Neutral Citation Number: [2024] EWHC 1256 (Admin)

Case No: AC-2024-LON-001428/
AC-2024-LON-001416

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 May 2024

Before :

LORD JUSTICE BEAN
MR JUSTICE JULIAN KNOWLES

- -

Between :

THE KING ON THE APPLICATION OF

(1) TOMASZ WEISS
(2)ADRIAN PIETRASZEWSKI

Claimants

- and –

WESTMINSTER MAGISTRATES' COURT

Defendant

-and-

(1) THAMES & CHILTERN CROWN PROSECUTION SERVICE

First Interested Party

(2) REGIONAL COURT IN GLIWICE, POLAND

Second Interested Party

- -
- -

Mark Summers KC and James Stansfeld
(instructed by **Sonn Macmillan Walker**) for the **First Claimant**
Mark Summers KC and Amelia Nice
(instructed by Michael Carroll & Co Solicitors)for the **Second Claimant**
Joel Smith KC (instructed by **Thames & Chiltern CPS**) for the **First Interested Party**
Richard Evans (instructed by **CPS Extradition Unit**) for the **Second Interested Party**
The Defendant did not appear and was not represented

Hearing date: 21 May 2024
- -

Approved Judgment

This judgment was handed down remotely at 14:00 on 24 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Julian Knowles:

Introduction

1. On 21 May 2024 we heard a 'rolled-up' permission hearing by the Claimants (Cs) on their application for judicial review of District Judge Rai's decision on 27 March 2024 to refuse to issue a witness summons under s 97 of the Magistrates' Court Act 1980 (MCA 1980) in connection with their extradition proceedings.

2. At the conclusion of Mr Summers KC's submissions Lord Justice Bean indicated that we did not need to hear from the Interested Parties (IPs); that permission would be refused; and that we would put our reasons into writing. This we now do.

Background

3. Cs are UK residents who are presently the subject of extradition arrest warrants (EAWs) issued by IP2 on 28 February 2023 and 3 April 2023 respectively.

4. The extradition of C1 is sought to prosecute him for two offences, namely, the assault and murder of Andrzej Mucha, alleged to have been committed in Slough, UK, on 29-30 November 2021. The extradition of C2 is sought to prosecute him for the same assault on Mr Mucha, and for an offence equivalent to our offence of perverting the course of justice relating to the disposal of Mr Mucha's body. All the conduct allegedly occurred in the UK.

5. At the time of the EAWs, Cs were in custody to the Reading Crown Court pursuant to two domestic charges pertaining to the same incident: (a) preventing Mr Mucha's lawful burial, and (b) perverting the course of justice on the grounds that they had concealed the murder of Mr Mucha, including by disposing of the body.

6. The trial was being prosecuted by IP1, and was listed to commence before a High Court judge in October 2023.

7. IP1 undertook concurrent-jurisdiction decision-making discussions with Poland, which culminated in IP1 discontinuing the domestic prosecution under s 23A of the Prosecution of Offences Act 1985 on 2 July 2023 (the date of the notice; the decision was taken by the CPS on 29 June 2023). Extradition proceedings were accordingly opened against Cs in July 2023.

8. There are two co-accused in custody in Poland for alleged offences in relation to the same matter (I will refer to them as KW and AN). Hence, if Cs are extradited, there will be a joint trial in Poland of all four co-accused for offences arising out of Mr Mucha's murder.

9. In their extradition proceedings, Cs are resisting extradition on a number of grounds. For present purposes two in particular are relevant:

    a. Their extradition is barred by s 19B of the Extradition Act 2003 (EA 2003) on grounds that the UK, not Poland, is the proper forum for their trial and so extradition would not be in the interests of justice; and

b. Their extradition is an abuse of the extradition process, being a deliberate attempt to prosecute them using evidence (namely the accounts of the Polish co-accused) that was known to both IPs to be inadmissible in this jurisdiction. They accuse the Polish authorities and IP1 of 'forum shopping' which they say is inherently objectionable so as to amount to an abuse of process.

10. Cs tried to obtain disclosure from IP1 and the CPS' Extradition Unit (which represents IP2 here) (CPSEU) of documents relating to the process by which the decision was taken to discontinue the domestic prosecutions (and so to allow the extradition proceedings to go forward). Disclosure was refused, and so Cs applied for a witness summons directed against IP1 under s 97 of the MCA 1980 for production of the material.

The application before the district judge

11. Section 97(1) of the MCA 1980 provides:

> "(1) Where a justice of the peace is satisfied that –
>
> (a) any person in England or Wales is likely to be able to give material evidence, or produce any document or thing likely to be material evidence, at the summary trial of an information or hearing of a complaint ... by a magistrates' court, and
>
> (b) it is in the interests of justice to issue a summons under this subsection to secure the attendance of that person to give evidence or produce the document or thing,
>
> the justice shall issue a summons directed to that person requiring him to attend before the court at the time and place appointed in the summons to give evidence or to produce the document or thing."

12. It is uncontentious that s 97 can be used in appropriate circumstances – and I emphasise those words - in extradition proceedings to secure the production of documents: see eg *R (Gambrah) v Crown Prosecution Service* [2013] EWHC 4126 (Admin), [15], an extradition to Ghana, where Mitting J said:

> "As I understand it, what the claimant seeks is the record of the criminal trial involving the victim in England, together with other information that the Metropolitan Police may have about his record and aliases and materials of that nature intended to show that he had other enemies. Because of the provisions of section 84 of the Extradition Act 2003, any statement about such matters would potentially be likely to be material evidence. There is therefore no reason why the claimant's solicitors should not seek a witness summons themselves to fulfill the duty which they seek to impose upon the CPS."

13. Aikens LJ agreed at [22].

14. In her decision, the district judge described the material sought by Cs in their application as follows:

> "1. The domestic CPS's charging decisions, including the decisions not to charge murder or assault.
>
> 2. The evidence and allegations adduced by the domestic CPS before the Reading Crown Court.
>
> 3. Details of the two defendants detained in Poland.
>
> 4. All records, and correspondence, concerning the CPS' liaison with UK police, Polish police and prosecutors, and the CPS Extradition Unit concerning the jurisdiction for Mr Weiss' prosecution."

15. In the event, category (2) was not pursued.

16. The material in question was described in Cs' Statement of Facts and Grounds (SFG) at [6] as:

> "material held by [IP1], including the records of the 2023 concurrent-jurisdiction decision-making process."

17. In their Skeleton Argument for this judicial review application, the material sought is described as:

> "records (decision-making records, minutes of meetings (including in February and June), and briefing notes) concerning the concurrent-jurisdiction decision-making process, excluding Treasury Counsel's advices over which TCCPS asserts LPP."

and compendiously referred to as 'the concurrent jurisdiction decision-making material'.

18. IP1 opposed the application, and on 21 March 2024, District Judge Rai sitting at the Westminster Magistrates' Court, heard argument on the applications. She had detailed written submissions and heard from leading counsel for Cs and IP1. The material sought was said to be relevant to the issue of double jeopardy (another bar being relied on by the Cs in the extradition case), as well as forum and abuse, but before us the argument was limited to its supposed relevance to the latter two grounds.

19. She adjourned the matter to 27 March 2024, whereupon she requested sight of some of the material held by IP1. Following a review of that material, she gave an *ex tempore* judgment refusing the application in its entirety. It is this decision which is the subject of this challenge. We were told by Mr Smith KC in his Skeleton Argument – and her judgment made clear - that the material that she viewed was limited to the minutes of an internal meeting of CPS lawyers on 29 June 2023 (at which the decision to discontinue proceedings against Cs was taken); two briefing notes compiled prior to that meeting; and the CPS charging decision (known as the MG3) in relation to Cs. Mr

Smith said that there had been redaction of passages of material subject to LPP and marking of confidential material in the documents the judge inspected.

20. We have an agreed note of the district judge's judgment. We can quote the relevant part as follows (*sic*):

> "In relation to abuse and forum:
>
> - MSKC allegation it was submitted there was bad faith on part of the Judicial Authority and on part of the CPS who have misled the Crown Court in respect of the nationality bar.
>
> - That the CPS and police and judicial authority lied to the Crown Court, to secure jurisdiction amounting to an abuse. It was also submitted that the Crown seek to expose the defendants to a trial in Poland on the basis of evidence inadmissible here, but admissible there.
>
> JSKC: nationality bar was in force at the time of making the decision, that was the understanding of CPS at time and it cannot amount to bad faith. Evidence admissible in one jurisdiction is not abusive, but in line with established case law – prosecutor entitled to consider admissibility regimes and does not amount to bad faith.
>
> I have carefully considered the application, the submissions, and the authorities provided, and for the following reasons the application is refused. The approach underpinning extradition is one of mutual trust and recognition of judicial authorities, Poland is a Category 1 territory, the system is designed to be swift and effective. The Crown Prosecution Service owes a duty to the court first and foremost, the suggestion that there has been a web of lies designed to mislead in conjunction with the Polish authorities or alone is fanciful.
>
> Despite that, there were three documents that may be relevant and I requested sight of them to consider their relevance. I was provided with the MG3, I was provided with two briefing notes and the minutes of the meeting in June. The Crown have not, at this stage, provided a copy of Treasury Counsel's advice as they have asserted privilege. This issue was parked until I had reviewed the remaining documents.
>
> Having reviewed the documents, there is nothing in those documents that is of relevance in a way which goes towards or supports in any way the basis on which counsel for the defence say they ought to be disclosed. I have considered the briefing…
>
> I have reconsidered whether I should look at Treasury Counsel's advice and I am satisfied from assessing additional briefing notes that that is now not required. The question of legal privilege does not arise.

> The requests for details of the co-defendants has been provided in the prosecutor's belief statement and this was not pursued in oral argument. In terms of the correspondence, the defence have not identified a proper basis on which that should be disclosed. The allegations of bad faith regarding the nationality bar and admissibility of evidence are not made out, and that has been strengthened by my review of three documents. Overall, the application is refused."

21. I need to explain two points in relation to this.

22. Firstly, the reference to the prosecutor's belief statement are to two letters (one in respect of each C) written by Gregor McGill, a Director of Legal Services with the CPS, dated 15 March 2024 pursuant to s 19B(3)(c) of the EA 2003. I will return to this provision, and to the statements, later.

23. Second, the reference to the nationality bar. This requires a slightly convoluted explanation but, in simplified terms, is as follows. (The full details are in IP1's Summary Grounds of Defence (SGD) at [9]-[17] and its Skeleton Argument at [8]-[11]). It refers to the existence (or not) of a bar on Poland extraditing its own nationals to the UK.

24. In the court below, it was said that IP1 had misled the Reading Crown Court about the existence of this bar when, in correspondence on 31 March 2023 in connection with the then extant domestic prosecutions of Cs, the bar was mentioned and it was said Poland would not extradite the two co-accused in Poland and, hence, that there could not be a trial of all four co-accused in the UK. A Senior Crown Prosecutor wrote:

> "A joint meeting was held between the Polish and UK prosecution and investigative teams with a view to establishing the most appropriate venue for the joint trial of all 4 defendants. There is currently an extradition bar from Poland to the UK which means that however we end up, we do not currently anticipate any trial here of all four defendants."

25. Cs maintained that the bar had never existed and that the CPS assertion was wrong and misleading. Paragraph 19 of their Skeleton Argument before the district judge argued:

> "To remind, the defence case under *Tollman* abuse [*R (Tollman) v Bow Street Magistrates' Court* [2007] 1 WLR 1157] is that Poland worked with [IP1] to procure the 2023 [IP1] decision to cede jurisdiction over an *ongoing* Crown Court trial via …. and which was brought about by Poland and/or IP1 having misled the Crown Court into believing Polish law did not allow the extradition of the co-accused [KW] and [AN] to the UK."

26. They relied on expert evidence of Polish law.

27. IP1's position is as follows. The decision to discontinue the domestic prosecution was taken by it on 29 June 2023. Prior to that, as the 31 March 2023 letter indicated, there had been meetings and communications involving Eurojust (the EU's Agency for

Criminal Justice Cooperation), the CPS, Polish prosecutors and the police about the case. The CPS' understanding as set out to Reading Crown Court in March 2023 was based on a notification made by Poland in April 2021 under the Trade and Cooperation Agreement between the UK and the EU, and notified to the UK by the EU that month. This was reflected in internal CPS guidance and memoranda prior to this case, which stated that the nationality bar was in force.

28. By the time that the decision to discontinue was taken in June 2023, it was known to the CPS from internal guidance that the bar was to be removed in August 2023. On 26 July 2023 Poland (through the EU) notified the UK of a partial withdrawal of the notification that its nationals would not be extradited, with effect from 3 August 2023. The CPS's guidance on nationality bars for EU member states, as updated at 15 August 2023, states in relation to Poland, 'No bar. Absolute bar previously in place was lifted 3 August 2023'.

29. IP1 therefore says that the position as set out to Reading Crown Court in March 2023 was correct.

Section 19B and the prosecutor's belief statements

30. Section 19B provides:

> **"19B Forum**
>
> (1) The extradition of a person ("D") to a category 1 territory is barred by reason of forum if the extradition would not be in the interests of justice.
>
> (2) For the purposes of this section, the extradition would not be in the interests of justice if the judge—
>
> (a) decides that a substantial measure of D's relevant activity was performed in the United Kingdom; and
>
> (b) decides, having regard to the specified matters relating to the interests of justice (and only those matters), that the extradition should not take place.
>
> (3) These are the specified matters relating to the interests of justice -
>
> (a) the place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur;
>
> (b) the interests of any victims of the extradition offence;
>
> (c) any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence;

(d) were D to be prosecuted in a part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence necessary to prove the offence is or could be made available in the United Kingdom;

(e) any delay that might result from proceeding in one jurisdiction rather than another;

(f) the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard (in particular) to—

(i) the jurisdictions in which witnesses, co-defendants and other suspects are located, and

(ii) the practicability of the evidence of such persons being given in the United Kingdom or in jurisdictions outside the United Kingdom;

(g) D's connections with the United Kingdom.

(4) In deciding whether the extradition would not be in the interests of justice, the judge must have regard to the desirability of not requiring the disclosure of material which is subject to restrictions on disclosure in the category 1 territory concerned.

(5) If, on an application by a prosecutor, it appears to the judge that the prosecutor has considered the offences for which D could be prosecuted in the United Kingdom, or a part of the United Kingdom, in respect of the conduct constituting the extradition offence, the judge must make that prosecutor a party to the proceedings on the question of whether D's extradition is barred by reason of forum.

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

31. Where it applies, therefore, s 19B requires the district judge to make an assessment of where the interests of justice lie, having regard to the matters in s 19B(3), and only those matters. The analogue of s 19B in cases under Part 2 of the EA 2003 (eg those involving requests from the United States) is s 83A. Both provisions were inserted into the EA 2003 by the Crime and Courts Act 2013.

32. In *Atraskevic v Prosecutor General's Office, Republic of Lithuania* [2015] EWHC 131 (Admin), Aikens LJ said at [13]-[14]:

> "13. The scheme of *section 19B* is clear. If a 'forum bar' point is raised, the judge has to decide whether the extradition of a person to a category 1 territory 'would not be in the interests of justice'.

> In making that decision the judge has to be satisfied on two questions. First, he has to decide whether a substantial measure of the requested person's 'relevant activity' was performed in the UK. Whether a 'substantial measure' of the requested person's 'relevant activity' occurred in the UK will usually be exclusively a question of fact, which will be determined by the 'appropriate judge'. If this pre-condition is not satisfied then that is the end of this issue. The statutory 'forum-bar' cannot operate in that case.
>
> 14. However, if the judge does decide that a 'substantial measure' of the requested person's 'relevant activity' was performed in the UK, then he has to decide whether it is in the interests of justice that the extradition should not take place. The judge will do so by first of all "having regard" to all the matters that are specified in *section 19B(3).* The judge cannot take any other factors into account, apart from the one in section *19B(4)* concerning disclosure. One or more factors may or may not be relevant on the facts of a particular case: but in all instances the judge must 'have regard' to each of the factors. The weight to be given to each of the specified matters set out in *section 19B(3)* is for the 'appropriate judge', ie. the judge at the extradition hearing, to decide on the facts of the case before him. There is no ranking of importance of the various factors. Finally, the appropriate judge has to make a value judgment overall on whether the extradition of the requested person would "not be in the interests of justice," having had regard to, but only to, the factors set out in *section 19B(3).* We believe this analysis is entirely consistent of that of Simon J at [18] of *Dibden v Tribunal de Grande Instance de Lille, France [2014] EWHC 3074 (Admin)* with which Pitchford LJ agreed."

33. More recently, in *Hamilton v Government of the United States of America* [2023] EWHC 2893 (Admin), [47]-[53], the Court said of s 19B and s 83A:

> "47. The overarching test prescribed by section 83A is whether extradition would not be in the interests of justice: section 83A(1), *Dibden v Tribunal De Grande Instance De Lille, France* [2014] EWHC 3074 (Admin) *per* Simon J at [18], *Shaw v USA* [2014] EWHC 4654 (Admin) *per* Aikens LJ at [41], *Love v USA* [2018] EWHC 172 (Admin); [2018] 1 WLR 2889 *per* Lord Burnett CJ at [22].
>
> 48. Section 83A prescribes the circumstances in which extradition would not be in the interests of justice. Two conditions must both be fulfilled. First, section 83A(2)(a) imposes a threshold or qualifying condition. Read with section 83A(6), this threshold condition is that activity which was material to the commission of the extradition offence, and which is alleged to have been performed by the requested person, was performed in the United Kingdom.

49. If (and only if) the threshold condition imposed by section 83A(2)(a) is satisfied, the court must then consider the seven specified matters in order to determine whether extradition should not take place: section 83A(2)(b), *Dibden* at [18], *Atraskevic v Prosecutor General's Office, Republic of Lithuania* [2015] EWHC 131 (Admin) *per* Aikens LJ at [13].

50. The seven specified matters that must be considered have no necessary hierarchical weight. They are matters that the court must consider to reach an overall evaluative judgment as to whether extradition would not be in the interests of justice: *Shaw* at [40], *Atraskevic* at [14], *Dibden* at [18], *Love* at [43] – [44], *USA v McDaid* [2020] EWHC 1527 (Admin) at [43] – [44].

51. In *Love* Lord Burnett CJ and Ouseley J explained the purpose of section 83A at [22]:

> 'In our judgment, section 83A is clearly intended to provide a safeguard for requested persons, not distinctly to be found in any of the other bars to extradition or grounds for discharge, including section 87 and the wide scope of article 8 ECHR. The safeguard is not confined to British nationals, but it is to be borne in mind that the United Kingdom is one of those countries which is prepared to extradite its own nationals. Its underlying aim is to prevent extradition where the offences can be fairly and effectively tried here, and it is not in the interests of justice that the requested person should be extradited. But close attention has to be paid to the wording of the statute rather than to short summaries of its purpose or to general Parliamentary statements. The forum bar only arises if extradition would not be in the interests of justice; section 83A(1). The matters relevant to an evaluation of "the interests of justice" for these purposes are found in section 83A(2)(b). They do not leave to the court the task of some vague or broader evaluation of what is just. Nor is the bar a general provision requiring the court to form a view directly on which is the more suitable forum, let alone having regard to sentencing policy or the potential for prisoner transfer, save to the extent that one of the listed factors might in any particular case require consideration of it."

52. In *Patman and Safi v Specialist Criminal Court in Pezinok, Slovakia* [2020] EWHC 3512, Swift J said (in the context of section 19B which is in materially identical terms to section 83A) at [18]:

> 'the notion of 'interests of justice' is not a matter at large; rather it is carefully calibrated by the matters listed at section 19(3). The objective pursued by section 19B a curb on claims to exorbitant jurisdiction, is also relevant because this too

> informs the choice of the matters which are listed in section 19B(3)'
>
> 53. As to the relative importance of each of the factors, Simon J said in *Dibden* at [18]:
>
> > 'The relative importance of each matter will vary from case to case, and the weight to be accorded to the specified matters may also vary. The court will be engaged in a fact-specific exercise in order to determine whether the particular extradition would not be in the interests of justice.'"

34. In relation to s 19B(3)(c) (belief of a prosecutor, etc), in the present case there were, as I have said, two statements made on behalf of the CPS by Mr McGill as to what his belief was in respect of each of the Cs. The statements were in the form of letters addressed to Westminster Magistrates' Court. They were in similar terms and were dated on the same date (15 March 2024). Mr McGill was not involved in the decision making process directly but explains that CPS guidance requires that all statements of belief are approved and signed by a Director of Legal Services. His statements were made on the basis of material provided to him. They are quite lengthy, but can be fairly summarised as follows.

35. The victim was believed to have died on or around 29 November 2021 at an address in Slough, where he lived with the four co-accused, together with the child of one of them. All are Polish nationals. The victim was originally classified as a missing person, and a homicide investigation did not begin until April 2022. By the time that investigation began, two of those living at the house (KW and AN) had returned to Poland. KW (who is female) had been in a relationship with C2. Despite the homicide investigation, there was insufficient evidence to establish how the victim died or who was responsible.

36. KW and AN subsequently became suspects in a Polish investigation and were charged in Poland with offences which are akin to perverting the course of justice in relation to the victim's death. In their interviews with the Polish authorities, both KW and AN implicated C1 as the person responsible for the victim's death. C1 and C2 are said to have separately assaulted the victim at a time before the incident which led to his death.

37. Mr McGill understood that the position as conveyed to IP1 was that the interview accounts given by KW and AN would be admissible against the Cs in Poland. However, he also understood that the Polish authorities informed IP1 that if proceedings against KW concluded then she could not be compelled to give evidence against C2 due to her previous relationship with him.

38. In January 2023, the allocated CPS reviewing lawyer authorised charges of perverting the course of justice and preventing a lawful burial against Cs. On 28 February 2023 the extradition warrant for C1 was issued for murder and assault. On 3 April 2023 the extradition warrant for C2 was issued for assault and an offence akin to perverting the course of justice.

39. In order to keep the court and the defence informed of the state of the continuing UK proceedings, information was provided by way of update to the court and the defence including:

a. That there was a parallel investigation in Poland into the victim's death and perverting the course of justice.

b. That a joint meeting between UK and Polish police/investigators took place on 28 February 2023 to assess the nature and extent of the evidence held by each jurisdiction and the most appropriate venue for a joint trial.

c. That further consideration was to be given to a number of issues including consideration of homicide charges, jurisdiction for prosecution and potential extradition.

d. The fact that two suspects (namely KW and AN) were being held in Poland on offences akin to perverting the course of justice.

e. The fact that all four suspects and several witnesses were Polish nationals, some of whom remained in the UK, but some of whom were in Poland.

f. That it was considered to be in the interests of justice for all four suspects to be tried together in one jurisdiction for the crimes alleged in relation to the victim's death and the aftermath.

g. That there was currently a bar on extradition from Poland to the UK preventing the suspects in Poland from being extradited to the UK at that time.

h. That no indictment had been preferred in the UK proceedings, as until the question of jurisdiction had been properly addressed, and in so far as the process did not adversely affect the rights of either defendant, it would not be in the interests of justice for any steps to be taken in the UK criminal proceedings that could jeopardise the issues as to jurisdiction, which were under consideration.

i. That Polish arrest warrants, seeking the extradition of C1 (for murder and assault of the victim) and of C2 (for assault and an offence akin to perverting the course of justice) were received on 28 April 2023.

40. A subsequent decision was made in June 2023 to discontinue proceedings in the UK, on the basis that a prosecution was no longer needed in the public interest as the most appropriate location for all offences to be tried was thought to be in Poland.

41. I will quote Mr McGill's 'Conclusion' section in his C1 letter *verbatim* (the conclusion in his letter regarding C2 is virtually identical *mutatis mutandis*):

> "9. I have considered s19B(3) of the Extradition Act 2003 and the factors set out in subsections a) to g) therein, as summarised below and corresponding to the subsection of the Act.
>
> a. All of the harm occurred in the UK.

b. It is believed that the victim's family are resident in Poland. It is in their interests that those suspected of being responsible for the offences committed against the victim are tried.

c. It is my belief that the UK is not the most appropriate jurisdiction in which to prosecute TW in respect of the conduct constituting the extradition offence.

d. I understand that there is insufficient admissible evidence to prosecute TW in the UK for the offences of murder and assault.

e. Proceeding in the UK with Perverting the Course of Justice and Preventing a Lawful Burial may have impeded the Polish prosecution for murder and associated offences, including by causing potential delay.

f. It is most desirable for one prosecution of all offences, having regard to the location of the two key witnesses and other suspects (all believed to be in Poland) and the fact that the evidence of the other suspects (KW and AN) would not be admissible against TW and AP in UK proceedings.

g. TW is a Polish national with no known existing connections to the UK.

10. It is my belief that although the UK would ordinarily have been the most appropriate forum for the offences with which TW was charged (namely Perverting the Course of Justice and Preventing a Lawful Burial), as proceeding with such offences could risk impeding the Polish prosecution for homicide and associated offences, I am led to the conclusion that the UK would therefore no longer be the appropriate forum. I have also considered the highly relevant factor that the Full Code Test is not met for any homicide or violence offence in the UK."

42. In light of this very full document (and its equivalent in C2's case), in my judgment it is clear why the CPS took the decision to discontinue the domestic proceedings against Cs. Although they could be prosecuted here for lesser offences, there was insufficient evidence to charge them with homicide or violence offences. The Full Code Test was not met for these. To prosecute them for those lesser offences could put in jeopardy their prosecution in Poland for those more serious offences, where the relevant evidence would be admissible. Thus for that reason, and the other reasons given, the decision had been taken to discontinue the prosecutions here in the public interest.

43. I am bound to observe that given Mr McGill's seniority and the extensive briefing he had obviously received before he prepared his statements, it is difficult to see what a record of the actual decision taken at the CPS meeting on 29 June 2023 would or could have added.

Submissions

44. On behalf of Cs, Mr Summers submitted as follows.

45. He said that the district judge's decision was vitiated by errors of law and that Cs' application should be remitted to a different district judge for re-determination. Alternatively, he submitted (at least in writing) that we should inspect the material for ourselves and order appropriate disclosure.

46. At the heart of Mr Summers' submissions was the contention (disputed by the IPs) that the material the Cs sought before the district judge as to the process by which the decision in relation to concurrent jurisdiction was reached, are disclosable; are of the type that are always disclosed in extradition cases where forum is in issue; and hence that the district judge somehow took an irrational course in this case by refusing the witness summons. He said there was no transparency in how or why IP1 had reached its discontinuance decision. As he put it orally, 'transparency has become the orthodox position'.

47. The four grounds of challenge are (Cs Skeleton Argument, [15]):

a. Ground 1: Forum: the district judge's decision is unlawful for lack of legally adequate reasons.

b. Ground 2: Forum: her conclusion is in any event *Wednesbury* unreasonable.

c. Ground 3: Abuse: her conclusion is also *Wednesbury* unreasonable.

d. Ground 4: Forum and abuse: the district judge made a material error of law in that she applied a test of relevance other than that identified in s.97 MCA 1980.

48. As to Ground 1, Mr Summers criticised the judge because he said that the whole focus of the substance of her judgment was the abuse argument. He said there was no recognition at all of the distinct issues under the forum bar and potential relevance of the material to those issues. He also criticised her for only looking at some of the material (and not, for example, material from earlier in 2023 when it is known there were meetings with the Polish authorities) and for not explaining why they were not relevant or why she had not inspected them.

49. In relation to Ground 2, Mr Summers argued (Skeleton Argument, [34]):

> "… concurrent-jurisdiction decision-making materials (i.e. understanding <u>why</u> TCCPS decided in 2023 to cede jurisdiction in this case to Poland) are crucial to understanding and evaluating both (a) the weight that can be placed under s.19B(3)(c) on TCCPS's 2024 PBS, and (b) the weight to be ascribed to the other statutory matters, including for example s.19B(3)(f) (the desirability and practicability of all prosecutions in one jurisdiction). Only an understanding of the *actual* decision that led to the cessation of jurisdiction in 2023 can sensibly inform those matters. At lowest, those materials are *relevant* to those issues."

50. He went on to assert (at [38]) that 'disclosure of concurrent-jurisdiction decision-making materials occurred, in one form or another' in the following cases: *Government of the United States v Osborne* [2022] EWHC 35 (Admin); *Lynch v Government of the United States of America* [2023] EWHC 876 (Admin); *Wyatt v Government of the United States of America* [2019] EWHC 2978 (Admin); *Socha v District Court, Ostravia (Czech Republic)* [2016] EWHC 139 (Admin), *Shaw v Government of the United States of America* [2014] EWHC 4654 (Admin); *Dibden v Tribunal de Grande Instance de Lille (France)* [2014] EWHC 3074 (Admin). He said at the end of the same paragraph: 'In fact, the Claimants are unaware of any case in which a concurrent-jurisdiction decision has been made and *not* disclosed to the extradition court', a claim repeated in [44]. Paragraph 42 argued (original emphasis):

> "The important point is that, in each of these cases, the Court had before it the actual record of the decision not to prosecute in this jurisdiction, completed and signed by the reviewing lawyer who himself had reviewed all the evidence."

51. In his oral submissions Mr Summers took us to these cases in an attempt to make good his submission. Recognising, I think it is fair to say, that some of them contain passages which at first blush are against Cs' case, he sought to distinguish them. I will therefore need to examine some of them later.

52. For now, however, I note the apparent shift in [38] of Cs' Skeleton Argument from the initial claim about disclosure of materials arising from the *process* by which a concurrent jurisdiction decision was reached (which is how the case was pleaded and put below and before us as to what should have been produced under the witness summons), to an assertion about disclosure of the decision *simpliciter*. Reflecting this shift, in his oral submissions Mr Summers said that the decision was all he was seeking. As I noted it, his submission was, 'I want the record of the decision, nothing more, nothing less.' He also said: 'If there were a template record we would just want that'; and (as I understood him) that it would be acceptable if the reasons for the decision were to be disclosed by IP1 in gisted form. This position, however, would appear to be inconsistent with what was said at [53] under the heading 'Extent of the application' where again it was asserted that process materials should be disclosed, including going back to February 2023 (and so encompassing discussions with the Polish authorities) and not just the decision taken by IP1 (and only IP1) to discontinue the domestic prosecutions at a meeting here in June 2023. It is also inconsistent with [54] et seq, where confidentiality of discussions with the Poles is argued not to be a reason not to order disclosure. I have considered Mr Summers' submissions on both bases.

53. At [49] Cs posed the rhetorical question:

> "How can the extradition judge rationally weigh a 2024 PBS [prosecutor's belief statement, ie, Mr McGill's statements] which adopts that antecedent 2023 decision, without knowing the full extent of the decision made, why it was made, and examining all its potential flaws ? Put otherwise, how could the DJ rationally conclude that none of this was '*likely to be relevant'* to the weight that might be afforded to the PBS in this case ?"

54. In relation to Ground 3, Cs re-iterated that their case was the extraditions are an abuse of process because they are a deliberate attempt to prosecute them for murder/assault in Poland using evidence from the co-accused in Poland which is admissible against them there, but understood by the IPs not to be so here, and that this amounts to 'forum-shopping' which – it is said – is 'offensive' or 'odious'.

55. The position of IP1 is that the evidence of murder/assault against Cs provided by KW and AN to investigators in Poland would plainly not be admissible or else not admitted in England, being accusations made against them in their absence. At a trial here, they would not become admissible against Cs unless and until KW and AN went into the witness box and repeated them. Unsurprisingly, Polish rules of evidence would appear to be different and the material would be admissible against Cs for murder/assault at a trial there. This is accepted by IP1 (IP1, Summary Grounds of Defence (SGD), [56]).

56. Cs argue in light of this, there is an *ipso facto* arguable claim of abuse, and that the district judge gave 'no sensible reason' for saying the material sought was not relevant to that argument.

57. In relation to Ground 4, Cs say the judge erred when she assessed the material by reference to its 'relevance'. They argue (Skeleton, [68]), that the difference between 'relevance', and the applicable test of 'likely relevance' in the sense of 'real possibility', is significant.

58. Finally, Cs submitted that this is not a case where we could or should apply s 31(2A) of the Senior Courts Act 1981 on the basis that it is highly likely that the outcome for them would not have been substantially different if the conduct complained of had not occurred.

59. In his Skeleton Argument on behalf of IP1, Mr Smith submitted as follows.

60. He began by listing the underlying material in IP1's possession which we might wish to see. It is extensive. It includes, for example: items relating to a Eurojust meeting in February 2023; working notes from that meeting; email correspondence with Poland; briefing notes for the June 2023 CPS meeting at which the decision to discontinue was taken; and the minutes of that meeting.

61. For reasons which will become clear, I did not need to inspect this material in order to reach my conclusions.

62. In relation to Ground 1, Mr Smith said the district judge's ruling and reasons were, assessed in the context of the case, the material she viewed and the submission she heard, proper. She had detailed written and oral submissions from the parties and would have had them well in mind. She measured the material against the bases advanced by Cs for why it should be disclosed. The decision to discontinue proceedings was the June 2023 CPS meeting and precursor notes. The district judge assessed this material and plainly did not accept that the material satisfied the statutory criteria, by reference to Cs arguments. Accordingly, her reasons were adequate.

63. In relation to Ground 2, he said that in substance what Cs were seeking to do was to obtain internal CPS materials in order to scrutinise the decision to discontinue proceedings in this country, and to challenge the prosecutor's statements of belief that

have been issued in these proceedings by reference to those documents. This is not permissible. This is not to say that these statements have to be automatically accepted. Instead, courts can and do scrutinize them by reference to their reasoning, rigour and consideration of relevant issues. Attempts to obtain witness summonses for the production of such material (or material said to be relevant to other specified factors in s 19B(3)) have failed. The CPSEU have confirmed that the kind of extensive material sought in this case has not been provided in previous cases. The Divisional Court has consistently refused to countenance the sort of application that the Cs have made in this case.

64. In relation to Ground 3, he said that the witness summons application had been premature and/or academic and that the *Tollman* process should be gone through at the extradition hearing. There is no dispute about the central facts which Cs say amount to an abuse.

65. On Ground 4, he said it had been an ex tempore judgment, and a degree of latitude had to be afforded to the district judge. She had viewed the material, and come to the conclusion that there was nothing which would support 'in any way' the basis for disclosure. This amounted to the application of the 'likely to be relevant' test, or if anything applied a test which was generous to Cs. If there was an error, we should apply s 31(2A) of the Senior Courts Act 1981.

66. IP2 also resists the claim. In its Skeleton Argument (not settled by Mr Evans), it submitted that courts should not issue a summons for the production of material underpinning a prosecutor's statement of belief, nor for internal CPS material which is said to be relevant to the forum bar more generally. Such an approach is contrary to s 19B and to the caselaw interpreting s 19B. There is no precedent for the provision of such material in previous cases, as was confirmed in IP2's response to Cs pre-action protocol letter. Applications for a witness summons to produce material said to be relevant to the specified factors in s 19B(3) are inappropriate generally (and not limited to applications for material underpinning the prosecutor's belief): see *Socha*.

Discussion

67. Despite Mr Summers' able, sustained and forceful submissions, I was satisfied at their conclusion that Cs case was not arguable and that permission should be refused. For the substance of the reasons advanced by IPs, and for the following reasons (reached following further reflection), it seemed and seems to me that the whole premise of Cs case on forum – namely that process materials are routinely disclosed in forum cases in the interests of 'transparency' – is wrong. I was and am further satisfied that there are a number of cases that are firmly against Cs position. I was and am also satisfied that the other grounds advanced by Cs were not arguable.

68. Mr Summers posited, given what he said was the paucity of reasoning on the part of the judge, that it was to be inferred she had accepted IP1's submission that *Socha* foreclosed his application, at least on forum. He said if that is what she had done, she had been wrong. I am of the view, which I shall explain, that far from being wrong, the district judge was right, and indeed on one view adopted an approach to forum which was more favourable to Cs than is warranted by the cases in as much as she inspected the material for relevance, when it would have been open her to say that the cases establish that defendants are not entitled to the type of material sought (save perhaps in an exceptional

case); hence it was not 'likely to be material evidence' within the meaning of s 97 of the MCA 1980; and thus that the summons application should be refused.

69. I begin by making the preliminary point, if my Lord agrees, that we are not concerned with the merits of Cs' forum or abuse of process arguments. Whilst we probed aspects of them in our questioning of Mr Summers, that was done in the firm knowledge that resolution of those issues lies in the hands of the district judge at the extradition hearing (and this court, should there be an appeal thereafter). We are solely concerned with the correctness in law of the district judge's decision to refuse the application before her.

70. The district judge was faced with a wide-ranging application for material relating to the decision making process by which the CPS made its ultimate decision in June 2023 to discontinue the domestic proceedings, and not just an application for the decision itself made at the CPS meeting in June 2023 (at which, we are told, no Polish prosecutors were present). For our purposes, this was said to be likely to be material evidence in relation to forum and abuse of process.

71. Paragraph 20 of Cs' Skeleton Argument below said:

> "The documents likely to be material evidence in respect of the abuse of process argument are:
>
> All records, and correspondence, concerning the CPS' liaison with UK police, Polish police and prosecutors, and the CPS Extradition Unit concerning the jurisdiction for Mr Weiss' prosecution. This should include, but is not limited to, minutes of the 28 February joint meeting, Treasury Counsel's advice and minutes of the CPS National Case Management meeting in April 2023.
>
> Details of the two defendants who, according to the CPS letter dated 31 March 2023, are detained in Poland and whether these defendants were ever arrested in the UK, spoken to, or interviewed by the UK police, or whether any statements have been shared with the UK authorities."

72. Paragraph 29 asserted:

> "The same materials identified above at 20 are also - and obviously - relevant to all of the s 19B(3) forum 'specified matters'. In the alternative [to abuse], therefore, the materials are sought on this basis also."

73. There are a number of decisions of this Court which have rejected applications for production of the type which Cs made.

74. I begin with *Socha*, a decision of this Court (Burnett LJ and Irwin J (as they then were)). The leading judgment was given by Irwin J. This was an appeal against a decision of 6 August 2015 taken by District Judge Blake sitting in the Westminster Magistrates' Court to order the extradition of Mr Socha to the Czech Republic, and a challenge by

way of judicial review to a linked decision by District Judge Purdy, made on 29 June 2015, to refuse a witness summons to compel attendance at court and production of material by a police officer responsible for an English investigation into offending by Mr Socha. The Court said that in each case the point at issue was the proper approach to s 19B(3)(d). The offences in question were trans-national drugs offences.

75. During the proceedings, the CPS served a record of their 'decision on concurrent jurisdiction', announcing that no further criminal proceedings would be prosecuted in England, and that the better course would be for prosecution to follow in the Czech Republic. The document followed broadly the matters set out in s 19B(3). It was signed by a reviewing prosecutor.

76. From this, I take it that the document served was broadly similar to Mr McGill's statements in the present case, albeit that its title was different and Mr McGill was (as he accepted) not involved in the decision to discontinue the domestic prosecutions.

77. In relation to the witness summons, Irwin J said at [18]:

> "Although the initial application had been very bald, subsequent written submissions made it clear that the application was focussed on Section 19B(3)(d), and the question whether evidence necessary to prove the offence was or could be made available in England. It was submitted that the Appellant was at a significant disadvantage in addressing this 'specified matter', since he had no access to the material forming the basis of the decision not to proceed with an English prosecution. There should be 'equality of arms' on the point. It was still not made clear what documentation was sought, in the sense of witness statements, exhibits or 'unused material', whether exclusively English, or foreign, or both."

78. Despite the qualification towards the end of this paragraph, I think it is tolerably clear that what was being sought was not wholly dissimilar to the process material sought by Cs in their application below.

79. At [20] Irwin J said:

> "DJ Purdy refused the application on 29 June 2015. He was referred in the course of argument to three authorities: *Dibden v Tribunal de Grande Instance de Lille, France* [2014] EWHC 3074 (Admin), *Piotrowicz v Regional Court in Gdansk, Poland* [2014] EWHC 3884 (Admin) and *Atraskevic v Prosecutor General's Office, Lithuania* [2015] EWHC 131 (Admin). These cases bear directly on Section 19B(3)(c) and the consideration of prosecutorial 'belief' as to forum, but DJ Purdy took those authorities to be 'strongly analogous' to the issue under s 19B(3)(d), and as pointing against further disclosure."

80. Having referred in the previous paragraphs to the need for extradition to be swift and effective, Irwin J noted at [31] that Aikens LJ had observed in *Atraskevic*, [10], that

although s 19B was a purely domestic provision, not reflected in the EU legislation on the European arrest warrant, nonetheless, there was no basis for reading the safeguards in such a way that would subvert the mutuality and effectiveness of extradition and that, 'The importation of extensive secondary litigation would have that effect.'

81. He went on to say at [32]-[37], and this was the crux of his judgment:

> "32. Were the Appellant to succeed in his application for a witness summons or in his submissions as to the proper approach to evidence in this case, extensive secondary litigation would become inevitable. It would first be necessary to receive an account of the evidence and/or other material held by the CPS when making the decision not to conduct an English prosecution. It is clear there could be extensive argument about what should or should not have been produced. It is likely that important questions of confidentiality, public interest immunity and legal professional privilege would arise. All that is so, even were the application to be confined, as Mr Gledhill says he intends, to English rather than foreign material. For myself, I find it difficult to see how, if such an approach was indeed appropriate in relation to English material, it would not very rapidly emerge that there was an application to see foreign material. The argument would be that it was necessary to see what material might be made available in the United Kingdom.
>
> 33. It is also worth re-emphasising that the question of evidence in the United Kingdom is only one of the range of matters which a district judge has to consider in the course of the overall decision as to the justice of extradition. In the absence of compelling specific circumstances, it seems to me that the structure of Section 19B itself points against extensive secondary litigation as to the individual 'specific specified matters' which must be considered. For all those reasons, I take the view that the decision of the Divisional Court in *Dibden*, my own judgment in *Piotrowicz*, and the decision of the Divisional Court in *Atraskevic*, whilst not direct authority on this subsection, do represent useful guidance when interpreting the approach to Section 19B(3)(d). Similar considerations arise in each case.
>
> 34. However, it seems to be that there are at least two additional serious problems with the submissions made by Mr Gledhill. The first concerns the effect on disclosure if such an application were to succeed and subsequently extradition were refused in favour of English prosecution. The outcome would be that an Appellant such as this would have subverted or bypassed the careful arrangements for disclosure in criminal proceedings laid down in statute and in the Criminal Procedure Rules. Set aside any question of operational material, or material subject to the legal professional privilege of the Crown: the Appellant would have obtained sight of the existing witness statements and potentially the 'unused material', whether inculpatory or exculpatory, before

he had even been charged, never mind served a defendant's case statement which, in the normal course of criminal proceedings, would be necessary before much of such disclosure would be triggered. It can hardly have been the intention of Parliament to override the criminal law and Criminal Procedure Rules in that way.

35. In this context Section 19B(4) is relevant. For convenience I repeat the wording here:

> "(4) In deciding whether the extradition would not be in the interests of justice, the judge must have regard to the desirability of not requiring the disclosure of material which is subject to restrictions on disclosure in the Category 1 territory concerned."

In my view it is inconceivable that Parliament could have intended to protect the normal rules governing disclosure in criminal proceedings in a relevant foreign jurisdiction, whilst intending to abrogate the limits on disclosure in England and Wales. If that is right, then a further argument would arise from an application such as that made by the Appellant. The Crown could legitimately argue that the Appellant should have no more disclosure than that to which he would be entitled under normal English criminal law and procedure. Unless that argument failed, the outcome of the application would be a circularity.

36. A further difficulty arising from this application was conceded by Mr Gledhill in the course of argument. He agreed that the outcome of his approach would mean, on the facts of this case at least, the district judge would be asked to review the decision by the appropriate prosecutor not to instigate a prosecution in this jurisdiction. As I have set out above, there was in this case a clear decision not to proceed. There is no need to rehearse the well-established reluctance of the Courts to interfere with the decisions of properly constituted prosecution authorities: see *R v DPP ex parte Manning* [2001] QB 330, at paragraph 23; *R (Purdy) v DPP* [2010] 1 AC 345, at paragraph 99; *R v DPP ex parte Kebilene* [2000] 2 AC 326.

37. For all the above reasons, in my judgment the application for disclosure made by this Appellant was ill-founded. The district judge was entirely right to reject it. Given that the Appellant now maintains no other criticism of the decision of DJ Blake, I therefore dismiss the appeal. I should add for completeness that, given the other material before the magistrates' court bearing on the other "specified matters" under section 19(B), it seems to me that there was a very strong basis for the Court's decision that the interests of justice favoured extradition and trial in the Czech Republic."

82. I regard this decision as conclusively against Cs' case for production of process material on the basis it was likely to be material evidence in relation to the issue of forum. It shows that it was not and could not be, because such material has no proper role to play in the evaluation of the specified matters in s 19B(3). I reject Mr Summers' attempt to distinguish *Socha* including on the basis that there had been service of a 'decision on concurrent jurisdiction', and in the present case (he said) there had not. In fact, as I said earlier, Mr McGill has given a very full explanation of why the decision was taken. Whilst his statements were titled differently and not in a standard CPS template format (a point made by Mr Summers), they served the same functional purpose. There is also no basis for any suggestion *Socha* is somehow wrongly decided.

83. It is possible to cite passages from other authorities which are also against Cs' case.

84. In *Piotrowicz v Regional Court of Gdansk, Poland* [2014] EWHC 3884 (Admin), forum had been raised as a bar before the district judge and rejected. The case was an appeal against that decision. Criticisms were made of the refusal by the CPS of disclosure of case files (see at [15]). Irwin J said at [21]-[24]:

> "21. [Counsel] then relies on the fact that the Crown concede that these offences could be tried in the United Kingdom, a concession which appears in the original skeleton argument on behalf of the requesting judicial authority. He encapsulates his criticism on this aspect of the case by saying the prosecution belief simply was not explored sufficiently.
>
> 22. In the course of argument, Mr Gledhill was asked by me to consider how far that process should go. Should there be disclosure of the existing files held by the CPS so as to demonstrate the exact extent of their evidence? Should there be disclosure sought of the files held by the Polish authorities so as to compare the two?
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> 23. Mr Gledhill was pressed two or three times as to where, in his submission, the limits of this process of investigation should go in the course of an extradition hearing. Perhaps wisely, he declined to attempt to formulate any general limitations. But it is clear that his submission is that there should be an extensive examination of the basis of the prosecutor's 'belief' as to the appropriate jurisdiction.
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> 24. Guidance was given in the course of the *Dibden* decision in the judgment of Simon J on this issue at paragraph 35. He said this:
>
> > 'In my judgment, section 19B(3)(c) was not intended to invite a review of the prosecutor's belief as to the more appropriate jurisdiction on grounds short of irrationality. It was certainly not intended to invite a debate with demands for documents justifying the belief.'

> 25. In my judgment, that was an entirely correct observation. The very statutory language, which for convenience I repeat, 'any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute', is instructive. It is not any developed view. What that language indicates is not any written presentation intended to invite investigation by the court in a way consistent with the submissions of Mr Gledhill. Of course, an irrational belief by the prosecutor which was self-evidently so would carry little or no weight when considered by the court looking at the relevant factors. Of course, enquiries to establish, in round terms, what the basis of the belief may be, will be entirely appropriate. But it would be far beyond what, in my judgment, was intended by the introduction of this consideration as one, amongst others, for the kind of secondary litigation presupposed by Mr Gledhill's submissions to be appropriate. I am fortified in that view by the judgment in *Dibden*."

85. It seems to me that this passage, and the quoted passage from *Dibden*, are also plainly against Cs' case. Mr Summers made observations about *Dibden*, and I acknowledge it was an early decision on s 19B, as he said. However, I respectfully consider that Simon J should be taken to have meant what he said and that the thrust of his *dictum* in [35] is clear.

86. On the secondary litigation point, it is clear to me that what the witness summons in the present case was aimed at was the production of material with a view to its deployment to undermine Mr McGill's stated conclusions. So, for example, [34] of Cs' Skeleton Argument said:

> "34. It is in that context that the concurrent-jurisdiction decision-making materials (i.e. understanding <u>why</u> TCCPS decided in 2023 to cede jurisdiction in this case to Poland) are crucial to understanding and evaluating both (a) the weight that can be placed under s.19B(3)(c) on TCCPS's 2024 PBS, and (b) the weight to be ascribed to the other statutory matters, including for example s.19B(3)(f) (the desirability and practicability of all prosecutions in one jurisdiction). Only an understanding of the *actual* decision that led to the cessation of jurisdiction in 2023 can sensibly inform those matters. At lowest, those materials are *relevant* to those issues."

87. Paragraph 49 said:

> "49. How can the extradition judge rationally weigh a 2024 PBS which adopts that antecedent 2023 decision, without knowing the full extent of the decision made, why it was made, and examining all its potential flaws? Put otherwise, how could the DJ rationally conclude that none of this was '*likely to be relevant'* to the weight that might be afforded to the PBS in this case?"

88. Although Mr Summers disavowed the suggestion, it is easy to see where the disclosure sought could lead. Suppose the minutes of the CPS June 2023 meeting were disclosed and they showed that some present thought the domestic prosecutions should continue, and that extradition would not be in the interests of justice. What then? One possibility is that it would trigger applications for summonses for their attendance for them to be questioned on whether they agreed with Mr McGill and if not, why not. The aim would be to show that they were right and he was wrong. If for some reason that did not happen, then no doubt an abuse of process application would follow. Or suppose communications with Poland were disclosed and they revealed differing views from prosecutors there about what should happen. Would this trigger requests for further information from Poland? If so, this again could lead into a thicket of issues.

89. We were also taken to the case of *Shaw* by Mr Summers, and he cited it to support his argument that transparency required the disclosure sought. However, again, I do not consider it assists him. There, the prosecutor's belief had first been presented in a letter from a (named) CPS lawyer, and then via counsel appearing on behalf of the Government on the basis of instructions emanating from other counsel and an unnamed CPS lawyer. As recorded by the Court at [44]:

> "44. … The facts before the DJ, as summarised by him at paragraph 21(c) of his Ruling, were as follows:
>
> > '...Prior to the forum bar provisions coming into force the views of the CPS were sought and by an undated letter (some time after 16th April 2013) sent by Mr Hadik to Mr Shaw's solicitors it is recorded "The CPS after conducting a careful review determined that it would forgo prosecution of Mr Shaw in connection with his possession of indecent images of children, in favour of Mr Shaw's prosecution by the US authorities." Subsequently, after the forum bar came into force, the matter has been re-visited by the CPS. [Counsel for the USA] has informed the court that the matter has been carefully considered at the highest level within the CPS and with the assistance of leading counsel advising, an unnamed Senior Crown Prosecutor 'believes England & Wales is not the most appropriate jurisdiction in which to prosecute Mr Shaw in respect of the conduct constituting the extradition offence'."

90. Of this process, the Court commented at [56]-[57] (my italics):

> "56. In my judgment, the position of the CPS on the facts of this case is not satisfactory. The original consideration was plainly given upon the wrong basis and not upon the statutory finding. It was then reviewed in the light of the statutory wording, but it was done on what can only be described as a rather unsatisfactory and 'non-transparent' basis. The person who actually made the decision was not then identified and no statement from the decision maker

> was given, *nor was there any other document setting out the decision and the basis for it."*
>
> 57. There is, in my view, very little weight to be attached to the 'belief' in these circumstances. It is not clear to me how much weight, if any, the DJ attached to this factor, but in my judgment the weight to be attached to it is comparatively small, if any at all."

91. The Court went on at [58]-[59]:

> "58. We have been asked by both counsel if we could give some guidance as to what we think the practice should be for dealing with this factor in the future. This is, I must emphasise, undoubtedly preliminary guidance. Guidance will inevitably evolve as more of these 'Forum Bar' cases come before this court. My guidance, at present, is as follows: first it is for the requested person to identify 'Forum Bar' as an issue that is to be raised in the extradition hearing before the DJ. Secondly, if the requesting state wishes to adduce material as to the 'belief' of the UK prosecutor, then that should be done in a document, something akin to a 'decision letter', that is so well-known in immigration proceedings. In that document the reasons for the belief should be given; and the 'prosecutor' who has the belief should be identified in the document. Thirdly, this material need not be in a statement form. However, it should be if it seems that under the circumstances of the case that is the appropriate way to deal with it. Fourthly, it is for the DJ to decide at a case management hearing, or equivalent, what the timetable should be for the production of material relating to this issue and any response to it, and also how that material is to be adduced at the extradition hearing. Fifthly, it is for the DJ to decide how the material concerning the belief and the challenge to it, if there is one, is to be dealt with at the extradition hearing.
>
> 59. We note and emphasise, once again, the limited basis upon which there can be a review of the prosecutor's belief, as set out in paragraph 35 of Simon J's judgment in *Dibden*. We agree with that approach and we again emphasise that section 83A(3)(c), like section 19B(3)(c), is not intended to invite a debate with demands for documents."

92. In my judgment these paragraphs provide no support either for the proposition that there has to be an actual record of the decision on concurrent jurisdiction before the court where forum is raised, let alone that there can or should be wide-ranging disclosure of underlying process documentation so that the merits of the belief can be tested.

93. As to the first point, adducing the record of the decision is just one way of putting a prosecutor's belief before the court. But the words I have italicised in [56] contemplate

that it is sufficient if the decision is explained in a document with reasons. There is no suggestion that this has to be from the person who took the decision, and the reasons why are obvious: that person may have retired, died, moved departments, etc. Read with [58]-[59] it is sufficient that there is such a document akin to a decision letter, from a named person who is a prosecutor in the sense explained by the Court at [48]:

> "'a prosecutor' must mean a domestic prosecutor within the UK: see the definition in section 83E(2). In England and Wales this means someone within the domestic branch of the CPS, rather than the separate and independent branch of the CPS, called the CPS Extradition Unit, which deals with extradition matters."

94. As Mr McGill made clear, it is CPS policy that prosecutor's belief statements have to come from a Director of Legal Services who, I take it, will in many cases not have been involved in the decision making process.

95. I consider that Mr McGill's letters in the present case satisfied these requirements. It will be open to Cs to say that they do not. They will no doubt suggest, for example, that because he was not involved in the decision, his views ought to carry no weight. If they are right about this, or any other argument, then the district judge will discount the weight to be given to his views appropriately. As the court in *Shaw* said at [53]:

> "It is ultimately for the judge to decide on the weight to give to this factor. If the material about the belief and the basis for it is sound, then doubtless this will weigh heavily with the appropriate judge. If the material appears to be flimsy, or ill considered or even irrational (or perhaps even given in bad faith), it will have little or no weight at all. The mere say-so of a prosecutor about his belief, which is not supported by reasons, will carry little or no weight and the judge will be entitled to dismiss this as a factor seriously to be taken into account."

96. On this point, the Divisional Court in *Hamilton* said at [86]:

> "86. [The prosecutor] expresses the clear view that the UK is not the most appropriate jurisdiction in which to prosecute the appellant. That is a factor that weighs heavily in the balance, if the view is sound. Conversely, if it is based on flimsy material, or is ill-considered or even irrational then it will carry no weight at all. Similarly, the mere assertion the UK is the most appropriate jurisdiction in which to prosecute a requested person does not, in itself, carry any significant weight: *Shaw* at [51] – [53], *Dibden* at [35], *Love* at [54] and *Wyatt* at [18] – [20]."

97. As for other cases to which we were referred, I consider that they did not provide any assistance to Cs' case. They did not bear out the proposition that process materials are disclosable, let alone that they are always disclosed. The following illustrate this.

98. In *Wyatt* the CPS served a prosecutor's statement of belief (which contained a quoted section from the prosecutor's earlier review note), along with a copy of the indictment and the sentencing note from the domestic case. There was no service of any other supporting documents relating to the decision making, such as the original review note, records of meetings or internal briefing notes.

99. In *Osborne* the prosecutor's belief in the extradition proceedings was provided by way of two 'records of a decision on concurrent jurisdiction', ie, there had been two decisions made at different times by the same prosecutor (see at [8]). Both were put before the district judge ([22]) and, on appeal, Lane J compared and considered both statements in assessing the weight to be given to the latter (see [52]-[53] and [78]).

100. In *Hamilton* a statement was provided by a different prosecutor (a Ms Graves) to the prosecutor who had previously been involved in the underlying investigation; Ms Graves had not considered the available evidence. No underlying material was provided to the Court or the defence and there was no application for such material. The fact that Ms Graves had not been involved in the investigation was a factor which diminished the weight to be attached to her statement of belief (see at [88]), however there is no trace in the judgment that this should have triggered the sort of disclosure sought in the present case.

101. In *Lynch* (where I was part of the Court), as Mr Summers reminded us, a statement from the SFO was provided but no underlying material accompanied it, nor was sought.

102. In short, I consider that there is no support in the case law or the statute for the submission that because the district judge will need to assess the weight to be given to the statement of the prosecutor's belief, this should be a trigger for underlying materials including, in this case, internal CPS meeting notes, and details of confidential meetings with foreign prosecutors.

103. I also agree with IP1's submission (Skeleton Argument, [32]) that it is clear that in different cases, the district judge has been provided with a statement from a prosecutor or a record of decision on concurrent jurisdiction which served the same purpose. There is no support in the case law for the proposition that, where a prosecutor's statement of belief is provided but no 'record of decision on concurrent jurisdiction' is provided, then disclosure of underlying materials is triggered.

104. It follows that I consider that the district judge did not err in law when she refused the application in relation to forum. She was right to conclude, as she did in substance, that there was no basis in law for disclosure based on the forum argument. There may have been a shorter route to the conclusion which the judge reached, principally *Socha*, but it was the right conclusion, and that is what is important. As I remarked earlier, the judge was perhaps more generous to the defence by inspecting some of the material than she needed to be. The application was contrary to settled law, even without the material being inspected in whole or in part. That is why I, for my part, did not need to inspect it.

105. Ground 2 therefore fails.

106. I turn next to Ground 3. So far as disclosure on the basis of abuse was concerned, in my view the judge was again plainly right to refuse the summons.

107. Before any disclosure obligation arises in connection with an alleged abuse of process in an extradition case the defendant must make an arguable case that there has been abusive conduct. In other words, they must show that something may have happened that is arguably abusive. In *Tollman* the Court said at [84] (my italics):

> "84. The judge should be alert to the possibility of allegations of abuse of process being made by way of delaying tactics. *No steps should be taken to investigate an alleged abuse of process unless the judge is satisfied that there is reason to believe that an abuse may have taken place.* Where an allegation of abuse of process is made, the first step must be to insist on the conduct alleged to constitute the abuse being identified with particularity. The judge must then consider whether the conduct, if established, is capable of amounting to an abuse of process. If it is, he must next consider whether there are reasonable grounds for believing that such conduct may have occurred. If there are, then the judge should not accede to the request for extradition unless he has satisfied himself that such abuse has not occurred."

108. The Court then analysed the process that should be followed by way of disclosure following from that preliminary showing. It then said at [93]:

> "93. We believe that the scenario described above will be rare. Once it has been shown that there is an issue of abuse of process that requires investigation, it should be possible, provided that the parties act reasonably, to agree material facts, or that the material necessary to resolve any issue is placed in the public domain."

109. In this case, Cs chose to make their allegation of abuse not at the extradition hearing, but on an interlocutory witness summons application. Their case was pitched clearly and strongly, namely, that this is a case of bad faith verging on dishonesty. Paragraph 8 of their Statement of Issues stated:

> "*Tollman* abuse of process: The UK police, domestic CPS and Polish authorities collectively determined that Polish law could achieve a murder/assault conviction based on evidence (co-accused statements) which UK law regards as inadmissible. Implementation of that abusive scheme required ceder of jurisdiction to Poland of an ongoing Crown Court trial (of defendants waiting in custody), regardless of the UK knowledge of the lack of independence of its judiciary, heedless of the broad interests of the ongoing UK trial, and regardless of the interests of the defendants. It was put into effect over the course of months by the joint meetings and advices referred to above at §6. It is not yet known whether extradition CPS were involved in these discussions. The scheme required and involved actively misleading the UK court as to Polish

> law, specifically the extradition liability of the two Polish defendants."

110. Paragraph 19 of its Skeleton Argument below put the matter as follows:

> "To remind, the defence case under *Tollman* abuse is that Poland worked with TCCPS to procure the 2023 TCCPS decision to cede jurisdiction over an ongoing Crown Court trial via (1) a bad faith desire to secure conviction upon testimony (of co-accused) which it knew would not be admissible in the UK trial, and which was (2) brought about by Poland and/or TCCPS having misled the Crown Court into believing that Polish law did not allow the extradition of co-accused Wojcik and Nikiel to the UK. See Note on Jurisdiction (26 February 2024) at §10(b)."

111. Paragraph 10(b) as referred to said:

> "Abuse of process (was the 2023 decision to cede jurisdiction to Poland a bad faith attempt to secure conviction upon testimony (of co-accused) which would not be admissible in the UK trial? Was the decision, in any event, brought about by Poland having misled TCCPS and the Crown Court into believing that Polish law did not allow the extradition of co-accused Wojcik and Nikiel to the UK?)"

112. The district judge's ruling referred to Cs' thesis in the following terms:

> "The Crown Prosecution Service owes a duty to the court first and foremost, the suggestion that there has been a web of lies designed to mislead in conjunction with the Polish authorities or alone is fanciful."

113. In other words, per *Tollman*, the district judge did *not* consider on the basis of the materials and argument then before her that there was reason to believe that an abuse may have taken place. She was entitled to reach that conclusion. That being so, no further enquiry was required at that stage and she was right to refuse the application on the basis of abuse.

114. It should not be overlooked that very many of the facts relating to the suggested abuse are agreed. IP1's Skeleton Argument at [44]-[45] makes clear the facts that have been conceded by it in Mr McGill's statements; in correspondence for this claim; and in submissions in the court below. The parties agree that IP1 discontinued the prosecution in the UK for offences of perverting the course of justice and preventing lawful burial, in order that the Cs might be prosecuted in Poland for conduct arising from the same incident including (in the case of C1) a homicide offence. When doing so, IP1 knew that the Polish authorities could rely on the evidence of two co-accused individuals in Poland, and that this evidence would either be inadmissible or not admitted in England. This is said by the Cs to be abusive.

115. It therefore seems to me that Cs have what they need. It is open to them to argue abuse at the extradition hearing and the judge will go through the *Tollman* procedure including deciding, first, whether there is reason to believe that an abuse may have taken place in the manner alleged.

116. Ground 3 therefore fails. The judge was right to refuse the summons on the basis of alleged abuse. As already indicated, but for the avoidance of doubt, nothing in this judgment should be taken as indicating my view one way or the other about the merits of the abuse argument.

117. So far as Ground 1 is concerned I consider that the judge's reasoning was not inadequate. The reasons for her decision can be understood when read in light of the submissions made to her and the materials before her, which is how the adequacy of reasons is to be assessed: see *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, [26]:

> "Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, *in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the judge reached the decision that he did*. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed …"

118. But in any event, given the judge was right in my judgment as a matter of law to refuse the summons, this ground is, in a sense, now academic.

119. So far as Ground 4 is concerned, it is right that the judge referred to 'relevance' rather than the statutory test in s 97 of 'likely to be material evidence', however I regard this as an immaterial slip given that, in any event, the judge was right in law for the reasons I have given to reject the application.

Lord Justice Bean:

120. I agree.