Neutral Citation Number: [2021] EWHC 1257 (Admin)

Case No: CO/3401/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/05/2021

Before:

MR JUSTICE CHAMBERLAIN

- -

Between :

JEMMA KILLORAN **Appellant**

- and –

INVESTIGATIVE JUDGE, ANTWERP COURT OF FIRST INSTANCE, BELGIUM

Respondent

- -
- -

GRAEME HALL (instructed by **Sonn Macmillan Walker**) for the **Applicant**
DAVID BALL (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 29 April 2021

- -

Approved Judgment

Mr Justice Chamberlain :

Introduction

1 The appellant, Jemma Killoran, is sought by the Court of First Instance of Antwerp, Belgium, pursuant to a European arrest warrant ("EAW") issued on 16 January 2020 and certified on 19 January 2020. This is an accusation warrant relating to offences of people smuggling, said to have been committed jointly with a Saman Ahmed Taha. The extradition hearing took place at Westminster Magistrates' Court on 13 and 17 July 2020 before District Judge Jabbitt. For reasons contained in a judgment handed down on 17 September 2020, he ordered the appellant's and Mr Taha's extradition.

2 The appellant appealed pursuant to s. 26 of the Extradition Act 2003 ("the 2003 Act"). Mr Taha also appealed but has now withdrawn his appeal and was extradited. In the appellant's case, permission to appeal was refused by Johnson J on the papers. The application for permission was renewed before me at a hearing on 29 April 2021. I indicated that I would reserve judgment.

3 Graeme Hall, for the appellant, advanced six grounds of appeal:

Ground 1 – s. 2(4)(c) of the 2003 Act – inadequate particulars

(a) The EAW fails adequately to particularise each offence.

(b) This was a "wholesale failure" to comply with s. 2(4)(c) of the 2003 Act, which could not be cured by further information.

(c) In any event, even read with the further information provided by the Belgian authorities, the EAW does not provide adequate particulars of the offence.

Ground 2 – s. 2(4)(d) of the 2003 Act

The EAW does not adequately particularise the maximum sentence for each offence and the sentencing range provided was inaccurate.

Ground 3 – Zakrzewski *abuse*

The EAW was fundamentally misleading in that it gave the wrong information about the sentence that could be imposed. In this respect to proceed on this warrant would be an abuse of process: *Zakrzewski v Poland* [2013] 1 WLR 324.

Ground 4 – s. 10 of the 2003 Act

This is said to be "parasitic on ground 1".

Ground 5 – s. 12A of the 2003 Act

Extradition is barred by s. 12A of the 2003 Act because no decision to try has yet been taken.

Ground 6 – s. 21A of the 2003 Act and Article 8 ECHR

Extradition would be a disproportionate interference with the appellant's private and family life.

The EAWs

4 In box c of the EAW, next to the words "Maximum length of the custodial sentence or detention order which may be imposed for the offence(s)" was "prison sentence of 15 to 20 years".

5 In box e of the EAW, it was said that:

> "This warrant relates to in total **several offences committed probably between August 2018 and the present date**." (Emphasis in original.)

6 The description of the circumstances in which the offences were committed was as follows:

> "The investigation has revealed that a criminal organisation presumably led by TAHA AHMED Saman (born in Iraq on 10 June 1990), also known as SARDAR SLEMAN Sarmand, has been using motorway parking areas along the E34 in Oud-Turnhout and Vosselaar, along the E313 Maasmechelen and along the E40 Aire de Crisnée for smuggling victims to the United Kingdom against the payment. The victims of the organisation either need to travel from Brussels to the motorway parking areas on foot and with public transport (railway and bus), where they receive further instructions from the members of the organisation, or are picked by the members of the organisation at the railway station and are then taken to the motorway parking area in the vehicle. After their arrival at the parking area, the smugglers lead the victims into the loading spaces heavy goods vehicles that are parked there, which include refrigerator trucks.
>
> Several facts of human smuggling that can be attributed to the criminal organisation and the motorway parking areas have now been added to the investigation. These events took place on 28 September 2018, 30 November 2018, 30 October 2019 and 7 November 2019.
>
> Within the framework of his human smuggling operations, TAHA AHMED Saman is assisted by several individuals, including his girlfriend KILLORAN Jamma [sic], the individual named ASSAD (possibly identified as the individual named KOLUNI Assad), individual named SORAN, the individual named ALI and the individual named IBRAHIM. Up to now, it has been impossible to identify all suspects.
>
> The investigation has revealed that, during several nights, KILLORAN Jemma, the girlfriend of TAHA AHMED Saman and a British national, was registered in the surroundings of the motorway parking areas along the E34 in Oud-Tunrhout and along the E313 in Maasmechelen, and that she transported victims from the Turnhout railway station to the motorway parking area along the E34 in Oud-Turnhout during several nights."

7 As to the nature and legal classification of the offences and applicable statutory provisions, the EAW said this:

> "A. Smuggling of human beings, committed against minors, during which the victim's life was exposed to serious danger, as a habit, and within the framework of a criminal organisation.
>
> B. Smuggling of human beings, during which the victim's life was exposed to serious danger, as a habit, and within the framework of a criminal organisation.
>
> Offences punishable in accordance with Section 66 of the Criminal Code and Sections 77, 77quater, 77quinquies and 77sexies of the Law of 15 December 1980 on the access to the territory, stay, establishment and return of the foreigners."

8 Further information has been given by the Antwerp Public Prosecutor's Office, which establishes that the police investigation in the appellant's case began on 28 September 2018. Since then, the examining magistrate started an "instruction" against Mr Taha for offences of smuggling human beings; the public prosecutor asked the examining magistrate to expand his instruction by adding additional facts; warrants were issued for phone tapping; requests were made for mutual legal assistance and the EAWs for Mr Taha and the appellant were issued. The examining magistrate will refer the case back to the public prosecutor when he or she considers sufficient evidence has been gathered. The public prosecutor then added as follows:

> "In light of the existing evidence in this case, I have already decided that once the Examining Magistrate refers the case back to me, I will refer it to the Council Chamber so that the case may go to a full criminal trial."

9 Further information received in July 2019 indicates that the appellant "can be placed on highway parkings E34 Oud Turnhout and E313 Maasmechelen, and this during several smuggling nights in period August 2018 until April 2019". The appellant is described as being "responsible for transporting victims/migrants from the train station in Turnhout to highway parking E34 Oud Turnhout, this while making use of a car registered to her name" and "responsible for transporting TAHA AHMED Saman and other members of the organization to the parking and picking them back up after completing the smuggling activities". It is added that "she has smuggled victims/migrants from France to the UK by ferry".

10 The appellant's role is said to include "purchasing cars in the UK used for smuggling activities". These are said to have been transported by the appellant by ferry from Dover to the mainland and handed over to Mr Taha or used herself to provide assistance during smuggling activities. The Appellant is said to be informed of the financial aspects of the activities of Mr Taha. She knows what price victims have to pay to be smuggled to the UK. She is responsible for transferring money on behalf of Mr Taha. She knows how the financial arrangements are made. She knows what Mr Taha has earned with regards to his smuggling activities. She is said to have given advice to Mr Taha as to how he should execute his smuggling activities, for example advising him to changes phones, and knows the other members of the organisation. The further information ends with this: "She's

alleged to have committed human trafficking in period 01/08/2018 until 20/01/2020, with a maximum sentence of 15 years, which up until present time 15 offences can be identified".

11 This prompted further questions, the answers to which clarified that the maximum sentence provided for law was 20 years, but that this was reduced to a maximum of 15 years "as a result of the (mandatory) acceptance of mitigating circumstances in case of referral of the matter to the correctional court". Further detail was given as to the appellant's involvement in the offences, including the dates of the occasions when she was present at the parking areas on the E34 and E313 and what was shown by the telephone intercept authorised.

Ground 1

The judgment below

12 The judge started from the general proposition that there should be a substantial measure of mutual trust and confidence between states that are signatories to the Framework Decision. The focus of the court should be on the alleged conduct, rather than a rigid requirement of specificity in respect of each alleged offence. The judge relied on the decision of Fordham J refusing permission to appeal in *Zeka v Court of First Instance, West Flanders Division, Bruges (Belgium)* [2020] EWHC 2304 (Admin), at [3]: "If the 'species' of the offence is clear, then 'dual criminality' compatibility testing can be undertaken. If the species of bird is known, the precise number within the flock does not change the fact that the species can be tested as to the requirement of dual criminality". Thus, the precise number of occasions on which it is alleged the offences were committed did not have to be spelled out.

13 Here, the conduct was set out in the EAW, supplemented by the further information. The appellant knew the type of offending for which she was sought and the substance of the allegations in terms of conduct, time, place and the nature of the offences.

Submissions for the appellant

14 For the appellant, Mr Hall submitted that the effect of the Extradition Act 2003 (Multiple Offences) Order 2003 (SI 2003/3150) ("the MOO") was that the requesting authority had to particularise each offence. He relied in particular on the decisions of the Divisional Court in *FK v Stuttgart State Prosecutor's Office, Germany* [2017] EWHC 2160 (Admin), *M & B v Italy* [2018] EWHC 1808 (Admin), [45] and *Avadenei v France* [2019] EWHC 2534 (Admin), [30].

15 The judge's reliance on *Zeka* was misplaced. *Zeka* was a permission decision of a single judge. No permission was granted for it to be cited. Moreover, it overlooked recent, binding authority *(FK)*, which made it clear that where more than one offence was alleged, each offence must be adequately particularised. The finding that, where an overarching conspiracy is alleged, it is not necessary to specify the number of offences, was contrary to *FK* and *M & B*.

16 In this case, it was not possible to identify how many offences the appellant was sought for. Different particulars were given in the various documents emanating from the judicial authority.

17 The failure to supply adequate particulars was a "wholesale failure": see *Alexander v France* [2017] 3 WLR 1427, [75]. The judge did not address this submission. He ought to have accepted it and discharged the appellant.

18 Even when read with the further information, the EAW does not explain how many offences the appellant is sought for and does not adequately particularise those offences. It "remains entirely unclear how the case is to be prosecuted against the Applicant" with the result that she will be unable to assert her specialty protection.

Submissions for the respondent

19 For the respondent, David Ball submitted that s. 2(4)(c) of the 2003 Act does not require particulars of the number of offences alleged. What was required was simply conduct, time and place and the relevant provisions of the law of the requesting state.

20 It is important not to treat the EAW as a charge sheet or indictment. Reliance was placed on *Fofana & Belise v France* [2006] EWHC 744 (Admin), [39] and *Denis v Poland* [2010] EWHC 3507 (Admin), [99]. As the Divisional Court said in *FK* at [54], the object of the EAW process was to remove the complexity and potential for delay in extradition and there was a particularly high level of mutual trust, confidence and respect between States in this respect. It held that there was "no requirement for full and exhaustive particularisation, the appropriate level of particularisation being dependent upon the circumstances of a specific case".

21 In this case, the EAW, taken with the further information, provided a sufficient level of particularisation. It was now clear what the appellant is alleged to have done, when and where. This is sufficient to enable the court to apply the dual criminality provisions and sufficient to enable the appellant to assert her specialty protection.

Discussion

22 The starting point for considering what is required by s. 2(4)(c) is the language used in that provision. It requires "particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the category 1 territory under which the conduct is alleged to constitute an offence". The effect of the MOO is that this is required for each alleged offence.

23 I accept that the EAW refers to "several offences", while the public prosecutor's further information document refers to an intention to prosecute for "one offence". Reading the EAW as a whole, however, it is clear that the reference to "several offences" is intended as a reference to the several occasions on which it is alleged that the appellant engaged in conduct constituting the offence. In this jurisdiction, these occasions might perhaps be charged as separate counts on an indictment. How exactly they are charged does not matter. What does matter, as the statute makes clear, is that the conduct alleged, the time and place where it is said it occurred and the legal provisions which made it unlawful are all set out.

24 In this case, the EAW provides the conduct and the legal provisions, but not the precise dates when it is said the appellant engaged in the alleged activity. The latter is provided by

the further information. Read as a whole, the material enables the appellant to assert her specialty protection and enables the court to apply the dual criminality provisions.

25 The high point of the appellant's case was the decision of the Divisional Court in *M & B v Italy*. But in that case the EAW did not make clear what each of the conspirators was alleged to have done (see at [48]). In the present case, the EAW does make that clear. Unlike in *Avadenei v France*, the further information provides more than adequate additional detail as to when the various conduct alleged against the appellant is said to have been taken place and this information expands upon, and does not contradict, the information in the EAW.

26 This is consistent with the approach of Fordham J at [2] of his permission decision in *Zeka*. Contrary to Mr Hall's submission, it is also consistent with *FK*, in which the Divisional Court emphasised at [54] that the EAW should be considered "as a whole".

27 In my view, the EAW was not so defective that the *lacunae* could not cured by further information so that there was a "wholesale failure" to particularise in the sense described in *Alexander v France.* When the EAW is read with the further information, it is clear that the requirements of s. 2(4)(c) were met. The contrary is not reasonably arguable. I will therefore refuse permission on ground 1.

Ground 2

28 The Belgian judicial authority's stance before the judge was that box c set out the maximum and minimum sentences applicable (20 years and 15 years respectively). The judge accepted this, saying at [91] that "the further information has set out the minimum and maximum sentences".

29 No additional materials have been placed before the court since the judge's decision. The Belgian authority's interpretation of the material appears, however, to have changed. In its Respondent's Notice, the Belgian judicial authority says this:

> "In summary there is a maximum sentence of 20 years, but that maximum can be reduced to 15 years where there are mitigating circumstances whose acceptance is mandatory. It is understood that these mandatory mitigating circumstances can include the presence of very young children."

30 This new interpretation is based on further information dated 16 July 2020, which was before the judge. No indication is given of why, on the basis of precisely the same material, the position advanced here is different from that advanced before the judge. This is unsatisfactory. Nonetheless, the position of the Belgian judicial authority now accords with the appellant's own position: there is no minimum sentence and the maximum sentence applicable to the appellant is 15 years.

31 In those circumstances, it is plain that (through no fault of his own) the judge erred in accepting the position then being advanced by the Belgian judicial authority. But on an appeal against an extradition order, it is not enough to show that the judge erred. It is necessary to go further and ask whether, if the judge had not erred, he would have been required to order the appellant's discharge: s. 27(3)(b) of the 2003 Act.

32 If the true position had been known, the judge ought still to have concluded that the condition in s. 2(4)(d) was met. It remains to be considered whether the lower sentence available affects any of the other grounds.

33 Insofar as complaint is made that there was a failure to specify the maximum sentence of each offence, the complaint – and the answer – are the same as made under ground 1. I will refuse permission to appeal on ground 2.

Ground 3

34 Under this ground, the appellant relies on Lord Sumption's judgment in *Zakrzewski*, where at [13] he held that an abuse of process argument could succeed subject to four conditions being satisfied:

> "The first is that the jurisdiction is exceptional. The statements in the warrant must comprise statutory particulars which are wrong or incomplete in some respect which is misleading (though not necessarily intentionally). Secondly, the true facts required to correct the error or omission must be clear and beyond legitimate dispute. The power of the court to prevent abuse of its process must be exercised in the light of the purposes of that process. In extradition cases, it must have regard… to the scheme and purpose of the legislation. It is not therefore to be used as an indirect way of mounting a contentious challenge to the factual or evidential basis for the conduct alleged in the warrant, this being a matter for the requesting court. Third, the error or omission must be material to the operation of the statutory scheme. No doubt errors in some particulars (such as the identity of the defendant or the offence charged) would by their very nature be material. In other cases, the materiality of the error will depend on its impact on the decision whether or not to order extradition. The fourth observation follows from the third… the sole juridical basis for the inquiry into the accuracy of the particulars in the warrant is abuse of process. I do not think that it goes to the validity of the warrant. This is because in considering whether to refuse extradition on the ground of abuse of process, the materiality of the error in the warrant will be of critical importance, whereas if the error goes to the validity of the warrant, no question of materiality can arise. An invalid warrant is incapable of initiating extradition proceedings. I do not think that it is consistent with the scheme of the Framework Decision to refuse to act on a warrant in which the prescribed particulars were included, merely because those particulars contain immaterial errors."

35 For the appellant, Mr Hall concentrated on the incorrect particulars as to length of sentence. To say, as the EAW does, that the offence carries a minimum 15-year sentence, when in fact it carried no minimum sentence, was fundamentally misleading. Mr Hall submitted that the error had a material consequence: it was relied upon as a principal ground for refusing bail. The appellant lost her liberty as a result of the EAW containing misleading particulars.

36 I accept that the error as to the sentence was a potentially significant one. Assessing whether it was material in the sense described by Lord Sumption requires consideration of whether, had the position been known, extradition would still have been ordered. The

answer to that question is plainly "Yes". Even on the footing that the maximum sentence is 15 years' imprisonment, and there is no minimum, the offences for which the appellant's extradition is sought are extradition offences; and given the conduct alleged, they are certainly serious. Moreover, the judge made clear when dealing with Article 8 that he accepted the appellant's expert evidence that the likely sentence in the appellant's case would be less than 3 years' imprisonment. (He thought that this was because of provisions allowing the court to disapply the minimum sentence, whereas in fact it was because there would be no minimum sentence at all in the appellant's case.)

37 The fact that the offences were thought to carry a minimum sentence of 15 years' imprisonment was, no doubt, relevant in principle to the decision to refuse bail. I doubt whether it was determinative, since – as noted above – the offences alleged were on any view serious; and even on the appellant's own expert evidence she could expect a substantial custodial sentence if convicted. Moreover, in that event, any time spent in custody on remand would count towards her sentence.

38 *Zakrzewski* was of course decided at a time when it was thought impermissible to make good defects in a warrant by way of further information. It is right to assume, unless and until the Supreme Court decides to the contrary, that the abuse jurisdiction remains. I do not consider, however, that the present circumstances are so exceptional as to trigger that jurisdiction. The contrary is not reasonably arguable. I will refuse permission on ground 3.

Ground 4

39 As this was said to be "parasitic on ground 1", I refuse permission to appeal on ground 4.

Ground 5

The law

40 Section 12A(1) of the 2003 Act provides:

> "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 from 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."

The arguments before the judge

41 The judge correctly directed himself that it was necessary to apply a two-stage test. He relied on *Kandola v Germany* [2015] EWHC 619, [31]-[32], *Puceviciene and others v Lithuania and others* [2016] EWHC 1862 (Admin), [2016] 1 WLR 4937, [39]-[42] and *Doci v Italy* [2016] EWHC 2100 (Admin), [32].

42 The judge had the benefit of two broadly consistent reports, one filed on behalf of the appellant and one filed on behalf of Mr Taha. These showed that the appellant was the subject of an ongoing judicial investigation led by an investigating judge of the Court of First Instance in Antwerp. No formal indictment had yet been preferred. When an investigating judge considers that the investigation has been completed, he or she sends the file to the public prosecutor. The public prosecutor either demands further investigative acts or the settlement of the investigation by the *Chambre du Conseil*, which decides whether there are sufficient indications of guilt to bring the suspect before the trial judge. The experts considered that this is the equivalent of a decision to try. In this case no such decision has been taken because the investigation is ongoing.

43 In another case, *McPhillips and Hatherley v Belgium*, District Judge Tempia held that the decision of the *Chambre du Conseil* was the decision to try.

44 For the respondent, it was submitted that expert evidence was of little assistance in deciding, as a matter of English law, whether there had been a "decision to charge/try" within the meaning of s. 12A. That question had to be answered applying a "cosmopolitan" approach, as required by *Puceviciene*, [50(ii)]. In the absence of anything else, a decision to charge showed that there was a decision to try: *Doci v Italy*, [32]. In other words, the decision to try was "contained within" the decision to charge.

The judge's conclusion

45 The judge adopted a "purposive and cosmopolitan approach" to the question whether the Belgian prosecutor's decision (which he thought was undoubtedly a decision to charge) could also be regarded as a decision to try. In this respect, he disagreed with the view of both experts and of his colleague (District Judge Tempia) that the body competent to make the decision to try was the Chambre du Conseil. The relevant decision-maker was in fact the prosecutor. He had already decided that he would send the case to the Chambre du Conseil when the file was returned to him by the investigating judge.

46 At [120], the judge said this:

> "I acknowledge that this issue, and maybe others, may require the scrutiny of the Divisional Court."

My conclusion on permission

47 The task for me at this stage is to consider whether any of the grounds of appeal is reasonably arguable. In my view, the fact that two district judges reached different views is a good indicator that this ground is reasonably arguable. The judge's own view that the issue may require the scrutiny of the Divisional Court is a further indicator that permission should be granted. I have considered the arguments carefully myself. The EAW here seems to me to record that a decision to charge has been taken, but it is reasonably arguable that – in a system such as that in Belgium – a decision to charge does not necessarily entail a decision to try within the meaning of s. 12A: see e.g. *Doci*, [33]. Whether and if so when, in such a case, extrinsic evidence is admissible to show that the first stage of the s. 12A test is satisfied, so that the burden of proving the matters in s. 12A(1)(b), is also a matter that should be considered at a substantive hearing.

48 Having reached the view that the point is reasonably arguable, it would not be appropriate for me to say anything more about it. I shall grant permission to appeal in respect of ground 5.

Ground 6

The judge's conclusions

49 The judge referred to *Norris v Government of the USA (No. 2)* [2010] UKSC 9, [2010] 2 AC 487, *HH v Italy* [2012] UKSC 25, [2013] 1 AC 338 and *Celinski v Poland* [2015] EWHC 1274 (Admin), [2016] 1 WLR 551. He listed the factors against extradition as follows at [146]:

> "a. The evidence of the child psychologist is that Miss JK's son, for whom she is the sole carer, would be seriously adversely affected. M is at the age where he is most attached to his mother; the consequences of separation on his mental health and well-being will be serious.
>
> b. The evidence in the s. 7 welfare report, by the social worker, Ms Wilson, reaches a similar conclusion, that extradition would affect M's sense of stability and security.
>
> c. There is no evidence as to how the emotional impact on M could be mitigated, for example visiting rights for M, if JK remains in a Belgian prison.
>
> d. The psychiatric report states that JK suffers with PTSD and moderately severe depression with somatic syndrome. Extradition will cause these conditions to worsen and her mental health to further deteriorate. The PTSD was caused by 'the frightening experiences of her arrest and the emotionally tumultuous experiences of custody as an exceptionally vulnerable time of being a new mother'
>
> e. The emotional impact of being separated from M upon JK is described by Dr Wain as likely to exacerbate her depression, and that she should be monitored if in custody in Belgium."

50 The factors in favour of extradition were listed as follows:

> "a. The serious nature of the allegations, the high potential maximum sentence, and the dangers inherent to individuals desperate to come to the UK in the back of lorries.
>
> b. The public interest in the UK fulfilling its treaty obligations to fellow signatories to the Framework Decision.
>
> c. The public interest in the UK not being a safe haven for individuals seeking to evade justice or able to resist justice, in the requesting state.
>
> d. Although extradition will have a severe emotional impact upon the child and JK, this is mitigated by the fact that the MGM, can look after M, is willing to do so, and has done so, whilst JK was in custody in these proceedings before she was granted bail.
>
> e. Anonymization of this decision will protect him from unwelcome attention as he grows up.
>
> f. An updating letter from Mr Van de Wal, dated 27 May 2020, States that mitigating circumstances leads to the "correctionalization' of sentencing, such that the minimum sentence will not be applied to JK, if convicted, and she is likely to receive a sentence of less than three years imprisonment."

51 The judge noted the strong emotional relationship between the appellant and her child. The welfare of the child would be "a primary consideration". The court cited *JP v Czech Republic* [2012] EWHC 2603 (Admin) and *Palioniene v Lithuania* [2019] EWHC 944 (Admin). In the latter case, at [46], it was said that the rights of children "even in sole carer cases will rarely outweigh" the importance of complying with extradition requests.

52 The judge noted that the s. 7 report showed that the child had a "warm relationship" with his maternal grandparents, who had cared for him between 20 January and 18 March 2020 (when the appellant was remanded in custody). If the appellant were extradited to Belgium, the maternal grandparents would take on the child's full-time care, with the appellant's consent. The judge also observed that, if convicted, the appellant was likely to receive a sentence of less than three years' imprisonment, so it might not be necessary to seek an order providing an element of parental responsibility to the maternal grandmother.

53 At [153], the judge said this:

> "The allegations are plainly very serious, and the public interest in honouring our extradition obligations to fellow treaty members in this case is high, thus although the child M's welfare is a primary consideration, this is not one of those rare cases where extradition, would be disproportionate, pursuant to Article 8 ECHR."

Submissions for the appellant

54 For the appellant, Mr Hall submitted that the judge had erred in that he:

(a) wrongly relied on the cases of *JP v Czech Republic* and *Palioniene v Lithuania;*

(b) applied a test of "rarity"; and

(c) failed to treat the sentence that the Applicant would likely face, if convicted, as a factor in favour of discharge when carrying out the Article 8 balancing exercise.

Discussion

55 The appellant's objection to the citation by the judge of two authorities is founded on the decision of the Divisional Court in *Celinski*, where at [14] Lord Thomas CJ said this:

> "Decisions of the Administrative Court in relation to Article 8 are often cited to the court. It should, in our view, rarely, if ever, be necessary to cite to the court hearing the extradition proceedings or on an appeal decisions on Article 8 which are made in other cases, as these are invariably fact specific and in individual cases judges of the Administrative Court are not laying down new principles. Many such cases were referred to in the skeleton arguments. We have referred to none of them in this judgment, as the principles to be applied are those set out in *Norris* and *HH*. If further guidance on the application of the principles is needed, such guidance will be given by a specially constituted Divisional Court or on appeal to the Supreme Court. It is not helpful to the proper conduct of extradition proceedings that the current practice of citation of authorities other than *Norris* and *HH* is continued either in the extradition hearing or on appeal."

56 I do not read this passage as advancing the proposition that, when considering Article 8, the citation of authorities other than *Norris, HH* and *Celinski* itself will vitiate a decision. That would be a very surprising proposition in a common law system. The point the Divisional Court was making was that decisions on Article 8 are intensely fact-specific. That must be borne in mind when referring to other decisions. Such decisions must not be treated as creating inflexible rules. Provided that they are not so treated, however, they can occasionally provide a useful yardstick by which to calibrate a decision about where the Article 8 balance lies. The use of previous decisions in that way cannot be regarded as disclosing an error of law.

57 In this case, there is nothing to suggest that the judge regarded the decisions in *JP v Czech Republic* or *Palioniene v Lithuania* as creating inflexible rules. The paragraphs cited from *JP* at [149] of the judgment provide no more than a summary of the principles articulated by the Supreme Court in *HH*. Similarly, the judge's only reference to *Palioniene* was at [150] of his judgment, where he cited it for the proposition that, even in sole carer cases, the rights of children will rarely outweigh the importance of complying with extradition requests. But this point, from [46] of Dingemans J's judgment in *Palioniene*, arose in the context of a discussion of the principles to be derived from *HH*. As Lady Hale made clear in *HH*, what is required is an intense focus on the facts of the specific case. In particular, "the court may have to consider whether there is any way in which the public interest in extradition can be met without doing such harm to the child": see *HH*, at [33].

58 In my judgment, this was precisely the approach taken by the judge in this case. He asked what would happen to the child if the appellant were extradited. He had detailed evidence on that question, in the form of the s. 7 report. The answer was that, with the appellant's consent, the child would go to the grandparents, who had already looked after him and with whom he had a warm relationship; and, given that the mother would probably receive a sentence of less than 3 years, it may well not be necessary to seek an order granting parental responsibility to them.

59 The balancing exercise undertaken by the judge in this case cannot, in my judgment, be faulted in any way. He undertook that exercise on the footing that the appellant was likely to receive a sentence of less than 3 years' imprisonment, which was what her own expert had said. In my view, he was correct not to refer to the length of sentence as a factor militating against extradition. This is so because the offences were serious (and the public interest in extradition for them therefore substantial) and a sentence of less than 3 years is still a significant sentence.

60 Applying the test in [24] of the Divisional Court's judgment in *Celinski*, there is nothing to suggest that the judge's decision was "wrong". The contrary is not reasonably arguable. I shall refuse permission on ground 6.

Conclusion

61 For these reasons, permission is refused in respect of grounds 1-4 and 6, but granted in respect of ground 5. Because this renewed application for permission involved more extensive oral argument than would be usual, and because my conclusions on grounds 1-4 and 6 involve some points of principle, I give permission for it to be cited.