Neutral Citation Number: [2015] EWHC 2305 (Admin)

Case No: CO/1724/2015 & CO/1815/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2015

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
and
MR JUSTICE CRANSTON

- -

Between:

Spanish Judicial Authority	**Respondent**
- and –	
Antonio Troitino Arranz	
	Appellant

(No 3)

- -
- -

Mark Summers QC and **Laura Dubinsky** (instructed by **Birnberg Peirce Solicitors**) for the **Appellant**
Ben Lloyd (instructed by **CPS**) for the Respondent

Hearing dates: 23 & 24 June 2015

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Approved Judgment

Lord Thomas of Cwmgiedd, CJ:

1. Between 2011 and the present time, the Spanish Judicial Authority have issued three European Arrest Warrants (EAW) against the appellant. In 2013, the appellant was eventually discharged by this court under the first EAW (EAW 1), a conviction warrant. He was discharged under the second EAW (EAW2), an accusation warrant by the Westminster Magistrates' Court. His extradition to Spain was ordered under the third EAW (EAW3). The current appeal is from that decision. As the issues in this appeal involve matters relating to EAW1 and EAW2, it is necessary to outline the background and the proceedings in respect of EAW1 and 2.

The background

(a) EAW1: the original conviction of the appellant, his release from prison and his arrival in England and Wales

2. In 1986 the appellant was a member of a terrorist cell which sought to further the aims of the Basque separatist group, ETA. On 14 July 1986, with others, he placed an explosive device in central Madrid which was detonated as a convoy of civil guards approached. Eleven members of the civil guard were killed in the explosion, 43 members of the civil guard and 17 civilians were injured and there was substantial damage to property. In 1989 the appellant was convicted of 91 offences including terrorism, murder and attempted murder and was sentenced to 2,232 years imprisonment for his part in the attack.

3. In 2000 the Audiencia Nacional, the highest trial court in Spain, fixed the combined time to be served and capped it at 30 years without remission. On this basis, his sentence would have been completed in January 2017. At the time that the sentence was fixed, Spanish law provided that a defendant was entitled to remission for good conduct against the 30 year term at which his sentence had been capped. Applying that law, it was determined that the appellant had earned 2,164 days remission and his release date was fixed for February 2011.

4. However, in a case involving another ETA defendant, the Spanish Supreme Court had, by a judgment of 28 February 2006, amended the law so that remission was to be applied to each sentence individually, namely the 2,232 years and not to the maximum 30 year term. This change to the law was known as the Parot doctrine.

5. On 1 February 2011 the Third Section of the Audiencia Nacional applied the Parot doctrine to the appellant's case so that instead of being released in 2011 he was to be released in 2017. Nonetheless, the appellant was released from prison on 13 April 2011, as it appears that effect had been given to the earlier decision.

6. It was appreciated by the Audiencia Nacional shortly thereafter that his release had taken place. On 19 April 2011 the Audiencia Nacional reversed the ruling permitting his release and issued a Spanish domestic warrant for the appellant's arrest.

7. The appellant left Spain and came to the United Kingdom. We refer to the case of the Spanish Judicial Authority in relation to the way in which he left Spain at paragraph 29 below, as that case forms the basis of the accusation under EAW3 with which this appeal is concerned. EAW1, a conviction warrant, was issued on 26 April 2011 to

enforce the Spanish domestic arrest warrant. Over a year later, on 29 June 2012, the appellant was arrested under EAW1 in the UK. False identity documents were seized from him.

(b) The decisions of the Strasbourg Court in Del Rio Prada

8. Shortly after his arrest in the UK, the Third Section of the Strasbourg Court held that the retroactive application of the Parot doctrine to the sentence of another ETA member violated Article 7 of the European Convention on Human Rights. Insofar as it purported to justify the detention, it was in breach of Article 5: see *Del Rio Prada v Spain* (2012 App 42750/09, July 2012). The Government of Spain appealed to the Grand Chamber.

9. Whilst that appeal was pending before the Strasbourg court the extradition proceedings under EAW1 continued. On 1 February 2013, the District Judge at Westminster Magistrates' Court ordered the appellant's extradition under EAW1. That decision was upheld by this court on 14 June 2013 in a judgment reported at [2013] EWHC 1662 (Admin). This court upheld the decision on the basis of an express undertaking by the Spanish Judicial Authority that it would scrupulously abide by the judgment of the Grand Chamber.

10. Whilst this court was considering whether to certify a question of law for the Supreme Court of the United Kingdom, the Grand Chamber delivered a judgment upholding the decision of the Third Section on 21 October 2013.

(c) The failure by the Spanish Judicial Authority to abide by their undertaking to this court in respect of EAW1

11. The appellant immediately applied to reopen his extradition appeal and to be admitted to bail. On 22 October 2013, the Spanish Judicial Authority requested time to consider its position; the appellant was admitted to bail.

12. In fact the appellant was not released on bail. He was detained in immigration detention as a result of a decision made by the Secretary of State to deport him to Spain. It was not until 27 November 2013 that the appellant was released.

13. The circumstances in which EAW1 was concluded were as follows.

(1) The position taken by the Spanish Judicial Authority was:

> "Considering the previous writ of the British liaison magistrate, this court orders it has to be joined to the executory and in response to the issues raised that this Third Section maintains its request for surrender extradition by EAW and says it is up to the British courts to resolve about its execution and, where appropriate, to apply the ECHR doctrine in its 2013/10/21 judgment."

(2) As explained to us, this was intended to convey the refusal of the Spanish Judicial Authority to withdraw the EAW, let alone the underlying proceedings in Spain to enforce the sentence imposed on the appellant under the Parot

doctrine. It was contended by the appellant that the pursuit of the appellant's removal under the EAW in these circumstances was an abuse of process.

(3) The Crown Prosecution Service, who act in such proceedings for each European Judicial Authority, did not dispute that position. This court decided that the appeal be allowed on the basis that:

> "Following the Grand Chamber's decision, the pursuance of the European Arrest Warrant, when there is no further period of detention in Spain that the appellant could be required to serve, amounts to abuse of this court's process."

(4) This court therefore ordered the appellant's discharge under s.27 of the Extradition Act 2003 (the 2003 Act) and quashed the order for removal.

14. That, however, left the original arrest warrant and EAW1 in place. If the appellant had left the United Kingdom, he would have been immediately subject to arrest under EAW1 in the territory of another Member State which these days can more easily be done under the Schengen II Information System.

15. As we set out below at paragraphs 38 and 39, it was only in the course of this appeal that the Spanish Judicial Authority withdrew the proceedings in Spain and the extant warrants for his arrest and finally complied with its undertaking to this court.

(d) The second European Arrest Warrant

16. On 10 January 2014 the Spanish Judicial Authority issued a second EAW (EAW2) in respect of the appellant. This was an accusation EAW alleging two offences, namely membership of a terrorist organisation and forgery of official documents. It will be necessary to return to the substance of the first of those offences in due course. Suffice to say that in a judgment delivered on 17 October 2014 the Westminster Magistrates' Court held that EAW2 was invalid under s.2 of the 2003 Act. The appellant was discharged.

(e) The third European Arrest Warrant

17. On 17 November 2014 the Spanish Judicial Authority issued a replacement EAW (EAW3) for the same two offences, curing the defect identified in the judgment of 17 October 2014. The appellant was rearrested on 11 December 2014 and released on bail.

18. There was an extradition hearing before the Senior District Judge on 6 February, 20 and 23 March 2015 at which evidence was heard. On 14 April 2015 the District Judge, for reasons carefully and clearly set out in a written judgment, ordered the appellant's extradition in respect of the first offence, namely membership of a terrorist organisation, but discharged him in respect of the forgery offence. The appellant appealed against his extradition. The Spanish Judicial Authority initially sought leave to appeal in respect of the forgery offence, but that appeal has been abandoned.

19. All the issues raised by the appellant before the District Judge are pursued on the appeal. These are:

(1) "Judicial engineering" by the Spanish Judicial Authority;

(2) Abuse of process on the basis that it was clear that the conduct set out in EAW3 did not give rise to the offence alleged;

(3) Specialty in respect of the extant proceedings which formed the basis of EAW1;

(4) Articles 6/5 of the European Convention on Human Rights;

(5) The bar under S.12A of the 2003 Act; and

(6) Article 31 of the Refugee Convention.

We will consider each of these in turn.

(1) "Judicial engineering" by the Spanish Judicial Authority

20. The first submission of the appellant was that the Spanish Judicial Authority had engaged in what was described as "judicial engineering". The submission ran that there had been an outcry in Spain about the early release of the ETA terrorists, including the appellant. The Spanish Government had stated it would use whatever means necessary to return the appellant to prison. The Spanish Judicial Authority had succumbed to that pressure by engaging in judicial engineering by taking every possible step to secure the appellant's extradition to Spain under EAW1 and in issuing the proceedings which underpinned EAW2 and EAW3 which had no *bona fide* basis. The Spanish judiciary could not be expected to try the appellant fairly.

21. Mr Summers QC, who made the submission properly to this court as it was based on admissible evidence, made it clear that there was no allegation that the Spanish Judicial Authority would engage in judicial engineering in other types of case, nor would the Spanish courts unfairly try other types of case. However, because of the pressure of public opinion and political pressure by the Spanish Government in relation to ETA terrorists, particularly those who had been released as a result of the annulment of the Parot doctrine, the Spanish Judicial Authority and the Spanish judges had departed from their ordinary exemplary standards.

22. The evidence in support of this submission, as put before the Senior District Judge, comprised principally reports and oral testimony by Mr Paddy Woodworth and Mr Jacobo Casanova.

(1) Mr Paddy Woodworth is a writer and journalist with great expertise on Spain. He was described by Professor Paul Preston CBE, the Príncipe de Asturias Professor of Contemporary Spanish Studies at the London School of Economics, as "the principal authority writing in English on the Basque country, its recent politics and relations with the Spanish political establishment". Professor Preston described Mr Woodworth's report as, "impressive, both in the range of its knowledge and its underlying research"; he concluded, "it also provides a balanced analysis of the issues concerning the partisan nature of the Spanish judiciary." He expressed his entire agreement with its content and conclusions.

(2) Mr Casanova has been in legal practice for 25 years and specialises in complex and important cases before the Audiencia Nacional.

23. In his clear and detailed reports, Mr Woodworth set out the political and judicial context in which the appellant and other ETA terrorists had been treated by Spanish public opinion, the Spanish Government and the Spanish judiciary. He pointed out that the appellant and others connected with ETA were always regarded as hate figures in Spanish public opinion; the appellant's release from prison had been condemned by many political leaders. Mr Woodworth observed, for example, that it was hard to avoid the conclusion that the Spanish Supreme Court had "bent" their legal judgment in enunciating the Parot Doctrine as a result of the extraordinary pressure exerted on them by public opinion, mobilised by the hard right. In bringing the proceedings under EAW2 and EAW3 the Spanish Judicial Authority was in effect bowing to public opinion which sought vengeance rather than justice. He pointed to the fact that the Spanish Minister of the Interior had, prior to the decision by the Grand Chamber in the *Del Rio Prada* case, declared, "that there would be a margin for judicial engineering".

24. The opinion of Mr Casanova again referred to similar background material and sought to illustrate why the charges made were the product of "judicial engineering".

25. We have very carefully considered the entirety of their reports and the note of the evidence given before the Senior District Judge. We have considered each of the instances on which they had relied and in particular the creation by the Spanish judiciary of the Parot doctrine as a retrospective provision directed at preventing the lawful release of ETA prisoners, the position taken by the Spanish judiciary in respect of counting time served in custody abroad in computing the time to be spent in prison in Spain, the statements made by Spanish Ministers in respect of the decisions of the Strasbourg court in *Del Rio Prada*, the various instances of the treatment of ETA prisoners, the prosecution of another ETA member, Juan Chaos, the arrest of lawyers acting for ETA, the complaints made by the Spanish judiciary about the actions of Spanish politicians in respect of ETA prisoners and the appellant and the conduct of the Spanish Judicial Authority in the present case. There can be no doubt that the evidence adduced was of sufficient weight that it was proper for Mr Summers QC to advance these serious allegations against the Spanish Judicial authority both before the Senior District Judge and on this appeal.

26. The judge, with some important exceptions, accepted the factual evidence provided by Mr Woodworth, but concluded, in respect of his evidence, that the evidence that the Spanish Judicial Authority had responded to pressure by giving decisions they knew were not in accordance with the law was not compelling. In respect of Mr Casanova's evidence it is clear that there was the usual difficulty that arose when an overseas lawyer gives his evidence in a language other than English. The Senior District Judge concluded that, even making allowance for the difficulties of giving evidence through an interpreter, his evidence was at times hard to follow. After considering the detailed points relied on by the appellant the Senior District Judge concluded that the issue of EAW3 had not been "manufactured" by the Spanish Judicial Authority and that there was no real risk that the Spanish Judicial Authority would treat the appellant on his return other than properly and fairly and would not make any decisions on the basis of political pressure.

27. We ourselves have very carefully considered the evidence that was before the Senior District Judge. In addition we have also taken into account the failure of the Spanish Judicial Authority to terminate the underlying Spanish proceedings relating to EAW1, in breach of their express undertaking to this court. However, as we explain at paragraph 39 below, the Spanish Judicial Authority has remedied that matter. As is apparent from the Senior District Judge's careful and considered judgment, he was also very concerned at the evidence put before him and the weight it carried.

28. Nonetheless, despite the careful and meticulous argument of Mr Summers QC, we cannot conclude that the Senior District Judge was wrong in the conclusion he reached on the evidence. He had the benefit of hearing the witnesses and of carefully weighing that testimony. We cannot in those circumstances see, on well established principles, that he came to a decision that was not open to him on the evidence. It would not therefore be the proper function of an appellate court to set his findings aside. In the result therefore this particular submission fails, though, as was submitted by Mr Summers QC, he was entitled to rely on the evidence of Mr Woodworth and Mr Casanova in relation to the other issues to which we now turn.

(2) Abuse of Process

29. The allegation set out in EAW3 by the Spanish Judicial Authority in respect of membership of a terrorist organisation contrary to Article 571 of the Spanish Criminal Code was based on the short account set out in the body of EAW3. That account was that between 13 April 2011 (the date on which the appellant was released from prison) until the issuance of the warrant for his arrest he went underground; that he had at first hidden himself in an unidentified location in Spain from which he contacted the terrorist organisation ETA so that this organisation could help him to flee from Spain; and that this rendered ineffective the search and arrest warrant issued by the Audiencia Nacional to which we have referred at paragraph 6 above. It was said that his actions had the effect of:

> "Thereby accepting a new integration and submission to the instructions of the terrorist organisation in relation to the so-called Collective of Refugees (branch that brings together its militants in countries other than Spain or France, always at the disposal of ETA)."

30. In addition, in relation to the forgery offences, EAW3 stated that the appellant handed over his photograph to the ETA logistics department which made 6 fake Spanish identity documents. Finally EAW3 stated that the house he was occupying when arrested in the UK was also occupied by another member of ETA.

31. The argument advanced before the Senior District Judge, principally on the evidence of Mr Casanova, was that the prosecution of the offence of membership of a terrorist organisation was untenable in Spanish law. Mr Casanova's evidence was that the Collective of Refugees referred to above in the EAW was a reference to an organisation based in France. It was an organisation that operated openly and was not proscribed; it was an organisation for ETA ex-prisoners. It could not therefore be a terrorist organisation. Thus even accepting the allegation in EAW3 that the appellant had accepted integration with the "Collective of Refugees", that fact could not amount to membership of a terrorist organisation. Secondly, the EAW did not allege that the

appellant had performed any act in furtherance of the aims of the terrorist organisation which was an essential element of the Spanish offence. The only acts set out in EAW3 were acts alleged for the benefit of the appellant.

32. Based on this evidence, it was contended that the appellant was entitled to rely on the well-known passage in the judgment of Sir Anthony May PQBD in *Spanish Judicial Authority v Murua* [2010] EWHC 2609 (Admin) at paragraphs 58-59. Those paragraphs state that on appropriately clear facts, the court could examine the allegation in the EAW to determine whether it was fair proper and accurate. If it was not, then the EAW was invalid under s.2 of the 2003 Act. In *Zakrzewski v The Regional Court in Lodz, Poland* [2013] 1 WLR 324, Lord Sumption giving the sole judgment of the Supreme Court accepted the principle set out by Sir Anthony May at paragraphs 8-13, but stated it should be properly categorised as a ground for setting aside the EAW proceedings as an abuse of process rather than a matter going to the validity of the EAW under s.2 of the 2003 Act.

33. The Senior District Judge dismissed this ground of objection on the basis there was no bad faith or manipulation of process and no abuse. As to *Zakrzewski*, he opined it did not create a new category of abuse of process and that in the specific circumstances there was nothing that amounted to what was described by Sir Anthony May in *Murua*.

34. In the light of the judgment of Lord Sumption in *Zakrzewski*, our system of precedent must operate on the basis that the jurisprudence in relation to the principles identified by Sir Anthony May in *Murua* is to be categorised as an abuse of process and not as the examination of the validity of the warrant under s.2 of 2003 Act. However it is not necessary for us to say more than that, as the simple question that arises, however the principle is categorised, is whether there were appropriately clear facts which would show that the description of the conduct alleged to amount to the extradition offence was not fair, proper or accurate.

35. We have examined the report of Mr Casanova and the conduct as set out in EAW3. Although we see the force of the point made by Mr Casanova as to the status of the Collective of Refugees, and the fact that it is not alleged that it is a terrorist organisation, the wording of the accusation warrant alleges contact with ETA, which is a terrorist organisation. On the evidence put before the Senior District Judge which we have carefully considered, we cannot say that the law or the facts are sufficiently clear for the court to be able to say that the description of the conduct is not a fair, proper or accurate description of matters that amount to the offence of membership of a terrorist organisation.

36. Although the reasons for our decision are different from those of the District Judge, we agree with the conclusion he reached.

(3) Specialty

37. We have already observed at paragraphs 13-14 above that the Spanish Judicial Authority did not terminate the proceedings in Spain under which EAW1 had been issued. That was a breach of the undertaking given by the Spanish Judicial Authority to this court. Indeed that breach was affirmed by information given by the State Public Chief Prosecutor in a memorandum dated 6 June 2014 when that prosecutor

said that the appellant had to put himself at the disposal of the Audiencia Nacional before the court would annul the proceedings.

38. In the light of the undertaking given to this court, we made it clear in the course of the appeal that the stance taken by the Chief Prosecutor was not one that was consistent with the undertaking given. It was submitted by the Spanish Judicial Authority that no proceedings could be taken against the appellant under EAW1, if he was extradited under EAW3, because Spain adhered to the principle of specialty. However, we think it is important to make clear that it is vital to the operation of the European Arrest Warrant system that each judicial authority acts in a way that enables other judicial authorities to have confidence in it. That is the basis of mutual confidence and mutual recognition. In the circumstances of this case given the necessity of judicial authorities abiding by such undertakings, we would not have extradited the appellant until the breach was remedied.

39. Our view was communicated to the Spanish Judicial Authority who immediately took action to bring the proceedings in Spain in respect of the original sentence to an end. The documentation has been provided to the court and to the appellant. It is accepted that the proceedings in respect of the conviction are at an end. The issue on specialty therefore no longer forms a bar to extradition.

(4) Article 6 of the European Convention on Human Rights

40. In the proceedings in Spain which underlie the issue of EAW3, the case is still at the stage of investigation before the Audiencia Nacional; the judge of the Audiencia Nacional is still conducting the *instruccion* phase. No decision has been made to charge or try the appellant for the offence of membership of a terrorist organisation. The evidence, however, was not as clear as it should have been. It appears that the investigation began on 29 June 2012 and, save for obtaining the evidence of the appellant, concluded on 17 February 2014. It is clear that it was conducted wholly in the absence of the appellant even though it was plainly known to the judge conducting the investigation that the appellant was in the UK and, because he was on bail for a substantial period of the investigation, easily contactable.

41. It was Mr Casanova's evidence that the appellant's Spanish lawyer had applied on 3 March 2014 to be admitted to the record. The application was returned by a court official. The evidence of Mr Casanova was that this practice was irregular and that it was wrong to complete the *instruccion* phase of the proceedings without allowing for the appellant to put his case. It was said that this amounted to a breach of Article 6 of the ECHR. It would amount to a breach of Article 5 as, if the appellant was returned to Spain, he would have to wait in custody until the decision was made to charge or try him. He could have lost his right to appear at the *instruccion* phase and so have the chance of the proceedings being dismissed before the decision to charge or try had been made.

42. It appears from the evidence of the Spanish Judicial Authority before us that the *instruccion* phase is not yet complete. No decision on whether to charge or try him can be made until the appellant has had an opportunity of putting his case.

43. Although this position under Spanish law is important to the next issue under s.12A of the 2003 Act, it is difficult to see how what has happened can amount to prejudice of

the kind put forward by Mr Casanova if the appellant can put his case prior to the decision to prosecute being made. If so, there can be no breach of Article 6 or Article 5 of the Convention.

44. We therefore agree with the District Judge that this ground fails.

(5) Section 12A of the 2003 Act

45. As we have set out, it is accepted that the proceedings against the appellant are at a stage where no final decision to charge or try has been made. This therefore gives rise to the question of whether there is a bar to extradition under s.12A of the 2003 Act, inserted into the Act by s.156 of the Anti-Social Behaviour, Crime and Policing Act 2014.

46. S.12A to the 2003 Act provides a bar to extradition if a decision to prosecute has not been made. S.12A(1)(b)(ii) provides an exception and allows extradition to proceed "if it appears that there are reasonable grounds for believing that the person's absence from the category 1 territory is the sole reason for the failure to make a decision to charge or try".

47. It was submitted to the Senior District Judge by the Spanish Judicial Authority that the only reason why the decision to try had not been taken was the absence of the appellant from Spain. That absence impeded the final conclusion of the *instruccion* phase and the opening phases of prosecution and trial. The Spanish Judicial Authority issued a certificate to that effect. It was submitted there was no bar to extradition.

48. Mr Casanova's evidence in relation to that certificate, which on this point was not disputed by any evidence to the contrary before the Senior District Judge, was that the appellant could have been questioned in the UK by video conferencing, the use of the Mutual Legal Assistance Convention or even a temporary transfer to Spain for the purposes of questioning under the provisions of the 2003 Act. It was therefore submitted on the appellant's behalf that his absence from Spain was not the sole reason why the decision to charge had not been made.

49. The response of the Spanish Judicial Authority was a statement that:

> "I can confirm that, in issuing such [the certificate to which we have referred], I considered whether there was any suitable alternative means of interviewing the defendant in this case, including for example the use of mutual legal assistance and videolink. I can confirm, having considered this, that the position remains as set out in the document of 13 February 2015; the only reason in this case why a decision to try has not been taken is exclusively the absence of the defendant in Spain."

50. After being referred to the decision of this court in *Kandola v The German and Italian Judicial Authority* [2015] EWHC 619 (Admin) the judge decided that he had confidence and mutual respect for the Spanish Judicial Authority; if the investigating judge told him that he had considered the alternatives and the sole reason why the decision to try had not been taken was the absence of the appellant, then he accepted

the word of the investigating judge. He therefore dismissed this as a bar to extradition.

51. It was submitted on behalf of the Spanish Judicial Authority that the Senior District Judge was correct and the Spanish Judicial Authority had said sufficient to satisfy s.12A of the 2003 Act; it was not required to explain why it had not used other means of obtaining the evidence of the appellant.

52. The judgment of this court in *Kandola* set out the background to s.12A and the difficulties that had arisen in earlier cases where a decision to charge or try had not been made by the requesting judicial authority. One of the difficulties that had arisen was that if a decision to charge had not been made, the investigative stage might take some time to conclude; thus a person would be held for a considerable time before a decision would be made to charge or try. The detention of Andrew Symeou in Greece had achieved notoriety as a result of such a delay. Parliament decided to remedy this issue by providing for a bar by s.12A of the 2003 Act.

53. Experience with extradition cases has shown that it is essential that courts determining issues in respect of extradition are astute to guard against issues of this kind delaying or adding undue complexity to the proceedings as a whole. This court made clear at paragraph 34 of its judgment in *Kandola* that the issues likely to arise under s.12A could be dealt with shortly.

> "If the requested person satisfies the [District Judge (DJ)] as required by both section 12A(1)(a)(i) (either as to a decision to charge *or* try) and (ii), so that the burden then falls on those representing the category 1 territory to prove (to the criminal standard) that the two decisions have been made, or, alternatively, that the sole reason for them not being made is the requested person's absence from the category one territory, how are those matters to be proved? In the vast majority of cases a short, clear, statement from the relevant Judicial Authority answering the following simple questions from the CPS acting on its behalf in the extradition proceedings should be determinative: "(i) has a decision been taken in this case (a) to charge the requested person and (b) to try him, if not, (ii) is the sole reason for the lack of each of the decisions that have not been taken the fact that the requested person is absent from the category 1 territory of which you are a/the Judicial Authority?" The requested person may be able to challenge such statements, but we would hope that disputes on the issues raised by section 12A(1)(b) will not result in elaborate hearings on factual or expert evidence, or else that would defeat the whole object of the EAW system of simple and quick procedures to surrender persons who are wanted for the purposes of criminal prosecution to category 1 territories. Elaborate evidence would also place an intolerable burden on the DJs who have to deal with extradition and who already have a very heavy work load of cases and hearings."

54. The court was rightly making the point that, although Parliament could never have intended any elaborate procedure, the requested person must be able to challenge a statement that the sole reason for the decision not to charge or try was absence from the jurisdiction, such a challenge being kept within narrow bounds.

55. It is clear from an examination of the actual decision of the court in *Kandola* on the cases before it that it was only in respect of the requests by the German Judicial Authority that the issue arose as to whether a decision to prosecute had been made. In the first of the cases, Mr Kandola's case, the German Judicial Authority explained that Mr Kandola was a flight risk and to use the Mutual Legal Assistance Convention would have alerted him; there was therefore a risk that that would have jeopardised the prosecution efforts in the case. It is clear, therefore, that there was a good reason why the examination had to take place in Germany. The court stated:

> "We are satisfied, to the criminal standard, that the option of MLA was considered by the competent Authority in Germany and rejected on the reasonable ground that there was a risk that Mr Kandola would evade the criminal proceedings in Germany if the EAW had not been issued and executed. There is no reason to doubt that statement."

However in the second of the German cases, Ms Droma, there was evidence before the court that the Mutual Legal Assistance Convention could have been used for an examination of Ms Droma by the Chief Public Prosecutor in the UK. The court continued:

> "In the absence of any coherent explanation of why [Mutual Legal Assistance Convention] has not been used in Ms Droma's case to undertake the "pre-indictment" examination, we have concluded that those representing the category 1 territory have not proved, to the criminal standard, that the sole reason for not making the decisions to charge and try Ms Droma is her absence from Germany."

The court refused the extradition of Ms Droma, but allowed that of Mr Kandola.

56. It is clear in our view that, where evidence is adduced which shows that a means of examination of a defendant is possible either through the use of the Mutual Legal Assistance Convention or otherwise before the decision to prosecute is made, then it is for the requesting European judicial authority to prove by adducing evidence to the requisite standard of proof that the test in s.12A(1)(b)(ii) has been met. In the present case the Spanish Judicial Authority has given no reasons. On the face of it, on the evidence before the court, it therefore has not shown that the sole reason for the decision to prosecute not having been made is the appellant's absence from Spain.

57. When this issue arose in the course of argument, we pointed out to Mr Lloyd, who represented the Spanish Judicial Authority with great skill, that there was a difficulty. If he wanted to apply to adduce further evidence, we would consider such an application. We allowed him time to take instructions. However he was instructed by the Crown Prosecution Service that no further evidence would be adduced and the position would be taken that a requesting judicial authority did not need to give

reasons. It was enough if the judicial authority had said that it had considered the point, even where there was evidence to show that there was a means of examination in the United Kingdom.

58. A further argument addressed to us that the court should in the light of the re-accession by the UK in December 2014 to the Framework Decision (which now has the status of a Directive) interpret the 2003 Act in the light of the wording and purpose of the Directive. As the terms of s.12A are clear and were enacted by Parliament it is not necessary for us to consider that argument.

59. There is in any event nothing inconsistent with the principles of mutual recognition and mutual confidence in requiring one judicial authority to explain to another why it has taken a certain course where the evidence plainly calls for such an explanation. Providing simple reasons enhances confidence; declining to do so can undermine confidence and thus work against the basic principles that underpin mutual recognition.

60. It seems to us, following the decision in *Kandola*, that the Senior District Judge was wrong on the facts of this case to act on the unreasoned statement of the Spanish judge.

(1) Proper evidence had been adduced before the court that there was a means of examining the appellant in the United Kingdom; therefore the sole reason for the decision to prosecute not having been made was not his absence from Spain.

(2) There are real concerns about the delay in this case. The matter with which the appellant is charged relates to events in April 2011 and further delay would not be acceptable.

(3) It would not have been difficult for the Spanish Judicial Authority to have responded on this point. It could easily set out its reasons, taking into account that the purpose of s.12A was to ensure that there would be no delays.

(4) It is inexplicable in these circumstances why the Spanish Judicial Authority did not seek to take advantage of the invitation which we extended to put in evidence during the course of the appeal. We are very concerned that our invitation was expressly declined on the instructions of the CPS, in contradistinction to acceptance by the Spanish Judicial Authority of the need to terminate the proceedings underlying EAW1.

(5) In the light of these matters and of evidence which we have considered under the first issue, “judicial engineering”, and the concerns we have expressed, the failure to answer the simple points raised by Mr Casanova cannot be accepted in this particular case.

(6) Even if *Kandola* was wrongly decided (which we think it was not) and the usual position is that it is permissible to accept the unreasoned statement of a judicial authority, it would not in the circumstances of this case be appropriate to accept the unreasoned statement of the Spanish Judicial Authority.

61. It follows that we consider the judge was wrong. We must therefore allow the appeal and discharge the appellant.

(6) The Refugee Convention

62. The final point taken by the appellant was reliance on Article 31 of the Refugee Convention 1951 which provides:

> "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

63. The Convention has been given effect in domestic law by s.31 of the Immigration and Asylum Act 1999. The Act provides a defence where a person has been charged with one of a number of specified offences relating to forgery and possession of false identification documents. The defence applies to a person who has come directly to the UK from a country where his life or freedom was threatened, who presented himself to the authorities without delay, showed good cause for his illegal entry or presence and made an application for asylum as soon as reasonably practicable.

64. It was contended that the appellant was entitled to rely on Article 31 as it would be contrary to the provisions of the Article to return him to Spain under EAW3 because Spain's purpose was to prosecute him for committing offences that had enabled him to flee from that territory to avoid unlawful threats to his life and freedom from the Spanish authorities.

65. The submission gave rise to a number of difficult issues on which there is no authority. In the light of our conclusion on the earlier issues, each of which is interrelated, and our decision to allow the appeal under s.12A, it is neither necessary nor desirable to extend the length of this judgment by setting out our views on points not necessary for the decision in this appeal.

Conclusion

66. The appeal is allowed.