Neutral Citation Number: [2018] EWHC 1808 (Admin)

Case No: CO/4180/2016 & CO/4196/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2018

Before :

LORD JUSTICE GROSS
MR JUSTICE NICOL

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Between :

(1) M	**Appellants**
(2) B	
- and -	
Preliminary Investigation Tribunal of Napoli, Italy	**Respondent**
-and-	
(1) X	
(2) Y	
(3) Z (by the Official Solicitor, his Litigation Friend)	
	Interested Parties

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Rebecca Hill (instructed by **Lawrence and Co, solicitors**) for the **1st Appellant (M)**
Graeme L. Hall (instructed by **Lansbury Worthington, Solicitors**) for the **2nd Appellant (B)**
Caoilfhionn Gallagher QC (instructed by **Simpson Millar LLP Solicitors**) for **Interested Parties X and Z**
Malcolm Hawkes (instructed by **Steel and Shamash, solicitors)** for **Interested Party Y**
Saoirse Townshend (instructed by **CPS Extradition Unit)** for the **Respondent**

Hearing dates: 14th December 2017 & 25th June 2018

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Approved Judgment

Mr Justice Nicol **:**

1. These are two extradition appeals against orders by District Judge Michael Snow on 11th August 2016 that M and B should be returned to Italy in response to two European Arrest Warrants ('EAWs'). The District Judge held the two extradition hearings together as they were obviously linked. Likewise, the appeals to this Court were also held together.

2. M is the wife of B. The Interested Parties, X, Y and Z are three boys. They are the children of M and B. Z was born on 16th February 2002. Accordingly, he was 15 in December 2017 when the first hearing of these appeals took place and 16 in June 2018. He was represented through the Official Solicitor as his Litigation Friend. X was born on 5th April 1999. He was, therefore, 18 in December 2017 and 19 in June 2018. Y was born on 11th May 2000 and was 17 in December 2017 and 18 in June 2018. Y was separately represented (by Steel and Shamash, solicitors at the hearing in December 2017 and, subsequently, by Malcolm Hawkes) for reasons which will be explained.

3. The two EAWs were issued by Judge Capuano, a Judge of the Preliminary Investigations Section of the Naples Court on 23rd May 2013. They were both certified by the National Crime Agency on 9th April 2015. The Appellants were arrested on 8th December 2015 and taken before Westminster Magistrates' Court. The extradition hearing took place on 27th June 2016 and judgment was handed down on 11th August 2016. Appeal notices were lodged in time. Dingemans J. refused permission on the papers on 26th October 2016. Both Appellants renewed their applications and permission to appeal was granted by Lang J. on 1st December 2016.

4. Nothing about these warrants is straightforward.

5. An EAW may be an accusation warrant, in which case it must include the statement in the Extradition Act 2003 ('EA') s.2(3) and the information in s. 2(4), or a conviction warrant, in which case it must include the statement in EA s.2(5) and the information in EA s.2(6).

6. The District Judge concluded that these were accusation warrants. There had been a trial in Court of Assize which had found the two Appellants guilty and sentenced M to 8 years' imprisonment and B to 7 years' imprisonment. However, the District Judge also had an email from Sally Cullen, the Liaison Magistrate in Rome, who had said that appeals had been lodged on behalf of both Appellants and that, as a matter of Italian criminal procedure, they remained accused persons until the appeals were disposed of. There is no challenge before us to that part of DJ Snow's decision.

7. The accusations against the Appellants can, broadly, be said to concern human trafficking of young women of African origin to Italy for prostitution.

8. Box E of the EAW template is where the Requesting Judicial Authority is expected to set out the offences in relation to which the Requested Person's return is sought. In these cases, Box E of each warrant was headed

> 'The present warrant is issued for the following crimes: charges against the accused person…'

9. Box E in each case then had several lettered sub-divisions. I will refer to the sub-divisions as 'paragraphs'.

10. Paragraph A listed a number of legislative provisions under which the Appellant in question was wanted and then said

> 'for having in complicity together with other persons not yet identified with a number of actions in execution of a single criminal plan, carried out activities aimed at procuring and facilitating the entry into Italy, or into the territory of other states of which the persons concerned are not citizens, and do not possess the right to permanent residence there, of foreign citizens emanating from various African countries (Nigeria, South Africa, Senegal, Sierra Leone and Ghana) in violation of … Having Committed the fact for purposes of profit or in any case for the purpose of gaining an indirect benefit, by 3 or more persons in complicity together and regarding in fact the illegal entry into or illegal residence in Italian state territory, or into another State of which the person concerned is not a citizen and does not possess the right to permanent residence there, by 5 or more persons. The fact having been committed by means of using international transport services and forged, altered and otherwise illegitimately obtained documents, as well for the purpose of the recruitment of persons to become prostitutes or for the exploitation of prostitution. Moreover, the persons listed below having been exposed to danger to their lives or their personal safety, as well as being subjected to inhuman or degrading treatment in order to procure their entry or permanent residence as indicated above.'

11. There then followed the words 'In particular' with 47 sub-paragraphs numbered B1 – B47.

12. B1 read:

> 'nr.1, nr.2 and nr.16 for having illicitly brought in two girls, not otherwise identified, one of them small and another one called Mabel. Fact ascertained at Castel Volturno between 10.5.2000 and 14.6.2000 (c.f. conv. Nrs 2400…)'

13. The meaning of 'nr' at the beginning of B1 and the meaning of 'conv Nrs.' in parenthesis at the end of B1 was not explained.

14. Each of the remaining subparagraphs followed a similar pattern.

15. After B47, this was written,

> 'With the aggravating circumstances, moreover, of having acted taking advantage of the conditions foreseen in art. 416-bis of the Penal Code i.e. in order to facilitate the activity of the associations foreseen in said article and in particular the one described in count A.'

16. The next paragraph within Box E is identified as 'B'. That is confusing because, as I have shown, the particulars in respect of paragraph A are labelled B1-B47. This paragraph B sets out another offence which, after citation of the relevant provisions of the Penal Code, reads,

> 'for having in complicity together with other persons not as yet identified, and greater than 5 in number, with a number of actions in execution of a single criminal plan, and on several occasions, with grave threats, physical and moral violence and with intimidation, also of a magic-religious nature, recruited for the purpose of their prostitution, facilitated and induced to travel national territory or in any case intervened to facilitate their departure, for having carried out activity in organisations and associations engaged in the recruitment of persons to become prostitutes or in exploiting prostitution, and having in any case favoured and exploited the prostitution, in particular…'

17. 41 particulars are then given. These are labelled C1 – C41. Within these are C4 which says,

> 'C4 Of a girl not otherwise identified, subsequently sold to another "madame", with the mediation of [M] and the complicity of nr 28, by those named in points 1, 2, 27 and 28. Fact ascertained at Castel Volturno between 9,5.2000 and (unstated) (c.f. conv. Nrs…..).'

18. After the end of C41 there comes the following,

> 'In particular they made provision to supply the supporting accommodation, established the places in which to exercise the activity, fixed the timing, made provision to accompany and retrieve the offended persons, saw to it that prostitution was carried on in the ways established, and collected the sums cashed daily.
>
> With the aggravating circumstance, moreover, of having taking advantage of the conditions foreseen in art. 416-bis of the Penal Code, i.e. in order to facilitate the activity of the associations foreseen in said article and in particular the one described in count A.'

19. Paragraph C of Box E appears to be a further count. After citing legislative provisions, it continues,

> 'for having in complicity together and with other persons not as yet identified, and more than 5 in number, with a number of actions in execution of a single criminal plan, and on several occasions, induced into prostitution or having in any case assisted or exploited the prostitution of persons under the age of 18 years, and for having trafficked in or otherwise made commercial use of minors under the age of 18 years in order to induce them into prostitution. With the aggravating circumstance of having committed the fact with violence or threats. With the aggravating circumstance moreover of having acted taking advantage of the conditions foreseen in art. 416-bis of the Penal Code i.e. in order to facilitate the activity of the associations foreseen in said article and in particular the one described in count A'.

20. Two particulars are given of count C in paragraphs labelled D1 and D2.

21. What appears to be a fourth count in Box E is described in paragraph E which, after citation of the legislative provisions, says,

> 'for having in complicity together and with other persons not as yet identified, and more than 5 in number, with a number of actions in execution of a single criminal plan, and on several occasions, reduced to a state akin to slavery, traded in, alienated or sold or bought the following persons who were in a state akin to slavery, after having bought them into the national territory, compelling them with grave threats, physical and moral violence and with intimidation, also of a magic-religious nature, to prostitute themselves and to hand over to them the entire proceeds of the said activity, and to be transferred and to live always under their direct control in the places chosen.'

22. 42 particulars of paragraph E are then given.

23. Box C of the template requires the Judicial Authority to specify the maximum sentence for the offence for which the Requested Person is sought. In this case the EAWs said that it was not less than 20 years increased by one third to one half in view of the aggravating circumstances.

24. The District Judge had four letters from the Judicial Authority providing further information in support of the warrants. He referred to them as 'RFFI 1', 'RFFI 2', 'RFFI 3' and 'RFFI 4'. In summary, these were:

    i) RFFI 1 dated 30th March 2016. The remands in custody (which was the domestic warrant in support of which the EAWs had been issued) was issued on 9th May 2003. The Appellants had been arrested prior to this, but the EAW was in no way linked to those arrests. They were unlawfully at large. They had been convicted in their absence by the Court of Assize on 6th December 2012. The letter continued,

    > 'as regards the crime of association it was charged as ascertained and committed in Castelvolturno; hence it follows that Castelvolturno is the place where the activity was conceived, planned and chaired and which by its nature extended elsewhere in Italy, Europe and third countries (given that it involves girls coming from various African countries who entered into the territory of Italy from different parts of the peninsula).'

    ii) RFFI 2 dated 30th April 2016 explained that RFFI 1 had to be corrected. The proceedings which led to the issue of the two EAWs were a continuation of earlier proceedings which had led to both appellants being arrested in Italy on 17th March 2003. They appointed defence attorneys and were interviewed by the judicial authority. Their remands in custody were declared ineffective and they were released. They elected domicile in Italy for the purpose of being notified of the proceedings. The present arrest warrants on which the EAWs were based were issued on 9th May 2003. It was repeated that the Appellants remained unlawfully at large and that they had been tried in their absence and convicted by the Court of Assize on 6th December 2012. What were referred to as 'offences sub B and E' were to be treated as having been committed in the places where the girls were found. As to offence 'sub C and D' they were to be treated as having been committed in the place of the commission of exploitation of prostitution and use of false documents.

iii) RFFI 3 was written on 15th June 2016. This said that the remand in custody order of 17th March 2003 had been declared ineffective for formal reasons which was why it had been renewed on 9th May 2003. On their release, the Appellants had been obliged to elect a domicile address and notify any change of address. There were no other restrictions on their freedom after their release, but they had either given a false address or failed to keep the authorities updated as to their new address. They were declared fugitives. On 29th April 2013 the police informed the Judicial Authority that the Appellants had been located in Manchester, England. That led the prosecutor to apply to the Preliminary Investigations Judge for EAWs. Following the convictions of the Appellants in their absence, their court appointed attorneys lodged appeals.

iv) RFFI 4 was an email to counsel for the Respondent from Sally Cullen, the Liaison Magistrate in Rome. She confirmed that a person remains an accused person until the relevant judgment is final. In these cases, appeals had been lodged and therefore the Appellants remained accused persons.

25. At the extradition hearing a number of objections were raised by the Appellants. Two only are pursued on these appeals and it is therefore sufficient to focus on what the District Judge said about them. The two live matters are:

i) The warrants did not comply with EA s.2(4)(c) and, for that reason, the Appellants should be discharged.

ii) The extradition of the Appellants would be contrary to the rights of the Appellants and their children under Article 8 of the European Convention on Human Rights and therefore they should be discharged pursuant to EA s.21A.

26. It is convenient to defer summarising the evidence relevant to the Article 8 issue until I turn to consider that ground of challenge. I will first explain how the District Judge dealt with the first issue.

The validity of the EAWs: the District Judge's findings

27. As I have explained, s.2(4) prescribes the information which must be contained in an accusation warrant. So far as material it says,

'(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 and any provision of the law of the category 1 territory under which the conduct is alleged to constitute an offence…'

28. The District Judge ruled as follows;

'34. A EAW is either valid or not. I am not entitled to take into account extraneous information in considering whether it complies with s.2.

35. In considering the issue of validity I take into account the entire contents of the warrants.

36. I am satisfied so that I am sure that the warrants describe in general terms a conspiracy to:

- facilitate the unlawful entry into Italy and other states of females from various African countries, for the purposes of prostitution, using forged and false documents.

- force women and children into prostitution and secure their departure using violence and threats. Some of the complainants were bought and sold.

- the conduct took place in 2000 and 2001 (more specific periods are detailed).

- 42 incidents of offending are detailed. Particulars provided include the names, dates and places of birth of the complainants.

- The EAW repeatedly refer to the facts having been ascertained at Castel Volturno, an Italian coastal town. I am satisfied that given the repeated use of this phrase, that I can properly infer that this is where the conduct took place.

- The provisions of the Penal Code are set out.

- The maximum sentence is 20 years imprisonment which can be increased by one third to one half if the described aggravating features are found.

37. The EAWs set out in part Box E the charges against the accused persons. It provides a general description of the conspiracy at paragraph A. At paragraph B it sets out the particular allegation against each RP.

38. I am satisfied so that I am sure that these warrants comply with the requirements of s.2(4)(c). I am satisfied so that I am sure that the allegations are extradition offences within the meaning of s.10 and s.64(3).'

29. Ms Hill on behalf of M and Mr Hall on behalf of B submitted that the District Judge was wrong to conclude that the EAWs were adequately particularised. In particular, it was submitted:

i) Where the warrant sought the return of a requested person in relation to more than one offence, each of the offences had to be properly particularised – see Extradition Act 2003 (Multiple Offences) Order 2003 SI 2003 No. 3150.

ii) Although the District Judge spoke at times of the warrants relating to a single offence (see his reference in paragraph 36 of his decision to 'a conspiracy' and in paragraph 37 to 'the conspiracy'), each EAW seemed to refer to 4 different counts or charges against each Appellant.

iii) However, each count then included various particulars that appeared to refer to different defendants by numbers, but nowhere was it explained which numbers applied to the two appellants. The warrants were simply unintelligible.

iv) In some cases there was no explanation of the dates or locations of the wrongdoing.

30. In response, Ms Townshend on behalf of the Respondent argued that the District Judge was right to dismiss this complaint about the warrants. She argued that, since Box E began by stating that what followed were the 'charges against the accused person' it was to be inferred that all of what followed was alleged against each of the Appellants. The particulars provided a plethora of detail as to the alleged offending. Ms Townshend also submitted that the purpose of s.2(4) was to allow the District Judge to be satisfied that the offences in question had their equivalent in England and that they were properly characterised as extradition offences. The present warrants plainly allowed the District Judge to do just that and there was no ground of complaint in either regard.

31. At the hearing in December 2017, Mr Hall submitted that the requirement in s.2(4) had a further purpose which was to allow the requested person to object on specialty grounds if he or she was prosecuted for an offence other than one for which extradition had been ordered. In this case, that would not be possible because of the uncertainties in the warrants. Indeed, it was not even clear if the Appellants were wanted to face prosecution for one charge or more than one.

32. At the conclusion of the hearing in December, we considered that it would be desirable to request further information from the Judicial Authority. The request was communicated to the Respondent Judicial Authority on 14th December 2017. A response was received from Judge Federica Colucci dated 15th January 2018. With his response Judge Colucci enclosed a copy of the decision of the Court of Assize of 6th December 2012.

33. The Court of Assize's decision did clarify some matters.

    i) First, the Appellants had been tried with (it seems) some 48 other defendants. Each defendant was numbered. M was number 27. B was number 28. The numbers in the particulars were, it seems, a cross reference to the corresponding numbered defendant.

    ii) The judgment recited the indictment (or parts of it). Count A was an offence under Article 416-bis of the Criminal Code. This is *not* the same as paragraph A in Box E of the EAWs. Count A on the indictment has been omitted from the EAW. The explanation for that omission seems to be that the Court of Assize found that Count A on the indictment was to be dismissed for all defendants (with an immaterial exception) because the offence had become statute barred.

    iii) Count B on the indictment corresponds to paragraph A of Box E on the EAW. It seems that this count was then followed by 48 particulars labelled B1-B48. Of these particulars, M (i.e. defendant number 27) and B (i.e. defendant number 28) are each mentioned in only B3, B4, B9, B32.

    iv) While it may be thought that there could only be a single verdict under Count B on the indictment., that, it seems, was not so. Both M and B were acquitted of the offence under B3. They were convicted of B4, B9 and B32.

v) Count C on the indictment corresponds to paragraph B of the EAWs. Of the 41 particulars under Count C, the following named M and B: C3, C9 and C26. M and B were acquitted of C3, but convicted of C9 and C26.

vi) It seems likely that Count D on the indictment corresponded to paragraph C of the EAWs. It has to be put in that cautious way because the copy of the judgment simply says 'D: Omitted'. That conclusion, though, is supported by the fact that neither of the particulars D1 or D2 refer to defendant Number 27 (M) or defendant Number 28 (B).

vii) Count E on the indictment does correspond to paragraph E of the EAWs. Particulars E3, E4, E9 and E29 allege wrongdoing by M and B. Of these, the Appellants were acquitted under E3 and convicted under E4, E9 and E29.

viii) Since Count A was dismissed because the offence was time-barred, it seems that the sentences which were passed on M and B for the offences of which they were convicted were not aggravated so as potentially to increase the maximum by one third to one half.

34. Judge Colucci's message of 15th January 2018 confirmed that both Appellants had been convicted of, and sentenced for, offences B4, B9, B32, C4, C9, C26, E4, E9 and E29. He adds 'The two defendants are charged with all the counts'.

35. We received further submissions from the parties in relation to this further material. In her written submissions of 9th March 2018 Ms Townshend submitted that the further information provided by the Judicial Authority corrected any purported failure to comply with EA s.2.

36. Ms. Hill in her submissions of 14th March 2018 and Mr Hall in his submissions of 15th March 2018 repeated their arguments that, at the time of the hearing before the District Judge, the EAWs did not comply with EA s.2(4)(c). They argued that the further information provided since the hearing in December 2017 was inadmissible. If the further information was admissible, it showed that the EAWs were an abuse of process and, for that reason as well, the Appellants' discharge should be ordered. Alternatively, the EAWs had been shown to be invalid. In the further alternative, if the further information was admissible, that, together with the original EAWs showed that the EAWs did not comply with EA s.2.

37. We considered that the new material, coupled with the Appellants' submissions, could only be considered fairly by holding a further hearing of the appeal. We notified the parties on 29th March 2018 that we would welcome submissions on two particular issues: (a) whether the further information from the Judicial Authority was admissible; and (b) whether, if the new evidence was admitted, the Appellants' extradition would be an abuse of process.

38. Since the same constitution of the Court would need to conduct the further hearing and since a date had to be chosen at which the same counsel could attend, the earliest that this hearing could be arranged was 25th June 2018.

39. In the meantime, yet two further pieces of further information were received from the Judicial Authority.

40. On 4th May 2018 Judge Colucci:

    i) Confirmed that B had been convicted in relation to the following counts: B4, B9, B32, C4, C9, C26, E4, E9, E29.

    ii) Confirmed that M had been convicted of the following counts: B4, B9, B32, C4, C9, C26, E4, E9 and E29.

    iii) The offence in count A had been declared time-barred.

    iv) The offences in paragraphs B, C, D and E were offences of criminal complicity rather than criminal association. Each of the numbered particulars was the relevant single target offence. They were individual episodes, all different and the proof of which was independent of the proof of associative crime.

    v) The EAWs had been based on the remand in custody order which was the reason why all the counts of the indictment had been replicated. 'Nonetheless, the first instance judgment prevails over the remand in custody order, therefore at the current stage, defendants may not be in custody for crimes for which they have been acquitted or which were time-barred. Until final judgment is rendered, all counts of indictment ascribed to defendants remain formally valid, including those for which a judgment of acquittal has been delivered but has not yet become final or a judgment on the statute of limitation has been pronounced but has not yet become final.'

41. The next piece of further information again came from Judge Colucci on 11th June 2018. He recalled that the EAWs had been issued by his colleague, Judge Capuano. He had done so on 12th June 2013 which was after the Court of Assize had given its judgment on 6th December 2012. Count A of the original indictment had not been included in the EAWs because the Court of Assize had found it to be time-barred. It was Count A which had potentially given rise to the aggravating circumstances referred to in Article 416-bis of the Italian Criminal Code. Because he was not the Judge who issued the EAWs, he was limited in what he could say about their form. He added 'What I can say is that my colleague included in the EAW the individual purposed offences with regard to all the episodes the defendants are charged with'. He undertook to investigate the state of the outstanding appeals.

42. The final further information was provided by Judge Colucci on 19th June 2018. He said that his inquiries had shown that the appeal was still pending in the Court of Assize of Appeal of Naples and no hearing had been scheduled so far.

43. In advance of the hearing in June 2018 we received further skeleton arguments from the parties.

Issue 1: On the basis of the information before the District Judge, was he right to find that EA s.2 was satisfied?

44. I remind myself that the critical parts of EA s.2 are as follows:

'(2) A Part 1 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 in subsection (3) and the information referred to in subsection (4)…

(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- ….

(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.'

45. As already noted, where an EAW is issued for more than one offence then the requirements of the Act have to be complied with in relation to each of the offences - see Extradition Act 2003 (Multiple Offences) Order 2003 SI 2003 No. 3150.

46. I do not consider that the following propositions are controversial:

i) Unless an EAW satisfies the terms of EA s.2, extradition cannot be ordered.

ii) It is for the Judicial Authority to show that what purports to be an EAW does indeed satisfy the requirements of s.2 - see EA s.206

iii) In this, as in all other matters relating to the extradition, the Judicial Authority must prove its case to the criminal standard *ibid*.

iv) In approaching the EAW, the District Judge must to do so in the spirit of mutual trust and confidence. This must include making reasonable allowance for difficulties that may arise because of documents being written in languages other than English.

47. It is fundamental, as is clear from EA s.2, that the warrant should identify the offence or offences for which the Requested Person is sought. One reason for this is that the offence (and each offence if there is more than one) must be an 'extradition offence' – see EA ss.10(2) and 64. A second reason is that, if extradited, the Requested Person can only (putting it over-simply) be prosecuted for the offences for which extradition was ordered. A Requested Person is unable to assert his or her entitlement to Specialty Protection if insufficient particulars are provided,.

48. At this stage, I stress, I am considering the position as it was before the District Judge. I have very great sympathy for him. As will have been clear, the warrants were extremely difficult to follow. That was so, even making reasonable allowance for the

fact that they had been written in Italian and translated (it might be thought somewhat imperfectly) into English. Nonetheless, bearing in mind particularly the burden and standard of proof, I do not consider that he was entitled to conclude that the warrants did identify the offences for which each of the Requested Persons' extradition was sought. I draw attention in particular to the following:

i) Although Box E of each EAW began 'The present warrant is issued for the following crimes: Charges against the accused person…' and that might have suggested that each and every charge was being made against each of the Respondents, that conclusion was difficult to square with the reference at the beginning of each particular to certain specified numbers. If the warrant was indeed seeking the return of the two Requested Persons in respect of every one of the hundred or more offences, it was very difficult to make sense of the references to those numbers at the beginning of each particular.

ii) However, if the particulars did distinguish between defendants, there was no clue or guide within the EAWs as to which number applied to the two Requested Persons named in these two EAWs.

49. The District Judge said 'I am not entitled to consider extraneous material in considering whether [the EAWs] are s2 compliant'. He cited *Dabas v Spain* [2007] 2 AC 31. The law, however, has moved on since then. A broader approach is now taken to the entitlement of the courts of a Requested State to seek further information, indeed, in some circumstances there may be an obligation to request further information: see Case C-241/15 *Criminal Proceedings against Bob-Dogi* [2016] 1 WLR 4583 and *Goluchowski v District Court in Elbag Poland* [2016] UKSC 36; [2016] 1 WLR 2665.

50. On the present understanding of the law, the District Judge could, therefore, have sought further assistance from the Judicial Authority. Absent that assistance, he could not, in my view, have concluded that the EAWs as they stood satisfied the requirements of EA s.2. Quite simply they did not specify with the necessary clarity the offences in respect of which each EAW had been issued – a matter borne out by subsequent events.

Issue 2: Is the further information obtained since the District Judge's decision admissible?

51. Ms Townshend submits that we can and must receive the further information. She recognised that the position was different from that which DJ Snow had found to be the case (and indeed different from what she herself had submitted to him was the proper interpretation of the warrant). She argued that the offences with which the Appellants had been charged were now clarified. Although those included the offences which had been found to be time-barred and also included the offences of which the Appellants had been acquitted, she made clear that the Italian court was not now seeking the return of the Appellants on more than the charges of which they had been convicted.

52. Her position, therefore, was that we could and should receive the new evidence, but in the light of that further evidence, we should uphold the extradition only in relation to the following offences (in respect of each Appellant): B4, B9, B32, C4, C9, C26, E4,

E9 and E29 and that we should allow the appeals and discharge the Appellants in respect of the remaining offences i.e. those offences (a) with which they had never been charged, (b) those offences which the Court of Assize had found to be time-barred and (c) those offences of which the Appellants had been acquitted.

53. The power of the courts of the Requesting State to receive further information has been reviewed recently by the Divisional Court in *Alexander v Public Prosecutor's Office, Marseille District Court of First Instance; Di Benedetto v Court of Palermo, Italy* [2017] EWHC 1392 (Admin); [2018] QB 408. At [73] Irwin LJ said:

> 'It is clearly open to a requesting judicial authority to add missing information to a deficient EAW so as to establish the validity of the warrant.'

At [74] he expressed difficulty with the application of the distinction drawn by Lord Mance in *Goluchowski* at [45] between 'formal' and 'substantive' requirements of the EAW. Then at [75] he said:

> 'None of this means that extradition can properly be achieved on the basis of a "bit of paper". In our view, there must be a document in the prescribed form, presented as an EAW, and setting out to address the information required by the Act. An otherwise blank document containing the name of the requested person, even if in the form of an EAW, will properly be dismissed as insufficient without more ado. The system of mutual respect and cooperation between states does not mean that the English Court should set about requesting all the required information in the face of a wholly deficient warrant. Article 15(2) [of the Framework Decision] expressly concerns itself with "supplementary" information and can properly be implemented with that description in mind. That will, of course, include resolution of any ambiguity in the information provided. It will include filling "lacunae". The question in a given case whether the Court is faced with lacunae or a wholesale failure to provide the necessary particulars can only be decided on specific facts.'

54. Irwin LJ noted that while the English Court could ask for further information, he added at [77]:

> 'At all stages, the principal responsibility for the provision of information required by the EAW lies on the state requesting extradition. That responsibility is not transferred to the English Court considering extradition. Nothing in the Framework Decision or the Act carries any different implication. Nor is the requesting judicial authority relieved of that responsibility because the RP fails to raise the point'.

55. In my judgment these EAWs were wholly deficient. They failed entirely to make clear for what offences the Appellants were to be prosecuted. The deficiencies were not simply lacunae that could be made good by further information: the problems with the warrants were far more fundamental than that.

56. Ms Townshend had sought to rely on *Lewicki v Italy* [2018] EWHC 1160 (Admin) as an example of a case where the requested person had been discharged on appeal from nine out of the ten offences for which his extradition had been sought. However, I agree with Mr Hall and Ms Hill that the position in that case was fundamentally

different. In that case, the EAW had accurately stated the offences for which the Requested Person was wanted at the time it was issued. *After* the EAW had been issued, the Italian court ruled that 9 of the 10 offences were time-barred. That scenario is quite different from the present cases where the form of the warrants led the District Judge into believing that the Appellants were wanted for each and every offence set out in the warrants. That had never been the case. Moreover, before the EAWs were issued, it was already known of which charges the Appellants had been convicted (and which had been declared time-barred or of which they had been acquitted).

57. Accordingly, I would conclude in agreement with Mr Hall and Ms Hill that the further information which has been provided since DJ Snow's decision is not admissible.

58. This leads me to the conclusion that the Appellants should be discharged since the warrants do not satisfy the requirements of s.2(4)(c) of the EA.

59. Because I have accepted this part of the Appellants' arguments, it is not necessary to consider alternative limbs of their argument.

60. They submitted that, since the information concerning the outcome of the proceedings in the Assize Court was known before the EAWs were issued and, therefore, also before the District Judge's decision, there was no adequate explanation for it not having been adduced at that stage. The Appellants submitted that the Respondent could not, therefore, satisfy the test in *Szombathely City Court v Fenyvesi* [2009] EWHC 231 (Admin); [2009] 4 All ER 324 for adducing evidence at the appellate level. Ms Townshend relied on *FK v Germany* [2017] EWHC 2160 (Admin) for the proposition that the *Fenyvesi* test derives from EA s.27(4) (or, where the appeal is against an order of discharge, the equivalent provision in EA s.29) and concerns the ability of an *Appellant* to rely on fresh evidence: it does not restrict the ability of a *Respondent* to adduce fresh evidence which is, instead, governed only by the 'interests of justice' test.

61. Mr Hall and Ms Hill criticised the decision in *FK* as unprincipled and contrary to other authority. As I have said, because I would anyway exclude the further evidence it is not necessary for me to rule on those competing submissions.

62. Ms Townshend relied on *FK* for a different proposition. She argued that this Court, having requested the further information from the Judicial Authority, was now obliged to admit it (see *FK* at [49]).

63. I do not accept that last proposition. This Court was entitled to ask for further information and we are grateful to the Judicial Authority for responding to those requests. We considered the further material *de bene esse* (as is commonly the case when the admissibility of evidence is challenged). Having seen it, my conclusion remains that the EAWs represented a wholesale failure to comply with EA s.2 and the further information does not make good lacunae, rather it reinforces that conclusion. *FK* was not dealing with such a wholesale failure.

64. The Appellants also argued that, even with the further information, their individual roles in the different conspiracies was not sufficiently particularised. *Pelka v Poland* [2012] EWHC 3989 (Admin). As Calvert-Smith J. put it in *Kopycki v Poland* [2012] EWHC 744 (Admin) at [16] the particulars needed to explain whether the Requested

Person was alleged to be a 'foot soldier, lieutenant or colonel'. It is right, as Ms Townshend submitted, that a great deal of information is provided in relation to the individual offences. As long as the impression was created that the warrants were alleging overarching conspiracies of which the individual 'particulars' were the equivalent in England to overt acts, I could see some force in the Appellants' objections. However, it now seems to be alleged that the remaining offences are *not* conspiracies but stand alone offences. In those circumstances, it does not seem to me that this discrete complaint about the warrants is justified. That said, if there are to be further proceedings in relation to these matters (see below) and since the allegations against the Appellants are considerably narrowed, the Judicial Authority may be well advised to consider whether further information can be given about the individual role alleged to have been played by the Appellants in the distinct charges against them.

65. Since I would discharge the Appellants in any event because of the Respondent's failure to satisfy EA s.2, it is also unnecessary to consider whether, if the further information was admissible, the warrants would become an abuse of process. I consider that it would be superfluous to say any more about this argument.

Article 8

66. Before the District Judge the Appellants had submitted that their extradition would be incompatible with the Article 8 rights of themselves and their three children. Limited evidence was then available as to the arrangements which would be put in place to care for Z who was still a minor. The District Judge concluded that, in view of the seriousness of the offences for which the Appellants were wanted, such disruption as there would be to the family lives of the Appellants and their children was proportionate.

67. We received a considerable quantity of further evidence which went to the Article 8 issue. Notably, it included the following:

    i) Further evidence as to the fragile mental state of Z and X.

    ii) Y had been arrested for, charged with, and convicted of, murder. He was now serving a sentence of detention during Her Majesty's Pleasure with a minimum term of 15 years.

    iii) There has not been an assessment by Manchester City Council of Z's needs under Children Act 1989, apparently because the Council does not accept that Z is a 'child in need'. So far as X was concerned, the Council's position was that, as an adult, he was not its responsibility.

68. At the hearing in June 2018 we canvassed with the Appellants whether, in the event that we were to discharge the Appellants on EA s.2 grounds, they would wish us to express views on the Article 8 grounds. The Appellants and the Interested Parties were unanimous that they would not invite us to do so. The reason is that, if the present warrants are discharged, it will, in principle, be open to the Judicial Authority to issue new EAWs. There is no principle of *res judicata* in extradition (see for instance *Auzins v Latvia* [2016] 4 WLR 75 Div Court).

69. If new warrants were issued, it would be necessary for there to be fresh extradition hearings in the Westminster Magistrates' Court at which the then current situation of the three children could be considered. The Appellants argued that the District Judge on any such occasion should approach their task afresh without the influence of our views on the evidence as it now stands.

70. I accept that, if the s.2 issue had been decided differently, the very great reduction in the number of offences for which the Appellants' return was sought would have required this court to conduct afresh the Article 8 balancing exercise mandated by cases such as *Celinski v Poland* [2015] EWHC 1274 (Admin); [2016] 1 WLR 551. That exercise is now unnecessary if the warrants are to be discharged anyway. The EA sets a series of questions for the District Judge to consider. The issue of whether extradition would be compatible with a Requested Person's human rights is required to be addressed (in an accusation warrant) by EA s.21A, but the District Judge will only have got to that question if he (or she) has already decided that the warrant satisfies the requirements of EA s.2. If my Lord agrees with me, these warrants will have failed at that earlier hurdle and the compatibility of the warrants with Article 8 simply does not arise.

71. I also accept that, should there be further EAWs issued in respect of these matters, the District Judge will need to consider the position as it prevails at the time of the extradition hearing. There may or may not be significant developments between now and then. I agree, therefore, that it would not be useful for this Court to express a view on how the balance would come down if it was to be struck today.

72. All that said, it is axiomatic that one of the factors to be taken into account is the seriousness of the conduct for which the Requested Person is to be prosecuted. Even slimmed down to the offences of which the Appellants have been convicted, these offences were undoubtedly serious. The sentences passed by the Assize Court of 8 years (in the case of M) and 7 years (in the case of B) can be seen as a reflection of how the offences were viewed in Italy. In those circumstances I would not be surprised if the Judicial Authority were to decide that the unfortunate debacle which the present EAWs represented should not be the final chapter in this sorry history.

Lord Justice Gross

73. I agree with Nicol J and would allow the appeal for the reasons he has given. I add only a very few words of my own.

74. There is a very strong public interest in extradition, all the more so in the case of serious offending, such as that here alleged - human trafficking, a base offence, causing human misery. But it is also necessary for the EAW system to work as it should. The requesting state must be expected to get its tackle in order. For the reasons given by Nicol J, the EAWs here were unacceptable, glaringly demonstrated by the additional information supplied to this Court.

75. As became clear, we were faced not with *lacunae* - but with a wholesale failure to provide the necessary particulars. Moreover, the further information did not assist in upholding the judgment of the District Judge but served to undermine it, very substantially. The upshot was that the proceedings limped from one hearing to

another, with inevitable delay (even if the requesting state's failures were not the sole cause of that delay).

76. It is much to be hoped that should the Judicial Authority issue new EAWs, they will absorb the lessons of this sorry history (as Nicol J has, rightly, described it).