Neutral Citation Number: [2021] EWHC 1234 (Admin)

Case No: CO/1297/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12th May 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

IBRAHIM KOC	**Appellant**
- and -	
TURKISH JUDICIAL AUTHORITY	**Respondent**

- -
- -

Saoirse Townshend (instructed by Sonn Macmillan Walker) for the **appellant**
Stuart Allen (instructed by the Crown Prosecution Service) for the **respondent]**

Hearing date: 28.4.21 and 29.4.21

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Final Judgment

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MR JUSTICE FORDHAM :

Introduction

1. This is an extradition case about serious offending, a trial in absence, a significant passage of time, and a family in extreme difficulties. Permission to appeal was granted on all grounds by Chamberlain J on 2 October 2020. Neither party resists applications made by the other to adduce fresh evidence: I grant those applications and will consider all the material. The Appellant is aged 37 and is wanted for extradition to Turkey. That is in conjunction with an Extradition Request ("the Request") issued on 21 November 2018 and certified by the Home Secretary on 15 February 2019. For reasons set out in a judgment dated 28 January 2020, DJ Zani ("the Judge") sent the case to the Home Secretary who on 25 March 2020 ordered the Appellant's extradition. The Request relates to a conviction and sentence imposed by the criminal court in Turkey by a verdict on 9 June 2008, but whose effective date was not until 6 April 2015. By that verdict the Appellant and 3 co-accused were sentenced to 18 years custody for offences of robbery (12 years) and kidnapping (6 years). The legal effect of that sentence under Turkish law, as explained in the Request, was that the Appellant has 7 years 2 months 16 days to serve but would (if of good conduct) be released after 5 years 2 months 16 days (with the further 2 years on probation). Unchallenged fresh evidence before this Court, which I accept, explains that changes in Turkish law as a result of the pandemic would now mean release (if of good conduct) after approximately 3 years 3 months 22 days in custody (with 17 months on post-release supervision). The mode of hearing was a remote hearing by Microsoft Teams. Both Counsel were satisfied, as was I, that that mode of hearing involved no prejudice to the interests of any person. By having a remote hearing we eliminated any risk to any person from having to travel to or be present in a court room. I am satisfied that the mode of hearing was justified and appropriate. The open justice principle was secured. The case and its start time were published on the cause list, together with an email address usable by any member of the press or public who wished to observe the hearing. The hearing was recorded. In this judgment, Deborah, Tammy, Tanya, Beth and Kevin are not the individuals' real names.

Factual Overview

2. The factual overview in this section gives a contextual framework for understanding the case and the issues. I am satisfied that its contents have a solid evidential platform, are consistent with the findings of the Judge, and are not the subject of any material dispute. On 21 September 2002 Sedat Kurt reported at a Turkish police station that he had been robbed and kidnapped over the course of 3 days (19 to 21 September 2002). Later that day the Appellant and 3 others were arrested. Items were seized including a flick-knife from the Appellant. The Appellant was detained over the next 4 days, was questioned, gave a statement to the police, and gave his family address. Meanwhile, Mr Kurt gave identification evidence. On 24 September 2002 the Appellant appeared in court. He was released. On 30 September 2002 an indictment was filed and on 11 October 2002 a preliminary proceedings report was completed. The Appellant was summoned to appear at court on 17 December 2002, which he did. At that hearing the Appellant gave a statement to the judge. He confirmed his address. Asked whether he wished to do so, the Appellant stated a preference for the purposes of Article 226 of the Criminal Procedure Code (exemption from the obligation to be present during subsequent hearings), which was granted. The Appellant's statements in September 2002 and December 2002 were to the effect that he had been present but had not participated in any robbery or kidnapping

carried out by the other co-accused. The Appellant had no legal representation at any of these stages.

3. On 13 January 2003 Mr Kurt had petitioned to withdraw his complaint, but the case was not discontinued. In April 2005 an expert report confirmed that the flick-knife was an illegal knife. At a hearing on 18 July 2005 the Turkish court assigned counsel to represent the Appellant pursuant to Article 150 of the Code. The court-assigned counsel was Advocate Gunes. She attended a hearing on 10 November 2005. She did not attend a hearing on 10 April 2008 at which Mr Kurt gave evidence. At a hearing on 9 June 2008 the court gave its verdict: convicting all 4 of the defendants and giving each the same sentence. Advocate Gunes attended that hearing (9 June 2008) and on 25 June 2008 received a notification of the conviction and sentence. She then filed an appeal on the Appellant's behalf, as a consequence of which the conviction file was delivered (15 July 2008) to the Court of Cassation Chief Prosecutor's Office (CPO) for appellate review. A notification relating to the appeal was sent to Advocate Gunes on 20 May 2010. On 14 June 2012 a decision was taken to return the appeal file, on the basis that it was unclear whether the Appellant was aware of and supported the appeal. On 23 August 2012 (as recorded in the court file) documents relating to the appeal were served on the address which the Appellant had given in 2002. On 6 April 2015 the verdict (of 9 June 2008) was approved by the Court of Cassation: this became the "effective date" of the verdict. Finalisation statements were issued on 12 May 2015 and arrest warrants for the Appellant were issued on 13 May 2015. In April 2015 the Turkish Police had visited the then family home – an address which does not appear to be the same as the Appellant gave in 2002 – looking for the Appellant, and were told that he was abroad. The family made contact with the Appellant and together they instructed a new lawyer (Advocate Akgun) who filed an application for an appeal on 29 May 2015. That application was rejected without consideration. On 31 May 2018 the Appellant instructed another new lawyer (Advocate Say) who filed a fresh application for an appeal on 24 August 2018 which was rejected on 3 December 2018. A Turkish domestic warrant of arrest was issued on 24 September 2018 and steps were taken culminating in the Request (21 November 2018).

4. The Appellant had left Turkey for Germany in April 2004. There was no control measure or security measure applicable to him which prevented him from doing so. No condition was imposed on him requiring him to remain in contact or to notify any change of address. There was no obligation on him to appear at court. In May 2004 the Appellant came to the United Kingdom, having obtained a visa. By October 2004 he was registering with the Inland Revenue here and in December 2004 made a business visa application. In 2005 he met his partner Deborah, a British citizen. In November 2005 the Appellant made an application for National Insurance. In 2006 he moved in with Deborah and Tammy, Deborah's 2-year-old daughter (born August 2003) from a previous relationship. In the years to come the Appellant became Tammy's stepfather. In May 2007 the business visa application was refused and the Appellant was subsequently for a short time held in immigration detention until released on bail with the help of immigration lawyers. In May 2008 the Appellant and Deborah had a daughter, Tanya, whose birth the Appellant registered with the UK authorities. In July 2009 they suffered a terrible bereavement: the death within a few hours of Beth, a daughter born prematurely. The death was registered by the Appellant. Deborah and the Appellant were married later in 2009, which was also registered. In 2012 the Appellant obtained a spouse visa giving a durable entitlement to stay in the UK. In February 2012 Deborah and the Appellant had a son, Kevin, again registered with the authorities by the Appellant. By

2013 the Appellant was self-employed and operating a solo food truck business. In May 2013 he visited the Turkish Consulate in London and successfully obtained a deferral of his Turkish military service: his UK address is clearly recorded in the Turkish official documentation. In July 2013 he returned to Turkey for 17 days. In April 2015 the Appellant's family contacted him about the police visit. That is when they together instructed Advocate Akgun. The Appellant has not returned to Turkey since 2015. In 2016 Tammy (aged 12) was diagnosed with a mental health condition by CAHMS. By November 2017 (aged 14) Tammy was suffering from an eating disorder, which led to her first admission to a psychiatric unit in August 2018 (aged 15). I will return to relevant events and evidence which post-date the Extradition Request (November 2018). Before I turn to the grounds of appeal, there are a number of topics which it will be helpful to identify and address.

The Offending and the Custodial Term

5. The Appellant maintained his innocence in the statements he gave in 2002 and he has continued to maintain it. He also says he was threatened, intimidated and beaten during his 4 days in custody in September 2002. As the Judge recorded: the Appellant in his statements "accepted presence but denied participation"; but that "version of events was clearly rejected by the trial court" in 2008, and the four defendants "received the same sentence, which appears to reflect equal culpability". The Judge proceeded on the basis that the Appellant has been "convicted of very serious offences". He also observed that equivalent criminal conduct, if the subject of a conviction and sentence in the UK, would mean almost inevitably a prison sentence of "some considerable length". The Judge recorded that: "There is a sentence of 7 years 2 months 16 days to serve, but I am informed that [the Appellant] may find himself released after 5 years 2 months 16 days". As I have already explained, the 5 years 2 months 16 days is now put at 3 years 3 months 22 days in custody. In my judgment, the Judge was right to proceed on the basis that the Appellant has been "convicted of very serious offences", and it is important never to lose sight of that. I have found it helpful to have at the forefront of my mind, throughout my consideration of this case, the following passages from the judgment. The Judge recorded the details of criminal conduct provided by the Respondent:

> ***Defendants Ibrahim KOC, Erman KARAKOC, Yusuf ALGIN and Ilhan KARAKOC have invited complainant Sedat KURT to the house of defendant llhan In Hamidye District, with the cover of having a cup of tea together on 19/09/2002; there the defendants have shown complainant Sedat a blank cartridge pistol with a silencer and a flick-knife threatening to kill him in case he did not provide money for them and demanded him to ask money from his family and friends. They have detained him by threatening him. The complainant has called his relatives by phone but he was not able to provide any money. Following this, defendants Ibrahim KOC, Erman KARAKOC, Yusuf ALGIN and llhan KARAKOT, have seized complainant Sedat's cell phone, silver ring and n 4.000.000 which was In his pocket. They have released the complainant on 21/09/2002 at about 05:45AM. A flick-knife taken from Mr KOC on arrest was later identified as being a weapon that had been used to threaten the victim.***

Later in the judgment, the Judge said this:

> ***[The Appellant] was convicted of very serious offences. This appears to have been a carefully planned attempt by [the Appellant] and others to extort money from the victim. He was detained against his will for more than a day in circumstances that must have been truly terrifying for him. He was threatened with a knife and a pistol. As mentioned above, a flick-knife is said to have been recovered from [the Appellant] upon arrest by the Turkish police and recognised as having been used to threaten the victim.***

There was no 2002 Notification of a 2008 Trial Date

6. In his judgment, the Judge accepted the Respondent's submission that the Appellant was notified in 2002 of his trial date 6 years later, 9 June 2008. This was based on two sources from the Respondent. First, the Request said this:

> ***The verdict was announced during the hearing on 09/06/2008 in the absence of the defendant and in the presence of his Defence Counsel [Advocate Gunes]. The following hearing date has been informed to the defendant during his interrogation but the defendant has not participated in the final hearing without making any excuse.***

The word "following" has been read as referable to the date just identified: 09/06/2008. No other candidate "date" is given in the text which follows the quotation. Secondly, the Respondent's Further Information dated 18 December 2019 said this:

> ***In his defence and the statement dated 17/12/2002… taken before the judge… the convict stated that he was aware of the judicial proceedings in 2008…***

The Judge said:

> ***Although one may initially raise an eyebrow at the suggestion that a trial date some 5 or 6 … years later was fixed and given to [the Appellant], it is not for this court to guess the reasons that there may have been for such a gap between December 2002 and the trial date in 2008.***

Mr Allen concedes that the Judge's conclusion – that the Appellant had in December 2002 been notified of a trial date in 2008 – cannot stand. It is not just a question of 6 years 'raising an eyebrow'. The date of 9 June 2008 was the date of a hearing at which the "verdict" (conviction and sentence) was arrived at in a ruling of the Turkish court. But the 2008 date on which the complainant Mr Kurt gave evidence before that court was 10 April 2008, a point emphasised in Advocate Say's evidence before the Judge. If a 2008 trial date were being notified, it would surely have been – and would have needed to be – the April 2008 date. Anyway, Mr Allen now – rightly – accepts that the previous assertion, and the Judge's acceptance of it, cannot stand in the light of the fresh evidence adduced before me by the Respondent. That fresh evidence includes a series of clear questions posed to the Turkish authorities. One question was:

> ***Do you mean to say that the [Appellant] was informed about his trial in 2008 when he appeared on 17 December 2002?***

The Respondent's Further Information dated 23 March 2021 responds to the questions by giving a detailed description of what is said to have happened during the proceedings. There is no reference to a notification in 2002 of a hearing date in 2008. On this, the dog did not bark. On that basis alone, Mr Allen is right to accept that this part of the Judge's factual analysis cannot now stand. Extradition courts place great reliance and trust in what is stated in Extradition Requests and in Further Information. One of the implications of this development is that it could undermine the confidence which an extradition court can have in factual assertions put before it – as it was put before the Judge in this case – in an Extradition Request and Further Information.

The Article 226 Exemption Request

7. In the latest Further Information (23 March 2021) the Respondent revisits another assertion concerning subsequent hearings including those in 2008. The Respondent's assertion was that the Appellant, at the hearing on 17 December 2002:

> ***… demanded not to attend those hearings.***

That assertion was also accepted by the Judge and appeared among his findings. However, as the Respondent has now explained to this Court (Further Information, 23 March 2021), the position was that the Appellant was:

> ***… asked during the hearing [on 17 December 2002] when he submitted his defence statement … whether he would like to be exempted from attending to hearings pursuant to Article 226 of the Criminal Procedure Code and he answered that he preferred to be exempted from attending to hearings.***

Article 226 of the Code is then set out. It provides:

> ***[If] the accused or his/her counsel, if clearly mentioned in the power of attorney, make such a request, the court may exempt him/her from the obligation to be present during the hearing.***

Mr Allen accepts that what Article 226 is doing is removing "the obligation" to attend any subsequent hearing; that it is not a provision recording that the accused will be absent, and not notified of hearings; nor that he has lost any right to attend, or be notified. The point is reinforced by what is later said in the same Further Information:

> ***[The Appellant] requested to be exempted from attending to hearings. While he had the opportunity to attend to the hearings and submit additional statement during every step of the proceedings he preferred not to act so…***
>
> ***As required by the trial procedure, the accused persons who are tried without arrest may use their right to be exempted from hearing and they may not attend to trials if they want to do so. Therefore, [the Appellant] was also asked by means of the directive court whether he would like to use this right of him and he answered that he wanted to use his right to be exempted from attending to hearings. Despite this, if he had desired to attend to hearings anyway he could have attended to these hearings, there was no hindrance on such will of him. There is no liability of the person who has been exempted from attending to hearings.***

Accordingly, the stated consequence of the Article 226 preference was that, at least absent a subsequent arrest or summons requiring him to do so, the Appellant was under no legal obligation to attend any subsequent court hearing, and had no liability if he did not do so. So, as the Judge elsewhere recorded:

> ***[Advocate] Say said in evidence, and I accept, that unless [the Appellant] had been ordered to attend a particular court hearing (as [it] appears [he] was for the hearing of 17 December 2002) there was no obligation for him to attend in person.***

What is not substantiated is that, by stating an Article 226 preference, the Appellant "demanded not to attend [the trial] hearings"; nor was he waiving any right to attend, or to be notified. Mr Allen – correctly, in my judgment – accepts that.

No Action 'to Trace the Appellant' 2004-2015

8. The Respondent accepts that there was no action to 'trace' the Appellant from December 2002 until the Turkish police appeared at the address where the family was then living,

in April 2015. As to 2004-2008, the Respondent in its Further Information (18 December 2019) said this:

> ***In 2004 – 2008, since the accused testified before the Public Prosecutor during the investigation phase and before the judge during the trial phase, no further work was carried out to trace the person, and no arrest warrant was issued at any stage of the trial.***

In relation to that period (2004-2008) the Further Information (23 March 2021) says this:

> ***The notification giving information concerning the hearings was not made due to the fact that the trial continued without arrest, the accused had already given his defence statement and it did not become necessary to get another statement of him… As the trial continued without arrest and the statement of [the Appellant] was taken during the trial phase by the directive court, he was not called by the court to stand present during the hearings.***

As to 2008-2015, the Further Information (18 December 2019) says:

> ***Since the [Appellant] did not attend the hearings although he knew his trial because his defence statement had been taken during the investigation and trial phase, no further work was carried out to trace him in 2008-2015, following the verdict, the file was delivered to the [CPO] upon the appeal, upon the approval of the verdict by the Court of Cassation in 2015, the verdict was finalised, and no arrest warrant has been issued about the mentioned person during that period.***

Seven Findings by the Judge

9. It is helpful at this stage to identify the following seven findings made by the Judge:

    i) First, the Judge found that the Appellant's statement made to a judge at the 17 December 2002 hearing "was part of the trial process". The Judge recorded having derived that finding from the oral evidence of Advocate Say. The relevant evidence was itself recorded earlier in the judgment, as follows: the Appellant's "statement in court (17 December 2002) would have been part of the evidence in the trial process". I shall need to return to whether a statement, at a hearing, which statement becomes "evidence in the trial process" means that that hearing is itself "part of the trial process" and – more specifically – of the "trial".

    ii) Secondly, the Judge found that notification of the verdict (conviction and sentence) of 9 June 2008 was sent on 25 June 2008, not only to the address of Advocate Gunes but also to the address which the Appellant had given in 2002. The Judge said:

    > ***The Turkish authority state – and I accept – that they sent notification of the conviction and sentence to the Turkish family home (that being [the Appellant]'s registered address).***

    This was a finding on a disputed issue, since Advocate Say (who gave oral evidence and was cross-examined) gave evidence, based on her investigation of the court files, that:

    > ***The [June 2008] conviction of the [Appellant] and the reasoned decision were notified only to the bar's attorney.***

    In rejecting that evidence, the Judge was accepting a statement in the Respondent's Further Information dated 18 December 2019:

> ***The notifications were sent to the address stated by the convict and to his defence counsel, and it was received personally by the defence counsel on 25/06/2008.***

It is worth noting that no assertion was made by the Respondent, and no finding made by the Judge, that a notification in June 2008 was "personally" received by the Appellant, or even by members of the family. Nor did the Judge make any such finding about documents served on 23 August 2012 in relation to the appeal, after the file was returned (14 June 2012). The Judge did not make a finding that the family had remained, at material times, at the same address which the Appellant had given in 2002. The evidence before this Court, as both Counsel accepted, indicates that the family address visited by the police in April 2015 was not the same address as originally given in 2002 and used to summons the Appellant to the December 2002 hearing.

iii) Thirdly, the Judge made a series of findings about the Appellant's state of mind when leaving Turkey in April 2004. The Judge found that the Appellant left:

> ***in the knowledge that the case against him was ongoing.***

The Judge found that the Appellant:

> ***had not received ANY information from the court that the case had been discontinued.***

The Judge found it was a 'reasonable inference' that the Appellant:

> ***was aware that he had been charged with [the] matters [in the indictment of 30 September 2002] either before or during the course of the hearing on 17 December 2002 and furthermore that the case was proceeding.***

The Judge further found that the Appellant had:

> ***not… been informed by the appropriate authorities that the case had been discontinued.***

The Judge also rejected, as unconvincing, the Appellant's evidence that he had checked with a co-defendant's father and a lawyer family friend about the withdrawal of the complaints. The Judge said:

> ***I find that there came a point in time when he merely decided to leave Turkey and hope[d] that the matter would fade away and that he would not be pursued.***

iv) Fourthly, the Judge found that the Appellant was "unlawfully at large". The Judge did not say from what date he found this. He may well have had in mind April 2004, as the date from which he considered the Appellant to be a fugitive.

v) Fifthly, the Judge found "as a fact that [the Appellant] is a fugitive" – from April 2004 – "for reasons previously set out" which were, in the light of the Judge's other findings, that:

> ***It is reasonable to infer that when he left Turkey he was placing himself beyond the reach of the Turkish authorities.***

vi) Sixthly, the Judge found, again in the light of his other findings:

> ***I am satisfied that [the Appellant] chose to absent himself from court proceedings as the Turkish authorities have stated and as he was entitled but he did not later keep in touch or enquire as to the progress of the proceedings…***

As the Judge put it: "I am entirely satisfied that [the Appellant] made himself deliberately absent from his trial".

vii) Seventhly, the Judge found that there was no "culpable delay". He said: "I do not consider that the Turkish authorities have been guilty of culpable delay in progressing with the case and/or seeking [the Appellant's] return". That was in the light of the procedural chronology in Turkey, the material elements of which are contained within my factual overview (§§2-3 above).

I will return to these and other aspects of the Judge's analysis, as appropriate during my discussion of the grounds of appeal. It is those to which I now turn.

Section 85: Deliberate Absence from Trial

10. This is a case of extradition to a Category 2 territory so Part 2 of the Extradition Act 2003 applies. Within Part 2 is section 85 whose effect, in essence, is that the Appellant is entitled to be discharged unless (a) he "was convicted in his presence" or (b) he "deliberately absented himself from his trial" or (c) he "would be entitled to a retrial or (on appeal) to a review amounting to a retrial". The Respondent accepts that (a) and (c) are not satisfied, but says (b) (deliberate absence) is satisfied, on which the onus is on the Respondent to the criminal standard (section 206; Stryjecki v District Court in Lublin, Poland [2016] EWHC 3309 (Admin) paragraph 50i). The Judge accepted that (b) is satisfied (see §9(vi) above).

11. The essence of Mr Allen's analysis on "deliberate absence", as I saw it, was as follows. The argument starts with a premise: that the Appellant's court appearance on 17 December 2002, for which he was summonsed to appear at court by notification to the registered address which he had given in September 2002, and at which he did appear, was part of the "trial". Mr Allen submits that the premise was accepted by the Judge, relying on the finding (see §9(i) above) "that [the Appellant's] statement on 17 December 2002 was part of the trial process". On that premise, the argument proceeds as follows. The Appellant had thus been summonsed to a "trial" event with a scheduled date and place, satisfying the relevant criteria (Cretu v Local Court of Suceava, Romania [2016] EWHC 353 (Admin) paragraph 34i and ii). It is true that the subsequent hearings, on 10 April 2008 (when Mr Kurt gave his evidence) and on 9 June 2008 (when the Mersin 1st High Criminal Court convicted the Appellant), were also the "trial"; that they were also events with a scheduled date and place; that they were not events to which the Appellant had been similarly summonsed; nor had he actually received the relevant information (Stryjecki paragraph 50v); nor had a third party actually passed on a summons or the relevant information to him (Stryjecki paragraph 54); nor was there any "manifest lack of diligence" by him (Stryjecki paragraph 50vii), which (Mr Allen conceded, citing Dziel v District Court in Bydgoszcz, Poland [2019] EWHC 351 (Admin) paragraph 28) "intrinsically" requires a breach of an obligation by the Appellant; nor was there any waiver by the Appellant, a concept which must be "unequivocal" as well as "attended by minimum safeguards commensurate to its importance" (Sejdovic v Italy Application No. 56581/00 paragraph 86). Nevertheless, and notwithstanding all of that, the 2008 hearings were the continuation of the "trial", of which the December 2002 hearing had been a part.

In those circumstances, the Appellant's "deliberate absence" from the 2008 hearings is established by two features. The first feature is the Appellant's stated preference, given on 17 December 2002, for the Article 226 exemption to be applied to him (see §7 above). The second feature is the Appellant's failure to take steps to engage with the process and inform himself about hearings, choosing instead to go abroad. As the Judge found: "he did not later keep in touch or enquire as to the progress of the proceedings". What links the first and second feature is the following contention. Although it is accepted (see §7 above) that a stated request, accepted by the Turkish court, for an Article 226 exemption discharges the Appellant from any continuing obligation to attend further hearings – and is not a statement of agreement to trial continuing in absence, nor a statement of waiver of notification – there is, nevertheless, an "enhanced duty" which arises. It arises, as a matter of "common sense". The enhanced duty is a duty on the individual, having stated an Article 226 preference, to keep themselves informed and take the initiative in doing so. Where an individual fails to discharge that enhanced duty, and a hearing later takes place, they are for that reason "deliberately absent" from that hearing. That, then, was the essence of Mr Allen's argument on why the Appellant was "deliberately absent" from "his trial".

12. This was not the Judge's analysis on the question of deliberate absence (see §9(vi) above). The Judge relied on the finding – now disavowed by the Respondent – that in December 2002 the Appellant had been notified of the 2008 trial date (see §6 above). The Judge also relied on the finding that the Appellant "demanded not to attend" the subsequent hearings, which has transpired not accurately to characterise the Article 226 exemption preference (see §7 above). The argument which Mr Allen developed before me, whose essence I have just summarised, was not the position taken before the Judge. In those circumstances, and where there is fresh evidence before this Court, I am quite satisfied that it is necessary and appropriate for this Court to revisit and re-evaluate for itself the question of "deliberate absence".

13. I am unable to accept Mr Allen's submissions on "deliberate absence". In my judgment, the Respondent is quite unable to establish – still less, to the applicable criminal standard – that the Appellant "deliberately absented himself from his trial". I will explain why. First, I make some general points. The starting point is that "presence" (section 85(1)) focuses on the conviction (here, June 2008). The Appellant was present at the hearing in December 2002, but that does not satisfy the relevant test of presence: he was not "convicted in his presence" (section 85(1)). Mr Allen does not submit that it is sufficient – if he is right about his premise – that the Appellant was 'present' at a first hearing which was part of the "trial". He accepts that he must also show that the Appellant was "deliberately absent" from the "trial" hearings in 2008. In speaking of 'deliberate absence' (section 85(3)), Parliament spoke of the requested person's "trial". Parliament did not speak of deliberate absence from the verdict, because Parliament was concerned with fair trial and rights of the defence. But there is a link between "trial" and being "convicted". Trial will have led to conviction. In this case, the hearings with the closest nexus to the "conviction" were in April and June 2008. The next point is that the principled framework of standards which inform 'deliberate absence' are not satisfied if the focus is squarely on the 2008 hearings. Mr Allen's argument concedes as much: these hearings were events; with a scheduled date and place; there was no summons giving the scheduled date and place; there was no information actually received as to the scheduled date and place; there was no manifest lack of diligence on the part of the Appellant; there was no unequivocal waiver (with attendant minimum safeguards). As is clear from my

encapsulation of its essence, Mr Allen's argument accepts that the 2008 hearings involved satisfaction of none of these standards. Yet these are standards which reflect the values informing an assessment of deliberate absence. It is precisely because, focusing on the 2008 hearings themselves, these values are not satisfied that Mr Allen needs his premise: the satisfaction of those values in relation to the December 2002 hearing, and its characterisation as the beginning of the "trial". The rigour with which the standards and values of the law apply can be seen by considering this further principle, describing conduct by the requested person which is insufficient to make them "deliberately absent" (Stryjecki paragraph 50v):

> ***Establishment of the fact that the requested person has taken steps which make it difficult or impossible for the requesting state to serve the requested person with documents which would have notified him of the fact, date and place of the trial is not in itself proof that the requested person has deliberately absented himself from his trial.***

Accordingly, in Stryjecki it was not sufficient that the Appellant had moved to the United Kingdom, without providing the Polish authorities with a UK address, and had made it more difficult for the Polish authorities to serve in the documents relating to his trial (see paragraph 55). Having identified these general points, I now turn to tackle Mr Allen's argument.

14. I do not accept that Mr Allen has established his premise (§11 above). The Judge concluded that the giving of the statement at the hearing on 17 December 2002 "was part of the trial process" (see §9(i) above). That conclusion was the Judge's acceptance of what "the court file records", as having been confirmed by Advocate Say's evidence. However, Advocate Say's evidence – as the Judge also recorded – was that the statement in court on 17 December 2002 "would have been part of the evidence in the trial process" (see §9(i)). Whether a statement given to a court – or for that matter another authority such as the police, or given in a taped interview involving legal representatives – would be "part of the evidence in the trial process" is one thing. It does not, of itself, establish that the day (including in court) on which the statement is given as part of the "trial process"; still less that it was "the trial". Naturally, extradition law recognises that criminal processes can involve different models of "the trial". In this case, the material from the Respondent speaks of the hearing on 17 December 2002 as being "during the trial phase". It also speaks of the "trial" as having "continued" in 2008. But there is no clear statement of the hearing on 17 December 2002 as "the trial". In the applicable standards in relation to "trial", the focus is on "an event which resulted in the person's conviction and sentence, rather than a broad concept of a trial process" (Cretu paragraph 27). Accordingly, "trial" is "not a reference to the general prosecution process, but rather the trial as an event with a scheduled time and venue which resulted in the decision" (Stryjecki paragraph 50ii). One feature of the present case is that the Appellant's statement to a court on 17 December 2002 was made to the Adana 3rd High Criminal Court (said to be "the directive court"), whereas the court which convicted the Appellant on 9 June 2008 was the Mersin 1st High Criminal Court, after the hearing on 10 April 2008 at which Mr Kurt gave his evidence. There are in my judgment very significant doubts, on all the materials, whether the hearing in December 2002 was a court day within "the trial", albeit that it was a day on which there was the opportunity to give a statement to a judge which would then become evidence in the trial.

15. But even if Mr Allen is right as to his premise, and even if the hearing on 17 December 2002 is treated as part of the "trial", I am unable to accept the analysis said to flow from

that premise (§11 above). This takes me back to the general points I have made (§13 above). Taking the hearing of 10 April 2008, at which the complainant Mr Kurt gave evidence before the Turkish court, that was a concrete trial event. It had a scheduled date and place. The Appellant was in no sense prohibited from being present (see §7 above). There are strong reasons of principle why the standards, and the underlying values, applicable to deliberate absence should need to be satisfied in relation to that event. I can identify no reason why those standards should be disapplied, diluted or sidestepped. There is no reason why the standards and values should not be applicable to the whole trial, and all of the days which constitute the trial. These are, after all, values concerned with due process and minimum standards relating to a fair trial and defence rights. It makes perfect sense that a formal summons may be referable to a first day of "trial". But when a trial court adjourns, or where there is a deferral or delay, it makes no sense to disapply or dilute the standards and values of the law so far as future "trial" dates are concerned. That means compliance with the principled standards, which compliance – Mr Allen's argument accepts – cannot be established in relation to the 2008 hearings. Ultimately, Mr Allen's argument places weight on the feature of the stated preference for the Article 226 exemption which it cannot bear, once it is understood (see §7 above). The argument rests on an inferred "enhanced duty" sourced, not in Article 226, nor in any statement made by or to the criminal accused, but in so-called "common sense". The logic of the argument would avoid the standards and values concerning waiver (Sejdovic paragraph 86). In the end, it relies on the sort of choices and "steps which make it difficult or impossible for the requesting state" which do not suffice to demonstrate deliberate absence under the principle from Stryjecki paragraph 50vi, to which I have referred.

16. In my judgment, an adverse conclusion that the Appellant "deliberately absented himself from his trial" is not an outcome which is sustainable, on the materials before the Court and the analysis advanced by the Respondent. Since it is common ground that the Court cannot decide that the Appellant would be entitled to a retrial, it follows that: the Appellant is statutorily entitled to be discharged pursuant to section 85(7); the appeal must be allowed, the Appellant discharged and the order for extradition quashed (section 103). I add this. The analysis does not turn on a submission made by Ms Townshend that, in order for a statement made by the Appellant at the hearing on 17 December 2002 to constitute a waiver, it would have been necessary for the Appellant to have had a lawyer, the absence of which (on Advocate Say's evidence) was moreover a breach of Turkish domestic law. Nor does it turn on another point emphasised by Ms Townshend, concerning the non-attendance by the court-assigned counsel (Advocate Gunes) at the hearing on 10 April 2008 when Mr Kurt gave his evidence. In the circumstances, I need say no more about those points.

Articles 5/6 ECHR: Flagrant Breach

17. Separate grounds of appeal were advanced to the effect that extradition would be incompatible with Convention rights (section 87(1)) because the conviction and sentence involved a "flagrant breach" of the Appellant's Article 5 and/or 6 ECHR rights. Those grounds involved emphasising the very same features of the case as were relied on in relation to section 85, and which are the subject of the principled standards and values applicable to "deliberate absence". Ms Townshend accepted, on reflection, that if the bespoke statutory protection of section 85 did not avail the Appellant, there was in this case no prospect that the prism of Article 5/6 could do so. In those circumstances, I will

say no more about Articles 5 or 6. However, I am satisfied that it is appropriate to go on to address the other grounds of appeal.

Section 82: Passage of Time

18. Pursuant to section 82(b) of the 2003 Act, in a conviction case, extradition is "barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite [the requested person] by reason of the passage of time since [they are] alleged to have … become unlawfully at large". The Judge concluded that the Appellant had been "unlawfully at large" (see §9(iv) above) but found that there was no section 82 bar because (a) the Appellant has been a fugitive since leaving Turkey in April 2004 (see §9(v)) and in any event (b) it would not be unjust or oppressive to extradite him. The section 82 analysis in this case raises a number of topics, to which I now turn.

Unlawfully at Large

19. Under the statutory language, in a conviction case it is by reason of the passage of time since the Appellant became "unlawfully at large" that extradition may be found unjust or oppressive (Konecny v Czech Republic [2019] UKSC 8 paragraph 53). A disputed question as to whether or when a requested person was "unlawfully at large" involves a contention made by the Respondent, that the requested person was not unlawfully at large when they say that they were. It follows, as was common ground, that this is a question on which the Respondent bears the burden of proof, to the criminal standard (section 206). Mr Allen has invited the conclusion, departing from the finding on this point of the Judge, that the Appellant was only unlawfully at large from 6 April 2015. The essence of Mr Allen's argument, as I saw it, was as follows. There is a statutory provision treating an individual as unlawfully at large after conviction (section 140A(1)), but it does not apply to section 82 (section 140A(2)). A person is "not unlawfully at large … when he is not subject to an immediate sentence of imprisonment and it would require a further judicial act before he could be lawfully detained" (Wisniewski v Regional Court of Wroclaw, Poland [2016] EWHC 386 (Admin) paragraph 52). Although by its ruling dated 9 June 2008 the Turkish trial court convicted the Appellant, and imposed an "immediate sentence of imprisonment", an appeal was filed by the court-assigned counsel (Advocate Gunes). The existence of that appeal meant there now needed to be a "further judicial act", by which the verdict was approved. That approval supplied the "effective date" of the verdict, through the judicial act of the Court of Cassation (6 April 2015), the significance of which is reflected by it being recorded and relied on in the Request. As the Further Information dated 2 April 2019 states, it was on 6 April 2015 that "the punishments against [the Appellant] were finalised". This fits with the arrest warrants (13 May 2015). It fits with why there was no action to 'trace' the Appellant for the whole period 2004-2015 (see §8 above). On that basis, this Court should conclude: that there was (in Mr Allen's words) a "suspension of the enforceable nature of the sentence", until the conviction was made final on appeal; that the Appellant could not lawfully have been detained until 6 April 2015; and that he therefore cannot have been "unlawfully at large".

20. I have not been persuaded by those submissions. In the first place, Wisniewski paragraph 52 – which was dealing with an unactivated suspended sentence – was describing, as insufficient, a situation where there was both (i) the absence of an immediate sentence of imprisonment and (ii) the need for the further judicial act for the individual to be detainable. I do not read that passage as saying – and I was shown no other passage in

any authority which says – that an "immediate sentence of imprisonment" would be insufficient, because a further judicial act is still needed for the individual to be detainable. In the present case, there was an immediate sentence of imprisonment. On the face of it, the Appellant was imprisonable. Moreover, I am not persuaded that there did need, necessarily, to be a further judicial act. Suppose, for example, that the appeal had been simply withdrawn by the Advocate. Mr Allen's logic appears to be that the Appellant was unlawfully at large after the verdict, but ceased to be unlawfully at large when his court-appointed counsel filed his appeal, or possibly when that appeal began to be processed. The question is not whether there was a warrant for arrest: indeed, warrant for arrest was a feature which Wisniewski paragraph 52 went on to indicate gave rise to different considerations. It is one thing to say that a case which goes through the appeal process involves the finalisation of the conviction and/or sentence, and another to say that there was in the meantime necessarily the suppression of the enforceable nature of the sentence or a situation where the individual could not lawfully be detained. That may be right, but the information placed before this Court by the Respondent, on an issue on which the Respondent is now seeking to depart from the finding of the Judge, and on which it has the onus of proof to the criminal standard, does not establish it. Nor was I shown any authority which holds that this would suffice, if established. If I am wrong in this conclusion, and if the Appellant was not "unlawfully at large" from June 2008 – or ceased to be "unlawfully at large" in July 2008 –then the consequence is that the "safety net" of Article 8 ECHR, to "permit the effect of passage of time to be brought into account", would become especially important (Wisniewski paragraph 56; (Konecny paragraph 55). I proceed on the basis that the relevant passage of time for the purpose of section 82 is the passage of time since 9 June 2008. From that starting date there were 10 years which elapsed before the Extradition Request was issued (21 November 2018); and it is relevant that there have been 13 years to today (Gomes v Government of Trinidad and Tobago [2009] UKHL 21 paragraph 38). Although that is the statutory focus (section 82(b)), to which the Court must hold (Konecny paragraphs 54-56), the authorities which I was shown indicate that, when evaluating whether extradition would be oppressive by reason of that passage of time, the Court can properly have in mind the overall passage of time from the date of the offending (see eg. Wenting v High Court of Valenciennes, France [2009] EWHC 3528 (Admin) paragraphs 13 and 23(7); Potocky v District Court in Michalovce, Slovakia [2013] EWHC 2052 (Admin) paragraphs 14-15). If I am wrong about that, the "safety net" of Article 8 ECHR would again be especially important (Konecny paragraph 57). The overall passage of time is that the Request was issued 16 years after the offending, and that 19 years have elapsed since the offending to today.

Fugitivity

21. Absent exceptional circumstances – and Ms Townshend does not submit that they exist in the present case – any period when the Appellant was a fugitive precludes section 82 reliance on the passage of time (though the passage of time could still be considered through the Article 8 prism). The Judge found that the Appellant left Turkey in April 2004 as a fugitive (see §9(5) above), a conclusion described by the Judge as something which it was "reasonable to infer" from the other findings and the circumstances of the case. Key findings made by the Judge were that there had been notification to the Appellant in 2002 of the 2008 trial date, a finding which the Respondent accepts cannot now be sustained (see §6 above); and a finding that the stated preference of Article 226 exemption was an act whereby the Appellant "demanded not to attend" his subsequent trial hearings, a finding which also cannot now be sustained (see §7 above). However,

submits Mr Allen, based on the Judge's other findings – in particular the finding about the Appellant's state of mind when leaving Turkey in 2004 (see §9(iii) above) – and the other circumstances of the case, the Judge's finding of fugitivity from April 2004 should be recognised by this Court as remaining intact. In circumstances where material findings by the Judge need to be 'stripped out' of the analysis of fugitivity, including by reference to fresh evidence from the Respondent itself, I am quite satisfied that it is appropriate and necessary for this Court to revisit the question of fugitivity, in the light of all the circumstances of the case, and the Judge's other findings of fact. In those circumstances, nothing turns on whether the Judge materially misapplied the onus and standard of proof in arriving at a finding of fugitivity as a matter of 'reasonable inference' (though he did refer elsewhere to a "finding", and to "the necessary threshold" in the Respondent "proving" fugitivity): had I concluded that he had done so, the consequence would have been for this Court to re-evaluate the question of fugitivity, which is what I am doing in any event. In conducting that re-evaluation, I am satisfied that it would not be appropriate for this Court to go behind the Judge's findings about the Appellant's state of mind when leaving Turkey (see §9(iii) above). That is notwithstanding that the Appellant's narrative about learning that Mr Kurt was withdrawing his complaint, has added plausibility in light of the description (in the Request itself) to Mr Kurt on 13 January 2003 having petitioned to do just that. That evidence was before the Judge. The Judge was not convinced, having heard oral evidence from the Appellant, that the Appellant considered matters to have been discontinued, in any reliable sense. The Judge emphasised that no official notification of discontinuance had been provided by any court or Turkish authority. The Judge described the Appellant's awareness of a matter which had not been formally resolved, but was continuing, and to the Appellant's hope that it would not be pursued. There is no proper basis, in my judgment, for this Court to substitute a different factual appreciation on any of this.

22. Mr Allen floated, at the hearing before me, the possibility of a fallback position on fugitivity, even if the Appellant was not a fugitive from April 2004. The fallback position was that the Appellant became a fugitive from 13 May 2015 when arrest warrants were issued, when he was aware of his conviction and sentence through members of his family, the family home having been visited by the Turkish police in April 2015, in circumstances where the Appellant and the family instructed Advocate Akgun to pursue a (further) application for an appeal. On reflection, Mr Allen accepted that he could not sustain this fallback analysis, in the light of De Zorzi v Attorney General Appeal Court of Paris, France [2019] EWHC 2062 (Admin): see especially paragraphs 57 and 59. I say no more about that, or any other, alternative fugitivity analysis.

23. The essence of Mr Allen's argument on the Appellant's fugitivity from April 2004, as I saw it, was as follows. The Appellant "knowingly placed himself beyond the reach of a legal process" (Wisniewski paragraph 59). That was so, notwithstanding that when he left Turkey in April 2004 he did not breach any condition or obligation which have been imposed on him. It was because "an inevitable consequence" when he left was that he would "eventually fall foul" of an obligation or requirement arising from the Turkish criminal process. That, together with the Judge's finding as to his state of knowledge and state of mind (see §9(iii) above), made the Appellant a fugitive. That is the essence of the argument. I cannot accept it. The starting point is that the Respondent does not say, cannot maintain, and the Judge did not find, that any obligation was imposed on the Appellant as at April 2004. There was no restriction on the Appellant leaving Turkey; there was no obligation as to his location; there was no obligation as to notification of an

address or change of address; there was no obligation to make or maintain contact with any person or authority; there was no obligation to attend a trial hearing (the whole point of the Article 226 stated preference, allowed by the Turkish court, was to lift any such obligation: see §7 above). The case-law on fugitivity strongly emphasises breach. As Ms Townshend emphasised, Wisniewski – which analysed the position in relation to suspended sentences – speaks as a fugitive of a person "who breaches conditions of his sentence which require him to keep in contact" and who "thereby becomes" a person "whose whereabouts are unknown to the authority which is entitled to know them and puts it beyond the authority's power to deal with him"; that it is "his conduct in breach of the suspended sentence that has given rise to his lack of knowledge that the sentence has been implemented" (paragraph 62). Similarly, Stryjecki (paragraph 32) emphasises the action of having "knowingly breached the terms of [the] suspension". Mr Allen is right that a person whose act of leaving makes a future breach inevitable may be a fugitive. An example is a person owing a regular duty to attend at a police station, who by leaving will not be able to attend future appointments. Another example is where individuals "deliberately flee the jurisdiction in which [they have] been bailed to appear" (Gomes paragraph 26). In this case, the Respondent cannot sustain, on the material before the Court, still less to the criminal standard (Gomes paragraph 27), that any 'inevitable breach' arose from the Appellant leaving Turkey in April 2004. It is not enough that the individual may one day owe an obligation and fall foul of it by being away from the requesting state: otherwise, everyone would be a fugitive. Moreover, in De Zorzi the appellant left France having been told by the Judge that she would have to return the following year (paragraph 6), but she was not a fugitive when she left, nor when she declined to return. The suggestion that there was an inevitability in this case involves the (alarming) proposition – which I cannot accept – that prosecution, trial, conviction and a custodial sentence were all themselves inevitable. The finding of fugitivity (see §9(v) above) cannot therefore stand.

Seriousness of the Offending: 'Slider Controls'

24. Having concluded that the Appellant was a fugitive, the Judge went on to consider the "position" under section 82, in case it "were … considered elsewhere that [the Appellant] should not be treated as a fugitive". I interpose that the Judge did not do the same for Article 8: that is not a criticism but it does mean that this Court does not have any alternative analysis from the Judge, as it does on the section 82 ground. In the section 82 analysis which followed, the Judge said that the Divisional Court in Mariotti v Government of Italy [2005] EWHC 2745 (Admin) had:

> ***laid down the principle that the seriousness of the offence(s) may operate as a bar notwithstanding a very considerable delay such that it would not be oppressive or unjust to order return.***

That "bar" was a "principle" which the Judge attributed to having been "pointed out by Mr Allen". Mr Allen disavows such a submission, does not recall having made one to the Judge, and accepts that there is no such "bar". Mariotti was a case involving an Italian conviction of an offence of kidnapping and a subsequent linked conviction of the offence of murder. As a consequence, it was recognised that the requested person if extradited would "probably spend the rest of his life in prison" (paragraph 14). The Court said this: "Having regard to the gravity of the offence, we do not consider that the passage of time renders it unjust for the [requested person] to be returned'. The Court in Mariotti did not say that the gravity of the offence operated as a "bar" to section 14 (the Part 1 equivalent

to section 82) injustice or oppression by reason of the passage of time. I have been shown no case which treats seriousness of the offence as being akin to fugitivity: treated as disentitling the requested person to raise section 14/82 oppression or injustice by reason of the passage of time, no matter how long, inexcusable or prejudicial the passage of time. In Mariotti the Court discussed the various periods of delay and examined the reasons for those periods of delay. It said of one of the periods of delay: "We do not condone [the] delay but we do not consider that it sustains a submission of injustice or oppression in the circumstances of this case". There is no "principle" involving a seriousness "bar". The correct position in law is this: "the gravity of the offence is relevant to whether changes in the circumstances of the accused which have occurred during the relevant period are such as would render his return… oppressive" (Gomes paragraph 31); "the seriousness or otherwise of the offence is a factor to be taken into account", which may mean, for example, that extradition relating to "a serious offence in which a young life was lost" is not judged as oppressive, notwithstanding the "devastating" impact on those affected by extradition (Kovac v Regional Court in Prague [2010] EWHC 1959 (Admin) paragraph 11, citing Sapstead v Kingdom of Spain [2004] EWHC 2352 (Admin) paragraph 34).

25. The seriousness of the offending, and the length of a custodial term to be served in a conviction case, are highly significant features in the evaluative exercise of considering oppression by reason of the passage of time. There is a spectrum of seriousness, just as there is a spectrum as to other features of a case which inform the outcome. There are features which can operate as 'on/off switches' for the purposes of section 14/82: whether the requested person was unlawfully at large; whether the requested person was a fugitive. But other relevant features are much more like 'slider controls', such as one might encounter on a 'mixing desk' in a recording studio. The Court's exercise in evaluation involves recognising the strength of each relevant factor. Some may be more dominant than others, by reason of their nature, or the evaluative weight. Some are features which will tend towards a favourable, others towards an adverse, conclusion. Each feature will have its own evaluative weight, in the context of the individual case. Some features will have special force when in combination: for example, the length of the passage of time; whether it constitutes "culpable" delay; and the change in circumstances during that period. Ultimately, it is the combined effect of all relevant features – adjusted by reference to their nature and the weight attributable on the individual facts – that produces the overall outcome. It is much the same with the Article 8 evaluative balancing exercise.

26. In the present case, the Judge went on to conclude – by reference to the seriousness and the fact that the Appellant had "a sentence of 7 years 2 months 16 days to serve, but… may find himself released after 5 years 2 months 16 days" – that, "in all the circumstances, even were it to be considered that the Turkish authorities have not been able to reach the necessary threshold improving that [the Appellant] is a fugitive, I remain of the view that it would not be oppressive and/or unjust to order his return". The fact that the only feature mentioned in the Judge's evaluation is seriousness (the offending, together with the custodial sentence to be served) indicates that, notwithstanding the Judge's reference to "all the circumstances", he was applying what he called a "bar" based on seriousness. Be that as it may, since this Court has relevant fresh evidence, I am in any event satisfied that it is appropriate for me to revisit the evaluation of 'oppression having regard to the passage of time' in all the circumstances and having regard to all

relevant features of the case, including the seriousness of the offence, together with the sentence and length of time to serve.

Injustice

27. I am going to put to one side the meaning of "unjust" in the context of section 82 and a conviction Request. The case-law tells us that "unjust" in the context of the passage of time, in an 'accusation' case, is directed primarily to the procedural prejudice from the passing of time, in the context of someone facing trial. That point could also feature in a 'conviction' case, where there is a right of retrial (section 85(5)). I was not shown any authority which assisted as to "unjust" in the context of passage of time, in a 'conviction' case, with no retrial right. It cannot be a re-run of the features of section 85 and, if it were, it adds nothing to what I have said above. The fact that "unjust" features alongside "oppressive" in section 91 (physical or mental condition) may indicate a broad concept. I am quite satisfied, whatever it means, that if "oppressive" does not avail the Appellant, "unjust" – whether standing alone or standing alongside "oppressive" – could not do so in the present case. I will focus on oppression.

Oppression: Working Illustrations

28. Both Counsel put before the Court authorities which, as I see them, are 'working illustrations' of statutory tests and legal principles being applied on the facts of individual cases. I make no criticism of that. My own view, and my own experience in public law and human rights law more generally, is that it is not unhelpful for lawyers – acting always with discipline, rigour and focus – to place before the Court 'working illustrations' of principles and legal tests 'in action'. Such examples can assist the Court's appreciation. That does not mean there should be a proliferation of authorities, in a game of 'tit for tat'. The temptation to overload authorities' bundles – a temptation which is the greater when the bundle is electronic – must always be avoided. And what is imperative is to remember that 'working illustrations' are that and nothing more than that. Each case turns on its particular facts and individualised fact-specific applications of legal principle must never be mistaken as having the force or influence of precedent. In relation to oppression by reason of the passage of time, I will describe three of those 'working illustration' cases which were placed before me and which have assisted me:

    i) Wenting was a 2009 case in which the Divisional Court held that it was oppressive by reason of the passage of time to extradite to France a 51-year-old man to serve the remaining 3 years of a 5 year custodial sentence for the importation of cocaine. The offence was committed in 1989 (aged 31). He had been convicted in his absence in 1992. These were serious offences. The requested person had served 2 years on remand in France between 1989 and 1991. He had known all along that there was an unresolved matter. From 1992 he had known of the conviction and sentence. He had hoped that nothing further would happen. The French authorities had communicated no decision discontinuing the matter. He had lived openly and the authorities had his address in the Netherlands from 1991 when he had been released on bail. He was not a fugitive. He was never summonsed or notified that he was required to serve his sentence, until notified in conjunction with the extradition proceedings. The delay from 1992 and 2006 when an EAW was issued was 14 years of unexplained delay. The period of 20 years since the offending was a very considerable time. The requested person had lived a blameless, law-abiding and useful life; he had built up businesses that he stood to lose; and he had a partner,

recently diagnosed with cancer, who could look to no other close family for support.

ii) Kovac was a 2010 case in which the Divisional Court concluded that it would be oppressive by reason of the passage of time to extradite the requested person to the Czech Republic. The offending (1993/94) was "very serious", involving the abduction and coercion of a young girl into prostitution, for which he had received a 9 year custodial sentence, imposed in 1996 and becoming final in 1997. He had come to the United Kingdom 2 years earlier (in 1994) and was not a fugitive. There had been no positive action by the Czech Republic authorities communicating discontinuance. The period between the imposition of the sentence (1996/1997) and the EAW issued in March 2008 was extremely long, wholly unexplained, and constituted culpable delay. The requested person did not know until 2006/07 that he had been convicted and sentenced 10 years earlier. He had a settled lifestyle in the UK, albeit with a string of 6 convictions of 18 road traffic offences; he was a husband with a wife and children; and the degree of hardship for the family was capable of supporting the conclusion that extradition would be oppressive.

iii) Potocky was a 2013 case in which Cranston J concluded that it would be oppressive by reason of the passage of time to extradite a 36-year-old man to Slovakia to serve a custodial sentence for a robbery committed 16 years earlier in 1997. The length of the custodial term to be served is not identified but what is recorded is that the robbery involved forcing the handover of jewellery, with violence, in a restaurant. The requested person had come to the United Kingdom in 1998 and had been tried and convicted in his absence in 1999. The EAW was issued 6 years after "one arm of the Slovakian state" knew about his whereabouts, in that he had applied for a passport at the Slovakian Embassy in London, which had been refused because of his conviction. There was culpable delay – not suitably explained – especially in the periods 2005 to 2007 and 2011 to 2013. The offending had been when aged 20. He had been living openly for 15 years in the United Kingdom, was employed and had a wife and two school-age children who would suffer hardship.

'Working illustrations' such as these, and others including Mariotti and Sapstead, do not begin to supply the answer to the present case. But what they do is illustrate the sorts of factors which inform the overall evaluative exercise.

Relevant Circumstances

29. The evaluation of whether extradition would be oppressive by reason of the passage of time has been called an "overall judgment on the merits", in which "all the circumstances must be considered" (La Torre v Republic of Italy [2007] EWHC 1370 (Admin) paragraph 37). I approach that evaluation assisted by the submissions made by Counsel as to whether this is (Ms Townshend), or is not (Mr Allen), a case where extradition would be oppressive by reason of the passage of time. The index offending is "very serious" (see §5 above). The sentence of the Turkish court was very substantial, and the custody actually required to be served was substantial as at the hearing before the Judge: 7 years 2 months 16 days; and (with good conduct) 5 years 2 months 16 days (with 2 years on probation). On the uncontradicted fresh evidence before this Court, it is very significant: 3 years 3 months 22 days in custody (with 17 months on post-release supervision). These features are relevant and weigh heavily against finding extradition by reason of the passage of time would be oppressive. The Appellant knew in 2004 that

there was an unresolved matter and hoped that it would fade away and he would not be pursued (see §9(iii) above). There are no positive actions to support a conclusion that the authorities engendered a false sense of security (Gomes paragraph 26; Potocky paragraph 18; Kovac paragraph 12; De Zorzi paragraph 46iv). The Appellant was aged 19 at the time of the index offending, 19 years ago. He has lived a settled, open and law-abiding life in the United Kingdom for the past 17 years. He has no other convictions, at any stage, either in Turkey or in the United Kingdom. Not only did he not leave Turkey as a fugitive, but he did not leave after being released on 17 December 2002. Rather, he left in April 2004. Before arriving at a conclusion on oppression by reason of the passage of time, there are features which need consideration in more detail, and which will also be relevant to Article 8, to which features I now turn.

Length of Time/Culpable Delay

30. The passage of time since the Appellant was convicted and sentenced (June 2008) is very substantial. It is 10 years between sentence and the Request; it is 13 years from sentence to today. Looking overall, there have been 16 years from the offending to the Request; and 19 years from the offending to today. The evaluation of the passage of time can be "coloured" by the question of whether delay was "culpable" on the part of the Turkish authorities (La Torre paragraph 37; Kovac paragraphs 15-16; Gomes paragraph 25). As to that, it can fairly be said that the periods 2002-2008 (to conviction and sentence), and the period 2008-2015 (from conviction and sentence to the resolution of the appeal), were periods in which the Turkish domestic "courts dealt with the matter in accordance with their procedures" (Mariotti paragraph 26). Indeed, it is because a trial had not taken place (6 years from 2002-2008) and an appeal had not been determined (7 years from 2008-2015) that the Turkish authorities took no action to trace the Appellant (see §8 above). It is, moreover, appropriate to proceed on the basis of the foundational "mutual trust and respect" which applies in extradition cases (Gomes paragraph 36). During the 6-year period 2002-2008 the Turkish courts were dealing with a case in which the Appellant, having made statements which were evidence, was protesting his innocence. During the 7-year period 2008-2015 the Turkish appellate court was dealing with a case in which the Appellant's court-assigned advocate had filed an appeal on his behalf notwithstanding his absence. Due process required that such matters be properly and conscientiously dealt with. None of this, however, makes it irrelevant to consider what was happening – or indeed whether anything substantial was happening – during those long periods of time. This Court has considerable detail from the Respondent by way of a description of the key stages. The fact that the domestic courts in the requesting state have "dealt with the matter in accordance with their procedures" does not preclude scrutiny; nor should it. Otherwise, the logic would be that criminal prosecutions and criminal appeals "dealt with" under domestic procedures could take many decades and be entirely free from any effective evaluation as to the nature and reasons for the delay and the question of culpability. Just as in Article 8 cases: "long unexplained delays can weigh heavily in the balance against extradition" (Stryjecki paragraph 70vi); and it is relevant, alongside the seriousness of the offending, to ask whether the circumstances "suggest any urgency about bringing the Appellant to justice" (HH v Deputy Prosecutor for the Italian Republic, Genoa [2012] UKHL 25 paragraph 46).

31. Having been able to work through what the Judge called "the chronology" of the present case, by reference to the detailed materials before the Court, with the assistance of both Counsel, the position is stark. There is a reference to Mr Kurt, on 13 January 2003, having

by petition sought to withdraw his complaint. But no significant step is referenced during: (i) the rest of 2003; or (ii) the whole of 2004. There is a reference to a report dated 21 April 2005 determining that the flick-knife seized from the Appellant was an illegal knife, to a hearing on 18 July 2005 at which Advocate Gunes was assigned by the court, and to a hearing on 10 November 2005 that she attended. But no significant step is referenced during: (iii) the whole of 2006; or (iv) the whole of 2007. There was then the hearing on 10 April 2008 at which Mr Kurt gave his evidence, culminating in the June 2008 verdict and sentence and the filing of the appeal on 15 July 2008. But after that, no significant step is referenced during: (v) the whole of 2009; (vi) the whole of 2010; or (vii) the whole of 2011. On 14 June 2012 there was the decision to return the appeal file, asking whether the Appellant was aware of and supported the appeal, after which documents were served (23 August 2012) on the address he had given in December 2002. But after that, no significant step is referenced during: (viii) the whole of 2013; or (ix) the whole of 2014. The verdict was approved by the appellate court on 6 April 2015, the arrest warrants issued on 13 May 2015, and a 29 May 2015 application by Advocate Akgun was rejected without consideration (no date is given but similar events took 4 months between August and December 2018). But no significant step is referenced during: (x) the whole of 2016; or (xi) the whole of 2017. That is notwithstanding that the family and the Appellant had instructed Advocate Akgun in May 2015 who had filed the application for an appeal on 29 May 2015. There are here no fewer than 11 'empty' years. Compiling a chronology based on the references provided in the detailed information before the Court, and including the contents of "the chronology" to which the Judge referred in his finding of no "culpable delay" (see §9(vii) above), and supposing a clean sheet of paper for each calendar year, there are no fewer than 11 years in which the sheet of paper is effectively blank: there is no explanation. That strongly suggests that no step of any particular significance was being taken during that period. None has been identified. No explanation has been given. This case is very different from the period between 1995 and 2000 in Mariotti, the various key steps during which the Divisional Court in its judgment described in some detail (Mariotti paragraphs 3 to 8). Making every reasonable allowance, I am quite satisfied that it is appropriate to find, as I do, that there has been "culpable delay" in all relevant periods identified as the 11 'empty' years: 2003-2004, 2006-2007, 2009-2011, 2013-2014, 2016-2017. I recognise that this Court cannot have or expect to have full visibility, I am not auditing the judicial processes of the Turkish state, and I do not think that I should simply condemn as "culpable" the entirety of those 11 years, notwithstanding that the Respondent has – in all its detailed information – given me nothing of substance to put into the chronology. Standing back and seeking to evaluate what, overall, would be a fair quantification of the overall "culpable delay", I am confidently able to assess it as being at least 8 years, overall. As a reference point, I find it helpful to put that conclusion, and that passage of culpable delay, alongside the period of custody to be served (see §5 above), for which extradition is pursued. The culpable delay is a significant factor in relation to section 82 oppression, as it is in relation to Article 8 proportionality.

Lack of knowledge: 2003-2015 (12 years)

32. Alongside this timeline there is also this point. It is not established by the evidence that any communications came to the attention of the Appellant's family in Turkey at any time before the police were able to locate the family and visit the then family home in April 2015. What is established is that the family then mobilised promptly once that visit took place: the Appellant was informed and Advocate Akgun was instructed. The

Respondent's Further Information recorded that a notification of the 9 June 2008 conviction and sentence was sent to the address stated by the Appellant in 2002. The Judge made a finding (see §9(ii) above) that that notification was sent to that address. It is not established on the evidence that the family was still living at that address, still less that they received that notification. In this respect, moreover, the Respondent's position suffers from exactly the same vice as applied to the Judge's finding about 2002 notification of the 2008 trial (see §6 above). That is because a specific question was posed about the disputed issue – in the light of evidence from Advocate Say based on her review of the court files – of whether the 8 June 2008 decision was notified only to the court-assigned counsel. The detailed Further Information of 23 March 2021, in response to that series of questions, does not maintain that that decision was notified to the family. For a second time (see §6 above for the first), the dog did not bark. As to whether the appeal documents were received by the family on 23 August 2012, the Judge made no finding. It is said in the court files that the documents were sent to the address which the Appellant had given in 2002. Nowhere is it established that the family was still present at that address. Indeed, as both counsel accepted, and as I have explained already, the address at which the family was visited in April 2015 is not, on the face of it, the same as the address recorded in the papers as having been given by the Appellant in 2002. The events of April 2015 do not indicate that the Turkish authorities had any difficulty in locating the family's current whereabouts, once there was an appetite for doing so. There is no evidence – and the Judge did not find as a fact – that the conviction and sentence came to the attention of the Appellant at any time until 2015 after the visit to the family in April 2015. That is a further relevant feature when considering oppression by reason of the passage of time (Kovac paragraph 21; Wenting paragraph 23). I am satisfied that it is appropriate to proceed on the basis that the Appellant was only made aware of the 2008 conviction and sentence in 2015, after the April 2015 visit to the family home in Turkey.

33. Also relevant is the fact, supported by contemporaneous documentation, that from at least 29 May 2013 an arm of the Turkish state had the Appellant's United Kingdom address (cf. Potocky paragraph 14), by reason of his application at the Turkish Consulate in London for deferral of his military service, which was granted; and that he was in Turkey for 17 days in July 2013. Mr Allen submits that, at that stage, the Turkish authorities would not have been looking for the Appellant because they were still dealing with the outstanding appeal which the court-assigned advocate had filed in July 2008. That is why no action was taken to trace the Appellant (see §8 above). But, as I have found, the period of time (7 years, from 2008-2015) to deal with the appeal involved "culpable delay". One irony is that the Appellant's whereabouts and contactability would surely have arisen in the minds of Turkish judicial authorities, since (in June 2012) the file was returned because it was unclear whether the Appellant was aware of and supported the appeal. Moreover, having finally approved the verdict in April 2015 there were then two years of what on the face of it were complete inaction, involving "culpable delay".

Changes in Circumstances

34. In considering whether extradition would be oppressive by reason of the passage of time, it is important to focus on the consequences of the passage of time and the effects of extradition following on from those consequences. In particular, that means considering "hardship … resulting from changes in… circumstances that have occurred during the period to be taken into consideration" (Kakis v Government of the Republic of Cyprus [1978] 1 WLR 779 at 782), including positing "events which would not have happened",

before a sentence came to be served, had matters proceeded "with ordinary promptitude" (Kakis at 783). As Ms Townshend forcefully submitted, the Appellant's circumstances, and those of the people who have come to rely on him, are "vastly different" as a consequence of the relevant passage of time. He has made his life in the United Kingdom since 2004, 17 years ago. He began a relationship with Deborah in 2005, with whom he has been for 16 years. They and Tammy became a co-habiting family unit in 2006, 15 years ago, and he has been Tammy's stepfather – and in every relevant sense her father – through all the events of Tammy's life (to which I will return) since she was a toddler. Together, the Appellant and Deborah have celebrated the birth (May 2008) and shared 13 years of the upbringing of Tanya; they have together been confronted with the unspeakable, and continuing, grief of the death of Beth in 2009; they got married 11 years ago; they have celebrated the birth (February 2012) and shared 9 years of the upbringing of Kevin; the Appellant was able to start up his own food truck business with his own van (2013); and they have been through the events which I will describe below when considering the position of the members of the family. The extradition proceedings have already exacted a price: the Appellant's mental health deteriorated to a position where he had to stop working for himself in 2020, having sold his van to pay legal fees, and giving rise to more than £10,000 in debts. I turn to the position of the family in more detail.

The Position of Members of the Family

35. The Court has a considerable body of evidence in relation to the members of the family. I am satisfied that I need to arrive at an informed and up-to-date evaluation – with the fresh evidence – of their situation and of the impact for each of them of extradition of the Appellant. The Judge referred to the expert evidence of Dr Pettle and of the Appellant himself, both of whom gave oral evidence at the hearing. The Judge also had written evidence from Deborah. The Judge also quoted extensively from a letter dated 10 January 2020 written by Tammy's treating clinician, Dr du Toit. The Judge ultimately encapsulated the position as follows:

> ***It is very well appreciated that there will be not inconsiderable hardship caused to [the Appellant] and to [Deborah] and their children (particularly [Tammy]) … [T]he family circumstances are very well borne in mind.***

The judgment also contains passages such as the following:

> ***Dr Pettle expressed particular concerns for the well-being of [the Appellant]'s partner, [Deborah] and of the child of the family [Tammy], if extradition were to be ordered. Without the support of [the Appellant] – particularly if he [is] to be in prison in Turkey – Dr Pettle fears that [Deborah] may well suffer severe mental health/depression issues. [Deborah] described herself as 'hanging on by a thread'. Furthermore, it is anticipated by Dr Pettle that [Tammy]'s fragile mental health would almost certain[ly] deteriorate.***
>
> ***Dr Pettle is resolute in her opinion that the sustained thread of [the Appellant]'s potential extradition is presently having an adverse impact upon [Tammy]'s current mental health… If extradition were to be refused, her treating clinical physician hopes that [Tammy]'s mental health will improve, as the disappearance of the present fear of losing the support of [the Appellant] would be a considerable weight of her mind and there would be some cause for cautious optimism for [Tammy] for the future.***

Within Dr du Toit's letter (10 January 2020), from which the Judge quoted, was this:

> ***Although [the Appellant] is not [Tammy]'s biological father, he has been a member of her family since she was two years old, and she has said that she considers him her dad, and that she has a***

> ***good relationship with him. As such he forms one of the main attachment figures in her life. [Tammy] has said that she is very worried about the current court case and that her father may be extradited to another country, and that the family may not see him for protracted periods of time. She has said that her parents have told her that she need not worry about it, yet she remains very worried and she has picked up that both her mother and father are also worried about the potential outcome of the pending court case. In addition to being a close attachment figure, [the Appellant] is also the only breadwinner within the family. [Tammy] told me during her last board review that he has had to sell his business and this has placed the family (to her knowledge) in some financial difficulty. [The Appellant] is also the only member of the family that is able to drive, therefore her parents' ability to visit [Tammy] and engage with family work and supported meals is now significantly hampered by his work shift pattern. It would therefore seem likely that if [the Appellant] were extradited that it would not only be a loss of a significant attachment figure for [Tammy] but it may also place a significant strain on the family and would impair their ability to engage with [Tammy]'s treatment. Since family work is a significant part of recovery, it is likely that interference with her treatment would have a detrimental impact on her recovery.***

36. The Judge clearly had the evidence, as it stood at the time of the hearing before him, well in mind. He said it was "very well borne in mind" and there is no indication that he misunderstood it. Mr Allen fairly accepted that the Judge "could have used stronger language" than the phrase "not inconsiderable hardship". Based on the updated evidence now before this Court, Mr Allen's own description was that the position of the family is "very difficult indeed", that they are in an "extremely serious situation", and that Tammy in particular has a "genuine persistent and serious mental health condition". These observations are well made. In circumstances where, for reasons which I have explained, I am satisfied that it is appropriate for this Court to revisit the evaluation of oppression, including the effects of extradition and the hardship for family members, on all the material including important updating fresh evidence, I must now have in my own mind all of the material before this Court. In considering fresh evidence I must keep in mind the question of which evidence is expert evidence delivered with a recognition of the duties of an expert witness to the Court, which evidence is from a treating clinician, and which evidence is found in updating proofs of evidence or witness statements from the Appellant or from Deborah, in circumstances where the evidence has not been tested on cross-examination (Debiec v District Court of Piotrkow Trybunalski, Poland [2017] EWHC 2653 (Admin) paragraph 12). Having said that, it is right to record that Mr Allen confirmed that the expert evidence and clinician evidence was not the subject of any substantive challenge below, nor did he invite me to reject or treat with any specific circumspection any of the contents of the fresh evidence, whatever its source. I will not set out or summarise the entirety of the evidence, but I will seek to identify the substance of the position. I will consider each family member, in age order.

37. Kevin is aged 9. At the time of the hearing before the Judge, as Dr Pettle explained, the Appellant and Deborah had taken the decision not to inform Kevin – or his sister Tanya – that the Appellant might be extradited (the family had, however, experienced the Appellant's arrest by the police). Dr Pettle expressed the view that Kevin's presentation at school indicated that he was somewhat vulnerable and that the effect of extradition would result in a big loss. In the light of the Judge's judgment and the order for extradition, the Appellant and Deborah decided to tell Kevin (as well as Tanya) that dad 'might have to go away for a while', but 'would always love him'. Kevin became distressed and said he would always carry his father's photo and sleep with it next to him. Dr Pettle reports (15 January 2021) that Kevin's presentation at school has deteriorated and he has difficulties which have a marked impact on his learning. Deborah's latest evidence (14 April 2021) tells me that Kevin is having serious attachment issues with his father, which the school understands, and has days when he cannot cope. When he sees

police officers, he thinks they are coming to take his dad away. He does not like to be away from his parents. They have had to resort to going into school for an hour during the day so that Kevin is reassured that they are 'still here and still safe'.

38. Tanya is aged 12. Like Kevin, she had not at the time of the hearing before the Judge been told that the Appellant may be extradited. Dr Pettle reports that Tanya is very emotional, fragile at times and easily upset; she has a close loving relationship with her father; and she is aware of the possibility that he might have to go away. When asked about her father, Tanya changes the subject. She admits to being good at pretending that she is okay. She has been assessed at school with a clinically significant level of emotional difficulties. The Appellant's latest evidence describes an incident on 12 April 2020 when Tanya was crying and said everything was getting too much for her. She agreed to letting her dad read her diary, as long as he 'did not judge her'. In the diary, he found, she had recorded thoughts about ending her life.

39. Tammy is aged 17. In 2016, when she was Tanya's age (12), Tammy was diagnosed with low mood related psychological symptoms. In the following months she attended various medical engagements at various clinics and hospitals. Her health deteriorated and by November 2017 she was suffering from an eating disorder. In August 2018 (aged nearly 16) Tammy was admitted to hospital in Southampton and two weeks later she was 'sectioned'. She was diagnosed with severe depression, anxiety and atypical anorexia. These illnesses have continued to exert a brutal, relentless hold on her. Tammy began being fed by a nasal-gastric tube. She was at this time already making serious efforts of self-harm including using ligatures. Tammy was discharged in April 2019. In June 2019 she attempted to take her own life by taking an overdose. In November 2019 Tammy was admitted to a specialist eating disorder clinic in Brighton, where she stayed, for 9 months. During that time she frequently tried to harm herself, making ligatures to tie around her neck and deeply cutting herself with objects. On 29 January 2020 the Appellant and Deborah received a call from the hospital in Brighton to say that – having heard the outcome the previous day of the extradition hearing – Tammy had, in the Appellant's words, "tried to cut her own throat". Tammy remained in hospital and was eventually discharged in June 2020. By the end of the following month (July 2020), now aged nearly 17, Tammy attempted to commit suicide by jumping off a bridge onto a motorway. A member of the public managed to grab hold of her and she was pulled to safety. She was again admitted to hospital in Southampton and again 'sectioned'. In August 2020 Tammy attempted suicide, on one occasion in her hospital bedroom, on another occasion after running away. Tammy was moved to Hatfield in November 2020, where she was assessed as very high risk and was under constant supervision. In the last year Tammy has been given the additional diagnosis of emotionally unstable personality disorder. Tammy started a period of home leave, first with short visits, in February 2021 but at the beginning of April 2021 she had what her mother describes as "a major crash at home, where she tried to kill herself again by throwing herself out of the window and after an incident lasting 5 hours was taken back to hospital. Tammy is still fed through a naso-gastric tube, and is likely to need to be fed in that way when discharged home. At the time of the hearing before me the plan was for Tammy to be once again discharged home in May 2021. The current plan for Tammy involves nursing support, individual psychotherapy and family therapy which should include the Appellant as the father figure in the family. In her mother's words, Tammy is "in deep crisis and I would not be able to cope without the assistance that [the Appellant] has given to me and our other

children", describing how the Appellant "through the years… has given unwithered support towards [Tammy] as he is the only father has been in her life".

40. Deborah is 32. Like the children, she is a British citizen. She became pregnant with Tammy at the age of 15. Her relationship with Tammy's father was a short one. She works in the home, looking after Tanya, Kevin and Tammy (when Tammy is allowed home). Deborah describes how also still honoured as a child in the family is Beth, the baby daughter born prematurely at 29 weeks who only lived for a few hours in 2009, a loss which is still raw. Dr Pettle explains that Deborah suffers from severe depression. She describes Deborah as having been devastated when her husband's extradition was ordered, finding this very hard to talk about, and now being on medication to help manage her anxiety. Dr Pettle describes Deborah referring to herself as: "so tired, hanging by a piece of string". In her evidence, Deborah speaks of her love and affection for the Appellant as "enduring through these challenging times in which I am trying my best to cope with anything which may come of the proceedings" adding that "what is more important is … our children, all of them rely upon their father in support of their daily lives". Dr Pettle's assessment is that Deborah:

> ***would find it extremely difficult to assist children in coping with their profound sense of shock and loss in the event of their father's extradition.***

Dr Pettle says there is:

> ***a significant risk that her precarious coping stance would disintegrate that she would experience an episode of acute depression rendering it difficult for her to explain, soothe, support all 3 children and manage the inevitable impact is extradition is likely to have on their emotional state and behaviour.***

Deborah told me this in a statement dated 14 April 2021:

> ***I am exhausted by this process now. I am [for] the first time in my life struggling to cope with everything. I have to do so much for [Tammy] even when she is in hospital, I convene meetings with the hospital 16-18 hours a week and am on the phone to [Tammy] for hours on end… [T]he last 4 years have been horrific for us all. The extradition order did have a major impact on us all. My biggest worry is… that I will struggle to cope with holding it together myself let alone having to rebuild 3 hearts, and one for a child who is extremely complicated. I do not know how I will be able to do that. He is so present in their lives that it will shatter them if he has to go.***

41. The Appellant is aged 37. As I have explained, legal fees incurred in conjunction with the extradition proceedings led to him selling his van and giving up his self-employed food truck business, established in 2013, as well as getting into over £10,000 of debt. Deborah describes how upsetting it has been, in particular for Tammy, to watch the Appellant "deteriorate from a fun-loving dad to someone who is so depressed, stressed and short tempered". Over November and December 2020 the Appellant's mental health deteriorated, which Deborah puts down to the following: Tammy being back in hospital in Essex, the loss of the Appellant's business, and the uncertainty surrounding his extradition case. Deborah's evidence tells me how at that time she would hear him go to the field behind the house and scream into the night. In early January 2021 the Appellant disappeared in the early hours. Not having not heard from him all day, Deborah received a text the next night stating that he wanted to end his life and was going to jump from a bridge. The police were able to find him and talk him around, sitting with him for 4 hours before bringing him home. The next day the Appellant and Deborah contacted the mental health team. The team placed the Appellant on anti-psychotic medication and anti-

depressants, assessing him as unsafe to be on his own and at a high risk of attempted suicide. As a consequence, he was admitted – as a voluntary patient – in a psychiatric unit where he spent 3 weeks, before returning home.

42. I have found it helpful to pause, as I do again now, to reflect on the positions of the family members. Overall, Dr Pettle has encapsulated the position as following passages:

> ***In my opinion the extradition of [the Appellant] would have a devastating impact on all family members and be severely detrimental to all 3 children. The changes that would follow for [Tammy, Tanya and Kevin], would result in significant emotional turmoil and could have far-reaching and long-lasting effects on many aspects of their psychological health, academic progress and emotional development … The loss of their father and the lack of opportunity to see him, be reassured of his well-being or have any reliable communication with him is likely to be profoundly distressing and felt, similarly to a bereavement by all the children.***
>
> ***The additional emotional and psychological blow if [the children's] father was sent to a Turkish prison will have an immediate and negative impact on them all. This will be made worse by the likelihood that there will be no meaningful contact that might reassure them that he is well. The likely long-term detrimental consequences are considerable: [Tammy] is struggling with recovery and this would be far more difficult for her to sustain; her younger siblings [Tanya and Kevin] are likely to show increased signs of emotional and behavioural difficulty which would have effects on their academic progress. The experience of loss, anxieties about their father's well-being and changes that would follow for [Tammy, Tanya and Kevin] would result in significant emotional turmoil and this is likely to have far reaching and long-lasting effect on many aspects of their development.***
>
> ***[Tammy]'s discharge is likely to place an additional intensive burden on the family on a daily basis and [Deborah] is at a loss to know how she would cope without [the Appellant] being available to support her and take a greater role with the 2 younger children [Tanya and Kevin]. The extradition of [the Appellant] would undoubtedly result in a high level of emotional distress for [Deborah] and the children. I anticipate this would be long-lasting and have significant detrimental effects on the prospect of recovery for [Tammy], and the emotional, behavioural and social development of [Tanya] and [Kevin].***
>
> ***This is a family on the edge of crisis.***

I accept Dr Pettle's evidence.

43. In my evaluative judgment, based on Dr Pettle's evidence and all the evidence before this Court, this is a case: where extradition of the Appellant would have very serious consequences for each of the 5 members of the family; where there would be severe hardship for the Appellant, Tanya and Kevin; and where there would be particularly severe hardship for Deborah and Tammy. Deborah, Tammy, Tanya and Kevin are all blameless. They have, moreover, all come to depend on the Appellant as a result of changes in circumstances during the passage of time, in which there have been many years of culpable delay on the part of the Respondent. Whatever the future holds for this family, and each of them, two things in my judgment emerge very clearly. First, it will be extremely difficult for all of the children, and their mum, to cope if the Appellant is extradited. Secondly, for this extradition process to be at an end, with the Appellant secure at the heart of the family, would be to give for each of them: the greatest chance to deal with the "extremely serious situation" rightly recognised by Mr Allen; and the greatest chance to find a path back from the "edge of crisis" described by Dr Pettle.

Section 82: Conclusion

44. On the particular facts of the present case, having regard in particular to the effects of extraditing the Appellant now and the impact in particular on the members of the family, I conclude as follows. The hardship is of such a degree are such that, having regard to all the features which I have described above, in all the circumstances, and notwithstanding the seriousness of the offending and the significance of the custodial term to be served, it would in this case be oppressive to extradite the Appellant by reason of the passage of time. On this basis too I would therefore order the Appellant's discharge and quash the order for his extradition (section 104).

Article 8 ECHR

45. I have already reached the conclusion, by reference in particular to the impacts on the family members of the Appellant's extradition, that extradition in this case would be oppressive by reason of the passage of time. I turn to analyse this case – as the Judge did – under the further and alternative prism of Article 8 ECHR (applicable by virtue of section 87). The Article 8 analysis would have been particularly important had I found in the Respondent's favour on the question of whether the Appellant was "unlawfully at large" prior to 2015. I have explained how Article 8 performs its "safety-net" role as to the passage of time (see §20 above), even if the Appellant was not "unlawfully at large", or even if section 82 does not allow any consideration of the overall passage of time from the date of the offending. Ms Townshend submits that extradition would be incompatible with Convention rights (section 87(1)) because it would be a disproportionate interference with Article 8 ECHR rights to private and family life. The Judge conducted the required balancing exercise, including a 'balance sheet' exercise together with reasoned conclusions, having discussed the evidence. I accept Mr Allen's submission that, in doing so, 'the Judge did not miss anything'. Having said that, for reasons which I have already explained, in my judgment the Judge's conclusions that the Appellant left Turkey as a fugitive, and his conclusion that there has been no "culpable delay" in this case, are not conclusions which can stand. In those circumstances, and the Court having updating fresh evidence from both parties, I am satisfied that it is appropriate for this Court to revisit the Article 8 evaluation in the light of all the features of the case. The details as to various relevant factors have been described already, and I do not repeat them. Naturally, I have considered all the circumstances of the case, and all of the evidence.

46. In favour of extradition the familiar, strong public interest considerations, albeit that the particular feature referable to the United Kingdom as a "safe haven" for an individual who is a "fugitive" does not apply (as the Judge considered it did). Linked to those strong public interest considerations in support of extradition is the recognition of the high degree of seriousness of the offending and the significant custodial term, but revisited now in light of the 3 years 3 months 22 days in custody described in the fresh evidence (see §5 above). It is appropriate for the Court to have regard to that reality (cf. HH paragraph 53). The very substantial passage of time (which I have moreover characterised as "culpable": see §31 above) does serve to reduce the weight of the public interest considerations favour of extradition (HH paragraphs 8(6) and 46). Against extradition are the following in particular. The index offending is very old. It was committed at a young age (19). The Appellant has no other convictions in Turkey or in the United Kingdom. He has lived here, openly, for 17 years. The passage of time strengthens the private and family life considerations (HH paragraphs 8(6)), in circumstances of non-fugitivity. There has been: a period of time of 10 years from

conviction to the Request; 13 years from conviction to today; 16 years from the offending to the Request; 19 years from the offending to today. There have been very significant changes in circumstances (see §34 above). The entirety of my assessment of the position of the members of the family is directly relevant here (see §§35-43 above). All five members of the family will suffer as a consequence of the Appellant's extradition.

47. If I were to look at the position of the Appellant – and put to the side the impact on the members of the family – then my conclusion is that extradition would not be an unjustified and disproportionate interference with his Article 8 rights to respect for private and family life. That is so, in in all the circumstances, having regard to the seriousness of the index offending and the custodial term to be served, and having regard to the position in relation to mental health services and his own mental health condition, about which I will say more under the section 91 ground below. Parliament speaks in some parts of the 2003 Act of the position of the requested person (see eg. section 91, discussed below). But Parliament does not speak (section 87) of the Convention rights "of the requested person". If it did so, given the terms of the Human Rights Act 1998, extradition appeals would inevitably be linked to judicial review claims by family members. It is a fundamental principle in the application of Article 8 that the Court must consider each affected family member: cf. Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39 paragraph 43. It is also a fundamental principle, when considering Convention rights, that the Court must recognise as a primary consideration (HH paragraph 11) the best interests of any and each child. The present case, in my judgment, graphically illustrates just how significant those fundamental principles are in the practical application of human rights standards in extradition cases. I have to consider whether extradition would be an unjustified and disproportionate interference with the Article 8 rights to respect for private and family life of the other family members. In all the circumstances, having regard to all of the features of the case, including all of those considerations which weigh in favour of extradition.

48. In the course of deliberating on the facts and circumstances of the present case, I have found it particularly helpful to revisit another 'working illustration': namely, those passages within the judgments in HH in which the position of the appellant PH (alongside that of his wife HH) was addressed by the members of the Court. In that case extradition was not incompatible with Article 8. That was notwithstanding the recognition of the circumstances as "exceptional", and the fact that the effects for the children – losing both parents – would be "deeply painful and distressing and the long-term effects very damaging". That was in circumstances where: PH had been an active participant in serious professional cross-border crime (conspiracy to import drugs) with a supervisory role within a criminal gang; the offending had taken place when he was a mature adult and parent; he had 8 years and 4 months custody to serve which would come down to 4 years and 22 days; he had left Italy in breach of his bail conditions and was a classic fugitive; and the first EAWs had been issued in January 2006 following convictions and sentences that month, the offences having taken place between April and September 2003. That 'working illustration', of the application of Article 8 at the hands of the most senior members of our Judiciary (together with the further working illustration in that case of F-K's Article 8-incompatible extradition in the same judgments) does stand as a powerful reminder of the very exacting threshold which extradition courts must, robustly, apply even in sympathetic cases. That is what I have done.

49. The outcome on Article 8 is this. I have come to the conclusion, on the particular facts and in the particular circumstances of the present case, that extradition of the Appellant would – in the light of all the evidence including the fresh evidence before this Court – be a violation of the Article 8 rights of the other members of the family: Deborah, Tammy, Tanya and Kevin. On this basis too, I would order the Appellant's discharge and quash the order for his extradition (section 104).

Section 91: The Appellant's Mental Health

50. The final ground of appeal is based on section 91(2): whether "the physical or mental condition of the person is such that it would be unjust or oppressive to extradite him". On this topic, as with others, there is material fresh evidence before this Court. I am, again, satisfied that it is appropriate to revisit the evaluation in the light of that evidence. The design of section 91(2) focuses the Court on the mental health of the Appellant alone, as the requested person.

51. The essence of Ms Townshend's submissions on section 91, as I saw it, came to this. A January 2021 expert report by Consultant Forensic Psychologist Dr Parsons records: that the Appellant continued to demonstrate evidence of a post-traumatic stress disorder, would meet the criteria for a depressive disorder and anxiety disorder, and was plainly a current risk of self-harm and suicide (being at that time a hospital in-patient); that the Appellant's psychological condition appeared to have undergone a significant deterioration since December 2019 when Dr Parsons previously reported; that extradition would undoubtedly cause the Appellant significant distress and anxiety; that there would be a period of adjustment during which time it would be very difficult to undertake any therapeutic intervention; that following extradition there would be a period of risk of self-harm and a need for suicide-monitoring steps; and that were the Appellant extradited that would be likely to prolong the duration of his current mental health difficulties and make treatment both longer and more complex. Those concerns are not adequately answered by Further Information provided by the Respondent dated 24 March 2021 setting out the arrangements in relation mental health care within the Turkish prison system. On the evidence, the relevant threshold is crossed: the Appellant has a "particularly serious mental… illness" and extradition "would result in a real and proven risk of a significant and permanent deterioration in his health" (Bobbe v Regional Court in Bydgoszcz, Poland [2017] EWHC 3161 (Admin) paragraph 61); and it is not established that "appropriate measures" would be taken (Bobbe paragraph 63). That is the position in circumstances where the "strong presumption that medical care… will be adequate" which flows from the principle of "mutual confidence between Member States" of the EU (Bobbe paragraphs 55iv, 63) does not apply, since Turkey is not a member of the EU. The test in section 91 is satisfied, just as it was in a case like Debiec (another 'working illustration' case). That was the essence of the argument.

52. I cannot accept those submissions. In my judgment, the Judge's conclusion on section 91 remains unassailable, notwithstanding the changed circumstances and the fresh evidence. The evidence of Dr Parsons cannot, in my judgment, support the conclusion that extradition would result in "a real and proven risk of a significant and permanent deterioration" of a particularly serious mental illness; the prison assurance in this case (relating to Yalvac Prison) is a proper and legally adequate description of appropriate treatment services for mental health; the Respondent's latest Further Information provides a specific detailed evidence of assessment arrangements, prison referrals to hospital, psychiatric services and suicide monitoring. A strong presumption of adequate

medical care arises, not just in EU cases, but from membership of the Council of Europe and compliance with the ECHR (Krakow District Court, Poland v Kolodziejczyk [2015] EWHC 4191 (Admin) paragraphs 14-15; W v Spanish Judicial Authority [2020] EWHC 2278 (Admin) paragraph 59). Viewed in terms of extradition and the Appellant's mental health condition, this case does not involve the degree of severity which could support a favourable conclusion under section 91 (cf. Kicak v District Court in Koszalin, Poland [2021] EWHC 847 (Admin): another 'working illustration', relied on by Mr Allen). I dismiss this ground of appeal.

Conclusion

53. For the reasons I have given, the appeal succeeds by reference to section 85 (no deliberate absence from trial), section 82 (oppression by reason of the passage of time) and Article 8 (private and family life). Articles 5 and 6 were not maintained. The section 91 ground of appeal (requested person's mental health) fails.

Order

54. The Court is always grateful when the legal teams, having received a confidential draft of the Court's judgment, liaise as to the terms of the appropriate order. I make this Order, in the terms agreed between Counsel: "(1) The appeal is allowed, the Appellant is discharged and the order for extradition is quashed pursuant to s.104(1)(a) and s.105 of the Extradition Act 2003. (2) There shall be no order for costs of the appeal before this Court. (3) There shall be an order for the payment of the Appellant's costs before the Magistrates' Court from central funds in accordance with sections 134(1)(a), 134(2)(b), 134(5) and 135B(2)(a) of the Extradition Act 2003. A detailed assessment will be made." Ms Townshend's submissions in support of (2) and (3), with which Mr Allen confirmed his concurrence, were: "1. Where an order for discharge is made by the High Court, an order for costs under section 134(5) of the Extradition Act 2003 may be made by the High Court, pursuant to section 134(2)(b). 2. Section 134(1)(a) applies because an order for the Appellant's discharge is being made by the High Court. 3. Section 134 does not place any restriction on the part of the proceedings for which a costs order may be made by the Court making such an order. 4. Section 135B prevents recovery of legal costs for proceedings. However, section 135B(2)(a) excludes legal costs incurred in the Magistrates' Court from this prohibition. It therefore prevents the appellant obtaining an order for his costs on the appeal to this Court, but it does not prevent him having an order for his costs for the proceedings below. 5. It therefore follows that this Court has the power to make an order for the appellant to recover his legal costs from proceedings before the Magistrates' Court from central funds. 6. In circumstances where the appeal is to be allowed and the Appellant discharged, the Appellant submits that it is just and proper in the circumstances that such an order be made."

12.5.21