



Neutral Citation Number : [2022] EWHC 1305 (Admin)

Case No: CO/1751/2021

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 27/05/2022

Before

**MR JUSTICE SWIFT**

Between

**ANDREJS GURSKIS**

**Appellant**

-and-

**LATVIAN JUDICIAL AUTHORITY**

**Respondent**

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**ANTHONY VAUGHAN** (instructed by **Lansbury Worthington**) for the **Appellant**  
**CLAIRE STEVENSON** (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 8 March 2022  
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**Approved Judgment**

## MR JUSTICE SWIFT

### A. Introduction

1. Mr Gurskis appeals against the extradition order made by District Judge John Zani on 12 May 2021, following a hearing that took place on 20 April 2021. Mr Gurskis is a Latvian national. His extradition is requested by the General Prosecutor’s Office, Latvia pursuant to a European Arrest Warrant issued on 11 August 2017, which has been certified by the National Crime Agency pursuant section 2(7) of the Extradition Act 2003 (“the 2003 Act”). The warrant is a conviction warrant. On 19 September 2014 at the Riga City Latgale Suburb Court, Mr Gurskis was convicted of possession and supply of a small quantity of heroin. The offence had been committed on or before 22 October 2013. Mr Gurskis was sentenced to 2 years 6 months in prison. The sentence was suspended for 2 years 6 months conditional on Mr Gurskis “signing in” with a probation officer every three months. The sentence was activated by the court on 24 March 2016 for breach of that condition. That order became final on 12 April 2016.
2. The ground of appeal advanced is that the District Judge was wrong to conclude that extradition would be a proportionate interference with Mr Gurskis’ rights under ECHR article 8 and the rights of his partner RK, and their child, AG (born on 25 September 2021). For that reason, it is submitted that Mr Gurskis’ extradition is prevented by section 21 of the 2003 Act. Part of the submission on this ground relies on evidence in statements made for this appeal, by Mr Gurskis dated 24 January 2022, and by RK on 5 January 2022 explaining events that have occurred since the extradition hearing.
3. In the course of his judgment, the District Judge made findings of fact relevant to his article 8 decision. Mr Gurskis first came to the United Kingdom in 2008 to be with his then wife and their child. (At the time of the extradition hearing that child was aged 12.) Mr Gurskis and his wife divorced in 2016, but his wife and child remain in the United Kingdom, and Mr Gurskis told the District Judge that he keeps in touch with his son.
4. Mr Gurskis’ relationship with RK started in 2018. RK is also a Latvian national. Her evidence was to the effect that she had not lived in Latvia since she was 14 years old (she is now 35 years old), and that her mother, stepfather, brother and other immediate family all live in the United Kingdom. RK has a son from a previous relationship (JK). He is now 16 years old. In her evidence to the District Judge, RK stated that JK has a good relationship with Mr Gurskis. At the time of the extradition hearing, RK was pregnant with AG. There was also evidence before the District Judge that, since 2014, RK has suffered from depression and has been prescribed medication. At the time of the extradition hearing she was not taking that medication (she had stopped taking it when she fell pregnant). She described herself as “stable” but said that the extradition proceedings caused her stress. The District Judge concluded that Mr Gurskis was a fugitive. At paragraph 52 of this judgment he said this:

“The JA asserts – and having considered the contrary, uncorroborated testimony provided by AG, I accepted these assertions – that AG is to be treated as a fugitive from Latvian justice because I find that;

(i) He was given a limited 3-month permission to leave Latvia while subject to a Suspended Sentence, but that he did not return to Latvia when that permission expired (see Further Information supplied). I also accept what it is asserted by the JA that he did not seek later permission to remain out of Latvia;

(ii) He failed to update the Latvian court or probation services with his up to date UK (Manchester) address, thereby placing himself outside of their reach (see Further Information – letters said to have been sent to the Derby address were returned as ‘undeliverable’);

(ii) He was fully aware of the terms of his suspended sentence, which included updating his place of residence, obtaining permission to go abroad for a period exceeding 15 days, and keeping all appointments with the probation;

(iv) He confirmed his knowledge of these obligations at an early stage of the process by signing the relevant written notification (see Further Information supplied).

(v) He was warned, and was therefore well aware of, the consequences of breaching the suspended sentence (see Further Information supplied).”

5. When considering the article 8 submission the District Judge directed himself by reference to the judgment of the Supreme Court in *Norris v Government of the United States of America* [2010] 2 AC 487, and the judgment of the Divisional Court in *Polish Judicial Authority v Celinski* [2016] 1 WLR 551. He accessed the facts of the case using the *Celinski* balance sheet approach.

**“67. Article 8 Balancing Exercise:**

**(a) Factors said to be in Favour of Granting Extradition:**

(i) There is a strong and continuing important public interest in the UK abiding by its international extradition obligations.

(ii) The seriousness of the criminal conduct in respect of which he has been convicted and sentenced. There remains a sentence of **2 years 1 months 1 day** outstanding, less the **9 days** spent on remand to this court before securing his release on bail.

(iii) The assertion by the Judicial Authority and the finding by this court that the requested person is a fugitive from Justice.

The reasons for this finding of fugitivity are that, as mentioned at para. 51 above, I accept assertions in relation thereto made by the JA, as follows:

(a) He left jurisdiction while subject to a Suspended Sentence, and did not return when the period of his permission expired.

(b) He failed to update the Latvian court or probation services with his up to date UK address, thereby placing himself outside of their reach.

(c) He was well aware of the terms of this suspended sentence, which included updating his place of residence, obtaining permission to go abroad for a period not exceeding 15 days, and keeping all appointments with the probation; he is said to have confirmed this via a signature and breached these terms both while in Latvia and after he returned to the UK. I am satisfied that he also chose not to answer a telephone call from probation to the mobile number he had provided them with.

(d) He was clearly warned of the consequences of breaching the suspended sentence.

**68. (b) Factors said to be in Favour of Refusing Extradition (Defence Representations)**

(i) AG says that he arrived in the UK in 2008 and settled here.

(ii) He adds that he has worked for most of the time that he has spent in the UK. He resides in rented accommodation with his pregnant partner, for whom he expresses concerns if extradition were to be ordered. It will also impact adversely on his son (by his previous relationship) as well as his partner's son from her previous relationship.

(iii) AG states that he has led a law-abiding life since settling in the UK

(iv) He asserts that he is not a fugitive from justice.

(v) AG submits that the criminal conduct for which return is sought is not so serious as would inevitably result in a prison sentence being imposed, if committed in the UK.

(vi) He also seeks to rely on the time that has passed since the commission of the offence as reducing the public interest in ordering extradition.”

The District Judge then stated his conclusion on article 8:

**“69. Article 8 Findings and Ruling:**

I find that it will **not** be a disproportionate interference with the Article 8 rights of the requested person for extradition to be ordered.

My reasons and findings are as follows:

(i) It is very important for the UK to be seen to be upholding its international extradition obligations. The UK is not to be considered a ‘*safe haven*’ for those sought by other Convention countries either to stand trial or to serve a prison sentence.

(ii) In my opinion, the criminal conduct set out in the EAW is serious and, in the event of a conviction in the UK for like criminal conduct, a prison sentence may well be imposed.

(iii) This court finds that the requested person is a fugitive from justice. The reasons for this finding are that it accepts the assertions made by the JA that he failed to abide by the conditions attached to his suspended sentence (see above).

(iv) It is appreciated that there will be hardship caused to AG, his pregnant partner and, to a lesser extent to his son (from whom

he is separated) and her son by her earlier relationship. However, as counsel will be aware hardship itself is not sufficient to prevent an order for extradition from being made. AG's partner has a large number of family members living very close to her and she maintains a close relationship with her mother. I am confident that, if necessary, her family will rally round to offer such assistance as may be required. [RK] is in receipt of appropriate benefits and there is no reason to consider that these will reduce were extradition to take place. Furthermore the £2000 case security will be returned on the understanding that AG surrenders himself as and when required. [RK] came across as an intelligent, resourceful and determined woman who would seek such assistance as was available (whether from family, her doctor or Social Services) to assist her in the event that extradition were to be ordered.

(v) I have also given careful consideration to the Brexit uncertainty for AG (as to whether or not he may be able to return to the UK after serving his sentence) but even though there may well be uncertainty surrounding his return to the UK, in my view, this does not tip the balance in favour of extradition being refused.

(vi) As this court has found as a fact that AG is a fugitive from justice, this finding brings paragraph 39 of the decision in **Celinski** above into consideration. I do **not** find that there are such strong counter-balancing factors as would render extradition Article 8 disproportionate in this case.

(vii) I would wish to add that, were it to be considered elsewhere that AG should not, in fact, be treated as a fugitive, I would still be of the view that ordering extradition would **not** be Article 8 disproportionate for AG, his partner and/or their children."

6. The submission for Mr Gurskis is that extradition will be a disproportionate interference with his article 8 rights and those of RK, JK and AG because events since the extradition order was made either change the article 8 assessment or make it plain that the District Judge's assessment of the material before him was wrong. Various matters are relied on. *First*, as matters have turned out, RK's family have not supported her since AG's birth. There has been a falling out between RK and her mother; RK's brothers have families of their own and have been unable to offer help. Thus, one premise of the District Judge's decision has turned out to be wrong, and events as they have turned out serve to emphasise the adverse impact that Mr Gurskis' extradition will have on RK. *Second*, the District Judge failed to take account of the impact of Mr Gurskis' extradition on AG. Mr Gurskis has been in custody since 2020 (his bail was revoked when he left the premises he shared with RK, at her request, following an argument between them), but before then Mr Gurskis was the "main carer" for AG. It is also submitted that, generally, the District Judge failed to pay proper attention to what would be in the best interests of AG and the best interests of JK, RK's son. It is submitted that the District Judge was wrong to describe Mr Gurskis as "separated" from his son from his previous marriage. The evidence was that before Mr Gurskis was detained in October 2021 they saw each other once or twice a month. Mr Gurskis absence since October 2021 has also affected JK. He is said to be "quite miserable" and is missing

the emotional support that Mr Gurskis used to provide. *Third*, the District Judge failed properly to consider the so-called “Brexit uncertainty” point. Following the United Kingdom’s departure from the European Union Mr Gurskis will not, once the sentence in Latvia is served, be able to re-enter the United Kingdom in exercise of free movement rights. Instead, whether or not he will be permitted to re-enter the United Kingdom will depend on the application of ordinary immigration rules. Thus, it cannot now be assumed that Mr Gurskis’ separation from RK, AG, and JK will be no more than the length the sentence he is to serve. This goes to the extent of the interference with Mr Gurskis’ article 8 rights. *Fourth*, it is said that the District Judge undertook no sufficient consideration of the seriousness or rather lack of seriousness, of the offence of which Mr Gurskis has been convicted. Mr Gurskis repeats the submission made to the District Judge that the public interest in favour of extradition is reduced because the offending leading to the sentence and the European Arrest Warrant is “less serious” and was committed as long ago as October 2013. *Fifth*, it is submitted the District Judge was wrong to say that because Mr Gurskis is a fugitive “strong counter balancing factors” were required before any conclusion that extradition was as disproportionate interference with article 8 rights could be reached.

7. Overall therefore, the submission is that the District Judge’s conclusion on article 8 was wrong either on the basis of matters as they stood at the time of the extradition hearing, or on the basis on those matters taken together with events as they have turned out since the extradition hearing.

## **B. Decision**

### **(1) The court’s power on appeal**

8. By section 27 of the 2003 Act the High Court may allow an appeal against an extradition order if the District Judge “ought to have decided a question before him at the extradition hearing differently”. Where an appeal relies on evidence not available at the extradition hearing the issue is whether that evidence would have required the District Judge to answer a question differently. In either case, if a different answer ought or would have been given, the appeal will succeed if that different answer would have required the District Judge to order the requested person to be discharged.
9. When the question is whether the District Judge correctly decided extradition would be a disproportionate interference with article 8 rights, the approach to take is the one explained by Lord Neuberger in his judgment in *In re B (a child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911 at paragraphs 90 – 91 and 93 – 94:

90. The argument that the Convention or the 1998 Act requires the Court of Appeal to form its own view in every case where a trial judge’s decision on proportionality is challenged, appears to me to be wrong in principle and potentially unfair or inconvenient. The argument is wrong in principle because, if the function of the Court of Appeal is as I have described, then, in my view, there can be no breach of the Convention or the 1998 Act, if it conducts a review of the trial judge’s decision and only reverses it if satisfied that it was wrong. The only basis for challenging that view is, on analysis, circular, as it involves assuming that the Court of Appeal’s primary function is to reconsider not to review. The argument is potentially unfair or

inconvenient, because in cases where the appeal court could not be sure whether the trial judge was right or wrong without hearing the evidence and seeing the witnesses, it would either to have to reach a decision knowing that it was less satisfactorily based than that of the judge, or it would have to hear the evidence and see the witnesses for itself.

91. That conclusion leaves open the standard which an appellate court should apply when determining whether the trial judge was entitled to reach his conclusion on proportionality, once the appellate court is satisfied that the conclusion was based on justifiable primary facts and assessments. In my view, an appellate court should not interfere with the trial judge's conclusion on proportionality in such a case, unless it decides that that conclusion was wrong. I do not agree with the view that the appellate court has to consider that judge's conclusion was "plainly" wrong on the issue of proportionality before it can be varied or reversed. As Lord Wilson says in para 44, either "plainly" adds nothing, in which case it should be abandoned as it will cause confusion, or it means that an appellate court cannot vary or reverse a judge's conclusion on proportionality of it considers it to have been "merely" wrong. Whatever view the Strasbourg court may take of such a notion, I cannot accept it, as it appears to me to undermine the role of judges in the field of human rights.

...

93. There is a danger in over-analysis, but I would add this. An appellate judge may conclude that the trial judge's conclusion on proportionality was (i) the only possible view, (ii) a view which she considers was right, (iii) a view on which she has doubts, but on balance considers was right, (iv) a view which she cannot say was right or wrong, (v) a view on which she has doubts, but on balance considers was wrong, (vi) a view which she considers was wrong, or (vii) a view which is unsupportable. The appeal must be dismissed if the appellate judge's view is in category (i) to (iv) and allowed if it is in category (vi) or (vii).

94. As to category (iv), there will be a number of cases where an appellate court may think that there is no right answer, in the sense that reasonable judges could differ in their conclusions. As with many evaluative assessments, cases raising an issue on proportionality will include those where the answer is in a grey area, as well as those where the answer is in a black or a white area. An appellate court is much less likely to conclude that category (iv) applies in cases where the trial judge's decision was not based on his assessment of the witnesses' reliability or likely future conduct. So far as category (v) is concerned, the appellate judge should think very carefully about the benefit the trial judge had in seeing the witnesses and hearing the evidence, which are factors whose significance depends on the particular

case. However, if, after such anxious consideration, an appellate judge adheres to her view that the trial judge's decision was wrong, then I think that she should allow the appeal."

This was said in the context of an appeal from the Principal Registry of the Family Division to the Court of Appeal. It holds good for present purposes too. The question for the Court of Appeal on the appeal in *B* was the one stated at CPR 52.11 – was the decision of the lower court "wrong"? That question is materially the same as the one posed by section 27 of the 2003 Act.

10. In the present case, since Mr Gurskis seeks to rely on new evidence, a form of hybrid approach is necessary. The *Fenyvesi* principles (*Szombathely City Court v Fenyvesi* [2009] EWHC 231 (Admin)) apply to determine whether evidence not relied on at an extradition hearing should be admitted on an appeal: the evidence must be evidence that either did not exist at the time of the original hearing or could not, with reasonable diligence, have been at the disposal of the party wishing to rely on it at that hearing; and it must be evidence that is decisive – i.e. it is evidence that would have resulted in the District Judge deciding the relevant question differently. If the new evidence is decisive it is both admissible and sufficient to met the condition for allowing an appeal at section 27(4) of the 2003 Act. If the new evidence is not decisive and therefore not admissible, the issue will be whether, based on the evidence that was before the District Judge the condition at section 27(3) of the 2003 Act is met.

(2) Evidence of interference with article 8 rights, including the new evidence

11. I do not consider the new evidence is decisive, and for that reason it is not admissible. The new evidence supports a number of contentions. Some of those matters were already obvious at the extradition hearing such as the possible impact of Mr Gurskis' extradition on his son by his former wife and on RK's son, JK. Both matters were recognised by the District Judge (see his judgment at paragraph at 68(ii)). The new evidence confirms those impacts but does not take those matters materially further. A particular point was raised as to the extent of Mr Gurskis' contact with his son from his previous marriage. In his statement for the extradition hearing, Mr Gurskis said he was "in regular contact with his son". At paragraph 31 of his judgment, the District Judge recorded that Mr Gurskis "kept in touch" with his son and accepted Mr Gurskis' evidence that he provided financial assistance as and when he could. Mr Gurskis takes issue with the passage at paragraph 69(iv) of the judgment where the District Judge says that Mr Gurskis was "separated" from his son. I do not see any necessary contradiction either between the passages at paragraph 31 and paragraph 69(iv) of the judgment, or between Mr Gurskis' witness statement and paragraph 69(iv) of the judgment. Mr Gurskis and his son are separated. That is not the same as saying they have no contact. The observation at paragraph 69(iv) of the judgment is to the effect that the adverse impact on Mr Gurskis' son, who does not live with him, will be less than the impact on RK, who does live with Mr Gurskis. In context, that was a conclusion reasonably open to the District Judge. This conclusion is reinforced by what he said at paragraph 68(iii) of the judgment, which expressly recognised the impact of Mr Gurskis' extradition on his son. It follows that what is said at paragraph 69(iv) of the judgment can, without distortion, be read consistently with what is at paragraph 31. That being so, those passages should be read as consistent.



12. Other matters already obvious at the extradition hearing were the likely impact of Mr Gurskis' extradition on RK and (the then unborn) AG. RK's pregnancy was an important part of the case advanced at the extradition hearing. It would be artificial to suppose that the District Judge did not recognise the future separation of Mr Gurskis and the new-born child and the possible effect of that separation on each of them, and take those matters into consideration. Even if that is too generous a conclusion, the new evidence on this matter is not decisive. Since AG is only a few months old, the likely impact on him can only be assumed taking account of Mr Gurskis' relationship with him. The new evidence is that Mr Gurskis is an attentive father; he stepped in to take care of AG in the month following his birth, when RK was incapacitated. I accept that had Mr Gurskis not been detained in October 2021 he would have continued to help care for AG. Mr Gurskis' extradition will harm the relationship between him and AG. But even though the separation will come at the earliest stage of AG's life I do not consider this impact will be more severe than the impact on parents and children consequent on any extradition.
13. The impact of Mr Gurskis' extradition on RK was also a mainstay of the submission at the extradition hearing. Inevitably, events since that hearing, and in particular since AG's birth have added to the picture. But there is no change that undermines the District Judge's assessment. RK remains vulnerable to the extent she suffers from depression, although the most recent evidence is that a change of medication has helped alleviate matters. It remains the case that RK is anxious that Mr Gurskis not be extradited, and no doubt she is fearful of what might happen if he is extradited. I accept that the District Judge's suggestion that in Mr Gurskis' absence, members of RK's family would rally round, has turned out to be wrong. However, that does not undermine his assessment of her as an "intelligent, resourceful and determined" person who in Mr Gurskis' absence would have support whether from family members or Social Services.

(3) Brexit uncertainty

14. Mr Gurskis relies on "Brexit uncertainty" as a consideration that increases the extent to which the extradition order will interfere with article 8 rights.
15. "Brexit uncertainty" was a term coined by Fordham J in his judgment in *Antochi v Richter in am Amstgericht of the Amstgericht Munchen (Munich), Germany* [2020] EWHC 3092 (Admin). That appeal was heard, and judgment handed down during the transition period following the United Kingdom's departure from the European Union. Fordham J's term referred to the consequence of the termination of free movement rights between the United Kingdom and European Union states. Although the United Kingdom left the European Union on 31 January 2020, free movement rights largely remained in place during the transition period that followed. The transition period ended on 31 December 2020. While free movement rights existed, there was a good chance that any EU national extradited from the United Kingdom would be able to return to the United Kingdom once the matters for which they were extradited were completed. This was not a matter of absolute entitlement. The Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") permitted EU nationals to be excluded or removed from the United Kingdom on (among other matters) grounds of public policy or public security: see generally, regulations 23, 25 and 27 of the 2016 Regulations. Yet the opportunity for such removal or exclusion was significantly limited by the 2016 Regulations in particular, for those who had a right of permanent residence under the 2016 Regulations, or who had lived continuously in the United

Kingdom for 10 years or more. Thus, it could be said that in many cases where an EU national was extradited from the United Kingdom he would be able to return once he had been dealt with abroad, so where extradition was opposed on article 8 grounds, say because the requested person had family in the United Kingdom, it was usually possible to assume that the duration of any separation from those family members would be finite.

16. At the time of Fordham J's judgment in *Antochi* it was known that it was likely that the position based on free movement and the provisions of the 2016 Regulations would not last beyond the end of transition period. But while it could reasonably be anticipated that from the end of the transition period EU nationals would be subject to entrance requirements in immigration rules, the precise form of those provisions was not set. This was the "uncertainty" in Brexit uncertainty – going to the conditions under which an EU national extradited from the United Kingdom might later be permitted to re-enter the United Kingdom to resume the family and personal life he had enjoyed before extradition. This was the point considered by Fordham J and determined by him (albeit *obiter*) to be something relevant to the extent of the interference with article 8 rights consequent on extradition: see his judgment in *Antochi* at paragraphs 50 – 52.
17. In this case, the District Judge expressly considered and gave weight to the effect of Brexit uncertainty: see his judgment at paragraph 69(v). The submission for Mr Gurskis that the District Judge was in error, falls into two parts.
  - (i) *The pending application for settled status*
18. The first part concerns an application Mr Gurskis has made for settled status under Appendix EU to the Immigration Rules ("Appendix EU"). Appendix EU contains the settlement scheme for EU nationals present in the United Kingdom as at 31 December 2020. Under the provisions of Appendix EU, settled status (a form of indefinite leave to remain) is available to qualifying EEA citizens if, as at that date, they had been continuously resident in the United Kingdom for at least 5 years; "pre-settled status", a right to remain for up to 5 years is available to those continuously resident for less than 5 years. The terms of the settlement scheme anticipate that those entitled to pre-settled status will, in due course, be able to apply for settled status. Mr Gurskis submits that the District Judge gave insufficient weight to what might happen to that application in the event that Mr Gurskis is extradited. Mr Gurskis submits that if he is extradited his application under Appendix EU "is likely" to lapse.
19. I do not consider this part of Mr Gurskis' submission undermines the conclusion reached by the District Judge. His reasoning at paragraph 69 rests on an assumption that Mr Gurskis would not retain a right to enter the United Kingdom – i.e., he assumed that what is said for Mr Gurskis in this part of the submission was correct, and that extradition would cause the application under Appendix EU to lapse with the consequence that Mr Gurskis, having completed serving the sentence of imprisonment in Latvia, would not have any form of entitlement to re-enter the United Kingdom. The District Judge's conclusion was that that matter did not "tip the balance in favour of extradition being refused".
20. Further, the premise of this part of Mr Gurskis' case is not established. Mr Vaughan (for Mr Gurskis) submitted, variously, that extradition would "nullify" Mr Gurskis'

pending application under Appendix EU, or that if extradited it was “likely” that the application would lapse. He relied on Immigration Rule 34K which states:

“Where a decision on an application for permission to stay has not been made and the applicant travels outside the common travel area their application will be treated as withdrawn on the date the applicant left the common travel area.”

I do not accept this submission. Even considering the terms of Appendix EU in isolation, the submission made does not seem plausible. It is apparent from Appendix EU that applications can be made by persons outside the United Kingdom. That being so, it is not immediately obvious why an application under Appendix EU by a person in the United Kingdom should lapse if he leaves the United Kingdom while the application remains pending. Further, Appendix EU contains its own set of procedural requirements (see paragraphs EU4 – EU8, and Annex 2 to Appendix EU), none of which say that an application will lapse if the applicant leaves the United Kingdom before a decision on the application is made.

21. The matter becomes clearer still in light of the Home Secretary’s published guidance “*EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members*” (“the Guidance” – Version 15.0, issued 9 December 2021). This states as follows:

“An application made under Appendix EU will not be treated as automatically withdrawn if the applicant travels outside the Common Travel Area before the application has been decided”.

Mr Vaughan’s submission is that rule 34K must take precedence over what is said in the Guidance. If the Rules and the Guidance addressed the same matter that would be correct. However, that is not so. That is the inevitable conclusion to be drawn from article 18 of the EU-UK Withdrawal Agreement (2019/C384I/01, dated 12 November 2019 which is to the effect that pre-Brexit rights of residence will remain in force pending decisions on applications for permission to remain pursuant to post-Brexit arrangements, and regulation 4 of the Citizens’ Rights (Application Deadline and Temporary Protection)(EU Exit) Regulations 2020 (“the 2020 Regulations”), which gives effect in English law to article 18 of the Withdrawal Agreement. It is therefore clear that rule 34K of the Immigration Rules does not apply to applications under Appendix EU.

22. There is an important point of practice to note. The submission made in this case, based on rule 34K of the Immigration Rules, was made without reference to the material part of the Withdrawal Agreement and the 2020 Regulations. If a party to extradition proceedings wishes to support its case by reference to propositions of immigration law, it is essential that the submission is fully-formulated, takes account of all relevant statutes, regulations and immigration rules, and that relevant authority is provided to the court. Immigration law consequences cannot simply be asserted; they must be supported by comprehensive and cogent submission and, where necessary, evidence. In extradition proceedings, the court will obviously not be engaged in deciding the existence or extent of any immigration law rights. However, if those matters are relied on as relevant to the court’s assessment of the extent that extradition would interfere with article 8 rights, the court must be provided with the material necessary to reach an informed conclusion.

*(ii) Likelihood of obtaining permission to re-enter the United Kingdom*

23. The second part of Mr Gurskis submission on Brexit uncertainty is that the District Judge took a wrong approach because rather than there being uncertainty as to whether Mr Gurskis will be able to return to the United Kingdom after serving the sentence of imprisonment in Latvia, the position under Immigration Rules is now certain – he will not be able to return. Thus, it is submitted, the District Judge under-estimated the extent of the interference with article 8 rights.
24. This submission relies on Part 9 of the Immigration Rules, which sets out the “suitability requirements” that apply to persons needing leave to enter the United Kingdom. Paragraphs 9.4.1, 9.4.2 and 9.4.3 are material and state as follows:

**“Criminality grounds**

9.4.1. An application for entry clearance, permission to enter or permission to stay must be refused where the applicant:

- (a) has been convicted of a criminal offence in the UK or overseas for which they have received a custodial sentence of 12 months or more; or
- (b) is a persistent offender who shows a particular disregard for the law; or
- (c) has committed a criminal offence, or offences, which caused serious harm.

9.4.2. Entry clearance or permission held by a person must be cancelled where the person:

- (a) has been convicted of a criminal offence in the UK or overseas for which they have received a custodial sentence of 12 months or more; or
- (b) is a persistent offender who shows a particular disregard for the law; or
- (c) has committed a criminal offence, or offences, which caused serious harm.

9.4.3. An application for entry clearance, permission to enter or permission to stay may be refused (where paragraph 9.4.2. and 9.4.4. do not apply) where the applicant:

- (a) has been convicted of a criminal offence in the UK or overseas for which they have received a custodial sentence of less than 12 months; or
- (b) has been convicted of a criminal offence in the UK or overseas for which they have received a non-custodial

sentence or received an out-of-court disposal that is recorded on their criminal record.”

25. Part 9 does not apply to applications under Appendix EU. This part of Mr Gurskis’ submission rests on a contingency – that his pending application under Appendix EU will be refused. On that premise, the submission for Mr Gurskis is that the District Judge erred by assessing whether extradition would be a disproportionate interference with article 8 rights on the basis that Mr Gurskis’ separation from his family might not be indefinite. This was wrong (it is submitted) because the consequence of paragraph 9.4.1 is that were Mr Gurskis to apply to enter the United Kingdom after serving the sentence of imprisonment in Latvia, that application would be refused.
26. One point raised by this submission is the one already mentioned at paragraph 22 – that submissions on immigration law points must be based on a thorough understanding of the Immigration Rules. In the circumstances of this case it is unlikely that any of rules 9.4.1 – 9.4.3 would be relevant to any application made by Mr Gurskis to re-enter the United Kingdom. The relevant entry provisions for a person wishing to enter the United Kingdom to resume family life with a spouse or partner are in Appendix FM to the Immigration Rules. While it is true, theoretically, that Mr Gurskis might apply to re-enter the United Kingdom under any of the routes contained in the Immigration Rules, Appendix FM would appear to provide his best option as it is the route specifically formulated for persons wishing to move to the United Kingdom to live with family members. If an article 8 assessment requires the court to consider possible future events, the court must proceed on the basis of realistic scenarios rather than theoretical possibilities. For present purposes, what is relevant is that Rule 9.1.1 of the Immigration Rules states that paragraphs 9.4.1 – 9.4.3 (and other parts of Part 9) do not apply to applications made under Appendix FM. Appendix FM has its own suitability requirements. So far as material for present purposes, the requirement is as follows

“S-EC.1.1. The applicant will be refused entry clearance on grounds of suitability if any of paragraphs S-EC.1.2. to 1.9. apply.

...

S-EC.1.4. The exclusion of the applicant from the UK is conducive to the public good because they have:

(a) been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years; or

(b) been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 12 months but less than 4 years, unless a period of 10 years has passed since the end of the sentence; or

(c) been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 12 months, unless a period of 5 years has passed since the end of the sentence.

...”

There is also an “exceptional circumstances” provision, in these terms:

“GEN.3.2.

(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.

(2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.

...

GEN.3.3.

(1) In considering an application for entry clearance or leave to enter or remain where paragraph GEN.3.1. or GEN.3.2. applies, the decision-maker must take into account, as a primary consideration, the best interests of any relevant child.

(2) In paragraphs GEN.3.1. and GEN.3.2., and this paragraph, “relevant child” means a person who:

(a) is under the age of 18 years at the date of the application; and

(b) it is evident from the information provided by the applicant would be affected by a decision to refuse the application.”

Thus, although Mr Gurskis’ situation would, *prima facie*, fall within the 10-year prohibition on entry, the final outcome of any application for permission to enter the United Kingdom would depend on the decision whether refusal would give rise to “unjustifiably harsh consequences” whether for Mr Gurskis, RK, or any of the children.

27. Be that as it may, this submission also raises, generally, the significance that should attach in extradition proceedings, and specifically, to submissions that extradition would be a disproportionate interference with article 8 rights, to the application of the Immigration Rules.
28. Fordham J’s reasoning in *Antochi* was followed and applied by Sir Ross Cranston in *Rybak v District Court in Lubin* [2021] EWHC 712 (Admin) and Choudhury J in *Gorak v Regional Court in Poznan (Poland)* [2022] EWHC 671 (Admin). Each assumed that the only matter that would be relevant was whether, if the requested person was an EU

national, his re-entry to the UK would or might be impeded by the cessation of free movement rights with the consequence that when and extradition order was made a court no longer to assume that interference of article 8 rights by reason of the order would be temporary.

29. However, there is a further point to consider, identified by Chamberlain J in his judgment in *Pink v Regional Court in Elblag (Poland)* [2021] EWHC 1238 (Admin). His reasoning on the Brexit uncertainty submission made to him in that case was as follows:

“52. Fifth, I accept on the basis of the appellant's latest evidence that there is a prospect that, if extradited, the appellant may not be readmitted to the UK after completing his sentence; and that this would put his current partner (who has settled status) in the difficult position of having to leave if she wishes to continue the relationship. But I do not think that this can properly be regarded as a consequence of extradition. It is, rather, a consequence of (i) the appellant's criminal convictions in Poland and (ii) the change to the immigration rules as a result of Brexit. Mr Hawkes said that the appellant could expect to acquire settled status if discharged from the existing warrant by this court. He was not, however, able to point to any policy document indicating that the Home Office's attitude to applications by persons with criminal convictions in EU Member States would be affected by whether the applicant had been extradited in respect of those offences. In the absence of any such document, I do not think it would be safe to make the assumption that extradition would make a difference to a person such as the appellant, who has been in the UK for a continuous period of more than 5 years since his release from prison in Poland in 2015.”

30. The overall point is that the court must be astute to identify, as clearly as possible, the extent of the interference with article 8 rights that will be the consequence of the extradition. Taking the present case as an example, the court should assess the extent of the interference with article 8 rights taking account of both (a) what will most likely happen in the event that, once the sentence in Latvia has been served, Mr Gurskis applies to enter the United Kingdom; and (b) the counterfactual – even if there is no extradition what effect does Mr Gurskis’ conviction abroad have on his immigration status in the United Kingdom?
31. Prior to 31 December 2020 that latter question too would have been answered by reference to the 2016 Regulations. An EU national in Mr Gurskis’ position, present in the United Kingdom in exercise of his free movement rights, would not by reason of this conviction run the risk of removal from the United Kingdom on immigration grounds. Surrender, pursuant to an extradition order would, therefore, result in interference with family and personal life, albeit that the duration of that interference would be finite because the effect of the 2016 Regulations was that, after being dealt with on extradition, the requested person could likely re-enter the United Kingdom in exercise of free movement rights.

32. Now the position is different. The outcome of an application to re-enter the United Kingdom following extradition will depend on the matters sketched at paragraph 26 above. So far as concerns the possibility of immigration removal if there is no extradition, the general approach is explained in the judgment of the Upper Tribunal (Immigration and Asylum Chamber) in *Cokaj v Secretary of State for the Home Department* [2020] UKUT 187 (IAC): see at paragraphs 65 – 80. The possibility of deportation in consequence of a foreign criminal conviction is not covered in the Immigration Rules. (Part 13 of the Immigration Rules concerns deportation decisions but, so far as concerns criminal convictions, only considers the situation if there is a conviction by a court in the United Kingdom.) Whether or not a foreign conviction should lead to deportation would be decided outside the Immigration Rules, and in accordance with the Home Secretary’s statement of policy in “Criminality: Article 8 ECHR cases” (version 8.0, published May 2019), the material part of which says this:

**“Deportation on the basis of convictions abroad**

Where deportation is pursued solely on the basis of one or more overseas convictions, the person liable to deportation will not meet the definition of a foreign criminal set out at section 117D(1) of the 2002 Act and will not fall within any of the criminality thresholds at paragraph 398 of the Immigration Rules. This means the claim will be considered outside the Immigration Rules, but the rules must be used as a guide, because they reflect Parliament’s view of the balance to be struck between an individual’s right to private and family life and the public interest. ...”

Using the Immigration Rules as “a guide” would mean the Home Secretary would approach the decision on removal in the same manner as she approaches decisions on entry clearance – i.e., in this instance, applying paragraph S-EC.1.4 in Appendix FM, tempered by paragraph GEN.3.2(2). However, the Home Secretary’s policy should be applied paying close attention to any specific features of the foreign conviction that might make it appropriate to attach lesser weight to the conviction or sentence (see *Cokaj* at paragraph 78).

33. Drawing these matters together, Fordham J’s notion of Brexit uncertainty has now been overtaken by events. When the judgment in *Antochi* was given it was not yet clear what immigration rules would apply to EU nationals. Now there is a settled position. Requested persons who have settled status under Appendix EU will in most instances be able to show that extradition will entail interference with their article 8 rights; absent extradition it is unlikely that they would be subject to immigration removal on account of a foreign conviction. But the duration of the interference is likely to be finite; having served the sentence it is likely that an application to re-enter the United Kingdom would succeed. Requested persons who do not have settled status are subject to the immigration rules other than Appendix EU. The assessment of the extent to which extradition will interfere with article 8 rights should take account not only of the obstacles to any future application to re-enter the United Kingdom (see, for example, the rules at paragraph 26 above), but also the counterfactual – i.e., the likelihood that, absent extradition, the foreign conviction could provide grounds for immigration removal. In some instances, there may be a difference between the scenario in which an extradition order is made and the counterfactual. There may be situations where if no extradition order is made no interference with article 8 rights would be likely for any other reason. When that is so the article 8 analysis must take account of that difference.



But other cases may make good what Chamberlain J suspected in his judgment in *Pink* – that interference with article 8 rights may be the same whether or not the extradition order is made.

34. In the present case, there is a clear possibility that if not extradited, Mr Gurskis could be liable to removal from the United Kingdom. This is relevant when considering the extent of any interference with article 8 rights consequent on the extradition order that has been made. If the District Judge made any error, it was by not taking account of the counterfactual – what would happen if there was no extradition order? That was an error in Mr Gurskis' favour. Overall, I do not consider the District Judge underestimated the extent of the interference with article 8 rights in this case by reason of the extradition order. Thus, the second part of Mr Gurskis' submission on Brexit uncertainly also fails.

(4) Justification for interference

35. The nature and extent of the interference with article 8 rights consequent on the extradition order is not materially different from the position that presented itself at the time of the extradition hearing. Even taking full account of the information in the new witness statements from Mr Gurskis and RK, I do not consider there is anything sufficient to outweigh the strong, generic public interest that effect should be given to extradition arrangements. In this case the District Judge was entitled to attach significant weight to this interest, not just for its own sake but also because Mr Gurskis' extradition is requested to serve a significant sentence of imprisonment. I accept that, from the details provided, the nature of the offending would likely not if occurring in England have attracted the same sentence. But that is not to the point. Save in extreme cases (and the present case comes nowhere close to being in that category) it is not for an extradition judge to pass judgment on the sentencing principles applied by a requesting judicial authority. That being so, the submission by Mr Gurskis that the District Judge failed properly to assess the seriousness of this offending leads nowhere. The District Judge did take account of the nature of the matters for which Mr Gurskis had been convicted when undertaking his article 8 assessment: see the judgment at paragraph 68(v), and paragraph 68(ii). I can see no error in the approach that he took or in the conclusion that he reached. Further, in this case the fact that Mr Gurskis was a fugitive meant that the significant public interest in giving effect to the extradition arrangements was not impaired by the passage of time. Overall therefore, the District Judge was not in error when he concluded that extradition would not entail unjustified interference with the article 8 rights of Mr Gurskis, RK, and AG.

**C. Conclusion and Disposal**

36. In the premises, this appeal is dismissed.
37. Mr Vaughan made a further submission to the effect that even if the appeal was dismissed, I should order that extradition not take place until Mr Gurskis' application for settlement status has been determined. In support of this submission Mr Vaughan provided me with examples of situations where notwithstanding dismissal of an appeal against an extradition order, the court has deferred the date of surrender for a defined period in anticipation of some specific event. He referred me to *Sobierajski v Lodz Regional Court*, Poland [2017] EWHC 1001 (Admin), *Tyza v Poland* [2015] EWHC 1007 (Admin) and *Tuba v Hungary* [2013] EWHC 1767 (Admin). I decline to make

any such order in this case. As set out above, I do not accept Mr Vaughan's submission that if Mr Gurskis is extradited his application under Appendix EU will automatically lapse. For that reason, delaying surrender would serve no purpose.

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