Neutral Citation Number: [2022] EWHC 1409 (Admin)

Case No: CO/2449/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/06/2022

Before:

LORD JUSTICE LEWIS
and
MR JUSTICE GARNHAM

- -

Between:

SALIM RAHIM RANA	**Appellant**
- and -	
RICHTER AM AMTSGERICHT, AMTSGERICHT, STUTTGART, GERMANY	**Respondent Judicial Authority**

- -
- -

Malcom Hawkes (instructed by **Hodge Jones & Allen Solicitors**) for the **Appellant**
Stuart Allen (instructed by **Crown Prosecution Service**) for the **Requesting Judicial Authority**

Hearing dates: 5 May 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE GARNHAM

Garnham J:

Introduction

1. This is an appeal against the decision of Senior District Judge Paul Goldspring of 9 July 2021 to order the extradition to Germany of the Appellant, Salim Rahim Rana. Germany is a category 1 territory and accordingly the Extradition Act 2003 ("the 2003 Act") applies.

2. The application for the Appellant's extradition is based on an accusation European Arrest Warrant (EAW) issued on 12 September 2019 by the District Court in Stuttgart and certified by the NCAA on 6 April 2020. It seeks the Appellant's extradition to face one charge of market manipulation, 33 charges of fraud, with alleged aggregate loss to victims totalling €54,811.25, and 58 acts of attempted fraud which, if completed, would have caused losses of €206,345.96. The Appellant was arrested at Heathrow Airport on 23 May 2020 on a stopover of a flight from India to his home in Canada.

3. The Appellant relies upon four grounds of appeal, namely that the Senior District Judge ("SDJ") was wrong *not* to conclude that:

   i) The EAW was invalid for want of adequate particulars of sentence (contrary to s2 (4) of the 2003 Act)

   ii) The EAW does not describe extradition offences (contrary to s (10))

   iii) The extradition of the Appellant would constitute a disproportionate interference with his rights and those of his family contrary to Article 8 ECHR, (and s21(A) of the 2003 Act) and

   iv) Due to the passage of time, the Appellant's extradition would be unjust or oppressive, (contrary to s14).

4. On 7 February 2022 Sir Duncan Ouseley, sitting as a judge of the High Court, granted permission to appeal on all grounds, observing that "*The appeal court could well be significantly assisted by understanding the German procedure for recording or not recording witness evidence, which is later used in the trial of another defendant in related alleged criminal conduct...*"

5. Following that indication, the Appellant sought and obtained a report from an expert in German Criminal Law, Dr Margarete von Galen. A significant part of the hearing of this appeal was taken up with considering Dr von Galen's report. We permitted the requesting authority to respond to that report and gave the Appellant the opportunity to reply. Dr von Galen's report goes primarily to ground 4 and I consider it at that stage of the analysis which follows.

6. The Appellant on this appeal was represented by Mr Malcolm Hawkes and the requesting authority by Mr Stuart Allen. We are grateful to both counsel for their written and oral submissions.

The Factual Background

The Appellant's Circumstances

7. The Appellant is 62 years old and has dual Canadian-Kenyan nationality. He is of good character. He was born in Kenya and moved to Canada in 1973 at the age of 15. After a period studying in the UK, he moved back to Canada before moving to the US in 1996. Between 1996 and 2003, he divided his time between Calgary in Canada and Las Vegas in the US. In about 2015 he moved back to India to work on various business projects.

8. The Appellant is the father of four, now adult, children, the eldest of whom is his son Salim Jr. Salim Jr is the father of Ruby who was born on 15 June 2019. During the currency of these proceedings, Ruby was diagnosed with Stage 4 liver cancer with metastases to the lungs. She has undergone extensive chemotherapy both before and after surgery. She became too unwell to continue with the chemotherapy which was paused on 8 April 2021. She has had intermittent hospital admissions since.

9. The Appellant was married, but divorced in 2002. His current partner lives in Ukraine. He has no family members in either the UK or in Germany. His health is stable but generally poor. He was hospitalised in June 2019 with pancreas and gallbladder problems. In July 2019 he underwent heart surgery. A few weeks later he suffered a thrombosis and was immobilised for a few months.

10. The Appellant's mother is 82 years old. She lives in Canada. She suffers from Alzheimer's disease. In January 2021 she underwent surgery, the complications of which caused her admission to intensive care.

11. On 16 October 2020 District Judge Radway agreed to vary the Appellant's conditional bail to enable him to travel back to Canada to be with his family. During the bail variation proceedings, the court's attention was drawn to the provisions of the Canada-Germany Extradition Treaty. In consequence, the Appellants knew that if he did not return from Canada, he could have resisted extradition on the basis of his nationality. Despite this, on payment of an increase bail security of £75,000, the Appellant travelled to and returned from Canada on the dates specified by the court.

12. The Appellant insists that he has not committed any offence, whether as alleged in the EAW or otherwise. He says he remains deeply concerned that he is not well enough to withstand the rigors of imprisonment. He says the effect of his current circumstances is that he is, in effect, stranded in a third country at a time of crisis for his family in Canada. He says that in those circumstances there is a powerful case to take measures less coercive than extradition. He says that he has made repeated offers to answer questions from a Germany prosecutor, but those offers have been rebuffed.

13. He says that there is no doubt that Ruby's condition would be subject to anxious monitoring in the months and years to come. He says it would *"be unbearable*" were he unable to be with his family when needed because of his extradition. His principal concern is the prospect of years of delay before matters would be dealt with in Germany.

The Index Offences

14. The underlying conduct is outlined in the EAW as one offence of market manipulation and 91 offences of fraud (including 58 attempted fraud). The attempted market manipulation relates to the share price of a company called *Clean Enviro-Tech Corporation* (CETC) between 1 January and 1 August 2013. It is said that the Appellant, together him with 5 other individuals (Toelderer, Ponsford, Cook, Haentjes, and Shepherd), engaged in the *"conscious and deliberate inflation of the share price of CETC. The promotional materials were published by members of the group or at their instigation in numerous market letters, via electronic media, in smartphone applications and social networks on the internet"*. These constituted *"target purchase recommendations"*.

15. It is said the groups failed to give *"adequate and effective disclosure of their own shareholding."* The provided information is said to be both incorrect and misleading as to the business affairs of CETC. It was alleged that, as a result, between 9 May and 20 June 2013 the company share price rose from €0.15 to €1.185 on the Stuttgart stock market. It was said that this was artificial as the company was only a "*letterbox*" company, without cash or employees, and which had "*an unqualified management*". Following a warning from the Federal Financial Supervisory Authority, the share price fell back to €0.15.

16. It is said that the Appellant, together with Ponsford, Cook and Shepherd, provided financial backing for the enterprise, while Toelderer and Haentjes, acting with others, were *"mainly responsible for the distribution of the publications".*

17. At least 33 investors acquired shares between 9 May and 1 August 2013 via a bank nominated by the Appellant and his co-accused to handle the sale of the shares. The EAW alleges that 33 investors suffered a loss as a result of the rise and then fall in share price.

18. The Appellant is also alleged to have attempted to deceive a further 58 investors *"about factors that determine the value of the shares"* of CECT. The warrant acknowledges that those investors had *"already decided to buy the shares… due to other circumstances".* Those investors would have suffered a loss of €206,345.96 *"if they had been influenced by the publication initiated by the Appellant"*.

19. The conduct as a whole is said to comprise one offence list is ticked of deliberate manipulation, 33 offences of collective fraud on a commercial basis and 58 offences of attempted collective fraud, contrary to paragraphs 38 and 39 of the German Securities Trading Act and paragraphs 263 of the Germany criminal code. The council framework offences is ticked for "*swindling*". Box C on the EAW asserts that the maximum custodial sentences for the offences is 10 years imprisonment.

20. Further information was provided by way of a letter from the requesting authority dated 18 January 2021. That letter asserts that the potential sentence for "collective fraud on a commercial basis", and for an attempt to commit that offence, is 10 years imprisonment as indicated on box C.

The Grounds

Ground 1 – Section 2

21. S2(4) of the 2003 Act requires that the EAW sets out that the "*particulars of the sentence which may be imposed under the law of category 1 territory in respect to the offence the person is convicted of it*."

22. Article 2 in the Council Framework Decision of 2002 ("FD") provides

> "European Arrest Warrant may be issued for acts punishable by the law of the issuing member state by custodial sentence or detention order for a maximum period of at least 12 months…"

23. In addressing the Appellant's arguments under s2(4) the SDJ said this:

> 55. S. 2(4)(d) requires particulars of the sentence which may be imposed under the law of the category 1 territory in respect of the offence if the person is convicted of it. The purpose of this provision is clear; namely to assess proportionality as to the serious of the offence. This is done through the prism of maximum sentence. Article 2 FD states that an EAW may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months. To facilitate that proportionality check, to make sure that the accused conduct is an extradition offence, every EAW/AW has to specify the maximum sentence that can be imposed.
>
> 56 . For the purposes of complying with s. 2 that is the sole requirement.
>
> 57 . The maximum sentence that may be imposed is expressed clearly in connection with the offences and conduct contained in the warrant. This requirement is satisfied.
>
> 58 . There is no requirement to give an indication of a likely sentence for the purposes of s.2 of the Act, although it is a relevant consideration under Section 21 A EA 2003 and that is the proper avenue for attack in this regard.
>
> 59 . There is no indication that the RP would be prosecuted for any other offences other than those set out in the EAW and the further information. However, even if the representation is correct that both the warrant and the further information leave open the possibility that the index conduct would be prosecuted as an administrative offence that does not affect the validity of the EAW.

> 60. it is impermissible for the German Prosecutor to prosecute the RP for offences other than those set out in the EAW as a result of s. 17 of the Act and also at Article 27 FD.
>
> 61. There is no evidence of any ulterior intent to prosecute for other offences disclosed on the evidence. The most that can be said is that there is a possibility may be preferred. It is hard to think of an extradition case when this would not be the situation. In that eventuality, s. 17 of the Act makes it plain that the RP could be prosecuted for conduct arising out of the same facts as disclosed by the EAW provided it is within the remit set out at s. 17(3)(b) of the Act or s. (d) or (e) without his consent nor that of the UK Judge. (sic)
>
> 62. But none of that changes the validity of the EAW nor does it require the German Authorities to specify every offence the RP could conceivably be prosecuted for which arise from the conduct described.
>
> 63. The requirements of S2 , that is the sentence particulars as required by s. 2(4)(d) are present. The EAW is valid and the challenge must fail.

24. Both before us and before the SDJ, Mr Hawkes argued that the further information of 18 January 2021 describes the conduct as falling under s263 of the German Criminal Code for the completed offence and s23 for the attempted offence. He says that that characterisation is far more limited than that contained in the EAW, which suggests that the conduct falls under the German Securities Trading Act as well as the numerous paragraphs of the German criminal code cited. He says both the warrant and the further information open the possibility that the relevant conduct will be prosecuted as administrative offences. Such offences would not amount to extradition offences under s10 and s64 of the 2003 Act. The same may be said in respect of the references to an offence contrary to paragraph 20(a) the German Security Trading Act - prohibition of market manipulation -which fails to set out what penalty such conduct attracts.

25. Referring to *Brodziak & others v Poland* [2013] EWHC 3394 (Admin), Mr Hawkes argued that the maximum sentence in an EAW is not simply a global tariff to cover whatever may be contained in the EAW; rather, the maximum sentence must be set out next to each offence. He said the 2003 Act was modified by the Extradition Act 2003 (Multiple Offences) Order 2003, which made it clear that, where a Part 1 warrant is issued for more than one offence, the terms in the Act are to be read as referring to '*offences'*. He argues that where an EAW alleges three types of offences, gives only two articles of the criminal code which lead to imprisonment, yet sets out several administrative, non-imprisonable offences which would also embrace the conduct as alleged, the EAW is self-evidently not compliant with s2 and the judge was wrong to find otherwise.

26. I would reject those arguments. On a fair reading, the EAW makes clear in Box E that the Appellant is charged with an offence of market manipulation contrary to section 38 (4) of the German Securities Trading Act, an offence which is punishable by 5 years imprisonment or a fine. The further information of 18 January 2021 makes clear that the 91 fraud offences are punishable, pursuant to s263 of the German Criminal Code,

by a sentence of up to 10 years imprisonment. The further information confirms that the maximum sentence of 10 years imprisonment applies to the attempted offence as well as the completed offence. That is sufficient to satisfy s2 (4) of the Act.

27. In any event, the German authorities are constrained by Article 27 of the framework decision as to the alternative offences that could be pursued against the Appellant on surrender. Accordingly, even if it could be said that the EAW appears to contemplate additional or alternative offences which are merely administrative in nature and attract no prison sentence, the German authorities could not prosecute the Appellant for any such offence.

Ground 2 – Section 10 and Section 64-65

28. S10 of the Act provides that *"(2) The judge must decide whether the offence specified in the part 1 warrant is an extradition offence*."

29. S64 and s65 define what is an extradition offence. Those provisions have been amended twice. They were first amended by s164 (1) of the Anti-Social Behaviour, Crime and Policing Act 2014. Second, they were amended by s12(2)(9)(A) of the European Union (Future Relationship) Act 2020.

30. The 2014 Amendment enabled the appropriate authority of a Category 1 territory to issue a certificate which showed that the conduct fell within the European Framework List, a step which would eliminate the need to establish dual criminality in the UK. The 2020 amendment deleted subsection 5. In the words of the Explanatory Notes, the 2020 amendment

> "removed the ability for UK courts to waive the requirement of dual criminality under the Agreements. As a result, the list of exempted offences under the European Arrest Warrant framework, which is made optional under the European Arrest Warrant framework, which is made operational under the Agreement will no longer be considered by UK courts in relation to any extradition request received by the UK."

31. The 2020 amendment, however, does not apply if the person in respect of whom the warrant was issued was arrested under the warrant before "Implementation Period completion day" ("IP completion day"). IP completion day was 31 December 2020 and the Appellant was arrested on 23 May 2020. Accordingly, the 2014 amendment, and not the 2020 amendment, applies on the facts of the present case.

32. Prior to the 2020 amendment, but after the 2014 amendment, S64 provides as follows:

> *(2) The conduct constitutes an extradition offence in relation to the category 1 territory if the conditions in subsection (3), (4) or (5) are satisfied.*
>
> *(3) The conditions in this subsection are that—*
>
> *(a) the conduct occurs in the category 1 territory;*
> *(b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom if it occurred in that part of the United Kingdom;*

> *(c) the conduct is punishable under the law of the category 1 territory with imprisonment or another form of detention for a term of 12 months or a greater punishment…*
>
> *[ss4 applies to conduct occurring outside the cat 1 territory]*
>
> *(5) The conditions in this subsection are that-*
> *(a) the conduct occurs in the category 1 territory;*
> *(b) no part of the conduct occurs in the United Kingdom;*
> *(c) a certificate issued by an appropriate authority of the category 1 territory shows that the conduct falls within the European framework list;*
> *(d) the certificate shows that the conduct is punishable under the law of the category 1 territory with imprisonment or another form of detention for a term of 3 years or a greater punishment.*

33. The SDJ considered s10 between paragraphs 64-74. He said:

> "64. The framework list is ticked against swindling.
>
> 65. This means that a dual criminality exercise is not required. The offences qualify as extradition offences pursuant to s. 64(5) of the Act.
>
> 66. The requirements of s. 64(5) of the Act are; (a) the conduct occurs in the category 1 territory; (b) no part of the conduct occurs in the United Kingdom; (c) a certificate issued by an appropriate authority of the category 1 territory shows that the conduct falls within the European framework list; (d) the certificate shows that the conduct is punishable under the law of the category 1 territory with imprisonment or another form of detention for a term of 3 years or a greater punishment.
>
> 66. Although the court must scrutinise the warrant to ensure that it complies with the relevant requirements, it should ordinarily accept the classification of the issuing member state, unless there is an obvious inconsistency which shows that the conduct alleged does not amount to an offence under the law of that state: see *Assange v Swedish Judicial Authority* [2011] EWHC 2849 (Admin).
>
> 67. Mr Hawkes submits that the fact that the Council Framework Offence list is ticked for 'swindling' does not save the position for the German authorities; the dual criminality question arises from the very wording of the EAW itself. It is an internally contradictory warrant. It follows that the 58 alleged offences of attempted fraud must be struck out for failure to comply with ss. 10 and 64 EA 2003.

67. Further he submits that the conduct described as 'attempted collective fraud' does not, on the facts, amount to a criminal offence.

68. I disagree with that analysis. The German warrant states that '*the investors had already decided to buy the shares of Clean Enviro Tech Corporation due to other circumstances'* and would have suffered losses '*if they had been influenced by the publications initiated by RANA'*....Where the EAW candidly accepts that the actions of the requested person had no bearing on the actions of the 58 investors in the case, it cannot be said that the RP has done anything either to deceive or cause those investors any loss. The contradiction in the EAW, and the further information that the company's shares were either worthless, or were worth €0.15 does not resolve the issue; if the shares had value, were lawfully tradable on the German stock exchanges and investors decided to purchase those shares, it cannot be said that there is any element of deception or dishonesty, which is the key ingredient in fraud.

69. The German Authorities clearly distinguish between 33 cases of a completed offence fraud and 58 cases of an attempted offence.

70. The submission really amounts to an argument about whether or not it can prove that it because of that actions of the RP that the investors made their decision to invest. In 33 cases it would appear that the German Authorities think they can prove their case. In 58 cases it seems that they cannot prove it was the actions of the RP that caused the investment decision to be made, However, again that is irrelevant for the purposes of these extradition proceedings, prima facie case does not feature as an issue.

71. All of s64 requirements are met. No more is required.

72. If I am wrong about that, it matters not because in fact, the conduct would nonetheless meet the double criminality test. In this jurisdiction those 58 offences would equate to completed offences for the purposes of s. 1 and Fraud Act 2006.

73. The requirements of, dishonesty, making of a false representation and intention to make gain for himself are all made out on the basis of the allegation. Fraud in E&W is a conduct crime not a result crime. There is no requirement in E&W for any gain to be realised. Nor if monies were paid would the Crown be obliged to prove that it was solely a consequence of the misrepresentation made. Even if in Germany the position would apparently be different, that is irrelevant for the purposes of considering Section 10. So long as the categorisation of the offending in the framework list is an accurate one, the double

> criminality test is superfluous. But in any respect the 58 'attempt offences' qualify as extradition offences pursuant to either s. 64(3) & 64(5) of the Act.
>
> 74. Therefore the challenge fail."

34. Mr Hawkes argued before the SDJ and before us that the conduct concerning the 58 investors does not, on the facts, amount to a criminal offence. He says that the investors would have suffered losses "*if they had been influenced by the publication initiated by Rana*". But, he argues, where the EAW candidly accepts that the actions of the Appellant had no bearing on the actions of the 58 investors, it cannot be said that the Appellant has done anything either to deceive the investors or to cause them any loss. He also suggests that the allegation is "*problematic*" because the shares are said to be worth nothing less that €0.15. If they had value and they were lawfully tradeable on the German Stock exchange, and investors decided to purchase those shares independently of the allegedly misleading publications, then it cannot be said that there is any element of deception or dishonesty. And that, he says, is a key ingredient in fraud. Furthermore, Mr Hawkes argues, there is no evidence of the effect on CETC's share price following the 58 investor's purchase of €206,345 worth of shares. It is not, says Mr Hawkes, a question of what the German authorities '*think';* it is a question of whether there are grounds to prosecute. If the EAW states, candidly that they do not have such grounds, any request to extradite and prosecute the Appellant is purely speculative.

35. In my judgment, none of the arguments advanced by Mr Hawkes as to the evidential strength of the prosecutor's case are of any significance. S64(5) of the Act applies to the facts of this case and its terms are satisfied here. As the SDJ said, the conduct here occurred in a category 1 territory; no part of the conduct occurred in the UK; a certificate, namely the Framework List, was ticked for "swindling", which is conduct falling within the European Framework List; and the certificate shows that the conduct is punishable under the law of Germany with imprisonment of a term 3 years or greater. That being so, the SDJ was correct to conclude that all the S64 requirements are met and nothing more is required. I agree with the SDJ that there is no obvious inconsistency in the Requesting Authority's request which might suggest that the conduct alleged does not amount to an offence under the law of Germany. That is enough to dispose of this ground of appeal.

36. Nonetheless, like the SDJ, I have gone on to consider whether, if that were not the case, the conduct alleged meets the double criminality test. In my view, it does. The German offence of market manipulation is the equivalent of a breach of s89-91 of the Financial Services Act 2012. What is described as the attempted collective fraud offences in the warrant amounts, in English law, to a conspiracy to defraud, contrary to common law. The attempts to mislead investors is the equivalent of fraud, contrary to s1 and 2 of the Fraud Act 2006 or attempted fraud, contrary to the Criminal Attempts Act 1981. The fact that, but for the actions of the Appellant and his co-accused, the investors would not have invested does not mean that this was not capable of being an attempt. It was. It follows the S64(3) is also satisfied.

Ground 3 – s21A

37. S11 (5) provides that, in circumstances such as the present, where the person is accused of the commission of the extradition offence but is not alleged to be unlawfully at large after conviction *"the judge must proceed under s21 (A)"*.

38. S 21 (A) of the Act provides:

> "(1) If the judge is required to proceed under this section (by virtue of section 11), the judge must decide both of the following questions in respect of the extradition of the person ("D")—
>
> (a) whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998;
>
> (b) whether the extradition would be disproportionate.
>
> (2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); but the judge must not take any other matters into account.
>
> (3) These are the specified matters relating to proportionality—
>
> (a) the seriousness of the conduct alleged to constitute the extradition offence;
>
> (b) the likely penalty that would be imposed if D was found guilty of the extradition offence;
>
> (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D."

39. I deal first with the issue of proportionality and less coercive measures.

40. In rejecting the case under S21 (A), the SDJ said this:

> "88. The divisional court in the leading case of *Miraszewski v District Court in Torun* [2014] EWHC 4261 made clear the court is assess proportionality per se with regard to the statutory considerations and not any extraneous matters. That requires this court to consider the seriousness of the offending, likely sentence upon conviction and whether any less coercive measures are available and appropriate.
>
> 89. As to the seriousness, contrary to the view expressed in the written submissions by Mr Hawkes, the offending is of some gravity and committed for financial gain. The EAW states; *"the defendant RANA and his accomplices acted with the intent to*

create for themselves a not inconsiderable source of income of a certain extent and duration in order to finance their living costs through a corresponding pecuniary advantage in the same amount."

90. The allegation is that the RP had an important, in fact leading role. Further Information dated 9th June 2020 is clear; RANA is the main culprit in our case. He was the mastermind of the operation. He spread his shares of the Clean Enviro Tech Corp. among his own companies and organized the marketing and the trade of the shares. RANA instructed the separately prosecuted accomplices mentioned in the EAW. He profited the most.

91. In terms of value, the German Authorities were asked In Box E of the European arrest warrant, it is said that the actual loss occasioned was 54,811.25 euros. Additionally, the fraudsters attempted to obtain a further 206,345.96 euros.

92. The further information of June 2020 states that the actual loss as well as the attempted loss can be attributed to RANA in full. According to German law he can be held responsible for the entire loss. In addition, the market manipulation lead to a profit of circa 2.11 million Euro for RANA.

93. The assertion that the RP's culpability would be medium, on the basis that, per the warrant, he was not the principal, but rather part of a group of accomplices (Box E) is clearly not an accurate interpretation of the evidence as it ignores the clarification from the further information, the two should be read conjunctively not disjunctively and selectively.

94. The German Authorities could not be clearer in their response dated June 2020. The RP was the mastermind of the operation.

95. As such the RP's references to SGC at presents is flawed as to the likely penalty that the RP would receive if convicted on a full - facts after trial before the courts in the UK.

96. Given the details of his role and the potential losses involved, there is in fact every possibility that he would receive an immediate custodial sentence.

97. As to less coercive measures two principle points arise, firstly the German Authorities have responded to all enquiries made of them and refused a s.21b request. and secondly the RP has no ties to the UK. He was arrested inbound from India on 23 May 2020 at Terminal 2 at Heathrow airport en route to Canada, he has been living in India since 2015. His partner lives in the Ukraine and his children in North America. It is clear that the

> case is for prosecution and that the Germany Authorities are abreast of their own prosecution.
>
> 98. I have not engaged with the suggestion that he should not be surrendered to Germany because the German prosecutor is in some way manipulating the system by using the United Kingdom as the requested State rather than Canada because of the lack of an extradition treaty between Canada and Germany it is both speculative and irrelevant for the purposes of considering this request
>
> 99. Given the above I am entirely satisfied that the offending is on its face serious, would likely lead to a custodial sentence if convicted in this jurisdiction and that not only have less coercive measures been ruled out by the German authorities they are not appropriate. Therefore, I find the request is proportionate.

41. Mr Hawkes repeated before us the arguments advanced before the SDJ and developed his points further. In particular, he asserted that there is no real case to answer here so that the extradition request amounts to an abuse of process. He says the index conduct should be viewed as low value as the total value of the losses was €54,811, meaning an average individual loss to each investor of €1660. He says the loss of an investment sum is broadly to be expected when investing in a new, high-risk, start-up company. He says the Appellant is entitled to ask the court to determine seriousness by comparing the nature and seriousness of the conduct alleged with other offences of its type. He invites comparison with the sentencing guidelines for England and Wales for conspiracy to defraud. The likely sentence here, he says, would be less than 2 years, which sentence would be suspended.

42. Mr Hawkes also contended that the Appellant's discharge would result in his return home to Canada and Germany could then, if it chose, seek his extradition from there. The Germany-Canada extradition treaty provides that where extradition is refused on the grounds of nationality, as might well be the case here given the Appellant's Canadian nationality, each country undertakes to prosecute the alleged offences according to their own national law. Accordingly, discharge would not result in impunity.

43. In my judgment, there is no merit in any of these arguments. The SDJ was entirely correct in his approach to seriousness and gravity. The Appellant makes repeated assertions about the weakness of the German case. But there is no ground under the 2003 Act to argue that the prosecution case is evidentially unsound. The German court is not required to provide evidence to the UK court, nor to provide information as to the strengths of their evidence.

44. In any event, in my view, it is plain that the German case is a serious one. It is the prosecution's case that the Appellant is the main culprit in a substantial fraud which had the potential to make him a very considerable profit. The SDJ was entitled to conclude that there was every possibility that he would, in England and Wales, receive an immediate custodial sentence. He was not *deferring* to the requesting state's assessment of seriousness; he was, quite properly, taking that assessment into account and comparing it with what would be the position in this jurisdiction.

45. In dealing with less coercive measures at paragraph 97 of his judgment, the SDJ did make an error. He correctly pointed out that the German authorities have responded to all enquiries made of them and refused the S21 (b) request. But he went on to say that "*the RP has no ties to the UK*." Whilst that is factually correct, it is, in my view, irrelevant to the issue the SDJ was addressing. However, that mistake does not, in my judgment, lead to a conclusion that the SDJ was wrong in his conclusion on this topic. The SDJ was correct to point out that the German authorities had properly responded to all enquiries made of them and had dismissed the S21(b) request. The German authorities are entitled to seek the Appellant's extradition from the UK, rather than allowing his return to Canada, then making an application for extradition from Canada, in the knowledge that the Canadian authorities would then prosecute him domestically. In my judgment they were entitled to dismiss the suggested alternative measure given the circumstances of the case and the seriousness of this alleged offending. The SDJ was not wrong to conclude that the request was proportionate.

46. The SDJ then turned to address Article 8 ECHR. He correctly identified the principles emerging from the leading authorities: *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, *Norris v USA* [2010], UKSC 9 *Polish Judicial Authority v Celinski* [2015] EWCH 1274 (Admin).

47. Then at paragraph [101]-[106] he sets out his approach.

> "101. Therefore, I am required to assess the issue by conducting a balancing exercise between the competing interests in favour of surrender as against those in favour of discharge.
>
> <u>Factors in favour of Surrender</u>
>
> - The public interest in honouring our extradition arrangements
> - The offending is of some gravity and committed for financial gain
> - The Requested person has no ties to the United Kingdom, he's not married and has no dependent children
> - The requested person has knowledge of the proceedings even if not a fugitive.
>
> <u>Factors in favour of discharge</u>
>
> - The age of the allegations
> - The RP is 61 years old (7/10/58) and a dual Canadian-Kenyan national of good character in this and in every jurisdiction.
> - The RP is the father to 4, now adult children: and wishes to continue to provide support to them which will not be possible from Germany

- The welfare of his 15-month-old granddaughter, Ruby (15/6/19)

- The RP was married but divorced in 2002. His current partner lives in Ukraine. The RP has no family members in either the UK or in Germany. He is currently staying with a friend of a friend in London.

- The RP is in health is poor: he was hospitalised in June 2019 with pancreas and gallbladder problems, which led to the insertion of stent in his gallbladder.

102. Quite rightly the focus of Mr Hawkes's submissions was a combination of the seriousness of the offending, on his view, the delay in bringing the proceedings and the Article 8 rights of the requested persons granddaughter.

103. The starting point in Part 1 cases is the public interest in the UK honouring its obligation in respect of requests for surrender. that public interest can be overcome but only where the counter vailing factors outweigh the public interest. Here the allegation is in fact serious, the German authorities frame how serious by reference to their proceedings It is not for this court to undermine the requesting authorities view of seriousness by imposing its own.

104. I have already indicated that I believe that the request is proportionate per say and set out the reasons therefore, the same reasoning applies when considering the serious of the offending and the proportionality of the interference with the requested persons rights. I have also dealt with delay under section 14, the requested person is entitled to and properly does raised the issue under the heading of articulate as well. I don't intend to set out in any detail of full analysis of the case law because it suffices to say that even though I rejected the section 14 argument the delay is still relevant in militating the public interest. Here, I accept, for the purposes of Article 8 that the delay and the culpability as I have found it do indeed militate the public interest to a degree. however, I have already set out the limits to expectations one should have of the German authorities to search the globe for Mr Rana before deciding how to seek his surrender and in extradition terms both the delay and the changes to his life are minimal, that in no way minimises the delay but does set a context, as does the fact that he was aware of the proceedings and could should he have chosen to have made himself available to the German authorities to deal with the matter in Germany .

105. In many ways the most powerful submission is the rights of his granddaughter and in relation to providing support for her and the wider family. Unless one has lived with seriously illness to a young child in the family it is hard to comprehend the

> emotional toll it takes and in coming to the conclusion I have in no way do I diminish or undermine the effect (emotionally) his granddaughters illness will have on the requested person. She is quite clearly very ill and he is quite clearly and understandably very concerned but he is not her carer and she will be and is being cared for to the best of her parents and the Canadian health systems ability. Whilst the Article 8 rights of her and the RP are engaged, in the circumstances the fact that he is not the child's carer and that surrender would remove emotional and practical support as opposed to daily care is a significant factor in deciding whether or not on its own or cumulatively it outweighs the public interest and makes the request disproportionate. I draw the distinction between a carer and a relative because had the granddaughter been permanently in his care I might have been persuaded to discharge.
>
> 106. However, she is not, and I have concluded that the request is a proportionate interference with his and his family's rights under the convention and therefore must reject the challenge under Article 8."

48. Before us Mr Hawkes argued that the judge fell into material error in his balancing exercise; he found as a factor in favour of extradition the Appellant's lack of ties to the UK, being unmarried and having no dependent children. The Article 8 test, he said, is not a test of ties to the UK. The test is the interference with the private and family life of a person of being extradited. He said it was wrong to consider that the principle of international co-operation in enforcing criminal law against the right to private and family life required a requested person to reach a *"striking or unusual"* or *"high"* threshold to prevail under Article 8. He said that the court should have regard to the significant delay in this case and should attach substantial weight to the Appellant's personal circumstances.

49. In particular, Mr Hawkes said the changes to the Appellant's life had been profound in the period since the alleged commission of the offences and the request for extradition. He said that the impact of his granddaughter's life threatening illness had been devastating. He said that there was a *"cruel twist of fate that this crisis arose seven years after the index conduct"*.

50. I would reject Mr Hawkes' submissions. The criticisms of the SDJ's approach to Article 8 are more matters of form rather than of substance. It is true that the fact that the Requested Person has no ties to the United Kingdom and has no dependants amounts to the absence of factors mitigating against extradition rather than positive factors in favour of surrender. And the fact that the requested person has knowledge of the proceedings serves only to reduce the weight to be attached in his favour to the fact that he is not a fugitive. But it is apparent that the SDJ had the relevant factors well in mind.

51. The SDJ correctly identified the principles emerging from the relevant authorities and conducted the appropriate balancing exercises. He considered the relevant factors and applied a careful analysis of the facts. He correctly recognised the tragedy of the Appellant's granddaughter's position but reached a conclusion that was properly open to him on the facts.

52. The factors in favour of extradition are cited in almost every extradition case but that does not, in any sense, reduce their significance or the weight to be attached to them. It was for the SDJ to identify the competing factors and weigh them against each other. That he did. He recognised the significance of the medical condition of the Appellant's granddaughter and plainly took it into account. He did not suggest that it was necessary for the Appellant to demonstrate some extraordinary hardship before according weight to the effect of extradition on his Article 8 rights; he simply recognised what is well established, namely that mere hardship is not enough. I see no grounds on which it can be said that the SDJ's conclusion on this issue was "wrong".

Ground 4:

53. Section 14 provides as follows:

> A person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of passage of time since he is alleged to have (a) committed the extradition offence (where he is accused of its commission).

54. In addressing the s14 argument the SDJ said this:

> "75. In order to establish oppression, the RP has to show that on the balance of probabilities that it would be unjust or oppressive to extradite him.
>
> 76. Applying the authorities, I consider the following factors as relevant
>
> 1. Any culpable delay on the part of the IJA
>
> 2. The length of that delay
>
> 3. Whether a false sense of security has been engendered
>
> 4. Has the RP's circumstances changed significantly
>
> 5. What were the circumstances when the RP left Germany
>
> 6. The effect extradition would have on those reliant upon him
>
> 7. The gravity of the allegations
>
> 77. There clearly is a delay in the issuing of the arrest warrant in 2019 from the alleged offending in 2013. What is not clear is whether the previous request was for the same offending but proceeding on the basis at the moment that it was clearly the German authorities had in mind to extradite the requested person in 2015. We know from the requested persons own evidence that he was living in India at the time and it is right to say that I am unaware of the extradition arrangements between Germany and India and it is a fair inference to draw that it may well have been

deemed too difficult as against the streamlined process of the European arrest warrant process . the requested person suggests that he was cooperating throughout this b ut chose not to return to Germany in order to sort out the issue he also says that they should have used an Interpol red notice if they wished to seek his extradition from India. It is not clear whether they knew he was in India or indeed where he was at all.

78. A Red notice isn't just a 'track and trace device'. It leads to physical detention of the Requested Person in more or less any country in which he is detained, irrespective of that countries' human rights record (risk to RP in apprehension or detention) or extradition relationship with the requesting state, many Prosecutors are (absent clear risk to public safety) reticent to use them.

79. Although not a fugitive the RP has been aware of these allegations for a long time and chosen not to surrender to them. Any suggestion of delay by the German Authorities needs to be placed in a context of at the very least an acquiescence in that delay by the RP.

80. Therefore although the period of time from which the delay should be considered is partly explained by the judicial authority Mr Hawkes suggests that the lack of clarity about the 2015 proceedings or why they chose not to seek his surrender from other countries shows that the authorities are culpable.

81. It should be remembered that it is impossible for any judicial authority to undertake a search of every corner of the globe and, at least to an extent, he's knowledge of the proceedings militates any culpability on behalf of the judicial authority.

82. Like all aspects of culpability there are levels and in this case whilst I accept that the German authorities could have been more diligent in their enquiries that is militated by the fact that on the face of it the investigation and gathering of evidence was a complex and lengthy process, searching for the RP frustrated by his absence from the requesting state, all of which would have contributed to any delay before the domestic search and the subsequent EAW

83. The delay is six years and although that is a considerable amount of time it must be viewed in the context of the oppression that it causes not just its length. The mischief to which the section is aimed is not delay in itself but the impact on the RP it has, the oppression it causes. To that end I have carefully considered whether or not the requested person had a full sense of security engendered and whether he has had any significant changes to his life in the intervening. The answer to both of those questions is adverse to the requested person , firstly he knew of the

> allegations and chose not to return to Germany to face them and at no point was he told the German authorities were no longer pursuing them, in fact he had German lawyers instructed to deal with the matter will be at he says they did not very well. His life has not changed significantly in the sense that he has no dependent children and has lived a transient life until he settled his roots in Canada , of course I accept that the illness to his granddaughter is a significant event but not sufficient in my view so as to create a change in circumstances under this challenge.
>
> 84. Finally I am asked to consider that the offending is not serious in the context of oppression, for the reasons I set out below when dealing with proportionality I do not accept that analysis and consider that on the German prosecutors case, taken at its highest, which I am obliged to do at this stage it is indeed relatively serious .
>
> 85. The test is whether the passage of time renders surrender oppressive. The RP cannot, in my view, show that it reaches that high threshold. The delay is not extensive by extradition standards, the offending potentially serious, the delay is not culpable to any great degree, no false sense of security has been engendered, his circumstances have not changed significantly in the interim and although
>
> 86. Oppression is not made out in this case. Although not specifically pleaded as such, much is made by Mr Hawkes as to the behaviour of the German prosecutor and the strength of the case against the requested person, it is not argued that this would make surrender unjust in the sense that a fair trial is prevented and issues as to the strength of the evidence are not for this court consider . It cannot be said to be unjust to try him due to the passage of time either.
>
> 87. I therefore reject the challenge under section 14."

55. Mr Hawkes repeated the argument before us that the German authorities have been dilatory in the period since the commission of the alleged offence. He points out that Germany is a member of the Schengen Information System which facilitates the exchange of information about wanted persons in the Schengen area of countries. He says that the German authorities could have issued an alert via that system from at least 2015 but chose not to do so until September 2019. He says the German authorities could have issued an Interpol red notice so as to locate the Appellant whereabouts in almost every country of the world but they failed to do so. He says that there is no evidence that this matter has been treated with any sense of urgency. He says the six-year delay to 2019 before seeking the Appellant's extradition is unexplained and therefore unjustified.

56. He says that the changes in the Appellant's family circumstances during the material time have been profound. He points again to the difficulties suffered by his granddaughter, to the fact that the Appellant's mother is in ill health, and to the fact that

his own health has deteriorated. He submits that the Appellant is in a fundamentally different position in 2021 to that in 2015. Mr Hawkes argues that the SDJ should not have speculated as to the difficulty of effecting extradition from India. He says he should not have decried the use of a red notice under the Interpol scheme. He says he was wrong to criticise the Appellant for failing voluntarily to surrender to Germany. He says the six-year delay is a considerable period in itself and a period in which the Appellant's life has changed significantly.

57. As is well known, the relevant test in respect of s14 is that laid down by Lord Diplock in *Kakis v Republic of Cyprus* [1978] 1WLR 779 at page 782. Lord Diplock said

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

58. In *Zengota v Poland* [2017] EWHC 191 (Admin), in a passage with which I respectfully agree, Cranston J summarised the effect of the authorities on oppression by passage of time. He said, so far as is material for present purposes, that the law regarding the bar of oppression through passage of time includes the following:

> i) Oppression is not easily satisfied; hardship is not enough.
> ii) The onus is on the requested person to satisfy the court that it would be oppressive to extradite him by reason of the passage of time.
> iii) The requested person must establish a causal link between the passage of time and its oppressive effects through the change in circumstances.
> iv) The gravity of the offence is relevant to whether changes in the circumstances of the requested person have occurred which would render his return to stand trial oppressive.
> …
> vii) Delay brought about other than by the requested person is not generally relevant since the focus is the effects of events which would not have happened, for example a false sense of security.
> viii) It is only in borderline cases, where the accused himself is not to blame, that culpable delay by the requesting state may tip the balance against extradition.

59. It follows that it was for the Appellant to establish that it would be oppressive to extradite him and that we should recognise that that is a test not easily satisfied. Notably, hardship is not enough.

60. In my judgment, the SDJ addressed the relevant issues correctly and was entitled to come to the conclusions at [86] that he did.

61. It is right that the Appellant is not a fugitive. However he has been aware of the German investigation since 2014, and of the arrest warrant since March 2020. He was under no obligation to return voluntarily to Germany, but the fact that he was aware of the German proceedings and chose not to return does reduce the impact of the delay upon him. This is not, for example, a case where the requested person was unaware of the German proceedings and changed his position on the assumption that no proceedings were in contemplation.

62. There may be some blameworthiness on the part of the German authorities for the delay between 2014 and 2015, but, as the SDJ observed, there would have been little point in issuing an EAW between 2015 and 2019 because in that period the Appellant was in India and had no connections to the UK. There is nothing to suggest that the German authorities knew he was in India and it is difficult to criticise them for not issuing an extradition request to the Indian authorities. The SDJ was right to take into account the difficulty for any judicial authority to undertake a search in every corner of the globe. Similarly, the SDJ was right to bear in mind that the use of Interpol red notice is not without its difficulties in some of the countries to which it applies and, on this premise, the German authorities did not know in which country the Appellant was residing at that time.

63. I would accept Mr Hawkes' submission that there is a connection between the ill-health of the Appellant and his family on the one hand and the passage of time on the other because the ill-health manifested itself during the relevant period. There is, however, no other connection and, self-evidently, it cannot be said that the delay *caused* the ill-health of the Appellant, his mother or his granddaughter. Nonetheless, I would accept that, if the Appellant was extradited, the delay in extraditing him would mean that his experience of the consequences of his own ill-health and, more particularly, that of his granddaughter would be significantly exacerbated. In short, he would not be around to help and support his family during this inevitably difficult time. He says the possibility of that is particularly difficult for him to bear given his granddaughter's condition. I agree that is a significant hardship but, as noted above, hardship is not enough. In my judgment, it cannot be said that the SDJ's conclusion that this was insufficient to constitute oppression was wrong.

The New Evidence

64. It is necessary to revisit the SDJ's analysis, and in particular his conclusions on ground 4, in the light of the new evidence. We considered the report of Dr von Galen *de bene esse*. The Respondent opposes its admission arguing that the expert report of Dr von Galen has been served very late in the day. The Respondent points out that Dr von Galen was not called before the SDJ and so has not been cross-examined and that the German authorities have not had the opportunity to provide a substantial response.

65. We reject that latter submission. We indicated at the end of the hearing that we would permit the German authorities to respond and they did so. Their response was brief but addressed the main points in dispute. Before deciding whether to admit the evidence of Dr von Galen, we turn to consider the merits of the case advanced in reliance on that report.

Dr von Galen's report

66. The Appellant relies upon the report of Dr von Galen dated 30 March 2022. Dr von Galen has been a specialist in German criminal law since 1998. She is a member of the Berlin bar and practices in Germany. Dr von Galen seeks to address the issues identified by Sir Duncan Ouseley when he granted permission.

67. She explains the position in German law as regards the recording of witness evidence or interrogation of the accused. She says that during the investigation phase of any criminal investigation, which is led by the public prosecutor, witnesses and suspects are

interrogated by the public prosecutor or by the police on his behalf in accordance with s168b paragraph 2 of the German Code Of Criminal Procedure (GCCP). She says that although there are different ways to record an interrogation during the investigation there will always be a record which is put in the file to which the defendant has access.

68. Pursuant to s118a and s273 paragraph 2 of the GCCP, statements of witnesses or defendants made in the course of the hearing for a review of detention are not normally recorded in detail. For a trial at the regional court, s273 paragraph 2 GCCP obliges the court "*to record essential results of the examination*". That means, she says, that in general witness evidence is not recorded at all. The practice of not recording witness statements is unusual compared to other jurisdictions in Germany. The reason for it is that the regional court has competence as a court of first instance for severe and complex cases. For these cases there is no court of second instance for judgment on the facts. The only appeal is on a point of law. On such appeals arguments in respect of the facts is not permissible. There is a rule called "*the principle of judges free evaluation of evidence*" which obliges the judge to decide "*at its discretion and conviction based on the entire contents of the hearing*" (s261 GCCP). The effect of those provisions, in the view of the German judiciary, is that there is no need to have witness statements recorded.

69. She says that recently there has been a "*broader discussion*", questioning this practice and pointing out the risks of wrong judgment because of errors about what has been said or not said.

70. She says that, to her knowledge, the failure to record what is said in hearings at the regional courts has not been challenged as an infringement of Article 6 ECHR or an infringement of the right to a fair trial guaranteed by the German constitution. She offers her explanations for what she describes as a "surprising" failure. She says, first, that before mounting such a challenge to the fairness of the procedure a claimant would have had to request a recording of the court hearing on first instance "*with the undoubted result that the request is rejected and the trial takes place without a recording*". She says many accused might start a trial with a hopeless application. Second, she says that the absence of recordings could only be challenged together with final judgment. The defendant would have to argue that the trial would have had a different outcome had it been recorded. She says "*it could be considered as generally difficult to supply evidence for such an argument*". In those circumstances, she says that "*the fact that there do not appear to have been challenges to the German constitutional court on the ECHR point should not be taken as an indication as no Article 6 issue is involved*."

71. Dr von Galen makes the following additional points about German criminal procedure:

    i) Under German law suspects and accused persons are not, in principle, obliged to tell the truth when interrogated by the police or the public prosecutor.

    ii) However, witnesses who testify before the court are obliged to give a truthful and complete statement. In consequence witnesses may change their statement in court from that which they gave in the early stage of the investigative procedure.

iii) German criminal hearings are based on the principle of orality. That principle requires the court to hear witnesses orally during the hearing and not base the judgement on witness statements on the files.

iv) There are limited exceptions to the rule of orality as set out in s251 of the GCCP. For example, written statements can be admitted into evidence by agreement or if the witness has died. In addition the interrogator including judges or prosecutors in previous cases, can give hearsay evidence of what the witness said to them. That evidence is admissible at trial provided the court demonstrates that it is aware of the limitations of hearsay evidence and describes "*how the decision has been influenced by this evidence*".

72. Next, Dr von Galen considered what she describes as "*the procedural situation which developed since the beginning of the proceedings (against the Appellant) in 2013.*" She says that:

i) the public prosecutor launched criminal proceedings against at least 18 suspects including Mr Rana. Proceedings against accomplices of Mr Rana were terminated by the public prosecutor in 2014 and 2015. The files in respect of such proceedings are stored for five years but must be destroyed thereafter.

ii) the file regarding the proceedings against Mr Shepherd should still exist.

iii) she has been told by Mr Rana's defence lawyer that the court file has been made available to them as well as selected parts of the investigation file.

iv) Mr Rana's defence lawyers also have access to the record of the hearing regarding review of detention of Mr Shepherd on 28 October 2014.

v) the file in respect to Mr Ponsford should still exist.

vi) In respect of the cases against Mr Cook and Mr Haentjes the written confessions of both accused would be amongst the court records. However witness statements were not recorded.

vii) There were no records of the "*numerous talks between judges, public prosecutor, and the defence lawyers…were carried out in camera*" and were not recorded.

viii) She did not have access to the court records in respect of Mr Toelderer, Mr Taze and Mr Busche who were acquitted. Those hearings lasted 45 days and several witnesses were heard but took no record of their evidence.

73. She turns next to the access to evidence for Mr Rana. She says that

i) he will have access to the files regarding the case against him and the case against alleged accomplices.

ii) he will not have the same level of information as the public prosecutors in the cases against Cook, Haentjes, Toelderer, Taze and Busche because the public prosecutor who was present at these hearings would have been able to take minutes for him or herself.

74. She concludes as follows

> "the testimony of the co-accused as well as witnesses in this case combined with the fact that the evidence in these files is no longer available is more than capable of giving rise to unfairness in the trial of Mr Rana. He would be at a disadvantage to the public prosecutor who has questioned witnesses or former accomplishes or read records of statements that the police [sic] were showing files which no longer exist or was present in the trial where the statements were not recorded. Even though in principle Mr Rana is able to challenge the recollection of witnesses from hearsay he will face the unfair situation not to be able to compare statements given in the trial against him with former statements and challenge emission, contradictions, differences, or exaggerations compared with what witnesses have said before. Plus he would not be able to confront witnesses with former statements if they are no longer available or have never been recorded."

75. In response the requesting authority says this

i) "in German criminal proceedings the principle of immediacy applies. This means the court has to hear the witnesses…directly in the courtroom and may not really read out transcripts of earlier statements."

ii) the investigation file will include a record of the evidence gathered by the police and the public prosecutor. That is available to defence lawyers.

iii) it is agreed that there is no verbatim record of witnesses' testimony before the regional court but "*the statements of the witnesses that are decisive for the verdict are reproduced in written records*." Accordingly it is said "*the accused Rana is in the position to compare what a witness testifies against him in the trial with his earlier statements*".

iv) the prosecutor has no advantage: "*the decisive factor is what the witness says in the current trial not what he says in the past. In absence of any records of statements made in court it is as much a disadvantage to the prosecution as it is to the defence*."

v) in practice, personal recollections or notes by public prosecutors are often not available due to the passage of time.

vi) the public prosecutor in the Appellant's case "*who would now have to represent the prosecution…did not actively participate in the previous court hearings but only as a representative and thus has no advantages whatsoever*."

vii) "The '*alleged injustice'* cited in (Dr Rana's) report does therefore not exist in reality.

viii) The accused Rana can expect a fair trial in Germany according to Germany procedure law."

76. Mr Hawkes accepts that German criminal law and procedure does not, in principle, conflict with Article 6 ECHR or the German constitutional guarantee of a fair trial. In my view, he was right to make that concession. Extradition will only be incompatible

with Article 6 of the ECHR if there is a *flagrant* risk of a depravation of fair trial (see *Ullha v Special Adjudicator* [2003] 1WLR para 32). There is certainly no basis for a conclusion that there is such a flagrant risk here.

77. But Mr Hawkes argued that, on the particular facts of this case, and given the delay in extraditing the Appellant, the evidence of Dr von Galen establishes that it would be unjust or oppressive to extradite the Appellant. I would reject that submission. I see no injustice and no oppression in ordering extradition.

78. First and foremost, the Appellant will be able to resort to the remedies and procedures available under German law to ensure the enforcement to a fair trial guaranteed by the German constitution and Germany's obligation to comply with Article 6 of the ECHR. There is no reason to believe that the German court would do anything other than ensure that the hearing of the criminal charges against the Appellant was conducted fairly. Furthermore, the German court is far better placed than a court in England and Wales to understand the procedures in place for trying criminal cases in Germany and to assess whether, in all the circumstances, the procedure is fair. I cannot see that the difficulties identified by Dr von Galen would prevent the Appellant pursuing the issue in Germany. I do not consider that there is any risk that there would be treated unfairly or unjustly by the German courts.

79. Secondly, and in any event, on the evidence before this court, I see no force in the particular criticisms made by Mr Hawkes to suggest that there would be any risk of unfairness. So far as complaint is made about the lack of recorded witness statements in the trials Toelderer, Taze and Busche, we have seen the judgment in that case. Neither Toelderer nor Taze made a statement during the main hearing but their statement to the police were reported to the court by the interviewing police officer. Busche too made no statement in court and what he said at a preliminary hearing was related to the court by a police officer. The German court judgements (or reports), however, provide a lengthy and detailed summary of the case and the court's conclusions in respect of each defendant. It recites at length the content or effect of documentary evidence relevant to each count. It provides a detailed evaluation of the evidence and sets out the court's legal assessment. If it were necessary for the Appellant to know what transpired at that hearing, the court record provides, so far as we can tell, an ample record of proceedings.

80. Furthermore, as Dr von Galen explains, the German courts proceed on the basis of oral evidence given at the hearing. Witnesses, including those formally accused of offences, if acquitted, can be called to give evidence by either party. Witnesses are under a legal obligation to tell the truth in court. The court cannot rely on witness statements made before the hearing in respect to which there was no obligation to tell the truth. Lawyers acting for the Appellant will have access to the court files and thereby to a witnesses' previous statements to the police. They will have access to the records of previous court hearings in related matters and thereby to a summary of the evidence given by relevant witnesses, if not to a record of the actual evidence they gave.

81. In practice, the prosecution in this case will have no advantage over the Appellant in trial, because, as the latest information from the German authorities makes clear, the prosecutor in the Appellant's case had no active parts in the trials of his co-accused. As to that, we note in addition, that we were told during the hearing that the Appellant had instructed a lawyer to attend the earlier hearings, in effect on a "noting brief". In those

circumstances it would appear that the prosecution will have no advantage at all over the defence.

82. Reviewing the SDJ's conclusion in the light of the new evidence, it is my view that the German criminal code will not lead to injustice in this case. Nor will it result in oppression. The delay changes the impact of events in the Appellant's personal life, notably his granddaughter's illness but that was a matter the SDJ considered and on which he reached a conclusion that was properly open to him.

83. In those circumstances, there is nothing in the report of Dr von Galen that causes me to conclude that the Senior District Judge's decision was wrong. In consequence, I would decline to admit the report into evidence

84. I deal finally with further additional material put before the court by Mr Hawkes, notably a witness statement and a letter from Dr Anna Oehmichen. We have read this material. It adds nothing of substance and could have been put before the SDJ. I would decline to admit it into evidence.

Conclusions:

85. For those reasons, if my Lord agrees, I would dismiss this appeal.

Lord Justice Lewis

86. I agree.