Neutral Citation Number: [2021] EWHC 64 (Admin)

Case No: CO/3115/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2021

Before :

LORD JUSTICE DINGEMANS
MR JUSTICE JULIAN KNOWLES

- -

Between :

ADAM WAWRZYCZEK	**Appellant**
- and -	
THE DISTRICT COURT IN BIELSKO-BIALA, POLAND	**Respondent**

- -
- -

Myles Grandison (instructed by **Lansbury Worthington**) for the **Appellant**
Nicholas Hearn (instructed by **CPS**) for the **Respondent**

Hearing date: **8 December 2020**

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Approved Judgment

Mr Justice Julian Knowles:

1. This is an appeal by Adam Wawrzyczek (the Appellant) against the order for his extradition to Poland made by District Judge Baraitser on 1 August 2019 under Part 1 of the Extradition Act 2003 (the EA 2003).

2. The District Court in Bielsko-Biala, Poland (the Respondent) seeks the Appellant's extradition in relation to a European Arrest Warrant (EAW), issued on 7 September 2017 and certified by the National Crime Agency on 11 October 2017. For reasons which will become clear I will call this EAW2.

3. EAW2 is a conviction warrant. It contains 32 offences. The Appellant's extradition is sought for him to serve two separate aggregated sentences of imprisonment. The first sentence relates to offences I-XXX and is of two years and two months' imprisonment, nearly all of which remains to be served. The second sentence of two years' imprisonment, all of which remains to be served, relates to offences XXXI and XXXII. The various offences are all categorised as 'fraud' on the Framework list of offences. I will set out the details later. It is unclear, as the district judge noted in her judgment at [90], whether the sentences will run concurrently or consecutively.

4. This is the second request for the Appellant's extradition. He was arrested on an EAW (EAW1) in 2015. EAW1 contained three offences, arising out of two sets of criminal proceedings in Poland, and these also appear on EAW2 as offences I, XXXI and XXXII. His extradition was ordered on EAW1 by District Judge Ikram (as he then was) on 29 May 2015. On 9 October 2015 the Appellant was discharged following a successful appeal to the High Court: [2015] EWHC 2854 (Admin).

5. The Appellant was arrested on EAW2 on 13 January 2019 and brought before Westminster Magistrates' Court on the following day. He is currently subject to conditional bail. The 32 offences on EAW2 arise out of four sets of criminal proceedings in Poland; under Polish criminal procedure these were aggregated to produce the two custodial sentences to which I have referred.

6. Grounds of appeal against the order for extradition were filed and served on 7 August 2019. Permission to appeal was granted on two grounds by Steyn J on 5 December 2019.

7. The Appellant was represented before us on the appeal by Mr Grandison and the Respondent by Mr Hearn. I am grateful to both of them for their clear and focussed written and oral submissions.

8. The two grounds of appeal for which permission was given are as follows:

    a. Ground 1: firstly, that the district judge erred in finding that, in relation to offences I, XXXI and XXXII, the second set of extradition proceedings did not constitute an abuse of process. Mr Grandison made clear that even if we were with him on this ground of appeal, his client would be liable (subject to our decision on the second ground) to be extradited on the remaining 29 offences.

b. Ground 2: second, that the district judge ought to have decided differently the question of whether extradition would be compatible with the Appellant's and his family's rights under Article 8 of the European Convention on Human Rights (the Convention). Had she done so, she would have been required to order the Appellant's discharge pursuant to s 21.

9. By an application dated 6 November 2020 the Appellant seeks to add a third ground of appeal, namely, that the district judge ought to have concluded that EAW2 was not issued by a 'judicial authority' as required by s 2(2) of the EA 2003 and that, had she done so, she would have been required to order the Appellant's discharge.

10. This third ground of appeal was not raised at the extradition hearing. Consequently, an application has been made pursuant to Crim PR r 50.20(6)(b). In summary, it is submitted that various legislative amendments that occurred in Poland in December 2019 and January 2020 mean that its courts can no longer be recognised as 'judicial authorities' capable of legitimately issuing EAWs for the purposes of s 2(2) as they lack the requisite independence from the executive. This issue is to be considered in March 2021 by a Divisional Court in the cases of *Chlabicz v Regional Court in Bialystok* (CO/4976/2019) and *Wozniak v District Court of Gniezno* (CO/4299/2019).

11. A similar argument was considered by the CJEU in *Openbaar Ministerie (Independence of the issuing judicial authority)* (Joined Cases C-354/20 PPU and C-412/20 PPU), following a reference by a Dutch Court. Advocate General Campos Sánchez-Bordona issued his Opinion on 12 November 2020 and the CJEU gave judgment on 17 December 2020 (ie, after the hearing before us).

12. In summary, the CJEU held that systemic or generalised deficiencies affecting the independence of the issuing Member State's judiciary, however serious, are not sufficient on their own to enable an executing judicial authority to consider that all the courts of that Member State fail to fall within the concept of an 'issuing judicial authority' of an EAW which, the Court said, is a concept which implies, in principle, that the authority concerned acts independently. The Court said that such deficiencies do not necessarily affect every decision that those courts may be led to adopt. The Court went on to state that, although limitations may in exceptional circumstances be placed on the principles of mutual trust and mutual recognition which underpin the operation of the EAW mechanism, denial of the status of 'issuing judicial authority' to all the courts of the Member State concerned by those deficiencies would lead to a general exclusion of the application of those principles in connection with the EAWs issued by those courts.

13. The Court said that a fact-sensitive examination needed to be carried out, where this issue is raised, in accordance with the two-stage test set out in its decision in *Minister for Justice and Equality (Deficiencies in the legal system)* (C-216/18 PPU). The Court went on to say that where the EAW has been issued for the purposes of criminal proceedings, the executing judicial authority must, where appropriate, take account of systemic or generalised deficiencies concerning the independence of the issuing Member State's judiciary which may have arisen after the EAW concerned was issued and assess to what extent those deficiencies are liable to have an impact at the level of that Member State's courts with jurisdiction over the proceedings to which the person concerned will be subject. Where an EAW is issued with a view to the surrender of a requested person for the execution of a custodial sentence or a detention order, the

executing judicial authority must examine to what extent the systemic or generalised deficiencies which existed in the issuing Member State at the time of issue of the European arrest warrant have, in the particular circumstances of the case, affected the independence of the court of that Member State which imposed the custodial sentence or detention order the execution of which is the subject of that EAW. The Court said that a general suspension of the EAW mechanism with regard to a Member State, which would make it permissible to refrain from carrying out such an assessment and to automatically refuse to execute EAWs issued by that Member State, would be possible only if the European Council formally declared that the Member State had failed to respect the principles on which the EU is based (the mechanism for which is contained in Article 7(2) of the Treaty on European Union (OJ C 326, 26 October 2012)).

14. Mr Grandison proposed that we deal with the two existing grounds of appeal and (if necessary) adjourn his application to add the new ground of appeal until at least 14 days after the Divisional Court has given judgment in *Chlabicz* and *Wozniak*. This will enable the Appellant to make further submissions in light of that judgment. Mr Grandison said such an approach was approved in *Podolak v Polish Judicial Authority* [2020] EWHC 2830 (Admin), [5].

15. If my Lord agrees, I would accede to Mr Grandison's application.

The background

The offences

16. The 32 offences on EAW2 were dealt with, ultimately, by two court decisions in Poland:

    a. The first court decision, II K 1368/15, is an amalgamated sentence for offences I to XXX. These were initially dealt with in three sets of proceedings: offence I under case reference 898/09; offences II to IV under case reference 02/05; and offences V – XXX under case reference 106/II. In broad terms, each offence alleges that the Appellant ordered goods and livestock from named companies and then failed to pay for them. The details of each of the 30 offences are set out in [6] of the district judge's judgment. In the main they date back to 2002 – 2004.

    b. The second decision, II K584/06, deals with the remaining two offences, XXXI and XXXII. Offence XXXI alleges that in 2005 the Appellant misrepresented his employment status in order to obtain a loan from a bank. Offence XXXII alleges that between 2003 and 2005 he obtained veterinary services which he failed to pay for.

17. As to sentence, according to Box (c) on EAW2:

    a. in the first case (II K1368/15) an aggregate sentence of two years and two months' imprisonment was imposed, of which two years, one month and 28 days remain to be served;

    b. in the second case (II K584/06) an aggregate sentence of two years' imprisonment was imposed, all of which remains to be served.

18. At [13] of her judgment the district judge summarised the five bars to extradition then relied upon by the Appellant. Three of these have fallen away, and we are only concerned with the grounds of appeal set out above, which are reflected in the bars to extradition set out in [13(d)] (Article 8) and [13(e)] (abuse of process) of the district judge's judgment.

19. Before considering that judgment in detail, it is convenient to summarise the High Court's decision in 2015 allowing the Appellant's appeal in respect of EAW1.

The High Court's 2015 judgment

20. The judgment was given by Supperstone J. As we have said, EAW1 only concerned offences I, XXXI and XXXII. Mr Grandison observed that although the Respondent supplied further information in respect of EAW2, there was no real explanation why the other offences on EAW2 had not been included in EAW1.

21. Before the district judge the Appellant argued that he should not be extradited by reason of a failure to comply with s 2 (in relation to two of the offences), ss 10 and 65 (dual criminality), s 20 (not entitled to re-trial), s 14 (passage of time) and s 21 (Article 8). The district judge rejected all grounds of challenge.

22. Cranston J granted permission to appeal on three grounds: dual criminality (s 10); retrial rights (s 20); and passage of time (s 14). Permission was refused in relation to s 2.

23. Supperstone J allowed the appeal on s 20 and therefore did not consider it necessary to consider the other grounds of appeal. His reasons for allowing the appeal can be summarised as follows.

24. Section 20 provides that where a defendant is convicted in his absence, and he has not 'deliberately absented himself from his trial' (s 20(3)), then he must be guaranteed the rights of re-trial as specified in s 20(8) (including the right to defend himself in person or with legal assistance; the right to examine witnesses against him; etc). If the law of the requesting state does not provide for these rights, then the defendant must be discharged. This provision reflects the fundamental unfairness in punishing a defendant following a trial in his absence when he did not intentionally choose to be absent from it.

25. At [7] of his judgment Supperstone J quoted a passage from the judgment of Aikens LJ in *Podlas v Koszalin District Court, Poland* [2015] EWHC 908 (Admin), [23]:

> "… Thirdly, … we accept that, upon its correct construction section 20(3) can only become relevant when, in accordance with the procedures of the relevant requesting state, a 'trial process' has been initiated against the requested person. Whether this 'trial process' has been initiated will be a question of fact in each case. Fourthly, given the terms of section 206 of the EA it must be for the JA to prove to the criminal standard, that the requested person has absented himself from this 'trial process' and that he has done so deliberately. *How* the requested person knows of the process is irrelevant; it is the fact of his knowledge of the

> process that counts. Fifthly, whether a requested person has absented himself from the trial process 'deliberately' calls for a consideration of what is in the mind of that person: see *Atkinson and Binnington* at [40] per Maurice Kay LJ. A requested person cannot have 'deliberately' absented himself from a 'trial process' if he did not know that that process is taking place or is about to be started. Sixthly, we agree with Mitting J that proof of the fact that the requested person had taken steps which made it difficult or impossible for the prosecuting authorities of the requesting state to serve the requested person with documents which would have notified him of the fact, date and place of the trial or, we would add, the start of the 'trial process', is not of itself proof that the requested person has 'deliberately absented himself from his trial' for the purposes of section 20(3).

26. In relation to the service of court summonses, EAW1 made clear that there had been two, and stated on p2:

> "This person was summoned in person on 29.09.2005 (in case VI K 898/05) and on 09.11.2006 (in case II K 584/06) and thus, was informed about the fixed dates and place of the hearings which resulted in issuing the decision in case VI K 898/05 and in case II K 584/06, and was informed that the decisions could be issued if he did not appear at the hearing."

27. In [9] of his judgment Supperstone J said that at the hearing before the district judge the judicial authority had stated that the term 'summoned in person' meant that the summons had been served on the Appellant personally. Prior to then, it had been the Appellant's understanding of those words in the warrant was that the summonses had been sent to him, in other words, served by post. In his proof of evidence dated 6 March 2015, the Appellant stated that he had never received any summons. He said that he had moved to the UK in January 2006 and he only went back to Poland once in 2007. At the hearing he provided evidence of his move to the UK including P60s and registration documents.

28. At [18] Supperstone J noted that during the proceedings in the lower court the judicial authority had been given the opportunity to file evidence in relation to the service of the summonses on the Appellant but it failed to do so. At p2 of his judgment District Judge Ikram referred to the fact that he had refused the judicial authority an adjournment because it had failed to comply with the court's directions for the service of further information. This failure by the Respondent was also referred to by District Judge Baraitser at [74] and [79] of her judgment on EAW2.

29. Following the hearing, the Appellant's then counsel (Mr Graeme Hall) advised the Appellant to obtain his wage slips for the month of November 2006, it being the judicial authority's case that he was served with a second summons personally on 9 November 2006), which he did. These were sent to the district judge after the hearing, They covered the period from 26 October 2006 to 30 November 2006, and showed that the Appellant worked a 40-hour week during this period, and that he also worked overtime each week. Mr Hall submitted that it would have been impossible,

that being so, for the Appellant to have received the summons in person, as contended for by the CPS. As he was not served a summons in person and he did not know about his trial dates, he ought to be entitled to a retrial. The CPS on behalf of the issuing judicial authority accepted that on the evidence before the court it could not show that the Appellant would be entitled to a retrial in the terms required by s 20(8). Accordingly, Mr Hall submitted that the Appellant's extradition was barred by s 20.

30. In email correspondence following the hearing and in his judgment the district judge declined to consider the payslips or Mr Hall's argument based upon them. Supperstone J held this to be an error. He wrote at [15]:

> "I accept Mr Hall's submission that the DJ was wrong to refuse to admit the wage slips. There was good reason why the evidence was not before him at the hearing. In my view, in the circumstances, the DJ should have admitted the payslips in evidence and taken into account Mr Hall's observations in relation to them, set out in his e-mails of 19 May 2015, before making his decision. Ms Hinton, for the Respondent, does not suggest to the contrary. It is evidence, which in my view, has an important influence on the result of the case. On that basis I admit it on this appeal (see *Hungary v Fenyvesi* [2009] EWHC 231 (Admin))."

31. I infer the 'good reason' referred to was the Respondent making explicit at a late stage of the proceedings that its case on service was that the Appellant had been served personally and not by post.

32. In considering the s 20 argument the district judge said in his decision (quoted by Supperstone J at [16]):

> "… On the evidence before me, I am satisfied that the RP was served personally with both summonses. His argument that he could not have been in Poland in 2006 when it is said that he was served the second summons on the basis that he has a P60 for that year is illogical. He could have been working during that tax year in the UK yet returned to Poland as and when he wished. Despite his denial of any knowledge in his proof of evidence, I also have to say that I found him vague when questioned by Ms Hinton [counsel for the issuing judicial authority].
>
> The RP says that he went to Poland in 2007 and arrested and held for 4-5 days.
>
> This was after court proceedings had begun. I have to say that I find his version of events that he was still unaware of proceedings inconceivable and just not credible.
>
> I am satisfied so that I am sure that the RP left Poland having been served the first summons. He chose to leave Poland and evade the proceedings he knew had begun. The JA say that the summonses were both served 'in person'. I have no reason to

> doubt what they say. I am satisfied that when he returned to Poland in 2006, he was then arrested and questioned and served the second summons.
>
> I am sure that his absence from the subsequent trial was deliberate and therefore his right of retrial under s.20 does not apply."

33. Supperstone J gave his reasons for allowing the appeal at [17]-[21]:

> "17. In my judgment if regard is had, as it should be, to the Appellant's weekly payslip covering the week 09.11.2006 it is not possible to be satisfied to the criminal standard that the second summons was served on him personally on 9 November 2006 as stated in the EAW. Indeed the evidence supports his case that he was not.
>
> 18. That leaves the first summons that the JA submit was served on him personally, according to the EAW, on 29.0.2005. He accepts that he was in Poland at that time but denies that he received a summons. It was made clear at the first Directions hearing before the DJ on 27 January 2015, as recorded by the DJ, that the Appellant disputed that he was notified of the hearings in Poland and that that was in issue in the extradition proceedings. The DJ directed that the Defence serve a proof and skeleton argument by 6 and 13 March 2015 respectively, which was done, and that the JA was to respond by 13 April 2015. Ms Hinton informs me that on 10 March 2015 the CPS sought further information from the JA. However no response was received to that request from the JA. Even now there is no evidence in support of the contention that the summonses were served on the Appellant personally.
>
> 19. The DJ did not find the Appellant's evidence that he was not served personally with both summonses to be credible. However on the evidence now before the court I am not satisfied, as I have said, that he was personally served with the second summons. Indeed it would appear that he was not. That conclusion must necessarily impact on the view that should be taken of the Appellant's credibility in relation to the first summons. I accept Mr Hall's submission that the findings of the DJ on the Appellant's credibility are fatally undermined by the wage slips which support his evidence that he was not personally served with the second summons on 9 November 2006. The JA has had more than adequate time in which to adduce evidence in support of the assertion that he was personally served with the first summons. In the absence of any such evidence there is no reason, in my view, having regard to the Appellant's evidence as a whole, to reject his evidence that he was not.

> 20. In conclusion, I am not satisfied that the Appellant was served with either summons. That being so I am not sure that his absence from the subsequent trial was deliberate. It is common ground that he is not entitled to a retrial if returned. It follows, in my judgment, that the Appellant's extradition is barred by virtue of section 20 EA.
>
> 21. Having reached the conclusion that I have in the Appellant's favour on the section 20 EA ground, intending no disrespect to counsel, it is not necessary for me to consider the other grounds of appeal, the renewed application for permission relating to section 2 EA, or the application to rely on a further ground of appeal (Article 8 ECHR)."

The district judge's decision on EAW2

34. I turn to the judgment under appeal before us. The district judge's decision is detailed and runs to 92 paragraphs. I can summarise the key parts of it as follows.

35. At [17] onwards under the heading 'The Evidence/Findings of Fact' the judge summarised the further information supplied by the judicial authority for the extradition proceedings in 2019. There were three sets of further information dated 27 February 2019, 24 April 2019 and 25 June 2019. In broad terms these set out the procedural history of the criminal proceedings against the Appellant in Poland and the steps which the authorities there had taken.

36. In relation to offence I, he was convicted of this on 11 October 2005. Earlier that year, in June 2005, he had attended police headquarters and been told of his obligation to notify the authorities of any change of address and, in particular, if he left his registered address for more than seven nights. That address was his parents' address. He signed a document confirming these conditions. Court hearings were held on 20 September 2005 and 11 October 2005. Summonses for these hearings were sent to his registered address and were signed for by an 'adult home dweller'. The further information indicated that the Appellant could seek to re-open this conviction by way of an 'extra-ordinary appeal' if he could satisfy the relevant legal conditions. If he were able to do so, then he could cross-examine witnesses and call evidence,

37. In relation to offences II-IV, the Appellant was given a suspended sentence of one year's imprisonment on 19 April 2005 which was later modified and activated when he was convicted of a further, similar, offence. He had been interviewed about this offence on 11 January 2005 and he admitted his guilt. On that date he was notified of his obligations regarding changes of address. He was tried on 12 April 2005 and sentenced on 19 April 2005. He did not attend either hearing. A summons for the main hearing was collected by the Appellant's mother, which is deemed effective service under the Penal Proceedings Code. On 27 April 2005 the Appellant collected a copy of the court's default judgment and on 2 May he applied for a copy of its reasons. He lodged an appeal on 30 May 2005; this was in his own handwriting and was signed by him. He signed a receipt of notice of the lodging of his appeal on 3 June 2005. His signatures have been verified, and where summonses were collected by his mother or father, this was recorded on the court file. On 29 November 2008 the

Appellant failed to attend prison to serve his sentence. These proceedings had not been included on EAW1 because the relevant district court had not requested it.

38. In relation to offences V-XXX, the Appellant was sentenced to a suspended sentence of one year and eight months imprisonment on 15 February 2006. This was later modified by an aggregate judgment on 24 February 2016. The Appellant was interviewed on 21 March 2005 and told of his reporting obligations. There is on the court file a letter signed by the Appellant after he had collected the summons, notification of court date and indictment. There were two court hearings in August 2005 and one in November 2005 which the Appellant did not attend. The first hearing in August was adjourned for non-attendance and the second one was adjourned when the Appellant's father telephoned to say he was ill and that a medical certificate would be provided. The November hearing was adjourned when his father again telephoned the court, this time saying that his son had fallen off a ladder. A hearing was then listed for 16 December 2005; the Appellant personally signed the summons for this hearing. He did not attend this hearing either, with his father again representing that his son was on sick leave. There was then a court ordered medical examination which concluded that the Appellant was fit to attend court. A hearing was listed for 15 February 2006. The Appellant did not attend. His father told the court that the Appellant had left Poland. The Appellant was convicted in his absence. The judgment was collected by his father on 24 February 2006. On 2 March 2006 the Appellant filed an appeal which was personally signed by him on 23 June 2006. The appeal was rejected on 8 November 2006. On 23 April 2008 the suspended sentence was activated because of the Appellant's failure to pay damages. On 9 May 2008 the Appellant's sister collected correspondence addressed to her brother and returned it, saying he no longer lived at the address. The judicial authority's position is that the Appellant has been unlawfully at large for these offences since 21 June 2008. A request had been made to include these offences in EAW1 but the court issuing that warrant had not acceded to the request.

39. In relation to offences XXXI and XXXII, the Appellant was initially sentenced to two years' imprisonment, suspended for five years. He was also ordered to pay compensation and was made subject to probation. He failed to pay compensation and left Poland. In July 2006 the Appellant was remanded in custody for these offences. This order was later set aside. On 29 September 2006 he was interviewed and notified of his obligation to notify the authorities of changes of address. He did not comply and correspondence was returned marked 'undeliverable'. The Appellant underwent a procedure called 'voluntary submission to punishment' during which he admitted his guilt. On 9 November 2006 a notice of the trial was sent to the Appellant and collected by an adult. He did not attend his trial. On 15 December 2006 a copy of the ruling and information on how to appeal was served on the Appellant and on his lawyer on the same day.

40. The suspended sentence was activated on 19 October 2010. The Appellant failed to attend prison to serve his sentence. A number of steps were taken to enforce the sentence between October 2010 and the date of EAW2. The Appellant was aware of the activation of his suspended sentence because on 28 May 2015 he requested his lawyer to file a motion for deferral of the execution of the sentence.

41. Further procedural details about events in Poland, and in particular the process by which the aggregated sentences were imposed, are set out in the judgment at [22] but

it is not necessary to go into the detail. A number of documents were sent to the Appellant and his lawyer, but some were returned as undeliverable as he had failed to notify changes of address as he was required to do.

42. The Appellant gave evidence on oath at the extradition hearing. The judge summarised this evidence at [24] et seq of her judgment.

43. In relation to offence I, the Appellant said he could not remember going to the police station or signing a document concerning his change of address obligations. He said that because of the passage of time he could not remember if he was summonsed or whether an adult had signed for the receipt of court summonses.

44. In relation to offences II-IV he said he had not been notified about an obligation to notify changes of address and claimed loss of memory due to passage of time about other matters such as whether his mother had collected the summons and whether he had received it. He said that he had 'most probably' collected a copy of the judgment but had not lodged an appeal, and that it was possible that his father had. He had not admitted his guilt of these offences and had not received a notice requiring him to attend prison.

45. In relation to offences V-XXX, he said that on 15 February 2006 he was in the UK. He again denied being told of his obligation to notify changes of address. He did not receive any notice of a court hearing and did not attend. He could not remember filing an appeal and did not receive a notice to attend prison. He was not aware that his sister had retained a lawyer for him, and he had not authorised her to do so. He said he did not know if he had been arrested and questioned in March 2005. Asked about the letter he wrote to the Court following receipt of the indictment and summons and notification of first hearing date he said, 'I don't remember'. He also said he did not remember knowing about his father advancing medical reasons to the court why he could not attend.

46. In relation to offences XXXI-XXXII he said he had been arrested and questioned about these on 29 September 2006 'as a witness' and that the case had 'expired'. He had gone to Poland; was arrested and detained for five days; and then released. He left Poland straight afterwards and was never told of a court hearing date.

47. At [30] the judge set out the Appellant's evidence about the aggregation process; again, it is not necessary to set out the details.

48. At [31] the judge summarised the Appellant's evidence given at the hearing on 7 June 2019: (a) he had had no involvement in the first and third offences on EAW1 but he accepted his involvement in the second offence; (b) he did not remember any police station attendances in 2005 and only remembers being questioned once in 2006; (c) prior to leaving for the UK in January 2006 he lived with his parents at their address, and was there throughout 2005; (d) before leaving for the UK he granted his father a general power of attorney; (e) by the second half of 2006 he was not on good terms with his parents; (f) his father's company had become seriously in debt and when he was 18 he had been beaten up by some of his father's creditors. He had left Poland because of his ties to his father's company.

49. At [32] the district judge summarised the Appellant's evidence about his personal circumstances. He lives in Norfolk with his wife, Anna, whom he married in 2016. They have a son, born in 2017. They have permanent residence in the UK. His parents and sister live in Poland. He has another son with his ex-wife. He pays maintenance for this son, who at the relevant time was 17. He has no health issues. After his arrival in the UK, in March 2006 he registered with the Home Office and applied for a National Insurance number. Since 2014 he has worked as a lorry driver for British Sugar earning about £3000 per month. He is the family's sole breadwinner. He owns a home which is subject to a mortgage. He felt great relief after his discharge in 2015. He would be 'truly devastated' to leave his sons, and extradition would have a 'very destructive' effect on his family.

50. At [33] the judge set out the evidence from the Appellant's wife. She said without the Appellant she would not have the resources to look after the family or pay the mortgage.

51. At [37] et seq the district judge addressed the bars to extradition relied on by the Appellant. Her findings relevant to this appeal are as follows.

52. At [51], in relation to her discussion of s 14 (passage of time), the judge found that the Appellant was a fugitive. She said that there had been four sets of proceedings in Poland in relation to the 32 offences on EAW2: on each occasion, according to the issuing judicial authority, the Appellant had attended a police station and been notified of his obligation to notify the authorities of any change to his address lasting longer than seven days and what the consequences could be if he failed to do so. According to the further information dated 25 June 2019, on each occasion he signed a document indicating that he had been notified of these conditions. This obligation lasted until he had served his sentences or the time limit for carrying them out had expired. Notwithstanding this, the Appellant (on his own account) had left Poland in January 2006 without notifying the authorities of his change of address.

53. The judge rejected the Appellant's account that he did not recall any of the police station attendances, and that he was not aware of his obligations regarding his address. She said his evidence was not credible because: (a) the judicial authority had provided a detailed account of his attendances, including the police stations concerned and what the Appellant had told the police on each occasion. They also referred to written confirmation by the Appellant of his obligations. In accordance with the principle of mutual trust and confidence, she said these assertions by the judicial authority were entitled to significant weight; (b) given the number of police station attendances, it was not credible that the Appellant would have no recollection at all of them; (c) regarding his attendance at a police station on 29 September 2006, the judicial authority had provided a detailed account that the Appellant had been interviewed as a suspect, that he had accepted his guilt, and that he had requested a 'voluntary submission to penalty' and had signed a document acknowledging his obligations. The Appellant, on the other hand, had made a bare assertion that he had been interviewed as a witness and not a suspect. The judge rejected the Appellant's account and accepted, on the basis of mutual trust and confidence, the judicial authority's account; (d) the judicial authority sent summonses for each court hearing to the Appellant's home address, and for the reasons she set out in [53] the judge rejected the Appellant's assertion that he never received them. These included that the summonses were sent to his parents' home address, which was also his address

that he had provided to the authorities; he plainly had been aware of some hearings because, for example, in relation to one of them on 27 April 2005 he had collected a copy of the court's default judgment and then applied to receive the court's reasons. He had also signed other documents in relation to court proceedings. There was also the letter of 15 July 2005 written by the Appellant after he had collected the indictment, the summons and notification of first hearing date for one of the sets of proceedings. He had also personally signed other documents for these proceedings.

54. The judge went on to refer to the judicial authority's evidence that summonses had been received and confirmed by an 'adult home dweller'. She also said that the Appellant's father would not have become involved without the Appellant's knowledge and involvement. She also said that it was difficult to see how the Appellant could have been examined by a court appointed doctor without having an awareness of the proceedings against him.

55. At [54] the judge referred to the sentence aggregation process in 2016 and that this had been done at the request of the Appellant's lawyer. The judge rejected the Appellant's account that following his successful appeal in 2015 he had 'lost interest' in the proceedings. She said the lawyer would not have made such an application without having instructions from the Appellant, and that the Appellant's assertion that his father might have given instructions pursuant to the power of attorney was not supported by any corroborating evidence, for example, from his father or the lawyer. Similarly, the judge said that the application which the lawyer had made for deferment of the activation of the suspended sentences could not have been made without the Appellant's knowledge and involvement.

56. At [56]-[59] the judge gave her summary reasons for concluding, in respect of each of the four sets of criminal proceedings in Poland, that the Appellant was a fugitive.

57. The judge then turned to s 20, the effect of which I set out earlier. She first set out s 20 and Article 4a of the EAW Framework Decision (ie, 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States). She then referred to *Cretu v Local Court of Suceava, Romania* [2016] 1 WLR 3344, [34]:

> "34. In my judgment, when read in the light of article 4a section 20 of the 2003 Act, by applying a *Pupino* conforming interpretation, should be interpreted as follows:
>
> (i) "Trial" in section 20(3) of the 2003 Act must be read as meaning "trial which resulted in the decision" in conformity with article 4a(1)(a)(i). That suggests an event with a "scheduled date and place" and is not referring to a general prosecution process, Mitting J was right to foreshadow this in *Bicioc's* case.
>
> (ii) An accused must be taken to be deliberately absent from his trial if he has been summoned as envisaged by article 4a(1)(a)(i) in a manner which, even though he may have been unaware of the scheduled date and place, does not violate article 6 of the Convention.

> (iii) An accused who has instructed ("mandated") a lawyer to represent him in the trial is not, for the purposes of section 20, absent from his trial, however he may have become aware of it.
>
> (iv) The question whether an accused is entitled to a retrial or a review amounting to a retrial for the purposes of section 20(5), is to be determined by reference to article 4a(1)(d).
>
> (v) Whilst, by virtue of section 206 of the 2003 Act, it remains for the requesting state to satisfy the court conducting the extradition hearing in the United Kingdom to the criminal standard that one (or more) of the four exceptions found in article 4a applies, the burden of proof will be discharged to the requisite standard if the information required by article 4a is set out in the EAW."

58. Next, the judge referred to the discussion in *Bialkowski v Regional Court in Kielsce, Poland* [2019] EWHC 1253 (Admin), [18]-[27], where Kerr J said:

> "18. An accused is taken to be deliberately absent from his trial if he has been summoned to appear at court in a manner which, even though he may have been unaware of the scheduled date and place of trial, does not violate article 6 of the ECHR: *Cretu v. Local Court of Suceava, Romania* [2016] 1 WLR 3344, per Burnett LJ (as he then was) at [34], proposition (ii)).
>
> 19. In connection with cases where the accused is not personally given the summons to attend court, the Court of Justice (Fourth Chamber) stated in *Openbaar Ministerie v. Dworzecki* C/108-16 PPU at [51] that the executing judicial authority may "have regard to the conduct of the person concerned" and referred to a test of "manifest lack of diligence of the person concerned, notably where it transpires that he sought to avoid service of the information addressed to him".
> 20. In *Romania v. Zagrean* [2016] EWHC 2786 (Admin), the Divisional Court, dealing with three applications, reaffirmed the authority of *Cretu*, citing (at [66]) the propositions at [34] in that case, including the proposition at (ii), quoted above. Cranston J (giving the judgment of the court also including Sharp LJ) held that the authority of *Cretu* had not been shaken by the analysis of the CJEU in *Dworzecki*: see at [77]. A requested person "will be taken to have deliberately absented himself from his trial where the fault was his own conduct in leading him to be unaware of the date and time of his trial" ([81]).
>
> 21. The following month, in *Stryjecki v. District Court in Lublin, Poland* [2016] EWHC 3309, Hickinbottom J (as he then was) drew seven propositions from those three cases, including at (v) that "generally the requesting authority must unequivocally establish … that the person actually received the relevant information as to time and place [of trial]" and that it is

"insufficient for the requesting authority to show merely that the domestic rules as to service … were satisfied, if it is not established that the person actually received the trial information".

22. His next proposition, at (vi) was that:

> "[e]stablishment of the fact that the requested person has taken steps which make it difficult or impossible for the requesting state to serve the requested person with documents which would have notified him of the fact, date and place of the trial is not in itself proof that the requested person has deliberately absented himself from his trial".

23. And at proposition (vii), Hickinbottom J said where actual knowledge of the trial information is not shown, because of a "manifest lack of diligence" on the part of the accused, "notably where the person concerned has sought to avoid service of the information so that his own fault led the person to be unaware of the time and place of his trial, the court may nevertheless be satisfied that the surrender of the person concerned would not breach his rights of defence".

24. Hickinbottom J's sixth and seventh propositions have not commanded complete support in this court. In *Tyrakowski v. Regional Court in Poznan, Poland* [2017] EWHC 2675 (Admin), Julian Knowles J at [30] respectfully queried whether the sixth proposition be reconciled with the Divisional Court's proposition in *Zagrean* at [81] that an accused "will be taken to have deliberately absented himself from his trial where the fault was his own conduct in leading him to be unaware of the date and time of his trial".

25. And in *Dziel v. District Court in Bydgoszcz, Poland* [2019] EWHC 351 (Admin), Ouseley J at [17] shared the concern of Julian Knowles J and professed himself unsure of "the derivation and accuracy either of [the proposition numbered] (vii)". He preferred to refer only to the Divisional Court cases. Ouseley J added the useful point at [28] that "deliberately putting it beyond the power of the prosecutor or court to inform him" of the time and place of trial "includes breaching his duty to notify them of his changes of address".

26. The Divisional Court (Irwin LJ and Stuart-Smith J) then proceeded to "respectfully endorse and adopt" Hickinbottom J's seven propositions, setting them out in full: *Szatkowski v. Regional Court in Opole, Poland* [2019] EWHC 883 (Admin), at [22]. It is not clear whether the decisions of Julian Knowles J and Ouseley J were cited to the Divisional Court; there is no indication in the judgment of the court that they were.

> 27. For my part, I respectfully consider that the seventh proposition is sound and that the sixth proposition can be reconciled with what was said by Cranston J in *Cretu* at [81]. I think Hickinbottom J was simply making the point that the requesting state does not prove that an accused deliberately missed his trial just by proving that he acted evasively in an attempt to avoid receipt of trial information documents. However evasive the accused's conduct, the requesting state must still prove that it took the steps that would acquaint a non-evasive accused with the time and place of trial."

59. At [64] the judge said she was sure to the criminal standard that the Appellant had deliberately absented himself from each set of proceedings in Poland. She set out her reasons for this conclusion at [65]-[70]. These included that the judicial authority had sent a number of summonses to the Appellant's home address; his account of not recalling attendance at police stations on a number of occasions was not credible for the reasons she gave earlier; his involvement in collecting documents, etc, from the courts involved; and he left Poland in breach of his obligations.

60. The judge then turned to consider s 21 and human rights. The Appellant contended that extradition would breach in a disproportionate manner his right to family and private life under Article 8 of the Convention At [73] the judge referred to the well-known cases on Article 8 and extradition of *Norris v Government of the United States* [2010] 2 AC 487; *H(H) v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor intervening)* [2013] 1 AC 338; and *Polish Judicial Authority v Celinski* [2016] 1 WLR 551.

61. At [74] the judge said this:

> "74. In this case, Mr Wawrzyczek's removal to Poland for case reference II K 898/05 and K 584/II (offences I, XXXI and XXXII) has previously been stopped by the High Court. In relation to case reference K 584/II the Judicial Authority had stated that a summons to a hearing on 9 November 2006 had been personally served on Mr Wawrzyczek. Evidence from his weekly pay slips indicated that he was in the UK on this date and could not have received personal service of the summons. The Judicial Authority failed to respond to this account and Supperstone J found that as the Judicial Authority had had more than adequate time to adduce evidence to support their position, and in the absence of further evidence, there was no reason to reject Mr Wawrzyczek's account. In relation to case file II K 898/05, Mr Wawrzyczek's credibility was no longer undermined by the Judicial Authority's assertion and his account that he was unaware of the proceedings was accepted."

62. At [75] the judge went on:

> "75. Mr Grandison submits that it would now be an abuse of process to extradite Mr Wawrzyczek for these matters. This submission overlaps with the article 8 balancing exercise and in my view it is appropriate to consider this alongside the impact extradition will have on Mr Wawrzyczek's family and private life. This was the conclusion reached by Ouseley J in the case of *Camaras v Romania* [2016] EWHC 1766 (Admin) and referred to by Burnett LJ (as he then was) in the recent case of *Giese v USA* [2018] EWHC 1480 (Admin). In *Giese*, a predecessor extradition request had been discharged because an adequate prison condition assurance had not been received in time for the extradition hearing. 'Adverse case management' meant that no further time was allowed and the Appellant was discharged. However, the USA issued a further request, which included an adequate prison condition assurance and the argument that the new request amounted to an abuse of process as it circumvented the case management decisions of the previous request, was rejected …"

63. In *Camaras*, supra, [20], Ouseley J referred to the rule of public policy embodied in the principle in *Henderson v Henderson* (1843) 3 Hare 100. This principle requires parties to litigation to bring their whole case before the court so that all aspects of it may be finally decided. They cannot, absent special circumstances, return to the court to put forward arguments or claims which they could have raised on the first occasion but did not do so, whether through negligence or accident. He said that if that principle applied without qualification to extradition cases, the appeal would be bound to succeed, it being a case where a second EAW had been issued, the defendant having been discharged on a first EAW following the judicial authority's failure in the first set of proceedings to cure the deficiencies in it, which were only then cured in the second warrant. Ouseley J went on to say at [27]-[28], [32]-[34], in a passage cited in part by the district judge at [75] of her judgment

> "27. I am in fact satisfied that it is neither principled nor practical to apply the principle in *Henderson v Henderson* in a straightforward manner to extradition warrant decisions. Extradition involves the issuing of a warrant by a foreign authority which engages the UK's international obligations as well as its domestic legislation. Statutory bars have been enacted which reflect those arrangements, whether Treaty or Framework Decision. There is no scope for more than a residual jurisdiction to preclude the extradition of someone who falls outside the scope of the statutory bars. That is the residual jurisdiction envisaged in the line of cases leading to *Belbin*, where the contention is that the prosecutor or judicial authority has acted in bad faith, deliberately manipulating proceedings, undermining the statutory regime to the unfair prejudice of the defendant. Such a jurisdiction is consistent with those international obligations only because it is obvious that no prosecutor or issuing authority should behave in the manner described in *Belbin* as an abuse of the court's process;

it is necessarily implicit in the arrangements, and accepted by all participants, that they would not be allowed to do so.

28. Any extension of that jurisdiction however would undermine the statutory process itself and the international arrangements to which they give effect. I do not consider that the residual jurisdiction should be expanded to embrace the *Henderson v Henderson* principle. If no bar is made out, it is difficult to see why a person who faces no bars to extradition should then not be extradited, other than as a sanction imposed on the requesting authority for not complying with directions or not getting its case in order. Such an approach, which may run contrary to the overall public interest in any given case, and which may be inconsistent with the primary purpose of extradition arrangements, cannot be extracted from the Framework Decision nor the Act. It must also be remembered that the discharge of a defendant on an EAW in one country does not necessarily mean that he would be discharged if arrested on the same EAW in another country. As Mr Henley accepted, this "abuse" argument might well not be accepted in other states where, were the Appellant present, the Romanian authorities might try to enforce this EAW. After all, the new EAW here is for service of a different term of imprisonment, and the EAW needed to be revised and re-issued if it were to be enforced in another state, as it could be.

…

32. It would be neither fair nor consonant with that public interest for the issuing judicial authority, failing to comply with the district judge's directions, or unable to produce the further evidence it wanted, simply to issue a further EAW, to reverse the effect of its non-compliance with court orders, or its failure to put its case forward. This is not an option open to defendants, though they have some more constricted routes to the same end. A court must be able to give effect to its own procedural directions, and to prevent their being circumvented on appeal or by a further EAW. That furthers rather than undermines the statutory scheme. Whether the attempted enforcement of a further EAW, in circumstances falling short of *Belbin* abuse of process, so undermines the interest of the statutory scheme in speedy finality, and in upholding the decisions and orders of the courts, that enforcement should be denied, cannot be answered without consideration of all the circumstances.

33. In my judgment, the right approach must be a balance reflecting the extent of the public interests at stake, as well as any unfair prejudice caused to the individual in all the circumstances of the case. These will involve the gravity of the actual or alleged offending, the nature and cause of the failure of the issuing authority or CPS which has led to the further EAW, the effect

> which that might have in consequence on the public interest in that particular extradition, the effect which that has had on the defendant both in his family and private life, and on his trial, retrial, and punishment, whether through change in circumstance or passage of time.
>
> 34. In reality, this involves consideration of s14, s21 or s21A oppression and human rights, which is where those balances can be struck. Such an approach, placing this issue within the context of the statutory bars to extradition, avoids extending the residual jurisdiction to areas where its language shows it was not intended to venture. It permits the court to weigh the competing interests raised by the sort of circumstances in which the application of the public policy in *Henderson v Henderson* in extradition may arise. The issues cannot in such circumstances and on this analysis be neatly compartmentalised."

64. At [77] the district judge said that she had to conduct a balancing exercise in order to determine whether extradition would violate the Appellant's rights under the Convention.

65. At [78] she said the value of the frauds was relatively high; there were 32 offences committed over a significant period of time; they would cross the custody threshold if committed in the UK; and that she was not in a position to second guess the sentences imposed by the Polish court.

66. At [79]-[80] she said:

> "79. Regarding the nature and cause of the failure of the issuing Judicial Authority which has led to the further EAW. In this case, it is clear from Supperstone J's decision in the previous proceedings that the CPS sought further information from the Judicial Authority when the case was still with the lower court but no response was received to that request. I must assume the Judicial Authority was at fault for this, a factor I take into account.
>
> 80. The position has now been clarified in Further Information of 25 June 2019 not before the Divisional Court, and set out in full above. It is now clear that Mr Wawrzyczek left Poland in breach of his obligation to notify the authorities of his change of address, and was in the UK on 9 November 2007 when the summons was served. Had Mr Wawrzyczek admitted at the outset, what is now clear on the evidence, then the information considered to be essential by the High Court would not have been required."

67. She went on to say at [81] that she was satisfied that the Appellant had placed himself beyond the reaches of the judicial authority when he came to the UK in 2006 and became a fugitive in relation to offences I to XXX in 2008 and a fugitive in relation to offences XXXI and XXXII in 2010.

68. Regarding delay, she said that the matters were of considerable age but that (relying on *Tarka v Judicial Authority in Swidnica, Poland* [2017] EWHC 3755 (Admin), [14]), that a fugitive cannot argue that the requesting state is to blame for even unexplained delay and that a fugitive cannot rely on delay in support of an Article 8 argument, just as the case law indicates such a person cannot rely on delay in relation to an argument under s 14. At [83] she analysed the various periods in question before concluding at [83(f)] that:

> "Mr Wawrzyczek is a fugitive from justice. He has not been candid with either this court or the High Court regarding his knowledge of proceedings."

69. At [84]-[85] she considered the Appellant's personal circumstances and his family's and ex-wife and son's reliance upon his earning capacity. She accepted that extradition could result in the loss of the family home, but said that loss of income and accommodation are not unusual features of extradition proceedings. At [86] she took into account the position of the Appellant's children, the youngest of whom was two at the time. She said the involvement of the children 'significantly strengthen[ed]' the Appellant's Article 8 argument and that extradition would likely cause them some emotional harm. However, she concluded that the youngest child would continue to be cared for by his mother and the older child would soon become an adult. Thus, she concluded that the impact of their separation from their father was likely to be reduced by these factors.

70. At [87] she said that she took account of the 'constant and weighty' public interest in extradition. At [88] she listed (per the approach required by *Celinski*, supra) the factors in favour of extradition, namely: the weighty requirement of the UK to fulfil obligations under the EAW scheme; mutual confidence and respect for the decisions of the Judicial Authority; the offences have been judged sufficiently serious as to have attracted prison sentences, most of which remain to be served; the Appellant is a fugitive; his eldest son has lived apart from him since 2008 and will soon become an adult; his younger son lives with his mother; the Appellant's wife will be eligible for state benefits; the Appellant came to the UK knowing that he faced several sets of criminal proceedings in Poland; there has not been significant delay in relation to offences XXXI and XXXII.

71. As against these factors, at [89] she took account of the following in the Appellant's favour: he has been in the UK since 2006 and long-term stable employment and accommodation; extradition will interfere with his family and private life; he has two sons, and extradition will cause emotional harm to them; there has been considerable delay from 2008 to 2015 in relation to offences I to XXX; the Appellant has led a law abiding life in the UK; EAW2 was issued following the discharge of EAW1 leading the Appellant to believe he could remain in the UK. He succeeded on EAW1 because of failings by the judicial authority.

72. At [90], in expressing her overall conclusion on Article 8, she said:

> "90. I am required to conduct a balancing exercise which reflects the extent of the public interest in extradition and any unfair prejudice caused to Mr Wawrzyczek in all the circumstances of the case. In my judgement, there is no compelling feature (nor

> combination of features) which overrides the strong public interest in extradition in this case … On the evidence before me, there is nothing to suggest that the negative impact of extradition on Mr Wawrzyczek and his family is of such a level that the court ought not to uphold this country's extradition obligations."

73. Finally, at [91] under the heading 'Abuse of Process', she said, 'For the reasons given above, I have dealt with this issue when considering s 21.'

Submissions on the appeal

The Appellant's submissions

74. In relation to Ground 1, Mr Grandison submitted that the district judge erred by failing to consider the abuse of process argument as an abuse of process argument and applying the principles relevant to that doctrine in extradition cases but, instead, combining it with (or subsuming it within) the Appellant's Article 8 submissions. He said the judge fell into error by relying upon *Camaras*, supra, [34], and that following the Divisional Court's judgment in *Jasvins v General Prosecutor's Office, Latvia* [2020] EWHC 602 (Admin), it should have been treated and addressed as a free-standing submission. He pointed out that this point is conceded by the Respondent in its Skeleton Argument at [15].

75. He said that the Respondent sought to rely on evidence in the second set of proceedings that it could, and should, have produced in 2015 in compliance with the court's directions. He said what the Respondent did amounted to a collateral attack on the High Court's decision to discharge the Appellant in relation to offences I, XXXI and XXXII. Had the district judge followed the approach advocated in *Jasvins*, supra, she would have found that the second request for extradition, in relation to those three offences, constituted an abuse of process.

76. He relied in particular on what the Divisional Court (Lord Burnett of Maldon CJ and Dingemans J (as he then was)) said in *Giese*, supra, [31]-[32]:

> "31. There will be cases where a judicial authority has, for example, failed to comply with court orders in the first extradition proceedings, where a question of abuse of process may arise for consideration in connection with a second set. Similarly, where in the first set of proceedings the requesting state has abjectly failed to get its evidential house in order. But a mechanistic approach to abuse is inappropriate. As Ouseley J observed in *Camaras* at [32],
>
> > "Whether the attempted enforcement of a further EAW, in circumstances which fall short of *Belbin* abuse of process, so undermines the interest of the statutory scheme in speedy finality, and in upholding the decisions and orders of the courts, that enforcement should be denied, cannot be answered without consideration of all the circumstances."

> 32. The key, in our judgment, to cases where it is said that the requesting state failed in the first set of proceedings such that the second set are an abuse of process is to make a "broad, merits-based judgment which takes account of the public and private interest involved and also takes account of all the facts of the case", see *Johnson v Gore Wood* [2002] 2 AC 1 at [31] and *Arranz v High Court of Madrid* [2016] EWHC 3029 (Admin) at [32] and [33]. Such a broad, merits-based judgment should take account of the fact that there is no doctrine of *res iudicata* or issue estoppel in extradition proceedings."

77. The particular passages from *Jasvins*, supra, relied on by Mr Grandison were these from the judgment of Davis LJ and Swift J:

> "16. Like the Court in *Giese*, and for that matter also like the Divisional Court (Burnett LJ and Cranston J) in *Auzins v Prosecutor General's Office of the Republic of Latvia* [2016] 4 WLR 75, we readily acknowledge the existence of the abuse jurisdiction. The comments of Ouseley J at paragraph 34 in *Camaras v Baia Mare Local Court, Romania* [2018] 1 WLR 1174 to the effect that the role of the abuse jurisdiction went no further than informing the way in which in the bars to extradition on the face of the 2003 Act could be interpreted and applied should now be read subject to these two judgments.
>
> …
>
> 20. Mr Jones's submission in this case is that wherever proceedings on a subsequent EAW amount to collateral attack on decisions taken in proceedings on an earlier materially identical EAW, the second proceedings must amount to an abuse of process and must be dismissed. We do not agree that the matter can be put in such absolute terms. Where there are successive warrants or successive extradition requests, if proceedings on the subsequent warrants can properly be characterised as a collateral attack on a decision in proceedings on the first warrant, the latter proceedings are capable of amounting to an abuse of process. It may be possible to go further and say that ordinarily this will be the case. But the outcome in any given situation must depend on the overall merits based assessment of public interests and careful evaluation of the facts, referred to at paragraph 32 in judgment of *Giese*.
>
> 21. There is a particularly important public interest that the system of enforcement of EAWs is not undermined. That public interest covers a number of objectives. One objective, plainly, is that those who are charged with criminal offences overseas or have been convicted overseas and are wanted for punishment are provided to requesting authorities. But maintaining the integrity of the EAW system includes ensuring that decisions can be made expeditiously and that courts are able to exercise effective case

> management powers. Put bluntly, if such orders are made, the starting presumption is that they will be complied with. Where, as in this appeal, the claim of abuse of process arises from a failure in earlier proceedings to comply with a court order, the court in the later proceedings must assess the significance of permitting the Requesting Authority to avoid the consequences of the earlier decision, while also taking account of the public interest in that particular extradition. This will also include considering the gravity of the alleged or actual offending, and the prejudice (if any) to the requested person arising from pursuit of the further warrant. In other words, a *Giese*-style broad, merits-based judgment taking account of the public and private interests as they are manifest on the facts of the particular case."

78. In light of these principles, Mr Grandison's core submission was that EAW2 amounted to an attempt by the Respondent (insofar as it relates to offences I, XXXI and XXXII) to re-visit a final judgment dealing with a substantive issue which led to Appellant's discharge under s 20 in 2015. He submitted that this was a 'paradigm example' of a collateral attack on the High Court's 2015 decision. The Respondent was seeking to raise in subsequent proceedings matters which could, and therefore should, have been litigated in earlier proceedings. The Respondent, having failed to comply with the Court's directions in 2015, should not be permitted a second 'bite of the cherry' in relation to offences that cannot be described as amongst the most serious on the criminal calendar, especially when one takes account of their age.

79. In relation to Ground 2, Mr Grandison accepted that he had to show that the district judge's decision was 'wrong'. As well as *H(H)*, supra, and *Celinski*, supra, he referred to the judgment of King J in *Oparcik v District Court in Lublin, Poland* [2015] EWHC 2067 (Admin), [25]:

> "It is now well-established from the guidance given by the Divisional Court in *Polish Judicial Authorities v Celinski and others* [2015] EWHC 1274 (Admin), that on appeal the question for this court is whether or not the decision reached by the court below under article 8 was wrong. The court should have regard in that context to whether or not the court below asked itself the correct questions, applied the correct principles, took into account only the relevant facts and did not ignore anything relevant, and made findings of fact it was entitled to. If the court below came to a conclusion on a balancing exercise which cannot be faulted in terms of the value judgment reached, assuming the balancing exercise has been properly carried out with the identified factors on both sides, then it is likely to be difficult for this court to say that the decision is wrong. That is the ultimate question."

80. Mr Grandison submitted that the judge's decision was wrong and that she had, in particular, failed to have any, or any proper, regard to: (a) the age of the offences; (b) the impact of the Appellant's previous discharge in diminishing the public interest in extradition or increasing the weight to be applied to the Appellant's Article 8 rights; and (c) the change of circumstances since the Appellant's discharge was ordered in 2015 and in particular the birth of his youngest son in 2017. He submitted that

extradition would be a disproportionate interference with the Appellant's Article 8 rights because of: their age; their relative lack of seriousness; the Appellant has been openly living in the UK since 2006; the lack of an adequate explanation why extradition was not sought for 29 of the offences on EAW1; the Appellant got married and has a young son, born since he was discharged.

81. Mr Grandison also, tentatively, relied on Brexit and the uncertainty whether the Appellant, if extradited, would be allowed back into the UK. He relied on *Antioch v Richterin am Amstegericht,, Munchen, Germany* [2020] EWHC 3092 (Admin), [51], where Fordham J took Brexit into account as part of the Article 8 calculus. Ultimately, however, Mr Grandison conceded, following an enquiry from the Court, that the Appellant's personal circumstances, including having permanent residence in the UK and a son who was born here, are such that he would be entitled to return to the UK at the conclusion of his sentence were he to be extradited.

The Respondent's submissions

82. On behalf of the Respondent, Mr Hearn submitted in relation to Ground 1 that the Court should undertake a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, per *Giese*, supra, [32]. He said such an analysis compelled the conclusion that the proceedings ought not to be stayed in respect of any of the offences on EAW2.

83. He said that the practice of judicial authorities reissuing EAWs following an order for the defendant's discharge is a common one. He said that the proposition that a re-issued EAW or extradition request does not (or not automatically) render a subsequent request abusive has been adopted in a number of following decisions including *Auzins*, supra, and *Camaras*, supra. He accepted that the district judge should have considered abuse of process as a free-standing matter rather than simply as part of an Article 8 analysis but that, in substance if not in form, she had conducted the necessary broad merits-based review in relation to Article 8 as to the propriety of extradition, and that she would have rejected a stand-alone abuse of process submission for the same reasons.

84. Mr Hearn relied in particular on the evidence now available from the judicial authority in its further information which shows (as the judge found and as is not challenged by the Appellant) that the Appellant was, in fact, fully aware of the criminal proceedings against him, had been interviewed in relation to each of them and engaged in court proceedings to a greater or lesser extent, and left Poland in 2006 knowingly in breach of his obligations to notify the authorities of his change of address. Mr Hearn also emphasised that it was now clear that the Appellant had given untruthful evidence during the first set of proceedings and had, in effect, procured his discharge on appeal by this false evidence. He put the matter this way in his Skeleton Argument at [18]:

> "The second set of extradition proceedings has demonstrated that the Appellant put forward a dishonest case in the first set of proceedings, that dishonest account led directly to his discharge. It would be a curious use of the court's residual jurisdiction to stay proceedings (usually deployed to avoid injustice where the 2003 Act cannot cure the injustice) in circumstances where it

> would reward a fugitive who has given a dishonest account to avoid extradition."

85. In relation to Ground 2, Mr Hearn's straightforward submission was that the district judge had carefully applied the *Celinski* check-list approach and had not left anything relevant out of account. Her conclusion could not be impugned as wrong. He said, for example, that the district judge had not failed to take account of the age of the offences and pointed to [82] of her judgment where she said, 'Regarding delay, there is no doubt that these matters are of considerable age, having been committed between 2002 to 2004'. He said, contrary to Mr Grandison's submission, that the district judge *did* consider the fact of the Appellant's previous discharge as a factor militating against extradition in her judgment at [89], however she went on to observe at [90] that the fact the Appellant had provided a dishonest account in the previous extradition proceedings and was a fugitive from justice outweighed the impact of his discharge in the previous proceedings. Lastly, Mr Hearn said the judge in several places dealt with the Appellant's personal circumstances and his changed family life since his discharge in 2015.

Discussion

Ground 1

86. I agree with Mr Grandison and Mr Hearn that the district judge should have considered the abuse of process argument as a separate and free-standing ground of challenge rather than simply as part of an Article 8 analysis. Although the facts said to give rise to an abuse of process might also be relied upon in support of a statutory bar to extradition, or a human rights argument, the abuse of process jurisdiction is conceptually distinct from these and rests upon distinct jurisprudential foundations. Equally, however, had the judge considered the abuse of process argument separately I have concluded that she would have been bound, on the facts of this case, to have rejected it.

87. The predecessor legislation to the EA 2003 was primarily the Extradition Act 1870 and the Extradition Act 1989. Until 2001, it had been held at the highest level that there was no abuse of process jurisdiction exercisable by the court of committal in extradition proceedings: *In re Schmidt* [1995] 1 AC 339, 377-378; *R v Governor of Pentonville Prison ex parte Sinclair* [1991] 2 AC 64, 81; *Atkinson v Government of the United States of America* [1971] AC 197, 232. Whether an extradition request was an abuse of process was a matter for the Secretary of State, to be determined either when s/he was considering issuing an authority to proceed, and/or when s/he was considering whether to order extradition following an order for committal. The High Court also had a statutory jurisdiction s 11(3)(c) of the Extradition Act 1989 to grant *habeas corpus* on the grounds of bad faith.

88. The position changed with the coming into force in 2000 of the Human Rights Act 1998. In 2001, in *R(Kashamu) v Governor of Brixton Prison* [2002] QB 887, the Court held as a consequence of this legislative change that the court of committal did have jurisdiction to determine whether extradition proceedings were an abuse of process. Mr Kashamu's extradition had been sought by the United States for a second time, the first set of proceedings having failed because of non-disclosure. At the committal proceedings the district judge declined to hear a submission that the second

committal proceedings were an abuse of process, on the ground that the appropriate jurisdiction was that of the High Court on an application for *habeas corpus*. The district judge followed his own ruling in the cases of two other applicants, whose extradition for very serious offences was sought by the United States and French Governments respectively. The first applicant applied for a writ of *habeas corpus* and all three applicants applied for judicial review of the ruling of the district judge on the ground that, following the implementation of the Convention via the Human Rights Act 1998, the magistrates' court had jurisdiction to determine whether extradition proceedings against a person amounted to an abuse of process. They argued that the absence of any judicial abuse of process jurisdiction was inconsistent with Article 5(4), which requires the 'lawfulness' of detention (*inter alia* for the purposes of extradition under Article 5(1)(f)) to be 'speedily' decided by a 'court'. In this context, 'lawfulness' does not just mean domestic lawfulness, but also means lawfulness in the Convention sense, that is non-arbitrary detention. The applicants argued that detention arising from bad faith or abuse of process, in particular, rendered the detention arbitrary and hence unlawful under the Convention. Consequently, they contended that the effect of incorporation of Article 5(4) into domestic law was to confer such an abuse of process jurisdiction on the court of committal.

89. The Divisional Court upheld the applicants' arguments. Rose LJ said at [32]–[34] (emphasis added):

> "32. What is in issue in the present case is whether, when lawful extradition procedures are being used, a resultant detention may be unlawful by virtue of abuse of the court's process. The magistrates' court, rather than the High Court, is, in my judgment, the appropriate tribunal for hearing evidence and submissions, finding facts relevant to abuse and doing so speedily. Furthermore, as it seems to me, the district judge's obligation under section 6(1) of the Human Rights Act 1998 to act compatibly with Convention rights requires him to make a determination under article 5(4). It seems to me that that determination should be in accordance with Lord Hope's analysis in *R v Governor of Brockhill Prison, Ex p Evans (No 2)* [2001] 2 AC 19, that is he must consider whether the detention is lawful by English domestic law, complies with the general requirements of the Convention and is not open to criticism for arbitrariness.
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> 33. It does not, however, follow that the district judge can be addressed on all the issues which may arise in the course of a summary trial. Extradition proceedings do not, nor does fairness require that they should, involve resolution of trial issues. Self-evidently, extradition contemplates trial in another jurisdiction according to the law there. It is there that questions of admissibility, adequacy of evidence and fairness of the trial itself will be addressed; and, if the Secretary of State has concerns in relation to these or other matters, it is open to him to refuse to order a fugitive's return.

> 34. What is pertinent here in the present cases is solely whether the detention is unlawful by English domestic law and/or arbitrary, because of bad faith or deliberate abuse of the English courts' procedure. The scope of the inquiry is, therefore, narrow. *In that connection, it by no means follows, merely because second proceedings have been instituted against Kashamu, following failure of the first proceedings in the circumstances earlier set out, that there has been an abuse. I add that it will only be in a very rare extradition case, provided the statutory procedures have been followed, that it will be possible to argue that abuse of process has rendered the detention unlawful under article 5(4).*"

90. The EA 2003 came into force on 1 January 2004. The continued existence of the judicial abuse of process jurisdiction under the EA 2003 was confirmed in *R (Bermingham) v Director of the Serious Fraud Office* [2007] QB 727, [96]. Laws LJ held that the appropriate judge conducting an extradition hearing under Part 2 of the EA 2003 has a discretion to stay proceedings as an abuse of process in order to ensure that 'the [extradition] regime's integrity' is not usurped by abuse of process. At [100] he said:

> "The prosecutor must act in good faith. Thus if he knew he had no real case, but was pressing the extradition request for some collateral motive and accordingly tailored the choice of documents accompanying the request, there might be a good submission of abuse of process. Again, if he knew he could not (or perhaps, could not without great difficulty) make out a *prima facie* case and so deliberately delayed the extradition process until the 1989 Act had been safely superseded by the 2003 Act, that also might be held to be abusive."

91. In *R (Government of the United States of America) v Senior District Judge, Bow Street Magistrates' Court* [2007] 1 WLR 1157 (Admin), [82], the Court approved the observations on abuse of process in *Bermingham*, supra. It applied to extradition proceedings the statement made by Bingham LJ in *R v Liverpool Stipendiary Magistrate ex parte Ellison* [1990] RTR 220 in relation to conventional criminal proceedings:

> "If any criminal court at any time has cause to suspect that a prosecutor may be manipulating or using the procedures of the court in order to oppress or unfairly to prejudice a defendant before the court, I have no doubt that it is the duty of the court to inquire into the situation and ensure that its procedure is not being abused. Usually no doubt such inquiry will be prompted by a complaint on the part of the defendant. But the duty of the court in my view exists even in the absence of a complaint."

92. In *McKinnon v Government of the United States of America* [2008] 1 WLR 1739, [8], Lord Brown said:

> "The district judge also has jurisdiction to consider whether the extradition proceedings constituted an abuse of process so as to protect the integrity of the statutory regime."

93. In that case the appellant's argument was that the extradition request was an abuse of process because it was said that the United States had tried to force him not to contest his extradition by the threat of a longer sentence. Lord Brown said at [33] that the questions to be considered were whether there had been an attempt to interfere with the due process of the court; whether undue pressure had been placed on the defendant to forego due legal process in the UK by the requesting state so as to disentitle it from pursuing extradition proceedings; whether extradition would violate those fundamental principles of justice which underlie the community's sense of fair play and decency; and whether the defendant, following extradition, would pay an unconscionable price having insisted on exercising his rights under English law.

94. The abuse of process jurisdiction established in these cases is equally applicable to hearings under Part 1 of the EA 2003. *R (Government of the United States of America) v Senior District Judge, Bow Street Magistrates' Court*, supra, was decided with a Part 1 case, *R(Central Examining Court, Criminal Court of the National Court, Madrid) v Bow Street Magistrates' Court*, and the point was expressly made in *Belbin v The Regional Court of Lille, France* [2015] EWHC 149 (Admin), [43]-[44] where the Court said:

> "43. It is clear from statements of this court in *R (Bermingham) v Director of the Serious Fraud Office* [2007] QB 727 ('*Bermingham*')**,** *R (Government of the USA) v Bow Street Magistrates' Court* [2007] 1 WLR 1157 ('*Tollman*') and *Symeou v Public Prosecutor's Office at the Court of Appeals, Patras, Greece* [2009] 1 WLR 2384 ('*Symeou*') that both the Magistrates' Court and the High Court on appeal retain an implied jurisdiction to refuse to extradite a requested person under Part 1 of the EA on the basis that there has been an abuse of the process of requesting extradition by the prosecuting authority or other emanation of the judicial authority seeking extradition. In *Tollman* (which involved extradition proceedings under both Parts 1 and 2 of the EA) and in *Symeou* (Part 1 extradition) the court emphasised that the abuse of the process has to be that of the *prosecuting authority*. But, given that, under the Framework Decision of 2002 on which Part 1 of the EA is based, all extradition requests must be made by a Judicial Authority, it seems to us that the court has an implied jurisdiction to consider whether there has been an abuse of the extradition process under Part 1 of the EA by a requesting judicial authority. We note, of course, the point made by Sir John Thomas, then President of the Queen's Bench Division, at [49]-[50] of *Swedish Prosecution Authority v Assange* ***[2011]*** EWHC 2849 (Admin) that the acts of a prosecutor, in contradistinction to those of a judge, must be subjected to "rigorous scrutiny" because a prosecutor is (unlike a judge) a party to the criminal proceedings in the requesting state. That "rigorous scrutiny" must be applied when considering whether a prosecuting authority, acting as a

> Judicial Authority for the purposes of the extradition request, has conducted itself in a way that is an abuse of the extradition process. It is important to note that the abuse of process jurisdiction does not extend to considering misconduct or bad faith by the police of the requested state in the investigation of the case nor in the preparation of evidence for the trial in the requesting state: see [34] of *Symeou.*
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> 44. However, whether it is the prosecuting authority's behaviour or that of another entity that constitutes the Judicial Authority of the requesting state that is being criticised, it will only amount to an abuse of the extradition process if the statutory regime in the EA is being 'usurped' (see [97] of *Bermingham***).** It would, for example, be 'usurped' by bad faith on the part of the Judicial Authority in the extradition proceedings or a deliberate manipulation of the extradition process. But any issues relating to the internal procedure of the requesting state are outside the implied abuse of process jurisdiction concerning extradition proceedings: see [36] of *Symeou.* Moreover, as is clear from the decision of this court in *Federal Public Prosecutor, Brussels, Belgium v Bartlett* [2012] EWHC 2480 (Admin)**,** this 'usurpation' of the statutory extradition regime has to result in the extradition being 'unfair' and 'unjust' to the requested person. In this regard it has also to be shown that, as a result of the 'usurpation' of the statutory regime, the requested person will be unfairly prejudiced in his subsequent challenge to extradition in this country or unfairly prejudiced in the proceedings in the requesting country if surrendered there."

95. In *Auzins,* supra, a Part 1 case, Burnett LJ (as he then was) said at [44]:

> "The underlying purpose of the abuse jurisdiction in extradition cases is to protect the integrity of the statutory scheme of the 2003 Act and the integrity of the EAW system, as well as to protect a requested person from oppression and unfair prejudice."

96. The scope of the extradition abuse of process jurisdiction as explained in these decisions show that although the facts said to give rise to an abuse of process in an extradition case might in some cases also be argued as giving rise to other bars to extradition under the EA 2003, they may not always do so. Fundamental principles of justice may be breached by facts which do not entail a breach of the Convention or give rise to a statutory bar to extradition. To that extent, I respectfully agree with the Divisional Court's observation in *Jasvins,* supra, [16], that the abuse of process jurisdiction in extradition goes further than merely informing the way in which in the bars to extradition on the face of the EA 2003 should be interpreted and applied. I agree that the *dicta* of Ouseley J in *Camaras,* supra, [34], need to be understood in that light.

97. I consider this analysis to be consistent with what the Divisional Court said in *Giese,* supra, [23]:

> "23. In the domestic criminal context, proceedings will amount to an abuse of process if either it is impossible to provide a fair trial or where it is necessary to protect the integrity of the criminal justice system (see *R v Maxwell (Paul)* [2010] UKSC 48; [2011] 1 WLR 1837 per Lord Dyson JSC at para 13 and *R v Crawley (Scott)* [2014] EWCA Crim 1028; [2014] 2 Cr App R 16, per Sir Brian Leveson P at paras 17–18). In extradition proceedings there are statutory bars in the 2003 Act to prevent an extradition to an unfair trial, and in a range of other circumstances. For these reasons most issues of abuse of process arising in extradition proceedings relate to the protection of the integrity of the system."

98. I read this paragraph as meaning that whilst a lot of factual matrices said to give rise to abuse of process in extradition will fit into the statutory extradition framework, abuse of process ranges more widely so as to protect the integrity of the extradition system.

99. I acknowledge that a finding that an extradition request is an abuse of process may also in many cases (at least where the defendant is in custody) entail a breach of Article 5(1)(f) because the detention would be arbitrary and unlawful as a consequence: *Kashamu*, supra, [32]; *R v Governor of Brockhill Prison ex parte Evans (No 2)* [2001] 2 AC 19, 38 even if it does not raise any other statutory bar. But, as Lord Brown remarked in *McKinnon*, supra, [9], in this context the Convention adds little, and the matter therefore is better simply analysed in terms of the abuse of process jurisdiction whose contours I have set out.

100. It should be emphasised that, given the extensive statutory framework and the bars to extradition in the EA 2003, including human rights, abuse of process is a residual jurisdiction which is only likely to arise in those rare cases where the facts do not engage any of the statutory bars. In *Belbin*, supra, [59], the Court said:

> "59. We wish to emphasise that the circumstances in which the court will consider exercising its implied "abuse of process" jurisdiction in extradition cases are very limited. It will not do so if, first, other bars to extradition are available, because it is a residual, implied jurisdiction. Secondly, the court will only exercise the jurisdiction if it is satisfied, on cogent evidence, that the Judicial Authority concerned has acted in such a way as to "usurp" the statutory regime of the EA or its integrity has been impugned. We say "cogent evidence" because, in the context of the European Arrest Warrant, the UK courts will start from the premise, as set out in the Framework Decision of 2002, that there must be mutual trust between Judicial Authorities, although we accept that when the emanation of the Judicial Authority concerned is a prosecuting authority, the UK court is entitled to examine its actions with "rigorous scrutiny". Thirdly, the court has to be satisfied that the abuse of process will cause prejudice to

> the requested person, either in the extradition process in this country or in the requesting state if he is surrendered."

101. The correct approach, therefore, is for the district judge to consider the statutory and human rights bars first, and then, if necessary, to consider the facts said to give rise to abuse of process after that in light of the principles applicable to the abuse jurisdiction.

102. It follows, as I said earlier, that I agree with Mr Grandison and Mr Hearn that the judge's approach to the question of abuse of process was insufficiently nuanced. She was being asked to exercise a jurisdiction which is separate and distinct from the statutory bars to extradition, including human rights, under the EA 2003. She was right to consider Article 8 first but then, having rejected that, she should have gone on (perhaps only briefly, given her extensive factual analysis) to consider the argument in light of the principles relating to abuse of process.

103. I turn to the species of alleged abuse of process with which we are concerned on this appeal, namely, a second EAW issued in circumstances where the defendant has been discharged on a first EAW after the judicial authority failed to comply with directions for the supply of further information.

104. It is clear from *Kashamu*, supra, [34], and *Giese*, supra, [24], that it is not, without more, an abuse of process for a judicial authority to issue a second EAW even where a first warrant has failed through its own fault. It may, or may not, be so, depending on the facts. What is required, as the Divisional Court said in *Giese* at [32], is a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case in order to determine whether extradition on the second EAW would result in unjust oppression to the defendant.

105. In my judgment the principal reason why it was not an abuse of process for the Respondent to include offences I, XXXI and XXXII on EAW2 despite the Appellant's discharge on them in 2015 is because, as the judge set out at length, the Appellant procured his discharge on a false basis. He knew that he had not been served personally with the summonses (notwithstanding the Respondent's assertion before District Judge Ikram) and produced payslips to refute a case that he knew was wrong in fact. He knew all along about the criminal proceedings against him in Poland and he left Poland in breach of his obligations in order to avoid them, and was thus a fugitive. The Appellant's evidence, as recorded by District Judge Ikram at p3 of his judgment, that he 'did not know about the cases in court', was simply not true. It cannot be said to be oppressive, nor was the system of extradition usurped, by the Respondent putting forward a corrected case demonstrating the Appellant's falsehoods in the first set of proceedings and all the more so, as the judge rightly found, because he also gave untruthful evidence in the second set of proceedings about his knowledge of the criminal cases against him in Poland.

106. In saying this, I do not condone the Respondent's failure either to include all of the Appellant's offences on EAW1, or its failure to respond to requests for further information. It could, and should, have done both of these things. When an issuing judicial authority invokes the assistance of the courts of this country to secure

extradition then it is under corresponding duties to bring forward the entirety of its case as soon as possible and to cooperate and supply information where this is sought. If it fails to do so, and the EAW is discharged, then there is a risk, depending on the facts, that a *Giese*-mandated broad merits-based review in relation to a second EAW may reach the conclusion that it is indeed oppressive and so an abuse of process.

107. But I, for my part, am unable to reach that conclusion here because of the judge's findings that the Appellant had given untruthful evidence and was a knowing fugitive from justice in Poland. Given the Appellant's inaccurate and untruthful evidence in the first proceedings, putting the full and correct position before court in the second proceedings cannot be described as an improper collateral attack on the 2015 judgment or be said to give rise to oppression. Mr Hearn was right to submit that to uphold the Appellant's plea of abuse of process would be to impermissibly reward his dishonest conduct.

108. For these reasons, I would reject the first ground of appeal.

Ground 2

109. I can take Ground 2 more shortly. The principles relating to the application of Article 8 in extradition cases is well-travelled ground and there was no dispute about the underlying principles. They were recently summarised by my Lord in *Gerulskis v Prosecutor General's Office of the Republic of Lithuania* [2020] EWHC 1645 (Admin), [63]-[65], in the following terms:

> "63. There was no material dispute about the applicable legal principles. Section 21A of the 2003 Act requires the Court to determine whether the extradition of the Appellant would be proportionate and compatible with rights under the ECHR. Article 8 of the ECHR provides a right to a private and family life, which is qualified. The relevant principles governing the approach to this issue have been established, see *Norris v USA* [2010] UKSC 9, [2010] 2 AC 487; *H(H) v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25, [2013] 1 AC 338; and *Poland v Celinski* [2015] EWHC 1274 (Admin); [2016] 1 WLR 551. Delay is a relevant factor for any article 8 assessment, see *Konecny v Czech Republic* [2019] UKSC 8; [2019] 1 WLR 1586.
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> 64. In *H(H)* the Supreme Court reviewed the approach set out in *Norris v USA* in the light of the decision in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166, and in the light of the way the guidance in *Norris v USA* had been applied in practice, see *H(H)* at paragraphs 2 and 22. It was acknowledged in *H(H)* at paragraph 1 that the impact on younger children of the removal of their primary carers and attachment figures would be devastating. It was noted that the interests of the children were a primary consideration, as set out in article 3.1 of the United Nations Convention on the Rights of the Child but "a primary consideration" is not the same as "the primary consideration" let

> alone "the paramount consideration" (emphasis added), see *H(H)* at paragraph 11. The importance of paying careful attention to what will happen to the child if the sole or primary care giver is extradited was emphasised, as was the need for a court to consider whether the public interest in extradition could be met without doing serious harm to a child, see *H(H)* at paragraph 33.
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> 65. The question before both District Judges (Magistrates' Court) was whether interference with the article 8 right is outweighed by the public interest in extradition. There is no test of exceptionality. In the balance there is a constant and weighty public interest in extradition, people should have their trials, the UK should honour treaty obligations, and the UK should not become a safe haven for fugitives. The best interests of the children are a primary consideration, and Courts need to obtain the information necessary to make the necessary determinations relating to children. Delay since commission of the crime may diminish weight to be attached to the public interest and increase the impact on private life and likely future delay is a relevant feature to be taken into account. The question before me on appeal is whether the Judge was wrong in his assessment of the article 8 balance."

110. Essentially for the reasons given by Mr Hearn, I cannot characterise the district judge's determination on Article 8 as being wrong. Mr Grandison argued that extradition would be a disproportionate violation of Article 8, and the judge should have so found, because of a combination of: (a) the age of offences; (b) they are not the most serious; (c) he has been living openly in the UK since 2006; (d) there is no adequate explanation why extradition was not sought for offences I – XXX on EAW1 given they were all part of a similar pattern of offending; (e) following his discharge in 2015 he got married and now has an infant son.

111. I set out the judge's reasons in some detail earlier in this judgment. In my opinion she carefully considered all of the relevant factors for and against extradition and reached a conclusion which was open to her. Her analysis is set out in her judgment at [78] onwards. I accept the offences are of some age and, as I have said, offences II-XXX should have been included on EAW1. However, the judge took account of this failure at [90] of her judgment. Also, the judge rightly observed that the impact of delay was lessened by the fact that the Appellant was a fugitive (cf *Tarka*, supra) and had not been candid during the proceedings. She carefully analysed the delay in [83] and its effects on the Appellant's family life at [84] and [85]. So far as the impact of extradition on the children specifically is concerned, the judge rightly, and in accordance with the principles I set out earlier, said that their involvement significantly strengthened the Appellant's Article 8 argument. Indeed, she noted the potential for emotional harm at least three times, at [86], [89] and [90]. But she noted that the younger child's mother would remain and be able to take care of him (with additional State benefits if necessary), and that the older child had not lived with the Appellant for some time and would shortly become an adult in any event. The judge

was entitled to conclude these factors would serve to lessen the impact of separation from the Appellant.

112. Overall, as I have said, the judge's reasons for rejecting the Article 8 argument at [90] of her judgment cannot be said to be wrong. There is also the overarching point that the changes in the Appellant's life since his discharge in 2015 (getting married, having a child) took place when he knew or should have known that there were still criminal proceedings against him in Poland and that a fresh EAW was therefore a possibility.

113. I would therefore dismiss this ground of appeal.

114. I would now adjourn this appeal pending the outcome of the appeals in *Chlabicz*, supra, and *Wozniak*, supra, for the reasons given earlier.

Lord Justice Dingemans:

115. I agree.