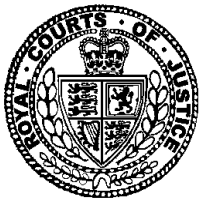

Neutral Citation Number: [2020] EWHC 2278 (Admin)

Case No: CO/1739/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 August 2020

Before :

LORD JUSTICE POPPLEWELL
MR JUSTICE JOHNSON

- -

Between :

W

Appellant

- and –

A SPANISH JUDICIAL AUTHORITY

Respondent

- -
- -

Helen Malcolm QC and Amelia Nice (instructed by **McMillan Williams Solicitors**) for the **Appellant**
Nicholas Hearn (instructed by **CPS**) for the **Respondent**

Hearing date: 30 July 2020

- -

Approved Judgment

Lord Justice Popplewell giving the judgment of the Court :

Introduction

1. This is an appeal from an extradition order made on 29 April 2019 by District Judge Blake pursuant to an accusation European Arrest Warrant issued by the Respondent on 19 July 2018 ("the EAW"). The appellant appeals against that order with leave on the grounds that extradition would be unjust or oppressive having regard to her mental

and physical condition. She also seeks to renew an application for permission to appeal on the further ground that extradition would be incompatible with rights under Article 8 of the European Convention on Human Rights ("ECHR"). In order to protect the anonymity of the children involved in the case the names of the persons involved have been given letters and the territory of the requesting judicial authority generalised as simply one in Spain.

Narrative

2. W was born in Russia and has joint Russian and British nationality. She began a relationship with X, who is of Iranian origin with joint British and Iranian nationality, in 2005 or 2006. They have a daughter, Y, who is now aged 6. For much of the period of their relationship, which lasted until the end of 2017, they lived in England. The history of that relationship is described in great detail in two judgments of Mrs Justice Gwynneth Knowles in family proceedings, the first determining an application by X in relation to the abduction by W of Y from Spain; and the second a fact-finding judgment in care proceedings in relation to Y ("the fact-finding judgment"). It is an understatement to say that almost from the outset the relationship between W and X was tempestuous, and the detail of that dysfunctional relationship which is set out in those judgments makes very unhappy reading, especially in relation to the damaging effect the behaviour of both W and X has had on Y, who is deeply traumatised. W's evidence, which was accepted by the District Judge at the extradition hearing, was that she was the victim of serious domestic violence from X over the course of their relationship. In the fact-finding judgment, which post-dated the extradition hearing, Knowles J made a similar finding and found further domestic abuse of W by X in the form of aggressive verbal abuse and controlling behaviour. Knowles J's findings were also, however, highly critical of W, whom she found to have been persistently verbally abusive to X and on occasions physically violent towards him; W used alcohol to excess when Y was in her care (she was convicted in April 2016 of being drunk in charge of a child when Y was two years old) and when stressed or intoxicated she would physically chastise Y; she and X both neglected Y's developmental and other needs, prioritising their own needs over hers and persistently failed to protect Y from the behaviour of the other exposing her to violence, alcohol and drug use. When Y was only 6 months old there was a local authority Child Protection Case Conference recommending that Y be made the subject of a child protection plan. In March 2016 X signed a written agreement with the local authority which recorded concerns about Y being at significant risk of harm whilst W was under the influence of alcohol; and about the father having been staying at the mother's address when, given the history of severe domestic violence, it was not considered safe for the parents to be together. The father agreed to live at his sister's address with Y until assessments had been completed, with the sister supervising Y's day to day care, and agreed not to take Y to W's address. The agreement was quickly broken and in April 2016 the local authority threatened care proceedings. A meeting of both W and X with the local authority led to further agreed arrangements, which were again soon broken. In July 2016 X and W flouted these arrangements by moving to live, with Y, in the territory in Spain where the alleged offence giving rise to the EAW took place some 18 months later. Knowles J found that both W and X failed to engage with the professionals concerned about Y's welfare and X lied repeatedly to the local authority, his dealings with which in 2016 were nothing but a charade to keep the local authority at bay whilst he planned and executed W and Y's

move to Spain. She also found that X exerted pressure on W to make the move to Spain.

3. X has a son, Z, by a former partner. Having previously lived with his mother, in November 2017 Z joined the family in Spain when he was then aged 13.

4. The offence alleged against W in the EAW is that in the early hours of the morning on 19 December 2017 W went to Z's bedroom where he was asleep and forced him to have sexual intercourse with her despite him telling her to get off. The maximum penalty for this offence under Spanish law is 12 years' imprisonment. W denies the allegation, contending that it has been concocted by X and Z. This was one of the allegations investigated by Knowles J in the fact-finding proceedings, in which she heard evidence from W, Z and a number of other witnesses who gave relevant evidence, including X who was abroad at the time of the alleged offence. Knowles J did not find the allegation proved, but she recorded that she did not have all the evidence from the Spanish investigation file. Her finding is not said to be a bar to extradition: the extraditing court is not concerned to investigate or evaluate the merits of the criminal allegation forming the subject matter of the EAW.

5. The alleged offence was immediately reported by Z. W was initially detained. She was granted bail by the Spanish Court on 20 December 2017 with a condition that she notify any change of address. On 29 January 2018 she fled to the United Kingdom with Y without notifying the Spanish authorities, in breach of her bail conditions. She did not inform the Spanish authorities because, she says, she was confused and frightened. Upon arrival in the UK she initially stayed with Z's mother but after a few weeks moved out with Y and thereafter stayed in a series of refuges.

6. The EAW was issued on 19 July 2018 following a request made on behalf of X to the respondent judicial authority. It was promptly certified by the National Crime Agency and W was arrested on 31 August 2018. Y was taken into care by the local authority and placed with foster parents, with whom she currently remains. On 3 September 2018 W was granted conditional bail, and has remained on bail since then.

7. The Spanish authorities completed their investigation of the allegation, and initiated proceedings, on 21 September 2018. On 8 November 2018 the Court in Spain made a ruling for an indictment against W as the first stage in an oral trial, requiring her to attend before the court for notification. The proceedings are not able to continue in her absence.

8. At the hearing before District Judge Blake, W resisted extradition on a number of grounds, two of which are relevant to the present appeal:

   (1) that, having regard to W's physical and mental condition, it would be unjust or oppressive to extradite her – section 25 Extradition Act 2003 ("EA 2003");

   (2) that extradition would be a disproportionate interference with W's and Y's article 8 rights to respect for private and family life – section 21A of EA 2003.

9. The District Judge rejected both grounds and ordered extradition. W was granted permission to appeal on the first ground (section 25). She was refused permission to appeal on the second ground (article 8) and renews the application.

The medical evidence

10. Although some reliance was placed on physical problems in relation to her back, jaw, stomach and bladder instability, these are not severe. The main thrust of the argument under both heads focused on W's mental health. W relied in particular upon the evidence of Dr Lucja Kolkiewicz, a consultant psychiatrist, contained in four written reports, (two being for the purposes of the family proceedings) and oral evidence she gave at the hearing. Dr Kolkiewicz has since produced two more reports, which we have admitted as fresh evidence upon the appellant's unopposed application.

11. Dr Kolkiewicz first interviewed W on 13 October 2018 and prepared a report dated 25 October 2018 which was before the Judge in the family proceedings but not the District Judge or us in these extradition proceedings. In a further report for the extradition proceedings dated 2 November 2018, which we were given to understand was largely a reiteration of her 25 October 2018 report, and was referred to in these extradition proceedings as her first report, she expressed an opinion that W's symptoms fulfilled the criteria for the following conditions, based on the interview with W on 13 October 2018 and access to documentation which included her GP notes and documents from the family proceedings amongst others:

    (1) Mental and Behavioural Disorder due to the use of Sedatives or Hypnotics – Dependence Syndrome, Currently using Benzodiazepines [active dependence]. The GP notes evidenced that she was paying privately to take a higher dose of the addictive anti-depressants than had been prescribed, and W confessed to being addicted to them.

    (2) Post Traumatic Stress Disorder. Dr Kolkiewicz based this in part on W's account of a history of domestic violence and being subjected to humiliating sexual practices by X and in part on her score in answers to the PTSD Checklist test PCL5.

    (3) Severe Depressive Episode without Psychotic Symptoms. The diagnosis was supported by the GP notes of previous diagnoses of depression, Dr Kolkiewicz's observation of W, W's description of her mood and outlook, and the high score W recorded on the PHQ9 test.

12. Dr Kolkiewicz also concluded that W was a low suicide risk given that she had made clear that she did not have, and had never had, any suicidal ideation, and there was no history of self harm.

13. After Dr Kolkiewicz had conducted the interview with W and prepared her earlier report for the family proceedings, she was contacted by those representing W in the family proceedings who were concerned whether W had lost capacity; and so shortly after her first report of 2 November 2018, prepared for the extradition proceedings, Dr Kolkiewicz saw W again and produced a second report dated 9 November 2018, Dr Kolkiewicz concluded that W was now displaying a range of psychotic symptoms (which she had not been previously) involving persecutory delusions which constituted a paranoid psychosis. These were directly related to the proceedings and prevented her trusting even her own lawyers. She accordingly concluded that W had lost capacity to conduct the abduction proceedings, due to commence on 21 January 2019.

14. In her third report, dated 17 January 2019, Dr Kolkiewicz concluded that W had regained capacity to conduct legal proceedings because there had been an improvement in the intensity of her delusional beliefs brought about by a geographical move in accommodation. The diagnosis for the retained psychosis was paranoid schizophrenia "course uncertain period of observation too short." The diagnoses of PTSD and benzodiazepine addiction remained. In relation to depression the diagnosis was changed to "Mild depressive episode without somatic symptoms", based on the further interview and W's now low score on the PHQ9 test. This was consistent with W's treating psychiatrist, Dr Czerwinska, who said in a written report of 2 January 2019:

> "I do not have any concerns regarding her capacity and decision making about her and her daughter's well-being… she did not present with any psychotic symptoms…we agreed that she will continue taking medication as mentioned above. I am hoping that after all the court proceedings have finished, we can support her with some psychological treatment to help her overcome the trauma she has experienced."

15. Dr Kolkiewicz's fourth report was prepared in the context of the extradition hearing due to take place on 3 April 2019. In her fourth report, dated 27 February 2019, Dr Kolkiewicz gave the same diagnosis as in her third report, save that W's current environment had stopped her benzodiazepines addiction at least temporarily. The diagnosis was (1) Paranoid Schizophrenia "course uncertain period of observation too short"; (2) Mild Depressive Episode without somatic symptoms; (3) Post Traumatic Stress Disorder; and (4) Mental and Behavioural Disorder due to the use of Sedatives or Hypnotics Dependence Syndrome, currently abstinent but in a protected environment.

16. The change in her PHQ9 score to one indicating mild depression was attributed to her taking half of the prescribed dose of sertraline, a non addictive anti-depressant. Dr Kolkiewicz addressed the impact of extradition as follows:

> "If [W] were to be extradited and remanded into custody with or without antipsychotic medication for the treatment of schizophrenia, in my opinion the stress associated with extradition and imprisonment would inevitably lead to a worsening of her symptoms of schizophrenia with subsequent loss of capacity. In my opinion treatment with antipsychotic medication would be more protective.
>
> …
>
> In my opinion, if [W] were to be extradited and remanded into custody with or without antipsychotic medication for the treatment of schizophrenia, and lost capacity it is highly likely that she would become unfit to plead. In my opinion treatment with antipsychotic medication would be more protective.
>
> …

> [W] denies ever feeling suicidal, even when I first assessed her 25.10.2019 when she had not yet presented with obvious psychotic symptoms and had symptoms of severe depression which is usually associated with suicidal ideas and a 10% suicide rate.
>
> On the three occasions that I have assessed [W] she has said that she would not take her own life because she loves life too much.
>
> Were [W] to be extradited, held in custody and lost hope of ever seeing her daughter again, or the distress associated with her untreated persecutory delusional beliefs became too much to bear, in my opinion there will be a high risk of self-harm or suicide.
>
> As already stated above, approximately 10% of people with severe depressive disorder complete suicide, and approximately 10% of people with paranoid schizophrenia complete suicide.
>
> If [W] were to be held in custody in Spain whilst her schizophrenia remains untreated with anti-psychotic medication and she is subjected to the continued stressor of a prison environment, in my opinion the severity of her symptoms will increase and she will show a deterioration in emotional, psychological, social and physical functioning…….In my opinion if [W] is held in a prison whilst she has active symptoms of schizophrenia, with or without treatment, recovery will be significantly impaired."

17. As will be seen, Dr Kolkiewicz was subsequently to revise her diagnosis of schizophrenia and attribute the psychotic episode suffered by W to depression and the effect of withdrawal from addictive anti-depressants. However this was her most recent report which she adopted in her evidence at the extradition hearing in April 2019. Her oral evidence is summarised as follows by District Judge Blake:

> "She stated that [W] was now much less distressed and more able to concentrate. She had suffered repeated domestic violence to a severe degree and the repeated trauma of domestic violence was reflected in her Post Traumatic Stress Disorder. If she was not now taking benzodiazepines her condition should significantly improve and even remit. She should take anti-psychotic medications so that she can engage with therapy and deal with her depression.
>
> She… confirmed that it remained her opinion… that [W]'s symptoms currently fulfil the ICD criteria for the following multi-morbid health conditions paranoid schizophrenia, mild depressive episode without somatic symptoms, post-traumatic stress disorder and mental and behavioural disorder due to the use of sedatives or hypnotics."

18. On 31 January 2020 Dr Kolkiewicz provided a fifth report addressing W's litigation capacity and witness competence for the purposes of the fact-finding hearings in the care proceedings, which were due to continue in February and early March 2020. Her PHQ9 score was raised again indicating severe depression at a level just above that when she was originally seen on 23 October 2018.

19. Dr Kolkiewicz's sixth report is dated 17 June 2020 and followed a remote conference for one and a half hours on 22 April 2020, when it had not been possible to have a face to face assessment due to the coronavirus pandemic. Her report records that this was less than ideal because W only had audio, not video, functionality on the call and the sound quality on the interpreter's line was unreliable. Dr Kolkiewicz was unable to have W complete the PHQ9 or PCL5 tests. Dr Kolkiewicz described these disadvantages as imposing a significant limitation to her assessment. She recorded that W told her that she had made three suicide attempts by taking an overdose of her prescribed medication. This was uncorroborated because W had not on any of the occasions gone to hospital or sought medical assistance. The report stated, however, that malingering was not an issue.

20. In her sixth report Dr Kolkiweicz discounted her previous diagnosis of paranoid schizophrenia as a result of her observations of W's presentation over the 18 months or so since her second report. She was now of the opinion that the episode of psychosis which caused W to lose litigation capacity was a worsening of her symptoms of depression coupled with abrupt withdrawal from benzodiazepines when she could no longer afford to buy them privately. W had now succeeded in maintaining full abstinence from this class of medication. The diagnosis was therefore of (1) Severe Depressive Episode without psychotic symptoms and (2) Post Traumatic Stress Disorder.

21. In relation to the depression, Dr Kolkiewicz said there were signs that the symptoms were beginning to improve but that it was fragile because of the restrictions of the coronavirus epidemic and the fact that W was consequently seeing less of her daughter: she was allowed contact once a week, alternate weeks of actual and remote contact, but had not managed to carry out either in the four weeks prior to seeing Dr Kolkiewicz. In relation to the PTSD, Dr Kolkiewicz observed that her symptoms had improved consequent upon having received the result of the fact finding hearing; having finally made a psychological separation from X whom she never wanted to see again and for whom she had stopped feeling sorry; and having come to the realisation that she had been controlled by X and had put his needs ahead of Y's.

22. In answer to a question about the suicide risk for W if she were extradited, Dr Kolkiewicz said "Were [W] to be extradited, held in custody and lost hope of ever seeing her daughter again, or the severity of her depressive disorder increased, in my opinion the risk of suicide would be high."

23. In answer to a question as to the impact of being separated from Y and held in a foreign prison where she does not speak the local language, Dr Kolkiewicz said "In my opinion extradition would cause an acute deterioration in [W]'s mental health because her recent improvement is minimal, early and fragile."

24. In answer to a question as to the impact of extradition on W's litigation capacity and fitness to plead, Dr Kolkiewicz confirmed that in her current state she had capacity

and was fit to plead but that "In my opinion in response to the stress associated with extradition the severity of [W]'s depression is likely to increase and she is likely to develop Severe Depression with Psychotic symptoms and lose litigation capacity as she did in November 2018. In the event of a deterioration such as this in my opinion [W] will no longer be fit to plead and stand trial."

The care proceedings

25. The final hearing in the care proceedings was due to have taken place shortly before the hearing of this appeal, but it was adjourned and is now to take place in the weeks commencing 9 and 16 November 2020 by video-link. We were provided with a helpful note of the current position which was agreed between all parties involved in those proceedings. In summary:

    i) The options which will fall to be considered for Y's long term care are (a) long term foster care; (b) custody granted to X who resides with Y's half siblings in Spain; or (c) subject to an assessment which is currently taking place, placement with X's sister. W does not at this stage seek the return of Y to her care. X seeks her return to his care, which involves the possibility of Y returning to Spain. The local authority's position prior to the further assessment of X's sister was that Y should remain in long term foster care for the duration of her minority. The position of W, and Y's guardian, will be finalised after the assessment of X's sister has been completed.

    ii) In the event that Y is to remain in foster care, W's visits would be reduced, the local authority's proposal being that W would have face to face contact six times a year for 3 hours in school holidays and indirect contact on limited occasions throughout the year. We were told by Ms Malcolm QC that the reduction would be gradual such that initially W would have face to face contact every two months. In such a case W (and X) would also be invited to attend reviews so as to be kept informed of Y's health and development, and it would remain open to either of them at some point in the future to apply to discharge that arrangement and seek the return of Y to that parent's care.

26. W will be represented by solicitors and counsel at the hearing. She has provided a witness statement, and it is anticipated that she will need to give oral evidence at the hearing to articulate and amplify the reasons for her objections to Y being placed with X or X's sister. She will need to be able to give instructions to her lawyers as the hearing unfolds and in response to the evidence from X and his sister, the Local Authority evidence, and the expert evidence, as it comes out. In the Order of 2 July 2020 by which the final hearing was adjourned to November, Knowles J included a provision to be drawn to the attention of this court in the following terms: "The court was informed that the hearing of the mother's extradition appeal has been fixed to take place on 30 July 2020 and authorised the mother's lawyers, in the event of that appeal being dismissed, to draw to the attention of the court hearing that appeal this court's concern as to the ability of the mother to participate fully in the [adjourned hearing] if she is returned to Spain before the conclusion of that hearing." We fully appreciate that concern and readily accept Ms Malcolm's submissions that W's ability to attend the final hearing in person is of very considerable importance in the context of those proceedings.

The legal principles

27. Spain is a category 1 territory and Part 1 of EA 2003 Act applies. Section 21A provides that the judge must order the defendant's discharge if extradition would be incompatible with the rights of the defendant or another person under the European Convention on Human Rights. The applicable principles in article 8 cases are well established: it is likely that the public interest in extradition will outweigh the article 8 rights of the defendant or a member of their family unless extradition would constitute an exceptionally severe interference with private or family life. The principles were succinctly summarised by Burnett LJ as he then was in *Olga C v The Prosecutor General's Office of the Republic of Latvia* [2016] EWHC 2211 (Admin) in these terms:

> "25. The applicable principles in extradition cases in which article 8 is relied upon to resist surrender derive from *Norris v Government of the United States of America* [2010] UKSC 9; [2010] 2 AC 487 and *HH v Deputy Prosecutor of the Italian Republic (Genoa)* [2012] UKSC 25; [2013] 1 AC 338 . They are too well known to require extensive citation. At their heart is a recognition of the constant and weighty public interest in the extradition of individuals to face trial for serious offences. The United Kingdom should honour its treaty obligations. No safe haven should be created for those accused or convicted of crimes overseas. Article 8 might in an exceptional case prevent extradition. The context of the cases heard together with *HH* was the potential impact upon children but reliance upon article 8 is not restricted to such cases."

28. The public interest there identified always carries great weight, although the weight to be attached to it in a particular case will vary according to the seriousness of the crimes of which the requested person is accused. In this case the crime alleged against W is a serious one, and the public interest in extradition very weighty.

29. Section 25 of EA 2003 provides:

> "**Physical or mental condition**
>
> (1) This section applies if at any time in the extradition hearing it appears to the judge that the condition in subsection (2) is satisfied.
>
> (2) The condition is that the physical or mental condition of the person in respect of whom the Part 1 warrant is issued is such that it would be unjust or oppressive to extradite him.
>
> (3) The judge must—
>
> (a) order the person's discharge, or
>
> (b) adjourn the extradition hearing until it appears to him that the condition in subsection (2) is no longer satisfied."

30. The "unjust or oppressive" test in s. 25 is sufficiently broad to encompass all cases where extradition would be unfair as a result of the defendant's ill health: see *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 799 per Lord Diplock at p. 782:

> "'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair."

31. That was said in the context of the test to be applied by the Secretary of State before EA 2003 transferred that decision to the Court by the enactment of s. 25. In *The Government of the Republic of South Africa v Dewani* [2012] EWHC 842 (Admin) Sir John Thomas, then President of the Queen's Bench Division, held that the dictum of Lord Diplock in *Kakis* applies equally to the expression used in section 25. At paragraph [73] he said that the term "unjust or oppressive" requires regard to be had to all the relevant circumstances, including the fact that extradition is ordinarily likely to cause stress and hardship neither of which is sufficient.

32. He also said in that paragraph: "We would add that it is not likely to be helpful to refer a court to observations that the threshold is high or that the graver the charge, the higher the bar, as this inevitably risks taking the eye of the parties and the court off the statutory test by drawing the court into the facts of other cases." However this court has subsequently referred to the fact that the threshold is high in a number of cases. In *Turner v Government of the United States of America* [2012] EWHC 2426 (Admin) Aikens LJ at [28] summarised the propositions that could be derived from the relevant cases as including the following:

> "(1) the court has to form an overall judgment on the facts of the particular case…
>
> (2) A high threshold has to be reached in order to satisfy the court that a requested person's physical or mental condition is such that it would be unjust or oppressive to extradite him…

33. Those and the other sub-paragraphs of [28] of Aikens LJ's judgment were approved as a succinct and useful summary of the approach to s.25 by Sir John Thomas P himself and Burnett J, as he then was, in *Wolkowicz v Poland* [2013] 1 WLR 2402 at [9]. For our part we regard it as important to keep in mind that the unjust and oppressive test in s. 25 is a high threshold, because the section must be read in the context of the very weighty public interest in ensuring that treaty obligations are fulfilled and in discouraging persons seeing the UK as a state willing to accept fugitives from justice. Lord Reed, now President of the Supreme Court, made this point when giving the judgment of the Inner House in *Howes v HM's Advocate* [2010] SLC 341 at [13]. As Lord Thomas CJ reiterated in *Polish Judicial Authorities v Celinski* [2016] 1 WLR 551 at [9], the public interest in ensuring that extradition arrangements are honoured is very high; and so too is the public interest in discouraging persons seeing the UK as a state willing to accept fugitives from justice. Accordingly, the fact that the treatment of a physical or mental illness abroad will be

less beneficial than treatment here does not of itself demonstrate oppression (see per Ouseley J in *Mikolajczyk v Wroclaw District Court* [2010] EWHC 3503 (Admin) at [16]-[17]).

34. The approach of this court on an appeal where the challenge is to the decision of a District Judge on article 8 grounds is normally to decide whether the judge's decision was wrong in an appellate review, as explained in *Celinski* at [18]-[24]. However where there is fresh evidence, this court must make its own independent incompatibility assessment based on all the evidence before it: see the *Olga C* case at [26]. On an appeal against an adverse finding under section s. 25 it is for this court to decide whether the appellant's medical condition is such that it would be unjust or oppressive to extradite her, again on the basis of all the material before the court including the fresh evidence. The position is different before us, not only by reason of the availability of further medical evidence from Dr Kolkiewicz, and the findings of fact in the care proceedings, which post-date the District Judge's decision, but also because of the context of the final hearing in the care proceedings in November 2020. Therefore although Ms Malcolm made criticisms of the judgment of the District Judge, ultimately it is for this court to decide whether extradition should be barred under s. 21A or s. 25 of EA 2003 based on our own evaluation of the evidence.

The Appellant's submissions

35. There was a good deal of overlap between Ms Malcolm's submissions on section 25 and those on article 8. So far as section 25 is concerned we detected four essential strands, namely that:

i) it is very likely that W will lose litigation capacity and be unfit to plead if she is returned to Spain, as Dr Kolkiewicz states in her fourth report;

ii) extradition will have an acutely adverse effect on W's mental health, as Dr Kolkiewicz states in her sixth report; W would almost certainly not be granted bail, as a former fugitive with no local ties or financial means of support and would be held in a Spanish jail where she does not speak the local language, and has no friends or relatives to provide support; there would be inadequate provision for the particular psychiatric treatment she would require in prison in Spain; this would likely be for at least a year pending trial and could be for up to four years if she were found unfit to plead;

iii) the Spanish trial practices do not provide adequate protective measures for vulnerable defendants with the appellant's characteristics;

iv) the appellant has made complaints to the police of multiple rapes by X over the years, which are now being investigated by the police in England; her removal to Spain will make taking such investigations to trial difficult, at best, and realistically unlikely.

In relation to article 8, Ms Malcolm additionally argues that extradition would interfere with the family and private rights of W and Y in the following weighty respects:

v) W would be deprived of access to Y and vice-versa. She would be held in a Spanish jail where there could be no face to face contact. Inmates in Spain are only be allowed phone calls of 5 mins, ten times per week, and a video conference contact every four months. W would likely be unable to make phone calls to Y because they have to be prepaid and she would have no funds with which to pay.

vi) W would be deprived of the opportunity to participate effectively in the final hearing of the care proceedings.

36. Ms Malcolm further submits that in the context of the article 8 rights these points gain considerable added weight from what she described as two unusual features of the case. The first is that there is jurisdiction under s. 72 Sexual Offences Act 2003 for W to be tried in this country for the alleged offence notwithstanding that its alleged commission took place abroad. This is not, therefore, a case in which discharge would mean that she would escape trial for the offence which is alleged. The interference with the article 8 rights could all be avoided or substantially ameliorated if she were to remain in this country and be prosecuted here. The second unusual feature relied on is the history of domestic violence. Ms Malcolm invokes the duty of the UK state to protect victims of domestic violence, and submits that extradition would involve failing to do so.

37. We will address these two last contentions first, before considering the different strands relied upon by Ms Malcolm.

England as an alternative forum

38. Section 19B of EA 2003 Act provides:

> "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.

(4) ……..

(6) In this section " D's relevant activity " means activity which is material to the commission of the extradition offence and which is alleged to have been performed by D.

39. As Ms Malcolm concedes, section 19B is not applicable in this case because subsection (2)(a) is not fulfilled: no part of the alleged criminal activity of W took place in the UK. Nevertheless, she submits that in the unusual case such as this where the offence falls within the extraterritorial jurisdiction of the English Court by reason of s. 72 of the Sexual Offences Act, the alternative availability of prosecution in this country is a relevant factor enhancing the weight of the article 8 grounds for resisting extradition because the court can give effect to the public interest in the defendant not escaping prosecution whilst at the same time avoiding or ameliorating the adverse consequences of extradition; the court is only justified in interfering with article 8 rights to the extent that the interference is the minimum necessary to protect the public interest involved, and to the extent that the interference is proportionate to that interest.

40. Two matters are of immediate note in relation to this submission. The first is that the public interest in extradition is not only to prevent those alleged to have committed crimes from achieving impunity by fleeing; it is also the strong public interest in giving effect to the UK's treaty obligations. The second is that s. 19B is not aimed simply at cases where the only available forum for prosecution is that of the requesting court; on the contrary, subsections (3)(c)(d) and (e) all contemplate a dual forum case where prosecution within a part of the United Kingdom is an alternative possibility. Parliament has therefore determined the circumstances in which such availability is to be a bar to extradition. The public interest in giving effect to treaty obligations has been deemed by Parliament to outweigh any considerations of *forum*

conveniens in cases falling outside s.19B, that is to say where a substantial measure of the defendant's conduct did not take place in the UK.

41. For this reason the authorities make clear that where s. 19B does not apply, the availability of England as an alternative forum will not normally be of any significant weight, although its minimal weight might in rare cases be sufficient to make a difference if all the other factors result in the scales being finely balanced: *Norris* at [66]-[67], [86] and [131]; *Bagri v Public Prosecutor at the Bordeaux Court of First Instance France* [2014] EWHC 4066 (Admin) at [43]; *Diri v Government of the United States of America* [2015] EWHC 2130 at [46]-[47].

42. This is not a case in which in our view the factors are finely balanced. Moreover the theoretical possibility of prosecution in England itself has adverse consequences by comparison with prosecution in Spain. X and Z are currently in Spain, where the alleged conduct took place and where it has been investigated to the point where a prosecution had been launched and would have proceeded but for W's flight. By contrast no investigation has taken place by the police in England and any prosecution would be further delayed. The public interest in extradition is also enhanced in this case by the effect of W's unlawful fugitive conduct: it has meant that the allegation which forms the subject matter of the criminal proceedings had to be addressed additionally in the care proceedings, with the attendant inconvenience for Spanish resident witnesses and the ordeal for Z as a minor in giving oral evidence and being cross-examined, something which would probably have been avoided had W not fled because the criminal trial would have concluded before the fact-finding in the care proceedings.

43. Accordingly in the circumstances of this case Ms Malcolm's points gain no greater weight or significance by virtue of the potential availability of England as an alternative forum.

Obligation to protect from domestic violence

44. Ms Malcolm submits that while the essential object of Article 8 is to protect the individual against unnecessary and disproportionate interference by the state, it also imposes positive obligations (1) to secure effective respect for physical and psychological integrity which is relevant to victims of domestic abuse: *Nitecki v Poland* (Dec.) no. 65653/01, 21 March 2002; *Sentges v the Netherlands* no. 27677/02, 8 July 2003; *Odièvre v France* [GC], no. 42326/98, § 42; *Glass v the United Kingdom*, no. 61827/00, §§ 74-83; *Pentiacova and Others v Moldova* no. 14462/03. She submits that where the court is concerned with a woman who has been a victim of domestic abuse, positive obligations arise in two important respects:

    i) Effective "respect" for private and family life may involve "the adoption of measures" in the sphere of the relations of individuals between themselves. In *Bevacqua v Bulgaria* [2008] (Application no. 71127/01), the court noted the particular vulnerability of the victims of domestic violence and the need for active State involvement in their protection and that of children where that might include the taking of measures with a view to him or her being reunited with his or her child.

ii) Positive obligations to take all legal and other measures necessary to provide effective protection of women against gender-based violence, including penal sanctions (due diligence obligations): Convention on the Elimination of All Forms of Discrimination against Women (signed and ratified by the UK in 1981 and 196 respectively); and CEDAW 'General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19'.

45. It is submitted that the extradition of W engages these principles because (i) it would involve W having to face her abuser, X, in Court with X's counsel as a private prosecutor, without any suitable protective measures; (ii) W's PTSD, which would not properly be treated in a Spanish prison, is the result of domestic violence; and (iii) W's damaged relationship with Y is the result of domestic violence such that depriving her of contact/access and failing to permit her to play a full part in the care proceedings is exacerbating the consequences of domestic violence.

46. We were not referred to any jurisprudence on the interplay between the duty to protect victims of domestic violence and the treaty obligations to extradite those accused of crime at the request of the EU member state in which the alleged offence was committed. Indeed Ms Malcolm submitted that this case therefore raised an important and novel issue of law. We do not, however, consider that this case requires any close analysis of such interplay. We are prepared to assume that where appropriate the duty to protect victims from the effects of domestic violence may have a part to play in the evaluation of whether article 8 rights should be a bar to extradition, whether by way of diminishing the weight to be given to the public interest in extradition by reason of a countervailing interest, or by way of enhancing the weight to be attached to the interference with the article 8 rights in question. However, in the circumstance of this case the three aspects which are said to engage the application of the protective duty are not such as add any significant weight in the appellant's favour in the balance between the public interest in extradition and the article 8 rights which are engaged. The Spanish courts can be expected to fulfil their duty to protect W from the effects of domestic violence in the trial process to the extent compatible with the public interest in the prosecution of crime; we address below the specific arguments concerning the absence of special measures protection. The argument based on an adverse effect of extradition on W's PTSD is, for the reasons given below, not a factor of any great weight. The conduct of W which has led to her daughter being taken into care is not primarily to be attributed to any domestic violence or abuse suffered by W, but rather from her own failings which are set out in detail in the fact-finding judgment; and the limited extent to which extradition will reduce the contact which W and Y would otherwise have is not a major factor in the article 8 balancing exercise. This is not a case in which the background of domestic violence and abuse is anything more than background: it does not affect the strength of the arguments under section 21A of EA 2003.

Unfitness to plead

47. It is well established that the question of fitness to plead is something which is to be left to the requesting court to decide, if it will do so adopting a fair procedure. Where the question of fitness to plead arises, it will be no bar to extradition under s. 25 of EA 2003 unless it is clear that he or she will definitely be unfit to plead; and will not necessarily be a bar even in such a case. This was established as the position prior to

the 2003 Act in *Warren v SSHD and Crown Prosecution Service (acting for the United States of America)* [2003] EWHC 1171 (Admin) by reason of the strong public interest in meeting treaty obligations for extradition: see per Moses J at [37]-[39] and Hale LJ at [40] and [42], where the latter said:

> "40. …The object of extradition is to return a person who is properly accused or has been convicted of an extradition crime in a foreign country to face trial or to serve his sentence there. This includes the determination of whether he is fit to be tried, an issue which, under criminal justice systems of both this country and New York, is decided by the court, and not by members of the executive or the medical profession. The extradition process is only available for return to friendly foreign states with whom this country has entered into either a multi or a bilateral treaty obligation involving mutually agreed and reciprocal commitments. Mr Perry, on behalf of the Claimant, accepts that there is a strong public interest in respecting such treaty obligations. Such international cooperation is all the more important in modern times, when cross border problems are becoming ever more common, and the need to provide international solutions for them is ever clearer. …
>
> …
>
> 42. It will not generally be unjust to send someone back to face a fair process of determining whether or not he is fit to face trial. I accept that it may be wrong or oppressive to do so if the inevitable result will be that he will be found unfit. But even in those circumstances, there may be countervailing considerations. For example, if there is the counter part of our process in the other country, where a person may be found to have committed an act which would have otherwise been a serious crime, particularly if it were to be a crime of violence involving risk to the public, and if it would be then appropriate to detain the person for medical treatment, it could be in the public interest to enable that process to take place. That is not this case, but I would not wish to accept that it is inevitably going to be oppressive to return somebody in such circumstances."

48. A convenient review of the cases which have endorsed the approach in *Warren* as applicable under s. 25 of EA 2003 is to be found in the judgment of Wilkie J in *Edwards v Government of the United States of America* [2013] EWHC 1906 (Admin), affirming that approach.

49. In this case, at the time of the hearing before the District Judge W was fit to plead. Dr Kolkiewicz's then opinion was that extradition would make it "highly likely" that she would become unfit to plead. Her most recent report has downgraded that to "likely".

50. Dr Jamie Campaner Muñoz is an expert in Spanish law. He holds a PhD in procedural law, is a criminal lawyer with more than 10 years' experience of Spanish Criminal Courts, and is an associate professor in Procedural and Criminal Law at the University of the Balearic Islands. He was instructed by W to give evidence on the procedure of a Spanish criminal trial. His evidence was not challenged by the Respondent. In one of his reports, he confirms that if W's representatives seek an evaluation of W's mental health then the judge will order a psychological evaluation to be carried out by a "medical-forensic expert". Dr Kolkiewicz's reports can also be submitted on W's behalf. If the evidence indicates that W is not fit to take part in the trial then the judge must take that into account, and the Spanish legal provisions envisage the dismissal of the proceedings "when the suspect is not in the appropriate conditions":

> "As a consequence, the proceedings against [W] would be concluded, and would only be reopened if her mental health recovered, which would mean [she] was able to understand the implications of the proceedings against her and fully exercise her right to defence."

51. In these circumstances, there is no basis for concluding that the process that would be adopted by the Spanish authorities to try W would be unfair or unjust. There is no reason to suppose that the Spanish Court will not consider the issue fairly and with appropriate regard to medical evidence. On the contrary that is the effect of Dr Campaner's evidence and is in any event to be assumed by virtue of the mutual trust between the United Kingdom and Spain as (at the time of the arrangements giving rise to the EAW system) EU member states. Spain is a member state of the Council of Europe and therefore bound by the obligation under article 6 ECHR to ensure that a defendant facing a criminal charge is afforded a right of a fair trial. It is also a member state of the European Union and therefore bound by the obligation under Article 48 of the Charter to guarantee respect for the rights of the defence of anyone charged with a criminal offence. Like the United Kingdom, it is part of the European Arrest Warrant system, regulated by Framework Decision 2002/584/JHA, as amended by Framework Decision 2009/299/JHA. Those Framework Decisions are based on a principle of "mutual recognition of criminal decisions." The principle of mutual recognition of criminal decisions is, itself, founded on "the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level, particularly in the Charter" – see *Aranyosi and Caldararu* [2016] QB 921 at [77]. It follows that this Court is required to proceed on the basis that Spain will act compatibly with fundamental rights recognised by EU law, save in exceptional circumstances – see *Aranyosi* at [78]:

> "Both the principle of mutual trust between the Member States and the principle of mutual recognition are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and

> particularly with the fundamental rights recognised by EU law..."

52. Accordingly the present prediction by Dr Kolkiewicz that it is likely that W will become unfit to plead if she is returned to Spain carries no weight in an argument that it would be unjust for her return to be ordered.

Adverse effect on mental health

53. Ms Malcolm's submissions on this point are that W has a highly complex diagnosis; she is at high risk of committing suicide if she is returned; and that the extradition will have an acutely adverse effect on her health.

54. As to the first, we would not regard W's current diagnosis as revealing particularly complex mental health issues. Without wishing to minimise them, they are not of an order which is markedly more severe or complex than those which it is a sad fact are suffered by a significant proportion of the prison population in this country and abroad. The position is different from that which obtained at the extradition hearing when Dr Kolkiewicz was advancing a diagnosis of paranoid schizophrenia requiring treatment with anti-psychotics. Her evidence now suggests a less complex picture because her diagnosis of paranoid schizophrenia has been revised. Dr. Kolkiewicz's most up to date diagnosis is of depression and PTSD. The depression has ranged from mild to severe, the severity being affected, as one might expect, by the stresses of the care and extradition proceedings and the effect of the Covid pandemic lockdown. These stressors will largely be removed upon the conclusion of the extradition and care proceedings, although they will be replaced by the other stressors considered below arising from her circumstances facing trial in Spain. So far as the depression is concerned W was at the time of Dr Kolkiewicz's most recent report taking 50 mgs of Sertraline by way of anti-depressant although she had previously been prescribed 100 mgs and the BNF maximum is 200 mgs. In her first report Dr Kolkiewicz had said that the majority of people achieve full symptomatic remission within 6 weeks of achieving the full therapeutic dose that is right for them and that SSRI anti-depressants should be prescribed until she reached the maximal tolerable BNF dose. The evidence suggests that appropriate pharmacological treatment for depression is available in Spanish prisons.

55. In relation to the PTSD, Dr Kolkiewicz thought that the symptoms had improved as a result of the catharsis of the fact finding hearing and W's psychological separation from X. She had identified in her first report that the appropriate treatment was a course of specialist psychological therapy. That will not be available in Spain if W is remanded in custody before trial, which we accept is the likely but not inevitable position. The unavailability of such therapy to prisoners does not however represent a difference between the UK and Spanish position: Dr Kolkiewicz confirmed that such therapeutic treatment is equally unavailable in prisons in this country. Moreover W's poor prospects of getting bail in Spain are in part the result of her fleeing as a fugitive, which it is the function of extradition to reverse.

56. As to the suicide risk if W is extradited, clear guidance as to the principles to be applied is to be found in paragraph 28 of the judgment of Aikens LJ in *Turner v USA*, summarising the effect of the numerous authorities on the issue, a summary which

was endorsed by Sir John Thomas P and Burnett J as they then were in *Wolkowicz* at [9]. Aikens LJ said:

> "28. There have been a number of cases in which the courts have considered what has to be established under section 91 of the Act (or the equivalent section in respect of an application for surrender under Part 1 of the Act, which is section 25) in order that a court may be satisfied that it would be unjust or oppressive to return a person to the state requesting extradition, because of the risk of suicide if the order to return were made. The relevant cases, which were recently examined with care by Bean J in *Marius Wrobel v Poland* [2011] EWHC 374 at [17] establish the following propositions: (1) the court has to form an overall judgment on the facts of the particular case: *United States v Tollman* [2008] 3 All ER 150 at [50] per Moses LJ. (2) A high threshold has to be reached in order to satisfy the court that a requested person's physical or mental condition is such that it would be unjust or oppressive to extradite him: *Howes v HM's Advocate* [2009] SCL 341 and the cases there cited by Lord Reed in a judgment of the Inner House. (3) The court must assess the mental condition of the person threatened with extradition and determine if it is linked to a risk of a suicide attempt if the extradition order were to be made. There has to be a "substantial risk that [the appellant] will commit suicide". The question is whether, on the evidence the risk of the appellant succeeding in committing suicide, whatever steps are taken is sufficiently great to result in a finding of oppression: see *Jansons v Latvia* [2009] EWHC 1845 at [24] and [29]. (4) The mental condition of the person must be such that it removes his capacity to resist the impulse to commit suicide, otherwise it will not be his mental condition but his own voluntary act which puts him at risk of dying and if that is the case there is no oppression in ordering extradition: *Rot v District Court of Lubin, Poland* [2010] EWHC 1820 at [13] per Mitting J. (5) On the evidence, is the risk that the person will succeed in committing suicide, whatever steps are taken, sufficiently great to result in a finding of oppression: ibid. (6) Are there appropriate arrangements in place in the prison system of the country to which extradition is sought so that those authorities can cope properly with the person's mental condition and the risk of suicide: ibid at [26]. (7) There is a public interest in giving effect to treaty obligations and this is an important factor to have in mind: *Norris v Government of the USA (No 2)* [2010] 2 AC 487."

57. We have quoted above the passage from Dr Kolkiewicz's sixth report expressing her conclusion that the suicide risk would be high. It is expressed to be founded on either W losing hope of seeing her daughter again, or of her depressive disorder increasing (from severe). There is no reason to suppose that either is likely. There is no reason for W to lose hope of ever seeing her daughter again if she is extradited, especially if, as she maintains, she is innocent of the offence charged. Nor will the stressors of return to Spain render the depressive order likely to be more severe than it has been over the course of the 18 months or so during which Dr Kolkiewicz assessed her. The assertion of three recent suicide attempts recorded by Dr Kolkiewicz were uncorroborated and out of line with her earlier attitude and diagnosis. Importantly, moreover, there is no reason to think that W will not get appropriate treatment for her depression or that she will not be appropriately monitored for suicide risk. Dr Kolkiewicz's evidence does not reach the high threshold required by the authorities of

showing a substantial risk of a suicide attempt being successful whatever steps are taken.

58. Ms Malcolm's submission that extradition would cause an acute deterioration in W's mental health is based on Dr Kolkiewicz's opinion to that effect expressed at page 19 of her sixth report, where she says: "In my opinion extradition would cause an acute deterioration in [W]'s mental health because her recent improvement is minimal early and fragile. In my opinion separation from her daughter will be the most significant stressor and loss of hope about seeing her is likely to result in increased suicide ideation and significantly increase the risk of completed suicide." We have already observed W losing hope of seeing her daughter again would not be justified as a consequence of extradition. It must also be borne in mind that there is a real prospect that her contact with Y would in any event be significantly reduced as a result of the outcome of the care proceedings. We accept, however, that the stressors of being in a Spanish prison awaiting trial, when she does not speak the language, with no local support and with minimal contact with her daughter, which is likely to be less than the limited contact she currently enjoys, are likely to have a significant adverse impact on her depressive illness if she is extradited. That is something which has weight in both the s. 25 and article 8 evaluation.

59. As we have explained, normally the requested court should assume that medical problems will be appropriately treated on the basis of the mutual trust principles and the presumption that member states will comply with their treaty obligations under the ECHR and the Charter. There are exceptional cases where, notwithstanding the mutual trust principles, the complexity of the medical condition may make it necessary to seek further information or assurances as to the treatment that will be specifically available for an extradited person in order to meet their particular personal needs – see *Magiera v District Court of Krakow, Poland* [2017] EWHC 2757 (Admin) *per* Julian Knowles J at [33]-[35].

60. Ms Malcolm suggests that the current case falls into that category by reason of the complexity of W's health problems and systemic failings in the Spanish treatment of psychiatric illness in prisons. We are unable to accept that submission. We have already observed that W's mental health problems are not especially complex. *Magiera* was a very different case on its facts, in which the specific physical debility suffered by the requested person was not such as one might expect to be catered for in a prison cell without specific assurances. By contrast there is no justification for requiring specific assurances in W's case. It is well known that a significant proportion of prisoners require mental health services. In that context, W's mental health difficulties are far from exceptional. This is not a case where a requested person is suffering from some sufficiently unusual medical condition as would naturally lead the receiving court to question whether the authorities of the requesting state were able to ensure the necessary treatment.

61. Nor would we accept Ms Malcolm's submission that W will not receive appropriate medical treatment because of systemic failings in the Spanish provision of mental health treatment for prisoners. It is clear from *Aranyosi* that there must be clear and cogent evidence that there is a real risk of a violation of Convention rights in the requesting state, to which there are substantial grounds for believing the defendant will be exposed, before it becomes appropriate to require specific assurances, because of the mutual trust principle to which we have already referred. The evidence must be

"objective reliable specific and properly updated" (paragraphs 89, 94, and 104). The evidence in this case falls far short of that degree of cogency indicating any such systemic deficiency or any real risk of violation of W's Convention rights in the respect suggested. In Dr Campaner's most recent report, he states that the Spanish General Penitentiary Law envisages in s. 36 that all prisons will be provided with a doctor with a knowledge of psychiatry; that s. 20 provides for inmates to be examined by a doctor with a knowledge of psychiatry as soon as possible; and that in cases of emergency or necessity inmates can be transferred to a hospital to be treated with the resources required. Prisons in Spain have programmes of comprehensive attention for mentally ill patients known as PAIEM, whose objectives include detecting diagnosing and treating mental illness in prisoners. In his first report, Dr Campaner identifies the prison in which W is most likely to be held if on remand pending trial; and states that the information from that prison is that it does not have a specific psychiatric department but that psychologists visit at least once or twice a week and it is they who treat victims of domestic violence. That prison has implemented the PAIEM programme since 2009. A report in 2016 carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") following a visit to six prisons confirms that, in general, inmates included in the PAIEM programme are accommodated in separate modules and assisted by a multi-disciplinary team composed of a general practitioner, psychologist educator, social worker, jurist and occupational monitor. In his email of 3 April 2019 Dr Campaner confirms the advice that he had given to W's junior counsel that W's physical and psychological problems would be assessed and she would be referred for treatment if required, which would involve an external appointment with the same waiting time as anyone else on the public waiting list. The CPT Report confirms that it is the practice of the prison authorities at the prisons visited to refer inmates to a civil hospital for mental health treatment where necessary. There is nothing in this evidence which suggests that W will not be appropriately diagnosed and treated.

62. As to wider systemic failings, Dr Campaner goes on to state that all prisons have PAIEM programmes "however, due to the insufficiency of funds, in practice, those programs are not successful and the mental health of inmates generally declines". This general assertion is not supported by any consistent body of international reporting or condemnation, although Dr Campaner cites a doctors' and nurses' union announcement that in February 2020 there were only half as many doctors available as "the stated amount" and a journal of forensic science paper which "evinces [that] the current resources to provide proper treatment to inmates with mental disorders in prisons are inefficient". Ms Malcolm relied on passages in the CPT Report, whose conclusion in this respect was that "access to psychiatric care [amongst the six prisons visited] remained problematic due to the paucity of resources and infrequent visits by external psychiatrists and the Spanish authorities should remedy this situation" and that in some of the six prisons visited access to psychiatric care was "inadequate". The detail behind this was to be found in paragraph 82 of the Report which carried a recommendation for appointment of a full time psychiatrist and clinical psychologist at four of the prisons visited whose population had a high incidence of mental health problems. Those observations were, however, made in the context of a more general finding that the health-care services in the prisons visited were, on the whole "of an acceptable standard and staffing levels generally sufficient." It is a feature of European democracies that prisons are subject to this type of independent international reporting which often throws up criticisms of some aspects of some

prisons within any country's system. States usually engage with such criticisms and address them if valid. The Spanish Government did so in this case. In its response to paragraph 82 it pointed out that mental health care was a matter for both the prison authorities and the National Health Care system working together, and while in some regions it was fulfilled by the prisons employing full time psychiatrists, in others provision was made by agreement with the prisons to provide access to external psychiatrists. The availability of psychiatrists is limited in many establishments because the prison administration depends on the decisions of each regional health-care service, some of which provide professionals to the prison establishments but others offer assistance in the mental health centres. The CPT does not appear to have made any further criticisms in the light of that response. Importantly there is no European Court of Human Rights case identified on W's behalf in which there is any criticism of the Spanish prison system in this respect, let alone any holding that there has been a violation of any prisoner's Convention rights in this respect.

63. Ms Malcolm also pointed to a report of the European Prison Observatory in 2019 which said that "[i]n Spanish penitentiary law there isn't legal provision for [the particular attention needed by prisoners who have experienced physical, mental or sexual abuses]." This says nothing about the practice, rather than the law, and if such experience causes mental health issues it is clear from what Dr Campaner says about sections 36 and 20 of the Spanish General Penitentiary Law that Spanish law does make legal provision for such victims. The Report also refers at p.30 to the fact that there is no legal difference between the psychiatric services available to inmates and those available to the general public, but that due to the growing number of inmates with mental health problems or illness "[t]the penitentiary administration has psychiatric hospitals and programmes and modules for this kind of inmates but they are [totally] insufficient". It is impossible to attach weight to such a generalised assertion.

64. At an extradition hearing the requesting authority is entitled to rely on the mutual trust principles unless the requested person puts forward clear evidence of sufficient weight and cogency that it rebuts the presumption and demands a specific response. Sporadic and generalised criticisms are not capable of meeting this threshold. The evidence advanced on W's behalf in this case does not approach such a degree of weight or cogency. The material relied on is insufficient to rebut the mutual trust upon which this court can rely to have confidence that W will be provided with appropriate treatment for her mental health if she is extradited.

65. In summary therefore, we accept that extradition is likely to have an adverse effect on W's mental health and that this is of weight in the s. 25 and article 8 evaluation. The court can and should rely on the mutual trust principle to have confidence that W will, nevertheless, be appropriately diagnosed and treated.

Protective measures

66. Dr Kolkiewicz has set out in her reports measures that would assist W to participate in court proceedings. She considered that "the single most helpful measure is the provision of an intermediary". She also considered that an interpreter should be used, and a screen to separate W from X (or, better, that X be excluded from the court room). In the family proceedings special measures were implemented. In particular, both an interpreter and an intermediary were appointed to facilitate W's participation

in those proceedings and to elicit her best evidence. There were regular breaks in the evidence. Measures of this type are now commonplace in criminal trials involving vulnerable witnesses or defendants – see Part II of the Youth Justice and Criminal Evidence Act 1999 and Part 18 of the Criminal Procedure Rules.

67. Dr Campaner's evidence is that some special measures, such as screens, are available in Spain for vulnerable *witnesses*. They would, therefore, be available for Z. However, with the exception of an interpreter (available for the trial, but not pre-trial preparation), measures of this type are not available for a defendant. Moreover, the concept of an intermediary "is not envisaged in Spanish law." The judge has power to order that a defendant should give evidence by video-link, but Dr Campaner states that "in practice, Judges are quite reluctant to allow that option and the defendant has to face trial physically in court." If a video-link is not used then W will have to be physically present in the same court room as X with no screen to shield from him. X's lawyer will sit next to the Judge, directly in front of W. Ms Malcolm also relied on the fact that W will sit next to the interpreter but remotely from her own lawyer (there is a growing practice of permitting the defendant to sit next to his/her lawyer but Dr Campaner suggests that it is only followed in a few courts), such that whilst the hearing is in session she will not be able to communicate orally with her own lawyer; in this last respect, however, she will be in no worse a position than that of a defendant in the dock in a criminal trial in this country. The Judge has power to order breaks in the trial.

68. Accordingly, Dr Campaner's evidence suggests that a number of measures available in criminal trials in England and Wales involving vulnerable defendants are not available in Spain. It is, however, important to recognise that the entire process of criminal procedure in a civil law jurisdiction is different from that which applies in England and Wales. We accept Mr Hearn's submission that focussing on one particular aspect of procedure (here, the provision of special measures for a defendant) does not necessarily facilitate an assessment of the overall justice of a system of criminal procedure. Such an assessment would need to take account of the complex mechanism of checks and balances that is in place.

69. We were not shown any authority, whether from the courts in Spain, England, Strasbourg, or elsewhere which lent any support to the proposition that the system that is in place in Spain is unjust for defendants in W's position. This court must proceed on the mutual trust basis unless there is a sufficiently strong evidential basis to depart from the presumption that Spain would comply with EU law. The evidence of Dr Campaner, identifying some respects in which the procedure of criminal trials in Spain differs from that in England, does not provide a basis for departing from the principle of mutual trust. The fact is that W will have the benefit of a legal representative and an interpreter for any criminal trial. The Judge will be entitled to direct that she may give evidence by video-link and/or to provide for breaks.

Criminal investigation into rape allegations

70. W maintains that throughout their relationship X repeatedly raped her. These allegations were investigated in the fact-finding hearing and found by Knowles J not to be made out. The same allegations are the result of a complaint to the English police, originally made in 2018 and now being investigated by Sally Norton of the Metropolitan Police Service who was the source for a statement about the

investigation prepared by W's solicitor. There has been a video recorded ABE interview of W herself and a statement taken from her mother. X has been interviewed under caution. Ms Norton was not able to give any timescale as to when the investigation might conclude. It would appear that it has progressed to a stage where a charging decision will be made by the CPS. It does not appear that W's extradition will have a significant impact on the course of the investigation prior to that stage. If X is charged, there is every likelihood that arrangements can and will be made for W to give evidence by video-link if she were in prison in Spain. W's extradition ought not therefore to have any adverse impact on the course of the investigation. Whether it will have any effect on a decision to charge is a matter of speculation. No doubt the CPS will have in mind that the allegations were made in the fact-finding proceedings and that Knowles J, having heard the cross examined oral evidence of both W and X about them, found them not proved; however the decision is one for the prosecutorial authorities.

Contact between W and Y

71. We have already considered the effect of separation on W's mental health. We are here concerned with interference with the article 8 rights of both Y and W entailed in such separation. Compared with many cases which involve the extradition of a parent who is a full time carer for one or more children, the level of interference is relatively low. The contact between them is now of a limited nature, and there is a significant prospect that it would in any event reduce further as a result of the outcome of the care proceedings were W to remain in this country.

Conclusion subject to the impact of extradition on the care proceedings

72. Subject to what we say below in relation to the impact of extradition on W's participation in the care proceedings, we would not allow the appeal either under s. 25 or under s. 21A. We have addressed Ms Malcolm's submissions individually, but we remind ourselves of the importance of considering them cumulatively. We have consciously stood back and considered them all together and in the round. Having done so we have concluded that, for the reasons we have given, they are of limited weight and in our view insufficient either to reach the high threshold of making the extradition unjust or oppressive, or to render the interference with article 8 rights sufficient to amount to a bar to extradition.

Interference with W's ability to conduct care proceedings.

73. As we have indicated, the effect of extradition on W's ability to participate fully in the final hearing in the care proceedings in November is a source of real concern to us. If it were necessary, we would determine now whether this was sufficient, taken together with the other factors, to amount to a bar to extradition. However we think that the justice of the case can best be met by allowing the care proceedings to be concluded in November before any extradition takes place. Further delay in extradition is not ideal, but in the particular circumstances of this case such delay would be warranted and the best means of balancing the important public interest in extradition and W's article 6 and article 8 rights (and those of Y) in W being able to participate fully in care proceedings which will have a long term impact on the life of Y and on W's contact with her.

74. The most convenient course would be to make an order that the District Judge's extradition order should not take effect until the conclusion of the final hearing in the care proceedings. That is not, however, an order this court can make of its own volition. Under s. 27 of the 2003 Act it can only allow or dismiss the appeal. By reason of the provisions of s. 36 of the 2003 Act, if the effect of this court's order is that the person is to be extradited, the extradition must take place within 10 days of that decision unless the requesting judicial authority agrees to extend the time. The Court cannot delay the extradition by use of its powers to extend time, and nor could it do so by way of a stay of execution of its own order. Having canvassed these difficulties in the course of argument, we invited Mr Hearn to seek instructions as to whether the Respondent would agree to extend the time until after the final care proceedings hearing in November. Mr Hearn subsequently informed us on instructions that the Respondent agreed to that course, and that extradition should be postponed if the appeal is to be dismissed. The Order will reflect this agreement.

Conclusion

75. The appeal on s. 25 grounds fails. We grant permission to appeal on the article 8 ground but dismiss the appeal on that ground also. The extradition order made by the District Judge will remain in place. However with the agreement of the Respondent there will be an extension of time within which extradition is to take place until after the conclusion of the hearing in the care proceedings in relation to Y, currently scheduled to be concluded in November 2020.