Neutral Citation Number: [2020] EWHC 1683 (Admin)

Case No: CO/4019/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 June 2020

Before :

MR JUSTICE FORDHAM

- -

Between :

Romana Dumitru	**Appellant**
- and -	
Court of Verona, Italy	**Respondent**

- -
- -

Martin Henley for the **appellant**
The **respondent** did not appear and was not represented

Hearing date: 24 June 2020

Judgment as delivered in open court at the hearing

- -

Approved Judgment

I direct that 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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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

Introduction

1. This was a remote hearing by Skype. It and its start time were published in the cause list together with an email address for anyone to use if they wished to observe the hearing. I heard oral submissions just as I would have done had we all been sitting in the court room. I have asked myself whether, and I am satisfied that: this constituted a hearing in open court; the open justice principle has been secured; no party has been prejudiced; insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

2. The appellant is 21. She is wanted for extradition to Italy. That is in relation to an accusation EAW. The EAW relates to alleged offending which took place on 22 April 2018 when she was aged 19. The offending is described as robbery together with the causing of injury. It involved a group who confronted an elderly victim on his bike in what is described as a 'hugging' technique and resulted in the stealing of his Rolex watch together with minor injuries. The appellant says that she was in the United Kingdom on that day and that it is all a mistake. She points out that she was heavily pregnant and indeed it is known that she gave birth on 9 July 2018 to the younger of her two children. I have also seen a record which on the face of it describes her attending her midwife appointment on 23 April 2018. She has a husband here and their two children: the older aged 5 and the younger aged nearly 2.

3. The district judge ordered extradition on 9 October 2019. At that stage, the resistance to extradition put forward by the legal representatives for the appellant was squarely based on article 8 ECHR. That resistance is maintained on this application for permission to appeal, and a new argument has been added. The district judge heard oral evidence from the appellant and her husband. She rejected the article 8 arguments for reasons she gave. An application to this court for permission to appeal was refused on the papers by Saini J. At that stage, article 8 remained in issue, though reference was also made to the interrelated question of statutory proportionality under section 21A(3).

4. A renewed application for permission to appeal was made, which Holman J adjourned to this hearing which has taken place before me today. The position before Holman J was there had been a change in Counsel and Mr Henley was raising the new point based on section 12A, to which I will come. He had only just been instructed. The judge, in adjourning the matter, gave directions for a skeleton argument to set out the point in detail, with the opportunity for the respondent to revisit the submissions accompanying the respondent's notice, in order to deal with the new point. Mr Henley seeks an extension of time for the skeleton argument, which was filed late, and I grant that extension. I am satisfied that it is in the interests of justice to do so, in circumstances where Holman J wished the point to be considered on its legal merits, and where the respondent has had a full and fair opportunity to respond.

Section 12A

5. I turn first to the new issue based on section 12A. That provision describes an extradition bar where there is an "absence of a prosecution decision". The structure of the section involves two stages. The first stage involves the requested person raising

before "the appropriate judge" the question of whether there are "reasonable grounds for believing that … the competent authorities … have not made a decision to charge or … to try" (or if they have that the requested person's absence is not "the sole reason for that failure"). Mr Henley's case is that that extradition bar arises on the evidence in this case. He submits that the first stage test is satisfied on the material before the court, and in the light of the authorities. For the purposes of the hearing today he submits – and I accept – that the question is whether that is reasonably arguably so.

Whether the point can be raised

6. A threshold objection is taken by the respondent, who says that the appellant ought not now to be able to raise an extradition bar, for the first time on appeal, having not taken the point before "the appropriate judge", at a hearing at which the appellant was legally represented. Mr Henley in response has two points. First, he submits that the appellant is 'entitled' to raise a new point of law which does not involve or engage putting forward any fresh evidence. In support of that entitlement he relies on the case of Adedeji [2012] EWHC 3237 (Admin) where Mr Justice Collins concluded (paragraph 11) that the earlier case of Khan [2010] EWHC 1127 (Admin) was 'clearly wrong'. Khan had taken a restrictive approach to the consideration for the first time on appeal of a point of law not dependent upon evidence, and had applied the familiar Fenyvesi [2009] EWHC 231 (Admin) fresh evidence approach to whether or not to entertain such an argument. Mr Justice Collins rejected that. He went on (at paragraph 12) to say this: "I therefore have to consider whether the point is a good one". Mr Henley submits that that approach supports an 'entitlement'. His second point, if he is wrong as to 'entitlement', it is that the Fenyvesi restriction is inappropriate, that the court has to make a judgment as to whether or not to allow the new point to be relied on, and that in all the circumstances of the present case that judgment should be made in favour of his client. For the purposes of today's hearing, he submits that it is sufficient if it is reasonably arguable either that he is right on 'entitlement' or that he is right so far as the exercise of judgment is concerned.

7. I would be very surprised indeed if there were a legal 'entitlement' to advance on appeal a point that could and should have been raised below, in a case where there was legal representation below, and in respect of an extradition bar which spells out on the face of the statute that "the appropriate judge" has to be satisfied that there are reasonable grounds. That is an ambitious submission. I am quite satisfied, however, that that it would not be appropriate at this stage to shut the point out – if the section 12A ground is reasonably arguable on its legal merits – on the basis that it was not raised below. Were that the position, I would be inclined to grant permission to appeal, while specifically making clear that I was leaving open to the respondent at the substantive hearing of the appeal the issue as to what approach the court should take in relation to the raising for the first time of a new argument of law, and the section 12A argument in particular, given the structure of the statutory provision. If necessary, I would direct a 'rolled-up' hearing to leave that point open. I asked Mr Henley whether he was aware of any more recent authority which was against him on the question of legal 'entitlement'. He candidly told me that he could think of at least one example where this court had refused to allow a new point to be raised on appeal. I am satisfied that no further enquiry in the circumstances is necessary or appropriate. I will put to one side the fact that the point was not relied on below.

The substance of the point

8. So far as the substance of the point is concerned the starting point is with the two-stage analysis of section 12A. That is authoritatively described in the case of Carpenter [2019] EWHC 211 (Admin) at paragraph 18(1). Mr Henley emphasises, taking me back to the case of Kandola [2015] EWHC 619 (Admin) [2015] 1 WLR 5097 at paragraph 30, that "reasonable grounds for believing" is "something less than proof on a balance of probabilities". The question is whether, reasonably arguably, the appellant can show based on the materials before this court, and in the light of the authorities, that the objective 'reasonable grounds for belief' is met. The argument starts with the documents and ends with the authorities.

The documents

9. So far as the documents are concerned Mr Henley has two points that he relies on as positive points in his favour. He addresses two further points which he says do not materially count against him.

   i) The first point, on which he positively relies, is in the EAW at box (b), which describes 'the decision on which the EAW is based', the underlying domestic warrant. So far as that requirement is concerned, Mr Henley has shown me the judgment of the CJEU in the case of Bob-Dogi [2016] 1 WLR 4583 and the conclusion in particular at paragraph 58. He relies on that for the proposition that there is a legal requirement that an EAW (or formal supplementary or further information) must spell out reliance on the underlying operative domestic warrant. I accept for the purposes of this hearing that that is correct. Returning to the documents, the EAW in this case specifies as the warrant on which the EAW is based an "order for pre-trial precautionary custody in prison issued on 11 June 2018 by the pre-trial investigation judge attached to the court of Verona in the criminal proceedings". Mr Henley relies on that 'pre-trial precautionary custody' underlying order, in support of his submissions as to stage one of section 12A.

   ii) The second positive reliance aspect is also in the EAW. It is the fact that the EAW is issued (and signed) by the 'pre-trial investigation judge'. Mr Henley has described such a judge as falling under the acronym of the "GIP" as opposed to the "GUP", those being acronyms discussed and described in the line of authorities relating to Italy and what are known as the 'immediate' procedure and the 'normal' procedure (see Carpenter at paragraph 20).

   Based on that content, Mr Henley submits that there is sufficient here, at least reasonably arguably, to trigger section 12A stage one 'reasonable grounds for believing that the competent authorities have not made a decision to charge or to try', so as to give rise to a stage two onus on the respondent to prove the contrary.

10. The two items of the materials which Mr Henley then submits do not displace that conclusion are as follows.

   i) First, there is the 'standard wording' from the start of the EAW which states: "This warrant has been issued by a competent judicial authority. I request that the person mentioned below be arrested and surrendered **for the purposes of**

conducting a criminal prosecution". The phrase "for the purposes of conducting a criminal prosecution" has been put into bold and underlined both in the English translation and in the original Italian. Mr Henley submits that that standard wording cannot be relied on as having any 'determinative' effect so far as concerns the question of 'reasonable grounds for believing' that there has been no decision to charge or to try. He emphasises that this standard wording is being used by the pre-trial investigation judge.

ii) The second source in the material to which Mr Henley took me, submitting that it did not undermine the position he was putting forward, is a document dated 26 July 2019. That was a formal reply to a request which had been made for an interview from the United Kingdom. The request was denied by order of the pre-trial investigation judge. That court order states, on its face: "Please note that the authority in charge of the decision (Court of Verona sitting as a panel of judges), where proceedings are pending at present, has already ordered that the trial shall take place with the participation of the defendant at a distance, and the trial hearing has been set for 6 December 2019 at 10:30 a.m." As to that, Mr Henley submits as follows. He submits that it does not constitute 'further information' in the true sense. He emphasises that it emanates from the pre-trial investigation judge. He emphasises that it was answering a request for an interview, which is what the formal court order in that document is addressing. He submits that it comes 'nowhere near' constituting a basis for a finding against the appellant as to 'reasonable grounds for believing' that the competent authorities have made no decision to charge or to try. He submits that the document is 'wholly ambiguous' and that the court can 'draw no comfort' from it. He submits that the court does not know the nature of the 'hearing' set for 6 December 2019 and there is insufficient detail in this material produced, as it was, for a different purpose.

The authorities

11. That is it, so far as the evidence before the court is concerned. I turn to the line of authorities which Mr Henley submits supports him in contending that that material, reasonably arguably, can cross the line for the purposes of the first stage of section 12A. He relied first on paragraph 30 of Carpenter. In that paragraph, the court was discussing an earlier case of Ijaz, one of the cases which were decided by the court in Kandola. That description of Ijaz emphasises that:

> "the EAW was issued by the GIP and identified in box (b) that the function and purpose of the EAW was the implementation of the domestic 'coercive measure of precautionary measure in prison issued by the judge for preliminary investigations'".

I pause there to note that that description of that element within the EAW was being explained by the court in Carpenter in February 2019, long after the Luxembourg court had explained the significance of the underlying warrant in Bob-Dogi (June 2016). The court in Carpenter in paragraph 30 goes on to explain that Ijaz was:

> "a case in which the terms of an Italian EAW which made clear that the extradition was sought to fulfil compliance with a custody order at the

> investigatory stage amounted to reasonable grounds for believing that a decision to try it had not yet been made", citing Kandola at paragraph 51.

So far, that passage supports Mr Henley, to this extent. It shows that in a case in which box (b) includes a description of an underlying warrant for 'pre-trial precautionary custody', and it is issued by 'a pre-trial investigation judge', that can lead to the stage one section 12A test being satisfied, if the terms of the EAW support that conclusion. The question is whether they do so, and whether box (b) and the signatory of that type of judge are almost themselves sufficient.

12. Paragraph 30 of Carpenter really goes no further than being a description of the Ijaz case in Kandola. It is therefore inevitably necessary to turn to the second key passage on which Mr Henley's argument relies. That passage is paragraph 51 of Kandola. At paragraph 51 the court in Kandola emphasises that in Ijaz's case EAW box (b) had described the "domestic 'coercive measure of precautionary measure in prison issued by the judge for preliminary investigations'". So far, so good. However, it is very clear, reading paragraph 51 as a whole, that the court was emphasising not simply the existence of that content, nor of the identity of the signatory judge, but further content describing the nature of the underlying enterprise in which the requesting state was embroiled. The court spelled out that the warrant had elsewhere referred to the requested person as being a person "under investigation". Mr Henley candidly accepted in his oral submissions that there was an 'investigation' component of the EAW in the Ijaz case, on the face of the documents. There is no such component on the face of the EAW in the present case. Moreover, the court in Kandola emphasised that the EAW was to be read alongside the formal 'further information' provided by the judicial authority. That 'further information' had stated that Mr Ijaz was being "investigated in the criminal proceedings" .What the court then said was: "We think it must also follow from that material that there are reasonable grounds for believing that Mr Ijaz's absence from Italy is not the sole reason why a decision has not been made to charge or try him". It then went on to describe how that material had satisfied stage one, such that the burden then passed to the respondent to prove the contrary. Paragraph 51, in which the entirety of the content of the EAW and 'further information' is described, is the paragraph in which the court explained that: "We are satisfied, on the basis of the Ijaz EAW alone, there are reasonable grounds for believing that no decision has been taken to charge or try Mr Ijaz".

13. The difficulty for the appellant in this case, in relying on Carpenter paragraph 30 and Kandola paragraph 51, is that it is necessary to strip out the specific references to "investigation", and argue that the box (b) description alone, together with the signatory judge, is arguably sufficient; and then to submit that the 'standard words' opening the EAW do not have any material effect. These two passages from these two cases, on their face, do not support that submission. Moreover, I am quite satisfied that there are other passages in the line of authorities that specifically address that very point.

14. Returning to the case of Carpenter there is a critical passage, in my judgment, at paragraph 27. In that passage, agreeing with a statement from earlier case of Prenga [2016] EWHC 3002 (Admin), concerned with looking at the EAW and reaching a stage one section 12A conclusion, the court said this (citations omitted):

> "It was unnecessary to look at evidence beyond the EAW. This is because the warrant was in the standard form asking for surrender for the purposes of prosecution and this gives rise to the inference of a decision to charge and a contingent decision to try in the absence of other indications. The mere existence of a pre-trial custody order would provide no such contrary indication when the warrant was purportedly issued for the purposes of a prosecution."

In my judgment, that passage is clearly fatal to the argument that Mr Henley is seeking to put forward in this case. It deals, in terms,with the EAW and the 'standard language' of asking for surrender 'for the purposes of prosecution. That is language which the court had earlier emphasised at paragraph 4 where it explained the significance of the language "for the purposes of conducting a criminal criminal prosecution". Paragraph 27 recognises that that is language which, of itself, is sufficient for the purposes of the stage one enquiry. Paragraph 27 says, in terms, that that is sufficient "in the absence of other indications". The previous paragraph, paragraph 26, had described the significance that external evidence may have. There is no external evidence in the present case. The only argument left would be that the box (b) entry, giving the order for 'pre-trial precautionary custody', would itself constitute a sufficient 'other indication'. But that is the very point being addressed the end of paragraph 27 when, I repeat, the court said this: "The mere existence of a pre-trial custody order would provide no such contrary indication when the warrant was purportedly issued for the purposes of a prosecution". That is this case. The warrant describes the 'pre-trial custody order' but the warrant states, in terms, by reference to what is said on its face, that it is "for the purposes of conducting a criminal prosecution". I repeat: both in the original, and in the translation that phrase has not only been included it has been put into bold and underlined.

15. The point becomes even stronger when one looks elsewhere in the authorities. In Carpenter itself the reason why the claim succeeded was because the EAW 'standard wording' had deliberately been amended so as to delete the phrase as to 'the seeking of surrender for the purposes of prosecution'. That point is discussed in paragraph 27 of the judgment, having been flagged up as "significant" at paragraph 4. Yet further reinforcement is to be found in the second half of paragraph 22 of the judgment in Carpenter. That is a description of an earlier case of Doci [2016] EWHC 2100 (Admin) and in particular "the ratio" of the decision regarding one of the appellants in Doci, namely Motiu. The Carpenter judgment explains (at paragraph 22) that "the ratio" of the court's decision in Motiu, in the Doci judgment, was as follows (citations omitted):

> "A decision to charge and to try require no formal decision. They can be made informally and contingently. The standard language in an accusation EAW that the surrender is sought for the purposes of the criminal prosecution usually shows that there has been a decision to charge and that may be a contingent decision to try. Accordingly the standard statements in EAW should suffice in showing a decision to try and charge in the absence of contrary indication and they did so in Mr Motiu's case."

In my judgment, that description is also fatal to the argument being put forward. Precisely the same moving parts are in play. Precisely the same elements are being relied on.

16. Before leaving Carpenter, I also refer to paragraph 20 which explains how it is that a "custodial precautionary measure" can be reconciled with the existence of a decision to charge or to try. Referring to the analysis in Doci, the Carpenter court said this: "Where, however, a custodial precautionary measure has been issued, as in Mr Doci's case, then as a rule it is the immediate procedure which applies although there can be exceptions. For the purposes of the custodial precautionary measure, the GIP must examine the evidence in depth and conclude that the person is highly likely to be found guilty and check that there are no defences. Under the immediate procedure, the criminal case then proceeds to trial without service of a notice that the investigation has concluded and without a preliminary hearing".

17. I pause to record that Mr Henley submitted that these various passages were either obiter and unsound, or were wrong, or had been overtaken by events. I do not accept that there is anything in these passages that renders them in any way unreliable so far as the correct analysis is concerned. I consider this to constitute a clear and consistent body of domestic authority directly on the point.

18. Returning to that caselaw, in order to see the context for "the ratio" of the Motiu case, that was being described by the Carpenter court (at paragraph 22), one turns to Doci itself. That was a case which itself postdated the judgment of the CJEU in Bob-Dogi. In Doci, the court was considering EAWs from Italy and was discussing the various that sorts of procedure – the 'immediate' procedure and the 'normal' procedure – as they arose in Italy. The description of the 'immediate' procedure and the circumstances as involving a GIP, and no further notice and no preliminary hearing, are at paragraph 10. At paragraph 32 of Doci the court describes the nature of the decision to try. It then refers to the 'standard wording' in the EAW. Referring to previous authority, it says this:

> "[T]he statement in the EAW that surrender is sought for the purpose of conducting a criminal prosecution usually shows that there has been a decision to charge, and … that may also be the same as the decision to try. Indeed, in the absence of other material, the standard statements in the EAW should suffice for both. After all, the decision to charge shows, in the absence of anything else, that there is a decision to try."

There is then subsequently a discussion of the facts and an analysis in the two cases in Doci: Doci and Motiu. Mr Motiu's case is analysed at paragraphs 43 onwards. When I look at those passages, I see that the box (b) point and signatory judge point are at the forefront of the case that was being advanced on behalf of Mr Motiu. I see the submission that was being made at paragraph 44, where the court said this:

> "It was simply submitted on his behalf that the fact that the EAW was issued by the GIP, and was based on an order for protective custody issued by the GIP, showed that there had been no decisions to charge or to try, or at least that there were reasonable grounds for such a belief."

That, in my judgment, encapsulates perfectly the point that is being made by Mr Henley in the present case. There is then a description of how counsel in that case had advanced that argument and sought to sustain it. However, it was an argument rejected by the court and "the ratio" is the one accurately recorded at paragraph 22 of Carpenter.

19. It is quite impossible, in my judgment, to put forward, even as reasonably arguable, a stage one section 12A submission based on the signatory judge and the box (b) content, in the light of the 'standard language' deliberately used at the start of the EAW. To complete the picture, the dots are joined by the fact that the Doci court itself goes on (at paragraph 51) to explain the basis on which Ijaz had been decided as it was in Kandola.

Conclusions

20. Even if the EAW stood alone, then looking at the contents objectively, the 3 aspects – the judicial signature, box (b) and the 'standard language' chosen and emphasised at the start of the EAW – would, in my judgment, plainly be fatal to the argument being advanced, based on those materials.

21. However, the material in this case goes further. As I have explained, a formal document was provided on 26 July 2019. I bear in mind the description of the section 12A 'decision to try', which as I have explained is addressed in Doci at paragraph 32. The court there says:

> "The decision to try is made when the relevant decision-maker 'has decided to go ahead with the process of taking to trial the defendant against whom the allegation is made'".

I look to this formal document dated 26 July 2019 and it states, in terms, that: there has been a "decision" of "the Court of Verona, sitting as a panel of judges", which has "ordered" that "the trial shall take place" and "the trial hearing" date has been set. The language of "trial" is unmistakeable. So is the language of "the authority in charge of the decision" as "the Court of Verona sitting as a panel of judges". Equally unmistakeable is the reference to "the defendant", for it is a "trial … with the participation of the defendant at a distance". That document is, of itself, fatal in my judgment to the argument that is being put forward.

22. It may well be that the legal representatives who were acting in this case before the district judge thought about the contents of the EAW and the order dated 26 July 2019, in the light of the authorities, and concluded that there was no proper basis of putting forward any argument based on section 12A. I know not. They may simply have missed the point and not considered it. I have looked at the point, with Mr Henley's assistance, and have considered the relevant content of the documents, against the line of relevant authorities.

23. Notwithstanding that it is a point of law, and notwithstanding that the threshold of reasonable arguability is a low one, I am quite satisfied that the materials and the authorities combined give a very emphatic answer to the point. It is not a reasonably arguable ground of appeal, in my judgment, on its legal merits, leaving aside the questions about whether it should have been relied on below, and can be relied on in this court having not been relied on below. I refuse permission to appeal on this ground on the basis that it is not reasonably arguable.

Article 8/proportionality

24. That leaves the issue that was always present in this case namely article 8 ECHR and the statutory proportionality exercise by reference to section 21A(3). These are the grounds on which the district judge held against the appellant. They are also the grounds on which Saini J concluded, on the papers, that the appeal was not reasonably arguable. Mr Henley has put forward written submissions in his skeleton argument directed by Mr Justice Holman. I make clear that I have also considered the rather more amplified points relating to statutory proportionality aspect in the 'initial grounds of appeal'. He has developed his submissions orally and he has made points which he candidly recognises were not in his skeleton argument. I have considered all of the points put forward, on their legal merits. Mr Henley accepts that there is no basis for criticising the district judges approach so far as the law in relation to article 8 and proportionality is concerned. Nor does he suggest that there is any basis in this case to impugn any finding of fact that the district judge made on the evidence before her. I am quite sure that he is right in both of those respects.

Article 8

25. Mr Henley submitted that the district judge failed properly to take account of the serious damage to the youngest child in particular of the separation from her mother and principal carer. He relies on the passage at paragraph 1 of H H [2012] UKSC 25 [2013] 1 AC 338 where Lady Hale said this: "No one seriously disputes that the impact upon the younger children of the removal of their primary carers and attachment figures will be devastating". That, Mr Henley rightly recognises, was a description which can be linked to later passages which describe the evidence in that case, in particular at paragraph 41. Mr Henley submitted that the district judge started in the right place but failed to carry through a 'finding' to her later analysis. What she said, as a starting point, is this: "It was acknowledged in H H at paragraph 1 that the impact on younger children of the removal of their primary carers and attachment figures would be devastating". In the later analysis of the present case the description of "devastating" impact does not reappear. The district judge speaks of the separation as being "distressing" for the children. She refers to the "negative impact of extradition" on the "family", as well as on the appellant. She refers to the "hardship", including the "emotional" hardship. She does not use the word "devastating". Mr Henley submits that she has therefore lost sight of 'the finding of fact' as to the scale of the damage to the youngest child from the separation. In writing, he also submits that there is also 'substantial harm to the older child', now nearly 6; he submits that the judge took 'a mechanistic approach' to care and support from the father and the rest of the family; and he submits that the state benefits available to the father were 'neither here nor there'. He submits that, overall, extradition is unjustified and disproportionate in this case and the court should uphold the appeal on that basis. As I have said, he specifically criticises the judge for not 'carrying forward' the description of "devastating" impact.

26. Mr Henley adds further criticisms. He submitted this morning that the judge should have conducted, as the court, a 'further enquiry' to obtain evidence in the form of a social worker report, and should have adjourned this case for that purpose. He also takes issue with the judge's approach so far as the seriousness of the underlying offending alleged against the appellant is concerned. He submitted, by reference to paragraph 125 of H H, that the district judge should have analysed the seriousness of the offending recognising that this is 'on the cusp' of robbery, if robbery at all, and

more accurately characterised as 'theft together with an assault'. He says that the pregnancy of the appellant, even if she were guilty of the offence, would be a relevant mitigating factor that needed to be considered. Finally, he maintains the position that the court should have addressed 'the strength or weakness of the Italian authorities' evidence' against the appellant, on the issue of whether she was in Italy in at the relevant time and whether the photograph from the CCTV can possibly be her, given that she is known to have been pregnant with the child to which she gave birth on 9 July 2018.

27. I have carefully considered all of these points. I repeat that there is no basis for impugning the findings of fact of the judge nor any basis for impugning the approach taken by the judge so far as the law is concerned. The district judge set out accurately the key points from the relevant authorities in this area. She specifically referred to "the interests of the children" as "a primary consideration". She referred to "the importance of paying careful attention to what will happen to the child if the sole or primary care giver is extradited". She directed herself that "there was no test of exceptionality". She directed herself that "the best interests of the children are a primary consideration" and that "courts need to obtain the information necessary to make the necessary determinations relating to children".

28. The judge set out, in detail, her description of the evidence given by both parents both of whom gave oral evidence before her. She describes what they told her, as to the implications for them and the children, and so far as concerns support and extended family. She found as a fact that the appellant was clearly concerned about the impact on the children. She also found as a fact that neither the appellant nor the husband had been "entirely open", or "frank", about the support available. She found as a fact that the "children are young … and are at an important stage of their development". And she was "satisfied that for any child separated in such circumstances" that "would be distressing for them". She observed that a particular medical issue had been raised in relation to the younger child but no evidence had been adduced and it would have been possible to adduce evidence had there been any. She rejected the suggestion that "either child" had "additional or particular needs that require support". She then went on to identify the factors in the familiar article 8 'balance sheet'. She recognised that the appellant was "the main carer for the children whilst her husband is at work"; that "the children are young and separation from their mother will be distressing for [them]". She went on to say this:

> The children in this case are very young and the best interests of the children are a primary consideration. I have considered very carefully the support available to the RP's partner and children to mitigate the consequences upon the children of the loss of their main carer, their mother. I am satisfied that family members are available in the United Kingdom to provide practical and emotional support. The children's grandparents live just a couple of miles from them and are willing to provide care. The children also have an Aunt, who lives some distance away, but who is also willing to provide care at times for the children. Whilst I accept that the father's ability to work his current hours may be affected, he has already made an application for benefits to supplement the family finances. On the evidence before me, there is nothing to suggest that the negative impact of extradition of the RP on her and her family is of such a level that the court ought not to uphold this country's extradition obligations. Hardship, both emotional and

financial, will be suffered as is almost always the case but I am satisfied that with family support the father will be able to manage.

29. The judge arrived at an evaluation, having taken into account what in my judgment were all the relevant considerations needing to go into the 'balance sheet'. Indeed, it has not been suggested that she missed out some key factor. I am not going to prolong this judgment by setting out references to each further factor which she described. But, by way of illustration, she recognised that the appellant and the family have "a settled life in the United Kingdom"; that the appellant "has no convictions in this country"; that she that she's lived here "for six years" and "her children were born [here]". She also recognised, though, that "the offences are serious offences of robbery of an elderly victim" and that "if convicted a lengthy prison sentence is likely to follow". She recognised the strong public interests in support of extradition. She concluded, in more than one passage in her judgment, that, so far as the strength of the evidence is concerned, that was for the Italian courts and "not a matter for this court".

30. I have discussed in some detail the approach the judge took, the way in which the various factors were identified, and her ultimate conclusion. In my judgment, there is no reasonably arguable basis for contending in this case that this court would overturn the overall evaluative conclusion that the judge arrived at. I do not accept that the judge, in referring to H H paragraph one was making "a finding of fact" in relation to either all young children in all extradition cases, or in relation to the children in the present case. She was, accurately, describing the impact that had been described in H H. What is very clear, in my judgment, is that the district judge evaluated very carefully the position on the evidence so far as the impact on the children in this case is concerned. There is, in my judgment, no reasonably arguable error of approach in her analysis, or inadequacy in her reasons. She recognised the serious implications for the children and anxiously addressed what the implications would be for them, on the evidence before her, on the basis of the oral evidence from both parents, and all the documents. I am satisfied that she was not, reasonably arguably, under an obligation to adjourn and order a social worker report. I am satisfied that her characterisation of the offending was accurate and open to her. I am satisfied that the approach she took on the arguments about alibi and UK presence were also an approach that was open to her.

31. In refusing permission on the papers on this aspect of the case – at the time the only grounds relied being article 8 and proportionality – Saini J said this:

> "The sole ground of appeal (Article 8 ECHR) is not reasonably arguable. The district judge made a careful and detailed assessment of the factors for and against extradition and also made a direction of law which was in accordance with Celinski [[2015] EWHC 1274 (Admin) [2016] 1 WLR 551] (paras 27 to 33). The judge was also not impressed by the lack of frankness of the evidence given in relation to support available to her husband. The other matters argued in the grounds relate to defences which the applicant may wish to pursue before the Italian courts. The extradition was not disproportionate."

I have reached the same conclusion for much the same reason, albeit given at more length and in respect for the submissions put forward in writing and orally, and given

the fact that cases involving young children are necessarily anxious cases which do warrant close scrutiny.

Proportionality

32. Finally that leaves the question of statutory proportionality. This was not advanced separately in oral submissions. But it does feature in the written submissions before the Court and I will address it. The approach to statutory proportionality, having dealt with article 8 compatibility, is located in section 21A(1)(b) and (3). The structure of the provision makes clear that it is a point independent of article 8 compatibility. The specified matters relating to it are spelled out on the face of the statute.

33. I am quite satisfied that there was no error of law in this case in the district judge's approach to those provisions, that the conclusions that she arrived at were open to her for the reasons that she gave, and that all of that is so clear as to put the contrary beyond reasonable argument. As it happened, the judge recorded that "no [separate] submissions" had been raised before her on the proportionality issue. By reference to the statutory considerations she said this:

> "I am satisfied that the offence is a serious one in which the RP is said to have acted with others to rob an elderly victim. Injury to the victim is described as bruising. I have not been provided with any information regarding the likely penalty if convicted in Italy. On the information contained in the warrant it would seem that the effect would fall into category C2 of our domestic sentencing guideline, with a starting point of two years imprisonment and a range of one to four years. The Italian authorities have confirmed that they are not willing to consider less coercive measures. In such circumstance I am satisfied that extradition would not be disproportionate."

That reasoning was, in my judgment, beyond argument, open to the district judge and there is no realistic prospect of this court overturning it upon appeal.

34. In conjunction with proportionality, the point is repeated that the appellant claims to have a strong alibi and that the evidence that she was in Italy committing this offence is weak. It is not easy to see how those factors can interface, in her favour, with the factors that are set out in section 21A(3). But, even if it could be said that the district judge is obliged to consider what to make of submissions of that kind, it is very clear – reading the district judge's judgment as a whole – that she thought about that submission, from the perspective of article 8 and proportionality. In that context, she had concluded: "I am satisfied that it is for the Italian court to consider the strength of the evidence within the trial process and it is not a matter for this court to determine". She repeated essentially the same point in her conclusions on article 8. In my judgment, on the facts and in the circumstances and on the evidence in the present case, it was entirely open to the district judge to take that approach to that topic. Indeed, I will go further: in my judgment, the response was not only appropriate but plainly correct and the contrary is not reasonably arguable.

Concluding remarks

35. This has been a lengthy hearing for a renewal application. The submissions took over an hour to make. That, however, was entirely appropriate. When Holman J adjourned

this hearing that he spelled out that the time estimate for the hearing should be one hour. I know not whether he envisaged that that time estimate would include the time for an oral judgment. As it happens, much longer has been needed, but much longer was available. I was satisfied that I did not need to reserve judgment in this case. The consequence, though, has been that the hearing has taken until 1245 from 1000, when all matters have been dealt with. That is not a criticism of anybody. This is a much longer judgment than would normally be given in refusing an application for permission to appeal. But the new ground was a point of law, which engaged a number of authorities. And the article 8 ground is one which calls for the most anxious scrutiny, given that this is one of those cases concerning young children and the extradition of a mother and primary carer. It is therefore not inappropriate that such a case should warrant a longer hearing and a lengthier judgment.

36. For all those reasons, permission to appeal in this case is refused.

26 June 2020