Neutral Citation Number: [2020] EWHC 1103 (Admin)

Case No: CO/3561/2019 & CO/3559/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/05/2020

Before:

THE RIGHT HONOURABLE LADY JUSTICE NICOLA DAVIES DBE

THE HONOURABLE MR JUSTICE LEWIS

- -

Between:

(1) RAYHAN SHIRNAKHY
(2) JAMAL HOSSEINALI

Applicants

- and -

(1) PERMANENT DUTY DIRECTOR,
WEIDEN LOCAL COURT GERMANY
(2) AMTSGERICHT COLOGNE, GERMANY

Respondents

- -
- -

David Perry Q.C. and Emilie Pottle (instructed by **Stephen Fidler & Co.**) for the **First Applicant**
David Perry Q.C. and Juliet Wells (instructed by **Armstrong Solicitors**) for the **Second Applicant**
Jonathan Hall Q.C., and Jonathan Swain (instructed by **the Crown Prosecution Service**) for the **Respondents**

Hearing date: 30 April 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Wednesday 6 May 2020.

Lady Justice Nicola Davies and Mr Justice Lewis:

INTRODUCTION

1. This is the judgment of the court.

2. These are two renewed applications for permission to appeal against the decisions of a district judge sitting in the Westminster Magistrates' Court ordering the extradition of each applicant to Germany pursuant to a European Arrest Warrant ("EAW") issued by an Amtsgericht, or local court, in Germany. Permission to appeal was refused on the papers by Sir Duncan Ouseley sitting as a judge of the High Court.

3. In essence, the applicants contend that the Amtsgerichte were not judicial authorities within the meaning of Article 6(1) of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States ("the Framework Decision"). First, they say that, as a matter of German law, power to issue EAWs has not been lawfully conferred on the Amtsgerichte. Secondly, they contend that the status of the Amtsgerichte as issuing judicial authorities had not been notified to the European Council as required by Article 6(3) of the Framework Decision at the time that the EAWs were issued. They contend that, in those circumstances, the Amtsgerichte were not judicial authorities for the purposes of issuing EAWs and the EAWs are not valid in their cases.

4. In addition, the first applicant, Rayhan Shirnakhy, submitted in his written grounds of appeal that the district judge was wrong to conclude that there had been a decision to charge and try him in Germany. It is his case that there was no such decision and, consequently, extradition was barred under section 12A of the Extradition Act 2003 ("the 2003 Act"). The second applicant, Jamal Hosseinali, initially contended in his written notice of renewal of his application for permission to appeal that extradition would be unjust or oppressive by reason of his mental health condition and it was contrary to section 25 of the 2003 Act for the judge to have ordered his extradition.

THE FACTS

The First Applicant

5. The first applicant is a national of the United Kingdom. On 29 May 2019, the Amtsgericht at Weiden issued an EAW seeking the arrest and extradition of the first applicant. That EAW was certified by the National Crime Agency ("NCA") on 31 May 2019.

6. The EAW begins by stating:

> "**EUROPEAN ARREST WARRANT**
>
> This warrant has been issued by a competent judicial authority. I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order".

7. The EAW identifies the first applicant and gives his address. It records that the EAW relates to 27 offences involving the alleged facilitation of illegal entry into Germany between 11 November 2017 and 12 June 2018. It states that the first applicant is a high-ranking member of an organisation operating in various European countries including Romania, Serbia, Turkey, and Greece which has established a substantial source of income by transporting persons of Iraqi, Iranian, Afghan or Syrian nationality illegally by truck. The first applicant is said to be responsible for recruiting the drivers, organising the reception centres, co-ordinating movements, determining the number of persons to be smuggled and negotiating the price with the drivers carrying out the smuggling.

8. The EAW records that the judicial authority which issued the warrant was Amtsgericht Weiden or the Weiden Local Court. It is stamped with the official court stamp.

9. In fact, this was the second EAW issued in respect of the first applicant. The first had been issued by the public prosecutor's office. The first applicant had been arrested and his extradition ordered on 17 May 2019. In two unconnected cases, the Court of Justice of the European Union held on 27 May 2019 that public prosecutors could not be judicial authorities in the cases cited as they were subject to the risk of being influenced, directly or indirectly, by instructions from the executive (there the German Ministry of Justice): see joined cases C-508/18, and C-82/19/PPU *OG and PI*. Following the decision of the Court of Justice in those cases the German authorities withdrew the EAW in the present case and the first applicant was discharged.

10. A new EAW was issued on 29 May 2019 by the Weiden Local Court. On 10 June 2019, the first applicant was arrested in Romford, near London. He was brought before a district judge at the Westminster Magistrates' Court on the same day. The first applicant was legally represented. The district judge fixed the date for an extradition hearing for 26 July 2019. Directions were given for the submission of evidence and skeleton arguments. On 29 July 2019, the first applicant was represented by solicitors who confirmed that the sole basis for resisting extradition was that it was barred by reason of section 12A of the 2003 Act. Unfortunately, the first applicant had not been produced from prison and the extradition hearing was adjourned,

11. The extradition hearing finally took place on 29 August 2019 before District Judge Zani. The first applicant was represented by counsel (not counsel presently instructed). His counsel sought to contend that authority to issue EAWs had not been conferred under German law on the local court and therefore the EAW was not a warrant issued by a judicial authority within the meaning of section 2 of the 2003 Act. He applied to rely on evidence in the form of an unsigned draft report from a German lawyer and lecturer, Dr Anna Oehmichen, dealing with the question of whether the local court had authority under German law to issue EAWs. The district judge gave a preliminary ruling refusing to admit that evidence. The district judge also considered the contention that there was no decision to charge or try the first applicant and therefore extradition was barred by section 12A of the 2003.

12. District Judge Zani gave his judgment on 5 September 2019. He included his reasons for his preliminary ruling refusing to admit the evidence of Dr Oehmichen. He

recorded that the expert had been approached on 22 or 23 August 2019. The quote for advice was too high and a reduced fee was quoted. Prior authority was granted for the report on 28 August 2019 and the expert was instructed on that date and provided the draft, unsigned report on the same day. The district judge refused to allow the draft expert report to be admitted as, to have done so, would have required:

> "(i) The expert to have a reasonable opportunity to make any necessary amendments before signing, dating and serving the same.
>
> (ii) The Judicial Authority to have a reasonable opportunity to consider the report and comment upon it.
>
> (iii) (in all likelihood) the expert having to giving [sic] live evidence at some later date, particularly if the contents of her report were not accepted."

13. The district judge took account of the facts that the first applicant had been in custody for some months and that any future hearing would not take place for several weeks if not months. He noted that the report began by stating that "*Although the current legal situation in Germany is far from clear, in my view there is no stable basis to support the competence of a local/district court to issue EAWs*". The district judge did not regard a report couched in those terms as sufficient authority for the submission that a local or district court was not capable of issuing an EAW. Counsel had been unable to provide any binding authority for the proposition that a local or district court could not properly issue an EAW and was not therefore a competent judicial authority.

14. On the question of section 12A of the 2003 Act, the district judge recorded that the core of the submission was that the pre-trial investigation had not yet concluded and that there was no clear indication that a decision to charge or try had been made. Further, it was said that there was no indication that any decision not to prosecute was solely because of the first applicant's absence from Germany. The issuing judicial authority had provided further information that the first applicant, on arrival in Germany, would be brought before a court and a decision made on detention. In accordance with German criminal procedure, he would be given the opportunity of making a statement, and taking account of that statement, the charges and indictment would be laid and the trial process would commence. The district judge noted that the EAW stated that extradition was sought for "the purposes of conducting a criminal prosecution". The domestic arrest warrant referred to the first applicant as the accused and the defendant. The district judge concluded that the decision to charge and try had been made. The fact that German criminal procedure provided for the first applicant to have an opportunity to make a statement before being formally charged did not preclude a decision from having been made. It meant simply that it was subject to review. In any event, any delay in charging the first applicant had been the result solely of the first applicant's absence from Germany. The district judge ordered that the first applicant be extradited and remanded him in custody.

The Application for Permission

15. The first applicant applied to the High Court for permission. The grounds of appeal were that: (1) the district judge was wrong to refuse to admit the evidence of Dr

Oehmichen; (2) he erred by not making inquiries about another case; (3) the notification made to the European Council under Article 6(3) made it clear that the regional court not the local court was designed as the competent judicial body under Article 6(3) of the Framework Decision; (4) the local court had no jurisdiction under German law to issue an EAW; and (5) the district judge was wrong in his conclusions on section 12A of the 2003 Act (see the five grounds of appeal set out at paragraphs 18 to 22 in the notice of appeal dated 11 September 2019).

16. Permission to appeal was refused on all grounds on consideration of the papers on 22 November 2019. Sir Duncan Ouseley concluded that the decision on section 12A of the 2003 Act was unarguably correct. The EAW, the further information from the judicial authority and the domestic arrest warrant, made it clear that a decision to charge and try the first applicant had been made. He would have the opportunity to make a statement and that might lead to further investigations but the charge and trial would follow. In any event, if no decision had been taken, that was the result solely of the first applicant's absence from Germany. On the issue of whether the Amtsgericht was a competent authority, Sir Duncan concluded that:

> "2. DJ Zani was unarguably correct in the way he dealt with the attempt to introduce a challenge to whether the Local Court was a judicial authority, authorised to issue EAWs. The earlier EAW was withdrawn because of the lack of independence of the German issuing prosecutor. This new issue concerned whether the Local Court was authorised under German domestic law to issue EAWs. (a) The draft report of a German lawyer on the topic was submitted on the morning of the full hearing, which had already been adjourned once. It could not have been received without being finalised, and an opportunity given to respond, necessitating an adjournment, (b) In any event, the highest that the draft put it was to say that the position was far from clear. No one could have concluded that the German courts were acting without domestic power on that basis. The applicant has identified no binding authorities in support of his claim, (c) Indeed, I do not consider that it would be appropriate for UK Courts to rule on that issue, which is a matter for German courts to decide, (d) I see no reason why DJ Zani had to wait and see what might emerge from DJ Snow who was, it was said, to be hearing such an issue, (e) The fact, if fact it be, that only Regional Courts or Landsgericht are designated for the purposes of Article 6(3) of the Framework Decision does not alter the German domestic position; it is only declaratory and such a declaration is not a requirement for domestic jurisdiction, (f) The grounds refer to the possibility of amended grounds and further evidence, but none have been supplied."

17. Sir Duncan gave his reasons for refusing permission to appeal on the other grounds of appeal. The first applicant has renewed his application before this Court for permission to appeal.

The Second Applicant

18. The second applicant is a national of the United Kingdom. On 31 May 2019 the Amtsgericht at Cologne issued an EAW seeking the arrest and extradition of the second applicant. It was certified by the NCA on 25 June 2019. The EAW also begins by stating that it had been issued a competent judicial authority. It identifies the second applicant. It records that the EAW relates to seven offences of facilitating unauthorised entry into Germany. It states that the second applicant with others is charged with having obtained forged visas for Schengen countries through a travel agency established for the purpose of deception and fraudulent representation of travel purpose and to bring persons to Germany to apply for asylum. The second applicant was accused of the regular submission of forged documents or information and the bringing of persons to Germany for the purpose of applying for asylum. The persons were advised, sometimes, untruthfully, about the reasons they could submit for seeking asylum. The persons who were smuggled into Germany paid between 7,000 and 20,00 Euros each.

19. On 19 July 2019 the second applicant was arrested and was brought before a district judge. An extradition hearing was fixed and took place on 3 September 2019. The second applicant was legally represented (not counsel presently instructed). The second applicant gave evidence. He also produced a medical report dated 19 February 2019 prepared by an associate specialist, Dr Sous, who noted that the second applicant had taken a drug overdose in September 2018 when he heard that his girlfriend had been arrested in Iran and in 2013 when he divorced. Dr Sous recorded his impression that the second applicant had a moderate depressive disorder and that the risk of suicide was low. The second applicant contended that extradition would not be compatible with his right to respect for private and family life under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms incorporated into domestic law by the Human Rights Act 1998 ("the Convention") and would be unjust and oppressive by reason of his mental condition (relying on section 25 of the 2003 Act). The applicant did not raise any issue before the district judge as to the competence of the Amtsgericht in Cologne to issue an EAW.

20. District Judge Zani gave judgment on 5 September 2019. He considered whether extradition would be disproportionate having regard to section 21A of the 2003 Act. He considered that the allegations were serious and if the second applicant were convicted of similar conduct in the United Kingdom he would be likely to receive a sentence of imprisonment of some length. He concluded that extradition would not be disproportionate. The district judge considered the medical evidence and concluded that the second applicant had not demonstrated that extradition would be unjust or oppressive and would not be contrary to section 25 of the 2003 Act. He concluded that the medical evidence did not provide evidence of a substantial risk of suicide and indeed said that there is "no death wish, no suicidal thoughts". The district judge carefully considered all the circumstances of the second applicant and his family and concluded extradition would not be a disproportionate interference with the second applicant's rights under Article 8 of the Convention. He ordered that the second applicant be extradited to Germany.

The Application for Permission

21. The second applicant applied for permission to appeal and submitted perfected grounds of appeal. The grounds (see paragraph 5 of the perfected grounds of appeal) are that the district judge: (1) should have adjourned to obtain more information on

his mental health condition and his risk of suicide; (2) would have decided the Article 8 issue differently if he had had correct information about the second applicant's family situation; and (3) was incorrect in his assessment of proportionality under section 21A of the 2003 Act. The grounds further noted that those instructed by the second applicant had failed to obtain up to date information as to his risk of suicide and that there had had been insufficient time to submit evidence of torture which he had experienced prior to his arrival in the United Kingdom in 2002 (see paragraphs 6 and 7 of the perfected grounds of appeal). For the first time, the second applicant contended that the Amtsgericht at Cologne lacked competence to issue an EAW and so the EAW was invalid under section 2 of the 2003 Act ("the section 2 ground") and sought permission to add that as a ground of appeal (see paragraph 8 of the perfected grounds of appeal).

22. Permission to appeal was refused on all grounds by Sir Duncan Ouseley after consideration of the papers and he refused to allow the second applicant to raise the section 2 ground. The second applicant gave notice on 28 November 2019 of his intention to renew the application relying on his mental condition and section 25 of the 2003 Act. He attached a letter from a nurse specialist saying he had taken a drug overdose with suicidal intent. The application also referred to him making an attempt to walk in front of traffic. In his application, he sought permission to obtain a detailed and up-to-date opinion of a psychiatrist on his current risk of suicide. By notice given on 16 January 2019, he sought again to rely on the section 2 ground. Supperstone J. granted permission on 31 January 2020 to include the section 2 ground as a further renewed ground of appeal.

23. On 31 March 2020, Nicola Davies L.J. granted permission for the second applicant to instruct a psychiatric expert to prepare a report on his mental health and, in particular, to address the alleged risk of suicide. The report was to be prepared for the oral permission hearing listed for 30 April 2020.

24. The second applicant did not adduce any further report and did not seek to rely upon any further medical evidence at the hearing on 30 April 2020.

This Hearing

25. The applicants were represented by David Perry Q.C., Emilie Pottle and Juliet Wells. The respondents were represented by Jonathan Hall Q.C. and Jonathan Swain. The hearing was conducted remotely on 30 April 2020. It was a public hearing in that persons had access to a link and could (and a number of persons, including at least one observer from Germany, did) observe proceedings. We are grateful to counsel for their succinct and helpful written and oral submissions. We are also grateful to them and their legal teams for the efficient preparation of electronic bundles dealing with the necessary materials and authorities which enabled the hearing to be conducted effectively and efficiently.

THE LEGAL FRAMEWORK

26. Part 1 of the 2003 Act provides for extradition from the United Kingdom to territories designated for this purpose. The 27 Member States of the European Union, including Germany, are designated as category 1 territories to which Part 1 applies. Section 2 of the 2003 Act provides, so far as material to this case, that:

"2 Part 1 warrant and certificate

(1) This section applies if the designated authority receives a Part 1 warrant in respect of a person.

(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 subsection (3) and the information referred to in subsection (4), or

…..

(3) The statement is one that—

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

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

(4) The information is—

(a) particulars of the person's identity;

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

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

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

…

(7) The designated authority may issue a certificate under this section if it believes that the authority which issued the Part 1 warrant has the function of issuing arrest warrants in the category 1 territory.

(8) A certificate under this section must certify that the authority which issued the Part 1 warrant has the function of issuing arrest warrants in the category 1 territory.

> (9) The designated authority is the authority designated for the purposes of this Part by order made by the Secretary of State."

27. Section 3 of the 2003 Act provides for the arrest of an individual subject to a certified EAW. The individual is brought before an appropriate judge who fixes a date for an extradition hearing and determines whether to remand the person in custody or on bail (see sections 7 and 8 of the 2003 Act). At the extradition hearing, a district judge will consider whether there are any bars to extradition such as double jeopardy, the absence of a prosecution decision, whether extradition would be unjust or oppressive by reason of the passage of time and other matters (see section 11 of the 2003 Act). The material bar in the first applicant's case is said to be section 12A of the 2003 Act which provides:

> "12A Absence of prosecution decision
>
> (1) A person's extradition to a category 1 territory is barred by reason of absence of prosecution decision if (and only if)—
>
> (a) it appears to the appropriate judge that there are reasonable grounds for believing that—
>
> (i) the competent authorities in the category 1 territory have not made a decision to charge or have not made a decision to try (or have made neither of those decisions), and
>
> (ii) the person's absence from the category 1 territory is not the sole reason for that failure,
>
> and
>
> (b) those representing the category 1 territory do not prove that—
>
> (i) the competent authorities in the category 1 territory have made a decision to charge and a decision to try, or
>
> (ii) in a case where one of those decisions has not been made (or neither of them has been made), the person's absence from the category 1 territory is the sole reason for that failure."

28. Furthermore, if during the extradition hearing before the district judge, there are concerns about the person's physical or mental conditions, section 25 of the 2003 Act applies. It provides that:

> "25 Physical or mental condition
>
> (1) This section applies if at any time in the extradition hearing it appears to the judge that the condition in subsection (2) is satisfied.

> (2) The condition is that the physical or mental condition of the person in respect of whom the Part 1 warrant is issued is such that it would be unjust or oppressive to extradite him.
>
> (3) The judge must—
>
> (a) order the person's discharge, or
>
> (b) adjourn the extradition hearing until it appears to him that the condition in subsection (2) is no longer satisfied."

29. If there are no statutory bars to extradition, the district judge will consider whether extradition would be compatible with the person's rights under the Convention and is proportionate. If so, the district judge must order that the person be extradited and remanded in custody or on bail: see section 21A of the 2003 Act.

30. There is provision to appeal with leave to the High Court against the extradition order: see section 26 of the 2003 Act. The court's powers on an appeal are set out in section 27 which provides that:

> "(1) On an appeal under section 26 the High Court may—
>
> (a) allow the appeal;
>
> (b) dismiss the appeal.
>
> (2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.
>
> (3) The conditions are that—
>
> (a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;
>
> (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.
>
> (4) The conditions are that—
>
> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;
>
> (c) if he had decided the question in that way, he would have been required to order the person's discharge.
>
> (5) If the court allows the appeal it must—

(a) order the person's discharge;

(b) quash the order for his extradition."

The Framework Decision

31. European Union law relating to extradition is contained in the Framework Decision. The recitals to the Framework Decision record that the intention was to introduce a simplified system of surrender of convicted or suspected person and reduce delay in the present extradition system (see recital 5). The aim, essentially, was to provide for a system of surrender between judicial authorities issuing the EAW and the extraditing state. The system would be based on mutual recognition of criminal decisions (see recitals 2 and 6). The role of central authorities in the execution of an EAW was to be limited to practical and administrative assistance.

32. Article 1 of the Framework Decision provides that:

> "**Definition of the European arrest warrant and obligation to execute it**
>
> 1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.
>
> 2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision…."

33. Article 3 and 4 of the Framework Decision set out the mandatory grounds for refusing to execute an arrest warrant or extradite a person. Article 6 of the Framework Decision identifies the authority competent to issue an EAW in the following terms:

> "Article 6
>
> **Determination of the competent judicial authorities**
>
> 1. 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.
>
> 2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State.
>
> 3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law."

34. The remainder of the Framework Decision deals with obligations relating to execution of the warrant and extradition.

35. As to the relationship between the Framework Decision and the 2003 Act, in essence, the United Kingdom opted back into the Framework Decision under Protocol 36 to the Treaty of Lisbon with effect from 1 December 2014. Section 7A of the European Union (Withdrawal) Act 2018 gives effects to right, powers, liabilities and obligations arising under the Withdrawal Agreement between the United Kingdom and the European Union. Article 61(2) of the Withdrawal Agreement provides that the Framework Decision applies in respect of persons arrested prior to the end of the transition period provided for by the Withdrawal Agreement (i.e. 31 December 2020).

THE ISSUES

36. Against that background the principal issues that arise on this application are whether it is arguable that:

    i) the district judge was wrong not to admit the evidence of Dr Oehmichen or that this court should in any event admit that evidence?

    ii) the EAWs were not issued by a judicial authority within the meaning of section 2 of the 2003 Act and Article 6 of the Framework Decision because:

        a) Amtsgerichte or local courts are not competent as a matter of German law to issue EAWs; or

        b) at the time they were issued, Amtsgerichte had not been notified to the General Secretariat of the European Council pursuant to Article 6(3) of the Framework Decision as competent judicial bodies for issuing EAWs?

37. These are grounds 1, 3 and 4, set out in paragraphs 18, 20 and 21 of the first applicant's notice to appeal, and grounds 8 and 9 of the second applicant's perfected grounds of appeal.

38. In the written submissions made on behalf of the first applicant it was contended that the district judge was wrong in the case of the first applicant to conclude that extradition was not barred by section 12A of the 2003 Act (ground 5 in paragraph 22 of his notice of appeal). In oral submissions, Mr Perry confirmed that if leave to appeal on the issues set out in paragraph 36 above was refused, he would no longer be pursuing the application for an adjournment and this ground would not be pursued.

39. In his perfected grounds of appeal and the notice of the renewal of the application for permission to appeal, the second applicant sought permission to appeal on the ground that his mental state was such that it would be oppressive or unjust to extradite him and so contrary to section 25 of the 2003 Act. In oral submissions, Mr Perry confirmed that if leave to appeal on the two issues set out in paragraph 36 above was refused, he was no longer pursuing the application for an adjournment and this ground would not be pursued. No submissions were made on any of the other grounds of appeal included in the second applicant's perfected grounds of appeal.

THE FIRST AND SECOND ISSUES

40. It is convenient to consider the issues in paragraph 36 above together.

Submissions

41. Mr Perry Q.C. for the applicants submits that the evidence of Dr Oehmichen establishes that it is arguable, as a matter of German law, that there is no sound jurisdictional basis upon which Amtsgerichte or local courts can issue EAWs. Consequently, he submits that they cannot be "issuing judicial authorities" within Article 6(1) of the Framework Decision and the EAW is not a "warrant issued by a judicial authority of a category 1 territory" within the meaning of section 2(2) of the 2003 Act. He submits that the applicants cannot be extradited pursuant to those invalid EAWs. Secondly, Mr Perry submits that Article 6(3) of the Framework Decision requires the member state, in this case Germany, to notify the General Secretariat of the European Council of "the competent judicial authority under its law". In the present case, the notification in place at the time that the EAWs were issued did not name Amtsgerichte as competent judicial authorities. That notification, dated 7 September 2006, stated that the competent judicial authorities were the Ministries of Justice who had transferred their power to the public prosecutors' offices and the regional courts (not the local courts). It was only on 18 November 2019 that the German authorities informed the European Council that the local, regional or higher courts were the competent judicial authorities.

42. Mr Hall Q.C. for the respondent judicial authorities submits that the issue of which authority is the competent judicial authority for issuing EAWs is to be decided "by virtue of the law of that State", that is, the law of the issuing state. There is no suggestion that the local courts are not capable of being judicial authorities as a matter of EU law. The question as to whether they have, as a matter of German law, had the power to issue EAWs conferred upon them is a matter of German law, not EU law, and not a matter for the courts in the United Kingdom (or elsewhere) to determine. So far as Article 6(3) is concerned, that requires a state to "inform" the General Secretariat of the European Council which body is the competent judicial authority and is declaratory only. It is not a precondition to the ability of the competent judicial body being able to act and issue an EAW. In any event, any ambiguity or deficiency under the 2006 notification had now been removed by the November 2019 notification.

Discussion

43. It is relevant first to note that there is nothing to suggest in the present case that the local courts or Amtsgerichte are incapable of acting as judicial authorities for the purpose of the Framework Decision. They are independent judicial bodies. They are not subject to the difficulty identified by the Court of Justice in *OG and PI* where the issuing authorities there, the public prosecutors' office, were not capable of being judicial bodies as they were subject to the risk that they may be influenced directly or indirectly by instructions issued by the executive. There was a suggestion in oral submissions that there might be an issue as to whether the local courts were equipped to carry out properly any consideration of the proportionality of issuing an EAW. There is no basis before us to cast doubt on the ability of the German courts to fulfil that task. Furthermore, the principle of mutual trust between states requires the courts of each state to consider that the courts of other states are complying with relevant legal requirements: see paragraph 43 of the judgment of the Court of Justice in joined cases C-508/18 and C-82/PPU *OG* and *PI*.

44. The issue in this case, therefore, is whether German law has in fact conferred power upon the Amtsgerichte to issue EAWs and, more particularly, whether that is a matter for this court to determine on an appeal against an extradition order. In our judgment, it is clear that there is no arguable basis for concluding that this court should proceed on the basis that the EAWs were, or might not, have been issued by a judicial authority. We reach that conclusion for the following reasons.

45. First, the question of whether or not the local courts are recognised as having authority to issue EAWs is a matter of German law. As Article 6(1) of the Framework Decision recognises the issuing judicial body is the body competent to issue an EAW "by virtue of the law of that State". As might be expected, it is for each state to organise its own internal affairs and to determine which judicial bodies are to have the authority to issue an EAW. They must as a matter of EU law be judicial bodies, i.e. bodies not subject to executive influence, but the choice of *which* such bodies are to be charged with the task of issuing EAWs is a matter for national law not EU law. That is confirmed by Article 6(3) of the Framework Decision. What a state notifies to the General Secretariat is the "competent judicial authority under its law".

46. Secondly, it cannot have been envisaged under the 2003 Act, or the Framework Decision, that the courts of one state would be required to adjudicate on the laws of another state in order to determine whether, under those laws, a particular court had been vested with the power to issue EAWs. That is not an exercise provided for by the Framework Decision. It would, indeed, run counter to the aim of creating "a new simplified system of surrender" which would "remove the complexity and potential for delay in inherent in the present extradition procedures" (see recital 5 of the Framework Decision).

47. Thirdly, there is no proper or sufficient basis for this court to consider that the Amtsgerichte are not judicial bodies as a matter of German law. The system of extradition between the European Union and the United Kingdom is based on mutual recognition of decisions as appears from the recitals to, and Article 1 of, the Framework Decision. The EAWs in these cases state that they have been issued by a competent judicial authority and identify the local court that has issued them. There is no basis for the domestic court to doubt that and to do so would run counter to the principle of mutual recognition underlying the Framework Decision.

48. Fourthly, the evidence relied upon before this court is not sufficient to justify any real doubt over the competence, as a matter of German law, of the Amtsgerichte to issue EAWs. Mr Perry relies upon the first report of Dr Anna Oehmichen dated 29 August 2019 and an addendum report dated 25 February 2020. The first report (then in draft and unsigned) was not admitted in evidence before the district judge. His reasons for refusing to admit that evidence are not arguably wrong. So far as this court is concerned, there is power to allow an appeal where an issue is raised that was not raised at the extradition hearing or evidence is available which was not available at the extradition hearing: see section 27 of the 2003 Act. We doubt that those conditions would be satisfied here. The first report could have been available in the case of the first applicant had he instructed the expert sooner than he did. The issue was available to the second applicant at his extradition hearing but he did not raise it nor did he seek to adduce evidence in support of it. However, we proceeded on the basis that the evidence has been admitted and both applicants could raise the issue.

49. We have, therefore, considered carefully the first report of Dr Oehmichen and the addendum report. In our judgment this material does not provide a sound basis to find that it is arguable that this court should grant permission and review the competence of the issuing judicial authorities to issue the EAWs as a matter of German law. On her evidence, four courts, on five occasions, considered that there is authority for local courts to issue EAWs and only the courts in Dortmund on two occasions have taken a different view. It is on that basis, however, that Dr Oehmichen expresses her view that "there is no clear legal basis that establishes the competence of district courts". It cannot in our judgment, be said, even arguably, that these reports justify a domestic court in England and Wales concluding that there is doubt as to the ability of the courts to issue the EAWs in these two cases. Rather, the indications are that the courts in Germany have, largely, accepted that Amtsgerichte or local courts can issue EAWs. For completeness, we note that further information has been provided by the German Federal Ministry of Justice and Consumer Protection dated 27 September 2019 which confirms the view of the German Ministry that Amtsgerichte or local courts have competence to issue EAWs under German law. That further information sets out in detail its analysis of the legal basis of the competence of the Amtsgerichte to issue EAWs.

50. Finally, Article 6(3) of the Framework Decision imposes an obligation on a state to inform the General Secretariat of the European Council which bodies are competent judicial authorities under the law of the state in question. That obligation is in terms concerned with notifying or informing the Secretariat which are the relevant bodies as provided for by national law. The notification or information is not the instrument which confers the powers on those bodies to act. The existence of a notification is not a precondition to the body being a judicial body and is not a precondition to the validity of an EAW. The fact that the notification had not been given until after the EAWs were issued in the present case is, therefore, not relevant to the question of whether German law had, at the time of the issuing of the EAWs, conferred authority upon the Amtsgerichte to issue EAWs. Rather, the fact that the notification to the General Secretariat clearly recognises that local courts do have the power to issue EAWs is an additional factor, if anything, which supports the conclusion that there is no arguable basis for this court to doubt the competence under German law of the local courts to issue EAWs.

51. For all those reasons, there is no arguable basis for this court to consider that the competence of the Amtsgerichte to issue EAWs under German law is a matter for this court to determine. In any event, there is no arguable basis upon which this court could consider that there is doubt as to the competence of the courts which issued the EAWs in the present cases.

52. Mr Perry Q.C. invited us to refer certain questions of European Union law to the Court of Justice under Article 267 of the Treaty on the Functioning of the European Union. Parliament has provided that courts can make such references until the end of 31 December 2020: see section 1A of the European Union (Withdrawal) Act 2018. He described the issues arising as par excellence ones of European Union law.

53. We do not consider that there is any necessity for a reference here. We consider that the meaning of Article 6(1) and (3) is *acte clair*. Article 6(3) is intended to provide for the notification at the European level of which judicial bodies are competent under the law of the state concerned to issue an EAW. Notification is not the source of the

power to act nor a precondition of the issuing of a valid EAW. So far as Article 6(1) is concerned, the real issue is whether as a matter of German law the local courts have competence to issue an EAW. That is not a matter capable or suitable for a reference for a preliminary ruling to the Court of Justice.

54. For those reasons, we would refuse permission to appeal on the two grounds relating to Article 6(1) and 6(3) of the Framework Decision.

OTHER GROUNDS OF APPEAL

55. As set out in paragraphs 38 and 39 above Mr Perry confirmed to the court that if leave to appeal on the issues set out in paragraph 36 above was refused he would not be pursuing the section 12A ground of appeal on behalf of the first applicant and the section 25 ground of appeal on behalf of the second applicant. None of the other matters relied upon by either party in his grounds of appeal give rise to any arguable case and we refuse permission on all grounds.

CONCLUSION

56. Permission to appeal is refused to both applicants on all grounds.