Case No: CO/3988/2014, CO/3749/2014 &
CO/4006/2014

Neutral Citation Number: [2015] EWHC 619 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/03/2015

Before :

LORD JUSTICE AIKENS
MR JUSTICE NICOL

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Between :

(1) Sukhdev Singh Kandola
(2) Lenuta Droma
(3) Naweed Ijaz **Appellants**
- and -
(1) Generalstaatwaltschaft Frankfurt, Germany
(2) State Prosecutor Nurnburg-Furth, Bavaria, Germany
(3) The Court of Milan (An Italian Judicial Authority) **Respondents**

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Mark Summers QC and James Stansfeld (instructed by **Tuckers Solicitors**) for the **1st Appellant**
Mark Summers QC and Martin Henley (instructed by **Lloyds PR Solicitors**) for the **2nd Appellant**
Mark Summers QC and Myles Grandison (instructed by **Sonn Macmillan Walker**) for the **3rd Appellant**
John Jones QC and Daniel Sternberg (instructed by **CPS**) for the **1st and 2nd Respondent**
John Hardy QC and Kathryn Howarth (instructed by **CPS**) for the **3rd Respondent**

Hearing dates: 10/12/2014 & 12/12/2014

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Judgment

Lord Justice Aikens :

1. This is the judgment of the court to which both of us have contributed.

Synopsis

2. These three appeals concern requests for extradition to Germany and Italy, which are, of course, EU member states which have, for the purposes of the ***Extradition Act 2003*** ("the EA") been designated Category 1 territories, so that ***Part 1*** of the EA applies to all three cases and appeals. The appeals are from extradition orders made by District Judges ("DJ") sitting at Westminster Magistrates' Court in respect of what are commonly called "accusation" European Arrest Warrants ("EAW"), viz. warrants issued by a requesting state for the surrender of a person for the purposes of prosecuting that person for an extradition offence. The appeals were heard together because they raise a common issue. That issue is, broadly, whether the extradition of each of the appellants is barred because of an absence of a "prosecution decision" in the requesting state to charge or to try the appellant, in circumstances where it has not been demonstrated that the sole reason for the absence of a "prosecution decision" is that the requested person (ie the appellant in each case) is absent from the requesting state?

3. This new "extradition bar" was created by ***section 12A*** of the EA which was inserted into that Act by ***section 156(2)*** of the ***Anti-Social Behaviour, Crime and Policing Act 2014*** (the "ASBCPA 2014"). ***Section 12A*** came into force on 21 July 2014 pursuant to the ASBCPA 2014 (Commencement No 4 and Transitional Provisions) Order 2014 (SI 2014 No 1916). ***Section 12A*** applies to all "accusation" EAWs where the "appropriate judge" (viz. in England and Wales, the DJ) had ***not*** ordered extradition prior to the commencement of the provisions. Thus it applies to the case of each of the appellants.

4. Other issues are raised in each of the three cases, which we will summarise shortly below. We will refer to each of the appellants, Sukhdev Singh Kandola, Lenuta Droma, and Naweed Ijaz as, respectively, Mr Kandola, Ms Droma and Mr Ijaz.

5. The EAW in the case of Mr Kandola was issued by Dr Weinbrenner, Public Prosecutor, Generalstaatsanwaltschaft (Prosecutor General's Office) Frankfurt am Main, Germany on 1 July 2013. It was certified by the Serious Organised Crime Agency ("SOCA") on 4 October 2013. We will call this EAW the "Kandola EAW". On 29 March 2012 the Attorney General of Frankfurt am Main had issued an investigational warrant for Mr Kandola's arrest. Mr Kandola is accused of nine offences of tax evasion committed between August 2009 and May 2011, when he was the managing director and sole shareholder of a company called Deco Fabrics, based in Frankfurt am Main and which dealt in mobile telephones. In relation to the first four offences, it is said that between August and November 2009 the company wrongly claimed refunds of VAT input tax in respect of mobile phones which it had purported to sell and deliver but which it had not. It is alleged that the VAT evaded amounted to €1,856,470.10. The remaining five offences concern the period January to April 2010. It is said that the company failed to comply with an obligation to submit advance turnover tax returns or an annual declaration for the year 2010. It is alleged that tax totalling €2,674,414.70 was evaded. The offences attract a maximum sentence of either 6 or 10 years imprisonment.

6. The Kandola EAW was challenged before District Judge Snow on three grounds, which are: (1) the Kandola EAW was not issued "for the purposes of prosecution" within the meaning of ***section 2(3)*** of the EA. (2) The Kandola EAW contains insufficient particulars of the circumstances in which Mr Kandola is alleged to have committed the offences, the time and places and those provisions of the law of the requesting state under which his conduct is said to be an offence, so does not comply with ***section 2(4)(c)*** of the EA. (3) The offences are not extradition offences within ***section 64(3)*** of the EA. Mr Kandola represented himself at the extradition hearing before DJ Snow on 5 August 2014 and the judge handed down a written ruling later that day. He rejected each of the three objections and ordered Mr Kandola's extradition.

7. On his appeal Mr Kandola is represented by Mr Mark Summers QC and Mr James Stansfeld. The three objections to extradition raised before the DJ are maintained. In addition, Mr Kandola wishes to argue a new point: that the extradition is barred by reason of an absence of a prosecution decision to charge or try him so that his extradition is barred by ***section 12A*** of the EA.

8. The EAW in the case of Ms Droma ("the Droma EAW") was issued by the Senior State Prosecutor, Ms Rosinski, of the Office of the State Prosecutor of Nurnberg-Furth, Germany, on 31 March 2014. The Droma EAW was certified by SOCA on 21 May 2014. Ms Droma's extradition is sought in respect of one offence, which was, essentially, an attempted robbery or theft of a wallet. The maximum sentence on conviction of such an offence under German law is 15 years. Ms Droma was arrested on the EAW on 18 June 2014. She is now on conditional bail. The substantive extradition hearing took place before District Judge Devas on 21 August 2014 and Ms Droma was represented by counsel. Ms Droma gave oral evidence. The Droma EAW was challenged on three grounds: first, the absence of a prosecution decision to charge or try her: ***section 12A***; secondly, that extradition would be a disproportionate interference with her and her children's ***Article 8*** rights and so is barred by ***section 21A(1)(a)*** of the EA; and, thirdly, that extradition would be not be proportionate, and so is barred by reason of ***section 21A(1)(b)*** of the EA. [1]

9. On her appeal, Ms Droma, who is represented by Mr Summers QC and Mr Martin Henley, maintains these three challenges to extradition.

10. The appellant Naweed Ijaz was the subject of an EAW issued by the Court of Milan on 25 June 2013. The validity of that EAW was challenged and, at the extradition hearing before District Judge Devas on 24 July 2014, Mr Ijaz was discharged in respect of that EAW. However, a second EAW, ("the Ijaz EAW") had been issued by the same court on 18 July 2014 and was certified by the National Crime Agency ("NCA") on 23 July 2014. On the same day the Italian authorities supplied further supplemental information concerning a possible "double jeopardy" issue. The Ijaz EAW was served on Mr Ijaz at the extradition hearing before the DJ originally fixed to deal with the challenges on the first EAW. After Mr Ijaz was discharged in respect of the first EAW the hearing proceeded in relation to the three challenges made on the Ijaz EAW.

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[1] ***Section 21A*** of the EA was inserted by ***section 157(2)*** of the ASBCPA 2014 and came into force on 21 July 2014. ***Section 21A*** applies only to "accusation" EAWs.

11. The Ijaz EAW alleges that Mr Ijaz stands accused of two offences: (1) participation in a "criminal association" contrary to Article 416 of the Italian Criminal Code; and (2) fraud, contrary to Article 8 of Legislative Decree 74/2000. In respect of the first alleged offence, which is effectively an allegation of participating in a conspiracy, it is said that, between 2010 and November 2011 in "Milan, national and foreign territory" Mr Ijaz participated in a criminal association whose aim was to commit "an indefinite series of tax offences…fiscal frauds to the detriment of the [Italian] national inland revenue and the European Union". It is said that this offence involved the appropriation of VAT totalling €8,587,192. As a result of that participation Mr Ijaz is said to have also committed a particular instance of VAT fraud which is dealt with by the second alleged offence. It is alleged that Mr Ijaz, as a director of Nabucco Ltd, re-sold energy credits acquired from three named companies "at different times and places", in the course of which he issued "subjectively inexistent invoices for a taxable income" with VAT amounting to €3,874,512. The Ijaz EAW sets out 40 invoices.

12. The Judge of Preliminary Investigations at the Court of Milan had issued an order for Mr Ijaz's remand in custody on 4 July 2012.

13. The three challenges to the Ijaz EAW before the DJ were: (1) an absence of adequate particulars of the alleged criminal "conduct" so that the Ijaz EAW did not comply with ***section 2(4)(c)*** of the EA. It was said that there were insufficient details in the Ijaz EAW of the alleged tax fraud or the actual conduct constituting a significant part of the alleged €8,587,192 VAT loss asserted. Moreover, it was said that the scope of the second offence alleged as unclear, despite the 40 particularised invoices. (2) The extradition was barred by reason of the rule against "double jeopardy" within ***section 12*** of the EA. (3) The extradition was barred by reason of an absence of a prosecution decision to charge or try Mr Ijaz, within ***section 12A*** of the EA.

14. The DJ rejected all three grounds of challenge in a written ruling handed down on 19 August 2014. Mr Ijaz appeals on the three grounds. He is represented on the appeal by Mr Summers QC and Mr Myles Grandison.

15. For convenience we have set out the relevant provisions of the EA, viz. ***sections 2(3), 2(4), 10, 11(1)*** and ***(1A), 12, 12A, 21A, 26, 27*** and ***64*** in the Appendix to this judgment.

16. Logically and in accordance with the statutory scheme of Part 1 of the EA, the issues of the validity of the EAW and whether there is a bar to extradition by reason of the "rule against double jeopardy" should be dealt with before the question of whether there is a bar to extradition by reason of an "absence of prosecution decision". However, given that only this last issue ("the ***section 12A*** issue") is common to all three appeals and that this is the first time that it has come before the High Court, we will deal with it first. We will then deal in turn with the other individual challenges to the rulings of the District Judges. We shall start with Mr Kandola's challenges to the validity of the Kandola EAW under ***section 2(3)*** and ***section 2(4)(c)*** and Mr Ijaz's challenge to the validity of the Ijaz EAW under ***section 2(4)(c).*** We will then deal with Mr Kandola's challenge that the offences identified in the Kandola EAW are not extradition offences pursuant to ***sections 10*** and ***64*** of the EA. Next we will deal with Mr Ijaz's claim that his extradition is barred under ***section 12,*** by reason of the rule against "double jeopardy". Lastly, we will deal with Ms Droma's arguments

that her extradition is barred because it would be contrary to her ***Article 8*** rights (***section 21A(1)(a)***) or because it would be disproportionate (***section 21A(1)(b)).***

Section 12A **of the Extradition Act: some background**

17. As is very well known by now, Part 1 of the EA was passed to discharge the United Kingdom's duty to transpose into national law the obligations imposed on it by the ***Council Framework Decision*** of 13 June 2002 ("FD 2002"), "on the European arrest warrant and the surrender procedures between Member States". The FD 2002 was adopted pursuant to Title VI of the Treaty on European Union. The history of the genesis of the FD 2002 is set out at [2] to [4] of the speech of Lord Bingham of Cornhill in ***Office of the King's Prosecutor, Brussels v Cando Armas [2006] 2 AC 1*** ("***Armas"*).** As this court noted in [9] of ***Asztaslos v Szekszard City Court Hungary [2011] 1 WLR 252,*** ("***Asztaslos***"), the UK took full advantage of the liberty granted to Member States by Article 34.2 of the FD 2002 to choose the form and methods to achieve the results at which the FD aimed as between Member States. Part 1 of the EA did not simply transpose the wording of the FD nor was it expressly incorporated into our law by UK legislation with the text of the FD added as a schedule to the Act as happens in the case of many international obligations of the UK to transpose an international agreement into national law. Part 1 uses its own wording and this has given rise to case law as a consequence. However, as was also noted at [9] of ***Asztaslos,*** it is well-established that Part 1 of the Act in general and ***section 2*** in particular must be construed on the assumptions that Parliament did not intend the provisions of Part 1 to be inconsistent with the FD 2002 and that, whilst Parliament might properly provide for a greater measure of co-operation by the UK than the FD required, it did not intend to provide for less: see [8] of ***Armas,*** per Lord Bingham of Cornhill.

18. EAWs that are issued to obtain the surrender of a requested person by a Member State "for the purpose of a criminal prosecution" (in the words of Article 1(1) of the FD 2002) are known as "accusation" EAWs, as opposed to those issued to obtain the surrender of a requested person "for the purpose of executing a custodial sentence or detention order", which are known as "conviction" EAWs. Mr Summers emphasised the definition of an "accusation" EAW in Article 1(1) of FD 2002 as being a "judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, ***for the purposes*** of conducting a criminal prosecution…" (our emphasis). The concept of "conducting a criminal prosecution" is to be contrasted to that of a criminal investigation: see ***Assange v Swedish Authority [2011] EWHC 2849 (Admin)*** ("***Assange***") at [129]. The threshold requirement that the requested person must be required for the purposes of conducting a criminal prosecution was carried into ***section 2(3)(b)*** of the EA, which requires that an "accusation" EAW state that it is issued with a view to the arrest and extradition of the requested person "for the purpose of being prosecuted for the offence".

19. ***Section 2(3)(a)*** of the EA, which is not based on the FD 2002, but on previous UK legislation,[2] contains a further threshold requirement, which is that the warrant state

[2] See: ***section 1*** of the ***Extradition Act 1989*** and ***Re Ismail [1999] 1 AC 320***

that the person in respect of whom an "accusation" EAW has been issued has the status of an "accused". If the warrant does not state that the requested person is an "accused" and does not state that the "accusation" EAW has been issued "for the purpose of" the requested person "being prosecuted" for the offence identified in the EAW, then that EAW is not a valid one within the meaning of ***section 2(3)*** of the EA. There have been a number of cases on how the English courts should determine whether a person is, for the purposes of ***section 2(3)***, an "accused" and whether the EAW has been issued "for the purpose" of the requested person "being prosecuted", whose effect this court attempted to summarise in ***Asztaslos*** and which cases were further considered by this court in ***Assange.***

20. What emerged from the ***Assange*** case is that it is possible for a person whose surrender is requested under an "accusation" EAW to be both required for the "purpose of being prosecuted" for the offence identified in the EAW and to be an "accused", but still not yet be the subject of a decision by the relevant judicial authority in the requesting state to charge him or to try him: see [140] and [151] of the judgment of the court in ***Assange*** given by Sir John Thomas, then President of the Queen's Bench Division. Thus an "accused" whose surrender was requested "for the purposes of conducting a criminal prosecution" could still, on certain facts and in some judicial systems of Member States, be wanted for continuing criminal investigation, where no decision either to charge or to try the requested person had been made: see ***Assange*** at [140], [150] and [153].

21. Thus, despite the fact that the ***Independent Review of the UK's Extradition Arrangements*** by Sir Scott Baker, published by the Home Office in October 2011, did not consider that any amendment was needed to ***section 2*** of the EA, ***section 156(2)*** of the ASBCPA 2014 introduced the new ***section 12A*** into the EA. ***Section 12A*** is not based directly on anything in the FD 2002, nor in the subsequent ***Council Framework Decision 2009/948/HJA*** of 30 November 2009 "on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings" ("FD 2009"). It is purely domestic in origin. The purpose of the new provision is set out in the Explanatory Note to the ***Anti-Social Behaviour, Crime and Policing Act 2014, section 156*** (paragraphs 462-3). Paragraph 462 states that the aim is:

> "…to ensure that a case is sufficiently advanced in the issuing State (that is there is a clear intention to bring the person to trial) before extradition can occur, so that people do not spend potentially long periods in pre-trial detention following their extradition, whilst the issuing State continues to investigate the offence…"

Paragraph 463 continued:

> "New section 12A will ensure that, in cases where the person is wanted to stand trial, extradition can only go ahead where the issuing State has made a decision to charge the person and a decision to try the person (or is ready to make those decisions)…The courts have interpreted the provisions in the 2003 Act in a 'cosmopolitan way',[3] mindful of the differences in criminal procedure in other Member States and it is anticipated that the courts will

[3] A reference to [38] of ***Asztaslos.***

> apply the same approach to the interpretation of section 12A, and, in particular, the concepts of 'decision to charge' and 'decision to try'…"

22. Similar expressions as to the intent of the new provision were used by both the Secretary of State for the Home Department and the Minister for Policing and Criminal Justice in the House of Commons and Committee stage debates. However, the Home Secretary erroneously described the new section as providing "extra safeguards for British citizens";[4] whereas, of course, the provision can be used by all those who face extradition under an "accusation" EAW. Whether British citizens or not, they cannot be extradited if there has been no decision to charge or try the requested person in the issuing state unless the *sole* reason for the lack of a decision is the absence of the requested person in the category 1 territory.

23. By introducing the new ***section 12A,*** the UK was doing no more than following the example of Ireland, which had insisted at the time the FD 2002 was being negotiated that its domestic legislation implementing the FD 2002 would provide that an EAW could only be executed for the purpose of "bringing that person to trial" in the case of an "accusation" EAW. Thus ***section 21A(1)*** of the Irish ***European Arrest Warrants Act 2003,*** provides, in its present form:

> "Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicted of an offence specified therein, the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state".

24. There was a similar safeguard provision in ***section 7(3)(b)*** of the ***European Arrest Warrant Act 2004*** of Gibraltar. This stipulated that, in the case of an "accusation" EAW, the warrant must be accompanied by a statement in writing of the issuing judicial authority (or a person who has similar functions to the Attorney General of Gibraltar) that "proceedings against the person have commenced and a decision to try him for the offence concerned has been made".

25. The last preliminary point to recall is the structure of Part 1 of the EA, which requires that the court consider the issue of the validity of the EAW and possible bars to a person's extradition in a logical sequence. As noted already, unless an "accusation" EAW satisfies the requirements of ***section 2(3)*** and ***(4)***, it will not be a valid EAW and is, effectively, a nullity. If those provisions are satisfied, then, assuming no issue under ***section 8A*** arises (person charged with an offence in the UK before the extradition hearing), the "appropriate judge" has to consider, in turn, each of the possible bars to extradition under the "accusation" EAW as identified in ***section 11*** of the EA. "Absence of prosecution decision" is second on the list after "double jeopardy". ***Section 11(1A)(a)*** states what, perhaps, obviously follows from this structure, namely that the judge is only to decide whether the requested person's extradition is barred by reason of "absence of prosecution decision" in the case of an EAW that "contains the statement referred to in ***section 2(3)***" viz. is an "accusation" EAW.

Construction of *section 12A*

[4] Hansard for 15 July 2013 col 779.

26. There is a trans-national interest in bringing those accused of serious crime to justice, as Lord Steyn noted in ***Re Ismail [1999] 1 AC 320*** at ***327.*** He considered that extradition treaties and extradition statutes should therefore be accorded "a broad and generous construction so far as the texts permit it in order to facilitate extradition". That point was noted by Lord Hope of Craighead in ***Armas*** at [24], which concerned the construction of the EA itself. Lord Hope also pointed out that individual liberty was also at stake, so that "generosity must be balanced against the rights of the persons who are sought to be removed under these procedures". He noted that the task of construction was not easy because the wording of Part 1 of the EA did not match that of the FD 2002. But, he said:

> "The task has to be approached on the assumption that, where there are differences, these were regarded by Parliament as a necessary protection against the unlawful infringement of the right to liberty".

The other four law lords agreed with Lord Hope's speech.

27. It seems to us that these are factors to be borne in mind in construing ***section 12A***. It was clearly inserted in Part 1 with the aim of ensuring that those extradited under "accusation" EAWs should not be subject thereafter to long periods in detention whilst investigations were carried out in the issuing state. At the same time, we must not approach the construction of the phrases "decision to charge" and "decision to try" in ***section 12A*** by reference solely to the domestic law and practice of criminal procedures in England and Wales or even the UK as a whole. Instead we must do so in a "cosmopolitan" way, just as Lord Steyn said the word "accused" in ***section 1(1)*** of the ***Extradition Act 1989*** must be so construed: see ***Re Ismail [1999] 1 AC 320*** at ***322.*** That was also the approach of this court in ***Assange:*** see [151].

28. The application of ***section 12A*** in practice is not easy to work out because it involves two distinct stages. In the first stage, which involves both ***section 12A(1)(a)(i)*** and ***(ii),*** the "appropriate judge" is concerned with whether there are reasonable grounds for *believing* that at least one of *two* decisions have *not* been taken, ie. the decision to charge *or* the decision to try the requested person, and, then, furthermore, if one of those two decision have not been made, that a state of affairs (the absence of the requested person from the category 1 territory) is *not* the sole reason for the failure to make one or other or both of those two decisions. Both those negatives have to be established (to the requisite level of "proof") by the requested person. The appropriate judge will only have to consider the issue of whether it appears that there are reasonable grounds for believing that the sole reason for a "failure" to make one or other or both of the two decisions (to charge and try) is not the requested person's absence from the category one territory if it "appears" to him that there are reasonable grounds for believing that at least one of those two decisions has not been made.

29. The appropriate judge will only embark on the second stage, in ***section 12A(1)(b)(i)*** and ***(ii),*** if he is satisfied that there are reasonable grounds for believing both that no decisions to charge and /or to try have been made *and* that the person's absence from the category 1 territory is not the *sole* reason for those decisions not being taken. Again the statutory wording puts the matter in a negative way. However, at this second stage, it is for "those representing the category 1 territory" to "prove", ie prove to the criminal standard (see ***section 206(2)*** and ***206(3)(b)*** of the EA), that it *has* made a decision to charge *and has* made a decision to try the requested person.

If those two matters are proved, that is the end of the ***section 12A*** challenge. However, if those representing the category 1 territory cannot prove, or accept, that *either or both* of the decisions have not been taken, then, in the alternative, the category 1 territory can prove (again, to the criminal standard) that the *sole* reason for whichever of those decisions has not been taken is the requested person's absence from the category 1 territory. If those representing the category 1 territory do not prove either of the matters identified in ***section 12A(1)(b)(i)*** and ***(ii)*** to the criminal standard, then the requested person's extradition to that territory for the extradition offence will be barred.

30. At the first stage, it seems to us that the default position will be that the two decisions have been taken. It is only if the requested person raises before the appropriate judge the challenge that no prosecution decision to charge or try has been made, that the appropriate judge (in England and Wales the DJ) has to decide the point. The phrase "it appears to the appropriate judge" must mean that he is satisfied, on the material before him, that there are "reasonable grounds for believing that" one or both of the two decisions have not been made. The phrase "reasonable grounds for believing" means that, on the *objective view* of the appropriate judge, there are "reasonable grounds for believing" that one or both of the two decisions have not been made. "Reasonable grounds for believing" involves something less than proof on a balance of probabilities, but more than simple assertion, or a fanciful view or "feeling".

31. On what evidence is the DJ to come to a decision that "it appears" to him that there are "reasonable grounds for believing" that at least one of the two decisions has or has not been made by the competent authorities? The exercise will be conducted on two bases. First, it may be clear from the EAW itself, read as a whole, that the appropriate authorities have taken or have not taken the two decisions. If the matter is clear from the terms of the EAW as a whole that the decisions have been taken, then the DJ should look no further in relation to that point. That is because the DJ is entitled to rely on the statements made in an EAW by a fellow judicial authority. Although ***section 12A*** is not based on either FD, it seems to us that any statement of the relevant judicial authority on this issue must be treated with a high degree of trust, because the whole basis of the EAW mechanism is "based on a high level of confidence between Member States": see paragraph (10) of the preamble to FD 2002.

32. Secondly, however, if a requested person makes a challenge under ***section 12A*** and it is unclear from the EAW itself whether decisions have been taken to charge and try, the DJ must be entitled to consider extraneous evidence. It is up to the requested person to advance sufficiently cogent evidence to raise a case to the standard indicated above. However, we think that extraneous evidence from a requested person should not be permitted to throw doubt on a clear statement in the EAW that the two decisions have, in fact, been made. Furthermore, we suggest that the production of elaborate "expert" evidence from lawyers or others on what, under the relevant domestic law, might constitute a "decision to charge" or a "decision to try" is not to be encouraged, particularly at the "reasonable grounds for believing" stage, or else hearings on this issue will become long, complicated and very costly. It may be necessary in rare cases, but it should not be regarded as the normal practice. We think that this approach is in line with that recommended in ***Assange*** at [147], although we appreciate that the remarks in ***Assange*** concerned ***section 2*** of the EA,

not the new ***section 12A.*** We accept the proposition advanced by the Judicial Authority in Mr Kandola's case that at the first stage (ie the "reasonable grounds" stage), it is neither appropriate nor necessary for the DJ to make or direct enquiries of the Judicial Authority as to whether decisions to charge or try the requested person have been made. That is because it is for the requested person to satisfy the DJ that there are "reasonable grounds for believing" that at least one of the two decisions has not been made. Likewise, it is not appropriate or necessary for the DJ at this "reasonable grounds for believing" stage to cause any inquiry to be made of the Judicial Authority as to the reason for the absence of either such decision. That is because, at this first stage, it is also for the requested person to show that there are reasonable grounds for believing that the failure to take whichever decision is missing is not solely due to the requested person's absence from the category 1 territory.

33. How is the DJ to tackle the question, at the "reasonable grounds for believing" stage, of whether the *sole* reason for the lack of decisions to charge and/or try is the absence of the requested person from the category one territory? Again, it must be for the requested person at this stage to provide sufficient evidence to raise a case that his absence from the category one territory is not the *sole* reason for the lack of decisions to charge and try him. It is likely that this could only be done by some sort of extraneous evidence from the requested person. We think that the evidence need not be elaborate, but mere assertion will be insufficient to raise a case that there are "reasonable grounds for believing" that the sole reason for the lack of decisions is not the absence of the requested person from the category one territory concerned.

34. If the requested person satisfies the DJ as required by both ***section 12A(1)(a)(i)*** (either as to a decision to charge *or* try) and ***(ii),*** so that the burden then falls on those representing the category 1 territory to prove (to the criminal standard) that the two decisions have been made, or, alternatively, that the sole reason for them not being made is the requested person's absence from the category one territory, how are those matters to be proved? In the vast majority of cases a short, clear, statement from the relevant Judicial Authority answering the following simple questions from the CPS acting on its behalf in the extradition proceedings should be determinative: "(i) has a decision been taken in this case (a) to charge the requested person and (b) to try him, if not, (ii) is the sole reason for the lack of each of the decisions that have not been taken the fact that the requested person is absent from the category 1 territory of which you are a/the Judicial Authority?" The requested person may be able to challenge such statements, but we would hope that disputes on the issues raised by ***section 12A(1)(b)*** will not result in elaborate hearings on factual or expert evidence, or else that would defeat the whole object of the EAW system of simple and quick procedures to surrender persons who are wanted for the purposes of criminal prosecution to category 1 territories. Elaborate evidence would also place an intolerable burden on the DJs who have to deal with extradition and who already have a very heavy work load of cases and hearings.

What is the factual position in the case of each of the appellants?

35. **Mr Kandola:** The ***section 12A*** argument was not advanced before the DJ, where Mr Kandola represented himself. However, Mr John Jones QC, who represented the Judicial Authority in Mr Kandola's appeal, did not object to the ***section 12A*** argument being advanced on the appeal. Mr Summers QC, for Mr Kandola, pointed out that box (b) of the EAW referred to an "investigational warrant of arrest"

as being the "decision on which the arrest warrant is based". He also noted that the EAW in that case had been issued by a prosecuting authority, not a judge of the court. That is not a powerful point, given that it is well known that in many civil law systems, such as France, Belgium, Spain and Italy, prosecutors are regarded as a part of the judicial hierarchy. The Tax Office in Frankfurt am Main had sent two letters to Mr Kandola in December 2013 and January 2014, seeking payment of outstanding turnover tax for the years 2009 and 2010. The letters were therefore sent some 6 months after the EAW had been issued on 1 July 2013. Mr Summers said that was all a powerful indication that no decisions to charge and prosecute had been made.

36. Any need to engage in the type of analysis undertaken by this court in ***Ali v Public Prosecutor of Bavaria [2014] EWHC 3881 (Admin)*** was rendered unnecessary because Mr Jones QC accepted unequivocally that the competent authorities had not made any decision to charge or try Mr Kandola. However, we were asked to take note of the statement made in a letter dated 4 December 2014 from the German Ministry of Justice that, under German criminal procedure, an EAW can be issued either before or after charges have been made against a requested person. The letter continues:

> "Before charges are made, the public prosecution office as the body competent for the investigation proceedings submits an application of a national arrest warrant to the competent local court. The public prosecution office then implements the national arrest warrant in an EAW itself by filling in the appropriate form. After charges are made, the court competent for carrying to the main proceedings issues the national arrest warrant and implements it in an EAW.
>
> Preferment of charges requires sufficient suspicion (section 170(1) in conjunction with section 203 of the German Code of Criminal Procedure). Such suspicion exists if, following the result of the investigations, it is probable that the accused has committed a punishable offence and will be convicted".

37. It follows that the only question raised in Mr Kandola's case is whether the sole reason for there being no decisions to charge and try is the lack of his presence in Germany. Because this issue was not before the DJ, it is for this court to make decisions on the facts. We are prepared to hold that there are reasonable grounds for believing that the absence of Mr Kandola from Germany is not the sole ground for the lack of decisions to charge or try him. The reasons for this will become clear from the succeeding paragraphs.

38. The letter of 4 December 2014 explains the stages in the German criminal procedure, which are, broadly: (i) an investigation stage leading to what is called by the JA a "bill of indictment", (ii) the opening of the "main proceedings" and (iii) their continuation to completion of the trial by the competent court. An examination of the accused is a pre-requisite for closing the investigation proceedings and then the submission of a bill of indictment to the competent court. In the case of an accused person not being present in Germany, the public prosecution office can and will make use of the European machinery for Mutual Legal Assistance in criminal matters to ask the authorities in the state where the accused resides to conduct an examination of him. If an examination cannot take place at all then the investigation proceedings

have to be "provisionally determined", ie. terminated. The decision of the public prosecution office to apply for the opening of the main proceedings does not require the accused to be present in Germany. However, the main proceedings cannot be conducted against an absent person. "The court may thus provisionally terminate the proceedings before deciding on the opening of the main proceedings if the absence of the indicted accused prevents the holding of the main hearing for a considerable time".

39. In Mr Kandola's case he has not yet been examined by the chief public prosecutor's office in Frankfurt am Main. It is clear that, normally, the examination of the accused will take place in Germany. However, since the ***European Convention on Mutual Assistance on Criminal Matters*** of 1959 there has been a system of mutual assistance in criminal matters between European States who are part of the Council of Europe and, now more particularly, are Member States of the EU. The ***Council Act*** of 29 May 2000 established the Convention on Mutual Assistance in Criminal Matters between the member States of the European Union. This built upon the 1959 Convention and subsequent agreements. The requests for "mutual legal assistance" (called MLA for short) can take various forms, including temporary transfer of persons held in custody for the purpose of investigation (Art 9), hearing by video-conference (Art 10) and hearing of witnesses and experts by telephone conference (Art 11). The UK statute governing international co-operation in criminal matters is the ***Crime (International Co-operation) Act 2003.*** ***Sections 30*** and ***31*** deal with evidence taken via a video-link or telephone conference. There is a Home Office document called "***Requests for Mutual Legal Assistance in Criminal Matters – Guidelines for Authorities Outside of*** *(sic)* ***the United Kingdom – 2014".*** Since 21 July 2014, when ***section 21B*** of the EA came into force,[5] a Judicial Authority that has issued an "accusation" EAW can request the temporary transfer of a requested person to the territory of the JA, but that will only be ordered if the requested person consents: see ***section 21B(2), (4)*** and ***(5)*** of the EA.

40. The German Ministry of Justice wrote a letter dated 8 December to 2014 to the Extradition Unit of the CPS, (which is administratively separate from the rest of the CPS and conducts extradition proceedings on behalf of category 1, 2 and other territories), on the use of MLA generally in extradition cases, but it did not deal specifically with Mr Kandola's case. In short, the German public prosecutor's office will use MLA before the issue of an EAW if practicable, but it may not do so if it is thought that its use would create a risk that the putative requested person would flee from possible arrest.

41. A further document, dated 4 December 2014, was also before us, which answered some specific questions about Mr Kandola and MLA. In response to the question "could MLA have been used in order to progress the case so that decisions to charge and try could have been made" the answer is "No", but with qualifications. Effectively, the reason given is that it was considered that Mr Kandola was a "flight risk" and to use MLA would have alerted him and there was a risk that he would have "jeopardised the prosecution efforts in this case". The further question posed is: "was the absence of Mr Kandola from Germany the "sole" reason for no decision having been taken to charge and try them (*sic*) or were there other reasons?". The answer given is:

[5] This was inserted by ***section 159*** of the ASBCPA 2014.

"No. The formal decision to charge Mr Kandola has not yet been made because investigation against Mr Kandola has not yet been concluded. This is due to the fact that Mr Kandola has not yet been heard by the chief public prosecutor's office in Frankfurt. In addition, reference is made to our last answers to the questions of the Crown Prosecution Service".

42. There is one further relevant fact to add. During the course of the hearing Mr Summers stated, on instructions, that Mr Kandola would consent to a "temporary transfer" pursuant to the terms of ***section 21B*** of the EA. Mr Summers submitted that Mr Kandola was not a "flight risk" and that MLA was available, but the offer of "temporary transfer" remained despite those submissions. Taking all these matters together, we must conclude that there are "reasonable grounds for believing" that Mr Kandola's absence from Germany is not the *sole* reason why the decisions to charge or try him have not been taken.

43. **Conclusion on *section 12A* issue in Mr Kandola's case:** Given that it is accepted that there have been no decisions to charge and try Mr Kandola, the only question we have to answer is that raised by ***section 12A(1)(b)(ii),*** viz. whether those representing the category one territory have proved, to the criminal standard, that the sole reason for not making those decisions is the absence of Mr Kandola from Germany. In our judgment, despite our conclusion that there are "reasonable grounds" for believing that this is not the case, they have done so when all the evidence is examined carefully. It is clear that, under German criminal procedure, the decisions to charge and try can only be taken once the suspect has been examined by the chief public prosecutor. That examination does not have to be done in Germany. But if it is not, then the only way it can be done is through MLA. The decision on whether to use MLA must be one for the German prosecutor to take, having considered all relevant circumstances. We are satisfied, to the criminal standard, that the option of MLA was considered by the competent authorities in Germany and rejected on the reasonable ground that there was a risk that Mr Kandola would evade the criminal proceedings in Germany if the EAW had not been issued and executed. There is no reason to doubt that statement. In any event, we accept the submission of Mr Jones that, in the absence of any cogent evidence of bad faith or something of a similarly compelling nature, this court should accept what is said on that topic by the competent authority. It must follow that, in practice, the sole reason why there has been no decision to charge and try Mr Kandola is his absence from Germany, which, in his case and for purely practical reasons, is the only place where he can be examined, which examination is a pre-condition to the decisions to charge and try being taken.

44. Therefore the challenge under ***section 12A*** must fail in Mr Kandola's case.

45. **Ms Droma:** The ***section 12A*** issue was argued before the DJ. With great respect to him, his ruling does not record any findings of fact or conclusions relating to that issue. It is accepted that the JA that issued the Droma EAW is a prosecutor, rather than a judge of the court. It was issued in the context of the issue of an underlying "untersuchungshaftbefehl", or warrant for "examination, scrutiny or investigation", as is clear from box (b) of the EAW. In box (e) it states that the "accused with an as yet unknown perpetrator" carried out the extradition offence. On this basis, Mr Summers submitted that there were clearly reasonable grounds to believe that no decision to charge or try Ms Droma had been made. We accept that submission. In

fact Mr Jones, on behalf of the respondent JA, conceded that no decision to charge or try Ms Droma had been made by the competent authorities.

46. The position with regard to the reason for the lack of decisions to charge and try Ms Droma is more complex. It is not clear from the EAW itself why this is so. It can be inferred that the reason is that the investigation has not so far been concluded. There has been no attempt to use MLA, despite the fact that (as the DJ found) Ms Droma is not a flight risk. On this basis, we are satisfied that there are reasonable grounds for believing that the absence of Ms Droma from Germany is not the sole reason for the lack of decisions to charge and try her.

47. If that is so, then the next question is whether, pursuant to ***section 12A(1)(b)(ii)*** those representing the category 1 territory have proved, to the criminal standard, that Ms Droma's absence from Germany is the sole reason why the two decisions have not been made. In addition to the general information concerning German criminal procedure to which we have already referred, the court had before it (but the DJ did not) a letter from the public prosecutor in this case dated 9 December 2014 concerning the use of MLA in her case and the reason why no decision had been made to "indict" her. Unfortunately, we did not have before us the precise terms of the three questions posed to which the letter gave the answers.

48. The first answer, which addresses a question on whether MLA could be used in this case, states that MLA could not have been used "…for the decision concerning the indictment as Ms Droma was absent from the city and therefore, according to German law, no charges could have been brought against her – even if due process of law were granted". This answer is difficult to understand, as Mr Jones for the JA accepted. It is because of the very fact that a person is not in the territory seeking MLA that such a request will be made. We fully understand that no charges can be brought under German criminal procedure unless the suspected person has been examined by the chief public prosecutor and, perhaps, that is the point that this answer was trying to make. But no coherent reason is given to explain why MLA has not been used in this case. The DJ recorded at paragraph 7 of his ruling that Ms Droma was not a fugitive and it was not argued before us that "flight risk" would be a reason why MLA could not be used in her case.

49. The second answer in the letter of 9 December simply says "moot question. See 1" and so is of no help. The third answer would appear to be given to a question about the reason for not "indicting" Ms Droma. The answer reads:

> "Ms Droma's absence from the city was the sole reason why it has not yet been possible to indict her. According to the documents before the court, after Ms Droma has been extradited and the due process of law has been granted in the course of the arrest warrant being established, her immediate indictment is currently to be expected".

50. **Conclusion on *section 12A* in Ms Droma's case:** In the light of the other material before the court on German criminal procedure, we interpret this last answer to mean that if Ms Droma is extradited under the EAW then she will be examined before the chief public prosecutor and then she will be charged and a decision to try her will be made immediately thereafter. As we understand the evidence that is before the court in these cases, in particular the first answer given in the document dated 4 December

2014 in Mr Kandola's case, under German criminal procedure the examination by the chief public prosecutor that must precede the decision to charge and try (which is constituted by the issue of the indictment and moving to the main proceedings), does not have to be in Germany. On the face of it, MLA could be used for an examination of Ms Droma by the chief Public Prosecutor in this case. In the absence of any coherent explanation of why MLA has not been used in Ms Droma's case to undertake the "pre-indictment" examination, we have concluded that those representing the category 1 territory have not proved, to the criminal standard, that the *sole* reason for not making the decisions to charge and try Ms Droma is her absence from Germany. Therefore, the extradition of Ms Droma is barred under ***section 12A.***

51. **Mr Ijaz:** We are satisfied that, on the basis of the Ijaz EAW alone, there are reasonable grounds for believing that no decision has been taken to charge or try Mr Ijaz. Thus, the Ijaz EAW states, in Box (i) that it was issued by the "office for the Judge for Preliminary Investigations –Court of Milan". In Box (b) it states that the function and purpose of the EAW is the implementation of the domestic "coercive measure of precautionary measure in prison issued by the judge for Preliminary Investigations…". Box (e) of the EAW refers to Mr Ijaz as one of the "persons under investigation". Further information was provided by the JA on 23 July 2014 and it refers to Mr Ijaz as being "investigated in the criminal proceedings…". We think it must also follow from that material that there are reasonable grounds for believing that Mr Ijaz's absence from Italy is not the sole reason why a decision has not been made to charge or try him.

52. In those circumstances, the burden passes to "those representing the category one territory" to prove, to the criminal standard, the matters set out in ***section 12A(1)(b)(i)*** and ***(ii).*** On behalf of the JA, Mr John Hardy QC accepted before us that there had been no decision to charge or try Mr Ijaz because the investigation against him was still continuing so that there could not yet be a decision on whether to charge or try him. Mr Hardy also stated that, as a matter of Italian law, it was not necessary for a person to be present within the jurisdiction to enable the preliminary investigation to be concluded and for a decision to charge and try to be made by the competent authorities.

53. Mr Hardy informed us that, so far as extraditions to Italy were concerned, the introduction of the ***section 12A*** bar will (in his word) "torpedo" 80 to 85% of all requests for extradition from the UK through EAWs. He said that the reason for this is simply the way that Italian criminal procedure is operated. The remaining 15-20% of extradition requests to the UK will concern "conviction" EAWs which are not affected by ***section 12A.***

54. **Conclusion on *section 12A* and Mr Ijaz's case:** Effectively, therefore, Mr Hardy had to concede that in the case of Mr Ijaz, the category one territory could not prove the matters set out in ***section 12A(1)(b)(i)*** and ***(ii).*** It must therefore follow, as Mr Hardy accepted, that the extradition of Mr Ijaz is barred under ***section 12A***.

The challenges to the validity of the Kandola EAW: *sections 2(3)* and *2(4)(c)* of the EA

55. On the first of these two issues, Mr Summers argued that the Kandola EAW was issued for the purposes of investigation rather than prosecution. He recognised that

the warrant began (as is extremely common), "I request that the person mentioned below be arrested and handed over for the purpose of criminal prosecution or of the execution of a prison sentence or of a deprivation of liberty measure for the prevention of crime", but he observed that this statement is itself ambiguous as to the purpose for which his return is requested. Mr Summers placed particular reliance on the entry in Box (b) of the warrant where the requesting judicial authority must specify the "Decision on which arrest warrant is based". The German Judicial Authority has said that the type of warrant is "investigational warrant of arrest" or , in the German original, 'untersuchgshaftbefehl'. Mr Summers submitted that this shows that the purpose for which Mr Kandola's extradition is sought is investigation rather than prosecution. At the very least, this entry means that the respondent JA cannot satisfy the burden of proof which lies on it to demonstrate that the EAW is indeed a "Part 1 warrant" as defined in ***section 2***. He drew our attention to ***Public Prosecutor's Office Bavaria Germany v Khan, Lewis and Din [2014] EWHC 1704 (Admin)*** where Nicola Davies J. was faced with three other German EAWs which were likewise described as "investigational arrest warrants". She held that they did not satisfy the requirement of ***section 2(3)*** of the EA.

56. In response, Mr Jones QC for the JA relied on ***Ali v Public Prosecutor of Bavaria Germany [2014] EWHC 3881 (Admin)***. In that case as well, the type of domestic warrant was described in the English translation as an "investigational arrest warrant". The appellant in that case used this as the basis for arguing that the warrant was not a Part 1 warrant because it did not contain the statement that it was seeking the person's extradition for the purpose of prosecution. In Mitting J's judgment (with which Aikens LJ agreed) that argument was rejected.

57. We are not persuaded by Mr Summers' argument on this point. It was common ground that the court's approach to challenges to the validity of an EAW based on ***section 2(3)*** is that set out in the judgment of this court in ***Asztaslos*** at [38], which was itself an attempt to summarise previous authorities:

> "(1) the court will look at the warrant as a whole to see whether it is an 'accusation case' warrant or a 'conviction case' warrant. It will not confine itself to the wording on the first page of the warrant which may well be equivocal.
> (2) In the case of an 'accusation case' warrant, issued under part 1 of the Act, the court has to be satisfied, looking at the warrant as a whole, that the requested person is an 'accused' within section 2(3)(a) of the Act.
> (3) Similarly, the court will look at the wording of the warrant as a whole to decide whether the warrant indicates, unequivocally, that the purpose of the warrant is for the purpose of the requested person being prosecuted for the offences identified.
> (4) The court must construe the words in section 2(3)(a)(b) in a 'cosmopolitan' sense and not just in terms of the stages of English criminal procedure.
> (5) If the warrant uses the phrases that are used in the English language version of the EAW annexed to the Framework Decision, there should be no (or very little) scope for argument on the purpose of the warrant.
> (6) Only if the wording of the warrant is equivocal should the court consider examining extrinsic evidence to decide on the purpose of the warrant. But it

should not look at extrinsic material to introduce a possible doubt as to the purpose where it is clear on the face of the warrant itself.
(7) Consideration of extrinsic factual or expert evidence to ascertain the purpose of the warrant should be a last resort and it is to be discouraged."

58. The validity of the last proposition was challenged in ***Assange,*** but the court did not decide the point, merely saying that cases where evidence extraneous to the EAW is admitted should be very few and far between: see [147]. Following the approach in ***Asztalsos,*** we respectfully adopt the analysis of Mitting J in ***Ali v Public Prosecutor of Bavaria (supra),*** which applies equally to the Kandola EAW. Thus, in ***Ali*** the warrant began with the same declaration as to its purpose as this warrant contains. It is true that the declaration was ambiguous, but the ambiguity was only as to whether it was a 'conviction' or an 'accusation' warrant. It is perfectly plain from the remainder of the warrant, that a trial had not by then taken place and there had been no sentence. The conclusion was obvious: that it was an accusation warrant and the initial ambiguity was resolved in favour of this being a warrant for the purpose of prosecution. So too in this case. Secondly, the English translation of the type of warrant in ***Ali*** was that of the German expression, 'untersuchgshaftbefehl'. That is precisely the German expression used in the original EAW for Mr Kandola. This word means warrant for 'examination, scrutiny or investigation'. Mitting J stated that this is consistent with the procedure in Germany and other civil law countries where the defendant or accused is engaged at the earliest stage of the process and invited to put his comments and evidence to the investigating judge. It would be contrary to the obligation to approach the EAW in a cosmopolitan sense to assume that this expression meant the requested person was wanted only for the purpose of investigation and not for the purpose of prosecution.

59. We prefer Mitting J's analysis to that of Nicola Davies J in ***Khan, Lewis and Din.*** We also note that in the latter case there were additional features which led Nicola Davies J to her conclusion. Notably, the EAWs said in terms that there were others involved in the offences who had not so far been identified. In addition, Box (g) of the EAW sought a substantial quantity of documentation to assist with the continuing investigation. Neither of these features is present in the Kandola EAW.

60. ***Section 2(4)(c)*** stipulates that in an accusation EAW there must be "particulars of the circumstances in which the person is alleged to have committed the offence" as well as the time and place at which he is alleged to have committed it. The EAW must also contain relevant provisions of law of the requesting state "under which the conduct is alleged to constitute an offence". In the standard form of EAW at the time, these details were to be set out in Box (e).

61. In the Kandola EAW, the information entered in Box (e) is as follows:

"Time of offence/period of criminal offence: August 2009 – May 2011
Scene of criminal offence: Frankfurt and other
Circumstances of the case: The accused was Managing Director and sole shareholder of Deco Fabrics, which was situated in Frankfurt and dealt with mobile telephones.
From 08-11/2009 (offences 1-4) the company submitted preliminary tax returns and declared turnover liable to taxation. The company had, however,

> obtained no power of disposition for the allegedly delivered cell phones. Nevertheless, it openly charged Valued Added Tax in its outgoing invoices. The input tax refund amounts were therefore wrongly claimed and offset. In this way the accused evaded turnover tax to the extent of EUR 1,856,470.10. From 01/2010 to 04/2010 the company again showed turnover tax to the tune of EUR 2,674,414.70 in its invoices while it failed to comply with its obligation either to submit advance turnover tax returns for the periods January – April or an annual declaration for the year 2010 (offences 5 – 9). The tax evasion resulting from this amounts to EUR 2,674,414.70. Extent of involvement: sole offender…"

62. The applicable criminal offence is described as "tax evasion" for which the maximum sentence is 5 years or, if the offence is particularly serious, 10 years imprisonment.

63. Mr Summers submitted that these particulars do not meet the requirements of ***section 2(4)(c)***. He submits that 'turnover tax' appears to be distinct from VAT and it is unclear whether the alleged criminality was in reclaiming VAT on transactions which never took place or there were transactions which did purportedly take place but which were ineffective because Mr Kandola's company did not own the telephones. He also argued that it is unclear what feature of charges 6 – 9 made those offences particularly serious but which feature was not, apparently, present in connection with charge 5 (or 4). Further, he submitted that the alleged role of the Appellant in committing these offences is unclear. In particular, it is not clear whether his liability is because of what he personally did or because of his status in the company as its managing director and sole shareholder.

64. Mr Jones submitted that that the District Judge was right to reject these contentions. The EAW plainly identified the time and place of the alleged offences which were then sufficiently identified. There is no need for guess work. The EAW does not have to explain why some of the conduct might be regarded as the more serious form of an offence and thereby attract a higher maximum penalty, while other parts of the conduct would have a lower maximum penalty, although it must be assumed that all would attract over 12 months imprisonment.

65. There was no real dispute as to the principles to be applied. The EAW does not have to describe the conduct in question with the detail which would be required of an indictment or a civil pleading: see ***Fofana and Belise v Deputy Prosecutor Thurbin, Tribunal de Grande Instance de Meaux [2006] EWHC 744 (Admin)*** [39]. That would be contrary to the objective of the FD and the legislation, namely to simplify extradition proceedings. On the other hand, the particulars must be sufficient to give the requested person an idea of the nature and extent of the allegations against him – see ***Ektor v National Prosecutor of Holland [2007] EWHC 3106 (Admin)***. In ***Dhar v National Office of the Public Prosecution Service The Netherlands [2012] EWHC 697 (Admin)*** at [68] the Court said that it was necessary to have regard to any potential prejudice to the requested person resulting from the lack of particulars. It had in mind that the absence of detail may prevent a requested person from arguing that one of the bars to extradition was applicable. Lack of particularity may also be prejudicial if it diminished the protection of specialty.

66. An appeal on the ground that the EAW is invalid by reason of lack of particularity will turn on the specific facts of the case in hand and an evaluation of the actual

wording in the EAW being considered. It follows that it is a fruitless exercise to compare the information provided in the Kandola EAW with that provided in other decided cases. In our judgment, the arguments of Mr Jones are to be preferred on this issue. For both sets of offences (1-4 and 5-9) the EAW provides sufficient information for Mr Kandola to have an idea of the nature and extent of the allegations against him. The time and place of the alleged offences are also given. His "degree of participation" (to use the phrase from ***Article 8*** of the FD 2002 on which ***section 2(4)(c)*** is based) is sufficiently identified – since he is described as the managing director and sole shareholder of the company concerned. We do not accept that it was necessary for the EAW to do more than it did to explain why some of the offences were regarded as more serious and therefore attract a higher maximum penalty. We deal below with the issue of whether the double criminality requirement was satisfied, but neither in that context nor in relation to any of the other potential bars to extradition is Mr Kandola prejudiced by the degree of particularity with which the EAW describes the conduct complained of. Likewise, we are not persuaded that he will be disadvantaged should he need to rely on the principle of specialty.

67. Therefore we reject this ground of appeal.

Mr Kandola: are the offences in the Kandola EAW "extradition offences" for the purposes of *sections 10* and *64(3)(b)*?

68. In the case of an "accusation" EAW where the alleged offence is not on the framework list of offences, then it is necessary for the JA to demonstrate that the conduct concerned would, if it occurred in England and Wales, be an offence under English law: ***see section 64(3)(b).***

69. On behalf of Mr Kandola, Mr Summers accepted that what has to be examined is the conduct complained of, rather than the elements of the offence under German law. In addition, he accepts that a necessary ingredient of the comparable English offence may be stated inferentially in the EAW. However, as the Divisional Court said in ***Assange v Swedish Prosecution Authority [2011] EWHC 2849 (Admin)*** at [57] "the facts set out in the EAW must not merely <u>enable</u> the inference to be drawn that the Defendant did the acts with the necessary *mens rea*. They must be such as to <u>impel</u> the inference that he did so; it must be the only reasonable inference to be drawn from the facts alleged." [emphasis in the original].

70. Mr Summers accepted that the allegation in counts 1-4 that Mr Kandola "wrongfully claimed and offset" the input tax in question carried the imputation that he had done so dishonestly. This would be an offence under English law if the conduct took place in England. However, he did not accept that the conduct alleged to be the basis of counts 5-9 likewise impelled the inference that in this respect Mr Kandola's conduct had been dishonest. In essence this charged him with failure to submit tax returns. This might have been done dishonestly, but it might also have been due to simple neglect. If the latter, then the equivalent conduct in England would not be an offence under English law.

71. We cannot accept that submission. The description of Mr Kandola's conduct in relation to counts 5-9 includes the sentence "The tax evasion resulting from this amounts to EUR 2,674,414.70." In our view, the term "evasion" necessarily connotes deliberate conduct and, in this context therefore, which is concerned with a legal

obligation to pay a tax, deliberate conduct which is also dishonest. We would have reached this conclusion anyway, but we are fortified by the fact that in ***Wahid v Department of Public Prosecution Munich Germany [2014] EWHC 2898 (Admin)*** at [19] – [24] this Court came to the same conclusion.

72. Therefore the DJ was correct to reject this objection to Mr Kandola's extradition and this ground of appeal fails.

Overall conclusions in the appeal of Mr Kandola

73. We have dismissed each of the four grounds of appeal raised by Mr Kandola. The DJ's order for Mr Kandola's extradition must therefore be confirmed.

Ms Droma: is the extradition a disproportionate interference with her *Article 8* rights and so must be barred pursuant to *section 21A(1)(a)?*

74. The DJ referred to the leading cases on ***Article 8*** and extradition under Parts 1 and 2 of the EA, namely ***Norris v Government of USA (No 2) [2010] 2 AC 487*** and ***HH v Italy [2013] 1 AC 338.*** The DJ noted the following facts about Ms Droma and her circumstances: (1) She had lived in the UK for 16 to 17 years and was only 13 when she gave birth to her first child. (2) She lived in rented accommodation with her partner and three children, who are all in education in the UK. The tax credits and other benefits amount to £230/£240 per week and the rent on the family house is £580 per month. (3) Ms Droma had had no education and the mental health assessment showed a picture of a "very vulnerable young woman". (4) The alleged offence was, effectively, one robbery for which "an immediate custodial sentence of some length would be the inevitable outcome of a conviction in this jurisdiction of the alleged offence in the EAW". (5) The ages of the children (about 12, 10 and 9) and the fact that Ms Droma was not the sole carer.

75. The DJ concluded, at [23] of his Ruling:

> "Whilst extradition in this case will amount to interference with the ***Article 8*** rights of the [Requested Person's] family, such interference is both necessary and proportionate. The circumstances come nowhere near the very high threshold required before it could be said that the balancing exercise should be determined in the [Requested Person's] favour. Although the allegation of robbery in this case may not necessarily be of the most serious kind, it is simply nowhere near trivial enough to tip the scales against extradition".

76. An independent social work report written by Mr Robert Simpson was prepared for the hearing before the DJ, although it was not quite finalised by the time of the extradition hearing. Ms Droma's counsel sought an adjournment so that the court could consider it and the DJ accepted that he should do so if it were relevant. However he did not consider it necessary for the court to make its decision on the ***Article 8*** issue. Mr Jones did not object to the report being considered by this court. Mr Simpson concentrated on the effect of possible extradition and so separation on the children. He concluded that: (1) it would cause them trauma and loss; (2) a period of deterioration in the family would lead to its eventual fragmentation; (3) there was concern that the long term effect of separation would be likely to have on the children given the circumstances; (4) Ms Droma is "at the present time, the sole

provider of all the children's emotional and basic care needs", so that (5) if Ms Droma were to be removed from the UK, the impact on the children "would be to end [their] family life and consequently the family life of Ms Droma". Mr Simpson doubted that Ms Droma's partner could adequately fulfil the role of the carer of the children, the eldest of whom was now difficult at school.

77. Mr Summers submitted that the DJ had erred in law in stating that the test was that the requested person's circumstances had to surmount a "very high threshold before it could be said that the balancing exercise should be determined in the requested person's favour". He submitted that this amounted to an "exceptionality" test, which was expressly disapproved in ***HH.*** Mr Summers submitted that the DJ should have set on one side of the balance the public interest in extradition, which he submitted was much less weighty in this case because the alleged offence was, comparatively speaking, minor. He submitted that, even taking account of the requested person's antecedents in the UK, in her circumstances she might not receive a custodial sentence if tried here for the extradition offence, particularly as she had been on "qualifying curfew" for 5 ½ months. On the other side of the balance the judge should have set all the personal circumstances of the requested person: the fact she is a young mother of three children of school age for whom she is the primary carer; that she is not a fugitive; the fact that the effect of separation from the children would be profound as is clear from Mr Simpson's report.

78. We accept that the DJ did not apply the correct legal test as refined in ***HH.*** The test is a "proportionality" test and there is no particular "threshold" of fact to be achieved before it can be "activated". The DJ has to take account of all factors, weighing the balance between the public interest in extradition on the one side and the effect that extradition would have on the private and family life of the requested person on the other. In this case we are particularly impressed with the effect that the extradition would have on the three minor children. The DJ did not have before him the report of Mr Simpson. That has persuaded us that, on the particular facts of this case, this is one of those rare cases where the extradition would result in a disproportionate interference with her ***Article 8*** rights. We would therefore allow Ms Droma's appeal on this ground as well.

Ms Droma: Is the extradition proportionate within *section 21A(1)(b)*

79. This makes it unnecessary to make a conclusion on the ***section 21A(1)(b)*** issue. We would comment on three matters, however. First, we record the argument of Mr Summers, which was not fully explored, that the first factor of the three factors identified in ***section 21A(3),*** viz, "the seriousness of the conduct alleged to constitute the extradition offence" is something that must be viewed "through English eyes"; ie. the seriousness must be judged as if the matter were being considered by a criminal court in England and Wales. That approach was implicitly, if not explicitly, adopted by this court in ***Miraszewski and others v Poland [2014] EWHC 4261,*** ("***Miraszewski*"),** which was the first case where ***section 21A(1)(b)*** was considered by this court: see [36] of the judgment of Pitchford LJ, with whom Collins J agreed.

80. Secondly, assuming that the second matter (viz. "the likely penalty that would be imposed if D was found guilty of the extradition offence") must refer to the penalty that would be imposed by a court in the requesting state, (see at [39] of the judgment of Pitchford LJ in ***Miraszewski***), we had no information on that point. Further, there

is no evidence before us about the third statutory "specified matter" that ***section 21A(2)*** stipulates that the court "must take into account" in order to carry out the "proportionality" exercise, viz. the possibility of the relevant "foreign authorities" taking measures that would be less coercive than the extradition of the requested person. The lack of such information on those two points makes it difficult to carry out the "proportionality" exercise.

81. Thirdly, there was some debate before us on whether the extradition offence in this case would come within the category of offences set out in the table at paragraph 17A.5 of the ***Criminal Practice Directions Part 17 Extradition 2014.*** If it did, then in the absence of exceptional circumstances, the Practice Direction stipulates that the judge should generally conclude that extradition would be disproportionate. The judge concluded that the extradition offence was not covered by the Practice Direction because, at the least, it constituted "theft from the person": see [22] of the Ruling. It was argued that this was, at most, an attempted theft. However, we have no need to make a finding on this and we do not do so.

Mr Ijaz: challenge to the validity of the Ijaz EAW: *section 2(4)(c).*

82. Box (e) of the Ijaz EAW contains the following:

> "This warrant relates to two offences
>
> Description of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation in the offence(s) by the requested person.
>
> 1) the offence provided for and punishable under Article 416 paragraphs 1 and 2 of the Criminal Code, aggravated by the transnational nature under Article 3, Law 146/2006, in that he participated in a criminal association by virtue of a specific criminal agreement, aimed at perpetrating an indefinite series of tax offences, indicated in the following counts, an association where the persons under investigation were mere participants, who if necessary had recourse to a permanent organisational structure, also made of the companies indicated in the following counts, each of them with well-defined roles and functions, all controlled by the transnational organisation which established its strategic orientations, operational management, social structure, capital in order to reach the aims of the criminal association, dissimulating the real objectives and activities of the criminal association in the society frameworks set up for this purpose, incorporating the operation of commercial activities of the companies below in the general strategy of the aforesaid criminal association and perpetrating a reiterated criminal activity which primarily consisted in committing fiscal frauds to the detriment of the national inland revenue and the European Union according the procedures specified in the following counts. The purported offences, to the detriment of national inland revenue involved the overall appropriation of value added tax on an overall taxable

income amounting to 52,123,156.80 Euros with VAT totalling 8,587,192.80 Euros

Milan, national and foreign territory from 2010 to November 2011

2) Article 8 legislative Decree n.74 of 2000, in that in his capacity as director of Nabucco Limited company, within his functions, resold energy credits – previously acquired from papers firms Madina limited company, L'Apepiera limited company and Hsyenai Avni, with several actions in pursuance of the same criminal plan, acting also at different dates and places, issued subjectively inexistent invoices for a taxable income amounting to 19,372, 560 Euros and a VAT amounting to 3,874,512.00 Euros as specified below. [there then followed a list of 40 invoices]…

Milan, national and foreign territory since 2010 and still ongoing, the fact was established on 11 October 2011."

83. Mr Summers accepted that, in principle, it was necessary to look at the EAW as a whole to see if sufficient particulars were provided. What might seem like a deficiency in, say, one count, could sometimes be satisfied by information in other counts. Nonetheless, he submitted, each of the two counts in this EAW lacked sufficient particulars. Taking the offences in reverse order, he argued that, in relation to count 2, the phrase 'inexistent invoices' makes no sense. In supplemental information dated 24 April 2014 it is explained that the reference should be to 'subjectively inexistent invoices'. However, Mr Summers reminded us that a Requesting State is not permitted to rely on material extrinsic to the warrant to establish that the warrant satisfies the definition of a Part 1 warrant: see ***Dabas v High Court of Justice in Madrid Spain [2007] 2 AC 31*** at [50]. Furthermore, Mr Ijaz's role in reclaiming the VAT supposedly represented by these invoices is unclear. The beneficiaries of the VAT reclaims would appear to have been Scirroco or Energy Life yet he is not alleged to have had any role with these companies.

84. In relation to count 1, Mr Summers argued that although it cross-refers to the allegations in count 2, the VAT loss in count 1 (approximately 8.6 million Euros) is very substantially more than the VAT loss in count 2 (approximately 3.9 million Euros). Count 1 must therefore refer to a wider activity than count 2. That is also shown by the dates of the two offences. Count 1 covers the period 2010-November 2011. Count 2 concerns a narrower period from July-October 2010. But the nature of the additional conduct in count 1 alleged against Mr Ijaz is not explained. The reader of the EAW is not assisted by the generalised allegation in count 1 that the criminal activity *primarily* consisted of unspecified fiscal frauds. In relation to both offences, Mr Summers argued that the reference to the fact that both offences were committed in "foreign territory" is vague as to where this territory was. In the context of Mr Ijaz that is particularly important because of his contention that he has already been punished for participation in the same kind of activity in Germany.

85. On behalf of the JA, Mr Hardy submitted that the warrant did satisfy the requirement of ***section 2(4)(c)***. Count 1 was identified by the EAW as a Framework List offence, namely participation in a criminal organisation. Count 2 was identified as a Framework List offence of fraud. In count 2 Mr Ijaz's role is specified: he was a director of Nabucco which resold energy credits that it had bought from other, paper, firms. 'Inexistent invoices' is rather inelegant English for fictitious. The other details which Mr Ijaz said were lacking were unnecessary and did not affect the validity of the warrant.

86. **Conclusion on the validity of the Ijaz EAW:** In our judgment count 2 did satisfy the requirements of ***section 2(4)(c)***. It made clear that it was Mr Ijaz's role as director of Nabucco in reselling energy credits which gave rise to the complaint. He was said to be party to a "criminal plan" but this was not a bare allegation of participation in a criminal conspiracy. We accept that with documents such as the EAW where the language of the original is not English and there will often be infelicitous translations into English, this court should be very slow to reject the document as invalid simply on the basis of a phrase that is not idiomatic. In the present context, we accept that we should read 'subjectively inexistent invoices' as meaning fictitious invoices. They are listed in detail. If, as the EAW alleges, Mr Ijaz was part of a criminal plan, the fact that other companies may have benefited from the criminal conduct does not demonstrate that the warrant lacks sufficient particularity. Nor, in our judgment, does the broad description of the place where the offence took place render the warrant invalid.

87. The position with regard to count 1 is different. We accept that count 2 may be used to shed some light on the conduct which is alleged under count 1. However, that does not take Mr Hardy far enough. The temporal scope of count 1 is greater than count 2. The losses involved in count 1 are very much greater than count 2. Yet it is not possible to tell from the warrant what is the conduct that the Appellant is alleged to have committed which implicates him in this additional reach of the first count.

88. We have to consider each of the counts in the EAW separately. We conclude, therefore, that count 2 does satisfy ***section 2(4)(c)*** but count 1 does not. Therefore the appeal succeeds on this point only so far as count 1 is concerned.

Mr Ijaz: is extradition barred by reason of the rule against "double jeopardy" pursuant to *section 12* of the EA?

89. The facts which Mr Summers submitted are relevant to this challenge are as follows: Mr Ijaz was manager of ASM Trading GmbH. Between January and May 2011 he issued fictitious invoices for fictitious energy credits sales to Energy Plus GMbH, specifying €2,875.228 turnover tax (ie VAT). Co-accuseds in subsequent German proceedings used Energy Plus to reclaim part of that VAT as an input tax, based on the fictitious invoices.

90. In June 2011 the Local Court of Nurnberg issued a warrant for Mr Ijaz's arrest and remand in custody in respect of six offences. These were: (i) membership of a criminal group formed to evade taxes by abusing turnover tax; and (ii) five specific instances of tax evasion. On 14 July 2011 the Public Prosecutor of Nurnberg issued an EAW and Mr Ijaz was arrested in the UK on 2 December 2011. He did not contest extradition and he was extradited on 1 June 2012.

91. On 31 July 2012 Mr Ijaz was questioned by the German authorities and he gave an account of his activities concerning ASM Trading GmbH, which, however, also mentioned that he was also a director of a Swedish and an Italian companies. He said that the "procedure" used by those company was very similar to that used by ASM Trading GmbH. Mr Ijaz confessed to receiving a total of £26,000 having gone to Milan, to meet a lawyer and having "signed for the company", viz Nabucco.

92. Following this confession, Mr Ijaz was charged in Germany on 27 September 2012. All the charges referred (either inferentially or expressly) to criminal activities of different companies outside Germany, in particular Sweden and Italy. At his trial in Nurnberg on 9 October 2012, Mr Ijaz repeated wide-ranging admissions which included criminal conduct in Italy and Sweden. The German authorities apparently accepted Mr Ijaz's confession as truthful and accurate and regarded him as someone who had been "sucked into" the criminal enterprise as a result of his "dire financial and personal situation" and he did not really know what was going on at ASM Trading GmbH.

93. Mr Ijaz was sentenced to a total of 2 years and 5 months imprisonment. The sentence noted that he had received £26,000 "simply for acting as formal managing director and partner of ASM Trading GmbH and two other companies in Sweden and Italy". Mr Ijaz was transferred to the UK to serve his sentence there pursuant to Framework Decision 2008/909/JHA of 27 November 2008 on the mutual recognition of custodial sentences.

94. Mr Summers submitted that count 1 in the Ijaz EAW relates to an "over-arching" conspiracy that comprises the Italian and other EU cross-border conduct. He noted that supplemental information from the JA of 23 July 2014 confirmed that count 1 encompassed conduct outside Italy by non-Italian companies. Mr Summers accepted that the German and Italian offences were not identical so that there was no "double jeopardy" by virtue of the principle of *autrefois convict.* But he submitted that count 1 of the Ijaz EAW did offend the principle of double jeopardy because it constituted a second prosecution based on the same or substantially the same linked facts. The decision of this court in ***Fofana & Belize v Deputy Prosecutor Thubin, Tribunal de Grande Instance de Meaux, France [2006] EWHC 744 (Admin) ("Fofana"),*** established that the "rule against double jeopardy" referred to in ***section 12*** of the EA did embrace that wider principle.

95. Mr Summers accepted that Count 2 constitutes a substantive offence which relates only to alleged Italian conduct. Nevertheless, the German court clearly took account of the Italian and Swedish misconduct to which Mr Ijaz confessed in sentencing him overall. Effectively, Mr Summers submitted, the German court performed the equivalent exercise that an English criminal court would do when taking other offences into consideration when passing sentence, even if there was no "TICs schedule". That is enough to bring the principle in ***Fofana*** into play. In addition Mr Summers relied on statements of Pitchford LJ in ***R v Dwyer [2012] EWCA (Crim) 10,*** at [25] and [31].

96. We accept that the key question in this case is whether the German courts passed sentence on Mr Ijaz on the basis, at least in part, of offences that are now covered by counts 1 and 2 in the Ijaz EAW. The assurance of the Italian Public Prosecutor in the further information of 23 July 2014 that Mr Ijaz would not be prosecuted for any facts

in which German companies are involved and that the Ijaz EAW is only concerned with frauds in Mr Ijaz's capacity as director of an Italian company, is, strictly speaking, irrelevant.

97. The German EAW box (e) refers to Mr Ijaz's capacity as "manager of ASM Trading GmbH" and refers only to the "German electricity market". The judgment of the German court of 26 October 2012 describes the nature of the "Missing Trader Intra-Community" (or "MITC") fraud and does indeed refer to two other companies in Sweden and Italy. But we are quite satisfied that, read overall, the German court's judgment and sentence were concerned only with the German offences and not with any fraud against the Italian fiscal authorities. The two counts in the Ijaz EAW are not based on substantially the same facts as those dealt with by the German court, even if the *modus operandi* of the Italian offences was the same as that of the German ones.

98. We therefore dismiss this ground of appeal.

Disposal of the three cases.

99. **Mr Kandola:** The appeals based on ***sections 2(3)*** and ***2(4)(c)*** (alleged invalidity of EAW due to lack of statement that "accused" and lack of particulars of circumstances of the offences) are dismissed. So also is the appeal based on ***section 10*** and ***section 64*** of the EA (allegation that not extradition offences). The appeal based on ***section 12A,*** (lack of decision to charge, try etc) which was not argued below but which we permitted to be argued before us, is also dismissed. The order of the DJ that Mr Kandola be surrendered to Germany pursuant to ***section 21(3)*** of the EA must therefore stand.

100. **Ms Droma:** The appeal based on ***section 12A*** (lack of decision to charge/try etc) succeeds. So too does that based on ***section 21A(1)(a)*** (***Article 8*** rights). We do not make a decision on the ***section 21A(1)(b)*** challenge (extradition would be "disproportionate"). Therefore Ms Droma must be discharged and the extradition order of the DJ must be quashed, pursuant to ***section 27(5)(a)*** and ***(b)*** of the EA.

101. **Mr Ijaz:** The appeal based on ***section 2(4)(c)*** (alleged invalidity of EAW due to lack of particulars of offence/circumstances) is dismissed so far as count 2 is concerned but it succeeds so far as count 1 is concerned. The appeal based on ***section 12*** (rule against "double jeopardy") is dismissed. However, the appeal based on ***section 12A*** (lack of decision to charge/try etc) succeeds. Therefore Mr Ijaz must be discharged on both counts in the Ijaz EAW and the extradition order of the DJ must be quashed pursuant to ***section 27(5)(a)*** and ***(b)*** of the EA.

Appendix:

Relevant provisions of the Extradition Act 2003: viz. *sections 2(3), 2(4), 10, 11(1), 11(1A), 12, 12A, 21A, 26, 27* and *64* of the *Extradition Act 2003* as amended by the ASBCPA 2014.

2 Part 1 warrant and certificate

(3) The statement is one that—

(a) the person in respect of whom the Part 1 warrant is issued is accused in the category 1 territory of the commission of an offence specified in the warrant, and

(b) the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being prosecuted for the offence.

(4) The information is—

(a) particulars of the person's identity;

(b) particulars of any other warrant issued in the category 1 territory for the person's arrest in respect of the offence;

(c) particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the category 1 territory under which the conduct is alleged to constitute an offence;

(d) particulars of the sentence which may be imposed under the law of the category 1 territory in respect of the offence if the person is convicted of it.

……..

10 Initial stage of extradition hearing

(1) This section applies if a person in respect of whom a Part 1 warrant is issued appears or is brought before the appropriate judge for the extradition hearing.

(2) The judge must decide whether the offence specified in the Part 1 warrant is an extradition offence.

(3) If the judge decides the question in subsection (2) in the negative he must order the person's discharge.

(4) If the judge decides that question in the affirmative he must proceed under section 11.

……..

11 Bars to extradition

(1) If the judge is required to proceed under this section he must decide whether the person's extradition to the category 1 territory is barred by reason of—

(a) the rule against double jeopardy;

(aa) absence of prosecution decision;

(b) extraneous considerations;

(c) the passage of time;

(d) the person's age;

(f) speciality;

(g) the person's earlier extradition to the United Kingdom from another category 1 territory;

(h) the person's earlier extradition to the United Kingdom from a non-category 1 territory;

(i) the person's earlier transfer to the United Kingdom by the International Criminal Court;

(j) forum.

(1A) But the judge is to decide whether the person's extradition is barred by reason of…
(b) forum

only in a case where the Part 1 warrant contains the statement referred to in section 2(3) (warrant issued for purposes of prosecution for offence in category 1 territory).

…….

12 Rule against double jeopardy

A person's extradition to a category 1 territory is barred by reason of the rule against double jeopardy if (and only if) it appears that he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction on the assumption—

(a) that the conduct constituting the extradition offence constituted an offence in the part of the United Kingdom where the judge exercises jurisdiction;

(b) that the person were charged with the extradition offence in that part of the United Kingdom.

……..

12A Absence of prosecution decision

(1) A person's extradition to a category 1 territory is barred by reason of absence of prosecution decision if (and only if)—

(a) it appears to the appropriate judge that there are reasonable grounds for believing that—

(i) the competent authorities in the category 1 territory have not made a decision to charge or have not made a decision to try (or have made neither of those decisions), and

(ii) the person's absence from the category 1 territory is not the sole reason for that failure,

and

(b) those representing the category 1 territory do not prove that—

(i) the competent authorities in the category 1 territory have made a decision to charge and a decision to try, or

(ii) in a case where one of those decisions has not been made (or neither of them has been made), the person's absence from the category 1 territory is the sole reason for that failure.

(2) In this section "to charge" and "to try", in relation to a person and an extradition offence, mean—

(a) to charge the person with the offence in the category 1 territory,

and

(b) to try the person for the offence in the category 1 territory.

……..

21A Person not convicted: human rights and proportionality

(1) If the judge is required to proceed under this section (by virtue of section 11), the judge must decide both of the following questions in respect of the extradition of the person ("D")—

(a) whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998;

(b) whether the extradition would be disproportionate.

(2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); but the judge must not take any other matters into account.

(3) These are the specified matters relating to proportionality—

(a) the seriousness of the conduct alleged to constitute the extradition offence;

(b) the likely penalty that would be imposed if D was found guilty of the extradition offence;

(c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D.

(4) The judge must order D's discharge if the judge makes one or both of these decisions—

(a) that the extradition would not be compatible with the Convention rights;

(b) that the extradition would be disproportionate.

(5) The judge must order D to be extradited to the category 1 territory in which the warrant was issued if the judge makes both of these decisions—

(a) that the extradition would be compatible with the Convention rights;

(b) that the extradition would not be disproportionate.

(6) If the judge makes an order under subsection (5) he must remand the person in custody or on bail to wait for extradition to the category 1 territory.

(7) If the person is remanded in custody, the appropriate judge may later grant bail.

(8) In this section "relevant foreign authorities" means the authorities in the territory to which D would be extradited if the extradition went ahead.

……..

26 Appeal against extradition order

(1) If the appropriate judge orders a person's extradition under this Part, the person may appeal to the High Court against the order.

(2) But subsection (1) does not apply if the order is made under section 46 or 48.

(3) An appeal under this section may be brought on a question of law or fact.

(4) Notice of an appeal under this section must be given in accordance with rules of court before the end of the permitted period, which is 7 days starting with the day on which the order is made.

……..

27 Court's powers on appeal under section 26

(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) or the conditions in subsection (4) 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.

(4) The conditions are that—

(a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;

(b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;

(c) if he had decided the question in that way, 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.

……..

64 Extradition offences: person not sentenced for offence

(1) This section sets out whether a person's conduct constitutes an "extradition offence" for the purposes of this Part in a case where the person—

(a) is accused in a category 1 territory of an offence constituted by the conduct, or

(b) has been convicted in that territory of an offence constituted by the conduct but not sentenced for it.

(2) The conduct constitutes an extradition offence in relation to the category 1 territory if the conditions in subsection (3), (4) or (5) are satisfied.

(3) The conditions in this subsection are that—

(a) the conduct occurs in the category 1 territory;

(b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom if it occurred in that part of the United Kingdom;

(c) the conduct is punishable under the law of the category 1 territory with imprisonment or another form of detention for a term of 12 months or a greater punishment.

(4) The conditions in this subsection are that—

(a) the conduct occurs outside the category 1 territory;

(b) in corresponding circumstances equivalent conduct would constitute an extra-territorial offence under the law of the relevant part of the United Kingdom;

(c) the conduct is punishable under the law of the category 1 territory with imprisonment or another form of detention for a term of 12 months or a greater punishment.

(5) The conditions in this subsection are that—

(a) the conduct occurs in the category 1 territory;

(b) no part of the conduct occurs in the United Kingdom;

(c) a certificate issued by an appropriate authority of the category 1 territory shows that the conduct falls within the European framework list;

(d) the certificate shows that the conduct is punishable under the law of the category 1 territory with imprisonment or another form of detention for a term of 3 years or a greater punishment.

(6) For the purposes of subsections (3)(b) and (4)(b)—

(a) if the conduct relates to a tax or duty, it does not matter whether the law of the relevant part of the United Kingdom imposes the same kind of tax or duty or contains rules of the same kind as those of the law of the category 1 territory;

(b) if the conduct relates to customs or exchange, it does not matter whether the law of the relevant part of the United Kingdom contains rules of the same kind as those of the law of the category 1 territory.