Neutral Citation Number: [2020] EWHC 3143 (Admin)

Case No: CO/4209/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

20th November 2020

Before :

MR JUSTICE FORDHAM

- -

Between :

ABD ALHALEEM FAROOKH	**Appellant**
- and -	
JUDGE OF THE SAARBRUCKEN REGIONAL COURT (GERMANY)	**Respondent**

- -
- -

Louisa Collins (instructed by MW Solicitors) for the Appellant
Jonathan Swain (instructed by the Crown Prosecution Service) for the Respondent

----

Hearing date: 10th November 2020

- -

FINAL JUDGMENT

Covid-19 Protocol: This Judgement was handed down by circulation to the parties' representatives by email and release to Bailii. The date and time for hand- down will be deemed to be 10:00 am on 20/11/2020. A copy of the judgement in final form as handed down can be made available after that time, on request by email to the administrativecourtoffice.listoffice@hmcts.x.gsi.gov.uk

MR JUSTICE FORDHAM :

Introduction

1. The Appellant is aged 21 and is wanted for extradition to Germany. That is pursuant to an accusation European Arrest Warrant (EAW2) issued on 4 June 2019 whose substantive content was materially identical to the one (EAW1) issued on 25 October 2018 by a senior prosecutor in Germany who had been shown to have failed the test of 'judicial authority'. The alleged offences to which EAW2 relates took place between June and October 2017 in Germany when the Appellant was aged 18. They are: two robberies with violence; threats to kill; assault; stabbing; assault occasioning actual bodily harm involving a knife. DJ Fanning originally ordered the Appellant's extradition on 28 February 2019, after an oral hearing on 20 February 2019, at which Article 8 ECHR had been raised. After an assessment on 25 March 2019 an expert report (Anderson 1) was written on 3 April 2019 by Dr Arthur J Anderson, a Consultant Clinical Psychologist. EAW2 was issued and the old one withdrawn and the case returned to DJ Fanning. At a second oral hearing on 16 September 2019 Dr Anderson and the Appellant gave evidence and were cross-examined. Article 8 ECHR was again relied on, as was section 25 of the Extradition Act 2003 (whether the Appellant's mental condition was such that it would be unjust or oppressive to extradite him). DJ Fanning ordered extradition on 21 October 2019. The Appellant had been arrested on 4 February 2019 and has been remanded ever since (now 21½ months). On 8 April 2020 Dr Anderson wrote an updated report (Anderson 2). On 6 July 2020 Holman J granted permission to appeal and permission to rely on Anderson 2 as fresh evidence.

Mode of Hearing

2. This was a remote hearing by BT Conference Call. Ms Collins and Mr Swain were satisfied, as was I, that this mode of hearing involved no prejudice to their clients' interests. By having a remote hearing we eliminated any risk to any person from having to travel to or be present in a courtroom. The open justice principle was secured. To observe this hearing all that was needed was to send an email and make a phone call: the case and its start time were published in the cause list, together with my clerk's email address, usable by anyone who wanted to observe the hearing. I am satisfied that the mode of hearing was necessary, appropriate and proportionate.

Mental Health

3. This Court can only allow the appeal if it considers that the District Judge was 'wrong'. However, where fresh evidence is relied on, the Court can - where satisfied that it is appropriate to do so - make its own evaluation of the evidence in considering whether it would be section 25 'unjust or oppressive' (or Article 8 disproportionate) to extradite the Appellant by reason of his mental health and thus whether the District Judge should have decided that question differently: see Cash v Court of First Instance, Strasbourg, France [2018] EWHC 579 (Admin) at paragraph 13. In a case based on mental health the section 25 and Article 8 issues are closely linked: see Debiec v District Court of Piotrkow Trybunalski, Poland [2017] EWHC 2653 (Admin) at paragraph 44.

Suicide Risk: The Turner Propositions

4. At the heart of this case is the question whether to return the Appellant to Germany would be oppressive (section 25) or disproportionate (Article 8) because of the risk of suicide. I can focus at this stage on the approach under section 25. In Polish Judicial Authority v Wolkowicz [2013] EWHC 102 (Admin) at paragraph 7 the Divisional Court listed some of the cases relating to suicide risk. At paragraph 8 the Court repeated the seven propositions set out by Aikens LJ in Turner v Government of the USA [2012] EWHC 2426 (Admin) at paragraph 28. It was common ground that those seven propositions stand as authoritative guidance for the purposes of this appeal. They are:

> Proposition (1) The Court has to form an overall judgment on the facts of the particular case.
>
> Proposition (2) A high threshold has to be reached in order to satisfy the court that a requested person's physical or mental condition is such that it would be unjust or oppressive to extradite him.
>
> Proposition (3). The Court must assess the mental condition of the person threatened with 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.
>
> Proposition (4). The mental condition of the person must be such that it removed 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.
>
> Proposition (5). [The Court asks:] 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?
>
> Proposition (6). [The Court asks:] 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 the risk of suicide?
>
> Proposition (7). There is a public interest in giving effect to treaty obligations and this is an important factor to have in mind.

The Requesting State 'Discharging its Responsibilities'

5. As the Divisional Court explained at paragraph 10(iii) of Wolkowicz: "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… 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."

The Court went on: "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".

'Discharging Responsibilities' and 'Whatever Steps are Taken'

6. I asked both Counsel what the relationship is, in principle, between Turner Propositions (3) and (5) – which speak of the risk of the requested person succeeding in committing suicide "whatever steps are taken" – and Turner Proposition (6) read with the idea of 'discharging its responsibilities' in Wolkowicz paragraph 10(iii). I was particularly concerned to understand whether Proposition (6) and the 'discharge of responsibilities' were to be regarded, in law, as providing an answer to "the question" in Proposition (3). The question, as it seemed to me, resolved into this. In principle, would it be a complete answer if the receiving state could be relied on to 'discharge its responsibilities' and thus to do all that could reasonably be expected of it? Or could extradition be characterised as oppressive on grounds of risk of suicide because, notwithstanding that 'discharge of those responsibilities', the risk of the requested person succeeding in committing suicide nevertheless remains sufficiently great on the evidence? In short, 'discharge their responsibilities' does not necessarily entail 'and thereby saving the requested person's life'. Or, to be precise: 'discharge their responsibilities' does not necessarily entail 'and thereby sufficiently reducing the risk of the requested person committing suicide'. Is 'discharge their responsibilities' enough?

7. Ultimately, the answer to this important question was common ground between the parties before me. It was common ground that the 'discharge of responsibilities' did not stand as a complete answer, and that the question in Proposition (3) is to be approached as the ultimate determinative question – when Proposition (3) is read with propositions (5) and (6) – is as follows (the encapsulation is mine):

> The question is whether, on the evidence, whatever steps are taken – and even if the Court is satisfied that appropriate arrangements are in place in the prison system of the country to which extradition is sought so that those authorities will discharge their responsibilities to prevent the requested person committing suicide – the risk of the requested person succeeding in committing suicide, by reason of a mental condition removing the capacity to resist the impulse to commit suicide, is sufficiently great to result in a finding of oppression.

As it seems to me, this composite approach makes best sense of the phrase "whatever steps are taken" in Turner propositions (3) and (5). It is a mistake to treat the Turner Propositions as being a sequential flowchart – like a 'route to verdict' – such that Proposition (6) provides an answer notwithstanding that the "question" described in Proposition (3) has previously been answered 'yes'. Putting the same point another way, the phrase "so that those authorities can cope properly with" in Proposition (6) would need to entail "steps" being "taken" which will reduce the risk so that it is no longer "sufficiently great to result in a finding of oppression" for the purposes of Proposition (3) and (5).

8. In the event, Counsel were agreed that the question which I had raised is to be regarded as authoritatively resolved by Jansons v Latvia [2009] EWHC 1845 (Admin), a case specifically cited in Turner at paragraph 28 in support of Proposition (3). This being a

remote hearing, Counsel and I were all able readily to access the judgment online during the hearing. In Jansons Sir Anthony May (the then President of the Queen's Bench Division) said this (paragraph 23): "on the material available to this Court … The prison arrangements in Latvia are such that all proper steps would be taken to treat [the appellant]'s illness and to prevent his suicide". He continued (paragraph 26): "The court must accept… That there are appropriate arrangements in place in the prison system in Latvia and that… [the appellant] cannot establish that the Latvian authorities will not properly cope with his mental condition and properly cope with the risk of suicide". He concluded (paragraph 29): "It would, in my judgment, be oppressive to order [the appellant]'s return when there is … such a substantial risk that he will commit suicide … In reaching the conclusion that it would be oppressive to return him, this is not a reflection on the ability of the Latvian prison authority to protect him and provide the necessary treatment. But an assessment, so far as the evidence enables one to do so, that the risk that he will succeed in committing suicide, whatever steps are taken, is on the evidence, sufficiently great to result in a finding of oppression".

9. Both Counsel accepted, as do I, these passages explain the phrase "whatever steps are taken" in propositions (3) and (5) from Turner, and the interrelationship between those propositions and Proposition (6). It comes to this. There is a distinction between (i) discharging a duty and (ii) actually sufficiently reducing the risk of death. Ultimately, the focus is on the outcome so far as risk is concerned. It may not be a sufficient answer that the authorities within the custodial and health systems of the requesting state would do their duty in seeking to save the requested person's life. This means there is a point of principle and an important distinction in applying the law correctly. I will return below to the question of the nature of the evidence in Jansons.

Stages I-III

10. In Wolkowicz at paragraph 10 the Divisional Court explained, accepting as correct submissions made by Counsel, that it was helpful in an extradition case to assess suicide risk, and measures to protect against it, in relation to three stages: (i) Stage I was the position while the requested person is being held in custody in the United Kingdom; (ii) Stage II was the position when the requested person was "being transferred to the requesting state" and the arrangements to prevent suicide "during the transfer"; (iii) Stage III was the position after the requested person has been received by the requesting state in the custodial institution in which he is to be held. In this case, Ms Collins on behalf of the Appellant focused on three key features of the case. She submitted that these, either individually or cumulatively, supported the "overall judgment" that the "high threshold" had been reached that extradition would be oppressive. Two of Ms Collins' three key features related to Stage III. One of them related to Stage II. I will deal with them in turn.

The District Judge's Overall Conclusion

11. The District Judge reached this ultimate conclusion: "Forming an overall judgment on the facts of this particular case, noting the high threshold that has to be reached in order to be satisfied that [the Appellant]'s mental condition is such that it would be unjust or oppressive to extradite him, and it appearing to me that I can rely on the presumption that Germany will afford him the proper medical care it assesses him to require, I cannot conclude that it would be unjust or oppressive to order his extradition".

Stage II: Transfer and 'Snowing'

12. Ms Collins' Stage II point was this. In Anderson 1, Dr Anderson had answered the question "can [the suicide] risk be managed during [the Appellant's] removal to Germany?" The answer was this: "in the short-term yes it can. However in the long-term the levels of medication needed to treat his severe symptoms will interfere with psychotherapy and his expectations for the future". The District Judge recorded this point, by reference to Anderson 1, stating: "In the short-term the risk can be managed". At the hearing before the District Judge Dr Anderson was asked questions on this topic. The District Judge recorded Dr Anderson's evidence in this way: "In the short term, [the Appellant] is effectively being sedated. The trauma of the physical act of extradition (the transfer from a UK prison to a German one) could, in Dr Anderson's view, be managed by increasing the dose of the sedative. But [the Appellant] will acclimate to the new dose within a short period – 30 days. Dr Anderson was very clear that medication to cope with the transfer to Germany would amount to no more than tranquilizing [the Appellant]. In the long term, therapy is required. He commented that common to both British and German remand prisons is a focus on medication and not therapy". In his ultimate reasons, the District Judge said this: "his medication will control his symptoms during the process of extradition. Dr Anderson says that". Ms Collins and Mr Swain both appeared at the hearing before the District Judge. Ms Collins explained (in her skeleton argument) that the oral evidence of Dr Anderson had described "snowing" the Appellant with medication for the purposes of the transfer, using "massive doses" of medication. Mr Swain accepted that: his note said "maximum doses". Ms Collins submitted that the reference to 'acclimate' was a description of the Appellant becoming (as the phrase had been used elsewhere in the District Judge's judgment) "acclimated to this level of benzodiazepines". Ms Collins submits that on the evidence, albeit that the use of medication for Stage II transfer would effectively protect the Appellant's life, it would in doing so involve an experience and long-term implications properly to be characterised as "brutal" and "oppressive". She submits that the District Judge 'downplayed' this aspect of the case which led to an analysis which was 'wrong'. I cannot accept those submissions. I am quite satisfied that both Dr Anderson and the District Judge dealt properly and fairly with the Stage II implications for the Appellant of protecting him effectively against the suicide risk. In my judgment, this aspect of the case falls far short of the threshold of oppression; nor is it capable of materially affecting the overall assessment of oppression. This is a case, in my judgment, in which "the question" is the one which was identified in Turner Proposition (3) by reference to Jansons. This case stands or falls with how that "question" is answered.

Stage III: Long Term Incarceration and Treatment

13. Ms Collins relied, in relation to stage III, on the observation in Anderson 1 that: "long-term incarceration in Germany would be a disaster from a treatment standpoint". Anderson 1 explained the basis for that observation, continuing as follows: "Germany represents a place where [the Appellant] experienced high degrees of PTSD symptoms that he self medicated for with alcohol and drugs. His constant reminders of previous actions and fears will cause him to ruminate over what has happened to him in the past and undermine psychotherapy. This decreases his long-term prognosis". The District Judge set out this part of Anderson 1 in full. Ms Collins submits that the long-term implications from a treatment standpoint of incarceration in Germany are such as to

render extradition oppressive or materially to contribute to an overall evaluation to that effect. I cannot accept those submissions. As with the intrusive nature of the medications which would protect his life during stage II transfer, so with the implications for therapy of being incarcerated in a German prison, this in my judgment is quite incapable of giving rise or materially contributing to a finding that extradition would be oppressive. I repeat: this is a case in which "the question" is the one which was identified in Turner Proposition (3) by reference to Jansons.

The District Judge's 'Catch 22' Point

14. Before I turn to "the question" there is one further matter with which it is appropriate to deal. Ms Collins submitted that the District Judge was wrong, and became distracted from the issues, in addressing what he described as the "Catch-22". The District Judge said this: "I do not see that [the Appellant] will have access to therapy in the UK. No one has told me that he will. It will be a matter of choice for him… If he is convicted in Germany, he may well receive the therapy Dr Anderson insists he needs. If I discharge him he won't. If he is acquitted in Germany he won't." The District Judge explained that he had in mind "Dr Anderson's evidence about drug and alcohol abuse… His view is that [the Appellant] will revert to such abuse unless he is given appropriate medication… I question the likelihood of that is fears discharged in these proceedings or acquitted in Germany". I do not accept that these passages constituted a material error of approach or a distortion or distraction in the District Judge's ultimate analysis. The District Judge went on squarely to address the issue of suicide risk. He went on to articulate the "overall judgment" which I have set out as his overall conclusion. He did not rest his conclusion on a comparison between (a) the Appellant being discharged and returning to a life of drugs and alcohol in which he did not access the therapy he needs and (b) the Appellant having a better chance of treatment within the German penal system if convicted. Rather, he rested his conclusion on a judgment based on what he assessed would happen in Germany so far as suicide risk and action by the German prison and medical service was concerned. I shall turn to consider how the Judge discussed that topic as I deal with "the question" on which this case must turn.

Stage III: Suicide Risk

15. In approaching the issue of risk of suicide it is right to recognise the human experience which Dr Anderson considered accounted for it. It was addressed in Anderson 1. It was based on the Appellant's own experiences in Syria, his country of origin. It was recorded by the District Judge from the Appellant's evidence in chief. Here is how Dr Anderson described it in Anderson 1: "From the background information, [the Appellant] is a Syrian refugee… [The Appellant] reports that when he was 14, he witnessed his father being brutally murdered in front of him. They were travelling in [their] car to the capital, Drah. Along the road they were stopped by rebels. They dragged his father out of the car and started beating him. They laid his father down on the floor and shot him in the head. They then started beating [the Appellant]; they punched him in the face … [The Appellant] reported that after the attack, the rebels drove off in [his] father's car and left him on the side of the road with his father. He was by his father's side for two hours until a car that was passing by stopped to help them. They helped take his father to hospital but it was too late, his father had passed away. [The Appellant] stated that he left Syria when he was around 15/16 years old. He believed he had to leave. He first travelled to Turkey where he stayed for around 5/6 months before moving to Germany. That's when he fell into drugs and alcohol". I have

paused to reflect on this story of human experience. I am quite sure the District Judge did so too.

16. Two of the key topics addressed in Anderson 1 were (1) the Appellant's past attempts at suicide and self-harm and (2) the assessment of what lay in the future if he were now extradited to Germany. So far as topic (1) was concerned, Anderson 1 referred to two incidents.

    i) The first incident was that the Appellant "was found collapsed on the floor of the magistrates' court" and was found to have self-harmed "by cutting his left arm in the magistrates' court cells". Everyone agrees that that is a reference to attempted self-harm on 20 February 2019 at the magistrates' court on the day of the original oral hearing before the District Judge. That incident was described in the Appellant's own proof of evidence, which he adopted as evidence in chief at the second hearing before the District Judge on 16 September 2019. The District Judge recorded that evidence as follows: "After the extradition hearing in February at Westminster magistrates' court, I made an attempt on my life in the cells using a blade I had hidden in my shoe. My memory is not clear, I was having flashbacks to my time in Germany [and] Syria and I just panicked".

    ii) The 2nd incident was described as follows in Anderson 1: "On 4 March 2019 at 00:47 [the Appellant] was found lying on the floor and a noose was hanging from a light. He appeared distressed. He was placed on constant observation by prison officers after that".

    The District Judge recorded the Appellant's evidence in chief: "I have attempted suicide and self-harm and more than 7 occasions whilst in custody, I've used a blade to cut myself and tried to hang myself with bedsheets. I've had no mental health issues in the past but I have recently been I unable to cope and I worry about my mental health. These proceedings [have] brought back all my past experiences and it's impacting on my mental health".

17. Dr Anderson said this in Anderson 1: "[the Appellant] has a severe form of PTSD with Anxiety and Depression. He has reported to be suicidal on multiple occasions and has recently attempted suicide at least twice". The District Judge recorded that as Dr Anderson's evidence. As Mr Swain properly accepted before me, at the hearing before the District Judge there was no challenge to these incidents as not having been genuine or concerted suicide attempts. The Appellant was not cross-examined about them. Dr Anderson was not challenged on his description of the Appellant as having "recently attempted suicide at least twice". Dr Anderson's description is, moreover, maintained in Anderson 2, the fresh evidence before this Court. Anderson 2 also quotes from excerpts from the prison medical record in which there are repeated references to the Appellant's "self-harm" and "attempted suicide". The prison medical record contains the following description relating to the second incident (the first incident took place at the magistrates' court): "over the weekend he tied a ligature with an intention of hanging himself. Said he tried to kill himself because he is sick and want to see a doctor and they did not want to take him. Said his solicitor and judge said he would be taken to see the doctor when he goes back to prison… He indicated he wanted to die but the desires are greater at night…"

18. The District Judge said this: "[The Appellant] says he has attempted suicide. I note that the suicide attempt said to have occurred at the magistrates' court involved [the Appellant] cutting his left arm. That which occurred in [prison] records that he was lying on the floor of his cell in a distressed state with a noose attached to the light. Cautious though I am in making this observation, as it is clear from the expert evidence of Dr Anderson that [the Appellant] represent a significant suicide risk, but the scant details of each of these attempts is arguably more capable of supporting the conclusion that they were not concerted efforts at suicide as [compared] to the conclusion that Dr Alison reaches – which is that they were. There is no evidence that [the Appellant] required hospitalisation on either occasion. He did not have to be resuscitated. There is no reference, for example, to ligature marks on [the Appellant]'s neck after the incident in [prison], nor to the nature and location of the cut on the arms, nor an indication that an artery was the apparent target. With due deference to Dr Anderson, I am not persuaded that the evidence leads me to the conclusion that the Westminster and [prison] incidents were concerted suicide attempts that lead to an inevitability that he will succeed in a suicide attempt".

19. Mr Swain submitted that the District Judge made a sustainable finding of fact, which this Court should not disturb, that the two incidents were not "concerted suicide attempts". I cannot accept that submission. I asked Mr Swain whether – if this Court were looking at this issue on the evidence afresh – it would be open to him to invite a similar factual conclusion from me, in circumstances where there was no challenge to the evidence of the Appellant or Dr Anderson on this point. Mr Swain, very properly, accepted that he would not be able to invite such a finding from this Court, in the absence of such a challenge having been made to the evidence. That, in my judgment, is fatal to Mr Swain's submission that there is a "sustainable" finding of fact by the District Judge on this point. If, in principle, this is a factual conclusion which could not properly be invited in this Court, absence a challenge to the witnesses on the evidence, then I cannot see how it is a conclusion which – when adopted – is a properly sustainable one. If the District Judge, minded to adopt this assessment of the evidence, had asked Mr Swain the same question I asked him – 'is it open to you to invite this factual conclusion?' – Mr Swain would, in my judgment, have been bound to give the District Judge the same – very proper – answer: no, not where there was no challenge to either of the witnesses on this point. In my judgment, absent a challenge to the evidence, the District Judge could not sustainably reject that these were genuine – and concerted – suicide attempts on which reliance could be placed as such, for assessing future suicide risk. The District Judge's points about lack of detail, lack of hospitalisation, lack of a need for resuscitation, absence of ligature marks, and the nature of the cutting of the arm, were not put to Dr Anderson, by Mr Swain or the District Judge, to explore whether his assessment was one which the court could accept. But there is another point. In my judgment, it is far from clear that the District Judge did make Mr Swain's suggested finding of fact. In the first place, he used the word "arguably". In the second place, in his conclusion on this topic, he in fact made a composite statement as to where the nature of the suicide attempts "lead", expressed in terms of a future attempt and "inevitability" of its success. That itself, in my judgment, was not in the nature of a sustainable finding, given that it was based on the Judge's assessment of the extent to which these were "concerted suicide attempts", which has not been challenged. Even if I were to read the District Judge as having found as a fact that these were not "concerted suicide attempts", I would be unable to accept that such

a finding was open to the District Judge, or that it constituted a basis for rejecting Dr Anderson's assessment.

20. The second topic concerns future risk, which is what the District Judge was touching on when he referred, in the context of "concerted suicide attempts", to a lack of "inevitability that he will succeed in a suicide attempt". That means there is an immediate problem: the District Judge linked an assessment of the future on doubts relating to a point unchallenged on the evidence. In relation to future risk, Anderson 1 stated this: "If he is returned to Germany, his PTSD will intensify and he will no doubt attempt suicide and self-harm by cutting again". Anderson 1 addressed the following question: "What is the likely impact of extradition on [the Appellant's] mental health?" This was his response:

> "Extradition will certainly increase his distress and emotional response symptoms. This will result in an increase in his suicidal thinking and attempts to end his life. He is preoccupied with the death of his father and survivor guilt now. This will be exacerbated if he is extradited to Germany and it is highly probabl[e] that he will eventually succeed in taking his life".

Anderson 2, as fresh evidence before me for which permission has been granted, maintains both of those assessments.

21. The District Judge recorded this as Dr Anderson's evidence on future risk. So far as the future was concerned, the District Judge dealt with the position in two passages. I have already described the first: the expression of lack of "inevitability", linked to the question of whether the past incidents were "concerted suicide attempts" such as to support a conclusion on "inevitability". The District Judge added this: "Returning to the proposition that extradition will probably result in a successful suicide attempt… Probability is not certainty. Probability is a scale". In the second passage the District Judge said this (adding in [i] and [ii] for the purposes of exposition):

> "Despite Dr Anderson's evidence, [i] I am not persuaded that there is evidence of a very high likelihood that he will make a concerted suicide attempt if extradited, [ii] nor that the German prison medical service cannot protect [the Appellant] from such an attempt".

22. Mr Swain submits that the District Judge made at [i] a sustainable finding that there is not in this case "evidence of a very high likelihood that [the Appellant] will make concerted suicide attempt if extradited". Mr Swain also submits that the District Judge made at [ii] a self-standing and sustainable finding that, even if the Appellant were to make a concerted suicide attempt if extradited, the German prison and medical services would be able to protect the Appellant from such an attempt. Mr Swain says [ii] was a finding which went beyond 'discharging its responsibilities' and was a conclusion as to the practical outcome of doing so being to save the Appellant's life.

23. I deal with each of those submissions in turn. So far as concerns [i], Mr Swain's submissions in my judgment face much the same problem as did his submission in relation to the past incidents. Mr Swain – again very properly – accepts that Dr Anderson was not challenged on this part of his evidence either: "it is highly probable that he will eventually succeed in taking his life". He accepted that, were the question at large before this Court looking afresh, it would not be open to him to invite this Court

to reach such a finding, in circumstances where there was unchallenged expert evidence on the issue. In those circumstances, it is in my judgment equally impossible for Mr Swain to maintain that the District Judge made a "sustainable" finding rejecting the expert evidence. Then there is the problem – with which I have already dealt – that the District Judge was approaching future likelihood based on doubting that there had been genuine (and concerted) suicide attempts, which was all unchallenged. There is also another point. Dr Anderson has written a further report (Anderson 2) – which this Court has already given the Appellant permission to rely on as fresh evidence – and it is, in my judgment, fully justified that this Court should look at the issue on the evidence and do so in the principled way that Mr Swain accepts. Anderson 2 maintains the relevant assessments, notwithstanding the description of some improvements in the Appellant's mental health condition. This is the case and an issue, ultimately, concerning life and death. I would not be prepared to examine whether the section 25 'outcome' is 'wrong' without looking afresh at whether a finding is legally open in the absence of unchallenged expert evidence. Mr Swain accepts, rightly, that – looking afresh – the conclusion which the Judge adopted would not be open to this Court, given the lack of challenge to Dr Anderson's evidence.

24. So far as concerns [ii], Mr Swain's first difficulty – in my judgment – is that it is very far from clear that the District Judge was examining the question of whether steps taken by the German authorities would be successful to save the life of the Appellant, were he to make the concerted future attempts to take his own life following extradition. In using the phrase "nor that the German prison and medical service cannot protect [the Appellant] from such an attempt" there is, at least, an ambiguity as to whether the District Judge was in truth focusing on the question of the German authorities 'discharging their responsibility'. Indeed, the previous paragraph of the judgment strongly suggests that he was. There, he relied on the presumption "that Germany will discharge its responsibilities to prevent [the Appellant] committing suicide". The most natural reading, in context, of the District Judge's phrase "protect [the Appellant] from such an attempt" is that he was expressing satisfaction that the German authorities would discharge their responsibilities. The District Judge had previously cited Turner and Wolkowicz and had emphasised the 'discharge of responsibilities' passage from Wolkowicz at paragraph 10(iii). He had not specifically grappled with the phrase "whatever steps are taken" when recording – as he faithfully did – the seven Propositions from Turner. He did not have the benefit which I have had, of identifying a point of principle and resolving an important distinction. Finally, even if the District Judge was expressing the view that the German authorities would be able to protect the Appellant from succeeding in taking his own life, were he to make a concerted attempt to do so, I cannot accept the submission that that was a finding open to the District Judge in circumstances where the expert evidence had expressly dealt with that question and had not been challenged at the hearing.

25. I said I would return to the question of Jansons and it is in this context that I do so. It is often said that authorities in the extradition context (and other similar contexts) are 'intensely fact specific'; that they do not constitute a precedent so far as concerns the application of principles to the facts; and that the Court must focus on the facts of the instant case. I accept all of that. The authorities are most regularly encountered either (a) as to the articulation of legal principle or (b) as no more than working illustrations of legal principles in action in fact specific environments. I have already explained the way in which Jansons answered a legal issue which was the subject of submissions in

the present case. There is more than that to derive from the judgment of the Divisional Court in the Jansons case, as both Counsel recognised. That was an extradition case in which the requested person had attempted to commit suicide in prison, as it happens the following day after an oral hearing before the magistrates' court. The appeal was on the basis that there was "uncontested psychiatric evidence… that if he is to be extradited to Latvia, he will commit suicide". The expert psychiatrist who had written the report in that case (Dr Drayer) had reached the following conclusion: "It is very likely that if he is sent back to Latvia his mental state will deteriorate and he will attempt to kill himself. The likelihood is high that he will succeed in killing himself". The Divisional Court described that and a subsequent expert report as constituting "unchallenged evidence before this Court [that] contain the unqualified statement that if the Appellant is sent back to Latvia, his mental state will deteriorate and he will kill himself". The Court explained that "the evidence shows that if the Appellant were to be returned to Latvia, his mental state is such that it would (a) deteriorate and (b) deteriorate to such an extent that he would commit suicide". The Court expressly accepted, as I have explained above, that the Latvian authorities would discharge their responsibilities. The Court's conclusion was that there was "on the evidence, such a substantial risk that he will commit suicide" that it would be "oppressive to order his return". At paragraphs 26 and 28 of the judgment the President said this: "The court must accept, as indeed I do, that there are appropriate arrangements in place in the prison system in Latvia and that … the Appellant cannot establish that the Latvian authorities will not properly cope with his mental condition and properly cope the risk of suicide. Set against that is the uncontradicted evidence not only that his mental condition will be triggered to deteriorate if he is returned to Latvia but also and in unqualified terms that he will commit suicide if he is returned to Latvia. Taking account, of course, of the fact that Dr Drayer is unable to express an opinion as to the effectiveness or otherwise of prison arrangements in Latvia, it is nevertheless, of course, within his competence and it is unchallenged that he can assess what the Appellant's mental state is and what he is able to predict will be the consequences of his return to Latvia, not because there may or may not be adequate arrangements when he gets there, but from the very fact of his extradition".

26. I have reached the same conclusion in this case. There is, in my judgment, absolutely no basis for this Court to take a different approach. It is an unmistakeable fact that the key components are materially identical to those which arose in Jansons. Indeed, this case is a stronger one in the following respect. In Jansons Dr Drayer's assessment arose only as fresh evidence before this Court. In the present case, Dr Anderson's assessment was given in evidence before the District Judge, where he was cross-examined, and it was not challenged by the Respondent, who had every opportunity to do so. Dr Anderson's evidence, like that of Dr Drayer in Jansons, was within his expertise, albeit that – like Dr Drayer – he was unable to express an opinion as to the effectiveness of arrangements in the German prison system. Absent a challenge to Dr Anderson's assessment, and applying legally correctly the Turner Propositions – in a case where the District Judge had and quoted both the material expert evidence and the key Propositions – the District Judge's overall conclusion, and the 'outcome', in relation to oppression are not in my judgment capable of withstanding scrutiny on appeal. In my judgment, the answer to the key question was and is as follows. Notwithstanding the ability of the German authorities to discharge their responsibilities by making appropriate arrangements, on the evidence such is the mental condition of the Appellant linked to the risk of suicide – where the condition is such as to remove the capacity to

resist a suicidal impulse – that the risk of the Appellant succeeding in committing suicide, whatever steps are taken, is sufficiently great to result in a finding of oppression, applying the high threshold that needs to be reached, as an overall judgment on the facts of the particular case, and having well in mind the public interest in giving effect to treaty obligations. The appeal succeeds on the section 25 ground.

Article 8

27. So far as concerns Article 8, Mr Swain conceded – very properly and correctly – that if the section 25 oppression ground of appeal succeeded then Article 8 would necessarily also succeed. In my judgment, that is right, and it is also right to record that in my judgment there is no prospect at all that Article 8 could otherwise possibly have succeeded, given the nature of the offending of which the Appellant is accused, and the strong public interests in support of his facing legal accountability under the German judicial process, notwithstanding the Appellant's age at the time of the alleged offending and the 21½ months of remand time served. This case is all, and only, about the risk of suicide. It is because of that risk, on the particular facts and evidence and in the particular circumstances of this case, that the appeal succeeds on the Article 8 ECHR ground as well and the Appellant will be discharged.