Neutral Citation Number: [2024] EWHC 3065 (Admin)

Case No: AC-2023-LON-002944

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/11/2024

**Before** :

**MR JUSTICE MOULD**

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**Between :**

| | |
|---|---|
| **ANDRZEJ FREDA** | **Appellant** |
| **- and -** | |
| **BOCHUM LOCAL COURT, GERMANY** | **Respondent** |

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**GEORGE HEPBURNE SCOTT** (instructed by **Saunders and Co**) for the **Appellant**
**AMANDA BOSTOCK** (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 19th November 2024

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# Approved Judgment

This judgment was handed down remotely at 2pm Thursday 28th November 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 MOULD

**MR JUSTICE MOULD :**

## Introduction

1. The Appellant, Andrzej Freda, appeals from the decision of a District Judge to order his extradition to Germany to face trial for murder. Germany is a Category 1 territory for the purposes of the Extradition Act 2003 **["the 2003 Act"]**. These extradition proceedings are governed by Part 1 of the 2003 Act.

2. The appeal is brought under section 26 of the 2003 Act. Permission to appeal was refused on the papers but granted on oral renewal by Swift J on 7 May 2024.

3. The appeal proceeds on two grounds –

   (1) That the District Judge was wrong to reject the Appellant's case, that it would be unjust and/or oppressive to extradite him by reason of the passage of time since he is alleged to have committed the offence of which he is accused in Germany (section 14 of the 2003 Act).

   (2) That the decision to extradite him constitutes a disproportionate interference with his right to respect for his private and family life protected under Article 8 of the European Convention of Human Rights **['ECHR']**.

## The factual background

4. The Respondent Judicial Authority seeks the Appellant's extradition pursuant to an arrest warrant issued on 22 September 2022 and certified by the National Crime Agency on 26 September 2022 **["the AW"]**. The offence stated in the AW is alleged to have been committed at around midnight on 1st March 1996. The victim was out walking when he was violently attacked. He was initially stabbed from behind in the left shoulder, the knife severing the bone in his shoulder blade. His assailant then grabbed his clothing and stabbed him repeatedly in the chest, severing his ribs and fatally wounding him with a knife wound to the heart.

5. The AW specifies a single offence of murder with a maximum penalty of life imprisonment.

6. Further information **["FI"]** provided by the Respondent on 15 November 2022 explained the course of subsequent events which led to the issue of the AW seeking the Appellant's extradition for trial for that offence –

   *"it was possible to find items of clothing and a knife in a waste bin that was located approximately 150 metres from the scene of the crime. There was blood adhered to these items that could be assigned to [the victim] during the further course of the investigations.*

   *The years of investigations that were conducted by the members of the murder commission at Bochum Police Headquarters did not result in this crime being solved. The items that were found were subjected to examinations over the years in order to search for possible additional DNA adhesions. It was possible to detect foreign DNA on these objects during the course of the examinations, it being certain that they could be allocated to the perpetrator. This resulted in the*

*additional DNA that was detected on the objects being entered in the DNA database in 2012, which is still the valid European standard today.*

*It was only possible to conduct police investigations with regard to [the Appellant] as from this moment in time. The suspect [Appellant] was not subjected to the taking of a saliva specimen in Germany for inclusion in the DNA database".*

7. The Appellant was arrested in Leeds on 26 September 2022. Following an initial hearing before Westminster Magistrates Court on 27 September 2022, he was remanded into custody where he remains.

## The District Judge's judgment

8. The extradition hearing before the District Judge took place on 1 September 2023. The Appellant gave evidence and was cross-examined. On 29 September 2023, the District Judge handed down her judgment ordering the Appellant's extradition to Germany pursuant to section 21A(5) of the 2003 Act.

9. In [22] of her judgment, the District Judge reproduced the Appellant's proof of evidence which was taken as his evidence-in-chief. The Appellant was born in Poland in February 1966 and moved to Germany in 1989. He is of German origin and entitled to a German passport and citizenship. He had married in 1986 and divorced in 1993. His former wife and their son still live in Germany, His son was 37 years old at the date of the hearing before the District Judge.

10. The Appellant said that he had married again, meeting his wife in 1993 and marrying in 2000. The couple have two children, a daughter aged 23 who was born in Poland and a son aged 16 who was born in the United Kingdom.

11. The Appellant said –

*"My son called me in May 2022 to tell me the police were looking for me in relation to a murder. I made no efforts to hide or flee, I thought there must be some mistake and I awaited being contacted. In June 2022, my father-in-law also told me that the Polish police had also contacted him regarding me being wanted to be questioned for an alleged murder. Again, I made no efforts to run or hide which I could easily have done…".*

12. The Appellant also gave evidence about his circumstances and movements in 1996 and the years following –

*"my wife was keen on moving back to Poland as most of her family lived there. During my time working in Germany I was still going back on a regular basis to Poland as my father was ill and was living on his own till his death in 1998. My mother had passed away in 1994. At the end of 1996 I moved to Poland for good to look after my father and be together with my future wife. Between 1997 and 2022 I have been back through Germany, and I would not have done this if I had anything to worry about. I came to the UK in 2001 on a German passport. I also travelled all over Europe including through Germany to countries like Greece, Holland, Denmark, France, Norway, Spain and also Brazil as I was working offshore plus holidays. In 2012 I made a trip to Bochum, Germany to retrieve my German ID*

*and to apply for a new one at the City Hall; I travelled to Dortmund airport in Germany on this occasion. In 2015, I drove to the UK via Germany in my car.*

*I have been arrested in relation to an accusation warrant concerning a murder which is something I have no knowledge of. In March 1996 I can't recall my exact whereabouts as I was going back to Poland a lot to see my father - I also had a flat in Poland - Sopot city. I had a housing association flat in Dortmund and did not want to lose it. My son was around 10 at the time and split his time with his mother. I do recall that in my flat a number of Polish labourers were staying with me. I do recall that the German police did arrest me in relation to a car theft insurance scam. It seems that some of the people staying in my flat may have been involved in an organised car theft ring but I had no knowledge of this and was not prosecuted. This was one of the reasons I wanted to leave as I was afraid of losing my fiancé if I was sentenced for two or three years in prison. I was arrested twice in 1995-6. I was so fed up and upset about being dragged into this mess that I decided I would just give up and move to Poland. I felt I had been taken advantage of. Things were very tight for me as I had to support my father, ex-wife and son.*

13. The Appellant expressed his concern about the passage of time since the date of the offence now alleged against him in the AW –

*"as far as I am concerned I am now British and feel that it is grossly unfair that I have to have my life disrupted and be extradited back to Germany for something I have no knowledge of. It has been more than 26 years since the offence. I would not even be sure how I would be able to defend myself. The people I lived with I am no longer in contact with and I would not have any access to any records etc".*

14. The Appellant gave the following evidence about his state of health –

*"I am also very concerned about my health. I had a hip replacement in 2021 after many years of discomfort and I feel that this will require further treatment in the near future and a possible further operation. Additionally, I do suffer from severe headaches, blurred vision and blackouts. I am sure this is linked to my time when I was involved in kickboxing and I feel these symptoms will get worse and I will not get the specialist care I think I will need".*

15. In answer to questions in cross-examination, the Appellant denied that he had left Germany immediately after the commission of the offence in March 1996 in order to avoid arrest. He said that as far as he could recall, he had left Germany for Poland at the end of 1996. His then fiancé had been a student in Poland at that time and he had gone to Poland after the start of the academic year in October 1996. His father had been ill and he returned to Poland to look after him. He had remained in Germany until the end of 1996. He denied that he had cut off all contact with his former wife and son in order to avoid detection. He said that he had kept in regular contact with his son throughout the years since 1996. It was during a phone call with his son that the Appellant had learned in May 2022 that the German police were looking for him.

16. It was put to the Appellant that he had produced no evidence to substantiate his asserted medical and health problems. Moreover, he had produced no evidence to substantiate his assertions that his wife was experiencing mental health problems. He was

challenged as to the lack of any evidence that he had remained in contact with his current family whilst he had been held on remand.

17. The District Judge stated her findings of fact at [32] of her judgment. They include the following –

> *"(a) There is no suggestion that the [Appellant] is a fugitive from justice and in the circumstances that is not a finding which I am able to make to the criminal standard. It is suggested that the appellant fled Germany immediately after the Commission of this offence and cut off contact with his wife and son. I am not prepared to make a quasi-finding in respect of fugitivity as a result of these allegations….*
>
> *(b) The [Appellant] has a wife and children in the UK albeit his daughter is studying in Poland. It was suggested to him that we have nothing to confirm that they even exist. I am not prepared to make a finding that they do not exist however I take the point, that the [Appellant] could have provided evidence from his wife and children and has not done so. His answer as to why he has not done this is because his wife is suffering with her mental health following his arrest. That may be, but that does not explain why his adult daughter has not provided a statement nor why his 16 year old son has not been asked to provide a statement. Further the [Appellant] says that he is concerned for his health and his wife's health. In his proof of evidence there were a number of comments in relation to health, but I have no supporting evidence of this. When the [Appellant] was asked about this, he said that he can provide them for the next hearing or offered to provide contact details to [counsel]. The time has well and truly passed for that. He has had a year to prepare his hearing and I've had no supportive evidence of this. I am therefore not prepared to make any findings in respect of [the Appellant's] wife. In relation to [his] health, I cannot make any findings in his favour in respect of his medical conditions, but even if they do exist, there is no reason why Germany cannot cater for them".*

18. In [33]-[45] of her judgment, the District Judge considered the question whether the Appellant's extradition was barred by reason of the passage of time in accordance with section 14 of the 2003 Act. In [45] she concluded –

> *"When considered in the round, and in the light of all the authorities I have been provided with, and the evidence I have seen and heard in this case, the [Appellant] has not established that the passage of time means that it would be unjust or oppressive to order extradition".*

19. In [46]-[60] of her judgment, in accordance with section 21A of the 2003 Act the District Judge considered whether the Appellant's extradition would be compatible with his rights under Article 8 of the ECHR or would be disproportionate. In [54] she found that it would not be a disproportionate interference with the Appellant's Article 8 rights to order his extradition to Germany. In [60] she drew the same conclusion under section 21A of the 2003 Act. She ordered the Appellant's extradition.

**The powers of the court on appeal**

20. An appeal lies to this court under section 26 of the 2003 Act. The relevant powers of this court on appeal are stated in section 27 –

*"27(1) On an appeal under section 26 the High Court may –*

*(a) allow the appeal;*

*(b) dismiss the appeal.*

*(2) The court may allow the appeal only if the conditions in subsection (3)….are satisfied.*

*(3) The conditions are that –*

*(a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;*

*(b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.*

*…*

*(5) If the court allows the appeal it must –*

*(a) order the person's discharge;*

*(b) quash the order for his extradition".*

**Ground 1 – section 14 of the 2003 Act**

21. At his extradition hearing before the District Judge, the Appellant relied upon section 14 of the 2003 Act. By that provision, in the case (as here) of an accusation warrant, a person's extradition to a Category 1 territory (as in this case) is barred by reason of the passage of time –

> *"if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have committed the extradition offence".*

22. In Kakis v Government of the Republic of Cyprus [1978] 1 WLR 779, 782H-783A, Lord Diplock gave the following explanation of essentially similar provisions in section 8(3)(b) of the Fugitive Offenders Act 1967 –

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

23. Lord Diplock went on to draw a distinction between a case in which the delay in bringing extradition proceedings had been caused by the accused person fleeing the country and a case in which the delay was not brought about by the accused person. In

the former case, any resulting difficulties that the accused person may encounter in the conduct of his defence would be of his own making and it would ordinarily be neither unjust nor oppressive that he should be required to accept them. In the latter case –

> *"As respects delay which is not brought about by the acts of the accused himself, however, the question of where responsibility lies for the delay is not generally relevant. What matters is not so much the cause of such delay as its effect; or, rather, the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promptitude".*

See *Kakis* at page 783B-C.

*The Appellant's submissions*

24. For the Appellant, Mr George Hepburne Scott said that a period of 27 years had elapsed since the date on which the Appellant was alleged to have committed the offence of murder in March 1996. It had not been suggested that the Appellant was a fugitive from justice and the District Judge had declined to make any findings as to when or why he had left Germany.

25. It was submitted that the very long passage of time since the alleged events in March 1996 resulted in very serious prejudice to the Appellant in the conduct of his defence to the accusation of murder, were he to be extradited. The FI suggested that the German prosecuting authority's case was that the Appellant had fled Germany in haste in March 1996 and thereafter ceased all contact with his former wife and son, in order to avoid detection. It was the Appellant's case that he had in fact remained in Germany until later but had visited Poland regularly to see his ailing father in the years prior to his death in 1998. His movements would be corroborated at least to a significant degree by production of his late father's medical records. However, after the passage of over 25 years, it was highly doubtful that those records would be available.

26. Mr Hepburne Scott also drew attention to the Appellant's evidence recalling that in 1996 he had a number of Polish labourers staying with him at his flat in Dortmund. If those persons could be found, they might well be able to give important evidence on behalf of the Appellant attesting to his movements in March 1996. However, given the very lengthy passage of time since that date, it was highly unlikely that the Appellant would be able to find them and, even if found, that they would be able to recall clearly events from so long ago.

27. Mr Hepburne Scott submitted that the Appellant had now been living in the United Kingdom for over 25 years with his wife and two younger children. He has settled immigration status in the UK. During that period he has held a series of respectable and responsible jobs. He has built his and his family's life in the UK openly. He is not to be held responsible for the very lengthy delay which preceded the extradition process which was begun only in September 2022.

28. In the light of these matters, it was submitted that, considering the very lengthy overall passage of time, the resulting loss of key documents and witnesses and the fact that none of the delay was attributable to the Appellant, the District Judge was wrong to have concluded that it would not now be unjust or oppressive to extradite the Appellant to Germany.

*Discussion and conclusions*

29. The District Judge clearly acknowledged the very lengthy delay in this case. In [41] of her judgment, she said that the passage of time in this case runs from 1996 to date, a period of some 27 years. She said –

> *"that is a very large passage of time and on first blush, when considering the various authorities, is of concern".*

30. However, the District Judge went on to set that very lengthy period of time in the context of the particular facts of this case –

> *"However, it is clear that the [Appellant] did not become a suspect in this case until relatively recently. That is because the DNA match was only established recently. The FI makes it clear that there were regular reviews of DNA on the items seized, which in 2012 yielded a result. Checks then revealed in 2020 that the DNA was a match to this [Appellant]. It cannot be said that the JA acted in a dilatory way. They continued to review what was in effect a cold case".*

31. Mr Hepburne Scott did not suggest that analysis was incorrect.

32. In [42] of her judgment, the District Judge considered the Appellant's argument that his extradition would result in injustice in the sense explained by Lord Diplock in *Kakis*. She said –

> *"In terms of injustice, it is submitted that the passage of time means that he cannot have a fair trial. It is submitted that, for example with the issue of whether he fled or not, he can no longer access his father's medical records, travel records for that time or such like. I asked what was the evidential basis for this assertion. Common sense was the answer, given the passage of time. However, for all I know, Poland could have a rule of always keeping medical records, or for, for example 30 years. Or they may not. I simply do not know. In order to reach specificity as required by Pesut I would need something more than a mere assertion that common sense says he will not be able to get those records. I also bear in mind that this is a DNA case, and the ability to challenge DNA has not diminished due to the passage of time. If anything with advances in science, it may have improved. I do not find that the assertions made in relation to injustice are anything other than general and vague complaints which would not meet the test for oppression".*

33. On the basis of that reasoning, Mr Hepburne Scott submitted that the District Judge had drawn an inference that Poland may have preserved pre-digitisation medical records for its citizens in the period prior to 1998 and, on the basis of that inference, had rejected the Appellant's case that the fairness of his trial for the alleged offence would be seriously prejudiced without access to his late father's medical records. It was submitted that the District Judge was wrong to have drawn and to have relied upon that inference, which was unsafe and unjustified on the evidence.

34. I do not accept that the District Judge drew any such inference. On the contrary, she was at pains to emphasise that on the basis of the evidence before her, she was unable to reach any finding whether the Appellant's late father's medical records had been

preserved in Poland; or, even if they had, whether they would be accessible to the Appellant. As she said, she simply did not know.

35. The question was whether the absence of that knowledge was in itself sufficient to substantiate the Appellant's contention that the lack of access to those medical records would result in injustice to him in the conduct of his defence, were he to be extradited. In answering that question, the District Judge followed the approach taken by the Divisional Court in Pesut v Republic of Croatia [2015] EWHC 46 (Admin) at [11]-[12] –

> *"11. The offence which gives rise to the request was committed 22 years before the decision of the District Judge and took place now 23 years ago. Mr Cooper submits that the passage of time will inevitably make it difficult for the Appellant to defend himself and to answer detailed questions about what happened that long ago. The problems for the defence will be the more acute because Vukovar has experienced considerable population changes since the events of 1991. The expert evidence of Professor Brad Blitz, Professor of International Politics at Middlesex University, was that Vukovar had lost 30% of its population by 2001 and there had been a further decline since then. Mr Cooper argued that this would inevitably hamper the Appellant in finding witnesses. The Appellant was not a fugitive and therefore the delay in bringing the matter to trial was not his fault. Furthermore, Mr Cooper argues, racial tensions in Croatia remain and make it still harder for the Appellant (who is of Serbian ethnicity) to identify witnesses on his behalf. Even if potential defence witnesses could be identified, they are likely to be reluctant to come forward to assist a Serb. In addition, the deterioration in the Appellant's health leads to him suffering periods of confusion. That, too, would pose a risk of prejudice to his trial.*
>
> *12. The District Judge was not persuaded by these arguments and neither am I. So far as they rely on the general passage of time, its impact on memories and the possible loss of witnesses, I consider that they are too vague to establish that the passage of time would make extradition unjust. In this country, allegations of a much greater vintage are tried despite similar objections. Greater specificity is required before the complaint can be made good that delay will make a trial unfair".*

36. The circumstances of that case were very different. Mr Pesut was accused of shooting dead a civilian in Vukovar during the civil war in the former Yugoslavia at the beginning of the 1990s. Nevertheless, the District Judge here was plainly correct to follow the approach adopted by the Divisional Court at [12] in *Pesut's* case. In this case, the complaint was no more than an assertion based on *"common sense"* that medical records in Poland from the late 1990s may no longer be available. There was no suggestion that any inquiries had been made to establish the possibility that such records might still exist and, if so, how readily accessible they might be for the purposes of being adduced as evidence in criminal proceedings in Germany. As the District Judge rightly said, more was needed than mere assertion that such evidence may no longer exist.

37. Moreover, as the District Judge correctly observed, the case against the Appellant is founded on DNA evidence. Neither the AW nor the FI suggests that there is any other evidence linking the Appellant to the extradition offence in March 1996. If returned to

Germany and thereafter prosecuted, there is no reason to presume other than that the Appellant will be able to challenge the reliability of the DNA evidence which founds the case against him. It is difficult to see how evidence of his movements between Germany and Poland in 1996 and the reasons for his travels will have any significant probative value. If the DNA evidence is found to establish his guilt to the criminal standard in Germany, the fact that he later travelled to Poland to see his ailing father is unlikely to affect the outcome of his trial. If, on the other hand, he is able successfully to impugn the DNA evidence as being insufficient to prove the case against him, evidence of his reasons for travelling out of Germany later in 1996 will hardly be necessary to his defence. The most that sight of his father's medical records might achieve is to corroborate, at least to some degree, his own testimony that he had an innocent motive for travelling from Germany to Poland in 1996.

38. The overarching consideration, however, is that the domestic court in Germany will have the obvious advantage, based on a clearer picture than I have, of precisely what evidence is available and the issues likely to arise: see Woodcock v Government of New Zealand [2004] 1 WLR 1979 at [21]. Germany is a Council of Europe country and is to be assumed to be capable of protecting the Appellant against an unjust or unfair trial, whether by an abuse of process or in some other way: see Gomes v Government of Trinidad and Tobago [2009] 1 WLR 1038 at [35]. The presumption must be that the Appellant's rights under article 6 of the ECHR would be respected in the criminal proceedings against him, in the event of his return to stand trial for the extradition offence.

39. As the District Judge said, this has the character of a cold case. Such cases are prosecuted fairly in the United Kingdom at similar periods of time removed from the date of the alleged offence, based wholly or principally on DNA evidence which has become available through advances in scientific knowledge during the intervening period. Our domestic courts are astute to the risks of unfairness to the defendant in such cases and are able to take the necessary steps to protect the defendant's right to a fair trial, including under their abuse of process jurisdiction. There is no evidence in the present case to presume other than that substantially similar procedural safeguards will be available to the Appellant in his prosecution and trial for the extradition offence, if he is returned to Germany.

40. Mr Hepburne Scott, however, deployed a second argument in challenging the District Judge's conclusion that extradition of the Appellant would be neither unjust nor oppressive by reason of the long passage of time since March 1996. In [43] of her judgment, the District Judge said that the gravity of the extradition offence was relevant to the question of oppression under section 14 of the 2003 Act. Here, the offence of which the Appellant was accused was of the gravest character. At [44], she continued –

> *"I accept that one must be careful not to let the years trip off the tongue. However, when one is considering the passage of time, it is also to be considered in context. Ex Parte Patel was a case involving money/fraud and not involving murder. The comments of course stand and are important, but one must consider that this is an allegation of the most serious nature. If this were an allegation of theft/fraud or minor assault, it may be that the passage of 27 years, even for the reasons such as in this case, would be too long and would mean that extradition would be oppressive or unjust. But that is not the case here, this is an allegation of murder*

*from 1996 but where the appellant has only been identified as a suspect in the last few years".*

41. Counsel criticised the District Judge's reasoning in that paragraph as legally unsound. It was submitted that the District Judge had proceeded on the basis that the gravity of the extradition offence operated as a *"bar"* which prevented the Appellant from raising the risk of injustice or oppression by reason of the passage of time. In other words, the District Judge had proceeded on the legally erroneous basis that, because of the great gravity of the extradition offence, the safeguards enacted by section 14 of the 2003 Act were simply not available to the Appellant. Reliance was placed on the analysis of Fordham J at [25] in Ibrahim Koc v Turkish Judicial Authority [2021] EWHC 1234 (Admin) –

> *"The seriousness of the offending, and the length of a custodial term to be served in a conviction case, are highly significant features in the evaluative exercise of considering oppression by reason of the passage of time. There is a spectrum of seriousness, just as there is a spectrum as to other features of a case which inform the outcome".*

42. In short, it was submitted, the District Judge had failed to undertake that evaluative exercise. Instead, she had simply treated the gravity of the extradition offence as necessarily determinative of the question whether extradition of the Appellant would be oppressive by reason of the passage of time.

43. In my view, that is not a true analysis of the District Judge's reasoning in [44] of her judgment.

44. I respectfully agree with Fordham J's analysis of the evaluative nature of the exercise of considering oppression by reason of the passage of time. In *Kakis* at page 784G, Lord Diplock said that *"the gravity of the offence is relevant to whether changes in the circumstances of the accused which have occurred during the relevant period are such as would render his return to stand trial oppressive"*. Relevant, but not necessarily determinative.

45. In my judgment, the District Judge's analysis was in accordance with those statements of principle as to approach. Her purpose in [44] of her judgment was not to treat the gravity of the offence alleged against the Appellant as necessarily determinative of the question whether his extradition would be oppressive by reason of the passage of 27 years since the offence was committed. Her purpose was rather to emphasise the gravity of that offence, which was a relevant factor in the evaluative exercise which she had to undertake. But more particularly, she sought to draw a clear distinction in that respect with other offences of a much less serious nature, such as the offence of fraud which was the subject matter of the extradition request before the court in R v Secretary of State ex parte Patel (1995) 7 Admin LR 56.

46. At the extradition hearing, the Appellant had relied on the following passage in the judgment of Henry LJ in *Ex Parte Patel* (at pages 71/72) –

> *"… wherever law is practised, justice is reproached by delay. There is a real danger that those of us who have spent a lifetime in the law become inured to delay. So too laymen associate the law with delay, and their expectation of it*

> *may harden them to the fact of it. So the years trip off the tongue, and so we reach a position where a citizen may be surrendered to face a trial in another state for matters at least 9 years stale without examination for the reasons for the length of delay or the consequences of it... so it is we are left with a delay period… of 9 to nearly 12 years, with yet some time to pass before trial. It is salutary to look back over one's life to evaluate the real length of that period, so as not to regard it just as a figure on a piece of paper. And when, in all the circumstances of this case, we additionally consider the 6 years of false security included in that period, and then set that against the bland few lines dealing with lapse of time in the affidavit in support of the Minister's decision… we conclude that the Minister's decision cannot stand. We judged the irresistible inference to be drawn from the facts in this case that it would be unjust and oppressive to surrender the Applicant, and that the Minister could not properly have reached any other conclusion…".*

47. It was necessary for the District Judge to consider that judicial analysis. Reliance had been placed upon it and it formed part of the judgment of a Divisional Court. In [44] of her judgment, she explained why, whilst acknowledging the force of Henry LJ's strictures about the need to recognise the evil of justice being delayed, particularly in the absence of explanation for that delay, the present case was to be distinguished on the facts from those which provided the context for the forceful judicial observations in *Ex parte Patel*. The points of distinction that she drew are plainly valid. The extradition offence in the present case is unarguably far graver than the offence of fraud which was the basis of the request in *Ex parte Patel*. Moreover, in that case there was no explanation for the delay in proceeding against Mr Patel; whereas here, the alleged offence may have been committed as long ago as March 1996, but it had not been possible to identify the Appellant as a suspect until the DNA match was revealed in 2020.

48. When the District Judge's reasoning in [44] of her judgment is properly understood in the context that I have explained, it is obvious that the Appellant's criticisms of that reasoning are without foundation.

49. That is not to say the long passage of time since March 1996 is to be viewed as anything other than a source of real concern. As the District Judge herself acknowledged in [43] of her judgment, the Appellant has a family in the United Kingdom, has worked here over the many years since he moved to this country and, aside from a conviction for affray in 2006, has committed no offence.

50. However, it is well established that the test of oppression is not easily satisfied, and that hardship alone will rarely suffice to justify the conclusion that extradition would be oppressive by reason of the passage of time: see *Gomes* at [31]. In the present case, The District Judge did evaluate the gravity of the alleged offence and the circumstances in which the Appellant came relatively recently to be a suspect. The District Judge reached the overall conclusion that, although the Appellant would suffer obvious hardship from being returned to Germany from the life that he has built up in the United Kingdom, his extradition would neither be oppressive nor unjust by reason of the very lengthy passage of time which had elapsed since the offence was committed. I am unable to say that the District Judge ought to have decided that question differently. On the contrary, in my judgment, she was right to conclude as she did.

51. This was a very grave offence. The case went cold for many years for lack of evidence. Notwithstanding continuing investigation, a DNA match was not made until 2020. The Appellant was made aware of his having come under suspicion shortly thereafter. It is to be presumed that he will receive a fair trial in Germany. If acquitted, having long since acquired settled status in the United Kingdom, he will be at liberty to return and to resume his life in this country. For these reasons, which reflect the careful assessment of the District Judge in her judgment, the Appellant's extradition to Germany to face trial for murder is neither unjust nor oppressive by reason of the passage of time since he is alleged to have committed that offence in March 1996.

**Ground 2 – Article 8 of the European Convention of Human Rights**

*Submissions*

52. Mr Hepburne Scott submitted that the District Judge had been wrong in [54] of her judgment to find that ordering extradition of the Appellant will not be a disproportionate interference with the Appellant's right to respect for his private and family life under article 8 of the ECHR. There had been a delay of 27 years since the date of the alleged offence. The Appellant had not been found to be responsible for that very lengthy delay. He had not been found to be a fugitive from justice. He had lived and worked in the United Kingdom for many years now. He had raised a family in this country. Aside from conviction for affray in 2006 for which he received a sentence of community service, he had committed no offences. He suffered from severe headaches, blurred vision and blackouts, which were likely to have resulted from kick boxing. Given the long delay since the date of the alleged offence in March 1996, he faced severe practical difficulties in obtaining evidence in his defence, if returned to face trial for murder.

53. Counsel relied upon the guidance given by the Divisional Court at [26] in Love v United States of America [2018] 1 WLR 2889 –

> *"The appellate court is entitled to stand back and say that a question ought to have been decided differently because the overall evaluation was wrong: crucial factors should have been weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed".*

54. Counsel accepted that there is a very strong public interest in extradition to a Category 1 territory in the case of an alleged offence of murder. Nevertheless, it was submitted that the lengthy delay of 27 years since the alleged offence was committed would inevitably result in very serious, probably insurmountable, difficulties in locating witnesses who would be able to speak to events at that time and documents which might support his case. Those considerations served to diminish the weight to be given to the strong public interest in extradition. The District Judge had failed properly to evaluate those considerations. She had *"under-analysed"* and undervalued them. In the result, this court should conclude that the District Judge's overall evaluation was wrong and the appeal be allowed on this ground.

*Discussion and conclusions*

55. The approach to be adopted on an appeal to this court in relation to issues of proportionality was considered in Polish Judicial Authority v Celinski [2016] 1 WLR 551 at [20]-[24]. At [24] the Divisional Court said –

> *"The single question therefore for the appellate court is whether or not the district judge made the wrong decision. It is only if the court concludes that the decision was wrong…that the appeal can be allowed. Findings of fact, especially if evidence has been heard, must ordinarily be respected. In answering the question whether the district judge, in the light of those findings of fact, was wrong to decide that extradition was or was not proportionate, the focus must be on the outcome, that is on the decision itself. Although the district judge's reasons for the proportionality decision must be considered with care, errors and omissions do not of themselves necessarily show that the decision on proportionality itself was wrong".*

56. In the present case, the District Judge helpfully carried out her analysis in accordance with the *"balance sheet"* approach approved by the Divisional Court at [16] in *Celinski.*

57. She found the following factors to speak in favour of extradition of the Appellant –

(1) The strong and continuing important public interest in the United Kingdom abiding by its international extradition obligations, an interest that is not easily displaced.

(2) The need for judicial authorities to be accorded a proper degree of mutual trust and confidence.

(3) The seriousness of the alleged offence and the potential for a sentence of life imprisonment in the event of a conviction.

(4) The fact that the Appellant has a conviction in the United Kingdom and cannot therefore be said to be of good character.

58. She found the following factors to speak against the Appellant's extradition –

(1) The Appellant has lived and worked in the United Kingdom for many years.

(2) The Appellant's evidence that he has a number of health problems.

(3) The Appellant's family: he has a wife and children, one of whom resides in this country, who would be affected by his extradition.

(4) The delay in this case.

59. In [54] of her judgment, the District Judge stated her reasoned conclusions why it would not be a disproportionate interference with the Appellant's article 8 rights to order his extradition to stand trial in Germany for the offence of murder allegedly committed in March 1996 –

> *"(a) It is very important for the United Kingdom to be seen to be upholding its international extradition obligations and Judicial authorities should be accorded a proper degree of mutual trust and confidence.*
>
> *(b) The offence is one of the most serious offences one can be sought for, and the [Appellant] faces life imprisonment if convicted.*

*(c) There is delay in this case. That is delay which I can take into account in relation to Article 8, even if I do not find that it would mean extradition would be unjust or oppressive. The offence occurred in 1996. There has been 27 years which have passed. However, delay does not diminish the public interest in extradition to the extent that it would mean that it is disproportionate. That is for two reasons. Firstly, the public interest in this case is so very high due to the nature of the alleged offence. Secondly, the delay is explained within the FI and occurred only because the [Appellant] was not a suspect until recently.*

*(d) The [Appellant] and his family will no doubt be affected by his extradition however, not to the extent that it would outweigh the public interest in extradition. He has lived and worked in the UK for a number of years, is clearly well thought of and his family will miss his presence if extradited and it will impact them. However, both children are now old enough to understand what is happening, and for the reasons outlined above I can attach little weight to the medical issues of the [Appellant] and his wife.*

*(e) Given the strong public interest in extradition, the nature of the alleged offence, and the potential sentence, the factors against extradition do not outweigh the public interest in extradition."*

60. Counsel's submissions focused upon the District Judge's consideration of the question of delay in paragraph (c) above. It was submitted that delay since commission of the alleged offence may both diminish the weight to be attached to the public interest and increase the impact upon private and family life. It was contended that the lengthy delay in this case had those effects. Reference was made to R v Lysiak [2015] EWHC 3098 (Admin), in which the court held that the judge had misdirected himself as to the relevance of the long delay that had occurred in that case. Instead of acknowledging the simple fact that long delay had occurred, a factor which may qualify and diminish the strength of the public interest in extradition, the judge had wrongly focused on whether the delay had been culpable.

61. In my judgment, this case is clearly to be distinguished from *Lysiak's* case. Here, the District Judge acknowledged the relevance of the lengthy delay that had occurred since the commission of the alleged offence in March 1996. She also acted in accordance with the principle that long delay may serve to diminish, sometimes significantly, the weight to be given to the public interest in extradition. Her evaluative judgment, however, was that the degree of diminution in the weight to be given to that public interest was not to so great as to justify the conclusion that extradition would be a disproportionate interference with the Appellant's private and family life. She gave two clear reasons for that judgment. Firstly, the public interest in extradition was particularly high in this case, given the heavy gravity of the alleged offence. Secondly, it had only recently been possible for the investigating authorities in Germany to identify the Appellant as a suspect, following the DNA match in 2020.

62. It is correct to acknowledge that, on the evidence before the District Judge and the facts which she found, the Appellant was not responsible for any part of that lengthy delay. That fact, however, does not affect or diminish the force of the two matters upon the District Judge founded, in concluding that the delay in this case, although very lengthy, did not justify the conclusion that extradition of the Appellant to stand trial for the

alleged offence of murder would be a disproportionate interference with his Article 8 rights.

63. It is necessary to stand back and to consider whether the District Judge was wrong in her overall evaluation of the question whether the interference with the Appellant's rights protected under article 8 of the ECHR was disproportionate.

64. The AW seeks the Appellant's extradition to stand trial for a grave offence, a violent and apparently unprovoked assault and murder. The maximum penalty following conviction would be a sentence of life imprisonment. The offence was committed many years ago in March 1996, but the investigation went "cold" for many years thereafter for want of any evidence enabling the identification of a suspect. Then in 2020, a DNA match with bloodied clothing and a knife discarded close to the scene of the crime enabled the Appellant to be identified as a suspect. The fact that he had come under suspicion was communicated to him shortly thereafter.

65. Due to the passage of time, the Appellant fears that he may struggle to find persons who were living in a flat which he let in Dortmund in 1996, who might be able to speak to his movements. He also fears that he may not be able to access medical records for his late father in Poland, which would provide some corroboration of his asserted reason for travelling out of Germany in 1996. Insofar as the passage of time may prejudice his ability to prepare his defence, it is to be presumed that the German court would take the necessary steps to ensure that the trial proceedings are fair, and that his prosecution does not risk any abuse of process. There is no evidence to assume other than that substantially similar procedural safeguards to those in criminal proceedings in the United Kingdom will be available to the Appellant in his prosecution and trial for the extradition offence, if he is returned to Germany.

66. Extradition of the Appellant will undoubtedly result in hardship to the Appellant and affect his family and their family life. However, his asserted health problems were not supported by any evidence before the District Judge. His children are aged 23 and 16 and may reasonably be expected to cope with his absence. If following his return to Germany he is acquitted, he may expect to return to the United Kingdom as he enjoys settled status, having lived and worked here for many years.

67. In the light of these matters, I am satisfied that the District Judge's overall evaluation was correct. In my judgment, in concluding that extradition of the Appellant would not constitute a disproportionate interference with the Appellant's rights protected under article 8 of the ECHR, the District Judge reached the right decision.

## Disposal

68. For the reasons I have given, I have not been persuaded that the District Judge ought to have decided the questions before her at the extradition hearing in this case differently. Neither ground of appeal has been made out. Accordingly, I must dismiss this appeal.