Neutral Citation Number: [2020] EWHC 590 (Admin)

Case No: CO/4610/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
In the matter of an appeal under s.26 of the Extradition Act 2003

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 March 2020

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

- -

Between :

AMANDEEP KAPOOR	**Appellant**
- and -	
JUZAGADO DE INSTRUCCION No.4 DE LAS PALMAS DE GRAN CANARIA (SPAIN)	**Respondent**

- -
- -

Daniel Sternberg (instructed by **ABV Solicitors**) for the **Appellant**
Ben Lloyd (instructed by **CPS**) for the **Respondent**

Hearing date: 27 February 2020

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Approved Judgment

Mr Justice Supperstone :

Introduction

1. The Appellant appeals against the decision of District Judge Mallon ("the DJ") made on 13 November 2018 ("the Decision") to order his extradition to Spain in relation to a European Arrest Warrant ("EAW") issued on 9 August 2018 and certified by the National Crime Agency on 14 August 2018. The EAW is for the Appellant to be prosecuted in Spain for two offences, trafficking in human beings and the facilitation of unauthorised entry and residence. The maximum length of the custodial sentence that may be imposed for the offences is 8 years' imprisonment.

2. The Appellant appeals the decision of the DJ on four grounds:

   i) The DJ erred in finding that the EAW was issued for the purposes of prosecution under s.2(3) of the Extradition Act 2003 ("the 2003 Act") (**Ground 1**);

   ii) The DJ erred in finding that his extradition was not barred by an absence of prosecution decision under s.12A of the 2003 Act (**Ground 2**);

   iii) The DJ erred in finding his extradition to be compatible with his rights under Article 8 of the European Convention on Human Rights ("ECHR") and s.21A of the 2003 Act (**Ground 3**); and

   iv) The DJ erred in finding his extradition was neither unjust nor oppressive under s.25 of the 2003 Act (**Ground 4**).

3. On 16 October 2019 Dove J granted permission to appeal on all four grounds.

Ground 1: EAW not issued for the purposes of prosecution (s.2(3))

4. This issue was not raised before the DJ, however the Respondent did not object to it being raised on appeal and Dove J granted permission to argue this ground.

5. Section 2 of the 2003 Act provides, so far as is material:

> "**2 Part 1 warrant and certificate**
>
> (1) This section applies if the designated authority receives a Part 1 warrant in respect of a person.
>
> (2) A Part 1 warrant is an arrest warrant which is issued by judicial authority of a category 1 territory and which contains—
>
> (a) the statement referred to in sub-section (3) and the information referred to in subsection (4), or
>
> (b) the statement referred to in sub-section (5) and the information referred to in sub-section (6).
>
> (3) The statement is one that—

> (a) the person in respect of whom the Part 1 warrant is issued is accused in the category 1 territory of the commission of an offence specified in the warrant, and
>
> (b) the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being prosecuted for the offence."

6. In *Office of the King's Prosecutor, Brussels v Cando Armas* [2006] 2 AC 1 Lord Scott stated (at paragraph 54):

> "Extradition for the purpose of interrogation with a view to obtaining evidence for a prosecution, whether of the extradited individual or of anyone else, is not a legitimate purpose of an arrest warrant. But the judicial authority in the requested state cannot inquire into the purpose of the extradition. It is therefore necessary for there to be an unequivocal statement of that purpose in the arrest warrant itself."

7. In *Asztaslos v Szekszard City Court, Hungary* [2011] 1 WLR 252 Aikens LJ, referring to the *Armas* case, stated, (at para 16):

> "If an EAW has been issued by a requesting state as an 'accusation case' warrant, but its purpose is, in fact, the surrender of the requested person for the purpose of conducting an investigation to see whether that person should be prosecuted, it is not a legitimate purpose and so the warrant is not an EAW within the meaning of section 2 (2) (3)."

8. Mr Sternberg submits that there is no unequivocal statement that the warrant is for the purpose of prosecuting: and that the purpose is in fact to conduct an investigation to see whether the Appellant should be prosecuted.

9. Mr Sternberg acknowledges that on the first page of the EAW there are the following words:

> "This warrant has been issued by a competent judicial authority. I request that the person mentioned below be arrested and surrendered to the judicial authorities for criminal prosecution purposes or for enforcement purposes under the scope of a coercive detention order or custodial sentence."

10. The EAW is plainly an accusation warrant and therefore Mr Sternberg acknowledges that it is stated to be 'for criminal prosecution purposes'. However, this statement on page 1 of the EAW is merely, he suggests, 'standard rubric'. He points to various other parts of the EAW which, he submits, make clear that the EAW is for the illegitimate purpose of conducting an investigation and not for criminal prosecution purposes.

11. First, on the same first page of the EAW there is a list of other persons 'under investigation'. They are said to be other members of the conspiracy with whom he was involved.

12. Second, at box D the warrant expressly states the reason it was issued:

> "The person under investigation is yet to be located in order to be questioned in the presence of a solicitor regarding his role in connection with the facts and the charges against him. Thus, it is vital that he be located, detained and surrendered to the jurisdiction of this Court."

Mr Sternberg submits that the use of the word 'charges' does nothing to resolve the ambiguity as to whether the Appellant is required for prosecution purposes or merely questioning.

13. Third, box E of the EAW, setting out the conduct repeatedly refers to the Appellant as a person under investigation:

> "… Over the past few months, several trafficking incidents of this nature have been identified in the Canary Islands in which the person under investigation was directly involved, together with other members of the conspiracy currently on remand awaiting trial in respect of these offences…. The person under investigation and other members of the conspiracy accompanied the persons attempting to enter European countries illegally on forged passports or genuine passports issued to other persons or members of the organisation, arranging lodging and transport for the illegal immigrants and covering their expenses."

14. Fourth, box G of the EAW has been completed requesting that evidence be seized to progress the investigation. It states:

> "This warrant pertains also to the seizure and handing over of property held by the wanted person in respect of the offence:
>
> Description of the property (and location) (if known); ID documents, transport tickets, bank statements, papers and any kind of document that might be related to the crimes under investigation, telephones, mobile phones, computers, tablets, digital storage devices, and other equipment or devices, that may have been used to carry out the offences, or that may contain information related to the said facts."

15. In *Public Prosecutors Office Bavaria Germany v Khan and others* [2014] EWHC 1704 (Admin) Nicola Davies J (as she then was) stated (at para 43):

> "The nature of the information sought in box (g) supports the overall impression that this is a warrant issued as part of an investigation. The extent of the information sought, namely all

> the accounts, business records and details of the payments made and received by the company undermines the particulars detailing the losses allegedly caused by the Appellant. If the investigation authorities are still seeking information about the income of the company and the details of the goods and payments, it is difficult to see how they can be in the position to particularise with anything approaching finality their case against the Appellant with regard to the losses allegedly incurred."

16. Mr Sternberg submits that the very broad 'shopping list' of evidence sought in box G of the EAW in the Appellant's case is a further indicator that he is not sought for prosecution but for investigation.

17. Fifth, box I of the EAW refers to the file reference for this matter in Spain as "Preliminary Criminal Proceedings No. 1948/2018-E". Mr Sternberg accepts that this reference alone would not suffice to give rise to invalidity under s.2(3) but, he contends that there is far more material than this to show that this is an investigation not a prosecution. The fact that the proceedings are formally at a preliminary stage confirms, he submits, that the true purpose of this EAW is not prosecution.

18. Sixth, the English translation of the EAW supplied by the CPS appends an order made by the Spanish Court on 5 September 2018, which states:

> "On 9 August 2018 request issued to non-court personnel was approved to be forwarded to law enforcement in the interests of securing the arrest and subsequent surrendering to the jurisdiction of this Court of AMANDEEP SINGH KAPOOR. This request was issued for the purposes of questioning the person of interest in the presence of a solicitor and ruling on the latter's personal situation in light of the serious nature of the charges laid against him. The Court drafted a European Arrest Warrant in respect of the aforementioned person under investigation and proceeded to issue the appropriate instrument to that end."

19. Seventh, in further information provided by the Spanish Authorities on 2 October 2018 they again state:

> "The reason a European Arrest Warrant was issued by this Court against Amandeep Singh KAPOOR is for him to be questioned as a person under investigation in the presence of legal counsel in light of the fact he is suspected of committing a count against the rights of foreign nationals (promoting illegal immigration) and a count of forgery of private documents. … Given the circumstances, it is appropriate that the subject be detained and surrendered to the jurisdiction of this Court in order to rule, once he has been questioned and pursuant to the prosecutor in Spain's motion at the time, on whether he should be remanded in custody or not. (Incidentally the other persons under investigation that belong to the conspiracy detained thus

> far are currently being held on remand). Such a measure is advisable given the suspect is a flight risk. He is a foreign national with no ties to Spain and he has been implicated in serious offences. For these reasons the Court refuses to approve his release."

20. In the further information provided on 2 October 2018 the JA also provides answers to questions asked by the CPS on 26 September 2018. Mr Sternberg places particular reliance on the answers to questions 2 and 3:

> "On what date did the authorities within the territory of the Judicial Authority reach the decision to prosecute Amandeep Singh KAPOOR for the offences in the EAW?'. (Question 2)
>
> 'Was Amandeep Singh KAPOOR made aware of the prosecution? If so, how was Amandeep Singh KAPOOR made aware?'." (Question 3)

21. The answers that were given are:

> "(2) Once the Court received the corresponding police report outlining the facts subject to investigation and the investigation carried out, and after the other persons implicated were surrendered to the jurisdiction of the Court (the other three suspects are currently being held on remand), the Court issued an EAW against Amandeep Singh KAPOOR as it was impossible to locate him in Spain. Moreover, the police enquiry revealed he was directly involved in the offences under investigation, and an arrest warrant dated […]
>
> (3) The suspect has not been made aware of the prosecution so far given that, as has already been explained, he has neither been arrested nor questioned in respect of the offences due to the fact that he was not located in Spanish territory."

22. Mr Sternberg submits that the answer to question 2 fails to answer the question as to when the JA reached the decision to prosecute the Appellant, and makes clear that no decision will be taken as to whether he will be put in custody until after he has been questioned. Again, Mr Sternberg submits that the answer to question 3 suggests, in the context of the EAW as a whole, that after the investigation, he may not be prosecuted. Mr Sternberg says that nowhere does the JA state other than in the standard heading to the EAW (see para 10 above) that the warrant has been issued for criminal prosecution purposes.

23. Finally, Mr Sternberg points to the further information provided on 17 October 2018 in response to the request of 10 October 2018. Again, the JA refers to the need to question the Appellant in the presence of legal counsel and to rule on whether he should be remanded together with the 'other persons under investigation in this matter'.

24. Mr Sternberg stresses that whenever the JA is asked about whether a decision to prosecute the Appellant has been taken, the response is not that the decision has been taken to prosecute him but that they want to question him and decide whether to remand him in custody.

25. Mr Ben Lloyd, for the Respondent, submits that it is clear that the EAW has been issued for the purposes of criminal prosecution. The EAW is, Mr Lloyd submits, unequivocal as to that and the references in the EAW to the Appellant and his co-conspirators being 'under investigation' do not undermine that fact.

26. Mr Lloyd says that the statement of Lord Scott at paragraph 54 in *Cando Armas* (see para 6 above) is not controversial (with a caveat as to what is meant by 'interrogation'). The authorities make clear, Mr Lloyd submits, that "it is possible for an investigation to continue although a decision to prosecute has been made" (*Shiraz Ahmed v Swedish Economic Crime Authority* [2017] EWHC 345 (Admin) at para 22).

27. In *R (Miguel Meizoso-Gonzales) v Juzgado de Instruccion Cinco de Palma de Mallorca, Spain* [2010] EWHC 3655 (Admin) Moses LJ at the outset of his judgment, stated (para 1):

> "The appeal raises the not unusual problem of whether the extradition warrant is issued for the purpose of being prosecuted for an offence constituting an offence or offences for which the Appellant may be extradited. The problem is whether, as the Appellant contends, the extradition is sought merely so that he should be investigated as to whether he is guilty of an offence or whether it is for the purposes of his prosecution. The problem is particularly acute where, under the criminal process in question, the Spanish criminal system, investigation and questioning takes place as part of the process of prosecution. The starting point must be the warrant by which the Appellant's extradition was sought. It contains on its face a statement:
>
> 'This warrant has been issued by a competent judicial authority. I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order'.
>
> No-one suggests that the purpose of the warrant is for executing a custodial sentence or detention order."

28. The only aspect of the warrant in that case that may have cast doubt on the accuracy of the statement as to the purpose for which the warrant was issued, namely for conducting a criminal prosecution, was the file reference. This contained the words 'diligencias previas' which were not translated. That prompted the Appellant to obtain expert evidence from Professor Ostos, a professor of procedural law at the University of Seville, Spain, as to the stage the proceedings had reached. Professor Ostos's evidence was that the case was at the first stage of investigation of an offence "called preliminary inquiry (Diligencias Previas)". In the present case the file reference also

contains the words 'diligencias previas' which were translated as 'Preliminary Criminal Proceedings'.

29. Moses LJ in *Meizoso-Gonzales* continued:

> "11. The fact that the prosecution is what Mr Ostos describes as a preliminary inquiry was not a ground for questioning the statement of purpose contained in a warrant issued in Spain, and a recent decision of this court, Street v Spanish National Court…
>
> 12. In my judgment, having regard to the need for trust in the judicial authorities of those countries which fall within Part 1 of Category 1 and Part 1 of the Extradition Act 2003, it is not possible for this court to go behind the express statements from the judicial authority as to the purpose of the extradition. True it is that she [the judicial authority] refers to investigation but there is ample authority and example of cases where, notwithstanding the fact that the extradited person or others are to be questioned and notwithstanding the fact that investigations are continuing, the process still forms part of the process of prosecution. …"

30. In *Asztaslos*, Aikens LJ said (at para 38) that "the court must construe the words in section 2(3) (a) (b) in a 'cosmopolitan' sense and not just in terms of the stages of English criminal procedure". As Mr Lloyd observes, the Spanish criminal justice system is based on the civil inquisitorial model, which has within it an important process of judicial interrogation of a defendant. Therefore, references to 'questioning' must be seen within that context. The 'questioning' referred to in the EAW is, I agree with Mr Lloyd, judicial questioning. Accordingly, in my judgment, references in the warrant to 'investigate' and 'questioning' do not suggest that no criminal prosecution is under foot or undermine the statement that the Appellant's arrest and surrender to the judicial authorities is required 'for criminal prosecution purposes'.

31. Adopting the 'cosmopolitan approach' I am satisfied that it is clear on the face of this accusation warrant that the Appellant is wanted for the purposes of criminal prosecution. The warrant relates to 2 offences and refers specifically to offences which carry a maximum of 8 years imprisonment pursuant to Article 318 of the Spanish Criminal Code. The warrant at box D and the court order refer to charges having been laid against the Appellant, and at box E there is a reference to the Appellant's co-conspirators being in custody 'awaiting trial' (not merely for the purposes of questioning and investigation as Mr Sternberg suggests is the purpose of this warrant).

32. I do not accept that the request to seize evidence (see para 14 above) assists the Appellant's argument. Article 29 of the Framework Decision provides for the seizure and handing over of property held by the wanted person in respect of the offence. The case of *Khan* is also of no assistance to the Appellant in this regard. It was decided on its own facts.

33. It is only if the wording of the warrant is equivocal should the Court consider examining extrinsic evidence to decide on the purpose of the warrant (*Asztaslos* at para. 38(6)(7)). In my judgment the warrant is not equivocal. However, if, contrary to my view, it is considered to be so, I am satisfied that the further information makes clear that the Appellant's arrest is for the purposes of criminal prosecution. The further information provided on 2 October 2018 refers to "the charges laid against him" (answer to question 1); and it is implicit in the statement that he has not been made aware of the prosecution so far that a decision to prosecute him has been made (answer to question 3).

34. I conclude that the warrant complies with s.2(3) of the 2003 Act.

Ground 2: The absence of a prosecution decision (s.12A).

35. Section 12A of the 2003 Act provides:

> **"12A Absence of prosecution decision**
>
> (1) A person's extradition to a category 1 territory is barred by reason of absence of prosecution decision if (and only if) –
>
> (a) it appears to the appropriate judge that there are reasonable grounds for believing that –
>
> (i) the competent authorities in the category 1 territory have not made a decision to charge or have not made a decision to try (or have made neither of those decisions), and
>
> (ii) the person's absence for the category 1 territory is not the sole reason for that failure,
>
> and
>
> (b) those representing the category 1 territory do not prove that –
>
> (i) the competent authorities in the category 1 territory have made a decision to charge and a decision to try, or
>
> (ii) in a case where one of those decisions has not been made (or neither of them has been made), the person's absence from the category 1 territory is the sole reason for that failure.
>
> (2) In this section "to charge" and "to try", in relation to a person and an extradition offence, mean –
>
> (a) to charge the person with the offence in the category 1 territory,
>
> and
>
> (b) to try the person for the offence in the category 1 territory."

36. The DJ ruled (at para 23):

> "I find that the wording on the warrant is clear and unambiguous and is supported by similar wording on other documents, repeatedly referring to "charges" – it is clear that the JA has made a decision to charge."

37. Mr Sternberg submits that the DJ erred in her approach to this issue in a number of respects.

38. First, the DJ failed to consider both limbs of s.12A. She made no finding on whether there had been a decision to try. In *Puceviciene v Lithuanian Judicial Authority* [2016] EWHC 1862 (Admin) Lord Thomas CJ, delivering the judgment of the Court, stated at paragraph 50(vi):

> "It is also important to emphasize that the real focus of s.12A is always on whether there has been a decision to try. If there has been no decision to try, the question of whether there has been a decision to charge is irrelevant. If there has been a decision to try, a decision to charge will inevitably have been taken either earlier or at the same time as the decision to try. The words "decision to charge" in reality add nothing to the achievement of the purpose, actual or supposed, of the Act or to its effect. They add nothing at either the "reasonable grounds" stage or at the second stage where the burden lies on those representing the competent authority of the requesting state to prove that the decisions have been taken."

39. Second, the DJ did not explain the evidential basis for her finding that there had been a decision to charge other than reference to the offences being described as "charges". She made no reference to the references to the Appellant as a person under investigation in the EAW; nor to the statements that his return was sought for questioning pending a decision to remand him in custody.

40. Third, the charges are also referred to as "counts" in the further information of 2 October 2018 which throws into doubt as to whether there was any decision to charge the Appellant.

41. Fourth, by reference to the evidence which Mr Sternberg relied upon in support of Ground 1 (which it is not necessary to repeat, see paras 10-23 above), he submits that there were reasonable grounds to believe that no decision to charge or to try (not even an informal decision) had been taken. The evidence, Mr Sternberg submits, indicated that the Appellant was wanted for questioning with a view to remanding him in custody. The Spanish authorities do not, Mr Sternberg submits, even go so far as to say that the decision to charge or try will then follow.

42. Mr Sternberg adds that there is no suggestion that the Appellant's absence from Spain is the sole reason that those decisions have not yet been taken. The JA has not, Mr Sternberg says, for example, suggested questioning the Appellant using mutual legal assistance ("MLA"), in person at the Spanish embassy, or by video link from the UK.

43. Mr Sternberg submits that on the material before the DJ there was more than sufficient to provide reasonable grounds to believe that the decisions to charge and try

had not been made and that the absence of the Appellant from Spain was not the sole reason for the lack of those decisions. The further information provided by the JA merely confirmed those matters and did not, Mr Sternberg submits, prove the contrary to the criminal standard.

44. Mr Lloyd emphasises that s.12A requires the Court to apply a two-stage test.

45. In *Kandola v Generalstaatwaltschaft Frankfurt, Germany* [2015] 1 WLR 5097 the Divisional Court stated (at para. 28):

> "**28**. The application of s.12A in practice is not easy to work out because it involves two distinct stages. In the first stage, which involves both s.12A(1)(a)(i) and (ii), the "appropriate judge" is concerned with whether there are reasonable grounds for *believing* that at least one of *two* decisions have *not* been taken, i.e. the decision to charge *or* the decision to try the requested person, and, then, furthermore, if one of those two decisions have not been made, that a state of affairs (the absence of the requested person from the category 1 territory) is *not* the sole reason for the failure to make one or other or both of those two decisions. Both those negatives have to be established (to the requisite level of "proof") by the requested person. The appropriate judge will only have to consider the issue of whether it appears that there are reasonable grounds for believing that the sole reason for a "failure" to make one or other or both of the two decisions (to charge and try) is not the requested person's absence from the category 1 territory if it "appears" to him that there are reasonable grounds for believing that at least one of those two decisions has not been made.
>
> **29**. The appropriate judge will only embark on the second stage, in s.12A(1)(b)(i) and (ii), if he is satisfied that there are reasonable grounds for believing both that no decisions to charge and/or to try have been made *and* that the person's absence from the category 1 territory is not the *sole* reason for those decisions not being taken…"

46. In *Pucevicience* the Divisional Court stated (at para.54):

> "…in our view, a decision to try is nonetheless a decision to try even if it is conditional or subject to review … There will, for example, be a decision to try, even if it is taken subject to the completion, after extradition, of formal stages, such as an interview and subject to those stages not causing a reversal of the decision already made even informally, to charge and try."

47. The Divisional Court in the case of *Doci v Italy* [2016] EWHC 2100 (Admin) endorsed the approach in *Pucevicience* to the concepts of charge and try under s.12A. Beatson LJ, delivering the judgment of the Court, stated (at para. 31):

> "The absence of a formal charge even where such a stage clearly exists in the procedures of the requesting state, does not mean that a decision to charge has not been taken within the meaning of section

> 12A…Section 12A is not to be construed as a means of throwing technical spanners into the extradition works. It does not require the concept of a decision to charge, or to try for that matter, to be construed as if applying domestic procedural concepts to foreign procedures. What matters is that a decision to charge has been taken within the meaning of section 12A, a broad expression applying equally in a practical and purposive way to the various criminal procedures of category 1 territories, the cosmopolitan approach."

48. Beatson LJ continued (at para. 32):

> "...*Puceviciene* at [55] explains that the statement in the EAW that surrender is sought for the purpose of conducting a criminal prosecution usually shows that there has been a decision to charge and, (at [56]) that may also be the same as the decision to try. Indeed, in the absence of other material, the standard statements in the EAW should suffice for both. After all, the decision to charge shows, in the absence of anything else, that there is a decision to try."

49. Mr Lloyd acknowledges that the DJ's reasons for concluding that extradition is not barred by reason of s.12A were brief and there could be some criticism of the way they were expressed, however he submits that overall her decision was not wrong. Plainly, Mr Lloyd submits, there was a decision to charge the Appellant, and there is no material on the face of the EAW to suggest that there was no decision to try him.

50. Although the DJ's decision could have been expressed with greater clarity, I am satisfied that she was entitled to find on the evidence (which is the same evidence that I have considered on Ground 1) that the Appellant is wanted for the purposes of criminal prosecution. That evidence, in my view, entitled the DJ to conclude, as I do, that (in the absence of any other material) there were no reasonable grounds for believing that there was no decision to charge or try the Appellant in Spain.

51. Mr Lloyd submits, and I agree, that even if there are reasonable grounds for believing that there was no decision to charge or try there are no reasonable grounds for believing that the Appellant's absence from Spain is not the sole reason for that failure.

52. The EAW at box D states that "the person under investigation is yet to be located in order to be questioned…in connection with the facts and the charges against him. Thus, it is vital that he be located, detained and surrendered to the jurisdiction of this Court". If there be any doubt about the matter, the further information given on 2 October 2018 states that the Appellant "has neither been arrested nor questioned in respect of the offences due to the fact that he was not located in Spanish territory" (see para 21 above).

53. It is also important to note that in *Puceviciene* (at para. 68) the Court held that MLA is not relevant to the questions which arise under s.12A.

54. It follows that the first stage of s.12A has not been satisfied by the Appellant and his extradition is not barred on this ground.

Grounds 3 and 4: Article 8 ECHR and the Appellant's extradition is unjust or oppressive by reason of his physical and mental condition (s.25 of the 2003 Act)

55. Mr Sternberg took these two grounds together as the evidence relied upon in relation to them is the same, although the legal issues are different. Factually they both concern the Appellant's state of health.

56. The Article 8 ECHR issue was raised at first instance; s.25 of the 2003 Act was initially raised but during the hearing it was conceded on behalf of the Appellant that there was insufficient evidence to support a challenge under this section.

57. In relation to Article 8 ECHR the DJ conducted the required balancing exercise, setting out factors favouring extradition being granted and factors against extradition being granted at paragraphs 29 and 30 of the Decision:

> "**29 Factors favouring extradition being granted:**
>
> (a) The public interest in this country complying with its international extradition treaty obligations and not being regarded as a haven for those seeking to avoid criminal proceedings in other countries.
>
> (b) The mutual confidence and respect that should be given to a request from the judicial authority of a Member State.
>
> (c) The extremely serious nature of the allegation – trafficking and forgery, punishable in Spain by sentences of 8 and 3 years' imprisonment respectively.
>
> **30 Factors against extradition being granted:**
>
> (a) Interference with the Requested Person's right to private and family life.
>
> (b) He is a young man with certain medical problems which cause limitations for him. It may well be that he would struggle if separated from his family for some time in a foreign country.
>
> (c) The Requested Person has no criminal convictions."

58. The DJ concluded on Article 8 (at para. 31):

> "I am satisfied that the Article 8 rights of Mr Kapoor are engaged. On the evidence before me, there is nothing to suggest that the negative impact of his extradition is of such a level that the Court ought not to uphold this country's extradition obligations, particularly given the serious nature of the offences alleged."

59. The DJ further found that she could not conclude that extradition would be disproportionate for the reasons set out at paragraph 32 of the Decision.

60. Mr Sternberg accepts that there was very little evidence before the DJ on the Appellant's health. The DJ noted the Appellant's evidence (at para. 5):

> "He lives with his parents. He was born with a form of cerebral palsy, has had speech and language support and attended a special school."

61. The DJ stated that the note from the Appellant's GP, Dr S. Ishaque, dated 28 October 2018 "encapsulates everything about his health, describing ongoing lifetime conditions…The note supports the [Appellant's] evidence about his condition" (para. 11). The DJ's findings included the following:

> "13. He suffers from a number of medical conditions which limit his opportunities, for example to work.
>
> 14. However he was educated and gained qualifications.
>
> 15. He was able to provide instructions and give evidence in these proceedings.
>
> 16. He was able to visit Spain (Gran Canaria) in April this year without any family members."

62. Mr Sternberg submits that the DJ mis-stated the law relating to the correct approach to Article 8 ECHR and she did not have sufficient regard to the Appellant's health problems.

63. I agree with Mr Lloyd that on the evidence overall the DJ was not wrong in her conclusion that it would not be disproportionate for the Appellant to be extradited. However, as Mr Lloyd accepts, in the light of the new medical material now relied upon by the Appellant this Court has to conduct the balancing exercise afresh in relation to Article 8, and also to consider whether extradition would be unjust and oppressive. Accordingly, it is not necessary for me to consider further Mr Sternberg's criticism of the DJ's approach to the Article 8 issue.

64. The new medical evidence consists of three reports: first, the psychiatric report on the Appellant prepared by Dr S R Nimmagadda dated 26 March 2019; second, the clinical psychology report of Dr Melora Wilson dated 12 June 2019; and third, the addendum psychiatric report of Dr Nimmagadda dated 28 July 2019.

65. Dr Nimmagadda interviewed the Appellant for the preparation of his report on 16 March 2019. His conclusions in his first report include the following:

> "13.1 Based on the available information there is evidence to suggest that Mr Kapoor had congenital abnormalities in the form of Dandy-Walker malformation and Microcephaly. He suffered from the symptoms of the Dandy-Walker syndrome in the form of poor co-ordination and balance since his childhood. There is also evidence in his medical records that he had learning problems at school and he received his education in a special school. He seems to have done reasonably well with the support he has received from the special school and has completed his schooling with passing his exams. He also enrolled into a college and has completed an ICT Diploma levels 1, 2 and 3. He had brief periods of employment…

> 13.3 There is no evidence to suggest that Mr Kapoor currently suffers from any diagnosable mental illness…
>
> 13.4 In my opinion, with his background physical, health conditions and his learning difficulties, Mr Kapoor is a vulnerable person. His vulnerability seems to have been compensated to a considerable extent with the support he has received consistently from his school, his family and the local support network. Although there is clear evidence in his medical records that he had learning difficulties, there is no record of any formal IQ assessments to ascertain the degree of his learning disability. The degree of his vulnerability depends on the extent of his learning disability. Hence, I recommend a neuro-cognitive assessment by a Clinical Psychologist to ascertain his cognitive function and his IQ.
>
> 13.5 I suspect that there is a significant risk of deterioration of his mental state if he were to be subjected to undue stress with his background learning difficulties, his brain deformities and physical health conditions. However, it is difficult to comment conclusively on his fitness to be extradited, stand trial and his ability to cope with a lengthy prison sentence in the absence of a detailed neurocognitive assessment."

66. Dr Wilson, consultant clinical psychologist at the North London Forensic Service, assessed the Appellant on 11 June 2019 at the offices of his solicitors. She conducted various forms of psychometric assessments. At paragraphs 56 – 63 of her report she sets out her conclusions under the heading "Summary and Opinion". These include the following:

> "57. Mr Kapoor presented as a pleasant, yet somewhat naïve young man. He appeared keen to display a presentation of non-disability, although his congenital problems were observable...
>
> 58. About subjective mental state, Mr Kapoor denied any mood disturbances or biological markers of depression or anxiety. However, while I am not of the opinion he presents with a significant depressive episode, I have some concern he may be masking his true emotions…
>
> 59. With regards to intellectual functioning, Mr Kapoor was operating within the Extremely Low range for Verbal Comprehension, Perceptual Reasoning and Processing Speed. His Working Memory score was in the Borderline range. …While his adaptive living skills appear to be within relatively normal parameters, these scores, coupled with his poor verbal fluency skills, indicate notable learning impairments. One would therefore assume that his reasoning and consequential thinking skills are far below that of others. …
>
> 60. Formal testing on the Gudjonsson Suggestibility Scale ranked Mr Kapoor five points above the 95th percentile. This suggested he was significantly vulnerable to suggestive bias, as

> well as being susceptible to the effects of interpersonal pressure and negative feedback.
>
> 63. About the trial process, I think Mr Kapoor is fit to file pleas, but, given his extremely poor intellectual abilities, and processing skills, coupled with his overly suggestible nature, I am of the opinion that he will struggle to follow proceedings and maintain focus when challenged in cross examination. I am also in agreement with Dr Nimmagadda, that, given his numerous difficulties, there is a significant risk of deterioration in his mental state if he is subjected to undue stress."

67. Dr Nimmagadda in an Addendum Psychiatric Report notes Dr Wilson's findings and assessment. Dr Nimmagadda concludes:

> "3.0. OPINION
>
> 3.1 In view of the new information in the form of objective psychological testing, I am of the opinion that while Mr Kapoor has the capacity to enter into a plea and understand the implications of such pleas, and probably he has the capacity to give valid instructions to his legal team, I believe he is likely to have difficulties to follow the proceedings of the trial. I have reasonable doubts about his fitness to stand trial. Results of the psychological testing confirm his vulnerability and I continue to hold the opinion that there is a significant risk of deterioration in his mental state, if he is subjected to undue stress. I am further of the opinion that the removal of Mr Kapoor from his family and support network or being subjected to a lengthy prison sentence is highly likely to cause him significant stress and that is likely to cause a deterioration of his mental state."

68. Mr Sternberg realistically accepts that the Appellant could not succeed with an Article 8 health submission on the basis of Dr Nimmagadda's first report. With respect to Dr Nimmagadda his addendum report adds very little, if anything, to the report of Dr Wilson. Essentially, therefore, the Appellant's case on his state of health relies on the report of Dr Wilson.

69. The reports of Dr Nimmagadda and Dr Wilson were sent to the Spanish authorities. On 7 November 2019 the JA wrote:

> "With respect to the supposed illness of the person under investigation, its very existence, nature and extension and its influence on the imputability of the person under investigation should be the subject of study, examination and diagnosis on the part of the forensic doctors attached to the Las Palmas Institute of Legal Medicine, who are responsible for assisting this Criminal Investigation Court in this matter as objective and impartial witnesses, and who answer directly to the Spanish Ministry of Justice.

> [The relevant provisions of the Spanish Law of Criminal Procedures (Article 520) that guarantees rights to all parties who are under arrest or held in custody are then set out. The response continues]
>
> With respect to the content of the medical reports, it should be taken into account that these appear to have been drawn up and issued by a private doctor, and it is evident that any serious pronouncement with a minimum scientific base about the pathology suffered by the person under investigation, and the relevance or influence of this on the degree of criminal imputability, would require close scrutiny by a specialist doctor in the field, and at the same time it is the Spanish Courts which are competent to pronounce on any modifying or exempting circumstance in terms of the criminal liability of the accused with respect to the serious offences which he is charged with and which in turn could be grounded in the pathology in question. For this reason, as I have pointed out in my previous requests and communications, once the aforementioned person under investigation has been handed over to this Court, orders will be given in order that with all due haste a forensic-medical report be drawn up dealing with the matter of the degree of imputability based on all the available factors and documents and on an in-depth medical check-up and exploration by the forensic doctors, notwithstanding the right of the accused's defence to present to the court any expert witness medical reports which it deems opportune."

70. Mr Sternberg criticises this response. He suggests that the reference to the Appellant's "supposed illness" is indicative of the attitude to him and that the Spanish authorities have failed to explain how, having regard to the medical problems identified by Dr Nimmagadda and Dr Wilson, they propose to deal with the Appellant. Those reports indicate, Mr Sternberg submits, that the Appellant has a unique combination of health conditions and Dr Wilson's report explains his intellectual limitations. Having had the opportunity to respond to this fresh evidence the Spanish authorities have, Mr Sternberg submits, provided nothing at all on the practical steps that they would take, for example, in terms of adaptations to the Appellant's trial, assessment of his fitness to stand trial, assistance in the form of an intermediary when giving evidence if required and adaptations to his conditions of detention and support if incarcerated. Mr Sternberg describes the JA's response as being plainly inadequate to assuage the evidence that the Appellant's extradition would be unjust, oppressive and a disproportionate interference in his Article 8 ECHR rights.

71. The Appellant suffers, as the Respondent accepts, from a number of medical conditions. He is said to be a "vulnerable person" and the evidence is that he has learning difficulties, together with low intellectual functioning (albeit it appears he passed his GCSEs with a D grade in maths, B in English and B in science, and he passed an ICT Diploma levels 1, 2 and 3).

72. I do not accept that the Appellant's health condition on the medical evidence is such as to render his extradition either disproportionate or unjust or oppressive. A high threshold has to be reached in order to satisfy the court that a requested person's physical and mental condition is such that it would be unjust or oppressive to extradite him (*Turner v Government of the USA* [2012] EWHC 2426 (Admin) at para. 28). In my view that test is not satisfied in this case.

73. The Spanish authorities can be taken to be able to provide whatever care or treatment the Appellant may require (*Poland v Wolkowicz* [2013] EWHC 102 (Admin)). They have to be taken to be aware of their responsibilities and that they will respond accordingly. There is no evidence that the Appellant would not be given proper care and attention.

74. Further, I reject the suggestion that there is any requirement that the Spanish authorities make clear in advance of extradition precisely what steps they would put in place to deal with the Appellant's case. They have been provided with the medical reports. Mr Lloyd acknowledges that the Appellant rightly takes issue with the reference in the response to his "supposed illness", however the Spanish authorities have made it clear that the Appellant would be the subject of examination by doctors attached to the Las Palmas Institute of Legal Medicine, who are objective and are impartial experts who assist the Spanish Court, and that the Spanish Court will ensure that he is properly examined following his surrender to Spain by a specialist doctor. The Appellant and his lawyers will also have the right to present any medical evidence to the Court.

75. Conducting the Article 8 balancing exercise afresh I am entirely satisfied that the factors to which the DJ had regard favouring extradition being granted (see para 57 above), in particular the very serious nature of the allegations and the likely sentence if convicted of them, outweigh the factors against extradition being granted. In reaching this conclusion I have had particular regard to the evidence of Dr Wilson and the response of the JA to the new medical evidence. I do not consider the Appellant's extradition to be a disproportionate interference in his Article 8 ECHR rights, and nor in my view would his extradition for these serious offences be unjust or oppressive by reason of his health.

Conclusion

76. In my judgment none of the grounds of appeal are made out. Accordingly, this appeal is dismissed.