Neutral Citation Number: [2024] EWHC 2622 (Admin)

Case No: AC-2022-LON-003545

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 October 2024

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between :

SEBASTIAN KLOS	**Appellant**
- and -	
REGIONAL COURT IN WARSAW, POLAND	**Respondent**

- -
- -

Rebecca Hill (instructed by **Taylor Rose**) for the **Appellant**
Alexander dos Santos (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing date: 3 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 18 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HEATHER WILLIAMS

MRS JUSTICE HEATHER WILLIAMS

Introduction

1. This is an appeal pursuant to section 26(4) of the Extradition Act 2003 ("the 2003 Act") brought by the Appellant, Mr Klos, against the judgment of District Judge Callaway ("the DJ") handed down on 7 December 2022, ordering his extradition to Poland. Mr Klos is a Polish national born on 18 April 1986.

2. His extradition was ordered in respect of a conviction warrant issued by the Regional Court in Warsaw on 19 August 2021 and certified by the National Crime Agency on 20 October 2021. As I detail below, the arrest warrant ("AW") relates to 12 offences of fraud and one offence of using a false instrument.

3. The Appellant applied for permission to appeal on two grounds. Firstly, he relied upon Article 5 of the European Convention on Human Rights ("ECHR"), contending that his trial in Poland was not compliant with his rights under Article 6. Secondly, he relied upon Article 8 ECHR. On 25 August 2023, Murray J refused permission to appeal on the papers. At a hearing on 14 November 2023, Fordham J granted the renewed application for permission to appeal on the Article 8 ground and refused permission on the Article 5 ground.

4. Accordingly, the only ground of appeal before me is that extradition would constitute a disproportionate interference with the Article 8 right to respect for private and family life and the DJ was wrong to have concluded otherwise.

5. As I will come on to explain, the Appellant has filed five application notices seeking to rely on further evidence for the purposes of this ground. Consideration of those applications was adjourned to the substantive appeal hearing.

The offences, the Polish proceedings and the extradition request

6. The AW seeks Mr Klos' return in respect of an enforceable judgment imposed on 25th April 2018, as amended on 11 March 2020, by the Court of Appeal in Warsaw. The 13 offences took place between 21 August 2009 and 1 September 2011. In summary, the Appellant's offending detailed in the AW is as follows:

   i) Between 21 August 2009 and 1 September 2011 in Warsaw, he defrauded complainant 1 of 240,000 PLN by misleading her on the purpose of a loan agreement and his intention of paying it back;

   ii) Between 22 September 2009 and 17 April 2011 in Warsaw, he defrauded complainant 2 of 165,000 PLN by entering into a loan agreement, misleading the complainant about the purpose of the agreement and monies were not paid back;

   iii) Between 14 July 2010 and 17 October 2010 in Warsaw, he caused complainant 3 a loss of 55,000 PLN by misleading them about the purpose of the agreement and monies were not paid back;

iv) On 19 October 2010 in Warsaw, he defrauded complainant 4 in respect of 50,000 PLN by taking out a loan and not paying it back, misleading the victim that they would be repaid;

v) On 19 January 2010, at an unnamed place, he defrauded complainant 5 of 30,000 PLN by misleading them over a loan agreement which he did not pay back;

vi) Between 13 July and 15 October 2010 in Warsaw, he defrauded complainant 6 of 80,000 PLN by misleading them on the purpose of the monies and the loan was not repaid;

vii) On an unknown date, not later than 13 July 2010 in Warsaw, he defrauded complainant 7 of 25,100 PLN by misleading her over a loan agreement which he did not pay it back;

viii) Between 21 January 2010 and 03 November 2010 in Warsaw, he defrauded complainant 8 of 25,000 PLN which he did not pay it back;

ix) On 30 August 2010 in Warsaw, he defrauded complainant 9 of 6,000 PLN by misleading them about the purpose of the loan which he did not pay back;

x) Between 25 January 2010 and 18 April 2011 in Warsaw, he defrauded complainant 10 of 158,000 PLN by misleading about his intention to repay the loan which he did not do;

xi) On 13 July 2010 in Warsaw, he defrauded complainant 11 of 25,000 PLN misleading them on the loan agreement via the same pattern of behaviour involving the fake car dealership and did not pay it back;

xii) On 14 July 2010 in Warsaw, he defrauded complainant 12 by disadvantageously disposing of property in the amount of 30,000 PLN via the same pattern of behaviour involving the fake car dealership;

xiii) On an unknown date no later than December 2011 in Warsaw, he used a forged document, namely a bank guarantee.

7. Box D of the AW indicates that the Appellant did not appear at the trial resulting in the decision. The details provided are as follows:

> "In the main trial while the case was being examined by the 1st instance the convict was absent, yet he was duly notified of its date and his defence attorney appeared on his behalf. Neither the convict nor his defence attorney were present whilst the judgment was being delivered, nevertheless his defence attorney received a copy of the judgment with grounds on 29 May 2018. An appeal was submitted against the first-instance judgment. In the appeal trial appeared both convict and his defence attorney. His defence attorney was present, while the judgment was being delivered, the convict did not appear. His defence attorney received a copy of the judgment of the appellate court on 18 June 2020."

8. Box F of the AW indicates that the Court of Appeal's judgment of 11 March 2020 imposed a concurrent sentence of 4 years and a fine. The judgment became final on 11 March 2020, when a further attempted appeal was dismissed. The Appellant's application to delay enforcement of the sentence was dismissed on 6 August 2020; a decision that was upheld on appeal on 1 October 2020. Afterwards, an order was issued to bring the Appellant to a specified penal institution. Box F continues that: "During local search as well as during search in whole Poland the convict was not detained but it was determined that the convict stayed probably on the territory of Great Britain".

9. The original warrant did not include the usual Box C information. However, this text was included in a modified version of the AW issued on 6 September 2021 (backdated to the date of the original AW), as explained in a letter of 24 August 2022 from the Judicial Authority. Box C gives the maximum sentence for the Appellant's offences and confirms that his sentence is one of four years, all of which remains to be served.

10. Further Information, dated 2nd June 2022, indicates that:

i) Offence 5 was committed in Warsaw.

ii) Offence 13 relates to use of a PKO BP S.A. bank guarantee which was forged.

iii) The sentences underlying the aggregate four-year term are two years for offence 1, four years for offences 2-12 and eight years for offence 13. The Appellant also received a fine for other offences, which has been paid.

iv) The Respondent considers that the Appellant has been at large since 20 July 2020, when he was required to surrender to Warsaw Bialokela Prison.

v) The Appellant was obliged to notify the Court of his whereabouts, which he had been informed of before being officially advised of his charges.

vi) The Appellant's movements were not restricted by his bail conditions, but he was required to notify of any change of his residential address, which he failed to do.

vii) "The Warsaw Regional Court became aware that the convict could be residing in the United Kingdom of Great Britain and Northern Ireland, when the indictment was handed up with the court, as the convicted stated he was residing in the territory of the United Kingdom of Great Britain and Northern Ireland, and in March 2020, the fact was additionally confirmed in his request to have enforcement of his custodial sentence postponed."

The domestic proceedings

11. Mr Klos was arrested on 12 January 2022 pursuant to the AW. He appeared for the initial hearing at Westminster Magistrates Court the following day. He was remanded on conditional bail. Pursuant to these conditions, the Appellant was required to reside at the family's address and to observe an electronically monitored curfew between the hours of 11pm – 5am. Until 26 May 2022 he was also required to report to a local police station once a week.

12. The Appellant was unrepresented throughout the proceedings below. The full extradition hearing took place on 3 November 2022. There had been two earlier adjournments; the extradition hearing was originally listed for 26 May 2022 and then on 14 September 2022. On both occasions it was adjourned because the Appellant indicated that he wished to obtain further evidence and/or he had only just served additional evidence which the Respondent required an opportunity to consider.

13. Extradition was challenged on three bases, namely: that it was not sought by a Judicial Authority meeting the requirements of independence and impartiality necessary to comply with section 2 of the EA 2003; there were substantial grounds for believing that he had received a flagrantly unfair trial in Poland; and his extradition would be a disproportionate interference with the Article 8 rights of him and his family.

14. The Appellant filed a number of documents in support of his case, including: a skeleton argument dated 12 September 2022; an undated document headed "Oral Submission"; and a statement from his wife, Iwona Klos, 20 July 2022. The full list of his submitted documentation is at para 12 of the DJ's judgment. He noted that the Appellant had devoted a huge amount of work to of this exercise.

15. The skeleton argument and the "Oral Submission" were focused upon issues with the Polish judicial system and the alleged absence of a fair trial in his case. His wife's statement described meeting the Appellant in 2009, his failed restaurant business and their relocation to the United Kingdom. She referred to him flying back to Poland repeatedly to try and prove his innocence at the various Court hearings. She said that they had lived under permanent stress as a result of the Polish proceedings, Mrs Klos said that they had two children and that the Appellant was a really good father to them and that she was able to work because he could look after them. She said that it would be devastating for their children if he was extradited. She said that if the Appellant was extradited she would not be able to continue with her employment, as there were no family members in the United Kingdom who could help to look after the children. Mrs Klos also said that it would be very difficult for her to go back to Poland as her home is here, her children were born here and her oldest daughter had just completed nursery. She also indicated that she would be in financial difficulties if she returned to Poland. as the couple still had debts there.

16. Before each of the hearings below, counsel for the Respondent, Mr dos Santos, served an Opening Note on the Appellant. This summarised the Respondent's position in respect of each of the issues that the Appellant has raised. Amongst other points, the Note contended that on the basis of the June 2022 Further Information, the Appellant was a fugitive; and in relation to Article 8 it was noted that the Appellant had not provided a proof "or raised matters which come close to outweighing the public importance in extradition".

17. It is apparent from his documentation and from the DJ's judgment, that the Appellant focused most of his submissions on his first two grounds, rather than on the Article 8 point. The judgment does not set out the detail of the oral

evidence that was given at the hearing. However, I have had the benefit of Mr dos Santos' note of the evidence, which has not been challenged in any respect.

18. Counsel's note indicates that when he gave evidence, the Appellant accepted that he was aware, at the time, of both the criminal trial at which he was convicted and the appeal. He said he knew that he had to serve a sentence of imprisonment and he did not surrender to do so; this was because he did not receive any request to surrender from the Polish authorities. He accepted that he had not made inquiries about this. The Appellant agreed that he was required to notify the authorities of any change of address "until judgment" and that "maybe" there was a continuing obligation to do so after that. It was put to him that he had not notified the authorities of his change of addressed and he said "No, because I had no address". He was asked about his address in the United Kingdom and he said that he notified the authorities of this "a year or so after trial". Asked why he had not done so earlier, he said "because I didn't". He indicated that his address in England had changed in June 2021. The Appellant did not provide any specifics about when and how he had provided his previous United Kingdom address, nor did he suggest that the Polish authorities had contacted him at that address.

19. When asked about his family, the Appellant said that if he was extradited his wife would return to Poland as she had no family support in the UK. He referred to the financial difficulties that she would experience in Poland and to his wife's current employment with a fleet management company earning £23,000 p.a. He said that he had worked full-time, but now worked part-time.

20. When she gave evidence, Mrs Klos said that she could not imagine life without her husband; they had two small children and she needed someone to help look after them, which he usually did. She said that going back to Poland was impossible.

The DJ's judgment

21. I will only refer to those aspects of the judgment that are relevant to this appeal. The DJ explained that the Judicial Authority asserted that the Appellant was a fugitive because he had failed to comply with the requirement to notify the authority of his change of address (para 4). He noted that the Appellant did not accept that he was a fugitive and maintained that he was not informed of the need to surrender or the location at which he should surrender (para 7).

22. Part of the ground of appeal concerns the DJ's legal directions. He said of the Article 8 caselaw:

> "31. The governing principle is well known and can be summarised thus: 'whether the interference with the private and family lives of the extradite and other members of his family is outweighed by the public interest in extradition (see HH v Deputy Prosecutor of the Italian Republic, Genoa [2012] UKSC 25 per Baroness Hale). There is no exceptionality test although a case where extradition is held to be a

> disproportionate interference with a person's Art 8 rights are likely to be rare."

23. As regards the facts, the DJ found that the Appellant was a fugitive. He said:

> "32. The JA asserts that the RP is a fugitive. The latter files a document entitled 'oral submission'. As I have already remarked the RP claims that no information was provided as to where it was that he should have surrendered. However, I can find not explanation throughout the vast quantity of documents he has filed which explains why it was that the RP failed to notify the JA of any change of address. This naturally has an interface with any notification requirements which the JA may wish to communicate.
>
> 33. The above facts, in my judgment, make this RP a fugitive within the meaning of Wiesniewski v Regional Court of Wroclaw, Poland [2016] EWHC 385 (Admin) as the JA have asserted."

24. At para 34 the DJ said as follows in relation to the Appellant's family circumstances:

> "I have heard from the RP and his partner. I note that the RP is settled in the UK and has employment in the UK. It is his stated wish to remain in the UK and to care for his wife and their child. Naturally, I accept that for the wife to take on child care responsibilities in the absence of the RP would present a whole range of difficult and unfortunate circumstances, but such matters fall short of the exceptionality test which this court is obliged to apply."

25. The DJ then undertook the usual balancing exercise. At para 35, he listed the following factors as pointing against extradition: (i) the Appellant is settled in the UK and has a family dependent upon him; and (ii) he has settled employment and wishes to remain in the UK. The DJ identified the following factors in favour of granting extradition: (i) the weighty public interest in the United Kingdom adhering to treaty obligations; (ii) the weighty public interest in ensuring that the United Kingdom does not become a safe haven for criminals; (iii) the Appellant is a fugitive; and (iv) the warrant is a conviction warrant and the offences for which he was convicted are serious.

26. At para 36 the DJ concluded that he had "no doubt" that the balance of the factors clearly fell in favour of the Appellant being extradited.

These proceedings and the applications to admit new evidence

27. The first application to admit further evidence, dated 3 February 2023, seeks to admit an undated 13-page witness statement from the Appellant and a letter

from the Polish authority dated 26 June 2020 advising him of the date for the hearing of his application for deferment of sentence. The significance of the latter from the Appellant's point of view is that it is addressed to his then home address in York Street, Blackburn, suggesting that the Judicial Authority had been supplied with this address at some point prior to the time when the letter was sent.

28. The Appellant's witness statement is wide-ranging and includes his early life and his employment in Poland. He sets out the circumstances of his failed restaurant business, asserting that he was not guilty of any fraud. He describes coming to the United Kingdom with his wife in June 2012. He says that they rented a flat in Accrington from July 2012 and then lived at the York Street address from July 2014 to June 2021, when they moved to their current address. The Appellant describes the employment undertaken by him and his wife since 2012, their family circumstances and the care they provide for their two young children, born in November 2017 and January 2021. He says that the criminal proceedings in Poland started in 2012, when he was already in the United Kingdom; his parents told him that the Polish authorities went to their address in Poland saying that they were looking for him and that he should go to the Prosecutor's Office. He says that he did not do so but instructed a lawyer to attend. He also says that he gave the York Street address to the Portuguese authorities in June 2015, when he was stopped at Border Control and was informed that the Polish authorities wanted his address and phone number. He indicates that in September 2015 he flew to Poland and went to the Prosecutor's Office and gave a statement to them as a witness. In 2016 he was charged with the offences in the AW. The Appellant says that the Prosecutor's Office was aware of his address in the United Kingdom, although he does not refer to any occasion when this was provided, other than via the Portuguese authorities in 2015. The statement also describes the Polish proceedings in some detail.

29. It appears to me that the only matters in the Appellant's statement that post-date the November 2022 extradition hearing are the discovery on 31 December 2022 that his wife was pregnant with their third child (para 106) and his receipt of settled status on 11 January 2023 (para 110).

30. By email dated 6 February 2023, the Respondent objected to the first application, pointing out that the majority of this material existed at the time of the extradition hearing and no adequate explanation had been provided as to why it was not adduced earlier. It was also said that the evidence was not capable of being decisive and that aspects of it were simply not credible.

31. The second application is dated 21 March 2023. It seeks to rely upon medical evidence confirming Mrs Klos' pregnancy. By email dated 27 March 2023 the Respondent indicated that it did not oppose this application.

32. The first and second applications were refused by Murray J when he refused permission to appeal. They were subsequently renewed along with the renewed application for permission to appeal.

33. The third application is dated 7 November 2023. The Appellant applies to admit: a "Further Addendum Proof of Evidence" dated 2 November 2023; a

witness statement from his wife, also dated 2 November 2023; his third daughter's birth certificate; and documents relating to the employment positions of him and his wife. Mr and Mrs Klos both explain that Mrs Klos gave birth to their third daughter on 31 August 2023 and that they were having to monitor her very carefully because she had a silent reflux which was causing her to choke on milk she had consumed several times a day. They indicate that they intended to take shared parental leave, with the Appellant taking seven months away from his employment. Their statements also say that on 26 October 2023 Mrs Klos was referred for an ultrasound by her GP, because of a tumour on her throat.

34. Additionally, the Appellant says that his bail conditions were affecting his work and family life. Before the extradition proceedings he worked about 70 hours a week as he did a lot of overtime in his main employment and he worked a second job on Saturday nights. The curfew meant that he had to give up the second job and restrict his hours at his primary employment. He describes being particularly concerned about the impact of extradition on his eldest daughter who has always had a tendency to become angry. Both Mr and Mrs Klos refer to the childcare difficulties that would arise if the Appellant was extradited. Mrs Klos observes that their middle daughter is particularly close to the Appellant and that her eldest daughter has started to shout.

35. When granting permission to appeal, Fordham J directed that the applications to adduce fresh evidence were to be deferred to the judge dealing with the substantive appeal hearing.

36. The fourth application is dated 8 March 2024 and concerns a Further Addendum Proof of Evidence of the Appellant dated 8 March 2024, an Addendum Witness Statement from Mrs Klos, also dated 8 March 2024 and a related medical form. These materials indicated that Mrs Klos had been referred for right hemi-thyroidectomy surgery and that until her tumour is removed it is not possible to know if it is benign or cancerous. The statements also explain that the Appellant was on shared parental leave until the end of May 2024 and intended to use remaining holiday in order to continue as the children's primary carer until July 2024. He explained that their second daughter had now started at nursery and that the health of their youngest daughter had improved, but she was more prone to developing infections because of the reflux problem.

37. This application to admit new evidence was accompanied by an application to vacate the substantive hearing, which at that stage had been listed for 19 March 2024. By order dated 15 March 2024, Steyn J vacated the hearing and directed that the fourth application be deferred to the judge dealing with the substantive appeal hearing.

38. On 5 July 2024 the Appellant filed the fifth application to rely on new evidence and an application to adjourn the substantive hearing then listed for 16 July 2024. This was on the basis that Mrs Klos was due to undergo her surgery on 29 August 2024. By order dated 12 July 2024, Swift J vacated the substantive hearing.

39. The Respondent accepts that much of the material comprising the third, fourth and fifth applications post-dates the extradition hearing, but disputes that any of it is decisive. The Respondent accepts that I should consider all of the new material de bene esse in order to evaluate its significance and determine its admissibility.

40. At the hearing Ms Hill explained that Mrs Klos surgery had taken place as anticipated on 29 August 2024 and she had recently been told that the removed tumour was benign. She was still in the process of recovering from the operation and had been told that this could take up to two months, meaning that her husband's assistance with the children was all the more important for the interim period. However, she had been well enough to return to work. Ms Hill acknowledged that in the circumstances the fifth application and aspects of the fourth application fell away and that reliance was no longer placed on Mrs Klos' medical condition.

The legal framework

41. Poland is a designated Category 1 territory pursuant to section 1 of the EA 2003. Accordingly, Part I of the Act is applicable to these proceedings. The request is governed by the Trade and Cooperation Agreement.

42. The appeal is brought pursuant to section 26(1) of the 2003 Act, which provides that a person may appeal to the High Court against an order for his extradition made by an appropriate judge. Such an appeal may be brought on a question of law or fact with the leave of the High Court (section 26(3)).

43. The powers of the High Court on an appeal brought under section 26 are set out in section 27, which provides as follows:

> **27 Court's powers on appeal under section 26**
>
> (1) On an appeal under section 26 the High Court may—
>
> (a) allow the appeal
>
> (b) dismiss the appeal.
>
> (2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied,
>
> (3) The conditions are that—
>
> (a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;
>
> (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.
>
> (4) The conditions are that—
>
> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;

(b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;

(c) if he had decided the question in that way, he would have been required to order the person's discharge.

(5) If the court allows the appeal it must—

(a) order the person's discharge,

(b) quash the order for his extradition.

44. Fresh evidence, that is evidence which was not raised or available at the extradition hearing, may be considered by the court on appeal pursuant to section 27(4)(a) of the 2003 Act.

45. The receipt of fresh evidence was considered in *Szombathely City Court, Hungary v Fenyvesi* [2009] EWHC 231 (Admin) (*'Fenyvesi'*) at [28]-[35] from which the following principles emerge:

i) Evidence that "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 (para 33);

ii) The fresh evidence must have been decisive, that is, had the evidence been adduced, the result would have been different resulting in the person's discharge (para 36).

46. *Fenyvesi* was considered by the Supreme Court in *Zabolotnyi v Mateszalka District Court, Hungary* [2021] UKSC 14. Lord Lloyd-Jones said at paras 57-58:

> "57. In my view these conditions in subsection 27(4) are, strictly, not concerned with the admissibility of evidence. I agree with the observation of Laws LJ in District Court of *Slupsk v Piotrowski* [2007] EWHC 933 (Admin), with regard to the parallel provision in section 29(4)…that it does not establish conditions for admitting the evidence but establishes conditions for allowing the appeal. In my view this applies equally to section 27(4) which is not a rule of admissibility but a rule of decision. The power to admit fresh evidence on appeal will be exercised as part of the inherent jurisdiction of the High Court to control its own procedure. The underlying policy will be whether it is in the interests of justice to do so….In this context, however, an important consideration will be the policy underpinning sections 26-29 of the 2003 Act that extradition cases should be dealt with speedily and not delayed by attempts to introduce on appeal evidence which could and should have been relied upon below….
>
> 58. Parliament in enacting sections 26-29 of the 2003 Act clearly intended that the scope of any appeal should be narrowly confined. The condition in section 27(4)(b) that the fresh evidence would have

> resulted in the judge deciding the relevant question differently is particularly restrictive. This is reflected in the judgment of the Divisional Court in *Fenyvesi* …"

47. The approach to be taken where Article 8 is engaged in extradition proceedings was considered by the House of Lords in *Norris v United States of America* [2010] UKSC 9, [2010] 2 AC 487. In *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2013] 1 AC 338 at para 8, Baroness Hale (giving the leading judgment) summarised the conclusions to be drawn from *Norris*, as follows:

> "(1) There may be a closer analogy between extradition and the domestic criminal process than between extradition and deportation and expulsion, but the court has still to examine carefully the way in which it will interfere with family life.
>
> (2) There is no test of exceptionality in either context.
>
> (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 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."

48. Baroness Hale went on to highlight that the best interests of the child or children impacted by an extradition must be a primary consideration, albeit they could be outweighed by countervailing factors (para 15).

49. In *Celinski* (at paras 15 – 17), the Divisional Court commended the "balance sheet" approach to assessing whether the interference with the private life of the extraditee is outweighed by the public interest in extradition. The Divisional Court also emphasised "the very high public interest" in ensuring that extradition arrangements are honoured" and the public interest in discouraging persons seeing the UK as a state willing to accept fugitives from justice (para 9). Furthermore, where a Requested Person is a fugitive from justice, very strong counterbalancing factors would need to exist before extradition could be regarded as disproportionate (para 39).

50. Long unexplained delays can weigh heavy in the balance against extradition. I have already referred to Lady Hale's judgment in *HH*. In the case of F-K, (one of the joined appeals before the Supreme Court), she indicated that their fugitive status did not preclude the Justices from relying on the overall length of the delay (para 46); and Lord Mance agreed at para 102. In *Stryjecki v Poland* [2016] EWHC 3309 (Admin) at para 70 (vi) Hickinbottom J (as he then was) referred to a number of earlier cases that had considered delay, including *Oreszczynski v Krakow District Court*, Poland [2014] EWHC 4346 (Admin) where Blake J emphasised that "even where the concerned person is a fugitive, the authorities cannot simply do nothing: they must make some reasonable enquiries as to the person's whereabouts".

51. "Fugitive" is a concept developed by the caselaw rather than a statutory term. It must be established to the criminal standard of proof. In *Wisniewski v Reginal Court of Wroclaw, Poland* [2016] EWHC 386 (Admin) at para 59 Lloyd-Jones LJ (as he then was) summarised the concept in the following way:

> "Where a person knowingly places himself beyond the reach of a legal process he cannot invoke the passage of time resulting from such conduct on his part to support the existence of a statutory bar to extradition."

52. In undertaking the Article 8 balancing exercise Courts may take into account periods when the requested person has been subject to an electronically monitored curfew: for example, *Prusianu v Braila Court of Law, Romania* [2022] EWHC 1929 (Admin) at para 49.

53. The question on appeal is whether the District Judge's ultimate decision was wrong: that is a question which considers the overall outcome of the determination arrived at via the balancing exercise, rather than the identification of any individual errors or omissions. In *Love v United States of America* [2018] EWHC 712 (Admin), the Divisional Court summarized the position at para 26:

> "The appellant court is entitled to stand back and say that a question ought to have been decided differently because the overall evaluation was wrong: that crucial factors should have been weighed so different significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed."

54. However, where the Appellant is permitted to rely on fresh evidence, the approach on appeal is modified. The appellate court must make its own assessment de novo based on the material as it now stands, in order to determine whether extradition would be a disproportionate interference with Article 8 rights: *Jozsa v Tribunal of Szekesfehervar, Hungary* [2023] EWHC 2404 (Admin) at para 18.

Discussion and conclusions

Fugitivity and the first application to admit new evidence

55. Ms Hill confirmed that the contention that the Appellant is not a fugitive rested on the material covered by the first application to admit new evidence. She accepted that, absent this additional evidence, there was no basis to challenge the DJ's conclusion regarding fugitivity. Accordingly, I will address the first application to admit new evidence at this juncture. In doing so, I apply the approach explained by Lord Lloyd-Jones in *Zabolotnyi* (para 46 above).

56. There is no doubt that the material existed at the time of the November 2022 extradition hearing. The letter of 26 June 2020 pre-dated this hearing by more than two years and it is not disputed that it was in the Appellant's possession at the material time. The circumstances described in his witness statement regarding the investigation and criminal proceedings in Poland and the extent to which he provided his address in the United Kingdom also all relate to the pre-hearing period.

57. However, Ms Hill submitted that although this material could theoretically have been provided earlier, I should regard it as having been unavailable to him at the time of the hearing, as it was not reasonable to expect the Appellant to have done so, as a litigant in person with no knowledge of the law and without guidance as to what was relevant. She said that neither the DJ's judgment, nor counsel's note of the hearing below indicates that such guidance was given to the Appellant. Ms Hill sought to draw an analogy with the approach taken by Linden J in *Murawska v Poland* [2022] EWHC 1351 (Admin). She also drew my attention to paras 66 – 67 of the Equal Treatment Bench Book (the version applicable in November 2022), which highlights that many litigants in person will not understand the real issues in the case and at the start of the hearing "it is vital to identify and, if possible, establish agreement as to the issues to be tried so that all parties can proceed on this basis".

58. I do not consider that any proper basis has been established for me to conclude that the material was unavailable to the Appellant in November 2022. He was made aware of the issues in the case. He had the benefit of counsel's Opening Note in advance of each of the hearings (para 16 above) and this included reference to the issue of fugitivity. He had been given additional time to prepare material for the substantive hearing and his "Oral Submission" document addressed the issue, disputing that he was a fugitive and maintaining that he was

not informed of the need to surrender (para 7, DJ's judgment). The DJ did establish the heads of challenge raised in opposition to extradition, as he set out at para 8 of his judgment. Furthermore, it is apparent from counsel's note of the evidence, that the Appellant was questioned about issues pertaining to fugitivity and had the opportunity to give his account, for example, as to when he had provided his United Kingdom address to the Polish authorities (para 18 above). In this regard I take into account that the Appellant is proficient in the English language (his written submissions and oral evidence were given in English) and it is apparent from his written materials that he is an intelligent man.

59. I also bear in mind that despite now providing the lengthy undated witness statement (and two subsequent addendum proofs), the Appellant has not given any account to the effect that the issues in the case were not clarified for him at or before the substantive hearing below; and nor does he explain why the material he now wants to rely on was not deployed at that earlier stage. Ms Hill invited me to infer that the Appellant did not understand that fugitivity was an issue or that it was important for him to detail the information that he gave to the Polish authorities regarding his whereabouts, from a combination of the following: there is no specific indication in the DJ's judgment that he explained this to the Appellant at the outset of the hearing; he is a litigant in person whose first language is not English; and he did conscientiously prepare material in support of other issues in the case. However, that is far too slender a foundation on which to draw such conclusions, when these matters have not been addressed directly by the Appellant in his later statements and given the circumstances I have summarised in the preceding paragraph. I also note that there is another more obvious explanation for the relative lack of prominence given to the fugitivity issue in the Appellant's evidence below; he chose to focus very considerable energies on his contention that the Polish system lacked impartiality and that he had not received a fair trial, as those were the points that he considered to be the most important. Similarly, he elected to give relatively little focus to the Article 8 factors, although he was plainly aware that this was an issue (as is illustrated by the statement he submitted from his wife). It is not in the interests of justice, now that he is represented, to give the Appellant a second chance to run a differently focused case to the one that he chose to mount below.

60. For the avoidance of any doubt, I entirely endorse the Equal Treatment Book text as to the importance of clarifying the issues to be tried at the outset of a hearing. It will also be sensible to record in the judgment that this was done, in order to avoid subsequent ambiguity or disputes. However, I do not accept that the sheer fact that a judgment does not refer to this having taken place, provides a basis, without more, to infer that it did not occur.

61. I do not consider that the present circumstances are at all analogous to those in *Murawska*, where Linden J decided that various factors led him to "give the appellant the benefit of the doubt" in admitting additional evidence, although he doubted that it could truly be said that it was not available at the extradition hearing (para 47). Without rehearsing the full, fact-sensitive details of that case, the factors that influenced his decision included: that the litigant had poor written and spoken English; there were technical problems during the

extradition hearing, which took place via CVP; she had not prepared for the hearing and did not have with her a proof that solicitors had earlier prepared; the email from the Court sent after the hearing did not clearly explain what additional material she was being given the opportunity to provide; and the appellant genuinely did not appreciate that she should have given greater detail of her case on the Article 8 issue (paras 40, 41 and 47). Moreover, the additional evidence in that case included some very striking and unusual material, namely that her previous solicitors accepted that they had included incorrect details about her partner's location and employment in the proof they had prepared for her, in circumstances where that incorrect material had led the District Judge to conclude that the appellant had lied about her partner living with her and to reject aspects of the evidence that she had given in consequence. Given all this, it is unsurprising that it was thought to be in the interests of justice to admit that new evidence.

62. Accordingly, I dismiss the first application to admit new evidence and I proceed on the basis that the Appellant is a fugitive.

63. Although it is therefore unnecessary to re-open the substantive question of whether the Appellant is a fugitive, I will explain briefly that even if I had admitted the material relied on in the first application, I would not have disturbed the DJ's conclusion that the Appellant is a fugitive. Ms Hill accepted that as she was not suggesting that the Court should hear oral evidence from the Appellant, she could only succeed if I was satisfied that in light of the new evidence the Court could no longer be sure that the Appellant was a fugitive. I do not accept that proposition. The 26 June 2000 letter, at its highest, shows that he provided his United Kingdom address at some unspecified point prior to that letter being sent. However, the Appellant's own witness statement does not suggest that he provided his address in England prior to events at the Portuguese border in 2015; and nor does he suggest that he gave his new address to the Polish authorities after he moved in June 2021, although he was fully aware at that time that he had an outstanding sentence to serve. In addition, he does not explain why the account in his witness statement is markedly different from the evidence he gave on oath at the extradition hearing, where he indicated that he did not provide his address in the United Kingdom until "a year or so after the trial" (which was in 2018). This was in a context where the Appellant accepted in cross-examination that he was aware of the obligation to notify a change of address and that he knew that he had been convicted and sentenced.

64. In so far as the Appellant's new witness statement also relates to family and employment circumstances, I do not accept that the pre-November 2022 material was unavailable to him at the time of the extradition hearing. I rely on, without repeating, factors that I have already highlighted in respect of the evidence concerning fugitivity. The Appellant was aware of the Article 8 issue, he had submitted a statement from his wife addressing such matters (para 15 above), he called his wife to give evidence on this at the hearing (para 20 above) and when he gave evidence he was asked about his employment and family circumstances and he could have elaborated on these (para 19 above). The fact that, with the benefit of legal advice, he now wishes that he had gone into his family circumstances in more detail is not a sufficient basis for admitting this

fuller account. The undated witness statement only addresses post-hearing matters to a very minor degree (paras 28-29 above) and the birth of the Appellant's third child is in any event covered in later material. It is not in the interests of justice to admit the witness statement.

Alleged errors in the DJ's reasoning

65. Relying upon the last sentence of para 34 of the judgment, Ms Hill submits that the DJ erred in applying an exceptionality test to the Article 8 question when there is no such test, as was confirmed by Baroness Hale at para 8(2) of her summary of the correct approach in *HH* (para 47 above).

66. Whilst the DJ used unfortunate language in referring to "the exceptionality test", I do not consider that he did apply the wrong test in conducting his Article 8 evaluation. In the earlier passage at para 32 of his judgment, he had specifically directed himself that there is no exceptionality test (para 22 above). As Mr dos Santos submits, I accept that the reference to exceptionality in the DJ's para 34, which, appeared in the context of his findings on the Appellant's family circumstances, was in fact a reflection of para 8(7) of Baroness Hale's summary in *HH*, where she observed that it was likely that the public interest in extradition will outweigh the Article 8 rights of family "unless the consequences of the interference with family life will be exceptionally severe". Accordingly, the DJ was correct to assess whether "exceptionally severe" consequences were present in this case. Moreover, it is quite clear from the remaining paragraphs of his judgment, that the DJ applied the usual *Celinski* weighing exercise, identifying the factors for and against extradition and determining where the balance lay.

67. Ms Hill's second point has more force. At para 8 the DJ referred to the Appellant having "a wife by the name of Iwona Klos and a young son"; and at para 34 he referred to the Appellant caring for "his wife and their child". Moreover, there are no references in the judgment to the Appellant and his wife having two daughters or to their age, their education or any other details. In the circumstances, I accept that this is not simply an isolated typographical error; it does not appear that the DJ had the Appellant's actual family circumstances in mind when he conducted the Article 8 evaluation.

The second, third and fourth applications to admit new evidence

68. I grant the second, third and fourth applications to admit new evidence. I do so applying the interests of justice test (para 46 above). I have summarised the material that is relied upon at paras 31 – 36 above. I accept that the majority of it relates to events that post-date the extradition hearing and that it is relevant to the Article 8 assessment of the proportionality of the extradition. For the avoidance of doubt, I admit the material in fairness to the Appellant so that I may consider it as part of the Article 8 balancing exercise; its significance will fall to be determined at that later stage. (As I have already noted, the evidence about Mrs Klos' health has been superseded by subsequent events, however it is simpler for me to allow the fourth application in its entirety, rather than seeking to differentiate between passages in the addendum proof and further witness statement for the purposes of the order that I will make.)

The Article 8 balancing exercise

69. In light of the new evidence that I have admitted and the DJ's failure to take account of the family's circumstances (para 67 above), it is appropriate for me to re-conduct the Article 8 balancing exercise.

70. In summary, the factors in support of extradition are as follows:

i) The constant and weighty public interest in extradition that people convicted of crimes should serve their sentences and that the United Kingdom should honour its treaty obligations to other countries;

ii) The United Kingdom should not become a "safe haven" to which those convicted in other jurisdictions can flee in the belief that they will not be sent back;

iii) The Appellant is a fugitive;

iv) Taken cumulatively the offending of which he was convicted is serious. It comprised 13 dishonesty offences, involving two types of offending; it was committed over a two-year period; and it attracted a substantial prison sentence;

v) A sentence of 4 years imprisonment was imposed, all of which remains to be served.

71. In summary, the factors against extradition are as follows:

i) The Appellant has been settled in the United Kingdom since 2012 and has led a productive life here, having been in employment throughout the period;

ii) The Appellant has not offended since coming to the United Kingdom and has no previous convictions other than those that are the subject of these proceedings;

iii) The adverse impact, emotionally and financially that extradition would have upon the Appellant's wife and his three young daughters (which I discuss below);

iv) The Appellant has been subject to restrictive bail conditions for a lengthy period since January 2022; and

v) The offences were committed a considerable time ago in the period August 2009 – September 2011.

72. I have borne all of the above factors in mind. Substantial weight is to be given to the public interest factors that I have identified. As the Appellant is a fugitive, very strong counterbalancing factors would need to exist before the extradition could be regarded as disproportionate (para 49 above). I have already explained why this offending is serious and a substantial prison sentence of four years was imposed, none of which has been served so far.

73. I only give limited weight to the age of the offences, given that I do not accept that this is a case where there has been culpable delay by the Polish authorities or an absence of fault on the part of the Appellant. Whilst the Respondent has provided no detailed information as to the course of the criminal investigation and it seems that the Appellant was only charged in 2016, on his own account he did not provide details of his whereabouts to the Polish authorities until 2015, despite knowing from 2012 that criminal proceedings were underway. In addition, as I have already noted, that account in his statement contradicts the evidence that the Appellant gave at the extradition hearing when he said on oath that he provided his address about a year after the trial (in 2018). In the circumstances, it is apparent that the Appellant bears a responsibility for at least a significant portion of the time that has elapsed. Furthermore, importantly, this is not a case where the Appellant was lulled into a false sense of security by the passing of time as he established a life in the United Kingdom. He was aware of the proceedings in Poland, frequently returning to attend hearings. He knew of the sentence that had been imposed and applied (unsuccessfully) to defer it. Mrs Klos also referred to living long-term under the stress of the proceedings in Poland in her original witness statement (para 15 above). In this case, the Appellant and his wife were fully aware of the risk of him being returned to Poland to serve his sentence.

74. I accept that some weight is to be attached to the bail conditions that the Appellant has been subjected to. It is a non-qualifying curfew and the six hours are at night, nonetheless, I accept that this, coupled with the residence condition, has been an imposition that has restricted his movement. He is not able to go away with his family and he had to give up his Saturday night job which he undertook to supplement the family's income. However, inevitably, the weight that I accord to this aspect is substantially less than I attach to the fact that the Appellant has so far avoided serving any of the four-year prison sentence which was imposed.

75. I accept that the Appellant's extradition will present real difficulties for his wife. She will not have his support in looking after the children and, in turn, this may well impact upon her current employment. She will undoubtedly be adversely affected by the loss of his financial contribution to the family and his extradition will be very upsetting for her. She may feel that she has to return to Poland, given the absence of family support in the United Kingdom. Mrs Klos' tumour is no longer a concern. I have not been provided with any supporting medical information in relation to her recovery period, but even if it takes up to the two months referred to by Ms Hill to make a full recovery, she has been fit enough to return to work and a month and a half of that period has already passed.

76. As I have already indicated, the impact on the Appellant's three young daughters is a primary consideration. I have already summarised the witness evidence in this regard. I accept that the Appellant has taken a primary role in caring for his children in recent times and that they will miss him very much if he is extradited. As Ms Hill emphasises, the children are British and have lived all of their lives in this country. If Mrs Klos feels that she has to return to Poland, the oldest child's schooling will be disrupted and it will be a huge transition for all of the children. I bear all of this in mind. However, this is not a

case where any of the children are affected by significant medical issues (the reflux problems experienced by the youngest child having improved) and the Appellant was not their primary care until he was subject to the bail conditions that restricted the hours that he could work.

77. In summary, whilst I accept that there will be a substantial adverse impact on the family if the Appellant is extradited, this does not go significantly beyond the usual consequences of extradition and I do not consider that the consequences of interference with family life will be exceptionally severe.

78. In all the circumstances I am satisfied that the Appellant's extradition will not amount to a disproportionate interference with the Article 8 rights of him or his family.

Conclusion

79. For the reasons given above I dismiss this appeal.