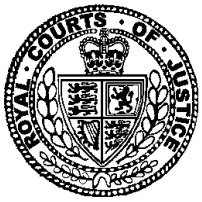

Neutral Citation Number: [2024] EWHC 957 (Admin)

Case No: AC-2023-LON-001050

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/04/2024

Before :

THE HONOURABLE MRS JUSTICE FARBEY

- -

Between :

DAMIAN DABLEWSKI	**Appellant**
- and -	
REGIONAL COURT IN LUBLIN, POLAND	**Respondent**

- -
- -

Hannah Hinton (instructed by **ITN Solicitors**) for the **Appellant**
Natalie McNamee (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 21 March 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 25 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mrs Justice Farbey:

Introduction

1. The appellant is a Polish national born in 1990. He appeals under section 26 of the Extradition Act 2003 ("the Act") against an extradition order made by District Judge Snow ("the DJ") in a judgment dated 9 March 2023. The respondent seeks his extradition pursuant to a "conviction" arrest warrant issued on 22 March 2022 and certified by the National Crime Agency on 5 October 2022. The appellant was arrested on 14 November 2022. He appeared at Westminster Magistrates' Court for an initial hearing on the following day and has remained in custody since then. The full extradition hearing took place on 9 March 2023. A written judgment was handed down on the same day.

2. Following a renewed application at an oral hearing, leave to appeal was granted by Julian Knowles J on the single ground that extradition would amount to a disproportionate interference with the appellant's rights and those of his children under article 8 of the European Convention on Human Rights. In granting leave, Julian Knowles J observed:

> "I have granted permission on the basis that the applicant is approaching the point at which he would be eligible for release in Poland. Given he might not be able to return to the UK (as the District Judge found) and he has young children here, I consider there is an arguable article 8 issue."

Factual background

3. The arrest warrant relates to two offences. The unduly stilted translation of the warrant says in essence that:

   i. Offence 1: Robbery: On 16 August 2015, in a street in Lublin, the appellant robbed a person, threatening him with immediate violence in a way that gave rise to the justified fear that the threat would be carried out. He stole a Samsung mobile phone, a silver chain with a medallion and a pair of Rayban spectacles. The total value of the stolen property was 1,270 PLN. The warrant notes that the appellant committed the offence within five years of serving at least six months of a custodial sentence for a similar offence.

   ii. Offence 2: Damage to property: On 30 July 2015, in Lublin, the appellant damaged (a) various parts of a Skoda car causing loss to a company in the sum of 4,981.31 PLN; (b) various parts of a Renault car causing loss to an individual in the sum of 7,744.41 PLN; (c) various parts of a Ford car causing loss to a second individual in the sum of 1,610 PLN; and (d) two panes of a door leading to the staircase of an apartment block causing loss in the sum of 250 PLN. The warrant notes that the various elements of this offence took place within short intervals of time and were pre-planned with another identified perpetrator. The offence was committed within five years of serving at least six months of a custodial sentence for a similar offence.

4. The history of the criminal proceedings in Poland is set out in a combination of the arrest warrant and further information from the respondent. On 4 December 2015, following three occasions of pre-trial interrogation, the appellant pleaded guilty and filed for "self-sentencing" in the form of 4 months' immediate custody, together with "the obligation to redress the damage to the victim" in relation to Offence 2. On 16 December 2015, he was convicted of Offence 1 and sentenced to 2 years 6 months' imprisonment in a judgment that became "legally valid" on 15 January 2016.

5. In February 2016, the appellant moved to the United Kingdom. On 24 May 2016, he was sentenced to 4 months' custody for Offence 2. On 28 June 2016, the sentence for Offence 2 became final.

6. On 16 April 2019, a European Arrest Warrant ("EAW") was issued in relation only to Offence 1, which sought the appellant's extradition to serve the sentence of 2 years 6 months' imprisonment. The EAW was certified by the National Crime Agency on 13 November 2019. The appellant was arrested on 27 October 2020 and remained in custody. In a written judgment dated 23 November 2020, the same DJ ordered his extradition for the first time. The appellant applied for leave to appeal.

7. Following a "cumulative judgment" in Poland on 20 August 2021, the appellant was sentenced to 2 years 9 months' imprisonment for Offences 1 and 2 together. In light of the imposition of the new cumulative sentence, the EAW was withdrawn. The appellant was discharged by order of this court dated 20 October 2021. His appeal did not therefore proceed.

8. The same order of this court required the appellant's release from custody in relation to the EAW. The DJ found that the appellant was in custody from 27 October 2020 until 20 October 2021 in relation to the EAW. The appellant has (as I have mentioned) remained in custody since his arrest pursuant to the present arrest warrant.

9. By virtue of the operation of article 26(1) of the EU Framework Decision, the Polish authorities are bound to deduct days served in custody in the United Kingdom from the time to be served in Poland. In a note provided to me after the hearing, the parties were agreed that the time left to be served at the date of the hearing was 4 months and 28 days. The passing of some further time pending this reserved judgment, together with some period of additional time that would ensue between the judgment and extradition, means that a further deduction would need to be made.

10. It is not in dispute that, if extradited, the appellant would be eligible to apply for early release from custody. That is because he will have passed the half-way point of his overall sentence through the deduction of days spent in custody in the United Kingdom. He cannot apply for early release from the United Kingdom. It is common ground that the Polish authorities are under no duty to give any view as to the prospects of his early release before he is extradited.

11. The appellant has no criminal convictions in the United Kingdom. He has three other convictions in Poland: insulting a public official (committed in 2008); burglary (also committed in 2008); and robbery (committed in 2009). The net result of these convictions is that the appellant spent 5 years in prison in Poland.

12. The appellant and his former partner have two sons born in the United Kingdom on 20 October 2016 and 28 December 2017 respectively. The relationship with his sons' mother had ended by July 2018.

The DJ's judgment

13. In a terse judgment, the DJ rejected the appellant's evidence that he had not entered the United Kingdom to avoid serving his sentence of imprisonment and found that he was a fugitive from justice. The DJ found that the appellant's sons live with their mother and her new partner in Stoke on Trent. Prior to his remand in custody, the appellant had access to his sons twice monthly for half a day. The appellant has good relations with their mother and there was no evidence that she would not facilitate the children's access to the appellant in Poland. The appellant himself is single.

14. The DJ found that, in light of the pending extradition proceedings, the appellant's application for pre-settled status has not been resolved. The failure to remove him to Poland after the EAW was discharged does not show that the Home Office would not deport him in light of his convictions. Despite a very serious road traffic accident in September 2022 (which left him in a coma for three days), he has no ongoing health issues that require medical treatment.

15. The DJ considered the appellant's immigration position in more detail:

> "[The appellant's solicitor] has reproduced the Immigration Rules as they are said to apply to the RP [ie requested person]. I have found the mere recitation of the Rules to be of limited assistance, this is an area which requires expert evidence. I am prepared to accept that if the RP is extradited, he would not have an automatic right to return to the UK and is likely to face significant hurdles if he seeks to return to reside in this country. As a consequence, access to his children will be difficult. This has an impact upon both their and his Article 8 rights. However, the impact on those rights does not arise from extradition but from the RP's criminal convictions in Poland."

16. Having made these findings, the DJ applied the balance sheet approach of *Polish Judicial Authorities v Celinski & Ors* [2015] EWHC 1274 (Admin), [2016] 1 W.L.R. 551. He held that the following factors weighed in favour of extradition:

> "a. There is a strong public interest in the UK honouring its international extradition obligations.
>
> b. There is a strong public interest in discouraging persons seeing the UK as a state willing to accept fugitives from justice.
>
> c. Decisions of the issuing judicial authority should be accorded a proper degree of confidence and respect.
>
> d. The independence of prosecutorial decisions must be borne in mind when considering issues under Article 8.

e. The offence of robbery was serious. He was a recidivist.

f. The RP has a substantial period to serve.

g. The RP is a fugitive from justice in respect of both cases."

17. On the other side of the balance sheet, the DJ found that the following factors weighed against extradition:

"a. His residence in the UK since February 2016.

b. The interests of his young sons.

c. The potential difficulty for the RP returning to the UK after he has served his sentence.

d. He has served approximately 1 year and 4 months of his sentence whilst on remand in this country.

e. He has no convictions in this country.

f. The offending occurred in [this sentence is unfinished by the DJ]."

18. In balancing the competing factors, the DJ gave no weight whatsoever to the age of the offending or to "the RP's life in this country" in light of his fugitive status. He gave substantial weight to the interests of the appellant's children which he properly recognised as being a primary consideration. However, this was "not a sole carer case." The children would continue to live with their mother and her new partner which lessened the weight that the DJ gave to their interests.

19. The DJ gave little weight to the likely difficulties that the appellant would face in returning to the United Kingdom on the basis that "there is a strong possibility that, in light of his criminal record, he will be deported." There was in any event a possibility that the appellant would be able to return after extradition. The difficulties that he would face in returning to the United Kingdom would not arise from extradition but from his criminal convictions in Poland. If he were not able to return, there would be no barrier to his children visiting him in Poland.

20. Quoting the well-known passage in *Celinski* at para 39, the DJ concluded that there were no "very strong countervailing factors" which would outweigh the public interest in upholding extradition arrangements. The appellant's extradition was therefore compatible with his article 8 rights. As no other issues were raised, the appellant's extradition was ordered.

Legal framework

21. An appeal brought under section 26 of the Act may only be allowed if the conditions of section 27(3) or (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."

22. The single question on an appeal is whether or not the DJ made the wrong decision. A decision is not wrong simply because the Administrative Court, which exercises a reviewing function on an appeal, would have taken a different view (*Celinski*, para 20). In answering the question whether the DJ was wrong to decide that extradition was or was not proportionate, the focus must be on the outcome; that is, on the decision itself (*Celinski*, para 24). Although the DJ'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 (*Celinski*, para 24).

23. In assessing the proportionality of extradition under article 8, the constant and weighty public interest in extradition will outweigh the rights of the family unless the consequences of the interference with family life will be exceptionally severe (*HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2013] 1 AC 338, para 8). When a child's rights are involved, the child's best interests are a primary consideration but they may nevertheless be outweighed by countervailing considerations (*HH*, para 15).

24. Delay since the extradition crime was committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life (*HH*, para 8). A district judge is entitled to take the view that the weight to be attached to delay in assessing the proportionality of extraditing a fugitive is very much reduced as any private and family life established in the United Kingdom will have come about as a result of the requested person's flight from justice (*Celinski*, para 48).

25. In relation to the re-entry of European Union nationals post-Brexit (which has gained the description "Brexit uncertainty" in the case law), if an individual wishes to raise their immigration position as an issue to be considered in the article 8 balance, it must be raised in a way that is "fully formulated, takes account of all relevant statutes, regulations and immigration rules" and "relevant authority" should be provided to the court" (*Hojden v District Court, Gorzow, Wielkopolski, Poland* [2022] EWHC 2725

(Admin), para 59, citing *Gurskis v Latvian National Authority* [2022] EWHC 1305 (Admin), [2022] 4 W.L.R. 82, para 22).

26. The court in *Hojden*, para 60, went on to consider whether there was any advantage to applying immigration law in an extradition case:

> "Even if it is properly advanced, it is perhaps doubtful whether the immigration issue is one that will carry significant weight of its own, **as opposed to being a factor that could make the difference in cases that are otherwise finely balanced**. True it is that the less the prospect of being able to return, the greater may be the likely interference with private and family life. However, to the extent that the prospects of return are dependent upon (a) the operation of immigration rules that are themselves based on the seriousness of the criminal offending; and/or (b) the operation of Article 8 outside those rules, the overall balance might not, in the end, be significantly affected. This is because, as a general matter, the greater the seriousness of that offending, the stronger the public interest is likely to be in extradition" (emphasis added).

27. The counterfactual scenario of whether, if the appellant were not to be extradited, he would be likely to face deportation, is relevant. As expressed in *Gurskis*, para 33:

> "The assessment of the extent to which extradition will interfere with article 8 rights should take account not only of the obstacles to any future application to re-enter the United Kingdom…but also the counterfactual – i.e., the likelihood that, absent extradition, the foreign conviction could provide grounds for immigration removal. In some instances, there may be a difference between a scenario in which an extradition order is made and the counterfactual. There may be situations where if no extradition order is made no interference with article 8 rights would be likely for any other reason. When that is so the article 8 analysis must take account of that difference. But other cases may make good what Chamberlain J suspected in his judgment in *Pink* [2021] EWHC 1238 (Admin) - that interference with article 8 rights may be the same whether or not the extradition order is made."

The parties' submissions

28. On behalf of the appellant, Ms Hannah Hinton (who did not appear below) submitted that the DJ was wrong in his assessment of article 8 on four main sub-grounds.

29. First, the DJ was wrong to have excluded the information relied upon by the appellant to show that he would not be permitted to return to the United Kingdom and was wrong to have reached his own speculative conclusion, having stated that the question of the appellant's return required expert evidence.

30. Ms Hinton emphasised that the Immigration Rules stipulate that the appellant would, upon applying to return, need to provide evidence that he was taking, and intended to continue to take, an active role in his sons' upbringing (Immigration Rules para E-ECPT.2.4(b)). This requirement would be dependent on either the continuing goodwill of his former partner or (if she refused to co-operate in facilitating contact) an order from an English court. Neither of those alternatives was secure or easy to rely on. Given that it was unlikely that this element of the Rules could be satisfied at some future point, the appellant's re-entry was likely to be refused. His likely future estrangement from his children should have been given due weight in the balancing exercise. Given the young age of his children and the appellant's positive role in their lives, this was a finely balanced case where the immigration position could be said to tip the balance in favour of discharge (*Hojden*, para 60, above).

31. Secondly, Ms Hinton submitted that the DJ failed to give proper weight to the time that the appellant had spent in custody which falls to be treated as time served under the cumulative sentence. The public interest in extradition was significantly reduced and was bound to carry less weight in the *Celinski* balancing exercise in circumstances where such a significant portion of the sentence had in effect been served.

32. Thirdly, the DJ failed to give any proper weight to the fact that the appellant would be eligible to apply for early release at the half-way point of the sentence which – by dint of time served in custody in the extradition proceedings – had nearly been reached at the date of the DJ's judgment and which has been far exceeded now. The prospect of release from custody is a factor reducing the public interest in extradition and should have been treated as such by the DJ.

33. Fourthly, the DJ failed to take account of the unexplained delay in issuing an extradition request for Offence 2. The delay of some 7 years was unexplained and significantly reduced the public interest in extradition.

34. Ms Natalie McNamee (who likewise did not appear below) accepted on behalf of the respondent that there were factors in favour of the appellant's discharge but submitted that the DJ was entitled to find that the balance fell in favour of extradition. The respondent did not seek to challenge the DJ's finding that the appellant would face "significant hurdles" in returning. However, those difficulties were considered and properly weighed by the DJ. He was entitled and correct to attach limited weight to future immigration difficulties because this was not a finely balanced case where the immigration position could be said to tip the balance in favour of discharge. The DJ was entitled to take into account the counterfactual and to conclude that, if the appellant were not extradited, his foreign convictions could provide grounds for removal in any event.

35. Ms McNamee submitted that there was no guarantee that an application for early release would succeed. In any event, the DJ was entitled to conclude that, notwithstanding the prospect of early release, the public interest in extradition outweighed the factors in favour of discharge, particularly as the appellant is a fugitive from justice.

36. In relation to delay, Ms McNamee submitted that the DJ was entitled to give no weight to the age of the offences. The appellant is a fugitive; the delay issuing the arrest warrant was not lengthy; and the appellant was put on notice by the EAW that he was wanted for extradition.

37. The respondent conceded that in one respect I was in a different position to the DJ. At the time of the extradition hearing, the appellant had effectively served just over a year of his sentence. Since then, he has effectively served a substantial portion of the sentence which is (the respondent accepts) a factor that will weigh in the appellant's favour in the article 8 balancing exercise. Given this development since the extradition hearing, Ms McNamee suggested that I may simply consider the balancing exercise afresh rather than focus on whether the DJ was right or wrong on the weight to be attributed to time served.

38. In relation to any fresh balancing exercise, Ms McNamee submitted that, taking the case as a whole, the factors in favour of extradition continue to outweigh the factors against extradition such that the passing of time between the extradition hearing and the appeal does not render the DJ's overall decision wrong. She relied in particular on the fact that the appellant is a fugitive; on the seriousness of the extradition offences; and on the appellant's substantial criminal record in Poland. The rights of the appellant's children are a primary consideration but are in this case outweighed by other factors. Any interference with the appellant's article 8 rights could come about in any event because of the strong possibility that his criminal record would result in his deportation. The time to be served until the completion of the sentence in Poland was a matter of months not weeks; it was not so short that it should outweigh other factors.

Discussion

39. For convenience, I shall deal with the appellant's four sub-grounds in a different order to that in which they were advanced by Ms Hinton.

Prospect of early release

40. The prospect of early release from a custodial sentence in Poland has been considered in a number of cases which were in turn reviewed by Fordham J in *Dobrowolski v District Court in Bydgoszcz, Poland* [2023] EWHC 763 (Admin). Fordham J, at para 9, describes how the line of cases starts with Foskett J's judgment in *Janaszeck v Poland* [2013] EWHC 1880 (Admin). In that case, the respondent produced a letter to the court to the effect that there was a right to apply for early release after serving half of the sentence in custody. Fordham J goes on in para 9 of *Dobrowolski* to describe the criteria (as set out in para 41 of *Janaszeck*) that the Polish authorities may apply when making what are discretionary decisions about early release:

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

41. I shall refer to these criteria for early release as the *Janaszeck* criteria. Fordham J goes on to say that these criteria have been applied in various other cases.

42. It was common ground before me that (i) the appellant may apply for early release immediately if extradited to Poland because he will be treated as having served over one half of his sentence by reason of time in custody in the United Kingdom; and (ii) the Polish authorities would consider his application on a discretionary basis in accordance with the *Janaszeck* criteria.

43. In *Sobczyk v Circuit Court in Katowice, Poland* [2017] EWHC 3353 (Admin), the Divisional Court (Gross LJ, Nicol J) considered the effect of the passing of time between the extradition hearing and the appeal. By the date of the appeal, time spent in custody meant that the appellant was 11 weeks short of the half-way point of his sentence when he would be eligible to apply for early release if extradited to Poland. The court held that the appellant was still short of the half-way point by some margin. Even at that point, it would be a matter for the discretion of the Polish court as to whether the remainder of the sentence should be reduced or suspended. The court held at para 29:

> "It is not for us to anticipate how any such discretion may be exercised."

44. As Ms McNamee submitted, the approach in *Sobczyk* reflects the principle that the domestic courts should be slow to usurp the judicial and sentencing processes of a requesting state. The court in *Sobczyk* made no attempt to do so: it made no assessment of the prospects of early release.

45. As *Dobrowolski* indicates, it is not clear that the self-denying ordinance of *Sobczyk* has been uniformly applied. It would appear that other judges in other cases have formed a view about the prospects of early release. In *Dobrowolski*, Fordham J (at para 9) refers to this line of authority as containing "a judicially perceived likelihood of early release" which he elucidates (at para 12) as follows:

> "This line of authority involves the Judges of this Court relying on information about the operation of the Polish provisions, including information as elicited and recorded in earlier judgments, and then making material observations about the likely implications of Polish law as perceived by the Judge in this jurisdiction."

46. I need only quote one other example in this line. In *RT v Poland* [2017] EWHC 1978 (Admin), para 65, the Divisional Court (Burnett LJ and Ouseley J) considered the question of the likely time to be served in Poland and held:

> "In considering that question in this case, as in others, the court must have regard to the reality of the sentence that a requested person will serve. In *Borkowski* at paragraph 16, King J referred to the 'well-known fact that the Polish authorities have a discretion to allow release after one half or two-thirds of the sentence has been served.' That was a reference to articles 77 and 78 of the Polish Penal Code which, in the context of this appellant, would allow but not guarantee his release after serving half of the sentence. **There is no reason to suppose that he would not benefit from those provisions**" (emphasis added).

47. The court in *RT* was willing to express its view of the prospects of early release, even if it did so in the somewhat guarded terms that there was no reason to suppose that the criteria would not apply. Ms Hinton also referred the court to *Murawska v District Court Koszalin, Poland* [2022] EWHC 1351 (Admin), para 58; *Chechev v Bulgaria* [2021] EWHC 427 (Admin), para 79; and *Kruk v Judicial Authority of Poland* [2020] EWHC 620 (Admin), paras 19-23. That the High Court has in *RT* and on other occasions been willing to undertake an assessment of the likelihood of early release may be difficult to reconcile with the approach taken in *Sobczyk*.

48. I sought counsel's views on this apparent tension in the cases. Ms Hinton submitted that there was no hard and fast rule as to how a district judge or this court should approach the prospect of early release, given the fact-sensitive nature of the *Celinski* balance. I should be wary of applying too narrow an approach that would constrain the consideration of all relevant factors. In this case, the prospect of early release was a relevant factor weighing in favour of discharge. This relevant factor should be considered and weighed together with the actual time that the appellant has now served and the rights of his children.

49. Ms McNamee submitted that *Sobczyk* was the more principled authority and represented the preferable approach. She submitted in the alternative that, even applying the *Janaszeck* criteria, the court cannot conclude that the appellant has a good prospect of early release. The appellant's previous convictions, his conduct as a person who has escaped justice and the serious nature of the extradition offences do not "justify the assumption that the perpetrator will after release respect the legal order, and in particular that he will not re-offend" (see the *Janaszeck* criteria set out above). Ms McNamee submitted that, in these circumstances, the prospect of early release is not a factor that weighs in favour of discharge but should be regarded as a neutral factor in the overall balance.

50. I would prefer the approach in *Sobczyk*. The application of law and practice to the question of the appellant's early release is entirely a matter for the Polish authorities. Ms Hinton seemed to suggest that the mere chance to submit an application for early release is a relevant factor to be weighed; but the chance to apply cannot advance the appellant's appeal in the absence of some principled reason to give the application itself a weighting in the *Celinski* balance. I see no such reason. Conversely, there is reason not to give it weight because it undermines the principle that sentencing law and practice must be left to requesting states to implement. The firmer and surer footing is that this court should not prejudge the matter.

51. I do not, however, need to decide this point of principle. Even adopting the approach in *RT*, the evidence before me consists of the briefly stated and unelaborated criteria in a citation of *Janaszeck* in *Dobrowolski*. I cannot in this case reach a conclusion – one way or the other – as to whether this appellant's early release application would succeed. For these reasons, the appellant's ability to apply for early release is a neutral factor in the *Celinski* balance. In so far as the DJ did not deal with early release in some different way, he made no material error. This sub-ground of appeal fails.

Time spent in custody

52. The effect of time spent in custody in the United Kingdom is to shorten considerably the time that the appellant has left to serve in Poland. It is not in dispute that, in

principle, the length of time left to be served is a relevant consideration in the *Celinski* balance.

53. The respondent has made a two-pronged concession: first, the fact that the appellant has now served a substantial portion of his sentence is a factor that will weigh in his favour in the article 8 balancing exercise; secondly, the time spent in custody at the date of the appeal before me means that I am confronted with a different factual picture to the one that the DJ was considering.

54. The court is not bound to accept a concession made by a party. I have had firmly in mind that this court will be careful to prevent the abuse of its procedures that would generally follow from enabling rights of appeal to be used as "an opportunity to reduce the time to be spent in a [foreign] prison and to burnish a proportionality argument" (*Gruszecki v Circuit Court in Gliwice, Poland* [2013] EWHC 1920 (Admin), para 8; cited in *Murawska*, para 57). Any indication from this court that time spent in custody could gradually build up an article 8 proportionality argument would encourage delays and prolong proceedings in order to raise such a point (*R (Kasprzak) v Warsaw Regional Court* [2010] EWHC 2966 (Admin), para 21; cited in *Murawska*, para 56). The concession made in this case can in no way be interpreted as going further than the present case. The assessment of proportionality is fact-sensitive and a concession on one set of facts can have no bearing on any other case. On the facts of this case, as presented to me on appeal, the respondent's concession was carefully considered and properly made. It would be churlish not to accept it.

55. In my judgment, the effect of the concession is that the time now served in custody represents a considerable development since the extradition hearing. This development should be treated as either an issue that was not raised at the extradition hearing or as evidence that was not available at the extradition hearing (section 27(4)(a) of the Act).

56. On its own, I would regard the short length of the sentence left to be served as having significant but not decisive weight in the *Celinski* balancing exercise. In my judgment, its proper effect should be considered in the context of the facts as a whole and I will therefore turn to consider Ms Hinton's other sub-grounds.

Immigration position

57. For present purposes, I am prepared to accept that the DJ was wrong to say that the Immigration Rules were of no utility in the absence of expert evidence about the appellant's prospects of re-entry to the United Kingdom. The refusal to engage with the Rules in the absence of expert evidence sets the bar too high. Nevertheless, I agree with Ms McNamee that any error by the DJ is immaterial because the DJ accepted that the appellant would face significant hurdles to re-entry such that access to his children would in future be difficult. He weighed this factor in the balance.

58. Ms Hinton's more pertinent submission relates to whether the DJ was wrong to give "little weight" to the accepted difficulties that the appellant will encounter in returning to the United Kingdom. In according little weight to the appellant's immigration position, the DJ referred to the strong possibility of the appellant's deportation if he were not extradited. It seems that in referring to the prospects of deportation, he had in mind the counterfactual scenario envisaged by *Gurskis*.

59. The counterfactual deportation of this appellant would not engage identical public interests as are engaged in extradition cases because presumably the appellant would not on this hypothetical scenario serve his sentence in Poland after discharge by this court. During the course of discussion, I raised with counsel whether there was any conceptual space for counterfactual deportation. If the appellant were to be extradited, no question of his deportation could arise. If the appellant were not to be extradited, it would be the result of a High Court decision that his extradition would breach article 8. Given the authoritative treatment of a judgment of this court in relation to (for example) the impact of removing the appellant from access to his children, it may well be thought that the Secretary of State for the Home Department would need to exercise caution before determining that deportation was compatible with the appellant's article 8 rights. Both counsel were minded to agree with this analysis.

60. Even if I am wrong about this, the focus of an extradition appeal is and should be on extradition law. The notion of a quasi-deportation hearing is – at least in this case – unenticing and the DJ was not provided with the tools (rules, policies, case law, jurisprudence) which would have enabled him to reach a reliable decision on deportation. On the evidence and material before him, he was incapable of reaching a reliable conclusion as to how the appellant would fare under the law relating to deportation. He was therefore wrong to treat it as a factor weighing in favour of extradition.

61. In giving little weight to the difficulties that the appellant is likely to encounter in re-entry, the DJ held that there is still "the possibility that he would be able to return after extradition." In my judgment, a broad reference to possible re-entry is insufficient to reduce the accepted difficulties that the appellant would face. The DJ was wrong to give this possibility anything other than minor weight.

62. As I have mentioned, the DJ observed that the difficulties that the appellant would face in returning to the United Kingdom arise from his criminal convictions rather than his extradition. This reflects the observation in *Lewandowski v Polish Judicial Authority* [2021] EWHC 2049 (Admin), para 32, that the fact that the appellant might be worse off under the Immigration Rules because of a criminal conviction was the result of the conviction and not of his extradition. I understand the observation in *Lewandowski* to mean no more than that immigration law, and not the fact of extradition, would govern the appellant's re-entry, such that this point effectively covers the same ground as the counterfactual scenario with which I have already dealt.

63. On the other side of the scales, the appellant's children are young (aged 6 and 5 years at the date of the DJ's judgment). They have had regular contact with their father whenever he has not been in custody. Their interests must on established principle be treated as a primary consideration.

64. The DJ found that there was no barrier to the children visiting the appellant in Poland. He appears to have reached that conclusion on the basis that there is no evidence that the children's mother would not facilitate access in Poland. As Ms Hinton submitted, there is no evidence either way as to whether the mother would or would not allow the children to travel to Poland. This is not a case in which the mother would have any cause to visit the appellant herself as she resides in the United Kingdom with a new partner. It is not a case of the mother taking the children to Poland as part of a family visit.

65. Turning back the clock to the time of the extradition hearing, I would not share the DJ's confidence that the appellant's extradition would – on the evidence available to the DJ – represent anything less than a serious interference with the children's family life with their father. Nevertheless, this mere difference of opinion with the DJ is insufficient to demonstrate that he ought to have decided a question before him differently. As the DJ rightly recognised, the appellant is a fugitive. The strong public interest in extraditing criminals who have fled from justice needs no elaboration and weighs very strongly in favour of extradition. As the DJ further rightly concluded, the offence of robbery is serious (albeit that the criminal damage offence is less serious).

66. However, the situation has moved on. Giving the significant weight that must be accorded both to time in custody in the United Kingdom and to the consistent and durable relationship between the appellant and his young children, I have reached the conclusion on the particular facts of this case that the immigration position makes a difference in an otherwise finely balanced case (*Hojden,* para 60). As it has turned out, the DJ was wrong to have given little weight to the appellant's immigration difficulties.

67. As well-known cases such as *HH* and *Celinski* make plain, the task of mounting a successful article 8 argument is demanding and I recognise the force of Ms McNamee's submissions that the high threshold is not met here, particularly as the appellant is a fugitive. However, in my judgment, the primary consideration that must be given to the children's interests means that the DJ was wrong to have concluded that it would be proportionate to extradite the appellant to serve the comparatively short period required to complete his sentence.

68. A combination of the appellant's immigration difficulties, the age of his children, his particular relationship with them, and the comparatively short time that would now remain to be served in completing his sentence in Poland have driven me to conclude that the DJ ought to have concluded that the factors in favour of discharge prevailed and that the appellant's extradition was not compatible with his and his children's article 8 rights.

Delay

69. The DJ gave no weight to the age of the offending in light of the appellant's fugitive status. That may be regarded as being a severe approach when the case law suggests that the weight to be accorded to delay in fugitive cases may be significantly reduced rather than extinguished. By a narrow margin, I accept Ms McNamee's submission that the DJ was nevertheless entitled to reach that conclusion in this case, irrespective of whether or not the delay was explained. The key impact of delay in this case lies in the time that the appellant has now served in custody. This sub-ground of appeal adds nothing of substance and cannot add significant weight to the factors against extradition. It fails.

Conclusion

70. The sub-grounds of appeal relating to early release and delay fail. The sub-grounds relating to the appellant's time spent in custody and to his immigration situation succeed. The overall result is that the DJ ought to have decided the article 8 question differently. Had he answered the question differently, he would have been required to order the appellant's discharge. The statutory criteria for allowing the appeal are met.

71. The appeal is allowed. The appellant will be discharged. I express my gratitude to counsel for their able submissions.