Neutral Citation Number: [2009] EWHC 723 (Admin)

Case No: CO/7230/2008

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/05/2009

Before :

LORD JUSTICE LAWS
MR. JUSTICE OPENSHAW

- -

Between :

MILAN SPANOVIĆ	**Appellant**
- v -	
GOVERNMENT OF CROATIA	**First Respondent**
and	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Second Respondent**

- -
- -

Mr. E. Fitzgerald QC & Mr. J. Jones (instructed by **Atlee Chung & Company**) for the **Appellant**
Mr. D. Perry QC & Miss M. Cumberland (instructed by **Crown Prosecution Service**) for the **First Respondent**
Mr. B. Watson (instructed by **Treasury Solicitors**) for the **Second Respondent**

Hearing dates: 24th & 25th February 2009

- -

Judgment

Introduction

1. This is the judgment of the court prepared by Openshaw J.

2. This is an appeal under sections 103 and 108 of the Extradition Act 2003 ('the Act') by Milan Spanovic ('the appellant') against a decision of Senior District Judge Workman on 30th May 2008 by which he sent the case to the Secretary of State and against her order of 22nd July by which she ordered his extradition to Croatia ('the requesting state') for war crimes alleged to have been committed against civilians in 1991.

The allegation

3. The case has a long history; we will rehearse it only insofar as it is relevant to the current proceedings. The appellant was born in Eastern Slavonia in 1962, in what was then Yugoslavia, of ethnic Serbian parentage. He is now 46. Following the break up of that country, Eastern Slavonia was claimed by the breakaway state of Croatia; in the civil war which followed there was fierce fighting in Eastern Slavonia between the Croats and the ethnic Serbs.

4. On 18th August 1991, during the course of the conflict, it is alleged by the requesting state that irregular Serbian forces attacked Maja and Svracica, two villages in the Danubia region of Croatia; although there was an exchange of fire, no one was killed but after the villages had fallen to the Serbs, houses were burnt and looted, property was stolen and a civilian was beaten up. It is alleged by the Croatian authorities that the appellant took part in this attack. The appellant claims that he only served in the regular Serbian forces as a private soldier; it is not clear whether he admits his presence in the villages at the time of the attacks but he accepts that he was known by some of the villagers, he even admits to going to school with one of the identifying witnesses. If the case goes to trial, he will presumably say that the witnesses were mistaken when they purported to recognise him as a participant in the attack.

The trial in his absence

5. On 17th November 1993, at the Sisak District Court, the appellant was tried and convicted of war crimes against the civilians, which it was alleged he had committed in the course of the attack on the two villages. The appellant was tried with nineteen others. Since the appellant was at the time still engaged in military operations in the field, neither he - nor it would seem any of his co-defendants - had any notice of the trial, nor of the charges which they faced; each was tried in his absence; one state defender was retained to act on behalf of all nineteen defendants but necessarily without instructions; he could provide no effective defence. Perhaps not surprisingly, all were convicted; in due course all received the maximum sentence of twenty years imprisonment. This was self evidently an unfair trial.

His movements after the trial

6. Following the conclusion of hostilities, in August 1995, in the course of 'Operation Storm', in an act of 'ethnic cleansing' widely condemned by world opinion, the Croats forcibly expelled the Serbs from Eastern Slavonia; as a result, the appellant and his family had to flee to Serbia. However, in January 1997, after the United

Nations forces moved into the area to protect the minority groups, including the ethnic Serbs, the appellant and his family returned.

7. The appellant lived in that part of Croatia until 1998; during that time, he occasionally travelled out of the country and returned, he was allowed to come and go freely. He also had various official dealings with government agencies, for example in applying for a passport for himself and later for his son and for a driver's licence; no one has ever stopped him or asked him about his alleged complicity in war crimes.

His immigration status

8. In November 1998, after a neighbour with the same name as the appellant had been assaulted – possibly by lawless elements in the Croatian police - apparently in the mistaken belief that he was the appellant, the appellant learned for the first time that he had been tried in his absence and convicted as a war criminal; he then realised that he was in peril in Croatia and fled to the UK. He claimed political asylum in this country claiming that, if he returned to Croatia, he would be persecuted as a war criminal, who had been convicted in his absence after an unfair trial.

9. I need not go through the complicated history of his claim for asylum, the subsequent refusal of that claim, his appeal against that refusal and the subsequent compromise of that appeal. Since the regime then in place in Croatia had little or no interest in providing a fair trial for Serbs accused of war crimes, his claim that he would be imprisoned following his conviction after an unfair trial, held in his absence, was at the time accepted; he was retrospectively granted exceptional leave to enter. He was later granted indefinite leave to remain.

The first proceedings

10. At the end of hostilities in Croatia, a warrant was issued for his arrest on 19th April 1995 but in the chaos and turmoil following the civil war, it was not executed. The warrant was renewed in 2001 and again in February 2004. An international arrest warrant was issued in October 2004 and Interpol was engaged to find him.

11. Meanwhile, even after he had arrived in the UK, the appellant had some dealings with the Croatian authorities, for example in registering the birth of one of his children (the original records having been destroyed in the civil war), in registering the birth of another in this country and in processing some land transfers. He visited the Croatian embassy here in London on a number of occasions.

12. He was eventually traced to the UK. He was arrested in this country on 13th June 2006. The matters came before the Senior District Judge. On 20th March 2007, he made these findings:

> '17. I now turn to the issue of passage of time. The defence claim that Mr Spanovic's extradition should be barred because it would be unjust or oppressive to extradite him by reason of passage of time since he is alleged to have committed the extradition offence. The offence is alleged to have occurred on 18th August 1991 and he was convicted in his absence on 17th November 1993. A warrant for his arrest was issued on 20th

April 1995. The former state of Yugoslavia was in a state of civil war and in August 1995, the defendant and his family left Croatia and fled to Serbia. He returned to Croatia in January 1996 when the area came under the control of the United Nations Transitional Administration. He remained in Croatia during the time that the Croatian authorities took full control of the sector in January 1998 and in 1997 was issued with a Croatian passport and driver's licence. He left Croatia and came to the United Kingdom in November 1998. He did not seek to hide his whereabouts and indeed, co-operated fully with the authorities in trying to resolve his immigration status. His address in the United Kingdom has been known since 1998. During that time, Croatian passports have been issued to his 2 children by the Croatian Embassy in 2005 and that he had attended the Croatian Embassy on 2 occasions in 2004. I am satisfied that the defendant has not attempted to hide his whereabouts but has been open with the authorities and that the Croatian Government have had knowledge of this whereabouts since at least May 1997.

19. The delay in this case is almost 16 years. I accept that for 5 or 6 of those years the country was in the turmoil of civil war. Even making allowance for that period, there is a very considerable delay since the extradition offence is alleged to have been committed.

20. In considering whether it would now be unjust or oppressive to return the defendant, I have considered the principles laid out in the case of Kakis. In deciding whether it would now be unjust for the defendant to be returned, I have considered whether there would be serious impediments to a fair re-trial. I have in mind that the alleged offences were said to have occurred during a period of civil war in which inevitably evidence will be hard to find or reconstruct. Witnesses memories after such a lengthy period during which radical change took place have faded or be inaccurate. Inevitably, some witnesses may be unavailable or impossible to trace.

21. Mr Spanovic came to this country in 1998 and for the last 8 years has, with his family, made his home here. He fully co-operated with the Immigration Authorities of the Home Office. His appeal seeking asylum in this country was dismissed on the basis of factual inaccuracy. In October 2000, the defendant was granted Exceptional Leave to Enter the United Kingdom for a period of 4 years. In 2000 that was further extended by the grant of Indefinite Leave to Remain. Mr Spanovic had, therefore, a reasonable expectation that he could live freely in this country and, as far as I am aware, he had done so in employment, supporting his family and without committing offences.

22. From the evidence I have received from the Home Office, it is apparent that in 2000, with the full knowledge of the conviction in Croatia, the Immigration authorities in this country considered that returning the defendant to Croatia would infringe his Human Rights. No doubt that finding also reassured the defendant that he would not be returned to Croatia.

23. For these reasons I find that it would now be both unjust and oppressive to extradite the defendant to Croatia.'.

13. The appellant was therefore discharged pursuant to section 82 of the Act on the grounds that his extradition would be unjust or oppressive. The requesting state appealed to the Divisional Court against that finding.

The first appeal

14. In the course of his judgment, delivered on the 27th July 2007, (reported at [2007] EWCA 1770 (Admin)) Hughes LJ reviewed the authorities, to which we will later turn. His actual decision is to be found at paragraphs 14, 15 and 17:

'14. It does seem to me that the District Judge somewhat overstated the case in saying Mr Spanovic's whereabouts had been known to the Government of Coatia since May 1997. It is certainly true that in that month he was issued with a new passport, and shortly after with a driving licence. It is also plain that between May 1997 and leaving Croatia in November 1998 he has travelled several time across the border into Hungary, and perhaps Austria, as the stamps on the passport show, but was not arrested. I do not think that we can here resolve a difference of evidence between the parties as to the division of responsibility for the issue of this passport in 1997 as between the nascent Government of the newly self-declared Croatia on the one hand and the UN supervising administration UNTAES on the other. I doubt very much that it has to be resolved, though that must remain a matter to the District Judge. The evidence would appear to show, whoever strictly issued the passport and other documents that Mr Spanovic's identity, passport number and personal details were on or available to the database(s) of the Government from May 1997 onwards. That may have been in common with an enormous number of people issued with new identity documents as part of a mass process designed to restore identifies to those who on one side or the other, had lost official registration during the war. Whether that is so or not, he was not in fact picked up, though there must have been opportunities when he might have been, such as border crossings. Likewise, the evidence clearly did establish that in the period when he was in the UK from November 1998 onwards Mr Spanovic had some contact with the Croatian Embassy, to which he applied for passports for his children and which he visited on a number of occasions. It was also shown that whilst in the UK he has also had some contact with branches of the Croatian Government in connection with matters such as a land

registration, probate, and travel documents for a daughter who had remained in Croatia. It seems not to be in serious dispute that on these occasions he dealt in his true name and provided his settled English address. None of that generates a request for arrest and none was made until 2006 when it seems there was a request by Croatia to Intepol to locate him.

15. All of that, however, falls some way short of showing that those in Croatia who were charged with following up the conviction and attempting to execute the warrant knew where he was before 2006. There is so far as I can see no basis for saying that they did. If the assertion made by Mr Spanovic be true, that someone else was arrested in 1998, having been mistaken for him, (which is something of which the present Government says it has no knowledge either way) then that also would tend to suggest that his whereabouts were not accurately known, at any rate at that time, to those looking for him. At all events, all that this evidence can justify, at best, is the proposition that the relevant Croatian officials or prosecutors could have found him if they had tried harder. Mr Stewart put it in this way, that if sufficiently determined the officer(s) of the Government would have found him….

17. In the present case, I am not sure how far the District Judge has addressed the possible relevance of culpable delay. It is not at all clear that he was addressed on any basis other than that it was enough that some part of the Croatian Government had the means of knowledge of the whereabouts of the respondent: that seems to be the genesis of the way he expressed himself in his judgment. For the reasons which I have explained, I do not think that that is enough. If culpable delay be advanced on behalf of the respondent, the question whether there was any blame must be addressed, and in any event the enquiry must move on to the next and critical step, namely whether as a result it would be unjust or oppressive to extradite the respondent. Accordingly, I conclude that ground (ii) is made out, and that the case must be remitted to the District Judge.'

The second proceedings

15. So the matter returned to the Senior District Judge for re-determination. On 30th May 2008, after hearing evidence and argument for some days, he sent the case to the Secretary of State, pursuant to section 87(3) of the Act. Following this, on 22nd July, the Secretary of State ordered the appellant's extradition. It is against these orders that the appellant again appeals.

The time point: the law

16. Section 82 of the Act reads as follows: 'A person's extradition … is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have committed the extradition offence …'.

17. The law on the point is clear from a number of authorities. The starting point must be the speech of Lord Diplock in *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779; I quote from page 782:

> "Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trail itself, 'oppressive' as directed to hardship of the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there if room for overlapping, and between them they would cover all cases where to return him would not be fair. Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied upon as a ground for holding it to be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of this defence in consequence of delay due to such cause are of his own choice and making. Save in the most exceptional circumstances it would be neither unjust nor oppressive that he should be required to accept them".

18. In the case of *La Torre v. the Government of Italy* [2007] EWHC 1370 (Admin), Lord Justice Laws cited with approval the words of Lord Edmund-Davis in Kakis:

> "[T]he fact that the requesting government is shown to have been inexcusably dilatory in taking steps to bring the fugitive to justice may serve to establish both the injustice and the oppressiveness of making an order for his return, whereas the issue might be left in some doubt if the only known fact related to the extent of the passage of time, and it has been customary in practice to advert to that factor..."

Lord Justice Laws concluded in La Torre that:

> "All the circumstances must be considered in order to judge whether the unjust/oppressive test is met. Culpable delay on the part of the State may certainly colour that judgment and may sometimes be decisive, not least in what is otherwise a marginal case (as Lord Woolf indicated in Osman (No 4). And such delay will often be associated with other factors, such as the possibility of a false sense of security on the extraditee's part. The extraditee cannot take advantage of delay for which he is himself responsible (see Lord Diplock in Kakis at 783). An overall judgment on the merits is required, unshackled by rules with too sharp edges".

Hughes LJ put the matter thus when giving judgment in the instant case (at page 16):

> ' … a development by the person sought of a sense of security may be one of the relevant effects of delay and one which may lead to a finding that extradition would be oppressive, as for example in

> Kakis itself, it seems to me that that may well involve examining whether culpable neglect or delay on the part of the requesting state has engendered such sense of security. But I have no doubt that it is not the law that if there is proved to be culpable delay in find the man it is therefore necessarily unjust or oppressive to extradite him, any more than it is necessarily unjust or oppressive to try a domestic English defendant because the police have been (culpably) less than assiduous in catching him. Although culpable delay may be relevant, the principle focus, when it come to considering the passage of time is not on a judgment on the performance of the requesting state's investigation but on the effect that time passing has had.

The time point: the facts

19. The first point, therefore, for the Senior District Judge to consider was whether the appellant was a fugitive of justice so as to disentitle him from relying on the time bar. He made the following findings: that the appellant held a passport which had been properly issued to him by the Croatian authorities; that any delay in leaving the country after he heard of his trial and conviction was caused by delays in obtaining a passport for his infant son and by the lapsing of the UN mandate; that there were at the time serious doubts about the quality of justice available to ethnic Serbs in Croatia. Accordingly, he held that the appellant was not a fugitive from justice, indeed he found as a fact that 'it was reasonable for the [appellant] to leave Croatia'; accordingly, he held that he was not therefore prevented from raising the passage of time as a bar to extradition. Plainly, the appellant does not appeal against that favourable part of his decision.

Culpable delay

20. The next point is whether the government of Croatia have shown culpable delay in seeking his extradition, which – if made out - would be one of the relevant considerations.

The district judge expressed himself in these terms:

> '17. In my reasons given in March 2007, I concluded that he Croatian Government had knowledge of the defendant's whereabouts since at least May 1997. that was based upon the fact that the defendant had disclosed both his permanent and temporary address in applying for a passport in 1997 and that since his arrival in 1998 he did not seek to hide his identity or whereabouts and fully cooperated with the authorities in trying to resolve his immigration status. There was evidence that he had visited the Croatian Embassy on a number of occasions and applied there for passports for his children. The Administrative Court commented that "all of that however falls some way short of showing that those in Croatia who are charged with following up the conviction and attempting to execute the warrant knew where he was before 2006. There is, so far as I can see, no basis for saying that they did". Following that guidance I have looked to see whether there is evidence that the Croatian officials or prosecutors responsible for pursing these

> proceedings knew of the defendant's whereabouts. I can find no evidence to meet that more stringent criteria and I conclude that there is no evidence of culpable delay on the part of the Requesting State.'

21. In so finding, plainly the Senior District judge was relying on the judgment of the Divisional Court at paragraph 15, to which we have already referred. He held therefore that the government of Croatia has not been guilty of any delay – let alone culpable delay - at all.

22. Mr Fitzgerald argues that this decision was wrong; he says that the state is one indivisible entity; in some senses this is true, but it does not follow that the act of each and every minor functionary engaged on each and every administrative act of each and every bureaucratic arm of the state concerning a citizen who, entirely unknown to them, is in fact wanted for war crimes, should be imputed to the law enforcement agencies charged with bringing such offenders to justice. There is clear evidence in the bundles before us that staff at embassies are not required or expected to check the whereabouts of wanted persons. Furthermore, a number of the actions of the officials in Croatia or in their embassy in London may have been taken at a time when the country was still in turmoil after the civil war and the administration was still fragmented and not fully integrated into the legal or administrative system of the new Croatian government. Everything depends on an examination of the facts of the particular case, which the Senior District Judge carefully considered in the course of his two rulings.

23. There was, as the Senior District Judge found, nothing in this case to suggest to the authorities with whom the appellant was actually dealing knew or even ought to have known that he was wanted for war crimes.

24. Furthermore, we are mindful of the rule that ordinarily this court will respect findings of fact made after evidence has been heard. We see no error in the approach of the District Judge or in his decision and this part of the appellant's appeal fails.

25. The same considerations apply to the argument which Mr Fitzgerald advances that these dealings with officials of the state somehow 'lulled the appellant into a false sense of security' – these are the words which he stressed. In our opinion, nothing passing between the appellant and these minor functionaries in other departments about other matters entirely had any bearing at all upon his alleged commission of war crimes some years before. There is nothing in this point and it is not surprising that the Senior District Judge did not even mention it in the course of his judgment.

The appellant's personal circumstances

26. There is a good deal of overlap, or at least interplay, between these various concepts but we focus now upon the appellant's personal circumstances. The Senior District Judge had to weigh the fact that the appellant had lived a peaceful and law abiding life here with his family since 1998, against the high public interest that persons accused of war crimes should face trial. This balancing act essentially requires a value judgment. He concluded that the balance here plainly favoured his return, provided that he would receive a fair trial. On the material before him, we see no error in his approach or in his decision.

The appellant's psychiatric condition

27. He did not have before him any evidence as to the appellant's psychiatric condition, to which we will now turn.

28. This was not a point which was taken below, in either sets of proceedings. Indeed it was not even taken before us until Mr Fitzgerald, having himself made detailed oral submissions to supplement his extensive skeleton argument, rose to reply to Mr Perry's submissions. He says that his previous written instructions not to take the point have now been countermanded and he now wishes to argue that the appellant's mental state is such that he should not be extradited.

29. Such brinksmanship is not to be encouraged, however in an attempt to head off further proceedings based upon this further information, we thought that we should deal with the point on its merits. There is the power for us to do so in section 104(4) which permits the court to hear and determine an issue even though it was not raised at the extradition hearing. There is no power for us to remit the point back to the Senior District Judge to hear and determine the matter since it was not an issue 'which he decided at the extradition hearing' (see the terms of section 104(1)(b)).

30. We have before us a report by Dr Roberts, dated the 23rd January 2008. he reports that the distressing and frightening experiences which the appellant claims that he suffered during the war, his enforced flight to Serbia during the ethnic cleansing, his return and his second flight from Croatia, have resulted in him suffering from post traumatic stress disorder, with upsetting flash backs. The appellant has low self esteem, he believes that he has deserted his fellow Serbs. He has been receiving treatment from his general practitioner for this condition at least since June 2007. He has also been under the care of the Community Mental Health Team. His anxiety has increased following the publishing of his arrest as a suspected war criminal. He has developed a paranoid and psychotic delusion that he is being hunted down by Croats, whom he fears intend to kill him. He says that he would rather kill himself than allow himself to be returned for trial in Croatia, where he believes that he will be tortured and killed.

31. Dr Roberts therefore concludes that he is suffering from serious psychiatric disorders, including a moderately severe and chronic post traumatic stress disorder and a persistent delusional disorder, which conditions have led to depression. Dr Roberts thinks that if the appellant is extradited to Croatia and held in a Croatian prison by those whom he regards as his 'enemies and tormentors', with the inevitable separation from his family, there is likely to be a 'serious exacerbation of his condition', leading to the probability of a serious suicide attempt. Dr Roberts believes that the treatment which he has so far received in this country has been ineffective; he has recommended psychometric testing, which might alleviate his conditions.

32. We have also read a statement from the appellant's wife dated 24th of February 2008 which speaks of her concerns' about the appellant's mental state.

33. Following the hearing, two further reports by Dr Roberts, both dated 12 March, were lodged. One deals with the appellant's present condition and another outlines the particular problems which he would face if extradited to Croatia. He reports that the appellant's paranoid psychosis has significantly deteriorated to the extent that he now considers that the appellant would be unfit to plead according to the tests applied by

the common law in this country. He is also strongly of the opinion that his condition would worsen if he was to be returned to Croatia, particularly since his paranoia triggers a delusional belief that the Croatian authorities are intent upon murdering him. He points out that 'careful observation and a sympathetic management of his condition will be required throughout any extradition process and during any trial'. (We will consider later in the course of this judgment whether such treatment would be provided to him if he was to be returned to Croatia).

34. The evidence of the appellant's illness permits Mr Fitzgerald to argue that section 91 of the Act is engaged. Section 91 requires the discharge of a person whose extradition is sought if the court is 'satisfied' that 'the physical or mental condition of the person is such that it would be unjust or oppressive to extradite him'.

The authorities

35. Whether any particular person suffers from a mental condition which renders it unjust or oppressive to extradite him must necessarily be a value judgment upon the facts of the particular case but some assistance is to be found in the authorities, which make clear that a very high threshold is set before a person's physical or mental condition will make it unjust or oppressive to extradite him.

36. In *Warren* [2003] EWHC 1177 the claimant was suffering from a severe psychiatric illness so severe that 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. The medical evidence established a clear risk of suicide if he was to be returned to the US. Notwithstanding the cogency of the medical evidence, the court was unmoved. Moses J said this (at paragraph 27):

> 'The starting point, in my view, must be the proposition that it is part of the trial process that there should be a determination where such an issue arises by the court of the question whether a defendant is fit to be tried…
>
> 27. 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 , just as other questions of fact are for the courts of the requesting State …'

Hale LJ said this:

> '40. The object of extradition is to return a person who is properly accused or has been convicted of an extradition crime in a foreign country to face trial or to serve his sentence there. This include 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 executive or the medical profession. The

extradition process is only available for return to friendly foreign states with whom this country has entered into either a multi or a bilateral treaty obligation involving mutually agreed and reciprocal commitments … .

41. Of course, there must be safeguards to protect the person accused. Some are for the courts to determine, for example whether he has been accused of an extradition crime or, in this case, whether there is a prima facie case against him. But in this case there is no original jurisdiction in this court to determine wider issues of fairness and potential hardship. That power lies in the Secretary of State. The well-established test, as my Lord has said, is whether it would be wrong, unjust or oppressive to return the claimant. It is also accepted that the right to respect for private and family life in Article 8 of the European Convention on Human Rights is engaged in this decision, and so the Secretary of State has to strike a fair balance between the competing interest of that right and the public interest to which I have already referred.

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 that it may be wrong or oppressive to do so if the inevitable result will be that the will be found unfit. But even in those circumstances there may be countervailing 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 is 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. That is not this case, but I would not wish to accept that it is inevitably going to be oppressive to return somebody in such circumstances.'

37. In *Boudhiba v. Central Examining Court No. 5 of the National Court of Justice, Madrid, Spain* [2006] EWHC 176, the appellant contended that it would be unjust and oppressive to send him back to Spain when there was clear medical evidence that he was suffering from clinical depression with psychotic features, complicated by post-traumatic symptoms; he was also suffering from auditory hallucinations and was said to be suicidal. This argument was rejected; Smith LJ said at paragraphs 64 and 65 of the judgement that:

'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'.

38. In *Tajik v USA* [2008] EWHC 666 (Admin), the Court (Richards LJ and Swift J) rejected an argument under section 91 of the 2003 Act. The Appellant was suffering from coronary heart disease and also from depression. The submission was that there was a serious risk to his mental and physical health and to his life in the event of his extradition. Having considered the relevant case law, Richards LJ stated at paragraph 108 of the judgment:

> "Whilst a judgment has to be made in every case by reference to the particular facts, it is clear from those authorities that in practice a high threshold has to be reached in order to satisfy the court that a requested person's physical or mental condition is such that I would be unjust or oppressive to extradite him".

39. It is plain to us, that the bar is set very high, and the graver the charge, the higher the bar, in that there is a heightened public interest in the alleged offender being tried: provided, of course, that the trial and the conditions in which he will be held will be fair.

The facilities in Croatia for the treatment of such conditions

40. Since the requesting state had no warning that these points were to be taken, we allowed an adjournment for enquiries to be made as to the facilities available for dealing with these conditions should the applicant to be returned to Croatia.

41. We have before us a statement from the responsible official at the Ministry of Justice in Zagreb, dated the 4th March (with a short supplementary letter dated 12th March), which is to this effect. The appellant, if extradited, will be medically examined upon his arrival in Croatia; that examination will include an assessment of his mental health; if treatment is required it will be provided. Mr Fitzgerald in his further submissions (dated 13th March) suggests that the appellant will not be eligible for bail but it is clear to us that whether or not he is to be detained in custody is a matter for determining by the local County Court; it is, in other words, a judicial decision to be taken by the competent court in the light of all the circumstances.

42. If he is ordered to be kept in custody, whether before or during or after trial and sentence, he will be entitled to receive the same level and degree of medical care which he would receive as an ordinary citizen of Croatia, outside the prison system. If, for some reason, such treatment is not available in prison, he will be treated in a civilian hospital. The authorities are aware of the dangers of self harm and will guard against it.

43. There is a procedure in Croatia for the determining whether a person is unfit to stand trial; if he is so found, the trial would not take place until his condition has improved but if it is found that he did the act alleged against him, without mental capacity, the

trial court has the power to order his confinement or detention in a prison hospital. Although Mr Fitzgerald complains of this, the provision is markedly similar to the process in this country which would follow upon a finding that a defendant facing a serious charge was unfit to plead.

44. No doubt requesting states can easily give assurances as to the suitability of their regimes and we are not bound always to accept them at face value.

45. We have carefully considered the several decisions of the European Court of Human Rights, to which Mr Fitzgerald has referred us, in which the medical care available within the prison system in Croatia has been found to be inadequate; these are the cases of Novak v Croatia (8883/04), Pilic (33138/06), Testa (20877/04) and Centauer (73786/01). Novak concerned the failure of the authorities in Croatia to provide treatment for Post Traumatic Stress Disorder to one particular Croatian prisoner in one particular Croatian prison, when such treatment had been ordered by the court as part of his sentence; none of these cases amount to a condemnation of the general medical facilities provided in Croatian prison system, indeed in Centauer (at paragraph 51) the court, having reviewed the evidence of the facilities available said: '… the foregoing proves that the Government [of Croatia] have shown a willingness to comply with the recommendations of the Court and of other bodies of the Council of Europe, a fact that cannot be ignored'.

46. In our judgment, there is nothing in the material before us to cause us to think that the appellant will not receive proper and appropriate medical care in Croatia or that the trial process in Croatia will do otherwise than to ensure that he is treated and tried fairly.

Conclusion

47. It is clear that section 91 creates a 'stand alone' right but the appellant's physical and mental condition does, of course, impact upon the judgment that the court must make under section 82 as to whether it would be 'unjust and oppressive' for him to be returned. In our opinion, for the reasons which we have already set out, neither considered in isolation nor cumulatively with the other matters to which we have referred, is the appellant's physical or mental condition so severe that it would be unjust or oppressive to send him back to Croatia, where – as we have already found – the legal system, the prison system and the medical services there are well able to cope with his condition.

The fairness of the retrial

48. We move on to what seems to us to be the real heart of the case. If he will not face a retrial on his return and a fair retrial at that, then it would plainly be unjust and oppressive to return him. Since the first trial was obviously unfair, everything now hangs on whether the appellant would receive a fair trial if he were to be returned to Croatia. It is now argued by Mr Fitzgerald that he will not even receive a re-trial at all.

49. It should be noted that this point was not taken below. In the first hearing before the Senior District Judge, the requesting state 'guaranteed' – their word – that the appellant would be entitled to a full retrial if he asked for one within a year of his

return to Croatia; accordingly the Senior District Judge expressed himself (in paragraph 17) 'satisfied that [the appellant] would be entitled to a re-trial which would include the right to legal assistance and the attendance and examination of witnesses'. The Divisional Court (at paragraph 7) recited that: 'The government [of Croatia] … gave an assurance that he would be re-tried. Whatever the basis in Croatian law for that may be, which remains unclear, it is no longer in issue that he will in fact undergo a retrial if returned'. By the time of the second hearing, the appellant had abandoned this point.

50. However, he now seeks to re-open the matter. Mr Fitzgerald argues that a recent case in Croatia (Arambasic, recently heard before the Split County Court) and the response of the Croatian authorities in their letter of 19th February 2008 to a specific request by the appellant, suggests that the appellant would have no right of re-trial at all but he would merely be allowed a review of the conviction, a procedure he likened to an appeal with the right to call witnesses, with the burden on the defendant to show that the conviction was wrong. We accept that if this is all to which the appellant was entitled on his return to Croatia, it would be an entirely insufficient guarantee of a fair trial. We have therefore agreed to re-examine the point again, notwithstanding the point that it was not taken below.

The unconditional right to a re-trial

51. There are two different points: the first is whether he will receive a retrial at all, the second is whether, if there is to be a re-trial, it will be fair. We will address these points in turn.

52. Croatia is a party to the European Convention on Extradition, together with its various Protocols. Article 3 of the Second Additional Protocol provides that, when a person has been tried in his absence '... extradition shall be granted if the requesting state gives an assurance considered sufficient to guarantee to the person claimed the right to a retrial which safeguards the rights of the defence'.

53. Mr Perry QC on behalf of the requesting state has said in clear and unequivocal terms that the appellant will have an unconditional right to a re-trial, if he claims that right within one year of his return to Croatia; this right is given by Article 412 of the Croatian Criminal Procedure Act, which provides that: 'if it becomes possible to conduct a trial in his presence, criminal trials in which a person was convicted in absentia shall be re-opened…' provided that the person makes a claim within one year of returning to Croatia.

54. This unconditional right to a re-trial, as we have found it to be, is to be distinguished from an entirely different procedure, entitled 'Request for the renewal of criminal procedure held in absentia' recently introduced into Croatian law, by which even a person who is outside Croatia can invite the courts to review the safety of a conviction recorded in their absence. This right, given by Articles 497 to 508 of the Criminal Procedure Act is the explanation for the case of Arambasic, on which Mr Fitzgerald relied; this was a request under these new procedure and not an application for a retrial under Article 412.

55. The appellant himself made an application under these new procedures for the matter to be re-examined whilst he was still in the UK. In fact, on a detailed reconsideration

of all the material, the authorities declined to overturn the conviction on the strength of his new submissions. They set out their findings and their detailed reasons in the letter of 19th February.

56. We conclude that the case of Arambasic and the letter of 19th February relating to the appellants 'request for the renewal of criminal procedure held in absentia' do not impact at all upon his right to a re-trial under Article 412, which are quite separate legal procedures. Accordingly, we are entirely satisfied that upon his return to Croatia, he will be allowed a re-trial unconditionally.

Fairness generally

57. Given that he will be entitled to a re-trial, we turn to the next question which is whether the retrial would be fair. Section 85(8) of the Act defines the rights that a person such as the appellant, who has been convicted in his absence and who has not deliberately absented himself from his trial, should have on a re-trial, being '(a) the right to defend himself in person or through legal, assistance of his own choosing or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require and (b) the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'.

58. Mr Perry has referred to the clear declarations of the requesting state, which he has been authorised to repeat to us, that the appellant will be entitled to a re-trial unconditionally.

59. He will have at the re-trial all the rights referred to in section 85(8) of the Act to which we have already referred. He has also been able to re-assure us that all the common features of a fair trial are present within the criminal justice system in Croatia; for example (but only by way of example for it would be quite impracticable to set out the whole of the relevant safeguards): the right to independent legal advice and representation (a right given by Article 5 of the Criminal Procedure Act of Croatia), the right to call evidence (a right given by Article 4), the burden of proof will be and will remain upon the prosecution. In short, there will be a full rehearing on the merits of the case. There is an automatic right of appeal to the Supreme Court and then on point of law to the Constitutional Court.

60. Furthermore, he points out that Croatia is a signatory of the ECHR, and the appellant would therefore be protected by the rights given by the Convention, including the rights of a fair trial enshrined in article 6. Article 14 of the Croatian constitution guarantees equality before the law; discrimination is a criminal offence. Furthermore, any decision of the court in Croatia would be reviewable on appeal both in Croatia and in the last resort to the European Court in Strasbourg.

61. In the implementation of extradition treaties, it is important that weight is given to the undertakings given by governments of countries who are fellow signatories of the European Convention (see on this point the decision of the ECHR in *Tomic v UK* 14 October (2003)).

62. We have considered the caveat entered by Walker J in *Lisowski v Poland* [2006] EWHC 3227 (Admin) (at paragraph 26) to the effect that the fact that a requesting

state is a signatory of the ECHR is a relevant factor but it is not determinative of the issue in the absence of other clear evidence about the legal processes in that state. However, in our judgment, it would require cogent reasons to be given before concluding that a person returned to such a country would not receive a fair trial.

63. Mr Perry also draws our attention to Article 275 of the Croatian Penal Code which imposes upon the courts the duty to stop or curtail the trial process if 'circumstances barring prosecution exist'; he suggests that this imposes a general duty upon the courts to exclude any unfairness. The wording seems to us to be rather too vague to amount to a specific or valuable safeguard and this particular provision does not – in our opinion – bear the weight which Mr Perry seeks to place upon it.

64. Mr Fitzgerald complains that there is no safeguard precisely analogous to the procedure available in this country permitting a defendant to apply to stay the proceedings on the grounds that they would be an abuse of the process of the court. The answer to that is that the procedure is peculiarly a remedy devised by the common law courts in this country; it is for other countries to lay down their own procedures to provide for a fair trial.

65. Echoing a point articulated by Mitting J in *Krzyzowski v Poland* [2007] EWHC 2754 (at paragraph 31), we are anxious to make clear that it is by no means a requirement of the extradition applications that requesting states adduce evidence of their law and procedures, to do so would – to use his words – 'significantly blunt the effectiveness' of the European Arrest Warrant procedure, and it would no doubt greatly add to the cost and complexity of the hearing. We have examined these procedures only because the fairness of the trials of ethnic Serbs before the courts in Croatia has been directly challenged.

66. For the reasons given, in our judgment, the criminal law and procedure of Croatia, if applied to the re-trial of the appellant is well able to provide him with a fair trial.

Extraneous circumstances

67. We turn now to Mr Fitzgerald's submission that the appellant will not receive a fair trial in Croatia for war crimes committed against Croats because he is an ethnic Serb. The applicant places considerable reliance upon the statement of Savo Strbac, an ethnic Serb and formerly a judge in Yugoslavia, now an adviser to an organisation called Veritas, which works in Belgrade to secure justice for Serbs in Croatia. His evidence – and we here summarise it robustly - was to the effect that despite the declarations and avowals of the new regime in Croatia that they will respect the human rights of ethnic Serbs charged in criminal proceedings, the reality falls short of these pious aspirations; he said that the criminal justice system still largely depended on judges who were appointed under the former discredited regime of President Tudjman and that the courts when trying war crimes remained biased against ethnic Serbs. The District Judge heard him give evidence and he was not impressed; he thought that the witness was not 'totally objective and independent'.

68. It is true that there has in the past been considerable prejudice against ethnic Serbs and there may have been a time when they did not receive a fair trial. It is clear, however, from the material before us that there have been considerable improvements. This was first noted by this court in *Travica v Croatia* [2004] EWCA

2747 (Admin), in which Laws LJ analysed the descent into nationalism during the regime of President Tudjman and the 'steady amelioration' since elections brought into power a new regime determined to rejoin the mainstream of European states. There are some continuing doubts but now even the ICTY has delegated some of the Yugoslav war crimes cases to the Croatian courts. From 1993 to 2006, the Supreme Court has dealt with 263 cases of war crimes, yet no final judgment has been challenged before the ECHR.

69. On the material before us, we are satisfied that Croatia will provide a fair trial to the appellant, even though he is a person of Serbian ethnicity accused of war crimes against Croatians.

70. We make clear that we have been provided by Mr Fitzgerald with two pages of a 14 page judgment of the Court of Appeal in Rome in the case of Ilija Brcic, handed down on the 8th July last, where on the material presented to that court on the facts of that case, they seem to have come to a different conclusion. This carries no weight with us as we consider the material available to us on the facts of this case.

Prejudice caused by delay and the passage of time

71. Of course there are problems caused by trials which take place many years after the event. Witnesses do die and disappear; memories do fade; documents are destroyed or lost. All these are common features of war crimes trials, which have often sanctioned proceedings after many more years than have passed since the raid on the two Croat villages in 1991. All legal systems must grapple with these problems and make allowances for the problems caused to the defence by delays or just by the effuxion of time. There is no reason to think that the legal system in Croatia is not perfectly able to make the necessary allowances.

72. The applicant claims that he has been prejudiced by the death of one Dragan Jakovovic, who was a co-defendant of the appellant's at the original trial in their absence. The appellant has not referred to this witness, or to the importance of his evidence, in the statements that he made before the death of this so-called witness. Nor is it suggested what it is alleged the witness might have said to assist the appellant. We agree with the submissions made by Mr Perry that the relevance claimed for the evidence of this witness only after his death should be treated with some scepticism. Indeed the reliance now sought to be put on this witness suggests a degree of opportunism.

The speciality point

73. There is no doubt that the conduct alleged against the appellant, if committed in the UK, would amount to the offences of conspiracy to cause grievous bodily harm, conspiracy to rob or at least to steal, conspiracy to damage property by fire and otherwise than by fire. Mr Fitzgerald takes a different speciality point. He says that there is some evidence that other ethnic Serbs extradited for specific war crimes committed against Croatian civilians have in fact been tried for other offences; he cites two examples, being the cases of Radjan and Maslovara. If true this would breach the rules as to speciality. However, Mr Watson on behalf of the Secretary of State has set out the detailed circumstances of those cases; they simply do not bear the interpretation which Mr Fitzgerald originally sought to put upon them, not least

because the proceedings against them both were dismissed. He has not pressed the point, which is – on analysis – without merit.

Conclusion

74. Accordingly, for the reasons which we have set out, we conclude that there are no proper grounds to set aside the orders made and the appeal therefore fails.