Neutral Citation Number: [2019] EWHC 211 (Admin)

Case No: CO/2983/2018

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

Royal Courts of Justice
Strand, London WC2A 2LL

Date: 07/02/19

Before:

LORD JUSTICE HICKINBOTTOM
and
MR JUSTICE POPPLEWELL
- -

Between:

STEPHEN CARPENTER

Appellant

- and -
PRE-TRIAL INVESTIGATION COURT MILAN, ITALY

Respondent

- -
- -

Martin Henley (instructed by **Lewis Nedas Law**) for the **Appellant**
Louisa Collins (instructed by **The Crown Prosecution Service**) for the Respondent

Hearing date: 13 December 2018
- -

Approved Judgment

Mr Justice Popplewell:

Introduction

1. Mr Carpenter appeals against an order under section 21A(5) of the Extradition Act 2003 ("the Act"), made on 20 July 2018 by District Judge Blake in the Westminster Magistrates Court, providing for his extradition to Italy to face two charges of fraud and money laundering. The order was made pursuant to a European Arrest Warrant ("the EAW") issued in Milan on the 22 June 2017 and certified by the National Crime Agency on 27 June 2017.

The EAW

2. The EAW was issued by Judge Roberta Nunnari in her stated capacity as a Giudice delle Indagini Preliminari ("GIP"), translated as a "Pre-trial Investigation Judge".

3. The request at the commencement of the EAW was in the following terms:

> "I request that the person mentioned below be surrendered for the purposes of executing a custodial sentence."

4. This is a modification from the proforma wording which is contained in the Annex to the Framework Decision under Title VI of the Lisbon Treaty, to which the United Kingdom opted back in from 1 December 2014, and which has the status of an EU Directive. The standard proforma wording states: "The warrant has been issued by a competent 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." The wording in the first half of this formulation ("for the purposes of conducting a criminal prosecution") is apposite where the requested person has not been tried and the EAW is what is commonly called an accusation warrant, namely one which falls within section 2(2)(a) and (3); the wording in the second half ("for the purposes of …..executing a custodial sentence or detention order") is designed for those already sentenced after trial and subject to what is commonly called a conviction warrant, falling within section 2(2)(b) and (5). The wording is commonly but not always modified to reflect these two aspects. In this case the first half of the standard wording ("for the purposes of conducting a criminal prosecution") had been deleted, as had the final reference to a "detention order". Nevertheless it was clear from all the material before the district judge that this was an accusation warrant and that there had been no trial or conviction. The district judge so held and no appeal is pursued from that aspect of his decision. This is significant in the context of the section 12A ground of appeal considered below.

5. In box (b) identifying the "decision on which the warrant is based" it stated:

> "Arrest warrant or judicial decision having the same effect:
>
> Pre-trial custody in prison order issued on 15.6.2017 by Pre-trial Investigation Judge attached to the Court of Milan…"

6. The warrant was in respect of two offences the details of which were set out in box (e). Because one of the grounds of appeal relates to whether they disclose an equivalent English law offence I must set them out in full:

> "Mr Carpenter is charged with the offence of fraudulent bankruptcy committed as legal representative of the company under English law "***FLOW METERING COMPANY Ltd*****"**.
>
> 1) Offence provided for, and punishable under, Articles 40 paragraph II, 110 of the Criminal Code, 223 paragraphs I and II N° 2, 2l9 paragraph 1 and II, 216 paragraph 1 N° 1) and 2) of Royal Decree 267/42, because, acting in complicity with one another, Mr. NOVIELLO at first as dejure manager of the **bankrupt company SPARTACO DUE spa, and subsequently**, with the entry of Mr. Bartoli, as de facto manager, and besides, as manager of BARTOLI group's subsidiaries, as voluntary liquidator of the company Spartaco Due, having powers as from July 2013, as well as of the subsidiary IMPIANTISTICA INDUSTRIALE s.r.l. (previous name: TM TECNOMATIC s.r.l.), in this case having powers as from June 2013; Mr. SENTATI, who made the estimates in support of the illicit transactions, de facto manager; Mr. BORLENGHL as "sole auditor" of IMPIANTISTICA INDUSTRIALE s.r.l., member of the board of auditors of the bankrupt company and of TM Tecnomatic spa (then MIRABELLO SRL), in addition to being a representative delegated by the Hungarian companies; Mr. SESTO as chairman of the board of auditors of the bankrupt company and of Mirabello srl; **Mr. CARPENTER as representative of the English company FLOW METERING COMPANY LTD**; Mr. PITTIA as representative of the
>
> Hungarian companies SENTRICA Kft, BARRET Kft and SOVENEK Kft, diverted, concealed, dissimulated, destroyed or dissipated the company assets causing a considerable financial damage through the following steps:
>
> - Mr. Noviello and Mr. Sentati, transferring (30.11.2012) the branch of the company dealing with manufacturing equipment for the oil industry, operating at the plant in Cremona (via delle Industrie N° 36), including start-up costs, tangible and intangible assets, credits and cash for a total of 5,200,000.00, to the subsidiary IMPIANTISTICA INDUSTRIALE sr.l. (previous name: TM TECNOMATIC s.r.l.) at the price of just 8,000 €, while the above-mentioned auditors did not prevent this transfer;
>
> - Mr. Noviello and Mr. Sentati, transferring (12.12.2012) all the shares (with a value of € 1,244,000.00) **of the British company Flow Metering Company Ltd, represented by Mr. Carpenter** and operating in the field of production of instruments and equipment for pressure measurements intended for petrochemical industry, to Impiantistica Industriale s.r.l., **at the**

lower price of € 980,000.00, while the above-mentioned auditors did not prevent this transfer;

- Mr. Noviello and Mr. Sentati, transferring (12.12.2012) the plant located in Cremona, viale delle lndustrie 36, having a commercial value of € 2,399,025.00, to the subsidiary Onofrio S.r.1. and, subsequently, through this company, to Impiantistica Industriale, estimating the value of the property at just € 98,000 for the first transfer, due to mortgages of € 2,399,025.00, one of which, however, having a value of € 1,410,000.00, concerned a non-existing debt, while for the second transfer the value of the property was further reduced to € 18,000.00 due to another mortgage of €80,000.00; the auditors did not prevent this transaction;

- Mr. Noviello and Mr. Sentati, transferring (31 January 2013) all the assets acquired by Impiantistica Industriale s.r.1. to its subsidiary "TM TECNOMATIC CREMONA s.r.l.", subsequently renamed MIRABELLO, at the price of just € 1,008,000, the value of said assets having already been previous1y estimated at € 1,270,000 against a real value of not less than € 4,500,000; Mr. Noviello, Mr. Sentati and Mr. Bartoli, transferring the shares of the company MIRABELLO to the Hungarian company SENTRICA Kft (50%), represented by Mr. Pittia, and to the Luxembourg company DYNAMICS Holding Sa (the remaining 50%), at the price of € 300,000, which has never been paid, while the auditors did not prevent this transaction;

- Mr. Noviello, Mr. Sentati, Mr. Bartoli, Mr. Pittia, effecting (11 March 2014) the partial division of MIRABELLO s.r.1. with the two foreign companies, as partners of the said Mirabello s.r.l., as a result of which the company TM DUE s.r.l. , as transferee of the property located in Cremona , and the company TM TECNOMATIC s.r.l., to which the branch of the company was transferred, were set up, with Mirabello retaining full ownership of Flow Metering Company Ltd; the auditors did not prevent this transaction;

- Mr. Noviello, Mr. Sentati, Mr. Bartoli, Mr. Pittia, transferring all the shares of Mirabello to Quartaroli Fava (7 August 2014) at the price of just € 1,600, while the auditors did not prevent this transaction;

Moreover,

- Mr. Noviello, transferring the warehouse to TM Tecnomatic s.p.a between 28 February and 9 April 2013 at the total price of € 1,756,000, which was not paid; however, a contingent liability of € 1,289,390 was registered in the accounts of the bankrupt

company (13 July 2013); the auditors did not prevent this transaction;

- Mr. Noviello, failing to recover the debt of € 422,448.65 from TM Tecnomatic s.p.a.; however, a contingent liability of the same amount was booked in the accounts;

- Mr. Noviello, granting loans (27 December 2012) amounting to € 727,735.18, which have never been repaid, but were booked as liabilities, **to the subsidiary Flow Metering Company Ltd, managed by Mr. Carpenter**; the auditors did not prevent this transaction; besides, transferring goods for a value of €700,493.64 to the said English company, without being paid this sum, and booking (1 March 2013) in the accounts a loss of the same amount, thereby causing a total damage

of € 1,428,228.82 to the bankrupt company;

- Mr. Carpenter. as a result thereof, as manager of FMC Ltd, ordering some money transfers (13.5.2013 — 29.11.2013) for a total amount of € 1,073,327.69 in favour of the Hungarian company SOVENECK Kft, managed by Mr. Pittia;

- Mr. Noviello and Baroli, transferring various planks and timbers previously purchased by the bankrupt company (31.3.2013) at the price of € 484,000 to AGRIPESCA s.r.l. at the price of just € 36,000, despite the fact that the goods had nothing to do with the company purpose; the auditors did not prevent this transaction;

- Mr. Noviello and Mr. Banoli, fully writing down (11 July 2013) — by booking extraordinary losses in the accounts - the shareholding in the Polish company TM POLSKA, the value of which until then had been booked as € 1,906,000; the auditors did not prevent this transaction;

- Mr. Noviello and Mr. Bartoli, concealing or destroying the book or other accounting records of the bankrupt company which concerned the period from 7 August until 25 November 2013, rendering it impossible to reconstruct the company's operations in that period;

- Mr. Noviello and Mr. Bartoli, causing fraudulently the financial difficulties of the company by failing to fulfil tax obligations amounting to € 660,000.

Committed in Milan on 25 November 2014

With the aggravating circumstance provided for by Article 219 paragraph II No. 1) of Royal Decree 267/42, for having

committed more than one of the acts among those laid down by the Bankruptcy Law.

2) Offence provided for and punishable under Articles 110 and 648 ter 1 of the Criminal Code as **far as Mr. CARPENTER and Mr. PITTIA are concerned**, in that, after the commission of the offence described in count 1), acting in complicity with one another, they used, replaced, transferred assets of the company Flow Metering Company Ltd, in such a way as to prevent the identification of their illicit origin, connected to undue capital assignments for a total amount of € 1,428,228.82, ordered in favour of the English company by the bankrupt company Spartaco Due spa; in particular, Mr. CARPENTER, by carrying out No. 2 money transfers, for a total amount of € 50,000 in favour of the Hungarian company SOVENECK Kft, managed by Mr. PITTIA, justifying the transaction as alleged "advance on invoices issued to the supplier" (more specifically, € 35,380

transferred from the account 57366099 held with BARCLAYS and in the name of FMC Ltd to SOVENECK on the account held with CIB BANK Ltd (IBAN CODE: U1l107007326713968450000005, and € 14,620.00 transferred from the account 57366099 held with BARCLAYS and in the name of FMC Ltd to SOVENECK on the account held with CIB BANK Ltd (IBAN CODE: HU11107007326713968450000005).

Committed in Milan and other places on 10.3.2015 and 11.3.2015.

Degree of participation in the offence(s) by the requested person: participant in the offences with Antonio NOVIELLO, Giovanni BARTOLI, Claudio PITTIA

Nature and legal classification of the offence(s) and the applicable statutory provision/code:

Applicable provisions:

- Arts. 223 paragraph s I and II No. 2, 219 paragraph I and II No. 1), 216 paragraph 1 No. 1) and 2) of

Royal Decree 267/42;

Art. 648 ter of the Criminal Code

Legal classification:

Fraudulent bankruptcy aggravated by the commission of more than one offence; self-laundering."

7. Box (c) indicated that the first offence carried a term of imprisonment from 3 to 10 years which could be increased by up to one-third; the second offence attracted a maximum term from 2 to 8 years and a fine of up to €25,000.

The Proceedings

8. Two days after the pre-trial custody order, the Public Prosecutor at the Court of Milan issued and filed a notice of indictment and on the right of defence and a notice of conclusion of the investigations dated 17 June 2017.

9. The EAW was executed when Mr Carpenter was arrested on 17 November 2017. He was released on conditional bail. Following a number of adjournments, the extradition hearing took place before District Judge Blake on 30 May 2018. Mr Carpenter was represented by Mr Henley, who appeared on his behalf before us. The respondent ("the JA") was represented by Ms Collins, who also appeared before us on the appeal.

10. Before the district judge the following five grounds of challenge to extradition were advanced on Mr Carpenter's behalf:

    (1) The EAW did not fulfil section 2 of the Act, and/or proceeding upon it was an abuse of process, because it was ambiguous as to whether it was an accusation or a conviction warrant.

    (2) The offence specified in the EAW did not fulfil section 10(2) of the Act which requires an extradition offence.

    (3) Extradition was barred under section 12(A) of the Act because there were reasonable grounds for believing that the competent authorities in Italy had not made a decision to charge or a decision to try.

    (4) Extradition to Italy was barred by reason of forum under section 19B of the Act because extradition would not be in the interests of justice.

    (5) The Article 8 rights of Mr Carpenter, his long-term partner and their families outweighed any public interest in extradition.

11. At the hearing Mr Carpenter and his partner gave evidence and were cross-examined. Mr Carpenter also sought to adduce evidence from an Italian lawyer, Mr Capellupo, who had prepared answers to a list of questions, both of which were set out in a letter dated 25 February 2018. On behalf of the JA, Ms Collins objected to such evidence. The district judge determined that he would permit evidence to be given in so far as relevant to the forum and Article 8 issues, but not in relation to the issue which arose under section 12A concerning whether there had been a decision to charge or decision to try. In fact it was common ground that there had been a decision to charge, so that the relevant issue was whether there had been a decision to try. There was no evidence before the district judge as to Italian procedure directed to that issue. Mr Capellupo was cross-examined by Ms Collins on his evidence on the other issues.

12. The district judge rejected the challenge under section 2/abuse of process on the grounds that it was clear that the EAW was in substance an accusation warrant, despite the terms of the request underneath its heading. He concluded that that was manifestly

a simple error, taking into account the other terms of the warrant and the further information which indicated that there had been no trial or conviction on the merits of the accusations. He went on to reject each of the other grounds of challenge. On this appeal Mr Carpenter accepts that the EAW is an accusation warrant which complies with section 2. He maintains the other four grounds of challenge to extradition which failed before the district judge. I address each in turn.

Section 10: Dual criminality

13. Section 10 of the Act provides that extradition may only be ordered for an extradition offence. In the case of Italy, as a category 1 territory, and where the relevant conduct occurs outside Italy (which it was common ground happened in this case), section 64(4)(b) of the Act provides that in order to qualify as an extradition offence it must be established that in corresponding circumstances equivalent conduct would constitute an extra-territorial offence under the law of the relevant part of the United Kingdom.

14. On this issue the district judge recorded and accepted the submissions of the JA as follows. The conduct alleged in offence 1 would amount to the common law offence of conspiracy to defraud if committed in this jurisdiction; that to defraud or act fraudulently is dishonestly to prejudice or to take the risk of prejudicing another's right, knowing that you have no right to do so: Welham v Director of Public Prosecutions [1961] AC 103; that in the present case the allegation was that Mr Carpenter acted in complicity with the managers involved in dissipating the assets of Spartaco Due Spa ("Spartaco") in order to prejudice that company and its creditors/depositors; and that an allegation of dishonesty can be inferred from the language used in respect of both offences. Conspiracy to defraud is a Group B offence within section 1(3)(b) of the Criminal Justice Act 1993 and therefore an extra-territorial offence. Offence 2 would amount to money laundering contrary to section 327 of the Proceeds of Crime Act 2002 if committed within this jurisdiction. On the facts alleged, the money from the fraudulent loans and the goods obtained from Spartaco under offence 1 would amount to criminal property, having been obtained through fraud; and by his involvement in the fraudulently obtained loans and property, Mr Carpenter can be said to have known or suspected that this was criminal property.

15. Before this Court Mr Henley repeated the submissions made to the district judge making essentially two points. The first was that the district judge had wrongly taken into account matters of mere narrative background rather than the conduct for which extradition was being sought, contrary to the principles articulated in [91] of Norris v Government of the United States of America [2018] UKHL 16; [2008] 1 AC 920, and [47]-[48] of Dabas v Spain [2007] UKHL 6; [2007] 2 AC 31. The second was that in relation to offence 1, the only conduct alleged against Mr Carpenter involving matters within his own knowledge and participation were the transfer of the €1,073,327.69 in favour of the Hungarian company Soveneck Kft ("Soveneck"); the remainder of the conduct alleged sets out some 14 specific incidents of fraudulent conduct none of which it was submitted were alleged against Mr Carpenter; that being so, the conduct alleged did not include dishonesty which is a necessary ingredient of the corresponding English Law offence of conspiracy to defraud.

16. I have little hesitation in rejecting this ground of challenge. The relevant part of the EAW, which is not narrative, identifies at the outset that what Mr Carpenter is charged with is an offence of "fraudulent bankruptcy", which itself necessarily involves an

allegation of dishonesty. The offence particulars then aver that he was acting "in complicity with" the other Italian defendants identified in order to divert, conceal or dissipate company assets so as to cause considerable financial damage through a number of identified steps. Mr Carpenter is not alleged to have been involved in all the steps pursuant to that conspiracy, but those in which he is said to have been involved indicate that his involvement is alleged to have been dishonest. In summary he is said to have been acting on behalf of FMC Ltd as its manager in receiving €727,735.18 in unrepaid "loans" and €700,493.64 in goods for which no payment was made, as a result of which there was a loss of €1,428,228.82 to the bankrupt company. Then "as a result thereof" he caused to be transferred a total amount of €1,073,327.69 in favour of the Hungarian company Soveneck. In other words, he is accused of being party to the extraction of some €1.4m of money or money's worth from the bankrupt company, without giving consideration, and then transferring a sum of some €400,000 less than that to a Hungarian company, all acting in concert with the other Italian defendants for the purposes of causing financial damage to the company. That is plainly an allegation of dishonest conduct which if made good would constitute conspiracy to defraud under English Law. If there were any doubt about that, which I do not think there is, it would be dispelled by the terms of offence 2 which is equivalent to the English money laundering offence. That alleges, again pursuant to a conspiracy, that Mr Carpenter made two payments to the Hungarian company falsely alleging them to be advances on invoices issued to the Hungarian company as a supplier, when in fact the purpose was to conceal the illicit origin of the receipt of the €1,428,228.82.

Section 12A: Decision to try.

17. Section 12A of the Act provides as follows:

> "(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 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.
>
> (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."

18. Section 12A is concerned with the necessity for requesting judicial authorities from Category 1 territory EU member states (which includes Italy) to have made sufficient progress in prosecution of an "accused" person before that person may be extradited under an EAW; its purpose is to ensure that individuals are tried expeditiously following their surrender: Puceviciene v Lithuanian Judicial Authority [2016] EWHC 1862 (Admin) at [1], [4(ii)] and [11]. Guidance as to the approach to this section was given in Kandola v Generalstaatwaltschaft Frankfurt, Germany [2015] EWHC 619 (Admin); [2015] 1 WLR 5097. It can be summarised as follows:

(1) The application of section 12A involves two distinct stages. At the first stage, which involves both subsection 1(a)(i) and (ii), the judge is concerned with whether there are reasonable grounds for believing that one or both of the two decisions, the decision to charge or the decision to try, has not been taken, and if so whether the person's absence from the foreign territory is not the sole reason for that failure. If there are such reasonable grounds for belief and the decision not to charge or try has not been made for the sole reason that the requested party is absent from the territory concerned, the judge must move to the second stage required by subsection 1(b). It is then for the JA to prove to the criminal standard that a decision has been made to charge and to try, or if not that the sole reason why not is the requested person's absence from the relevant territory. See [28] and [29].

(2) At the first stage the default position is that the two decisions have been taken. It is only if the requested person raises a challenge that there has been no relevant decision that the question arises, and it must be based on something more than mere assertion. It does not involve proof on a balance of probabilities but cannot be based on simple assertion or a fanciful view or "feeling". See [30].

(3) If it is appropriate to embark upon the first stage, it may be clear from the warrant itself, read as a whole, that the appropriate authorities have taken or have not taken the two decisions. If the matter is clear from the terms of the warrant as a whole that the decisions have been taken, the district judge should look no further in relation to that point ([31]). That guidance was reiterated Puceviciene at [51].

19. It was this guidance which the district judge said he was following in excluding Mr Capellupo's evidence on this issue. The district judge went on to say that he had regard

to statements of Holroyde J (as he then was) in Bledar Prenga v Court of Florence, Italy [2016] EWHC 3002 (Admin) and to the decision in Altin Doci v The Court of Brescia and Alexandru Motiu v Criminal Court Nowy of Santa Maria Capua Vetere, Italy [2016] EWHC 2100 (Admin). He concluded that because box (b) indicated that there had been an order for pre-trial custody, this was akin to the position in Prenga and that he could conclude from that entry in the EAW that a decision to try had been made.

20. In Doci and Motiu**,** the Divisional Court was concerned with an appeal from two separate decisions. In Doci there had been considerable evidence as to Italian procedure in relation to an EAW issued in September 2015. The evidence in that case suggested that there were two different procedures which might be adopted in Italy, one being the "immediate procedure" and another being the "ordinary procedure". In the case of the ordinary procedure, a person under investigation is served with a notice at the end of the investigation stating that the preliminary investigation phase has been concluded; the prosecutor files a committal to trial and the accused person is then entitled to present his case at a preliminary hearing before a preliminary hearing judge, the Giudice per L'Udienza preliminarie ("GUP"). The preliminary hearing results either in a committal for trial, which requires the investigatory material to show that the accusation is sustainable at trial, or in a decision that the trial is not to take place. In those cases it is the GUP, not the GIP, who takes the decision whether there should be a trial. Where, however, a custodial precautionary measure had been issued, as in Mr Doci's case, then as a rule it is the immediate procedure which applies although there can be exceptions. For the purposes of the custodial precautionary measure, the GIP must examine the evidence in depth and conclude that the person is highly likely to be found guilty and check that there are no defences. Under the immediate procedure, the criminal case then proceeds to trial without service of a notice that the investigation has concluded and without a preliminary hearing.

21. The evidence established that in Doci, the GIP had made it clear that the prosecution would proceed under the immediate procedure and the Divisional Court held that it was clearly established on the evidence that in such cases it was the GIP who took the decision to try in such cases and had done so.

22. In the conjoined case of Motiu, there had been no expert evidence before the district judge. The Court said, at [53], that if the evidence of Italian procedure which the district judge had in Mr Doci's case had been available, that would have been conclusive against Mr Motiu because there was an order for precautionary measures identified on the face of the EAW in his case; accordingly in the light of the evidence of Italian procedure which the court had received in Mr Doci's case, "the order for precautionary measures is also a contingent but not formal decision by the GIP that Mr Motiu should be tried, a decision contingent on his presence in Italy, interview and a prosecutor's request if necessary, but a decision made by the person who is empowered to make the decision to try". However this was not the basis for the decision in Mr Motiou's case. The ratio of the decision in his case was as follows. A decision to charge and to try require no formal decision. They can be made informally and contingently ([30]). The standard language in an accusation EAW that the surrender is sought for the purposes of a criminal prosecution usually shows that there has been a decision to charge and that may be a contingent decision to try: [32] and Puceviciene at [55]. Accordingly the standard statements in an EAW should suffice in showing a

decision to try and charge in the absence of contrary indication: [32]; and they did so in Mr Motiu's case: [48].

23. It had been conceded before the district judge in Mr Doci's case that if the case were to proceed under the ordinary procedure there had been neither a decision to charge nor a decision to try because no notice of the conclusion of the investigation had been served, nor had a request been made for a committal for trial: see [19]. The Court stated that because of the evidence that the immediate procedure would be adopted it did not need to consider the correctness of that concession, but it seems from the reasoning in Mr Motiu's case that it would not have treated it as correctly made.

24. In Prenga, Holroyde J was considering an appeal in a case in which the district judge had again received expert evidence as to Italian procedure. The district judge in that case had fallen into error in concluding that it was the prosecutor who made the decision to try. The case in Italy was proceeding under the ordinary procedure, although a pre-trial precautionary custody order had been made. Holroyde J confirmed on the evidence in that case, that when the ordinary procedure was adopted, the decision to try could only be made by the GUP, not the GIP. In dismissing the appeal, Holroyde J relied upon the fact that whilst the extradition appeal to him was pending, the preliminary hearing had taken place in Italy and a decision had been taken by the GUP to proceed to trial; he held that the relevant time at which to determine whether section 12A was fulfilled was the date of the hearing of the appeal before him, rather than the date of the hearing before the district judge, by which time the decision to try had been taken by the GUP. Accordingly he dismissed the appeal.

25. He also determined that section 12A was not a bar to extradition in that case on the additional grounds that had the district judge confined herself to the terms of the EAW and declined to hear evidence of Italian procedure, as the subsequent decision in Kandola required her to, she would have had to conclude that the EAW alone demonstrated a decision to try. He said:

> "42. The route which the DJ took to her decision was taken in error. Had the chronology of relevant events been slightly different, however, and had the DJ been aware of Kandola when giving directions for trial, it seems to me that her route would have been different but her decision would have been the same. This is because I accept Ms Hinton's submission that in the light of Kandola, the DJ would have been entitled to confine her attention to the EAW and to order extradition on that basis alone. Considered in isolation, the EAW showed that the evidence against the appellant had already been assessed (when the order for pre-trial precautionary custody was made) as being so strong that the immediate procedure would be followed if the appellant were speedily returned to Italy, and the DJ would in my view have been entitled (as in Motiu) to regard the order for pre-trial precautionary custody as a contingent decision to try."

26. I have some reservations about that reasoning as an alternative basis for the decision, not least because the district judge had evidence in that case that the ordinary procedure, not the immediate procedure was being followed; and which suggested that no decision to try had been made by a person with institutional competence to do so because only

the GUP at the preliminary hearing could make the decision to try, and he had not then made such a decision. As Holroyde J himself observed at paragraph [40], that evidence could not be ignored notwithstanding that had the guidance in *Kandola* been followed it might not have been given.

27. Nevertheless, without having to determine such issues, I agree with Holroyde J that had the district judge in that case considered only the EAW, she would have concluded that there had been a decision to charge and to try. It was therefore unnecessary to look at evidence beyond the EAW. This is because the warrant was in the standard form asking for surrender for the purposes of prosecution: see [16]; and this gives rise to the inference of a decision to charge and a contingent decision to try in the absence of other indications: Puceviciene at [54], [56] and Doci and Motiu at [32] and [48]. The mere existence of a pre-trial custody order would provide no such contrary indication when the warrant was purportedly issued for the purposes of a prosecution.

28. The position in the present case is different. The first half of the pro forma standard wording, stating that the warrant is for the purposes of prosecution, has not been adopted in the request, and it must be assumed that that was deliberately so. The EAW specifically does not seek surrender for the purposes of prosecution. On the contrary the purpose of the warrant is expressed to be confined to securing compliance with the order that Mr Carpenter should be placed in custody; box (b) indicates that that was an order made by a Pre-trial Investigation Judge, which on its own terms would suggest an investigatory purpose. The reference to a trial in the expression "*Pre-trial* custody" in box (b) must be read in this light as referring to custody prior to a trial *if any*, not evidencing a contingent decision that there should be a trial, given that the order is made by an investigation judge without the standard part of the request that it is for a prosecution. These indications, taken together, would suggest that the purpose of the warrant is to secure detention pending conclusion of the investigation phase. It is clear that a warrant does not satisfy s. 12A if it is issued for the purposes of investigation of an offence alone in circumstances where that investigation might or might not result in a prosecution: Minister for Justice, Equality & Law Reform v Olsson [2011] IESC 1, [2011] IR 384 at [34], cited with approval in Puceviciene at [44]. The inference to be drawn from the face of the EAW, therefore, including the deletion of the pro forma wording that it was for the purposes of prosecution, is that there are grounds for believing that no decision had yet been taken to proceed to trial.

29. I would therefore accept Mr Henley's submissions on behalf Mr Carpenter that the district judge fell into error in concluding that by looking at the EAW alone there were no reasonable grounds for believing that a decision to try had not been made. The fact that the EAW was not issued in the usual form of an accusation warrant seeking to secure the requested person for the purposes of a prosecution is a critical distinction from the position in Prenga and Doci and Motiu, on which the district judge relied.

30. A similar conclusion was reached on the facts in the case of Ijaz, one of the three conjoined cases in Kandola, in which the EAW was issued by the GIP and identified in box (b) that the function and purpose of the EAW was the implementation of the domestic "coercive measure of precautionary measure in prison issued by the judge for Preliminary Investigations…". I do not wish to be understood to be undermining or watering down the emphatic statements in Puceviciene at [30] and Doci and Motiu at [50] that cases should not generally be cited for comparison on their facts, and the facts in Ijaz were not identical to those in the present case. Nevertheless Ijaz is an example

of a case in which the terms of an Italian EAW which made clear that the extradition was sought to fulfil compliance with a custody order at the investigatory stage amounted to reasonable grounds for believing that a decision to try had not yet been made: see Kandola at [51]. A similar conclusion follows from the content of the EAW in the present case for the same reasons.

31. The EAW was not the entirety of the evidence before the district judge. He also had three further documents concerning steps taken in Italy:

(1) A "Notice of Indictment and on the Right of Defence" and "Notice of Conclusion of the Investigations" dated 17 June 2017 was issued and filed by which the Public Prosecutor at the Court of Milan. It gave details of the offences which were being investigated in similar, but not identical, terms to those set out in the EAW. It invited the six addressees to nominate their domicile and appoint legal representatives. It notified them that the Public Prosecutor's office had concluded the preliminary investigations, and had filed the related documents which the addressees were free to inspect and copy. It informed them of their right to provide evidence in documentary or oral form including requesting to be questioned, and to request the prosecutor to make further investigations On its face it suggests that the investigatory phase had not concluded but had moved from the prosecutors own private investigations to a stage where the investigation would take into account any evidence the addressees adduced or wished the prosecutor to pursue.

(2) A Request for Committal for trial dated 9 April 2018 addressed by the Public Prosecutor to "the Pre-trial Investigation Judge at the Court of Milan". The criminal proceedings were identified as being against Mr Carpenter and Messrs Noviello, Bartoli, Sentati and Pittia, all of whom were said to have domiciles in Italy, in Mr Carpenter's case being that of Mr Capellupo in Turin. The offences were set out in similar, but not identical, terms to those set out in the EAW. The request was for "the issue of a decree committing the aforementioned defendants to trial for the offences indicated above". The covering letter from the prosecutor, also dated 22 May 2018, stated that the effect of the Request was that "the proceedings are now pending before the Preliminary Hearing Judge for them to set a preliminary hearing…".

(3) A request also dated 9 April 2018 from the Public Prosecutor to the Presiding Judge of the Criminal Division of the Court of Milan in "criminal proceedings against" Noviello and others to authorise three identified witnesses to be summoned to attest to the facts of the conduct alleged.

32. These documents suggest that at the time of the hearing before District Judge Blake on 30 May 2018 the investigation phase was complete, the public prosecutor was seeking a trial on the charges which were identified, but that a decision whether the prosecution would take place was in the hands of the Pre-trial Investigation Judge at a preliminary hearing which was yet to take place. These further materials do not suggest that a contingent decision to try had been made by a judicial authority with competence to do so, whatever the wishes of the Public Prosecutor who had clearly made a decision to charge. The documents do nothing to undermine the reasonable grounds afforded by the EAW itself for believing that there had not yet been a decision to try; indeed they tend to support that conclusion.

33. I address the consequences of this conclusion at the end of the judgment.

Section 19B: Forum

34. Section 19B of the Act provides as follows:

> "**19B Forum**
>
> (1) The extradition of a person ('D') to a category 1 territory is barred by reason of forum if the extradition would not be in the interests of justice.
>
> (2) For the purposes of this section, the extradition would not be in the interests of justice if the judge—
>
> (a) decides that a substantial measure of D's relevant activity was performed in the United Kingdom; and
>
> (b) decides, having regard to the specified matters relating to the interests of justice (and only those matters), that the extradition should not take place.
>
> (3) These are the specified matters relating to the interests of justice—
>
> (a) the place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur;
>
> (b) the interests of any victims of the extradition offence;
>
> (c) any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence;
>
> (d) were D to be prosecuted in a part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence necessary to prove the offence is or could be made available in the United Kingdom;
>
> (e) any delay that might result from proceeding in one jurisdiction rather than another;
>
> (f) the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard (in particular) to—
>
> (i) the jurisdictions in which witnesses, co-defendants and other suspects are located, and

> (ii) the practicability of the evidence of such persons being given in the United Kingdom or in jurisdictions outside the United Kingdom;
>
> (g) D's connections with the United Kingdom."

35. At paragraph 47 of his judgment, the district judge reminded himself that it was important to look at the specific wording of Section 19B. He went on to record that it was accepted that at least a substantial measure of Mr Carpenter's relevant activity took place in the UK, where he received the monies and goods to the UK company from the Italian company and then transferred money to a company in Hungary. He concluded that applying the statutory factors the appropriate place for the trial would be in Italy for the following reasons:

> "1. The fraud substantially took place in Italy. It is where the defrauded company, Spartaco is based."
>
> 2. The victims of the fraud, namely the creditors, depositors and the other shareholders in Spartaco are based in Italy. The victims' interest would appear best served by the offence being prosecuted in Italy.
>
> 3. The CPS have no intention of prosecuting the RP in the UK.
>
> 4. Four of the six co-defendants identified in the EAW are resident in Italy. It is both desirable and practicable that the prosecution of all those involved in the alleged offence takes place in the same jurisdiction as part of the same proceedings.
>
> 5. The issues raised by the RP about his family and his extended family are not sufficient in my view to bar extradition under section 19B of the Act.
>
> 6. My attention has been brought to the case of Love v Government of the United States of America (2018) EWHC 172 (Admin); [2018] 1 WLR 2889. I consider that this case is on its own facts and does not set some precedent which is of assistance to the RP. The proper course is to look at the provisions of subsection (3) and conclude in the light of that what is in the interests of justice. In this case I concur with the RJA that the interest of justice test has not been met. This is manifestly a case where the RP should return to Italy for trial of the matter and the interest of justice test has not been met for me to conclude that extradition should not take place."

36. Mr Henley submitted that the district judge was in error in suggesting that no guidance on the relevant principles was to be derived from the decision of Love. This is not a fair criticism. What the district judge was saying was that the facts of Love were of no precedential value in the instant case, a view which is entirely justified. However that may be, Mr Henley was unable to identify any of the guidance in Love with which the

district judge had not complied in the approach he took. He correctly identified that the factors to which he must have regard were those set out in Section 19B and he considered such factors. Given the weight to be attached to the desirability of the trial of conspirators taking place in a single forum on a single occasion, the conclusion to which he came was plainly one in the interests of justice.

37. Mr Henley did submit that the factor identified at sub paragraph 3 was not one which should have been taken into account. As this Court identified in Scott v Government of the United States of America [2018] EWHC 2021 (Admin) at paragraph 26, the Act makes provision for the domestic prosecution authorities to have input into the question whether a requested person should be extradited in two ways. The first is the provision in subsection (3)(c) for the prosecutor to express a belief that the United Kingdom is not the most appropriate jurisdiction for a prosecution. Where such a belief is stated that would be a factor in favour of extradition. Part 2 of the Act also provides in sections 83B to 83D – the equivalents in part 1 being sections 19C to 19E – for a "prosecutor's certificate" to be given where a formal decision has been made not to prosecute the requested person on the grounds that (a) there would be insufficient admissible evidence or the prosecution would not be in the public interest or (b) there are concerns about the disclosure of sensitive material in any prosecution. Where a prosecutor certificate is given, it is decisive; the Court must then decide that extradition is not barred by reason of forum: see section 19C(1).

38. In this case there was no prosecutor's certificate pursuant to sections 19C to 19E. The judgment of the district judge reflected what he had been told by Ms Collins who had made enquiries of the Crown Prosecution Service and was told that the result of those enquiries was that there was no intention to prosecute. I am inclined to accept Mr Henley's submission, that in the absence of a certificate, a statement that there is no current intention to prosecute does not involve expressing a belief one way or another as to whether the prosecutor has a belief in relation to whether the UK is "the most appropriate jurisdiction" in which a prosecution should take place. As he submitted, a lack of current intention to prosecute is consistent with no belief on the appropriateness of jurisdiction having been reached, with there having been no investigation of the underlying position; or consistent also with the position having been investigated and a conclusion reached that the evidence is not sufficient to justify prosecution. In those circumstances, the intention not to prosecute in the United Kingdom is a neutral factor so far as concerns the application of subsection 3(c). It was made clear in Scott at paragraphs 28 to 31 that if there were no belief expressed of the kind indicated in that subparagraph, that was a neutral factor which did not point in one direction or the other.

39. However that is not to say that the district judge took into account an irrelevant matter when recording that there was no intention to prosecute in the United Kingdom. One of the specific matters to which he needed to have regard was that set out in subparagraph 3(f) namely the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction. That was the point he was addressing at subparagraph 4, and it was relevant to that to record not only that the proceedings would be going ahead against four of the six defendants (in fact four of the five defendants, Mr Carpenter being the only exception) in Italy and that there were not to be, on current intentions, any proceedings in England.

40. In conclusion on this issue, the district judge cannot properly be criticised for his approach or his conclusions and this ground of challenge is rejected.

Article 8

41. In Norris, the Court held "that the consequences of interferences with Article 8 rights must be exceptionally serious before this can outweigh the importance of extradition". (paragraph [56])

42. In HH v Deputy Prosecutor of Genoa, Italy [2012] UKSC 25; [2013] 1 AC 338, Lady Hale at drew the following conclusions from Norris at paragraph [8]:

> "(1) There may be a closer analogy between extradition and the domestic criminal process than between extradition and deportation or expulsion, but the court has still to examine carefully the way in which it will interfere with family life.
>
> (2) There is no test of exceptionality in either context.
>
> (3) The question is always whether the interference with the private and family lives of the extradited person and other members of his family is outweighed by the public interest in extradition.
>
> (4) There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no 'safe havens' to which either can flee in the belief that they will not be sent back.
>
> (5) That public interest will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved.
>
> (6) The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life.
>
> (7) Hence it is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe."

43. The district judge identified these as his guiding principles and expressed his decision on this point in the following terms:

> "52. I found the following matters in **favour** of ordering extradition; -
>
> - The public interest in ensuring that extradition arrangements are met is very high. 'It is highly likely that public interest in extradition will outweigh the article

> 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe' (Lady Hale HH).
>
> - There is a strong public interest in discouraging persons seeing the UK as a state willing to accept fugitives from justice.
>
> - The decisions of the judicial authority of a member state making a request should be accorded a proper degree of mutual confidence and respect.
>
> - The RP faces extradition for offences of some gravity and faces a substantial term of custody.
>
> 53. I found the following matters mitigated against ordering extradition:-
>
> - The article 8 rights of the RP and his family are engaged by this application.
>
> - The RP's wife has a debilitating spine condition.
>
> - Both the RP's and his partner's parents are in poor health.
>
> - The RP's company is seeking to make good the loss suffered in this case. His extradition would jeopardise the future of the company.
>
> 54. The RP's article 8 rights and those of his family are engaged by this application. I accept that to order extradition will cause emotional and financial hardship to them. It will be particularly hard with regard to the care of his and his wife's parents who are in poor health. His extradition will jeopardise the viability of his company and potentially cause job losses. It is likely to prevent the RP making further recompense in respect of the fraud he is accused. I take all these factors into account and balance them against the public interest in ensuring extradition arrangements are met. Much of what is raised by the RP is commonplace in cases of extradition. I accept that there is no rule of exceptionality, but I am satisfied that in this case the balance falls in favour of ordering extradition."

44. Mr Henley's submissions on this ground of challenge were unable to identify any error of principle in the approach taken by the district judge. His submission essentially was that the evidence in this case meant that the relevant circumstances were sufficiently exceptional for the Article 8 rights to prevail. I am unable to accept that submission and am in full agreement with the district judge.

45. I should record that Mr Carpenter made an application to adduce before us fresh evidence comprising minutes of a board meeting of the 31 October 2018. It was

suggested that it assisted in two ways. First it identified that the liquidator of the parent company was relying upon Mr Carpenter to continue as the sole representative of the company in the United Kingdom responsible for carrying on its business in this country. Secondly it made reference to some loans having been repaid to the parent company. Mr Henley wished to rely on this evidence to support a submission that an additional factor which made extradition contrary to the interests of justice was that Mr Carpenter's presence in this country without which the company would likely go into liquidation, was itself in the best interests of those who had suffered loss as a result of the putative fraud, because it would mean the company would be enabled to make further payments to the parent company and the value of the company would increase so as to increase the recovery by the parent company, and therefore the creditors, should it be sold.

46. This evidence does not meet the test for fresh evidence to be admitted. The subject matter to which it goes could have been addressed in evidence before the district judge, and although the board meeting is dated 31 October 2018 it was not sought to be relied on until an application notice the day before the hearing before this Court. In any event it does not support the submission for which it is relied on. As to repayment there is nothing to indicate that the payments which are there identified have anything to do with the subject matter of the fraud. Moreover in the current state of the market in which the company operates, it is a matter of speculation as to whether if it continues to trade it will increase or decrease in value, or become better able rather than less able to repay any debts. If Mr Carpenter is extradited and the result of that is that company now has to be sold, there is no secure basis for thinking that that would be to the detriment of the creditors who have suffered as a result of the putative fraud.

Conclusion

47. I have rejected all the grounds of appeal save that under section 12A. In the light of the conclusion that the first stage of Section 12A was fulfilled on the evidence before the district judge, the course which he should have adopted was to consider the question at stage 2, in which the burden of showing the relevant matters fell on the JA. We indicated at the hearing that if this were the conclusion we would invite written submissions as to the appropriate form of remedy or relief. Subject to my Lord, Hickinbottom LJ, I would direct that the parties file and serve such written submissions within 14 days of the handing down of this judgment.

Lord Justice Hickinbottom :

48. I agree with the analysis and conclusion of Popplewell J, and with the disposal he suggests. Unless they can agree and order, the parties will file and serve written submissions as to the appropriate form of relief within 14 days.