Case No: CO/3256/2017

Neutral Citation Number: [2018] EWHC 401 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2018

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

VINCENZO SURICO	**Appellant**
- and -	
PUBLIC PROSECUTOR OF THE PUBLIC PROSECUTING OFFICE OF BARI, ITALY	**Respondent**

- -
- -

Catherine Brown (instructed by **Hayes Law LLP**) for the **Appellant**
Rachel Kapila (instructed by **CPS**) for the **Respondent**

Hearing dates: 7 December 2017

- -

Judgment

Mr Justice Julian Knowles:

1. This is an appeal by Vincenzo Surico, the Appellant, with permission granted by myself on 18 October 2017 following an oral hearing, against the decision of District Judge McPhee dated 6 July 2017 ordering his extradition to Italy. Sir Wyn Williams, sitting as a High Court judge, had earlier refused permission on the papers. I granted permission only in respect of the Appellant's challenges under ss 14, 21 and 25 of the Extradition Act 2003 ('EA 2003'). The s 21 challenge relates to a claimed breach of Article 8 of the European Convention on Human Rights ('the Convention'). I refused permission in relation to a ground of appeal to the effect that the European arrest warrant ('EAW') was not sufficiently particularised.

2. The Appellant was represented before me by Ms Catherine Brown. The Respondent was represented by Ms Rachel Kapila.

The offences specified in the EAW

3. The Appellant was born on 5 July 1943 in Acquaviva delle Fonte, Italy. He is therefore now aged 74. He has lived in the UK for many years. The EAW was issued on 10 October 2016. It is based on the decision of the Court of Bari, 1st Division, dated 2 May 2007, which was upheld by the Court of Appeal of Bari on 15 October 2010, which became final on 14 December 2011. The Appellant's return is sought in order that he should serve a sentence of four years' imprisonment imposed after a trial at which (according to the EAW) he was present. According to Further Information from the Respondent, an order for the Appellant's incarceration was issued on 3 January 2012. The Further Information also states that the *carabinieri* were aware later in January 2012 that the Appellant was living in the UK, and that the EAW was issued as soon as the requesting judicial authority became aware of his exact address.

4. The offences for which the Appellant's extradition is sought are sexual offences against a minor. The particulars of conduct state that in August 2002 the Appellant was living in Hyde, Greater Manchester. A 14-year-old Italian boy, G, came to stay with him. Later, when G returned to Italy he showed signs of being psychologically disturbed. In 2004, G met the Appellant in Italy and made the allegations which led to the Appellant's arrest and eventual conviction. G said that whilst he had been in England the Appellant had forced him to watch pornography whilst masturbating, and also that the Appellant had touched him sexually and forced him to touch his penis.

5. The EAW Framework list is marked to designate the conduct as 'sexual exploitation of children and child pornography'. However, as the conduct constituting the offences occurred in England, the Respondent is not able to rely upon s 65(3) of the EA 2003 to show that it amounts to extradition offences. However, it is rightly accepted on behalf of the Appellant that the conduct constitutes extradition offences by virtue of s 65(4) of the EA 2003. This is because the conduct occurred outside Italy, and in corresponding circumstances equivalent conduct would constitute an extra-territorial offence under the law of England and Wales. That is by virtue of s 7 of the Sex Offenders Act 1997, which created extra-territorial jurisdiction for the offences specified in Sch 2 of the Act, which including for the offence under s 15 of the Sexual Offences Act 1956 (indecent assault) and s 1 of the Indecency with

Children Act 1960 (indecency), which are the English offences that would have been constituted by the Appellant's conduct at the time it took place.

6. The Appellant gave evidence before the judge that he was assaulted by G's family in Italy in 2004, and there was medical evidence before the judge from that time which corroborated his evidence.

The proceedings before the district judge

7. The Appellant resisted extradition before the district judge on a number of grounds.

8. First, he argued that the conduct was not sufficiently particularised on the EAW, as required by s 2 of the EA 2003. The judge held that because the allegations were ones of historic child sex abuse, it was often difficult to specify precisely the dates and times when the abuse occurred. But he held that the conduct was particularised sufficiently so that the Appellant was able to raise any bars to extradition. As I have said, I refused permission to appeal against that decision.

9. Next, the Appellant argued that it would be unjust or oppressive to extradite him by reason of the passage of time, and thus that extradition was barred by s 14 of the EA 2003. The judge held that the Appellant was not a fugitive and so was not debarred from relying upon s 14. The judge heard evidence about the Appellant's state of health from Dr Nabavi, who is a consultant psychiatrist. He told the judge that Mr Surico has a number of medical conditions including multiple myeloma and a panic disorder which would make him very vulnerable in prison. He said there would be a marked deterioration in the Appellant's mental health if he were to be extradited, and that he would be without the support of his family. He thought there would be a significant increase in the risk of a depressive disorder. The Appellant himself also gave evidence. He described having attended one hearing in Italy, and learning of his sentence when he was back in the UK and in hospital suffering from pneumonia. He described a number of other ailments including Type 2 diabetes and reduced kidney function. He also gave evidence about various lawyers becoming involved in the case in the UK and in Italy.

10. The judge observed that in relation to s 14 he was only concerned with events since January 2012, when the Appellant became unlawfully at large. He reviewed the Appellant's various medical conditions and pointed out that many of them began prior to January 2012. He observed that his myeloma is controlled and does not currently require treatment; he found that his diabetes is also controlled; and he found that he suffered from moderate panic disorder. Overall, the judge concluded it would not be unjust or oppressive to extradite the Appellant by reason of the passage of time.

11. The next substantive challenge considered by the judge was s 21, read with Article 8 of the Convention. The judge directed himself by reference to the decisions in *Norris v. Government of the United States of America* [2010] 2 AC 487, *HH v. Deputy Prosecutor of the Italian Republic, Genoa* [2013] 1 AC 338 and *Polish Judicial Authorities v. Celinski* [2016] 1 WLR 551. He held that the factors in favour of not extraditing the Appellant were his life in the UK and the assistance which be receives from his family; his age and infirmity and his medical conditions; and the time that has passed since the offences were committed. The judge identified the following

factors as weighing in favour of extradition: the UK's extradition treaty obligations; the seriousness of the offences; the length of the sentence to be served; the public interest that those who have been convicted should serve their sentences; that he had been ordered to serve his sentence; and that he had known for some time about the likely outcome of the case.

12. The judge said the three issues to consider were the Appellant's age and ability to cope in prison; his health; and the time which the case had taken leading to the issue of the EAW. For the reasons that the judge then went on to explain, having regard in particular to the seriousness of the offences and the fact that his conditions were in remission or controlled (except for the panic disorder) the judge said he was satisfied that it would not be disproportionate to order extradition, and he said that he relied upon Italy as being able to provide the Appellant with the requisite health care in the event that his health deteriorated in prison.

13. The judge then dealt with the Appellant's arguments under s 25, by reference specifically to the risk of suicide (cf. *Wolkowicz v Regional Court in Bialystock, Poland* [2013] 1 WLR 2402). He held that the risk of suicide was not sufficiently high and that, as he had previously found, the Appellant's conditions were for the most part either controlled or in remission, it would not be unjust or oppressive to extradite him.

14. Accordingly, the judge ordered the Appellant's extradition. He gave directions that the date of extradition be arranged with the requesting judicial authority so that the Appellant's medical notes could be assembled for submission to Italy in order that he could begin to receive appropriate medical care immediately upon his return.

The parties' submissions on the appeal

15. As I have said, Ms Brown on behalf of the Appellant appeals against the judge's conclusions on s 14, s 21/Article 8 and s 25.

16. In relation to s 14 Ms Brown submits that the judge was wrong to conclude that the Italian authorities had only known of the Appellant's address in 2016. She says that they must have known where he was long before that. She also criticises the judge's reasoning and what she says was his failure to take account of the Appellant's family life under s 14 and the effect that separation from his family would have upon him.

17. In relation s 21/Article 8, Ms Brown accepts that the risk of suicide is not so high as to engage the very high threshold which, on the authorities, must be surmounted before a risk of suicide can give rise to a bar to extradition. But nonetheless she submits that in the event of extradition the Appellant would be a vulnerable elderly man within the prison estate. She submits that he has complex medical needs, and that the evidence shows that, deprived of his family's support, there would be deterioration. She also relies on the time which the Italian proceedings took which led to the order for his incarceration in 2012. Whilst acknowledging that he engaged with the proceedings, and accepting that he knew that they were not at an end, she lays responsibility for the delay at the door of the Italian authorities. She also criticises the district judge's approach and his conclusion that there had been no delay in the case.

18. In relation to s 25, Ms Brown submits that the Appellant's physical and mental health is such that it would be unjust and oppressive to extradite him. She criticises the district judge's approach to s 25 because she says he concentrated too heavily on the question of suicide risk when it had been conceded that this was not a 'suicide case' because the level of risk was not sufficiently high.

19. She points to the absence of any concrete evidence as to what health care facilities would be available to him in prison in Italy, and relies upon *Magiera v District Court in Krakow, Poland* [2017] EWHC 2757 (Admin), paras 34 – 35, where I said that the general presumption that EU Member States will provide sufficient health care in prison would be sufficient to meet health concerns in some cases where health issues and s 25 were raised in extradition proceedings, but that more complex medical conditions might require a specific response from the requesting judicial authority in order to meet the s 25 issues which might otherwise arise. She submits that the district judge placed too much emphasis on the question of suicide risk, and that he failed to place sufficient weight on the entirety of the Appellant's medical needs and the oppression to which they would give rise if he were extradited.

20. On behalf of the Respondent Ms Kapila submits that the district judge did not err in his conclusions on s 14, s 21/Article 8 and s 25, and that the appeal should be dismissed.

21. In relation to s 14, whilst accepting that the Appellant is not a fugitive, nevertheless Ms Kapila submits that this is not a case in which the passage of time has engendered any sense of false security on the Appellant's part. She says it is plain that he has known since January 2012 that he has to serve a sentence of imprisonment and that he knew that the proceedings had not gone away. She argues that the judge correctly identified that the only medical condition which has deteriorated since January 2012 is the Appellant's kidney condition, and that in respect of his other conditions they are only subject to routing monitoring and medication.

22. In relation to s 21/Article 8, Ms Kapila submits that the judge correctly carried out the balancing exercise required by *Celinski,* supra*,* She accepts that he is not a well man, and that extradition will cause him some psychological harm, and concedes that there was some delay by the requesting judicial authority in issuing the EAW and that the information provided by it does not provide a full explanation for the delay, given that the Appellant has lived at the same address throughout the relevant period (and at the address where the offences were said to have been committed). She also accepts that the judge's reasoning is not as detailed or extensive as it might have been. But, overall, she says that the judge's conclusion was right: the Appellant has been convicted of sexual offences against a child and therefore there is a strong public interest in favour of ordering extradition.

23. In relation to s 25, Ms Kapila submits that the medical evidence adduced before the district judge showed that his myeloma (specifically, light chain multiple myeloma) was in full remission following a bone marrow transplant in 2009 and that his type 2 diabetes, hypertension, renal impairment and lower back pain are all currently managed with medication and routine monitoring. Although he is physically frail and fell in November 2016, she points out he was able to attend the permission

hearing in October 2017 (and, indeed I would add, the appeal hearing in December 2017). She said that his diagnosis of panic disorder has not required treatment in the past and had never been raised with his GP in in the past. She points out that he has no history of self-harm, and also points out that it is accepted that suicide risk does not provide a stand-alone basis for resisting extradition. She submits that the threshold imposed by s 25 is a high one, and that there is a presumption that Italy will meet the Appellant's care needs. She submits that my judgment in *Magiera*, supra, should not be read as imposing a requirement that rebutting detailed medical evidence from the requesting judicial authority is always required whenever a defendant relies on s 25. Whilst accepting that this was not a straightforward case, and that there would be some hardship for the Appellant, she submitted the hardship did not reach the requisite level that is required for the bar to extradition under s 25 of the EA 2003 to arise.

Discussion

The state of the medical evidence

24. When I granted permission last October I gave leave to the Appellant to serve up to date medical evidence, if so advised, so that I could be apprised of the latest position so far as his health is concerned. In the event, no evidence was served prior to the hearing. Shortly after the hearing I received from the Appellant's solicitor a letter from his GP dated 5 December 2017 setting out his conditions. The only new information in the letter is that the Appellant is more prone to infections and fractures because of his myeloma. However, this aside, the position with regards to the Appellant's state of health is the same, or at least not markedly different, to how it was at the time of the hearing before the district judge.

The standard of appellate review in relation to the district judge's conclusions on s 14, s 21/Article 8 and s 25

25. In this case extensive live evidence, including expert medical evidence, was called before the district judge, and there was cross-examination. The judge therefore had the advantage of hearing and seeing the witnesses which I have not had. In these circumstances, I have to consider the proper appellate approach to the various decisions which the district judge made.

26. The standard of appellate review in extradition cases was very recently considered by a Divisional Court (Lord Burnett of Maldon CJ and Ouseley J) in *Love v Government of the United States of America* [2018] EWHC 172 (Admin). Mr Love was accused of hacking into computers located in the United States from his home in England. The United States sought his extradition so he could stand trial there. The case concerned the forum bar in s 83A of the EA 2003. In simple terms, s 83A bars extradition for crimes substantially committed in the UK if the district judge decides that it would not be in the interests of justice to extradite the defendant having regard to the factors set out in s 83A. An issue on the appeal was how the Divisional Court should approach the judge's finding that it would *not* not be in the interests of justice to extradite Mr Love. At paras 22 – 26 the Court said:

"22. In our judgment, section 83A is clearly intended to provide a safeguard for requested persons, not distinctly to be found in any of the other bars to extradition or grounds for discharge, including section 87 and the wide scope of article 8 ECHR. The safeguard is not confined to British nationals, but it is to be borne in mind that the United Kingdom is one of those countries which is prepared to extradite its own nationals. Its underlying aim is to prevent extradition where the offences can be fairly and effectively tried here, and it is not in the interests of justice that the requested person should be extradited. But close attention has to be paid to the wording of the statute rather than to short summaries of its purpose or to general Parliamentary statements. The forum bar only arises if extradition would not be in the interests of justice; section 83A(1). The matters relevant to an evaluation of "the interests of justice" for these purposes are found in section 83A(2)(b). They do not leave to the court the task of some vague or broader evaluation of what is just. Nor is the bar a general provision requiring the court to form a view directly on which is the more suitable forum, let alone having regard to sentencing policy or the potential for prisoner transfer, save to the extent that one of the listed factors might in any particular case require consideration of it.

23. The approach of an appellate court to the evaluation of the section 83A factors also calls for some comment. Mr Caldwell favoured the approach taken in *Celinski v Poland* [2015] EWHC 1274 at [18-24], where the Divisional Court concluded, in relation to article 8 cases, that the correct approach for an appellate court was to ask the single question whether or not the district judge made the wrong decision, and to allow the appeal only if the decision was wrong in the way described by Lord Neuberger in *Re B (A Child) (FC)* [2013] UKSC 33. Findings of fact, especially if evidence had been heard should ordinarily be respected. The approach of Aikens LJ in *Shaw v Government of the United States of America* [2014] EWHC 4654 (Admin), was preferred by Mr Fitzgerald. He held at [42] that the appellate court could interfere with the judge's "value judgement" if there were an error of statutory construction, or if he failed to have regard to a relevant factor or considered an irrelevant one, or if the overall judgment was irrational. Such an error would "invalidate" the judgment and the appellate court "would have to re-perform the statutory exercise and reach its own 'value judgment'". He continued:

> "43. However, if this court concludes that the DJ has not erred in any one of those respects I have just identified, but simply took the view that it would give a different weight to a particular specified matter from that given to it by the judge below, I very much doubt that this court could therefore conclude that the appropriate judge ought to have decided the Forum Bar question before him in the extradition hearing

differently: see section 104(3)(a) of the EA. It is possible, but in my judgement, in practice, very unlikely."

24. This was very much the approach adopted in relation to article 8 cases by Aikens LJ and Edis J, in *Belbin v Regional Court of Lille, France* [2015] EWHC 149 (Admin), which, while approved in *Celinski*, was overtaken by the latter's simpler approach.

25. The statutory appeal power in section 104(3) permits an appeal to be allowed only if the district judge ought to have decided a question before him differently and if, had he decided it as he ought to have done, he would have had to discharge the appellant. The words "*ought* to have decided a question differently" (our italics) give a clear indication of the degree of error which has to be shown. The appeal must focus on error: what the judge *ought* to have decided differently, so as to mean that the appeal should be allowed. Extradition appeals are not re-hearings of evidence or mere repeats of submissions as to how factors should be weighed; courts normally have to respect the findings of fact made by the district judge, especially if he has heard oral evidence. The true focus is not on establishing a judicial review type of error, as a key to opening up a decision so that the appellate court can undertake the whole evaluation afresh. This can lead to a misplaced focus on omissions from judgments or on points not expressly dealt with in order to invite the court to start afresh, an approach which risks detracting from the proper appellate function. That is not what *Shaw* or *Belbin* was aiming at. Both cases intended to place firm limits on the scope for re-argument at the appellate hearing, while recognising that the appellate court is not obliged to find a judicial review type error before it can say that the judge's decision was wrong, and the appeal should be allowed.

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

27. The decision in *Love*, supra, therefore represents a clear statement of the appellate test in relation to s 83A, which is an adoption of the *Celinski*, supra, test in relation to Article 8, namely, whether the district judge's decision was 'wrong', in the sense explained in the two decisions.

28. What about the appellate approach to other bars to extradition, in particular those based on injustice or oppression, such as s 14 and s 25 ? The decision in *Government of South Africa v Dewani* [2013] 1 WLR 82 concerned s 91, which is the equivalent of s 25 in cases under Part 2 of the EA 2003. The Court (Sir John Thomas P and Ouseley J) said at para 63 under the heading '*The Approach To s 91 And The Contentions Of The Parties':*

> "[63] On the appeal, we are required by the terms of s 103 and s 104 to consider ourselves whether his mental condition was such that it would be unjust or oppressive to extradite him: see *Government of the United Sates v Tollman* [2008] EWHC 184, [2008] 3 All ER 350 at para 95 and *Howes v Her Majesty's Advocate* [2009] SCL 341 at para 91 [*sic.* The correct reference is para 13]. Although we did not have the benefit of hearing the witnesses, Professor Eastman and Professor Kopelman were both eminent psychiatrists and the disagreement between them was a disagreement of degree. Thus although we should hesitate before reaching a contrary conclusion on findings of fact and the decision of the Senior District Judge is to be accorded the greatest respect, we are free to depart from his conclusion if on the evidence we consider that the extradition of the Appellant would be unjust or oppressive."

29. It is possible to read this passage as meaning that on appeals in relation to s 91 and s 25 the High Court is free simply to make its own *de novo* redetermination of the questions of injustice and oppression (and so, by extension, to adopt the same approach to other bars based on injustice or oppression such as the passage of times bars in s 14 and s 82), particularly if one reads the words '… we are free to depart from his conclusion if on the evidence we consider that the extradition of the Appellant would be unjust or oppressive' in isolation. However, in my considered judgment that is not how this paragraph is to be read. *Government of the United Sates v Tollman* [2008] 3 All ER 350 concerned the passage of time bar in s 82 of the EA 2003 (in similar terms to s 14). Moses LJ said at para 95:

> "[95] In reaching a conclusion that it would not be unjust to extradite the defendant by virtue of the passage of time we are conscious that we are differing from the conclusion reached by the senior district judge. His conclusion was based on his findings of fact as to the non-availability of witnesses which he considered would have helped Mr Tollman. Appeals under s 105 of the 2003 Act may be brought either on questions of law or fact (see s 105(4)). But where the senior district judge has made findings of fact this court should hesitate before reaching a contrary conclusion, particularly in the light of the senior district judge's wide experience of extradition cases. Similarly, his value judgment as to injustice must be treated with what Lord Morris of Borth–Y–Gest in *Union of India v Narang* [1978] AC 247 at 279 described, albeit in relation to the Divisional Court, as 'the very greatest respect'.

> 'No contrary opinion will lightly be formed. But if after due consideration a contrary opinion is in fact formed, those upon whom devolves the duty of considering the matter cannot in my view be absolved or inhibited from expressing their opinion. If they were, there would be little purpose in having an appeal.' (See [1978] AC 247 at 279.)
>
> There is ample authority demonstrating differing views as to justice and injustice in which either the district judge or the Divisional Court or the House of Lords has reached a contrary view. For the reasons we have given, we are satisfied that the senior district judge did make errors of law and of fact in his approach to an appraisal of the significance of the evidence as relied on as showing that extradition would be unjust by reason of the passage of time.

30. There is little or no difference between this approach and the approach taken in *Celinski*, supra, and *Love*, supra, and so in my judgment this is how para 63 of *Dewani*, supra, is to be read (where para 95 of *Tollman*, supra, was cited). As a result of statutory language governing appeals under the EA 2003, what an appellate court is concerned with is not a re-weighing of factors on the basis of which it can reach its own conclusion unconstrained by the district judge's decision, but with determining whether the district judge has erred in such a way which justifies the court in saying he or she should have answered the statutory question differently. To read para 63 of *Dewani*, supra, as saying that the appellate court can carry out an unconstrained *de novo* review would have the highly undesirable consequence of there being different appellate approaches to grounds of appeal in relation to different extradition bars.

31. The question of the standard of appellate review in relation to determinations by district judges of questions of proportionality under Article 8, and the statutory bars based on injustice and oppression or the interests of justice, can now be taken to be settled. The question for the appellate court in all cases is whether the judge's determination was wrong, in the sense explained in *Love*, supra, and *Celinski*, supra. This is how what I said in *Magiera*, supra, at para 31, is to be understood.

Grounds of appeal - discussion

(i) Section 25

32. At its heart, this case concerns the Appellant's physical and mental health, and I therefore propose to begin with s 25, and the argument that the judge should have held that it would be unjust and oppressive to return the Appellant to Italy because of his physical and mental health. Although ill-health can be relied upon in relation to other bars to extradition, s 25 is the *lex specialis* and so is the right starting point.

33. Section 25 provides:

> "25 Physical or mental condition

(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 in respect of whom the Part 1 warrant is issued 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."

34. The leading decision on s 25 is *Dewani*, supra. The appellant, Shrien Dewani, was accused of arranging for the murder of his wife whilst they were on honeymoon in South Africa. He resisted extradition on the grounds that he had become unfit to stand trial through mental illness. The district judge ruled against him and he appealed to the High Court. The High Court allowed his appeal and held that the district judge should have adjourned the extradition hearing pending Mr Dewani's recovery. At para 66 the Court said that s 25, and its equivalent in Part 2 cases, s 91, were provisions introduced into extradition procedure to give the court, as opposed to the Secretary of State, the duty to make the decision in cases of ill-health. In the proceedings relating to General Pinochet, the Secretary of State had had to make a decision on fitness to plead which had then been the subject of judicial review: *R v Secretary of State for the Home Department ex parte Kingdom of Belgium,* Unreported, 15 February 2000. It was considered an inappropriate procedure. The Court went on:

> "[67] The section uses the terms "unjust or oppressive" which were used in previous statutes. In *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 799, Lord Diplock, explained the terms in a well known passage in his speech at pp 782–783:"'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair."
>
> [68] In *Gomes v Trinidad and Tobago* [2009] 1 WLR 1038 the House of Lords reconsidered this in the context of section 82 of the 2003 Act. In considering the requirement of oppression, hardship was not enough.
>
> [69] It was contended on behalf of the appellant that different considerations applied to section 91. Section 25 gave effect to article 23(4) of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member states (2002/584/JHA) (OJ 2002 L190, p 1) which provides: "surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there

are substantial grounds for believing that it would manifestly endanger the requested person's life or health." In accordance with well established authority, section 25 should therefore be construed to give effect to the provisions of article 23(4). Section 91 could not bear a different meaning and thus should be construed in the same way. Adopting this approach, the court should, it was submitted, consider the terms "unjust or oppressive" in the context of the Framework Decision's requirement of serious humanitarian reasons, such as endangering the person's health.

[70] It was also submitted on behalf of the appellant that, as section 91 was a freestanding provision in addition to the provisions of section 87 barring extradition if a breach of the appellant's Convention rights, the section ought to be construed independently. In particular, it was not appropriate to carry out the balancing exercise required by *R (Wellington) v Secretary of State for the Home Department* [2009] AC 335. It was a temporary bar, lasting only as long as the condition persisted.

[71] The Government of South Africa submitted that the court should keep its eye firmly on the test set out in section 91 and that it was necessary to take into account all the relevant surrounding circumstances.

[72] We were referred to a number of decisions of this court on section 91 and section 25 including *Bhoudiba v Central Examining Court No 5 of the National Court of Justice, Madrid* [2007] 1 WLR 124, *Prancs v Latvia* [2006] Extradition LR 234, *Government of Croatia v Spanovic* [2007] Extradition LR 255, *Government of the United States of America v Tollman* [2003] 3 All ER 150, *R (Ahsan) v Government of the United States of America* [2008] Extradition LR 207, *Rot v District Court of Lublin, Poland* [2010] EWHC 1820 (Admin), *Wrobel v Poland* [2011] EWHC 374 (Admin), *R (Griffin) v City of Westminster Magistrates' Court* [2012] 1 WLR 270 and *Mazurkiewicz v Poland* [2011] EWHC 659 (Admin). We were referred to the decision of the High Court of Justiciary in *HM Advocate v Henderson* 2008 SLT 1077. We were also referred to the decision of the High Court of the Republic of Ireland in *Minister of Justice and Equality v L* [2011] IEHC 248 where the provisions of the European Arrest Warrant Act 2003 more closely mirrors article 23(4) of the Framework Decision.

[73] In our view, the words in section 91 and section 25 set out the relevant test and little help is gained by reference to the facts of other cases. We would add it is not likely to be helpful to refer a court to observations that the threshold is high or that the graver the charge the higher the bar, as this inevitably risks taking the eye of the parties and the court off the statutory test by drawing the court into the consideration of the facts of the 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 those is sufficient. It is not necessary to enumerate these circumstances, as they will inevitably vary from case to case as the decisions listed at para 72 demonstrate. We would observe that the citation of decisions which do no more than restate the test under section 91 or apply the test to facts is strongly to be discouraged. There is a real danger that the courts are falling into a similar error as courts fell into in relation to section 23 of the Criminal Appeal Act 1968 and as described by Lord Judge CJ in *R v Erskine* [2010] 1 WLR 183.
>
> [74] The only issue that could arise is whether the words "unjust or oppressive" are to be read in the sense used in cases such as *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 799 or to be read in the context of article 23(4). We agree with the observations of Maurice Kay LJ in *Prancs v Latvia* [2006] EWHC 2573 (Admin) at [10] that the words are plainly derived from *Kakis* . The parliamentary history of the Extradition Bill suggests that the provision was introduced into what is Part 2 for the reasons we have given at para 67 and then the Bill was amended to add the provision to Part 1. Although that may not assist in determining whether section 25 (and hence section 91) is to be read as reflective of article 23(4), the use of the term "unjust or oppressive" plainly indicates that Parliament intended its own test."

35. The sort of observations which the court was referring to in para 73 are exemplified by the *dicta* in *Mikolajczyk v Wroclaw District Court* [2010] EWHC 3503 (Admin), para 16 ('The threshold for showing that it would be oppressive to extradite someone on account of their physical condition is necessarily a high one.') and *Kolanowski v Circuit Court in Zielona Gora* [2009] EWHC 1509 (Admin), para 9 ('I accept that the seriousness of the offence is to be taken into consideration …'.). However, despite what was said in para 73, similar observations continue to be made: see eg, *Olga C v. The Prosecutor General's Office of the Republic of Latvia* [2016] EWHC 2211 (Admin), para 30 ('Oppression is different from hardship and imports a high threshold').
36. The case of Shrien Dewani returned to the High Court in 2014 following a second extradition hearing before the district judge in 2013. In *Government of the Republic of South Africa v Dewani (No 2)* [2014] EWHC 153 (Admin), the Court gave further guidance on s 91 (and thus s 25):

> "[50] We therefore accept, as was submitted by Miss Montgomery QC, that the breadth of the factors to be considered under s 91 include looking at the question of whether it was unjust or oppressive to extradite the person at the time the request was being considered as well as looking forward to what might happen in the proceedings in South Africa if he was extradited. We must take into account all such matters, including the consequences to the requested person's state of health and age. We accept that this entails a court taking into account the question as to whether ordering extradition would make the person's condition worse and whether there are sufficient safeguards in place in the requesting

> state (as the Privy Council held was necessary in *Knowles v Government of the USA* [2006] UKPC 38, [2007] 1 WLR 47 at para 31, 69 WIR 1).
>
> [51] We do not, however, accept that there are any hard and fast rules; that would be inconsistent with the position that each case must be specifically examined by reference to its facts and circumstances. The only situation in which a court would most probably say it would be oppressive and unjust to return him is where it is clear that he would be found by the court in the requesting state to be unfit to plead. That follows from the decisions to which we have referred at para 19. However, such a case would, as Mr Keith QC accepted, be in many respects analogous to a case where a UK court concludes it is inevitable that a court in the requesting state will conclude that a fair trial is not possible. In such a case it would be unjust and oppressive to return that person: see *Woodcock v Government of New Zealand* [2003] EWHC 2668 (Admin), [2004] 1 All ER 678, [2004] 1 WLR 1979 at para 20; *Knowles* at para 31 and *Gomes v Government of Trinidad and Tobago* [2009] UKHL 21, [2009] 3 All ER 549, [2009] 1 WLR 1038 at paras 31-36."

37. In *Magiera v District Court of Krakow, Poland* [2017] EWHC 2757 (Admin) I ventured to make some observations on the operation of s 25. I said at para 34 that the starting point was the rebuttable presumption that there will be medical facilities available of a type to be expected in a prison available to the defendant: *Kowalski v. Regional Court in Bielsko-Biala, Poland* [2017] EWHC 1044, para 20. I also said that despite this starting point, where the defendant relies on s 25, then the more complex the medical picture, the more which may be required by way of evidence from the requesting state as to what treatment or facilities are available. I emphasise the words 'may be required'. I was not intending to lay down any hard and fast rule. As the Court said in *Dewani (No 2)*, supra, at para 51, there is no scope for hard and fast rules in relation to the operation of ss 25 and 91 (save for the specific example it gave of a defendant who is unfit to stand trial). My observations were made in the context of a defendant whose medical condition raised in an acute fashion specific medical and personal care issues which had not been dealt with at all in the rather general evidence from Poland, leading to my conclusion that it would be oppressive to extradite him because of his medical condition.
38. Turning to the facts of the present case, the question for me is whether the decision of the district judge that it would not be unjust or oppressive to extradite the Appellant on the grounds of his physical and mental health was wrong in the sense I have explained. It is necessary, therefore, to consider carefully the reasoning of the district judge.
39. The judge dealt with s 25 after he had dealt with the other grounds of appeal. He said that the Appellant accepted, by reference to cases such as *Wolkowicz v Regional Court at Bialystock, Poland* [2013] 1 WLR 2402, that he could not prevail in an argument in respect of a risk of suicide pursuant to s 25. However, the judge then set out the principles which he derived from *Wolkowicz*, supra, including that the mental condition of the person must be such that it removes his capacity to resist the impulse to commit suicide. The judge then went on to quote para 10 of the judgment of Sir John Thomas P. The judge then said:

> "The reports provide the opinion that the requested person suffers from a panic disorder but it is apparent that his condition is not such as would require compulsory admission to hospital for assessment or treatment. In fact the opinion provided is that he is able to receive an appropriate level of care in the community.
>
> The test for extradition to be unjust or oppressive is high, the risk of suicide is just that, a risk and perhaps an increasing and enhanced risk, but he has never expressed a wish to suicide and self-harm. Save for his panic disorder his other conditions are either in remission or controlled by medical review and medication. I do not find that it would be unjust or oppressive to order his extradition."

40. The following evidence from the report of Dr Nabavi is relevant:

> "9.4 According to his medical (GP) records, Mr Surico has suffered from the following medical conditions: Renal (kidney) impairment, hypertension, hypercalcaemia, Barrett's oesophagus (May 2006), diabetes mellitus (August 2008), malignant neoplasm spinal cord (September 2008), multiple myeloma (November 2009), and hiatus hernia (April 2000).
>
> 9.5 According to his medical records, his current prescribed medication for his medical conditions includes: tramadol, domperidone, metformin, pravastatin, folic acid, hydroxyzine and lazoprazole.
>
> …
>
> 10.2 His behaviour was appropriate. Due to his physical conditions, he lied on his bed during interview (*sic*).
>
> …
>
> 10.4 Mr Surico did not embellish his symptomatology. For example, he was well able to discuss the contribution of his current Court hearings and its psychological effects to his overall wellbeing and functioning in a balanced manner.
>
> …
>
> 10.10 Mr Surico reported feeling anxious at times. He reported experiencing panic attacks, which usually last less than 20 minutes 2-3 times per week. He told me that during his panic attacks, he experiences severe agitated sweating, palpitation, light headedness, as well as having a fear of losing control or dying.
>
> …
>
> 11.4 Mr Surico did not show evidence of any formal thought disorders or other psychotic symptoms, including delusional beliefs. He had normal thought processing.

…

11.7 Mr Surico did not have any deliberate self-harm nor suicidal intentions at the present time. He had no thoughts of harming others.

…

11.12 On the depression sub-scale [of the Hospital Anxiety and Depressive Scale] Mr Surico scored 8 out of 21; and on the anxiety sub-scale he scored 14 out of 21, indicating clinically significant symptoms in both domains.

…

12.2 I have considered the diagnosis of mental disorder in accordance with the ICD-10 Classification of Mental and Behavioural Disorders, Clinical Description and Diagnostic Guidelines, World Health Organisation, Geneva, 1992, I believe Mr Surico suffers from the diagnosis related to mental disorder, which is to follow (*sic*):

Diagnosis

ICD-10 41.0 Panic Disorder

12.3 In my opinion Mr Surico, in all probability, satisfies the criteria for the diagnosis of a panic disorder (ICD-10, F41.0) as per the International Classification of Mental and Behavioural Disorders. Panic disorder is also classified as one of the anxiety disorders (300.01) in the 2013 edition of the American Psychiatric Association's diagnostic manual (DSM-5).

12.4 In my opinion, on the balance of probabilities, it is likely that he has been suffering from this disorder after experiencing a marked deterioration in his physical conditions, including developing multiple myeloma over the past few years. However, in the presence of his complex physical conditions, it is likely to have made it difficult for professionals to recognise and diagnose this disorder.

…

12.6 In my opinion, Mr Surico currently fulfils the diagnostic criteria for 'panic disorder'. He reported a noticeable deterioration in the severity and frequency of his panic attacks since October last year, when he was arrested in relation to his current extradition to Italy.

…

12.8 Panic disorder can be categorised according to their severity as mild, moderate or severe. In my opinion, Mr Surico has

fluctuated between a 'moderate' and 'severe' in severity, although being predominantly 'moderate' on the basis of the degree of his functional incapacity, which is evident from his current day-to-day activities.

12.9 Panic disorder would be so debilitating as too often require pharmacological and psychological treatment (*sic*). However, in Mr Surico's case, due to his strong family support and normal premorbid personality, his clinical symptoms of panic disorder has been managed on no regular psychotropic medication over the past few years.

…

…

12.41 Henceforth, on the balance of probabilities, the prognosis of his psychiatric injuries is highly likely to remain poor, due to the severity and chronicity of his multiple physical conditions, including his cancer (multiple myeloma), kidney failure, diabetes mellitus and its complications, which I understand to be almost permanent.

12.42 In addition, the current ongoing extradition proceeding by itself is a stressor factor. In my opinion, on the balance of probabilities, the litigation will continue to adversely affect Mr Surico's mental health.

12.43 In my opinion in view of his psychiatric condition, on the balance of probabilities, Mr Surico will continue remaining vulnerable and at a higher risk of experiencing further deterioration in his mental health in the future. On the balance of probabilities, it is likely that any future organic or psychosocial adversities suffered by Mr Surico or his close family, however minor, would trigger further deterioration in his psychiatric condition.

…

12.59 Although I am not aware of prison system, their facilities and services in Italy, I believe that, on the balance of probabilities, it would be extremely challenging for any prison services to meet Mr Surico's high complexity of physical and mental care required at the present time.

12.60 In addition, due to the sexual nature of his convictions, it is likely that Mr Surico to be subjected to a significant level of abuse and harassment by inmates and prison officers, alike (*sic*).

12.61 It should also be noted that Mr Surico suffers from a longstanding psychological injuries, including panic disorder. He presents as a psychologically extremely vulnerable individual, who is likely to suffer from a further deterioration within the prison

> setting. He also is at greater risk of experiencing complications of his mental health, such as amotivation and anhedonia, which would increase the risk of deliberate self-harm and suicide.
>
> 12.62 In summary, in my opinion, on the balance of probabilities, I believe that Mr Surico is an extremely vulnerable individual, who without his family's support, including his children, he will not be able to fulfil his basic day-to-day needs independently. Considering his poor physical and mental conditions, I believe that, in the case of his extradition to Italy and imprisonment, it is highly likely that Mr Surico would experience marked deterioration in his mental health and engage in serious acts of suicide."

41. The judge summarised the evidence given by Dr Nabavi and it is clear he accepted the doctor's evidence more or less in its entirety.
42. I consider that there is some force in Ms Brown's criticism that the district judge was wrong to focus on the risk of suicide to the extent that he did – it having been accepted that this was not a 'suicide case' – instead of considering the Appellant's primary case that his extradition and incarceration in Italy would cause his physical and mental health to decline and that this, combined with the absence of the strong support network from his family, would result in oppression, with the consequence that extradition is barred by s 25 of the EA 2003. A risk of suicide in the requesting state is just one way in which s 25 may be engaged so as to bar extradition. But it is not necessary to establish a risk of suicide before s 25 comes into play. If the evidence discloses that extradition may result in a deterioration in a person's mental health so that they will become seriously unwell if they are extradited then that might serve to establish the necessary oppression for the purposes of s 25.
43. However, as I have explained, the question for me is not merely whether I can identify some error in the judge's reasoning, so that I then take the decision myself, but whether the judge's decision that it would not be unjust or oppressive to order extradition by reason of the Appellant's physical or mental health was wrong.
44. I have considered the material that was before the district judge carefully, and I have come to the conclusion that it cannot be said that the district judge's decision was wrong.
45. So far as the Appellant's physical conditions are concerned, these are either currently controlled, or else it can be presumed that Italy will be able to provide appropriate treatment for them. The evidence before the district judge established several physical conditions on the part of the Appellant, that is, light chain myeloma; type 2 diabetes; hypertension; renal impairment; and lower back pain. However, the evidence was that these are currently managed by monitoring and medication, and there is nothing to suggest that such monitoring and medication will not be available to the Applicant in prison in Italy.
46. In relation to the Appellant's mental state, as I have said, the judge accepted the evidence of Dr Nabavi that the Appellant suffers from a panic disorder. However, the evidence was that this had not required treatment in the past, and indeed the condition was not so serious as to even have caused the Appellant to raise it with his GP. As I read Dr Nabavi's evidence, his opinion was that this condition can be treated with medication, but this has not been necessary in the Appellant's case because of the support of his family (see para 12.9 of his report, set out above). I have to assume, consistently with the principles that I have set out, that in the event that the Appellant is extradited to Italy, and his condition deteriorates because of the absence of family

support, that there would be medical treatment and the necessary prescribed medication available for the Appellant in Italy to rectify the situation. His condition is a well-recognised and well-understood one.

47. Therefore, whilst I accept, as the judge accepted, that there is a risk of a deterioration in the Appellant's mental condition if he were to be extradited to Italy, in my judgment the district judge was not wrong in his conclusion that the threshold of oppression was not reached on the basis that his medical conditions could be managed within the Italian prison estate. Although Dr Nabavi expressed doubt as to whether the Appellant's conditions could be managed in prison, he also said that he was not an expert on the Italian prison system. To that extent, therefore, the judge was correct not to place any weight on this expression of opinion, which went outside the doctor's area of expertise.

48. I therefore reject this ground of appeal.

(ii) Section 14

49. Ms Brown submits that the judge should have held that it would be oppressive to extradite the Appellant by reason of the passage of time. In other words, she submits that the judge should have held that extradition was barred by s 14 of the EA 2003.

50. Section 14 provides:

> "A person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time [since he is alleged to have—
>
> (a) committed the extradition offence (where he is accused of its commission), or
>
> (b) become unlawfully at large (where he is alleged to have been convicted of it)]."

51. The term 'unjust' is directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, whereas 'oppressive' is directed at hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration: *Kakis,* supra, pp782-783. In *Gomes and Goodyer v. Government of Trinidad and Tobago* [2009] 1 WLR 1038, para 31, the House of Lords said the test of oppression will not readily be satisfied and that mere hardship, a commonplace consequence of an order for extradition, will not suffice.

52. A refusal to return the defendant must be based on injustice or oppression caused by the passage of time as it operated in the circumstances of the particular case to give to that particular passage of time a quality or significance which leads to the conclusion that return would be unjust or oppressive: *Kakis,* supra, p785. In other words, delay must have operated as the 'cradle of events' giving rise to injustice or oppression in order for s 14 to be engaged: *Kakis*, supra, p790. A sense of false security engendered in the defendant is also a relevant consideration. If the actions of the government have led him to believe that he will not be extradited then it may be oppressive if the government then proceeds to try to do so: *Kakis*, supra, p790.

53. It follows from s 14(b) that the period in question in this case is the period from 3 January 2012 (the date when, according to Further Information, the order for the Appellant's incarceration in Italy was made and he thus became unlawfully at large) until today.

54. Ms Brown criticises the judge's conclusion that the Italian authorities only became aware of the Appellant's exact address in England in April 2016. She submits that they must have known earlier than that, and there was culpable delay by the Italian authorities from January 2012 until October 2016 when the EAW was issued.

55. The question for me is whether the judge's decision that extradition was not barred by s 14 was wrong. Because this is a conviction case, only the oppression limb of s 14 is potentially applicable.

56. There is no scope in this case for the Appellant to argue that he had a false sense of security brought about by the actions of the Italian authorities. The evidence before the district judge was that the Appellant was aware at all times of the ongoing nature of the proceedings, and that he had known from January 2012 he was liable to serve a sentence of imprisonment, and so did not thereafter travel to Italy (as he had previously) because of the prison sentence.

57. Nor is there anything in the Appellant's medical history capable of supporting the conclusion that his health has deteriorated in the period from January 2012 until today so as lead to the conclusion that it would be oppressive to extradite him. The judge reviewed his medical history, and identified that the only condition which has developed since 2012 is his renal problems, which are now controlled with medication.

58. I therefore reject this ground of appeal.

(iii) Article 8

59. The Appellant submits that the judge was wrong to conclude that it would not be disproportionate to extradite him and therefore that extradition was compatible with the Appellant's right to a private and family life under Article 8(1) of the Convention

60. In assessing whether extradition would be a disproportionate interference with a defendant's rights under Article 8, the effect of the decisions of the Supreme Court in *Norris*¸ supra, and *HH*, supra, and *Celinski,* supra, is that the issue is whether the interference with Article 8 is outweighed by the public interest in extradition. It is likely that the public interest in extradition will outweigh the Article 8 rights of the requested person (and any relevant member of his family where that factor is relied upon) unless it would result in an exceptionally severe interference with family life. That public interest always carries great weight, though the weight to be attached to it in a particular case will vary according to the nature and seriousness of the crimes of which the requested person has been convicted or stands accused. As was made clear in *HH*, supra, delay since the relevant crimes were committed may both diminish the weight to be attached to that public interest and increase the impact of extradition upon family life: *Magiera*, supra, para 27.

61. The judge dealt with Article 8 in his judgment as follows. Having cited *Celinski*, supra, the judge said:

"In this respect I have to consider the following matters in favour of not extraditing the requested person:

- His life in the UK and the assistance he receives from his extended family
- His age and infirmity together with the medical issues confronting him.
- The time which has passed since the commission of the offences.

I have to consider the factors in favour of extradition

- The treaty obligations of the UK and the high public interest in ensuring such obligations are honoured.
- The seriousness of the offences and the role of the requested person in the conduct alleged.
- The length of the sentence to serve, recognising that the conduct is likely to be an offence of sexual activity with a child and in England and Wales the conduct would likely merit a starting point of 3 years' imprisonment.
- 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 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.
- The determination of the judge in Italy that he should be returned to serve his sentence.
- That he has known of this likely outcome since trial and has taken no step to deal with this issue.

There are perhaps 3 major issues to consider:

- His age and infirmity and ability to cope in prison.
- His health, including the potential for deterioration if extradited
- The time which the case has taken leading to the EAW."

62. Having then reviewed the medical evidence, which I have dealt with earlier in this judgment, the judge concluded that the there was a high public interest in ordering extradition having regard to the seriousness of the offending, and that this outweighed the impact upon the Appellant of ordering extradition. Consequently, he held that extradition would not be incompatible with Article 8 of the Convention.

63. In my judgment the district judge identified and took into account all of the relevant factors and reached a decision which was open to him on the evidence that he heard. He considered all the evidence and carried out the balancing exercise required by *Celinski*, supra. He had due regard for the Appellant's health conditions and expressly acknowledged that he is not a well man, and that extradition would have some adverse impact upon him. Nonetheless, the Appellant has been convicted after a trial in which he took part of serious sexual offences against a child who was, according to the EAW, in his care, and the judge concluded that this and the other factors weighing in favour of

extradition outweighed the impact upon the Appellant that extradition would have. I am unable to say that the conclusion which the judge reached was wrong.

64. I therefore reject this ground of appeal.

Conclusion

65. I agree with Sir Wyn Williams, who commented in his permission decision that this was a 'very difficult' case at first instance. Nonetheless, for the reasons that I have given, the appeal must be dismissed. However, I echo what the district judge said at the end of his judgment, namely that the Appellant's medical notes should if possible be translated and travel with the Appellant to Italy so that his health care needs can be assessed by the Italian authorities straight away. His return to Italy should be arranged so as to accommodate this process.