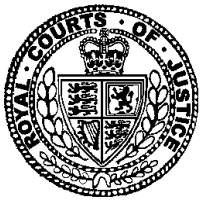

Neutral Citation Number: [2023] EWHC 3252 (Admin)

Case No: CO/4110/2023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2023

Before :

THE HONOURABLE MRS JUSTICE FARBEY

- -

Between :

ZYGMUNT NIZIOL	**Appellant**
- and -	
REGIONAL COURT IN WARSAW (A POLISH JUDICIAL AUTHORITY)	**Respondent**

- -
- -

David Perry KC and Rebecca Hill (instructed by **Bindmans LLP**) for the **Appellant**
Alexander dos Santos (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 10 October 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 19 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mrs Justice Farbey:

Introduction

1. The appellant is a Polish national born on 28 August 1953. He appeals under section 26 of the Extradition Act 2003 ("the Act") against the order for his extradition made by District Judge Sternberg ("the DJ"). The appellant was arrested on 21 May 2021 and produced at Westminster Magistrates' Court on the same day for an initial hearing. The extradition hearing took place before the DJ on 22 and 23 August 2022. The DJ received further written submissions before handing down judgment and ordering extradition on 1 November 2022.

2. The appeal is founded on fresh evidence that was not available to the DJ. The fresh evidence comprises:

    i. A sixth statement of the appellant's criminal lawyer in Poland, Piotr Kardas, who is a Professor of Criminal Law at Krakow University. The statement (dated 31 January 2023) deals with the appellant's cassation appeal to the Polish Supreme Court.

    ii. A copy of the Polish Supreme Court's statement of reasons for dismissing the appellant's appeal on the basis that it was clearly unfounded. The statement of reasons is dated 27 October 2022.

3. Strictly speaking, the Supreme Court decision pre-dates the DJ's decision and so the decision and Professor Kardas' fresh statement about the decision might have been made available for the DJ to consider. However, the respondent does no more than point out the chronology. I accept that it would not have been practicable for the DJ to consider the Supreme Court decision before making the extradition order. Importantly, the statement of reasons was not received by the appellant's Polish lawyers until after the DJ's judgment had been handed down. I accept that both the Supreme Court's decision and Professor Kardas' views of that decision are fresh evidence (*Szombathely City Court v Fenyvesi* [2009] EWHC 231 (Admin), para 32).

4. On the basis of the fresh evidence, the appellant submits:

    i. **Ground 1**: The new evidence demonstrates that the DJ was wrong to conclude that the Polish judiciary possesses the necessary qualities of independence and impartiality to meet the requirements of a judicial authority under s.2 of the Act;

    ii. **Ground 4** (retaining the original numbering of the written grounds): The DJ was wrong to conclude that the appellant does not face a real risk of a breach of his right to liberty under article 5 of the European Convention on Human Rights ("the Convention") in so far as his conviction and sentence were imposed through a trial process which was flagrantly unfair and which breached his article 6 fair trial rights; and

    iii. **Ground 2**: The fresh evidence demonstrates that the appellant was convicted in his absence. Given that his absence was not deliberate, the DJ was wrong to conclude that his discharge was not required under s.20(7) of the Act.

5. In response to these Grounds, the respondent submits that the fresh evidence does not show that the DJ was wrong on any issues. Had this evidence been available to the DJ, it would not have led to the appellant's discharge.

6. Permission to appeal on other grounds was refused.

7. I heard submissions from Mr David Perry KC (who did not appear below) with Ms Rebecca Hill on behalf of the appellant and Mr Alexander dos Santos on behalf of the respondent. I am grateful to all counsel and their solicitors for the high standard of their work.

The extradition offences

8. The appellant was extradited from the United Kingdom to Poland on 15 June 2007 to stand trial but he subsequently managed to return. His extradition is now sought pursuant to an arrest warrant issued on 21 December 2020 and certified by the National Crime Agency on 19 May 2021.

9. The warrant is based on the appellant's convictions and sentence in relation to four offences. Those offences are described at length in the warrant. They relate to the appellant's involvement with a company whose name is translated as "Plasma Fractionation Laboratory in Mielec" ("the Company"). The offences may be summarised as follows:

    i. ***Forgery***: Between 6 December 1996 and 20 January 1998, the appellant as a President of the Management Board of the Company, misappropriated 8,091,750 USD through the vehicle of a number of counterfeit invoices.

    ii. ***Fraud***: Between 4 March 1997 and 29 December, the appellant, as a President of the Management Board, undertook various fraudulent actions in relation to investment credit in favour of the Company. My understanding is that the value of the fraud was 21,218,547.17 USD.

    iii. ***Fraudulent trading***: Between 30 April 1997 and 31 December 1998, the appellant, as a President of the Company, spent Company money on non-Company business (renting office space in London; taking legal advice for his own benefit on British immigration law; and travel for family members). The total sum that he gained was around 454,432,77 zloty (equivalent to £77,760).

    iv. ***Fraudulent trading***: On 26 November 2002, when the Company was threatened with insolvency, he frustrated the payment of creditors by taking Company assets. This had a significant effect on the value of the Company's share capital.

10. In his evidence to the DJ, the appellant maintained that he is not guilty of any of the offences. He gave details of how the Company was supported by high profile ministers and politicians. He believes that he was convicted because he was less well connected politically than other persons who were tried for the same offences and acquitted.

Trial and appeals in Poland

11. Given the emphasis on unfair trial procedures in the grounds of appeal, it is necessary to set out in some detail the history of the criminal proceedings in Poland.

Regional Court: Trial and sentence

12. The appellant's trial took place in the Regional Court in Warsaw. The Polish authorities provided the DJ with further information in order to supplement the information in the arrest warrant. The further information confirms that the appellant stood trial during 123 hearing days between 29 March 2010 and 6 August 2018. He was represented throughout the trial by three defence attorneys who attended the hearings or sent a substitute. Notices of the hearing dates were given. Applications by the appellant to change hearing dates (for reasons of health) were allowed. He attended most of the hearing days. When he did not attend, his lawyers asked to proceed in his absence.

13. The further information says that, on 6 August 2018, a hearing took place "to process the case in terms of merits." The appellant attended and addressed the court as to sentence. The judgment as to sentence was adjourned to 20 August 2018. Although the appellant did not attend on that date, his lawyer was present. The arrest warrant states that the Regional Court imposed a four-year term of imprisonment.

Court of Appeal: Prosecution appeal against sentence

14. Notice of a Prosecution appeal against sentence was posted to the appellant's address but not served upon him personally. For that reason, the appeal was adjourned from 20 January 2020 to 26 February 2020. The appellant did not attend the appeal hearing but one of his lawyers did so. The Court of Appeal in Warsaw increased the sentence to 7 years' imprisonment (of which 4 years, 11 months and 8 days remains to be served). The Court of Appeal panel was comprised of three judges. The judgment was given by Judge Anna Kalbarczyk, who was at the time seconded to the appeal court by the Minister of Justice. It was a central theme of the appellant's submissions before the DJ, as it is before me, that the deployment of a seconded judge was unfair because seconded judges are too close to, and influenced by, the Polish Government.

Regional Court: Appellant's application to postpone sentence

15. The Police thereafter tried but failed to locate the appellant in order to enforce the sentence. On 9 September 2020, the Regional Court issued a domestic warrant for his arrest. Professor Kardas applied for the postponement of the sentence but, in a decision of 19 November 2020, the Regional Court refused the application.

16. On 17 February 2021, the Court of Appeal upheld the Regional Court's decision. In response to a question about whether any judge had been seconded or delegated for that appeal, the further information states:

> "each of the adjudicating judges is independent, and there is no legal basis to challenge that. For the above reasons, giving a response to the questions concerned shall be considered unproductive."

Supreme Court: Cassation appeal against conviction

17. Professor Kardas lodged a cassation appeal to the Polish Supreme Court. One ground of appeal was that the composition of the Court of Appeal that had allowed the Prosecution appeal on 26 February 2020 was improper because Judge Kalbarczyk was a seconded judge and so not independent of the Polish Government.

18. On 21 April 2021, Judge Igor Zgolinski dismissed an application in the Supreme Court to suspend the execution of the sentence. Judge Zgolinski was appointed by the National Council of the Judiciary (known as the "neo-NCJ") which was established under a 2017 law to exercise jurisdiction over the appointment of judges. For present purposes, Mr dos Santos does not oppose the appellant's submission that the neo-NCJ is unconstitutional and that it lacks impartiality and independence from the Polish Government.

Professor Kardas' evidence before the DJ

19. Professor Kardas provided five witness statements to the DJ and gave oral evidence. He confirmed that he had been involved in the appellant's case since 2003. He was one of the trial lawyers. He took part in the majority of the hearings. He confirmed that the appellant had faced six charges but that two were discontinued by reason of limitation.

20. For present purposes, the key element of his evidence concerned the progress and status of the cassation proceedings. Professor Kardas indicated that, at the time of the hearing before the DJ, the appellant's appeal against conviction was pending in the Supreme Court. The appeal had surmounted the first hurdle in that the Supreme Court had decided not to reject the appeal as "manifestly groundless." The appellant was awaiting the hearing of the appeal.

21. Professor Kardas said that the Supreme Court application might result in the reversal of the judgment of 26 February 2020 and that, if that happens, the Supreme Court usually refers the case to the court of second instance for re-examination.

22. Professor Kardas stated that Judge Zgolinski (appointed by the neo-NCJ) had been scheduled to hear the Supreme Court appeal on 10 February 2022 together with Judge Antoni Bojanczyk (also appointed by the neo-NCJ) and Judge Wieslaw Kozielewicz. Professor Kardas said that Judge Zgolinski and Judge Bojanczyk would be reluctant to accept that the Court of Appeal's judgment should be set aside on the grounds that Judge Kalbarczyk was a seconded judge. He had therefore applied for their exclusion from the panel that would hear the appellant's appeal.

23. On 10 February 2022, the Supreme Court decided to hold an open hearing of the cassation appeal and adjourned the case. On 21 April 2022, the Supreme Court excluded Judges Zgolinski and Judge Motuk (appointed by the neo-NCJ) from the cassation panel. The appellant was notified that Judge Bednarek - appointed by the neo-NCJ and recently transferred from the Disciplinary Chamber - had been appointed to his case in place of Judge Bojanczyk. Mr dos Santos does not for present purposes contend that the Disciplinary Chamber as a body should be treated as impartial and independent of the Polish Government.

24. Professor Kardas said that, in August 2022, the appellant applied to exclude Judge Bednarek. At the date of the DJ's decision, that application had not yet been determined. Professor Kardas was concerned that Judge Bednarek's general stance is inconsistent with the rule of law and favours the executive. For example, she had initiated the proceedings before the Polish Constitutional Court which led to the finding that CJEU jurisprudence is inconsistent with the Polish Constitution.

25. Professor Kardas' evidence was that any future application to exclude a neo-NCJ judge would be difficult because a law in force since 2022 determines that "it will not be possible to argue that the Supreme Court is improperly constituted only because of the fact that the judge has been appointed upon the recommendation of the National Council for the Judiciary… The same is applicable the proceedings before any ordinary courts." It follows from this law that the mere presence of a neo-NCJ judge on a panel of judges cannot as a matter of Polish law render the proceedings unfair. It seems that, in light of this legislative obstacle, Professor Kardas lodged a second application to remove Judge Bednarek based on principles of natural justice (nemo iudex in causa sua).

26. In short, at the time of the DJ's extradition order, the appellant's cassation appeal was pending. He was expecting his lawyers to attend to represent his interests and to make his case at an oral hearing.

The DJ's judgment

27. In a judgment which runs to nearly 72 pages, the DJ gave comprehensive reasons for ordering the appellant's extradition. He concluded that the appellant is a fugitive from justice applying the familiar principles set out in (for example) *Wisniewski v Regional Court of Wroclaw, Poland* [2016] EWHC 386 (Admin), [2016] 1 W.L.R. 3750.

Expert evidence

28. The DJ dealt with the evidence from a number of expert witnesses called on behalf of the appellant. In particular, Professor Laurent Pech gave evidence about the rule of law in Poland. As Mr dos Santos emphasised, the DJ did not accept significant parts of Professor Pech's analysis of the effect of the mere presence of a judge appointed by the neo-NCJ:

> "I do not accept Professor Pech's evidence that the mere presence of a judge appointed by the Neo-NCJ on a panel will lead to a violation of article 6 ECHR. **All depends on the facts and circumstances of the case, the fairness of the proceedings and the quality of the decision rendered.** That seems to me to be consistent with the CJEU's judgment in the *Openbaar Ministerie* case. Professor Pech accepted that his opinion was different. I prefer the decision of the CJEU on this point given its experience and close involvement in consideration of these issues and the impartiality with which it approaches issues of EU law and judicial independence" (emphasis added).

29. In my judgment, the DJ's approach is impeccable, whether on the basis of the evidence that was before him or on the fresh evidence or both. It reveals no error of law and is

consistent with the approach of the Divisional Court in the leading case of *Wozniak v Poland* [2021] EWHC 2557 (Admin) (Dame Victoria Sharp P, Julian Knowles J) to which I shall return below.

30. Mr Patryk Wachowiec gave evidence about relevant aspects of Polish law. In similar vein, the DJ did not accept the entirety of his analysis:

> "As to Mr. Wachowiec's evidence, I do not accept that the secondment of Judge Kalbarczyk to the panel which heard Mr. Niziol's appeal gives rise to a breach of article 6 for the same reasons I have given immediately above in relation to Professor Pech's evidence."

31. There is no realistic challenge to this conclusion.

Political context

32. The DJ considered the political context. He noted that a number of other people were prosecuted for conduct connected to the offences for which the appellant was convicted, including politicians. He accepted that "this case and its wider ramifications attracted press interest and profile in Poland." Nevertheless, he concluded:

> "Whilst there clearly was political interest in Mr. Niziol's case and politicians were amongst those prosecuted for events at [the Company], **I do not accept that any political motivation underlies this warrant.** Nor do I accept Mr. Wachowiec's evidence that the involvement of politicians in this case shows that the Minister of Justice will act in such a way as to produce a particular result in Mr. Niziol's case. If his evidence on this point was correct, the Minister could have put pressure on the Supreme Court to dismiss his cassation application as manifestly ill founded. That did not happen. The treatment of Mr. Niziol's case by the Supreme Court thus far has demonstrated independence on the part of the judges of the criminal chamber. Accordingly, I do not accept that any political animus on the part of the Minister of Justice towards members of the previous socialist government will have any impact on Mr. Niziol's appeal to the Supreme Court" (emphasis added).

33. In relation to the question of politically motivated prosecution, he held:

> "73…As I have noted above, I accept that politicians and persons with a political profile were prosecuted motivated by political factors as the requested person alleges. I note that no bar to extradition was raised under the head of extraneous considerations, although of course that is not dispositive of this point. The fact that there was a high level of interest by members of the public does not illustrate or show that political factors motivated the requested persons prosecution or that his belief in the political animus behind his cases made out. **Therefore, I do not find that the factual context of the charges shows or**

> **supports the argument that the warrant seeking his return has not been issued by a judicial authority**…
>
> 74…The fact that politicians were investigated and prosecuted, and some acquitted, for matters arising out of the same case does not assist me particularly one way or the other…**I am unable to accept the submission that the Minister of Justice had a motive to involve himself in these proceedings. It does not seem to me to be made out by the evidence which I have heard, and on which my findings are set out above**" (emphasis added)."

34. The DJ therefore rejected in plain terms the submission that the appellant's prosecution was politically motivated.

Presence of Judge Kalbarczyk on sentence appeal

35. In relation to the involvement of Judge Kalbarczyk in the Court of Appeal, the DJ observed that there was "no specific criticism of any decision or involvement in that judge in hearing this appeal." As regards her mere presence, he held:

> "77…On the evidence I have heard and read I am unable to conclude that there has been a breach of Mr. Niziol's fundamental right to a fair trial before an independent and impartial tribunal previously established by law. The mere presence of Judge Kalbarczyk on the panel of the Court of Appeal judges does not establish such a risk and I have not been presented with any evidence to show that that judge was subject to any improper pressure or influence, or the risk of any improper pressure or influence because of the manner of their appointment nor that the manner of their appointment had any influence on the way that that judge decided Mr. Niziol's case. I accept that there has been conflict between the Polish courts and the courts of the EU and ECtHR. That does not seem to me to provide a basis to find that any arguments relating to the lack of any lack of impartiality on the part of Judge Kalbarczyk could not be properly raised and addressed in the Cassation appeal before the Supreme Court, assuming there are proper grounds to do so.
>
> 78. Accordingly, I do not accept that the generalised deficiencies in the Polish judicial system provide a basis on which the Ministry of Justice could interfere in the requested persons appeal to the Supreme Court, or in any remitted proceedings should his appeal to the Supreme Court be unsuccessful. As to the latter, it seems to me to be an exercise in speculation to try to predict whether a judge appointed under the old system or under the new system would hear any remitted case, and the attitude of such a change to this requested person's case."

Cassation proceedings

36. The DJ considered in detail the history of applications to exclude neo-NCJ judges from the panel that would hear the cassation appeal. He found that the success of the applications for the recusal of those judges illustrates that the Supreme Court had to date considered the applications fairly. He held at para 54(xxii):

> "I do not find that the mere presence of Judge Bednarek on the panel that has been appointed to hear Mr. Niziol's appeal…creates a risk to the fairness of those proceedings. Her past involvement in the conflict between the Polish courts and the CJEU and in the disciplinary chamber does not show that that Judge will not properly and fairly consider Mr. Niziol's appeal. In any event, the defence's two applications for Judge Bednarek to be recused from hearing the appeal remain outstanding. As I have set out above, I accept that those applications will be properly considered on the assumption that there are proper grounds to seek recusal other than the time and manner of appointment of the judge in question."

37. Citing the previous case law of this court, the DJ went on to hold that the Criminal Chamber of the Supreme Court contains a majority of judges who are lawfully appointed. The Disciplinary Chamber, which was a controversial institution, has now been abolished and replaced with a new Chamber of Professional Liability. The work of that chamber is under the supervision of the European Court of Human Rights who have to be informed 72 hours before any hearing is scheduled. The DJ accepted that the independence of this Chamber remained to be seen.

38. The DJ rejected the proposition that the mere presence of a judge appointed by the neo-NCJ would lead to a violation of article 6 ECHR. He held:

> "76…I accept that Polish law has now changed to prevent applications to recuse judges being made solely on the basis of the time and manner in which they were appointed. The CJEU's decisions, including those set out above, do not seem to me to provide a basis that that change in the law makes good this argument. That seems to me to equally apply to any challenge to a judge who might replace Judge Bednarek. I also note Mr. dos Santos' submission on Mr. Kardas' evidence that he had submitted two applications to remove Judge Bednarek. The first application, based on the new legislation, might not be accepted because the legislation is such that the assessment becomes impossible. The second application is based on the principle of *nemo iudex in causa sua*. As to the likely success of the second application, he said: "*I cannot imagine that application not being accepted as it is obvious. Although I cannot be absolutely certain*." That seems to further undermine any weight that the defence's challenge on this ground might otherwise bear" (emphasis in the original).

39. The DJ concluded that on a specific and precise assessment of the appellant's case, he was not satisfied that there was a real risk of the breach of the essence of a right to a fair trial; nor was there a risk of a flagrant denial of justice. Two consequences followed. First, the appellant's challenges under articles 5 and 6 ECHR failed. Secondly, the arrest warrant had been issued by a judicial authority for the purposes of section 2 of the Act such that the appellant's section 2 challenge also failed.

Other aspects of the DJ's decision

40. There is before me no challenge to the DJ's conclusions on article 8 of the Convention (right to respect for private and family life). I note for the sake of completeness that the DJ took into consideration that the appellant's wife and family are settled in the UK. His children are now adults and he has grandchildren.

41. The DJ accepted that the appellant suffers from a number of medical conditions including hypertension, mitral valve disease, chronic low back pain, diabetes and high cholesterol with a risk of stroke. He accepted medical evidence that the appellant would require "careful medical monitoring and assistance" in relation to physical ill health if he were to be imprisoned.

42. As regards the appellant's mental health, the DJ found that he suffers from recurrent depressive disorder and that he attempted suicide while detained in prison previously. He will need ongoing treatment for his depression. His extradition would lead to an elevated risk of suicide. He would need appropriate close monitoring should he be imprisoned in Poland in order to ensure that he does not harm himself or attempt suicide. The DJ accepted expert evidence called on behalf of the appellant that there are a limited number of 24-hour psychiatric beds in the Polish prison estate and that access to treatment in those beds is limited.

43. The DJ rejected the appellant's argument that the inadequacy of medical care would render the appellant's extradition oppressive by reason of his poor mental and physical health. He rejected the linked argument that the appellant's physical and mental health problems would give rise to inhuman and degrading treatment under article 3 of the Convention. There is no challenge to the DJ's conclusion about these elements of his judgment and no need for me to consider them in any further detail.

44. The appellant's challenges to extradition having failed, the DJ ordered his extradition to Poland.

The fresh evidence

45. In his sixth statement, Professor Kardas updates his previous evidence. He confirms that the application to exclude Judge Bednarek (pending at the time of the proceedings before the DJ) was allowed and she was excluded. She was replaced as presiding judge by Judge Kozielewicz who had taken part in the adjourned open hearing on 10 February 2022.

46. Professor Kardas states that the cassation applications in the appellant's case and that of his co-accused were found "manifestly groundless" by Judge Kozielewicz on the papers. The judge's decision was taken during a closed session with no advance notice. The judge issued his decision on 27 October 2022 at a time of day that was immediately

before he was formally appointed (at a ceremony in the Polish President's Palace) as President of the Professional Liability Chamber of the Supreme Court.

47. The decision issued on 27 October 2022 consisted of only one sentence and did not include a statement of reasons. The decision was delivered to the defence legal team on 31 October 2022. A statement of reasons followed on 28 November 2022. The written reasons ignored and failed to address in any way the primary ground for the cassation application, namely the composition of the Court of Appeal in Warsaw and, in particular, the presence of Judge Kalbarczyk.

48. Professor Kardas states that if the judgment of 27 February 2020 were to have been revoked, the case would have returned to "the stage of appellate proceedings" and there would have been no enforceable custodial sentence on which the appellant's extradition could be founded. Judge Kozielewicz's decision to proceed to a closed hearing with only one judge was not lawful. The case should have proceeded to an open hearing on notice to the parties. There was no explanation as to why the case had proceeded in this unlawful way.

49. Professor Kardas confirms that Judge Kozielewicz's decision means that the case before the Supreme Court is closed. There are no further appellate measures against the decision. The appellant's principal recourse will now be to the European Court of Human Rights on the basis that the Supreme Court has not considered all the cassation grounds and that it held a closed rather than open hearing.

50. Judge Kozielewicz's written reasons for his decision state that the appellant's cassation appeal is clearly unfounded. He sets out the nature of the cassation jurisdiction in Poland as being that (with the stilted translation retained):

> "the party should raise arguments aimed at undermining the legal and binding ruling of the court of appeal, which is based on the presumption of a correct ruling. The necessity to make sure that such rulings remain stable leads to certain limitations to the possibility of challenging these only to situations in which the court procedure suffered from a judicial error… or to gross violations of the law…
>
> Therefore, the specific and exceptional nature of the last resort appeal procedure makes it impossible to exercise in this procedure a…'third-instance' control of the ruling of the court of the first instance… The nature of the last resort appeal, as an extraordinary measure of appeal raised against a legal and binding ruling of a court of appeal, due to a gross violation of the law by this court, also makes it impossible to question the factual findings made in the case in the course of the last resort appeal…"

51. Irrespective of anything else about Judge Kozielewicz or the lawfulness of his decision, I have been provided with no reason to suppose that he has misdescribed the cassation jurisdiction in Poland as being a limited jurisdiction, which does not reconsider the merits of the criminal charges against a defendant.

Legal framework

Section 2 of the Act: arrest warrant issued by a judicial authority

52. An arrest warrant for a person's extradition under Part 1 of the Act must have been issued by a "judicial authority" (s.2(2)). It is now established (and is not in dispute) that, in order to qualify as a judicial authority, the body issuing the warrant must possess the necessary qualities of independence and impartiality. The body must not be exposed to the risk of being influenced by the executive branch of government.

53. In *LM* Case C-216/18 (CJEU Grand Chamber 25 July 2018), the CJEU considered how executing judicial authorities should treat concerns regarding systemic and generalised deficiencies in the independence of the judiciary in Poland when considering whether Polish judges are "judicial authorities" under the Framework Decision 2002/584. The Court held that:

> "72. … it is only if the European Council were to adopt a decision determining, as provided for in art.7(2) TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in art.2 TEU, such as those inherent in the rule of law, and the Council were then to suspend Framework Decision 2002/584 in respect of that Member State that the executing judicial authority would be required to refuse automatically to execute any European arrest warrant issued by it, without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his fundamental right to a fair trial will be affected."

54. The CJEU in in *L&P* C354/20 PPU and C412/20 PPU (CJEU Grand Chamber 17 December 2020) concluded:

> "35…it should be noted that both the principle of mutual trust between the Member States and the principle of mutual recognition, which is itself based on the mutual trust between the latter, are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (Opinion 2/13 of 18 December 2014, EU:C:2014:2454, paragraph 191, and judgment of 27 May 2019, OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau), C508/18 and C82/19 PPU, EU:C:2019:456, paragraph 43)…"

55. The Court described a two-step process to be adopted when considering whether to refuse to execute a European arrest warrant on the basis of a lack of independence in the judiciary of the State that has issued the warrant. The first step is to examine whether there are systematic or generalised deficiencies:

> "54 In the context of a first step, the executing judicial authority of the European arrest warrant in question must determine whether there is objective, reliable, specific and properly updated material indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary (see, to that effect, judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C216/18 PPU, EU:C:2018:586, paragraph 61).

56. There is an additional, second step which requires a case-by-case analysis:

> "55 In the context of a second step, that authority must determine, **specifically and precisely**, to what extent those deficiencies are liable to have an impact at the level of the courts of that Member State which have jurisdiction over the proceedings to which the requested person will be subject and whether, **having regard to his or her personal situation, to the nature of the offence for which he or she is being prosecuted and the factual context in which that arrest warrant was issued**, and in the light of any information provided by that Member State pursuant to Article 15(2) of Framework Decision 2002/584, there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to that Member State (see, to that effect, judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C216/18 PPU, EU:C:2018:586, paragraphs 74 to 77)" (emphasis added).

57. In *Openbaar Ministerie* [2022] 1 W.L.R. 3568, the CJEU held that it is not enough to resist extradition to demonstrate that a judge hearing a case was appointed under the controversial appointment system in Poland:

> "98….information relating to the appointment, on application of a body made up, for the most part, of members representing or chosen by the legislature or the executive, as is the case with the KRS since the entry into force of the Law of 8 December 2017, of one or more judges sitting in the competent court or, where it is known, in the relevant panel of judges, is not sufficient to establish that the person concerned, if surrendered, runs a real risk of breach of his or her fundamental right to a fair trial before a tribunal previously established by law. Such a finding presupposes, in any event, a case-by-case assessment of the procedure for the appointment of the judge or judges concerned."

58. The key question is whether the judicial authority issuing the warrant is functionally (and not necessarily institutionally) independent of the executive (*Assange v Swedish Prosecution Authority* [2012] UKSC 22, [2012] 2 A.C. 471, para 153).

Wozniak v Poland

59. The Divisional Court considered the issue of Polish Judicial independence in *Wozniak v Poland* [2021] EWHC 2557 (Admin) and affirmed the two-step test. As regards the first, generalised stage, the court accepted that there are systemic or generalised deficiencies in relation to the independence of the Polish judiciary:

> "185. … There is a very considerable body of objective, reliable, specific and up-to-date material indicating that there is a real risk of breach of the values in Article 2 TEU, on account of systemic or generalised deficiencies relating to the independence of Poland's judiciary resulting from the reforms since 2015. This was the conclusion of the European Commission in its Reasoned Proposal of December 2017, which remains under consideration, as we have said…We have concluded that the situation in Poland has only worsened since then. "

60. The court nevertheless concluded:

> "222. Structural weaknesses in judicial independence arising from the reformed judicial appointment process in Poland do not lead to the conclusion that judges appointed under it lack independence once in office. The issues are separate, and it cannot be presumed that a professional judge lacks independence in carrying out his/her functions merely because of how he/she was appointed."

Flagrant denial of justice

61. In order successfully to resist extradition on article 5 or 6 grounds, a requested person must demonstrate that he risks "suffering a flagrant denial of justice in the requesting country" (*Othman v United Kingdom* [2012] 55 EHRR 1, para 258). The Divisional Court in *Wozniak* reaffirmed that the "flagrancy" threshold is set very high:

> "211. The meaning of the phrase 'flagrant denial of justice' was explained in the partly dissenting opinion of Judges Bratza, Bonello and Hedigan in *Mamatkulov* and *Askarov v Turkey* (2005) 41 EHRR 494, 537, [O-III14] as conveying 'a breach of the principles of fair trial guaranteed by article 6 which is **so fundamental as to amount to a nullification, or destruction of the very essence, of the right** guaranteed by that article. This formulation was endorsed by Lord Bingham and Lord Hope in *EM (Lebanon) v Secretary of State for the Home Department* [2009] AC 1198, [3], [33]. and adopted by the ECtHR in *Othman v United Kingdom* (2012) 55 EHRR 1, [260]" (emphasis added).

62. In considering whether the appellant's extradition would amount to a breach of article 5 or 6, the DJ applied the more generous standard of whether there were substantial grounds for believing that there was a real risk that the appellant's trial had been flagrantly unfair in accordance with the judgment of the Divisional Court in *Popoviciu v Curtea de Apel Bucharest (Romania)* [2021] EWHC 1584 (Admin). Mr dos Santos

did not take any point about this low standard before me. Since the hearing, the Supreme Court has held that the Divisional Court misdirected itself in this regard and applied the wrong standard of proof. The judgment of the Supreme Court establishes that, where a fugitive in a conviction case complaints that his extradition would constitute a violation of article 5 or 6 of the Convention, because he has suffered a flagrant denial of a fair trial in the State that has issued the arrest warrant, he must prove the allegations of unfairness are true on the balance of probabilities: [2023] UKSC 39, [2023] 1 W.L.R. 4256, paras 71 and 78.

63. Neither party has asked me to re-open the appeal hearing and I do not regard such a course as being necessary. Nothing in this judgment turns on the standard of proof.

Section 20 of the Act: presence at trial

64. Section 20 provides:

> "(1) If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence.
>
> (2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 21.
>
> (3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial.
>
> (4) If the judge decides the question in subsection (3) in the affirmative he must proceed under section 21.
>
> (5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial.
>
> (6) If the judge decides the question in subsection (5) in the affirmative he must proceed under section 21.
>
> (7) If the judge decides that question in the negative he must order the person's discharge.
>
> (8) The judge must not decide the question in subsection (5) in the affirmative unless, in any proceedings that it is alleged would constitute a retrial or a review amounting to a retrial, the person would have these rights -
>
> > (a) the right to defend himself in person or through legal assistance of his own choosing or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required;

> (b) the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

65. Section 20 is derived from article 4a of the Framework Decision which concerns extradition decisions following a trial in the requesting state at which the requested person did not appear in person. For present purposes, it is sufficient to note that (under sub-paragraph 1):

> "1. The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person **at the trial resulting in the decision**…" (emphasis added).

66. In *Tadas Tupikas* (C-270/17 PPU) 10 August 2017, the CJEU considered how the concept of the "trial resulting in the decision" should be applied where the State issuing the arrest warrant has provided for a criminal procedure involving several degrees of jurisdiction. The Court held (at para 37) that the purpose of article 4a(1) is to enable the executing authority to allow surrender, despite the fact that the requested person was not present at a trial resulting in conviction, while fully respecting that person's right of defence. The Court held (at para 100):

> "the concept of 'trial resulting in the decision', within the meaning of article 4a(1) of Council Framework Decision 2002/584…as amended,…, must be interpreted as relating only to the instance at the end of which the decision is handed down which finally rules on the guilt of the person concerned and imposes a penalty on him, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case."

67. Similarly, the purpose of section 20 is to ensure that no one is surrendered where that would mean a breach of their human rights (*Jakubowski v Regional Court in Bialystok III, Criminal Division, Poland* [2022] EWHC 660 (Admin), para 17, per Swift J).

Grounds 1 and 4

68. It is convenient to take Grounds 1 and 4 together, which was the approach adopted by both parties in their written and oral submissions. Those grounds each concern the independence of the judiciary in Poland.

The parties' submissions

69. Mr Perry submitted that the fresh evidence impels the conclusion that the appellant's prosecution was politically motivated. He pointed to Judge Kozielewicz's appointment as the President of the Professional Liability Chamber; the timing of his decision made immediately before his official appointment at a ceremony in the President's Palace; and his unexplained and inexplicable failure to deal with the arguments relating to Judge Kalbarczyk, which were a fundamental aspect of the cassation appeal. These

multiple factors demonstrated on a specific and precise analysis that the decision to prosecute and convict the appellant was politically motivated and animated by extraneous considerations. It could not be said that the arrest warrant had been issued by an independent and impartial tribunal.

70. Mr Perry invited me to consider the impact of the fresh evidence both on its own and as one of a number of factors which – taken cumulatively and mounting up – demonstrated that the DJ's conclusions were wrong. Ongoing political developments in Poland have fundamentally undermined the rule of law and the independence of the judiciary. In particular, there have been increasing efforts of the Polish executive to control the judiciary sitting in the criminal courts, including the Supreme Court. The expert evidence before the DJ from Professor Pech and Mr Wachowiec made clear that judges of criminal courts are increasingly subject to disciplinary sanctions for seeking to follow principles set down in the case law of the CJEU and the European Court of Human Rights.

71. Mr Perry submitted that this was not a case where the appellant relied on the mere presence of a seconded judge or the mere presence of neo-NCJ judge: other factors were in play which combined to controvert the DJ's findings. Events in the Supreme Court, when combined with other factors such as the presence of a seconded judge in the Court of Appeal, mean that there are mounting factors which point to politically motivated convictions and specific unfairness to the appellant.

72. Under Ground 1, Mr Perry submitted that the fresh evidence demonstrates that the DJ was wrong to conclude that the Polish judiciary (which issued the arrest warrant) possessed the necessary qualities of independence and impartiality to meet the requirements of s.2 of the Act. In relation to the second step of the two-step process confirmed by the Divisional Court in *Wozniak*, Mr Perry submitted that there is a specific and precise risk of unfairness and interference, owing to the political background to the appellant's prosecution and convictions. Mr Perry's skeleton argument for this appeal emphasises the involvement in the Company of the former Minister of Economy (Wieslaw Kaczmarek) and the former Finance Minister (Helina Wasilewska-Trenkner) who were both charged with criminal offences.

73. Mr Perry submitted that, had the DJ been aware of the Supreme Court's procedurally irregular decision, he would have drawn different inferences and reached a different conclusion on the risk of political interference in the judicial process. On all the evidence now before me (including the fresh evidence), the warrant did not meet the requirement of issue by a judicial authority under s.2 of the Act.

74. Under Ground 4, Mr Perry submitted that the appeal hearing over which Judge Kalbarczyk presided formed part of the appellant's trial. Judge Kozielewicz - who (it will be recalled) determined the cassation application - was required to adjudicate upon the lawfulness of another judge's secondment in the context of a prohibition on judges applying the case law of the CJEU and European Court of Human Rights, multiple disciplinary measures against judges who chose to do so and when he was about to be made President of the new Disciplinary Chamber. Mr Perry submitted that, in these circumstances, Judge Kozielewicz was not independent and impartial in considering the cassation application.

75. Mr Perry emphasised that the judge had dismissed the cassation appeal after a single judge had decided that the appeal was not manifestly unfounded and after an oral hearing had begun. The appellant's representatives had not consented to the determination of the appeal on the papers; nor were they afforded any opportunity to make submissions about the matter. There had been a flagrant failure to provide adequate reasons as the judge had entirely ignored a specific, pertinent and important point raised by the applicant, namely the presence of a seconded judge on the panel for the appeal proceedings. The lengthy written reasons provided by the judge do not make any reference to this ground of challenge. In all these circumstances the appellant had suffered a flagrant denial of justice which met the high threshold in *Othman.*

76. Mr dos Santos submitted that the DJ's judgment was correct and that the fresh evidence made no material difference to his conclusions whether under Ground 1 or Ground 4. He submitted that, to the extent that the appellant relied on the DJ's comments on the Supreme Court proceedings as a safeguard against an unfair trial, Mr Perry had taken the comments out of context and attributed to them a decisive weight which they did not bear.

Discussion

77. The DJ accepted that politicians and persons with a political profile were prosecuted with the appellant and that their prosecution was motivated by political factors. It does not follow that the appellant's prosecution was political. The appellant is not a political activist and no bar to extradition was raised before the DJ under the head of extraneous considerations as one would have expected if there was merit in the arguments about political motivation. I agree with the DJ that a high level of interest by members of the public does not demonstrate that the appellant's prosecution was politically motivated.

78. The DJ did not accept that the Minister of Justice had a motive to involve himself in the proceedings which relate to very old offences. He did not accept that the appellant had been targeted for political reasons or that there had been any external attempt to influence the decisions of judges hearing his trial and appeal. Mr Wachowiec accepted that he was not in a position to say that there has been or will be political influence in this case. There is no adequate evidence of political interference in the trial process or in the appeal process, whether in the Court of Appeal or in the Supreme Court.

79. As regards the Supreme Court, the appellant points to (i) Judge Kozielewicz's appointment as the President of the Professional Liability Chamber; (ii) the procedurally irregular nature of the cassation decision; (iii) Judge Kozielewicz's failure to deal with the presence and role of Judge Kalbarczyk in the Court of Appeal; and (iv) the timing of the cassation decision immediately before an official ceremony involving Judge Kozielewicz at the President's Palace. Standing back and taking the evidence as a whole, I do not accept that these factors (individually or cumulatively) show any adverse treatment of the appellant on political (as opposed to general procedural) grounds.

80. It is not in dispute for present purposes that the appellant surmounts the first of the two steps endorsed in *Wozniak* in that the evidence before the DJ demonstrated that there are systematic or generalised deficiencies in the independence of the Polish judiciary. The dispute in this appeal relates to the second step, i.e. the individualised assessment. I do not accept that the evidence is capable of showing that Judge Kozielewicz decided

to dismiss the cassation proceedings in order to placate or find favour with any political faction in relation to the appellant. I do not accept that, on any specific or precise analysis, there is anything in the cassation proceedings to demonstrate that Judge Kozielewicz had any adverse animus to the appellant.

81. As regards the deployment of a seconded judge in the Court of Appeal, there has been no proper elucidation before me of any specific or precisely formulated unfairness caused by Judge Kalbarczyk's secondment. Even if the second instance proceedings constituted a trial, I agree with Mr dos Santos and with the DJ that her mere presence on the panel is insufficient to raise any bar to extradition. I do not accept that anything that happened in the cassation proceedings – whether before or after the DJ's decision – changes the position.

82. Mr Perry emphasised some passages in the DJ's long judgment which could (if taken out of context) suggest that the DJ relied on the fairness of the cassation proceedings as providing a safeguard against any unfairness created by the role of Judge Kalbarczyk in the Court of Appeal or in the trial process generally. He submitted that the DJ had relied on the fact that, at the time of the proceedings before him, the cassation appeal was proceeding in a conventional manner. That assumption had been proved wrong by the fresh evidence. Professor Kardas' evidence to the DJ was that the cassation appeal might lead to the reversal of the Court of Appeal's decision. There was other evidence before the DJ to suggest that the appellant had a cast iron cassation appeal. The DJ had found that the treatment of the appellant's appeal had "thus far demonstrated independence on the part of the judges of the criminal chamber" but he had assumed a fair cassation appeal.

83. I agree with Mr dos Santos that it is important not to cherry-pick certain passages in the DJ's judgment. The DJ did not found his decision on the basis of fair cassation proceedings. The existence and progress of the cassation appeal was not decisive to the DJ's judgment and was no more than one strand of his overall reasoning.

84. There is nothing in the fresh evidence to impugn the conclusion of the DJ that, on a specific and precise analysis of this appellant's case, the Polish judicial authorities meet the functional requirement of independence and impartiality. For these reasons, Ground 1 is dismissed.

85. As regards Ground 4, in my judgment, the high test of flagrancy is not met whether taking the fresh evidence on its own or in combination with the evidence that was carefully considered by the DJ. The appellant makes no specific criticism of the Regional Court. The appellant attended a lengthy trial consisting of 123 court days. He was represented by a team of lawyers who attended all hearings in person or via substitutes. The appellant attended most of the hearings. When he did not attend, his lawyers were content for the trial to continue in his absence save for specific occasions when adjournments were granted. Two of the counts against him were discontinued. He had notice of the date of the sentencing hearing which his lawyers attended on his behalf.

86. As regards the Court of Appeal, the Prosecution appeal against sentence was adjourned so that the appellant had proper notice. He was represented at the hearing by one of his lawyers. The panel which allowed the appeal consisted of three judges which would have acted as some protection against the predominance of any one judge's unlawful

views. As I have already mentioned, there is no specific or concrete criticism of anything done by Judge Kalbarczyk.

87. The Supreme Court was receptive to the appellant's requests to remove a number of judges from the panel. There is no evidence of any politician or member of the Polish Government putting pressure on the Supreme Court to dismiss the appellant's cassation appeal.

88. I accept that the appellant has, through the lens of the English common law, suffered serious procedural unfairness by Judge Kozielewicz's apparently peremptory or summary decision to convert an appeal in open court into a closed hearing on the papers without notice. I do not understand (and the respondent has not informed me) why it is lawful within a cassation appeal to overturn a previous interim decision that the appeal warranted a substantive hearing and to do so without providing the appellant with an opportunity to make representations. The principles of mutual trust and respect on which Part 1 of the Extradition Act is founded are not a substitute for the fundamental rights guaranteed to those who face extradition (*Tupikas*, para 59). I accept Mr Perry's submission that a combination of features of unfairness may meet the test of flagrant denial of justice (*Popoviciu* [2021] EWHC 1584 (Admin), para 145, which in this respect was not reversed on appeal).

89. However, Mr Perry was unable to point to any case in which either the domestic courts or the European Court of Human Rights has accepted that the flagrancy test may be successfully applied to cassation proceedings in isolation. In my judgment, questions of fair trial, at least in the present case, fall to be viewed in the context of the criminal proceedings as a whole and not by reference to one particular element or instance. In circumstances where the appellant has had a full opportunity to defend himself at two instances, the Supreme Court's decision is unfair but falls short of a nullification or destruction of the very essence of a fair trial. For these reasons, Ground 4 is dismissed.

Ground 2

The parties' submissions

90. Under Ground 2, Mr Perry submitted that Judge Kozielewicz's decision should be treated as a merits appeal forming part of the trial process that determined guilt because it was apparent from the statement of reasons that the judge had investigated the underlying merits of the case. The cassation decision therefore engaged the protections of s.20. Given that the cassation decision was taken on the papers without notice to the appellant's lawyers, the appellant was not present at the appeal and his lawyers had not participated to any adequate extent. There is no way of challenging the cassation decision and so no right to a retrial. The fresh evidence demonstrates, therefore, that the appellant's discharge would breach s.20(7) of the Act.

91. Mr dos Santos submitted that a cassation appeal does not in the present case constitute a "trial" within the meaning of the Framework Decision as it was a second appeal which did not entail a re-examination of the merits of the Prosecution case against the appellant. Mr dos Santos relied on *Tupikas* which makes plain that the concept of a "trial" involves an assessment of the merits of the accusations in fact and in law (para 79). A trial involves an assessment of the "incriminating and exculpatory evidence" (para 81) and "the substance of the case" (para 87). It is clear from the statement of

reasons that Judge Kozielewicz did not deal with the merits or substance of the accusations against the appellant. He applied a restricted appellate jurisdiction of a sort which does not ordinarily engage article 4a of the Framework Decision or section 20 of the Act (*Jakubowski*, para 21).

Discussion

92. I agree with Mr dos Santos' submissions. The court in *Jakubowski* observed at para 21 that cassation appeals do not ordinarily depend on re-examination on the merits of the case. On the facts of the present case, I am not persuaded that the Polish Supreme Court's decision was anything other than the exercise of a limited appellate jurisdiction. Judge Kozielewicz did not deal with the substance or re-examine the merits of the charges that form the subject of the arrest warrant.

93. I have not been directed to or asked to consider any grounds of appeal to the Supreme Court other than matters relating to the lack of independence and impartiality of Judge Kalbarczyk in the Court of Appeal. An appellate challenge relating to bias of a lower court is in my judgment a far cry from the re-examination of the substance of the charges and from any determination of the appellant's guilt or innocence which would require his or her lawyer's presence. The fresh evidence does not provide grounds to discharge the appellant on the grounds that he was not present at his trial within the meaning of s.20 of the Act. For these reasons, Ground 2 is dismissed.

Conclusion

94. I am not persuaded that, whether taken on its own or with the evidence before the DJ, the fresh evidence would have resulted in a question being decided differently such that the DJ would have been required to order the appellant's discharge. I refuse to admit the fresh evidence because it would make no difference and I dismiss this appeal.