Neutral Citation Number: [2022] EWHC 693 (Admin)

Case No: CO/183/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/03/2022

Before :

MR JUSTICE CHOUDHURY

- -

Between :

PIOTR ZIEMBINSKI	**Appellant**
- and -	
REGIONAL COURT OF PLOCK (POLAND)	**Respondent**

- -
- -

Émilie Pottle (instructed by **ITN Solicitors**) for the **Appellant**
Stefan Hyman (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing date: Thursday 17 March 2022

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 25th March 2022.

Mr Justice Choudhury :

1. This is an appeal against the decision of District Judge Griffiths, sitting in Westminster Magistrates' Court, on 13 January 2021, ordering the Appellant's extradition to Poland. Leave to appeal was granted by Sir Ross Cranston on 14 February 2022 in respect of three grounds of appeal. A fourth ground of appeal related to an argument that no court in Poland could be considered a Judicial Authority for the purposes of s.2 of the *Extradition Act 2003* ("the 2003 Act") but this was not pursued following the judgment of the Divisional Court in *Wozniak v Poland* [2021] EWHC 2257 (Admin).

2. There are two European Arrest Warrants ("EAWs") giving rise to the extradition proceedings in this matter:

3. The first, EAW 1, is an accusation warrant issued on 10 March 2020. It relates to a single offence that the Appellant:

> "in the undetermined period, but not earlier than from spring 2009 to 16 June 2010 in Plock, contrary to the provisions of the Act, in order to gain a financial benefit through sale, […] granted a narcotic drug in the form of marijuana with an undetermined amount of not more than 50g and value of not more PLN 1,500 to a minor…".

4. That offence was alleged to have been committed within 5 years of serving a sentence of more than 6 months' imprisonment for what has been described as an earlier "similar offence". That earlier offence was one of robbery committed on 7/8 August 2003, also in Plock, when the victim, a minor, was beaten and money was taken. For that offence he was sentenced to 2 years' imprisonment suspended for 5 years. However, the Appellant got into a fight in 2005 and the suspended sentence was activated. He surrendered to prison and served the full 2 years of the activated sentence.

5. The second EAW, EAW 2, is a conviction warrant and was issued on 24 June 2020. It relates to an offence committed on 12 June 2009 when the Appellant, acting jointly with another, took part in an assault on two victims by beating them with his fists and kicking them. One of the victims suffered bodily injury. That offence was also committed within the 5-year period following the serving of a sentence of more than 6 months for a similar offence, namely the 2003 beating referred to above. At a hearing before the District Court in Plock on 18 September 2009, the Appellant was sentenced to 2 years' imprisonment conditionally suspended for 5 years. The Appellant was present at the time of sentencing. By a decision dated 28 January 2011, the suspended sentence was activated as a result of the Appellant changing his place of residence without informing the Court. A search was ordered by means of an arrest warrant. However, the Appellant could not be located. On 12 February 2020, the police informed the Court that the Appellant may be in the UK and steps were taken to issue EAW 2, which was issued on 24 June 2020.

6. The Appellant had left Poland in June 2010. Since then he has been in regular employment in various jobs in the Peterborough area. He has no convictions or cautions in the UK.

7. He has been together with his fiancée, Ms Sian Whitecross, for almost 8 years. They live together and plan on getting married. Ms Whitecross suffers from depression and anxiety and depends on the Appellant for emotional support. They have no children. The Appellant has no other family in the UK. He is not in touch with his father but he

is in contact with his mother who resides in Poland. She has been to visit him in the UK every couple of years.

Hearing before the Magistrates Court

8. In relation to EAW 1, the Judge found that there was nothing to suggest that the Appellant was under any bail conditions or obligations in relation to this offence. Accordingly, the Judge found that he is not a fugitive in relation to that matter.

9. However, in relation to EAW 2, the Judge found that the Appellant is a fugitive from justice. The Judge rejected his contention that he was unaware of the conditions attached to his suspended sentence and concluded that he had deliberately put himself beyond the reach of the Judicial Authority in order to avoid serving the sentence of imprisonment.

10. The Appellant contended that the particulars contained in EAW 1 were insufficient and failed to comply with s.2(4)(c), of the 2003 Act, read in the light of Article 8(1)(e) of the *Council Framework Decision of 8 June 2002* ("the Framework Decision"), which provides that an EAW must include, inter alia:

    i) The nature and legal classification of the offence…; and

    ii) A description of the circumstances in which the offence was committed including the time, place and degree of participation in the offence by the requested person:

11. Having considered the authorities, the Judge concluded that the particulars were sufficient.

12. The Appellant raised a passage of time argument under s.14 of the 2003 Act. The Judge noted that the Appellant could not rely upon s.14 in relation to EAW 2 as he was a fugitive. Whilst the Appellant was not a fugitive in relation to EAW 1, the Judge felt unable to ignore his conduct in relation to EAW 2 where he had taken himself out of the jurisdiction.

13. Insofar as there was a delay in relation to the issuing of EAW 1, that was at least in part because the Appellant had left Poland without informing the Judicial Authority. There was no evidence that Appellant could not be fairly tried. Mere passage of time was not sufficient to establish oppression. Whilst there would be some emotional and financial impact on his partner, it was not so great as to amount to oppression. The Judge considered that the Appellant's partner would cope. For these reasons, set out more fully at [65] to [67] of the judgment, the Judge concluded that the Appellant's extradition was not barred by passage of time.

14. As to the Appellant's Art 8 rights, the Judge considered the factors for and against extradition at [82] to [89], and concluded that, whilst the Appellant's Art 8 rights are engaged, there was nothing in the evidence before her to suggest that the negative impact of extradition on the Appellant and his fiancée outweighs the strong public interest in extradition. In those circumstances, it was not considered disproportionate to order extradition.

15. Finally, the Judge considered whether it would be disproportionate under s.21A of the 2003 Act to extradite the Appellant for the offence under EAW 1, which is an accusation warrant. The Judge considered that, although the offence was not the most serious, it was not insignificant. The Judge also had regard to the fact that it was committed within 5 years of serving a sentence of more than 6 months' imprisonment for a "similar offence". The Judge was unable to say what the likely penalty would be but considered that a custodial sentence would be likely given the nature of the offence – selling cannabis to a minor – and the fact that the Appellant has previous convictions. There was no indication that the Judicial Authority would take any less coercive measures. In all the circumstances, extradition was not considered to be disproportionate.

The Grounds of Appeal.

Ground 1 – Sufficiency of Particulars.

16. Ground 1 relates only to EAW 1. The contention is that the particulars of the offence in EAW 1 are insufficient and fail to comply with the requirements of s.2(4)(c) of the 2003 Act read in the light of Article 8(1)(e) of the *Framework Decision*.

Submissions – Ground 1

17. Ms Pottle, who appears for the Appellant (but did not appear below), submits that the particulars are deficient because they do not permit the Appellant to properly to raise the following bars:

    i) Speciality under s.11(f), of the 2003 Act;

    ii) Proportionality, under s.21A, of the 2003 Act; and

    iii) Art 8, ECHR.

18. As to the first of those points it is submitted that the description of the offence is so broad that if the Appellant were to be prosecuted upon his return for a drugs offence occurring at some point in the 15-month timeframe stipulated, it would be nearly impossible for him to avail himself of the speciality protection. The description of the offence fails to identify the person to whom the drugs were sold, covers a lengthy time period, and also covers the entire city of Plock. Furthermore, the amount and value of the drugs is not stated save for the expression of an upper limit on each, and the possibility of more than one transaction is not excluded. Taken as a whole, Ms Pottle submits that the accusation is so vague as to render the speciality protection provided by the 2003 Act illusory.

19. As to proportionality under s.21A of the 2003 Act, it is submitted that the Appellant is severely constrained as to the submissions he is able to make on seriousness and the likely penalty because the information as to the offence, in terms of the quantity and value of marijuana sold and the number of transactions involved, is so vague. These deficiencies apply equally to the Art. 8 considerations because of the need for the Judge to weigh the seriousness of the offence.

20. Mr Hyman, who appears for the Respondent (but who also did not appear below), submits that it is a question of fact and degree whether or not particulars in a particular EAW are sufficient, and there is nothing here to suggest that the Judge's conclusion that they were sufficient was wrong. The information provided was sufficient to enable the Appellant to know what he was being accused of and to ascertain whether any statutory bar to extradition was applicable.

Ground 1 - Discussion

21. As to the degree of particularity required, the principles are well-established and were set out in in *King v. Public Prosecutors Office of Villefranche sur Soane, France* [2015] EWHC 3670 (Admin). Collins J (sitting with Lloyd Jones LJ, as he then was) said at [18]:

> **"18… What is needed in all cases is sufficient information to enable any mandatory or optional bar contained in Article 3 and 4 of the Framework Decision to be considered whether by the authority in the executing state or the requested person"**

22. He continued at [22]:

> **"I do not believe that the particulars required whether for an accusation or a conviction warrant need great detail. As I have said, provided they give sufficient information to enable any available point on a bar to be taken and the ability to judge whether the offence is properly listed in the framework list and dual criminality can be shown if that should be needed, they will suffice whether for accusation or conviction cases"**

23. In my judgment, the Judge was plainly correct to find that the particulars in EAW 1 were sufficient. A date range for an offence is not impermissible *per se*; indeed, prosecutions are routinely brought in this jurisdiction in respect of offences committed between two stated dates or within a defined timeframe. It is perhaps unusual to commence a time period with a season rather than a date or month, but the information would still enable the Appellant to know what he is accused of doing and when. A range that commences from 'Spring', as is the case here, is not significantly more problematic than, for example, stating that the offence committed at some point from "about 1 March". Of course, there may be situations where the Judge is unable to feel sure that the particulars supplied were adequate because of the breadth of the range, but there can be no hard and fast rule as to what period a range must not exceed before it becomes too broad; all will depend on the circumstances of the offence, and it is, as Mr Hyman submits, a matter of fact and degree.

24. In this case, the Judge found that EAW 1 was in respect of a single offence committed in the city of Plock and involved the selling of cannabis of up to a defined quantity to a minor. The Judge was entitled to conclude in those circumstances that the breadth of the time period over which the offence is said to have been committed does not render the particularisation of the offence inadequate.

25. Of course, one of the reasons for ensuring particulars are sufficient is so as to enable the requested person to identify any potential bars to extradition. Ms Pottle submits that there are two bars in particular that are rendered difficult for the Appellant as a result of the way in which the offence is stated. The first is the speciality bar. Section 17, of the 2003 Act provides:

17 Speciality
(1) A person's extradition to a category 1 territory is barred by reason of speciality if (and only if) there are no speciality arrangements with the category 1 territory.
(2) There are speciality arrangements with a category 1 territory if, under the law of that territory or arrangements made between it and the United Kingdom, a person who is extradited to the territory from the United Kingdom may be dealt with in the territory for an offence committed before his extradition only if—
(a) the offence is one falling within subsection (3), or
(b) the condition in subsection (4) is satisfied.
(3) The offences are—
(a) the offence in respect of which the person is extradited;
(b) an extradition offence disclosed by the same facts as that offence;
(c) an extradition offence in respect of which the appropriate judge gives his consent under section 55 to the person being dealt with;
(d) an offence which is not punishable with imprisonment or another form of detention;
(e) an offence in respect of which the person will not be detained in connection with his trial, sentence or appeal;
(f) an offence in respect of which the person waives the right that he would have (but for this paragraph) not to be dealt with for the offence.
(4) The condition is that the person is given an opportunity to leave the category 1 territory and—
(a) he does not do so before the end of the permitted period, or
(b) if he does so before the end of the permitted period, he returns there.

26. The purpose of these provisions is, broadly speaking, to ensure that requested persons are not subject to further prosecutions for matters unrelated to the matter for which they are being extradited, unless there is consent from the appropriate judge. Art 27 of the *Framework Decision* provides that if the Appellant is prosecuted for a further offence for which consent is required (as would be the case for another charge of dealing drugs), then a Court in Poland is required to seek consent from the Magistrates' Court.

27. Ms Pottle's argument is that the broad nature of the description of the offence means that the Appellant could be prosecuted for more than one transaction given that it is not known, for example, whether there was one minor involved or more, how many transactions are alleged or even where in Plock they were supposed to have occurred.

28. It is convenient at this juncture to deal with an application to adduce further information made by Mr Hyman for the Respondent. The Respondent sought to clarify the dates on which the offence was committed and the CPS sent a request for Further Information pursuant to Art 15 of *Framework Decision* was made to the Judicial Authority a few days ago. The Judicial Authority responded on 14 March 2022 with some further information which Mr Hyman now seeks to adduce. Ms Pottle objects to that evidence for two reasons: first it is said that the further information does not take the matter any further and does not clear up any insufficiency; and second, she submits that it is patently unfair to adduce the information on the night before the hearing as has happened in this case.

29. As to the first of those points, the parties have agreed that I could consider the further information *de bene esse* before reaching any final conclusion on its admission. Having done so, it is clear to me that the further information does clarify whether the source of the allegation is a single person or more than one person. As to the late service, that is unfortunate, but in the circumstances of this case, it is not unduly prejudicial. The further information is very short, and Ms Pottle has dealt with it very capably in the time available.

30. The applicable test in such circumstances is set out in *FK v Germany* [2017] EWHC 2160 (Admin) at [39] to [43]. This court has inherent jurisdiction to admit evidence on an extradition appeal and may do so if it is considered to be in the interests of justice. In my judgment, it would be in the interests of justice to admit this further information. The information is relevant and goes to support the decision to extradite already made by the Judge. Furthermore, there is no real prejudice to the Appellant who is able to make and has made representations on it.

31. The further information is in the following terms.

> "In response to the request in the e-mail, I shall kindly inform that that the period when the alleged offence under art. 59 section 1 and 2 of the Act of July 29, 2005 was committed by Mr. Piotr Ziembinski was given on the basis of testimonies of a person who was buying narcotic drugs from him. The witness testified that that he had been buying narcotic drugs from spring 2009 until June 16, 2010."

32. Several things are clarified by that further information: first, it is clear that the allegation is that the drugs were sold to one person, who was a minor at the time, and not to several minors; second, the Judicial Authority relies upon witness testimony from that person, thus suggesting that it is aware of that person's identity; finally, it is clear that the allegation is one of a continuing act whereby the minor "had been buying" narcotic drugs from the Appellant over a period of time.

33. The fact that there is only one source for the allegation deals with one of the potential difficulties raised by Ms Pottle, namely the risk, arising from the fact that the EAW refers to an unidentified minor, that there could be a prosecution in respect of some other minor who was also supplied with cannabis: any attempt to prosecute in respect of transactions with more than one minor or a different one from the one whose testimonies are referred to in the further information, would clearly fall outside the scope of EAW 1 and would require consent. The fact that the minor is unidentified at this stage is clearly not due to the Judicial Authority not knowing who the person is, and may be more to do with the fact that the person is (or was at the time) a minor, whose identity is protected.

34. As to the possibility of being dealt with for a number of transactions within the period, it seems to me that that would be permissible within the terms of the speciality provisions under s17(3)(b) of the 2003 Act, as these would be offences "arising out of the same facts". However, if the Judicial Authority sought to prosecute for transactions outside the stipulated period, or for transactions outside Plock, or for a different narcotic or quantity thereof, then consent would be required. The limitations on the extent to which the Judicial Authority can step outside the terms of the EAW confirm that the speciality protection remains real in this case and is not rendered illusory at all.

35. It seems to me therefore that the prospect of unrelated and impermissible prosecutions is somewhat overstated. Even if such a risk did materialise, the appropriate stage at which to raise this issue would be when a Court in Poland seeks consent from the Westminster Magistrates' Court. Accordingly, this issue, which was not raised below, is premature and does not advance the Appellant's case that the decision below was wrong.

36. Ms Pottle also contends that his ability to raise a challenge under. S.21A of the 2003 Act, under which the seriousness of the alleged conduct and the potential penalty are to be taken into account, are severely hampered by the broad way in which EAW 1 is framed. In particular, it is said that submissions on seriousness and penalty would be difficult because of the vagueness in the quantity of marijuana sold and its value, and because the number of transactions is not set out.

37. As to the quantity and value, the particulars provided are, in my judgment, perfectly adequate in that they provide a maximum quantity of 50g for which the value is stated as being 1500 PLN. The Appellant would certainly be able to make (and has made) submissions on seriousness and likely penalty based on that information, which is presented in a manner that is comparable to the ranges that appear in the Sentencing Guidelines in this jurisdiction. I return to the issues of seriousness and penalty when considering Grounds 2 and 3 below

38. In her written submissions, Ms Pottle contended that the Judge erred in her consideration of sufficiency because she found that a sentence of 2 years had been imposed when in fact this was an accusation warrant. The judgment must be read as a whole. There can be no doubt that the Judge was perfectly aware that the EAW 1 was an accusation warrant. Although the opening sentence of [48] suggests that all the findings that appear in the subsequent sub-paragraphs relate to EAW 1, it is clear from [49] that the Judge was considering the adequacy of the particulars in respect of both EAWs. Hence the reference to the sentence under EAW 2 was not inapposite. In any case, this was not a point developed in oral submissions and I need say no more about it.

39. For these reasons, Ground 1 is dismissed.

Ground 2 – Article 8

Time Served

40. Ms Pottle's first submission relates to the time served in respect of the EAW2 offence as this has increased significantly since the time of the hearing below. The Appellant has been in custody since his arrest. He has served 1 year 7 months and 21 days as of the date of this hearing and thus has 4 months and 1 week to serve out of his 2-year sentence under EAW 2. Ms Pottle submits that that materially alters the Art 8 balancing exercise from that which the Judge had to undertake early last year.

41. I was referred to the case of *Gruszecki v Poland* [2013] EWHC 1920 (Admin) in which Ouseley J considered whether removal to Poland to serve out a similarly short balance of an outstanding sentence would be disproportionate. At [9] and [10] of a short judgment, Ouseley J stated as follows:

> **"9. So I approach this very much on the basis that there is a proper case for the appellant to serve the balance of his time in Poland. It is his fault that he has that balance to serve. The Polish authorities are entitled, when a person absconds from prison, to seek to prevent them taking advantage of that absconding by seeking to ensure that they at least serve the balance of their sentence. That said, here there would be a degree of interference not just with private but with family life. It is impossible to be precise over the time which would in fact be served in relation to the birth date and the support for the pregnant partner, which it is to be hoped, if not expected, that the appellant would provide. I have found this more problematic than proportionality cases generally because there is clearly a strong public interest in ensuring that no advantage accrues to**

those who abscond from prison, waste time here in contesting extradition on a notice of appeal which raises an absurd ground and in whose case there is the added drawback of his offending behaviour in the United Kingdom.

10. However, I have come to the conclusion that extradition would be disproportionate. The period left to be served, even at 4 months and 26 days, is close to the period which would be the cut-off point for the warrant. It is to be allied with the fact that the appellant has a pregnant partner who is likely to be giving birth at a time when he may be absent, and also unable to offer such support as he intends to over the remaining months of the pregnancy. But I reach that conclusion with no enthusiasm and it is a very marginal decision because I take a very dim view of someone absconding and then, if you like, getting away with it."

42. Ms Pottle did not seek to persuade me that this judgment sets any sort of standard that any case where a comparable period remains to be served should tip the balance against extradition. It is, very fairly, drawn to my attention merely as an example of the approach that a Court might take in such circumstances.

43. In my judgment, very little reliance can be placed on *Gruszecki* for the simple reason that 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. In *Gruszecki*, the requested person's partner was about to give birth to their child, and even then, Ouseley J reached the decision that he did with "no enthusiasm" and emphasised that it was "very marginal". The duration of a sentence that remains to be served is but one factor that the Court will take into account. That was made very clear by McCombe J (as he then was) in *Kasprzak v Poland* [2010] EWHC 2966 (Admin):

"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, as Miss Rafter submitted, 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, Miss Rafter submitted that 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, Miss Rafter submits that 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. This is a case where there was an offence of violence committed in the company of others, to which the appellant pleaded guilty. It led to a sentence of one year, three months and even the outstanding sentence to be served is well above that which would ground extradition for a framework offence, or indeed in the dual criminality case in those circumstances".

44. In *Molik v Poland* [2020] EWHC 2836 (Admin), Fordham J considered *Kasprzak* and stated (at [11]) that, "*The Court considering Article 8 proportionality must, in principle, respect the time left to be served and which is required, by the requesting state authorities, to be served there…".*

45. The period remaining to be served in the present case - 4 months and 1 week - is not insignificant. The proceedings have not reached the stage where the Appellant is at, or even near, the cusp of having served the full term of his sentence, where a different approach may be justified: see *Molik* at [18]. Thus, although the duration of the sentence remaining to be served is a factor to be taken into account, it is not one that, in the circumstances of this case and at the stage of this judgment, has any material effect on the balancing exercise that was undertaken. I turn therefore to Ms Pottle's other challenges to the Judge's approach to Art 8.

Ground 2 – Submissions

46. It is submitted that the judge erred in assessing the seriousness of the offence under EAW 1 because she had incorrectly assumed that it was the Judicial Authority's view that the Appellant had committed the drugs offence within 5 years of serving a sentence of more than 6 months' imprisonment for a "similar offence" and that the drugs offence was thereby rendered more serious. In fact, as Ms Pottle is right to point out, that was the view of the prosecutor and it was not one that the Judicial Authority shared, as the following extract from the further information dated 10 November 2020 demonstrates:

> "The Court shall send, with translation, the position of the Prosecutor's Office, informing that the Prosecutor's Office is of the opinion that the currently charged act is similar to the crime of armed robbery, for which Piotr Ziembinski was serving a prison sentence. The court that issued the EAW does not share this view, but was not entitled to interfere with the content of the allegation - the wording of Article 64 paragraph and Article 115 paragraph 3 of the Penal Code are enclosed."

47. Ms Pottle's submission is that had the Judge appreciated that that was not the view of the Judicial Authority then there would have been no proper basis on which to conclude that the drugs offence would be treated more seriously. It is also said that the Judge placed undue weight on the potential maximum sentence for the offence in Poland, namely 15 years' imprisonment (the normal maximum of 10 years being increased as a result of the aggravating feature of it being committed with 5 years of serving a sentence of more than 6 months for a similar offence). Although that is a relevant consideration, seriousness is to be assessed by reference to the requested person's conduct: see *Miraszewski v Poland* [2015] 1 WLR 3994 at [36].

48. It was further submitted that, whilst the Judge acknowledged that the Appellant was not a fugitive under EAW 1, she allowed her analysis of the effect of delay to be clouded by taking account of the fact that he was a fugitive under EAW 2. The weight attached to fugitive status was therefore wrongly increased and a proper analysis would have resulted in the Judge concluding that the delay in this case in relation to EAW 1 diminishes the public interest in extradition.

49. Finally, under this ground, it was submitted that the effect of Brexit was not taken into account. The likelihood, in the light of Government guidance published since the hearing below, is that the Appellant's return to the UK would be prevented because of his criminal record. That would result in the permanent severance of the Appellant's relationship with his fiancée, thereby rendering extradition disproportionate.

50. Mr Hyman submitted that even if the Judge erred in assuming that it was the Judicial Authority's view that the offence under EAW1 was rendered more serious because of a previous similar offence, that error was not material in the circumstances. The Judge clearly had regard to the less serious nature of the offence under EAW 1. There was no flaw in the Judge having regard to the Appellant's fugitive status under EAW 2 in considering EAW 1. The effect of extradition is binary, in that either the Appellant is extradited or he is not. Where extradition is sought under multiple warrants, the Court must consider proportionality and Article 8 in the round: see *Zakrzewski v Poland* [2015] EWHC 3393 (Admin) at [20] to [23] per Irwin J (as he then was). As to the Appellant's immigration status, this was a matter that was taken into account as a factor that militated against extradition. In summary, the Judge did not err in concluding that extradition would not be disproportionate.

Ground 2 –Discussion

51. The approach to be taken by this Court on an appeal against a decision on proportionality under Article 8 was set out by the Divisional Court in *Belbin v Regional Court of Lille, France* [2015] EWHC 149 (Admin), in which Aikens LJ stated as follows:

> **"The correct approach on appeal is one of review, then we think this court should not interfere simply because it takes a different view overall of the value-judgment that the District Judge has made or even the weight that he has attached to one or more individual factors which he took into account in reaching that overall value-judgment. In our judgment, generally speaking and in cases where no question of "fresh evidence" arises on an appeal on "proportionality", a successful challenge can only be mounted if it is demonstrated, on review, that the judge below; (i) misapplied well-established legal principels, or (ii) made a relevant finding of fact that no reasonable judge could hae reached on the evidence, which had a material effect on the value-judgment, or (iii) failed to take into account a relevant fact or factor, or took into account an irrelevant fact or factor, or (iv) reached a conclusion overall that was irrational or perverse." (Emphasis added)**

52. (I emphasise (ii) in that citation because Ms Pottle's submission is that there was such an error here, in that the Judge unreasonably ascribed to the Judicial Authority a view as to the seriousness offence which it did not hold). That guidance was endorsed by Lord Thomas CJ in *Polish and Slovakian Judicial Authorities v Celinski and others* [2015] EWHC 1274 (Admin); [2016] 1 WLR 551, where he went on to state:

> **"The single question therefore for the appellate court is whether or not the district judge made the wrong decision. It is only if the court concludes that the decision was wrong … that the appeal can be allowed. Findings of fact, especially if evidence has been heard, must ordinarily be respected. In answering the question whether the district judge, in the light of those findings of fact, was wrong to decide that extradition was or was not proportionate, the focus must be on the outcome, that is on the decision itself. Although the district judge's reasons for the proportionality decision must be considered with care, errors and omissions do not of themselves necessarily show that the decision on proportionality itself was wrong."**

Seriousness and likely penalty

53. In relation to the error as to the Judicial Authority's view of the offence under EAW 1, there are two questions to be determined: (i) was the finding one that no reasonable judge could have reached on the evidence; (ii) if it was, then did that have a material effect on the overall value judgment reached by the Judge. The mere fact that a particular factual finding was wrong does not necessarily vitiate the analysis on proportionality.

54. In the present case, there is no doubt that the Judge did err in concluding that the Judicial Authority took the view that the drugs offence under EAW 1 was a "similar offence" to that of the beating offence committed previously and for which the Appellant had received a sentence of 2 years. Although the prosecutor had taken the view that both offences were similar because both had been committed for financial gain, the Judicial Authority did not share that view. The question then is whether that had a material effect on the overall value judgment reached by the Judge. I am not persuaded, despite Ms Pottle's powerful submissions to the contrary, that the Judge's error in this regard was such as to vitiate her analysis of seriousness overall. There are several reasons for coming to that conclusion.

55. First, it is clear that throughout her judgment, the Judge recognised that not only was the drugs offence not intrinsically the most serious of offences, but also that it was "not insignificant" since it involved the sale of cannabis to a minor: see [40] (8th bullet point), [80(f)], [88], [92(a)] and [92(b)]. Although the Judge did note that seriousness was increased by reason of the earlier offence, the starting point was not that this was the most serious of offences. Second, whilst the Judge did note that seriousness was increased by reason of the earlier offence, that was not an unreasonable finding to make. Previous offences are a relevant consideration and would generally be an aggravating factor in determining sentence. The error here lay in assuming that the Judicial Authority would treat the offence under EAW 1 as similar to the earlier offence. However, the effect of this error was not to render a trivial offence a grave one, but rather to render a not insignificant offence into something slightly more serious. It is relevant to note that the drugs offence on its own carried a maximum of 10 years sentence; it was in other words potentially serious enough on its own to warrant a custodial sentence. The effect of the "similar offence" rule in this case was thus not to alter a non-custodial offence into a custodial one, but merely to increase the maximum penalty. There is nothing here to suggest that the Judge had at any stage, by reason of the earlier offence, treated the drugs offence as something far more serious. In fact, the most that the Judge felt able to conclude was that a custodial penalty was likely: [92(b)].

56. All of this has to be considered in view of the further, inescapable fact that the Appellant was also subject to a conviction warrant in respect of an offence that clearly was serious and for which the Appellant was sentenced to two years' imprisonment (albeit initially suspended). The question of proportionality has to be determined by reference to all relevant factors and balancing all of them in the same exercise: see *Zakrzewski* at [23].

57. In determining proportionality here, the Judge correctly took into account the seriousness of both offences in the round, one of which (EAW2) was considered to be clearly serious, and the other of which (EAW 1) was "not insignificant" but likely to result in a custodial sentence. In those circumstances, any error as to the latter would be highly unlikely to have materially affected the overall value-judgment as to the seriousness of the criminality involved.

58. Ms Pottle further attacks the Judge's assessment of seriousness, and in particular, the conclusion that a custodial penalty was likely, by reference to the Sentencing Guidelines for similar drugs offences in this jurisdiction. She submits that, given the small quantity of cannabis involved (less than 100g – Category 4), and assuming a "lesser role" within the meaning of the relevant Guidelines, the offence would carry a starting point here of a low level community order with a range of a Band B fine up to a medium level community order. In other words, a custodial sentence would not have been likely for the same offence in this jurisdiction. I was not persuaded that that is a correct analysis. A "lesser role" would be one where there is the absence of any financial gain, whereas, even the brief details in EAW 1 confirm that the offence was committed "in order to gain a financial benefit through sale". That would indicate a "significant role" within the Guidelines. A sale of cannabis to a minor for financial gain would also imply a street-dealing type of offence in which case the starting point is not based on quantity but falls within Category 3 of the Guidelines. These factors are likely to result in a sentence with a starting point of 1 year's custody with a range from 26 weeks to 3 years' custody. The sale of drugs to a minor would be an aggravating feature: see Drug Offences Guidelines at pp. 12 to 14. Thus, even if the Judge had had regard

to the domestic guidelines, it is highly unlikely to have significantly altered her view that a custodial sentence in respect of EAW 1 was likely.

59. Ms Pottle also criticised the Judge's reliance upon the maximum sentence of 15 years. Reliance is placed on the following extract from the decision of the Divisional Court in *Miraszewski v Poland* [2015] 1 WLR 3994:

> **"36… I accept Mr Summer's submission that the maximum penalty for the offence is a relevant consideration, but it is of limited assistance because it is the seriousness of the requested persons conduct that must be assessed. Mr Fitzgerald's identification of seven years' imprisonment as the maximum sentence for theft".**

60. The Judge in the present case did little more than have regard to the maximum sentence, as she was entitled to do; there is nothing in the judgement to suggest that the Judge considered the maximum sentence a likely penalty for the offence in question or that her assessment of seriousness or likely penalty was governed by that consideration. In fact, the Judge felt "unable to speculate what the likely penalty in the event of conviction might be…". The most that she could say was that a "custodial penalty would be likely…": see [92]. The Judge's approach to the maximum sentence was, in my view, wholly unobjectionable.

Delay

61. In assessing the impact of delay, the Judge bore in mind that for EAW 1, the Appellant was not a fugitive, but felt unable to ignore the fact that he was a fugitive in relation to EAW 2 and had deliberately taken himself out of the jurisdiction. Ms Pottle submits that this was not a fair way to assess delay in relation to EAW 1 and that it would have been more accurate only to take account of fugitive status in relation to EAW 2.

62. In my judgment, the Judge was entirely right, in the circumstances of this case, to take account of the Appellant's fugitive status under EAW 2 even when assessing delay under EAW 1. Proportionality is to be assessed in the round, having regard to all relevant factors and giving them appropriate weight on either side of the scale in the *Celinski* balancing exercise. In the present case, the chronology is that the Appellant was sentenced for the offence under EAW 2 on 18 September 2009; he was found to be aware of the conditions under which his sentence was suspended and that the police were investigating the allegation: It was during the currency of that suspension that the Appellant gave a statement to the police denying the drugs offence, but heard nothing further. The Appellant then left Poland in June 2010 without telling the authorities, this leading to the activation of this sentence in January 2011. In these particular circumstances, where the events giving rise to both EAWs overlap to some extent, it would have been highly artificial for the Judge to have treated each EAW as hermetically sealed in assessing delay. The Judge was right to say that the Appellant's fugitive status under EAW 2 could not be "ignored".

63. The passage of time was a point raised below pursuant to s.14 of the 2003 Act. This provides:

> **14 Passage of time**
> A person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have–

(a) committed the extradition offence (where he is accused of its commission), or
(b) become unlawfully at large (where he is alleged to have been convicted of it)

64. Thus, in relation to the accusation warrant EAW 1, the only question for the Judge was whether the passage of time since the Appellant committed the offence had rendered it "unjust and oppressive" to extradite him. The Judge plainly had in mind that the Appellant was not a fugitive in relation to EAW 1, but considered, "The circumstances in which he left Poland [to be] relevant to the issue as to whether it is unjust or oppressive to extradite the RP": [64] That was, in my judgment, the correct approach in this context because of the almost direct overlap between the period for which he was a fugitive under EAW 2 and the period during which he was not dealt with by the Judicial Authority in respect of EAW 1. It would be anomalous for the Judicial Authority's failure to apprehend the Appellant under EAW 2 to be considered explicable (at least in part) by the Appellant's express self-removal from the jurisdiction, whilst at the same time, and in respect of substantially the same period, for the Judicial Authority to be considered culpable and/or entirely at fault for the failure to apprehend him under EAW 1.

65. On appeal, the Appellant contends that there was an error, not in the application of s.14, but in relation to the Art 8 balancing exercise. However, it is clearly relevant in the circumstances of this case (which are described above) to take the Appellant's fugitive status under EAW 2 into account in assessing the weight to be attached to the delay in respect of EAW 1. The Judge identified the following factors, amongst others, as militating against extradition:

"83. …

…

(d) The RP is not a fugitive in relation to EAW 1. I do not intend to repeat my findings set out earlier in this judgment.

e) The RP has a no convictions in the UK.

f) In relation to EAW 2, there has been some delay in these proceedings between the activation of the sentence and the EAW being issued. There has also been a delay between the dates of the offences in the EAW 1 and the EAW being issued. In relation to EAW 2, the delay, at least in part, is because the RP left Poland and did not inform the authorities of his address as he was required to do. The fact that the RP is a fugitive cannot be ignored. Further, in relation to EAW 1, I cannot ignore the RP's conduct in relation to EAW 2 and that he deliberately put himself out of reach of the JA in relation to that matter.

…"

66. In so doing, it cannot be said that the Judge took account of any irrelevant matters or left any relevant matters out of account. The Judge did not at any stage lose sight of the fact that the Appellant was not a fugitive under EAW 1. However, for the reasons set out above, fugitivity under EAW 2 is a relevant consideration in relation to the delay under EAW 1 given that it was that status that put him beyond the reach of the authorities. If that is correct, then the Appellant's only remaining argument is that the Judge attached insufficient weight to these factors. However, the value-judgment placed on particular factors is, in the absence of irrationality (which was not argued), very much a matter for the Judge. The Judge's approach to the question of delay cannot be said to be wrong.

The Brexit factor

67. The relevance of this has been considered in several recent decisions. In *Antochi v Germany* [2020] EWHC 3092 (Admin) (promulgated only a week or so before the extradition hearing here), Fordham J considered what was referred to there as "Brexit uncertainty" at [49] to [52]. Fordham J accepted that Brexit and the consequential uncertainty vis-à-vis the ability of the requested person to return to the UK thereafter was properly a matter which, subjectively (in terms of the "anguish" caused) and objectively, could militate against extradition and thus should be a factor in the *Celinski* balancing exercise.

68. That analysis was considered in *Rybak v Poland* [2021] EWHC 712 (Admin), in which Sir Ross Cranston (sitting as a Judge of the High Court) held that the District Judge had erred in failing properly to take account of Brexit uncertainty, which was a matter that weakened the public interest in extradition: *Rybak* at [37].

69. These authorities suggest that the uncertainty created by Brexit in relation to a person's immigration status is a matter that ought to be taken into account. Mr Hyman sought to rely on the even more recent judgment of Chamberlain J in *Pink v Poland* [2021] EWHC 1238 (Admin) in which, arguably, a different approach was taken. There it was said, in a case where the requested person did not have settled status:

> **"52 … 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."**

70. On one view, it could be said that Chamberlain J's view was not that Brexit uncertainty could *never* be a relevant consideration, but that it was not properly regarded as a consequence of extradition in that case, which involved only conviction warrants. The subjective anguish and objective difficulties resulting from Brexit uncertainty may be said to be somewhat more weighty considerations where the requested person is subject to an accusation warrant accusing him of an offence that is denied. In any case, it seems to me that considerable weight may be attached to the analysis of Fordham J in *Antochi*, (albeit not contained in the ratio of that case), and followed in *Rybak* in assessing the relevance of this factor. There is nothing in *Pink* which undermines that analysis.

71. The Judge below cannot be criticised for not expressly considering the effect of Brexit: *Antochi* was only decided a week or so before the extradition hearing and it is not clear whether it was cited or whether any representations were made on this issue. What can be said, is that the Judge clearly had the Appellant's immigration status well in mind as a factor *against* extradition being ordered:

> **"83. Factors against extradition being granted:**

a) The RP entered the UK in 2010. The RP met his fiancée, Miss Whitecross, in the UK. She is a UK national. They have been in a relationship for around 8 years. They have a settled intention to remain in the UK and they intend to marry in the near future. The RP has been granted settled status to remain in the UK. Prior to his remand in custody, the RP lived with his fiancée. Since his remand in custody, the RP's fiancée has returned to live with her mother and younger sister. Once these matters are resolved, the RP intends to live with his fiancée again."

72. Ms Pottle submits that this is inadequate because nationals with settled status who have been convicted of certain crimes would be refused entry. I was referred to guidance issued by the Home Office on 25 November 2021 which, as one would expect, sets out guidance that accords with the general principle that the entry into the UK of offenders would not be conducive to the public good. Accordingly, submits Ms Pottle, there is a real risk that the relationship with Ms Shawcross will be permanently severed if the Appellant is extradited.

73. Mr Hyman submits that given the Appellant's settled status, which is unusual in such cases, there will be a presumption of a right to enter although there is distinct possibility that that could be revoked. In any event, the weight attached to this factor should be limited and that which the Judge attached to immigration status was more than adequate.

74. The Guidance provides that:

" … a person's indefinite or limited leave to enter or remain granted under Appendix EU may be cancelled on or before their arrival in the UK where the Secretary of State or an Immigration Officer is satisfied that it is proportionate to cancel that leave where: (a) the cancellation is justified on grounds of public policy, public security or public health…" (at p.30).

75. The refusal of entry would not therefore be automatic upon extradition; a proportionality test would be applied. In my judgment, it cannot, therefore, be assumed that the Appellant would necessarily be refused entry or that permanent severance would result so as to require attaching substantially more weight to the Appellant's immigration status or the uncertainty in relation thereto. The Judge took account of the emotional and financial impact on Ms Shawcross of the separation to date and of the continued separation if the Appellant were to be extradited, and concluded that Ms Shawcross, due to the support of a loving family, would cope. The Judge further noted that the couple planned to marry and that, "Once these matters are resolved, the RP intends to live with his fiancée again". There is nothing to indicate that the Judge operated on the assumption that the Appellant's return to the UK would be granted as a matter of course having been extradited and served a sentence, and/or been convicted of an offence in Poland; indeed, that would not have been the position even before Brexit (albeit the rules would have operated somewhat differently), as this experienced Judge would have been aware.

76. For all these reasons, it is my view that, whilst Brexit uncertainty can be a factor to be taken into account, the Judge's analysis of the Appellant's settled immigration status cannot be said to be wrong, notwithstanding the absence of any express reference to Brexit.

Ground 2 - Conclusion

77. In conclusion, under Ground 2, I do not find that the Judge erred in her approach to the Art 8 balancing exercise. All relevant factors militating against extradition were taken

into account, and the overall conclusion reached, namely that the high public interest in extradition was not outweighed by those factors, cannot, in my judgment, be said to be wrong.

Ground 3 – Proportionality under Section 21A of the 2003 Act

78. Section 21A 2003 Act, so far as relevant, provides:

> **21A Person not convicted: human rights and proportionality**
> (1) If the judge is required to proceed under this section (by virtue of section 11), the judge must decide both of the following questions in respect of the extradition of the person ("D")—
> (a) whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998;
> (b) whether the extradition would be disproportionate.
> (2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); but the judge must not take any other matters into account.
> (3) These are the specified matters relating to proportionality—
> (a) the seriousness of the conduct alleged to constitute the extradition offence;
> (b) the likely penalty that would be imposed if D was found guilty of the extradition offence;
> (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D.
> (4) The judge must order D's discharge if the judge makes one or both of these decisions—
> (a) that the extradition would not be compatible with the Convention rights;
> (b) that the extradition would be disproportionate
> …"

79. This only applies to the accusation warrant, EAW 1. Having concluded that extradition was not incompatible with the requested person's Art 8 rights, the appropriate judge must consider whether extradition would be proportionate, having regard only to the three specified matters in s.21A(3), namely the seriousness of the conduct alleged, the likely penalty if convicted, and the possibility that the Judicial Authority would take measures less coercive than extradition.

Ground 3 - Submissions

80. Ms Pottle submits that the Judge erred in her assessment of seriousness and likely penalty for essentially the same reasons as set out above under Ground 2: see [46] to [47] above. The question is whether the Judge erred in her approach having regard to the particular focus on the three specified matters required by s.21A. It is implicit in Ms Pottle's submission that the Judge was entitled to reach a different conclusion on whether to extradite or not in respect of EAW 1 than that reached under EAW 2.

81. Mr Hyman submits that the proportionality of the Appellant's extradition on EAW 1 "cannot be uncoupled" from his extradition on EAW 2 and that if the Appellant is to be extradited on the latter then it would be "absurd" for the Court to refuse extradition on the former. In any event, submits Mr Hyman, the Judge was correct to consider that a custodial sentence was likely

Ground 3 – Discussion

82. Pursuant to s. 2(7A) of the 2003 Act, the Lord Chief Justice provided statutory guidance on proportionality. This is presently found in the Practice Direction at para. 50A.2 to 50.A5 to the Crim PR. The table at Para. 50.A5 thereof sets out the kind of offences for which extradition would, save in exceptional circumstances, be considered disproportionate. These are fairly described as trivial or non-serious offences. The only offence that relates to drugs is that described in the tables as "Possession of controlled substance (other that one with a high capacity for harm such as heroin, cocaine, LSD or crystal meth)". The example given next to that entry is: "Where it was possession of a very small quantity and intended for personal use". It is clear that the offence under EAW 1, where the cannabis was allegedly sold for financial gain to a minor, does not fall into that category.

83. Guidance on the operation of s.21A was given in the Divisional Court case of *Miraszewski v Poland* [2015] EWHC 4261 (Admin); [2015] 1 WLR 3929 (Pitchford LJ; Collins J). In most cases the seriousness of the offence will be determinative of the likely sentence, and for that reason of proportionality. The very low threshold of seriousness in the categories of minor offences set out in the guidance identifies "a floor rather than a ceiling" for the assessment of seriousness. In determining whether extradition would be disproportionate a district judge is not limited by those categories and should weigh the relevant factors for himself. He may conclude that an offence is not serious even though it does not fall within the categories listed in the guidance.

84. Other principles established in *Miraszewski* relevant to the present appeal are as follows:

i) The proportionality of extradition is question for assessment by the appropriate judge at the extradition hearing: [31]

ii) The considerations in s. 21A(3) of the 2003 Act are not listed in a hierarchy of importance. Nevertheless, in many cases the seriousness will be linked to the sentence which may be imposed and thus determinative of the proportionality question: [32].

iii) The seriousness of the conduct (ss. (3)(a)) is adjudged against domestic standards, although, as in all cases of extradition, the court will respect the views of the requesting authority if they are offered: [36]

iv) The maximum sentence is "a relevant consideration" but may be of "limited assistance" since an offence type (e.g. theft in English law) encompasses a wide range of offending: [36].

v) The likely penalty on conviction relates to whether a requested person will receive a custodial sentence on conviction (ss. (3)(b)). The requirements of mutual trust and confidence require the United Kingdom to accept instances in which a fellow contracting party to the Member Statewould impose a custodial sentence in respect of offending for which, in England, the courts would not: [37]. The appropriate judge, nevertheless, "is entitled to draw inferences from the contents of the EAW and to apply domestic sentencing practice as to the measure of likelihood" [38].

85. In *Zakrzewski*, Irwin J (as he then was) held that the Court must grasp the reality of the situation before it. Where extradition is sought on multiple warrants, the Court must consider proportionality and Art 8 in the round: [20] to [21]. At [24], he held:

> **"24 It is important to emphasise that this approach is consistent with the guidance from the Lord Chief Justice, and is not inconsistent with the emphasis laid by the Divisional Court in Polish Judicial Authorities v Celinski [2015] EWHC 1274 (Admin); [2016] 1 WLR 551, on the threshold for successful appeal being a finding that the decision at first instance was "wrong". Celinski was intended to restate and emphasise that an extradition appeal is not a re-hearing. In my view, that approach in no way precludes looking at matters in the round, when considering proportionality on facts as they are here. The alternative would be absurd. A trivial offence could properly lead to extradition if listed in the same warrant as a serious offence (following the Guidance) but a different outcome would be reached if the serious offence was in a separate warrant before the court on the same day."**

86. Irwin J's analysis in *Zakrzewski* was considered by Holman J in *Dyko v. Poland* [2021] EWHC 2910 (Admin). In *Dyko*, in which the requested person was sought to serve terms of imprisonment across two conviction warrants, Holman J (respectfully) relied on the "absurd" and "wholly artificial" analysis of the appropriate judge's decision to discharge the requested person on one conviction warrant but not another: [48]. Holman J did, however, consider that the situation might potentially differ where two different types of warrant are involved:

> **"43. It is important to stress in the present case that both warrants are conviction warrants. Ms Herbert has just made a powerful submission to me based on a hypothetical example where one of two warrants may be an accusation warrant and the other a conviction warrant. As different considerations do, or may, apply to the approach to accusation and conviction warrants respectively, it may well be that, where there are two warrants of those different kinds, there may be no tension or illogicality in discharging the Requested Person in relation to the accusation warrant, but, nevertheless, ordering his extradition in relation to the conviction warrant. That, however, is all for another day."**

87. In my judgment, there is no obligation on the Court to treat all warrants before it as requiring the same outcome. The structure of the 2003 Act dictates that different considerations apply depending on whether an accusation or conviction warrant is in play; the terms of s.21A are an example. Whilst there may have been an absurdity in the Court in *Zabrzewski* and *Dyko* reaching different views in respect of two conviction warrants, the same may not always apply where there are two different types of warrant being considered. One can envisage an example where extradition on a very stale accusation warrant involving relatively minor offending is considered disproportionate even though the Art 8 balance favours extradition on a more recent conviction warrant. In such circumstances, "decoupling" one warrant from the other may be feasible. The refusal to extradite under the accusation warrant in those circumstances would not be rendered academic by the fact of extradition under the conviction warrant: the Judicial Authority would not, by reason of the speciality arrangements, be entitled to prosecute on the failed warrant without consent, which may not (given the proportionality considerations) be forthcoming.

88. Thus, the analysis as to proportionality under s.21A is to be undertaken by reference only to the accusation warrant. The Judge in this case was scrupulous in this task. She commenced her analysis by highlighting that s.21A was "relevant to EAW 1 only". She then proceeded to consider the three specified matters by reference only to the offence under EAW 1, and reached the conclusion that extradition under that warrant would be proportionate.

89. None of the grounds on which the Appellant contends that the Judge erred is made out for reasons already considered under Ground 2 above. In summary:

    i) The Judge was entitled to reach the view on seriousness that she did, notwithstanding the erroneous belief that the Judicial Authority considered the offence more serious by reason of it having been committed with 5 years of serving a sentence of more than 6 months imprisonment for a "similar offence": see [55] to [57] above;

    ii) As to the likely penalty, the Judge was entitled to conclude that a custodial sentence was likely by reference to the description of the offence in EAW 1. The Judge was not guided solely by the maximum penalty for the offence. Whilst the Judge did not refer to the domestic sentencing provisions, had she done so, it is highly probable that she would have reached the same conclusion, namely that a custodial sentence was likely: see [58] to [60] above.

90. A final point made by Ms Pottle was that the Judge erred in referring (at the end of [92](b)) to the fact that, "***Celinski*** *makes it clear that factors that mitigate the gravity of the offence or culpability will ordinarily be matters that the court in the requesting state will take into account*." Ms Pottle submits that that is obviously wrong as the Judge was required to assess seriousness by reference to the requested person's culpability for the acts alleged and the harm caused. However, the reference to *Celinski* here, which is arguably incorrect, does not undermine the Judge's analysis in the remainder of [92], which clearly did involve an assessment of seriousness by reference to the Appellant's conduct as described in EAW 1. The error (if there was one) was not therefore material to the overall conclusion.

91. For these reasons, I consider that the Judge was not wrong to conclude as she did; and extradition under EAW 1 was not disproportionate in the circumstances of this case.

Conclusion

92. For all of these reasons, and notwithstanding Ms Pottle's powerful submissions, this appeal is dismissed.