the very bottom end of the scale of seriousness, where the triviality of the conduct alleged would *alone* require the judge to discharge the requested person. As such, it identified a floor rather than a ceiling for the assessment of seriousness (paras 28 and 31). Mr Joyes emphasised the following passage:

> "31. ... The court may, depending on its evaluation of factors, conclude that "extradition would be disproportionate" if (i) the conduct is not serious and/or (ii) a custodial penalty is unlikely and/or (iii) less coercive measures to ensure attendance are reasonably available to the requesting state in the circumstances."

75. At para 33, Pitchford LJ noted that the bracketed words in section 21A(2) ("so far as the judge thinks it appropriate to do so") enabled the judge "to give differential weight to the subsection (3) factors depending upon the circumstances of the case".

76. In terms of the first two factors listed in subsection (3), Pitchford LJ gave the following guidance:

> "Subsection (3)(a) – seriousness of the conduct alleged
>
> 36. I have already considered the general approach to seriousness in paragraphs 30 – 33 above. Section 21A(3)(a) requires consideration of "the seriousness of the conduct alleged to constitute the extradition". I agree that, as Mr Fitzgerald QC argued, paragraphs (a), (b) and (c) of subsection (3) all assume an approximate parity between criminal justice regimes in member states that embrace the principles of Articles 3, 5 and 6 of the ECHR and Article 49(3) of the Charter of Fundamental Rights of the European Union. In my view, the seriousness of conduct alleged to constitute the offence is to be judged, in the first instance, against domestic standards although, as in all cases of extradition, the court will respect the views of the requesting state if they are offered. I accept Mr Summers QC's submission that the maximum penalty for the offence is a relevant consideration but it is of limited assistance because it is the seriousness of the requested person's conduct that must be assessed. ... In my view, the main components of the seriousness of conduct are the nature and quality of the acts alleged, the requested person's culpability for those acts and the harm caused to the victim. I would not expect a judge to

adjourn to seek the requesting state's views on the subject.

Section 21A(3)(b) – the likely penalty on conviction

37. Section 21A(3)(b) requires consideration of "the likely penalty that would be imposed if D was found guilty of the extradition offence". Since what is being measured is the proportionality of a decision to extradite the requested person under compulsion of arrest, I consider that the principal focus of subsection (3)(b) is on the question whether it would be proportionate to order the extradition of a person who is not likely to receive a custodial sentence in the requesting state. The foundation stone for the Framework Decision is mutual respect and trust between member states...

38. It would be contrary to the objectives of the Framework Decision to bring mutual respect and reasonable expedition to the extradition process if in every case the judge had to require evidence of the likely penalty from the issuing state... In my judgment, the broad terms of subsection (3)(b) permit the judge to make the assessment on the information provided and, when specific information from the requesting state is absent, he is entitled to draw inferences from the contents of the EAW and to apply domestic sentencing practice as a measure of likelihood. In a case in which the likelihood of a custodial penalty is impossible to predict the judge would be justified in placing weight on other subsection (3) factors. However, I do not exclude the possibility that in particular and unusual circumstances the judge may require further assistance before making the proportionality decision.

39. While the focus of subsection (3)(b) is upon the likelihood of a custodial penalty it does not follow that the likelihood of a non-custodial penalty precludes the judge from deciding that extradition would be proportionate. If an offence is serious the court will recognise and give effect to the public interest in prosecution. While, for example, an offence against the environment might be unlikely to attract a sentence of immediate custody the public interest in prosecution and the imposition of a fine may be a weighty consideration. The case of a fugitive with a history of disobeying court orders may require increased weight to be afforded to subsection (3)(c): it would be less likely that the requesting state would take alternative measures to secure the requested person's attendance."

77. It is unnecessary for me to set out the guidance that was provided in relation to the third factor, less coercive measures, as counsel were agreed that this factor was neutral in the present case.

Section 21A(1)(a) of the 2003 Act

78. I have set out the statutory provision at para 72 above. As I indicated in the Introduction, the Appellant contends that his extradition would be incompatible with his rights under Article 8 ECHR, which protects "private and family life".

79. The approach to be taken where Article 8 is engaged in extradition proceedings was considered by the House of Lords in *Norris v United States of America* [2010] UKSC 9, [2010] 2 AC 487. In *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2013] 1 AC 338 at para 8, Baroness Hale (giving the leading judgment) summarised the conclusions to be drawn from *Norris*, as follows:

> "(1) There may be a closer analogy between extradition and the domestic criminal process than between extradition and deportation and expulsion, but the court has still to examine carefully the way in which it will interfere with family life.
>
> (2) There is no test of exceptionality in either context.
>
> (3) The question is always whether the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition.
>
> (4) There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no 'safe havens' to which either can flee in the belief that they will not be sent back.
>
> (5) That public interest will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crimes involved.
>
> (6) 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.
>
> (7) Hence it is likely that the public interest in extradition will outweigh the Article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe."

80. In *Celinski v Slovakian Judicial Authority* [2015] EWHC 1274 (Admin), [2016] 1 WLR 551 at paras 15 – 17, the Divisional Court commended the "balance sheet" approach to assessing whether the interference with the private life of the extraditee (and, where relevant, their family members) is outweighed by the public interest in extradition.

81. When Article 8 is engaged, the length of sentence that the extraditee is likely to serve if returned to the Requesting State and the prospect of early release may be a relevant factor. In *Dobrowolski v District Court in Bydgoszcz, Poland* [2023] EWHC 763 (Admin) ("*Dobrowolski*"), Fordham J reviewed the case law in relation to extradition to Poland. He accepted the submission of Mr Dobrowolski's counsel that in the circumstances he could properly conclude that the Appellant would have "good prospects" of early release, that it was "difficult to see" why there would not be early release and that early release is "likely" (paras 14 and 15). These phrases were taken from the judgments he had cited at paras 9 – 13, specifically: "good prospects" of release from para 25 of Ouseley J's judgment in *Chmura v Poland* [2013] EWHC 3896 (Admin); "difficult to see" why the Appellant would not be released from para 19 of Wilkie J's judgment in *Jesionowski v Poland* [2014] EWHC 319 (Admin); and "likely" to be eligible for early release from para 27 of Steyn J's judgment in *Kruk v Poland* [2020] EWHC 620 (Admin).

82. The Judge concluded that the period of Mr Dobrowolski's sentence left to serve did not provide a standalone basis for finding a disproportionate interference with his Article 8 rights, but he arrived at this conclusion as a result of the combined weight of features he identified, including the prospect of early release, the Appellant's mental health and the passage of time (including unexplained delay) (para 24). He emphasised that Article 8 cases are "intensely fact-specific" (para 23).

The Oppression Ground: discussion and conclusions

The parties' submissions

83. Mr Joyes submitted that the medical evidence now available fundamentally undermined the District Judge's conclusion that the Appellant did not have a mental health condition. Furthermore, there was a substantial risk of him committing suicide if he was returned to Germany, as shown by his frequent recent suicide attempts, his suicidal ideation, and the particular fear he has expressed of being returned to Germany in light of past trauma he experienced and the related PTSD from which he is suffering. He said that the evidence highlighted the Appellant's impulsivity which overwhelmed his ability to control his behaviour. He relied on the CPT report as rebutting the presumption that he would be adequately cared for in Germany. He also submitted that the Schug letter supported the proposition that extradition would be oppressive.

84. Ms Bostock did not accept that the Appellant's suicide attempts were an indication of involuntary behaviour. She said that the incidents documented in the medical records were indicative of someone who manipulates and uses self-harm and suicide threats as a route to getting what they want. She said that the medical evidence did not establish that he lacked capacity and it was his own voluntary act that posed the risk of suicide. In so far as the Appellant's case was that he would admit the offences if returned to Germany and thus be released on probation, this weakened, rather than strengthened his case on the Oppression Ground, as the trauma he relied upon was linked to being in

detention. In any event, the presumption that the German authorities would provide him with adequate care and protection had not been rebutted.

The new evidence

85. The updated medical records should be admitted in evidence. They were not in existence at the date of the extradition hearing. They are plainly relevant to this ground, and this course was envisaged in the Baker Order (para 39 above). The Respondent did not object to this. I also grant permission to rely on the Schug letter. It post-dates the extradition hearing and the Baker Order, and again, the Respondent did not object to this. It is relevant to this ground; indeed both parties claim that it supports their respective positions. Similarly, I will grant permission for the Appellant to rely upon his 12 June 2023 statement (para 44(iv) above); this is also relevant to the period he may spend in custody in Germany, and I accept that the relevance of the same was only apparent to his lawyers after receipt of the Schug letter. I emphasise that in admitting this evidence I am simply accepting that it should be considered by the court; I am not accepting that it is decisive.

86. The CPT Report is dated 14 September 2020 and thus was not available at the time of the extradition hearing. It was not admitted in evidence by the Baker Order. Whilst I am able to reconsider this (para 63 above), the circumstances have not changed in terms of the issue in question, namely the adequacy of care that will be provided by the German authorities. Furthermore, the report only gives an incomplete picture; Mr Joyes accepted at the hearing that the response report from Germany should also have been provided to the court, but this had not been done through oversight. For these reasons, I refuse the application for permission to rely on the CPT report. However, for completeness, I have considered its impact, as I set out at paras 96 - 101 below.

87. It does not appear to me that the other statements which the Appellant seeks to rely on as new evidence can have any significant bearing on the Oppression Ground; I consider them further at paras 121 - 122 below in relation to the Article 8 Ground.

The risk of suicide

88. As I have set out earlier, the Appellant has a history of self-harming and suicide attempts both here and in Germany (paras 27 - 34 above). During his time at HMP Wandsworth he has repeatedly expressed an intention to kill himself if he is returned to Germany. He has been diagnosed as suffering from PTSD consequent upon trauma he experienced when in custody in Germany (paras 36 – 37 above).

89. In the circumstances I accept that there is a risk of suicide if he is extradited. I also accept that the evidence shows that the District Judge would have decided differently the question of whether the Appellant has a mental health condition (para 21(iii) above). However, I reject the proposition that this would have proved decisive; for the reasons that I will now set out, it would not have led to the conclusion that it was oppressive to extradite the Appellant within the meaning of section 25 of the 2003 Act.

90. The nature and degree of the risk of the Appellant committing suicide is to be viewed in context, in particular:

i) The only documented suicide attempts since 6 October 2022 occurred on 17 April 2023 and possibly on 21 February 2023 (para 46 above);

ii) The most up to date expert medical evidence is the report from Dr Bolstridge which is almost a year old;

iii) The combined effect of the Schug letter and the Appellant's most recent witness statement (paras 40 and 44(iv)) indicates that on his case, if he is extradited and admits the offences, he is likely to be released from custody soon after he is returned to Germany. Mr Joyes submitted that this did not weaken the Oppression Ground, as the Appellant's fear of a return to Germany, and thus the impact on his mental health, was not limited to periods in detention and the German medical records showed incidents of self-harm and an attempted suicide when he was not in custody. However, the source of the trauma that the Appellant has described, whilst containing inconsistencies, is explicitly linked to his experiences of being in custody in Germany. For example, I note the descriptions he gave: when he was an inpatient in Germany (para 28 above); in his second additional witness statement (para 25(ii) above); and to Dr Bolstridge (para 36 above). Indeed, in his first additional witness statement, the Appellant said in terms that being in prison definitely made his mental health much worse (para 25(i) above). Accordingly, a scenario in which he is placed on probation shortly after his return in Germany, tends to indicate a relatively reduced risk of suicide. Whilst Mr Joyes also referred to potential trauma arising from the threat posed by the Albanian gang; that account was rejected by the District Judge and has not been the subject of any significant additional evidence (para 21(ii) above). I also note that the records from Germany do not indicate any incidents of hospitalisation from self-harming incidents in the period June 2019 to January 2022, when the Appellant was not detained. Whilst the records may be incomplete or the Appellant may have been in France or otherwise outside Germany during some of this period, the fact remains that there is no evidence of him presenting a suicide risk during this substantial period when he was not in detention;

iv) Dr Bolstridge's assessment that the Appellant was suffering from PTSD was based on his self-reporting of events when he was in custody in Germany, as the report acknowledged (para 36 above). It does not appear that Dr Bolstridge had access to the German medical records; and the amount of weight that can be attached to this self-reporting is, at best, questionable in circumstances where the records appear to indicate significant variances in the Appellant's accounts of the triggering events when he was in custody in Germany (see the accounts referred to in para 90(iii) above) and where those accounts have not been subject to cross-examination; and

v) Dr Bolstridge indicated that the uncertainty over whether the Appellant would be returned to Germany or not was likely to impact on his mental state (para 37 above). Self-evidently, this will no longer be a feature if he is extradited.

Removal of capacity or a voluntary act

91. As I have identified at para 69 above, for extradition to be oppressive within the meaning of section 25 of the 2003 Act, the mental condition of the requested person

must be such that it removes their capacity to resist the impulse to commit suicide, otherwise it will not be their mental condition, but their own voluntary act that puts them at risk of dying. The evidence does not show that the Appellant lacks capacity in this sense. Accordingly, the risk of suicide that I have just described, does not in any event render the Appellant's extradition oppressive.

92. I arrive at this conclusion for the following reasons:

i) Dr Bolstridge does not say that the Appellant's mental health condition is such as to remove his capacity to resist the impulse to commit suicide;

ii) There is no other expert medical evidence that specifically considers that issue;

iii) There are indications to the contrary in the medical records, which suggest that the Appellant's actions are voluntary, with a view to achieving a particular end. As I have already noted, both the nurse who found him and Dr Bolstridge considered that the 12 July 2022 incident was an attempt to convey distress, rather than a genuine suicide attempt (paras 33(iv) and 37 above). On the next occasion, on 25 September 2022, the Appellant tied a ligature in the presence of his cellmate (para 33(v) above); on the next occasion, in October 2022, he expressly linked his actions to particular frustrations including with the current prison regime (para 33(vi) above); and on 21 February 2023 his tying of a ligature was said to be because of his annoyance at not having been let out that morning (para 46 above). There are also incidents in the HMP Wandsworth notes where the Appellant said in terms that he self-harmed because he was unhappy with an aspect(s) of prison life. For example: on 12 June 2022 he said he had cut his stomach and neck in the night because he had not been left out for exercise and a shower; on 20 July 2022 he threatened to harm himself with a pen and told the nurse-in-charge that he wanted to be transferred to the wing (from the prison health care wing); and on 27 July 2022 he cut through an existing wound on his left wrist and threatened he would do it again if he was not moved from the health care wing; and

iv) I do not accept Mr Joyes' submission that it was incumbent on the Respondent to adduce expert evidence showing that the Appellant's suicide attempts were voluntary, in circumstances where, as here, there is no clear evidence that his acts were involuntary and positive indications to the contrary (as I have noted).

93. Mr Joyes' emphasised the references in the medical records to the Appellant's "impulsivity" and to what appear to be significant fluctuations in his mood. He submitted that this was significant in itself, particularly in a context where the suicide attempt on 10 May 2022 was nearly fatal (para 36 above). He said this "spoke for itself". I do not accept this contention. It is clear from Aikens LJ's articulation of this aspect of the test in *Turner* that it does not follow from the sheer fact that a person is moved to take the extreme step of trying to kill themselves that their action is to be regarded as involuntary.

94. Whilst I have found that the risk in this instance is not one that renders the Appellant's extradition oppressive, for completeness, I will go on to consider whether there are appropriate arrangements in place to in Germany to properly cope with the Appellant's mental health condition and risk of suicide.

The arrangements for coping with the risk in Germany

95. As I indicated at para 70 above, it will ordinarily be presumed that a European Union receiving state will discharge its responsibilities to prevent the requested person from committing suicide, in the absence of strong evidence to the contrary.

96. I do not consider that strong evidence to the contrary has been adduced in this case. No basis has been shown to overturn the District Judge's conclusion that the Appellant would be adequately cared for in the UK and German prison system and during any journey between the two (para 21(iii) above).

97. It is apparent that the authorities managed the Appellant's mental health condition and risks of self-harm and suicide when he was previously in Germany, both when he was in custody and at liberty. The evidence does not indicate that he is now in a significantly worsened condition than he was then. Indeed, the updated medical records indicate that there has been some improvement in his condition and a decreased number of suicide attempts compared to the first half of 2022 (para 46 above).

98. The only material that is relied upon to displace the presumption is the CPT report. I have already refused permission to admit this report in evidence (para 86). However, as I foreshadowed then, I will address it briefly for completeness.

99. The report is based on visits undertaken in December 2020. Whilst some concerns were expressed in relation to the particular prisons that were inspected, these do not come close to constituting the strong evidence necessary to displace the presumption. Positive comments were made about the material conditions of the health-care facilities, the available medication and the fact that newly arrived prisoners were medically examined shortly after their admission. Serious concerns were expressed about the standard of psychiatric care at two of the prisons visited (Bayreuth and Gelsenkirchen); and that several prisoners with severe and enduring mental disorders were held in prolonged segregation at Celle and Lübeck Prisons, with difficulties encountered in arranging transfers to a therapeutic environment. Material conditions at the two psychiatric establishments that were visited were generally found to be of a high standard.

100. At its highest, the report relates to the specific prisons and psychiatric clinics that were visited. Notably, it does not conclude that there is insufficient protection for prisoners who attempt suicide. Nor is there any indication that the Appellant would be held at one of these particular prisons if he is returned to Germany. Furthermore, the report was transmitted to the German authorities on 24 August 2021 and they prepared a response addressing steps taken to implement the CPT's recommendations. Without the benefit of seeing that response, little weight can be placed on the CPT's report for present purposes. I also have no information as to the steps taken since that time.

101. No evidence has been adduced as to the medical standard of care that the Appellant would receive if released from custody.

Conclusion

102. It therefore follows that I do not find that it would be oppressive to extradite the Appellant within the meaning of section 25 of the 2003 Act. In turn, this means that the

conditions for allowing the appeal prescribed by section 27(4) of the 2003 Act (para 49 above) are not made out and this ground of appeal fails.

The Disproportionality Ground: discussion and conclusions

The parties' submissions

103. The Appellant seeks permission to rely on this ground, which is primarily founded on the indication contained in the Schug letter which was unavailable to the District Judge when he found that the section 21A(1)(b) bar to extradition did not apply. As regards the section 21A(3) criteria, Mr Joyes accepted that the offences in question are serious ones, but he submitted that this is not a trump card, particularly in circumstances where it is "certain" (as opposed to simply "likely") that the penalty imposed would result in the Appellant's release from custody shortly after his arrival in Germany if he is extradited.

104. Ms Bostock did not accept that permission should be granted. She also emphasised the seriousness of the offences and the public interest in the offences being tried. As regards to the likely penalty, she observed that the sentencing position was not a definitive one; the indication in the Appellant's most recent witness statement was qualified and whilst he presently had an incentive to say that he would admit the offences, there would be nothing to stop him from changing his position and contesting the charges, in which instance the non-custodial indication would be irrelevant.

Permission to amend and permission to appeal

105. I will permit amendment of the Appellant's grounds to include the Disproportionality Ground.

106. As I discussed at paras 58 - 62 above, to grant permission to amend to add this ground, I first need to be satisfied that there has been a material change of circumstances since the Baker Order and that the application was made as soon as practicable after the Appellant became aware of those circumstances. I accept that there has been a material change of circumstances in the form of the Schug letter, indicating that the Appellant will be released on probation if he admits the offences before the German court. This is directly relevant to likely penalty and thus to this proposed ground of appeal. On the evidence before him, the District Judge found that the likely penalty would be a substantial sentence of imprisonment (para 21(vi) above) and the only evidence to undermine that at the time of the Baker Order was the opinion of the Appellant's own lawyer in Germany, Dr Karl, which the Respondent did not accept was a reliable indicator. The ground is sufficiently meritorious to warrant the grant of permission to appeal, as I address in the next paragraph. I also accept that the Appellant's lawyers acted promptly in making the application shortly after the Schug letter came to their attention.

107. In accepting that I should grant permission to amend in respect of this ground, I also bear in mind that: (a) no specific prejudice is caused to the Respondent if I permit the amendment; Ms Bostock was fully able to address this ground at the appeal hearing; and (b) it does not extend the appeal proceedings (which already have a lengthy history). Ms Bostock emphasises the terms of para 1 of the Baker Order, that the Updated Perfected Grounds, containing the earlier version of the Disproportionality

Ground, were not to be admitted at the appeal hearing. However, that is of limited assistance as it was prior to the material change of circumstances. I have also considered Andrew Baker J's reasoning on the evidence as it then stood, that this ground added nothing significant to the Oppression Ground. However, in the circumstances that now exist it is *capable* of doing so. For reasons I have explained at para 90(iii) above, on the particular facts of this case, the Schug letter weakens the Oppression Ground, but I accept that it strengthens the Disproportionality Ground.

108. I also grant permission to appeal in respect of this ground, as I accept that it is reasonably arguable.

The new evidence

109. The new evidence that is relevant to this ground is the Schug letter and the Appellant's 12 June 2023 statement regarding his intention to admit the offences. I have already admitted this evidence when considering the Oppression Ground (para 85 above).

Seriousness of the offence and the likely penalty

110. I have set out the correct approach to the section 21A(3) specified matters at paras 74 - 76 above and direct myself accordingly. As I indicated earlier, I am only concerned with the specified matters at subsection (3)(a) and (b), as it is accepted that the possibility of less coercive measures is a neutral factor in this instance. I will consider them in turn.

111. There is no doubt that the two offences are very serious ones. The Appellant would receive a significant sentence in the UK for such offences, not least because this is not the first drug offence he has committed within a relatively short space of time (para 12 above). Applying the *Miraszewski* guidance, I also consider the Appellant's culpability and the harm caused to the victim. The account given in the AW states that the Appellant approached the victim with a kitchen knife without any justifying reason or excuse, moving the blade in the direction of his stomach. The victim's finger was injured when he grabbed the knife to fend off the assault. The AW also states that the Appellant grabbed the victim by the neck, again without any justifying reason or excuse, and in consequence the victim suffered a scratch and bruises on his neck. This account indicates the Appellant was directly responsible for the attack and does not suggest the presence of any mitigating features. The victim was likely put in fear and sustained physical injuries. In relation to the drugs offence, it is said that the Appellant was planning to sell 817 grams of cannabis for profit. If the Appellant is not extradited, he will receive no convictions for these offences and no accountability will be established for the victim.

112. I accept that the seriousness of the offences is not a trump card. I must weigh that along with the likely penalty. It is apparent from the Schug letter that the overall offending is considered serious enough to merit a sentence of up to three years imprisonment, even if the offences are admitted. The likelihood of a portion of the sentence being suspended and served on probation stems from the time that the Appellant has already spent in custody. If the Appellant were to deny the offences but was found guilty, the sentence of imprisonment would plainly be significantly longer than the three years referred to by Judge Schug.

113. Mr Joyes submitted that in this case there is virtual "certainty" that the Appellant would be released shortly after his return to Germany. I do not accept that this is the case. He has a strong incentive to say at this stage that he will admit the offences, in the hope that he will thereby avoid extradition and conviction. Furthermore, what he does say in the 12 June 2020 statement is qualified by the reference to the advice he receives from his German lawyers (para 44(iv) above). In his earlier accounts, for example in the proof of evidence that was before the District Judge, he denied both offences. The Appellant has not been exposed to cross-examination at any stage (because he did not attend the extradition hearing). There are question marks around his credibility. I have already referred to discrepancies in his accounts of mistreatment whilst in German custody (para 90(iv) above). That is not the only concerning feature in this regard. A letter dated 6 March 2018 from a doctor at the Regensburg District Hospital indicates that the Appellant said his mother had died three months earlier from an illness. However, on 4 March 2022 the Appellant reported to staff at HMP Wandsworth that he had learnt that his mother had died overnight.

114. I also consider that given the circumstances of these offences, there is a clear public interest in their prosecution to a conclusion.

Conclusion

115. Taking into account only the section 21A(3) specified matters, I conclude that the Appellant's extradition would not be disproportionate. Accordingly, the new evidence that I have admitted is not decisive and this ground of appeal fails.

The Article 8 Ground: discussion and conclusions

The parties' submissions

116. Mr Joyes submitted that the force of the Article 8 Ground also came from the Schug letter and that the application to amend had been made promptly after receipt of that document. Relying upon *Dobrowolksi*, he contended that the likelihood of the Appellant's early release "militates powerfully and determinatively against extradition" and that extradition would have a severely deleterious impact on his mental health.

117. Ms Bostock opposed the application to amend to introduce an Article 8 Ground for the first time. She emphasised that the Appellant was someone who had no life in the UK outside of prison and who had deliberately fled the German proceedings. She relied on her submissions regarding the Appellant's mental health and suicide risk and the significance of the Schug letter that I have already summarised. In the circumstances she did not accept that Article 8 was engaged and, in the alternative, she submitted that the public interest in favour of extradition plainly outweighed the factors relied upon by the Appellant.

Permission to amend and permission to appeal

118. I am not persuaded that sufficient reason has been shown for the Appellant first relying upon the Article 8 Ground as late as the 19 May 2023 application to amend. Article 8 was not raised before the District Judge and it was not a part of the Updated Perfected Grounds considered by Andrew Baker J. Although the Schug letter is said to have been the trigger for attempting to add this ground, it is not the only factor relied upon, in

particular, reliance is also placed on the Appellant's mental health and risk of suicide and when Andrew Baker J considered the application for permission to appeal on 15 March 2023, Dr Bolstridge's report and the UK and German prison records had been admitted as new evidence since the 28 November 2022 Bourne Order.

119. Furthermore, I am not persuaded that the Article 8 Ground is reasonably arguable in the circumstances of this case and thus, in any event, I would not grant permission to appeal in respect of it, even if its late addition could be satisfactorily explained. My reasoning is at paras 123 – 129 below, after I refer to the new evidence. Even if I were thought to be wrong in not granting permission to amend and permission to appeal in respect of this proposed ground, the same reasoning would in any event mean that the Article 8 Ground would fail on its substantive merits.

The new evidence

120. For the purposes of considering the issues raised by the Article 8 Ground I will take into account the evidence that I have admitted in relation to the other grounds, namely: the updated HMP Wandsworth medical records; the Schug letter; and the Appellant's witness statement of 12 June 2023. I have explained at para 86 above why I do not admit the CPT report.

121. The other material that is the subject of the current application to admit new evidence is clearly not capable of having any real impact, let alone a decisive one, even if considered cumulatively. Furthermore, in relation to the two statements from June 2023, I have received no adequate explanation as to why they could not with reasonable diligence have been obtained at an earlier stage.

122. Accordingly, I refuse to admit in evidence the following statements: from Eda Ahmet dated 5 July 2022; Sema Ahmet dated 17 August 2022; Hoshmalnd Jamil dated 17 August 2022; from Kayleigh Thorpe dated 13 June 2023; and from Alex Dempsey dated 13 June 2023 (paras 38(i) and (iii) and 44(i), (v) and (vi) above).

Engagement of Article 8

123. It is common ground that the Appellant was detained as soon as he arrived in the UK by dinghy. He has never lived in the UK outside of a detention centre or prison. He has never worked in the UK and he has no partner or family members here. Even if I were to take into account the statements that I have just referred to, at their highest they show no more than that he has friends in the UK, who so far he has never spent time with outside of a couple of visits to him in prison. There is no guarantee that he can remain in the UK if he were not extradited (even if I were to have regard to Mr Dempsey's description of his outstanding application for asylum). Whilst the authorities have sought to keep him safe whilst he has been in HMP Wandsworth and he has spent lengthy periods under the care of the prison health care wing, it is not suggested that he is in the process of receiving particular treatment that cannot be supplied elsewhere; and the most recent report that the court has from an expert psychiatrist is almost a year old. I have assessed the evidence relating to the Appellant's mental health and suicide risk at paras 88 – 93 above.

124. Mr Joyes submitted that Article 8 was engaged in light of the Appellant's mental health condition and suicide risk and in this regard he relied upon *Dobrowolski* (para 6).

However, I do not consider that it assists the Appellant on this point. In *Dobrowolski* it was agreed that Article 8 was engaged. Furthermore, the circumstances involved a requested person who had been in the UK for nearly 8 years at the time of the extradition hearing, living a "crime-free and hard-working life" and who had sustained a serious head injury in September 2019 for which he had been treated in the UK.

125. In the particular, stark circumstances of the present case, where he has no established life in the UK and there is no sound basis for contending that the medical care he receives in the UK will not be provided in Germany, I am not persuaded that the Appellant's Article 8 rights are engaged by the prospect of his extradition or that this is a reasonably arguable proposition.

The balance between Article 8 rights and the public interest in extradition

126. However, if I am wrong about the engagement of Article 8, the features I have just discussed plainly show that the public interest in extradition is not outweighed, or arguably outweighed, in the circumstances.

127. I will firstly address Mr Joyes' point regarding the Schug letter and the likelihood of early release if the Appellant is returned to Germany. I have already rejected the submission that early release is a certainty, given it rests on the uncertain proposition that the Appellant would admit the offences, if returned (para 113 above). Furthermore, the significance of the prospect of early release in terms of an extraditee's Article 8 rights will always be case specific. A central plank of the Article 8 argument in an "early release" case will usually be that because the requested person would only serve a very short sentence if returned, the extradition constitutes a disproportionate upheaval to their life in the UK and (in some cases) uncertainty over their ability to return to that life in the UK afterwards. By contrast, in the Appellant's case he has no established life in the UK and has never lived here outside of detention. A further feature of the present case, is that there is a clear public interest in the Appellant's extradition, given the nature and circumstances of the offending (paras 111 – 112 and 114 above). Accordingly, I do not accept that evidence of early release has a significant potency in his case, in terms of the Article 8 balancing exercise.

128. For the reasons that I have discussed at para 123 above (and the earlier paragraphs referred to therein), there is an absence of other significant factors to weigh in the balance as tending against extradition. There is nothing that could be said to come close to rendering the consequences "exceptionally severe" (para 79).

129. Set against this, there are strong factors in favour of extradition, namely:

i) The constant and weighty public interests in people accused of crimes being brought to trial; and in the UK honouring its treaty obligations to other countries;

ii) The constant and weighty public interest in there being no "safe havens" to which a person accused of a crime can flee in the belief that they will not be sent back. In this instance there is no appeal against the District Judge's finding that the Appellant is a fugitive; and

iii) The offences he is accused of are very serious ones (paras 111 - 112 above).

Conclusion

130. Accordingly, I do not consider that it is reasonably arguable that the new evidence which I have admitted would have resulted in the District Judge deciding the question before him differently in terms of his finding that extradition was compatible with the Appellant's Convention rights. In the circumstances I refuse permission to amend to add the Article 8 Ground.

Overall conclusions

131. For the reasons that I have identified above:

i) The application dated 12 May 2023 to adduce new evidence, namely the Schug letter, is granted;

ii) The application dated 3 June 2023 to adduce new evidence is granted in respect of the Appellant's statement dated 12 June 2023 and his updated medical records and refused in respect of the other materials;

iii) The application dated 19 May 2023 to amend the grounds of appeal out of time is granted in respect of the Disproportionality Ground and refused in respect of the Article 8 Ground;

iv) The appeal in respect of the Oppression Ground and the Disproportionality Ground is dismissed.