IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
BETWEEN:

Case No: CO/2118/2009

IN THE MATTER of an appeal pursuant to section 26 of the Extradition Act 2003.

GARY SAMUEL OWENS

Appellant

v

COURT OF FIRST INSTANCE No.4, MARBELLA, SPAIN

Respondent

CONFIDENTIAL SKELETON ARGUMENT
ON BEHALF OF THE APPELLANT

Date of hearing:	14th May 2009
Time estimate:	4 hours
Essential Reading:	Skeleton Arguments Hearing bundle Tabs 3-6.
Chronology:	See below paras. 2-8, 33, 42, 50-53, 57-58.

Preliminary

1. Aspects of submission 2 (below paragraphs 48-51, 53, 57-58) concern matters and evidence the nature of which necessitated the substantive hearings in the Magistrates' Court being conducted *in camera* (at the request of SOCA). The District Judge's ruling was given *in camera*. Application is made for a continuation of that order in respect of proceedings on this appeal on those aspects of submission 2.

Introduction

2. By means of European Arrest Warrant ("EAW") issued on **6th August 2007**, the extradition of the Appellant has been requested by the Court of First Instance No. 4 of Marbella. Spain has been designated a Category 1 territory pursuant to section 1 of the 2003 Act[1]. Thus, Part 1 of the 2003 Act applies, as modified by the Extradition Act 2003 (Multiple Offences) Order 2003 (SI. No. 3150 of 2003) and as amended by schedule 13 to the Police and Justice Act 2006.

1 . The Extradition Act 2003 (Designation of Part 1 Territories) Order 2003 (SI. 2003 No. 3333).

3. The Appellant's extradition is sought in respect of the following two Spanish criminal offences;

   a. 'pre-meditated murder' contrary to Article 138 of the Spanish Criminal Code (punishable with 10-15 years' imprisonment), and

   b. 'pre-meditated robbery with violence' contrary to Article 242 of the Spanish Criminal Code (punishable with 2-5 years' imprisonment).

4. The EAW was submitted to, and received by, the Serious Organised Crime Agency ("SOCA"); an authority designated by the Secretary of State for the purposes of Part 1[2]. On **27th February 2008**, the EAW was certified by SOCA under s2(7) & (8) of the 2003 Act.

5. On **18th March 2008**, the Appellant was arrested at his home address under section 3 of the 2003 Act. The extradition hearing commenced on **2nd April 2008** and was adjourned part-heard. The District Judge heard evidence on **11th November 2008**, **11th December 2008** and **20th January 2009**.

6. On **26th February 2009**, District Judge Tubbs ordered the appellant's extradition pursuant to section 21(3) of the 2003 Act.

7. By section 26(4) of the 2003 Act, that decision commenced the 'permitted period' for appealing against the order for extradition (the 'relevant decision'). Section 26(3) of the Act provides for an appeal to the High Court, on behalf of the person whose extradition is ordered, on questions of law or fact.

8. On **4th March 2009**, within the permitted period, the Appellant lodged the present appeal against that decision pursuant to section 26 of the 2003 Act.

The statutory matrix

9. Section 26 of the 2003 Act provides, insofar as is relevant, that:

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

2. The Serious Organised Crime and Police Act 2005 (Consequential and Supplementary Amendments to Secondary Legislation) Order 2006 (SI 2006 No. 594).

10. Section 27 of the 2003 Act further provides that:

> "…(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…"

Submission 1 (section 2(4)(c))

11. Section 2(2) of the 2003 Act provides, so far as is relevant, that:

> "…(2) A European Arrest Warrant is an arrest warrant which is issued by a judicial authority of a category 1 territory and which contains-
> a. the statement referred to in subsection (3) and the information referred to in subsection (4)…".

12. Section 2(4) of the 2003 Act provides, so far as is relevant, that:

> "…(4) The information is-…
> 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…".

The Framework Decision

13. Section 2(4)(c) of the 2003 Act gives effect to the mandatory requirement of Article 8.1(e) of the Framework Decision 2002/584/JH which provides that;

> "…The European Arrest Warrant shall contain the following information set out in accordance with the form contained in the Annex:
> …e. a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person…".

14. Enacted as they were in discharge of the United Kingdom's duty to transpose into national law the provisions of the Framework Decision, the constructional imperatives of Article 34 of the Treaty on European Union require that the provisions of Part 1 of the 2003 Act must, so far as possible, be interpreted in a way which is consistent with the Framework Decision and gives effect to the obligations contained within the Framework Decision. By article 34(2)(b) EU, which reflects the law on directives in article 249 of the EC Treaty, Framework Decisions are binding on member states as to the result to be achieved but leave to national authorities the choice of form and methods. Thus, in cases concerning Part 1 of the 2003 Act, the House of Lords has repeatedly held that, when applying national law, the national court that is called on to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with article 34(2)(b) EU (***Dabas v High Court of Justice in Madrid, Spain*** [2007] 2 AC 31, HL [Tab 9][3])

15. Thus, section 2(4)(c) of the 2003 Act must be construed in accordance with Article 8.1(e) of the Framework Decision.

The overriding principles

16. The House of Lords has repeatedly observed that section 2 'validity' is a jurisdictional prerequisite of a Part 1 warrant under the 2003 Act. If an EAW does not conform to the requirements set out in section 2 of the 2003 Act, it will not be a Part 1 warrant within the meaning of that section and Part 1 of the 2003 Act will not apply to it (***Office of the King's Prosecutor, Brussels v Cando Armas*** [2006] 2 AC 1, HL [Tab 14] per Lord Hope of Craighead at paras. 28 & 42; ***Dabas v High Court of Justice, Madrid*** (supra) [Tab 9] per Lord Hope of Craighead at para. 50)[4].

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3 . Per Lord Bingham of Cornhill at paras. 4-8; per Lord Hope of Craighead at paras. 14, 25, 38-43; per Lord Brown of Eaton-under-Heywood at paras. 75-79. Applying the decision of the European Court of Justice in ***Criminal Proceedings against Pupino*** (Case C-105.03) [2006] QB 83 at paras. 34 & 43. Those principles were re-iterated by the European Court of Justice in ***Criminal Proceedings against Dell'Orto*** (Case C-467/05) [2007] ECR 1-5557 at para. 28. See also ***Pilecki v Circuit Court of Legnica, Poland*** [2008] 1 WLR 325, HL per Lord Hope of Craighead at para. 24-33; ***Caldarelli v Court of Naples*** [2008] 1 WLR 1724, HL per Lord Bingham of Cornhill at para. 22.

4 . See also ***Pilecki v Circuit Court of Legnica, Poland*** (supra) per Lord Hope of Craighead at

17. The House of Lords has also emphasised the principle of strict compliance with the requirements of section 2 of the 2003 Act (and Framework Decision);

> "…The [part 1] system has, of course, been designed to protect rights. Trust in its ability to provide that protection will be earned by a careful observance of the procedures that have been laid down…the liberty of the subject is at stake here, and generosity must be balanced against the rights of the persons who are sought to be removed under these procedures. They are entitled to expect the courts to see that the procedures are adhered to according to the requirements laid down in the statute…" (***Office of the King's Prosecutor, Brussels v Cando Armas & another*** (supra) [Tab 14] per Lord Hope of Craighead at paras. 23-24)[5].

18. The Spanish offences in this case are both certified as a Framework List offences. But, even in Framework list cases, conduct reasonably capable of constituting the extradition offences specified must be described in the Part 1 Warrant (***Palar (Gheorghe) v Court of First Instance of Brussels*** [2005] EWHC 915 (Admin) [Tab 15] per Laws L.J. at paras. 7-11). The requirement for a clear description of the facts is crucial in Framework List cases where the requirement to establish dual criminality is abrogated (***Minister for Justice, Equality and Law Reform v Desjatnikovs*** [2008] IESC 53 [Tab 7] per Denham J. at para. 21).

The present EAW

19. The extent of description of conduct contained within the EAW (at box (e)) is that;

> "...On 22 February 1991 Gary Owens, acting in collaboration with other charged persons in this case, stole a quantity of jewellery and credit cards from the residence of Torbjorn Langaas Reija and Ivonne Anna Christine Bertlin, after which they murdered Torbjorn Langaas Reija and hid the body in a well in Marbella..."

The requirements of section 2(4)(c)

20. Section 2(4)(c) of the 2003 Act, and Article 8.1(e) of the Framework Decision, requires a valid EAW to contain particulars of four things;

    i. **What is alleged to have happened** [in s2(4)(c) terms "particulars of…the conduct alleged to constitute the offence" / in Article 8.1(e) terms "a

para. 14

5 . See also ***Regina (Guisto) v Governor of Brixton Prison and another*** [2004] 1 AC 101, HL per Lord Hope of Craighead at para. 41; "…it is a fundamental point of principle that any use of the procedures that exist for depriving a person of his liberty must be carefully scrutinised.…the courts must be vigilant to ensure that the extradition procedures are strictly observed…The importance of this principle cannot be over-emphasised…"

description of the circumstances in which the offence was committed"].

ii. **The defendant's participation in the offence; the defendant's role in what happened** [in s2(4)(c) terms "particulars of the circumstances in which the person is alleged to have committed the offence" / in Article 8.1(e) terms "a description of the…degree of participation in the offence by the requested person"].

iii. **When the alleged offence occurred** [in s2(4)(c) terms "particulars of…the time…at which he is alleged to have committed the offence" / in Article 8.1(e) terms "a description of…the time…the offence was committed"].

iv. **Where the alleged offence occurred** [in s2(4)(c) terms "particulars of…the place…at which he is alleged to have committed the offence" / in Article 8.1(e) terms "a description of…the…place…the offence was committed"].

21. The composite requirements of section 2(4)(c) were considered in ***Ektor v National Public Prosecutor of Holland*** [2007] EWHC 3106 (Admin) [Tab 8], where it was held (per Cranston J.) that:

i. The description must include when and where the offence is said to have happened and what involvement the person named in the warrant had (para. 7).

ii. A balance must be struck between the need on the one hand for an adequate description to inform the person, and on the other the object of simplifying extradition procedures (para. 7).

iii. The person sought by the warrant needs to know what offence he is said to have committed and to have an idea of the nature and extent of the allegations against him in relation to that offence (para. 7).

iv. The language of the 2003 Act somehow connotes the specificity or lack of it demanded in the particulars for a count on an indictment (para. 8).

v. The amount of detail may turn on the nature of the offence (para. 7).

vi. Where dual criminality is involved, the detail must also be sufficient to enable the transposition exercise to take place (para. 7).

vii. Allowance must be made where an EAW has been translated (para. 8).

Murder – what is alleged to have happened?

22. The EAW says no more than that, at some point after the alleged robbery, *"...they murdered Torbjorn Langaas Reija..."* and then hid the body. The EAW contains no

particulars so as to enable the Appellant to understand, even in broad terms, how the murder was committed. Was Reija shot, stabbed, strangled, drowned, bludgeoned to death etc?

23. See ***Von der Pahlen v Government of Austria*** [2006] EWHC 1672 (Admin) [Tab 11] per Dyson L.J. at para. 21;

> "...The language of section 2(4)(c) is not obscure and, in my judgment, it should be given its plain and ordinary meaning. The sub-section requires the warrant to obtain particulars of the circumstances in which the person is alleged to have committed the offence. These particulars must include four elements: (1) the conduct alleged to constitute the offence…The difficulties in the present case centre on element (1). *The use of the introductory word "particulars" indicates that a broad omnibus description of the alleged criminal conduct, "obtaining property by deception", to take an English example, will not suffice*…" (emphasis added).

Murder – what is the Appellant's alleged role?

24. No particulars are provided as to what the Appellant is alleged to have done in the murder "acting in collaboration with other charged persons in this case". Was he physically present? Did he enter the venue? Did he administer blows? Did he possess a weapon?

25. This EAW contains less detail that even than the EAW in ***Vey v Office of the Public Prosecutor of the County Court of Montlucon, France*** [2006] EWHC 760 (Admin) [Tab 12] in respect of which Moses L.J. observed, at paras. 30-35, that;

> [30.] "...This court must be careful, in considering whether particulars sufficient to satisfy Section 2(4) have been given, not to trespass upon consideration of the merits of the proposed prosecution. The principle which underlines the Framework Decision (OJ 2002 L 190, page 1) and the 2003 Act is to recognise judicial decisions of other Member States and to accord them respect. The 2003 Act was designed to be consistent with the Decision even though it did not merely implement those provisions. Accordingly it is not for this court to enquire into the merits of the proposed prosecution (see Lord Bingham in *Office of the King's Prosecutor, Brussels v Cando Armas* [2005] 3 WLR 1079, paragraph 8, page 1084 and Lord Scott, paragraph 52, page 1099).
>
> [31.] However, trust, which forms the foundation of the co-operation Member States expect of each other, also requires clarity. Lord Hope in *Cando Armas* took the view that the court could draw inferences from the material available to it to determine whether the requirements of the statute had been satisfied. But any gap should not be filled by mere guess work (see paragraph 48).

> [32.] In the instant case there is no clear statement whatever of the circumstances in which the appellant is alleged to have committed the offence nor of her conduct. Those are requirements not only in Section 2(4)(c) but in Article 8(e) of the Framework Decision. The space in the warrant provided for describing the circumstances of the offence and the level of participation of the wanted person, is mainly taken up with an account of the arrest, questioning, confession and accusations of the appellant's son. Those matters merely add to doubts concerning what precisely the circumstances were in which the appellant was alleged to have committed the offence of murder. Still less do they throw any light on the conduct alleged. The most which can be said is that there was an accusation by the appellant that she was:- "the author of the knocks received by the victim."
>
> [33.] Perhaps, there may be cases where an account of an accusation will provide sufficient particulars of the circumstances to satisfy Section 2(4) of the 2003 Act. But not in this case. The warrant identifies the three conflicting accounts given by the appellant's son. Firstly, that he struck the blows which left the victim in a pool of blood; secondly, that it was his stepfather; and thirdly, once that accusation had been proved to be false, that it was his mother who was the murderess.
>
> [34.] In those circumstances there is no information of the circumstances in which the appellant is alleged to have committed the offence and no statement of her conduct alleged to constitute the offence. All that the European arrest warrant reveals is this history of accusation. That that is the most which can be discerned from the information provided may be thought surprising...After all, the information states that the appellant's son took a hammer and hit the victim several times on the head. *Is it now alleged that the appellant took the hammer and hit the victim several times on the head? What are the circumstances?*
>
> [35.] *The absence of the information required leads to the conclusion that the warrant does not comply with Section 2(4) of the 2003 Act...*" (emphasis added)

Murder – where is it alleged to have happened?

26. The body was ultimately hidden in Marbella. But the EAW contains no particulars as to where the murder had occurred. Even if (which is not accepted) it is to be inferred that the murder occurred in the "the residence of Torbjorn Langaas Reija and Ivonne Anna Christine Bertlin", there exist no particulars as to where that residence is. Even what country it is in. See, in this regard, ***R (Pillar) v Bow Street Magistrates' Court***

[2006] EWHC 1886 (Admin) [Tab 10] per May L.J. at paras. 16-21 regarding the fatal absence of particulars regarding the location of 'Castle Schloss Lolling'.

Robbery – what is the Appellant's alleged role?

27. As with the murder, no particulars are provided as to what the Appellant is alleged to have done in the robbery "acting in collaboration with other charged persons in this case". Was he physically present at the residence? Did he enter?

Robbery - where is it alleged to have happened?

28. As stated above, the robbery occurred in the "the residence of Torbjorn Langaas Reija and Ivonne Anna Christine Bertlin", but there exist no particulars as to where that residence is.

Validity not argued below

29. Validity was not argued by those representing the Appellant below. But if, at any time, an issue is raised as to the jurisdiction of the UK courts to entertain the EAW, it falls to be determined; ***Boudhiba v Central Examining Court No. 5, of the National Court of Madrid*** [2007] 1 WLR 124, DC [Tab 13] per Smith L.J. at para. 15; ***Vey*** (supra) [Tab 12] per Moses. L.J. at para. 35. In both cases, validity was not argued at first instance;

> "…The warrant founds the jurisdiction of the appropriate judge. Even if no objection is taken to the validity of the warrant, it must be assumed that the Court has considered and been satisfied as to its validity. Otherwise it could not have accepted jurisdiction. So, even though validity is not expressly mentioned in the Act as a question which must be determined, it must be treated as a question which has been answered. If, at any stage of the proceedings, the question of validity is raised, it calls jurisdiction into question. For that reason, despite the absence of an express power to consider compliance with section 2(3) or 2(4), I am satisfied that the appropriate judge is entitled to consider and determine whether, as the result of non-compliance with those provisions, he does not have jurisdiction. Further, the jurisdiction of this court is also dependent on the validity of the warrant. So, although section 27 permits this court to allow an appeal only if it is satisfied that the appropriate judge ought to have decided a question before him at the extradition hearing differently or would have decided it differently if he or she had considered the new issues or evidence raised on appeal, this court can still examine the validity of the warrant. If this court were to hold that the warrant did not comply with section 2, the proceedings would have been a nullity…" (***Boudhiba*** (supra) [Tab 13] per Smith L.J. at para. 15).

Submission 2 (section 14)

30. It is submitted that it would, in any event, be unjust or oppressive to return the Appellant by reason of passage of time.

31. Section 14 of the 2003 Act (as amended by Schedule 13 to the Police & Justice Act 2006) provides that:

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

The present case

32. The delay in the present case is **over 18 years**. The offence was alleged to have been committed in February 1991. The magnitude of delay is such that it would be both unjust and oppressive to return the Appellant to Spain now after so many years: unjust because at this distance in time it will be virtually impossible for the Appellant to defend himself against these allegations; oppressive because of the sense of security that was created by the inaction of Spain, and the changes in the Appellant's circumstances, within the 'cradle of events'.

33. The chronology provided by the Spanish authorities in the EAW [Tab 3, p10] and in the documents that supplement it [Tab 3, p25] is as follows;

a. The alleged offences date from **22nd February 1991** [Tab 3, p12].

b. On **28th February 1991**, the victim was reported missing to the police and a police investigation (preliminary proceedings 218/91) commenced [Tab 3, p12, 25].

c. On **2nd April 1991**, the Appellant was arrested in Tenerife and transferred into custody in Marbella. His address was searched [Tab 3, p12, 25]. On **3rd and 5th April 1991**, the Appellant's testimony was taken [Tab 3, p12, 25]. Thereafter, on **5th April 1991**, the Appellant's preventative detention was ordered by means of a Writ [Tab 3, p12, 25, 28].

d. On **8th July 1992**, following an overheard conversation in the prison where the Appellant was being detained, the victim's body was recovered from a well in Marbella [Tab 3, p25].

e. On **14th & 31st July 1992** and on **23rd September 1992,** the Appellant's further testimony was taken before the Spanish judge [Tab 3, p12, 25].

f. On **18th January 1993**, the Appellant was granted conditional bail but not released from custody (being unable to satisfy the financial 'bond' condition) [Tab 3, p12, 25, 27].

g. On **30th March 1993**, a request / resolution was made for summary proceedings to start / investigation to continue [Tab 3, p12, 25].

h. On **14th June 1993**, a 'processing writ' was issued by the Spanish court (which 'described exactly what [the Appellant is] accused of and, thus, what may lead to charges') commencing summary proceedings against the Appellant and others [Tab 3, p12, 25-26].

i. On **15th June 1993** the Appellant's further testimony was taken before the Spanish court. It is asserted that the Appellant's description of the facts during these testimonies 'varied considerably on each of those occasions' [Tab 3, p26] but neither the detail of the testimony, nor the alleged variations have ever been detailed or disclosed [Tab 3, p26].

j. On **5th October 1993**, the Appellant was granted conditional bail with no financial 'bond' condition and was released from custody (with an obligation to 'assign an address' and to report to the court twice-monthly). For the next two years, the Appellant remained in Spain and complied with his bail conditions [Tab 3, p12, 26, 27, 28].

k. On **10th January (March?) 1994**, the Appellant's reporting requirement was reduced to once a month [Tab 3, p26, 27].

l. On **11th May 1995**, a further 'processing writ / auto' [referred to in the EAW as a 'court order (of proceedings)'] was issued by the Spanish court (which 'increase[ed] the initially included facts'). Attempts were made to serve the writ and to take further testimony from the Appellant at his home address in Cadiz, but that was not possible because the Appellant he had left his address without notifying the court [Tab 3, p11, 26, 27, 28].

m. On **2nd August 1995**, a 'letter rogatory [was] issued for exploratory statement'. On **18th August 1995**, a reply was received [to the letter rogatory] that [the Appellant?] went to London [Tab 3, p12]. However, it is asserted elsewhere that no rogatory letter was issued [Tab 3, p28]

n. In **November 1995**, the Spanish court received (via the Appellant's Spanish

attorney) a letter from the Appellant declaring that he was in Scunthorpe [Tab 3, p26, 27, 30].

o. On **20th November 1995**, a detention order was issued in respect of the Appellant [Tab 3, p12].

p. On **16th February 1996**, a 'search and capture order' was issued to Interpol [Tab 3, p12].

q. On **16th July 1996**, the Appellant was declared in contempt of the Spanish court and police enquiries were initiated into his whereabouts [Tab 3, p26].

r. On **3rd September 1996**, a request was made by the Spanish court to Interpol to confirm the information contained in the letter referred to above at paragraph 33(n) [Tab 3, p26, 28].

s. On **15th November 2004**, Interpol informed the Spanish authorities that the Appellant was in Poynton, Cheshire [Tab 3, p26, 27, 28].

t. On **14th January 2005,** an international search order (referred to in the EAW as a 'court order concurring on the arrest') was issued [Tab 3, p11, 26, 28].

u. On **11th February 2005**, the Spanish authorities were advised by Interpol that the English Court may 'oppose' the extradition by reason of the passage of time and were requested to provide a summary of the investigation [Tab 3, p26]. That was supplied to Interpol on **16th March 2006** [Tab 3, p26] (it is presumed that this is the 'summary of investigation' that appears at box (e) of the EAW at Tab 3, p12).

v. On **13th September 2006**, Interpol raised further matters in respect of the content of (what is presumed to be a draft) EAW [Tab 3, p12, 26].

w. On **6th August 2007**, the EAW was issued [Tab 3, p10].

34. Even on Spain's own chronology, it is observed that;

i. The Appellant was detained in custody for over 2 years before summary proceedings were commenced (February 1991 – June 1993).

ii. The Appellant was then released on bail without bond (October 1993).

iii. The Appellant then remained in Spain for almost another 2 years; still apparently without any prospect of a trial in sight (October 1993 – June 1995).

iv. Immediately after the Appellant left Spain in 1995, over 4 years after his arrest, the Spanish court was in receipt of his letter (truthfully) explaining his whereabouts (November 1995).

v. Almost a year later, that letter was forwarded by Spain to Interpol (September 1996).

vi. Nothing then appears to happen for 8 years; Spain neither seeking nor receiving any progress from Interpol (September 1996 – November 2004).

vii. When in receipt of the Interpol report in November 2004, it took almost another 4 years to issue an EAW (November 2004 – August 2007).

viii. When requested by Interpol in early 2005 to provide information, Spain took over a year to supply a single paragraph (February 2005 – March 2006).

ix. When requested by Interpol in September 2006 to provide further information, Spain took another year to issue the EAW (September 2006 – August 2007).

x. It then took about 6 months to submit the EAW to SOCA for certification (August 2007 – February 2008).

Governing principles

35. As a matter of general principle, the longer the passage of time since a person is alleged to have committed an extradition offence, the greater is the risk of injustice or oppression arising from his extradition. Thus it is a longstanding provision of extradition law that extradition may be refused where the passage of time is of a nature or quality that results in extradition being oppressive or unjust.

36. Unlike many provisions of Part 1 of the 2003 Act, section 14 has no direct antecedent in the *Framework Decision*. Rather it has its origins in earlier United Kingdom extradition legislation. It effectively re-enacts section 11(3)(b) of the Extradition Act 1989 Act which, in turn, reproduced section 8(3)(b) of the Fugitive Offenders Act 1967. Under the 1967 Act, in ***Kakis v The Government of the Republic of Cyprus*** [1978] 1 WLR 772, HL [Tab 24] Lord Diplock (with whom all other members of the House of Lords agreed on this issue) observed that;

> "unjust" in the statute is "…directed primarily to the risk of prejudice to the accused in the conduct of the trial itself…", "oppressive" is "…directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration…", but "…there is room for overlapping, and between them they would cover all cases where to return [the accused] would not be fair…" (at p782H-783A).

37. The period of time to be taken into account is "the cradle of events" (***Kakis*** (supra) [Tab 24] per Lord Scarman p790E). The cradle of events is to be measured (in accusation cases) from the date of the alleged commission of the offence (here 22nd February 1991) until the hearing of the present appeal (***Gomes & Goodyer v Government of Trinidad & Tobago*** [2009] UKHL 21 [Tab 16] per Lord Brown of Eaton-under-Heywood at para. 38).

38. Section 14 is not to be restricted to exceptional or rare cases (***Union of India v Manohar lal Narang*** [1978] AC 247, HL [Tab 25] per Lord Morris of Borth-y Gest at p279C-E, per Lord Edmund-Davies at p283D-F, 285F-G, per Lord Fraser of Tulleybelton at p288A-D and per Lord Keith of Kinkel p293H-294D).

39. Section 14 involves no exercise of discretion. Once injustice or oppression is established, discharge follows as of right (**Narang** (supra) [Tab 25] at p273A-274B per Viscount Dilhorne, at p283E-284B & 285F-G per Lord Edmund-Davies, p287F-289B per Lord Fraser of Tullybelton, p293C-F per Lord Keith of Kinkel).

Unjust

40. The net result of the delay is that the Appellant faces trial at least 18 years after the alleged offences. The delay is such that the Appellant can no longer receive a fair trial. This case is not a document intensive fraud case, but one that relies upon human memory and recollection of events and conversations. Particularly regarding the Appellant's ability to account for his whereabouts on 22nd February 1991.

41. It is well-established that the term "unjust" covers situations where, by virtue of delay, the passage of time inhibits, by dimming recollection or otherwise, proper consideration of trial issues or inhibits the tracing of witnesses still able to recollect specific events (see, for example, ***R v Secretary of State, ex parte Patel*** (1995) 7 Admin LR 56, DC [Tab 21] per Henry L.J. at p70F-G).

42. Following his arrest in April 1991, the Appellant was detained incommunicado for about one year. During that time, he was given very little information as to the circumstances of the allegation against him [Tab 4, p39-4 / Tab 5, p101-111, 113]. Whilst he undoubtedly knew that the allegation concerned a murder[6], it is clear from contemporary correspondence[7] that he was not given detailed information as to the circumstances of that alleged murder;

    a. On **12th March 1992**, the Appellant wrote a letter from prison in Grenada to the judge (copied to MPs, MEPs and Under-Secretary of State and press) complaining about the lack of any defence lawyer assigned to him and the lack of any information as to allegations ("I have been in jail for one year and don't have a single piece of paper to say why"). The letter

6 . Tab 6, p169. Although the matter was plainly not beyond confusion; see GO/9 [Tab 4, p69] where the Appellant was granted bail apparently in respect of the offence of 'deception and fraud'.

7 . The case for the Respondent (submitted after service of these exhibits) is inexplicably that that "…it is unthinkable that a person would be held in custody for more than two years without complaining at all and not know the reasons why he had been deprived of his freedom. Absolutely no complaint of this type exists in the proceeding's files…" [Tab 3, p29]. In relation to the lack of assistance from state-appointed lawyers, it is inexplicably asserted that "….no complaint exists in this respect either…" [Tab 3, p29]. Note also that in 1993, the Appellant's state-appointed lawyer was also frustrating efforts by the British Consul to obtain details of the Appellant's case (GO/8 [Tab 4, p63]).

states that it is the fourth such letter written, no reply having been received to previous three. He requests particulars of the case against him (GO/1) [Tab 4, p50, 40 / Tab 5, p102, 110].

b. **25th March 1992**. The Appellant received a reply purportedly emanating from the court advising that the Appellant write to the Prosecutor's Office for information regarding the allegations and to 'A la Fiscalla de Malaga' regarding representation (GO/3) [Tab 4, p56, 40, Tab 5, p102].

c. **14th April 1992**. The Appellant wrote to 'A la Fiscalla de Malaga' complaining again about the lack of any defence lawyer assigned to him and the lack of any information as to allegations. He asks for assistance from the Forensic Science Service in London. He requests copies of statements, including his own (GO/2) [Tab 4, p54, 40, Tab 5, p110].

d. **9th June 1992**. The Appellant wrote to the Forensic Science Service in London; revealing that the Appellant remained concerned that forensic evidence that might reasonably be expected to assist his defence was not being properly gathered or investigated (GO/7) [Tab 4, p62, 42, Tab 5, p102].

e. On **23rd July 1992**, the Forensic Science Service in London indicated their inability to intervene (GO/7) [Tab 4, p62, 42].

43. Significantly, the Appellant has consistently maintained that, at no time prior to receipt of the EAW in 2008, was he made aware of the date of the alleged murder [Tab 4, p41, 45]. That assertion has never been countered. If, contrary to his assertion, the Appellant had been informed of the date of the offence prior to 2008, it would be a simple task for the Spanish authorities to produce that document (for example, the 'processing writ' referred to above at paragraph 33(l), if it contained such information). No such document has ever been disclosed or alluded to.

44. In the result, and contrary to the ruling of the District Judge [Tab 6, p174-175], the Appellant has been deprived of the opportunity to investigate, and secure evidence of, his alibi defence. Enquiries now into the events of 22nd February 1991 are self-evidently, and have proved, impossible [Tab 4, p45]. In all the circumstances, this case meets the 'impossibility' test in ***Gomes & Goodyer v Trinidad*** (supra) [Tab 16] per Lord Brown of Eaton-under-Heywood at paras. 32-33. Expecting a defendant to be able to account for (let alone prove) his whereabouts on a specific night, when he is told of the precise date some 18-years after the event for the first time, is an 'impossible' task.

45. The fact that Spain is a Council of Europe country, assumed capable of protecting an accused against an unjust trial (***Gomes & Goodyer v Trinidad*** (supra) [Tab 16] per Lord Brown of Eaton-under-Heywood at paras. 34) is nothing to the point; it would be an impossible task in any jurisdiction, including this one. If it can be shown that the court of the requesting state is bound to conclude that a fair trial is impossible, it would be unjust or oppressive for the requested state to return the accused (***Gomes & Goodyer v Trinidad*** (supra) [Tab 16] per Lord Brown of Eaton-under-Heywood at

paras. 32-33).

Delay not brought about by the defendant's own conduct

46. In ***Gomes & Goodyer v Trinidad*** (supra) [Tab 16], the House of Lords restated the undiluted application of the passage of Lord Diplock's speech in ***Kakis*** (supra) [Tab 24] at p783A-B concerning 'delay brought about by the acts of the accused himself' where it was held that;

> "…Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied upon as a ground for holding it to be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of his defence in consequence of the delay due to such causes are of his own choice and making. Save in the most exceptional circumstances it would be neither unjust nor oppressive that he should be required to accept them…"

47. In the present case, the Appellant does not fall within that exclusionary principle for either or both of the following reasons;

i. The Appellant's flight was under duress and was not in order to evade the proceedings

ii. In any event, the Appellant immediately made his whereabouts known to the court and offered to attend any court hearings.

Flight through duress

48. Whilst in custody, the Appellant was providing information to the British and Spanish police regarding English criminal in Spain. He was subjected to threats to himself and his wife from his co-accused [Tab 4, p42-43 / Tab 5, p104 / Tab 6, p170]. The Appellant was given a pseudonym (Charles Samuel Axon) by the Spanish authorities whilst in custody 'for security reasons' (see GO/10 [Tab 4, p71 / tab 5, p103]). See also GO/5 [Tab 4, p59], GO/9 [Tab 4, p69], GO/11 [Tab 4, p72A] and GO/13 [Tab 4, p74]). So was the Appellant's wife (Liz Axon; see GO/4 [Tab 4, p57 / Tab 5, p104, 143]). Despite the profession of ignorance of this by the Spanish Court [Tab 3, p29], it is plain that the Spanish court was aware of the pseudonym (see GO/9 [Tab 4, p69], GO/10 [Tab 4, p71]) and the reasons for it (see GO/10 [Tab 4, p71]).

49. After his release on bail, the Appellant became engaged in 'informing' on local British ex-patriot 'Costa del Sol' criminals for the British police and intelligence services in Spain. Through **Charles Formby** of the British Embassy [Tab 5, p105], he was introduced to **Paul Studley** (also at the British Embassy) [Tab 5, p105] and,

through Studley, to his handler **Toby Childs**[8], a police officer on secondment to NCIS in Spain [Tab 5, p97]. As far as the Appellant was aware, he worked for MI6 [Tab 4, p43-44]. An example of the Appellant's contact with Childs is seen at GO/18 [Tab 4, p93 / Tab 5, p113]. That letter refers to the Appellant being 'beaten up'.

50. On **20th October 1993**, within 2 weeks of the Appellant's release on bail, he (using his pseudonym) was in receipt of a telegram from 'Formby' confirming a meeting with Paul Studley at the British Consulate in Seville on **26th October 1993** (GO/13) [Tab 4, p74, 43].

51. For the next 2 years, the Appellant remained concerned in the provision of intelligence. The Appellant called evidence before the District Judge from SOCA[9] confirming that he had been an informant for NCIS at the material times [Tab 5, p95-99]. Whilst much NCIS documentation (including contact sheets and intelligence logs [Tab 5, p97, 99]) had been destroyed (this period being pre-computerisation [Tab 5, p96]), SOCA had located the following receipts for payment to the Appellant by NCIS;

a. **11th August 1995** (payment of 10,000psts to the Appellant at Alicante airport) [Tab 5, p96, 106]

b. **22nd August 1995** (payment of 15,000psts to the Appellant at Alicante airport) [Tab 5, p97, 106][10]

52. Over the same period, the Appellant was living and working in Spain, and complying with his bail conditions. See, for example;

a. **1st February 1995**. Signing at court in accordance with bail (GO/15) [Tab 4, p84],

b. **3rd April 1995**. Signing at court in accordance with bail (GO/15) [Tab 4, p86],

c. **2nd May 1995**. Signing at court in accordance with bail (GO/15) [Tab 4, p88],

d. **18th August 1995**. Working in Spain (GO/12) [Tab 4, p73, 43],

e. **1st September 1995**. Signing at court in accordance with bail (GO/15) [Tab 4, p90][11],

f. **2nd October 1995**. Signing at court in accordance with bail (GO/15) [Tab 4, p92].

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8. Childs apparently has no recollection of the Appellant at all [Tab 5, p98] (cf. GO/17 [Tab 4, p93]).
9 . SOCA had inherited the role and functions and documentation of NCIS which was dispanded.
10 10. Tab 6, p170-171. To put the sums (approximately £60 and £100) into context, the bail bond originally imposed by the court in respect of the murder allegation was approximately £5900 [Tab 4, p63].
11. Compare the Spanish chronology above at paragraph 33(l)-(m).

53. In **October 1995**, the Appellant's role as an informant was uncovered by those he was attempting to infiltrate. The District Judge accepted that he was the subject of a serious assault in which he was repeatedly stabbed with a fork [Tab 6, p171]. His life, and that of his (then pregnant) wife, was threatened. He was advised by his assailants to leave Spain [Tab 4, p44 / Tab 5, p106, 144-145]. The Appellant maintains, although the District Judge did not accept [Tab 6, p171-172] that he informed Studley and was also advised by him to leave Spain [Tab 4, p44 / Tab 5, p106, 112][12]. Within 48 hours, the Appellant and his wife had sold their possessions and fled Spain [Tab 4, p44 / Tab 5, p106, 112, 140-141, 145 / Tab 6, p172].

54. On those facts, the Appellant would submit that his flight from Spain was involuntary and falls within the 'most exceptional circumstances' exception to the ***Kakis*** (supra) [Tab 24] exclusionary principle (as re-stated by the House of Lords in ***Gomes & Goodyer v Trinidad*** (supra) [Tab 16]). The ***Kakis*** exclusionary principle does not bite on someone whose flight from the requesting state is not so as to evade the prosecution (***Davis v Court of Instruction No. 2 Benidorm, Spain*** [2008] 1 WLR 2593, DC [Tab 17] per Moses L.J.).

55. As regards flight through duress, see for example ***Government of Croatia v Spanovic*** [2007] EWHC 1770 (Admin) [Tab 18] per Hughes L.J. at para. 13.

> "…Those words are plainly aimed principally at the fugitive from justice; that is to say the man who has fled the country in which he is wanted not for any good reason, but simply to evade trial or implementation of sentence. Mr Perry accepted before us that if a person fled a country because he would not receive a fair trial there, in circumstances where that belief was objectively justified, he would properly be regarded as departing under duress. I would put that concept slightly differently, but to the same effect. Mr Spanovic is, as it seems to me, entitled to demonstrate, if he can, that…it was reasonable for him to flee the country and to seek to establish himself elsewhere. If he does establish this, then it seems to me that he is not disentitled to rely on the passage of time..."

Immediate notification of whereabouts

56. But, whether or not the District Judge's rejection of the Appellant's account of his flight [Tab 6, p172] is upheld, the facts of the present case go very significantly further.

57. The Appellant did not go to ground. He maintained open contact with NCIS (Appleby[13]; see GO/18 [Tab 4, p94, 44 / Tab 5, p98, 107, 112]). SOCA confirmed before the District Judge that, on **22nd February 1996**, the Appellant had applied for a further payment reward (£100) which had been paid to him on **17th March 1996** [Tab 5, p97 / Tab 6, p170].

12. Studley apparently has no recollection of the Appellant at all [Tab 5, p98] (cf. GO/13 [Tab 4, p74]).
13. Appleby apparently has no recollection of the Appellant at all [Tab 5, p98] (cf. GO/18 [Tab 4, p94]).

58. Far more significantly;

i. On **26th October 1995**, the Appellant faxed his Spanish lawyer (GO/14) [Tab 4, p79, 44 / Tab 5, p108], stating that;

a. He had been informing for the British police and 'one of the people I was working against' had discovered his activities,

b. He had been attacked and injured as a result,

c. He and his wife had therefore departed Spain owing to the threat to their lives,

d. That immediate departure was on the advice of the police,

e. The police had advised him to make (this) contact with the court,

f. Offering to continue reporting once per month (as per his present bail conditions) at the Spanish embassy in London,

g. Indicating his willingness to fly to Spain to attend any subsequent court hearings,

h. Requesting the lawyer to provide this information to the court,

i. Providing his address and telephone number (being those of his parents-in-law) in the United Kingdom,

j. Stating that that he has also written to the court to say that he (the Spanish lawyer) will be in touch with the court.

ii. On **26th October 1995**, the Appellant also wrote to the Judge (GO/14) [Tab 4, p77-78, 44 / Tab 5, p108] stating that;

a. He and his wife had departed Spain owing to a threat to their lives (and money and health problems),

b. He has contacted his Spanish lawyer and provided 'all the details' and he (the Spanish lawyer) will be in touch with the court,

c. Offering to continue reporting once per month (as per his present bail conditions) at the Spanish embassy in London,

d. Indicating his willingness to fly to Spain to attend any subsequent court hearings,

e. Repeating that he had respected his bail conditions in Spain until then.

iii. On **3rd November 1995**, the Appellant wrote again to the Judge (GO/14) [Tab 4, p76, 44 / Tab 5, p108] stating that;

a. He had faxed his Spanish lawyer on 26th October (a copy of which was enclosed),

b. He had telephoned his Spanish lawyer on **27th October 1995** and been advised that the Spanish lawyer would 'sort it out',

c. He had requested Prisoners Abroad to contact his Spanish lawyer on **2nd November 1995,**

d. He had telephoned his Spanish lawyer again on **3rd November 1995** and discovered that the Spanish lawyer had not been in touch with the court,

e. He had then telephoned the court and been advised that the court requires a document from a lawyer or the consulate,

f. He had then telephoned the consulate who will be arranging for a document to be sent from the [British] embassy in Madrid,

g. Reiterated his reasons for departure (safety health and welfare),

h. Reiterated that he had provided his address in the United Kingdom,

i. Reiterated that he had offered to sign on at the Embassy in London,

j. Reiterated that he had complied with bail conditions whilst in Spain,

k. Provided again his telephone nugo/15mber,

l. Provided the telephone number of his contact at Prisoners Abroad.

iv. That letter (and another to his Spanish lawyer on the same date) was sent from a post office in Scunthorpe (GO/14 [Tab 4, p81]).

v. On **3rd November 1995**, the Appellant faxed the correspondence to the British Consulate in Malaga (GO/14) [Tab 4, p75, 44], in which he referred to a conversation with Patrick Boyce of the Consulate on that date, stated that he would call again and additionally provided the British Consulate with details of;

a. The Spanish case number, court, judge and telephone number,

b. His Spanish lawyer's name, address and telephone / fax numbers,

c. His contact at Prisoners Abroad,

d. His address and telephone numbers.

vi. That fax (and another fax to Prisoners Abroad on the same date) was sent from an office at 89 Mary Street, Scunthorpe (GO/14 [Tab 4, p81]); the same street as the address provided to the Spanish court (75 Mary Street, Scunthorpe).

59. 75 Mary Street was the address at which the Appellant was staying [Tab 5, p140-141 / Tab 5, p108. See also GO/8 at Tab 4, p63, 67]. It was the address owned and occupied by the Appellant's parents-in-law (the Fordhams) until after the EAW was issued in 2007 [Tab 5, p140-141]. It was the address from which Mr. Fordham wrote to his MP, and to the FCO, regarding this case (GO/8 [Tab 4, p63, 67]).

60. The Spanish authorities accept that they were in receipt of this correspondence via the Appellant's Spanish lawyer (see above paras. 33(n) & 33(r)). The District Judge was simply incorrect to observe [Tab 6, p173] that the Appellant's flight "had made it much more difficult to establish [the Appellant's] whereabouts".

61. In the circumstances, contrary to the findings of the District Judge [Tab 6, p173-174], the post-November 1995 delay in the commencement or conduct of extradition proceedings was not "…brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest…" within ***Kakis*** (supra) [Tab 24] and ***Gomes & Goodyer v Trinidad*** (supra) [Tab 16]. The Appellant had immediately made his whereabouts known to the Spanish and United Kingdom authorities and had made his willingness to attend court (and even sign on at the Spanish embassy in London) known. There was no need to extradite the appellant at all. But, even if the Spanish authorities decided to extradite rather than communicate with the Appellant, they had been provided with the means to do so by the Appellant.

Oppression - false sense of security

62. The Spanish authorities did not attempt to make contact (whether directly or through the assistance of the UK authorities) with any of the addresses or telephone numbers in their possession. For the next 12½ years, the Appellant lived openly in this country and heard nothing from the Spanish courts.

63. In view of the abject lack of progress in the proceedings for the preceding four years when he had been in Spain, it would have been of no surprise to the Appellant when nothing happened initially.

64. But as the months and years slipped by, that inertia would have (and did) lead the Appellant to justifiably conclude that the matter had been concluded [Tab 4, p45]. It was not until March 2008, after at least 10 years of well-founded sense of security, that that sense of security was dispelled when the Appellant was arrested 'out of the blue' in the UK on the EAW [Tab 5, p141].

65. It is settled law that;

> "….the fact that the requesting government is shown to have been inexcusably dilatory in taking steps to bring the fugitive to justice may serve to establish both the injustice and the oppressiveness of making an order for his return…" (***Kakis*** (supra) [Tab 24] at p785C-D per Lord Edmund Davies; ***Gomes & Goodyer v Trinidad*** (supra) [Tab 16] per Lord Brown of Eaton-under-Heywood at paras.25-27).

66. The reason for this is clear. As time passes, it creates an increasingly credible sense of false security. The subject is encouraged by the inaction of the Requesting State to believe that the matter is not being pursued. See ***Hunt v Court of First Instance, Antwerp*** [2006] 2 All ER 735, DC [Tab 19] per Newman J. at para. 25;

> "…Where there has been full co-operation and the requesting state has thereafter delayed for years, it can be inferred that the subject may be lulled into a sense of security…"

67. In such cases, it is the quality rather than the quantity of the passage of time that is important;

> "...The oppressiveness in returning him for trial would arise because during the years that have elapsed since the end of July 1974 events have conspired to induce in Mr. Kakis a **sense of security** from prosecution. Yet during, these years he has not led the life of a fugitive from justice. On the contrary, he has settled in this country openly and - as it must have appeared to him - with the assent of, or at the very least without objection by, the authorities in Cyprus. It was not until February 1976 that proceedings were instituted in Cyprus to seek extradition and not until March 1977 that he was arrested. The...build-up of his **sense of security** both result from the passage of time, the effect of which, according to the section, has to be considered "having regard to all the circumstances." It is not permissible, in my judgment, to consider the passage of time divorced from the course of events which it allows to develop. For the purposes of this jurisdiction, time is not an obstruction but the necessary cradle of events, the impact of which upon the applicant has to be assessed. I have no doubt that the events in this case, which have been made possible by the passage of time since July 1974, would now make it unjust and oppressive to send Mr. Kakis back to Cyprus for trial..." (***Kakis*** (supra) [Tab 24] at p790B-E per Lord Scarman).

68. See, for example, ***Daly v Federal Republic of Germany*** [2003] EWHC 1838 (Admin) [Tab 20] per Rose L.J. at paras. 34-38;

> "…on the chronology which I have set out, the applicant could very well have believed that he had heard the last of it…Indeed [counsel for Germany], with characteristic realism, accepted that there may have been induced in the applicant a feeling of security….[counsel] submits however that there would be no injustice or oppression in returning the applicant to Germany. For my

part I **profoundly** disagree. Having regard to the chronology which I have set out, it would be **manifestly unfair** to return the applicant to Germany, in face of…the impression on the applicant's mind resulting from the delay…" (emphasis added).

69. ***R v Secretary of State, ex parte Patel*** (supra) [Tab 21] concerned a 9-year period in which no efforts were made by the US government to establish the Appellant's whereabouts, followed by a 3½-year delay in issuing the extradition request. None of the delay was explained. In that context, this court (Henry L.J. at p71-72) observed that;

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

70. It is observed that, even were it (for the sake of argument) the case that the entire period of delay in this case had been brought about entirely by the conduct of the Appellant;

> "…circumstances which would justify a sense of security on his part notwithstanding his own flight from justice, could allow him to properly assert that the effects of the further delay were 'not of his own choice and making…" and thus fall within the ***Kakis*** (supra) [Tab 24] 'most exceptional circumstances' so as to permit reliance on section 14 (***Gomes & Goodyer v Trinidad*** (supra) [Tab 16] per Lord Brown of Eaton-under-Heywood at para. 26).

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71. During that period, the Appellant and his wife (who suffered a nervous breakdown as a result of the events in Spain) have settled openly in the United Kingdom and have raised a child (now aged 13) [Tab 5, p109, 141, 145]. The District judge erred in concluding that the 'hardship' to the Appellant's son is 'not linked to the passage of

time' [Tab 6, p176-177].

72. In ***Re: Ashley-Riddle*** [1993] unreported, 23rd November, DC [Tab 22], Mr. Ashley-Riddle was wanted by the Commonwealth of Australia for trial in relation to four offences of misappropriating money allegedly committed in August 1988. By December 1989 it was known to the Australian authorities that he had gone to England. A year later a formal request for extradition was made. Further evidence was required, and 1½ years elapsed before it was provided by the Australian authorities. In October 1992 the Secretary of State gave authority to proceed, and the applicant was then arrested. On 14th January 1993 he was committed to await the determination of the Secretary of State under the 1989 Act. The High Court concluded that it would be unjust and oppressive to return him to Australia pursuant to section 11(3)(b) of the 1989 Act as a result of (a) the death of a potential defence witness in October 1990, (b) the effect upon his son:

> "…Secondly, to uproot the applicant indefinitely when he has not only settled here but has had his son for a number of years in boarding school in England would create real hardship, making it arguably oppressive to return the applicant…".

73. Sedley J. observed that;

> "…Section 11(3)(b), it should be remembered, is neither a limitation clause nor a disciplinary measure. Its focus is the person sought and the effect on him or her of whatever delay there has been. Thus excusable delay, if its effect meets the statutory test, may require discharge; and inexcusable delay, if its impact on the person sought is not within the mischief aimed at, may fail to do so. Whether in either case this is the result will depend in part on 'all the circumstances', and these may undoubtedly include any good reasons or want of good reasons for the lapse of time, and whether any bad reasons have been the fault of the person sought or the requesting state…".

74. ***R v Secretary of State for the Home Department, ex parte Sinclair*** [1992] Imm AR 293, DC [Tab 23], concerned a 10-year period in which no efforts were made by the US government to seek extradition, for which the US government had afforded no explanation. In that context, this court (Watkins L.J. at transcript p7) observed that:

> "… it was further argued on behalf of the Secretary of State that any prejudice caused to the Applicant by delay on the part of the United States government was slight. I profoundly disagree. Whilst I doubt if, strictly speaking, Article 8 of the Convention for the Protection of Human Rights is applicable to present circumstances the principle underlying it is very much to the point. Whilst the United States government over many years showed complete indifference to the whereabouts and way of life of the Applicant and took an inordinate time to make and pursue the extradition request, he has devoted himself to creating a settled family life firstly in Trinidad and secondly in the United Kingdom. The delay in this respect, on any view of it, is, in my opinion, inexcusable and quite appalling (transcript p6)…the irresistible inference to be drawn from the

primary facts is that it would be unjust and oppressive to surrender the applicant…I have come to what I regard as the inevitable conclusion in the circumstances of this, I repeat, extraordinary case. It is that it would be utterly unjust and oppressive to return…I fail to see how any Home Secretary acting reasonably could possibly use his discretion other than to refuse the request…".

Culpability

75. The Appellant's case on false sense of security and oppression generally does not rely on any finding of culpability on the part of the Spanish authorities. But, if it is necessary to do so, the Appellant will submit, pursuant to paras. 34 & 56-61 above, that the post-1995 delay (and indeed the 1991-1995 lack of progress) in this case is plainly 'culpable', and the District judge erred in holding otherwise [Tab 6, p173-174]. In those circumstances, regardless of any sense of security engendered as a result, that culpability, where the Appellant has not been responsible for the delay;

"…may certainly colour [the court's] judgment and may sometimes be decisive, not least in what is otherwise a marginal case …" (***Gomes & Goodyer v Trinidad*** (supra) [Tab 16] per Lord Brown of Eaton-under-Heywood at paras. 25-27)[14].

Dated this the 1st day of May 2009

Mark Summers
Matrix

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14 . See also ***Narang*** (supra) [Tab 25] per Lord Fraser at p290B-F and per Lord Keith & p294H-295B; if the requesting government had been dilatory, then the passage of time would tell in favour of the fugitive.