Neutral Citation Number: [2022] EWHC 1351 (Admin)

Case No: CO/1712/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/06/2022

Before:

THE HONOURABLE MR JUSTICE LINDEN

- -

Between:

BARBARA MURAWSKA

Appellant

- and -

DISTRICT COURT KOSZALIN, POLAND

Respondent

- -
- -

Amelia Nice (instructed by **Lawrence & Co CDS LLP**) for the **Appellant**
Mark Smith (instructed by **Crown Prosecution Service Extradition Unit**) for the **Respondent**

Hearing date: 11 May 2022

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Approved Judgment

- -

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: this judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time of hand-down is 10.30am on 1 June 2022

MR JUSTICE LINDEN

MR JUSTICE LINDEN:

Introduction

1. This is an appeal against an Order for the extradition of the appellant made by Senior District Judge Goldspring ("the SDJ") on 7 May 2021, at the Westminster Magistrates Court.

2. The appeal is brought pursuant to section 26 of the Extradition Act 2003. The Perfected Grounds of Appeal took points under section 2 of the 2003 Act, as to whether the respondent is a valid *"judicial authority"*, and under section 21 on the basis that extradition was not compatible with the appellant's rights under Articles 3 and 8 of the European Convention on Human Rights ("ECHR"). The section 2 and the Article 3 points have since fallen away in the light of the decisions of the Divisional Court in **Wozniak v Circuit Court in Gniezno, Poland** [2021] EWHC 2557 (Admin) and **Litwinczuk v Poland** [2021] EWHC 2735 (Admin). However, permission was granted on the Article 8 ground by Order of Sir Ross Cranston dated 24 January 2022.

The extradition proceedings

3. The effective European Arrest Warrant ("EAW") in this case was issued on 12 November 2020 and was certified by the National Crime Agency on 18 November 2020. It concerns a single conviction, on 14 February 2011, for six offences of theft from the person committed between April and September 2010. The total value of the thefts was in the order of £337.

4. The appellant was sentenced to 6 months' imprisonment, conditionally suspended for 2 years, and the custodial sentence was activated on 21 March 2013. However, execution of the sentence was deferred following applications to the Polish courts by the appellant and, on 26 November 2014, the custodial element was conditionally suspended again, for a further period of 3 years. The sentence was activated again on 28 November 2016 because of the commission of further offences in June to October 2015 but, on 6 March 2017, the Polish court granted the appellant permission to serve the term outside prison under an electronically monitored curfew. On 20 June 2017, the Order of 6 March 2017 was revoked, and the appellant was conditionally released from the rest of her sentence, one of the conditions being that she maintained contact with the probation service until 20 June 2019. However, upon the appellant leaving Poland in January 2018, and subsequently losing contact with the probation service, her release from her sentence was revoked by Order dated 21 September 2018 and the execution of the rest of her sentence was ordered.

5. There are 2 months and 13 days of the appellant's sentence remaining given the period of electronically monitored curfew which she has served. An EAW was issued on 9 March 2020 and the appellant was arrested pursuant to it in October 2020, but she was released again upon this EAW being discharged. She was then arrested again on 1 December 2020 pursuant to the 12 November 2020 EAW referred to above.

6. Given the date of the appellant's arrest, it is agreed that the Extradition Act 2003 applies to this case in its unamended form and that the EU Framework Decision also applies. The extradition hearing before Westminster Magistrates Court took place on 20 April 2021 and, as I have said, the Order for extradition was made on 7 May 2021.

The appeal

7. Counsel for the appellant, Ms Nice, made various criticisms of the SDJ's judgment. In her oral submissions she began with a contention that the SDJ had made a material factual error in that he had found that the appellant had lied when she gave evidence that she lived with her long term partner, Mr Jozef Szerwinski. The success of this ground of appeal depends on the appellant being permitted to rely on fresh evidence. There is also an application to rely on fresh evidence about the appellant's relationship with Mr Szerwinski and their circumstances more generally for the purposes of the arguments under Article 8 ECHR.

8. Ms Nice also contended, in effect, that applying **Belbin v Regional Court of Lille, France** [2015] EWHC 149 (Admin) [66], the SDJ failed to take into account various relevant considerations in reaching his decision under Article 8 ECHR. These were:

   i) the fact that there were only 2 months and 13 days left on the appellant's sentence;

   ii) the impact of incarceration upon the appellant given her age, which was 63 at the time of the extradition hearing, and given that this would be her first period in prison;

   iii) the degree of seriousness of the offences;

   iv) the effect of extradition on the appellant's immigration status;

   v) the fact that the appellant has been subject to a tagged curfew as a condition of bail since her arrest;

   vi) the fact (the appellant said) that the appellant had paid the compensation required as part of the suspended sentence order; and

   vii) the fact that the appellant had been arrested twice and the anxiety which the threat of extradition had caused.

9. Ms Nice also argued that the SDJ had erred in his approach to the question of delay. In particular, he had applied an approach which was appropriate to the potential bar under section 14 of the 2003 Act based on the passage of time, rather than the correct approach where the court is carrying out the proportionality assessment under Article 8 ECHR.

10. Finally, she contended that the SDJ had erred in finding that the appellant was a fugitive.

Alleged factual error in relation to the appellant's relationship with her partner

Background

11. Dealing with the application to admit fresh evidence first, before the extradition hearing the appellant consulted a solicitor, Ms Alison Fong San Pin, of Lawrence & Co CDS LLP. Legal aid was refused, and the consultation therefore took place on a private basis on 20 January 2021. The appellant paid for an hour of Ms Pin's time. She was asked to help the appellant prepare a proof of evidence. They communicated through an

interpreter who was also paid for by the appellant. No legal advice was given and nor was there time or funding to take the appellant through her proof to check that it was correct. Ms Pin typed up the proof of evidence in English and emailed it to a friend of the appellant's who spoke English, a Ms Vicktoria Prokopczuk, so that she could help the appellant to read it through and sign it.

12. The proof was apparently sent to the court unsigned and undated, although it is not clear by whom. It was brief: it ran to 4 pages and was double spaced. It said that the appellant first came to this country in September 2016, that she had lived at 30 Chamberlain Street, St Helens in Merseyside since October 2018 and that she lived there with Mr Szerwinski. It gave his date of birth as 24 February 1957. It said that he is her ex-husband *"We divorced in 2002 but we are on good terms"*. It also gave details of the appellant's employment as a warehouse operative in a factory in St Helens and, importantly for present purposes, at [18] it said that Mr Szerwinski worked *"in a factory for Rockwood Limited, Chiswick Tower, 289 Chiswick High Road, Chiswick, London, W4 4AL. It makes building material for insulating buildings"*. The proof said that the appellant has no children of her own and that Mr Szerwinski has children from a previous marriage who are now adults. It also set out information about various health issues which the appellant and Mr Szerwinski were experiencing. Other topics touched on in the proof were the appellant's accommodation costs and her response to some aspects of what was said in the EAW.

13. The appellant appeared in person at the extradition hearing, via CVP, and communicated with the court through an interpreter. At [34] and [35] of his judgment the SDJ described the hearing as follows:

> *"34. The requested person appeared via a CVP connection, this was the third attempt at securing an extradition hearing, on a previous occasion she struggled with the technology and did not turn her camera on, the same problem persisted on this occasion and although it was too late and not in the interest of justice to rescind the CVP order, I would not have granted the application in the first place. Therefore, the requested person was not in the court room, was unable to sign her proof of evidence and had not prepared for the hearing (perhaps unsurprisingly given she was unrepresented) and therefore did not have a copy to hand, I therefore confirmed with her that she had prepared such a statement and that she wished to rely upon its content.*
>
> *35. She confirmed following taking the oath that she had prepared it with the solicitors before they withdrew due to the lack of funding and that she indeed wished to rely upon it although she could not remember its content. I therefore read each line to her through the interpreter of the below proof at the end of every sentence I asked her to confirm whether or not the content of the previous sentence was true and only if she did move on. She confirmed at the end of every single statement that the previous sentence was true and her evidence. This is important as will become obvious shortly…."*

14. The SDJ's judgment then sets out the appellant's proof of evidence verbatim and records that:

> *"35….at the conclusion of her evidence in chief I asked her whether or not she could confirm that her ex-husband and her was (sic) still living together, she said*

> *they were and that in fact although divorce (sic) they essentially had rekindled their relationship,*
>
> *36. I queried this as is (sic) in the proof and her oral evidence (confirmed on oath) she stated not only that he worked in Chiswick in London but gave the company name and the address. She replied that that was an error that he has never worked in London and that he works in St Helens and lives with her permanently, I asked her again expressing surprise that the solicitors would get it so wrong given that not only was reference made to working in London but the company name and the address were provided which on its face could only have come from her. She maintained that she had not given that information to her solicitors."*

15. The SDJ asked the appellant whether she had any medical evidence to support her assertions about her health and it became apparent that she had paid for certain documents to be translated. She said that they had been sent through to the court, as indeed they had been by Ms Prokpoczuk by email on 4 March 2021, although the documents had not found their way to the SDJ. He decided that he should allow the appellant an opportunity to produce the medical evidence to which she referred and, it appears, to address his concern about the apparent discrepancy between what her proof of evidence said as to Mr Szerwinski's place of work and what she said about her relationship with him and where he lived. The CPS Note of what the SDJ did is as follows:

> *"The DJ decided that as the RP is unrepresented she should be afforded 7 days to provide any medical evidence (which she says has already been served) and clarification from her previous representatives of whether the reference to her husband's employment at a factory in Chiswick is their error. The Court emailed her their address so any documents can be served by reply and they will then be sent on to us."*

16. After the hearing on 20 April 2021 an email was indeed sent from the Magistrates Court to the appellant at 16:18. This said:

> *"Please email Westminster.ij@justice.gov.uk to forward any further medical evidence you intend to rely upon, or material to correct any errors in either your written proof of evidence, or oral testimony from today's hearing, within the next seven days"*

17. I note that this paragraph does not, in terms, require a statement or other evidence from the appellant's solicitor which, it appears, is what the SDJ required if he was to find that there was an error in the proof of evidence. The email also refers to material to correct any errors rather than an explanation for how the error came to be made. Neither the CPS Note nor the Court's email of 20 April 2021 was sent to Ms Pin.

18. On 22 April 2021, the appellant did then email to the Court her medical discharge summary (which had been translated from Polish) and a printout from the electronic GP Records of Mr Szerwinski. Her evidence is that Ms Prokopczuk helped her to do this as she did not know how to attach documents to an email.

19. It is apparent on the face of the extract of the GP Record for Mr Szerwinski that it had been printed out on 22 January 2021. It gave his address as 30 Chamberlain Street, St

Helens and stated that he had registered with the GP on 15 November 2018, so not long after the appellant said she had started to live there. It also gave a gmail address and mobile telephone number for him. The document then set out details of Mr Szerwinski's medication, a list of invitations to have flu vaccinations which he had declined and evidence that he had type 2 diabetes. His most recent prescription had been metformin (for the diabetes) which had been issued on 19 January 2021.

20. On the same day, Ms Prokopczuk emailed Ms Pin saying:

> *"I'm just writing an email because when you created a statement for [the appellant] to use in court for her case you wrote that her partner works in London but he works in St Helens and I was just wondering if that can be fixed please."*

21. Five days later, on 27 April 2021, Ms Pin replied asking whether it was the name of the company that was wrong, or the company was in St Helens. Ms Prokopczuk replied immediately, stating that Mr Szerwinski worked in a factory called U-Spec Insulation Limited in St Helens.

22. A week later, on 4 May 2021, Ms Pin replied asking whether the following passage correctly stated the position: *"Jozef works in a factory for U-Spec Insulation Ltd, Unit 1-3 M & D Business Park, Burtonhead Road, St Helens, WA9 5EA. It makes building material for insulating buildings"*. She said that if it did, she would send Ms Prokopczuk an updated version of the statement. Ms Prokopczuk confirmed that the revised text was correct. Ms Pin then emailed the corrected proof at 19:55 that evening.

23. The corrected proof was not sent to the Magistrates Court. The appellant says that she does not read English and used Google translate to understand the 20 April 2021 email from the court. She thought that it was referring to the need to re-send her medical evidence. However, she did discuss the matter with Ms Prokopczuk, as she herself says and as is apparent from the fact that Ms Prokopczuk sought a correction to the proof on 22 April 2021. It appears, however, that neither of them appreciated that what the Court was seeking was evidence that the proof was incorrect and an explanation for the alleged error in the original proof rather than merely a corrected version of the document. As I have noted, the email from the Court on the afternoon of 20 April 2021 did not make this entirely clear. The evidence of the appellant is also that she did not understand from the email, or from what had been said at the hearing, that this is what was required.

24. As to why the corrected version of the proof was not sent to the Magistrates Court, albeit this would have been after the expiry of the 7 day deadline which had been set, Ms Prokopczuk explained in an email to Ms Nice, dated 18 May 2022, that she thought that Ms Pin would do this. Ms Pin does not appear to have been aware of the reasons why the correction was requested, nor to have asked. She did not send the corrected proof to the Court because, she explains, she was not instructed to do so. *"The one-off private fee….did not include for me to file and serve the proof of evidence, but only to take [the appellant's] instructions and draft the proof of evidence……I thought that Ms Prokopczuk would print it off for [the appellant], to then sign, date and file and serve it herself as she was representing herself."*.

25. On 7 May 2021, the SDJ's decision was promulgated. [41] of the judgment records that two items of medical evidence had been served by the appellant but *"no statement was served from the solicitor in relation to the proof of evidence and the error".* In the *"Findings"* section of his judgment, the SDJ noted that the medical evidence confirmed what the appellant had said about her health but said that it was of little or no value for various reasons, including that the evidence was not in the form of medical reports and did not give any real detail or set out a prognosis. As far as her evidence about her relationship with Mr Szerwinski is concerned, the SDJ reiterated that he had taken her through her proof and that she had confirmed that it was true. He said that her claim that the address of his employer was an error made by her solicitor was problematic because it only emerged when he queried whether her husband commuted between London and St Helens or was living with her at all. He said *"I find it incredulous (sic) that information (sic) came from any source but her"* [45].

26. In relation to the extract from the GP Records for Mr Szerwinski the SDJ said:

> *"47. In support of her oral testimony the requested person served a page from medical notes relating to her partner dated October 2020, that document sets out a number of immunisations, diagnosis of diabetes and repeat prescription drugs, importantly it records her partner's home address as the same as hers. However, it is nearly 6 months old, the partner did not give evidence to corroborate her account and there still is the difficulty with the oral evidence that she gave as set out above."*

27. It is not clear why the SDJ said that the document was dated October 2020 and nearly 6 months old, when in fact it was dated 22 January 2021, and therefore just under three months old at the time of the extradition hearing. Although it was not decisive as to Ms Szerwinski's address as at 20 April 2021, it did tend to support her claim that he lived with her when the date on which he had registered with the GP was also taken into account, though this point does not seem to have been noted by the SDJ.

28. The SDJ went on to say, at [48], that even allowing for the fact that the appellant was unrepresented he could not reconcile the contents of her proof with the medical notes and her oral testimony, because *"I cannot fathom in the absence of a statement from the solicitors accepting it was their error…it was only when she realised under my clarification the significance….that her evidence changed".* At [49] he concluded:

> *"49. <u>The only conclusion that I can come to therefore is that she lied</u>, I do not believe that she lives permanently with her ex-husband although I do accept they are probably in some form of friendship and do provide support to each other."* (emphasis added)

29. I note that, permissibly in the circumstances known to him, the SDJ's view was that the appellant was a liar, rather than that she was mistaken. Although, in principle, this ought not to have affected his assessment on the basis of the aspects of the appellant's evidence which he accepted, the possibility that this view of her coloured the value judgment which he was required to make under Article 8 ECHR remains. Perhaps more importantly, it does not appear that the SDJ asked the appellant any questions about the substance of her relationship with Mr Szerwinski for the purposes of the Article 8 assessment. His focus was on whether they lived together at all and, having formed the view that she was lying about this, he may well have considered that it was idle to

inquire further as to, for example, how long they had lived together, the relevance of the details about his health and employment, and the impact on them of her being extradited. These matters were not specifically addressed in the proof of evidence.

Legal framework

30. As is well known, section 27(4) of the 2003 Act provides that the conditions for an appeal to be allowed on the basis of evidence which was not adduced at the extradition hearing are as follows:

> *"(a) .... evidence is available that was not available at the extradition hearing;*
>
> *(b) the……. evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;*
>
> *(c) if he had decided the question in that way, he would have been required to order the person's discharge."*

31. In **Hungary v Fenyvesi** [2009] EWHC 231 (Admin), at [32] the Divisional Court considered the equivalent provisions in section 29(4) of the 2003 Act in the context of an appeal against a decision to discharge the defendants. Sir Anthony May, giving the judgment of the Court, said:

> *"In our judgment, evidence which was "not available at the extradition hearing" means evidence which either did not exist at the time of the extradition hearing, or which was not at the disposal of the party wishing to adduce it and which he could not with reasonable diligence have obtained. If it was at the party's disposal or could have been so obtained, it was available. It may on occasions be material to consider whether or when the party knew the case he had to meet. But a party taken by surprise is able to ask for an adjournment. In addition, the court needs to decide that, if the evidence had been adduced, the result would have been different resulting in the person's discharge. This is a strict test, consonant with the parliamentary intent and that of the Framework Decision, that extradition cases should be dealt with speedily and should not generally be held up by an attempt to introduce equivocal fresh evidence which was available to a diligent party at the extradition hearing. A party seeking to persuade the court that proposed evidence was not available should normally serve a witness statement explaining why it was not available…."*

32. At [35] he emphasised:

> *"Even for defendants, the court will not readily admit fresh evidence which they should have adduced before the district judge and which is tendered to try to repair holes which should have been plugged before the district judge, simply because it has a Human Rights label attached to it. The threshold remains high. The court must still be satisfied that the evidence would have resulted in the judge deciding the relevant question differently, so that he would not have ordered the defendant's discharge. In short, the fresh evidence must be decisive."*

The application of these principles in the present case

Overview

33. As I pointed out in the course of the hearing, and Ms Nice accepted, the application of the **Fenyvesi** principles in the present case requires differentiation between different aspects of the "fresh" evidence on which the appellant now wishes to rely.

34. Having regard to the issues in the appeal, the evidence which the appellant now asks to be admitted falls into the following broad categories:

    i) First, evidence as to the discrepancy between the appellant's claim that she lived with Mr Szerwinski in St Helens and the statement in [18] of her proof of evidence that he worked in London.

    ii) Second, further evidence from the appellant and evidence from Mr Szerwinski to support her case that they were living together in a close relationship, his ties to the United Kingdom including the fact that he has pre-settled status and would remain here if she were extradited as well as evidence to the effect that he would be unable to pay the rent if she were extradited given that he earns £320 per month and the rent is £800 per month.

    iii) Third, more detailed evidence about their health issues and about the extent to which the appellant assisted him in relation to his health issues.

    iv) Fourth, further detail about the appellant's employment including that she says that she must work until October 2022 before she can retire and that she would get sacked if she were to be extradited.

    v) Fifth, further detail about the background to the extradition proceedings including that the appellant says that she had paid the compensation which was the condition for the custodial term being suspended.

    vi) Sixth, updating evidence in a statement from the appellant dated 5 April 2022. This includes evidence that she made an application under the EU Settlement Scheme before 30 June 2021, although the date of the application is not given, and that the outcome is awaited.

35. The respondent's pleaded position in its Respondent's Notice, at [37], was that save for updating information, the fresh evidence which the appellant sought to rely on could, with reasonable diligence, have been put before the SDJ. It was not for him or the Prosecution to investigate or advance the case of an unrepresented party and, in any event, the appellant was given a further opportunity to clarify the position in relation to Mr Szerwinski's place of work within 7 days of the hearing on 20 April 2021. This *"being said, given the Applicant was previously unrepresented the Respondent is neutral as to the application to adduce this evidence"*. However, it was submitted that even taking into account the further evidence, extradition of the appellant was proportionate in all the circumstances.

36. Mr Smith also submitted that the additional evidence could have been obtained with due diligence and emphasised that the SDJ gave the appellant an additional opportunity to seek the assistance of her former solicitor to clarify the position in relation to Mr

Szerwinski's place of work. He submitted that the evidence was not decisive in any event.

The evidence about the discrepancy

37. As far as the evidence explaining the discrepancy in the appellant's proof of evidence is concerned, at the time of the hearing before me this comprised a 7 paragraph statement from Ms Pin, dated 18 June 2021, which explained that during a conference that day, the appellant had said that there had been a misunderstanding. Ms Pin had checked her records for the purposes of the failed legal aid application and had discovered that in fact the appellant had given her Mr Szerwinski's payslip dated 6 November 2020, which shows that his employer at that date was U-Spec Insulation Limited of Unit 1-3 M&D Business Park, Burtonhead Road, St Helens. There had been an error on Ms Pin's part. There was also a further statement from the appellant, also dated 18 June 2021, and a statement from Mr Szerwinski dated 8 June 2021, which supported the case that his employer was U-Spec Insulation Limited and that there had been an error, as was demonstrated by the same payslip, which Mr Szerwinski exhibited.

38. Having reserved judgment on the basis that Counsel had asked to make further written submissions in writing on the issue as to the impact of extradition on the immigration status of the appellant, I was concerned that Ms Pin's statement did not explain how the alleged error came to be made, and that the payslip relied on was dated 6 November 2020. The possibility that Mr Szerwinski had subsequently taken up employment in London, and that the appellant's proof of evidence was therefore accurate as at the date of the extradition hearing, had not been eliminated. I therefore raised these issues with the parties by email on 16 May 2022 whereupon further witness statements from Ms Pin and the appellant, dated 13 and 18 May 2022 respectively, were produced, together with written submissions on the point from Ms Nice. In summary:

    i) Ms Pin had now reviewed her emails and she gave evidence of the email exchanges between her and Ms Prokopczuk between 22 April and 4 May 2021 about correcting the proof of evidence which I have summarised above. These emails were now exhibited by her. Mr Szerwinski's payslips for March to May 2021 were also exhibited and these show that he was indeed working for U-Spec Insulation Limited at all material times. Ms Pin explained that she could not remember how the error as to his employer and place of work was made. She typed the proof of evidence at the consultation in January 2021 and did not keep an attendance note. However, it was possible that it was the result of the interpreter misunderstanding the appellant. Her experience is that even where the proof is read through with client and interpreter present, inaccuracies may not be picked up. But even this had not been done in the present case, as I have noted.

    ii) The appellant gave evidence about what she understood was required by the Magistrates Court and the Court's email of 20 April 2022, which she exhibited.

39. It was on the basis of these materials that I was able to make the important findings at [11] and [16]-[24], above, and am satisfied that [18] of the appellant's proof of evidence was indeed incorrect and that Mr Szerwinski was employed in St Helens at all material times. I am bound to say that, given what is at stake for the appellant, it is concerning

that these materials were only produced after inquiries by me which were made after the hearing. They were obviously relevant, and they ought to have been produced in advance of the hearing to explain what had happened. It is also ironic that the context is what is accepted to be an error on Ms Pin's part, which significantly damaged the appellant's case before the SDJ. Fortunately for the appellant, those inquiries were made, and Mr Smith has very fairly made no submission that I cannot or should not take the further materials into account in determining the appeal. Nor has he sought to cast doubt on what the materials are said to show (see his email dated 23 May 2022).

40. In my judgment the evidence that [18] of the appellant's proof of evidence was the result of an error by Ms Pin, and the further evidence as to Mr Szerwinski's employer and place of work, were not at the disposal of the appellant at the time of the extradition hearing and could not with reasonable diligence have been obtained for the purposes of that hearing. It is clear from the evidence, including the SDJ's account at [34]-[35] (set out at [14], above), that the appellant was, with respect to her, an unsophisticated litigant in person with poor spoken and written English and no experience of the legal process in this country. She had little idea of what the process would be at the extradition hearing and was not prepared for it. She did not have her proof with her, which was in English in any event, and she did not appreciate that the error had been made. She had no reason to think that there would be controversy as to where Mr Szerwinski worked, not least because it was true that they lived together. In this respect, she was not aware of the case which she *"had to meet"*.

41. The argument that the appellant could, with reasonable diligence, have subsequently obtained the evidence which showed that a mistake had been made, in the 7-day period after the hearing allowed by the SDJ, is more compelling. But I bear in mind what I have said about the appellant in the preceding paragraph. It is clear to me that she would have done whatever she understood needed to be done to support her case. She did take steps to address what she understood was needed by re-sending the medical documents to the Court. The fact that she took the wrong steps in relation to the error in her proof of evidence tends to reinforce the view that, as she says, she genuinely misunderstood what was required. Unfortunately, the email from the Court after the hearing compounded the problem in that it did not clearly explain what was needed to a person who can read English (i.e. Ms Prokopczuk). On the contrary, the message was highly capable of indicating, to a person who did not know otherwise, that what was required was for the proof to be corrected, as opposed to an explanation and/or proof of the error. Again, Ms Prokopczuk's actions show that she would have done what she understood was required, that she understood that what was needed was for [18] of the proof to be corrected, and that this genuinely was a case of two people with no real experience of process failing to understand, for reasons which were not their fault, what they needed, or were being asked, to do.

42. For all of these reasons, I accept that the fresh evidence which explains the position in relation to [18] of the proof of evidence was not available at the hearing in the relevant sense (section 27(4)(a)). I am also satisfied that had it been, the SDJ would have found that in fact Mr Szerwinski worked in St Helens, that [18] was incorrect and that there was no reason to doubt the appellant's evidence that they lived together and had a stable long term relationship which would be affected were she to be extradited. As I have noted, his scepticism about the value of the extract from Mr Szerwinki's GP Record in relation to this issue also appears to have been based on a misreading of the document.

43. I am therefore satisfied that once the true position in relation to Mr Szerwinski's employment became clear the SDJ would have decided the question differently in that he would have accepted that they had a relevant relationship for the purposes of Article 8 ECHR and would not have proceeded on the basis that the appellant was lying about this (section 27(4)(b)). I also think it likely that, in fairness, he would have made more inquiries of the appellant as to the details of this relationship, whereupon some of the evidence which she now seeks to rely on would have emerged. The question is then whether this, in turn, would have resulted or should result in the appellant's discharge.

The evidence about the appellant's relationship with Mr Szerwinki and their circumstances more generally

44. As to categories 2-4 of the "fresh" evidence identified at [34(ii)-(iv)] above, this evidence was in existence and a legally represented party could reasonably be expected to appreciate that it was relevant and to call or adduce it at the extradition hearing. Here, Ms Nice relied on the fact that the appellant was in person, was an unsophisticated factory worker with very little English and did not have a good understanding of the relevant legal processes. She took me to passages in Chapter 1 of the February 2021 Equal Treatment Bench Book which deal with the position of litigants in person and explain the difficulties which they may have in taking part in the litigation process and how their participation may be facilitated appropriately. These were the Overview and [10]-[13], [29], [37]-[38] and [45]-[52]. Perhaps the most relevant of the passages were:

    i) [45] and [46], which explain that litigants in person sometimes do not appreciate that they will have to prove their case by evidence, and that they will have to give evidence themselves;

    ii) the first bullet point of [46] which says that litigants in person *"should be informed at an early stage that they must prove what they say by witness evidence, so they may need to approach witnesses in advance and ask them to come to court"*.

45. Ms Nice noted that at [44] of his judgment the SDJ said that in relation to the appellant's personal circumstances he had:

> *"….given considerable latitude to the requested person being unrepresented, on two previous occasions when hearings were ineffective she was told that it was for her to serve the evidence on which she sought to rely, as of the date of the hearing neither the CPS nor this court had received anything other than the proof of evidence to which I alluded to above (sic*)". (emphasis added)

46. Ms Nice submitted that, measured against the standard set in the Equal Treatment Bench Book, this was not an adequate explanation of the fact that the appellant could and should adduce evidence to corroborate what she said, including by calling Mr Szerwinski. She also relied on evidence in the appellant's and Mr Szerwinski's statements of 18 June 2021 and 18 May 2022 that they were not aware that he could be a witness, that no one had explained that he could or should give evidence and that he would have taken the day off work to do so had it been appreciated that he could be a

witness. He had in fact driven her to London for one of the hearings but had not come into the hearing.

47. I have some doubts that it can truly be said that the additional categories of evidence referred to above, which spelt out the appellant's case on Article 8, were not available at the extradition hearing in the relevant sense. However, various factors have led me to give the appellant the benefit of the doubt on this issue. These are:

i) the fact that she was an unsophisticated litigant in person with poor written and spoken English and poor technical skills, as I have described;

ii) the fact that the hearings at which the process was explained to the appellant took place by CVP and there were the problems with these hearings described by the SDJ at [34] and [35] of his judgment;

iii) the SDJ's own description (at [44]) of the explanation which was given to the appellant of what she needed to do, which does not appear to have included an explanation of the need to call witnesses;

iv) the fact that I am satisfied that the appellant genuinely did not appreciate that she could and should have given greater detail as to her case on Article 8 and/or called Mr Szerwinski. Had she understood this, she would have done it as is illustrated by her actions in the run up to the extradition hearing in paying for her discharge summary to be translated, her actions after the hearing and the steps taken in this appeal once she had the benefit of legal assistance;

v) bluntly, the fact that she was ill served by the proof of evidence which was prepared for her. This document was not detailed, thorough or written clearly (see further [90] below) and it contained an error which led the SDJ to conclude that the appellant was a liar. It caused the appellant to think that she had covered what she needed to cover, when there was a good deal more to be said, and it may well have caused the SDJ to think that she had had the benefit of legal advice (e.g. as to whether witnesses could or should be called) and that the proof said all that could be said, when neither was the case. Ms Pin's evidence is that it is unlikely that she gave the appellant any advice as she was only being paid to prepare the proof of evidence.

vi) the fact that the SDJ thought that the appellant was a liar may also have had the effect that he did not explore her case as much as he would normally have with a litigant in person. Had he done so, at least some of the supplementary evidence would have emerged and, assuming that it was accepted that [18] was wrong, would likely have been accepted; and

vii) Mr Smith very fairly said that if I was satisfied that there were errors in the reasoning of the SDJ (which I am: see, further, below) I should decide the Article 8 issue for myself, taking into account the facts as I find them to be, rather than limit myself to the evidence which was before the SDJ.

48. I return to the impact of the supplementary evidence for the purposes of the **Fenyvesi** test, below.

The evidence that the appellant paid the compensation required as a condition of the suspension of her custodial sentence

49. However, I am not persuaded that the evidence that the appellant had paid the compensation ordered by the Polish courts as a condition for the suspension of her custodial sentence (category 5 at [34(v)] above) should be regarded as not available at the time of the extradition hearing. The evidence is the following passage in the appellant's statement of 18 June 2021: "*I paid the compensation. I think I paid it in instalments in 2013 and 2014. By 2015 it was all paid."* This is a point which could have been made in the section of her proof of evidence which deals with the EAW and which comprises just under half of the proof and goes into some detail. I do not agree with Ms Nice that this claim is consistent with the EAW and the Further Information provided by the respondent – these documents make no reference to the point, one way or the other - and nor is this claim supported by any documentary evidence. Had it been made before the extradition hearing; the respondent would have been able to make inquiries. In any event, I do not consider that this evidence materially affects the analysis, not least given that the fact remains that the sentence was activated and a portion of it remains to be served.

The updating evidence in the statement of 5 April 2022

50. As the certificate which confirms receipt of appellant's in-time application under the EU Settlement Scheme is dated 4 August 2021, I will proceed on the basis that the application was made after 20 April and before 30 June 2021 although this is not clear from the evidence. On this basis, the evidence that an application for settled status had been made (category 6 at [34(vi)] above) was not available as at the date of the extradition hearing. In any event, as will be seen, this evidence does not materially assist the appellant. Nor was the other updating evidence in her 5 April 2022 statement available at the extradition hearing.

Failure to take into account relevant considerations

General legal framework

51. As is well known, by virtue of section 21 of the Extradition Act 2003 extradition to a category 1 territory may only be ordered if to do so is compatible with the ECHR. Article 8 ECHR provides:

> *"**Right to respect for private and family life***
>
> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

52. There was no dispute before the SDJ that extradition would interfere with the appellant's Article 8 rights, that the interference would be *"in accordance with the law"* and that it would have a legitimate aim, namely the prevention of disorder or crime. The issue was therefore whether the interference was necessary in a democratic society i.e. proportionate and, in particular, the fourth question in the formulation of the test by the Supreme Court in **Bank Mellat v HM Treasury (No 2)** [2014] AC 700 namely "*whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure"* (per Lord Reed at [74]).

53. Nor was there any real dispute as to the general approach to this aspect of the proportionality issue in the context of extradition. This is set out in the well-known decisions of the Supreme Court in **Norris v Government of the United States of America (No 2)** [2010] AC 487 and **HH v Deputy Prosecutor of the Italian Republic, Genoa** [2013] AC 338 as well as the decision of the Divisional Court in **Celinski v Polish Judicial Authority** [2016] 1 WLR 551. [8] of the judgment of Baroness Hale in **HH** contains a statement of the general principles which is sufficient for present purposes:

> *"…. (2) There is no test of exceptionality…. (3) The question is always whether the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition. (4) There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back. (5) That public interest will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved. (6) The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life. (7) Hence it is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe."*

The approach to the balancing exercise

54. In the context of the present case, it is also worth noting the following very well-known passages from the judgment of Lord Thomas LCJ in **Celinski**. Having said at [14(ii)] that a structured approach is *"essential, because each case turns on the facts as found by the judge and the balancing of the considerations"*, he said this at [15]-[17]:

> *"15. …it is important…that judges hearing cases where reliance is placed on article 8 adopt an approach which clearly sets out an analysis of the facts as found and contains in succinct and clear terms adequate reasoning for the conclusion arrived at by balancing the necessary considerations.*
>
> *16. The approach should be one where the judge, after finding the facts, ordinarily sets out each of the "pros" and "cons" in what has aptly been described as a "balance sheet" in some of the cases concerning issues of article 8 ….*

> *17. We would therefore hope that the judge would list the factors that favoured extradition and then the factors that militated against extradition. The judge would then, on the basis of the identification of the relevant factors, set out his/her conclusion as the result of balancing those factors with reasoning to support that conclusion. As appeals in these cases are, for the reasons we shall examine, common, such an approach is of the greatest assistance to an appellate court."*

The relevance of the fact that a short time remains to be served on the sentence

55. Ms Nice's skeleton argument referred to a number of decisions in which the fact that the requested person only had a short time to serve on their sentence was regarded as a relevant factor in the assessment of proportionality. She appeared to rely less on any principle which she derived from these cases than on comparisons between the facts of those cases and the facts of the present case. Mr Smith did not dispute that the length of time left to be served is a relevant consideration, but he submitted that each case turns on its own facts, so that comparisons of the facts are not helpful. He also submitted that the relevant consideration in the cases to which Ms Nice referred was the proportion of the original sentence which remained to be served rather than the remaining period of time itself, in absolute terms.

56. I think that the most helpful statement of the principle is that of McCombe J (as he then was) in **R (Kasprzak) v Warsaw Regional Court** [2010] EWHC 2966 (Admin). At [21] he said:

> *"21. I accept that in certain circumstances the fact that a very short period of time remains to be served may be a circumstance that the court will take into account. However, …that is one factor alone. First of all, it has to be borne in mind that it is not for the courts of this country to second guess the sentences passed by courts in other convention states. If a sentence has been passed this court should take the view that the sentence is, all things being equal, to be served. Secondly, ……any indication from the courts that time spent in custody could gradually build up a "proportionality" argument would encourage delays on behalf of those sought to be extradited in prolonging the proceedings so as to raise such a point.*
>
> *22. Finally, …one has to look at the matter as a whole and not just the question of sentence that the court has to consider, but the seriousness of the offence…."*

57. See, also **Zakrzewski v Poland** [2012] EWHC 173 (Admin) [46] and **Molik v Judicial Authority of Poland** [2020] EWHC 2836 (Admin), at [2] and [11], where a number of the authorities were helpfully analysed by Fordham J in coming to the conclusion, on the facts to that case, that it was not disproportionate to extradite the appellant to serve the remaining six weeks of a 10 month sentence. It is right to point out, however, that in many if not all of these cases the reason why a short period remained to be served was that the requested person was remanded in custody pending the outcome of the extradition proceedings and had therefore served a substantial part of the sentence in the United Kingdom by the time of the appeal. This engaged McCombe J's second point in **Kasprzak**, that the court should be careful not to encourage an approach to extradition proceedings which seeks, as Ousley J put it in **Gruszecki v Circuit Court in Gliwice Poland** [2013] EWHC 1920 (Admin), albeit referring to abuse of the appeal process, *"an opportunity to reduce the time to be spent in a Polish prison and to burnish a proportionality argument"*. This policy consideration does not arise in the present

case, where there is no suggestion that the appeal is abusive and where the limited time to serve on the sentence is the result of part of the sentence having been served in Poland rather than time spent in custody in this country.

58. Secondly, there are cases in which the courts have struck the proportionality balance in favour of discharging the requested person despite the fact that fairly significant periods of time remained to be served: see e.g. **Kruk v Judicial Authority of Poland** [2020] EWHC 620 (Admin) [19]-[23], [27] and **Chechev v the Prosecutor's Office in Kardzhali, Bulgaria** [2021] EWHC 427 [79]. However, these cases have turned on their particular facts including, in many of them, the view of the appellate court that the requested person was likely to be eligible for early release on their return given the circumstances including the amount of time served in custody during the appeal proceedings in the United Kingdom. Again, this is slightly different to the present case where it cannot be said that whereas the Polish authorities originally took the view that the appellant should serve the sentence in question, and then that she should be extradited to serve the remainder of her sentence, they would now be likely to release her on her return given that she has served a significant part of it in custody in the United Kingdom. However, there is a point on the fact that she has been subject to an electronically monitored curfew, and has therefore been subject to a degree of further punishment, since she was arrested in December 2020 as well as other circumstances of the case to which I will return.

59. In this connection, Ms Nice drew attention to the fact that the Polish law enforcement authorities apply a *"principle of legality"* which means that they are obliged to "*take all measures to bring someone to justice*". There is therefore no exercise of discretion as to whether an EAW should be withheld on the grounds of proportionality: see **Mirazewski & Others v Poland** [2014] EWHC 4261 (Admin) [21]. The assumption that the question of proportionality has been considered by the requesting authority therefore cannot be made in the present case. One is left, however, with the point that the Polish authority clearly considered that the remainder of the appellant's sentence should be served in custody i.e. McCombe J's first point in **Kasprzak** – the importance of not second guessing the sentencing decisions of the requesting authority - is directly engaged.

60. Ms Nice also raised the possibility of early release in the present case and relied on **Janaszek v Circuit Court in Plock, Poland** [2013] EWHC 1880 (Admin) [41] where Foskett J said:

> *"Unlike in the UK, release at the half-way point is not automatic, but depends on Article 77(1) of the Criminal Code which empowers the court to order early conditional release 'only when [the prisoner's] attitude, personal characteristics and situation, his way of life prior to the commission of the offence, the circumstances thereof, as well as his conduct after the commission of the offence, and whilst serving the penalty, justify the assumption that the perpetrator will after release respect the legal order, and in particular that he will not re-offend.'"*

61. Finally, I agree with Choudhury J's emphasis, in **Ziembinski v Regional Court of Plock, Poland** [2022] EWHC 693 (Admin) [43], on the point that, as Mr Smith submitted, *"each case will depend on its own facts and that there is no 'tipping point' at which outstanding terms less than a certain duration will alter the Art 8 balance"*.

62. I do not agree with Mr Smith that what matters is the proportion of the original sentence which remains to be served, rather than the absolute period of time. The position is as per McCombe J's third point: the case should be considered as a whole including the seriousness of the offence. The proportion of the sentence which remains to be served may be a relevant consideration but so may the actual period of time which remains to be served. It hardly seems likely that the court would take the same view of a case where the requested person had 4 years to serve on a 10-year sentence as it would of the present case.

The balancing exercise carried out by the SDJ in the present case

63. At [57]-[58] of his judgment, the SDJ set out an account of the authorities on the application of Article 8 ECHR in the context of extradition proceedings and no criticism of his self-directions in this regard was made by Ms Nice. Paragraph [58] included a non-exhaustive list of factors which are relevant in carrying out the Article 8 balancing exercise in extradition cases generally, but without reference to the facts of the present case. Relevantly for present purposes, these included *"The gravity of the offences"*, *"Delay and whether during the lapse of time the RP and (if relevant) family have made a new and blameless life for him/themselves"*, *"The age of the requested person at the time of the conviction"* and *"Impact of (sic) his private life that extradition would cause, including the financial effect of loss of employment"*.

64. There was then a heading - *"Factors in favour of surrender"* - which encompassed the following passage:

> *"• The public interest in honouring our extradition obligations*
>
> *• The fact that a prison sentence remaining (sic) outstanding*
>
> *• Not allowing the United Kingdom to become a safe haven for fugitives*
>
> *• Although the offending was some time ago the enforceable judgement and the. (sic) Therefore, that (sic) she has been unlawfully at large is only from 2017 and therefore delay within the context of article 8 is limited."*

65. This was followed by a heading - *"Factors in favour of discharge"* - which encompassed the following passage:

> *"• The offence (sic) was committed almost 11 years ago;(but see below)*
>
> *• The sentence was originally suspended suggesting that the JA did not consider the offending to be sufficiently grave to justify the imposition of an immediate custodial sentence;*
>
> *• The R.P. has lived in the U.K. since 2016 and is of good character in this jurisdiction;*
>
> *• The R.P is in gainful employment;*
>
> *• The RP is of previous good character in the UK."*

66. There was then a section headed *"Analysis and Conclusion"* where the SDJ carried out the balancing exercise at [59]-[61]. Much of the text of these paragraphs dealt with the question of delay and why, in the view of the SDJ, this did not tell in the appellant's favour. I set this text out below in relation to the challenge to the SDJ's approach to this issue. He concluded:

> *"As Lord Justice Burnett (as he was then) indicated in RT v Poland it is both inimical to and outside the remit of the framework decision for the judicial authority to routinely be asked to explain delay when somebody is a fugitive but also it is not for the authorities either here or in the requesting state to search the byways and alleyways of officialdom in order to find that somebody who is deliberately placing themselves beyond the reach of the authorities. For this reason, I do not consider the delay to in any meaningful way militate (sic) the public interest, the factors that do are the her good character, her poor health and her gainful employment in this jurisdiction. Her health is not sufficiently poor to prevent her from working full-time and no evidence served suggests that she has caring responsibilities or indeed any real community ties (other than her work)."* (emphasis added)

67. At [61] the SDJ went on to conclude that he was entirely satisfied that the extradition of the appellant was *"a proportionate interference with her rights under article 8 and those of her partner, who I am not satisfied lives with her*.".

68. I note that the SDJ did not refer, in either his **Celinski** balance sheet or the section of the judgment in which he carried out the balancing exercise itself, to a number of the considerations relied on by Ms Nice. The most notable of these is, perhaps, the fact that there were 2 months and 13 days to serve on the sentence which had been one of six months. Indeed, it could reasonably be said that the focus of the inquiry into the proportionality of an order for extradition in the present case ought to have been the point that the sentence to be served was short and amounted to a little over one third of what had originally been a short sentence in any event. This needed to be weighed against the harm to the appellant's Article 8 rights which would be caused by her extradition.

69. Mr Smith pointed out that the SDJ recorded the length of the sentence which remained to be served at [6] of his judgment but it is striking that he did not explicitly identify this point as part of his reasoning despite the fact that he noted, as a factor in favour of surrender, that there was a prison sentence outstanding and, as a factor in favour of discharge, that the sentence was originally suspended. The fact that he specifically picked out her good character, her health and her being in employment in this country as being the factors which militated against the public interest in extradition, but did not pick out the point about the length of the sentence which remained to be served, also tends to support the view that he did not have this point clearly in mind as a consideration which weighed against extradition.

70. By a similar process of reasoning, it does not appear that the SDJ had in mind the fact that the appellant had been subject to an electronically monitored 11pm to 6am curfew for just over 4 months at the time of the extradition hearing. Although this would not have been a qualifying curfew condition for the purposes of reducing a custodial sentence under our law, because it was for less than 9 hours, there was an element of punishment which ought to have been taken into account given the shortness of the

sentence which remained to be served, albeit the point would have been far from decisive: compare **Danfelds and Jodelis v General Prosecutor's Office, Latvia** [2020] EWHC 3199 (Admin).

71. Although the SDJ did make a point in favour of discharge which referred to the seriousness of the offending, I also consider that there is force in the complaint that the SDJ did not fully reflect the true position in his judgment. The level of seriousness of the offending was not referred to by the SDJ at [60] when he identified the three factors – good character, health and employment – which, he said, militated against the public interest in extradition. He did not expressly refer, when he carried out the balancing exercise, to the fact that the offences had been a series of thefts with a total value of around £337.

72. Furthermore, the bullet point: "*The sentence was originally suspended suggesting that the JA did not consider the offending to be sufficiently grave to justify the imposition of an immediate custodial sentence"*, insofar as it was taken into account, purports to deduce something which is obvious. In my view it was also relevant that, not only had the sentence been suspended when it was imposed; it had been suspended again for 3 years in 2014 and there had then been a decision in 2017 that it need not be served in custody and could, instead, be served in the form of an electronically monitored curfew. The history which I have briefly summarised at [4] above was not covered in the judgment, suggesting that it was not taken into account, but it does tend to tell against the conclusion that extradition was proportionate.

73. Neither the point about the principle of legality, nor the possibility of early release appear to have been considered by the SDJ albeit they may not have been raised before him. (They were not raised by the appellant, but they may have been raised by the then Counsel for the requesting authority).

74. The SDJ referred to the age of the offender *at the time of conviction* as a generally relevant consideration but he did not refer to the specific fact in the present case that the appellant was aged 63 at the time of the extradition hearing. Nor did he refer to the impact of prison on her bearing in mind that the pandemic was still upon us in April/May 2021, nor to the anxiety which may have been caused to the appellant by being arrested twice. To my mind these were less compelling considerations but they were relevant (see e.g. **Antochi v Richtern am Amstegericht of the Amstgericht Munchen (Munich), Germany** [2020] EWHC 3092 (Admin) [51] and [58]). The fact that they were not referred to also adds to the overall impression given by the drafting of the judgment that, with respect, the SDJ did not carry out a sufficiently careful balancing exercise, bearing in mind the standard of reasoning and explanation indicated by the passages from **Celinski** which I have cited at [54] above.

The SDJ's approach to the issue of delay

75. As to the question of delay, before referring to *"RT v Poland"* in the passage which I have cited above at [66], the SDJ said:

> *"60. In relation to the age of the offending it is important to recognise 2 factors. Firstly, that the time that she has been unlawfully at large does not run from the date of the offence and in fact she only became unlawfully at large approximately four years ago with the enforceable judgement for the activation of the suspended*

> *sentence. It is right to say that the delay in that seven-year period was because of the various processes and delays resulting from her applications to suspend activation of the sentence. This is not a case where the judicial authority can be remotely considered as culpable, therefore the real delay for this court to consider is approximately four years. During that time the IJA will have had to have conducted a domestic search, the authorities notified the call that the search was unsuccessful, the process of applying for and a European arrest warrant started and completed, the warrant being entered onto the SIS II information sharing system and only once the NCA was satisfied that she was in our jurisdiction the warrant certified."*

76. He then went on to refer to *"RT v Poland"* and to conclude that the delay did not in any meaningful way militate against the public interest, as I have noted. I agree with Ms Nice that the SDJ's emphasis on the questions when the appellant became *"unlawfully at large"* and whether the delay was culpable suggests that the SDJ had the authorities in relation to the passage of time bar under section 14 of the 2003 Act in mind and the principle that if the delay results from the requested person fleeing the country, concealing their whereabouts or evading arrest then it cannot be relied on as a basis for arguing that, by reason of the passage of time, it would be unjust or oppressive to extradite them: see e.g. **Kakis v Government of the Republic of Cyprus** [1978] 1 WLR 779.

77. I also agree that there is a difference of emphasis where the issue of delay is considered in the context of Article 8 ECHR. As Baroness Hale said at [8(6)] of her judgment in **HH**, it "*may both diminish the weight to be attached to the public interest and increase the impact upon private and family life"*. At [46] she said:

> *"While the district judge did find that the appellant fled Poland in order to avoid prosecution, and thus was not entitled to rely upon passage of time as a bar for the purpose of section 14 of the 2003 Act, the overall length of the delay is relevant to the article 8 question."*

78. However, the questions whether or to what extent the requested person or the requesting authority are responsible for the delay which occurred and/or whether the requested person is a fugitive will be relevant to the Article 8 analysis. They go to the weight of the argument that the delay is indicative of a lack of importance being attached to the extradition of the requested person. Article 8 ties which have been established during the period of delay, but in the knowledge of the risk of being returned, will generally also carry less weight.

79. I therefore would not have allowed the appeal on the basis of the SDJ's treatment of the age of the offending alone. The essential point which the SDJ appears to have been making is that the fact that the offending took place in 2010 did not, of itself, carry a great deal of weight given that much of the period of time which had elapsed since then had been taken up with proceedings in the Polish courts relating to the sentence which had been passed. It was only in June 2017 that it was finally decided that the appellant was required to serve the remainder of her sentence in custody. The real delay was the approximately 4 years which had elapsed since then, but it was only in May 2019 that it was reported that the appellant was likely to be in the United Kingdom. However, as I have noted, there was force in the argument that the delay in getting to the point where the Polish authorities came to the final view that the balance of the sentence should be

served in custody was relevant and this point does not appear to have been considered by the SDJ.

Additional points raised by the appellant

The effect of extradition on the appellant's immigration status

80. As to the effect of extradition on the appellant's immigration status, this was not a point which was raised before the SDJ. It appears that after that hearing the appellant made an application for settled status under Appendix EU to the Immigration Rules. Ms Nice argued that Rule 34K of the Immigration Rules may apply in the event that the appellant is extradited. This provides that:

> *"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."*

81. Her case was that the extradition of the appellant would therefore result in the appellant's application for settled status lapsing and there would then be difficulties for her if she sought to return. In particular, she and Mr Szerwinski would have difficulty in meeting the financial requirements of a gross annual income of at least £18,600 or *"specified savings"* of £16,000 under E-ECP 3.1 of Appendix FM to the Immigration Rules. There was also a risk that she would be excluded on grounds of *"suitability"* given her conviction and extradition.

82. Mr Smith argued, at the hearing, that Ms Nice's submission as to the effect of the appellant leaving the common travel area on her application for settled status was incorrect. Rule 34K is the general or "default" rule whereas the position under the EU Settlement Scheme is as stated at page 70 of the Guidance to that Scheme – *"EU Settlement Scheme: EU, Other EEA and Swiss citizens and their family members"* version 17, published for Home Office Staff on 13 April 2022:

> *"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".*

83. The Home Office Certificate of Application dated 4 August 2021 which was sent to the appellant states that it can be used, amongst other things to *"travel into and out of the country without having to approve your status, as your information will be checked automatically"*. This is entirely inconsistent with the suggestion that it will lapse in the event that the holder leaves the Common Travel Area.

84. Mr Smith then provided a very helpful written analysis, dated 16 May 2022, to show the legal basis for his argument. Ms Nice accepted much of his analysis of the relevant provisions but argued in writing that the word *"automatically"* in the passage from the Guidance quoted above implied that there could be a decision to treat the application as withdrawn, as opposed to it lapsing automatically, and/or that extradition might not be regarded as *"travel"* so that the principle did not apply in extradition cases. On either basis, she argued, this passage might not protect the appellant and there was, therefore, a risk that she would not be able to re-enter the United Kingdom having served her sentence in Poland or, at least, would have difficulties in doing so.

85. I accept Mr Smith's submission on this issue. The essential points are that:

i) Appendix EU contains its own procedural requirements at paragraphs EU4-EU8 and Annex 2, and these do not say or suggest that an application will lapse if the applicant leaves the Common Travel Area whilst an application is pending. The Appendix also permits applications to be made from outside the United Kingdom.

ii) Regulation 4 of the Citizens' Rights (Application Deadline and Temporary Protection)(EU Exit) Regulations 2020 (SI 2020/1209), which implements Article 18 of the EU-UK Withdrawal Agreement (2019/C384I/01, dated 12 November 2019), preserves existing rights of residence of EU citizens and the right of admission to the United Kingdom under Regulation 11 Immigration (European Economic Area) Regulations 2016 (SI 2016/1052) pending the outcome of in-time applications for leave to enter or remain by those who are lawfully resident in the United Kingdom by virtue of the 2016 Regulations at the time of the application.

iii) Rule 34K therefore does not apply to applications made under the EU Appendix.

iv) There is no material distinction between extradition and travel for other reasons, whether voluntary or otherwise. The principle underpinning the 2020 Regulations is that existing rights of residence and free movement are preserved pending the outcome of applications for residence provided they are made within the specified deadline. There is no rational reason why this principle would not apply where a person has been extradited and seeks to return to the United Kingdom having served their sentence.

v) It is not realistically arguable that the fact that the appellant was convicted in Poland of offences of theft in 2011 and subject to a suspended sentence of 6 months' imprisonment would provide a basis for refusing her entry. The only conceivable basis would be that she posed a *"genuine, present and sufficiently serious threat affecting one or more of the fundamental interests of society"* (regulation 27(5)(c) of the 2016 Regulations) but the fact that no steps other than the extradition proceedings have been taken to remove her reflects the fact that the circumstances including the age, nature and seriousness of her offending do not provide a plausible basis for concluding that she poses such a threat. As regulation 27(5)(e) states, "*a person's previous criminal convictions do not themselves justify the decision"* and it also seems unlikely that such a decision would be proportionate (regulation 27(5)(a)) given that the appellant would have served her sentence. The risk of the appellant being refused admission under regulation 27 of the 2016 Regulations on grounds of public policy or public security is therefore vanishingly small.

86. The risk of the appellant being refused admission on the basis that her application under Appendix EU has lapsed and/or a decision that she should be refused entry to the United Kingdom after she has served her sentence is therefore negligible on the evidence before me. Moreover, as Mr Smith points out, given that the function of the Certificate with which she has been provided is to facilitate free movement, and given that the appellant's travel and immigration details are already on record, it seems unlikely that

there would be any delay in her returning once she was released by the Polish authorities.

87. I note that Swift J came to essentially the same view on this point, albeit obiter, in **Gurskis v Latvian Judicial Authority** [2022] EWHC 1305 (Admin) at [20]-[21].

88. My conclusion on this issue means that I need not enter into the question of how to approach so called "Brexit uncertainty" which is discussed in **Antochi v Richtern am Amstegericht of the Amstgericht Munchen (Munich), Germany** [2020] EWHC 3092 (Admin), **Rybak v District Court in Lublin (Poland)** [2021] EWHC 712 (Admin) **Pink v Regional Court in Elblag (Poland)** [2021] EWHC 1238 (Admin), **Gorak v Regional Court in Poznan** [2022] EWHC 671 (Admin), **Piekarski v The District Court in Lublin, Poland** [2022] EWHC 1088 (Admin), and **Gurskis** (supra) amongst other recent cases. On the evidence, this issue does not arise because there is no relevant Brexit uncertainty. The Article 8 balancing exercise falls to be carried out on the basis that the appellant will be able to return to the United Kingdom assuming that she is entitled to residence here, whether under the 2020 Regulations or because such has been granted residence under Appendix EU. I accept, however, that she is anxious about this issue and that it is relevant to take her subjective perception of the position into account in carrying out the Article 8 assessment: see **Antochi** at [50].

Fugitivity

89. As to the SDJ's finding that the appellant was a fugitive, Ms Nice submitted that he had misunderstood the appellant's evidence that *"I never knew about the prison sentence to serve as I thought it was suspended"* in that he took her to be referring to the (second) activation of the sentence on 28 November 2016. At [43] he then proceeded to dismiss this supposed claim on the basis that she must have known given that she then applied for the sentence to be served by way of electronically monitored curfew. This was of a piece with his view that she was a liar but, in fact, she was referring to the revocation of her conditional release from serving her sentence which took place on 21 September 2018, by which time she was not in Poland. The Further Information provided by the requesting authority was in fact consistent with her evidence, when it was understood as it was intended, in that it said that the Order was delivered to her address on two occasions but returned.

90. I accept that the SDJ understood the appellant's evidence in the way alleged. That understanding is explicable by the wording of her proof of evidence, which referred to her belief that the custodial element was suspended rather than her belief that she had been conditionally released, in June 2017, from serving the rest of her sentence, and her being unaware that this had been revoked. Later in the proof she says that she did not know about the revocation of her suspension until 5 or 6 months after she moved to the United Kingdom. She had kept in touch with her probation officer for roughly this period but had then lost touch. Again, this did not make any sense if it referred to the November 2016 activation of the sentence. In my view the SDJ's point that she must have known of the activation of the sentence in order to apply for it to be served by electronically monitored curfew should have caused him to question whether she meant what he thought she meant. I also accept that the SDJ's understanding was a misunderstanding of what the appellant intended to say.

91. I would not have allowed the appeal on the basis of this point, however, because the "bottom line" is that the SDJ also found that whether or not the appellant was permitted to leave Poland, she was well aware of the condition of her release that required her to keep in touch with probation, and she should have been aware that failure to do so would lead to the activation of the rest of her sentence. She had chosen to place herself beyond the reach of the Polish criminal justice system and knowingly exposed herself to the risk of the sentence being activated. She therefore was a fugitive: see **Wisniewski v Regional Court of Wroclow, Poland** [2016] EWHC 383 at [62].

Drawing the strands together

92. I therefore accept that:

i) the SDJ was wrong to find that the appellant lied about her relationship with Mr Szerwinski, albeit this view was open to him on the information which he had at the time of the hearing;

ii) his reasoning was flawed in the respects which I have identified; most notably he did not take into account the relevant considerations to which I have referred at [68]-[74] above, but his approach to the issue of the age of the relevant offences/delay was also flawed;

iii) the SDJ misunderstood the appellant's evidence as to her awareness of the activation of her sentence, albeit this was not his fault and it did not mean that his conclusion that she was a fugitive was wrong, and he misinterpreted the extract from Mr Szerwinski's GP records for reasons which are not clear;

iv) there was further relevant evidence as to the appellant's Article 8 ties to this country which was not before the SDJ and/or did not emerge at the hearing.

93. A number of the errors may well have come about because the hearing was conducted by CVP and there were technical difficulties, and the appellant was an unsophisticated litigant in person with limited IT skills, communicating through an interpreter. The fact that the appellant had had dealings with a solicitor may also have given the SDJ a false impression of the assistance and advice which she had received. But having read the judgment in the light of the evidence and the submissions of the parties, I am satisfied that the consideration which was given to the appellant's case under Article 8 was not sufficiently careful or thorough to meet the standard indicated by **Celinski**. That is not the end of the matter, however, because the decision cannot be held to be "wrong", and the appeal allowed, unless I am satisfied that the appellant ought to be discharged on a proper consideration of the evidence (sections 27(3)(c) and (4)(c)).

My assessment

94. As Burnett LJ (as he then was) stated in **T v Circuit Court in Tarnobrzeg, Poland** [2017] EWHC 1978 (Admin) at [72]:

> *"72. In a fresh evidence, or fresh issue case, the court hearing an extradition appeal must make its own determination on the relevant questions on the basis of all the material then available."*

95. The public interest in extradition and in the United Kingdom not being, or being seen to be, a safe haven for offenders fleeing the criminal justice system in their own countries is a very powerful one. However, that interest is weakened in the present case, and/or is less likely to be advanced by the extradition of the appellant, given the fact that the index offences were low value thefts which were committed in 2010. They resulted in a suspended sentence of 6 months' imprisonment but the Polish authorities were, rightly given the relatively low level of seriousness of the offending, slow to reach the point where they finally concluded that the remaining part of the sentence should be served in custody. Over a period of approximately seven years the sentence was suspended, then activated, then suspended again for 3 years, after which it was held to be appropriate for it to be served by electronically monitored curfew, after which the appellant was conditionally released from serving the rest of the sentence before it had been completed. She is a fugitive, but on the basis that she lost contact with the probation service in early 2018, whereas if she had kept in contact from the United Kingdom for around another year there would have been no question of extradition.

96. The upshot is that only 2 months and 13 days remain to be served, well below the minimum sentence of 4 months required under section 65 of the 2003 Act. Although I acknowledge that this does not apply directly given that the sentence was 6 months, it is in my view a relevant factor.

97. All of these circumstances, together with the facts that the Polish authorities have not considered the issue of proportionality in seeking extradition; that the appellant has not offended for 7 years or at all in this country; that she has never been to prison before; and that she has now been subject a degree of additional punishment by way of an electronically monitored curfew for 18 months since her arrest (i.e approximately the length of time she was required to keep in contact with the Polish probation service after she was released from the curfew in Poland) as well as the stress associated with the extradition proceedings, lead me to conclude that she is likely to be granted early release if she is required to serve the sentence in custody at all.

98. In terms of the consequences of extradition for the appellant, she is now 64 years old. She first came to this country in September 2016 (although it appears that she returned there for around 6 months at the end of 2016) and she has a home and a job here. She has been of good character in this country. She also has significant health issues for which she takes medication - angina, breathlessness, an abdominal aortic aneurism and high blood pressure - although I accept the SDJ's point that these do not prevent her from working and would not, in themselves, be sufficient to prevent extradition.

99. I also accept, however, that the appellant would lose her job if she were extradited and that this would be particularly harmful given her financial situation and given that she intends to retire in October this year when she turns 65. The labour market at the moment is such as to suggest that she would have reasonable prospects of finding another job but there was no evidence about the availability of suitable jobs in St Helens and there is clearly a risk that she would have problems in this regard given her age and health. She has been off work with stress recently and she says that her health and her age were preventing her from finding employment in Poland.

100. I also accept that the appellant's relationship with Mr Szerwinski adds some weight to her case under Article 8. He is of a similar age to her. On the evidence now available, they have been in a stable relationship for around 20 years, albeit with a 3-year break

in 2002-2005, after they divorced. He also has health issues which she told the SDJ about – his diabetes, high blood pressure and heart issues - and, he says, she helps him with these by ensuring that he takes his medication and helping him to manage his diabetes. She also helps him by doing the shopping, the housework and cooking as he has mobility issues related to his health conditions. He has pre-settled status and would not follow her to Poland as he would find it hard to get a job given his health, although the likelihood is that she would be able to return here at the end of her sentence, as I have found.

101. Both have concerns about the effect of extradition on their home given that Mr Szerwinski does not earn enough to pay the rent on 30 Chamberlain St, and they have no savings other than the bail security of £800 which would be returned to them. I accept that the appellant is likely to be able to return after completing her sentence, so after a relatively short time, and that she may well be able to find employment soon after her return. Eviction for non-payment of rent therefore seems unlikely but the risk of this cannot be discounted altogether.

102. Both say that they have nothing to return to in Poland and that their life is in England now. I also accept that the prospect of extradition and the fear of not being able to return to this country and/or of being unemployed and having to leave their current home in St Helens have caused the appellant significant anxiety and would continue to do so if she were extradited.

103. On balance, and after some hesitation, I am satisfied that in the unusual circumstances of this case the weakened public interest in extradition, and the very limited extent to which that interest is likely to be advanced by the extradition of the appellant, are outweighed by her and Mr Szerwinskis' Article 8 rights to respect for their private and family life and home. I have been persuaded that, bearing in mind the curfew which has been applicable to the applicant in the last 18 months, it would be disproportionate to disrupt their lives by extraditing her for what, at most, would be a very short time in prison in Poland.

104. I therefore propose to order that the appellant be discharged.