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*Judgment: approved by the Court for handing down (subject to editorial corrections)**

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IN THE MATTER OF THE EXTRADITION ACT 2003
("The 2003 Act")

BETWEEN:

KINGDOM OF SPAIN

REQUESTING STATE

AND

JOSE IGNACIO DE JUANA CHAOS

REQUESTED PERSON

[1] The Requesting State issued a European Arrest Warrant on 11 November 2008, seeking the extradition of the Requested Person (Mr De Juana) for the offence of "public justification of terrorists acts (his own and that of others), which caused humiliation and intensified the grief of both the victims and their relatives".

[2] The Kingdom of Spain is a Category I Territory for the purposes of the 2003 Act, and on 12 November 2008 the Serious Organised Crime Agency certified that the Warrant issued by Magistrate/Judge Eloy Velasco Nunez, Central Examining Magistrate's Court No 6, High Court, Madrid, Spain was issued by a "judicial authority" of a Category I Territory which has the function of issuing Arrest Warrants. The Secretary of State by virtue of an Order made under Section 1 of the 2003 Act has designated Spain for the purposes of Part I of the 2003 Act.

[3] This Ruling is supplemental to a previous Ruling by the court which confirmed:

(a) That Mr De Juana is an 'accused person' for the purposes of Section 2(2) of the 2003 Act; and
(b) That the offence with which he is accused is an extraditable offence for the purposes of Section 10(2) of the 2003 Act.

[4] I will return to the background to my determination of Mr De Juana as an "accused person" in a moment.

[5] The 2003 Act gives effect in domestic law to the provisions of the European Council Framework Decision dated 13 June 2002, an instrument of EU Law governing the extradition of individuals from one Member State to another. The objectives of this measure are set out in the fifth recital which states:

> "The objectives set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional co-operation relations which have prevailed up to now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice".

[6] The European Arrest Warrant is described in the sixth recital of the Framework Decision as the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the "cornerstone of judicial co-operation".

[7] At recital 10 the mechanism of a European Arrest Warrant is stated to be based on a "high level of confidence between Member States …"

[8] Article 6 of the Framework Decision provides:

> "The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European Arrest Warrant by virtue of the law of that State."

[9] The 2003 Act, giving effect to the provisions of the Framework Decision, comprehensively reformed the law relating to extradition. Its main features include

- a regime whereby each of the United Kingdom's Extradition partners belongs to one of two categories designated by order of the Secretary of State, and the adoption of the Framework Decision, which is widely acknowledged as creating "fast track" extradition arrangements amongst the EU Member States:
- simplification of the procedures for authentication of foreign documents;
- the abolition of the requirement for prima facie evidence in certain cases; and
- a simplified single avenue of appeal for all cases.

The reference to the abolition of the requirement of prima facie evidence ***in certain cases*** applies to extradition between Category I countries, in this instance as between the United Kingdom and the Kingdom of Spain.

[10] Sections 8-19 of the 2003 Act contain a number of provisions arranged under the general heading "Bars to Extradition". These include matters some of which will be relevant to my determination in this particular matter, but I note at this stage the

impact of the Human Rights Act 1998 which is reflected in Section 21 of the 2003 Act, which provides:

"(i) If the judge is required to proceed under this Section (by virtue of Section 11 or 20) he must decide whether the person's extradition would be compatible with the Convention Rights within the meaning of the Human Rights Act 1998.
(ii) If the judge decides the question in subsection (i) in the negative he must order the person's discharge.
(iii) If the judge decides that question in the affirmative he must order the person to be extradited to the Category I Territory in which the Warrant was issued".

[11] The objective in the Framework Decision of replacing a previous system by one of free movement of judicial decisions in criminal matters, and the mechanism set out in recital 10 of the Framework Decision as one based on "a high level of confidence between Member States", has been recognised by our highest courts in a large number of cases since the passing the 2003 Act. Apart from that general principle there is one particular aspect of the legislation reflecting the objectives of the Framework Decision to which I have already referred, namely the abolition of the requirement for prima facie evidence in extraditions between Category I Territories. In *Dabas –v- High Court of Justice in Madrid, Spain* [2007] UKHL 6, [2007] 2 AC 31 Lord Bingham stated at page 29G:

> "(4) But Part I of the 2003 Act must be read in the context of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States … this was conceived and adopted as a ground breaking measure intended to simplify and expedite procedures for the surrender, between Member States, of those accused of crimes committed in other Member States or required to be sentenced or serve sentences for such crimes following conviction in other Member States. Extradition procedures in the past have been disfigured by undue technicality and gross delay. There is to be substituted "a system of surrender between judicial authorities" and "a system of free movement of judicial decisions in criminal matters" ….. This is to implement the principle of mutual recognition which Council has described as the cornerstone of judicial co-operation (recital (6)). The important underlying assumption of the Framework Decision is that Member States, sharing common values and recognising common rights, can and should trust the integrity and fairness of each other's judicial institutions.
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> (5) By Article 34(2)(b) of the Treaty on European Union, reflecting the law and 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 words and methods. In its choice of form and methods a national authority may not seek to frustrate or impede the purpose of the Decision, for that would impede the general duty of co-operation binding on Member States under Article 10 of the EC Treaty.
>
> (6) Thus while a national court may not interpret a national law contra legem, 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" …

[12] In the same case Lord Hope at page 50 stated:

> "(43) There is no doubt that the imposition of additional formalities, not to be found in the Framework Decision itself, by one Member State to suit its own purposes would tend to frustrate these objectives. As my noble and leaned friend, Lord Bingham of Cornhill, said in *Office of the King's Prosecutor, Brussels –v- Cando Armas* [2006] 2 AC1, at paragraph 8, the interpretation of Part I of the 2003 Act must be approached on the assumption that Parliament did not intend the provisions of Part I to be inconsistent with the Framework Decision or to provide for a lesser degree of co-operation by the United Kingdom than the Framework Decision requires. …

[13] In *Castillo –v- the Kingdom of Spain and the Governor of HM Prison Belmarsh* [2004] EWHC 1672 (Admin) Thomas LJ stated at paragraph 24:

> "It is the obligation of a State making a request under the Convention, in the light of Article 12, to set out a description of the conduct which it is alleged constitutes the offence or offences for which extradition is requested. That requirement does not mean that the evidence has to be provided, because Article 3 of the Convention provides that the State requesting extradition does not have to provide the courts of the State to which the Request is directed with evidence and the court in that State does not have to be satisfied that there is sufficient evidence; as reflected in Section 9(4) of the Act and paragraph 3 of the European Convention Extradition Order 2001 there is no requirement of evidential sufficiency. As the House of Lords made clear in *re: Evans* [1994] 1 WLR 1006 and 1013.
>
> > "The Magistrate is not concerned with proof of the facts, the possibility of other relevant facts, or the emergence of any defence: these are matters for trial."

[14] While these observations are made in the context of the Extradition Act of 1989, they remain valid in relation to the provisions of the 2003 Act. In *R (Hilali) –v- Governor of Whitemoore Prison & Another* [2008] UKHL3 at page 805 there was considerable discussion about the question of evidence that had been sent to the English Court by the Spanish Authorities. However that discussion arose from the specific facts of that case. In the Divisional Court Smyth LJ at paragraph 60 stated

> "60 In approaching that question, it seems to us we must rely only on the original EAW (as redacted) and to pay no heed to the alleged existence of additional evidence as described by Mr Rubira. That is not because Mr Rubira's evidence is not admissible in these proceedings. It clearly is and, to the extent that he says that he will not rely on intercepted telephone calls if the applicant is returned, it is plainly important. However, Mr Rubira is not in a position to amend or complement the EAW and does not in fact seek to do so. And we say that we will pay no heed to Mr Rubira's claim that there is other evidence on which the prosecutor can rely because evidence is not a

matter for the court of the Requested State. The adequacy of the evidence by which the conduct alleged is to be proved and the admissibility of such evidence are entirely matters for the Spanish Court. It seems to us that if the EAW had been completed as it should have been, by including the concise description of the conduct alleged and omitting an account of the evidence to be relied on, the application could never have been mounted. The loss to the prosecutor of some or even all of the evidence he had intended to rely on would have been of no concern to the English Court." (the underlining is mine)

[15] In the House of Lords Lord Hope of Craighead referred to this at paragraph 15 and stated

"15. The Divisional Court recognised that evidence is not a matter for the Requested State. This can be seen from the passage in paragraph 60 of the judgment which I have already quoted (ante, paragraph 11). But, with obvious regret, it decided it could not apply that principle to the description of the conduct in the European Arrest Warrant when it gave affect to the applicant's argument. The explanation for this is to be found at paragraph 61 of the judgment. The fact that the description showed that it was dependent upon the telephone intercept evidence led the court to conclude that, without that telephone intercept evidence, the senior district judge could not have reasoned his decision in the way that he did. In my opinion it was, with respect, the court's own reasoning that was at fault here. The question whether there is a case to answer on the conduct that is alleged in the European Arrest Warrant is not what can be examined in the Requested State. An enquiry into that question is contrary to the principal of mutual recognition on which the Framework Decision is founded. It was not for the Divisional Court, anymore than it would have been for the senior district judge, to say that the conduct that was alleged against the applicant was incapable of being proved because the grounds upon which Yarks had been acquitted on the conspiracy removed all the evidence narrated in the European Arrest Warrant from which it could be inferred that the applicant was involved in it. (the underlining is mine)

16. In paragraph 72 of its judgement the Divisional court said it was acutely conscious that it ought not to have been driven to examine the adequacy of the European Arrest Warrant in this way, and that it had only done so because of the way the Warrant had been drafted. It is true the way the Warrant was drafted invited the argument that it had been subverted by subsequent events because the evidence narrated in it, that showed that the applicant was accused of an extradition offence, could not be used at his trial. The court ought to have rejected this argument. The question whether the evidence that is relied on to prove the extradition offence is or is not admissible is for determination by the court in the Requesting country when the person is put on trial there for the offence. That was the position in law when the European Arrest Warrant was before the District Judge at the extradition hearing. The position in law was not altered by the subsequent events in Spain which indicated that some, most or even all of the evidence relied on to prove the conspiracy was not admissible.

> 17. The Divisional Court's decision to pay no heed to the point made in Mr Rabira's witness statement that there was other evidence on which the prosecutor could rely and his evidence was not a matter for the Requesting State, does not sit easily with its decision to take account of the affect of the change of circumstances on the evidence narrated in the European Arrest Warrant. But it is not necessary to comment further in this point as the exercise which the court was asked to carry out was not one that it should have undertaken in the first place."

[16] The judgment is authority from our highest court that we should place confidence in the integrity of the judicial systems in other European countries and that, specifically, it is not a matter for the courts of the United Kingdom whether or not there is evidence upon which the extradition offence is founded. Therefore, subject to one caveat (the court's power to stay proceedings for an abuse of process) it is not possible for this court to place any weight on the argument put forward on behalf of the Requested Person as to the sufficiency or otherwise of the evidence in the possession of the judicial authorities in Spain. I will return to this aspect of the approach of the court when I deal with some of the arguments put forward on behalf of the Requested Person.

[17] I have referred to my previous decision in relation to the Requested Person being an "accused person" for the purposes of the 2003 Act. At this stage I will set out the factual background to the issue of the European Arrest Warrant and subsequent requests by the legal representatives of the Requested Person for documentation in relation to the evidence available against him.

(a) The Requested Person was released from prison in Spain on 1 August 2008 having served in excess of twenty one years in prison for having committed a substantial number of offences of murder and one offence of threat as part of a campaign by ETA. In fact the Requested Person had been sentenced to over 30 years in prison but was released under provisions for remission under Spanish law. However his release date had been delayed by further proceedings taken by the Spanish Authorities in respect of alleged offences committed while he was in custody and to which I will refer later.
(b) On 2 August 2008 the events giving rise to the European Arrest Warrant occurred - as set out in paragraph (e) of the Warrant.
(c) On 3 August 2008 the Requested Person left Spain, travelling first to the Republic of Ireland before moving to Northern Ireland.
(d) By letter of 6 August 2008 the Press Office of the Victim's Association of Terrorism (AVT) lodged a complaint stating that the "Ertzaintza, the Garda Civil, UCE1, Information Service and UCI of the National Police must be informed of what they considered to be a criminal complaint arising out of the events in San Sebastian on 2 August so that they can investigate for a judicial Order de facts denounced".
(e) The offence alleges that the Requested Person aided and abetted an offence of public justification of terrorist actions (his own and that of others) "which cause humiliation and intensify the grief of both the victims and their relatives". One therefore can understand why a representative body of such victims would have a status in making a complaint – indeed it may well be that such a complaint would

be an integral proof in such a case. I will return to the motives attributed to AVT on behalf of the Requested Person shortly.

(f) On 16 October 2008 the Central Preliminary Investigation Court No 6 of the National High Court in Madrid issued a Summons addressed to the Requested Person to appear before the Court located in Madrid on the 11 November 2008. In the summons the purpose is set out as follows:

> "To take a statement as Accused by an alleged crime of exaltation of terrorism, in relation with the homage carried out at San Sebastian on August 2, 2008 on the occasion of your release. **You will have to appear in Court assisted by a Lawyer of your confidence**, or to request this court in advance the designation of a legal aid lawyer.
>
> The document continues:
>
> "We warn you about your obligation to attend this summons, advising you that if you don't, An International Arrest Warrant will be issued".

[18] It is clear that the issue of this summons became known to the Requested Person very shortly thereafter. By letter dated 21 October 2008, his present solicitors, Kevin R Winters & Co, wrote to the National High Court stating that they had received instructions from their client and stating he had "every intention of co-operating with the summons." The letter however proceeded to request confirmation if the matter could be dealt with in Northern Ireland, or alternatively if the court in Spain would be "amenable to written representations in respect of a number of the matters arising?". The letter contained no explanation as to why, in the light of the Requested Person's willingness to co-operate, he would not return to Spain in order to attend the court in Madrid.

[19] On 30 October this court received a letter in the absence of any proceedings whatsoever in this jurisdiction, enclosing a copy of the summons and the letter of 21 October making a number of claims of innocence but stating that the Requested Person (did) not want to return to Spain. This court was asked if it could entertain jurisdiction of the matter – which it quite clearly could not.

[20] Notwithstanding the terms of Summons, namely that the matter would be heard on 11 November 2008, and the consequences of a failure to attend, the next letter from the solicitors is dated 13 November 2008 seeking an urgent reply but also asking the court's "immediate preliminary views". Included in the views sought was a request for

> "any other documents or papers other than the enclosed copy Summons. We will require full disclosure of the material that is currently in possession of the Court and the source of such a claim. In particular please confirm whether or not the Police Authorities of Spain supplied material to the court to warrant the issue of the Summons."

A request was then made for the deadline of the 11 November to be extended by fourteen days.

[21] However by that stage the date of the hearing had expired and on 11 November the court ordered in the following terms:

> "I DISPOSE: Provisional prison, with visits, but without bail for Jose Ignacio De Juana Chaos, national identity no: 15910046-A, born on 21 September 1955 in Legaszpi (Guipuzcoa), son of Daniel and Esparanza, to be summonsed that within ten days he should appear before this Central Court, and he is warned that if he does not appear he will be declared a rebel."

[22] The Order of the court went on to order the police to proceed to search and bring the defendant before the court through the drawing up of 'the European Order of Arrest and Handing over and the international order of arrest'. The State Prosecutor and "the other parts" (sic) could lodge appeals within a three day period.

[23] As I have already recited the European Arrest Warrant was therefore issued by the judicial authority, namely the Magistrate/Judge of the Central Examining Magistrate's Court No 6 of the High Court of Madrid, on 11 November 2008.

[24] After the matter came before this court a live issue was the question of whether or not this was an extradition offence falling as it would under the principle of 'dual criminality'. For the purposes of ensuring that this court had a clear statement of exactly what it is alleged were words which gave rise to the offence were, this court made a request for clarification on 16 December 2008. This was not a request for evidence as to the involvement of the Requested Person, for the reasons that I have set out in *Castillo* and *Hilali*. The court received substantial documentation from the court in Spain in January 2009 and on 2 February 2009 the court furnished all of the documents, both in Spanish and in English, to those legal representatives.

[25] By their original letter of 13 November 2008 and subsequently, the Requested Person's legal representatives have sought the papers grounding the proceedings in the Spanish courts. These have not been produced, although in correspondence it has been indicated that this will be a matter for legal representatives of the Requested Person in Spain, as part of the Spanish legal procedure. It is clear in the documentation from the Spanish Authorities that they do not see their procedures in Spain as involving an intra jurisdictional arrangement whereby the Requested Person can remain in Northern Ireland and the legal procedures be conducted through his legal representatives in Northern Ireland.

[26] This failure is described in the skeleton argument prepared for the purposes of this hearing as "a contentious or condescending attitude towards the Requested Person and his legal representatives", and that this court should regard it as informing its view "as to how the Spanish Authorities will ultimately behave towards the Requested Person if he is extradited".

[27] In paragraph 11 of the skeleton argument the refusal to respond to what is described as an " uncomfortable disclosure request" is 'a recurring theme for Spain' and that this court's attention will be invited to other incidents wherein requests for extradition have been refused in the face of questionable behaviour in extradition cases, including "provision of misleading information."

[28] At paragraph 12 I am advised that the case papers are required to demonstrate to this court that there is no evidence against Mr De Juana other than a newspaper article referred to in the argument. Furthermore, if the case papers were to hand Mr De Juana is confident that his representatives would be able to expose further weaknesses and support his abuse of process point – that is there is "no likelihood of a successful prosecution".

[29] These are serious allegations. They are the more serious because this court finds not one iota of evidence to substantiate any of them in relation to the facts of this case. I remind myself that as early as 21 October 2008 the Requested Person was fully aware of the request of the Spanish Magistrate/Judge for his attendance to give a statement as part of the investigative procedures. He refused to return to Spain in order to give that statement. That failure to engage in the procedure at that time led to the consequences set out in the Summons, of which he was fully aware, on 11 November. Any request for papers was made after the decision of the judicial authority in Spain to issue the Warrant, which the Requested Person knew would be the consequence of his failure to attend on 11 November 2008. No evidence has been placed before this court that the judicial authority, a member of the judiciary in the Kingdom of Spain, has been guilty of "questionable behaviour", nor is there any authority placed before this court of any such acts either on the part of the prosecuting authorities or AVT. This latter group are accused of what is effectively a "witch hunt" against the Requested Person, seeking to have him returned to jail, being disgruntled as to his release. Amongst all of the documentation provided to the court are a number of articles in newspapers many of them attributing comments to the Minister of Justice and politicians, both in Government and opposition. What is clear from reading these papers is that:

(a) It is accepted that any change in the law to prevent early release of such prisoners can never be made retrospective: and
(b) That any action that would be taken would always be within the law of the country.

[30] The request from the Kingdom of Spain is in respect of a specific alleged offence. It is not an attempt to send the Requested Person back to prison for offences committed by him in the past and which, under the law of Spain, allowed for his release on 1 August 2008. A complaint was made by a Group representing people directly referred to in the offence on the statute book of Spain. Their letter of 6 August asked for that letter to be considered as 'a complaint' and for the Prosecuting Authorities to investigate. That is exactly what they did, and it was as a result of that investigation that the matter was brought it before the Magistrate/Judge for further investigation, including affording the Requested Person the opportunity to appear before him. At that time there is nothing to indicate that he would not have received a fair hearing. Indeed from the correspondence his legal representative would have had access to all papers relevant to his case and the evidence against him. It was his choice, notwithstanding legal representation in this country, not to afford himself with that opportunity.

[31] I have made it clear that subject to one possible exception, this court has no role to play in considering the evidence in the possession of the Spanish Authorities as is relates to this alleged offence. Indeed ***Hilali*** could not be a more stark example since, in the circumstances of that case, it was acknowledged that even if all of the evidence

which had been set out in the document sent from Spain was missing, it would still remain a matter for a hearing in the Spanish Court. And, I remind myself, I am obliged, and accept that obligation willingly, to place trust in the judicial procedures of Spain unless and until some evidence is placed before me that any Requested Person would not receive a fair trial – in breach of any Convention Right which I am obliged to consider under Section 21 of the 2003 Act. All that has been presented to this court is an unfounded allegation against the judicial authority, which is at the very least unfortunate.

[32] Turning then to the basis on which I am asked to refuse the Extradition. These are as follows:

(A) That they constitute abuse of the extradition process by the prosecuting authority on the grounds:

(a) They had failed to respond to reasonable disclosure of requests to enable Mr De Juana to advance his case – thus denying him a fair trial:
(b) That the Prosecuting Authority know that the trial cannot succeed.

(B) Extraneous considerations under Section 13 of the 2003 Act that:

(a) The Warrant is issued for the purposes of prosecuting or punishing him on account of his political opinions;
(b) If extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his political opinions.

(C) The mental condition of Mr De Juana is such that it would be unjust or oppressive to extradite him;

(D) His extradition would not be compatible with his Convention Rights under Articles 3, 5, 6, 8 and 10 within the meaning of the Human Rights Act 1998.

[33] **GROUND A**

IN THE MATTER OF AN APPLICATION BY LIAM CAMPBELL FOR A WRIT OF HABIUS CORPUS SUBJICIENDUM, delivered by the Divisional Court of Northern Ireland on the 27th October 2009, the powers of the Court in relation to proceedings for abuse of process were set out by the Court. The Court stated as follows:

[39] The contours of the doctrine of abuse of the court's process have become familiar during recent years, particularly in the context of criminal prosecutions. As noted above, the operation of this doctrine in the specific context of extradition proceedings has been expressly acknowledged: see *Bermingham* and *Tollmann*. As explained by Laws LJ in *Bermingham*, this entails the implication of a statutory power designed to prevent the usurpation of the integrity of the statutory regime. We consider that it would be inappropriate to attempt any definition of the scope and boundaries of the court's jurisdiction in this respect. These will be developed gradually, on a case-by-case basis. Moreover, it must be remembered that a substantial

proportion of the decided cases belongs to the sphere of criminal prosecutions. Some reflection on the evolution of the doctrine of abuse of the court's process is, however, instructive.

[40] In *DPP -v- Connolly* [19641 AC 1254, Lord Reid emphasized the responsibility of the courts to ensure that "the process of law is not abused" (at p. 1354). In *The Queen —v- Derby Crown Court, ex parte Brooks* [1985] 80 CR. App. R 164 Ormrod LJ devised the test of whether the prosecution "… have manipulated or misused the process of the court so as to deprive the Defendant of a protection provided by the law or to take unfair advantage of a technicality ..." (at pp. 168-169). In *The Queen -v- Horseferry Road Magistrates Court, ex parte Bennett* [1994] 1 AC 42, the House of Lords recognised that the doctrine of abuse of process extends to cases where a prosecution "... offends the court's sense of justice and propriety ..." (per Lord Lowry, at p. 74g). In the same case, Lord Griffiths spoke of executive conduct which "threatens either basic human rights or the rule of law" (at p. 62). In the language of Lord Bridge, the abuse of process jurisdiction encompasses "executive lawlessness" and "degradation" of the court's process (see pp. 67-68). As the decision in *Bennett* makes clear, a misuse of the court's process can potentially occur by virtue of the circumstances in which the Defendant is brought before the court. In *The Queen -v- Hui Chi-Ming* [1992] 1 AC 34, Lord Hope opined that the doctrine embraces "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all respects a regular proceeding" (at p. 57b).

[41] As appears particularly from the speeches of their Lordships in *Bennett*, an established feature of the doctrine of abuse of process of some importance is that it confers on the court a power to be exercised sparingly and selectively. See in particular per Lord Griffiths at p.63, echoing the warning of Viscount Dilhorne in *DPP -v- Humphries* [1977] AC 1 that the court should have resort to this power only "in the most exceptional circumstances" and the formulation of Lord Lane in *The Queen -v- Oxford City Justices, ex parte Smith* [1982] 75 CR. App. R. 200, at p.204 ("very strictly confined"). In *Re DPP's Application* [1999] NI 106, Carswell LCJ emphasized, at paragraph [33]:

> " 1. The jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons …
> 2. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct".

We further consider that the celebrated statement of Lord Steyn in *Attorney General's Reference No. 3 of 1999* [2001] 1 All ER 577, at p. 584, has some analogous force where applications to stay extradition proceedings are brought on the ground of abuse of process:

> "The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a

> criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family and the public".

We consider that where an abuse of process complaint is ventilated, a contextualised evaluation, tailored to the specific features and context of the individual case, will invariably be required. This will entail the formation of an evaluative judgment on the part of the court. This judgment must be formed at the stage when the complaint is canvassed. Furthermore, given these considerations, a complaint of this nature will almost invariably not be susceptible to an answer which may be characterised right or wrong. Thus there will be scope for differing opinions, a truism noted in the analogous context of abuse of process rulings based on unfair trial arguments in criminal prosecutions:

> "Whether a fair trial is possible will depend on the circumstances of the particular case and it is also a question on which even experienced judges might sometimes form different opinions".

[*Regina —v- JAK* (1992) LR 30, at p. 31].

We consider that this observation applies with equal force to the present context.

[34] As to the threshold for establishing a misuse of the court's process of this kind, at paragraph [38] the Divisional Court stated that:

> "Mr Fitzgerald was disposed to accept, in our view correctly, that the threshold for establishing a misuse of the court's process of this kind is a relatively high one. This is a reflection of the cautionary words of Rose LJ in ***Kashamau*:** see paragraph [23], supra. It is also a reflection of the well established principle that the court should have resort to its jurisdiction to stay proceedings as an abuse of its process sparingly and selectively: see paragraph [44] infra."

[35] As the approach to be taken, in *R (Government of the USA) –v- Bow Street Magistrates Court ex parte Tollman* Lord Phillips of Worth Matravers CJ at paragraphs 84-89 set out the approach in the following terms:

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

85 Both our civil and our criminal procedures have complex rules in relation to disclosure of documents. In each of the cases before us the persons whose extradition is being sought have persuaded the judge that he should make an order for disclosure. We do not consider that this was the appropriate course to take. Neither the rules governing disclosure in a civil action, nor those governing disclosure in a criminal trial can be applied to an extradition hearing. Furthermore, those rules form part of an adversarial process which differs from extradition proceedings. Where an order for disclosure is made, it requires one party to disclose documents to the other, not to the court. But where extradition is sought, the court is under a duty to satisfy itself that all the requirements for making the order are satisfied and that none of the bars to making the order exists.

86 There is a further objection to ordering disclosure. The order will be made either against a judicial authority within the European Union or against a foreign sovereign state that is requesting the Secretary of State to comply with treaty obligations. In neither case would it be appropriate to order discovery. Were it appropriate to make such an order, the only sanction for a failure to comply with it would be to reject the request for extradition. That fact points the way to the appropriate course that the court should take where there are grounds for believing that an abuse of process has occurred.

……..

89 The appropriate course for the judge to take if he has reason to believe that an abuse of process may have occurred is to call upon the judicial authority that has issued the arrest warrant, or the State seeking extradition in a Part 2 case, for whatever information or evidence the judge requires in order to determine whether an abuse of process has occurred or not."

[36] A pre-condition to the court considering the exercise of its power under this jurisdiction is that I am to be satisfied that there is reason to believe that an abuse has taken place. For the reasons that I have stated I do not believe there is evidence in respect of either of the grounds upon which I am asked to find an abuse on the part of the Requesting State arise. I have dealt in detail with the allegation regarding the failure to respond to "reasonable disclosure request" such as would deny the Requested Person a fair trial: and I have also set out in detail the position relating to the role of this court to address the question as to whether a trial can or cannot succeed.

[37] For the sake of clarity I confirm that I find no mal fides in the approach of the judicial authority or the Requesting State in either of these two areas. In such circumstance I rule that the proceedings do not constitute an abuse of process.

(B) EXTRANEOUS CONSIDERATIONS

[38] Section 13 of the Act provides

"**13 Extraneous considerations**

A person's extradition to a Category 1 Territory is barred by reason of extraneous considerations if (and only if) it appears that –

(a) The Part 1 Warrant issued in respect of him (though purporting to be issued on account of the extradition offence) is in fact issued for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or

(b) If extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions."

[39] It is argued that this Warrant was issued for the purposes of prosecuting or punishing the Requested Person on account of his political opinions, and that if extradited he would be prejudiced in his trial or punished, detained or restricted in his personal liberty by reason of his political opinions.

(a) I find no evidence on the papers whatsoever that this Warrant was issued for the purposes of prosecuting or punishing the Requested Person for his political opinions. He is sought for a specific offence which he is alleged to have committed on the basis of a joint enterprise - An offence involving an allegation of effectively glorifying violence for a political end. No evidence has been placed before this court that this law, passed by the Spanish legislature, is unconstitutional, or that represents a breach of the Convention right of freedom of speech. The Convention right of freedom of speech is a qualified right, to which I will refer later. Suffice to say that it requires to be balanced against the right of any State to pass laws to protect its citizens. I will return to my judgment on that exercise under the provisions of Section 21 of the 2003 Act, but at this stage I remind myself that Spain is a signatory to the European Convention. I have confidence that if such an argument were to be placed before its courts it would be addressed in a proper and judicious manner.

(b) I return to the cornerstone of the Framework Decision - the obligation of this court to approach our legislation in the context of confidence in the judicial system of the Requesting State. The defendant will have the right of full legal representation before the Spanish Court. This court has confidence that the Spanish Court will consider the evidence as to the role, if any, of the Requested Person in the alleged events, and whether any such role constitutes a breach of the legislative provision which brings him before that court. No evidence has been placed before the court in relation specifically to the Requested Person, that any previous convictions were based on any matter or basis other than the evidence of his involvement in the offences for which he was found guilty and imprisoned.

[40] I therefore reject arguments that the extradition of Mr De Juana should be barred by reason of the provisions Section 13 of the Act.

(C)(D) – SECTIONS 21 AND 25 OF THE ACT

[41] I am combining these two grounds because evidentially there is a considerable overlap, not least in relation to the mental condition of Mr De Juana, based on the

evidence placed before the court by Dr Adrian Grounds, Consultant Psychiatrist. Dr Grounds filed a report dated 28 September 2009 and an addendum to that report dated 9 November 2009. In addition the court was handed a handwritten affidavit completed by Dr Grounds on 13 November 2009 setting out some further information in relation to the effects of food refusal – the relevance of which will become apparent later.

[42] Section 21 of the Act provides:-

"**21 HUMAN RIGHTS**

(i) If the judge is required under this Section (by virtue of Section 11 or 20) he must decide whether the person's extradition would be compatible with the Convention Rights within the meaning of the Human Rights Act 1998(c42).

(ii) If the judge decides the question in the affirmative he must order the person to be extradited to the Category 1 Territory in which the Warrant was issued.

(iii) If the judge makes an Order under sub-section (ii) he must remand the person in custody or on bail to wait for his extradition to the Category 1 Territory.

(iv) If the judge remands the person in custody he may later grant bail."

[43] Section 25 of the Act provides:-

25 PHYSICAL OR MENTAL CONDITION

(i) This section applies if at any time in the extradition hearing it appears to the judge that the condition in sub-section (ii) is satisfied.

(ii) The condition is that the physical or mental condition of a person in respect of whom the Part 1 Warrant is issued is such that it would be unjust or oppressive to extradite him.

(iii) The judge must –

(a) Order the person's discharge; or

(b) Adjourn the extradition hearing until it appears to him that the condition in sub-section (2) is no longer satisfied."

[44] To deal with these matters it is necessary for the court to set out some of the background to the previous imprisonment of Mr De Juana. This is helpfully recorded in Dr Ground's report at pages 44-52, based on instructions given by Mr De Juana as to his prison history. No point was taken on behalf of the Requesting State as to this history. Mr De Juana was arrested on 16 January 1987 and in September 1987 was convicted and sentenced for the killing of 25 people, principally police officers and soldiers, in a series of bombings and shootings carried out by ETA. He was given the maximum sentence of 30 years imprisonment which, with remission, would result in him serving a maximum of 18 years. Shortly before his release date in October 2004 he was charged with making terrorist threats in letters sent to newspapers. In November 2006 he was sentenced to 12½ years imprisonment for these offences, but the sentence was subsequently reduced to 3 years. He was released on 2 August 2008 after 21½ years detention.

The history given by him evidences that over that period he was moved on a number of occasions to different prison establishments. He was held in isolation for long periods of time and was subjected, on his instructions to his solicitors, to beatings, deprivation of sleep, strip searches, physical assaults, including administration of electric shocks, and other behaviour amounting to ill treatment.

[45] Dr Grounds records that this account indicated significant and long periods of depression and periods when the Requested Person experienced marked fatigue and lack of energy. He records suicidal thoughts but stated (at paragraph 47)

> "When asked further about suicidal thoughts he said he could not commit suicide because it would be a surrender that would make his enemies happy, and also because his mother was still living. Therefore he had to keep going. However,
>
> > Dying of a heart attack in the night, that's ok.
>
> At this point in the interview Mr De Juana again became very upset that these were distressing memories he was trying to forget."

[46] In paragraph 48 of Dr Ground's report he records:

"48. When asked about his physical health during the 17 year period of the special isolation regime (apart from his condition and his hunger strikes) Mr De Juana said he had symptoms from longstanding asthma, arthritis affecting his fingers, and back pain for which he took anti-inflammatory medication."

[47] The report also records hunger strikes in the 1990s, but for the purposes of this ruling I bring myself forward to August 2006 when it was decided to bring further proceedings against Mr De Juana for inciting terrorism in the form of two articles he had written for a Basque newspaper, to which I referred earlier. On 7 August 2006 the defendant commenced a hunger strike which lasted for 63 days. That was apparently triggered by the expectation of a very long prison sentence of 99 years which was being sought by the prosecution in the event of imprisonment. In paragraph 62 of Dr Ground's report he records

> "In his Instructions to his solicitors he said that he ceased the hunger strike when it was privately conceded that his sentence would be no longer than 2 years."

[48] However in November 2006 he was sentenced to 12 years 7 months imprisonment which resulted in him commencing a second hunger strike that continued for 115 days and during which time he was force fed. An appeal against that sentence was lodged in February 2007 resulting in a reduction of the sentence to 3 years. Mr De Juana then ceased his hunger strike. As I have recorded he then remained in custody until his release on 2 August 2008.

[49] At paragraph 167 Dr Grounds states as follows

> "167. It is relevant here to outline further the background of experience I am drawing on in assessing Mr De Juana's condition. I have had extensive general experience in my work as a forensic psychiatrist during the last 27 years of interviewing long term prisoners and ex-prisoners. My NHS duties include working weekly at a prison (HMP Littlehey). I have previously assessed several paramilitary prisoners serving long sentences who were held in Special Security Units (SSUs) in the English Prison system. In the course of my work as a Sentencing Review Commissioner in Northern Ireland I have read trial papers (including v*oir-dire* hearings relating to police interrogations), prison history papers and the prison medical records of about half of 166 people sentenced to life imprisonment following conviction for scheduled offences whose cases were considered by the Commissioners. I have also conducted research interviews focusing on the experience of long term imprisonment with ex-paramilitary prisoners in Northern Ireland, and a few individuals who have served long sentences for notorious offences at other jurisdictions (Canada and the Irish Republic). I have reported on over 40 individuals released by the Court of Appeal following quashing of their convictions, including 5 who have been convicted of exceptionally notorious terrorist offences and who had been subject to ill-treatment in police and prison custody. Amongst these many cases there were periodical accounts of assaults and experiences of harsh treatment, but typically these reported instants were occasional or occurred over very limited periods of time in total periods of detention.

[50] In approaching the history given by Mr De Juana, Dr Grounds has clearly looked carefully in order to form a view as to the authenticity of his account. In that he drew on reports from other respected and well recognised authorities who looked at Mr De Juana's personal circumstances, including a number of visits over the years, including times of force feeding during hunger strikes. He refers at paragraph 170 to such reports including specific findings in relation to prison regimes and forms of reported ill treatment that fitted with descriptions given by Mr De Juana.

[51] Having considered all of the information and the instructions he had received, Dr Grounds comes to the following conclusions which are relevant to the considerations that I believe I require to take into account. These are set out between paragraphs 165 to 169 of his report and state:

> "165. In addition Mr De Juana described long periods of depression characterised by fatigue, lethargy, loss of energy and motivation, impaired concentration and marked feelings of despair and wanting to die. His account indicated that these amounted to depressive episodes, probably of moderate severity (F32.2).
>
> 166. Mr De Juana's account of his state of mind in deciding to go on hunger strike in 2006 and 2007 (when he was facing the new prospect of further prolonged imprisonment after serving his original sentence) indicated that his hunger strikes were not only forms of protest he hoped would succeed but they also reflected a conviction that he could not face or cope with further long incarceration. He described feeling psychologically exhausted and no longer able to bear prolonged imprisonment. This outlook may have been a rational

reappraisal but also influenced by depression. I think he was both admitting to knowledge about himself, but also these feelings and thoughts – of despair, exhaustion, loss of motivation and confidence – have a depressive quality.

167…….. the cumulative history, continued over 2 decades, of assaults, other ill treatment, deprivations and prolonged placement in isolation regimes reported in Mr De Juana's case is quite exceptional. From a clinical perspective it becomes explicable that a man with his personal characteristics of resilience and determination has reached a point of being psychologically unable to face further long incarceration.

168. The accounts of Mr De Juana and his wife indicate that he remains generally low in mood, worried and more withdrawn than normal. He reported some concentration difficulties and also persisting problems of sleep disturbance, apprehension and hyper vigilance. I think he continues to have some longstanding symptoms of depression and some of the symptoms characteristic of post traumatic stress disorder (PTSD) (F43.1). His scores on the diagnostic questionnaires support this conclusion.

169. If Mr De Juana was returned to custody in Spain I think it is likely that his depression and his PTSD would worsen. It seems likely he would recommence a determined hunger strike if faced with the prospect of further long imprisonment. I think such a decision would be competent but also associated with depression. I think he is right in his judgment that he could not cope psychologically with further long imprisonment in Spain and that he would not survive it. The history of his past treatment suggests it is possible that decisions could be made there to force feed him if a hunger strike put his life in danger, but it seems highly unlikely that he would voluntarily cease a hunger strike (unless he had succeeded in gaining release), and the suffering he would experience in these circumstances would be immense. The account given by his wife indicates that she would also experience considerable fear for her own safety if she returned with him, and she believes that her husband would die."

[52] I referred earlier to an addendum report of 9 November 2009 where Dr Grounds expanded on the question of the impact on Mr De Juana if he were returned to custody in Spain. There he continues:

> "He is likely to be psychologically "re-traumatised" by being faced with reminders of his past experience, and his depression is likely to worsen as a reaction to further imprisonment there. His state of psychological exhaustion resulting from his previous imprisonment was such that, he cannot face a return to the conditions in which he was previously detained, and because of his mental condition he would want his life to end."

The reference to exhaustion in this report is not a physical exhaustion but one approaching clinical depression.

[53] Before turning to consider Dr Ground's report, and in particular his prognosis as to the affect of the return of Mr De Juana to Spain, I should record Mr De Juana's own views

as expressed to Dr Grounds. These are set out in paragraphs 67 and 68 of the report which state as follows:

> "67. In relation to the proceedings seeking his return to Spain Mr De Juana said he felt as if he was not out of prison. He had served his prison time plus 3 years, but now the Spanish Government was pursuing his extradition. He said he could be potentially sentenced to a maximum of 2 years, but he anticipated that if returned a longer sentence such as 5 years would then be sought, and he could not accept it. He believed that if returned to Spain he would also be imprisoned pending trial:
>
> > "exactly what I was in before."
>
> 68. He believed he would be subject to a special isolation regime and would probably be sent down to the south of Spain again, and (in the words used by his translator):
>
> > "Even if he was in a "golden prison" [ideal prison] he wouldn't accept it. He would probably go on hunger strike again."

[54] I have set out a very substantial amount of information contained in Dr Ground's report, none of which was challenged on behalf of Spain. I therefore proceed on the basis of the impact that the previous incarceration of Mr De Juana has had on him, and his present mental and physical condition are as recorded by Dr Grounds. As to the consequences, if he were returned to Spain I make a number of observations which arise directly from Dr Ground's report and the history and views expressed by Mr De Juana as forming the basis for the conclusions he reached. These are

(a) That if returned to Spain he would be remanded in custody pending any trial:
(b) That if held in custody on remand he would be kept in the same conditions as before, including being kept in isolation:
(c) That if imprisoned as a result of any conviction again he would be held in the same conditions as he was previously and would be dealt with in the same way as he was previously:
(d) That he, Mr De Juana, did not believe that any sentence to be passed would be within the legislative structure which allows a maximum of 2 years, but that a sentence of longer than that would be imposed – although on what basis no information was given: and
(e) That such a period of imprisonment would be "long", a description used on several occasions in Dr Ground's report.

[55] I asked Dr Grounds about this question of the length of any sentence which might give rise to the reaction of Mr De Juana of going on hunger strike. I did that, based on the instructions he had received that Mr De Juana came off hunger strike in 2008 when he realised that his sentence would be 3 years, not 12½ years or 99 years which was sought by the prosecution, these being the triggers for him going on hunger strike in the first place. However Dr Grounds indicated that clearly the length of any period in custody would be relevant, but that it could be modestly short, potentially even a matter of months.

I will deal with each of these issues in paragraphs (a) – (e) above

[56] **Remand in custody pending trial.**

Representations were made on behalf of Mr De Juana that the Spanish court had already determined that if returned to Spain he would inevitably not be granted bail – that the decision has already been made without any right of representations being made for bail. However such a determination or approach would be in direct contravention of the provisions of Article 5 (Rights of any defendant under the European Convention to the right to liberty except in defined circumstances and then only when such restrictions are properly and judicially exercised).

[57] I also note the terms and provisions of the original summons requiring Mr De Juana to appear before the investigating magistrate. That wording refers to him being arrested and brought "without bail" before the court. However that procedure would be akin to the procedure in our own jurisdiction where, on a failure to attend a court hearing properly convened, it is open to the court to issue a Bench Warrant for the arrest of a person, and for that person to be brought before the court. At that point the question of bail would then be considered. There is nothing on the papers which indicates that such a procedure would not have been followed by the investigating magistrate, nor is there anything on the papers to indicate that this would still not be the position.

[58] Reference was made to an article in The Guardian newspaper in the United Kingdom on 11 November 2008 where it is stated, and these words are not in inverted commas and therefore not directly attributable to the judge, that:

> "The judge has not formally charged De Juana Chaos but issued a European Arrest Warrant for him. He said he would be held without bail in Spain if and when he was detained."

There is no evidence that the judge made any such comments, and I would not regard such a report as beginning to give an evidential basis for concluding that a member of the judiciary in another jurisdiction would approach their obligations to Convention rights in such a manner.

Whilst I have determined that I cannot accept the views of any member of the media as to the merits of a case, or the approach of the court to any determination of bail or otherwise, included in the Bundle of documents filed by the Requested Person's legal representatives is an article by Jose Yoldi dated 27 October 2008 in El Pais where he states

> "No one will manage to put De Juana in prison for this case. When he will make his statement, which he will make, with the only fact of saying that he did not write the letter and did not attend the event he would be released."

[59] I am satisfied that it would be open to Mr De Juana to make an application for bail. It would be open to him, once he has engaged with the Spanish legal system, which he has so singularly failed to do to date, to deploy arguments such as whether or not there is a case to answer, and his medical condition including the impact of being returned to prison at all, let alone the particular conditions, based no doubt on the authoritative

report of Dr Grounds. In making its decision I am satisfied that the Court in Spain will fully comply with its obligations under Spanish law and the Convention rights of Mr De Juana.

[60] **(b), (c) and (d) Custody if Convicted**

I remind myself that the Requested Person has not been convicted of any crime. This is not a case where Mr de Jauna is being sought in order to serve a sentence of imprisonment already imposed in Spain. If that had been the position I would consider the impact of such a term of imprisonment in the context of Sections 21 and 25 of the 2003 Act. That however is not the situation – he is being sought in order to stand trial. In those circumstances I have determined that my task is to satisfy myself that he will be afforded protection by the Courts of Spain, including protection of his Convention rights, in any trial process and any approach to sentencing.

[61] In approaching that task I have referred already to the underlying principles of the system of the European Arrest Warrant. That is that the court should, unless contrary evidence is placed before it, have confidence in the system of the administration of justice in other European countries. Nothing has been placed in front of me which in any way challenges the judicial process under which Mr De Juana was convicted of the offences which led first to his original imprisonment for 30 years (18 years after remission), or to the further imposition of a term of 3 years for the later offences. It is not argued that those convictions were based on "trumped up" charges, or represented decisions made by Spain to breach Mr De Juana's rights under the Convention.

I therefore ask myself what evidence is there that he would not get a fair hearing before a Spanish Court. I had referred to me the role of AVT. However this is a group which is entitled under Spanish law to make representations, no doubt, again as I have stated, because they are directly involved in the very concept of the offence for which Mr De Juana is sought by the Spanish authorities. The investigating magistrate followed procedures which afforded Mr De Juana the right to come before the court and, through his legal representatives, to make a statement which no doubt would have denied his involvement in these matters. Mr De Juana's failure to afford of that opportunity led to the next step in the legal procedure of Spain, namely that he would be brought before the court – in this case by reason of him having left the country through the use of a European Arrest Warrant. Nothing in any of the steps that have been taken evidences any action or omission on the part of the Spanish judicial system which would argue for me not to have confidence in it.

[62] However the matter does not stop there. This issue has been addressed by our courts in *Boudhiba –v- Central Examining Court No. 5 of the National Court of Justice, Madrid, Spain* [2006] EWHC176 in which Smyth LJ stated at paragraph 64 and 65:

> "65. The question is not whether the appellant is suffering from a psychiatric disorder with or without the added disadvantage of low intelligence: it is whether, by reason of his mental condition it would be unjust or oppressive to extradite him. Spain is a civilised country. The evidence shows that, if extradited, proper examination will be made to ascertain whether the appellant is fit to stand trial. Such examination will also establish whether the appellant

is a suicide risk and whether he is in need of psychiatric treatment. So, I would conclude that, even though it may turn out that the appellant is of low intelligence and might be unfit to stand trial it is not unjust or oppressive to extradite him to Spain."

[63] In *R (on the application of Warren) –v- Secretary of State for the Home Department* [2003] EWHC 1177 the claimant was suffering from severe psychiatric illness, so severe it was contended that in this country he would be found unfit to plead or at least unfit to stand trial. Furthermore he had a severely handicapped child who suffered brain damage at birth and suffered from what was described "autistic tendencies". The medical evidence established a clear risk of suicide if the claimant was to be returned to the US. Notwithstanding the cogency of the medical evidence the court ordered his extradition.

[64] At paragraph 27 Moses J said:

> "The starting point, in my view, must be the proposition that as part of the trial process that there should be a determination where such an issue arises by the court that the question whether a defendant is fit to be tried … In the context of extradition proceedings, it is for the courts of the Requesting State to determine those issues. They are questions of fact relevant to the issues of fitness for trial, which are for the courts of the Requesting State to determine. Such a determination is not for the executive or for doctors, but are matters appropriate for judicial determination, such as other matters of fact are for the courts of the Requesting State …".

[65] Hale LJ said at paragraphs 40 and 42:

> "40. The object of extradition is to return a person who is properly accused or who has been convicted of an extradition crime in a foreign country to face trail or to serve his sentence there. This includes the determination of whether he is fit to be tried, an issue which, under the criminal justice systems of both this country and New York is decided by the courts, and not by members of the executives or the medical profession. The extradition process is only available for return to friendly foreign states with whom this country has entered either into a multi or a bi-lateral treaty obligation involving mutually agreed and reciprocal commitments …
>
> 42. It will not generally be unjust to send someone back to face a fair process of determining whether or not he is fit to face trial. I accept it may be wrong or oppressive to do so if the inevitable result will be that he will be found unfit. But even in those circumstances there may be counter prevailing considerations. For example, if there is the counterpart of our process in the other country, where a person may be found to have committed an act which would otherwise have been a serious crime, particularly if it were to be a crime of violence involving risk to the public, and if it would then be appropriate to detain the person for medical treatment, it could be in the public interest to enable that process to take place. This is not this case, but I would not wish to accept that it is

inevitably going to be oppressive to return someone in those circumstances."

[66] In this case no evidence has been given that Mr De Juana is unfit to stand trial. The question is whether, given his mental condition as evidenced in Dr Ground's report, he is able to withstand a period of imprisonment whether on remand or as a result of any conviction. Just as, except in exceptional circumstances, the courts in the United Kingdom have determined that matters of fitness to stand trial are matters for the court of the Requesting State, then I believe that this approach must also resonate in connection with this particular case.

[69] I repeat myself. The fact is that if Mr de Juana were to engage with the Spanish judicial system, which he was invited to do with legal representation, then as a first step it will be open to him to make representations in terms of obtaining bail. There is no evidence before this court that the Spanish judicial system has made any determination in relation to that, and I have confidence that the evidence put forward on behalf of Mr De Juana as to his present medical condition, will be given its appropriate and proper weight by the Spanish Court. Just as the judges in the cases to which I have referred state that any decision of fitness to stand trial is not a matter for the executive or doctors, so it is not a matter for the executive or others, to determine the question of bail. That is a matter for the Spanish Court and in doing so the Spanish Court will address its obligations under the European Convention.

In the same way I am satisfied that there is no reason for this court to make the determination as to any sentence that should be passed, assuming any conviction takes place. The overwhelming thrust of the case put forward on behalf of Mr De Juana is that there is no case against him. If correct, then the question of imprisonment will not arise. If on the other hand there is a proper case against him, and that is determined in accordance with the independent judicial system of the Kingdom of Spain, the sentence to be passed as a result of that will be a matter for that court exercising I have no doubt its powers in a proper manner, informed by the evidence put before it as to what might or might not be the impact on Mr De Juana of any period of imprisonment – and the terms of that imprisonment.

[70] I have therefore determined that the question of the mental condition of Mr De Juana in respect of any period of imprisonment as a result of remand, or any period of sentence should he be convicted, should be left to the judicial authorities of Spain, and should not be determined by this court.

[71] This determination and the evidence allow me to deal with the other matters arising from allegations of breaches of the Convention.

- There is no evidence before the court which would argue that Mr de Juana will not receive a fair trial. That is not argued in relation to any previous offences and there is no evidence before the court but that the determination will be made by an independent judiciary.

- Whilst any extradition proceedings and any period of imprisonment which may follow are an interference with the rights of Mr de Juana in terms of family

life, nevertheless any period of custody would not be in itself a violation of those Article 8 rights – see ***Makos***. The maximum period of imprisonment for this offence is one of 2 years. Whilst Dr Ground refers to a relatively short period of imprisonment potentially giving rise to fears of another hunger strike, and the effect that that might have Mr De Juana, nevertheless his fears that the sentence would be longer than two years has no foundation - I refer to this below in the context of 'speciality'. I remind myself that whenever the period of custody was determined in February 2008 as being one of 3 years, Mr De Juana came off his hunger strike. Whilst I acknowledge Dr Ground's evidence that such a decision to go on the hunger strike might be in part an informed decision, but in some other way may arise from clinical depression and as such would not be "suicide", nevertheless even if the matter were to progress to the point where a period of imprisonment was imposed, there is no evidence before the court it would be in the same conditions, which again would have been a pre-requisite to the prognosis of Dr Grounds. In any case I have confidence that the Court in Spain will carry out the balancing exercise of the rights of the State and those of the Requested Person in accordance with its Convention obligations and that there will be a proportionate response such as will ensure the breach of the Article 8 right will not amount to a violation of that right.

Any period of imprisonment affects other members of the family an imprisoned person. That would be the case if any person was imprisoned for an offence committed in this jurisdiction. The fact that the offence is committed elsewhere does not in itself amount to a violation of the rights under Article 8 of that member of the family. However there is nothing in the evidence that has been given to the court that would elevate the breach of the rights of Mrs De Juana under this Article to a violation of that right if her husband was surrendered to Spain, and even if he were to be imprisoned, that decision being taken by a court exercising its powers in accordance with the Convention.

As to the right of "free speech" under Article 10 of the Convention the offence alleged is a matter for the legislature of the country which passes its laws in the discharge of its duties and responsibilities towards its citizens. There is a balance to be struck between freedom of speech and the interests of the citizens of any State. Nothing has been placed before the court which would allow me to determine that the passing of that law, and its enforcement, is disproportionate to the interests that the Kingdom of Spain seeks to protect, and that in the balancing exercise I would not determine that the restriction amounts to a violation of the Article 10 rights of Mr De Juana.

CONCLUSION

[72]

- In this case Mr De Juana claims that there is no case for him to answer. To date he has not afforded of the opportunity of placing before the court in Spain his argument to substantiate that position. If he had engaged he would have had right to access to the evidence against him and to be able to present all arguments to show the fragility of such a case. He chose not to.

- No argument has been put before this court that either in that process or indeed in the process which he would now face were he to be extradited would afford him other than a fair trial.

- Any argument as to the representations of the alleged victims of his offence do not evidence to this court that the independent approach of the judicial system is compromised or in any way dictated to by that group, or indeed any member of the executive. The judge was carrying out his obligation to carry out an investigation, and subsequently to consider a prosecution based on a complaint received from someone who believed they were a victim of an offence. It may be that such a group is vociferous, but that in itself does not change the position as to the independent nature of the process. All courts are more than conscious of the statements and pressures that emanate from many sources outwith the judicial system but there is no reason to believe that the judicial system of Spain is any less robust in carrying its duties out without fear or favour.

- Mr De Juana has obviously experienced considerable trauma as a result of his imprisonment for past offences. They have left their scars and those experiences and those affects have the potential of having further adverse affects, serious affects, were he to be sent back to prison and in particular in such conditions as solitary confinement - as set out in Dr Ground's report. However the opportunities exist for Mr de Juana, through his legal representatives to explain that position to the judicial authorities in Spain in relation to him being remanded in custody or being granted bail.

- The judicial authority is obliged under the Convention to approach Mr De Juana on the basis that he is entitled to bail unless there are other circumstances that argue for him not being granted bail. In that determination everything about his personal circumstances, and indeed the weight of the case against him, would be taken into account as it would be in any judicial process.

- I have determined that in the absence of any evidence other than that he would receive such a fair hearing I see no reason why that should not be a decision for the Spanish judge. And in the same way, should Mr De Juana be convicted I have no doubt that the question of his mental state and the impact of any imprisonment will be a matter of considerable concern for the trial (and sentencing) judge. Again however I believe that these are matters which are rightly left to the sentencing judge if those particular circumstances arise.

- This is not a case where Mr De Juana has been convicted and therefore inevitably on his return would be sent to prison. If it had been such a case this court would have had a role to play in considering the evidence of Dr Grounds. However that does not arise in circumstances where he has not even yet been put before the court on trial. These are matters for the future and a matter for the Spanish judicial authorities in due course should he be convicted.

[73] **(d) and (e)**

Finally I address question of speciality under Section 17 of the 2003 Act, reflecting the obligations in Article 27 of the Framework Decision, which states:

> "27(2) A person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was sentenced."

In *Hilali –v- Central Court for Criminal Proceedings No. 5 of the National Court of Madrid* at paragraph 52 Scott Baker LJ said:

> "It seems to us a surprising submission that Spain is likely to act in breach of the international obligations to which it has signed up. There is no evidence before us that it has done so in the past and in these circumstances we would need compelling evidence that it is likely to do so in the future. By Article 34 of the Framework Decision Member States were requested to take necessary measures to comply with its provisions by 31 December 2003. It is not suggested Spain has failed to meet this implementation provision. It seems to us therefore that it is to be inferred that the speciality arrangements referred to in Section 17(2) of the 2003 Act are in place."

I am therefore satisfied that there are no grounds for any concern expressed by Mr De Juana that the authorities in Spain would seek to put him on trial for any offence other than that which is included in the Warrant, and that in respect of this offence, if convicted and it were minded to impose any period of imprisonment, it would seek to exceed its sentencing powers of 2 years.

[74] I have therefore determined that Mr De Juana should be extradited in accordance with the request in the Warrant.