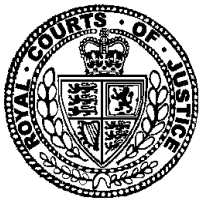

Neutral Citation Number: [2023] EWHC 764 (Admin)

Case No: CO/2212/2022

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

Friday, 31st March 2023

Before:
MR JUSTICE FORDHAM

- -

Between:

DAMIAN BACIEJOWSKI	**Appellant**
- and -	
DISTRICT COURT IN KOSZALIN, POLAND	**Respondent**

- -
- -

Genevieve Woods (instructed by Abbey Solicitors) for the **Appellant**
Gary Dolan (instructed by CPS) for the **Respondent**

- -

Hearing date: 9.3.23

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

- -

THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This is an extradition case at whose heart are grounds of appeal as to whether it would be "unjust or oppressive to extradite" the Appellant "by reason of the passage of time since he is alleged to have committed the extradition offences" (section 14 of the Extradition Act 2003) or whether extradition would be incompatible with Article 8 ECHR rights to respect for private and family life (section 21A(1)(b). There is also a distinct issue about statutory proportionality (section 21A(1)(b)). In order to do justice to the arguments of Ms Woods for the Appellant on section 14 and Article 8, I will need to conduct an analysis of the sequence of events across a timeline from 2010 to 2021, dealing along the way with a series of eleven issues referable to points in that timeline. But before doing that I will set the scene, address the section 21A(1)(b) issue, and discuss 'missed opportunity' extradition and 'speciality' protection.

2. The Appellant was born in November 1991 and is aged 31. He is wanted for extradition to Poland. That is in conjunction with an 'accusation' Extradition Arrest Warrant ("the ExAW") issued on 11 July 2019, certified by the National Crime Authority on 6 May 2021, on which he was arrested on 14 September 2021. There are two alleged offences ("the Alleged Index Offences") of which he is accused and is wanted to stand trial, pursuant to the ExAW. First, on 6 May 2011 (aged 19) he allegedly obtained a bank loan by fraud in a sum equivalent to £377, by falsely stating to the lending bank that he was employed by a named employer ("the Bank Loan Fraud"). Secondly, on 1 October 2011 (also aged 19) he allegedly committed a violent assault, beating the victim and kicking them to the head ("the Assault"). The statutory maximum sentences in Poland are imprisonment for 8 years (the Bank Loan Fraud) and 5 years (the Assault). After an oral hearing on 13 May 2022, at which the Appellant adopted his October 2021 witness statement and gave oral evidence, with cross-examination, DJ Clews ("the Judge") ordered the Appellant's extradition for reasons set out in a judgment dated 13 June 2022 ("the Judgment"). The documentary evidence before the Judge included a document issued on 5 October 2021 by the Criminal Records Office (the "ACRO Document") and Further Information from the Respondent dated 5 January 2022 and 31 January 2022. The oral evidence given by the Appellant was summarised in detail in the Judgment. The Judge rejected arguments based on bars to extradition arising by virtue of section 14, Article 8 or section 21A(1)(b). My responsibility is to decide whether I think the Judge was "wrong" to do so.

Section 21A(1)(b)

3. I will start with the distinct issue raised in relation to the statutory proportionality test in section 21A(1)(b), read with (2) and (3). Ms Woods says that the Judge was "wrong" not to discharge the Appellant in relation to the Bank Loan Fraud. I am satisfied that there is no legal merit in that argument. The Judge impeccably summarised the substantive contents of the statutory provisions and Criminal Procedure Rules Practice Direction, and the principles derived from Miraszewski v Poland [2014] EWHC 4261 (Admin) [2015] 1 WLR 3929. He correctly identified, as a listed "type of offence" in respect of which a judge ought generally to determine that extradition would be disproportionate unless there are exceptional circumstances: "obtaining a bank loan using a forged or falsified document". He also correctly identified, as listed examples of "exceptional circumstances": (i) significant pre-meditation; (ii) extradition also

sought for another offence; and (iii) previous offending history. Ms Woods says the Judge was "wrong" to say "it is inevitable that an offence of this kind will have involved significant pre-meditation". She says: (a) obtaining a bank loan on false employment information (as alleged here) could be "spur of the moment"; and (b) the ExAW description does not provide any description of pre-meditation. To these, I would add a third: (c) it cannot be correct, as a coherent interpretation of the Practice Direction, that an identified "inevitable" feature of a listed "type of offence" is at the same time an inevitable "exceptional circumstance". That interpretation would simultaneously give with one hand and take with the other. The reason why this point has no legal merit is that the Judge found a 'full house' of exceptional circumstances. The Judge unassailably found: that extradition is being sought for another offence; and that the Appellant has a significant offending history in Poland. Moreover, as to the latter, as the Judge pointed out, the alleged Bank Loan Fraud would have been committed (6.5.11) while awaiting being dealt with for criminal damage and theft (of which the Appellant was convicted on 18.5.11). I would add that the Bank Loan Fraud would also have been committed the same day as a 2 year suspended sentence took effect, for robbery and attempted theft; and the Assault would have been committed during the currency of three suspended sentences. Even if I were to retake the section 21A(1)(b) evaluative exercise, I agree with the Judge as to the outcome. This ground fails.

'Missed Opportunity' Extradition

4. An important feature of the case is what I am going to call 'missed opportunity' extradition. The Appellant was extradited to the same requesting state (Poland) in the past. In 2013 he was extradited there from Germany, after German extradition proceedings in the first half of 2013 (the "2013 Extradition"). His extradition surrender was on 1 July 2013. It is common ground that he did not consent to the 2013 Extradition, which is known to have had the following features. It did not relate to the Alleged Index Offences. It related only to certain 2011 convictions, imposed for certain 2010 offences ("the 2010 Offences"), in respect of which suspended sentences imposed in 2011 had been 'activated' in early 2012. Those features can all reliably be deduced from the ACRO Document, as can the "beginning of the sanction" (23.4.13) reflecting the start of qualifying remand in Germany. The ACRO Document describes the overall sentence to be served in Germany as having been determined (on 11.3.14) as 3 years 4 months, credit having been given for a period of remand in Poland (20.9.10-28.4.11). After the 2013 Extradition, it is known that the Appellant served his term of imprisonment in Poland until being released (12.1.16) and given 45 days to leave Poland (the "45 Day Notice"). The 2013 Extradition has been characterised by Ms Woods for the Appellant as a 'missed opportunity' extradition. That is because charging decisions had been taken in relation to the Alleged Index Offences: on 20 December 2011 (the Assault); and on 13 July 2012 (the Bank Loan Fraud). Moreover, in conjunction with the Alleged Index Offences, a prohibition was issued (20.12.12) on the Appellant leaving Poland (the "December 2012 Prohibition"). Furthermore, the Respondent's position is that by October 2013 the Alleged Index Offences were able to be put at a court hearing in Poland. One way or another, says Ms Woods, the Alleged Index Offences could have been pursued in conjunction with the 2013 Extradition. That opportunity was missed.

The Shielding Safeguard of "Specialty"

5. Another feature of this case is the specialty (or "speciality") rule, described as follows by Sir Declan Morgan in Warner v Attorney General of Trinidad and Tobago [2022] UKPC 43 at §65:

> ***Specialty is a rule of extradition law that is intended to ensure that the person extradited is not dealt with in the requesting state for any offence other than that for which he was extradited.***

As the Explanatory Notes to the Extradition Act 2003 put it (at §53):

> ***The speciality rule is a long-standing protection in extradition. It prohibits a person from being prosecuted in the requesting territory after his extradition for an offence committed before his extradition. The exceptions to this rule are where the offence is that in respect of which he was extradited, where the consent of the requested state is obtained or the person has had an opportunity to leave the country to which he was extradited but has failed to do so.***

This 'shielding safeguard' of specialty is seen at Article 27(2) of the EU Framework Decision 2002/584/JHA (to which Article 13(1) makes reference), with exceptions identified at Article 27(3). The provisions of Article 27, references to which will feature heavily throughout this judgment, and Article 13 are set out below. The following observations can be made. (1) The relevance of the 45 Day Notice (§4 above) can be seen from Article 27(3)(a) (and also in s.17(5) of the 2003 Act). (2) An exception based on renunciation accompanying prior consent to extradition, while the requested person is in the executing state (here, Germany in the first half of 2013), is seen at Article 27(3)(e) read with Article 13. (3) An exception based on renunciation after surrender, when the requested person is back on the issuing state (here, Poland after 1.7.13) is seen at Article 27(3)(f) (and reflected in s.17(2)(f) of the 2003 Act). (4) An exception based on consent from the executing state (here, Germany) after the requested person is surrendered to the issuing state (here, Poland after 1.7.13) is seen at Article 27(3)(g) and (4) (reflected, for requests where the UK was the executing state, in s.54 of the 2003 Act).

6. Article 27 (entitled "Possible prosecution for other offences") provides as follows:

> ***(1) Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to carrying out of a custodial sentence or detention with a view to the carrying out of a custodial sentence or detention order for the offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.***
>
> ***(2) Except in the cases referred to in paragraphs (1) and (3), a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.***
>
> ***(3) Paragraph (2) does not apply in the following cases: (a) When the person having had an opportunity to leave the territory of the Member State to which he or she has been surrendered has not done so within 45 days of his or her final discharge, or has returned to that territory after leaving it; (b) The offence is not punishable by a custodial sentence or detention order; (c) The criminal proceedings do not give rise to the application of a measure restricting personal liberty; (d) When the person could be liable to a penalty or a measure not involving the deprivation of liberty, in particular a financial penalty or a measure in lieu thereof, even if the penalty or measure may give rise to a restriction of his or her personal liberty; (e) When the person consented to be surrendered, where appropriate at the same time as he or she***

> ***renounced the speciality rule, in accordance with Article 13; (f) When the person, after his/her surrender, has expressly renounced entitlement to the speciality rule with regard to specific offences preceding his/her surrender. Renunciation shall be given before the competent judicial authorities of the issuing Member State and shall be recorded in accordance with the State's domestic law. The renunciation shall be drawn up in such a way as to make clear that the person has given it voluntarily and in full awareness of the consequences. To that end, the person shall have the right to legal counsel; (g) Where the executing judicial authority which surrendered the person gives its consent in accordance with paragraph (4).***
>
> ***(4) A request for consent shall be submitted to the executing judicial authority, accompanied by the information mentioned in Article 8(1) and a translation as referred to in Article 8(2). Consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision. Consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4. The decision shall be taken no later than 30 days after receipt of the request.***

7. Article 13 (entitled "Consent to surrender") provides as follows:

> ***(1) If the arrested person indicates that he or she consents to surrender, that consent and, if appropriate, express renunciation of entitlement to the 'speciality rule', referred to in Article 27(2), shall be given before the executing judicial authority, in accordance with the domestic law of the executing Member State. (2) Each Member State shall adopt the measures necessary to ensure that consent and, where appropriate, renunciation, as referred to in paragraph 1, are established in such a way as to show that the person concerned has expressed them voluntarily and in full awareness of the consequences. To that end, the requested person shall have the right to legal counsel. (3) The consent and, where appropriate, renunciation, as referred to in paragraph (1), shall be formally recorded in accordance with the procedure laid down by the domestic law of the executing Member State. (4) In principle, consent may not be revoked. Each Member State may provide that consent and, if appropriate, renunciation may be revoked, in accordance with the rules applicable under its domestic law. In this case, the period between the date of consent and that of its revocation shall not be taken into consideration in establishing the time limits laid down in Article 17. A Member State which wishes to have recourse to this possibility shall inform the General Secretariat of the Council accordingly when this Framework Decision is adopted and shall specify the procedures whereby revocation of consent shall be possible and any amendment to them.***

Three 'Missed Opportunity' Extradition Cases

8. Three cases were cited to me on the subject of 'missed opportunity' extradition. I have found each of them helpful as 'working illustration' cases. I will introduce them now and identify what they decided. First, Zapala v Poland [2017] EWHC 322 (Admin) (Blake J, 24.2.17). Mr Zapala was wanted for extradition to Poland on a conviction European Arrest Warrant ("EAW") (5.16) to serve a 12 month sentence (8.07) for the offence of driving while disqualified (DWD) (12.06). He had come to the UK (originally as a fugitive: §23iv) and been resident here since 2007, beginning a family life with a partner (in 2008: §23v) and having a child together (in 2011: §3), being the young child's joint carer and sole financial support for partner and child (§23ii). He had "changed his life" by 9 years in the UK with remunerative employment and no re-offending (§23i). The "missed opportunity" (§24) was a 2013 extradition from Croatia to Poland, on an accusation EAW relating to an alleged theft (12.07), involving a surrender (5.6.13), then trial, conviction (11.13) and 8 month sentence until release (4.14), after which Mr Zapala had returned to the UK within the (Article 27(3)(a)) period of 45 days (§15). He was no longer a fugitive from June 2013 (§23iv). While

detained in Poland, by letter (18.9.13), he had been asked to consent (Article 27(3)(f)) to being dealt with for the DWD, being told that without which consent the 12 month sentence (8.07) "cannot be executed". He did not consent, as was his entitlement (§23iii). But the Polish authorities "could and should have sought the consent of Croatia so he could have been dealt with for all outstanding matters" (Article 27(3)(g)(4)), with sufficient time to do so (§23iv). There was no "indefinite bar" on Poland subsequently enforcing the DWD sentence (§17), and its pursuit by extradition was understandable, albeit this was "in the lower range of criminality" (§22ii). However, the events had engendered "false sense of security": from the letter (18.9.13) and the absence of an evidenced explanation of consequences (§20), it was reasonable to suppose that Mr Zapala believed the DWD sentence could not (ever) be enforced without his consent (§19); and "the experience in 2013" (§23vi) made it reasonable for "the family" to conclude that all "past offending in Poland had now been addressed" (§23v). This was "a second extradition for an elderly offence" (§23vii). It would mean the family, and young child, now facing "undoubted" emotional and economic "hardship", being "different kinds of hardship" from a "second return" (§§23viii, 24). Re-evaluating the Article 8 balance given new information (§21), extradition was a disproportionate Article 8 interference (§24). By way of an encapsulation, I think what Zapala decided was this:

> ***Zapala encapsulated. On all the facts of the case, the extradition of a requested person, who had changed his life during 9 years in the UK, to serve a 12 months sentence for a 10 year old offence in the lower range of criminality, was Article 8-incompatible as a disproportionate interference with private and family life rights, given in particular (a) the emotional and economic hardship impacts of a 'second extradition' for his partner and young child and (b) the 'missed opportunity extradition' which severed his fugitivity and whose circumstances had engendered for the whole family a 'false sense of security'.***

9. Secondly, Szlichting v Poland [2017] EWHC 1006 (Admin) (Sir Ross Cranston, 24.3.17). Mr Szlichting was wanted for extradition to Poland, inter alia, on an accusation EAW (7.16) to face trial for an alleged offence of giving false details to the police ("FDP") (3.13). A second offence was discharged (§11). Mr Szlichting had come to the UK (after March 2013: §16) and had lived here with his wife and children (who by 2016 were aged 12, 17 and 19: §15). He had employment and no convictions in the UK but was not the sole or primary carer for the 12 year old, whose working mother was able to support her (§16). Later during 2013 he had been extradited from the UK to Poland on a 2013 conviction EAW, serving a 2½-year sentence, then being released and returning to his family in the UK in 2015 (§17). While in Poland, the Polish authorities had invited him to consent to being dealt with for the FDP offence; he had declined consent. He had a right to do so, and the Polish authorities could have sought the UK's consent (Article 27(3)(g)(4)), which meant the delay was "attributable" to them "in a sense" and "to an extent", but "certainly" not "solely" (§21). Even on an Article 8 rebalancing (§22) there was no Article 8 incompatibility. The FDP offence was not trivial and the delay was not "unusually long" (§22). And unlike Zapala (§20), there was no "false sense of security" engendered by the circumstances of the earlier extradition, there being "no evidence" that he was "told that that was the end of the matter" or "could legitimately take the view that the Polish authorities would not pursue him any further" (§23). The same outcome arose as to a separate conviction EAW (§29). By way of an encapsulation, I think what Szlichting decided was this:

> ***Szlichting encapsulated. On all the facts of the case, the extradition of a requested person to face trial for an alleged non-trivial 4 year old offence was Article 8-compatible as a***

> ***proportionate interference with private and family life rights, where his working wife could care and provide for their now-teenage daughter, and where the circumstances of the earlier 'missed opportunity extradition' (a) meant a shared responsibility for the (not unusually long) period of delay and (b) had engendered no "false sense of security".***

10. Thirdly, Prystaj v Poland [2019] EWHC 780 (Admin) (Supperstone J, 28.3.19). The Prystaj brothers were on tagged-curfew (§46), wanted for extradition to Poland on accusation EAWs (6.17) to face trial for an alleged offence (8.11) of robbery (§§1, 3). They had come to the UK in August 2011 (§§6-7). Adrian Prystaj had weekend contact with his 9 year old daughter (§38); Patryk Prystaj had no other UK-based family or dependants (§44). Adrian had previously been extradited to Poland (16.4.15) on 3 EAWs and had then returned to the UK (10.15). Patryk had previously been extradited to Poland (5/6.14) on an EAW and had then returned to the UK (7.14). It was acknowledged that there had been "some culpable delay" between "the previous extraditions" (2014/2015) and the current EAWs (6.17) (§§32, 45). It was also acknowledged that there had been a "failure to deal" with these matters by "timely consent request" (Article 27(3)(g)(4)) when the Prystaj brothers were previously extradited (§§34, 45). But no Zapala "false sense of security" had been engendered (§44). Extradition was not an abuse of process (§29) and was compatible with section 14 (§§37-40) and Article 8 (§§41-46). As to s.14 injustice, 7½ years later a fair trial remained possible (§37). As to s.14 oppression, there was no hardship amounting to oppression (§38), this being a serious offence (§39). As to Article 8, the interference was proportionate given the weighty public interest considerations (§45), despite the "culpable delay" and "failure to deal" (§43, 45), given the "limited family life" and absence of a "false sense of security" (§44), and notwithstanding the tagged-curfew (§46). By way of an encapsulation, I think what Prystaj decided was this:

> ***Prystaj encapsulated. On all the facts of the case, the extradition of requested persons to face trial for a serious 7½ year old offence was not an abuse of process and was compatible with section 14 and Article 8, the impacts of extradition for family members being limited, and the circumstances of earlier 'missed opportunity extraditions' – albeit followed by a period of "culpable delay" – had engendered no "false sense of security".***

2010-2012

11. I turn then to analyse the timeline of the case, addressing along the way eleven issues raised by the Appellant on this appeal. We can start in 2010 (aged 18) when the Appellant committed criminal damage and theft offences between 25 February and 26 April 2010. For these, he was later convicted on 18 May 2011, and sentenced to a two-year sentence of imprisonment suspended for five years, taking effect from 26 May 2011. Then on 25 July 2010 the Appellant had committed an offence of theft. For that, he was later convicted on 4 August 2011 and sentenced to a six month custodial sentence suspended for five years taking effect from 12 August 2011. Then, between 23 August 2010 and 20 September 2010, the Appellant had committed offences of robbery and attempted theft. For those, he was convicted on 28 April 2011 and sentenced to a two-year custodial sentence suspended for five years taking effect from 6 May 2011. The Appellant was detained on remand between 20 September 2010 and 28 April 2011. These convictions and sentences were all in 2011 (aged 19). 2011 was also the year in which the Alleged Index Offences of the Bank Loan Fraud in May 2011 and the Assault in October 2011 are said to have been committed. What happened in 2012 (aged 20) was that the three suspended sentences are all recorded as having been "revoked": on 27 January 2012 (criminal damage and theft); and on 16 March 2012

(theft; robbery and attempted theft). In relation to the Alleged Index Offences the prosecutor had ordered a search for the Appellant on 31 July 2012 and the December 2012 Prohibition was issued on 20 December 2012. The Appellant's evidence to the Judge was that he left Poland to go to Germany in December 2012 (aged 21) and did so before 20 December 2012.

12. A first issue for me to consider is this. Ms Woods submits as follows. There was a period of material inactivity by the Polish authorities in relation to the Alleged Index Offences, during 2011 and 2012, given that the Appellant was not arrested or interviewed. The Judge was wrong not separately to assess this period, as a period of unexplained and indeed culpable delay, part of what engendered a false sense of security. I cannot accept those submissions. The Judge was very well aware of the circumstances and events in 2011 and 2012. Describing the charging decision (13.7.12) in relation to the Bank Loan Fraud (6.5.11), he pointed out that such a fraud presumably came to light in the context of non-repayment. He identified the charging decision (20.11.11) in relation to the Assault. There was the prosecutor's order of a search for the Appellant (31.7.12), after which there was the December 2012 Prohibition (20.12.12). There was no need to say more. It is impossible, in my judgment, to attribute to any of this the descriptions of material inactivity, unexplained delay, culpable delay, or the engendering of a false sense of security. On this first issue, my conclusion is as follows:

> ***Conclusion. There was no material, unexplained or culpable delay in the period 2011/2012.***

First Half of 2013

13. The Appellant (aged 21) was in Germany from December 2012 until 1 July 2013 when he was surrendered to Poland in the 2013 Extradition. His evidence to the Judge was that he was in custody on remand in Germany for three months prior to extradition. That reflects the ACRO Document which records 23 April 2012 as the "beginning of the sanction".

14. A second issue for me to consider is this. The Judge agreed with the Respondent that the Appellant "was a fugitive when he left Poland for Germany in December 2012", finding that he "was in breach of the terms of a suspended sentence when he left" Poland for Germany and "I am satisfied to the criminal standard that at that time he was a fugitive from Polish justice". A consequence of a fugitivity finding was that the time "from then" could not "count towards a passage of time argument" under section 14. The basis for the Judge's finding is clear. It was not based on breach of the December 2012 Prohibition: the Judge, unimpeachably, was not sure that the Appellant had left after it and so in breach of it. It was instead based on "breach of the terms of a suspended sentence". The Judge cited and applied Wisniewski v Poland [2016] EWHC 386 (Admin) [2016] 1 WLR 3750. The "breach" and "terms" were referable to what the Judge, earlier in the Judgment, described as the Appellant's own oral evidence (the "JA" is the Respondent):

> ***He was asked if it was correct, as the JA asserted, that he was returned from Germany to Poland in July 2013? He said he could not remember. He was in custody in Germany for 3 months before extradition to Poland. He thought the aggregated sentence he received was 5 yrs, of which he served 3½ yrs. He had already received that sentence when he left for Germany in December 2012 but it had been suspended. It was activated because he went to Germany for work and did not keep in touch with his probation officer (once in Germany).***

15. Counsel submit as follows. Ms Woods submits that this fugitivity conclusion was legally unsafe. She says, in essence: (1) the Respondent's case on fugitivity was based solely on the December 2012 Prohibition and not on failure to keep in touch with probation; (2) the Judge failed to appreciate that the Appellant's oral evidence about a sentence being "activated" was describing an earlier visit to Germany; and (3) the Judge's assessment does not square with the ACRO Document, in which the only 'revocations' recorded were in early 2012 (27.1.12 and 16.3.12) and no 'suspended sentence' (or 're-suspended' sentence) is recorded as being in place at December 2012. Mr Dolan responds that point (1) is clearly contested in the Respondent's Notice submissions (19.7.22), drafted by Counsel who appeared as Ms Woods' opponent before the Judge, and has not been made good by evidence. As to points (2) and (3), Mr Dolan submits that the Judge, who had and had in mind the ACRO Document, enjoyed the considerable advantage of hearing the live evidence and assessing what the Appellant was saying about "activation"; and that it was entirely open to the Judge to be sure that when the Appellant had gone from Poland to Germany in December 2012 he had failed to keep in touch with probation, this constituting him a fugitive under Wisniewski.

16. In my judgment, there is force in Ms Woods's point (3). The ACRO Document does not support the Wisniewski analysis of fugitivity as at December 2012. It supports the view that there was an earlier "activation" (January and March 2012) of suspended sentences; that there was no "suspended sentence" in place in December 2012; and that there was no post-December 2012 "activation". Having said that, the ACRO Document is problematic even on the Appellant's own case. His evidence – not disputed – was that he was detained in 2012 in Poland, then released, and then went to Germany in December 2012. The ACRO Document contains nothing to explain the Appellant being detained in 2012 (the Further Information describes decisions on 2 March 2012 and 31 May 2012 to charge him with "other crimes", for which he was "wanted"); still less to explain why he was then released. It is also striking that a prosecutor would order a search for the Appellant (31.7.12) in relation to the Alleged Index Offences, if he was in Polish custody. All of this is a conundrum. In my judgment, given that a suspended sentence in place in December 2012 is not supported by the ACRO Document, and absent a plausible explanation for that, an adverse conclusion on fugitivity to the criminal standard for the period December 2012 to July 2013 cannot be maintained. On this second issue, I have concluded as follows:

Conclusion. The Appellant was not a fugitive during the period December 2012 to July 2013.

17. A third issue for me to address is this. Ms Woods submits that the 2013 Extradition constituted a clear 'missed opportunity'. One reason for this is that the Alleged Index Offences could have been included within the scope of an EAW in the first half of 2013, which would then have been dealt with in Germany after the extradition surrender (1.7.13), consistently with the specialty rule (Article 27(2)). That would have meant a criminal process in Poland after July 2013 in respect of the Alleged Index Offences. If the Appellant were convicted, it would have meant a single period in prison. The release date would have been after January 2016, but it would all have been dealt with in one sentence at one time. This is the same submission which Ms Woods made to the Judge, as recorded in the Judgment:

> ***[A]s these offences pre-date the ones for which he was extradited from Germany these offences could and should have been included in that warrant, in which case they could have been dealt with upon his arrival in Poland from Germany.***

The Judge concluded that it was "possible" that the Alleged Index Offences could have been included in the 2013 Extradition. He said this:

> ***The … submission made that Poland could have included these matters in the German warrant appears to have a sound basis but I cannot be sure what the state of the evidence was at that time … The [Appellant] first became suspected of these two offences in December 2011 (Assault) and July 2012 (Bank Loan). Presumably the suspicion in relation to the latter offence arose when he failed to make repayments. But it is not known to me whether at those times the available evidence was sufficient to prosecute him. It was submitted to me, that these offences could have been included in the warrant which sought his extradition to Poland from Germany in 2013. It is possible that is the case but I cannot be sure of it in the absence of information about the available evidence at that time.***

In my judgment, the Judge's assessment is unimpeachable and there is no basis to go behind it. Ms Woods was unable to point to any basis on which this assessment by the Judge was an understatement. Mr Dolan was unable to point to any basis on which it was an overstatement. On this third issue, I have concluded as follows.

> ***Conclusion. It is possible that in 2013 the Respondent could have included the Alleged Index Offences in an EAW within the scope of the 2013 Extradition.***

July 2013 Onwards

18. Having been surrendered in the 2013 Extradition, the Appellant was back in Poland, serving the remainder of his custodial sentences for the conviction matters on which he had been extradited. That imprisonment in Poland carried on through 2014 (aged 22) and 2015 (aged 23). It came to an end on 12 January 2016 (aged 24) when the Appellant was released. The Appellant had not consented to extradition (Article 13), still less had he renounced specialty protection on giving such consent (Article 27(3)(e)). Having not been extradited for the Alleged Index Offences, the consequence of his specialty protection was that criminal proceedings could not be taken against him in Poland at this time for those alleged offences, absent post-surrender consent from him with regard to the Alleged Index Offences (Article 27(3)(f)) or consent secured from the German authorities (Article 27(3)(g)(4)).

19. The fourth issue for me to consider is this. Having decided that the Appellant was a fugitive in the first half of 2013 in Germany (§14 above), the Judge went on to find that he continued to be a fugitive from July 2013 to January 2016. The Judge's reasoning was that the Appellant remained a fugitive "until he was released from his sentence in Poland (having been extradited from Germany to serve it) in January" so that "none of the time can count towards a passage of time argument" under Article 14. Ms Woods submits that, even leaving aside the question of fugitivity in the first half of 2013, this was not a sustainable finding of fugitivity. Mr Dolan concedes that she is right. I agree with them both. Even if the Appellant had been a fugitive up to June 2013, by 1 July 2013 he had been surrendered safely back in Poland, into the hands of the Polish authorities, within the Polish custodial system. The only sense in which he was "beyond the reach of the legal process" was because of the scope of the 2013 Extradition and the application of the specialty shield. In agreement with both parties, I cannot see how that can constitute fugitivity. Nor could Blake J in Zapala at §23iv. Insofar as Szlichting §22

hints at a contrary view, it was not argued or analysed. Mr Dolan concedes that, on the basis of this issue alone, it is appropriate for me as the appeal Court to "retake" the section 14 and Article 8 evaluative exercises, since no adverse finding of fugitivity (to January 2016) ought to have featured. On this fourth issue I have concluded as follows.

> ***Conclusion. The Appellant was not a fugitive during the period July 2013 to January 2016.***

October 2013

20. The fifth issue for me to consider arises out of the position in and after October 2013. The Judge reached these key findings of fact, adverse to the Appellant (who he described as the "RP") (Judgment §35):

> ***35. I … accept the JA's information that the RP was made aware it was intended to prosecute him for these offences when he appeared in court in Poland in October 2013. I do not accept the RP's assertion he knew nothing of any further offences against him in January of 2016 when he was released from prison in Poland, or until he discovered the police were looking for him in the UK. His evidence in this respect was contradictory and unsatisfactory.***

By "these offences", the Judge was referring to the Alleged Index Offences. The Judge found that the Appellant had "appeared in court in Poland in October 2013". This is a clear reference to a hearing in Poland for the purposes of the question of denunciation of specialty (Article 27(3)(f)). The Judge found as a fact that the Appellant was, as a consequence of such a court appearance, "made aware" that the Polish authorities "intended to prosecute him" for the Alleged Index Offences. The Judge disbelieved the Appellant, who said he had been in ignorance of these matters until 2021 when he discovered that the police were looking for him. Ms Woods emphasises that these adverse findings of fact were highly material throughout the Judge's subsequent analysis of the section 14 and Article 8 issues, throughout the Judgment. I agree. The Judge's findings about an October 2013 court appearance, and the situation what the Appellant was as a consequence "made aware", were highly relevant to the Judge's characterisation of delay and the passage of time, and to the Judge's adverse findings on the Appellant having a "false sense of security". In the context of section 14, the Judge said this (Judgment §§44, 48, 50):

> ***44. It was in October 2013 that the RP declined to give his consent for these matters to be dealt with … when he appeared in court in Poland…***
>
> ***48. Whilst it cannot properly be said the RP is responsible for any delay, in the sense there is no negligence or dithering by him, nevertheless it is a reasonable stance to suggest he has engineered the delay by declining to consent to these matters being dealt with when he was in Poland, even though he was entitled to. In those circumstances, it lies ill in his mouth, in my view, for him to seek to be given with one hand when he himself has taken away with the other.***
>
> ***50. … The RP knew when he declined to give his consent to these matters being prosecuted when he was in Poland, that they were not going to 'go away' and he must have expected that Poland would in due course, seek his extradition in respect of them. There is nothing in my judgement that would make his extradition oppressive. It would not be unfair to extradite him.***

In the context of Article 8, the Judge said this (Judgment §§82-83, 85):

> ***82. What is clear, (from the further information) is that the RP was asked for his consent to the two offences being dealt with (by way of preparatory hearing) in October 2013 when he***

> ***was dealt with at court in Poland. He declined as he was entitled to do. There does not seem to be a great deal of difference in the timeline between the two possibilities of him being asked for his consent at court in Poland or of Germany being asked for its consent during the extradition proceedings in early to mid 2013.***
>
> ***83. Whilst it is true that from October 2013, when the RP was sentenced at court in Poland, he was then in custody serving a sentence for the next 3 yrs 4 months for offences that post date these, the fact is he knew from October 2013 onwards that Poland intended to prosecute him for these two offences also. It is thus impossible for me to accept Ms. Woods' submission that he was to any degree led into a 'false sense of security' by the passage of time…***
>
> ***85. The RP cannot be criticised for exercising his right not to consent to these matters being dealt with in 2013, but by the same token he cannot have it both ways and then say there has been culpable failure by the JA to deal with these matters earlier particularly when he knew the day of reckoning would one day dawn and when he himself chose to postpone the date of its arrival.***

21. Ms Woods submits as follows. The Judge was wrong to find that there was any court-appearance in October 2013, from which the Appellant was made aware that the Polish authorities intended to prosecute him for the Alleged Index Offences. That is because:

i) The Judge rested these adverse conclusions squarely on the Further Information. He referred to "the JA's information" (Judgment §35) and described a position being clear "from the further information" (Judgment §82): see §20 above. But the Judge misunderstood what the Further Information was describing.

ii) The first round of Further Information (4.1.22) said this:

> ***The Local Court in Bialogard, by its decision of 15 February 2019, ref. II Kp 12/19, applied temporary arrest against Damian Baciejowski for the period of 30 days from the date of his arrest. However, Damian Baciejowski was not actually arrested in the case due to the impossibility of his capture. Maciej Baciejowski has never appeared in court in connection with any of the charges in the case.***

The "charges in the case" are the Alleged Index Offences. The important words are "never" and "in connection with". A hearing as to whether a requested person will renounce specialty, conducted before competent judicial authorities (Article 27(3)(f)), would necessarily be appearing in court "in connection with" the Alleged Index Offences. There is no justification for reading "as a defendant" into the Further Information. The Further Information is communicating that such a hearing has "never" happened.

iii) The second round of Further Information (31.1.22) was a response to Questions which were as follows:

> ***i. He [the Appellant] says he has never been arrested or interviewed in respect of either offence in the ExAW. The first he knew of the two allegations is when he was arrested in 2021 in the UK. Is he right about this? If he was, what the reason for the imposition of the ban on him leaving Poland in the year from December 2012 – December 2013 and the imposition of the Article 75(1) requirement?***
>
> ***ii. He says he was extradited to Poland from Germany in 2012 in relation to unrelated matters. He says was in custody in Poland for four years thereafter. He was released in 2016 and told that he had to leave the country within 45 days. The implication of this is that there was an opportunity for consent to be sought and for***

> ***him to be prosecuted for these offences at that juncture. What is your response to that assertion?***
>
> ***(iii) The decision on temporary arrest was made on 15th February 2019. Why does that come seven years after the decision to recognise the RP as a suspect in both cases?***

The Further Information in response (31.1.22) said this:

> ***(i) The allegation of Damian Baciejowski is not true as on 31 July 2012, the prosecutor ordered his search for the purpose of establishing his place of residence in the entire territory of the Republic of Poland and he was entered into the Schengen Information System on 8 August 2012 in connection with crimes listed in the European Arrest Warrant. At that time Damian Baciejowski was already wanted by an arrest warrant for other crimes he was charged with under decisions of the Local Court in Bialogard dated 2 March 2012 and 31 May 2012. Damian Baciejowski's claim that he did not see the charges is probably his line of defence based on the fact that due to his fugitive status (including in other cases), it was not possible to detain him and announce the charges indicated in the ExAW to him. The ban on leaving the country was imposed on him in order to formally prevent him from leaving Poland and continuing to hide from law enforcement authorities abroad. The obligation referred to in Article 75 §1 of the Code of Criminal Procedure is imposed on every suspect by law. Moreover, Damian Baciejowski, in connection with his extradition from the Federal Republic of Germany in 2013, was informed about the proceedings conducted against him by the District Prosecutor's Office in Bialogard and did not consent to his prosecution for these acts, and therefore knew very well about the new charges against him.***
>
> ***(ii) Damian Baciejowski was extradited from the Federal Republic of Germany to the Republic of Poland on 1 July 2013 in connection with a European Arrest Warrant covering other acts for which he had previously been validly sentenced by Polish courts. The Local Court in Bialogard, by the decision of 15 October 2013, ref. no. II Kp 123/13, stated that Damian Baciejowski did not consent to preparatory proceedings being conducted against him by the Local Prosecutor's Office in Bialogard, i.e. for acts other than those in connection with which he was extradited under the ExAW. Therefore, there was no possibility to prosecute Damian Baciejowski by the Local Prosecutor's Office in Bialogard at that stage.***
>
> ***(iii) The lapse of time between the charge of the acts covered by the ExAW and Damian Baciejowski's pre-trial detention is due to the fact that pre-trial detention is treated as a serious and exceptional instrument applied on the ultima ratio principle. Prior to the implementation of the pre-trial detention procedure, efforts were made to establish Damian Baciejowski's whereabouts and to carry out obligatory procedural activities with his participation using other means, which, however, proved unsuccessful and in 2019 it was decided that pre-trial detention was the only available means to hold Damian Baciejowski criminally responsible for the crimes he was charged with.***

iv) On close scrutiny, the reference at paragraph (i) of the second round of Further Information (31.1.22) to "did not consent to his prosecution for these acts" is referring to extradition proceedings in Germany in the first half of 2013, where the Appellant did not consent to his extradition and renounce his specialty rights (Article 27(2)(e) and Article 13). Paragraph (i) is about the German extradition proceedings, answering Question (i). It is paragraph (ii) which is describing what happened in Poland, in response to Question (ii). That is the 'flow' of the document. But 15 October 2013 is described as a "decision"; not a hearing. What was "stated" in the "decision" on 15 October 2013 was a record of the position in the German extradition proceedings in the first half of 2013, where

the Appellant did not consent to his extradition and renounce his specialty rights (Article 27(2)(e) and Article 13). It was not a description of some new step, still less a hearing, in Poland after surrender.

v) Leaving aside the Further Information, it is true that the Judge recorded this evidence being given by the Appellant at the hearing in cross-examination:

> ***He was asked if he had asked why he'd been given 45 days to leave? He replied that he had come here [to the UK] to live and work. He said he had attended court hearings. He was asked what they were for? He said, "these allegations". When asked when he was first aware of them, he said he said it was when he was in prison in Poland. It was then suggested Poland had asked him to consent to being prosecuted for these matters and he had declined to consent. He agreed that was the case.***

But this evidence was unclear and ambiguous. The Judge, who relied on the Further Information rather than the oral evidence, went on to record the Appellant's clarified and unambiguous evidence, given in re-examination:

> ***He was re-examined: He said he found out about the allegations but was not aware of any proceedings. He was not aware of these allegations when he was extradited from Germany to Poland. He was not asked if he consented to these allegations forming part of the extradition process from Germany. He was told there were no other offences in the extradition request. When he left prison he was not aware of any other matters against him, and was not required to attend court. He only found out later the police were looking for him but did not know why, he only knew when he was arrested in 2021 and that was the first he knew of them.***

22. I am unable to accept these submissions. The Questions which were asked (§21iii above) did not, in my judgment, involve a 'flow' which started with (i) proceedings in Germany in the first half of 2013 and then (ii) proceedings in Poland after 1 July 2013. Question (i) asked whether the first the Appellant knew of the Alleged Index Offences was when he was arrested in 2021 in the UK. Question (ii) asked whether there was an opportunity to consent in conjunction with the extradition and surrender (ie. 2013-2016). The Further Information at paragraph (i) is not a description of the Appellant being asked in Germany by the German authorities about having "renounced the specialty rule" (Article 27(2)(e)). That is something which arises where the requested person "consented to be surrendered", and a question thus arising where a requested person "indicates that he or she consents to surrender" (Article 13(1)). The Appellant is known not to have consented to surrender from Germany. And this description is not about renouncing specialty, but rather renouncing speciality "with regard to specific offences", as was applicable in Poland post-surrender (Article 27(2)(f)). That is the natural and straightforward reading of paragraph (i). Then, in giving further detail about the "opportunity to consent" in the extradition – Question (ii) – the answer in paragraph (ii) makes no reference to any event in Germany. It gives no date in Germany. It straightforwardly, in my judgment, records a court procedure before a local court. That could not be a reference to Article 27(2)(e), since the Appellant never consented to be surrendered. It was clearly a reference to Article 27(2)(f), where renunciation has to be "before the competent judicial authorities". That refusal – at 15 October 2013 – meant the Appellant could not be prosecuted "at that stage". It is plain the paragraphs (i) and (ii) need to be read together. It was on 15 October 2013 that the Appellant "was informed about the proceedings" in relation to the Alleged Index Offences, and he "did not consent to his prosecution for these acts", meaning he "knew very well about the

new charges". None of this contradicts the first round of Further Information, provided earlier the same month (4.1.22). The refusal to consent on 15 October 2013 meant that "preparatory proceedings" could not be "conducted", and "there was no possibility to prosecute", which means the Appellant "never appeared in court in connection with any of the charges in the case". Renunciation was a distinct, prior stage. All of this is derived from the Further Information. But the Judge heard the oral evidence of the Appellant. The Judge recorded in the Judgment that at one stage the Appellant accepted that this was what had happened, and then gave a different answer in re-examination. These were aspects of what the Judge unassailably assessed was his "contradictory and unsatisfactory" evidence. In my judgment, the Judge's adverse findings (Judgment §35: §20 above), and the Judge's findings as to their ongoing adverse significance (Judgment §§44, 48, 50, 82-83, 85: §20 above), are unimpeachable. On this fifth issue, I conclude as follows.

> ***The Judge was not wrong in making any of these findings: (a) that the Appellant appeared in court in Poland in October 2013, was asked for his consent to the two Alleged Index Offences being dealt with, which he declined (as was his entitlement); (b) that he was made aware by virtue of that court appearance that it was intended to prosecute him for the Alleged Index Offences, knew from October 2013 onwards that Poland intended to prosecute him for these two offences, and knew that they were not going to 'go away'; (c) that he knew about these further offences alleged against him in January 2016 when he was released from prison in Poland, and knew the day of reckoning would one day dawn.***

23. The sixth issue which I need to consider is this. Ms Woods submits as follows. Even if the Judge was right about the October 2013 court appearance, he was nevertheless wrong not to find that a "false sense of security" arose at that stage, as in Zapala. I cannot accept these submissions. I have set out under the fifth issue what in my judgment the Judge unassailably found. Nowhere in the Appellant's fluctuating evidence (as conscientiously summarised by the Judge) did the Appellant ever say that events in October 2013, in connection with a refusal by him to consent, made him think he could never be prosecuted. There was no evidence of his being told that the Alleged Index Offences "cannot" be dealt with (cf. Zapala §18). There is a clear parallel with the reasoning in Szlichting (at §23) where Sir Ross Cranston said:

> ***it seems to me that no sense of false security on the part of this appellant has been established. The fact is that he was aware in Poland in 2013 that there were outstanding matters. He chose not to have them dealt with at that time which was his right. But there is no evidence that he was ever told that that was the end of the matter and that he could legitimately take the view that the Polish authorities would not pursue him any further.***

Here too there was no evidence of being told that it was "the end of the matter". There was no reason for the Polish authorities to have given any such indication. Indeed, the whole point of the 45 Day Notice (Article 27(3)(a)) was to allow the prescribed period before any subsequent pursuit. The Judge – having considered all the evidence including the twists and turns of the Appellant's oral evidence – found as a fact that the Appellant knew from October 2013 onwards that the Polish authorities did want to prosecute him. The Judge's reasoning (Judgment §83: §20 above), for rejecting the "false sense of security" arising after October 2013, is unassailable. On this sixth issue, I have concluded as follows.

> ***Conclusion. The Judge was not wrong in finding that the Appellant had no "false sense of security" in and after October 2013.***

After October 2013

24. The seventh issue which I need to consider is this. Ms Woods submits as follows. Leaving aside the 'missed opportunity' regarding the scope of the 2013 Extradition EAW, there was a basic and obvious failure by the Polish authorities to make an Article 27(3)(g)(4) request to the German authorities for their consent to prosecute the Appellant for the Alleged Index Offences. Especially given the Respondent's case that the Appellant was asked to consent and refused in October 2013. There was an unexplained, indeed culpable failure and delay. The Judge failed to recognise this weighty factor. Indeed, the Judge misunderstood the law. Having recorded the submission that "these matters could have been dealt with in Poland between 2013 and 2016 when he was serving his sentence in Poland", the Judge said this:

> ***I am not sure th[is] … submission is correct. Poland was not entitled to deal with these offences unless he gave his consent which he did not.***

The Judge's analysis overlooked the Polish authorities' failure to invoke Article 27(3)(g)(4). This is an important point, as emphasised in Zapala at §23iv where:

> ***The Polish authorities could and should have sought the consent of Croatia so he could have been dealt with for all outstanding matters on one occasion.***

In Zapala, 10 months to make an Article 27(3)(g)(4) request of Croatia was sufficient. Here, the Polish authorities had the Appellant in prison for 2½ years from July 2013 to January 2016. They had 2½ years to make an Article 27(3)(g)(4) request of Germany. The Polish authorities – on their own case – wanted to pursue a prosecution and had tried in October 2013 the Article 27(3)(f) route by asking the Appellant for his consent. They then had more than two years to take the available alternative course, making a simple Article 27(3)(g)(4) request to the German authorities. The German authorities would have consented. So, this is a failure to which the whole passage of time from January 2016 to September 2021 is directly attributable. The Judge failed to recognise this and, instead, wrongly attributed the delay and passage of time to the Appellant.

25. I cannot accept that the Judge misunderstood the law, and therefore overlooked the possibility of an Article 27(3)(g)(4) request to Germany. Elsewhere in the Judgment, the Judge said that he accepted "that the Polish authorities could have applied under the Framework Decision to have the matters finalised at that point". This is a clear reference to an Article 27(3)(g)(4) request to Germany. The Judge also said there did not "seem to be a great deal of difference in the timeline between the two possibilities of him being asked for his consent at court in Poland or of Germany being asked for its consent during the extradition proceedings in early to mid 2013". The second of these possibilities is the Article 27(3)(g)(4) request to Germany. I do, however, accept that the Judge did not address the nature of the Polish authorities' failure to make an Article 27(3)(g)(4) request to Germany. The Judge did not identify any explanation or excuse. None has been identified by Mr Dolan. I can find no explanation or excuse on the evidence. I can find no sound basis for any inference in the Respondent's favour. If – as the Respondent maintained and the Judge found – the Appellant could be asked at a court appearance in October 2013 to consent in relation to the Alleged Index Offences (Article 27(3)(g)), then when he refused, so could Germany (Article 27(3)(g)(4)). There was an obvious justification in asking the Appellant first (October 2013). But between October 2013 and January 2016, in my judgment, there is a 'missed opportunity' which is "unexplained". On this seventh issue, I have concluded as follows:

> ***Conclusion. There was an unexplained failure between October 2013 and January 2016 to request the German authorities' consent (Article 27(3)(g)(4)) to the Appellant being prosecuted at that stage for the Alleged Index Offences.***

26. The eighth issue which I need to consider is this. Ms Woods submits that the delay and passage of time after October 2013 were squarely attributed by the Judge to the Appellant, when they should squarely have been attributed instead to the Polish authorities. The Judge said of the Appellant (Judgment §48: §20 above) "he has engineered the delay by declining to consent to these matters being dealt with when he was in Poland" and (Judgment §85: §20 above) "he cannot have it both ways and then say there has been a culpable failure … to deal with these matters earlier". In my judgment, the Judge's reasoning was more nuanced than squarely attributing the delay and passage of time to the Appellant, and in no sense attributing them to the Polish authorities. Rather, the Judge said (Judgment §48: §20 above) that "it cannot properly be said [that] the RP is responsible for any delay, in the sense [that] there is no negligence or dithering by him"; that the Appellant was "entitled" to withhold his consent, but that "a reasonable stance" was "to suggest he has engineered the delay by declining to consent", so that "it lies ill in his mouth … to seek to be given with one hand when he himself has taken away with the other". This is similar to the nuanced approach of Sir Ross Cranston in Szlichting at §21 (which had been cited to the Judge):

> ***I accept that the appellant in this case had a right to refuse his consent when extradited under the earlier warrant in 2013 to have the current matters dealt with then. I also accept that the Polish authorities could have applied under the Framework Decision to have the matters finalised at that point. So, in a sense, the delay which has occurred is attributable to an extent to the Polish authorities. However, I cannot accept that it lies in the mouth of the appellant to assert that the delay which has occurred in dealing with the matter in this warrant is solely attributable to the Polish authorities. It certainly is not.***

The Judge also said (Judgment §85: §20 above) that the Appellant "cannot be criticised for exercising his right not to consent to these matters being dealt with in 2013"; but that "by the same token he cannot have it both ways" and "then say there has been culpable failure by the JA to deal with these matters earlier"; that was "particularly when he knew the day of reckoning would one day dawn and when he himself chose to postpone the date of its arrival". It needs to be remembered that the Appellant was serving a sentence of imprisonment in relation to other matters until January 2016. The real point is that there could have criminal proceedings in relation to the Alleged Index Offences within the time frame to January 2016, when they have been pursued only after January 2016. That in my judgment means that the real focus is on the delay and passage of time since January 2016. I will not repeat my conclusions on the third issue and the seventh issue (§§17 and 25 above). On this eighth issue, agreeing with what Sir Ross Cranston was saying in Szlichting at §21, I have concluded as follows:

> ***Conclusion. Because of the 'missed opportunity' 2013 Extradition, the delay and passage of time after January 2016 were in a sense – but not solely – attributable to the Polish authorities.***

January 2016 to September 2021

27. On 12 January 2016 (aged 24) the Appellant was released and given the 45 day grace period (Article 17(3)(a)) to leave Poland. Two things are common ground. First, that the Appellant was not a fugitive. Secondly, that neither the specialty rule nor any other legal principle or provision made it impermissible that he should subsequently have

been pursued by way of an extradition warrant in relation to the Alleged Index Offences. After a 'missed opportunity' extradition, and after leaving the country during the 45 grace period (Article 17(3)(a)), there can be subsequent extradition proceedings. A second extradition was not, in principle, impermissible or an abuse in Zapala, Szlichting or Prystaj. It was in principle open to the Polish authorities to pursue extradition notwithstanding that specialty protection and the absence of consent had prevented them from prosecuting the Appellant having secured his extradition from Germany, because of the scope of the extradition request which had been implemented. The Appellant chose to travel to the UK. The Judge found in his favour that he was not at any stage thereafter a fugitive. The Judge said this (Judgment §84):

> ***The RP was released in January 2016 and came to the UK having been given, according to law, 45 days to leave Poland. It then took until 2019 to find him. He accepted in evidence that he did not inform the authorities in Poland or anyone else that he was leaving. The further information suggests that under Polish law he was obliged to notify any change of address over 7 days. He clearly did not do so. In the light of the 45 Day Notice I am not prepared to find that failure in itself makes him a fugitive but he can then hardly complain that it took time to find him.***

28. The ninth issue which I need to consider is this. Ms Woods submits as follows. The Judge was wrong not to recognise that this January 2016 event itself gave rise to a "false sense of security". On the evidence, the Appellant thought he was being 'expelled' from Poland. That communicated to him – as it would to any ordinary person – that the Polish authorities were 'finished' with him and were 'washing their hands' of him. He was being required to leave the country. No outstanding matters were now hanging over him. I cannot accept those submissions. As I have explained, the Judge unassailably found that the Appellant knew about these further offences alleged against him, in January 2016, when he was released from prison in Poland; and that he knew the day of reckoning would one day dawn. There is no evidence that he was told that was the end of the matter (Szlichting §23). Objectively, of course, the 45 Day Notice (Article 27(3)(a)) was the prescribed opportunity to leave under the speciality rule. It arose in the context of the idea of the Appellant being pursued and proceeded against for the Alleged Index Offences. On this ninth issue I have concluded as follows.

> ***Conclusion. The Judge was not wrong to find that the Appellant had no false sense of security at or after January 2016.***

29. The Appellant was in the UK throughout 2016 (aged 24), 2017 (aged 25), and 2018 (aged 26). It was not until 15 February 2019 (aged 27) that a local court in Poland ordered his temporary arrest in relation to the Alleged Index Offences. The ExAW was then issued on 11 July 2019 and stated that at that stage the Polish authorities believed that the Appellant was in Manchester. He remained in the United Kingdom through 2020 (aged 28) and 2021 (aged 29). During that period, the Appellant was employed, and has had no criminal convictions. The NCA having certified the ExAW on 6 May 2021, the Appellant was eventually arrested on 14 September 2021. He has been the subject of these extradition proceedings ever since. He has been on tagged-curfew.

30. The tenth issue which I have had to consider is this. Ms Woods submits as follows. Quite apart from the 'missed opportunity' extradition, the passage of time between January 2016 and 2019 constitutes unexplained and culpable delay. The Judge was wrong when he said:

> ***the further information provided by the JA sets out the steps they took to locate him and detain him between 2016 and 2019 when the ExAW was issued. The issuing of the warrant was a last resort. The JA say they were unable to find him. Those circumstances do not amount to culpable delay by the JA.***

No "steps" which were "taken" to locate the Appellant have been "set[] out" by the Respondent. The Judge was also wrong when he downplayed the Appellant having been "living openly". The Judge said:

> ***The assertion that he was 'living openly' and therefore should have been found sooner is unattractive, even in the absence of him being found to be a fugitive (see the judgement of Ouseley J in RT v Poland [2017] EWHC 1978 (Admin)).***"

That was a reference to §62 of RT, which says:

> ***It is a frequent submission that someone has been living in the United Kingdom openly, often having had contact with various official bodies here. But neither the foreign judicial authority nor the NCA can be expected to explore the byways and alleyways of British officialdom to discover whether someone is in this country.***

31. I am unable to accept those submissions. I have already dealt with the sense in which delay after January 2016 was attributable to the Respondent. I can accept that the level of detail about steps taken is sparse. I accept that in principle, after the 45 Day Notice the Polish authorities could have prioritised a search for the Appellant and the issue of an EAW on the basis that he had left Poland. But the message in the evidence was clear: that the authorities were unaware of the Appellant's whereabouts and unable to find him. The Judge's reference to RT was, moreover, apt. The Further Information records that the issuing of the ExAW was a last resort and the Respondent was unable to find the Appellant. That is what the Judge said about the information. There is nothing to suggest that the Polish authorities should have been able to identify the Appellant's whereabouts. Nor was there anything in the suggestion that the circumstances of the Appellant's initial interaction with the police could give rise to a "false sense of security". On this tenth issue my conclusion is as follows:

> ***Conclusion. There was no freestanding unexplained or culpable delay on the part of the Respondent after January 2016.***

32. The eleventh issue which I need to address is this. The Judge said of the Appellant that: "He has been in the UK since 2016 … His life has moved on somewhat in that time but there have not been major changes". Ms Woods submits as follows. The Judge was wrong to describe the absence of "major changes". The Appellant has made "major strides". He has, since January 2016 (aged 24), been in settled accommodation with employment and has had no convictions. This is a dramatic contrast with the picture in Poland from 2010 to 2012 (aged 18 to 20), after which he was imprisoned from 2013 to 2016 (aged 21 to 24). The Appellant has turned his life around. He is a very different person as a 31 year old in the UK, based on the last 7 years here, than he was in Poland. He also has his family – his mother, two sisters and brother – here in the UK living in the same locality. His life has undergone a major change. In my judgment, the Judge was very well aware of all of these features. The phrase "major changes" was one which the Judge used in the context of having identified that the Appellant "has no partner or children". The Judge recorded the position of the extended family and their letters of support. He was well aware of the contrast, recording that the Appellant had "a substantial record of offending in Poland" but "[he] has now been living in the UK for

6 years; he has built a life for himself here; he has employment; he has not offended in the UK". Reading the Judgment as a whole, I see no error by the Judge, but I think the phrase "great strides" is apt and my conclusion on this eleventh issue is as follows:

> ***Conclusion. By contrast with his substantial record of offending in Poland, the Appellant has made great strides in his 7 years in the UK.***

Conclusions

33. I will set out in one place the conclusions which I have expressed so far, on the issues encountered in the course of my analysis of the timeline. (1) There was no material, unexplained or culpable delay in the period 2011/2012. (2) The Appellant was not a fugitive during the period December 2012 to July 2013. (3) It is possible that in 2013 the Respondent could have included the Alleged Index Offences in an EAW within the scope of the 2013 Extradition. (4) The Appellant was not a fugitive during the period July 2013 to January 2016. (5) The Judge was not wrong in making any of these findings: (a) that the Appellant appeared in court in Poland in October 2013, was asked for his consent to the two Alleged Index Offences being dealt with, which he declined (as was his entitlement); (b) that he was made aware by virtue of that court appearance that it was intended to prosecute him for the Alleged Index Offences, knew from October 2013 onwards that Poland intended to prosecute him for these two offences, and knew that they were not going to 'go away'; (c) that he knew about these further offences alleged against him in January 2016 when he was released from prison in Poland, and knew the day of reckoning would one day dawn. (6) The Judge was not wrong in finding that the Appellant had no "false sense of security" in and after October 2013. (7) There was an unexplained failure between October 2013 and January 2016 to request the German authorities' consent (Article 27(3)(g)(4)) to the Appellant being prosecuted at that stage for the Alleged Index Offences. (8) Because of the 'missed opportunity' 2013 Extradition, the delay and passage of time after January 2016 were in a sense – but not solely – attributable to the Polish authorities. (9) The Judge was not wrong to find that the Appellant had no false sense of security at or after January 2016. (10) There was no freestanding unexplained or culpable delay on the part of the Respondent after January 2016. (11) By contrast with his substantial record of offending in Poland, the Appellant has made great strides in his 7 years in the UK.

Re-Taking the Decision

34. I am satisfied – as Mr Dolan accepted – that it is appropriate that this Court retake the decision on section 14 and Article 8.

Section 14: Injustice

35. The question is whether it is "unjust" to extradite the Appellant by reason of the passage of time since May and October 2011, when he is alleged to have committed the extradition offences. I am evaluating this question afresh. All of the passage of time is relevant and none is excluded, because the Appellant was at no time during the timeline a fugitive. As to the law, the Judge set out the relevant law and discussed the key authorities. No complaint is made about that discussion. He correctly identified that "unjust" is "directed primarily to the risk of prejudice to the accused in the conduct of the trial"; that if a fair trial is now impossible then would clearly be unjust to order extradition; and that all the circumstances must be considered. The Judge addressed the

submissions that were made by Ms Woods: that after 11 years the Appellant may not be able to have a fair trial; that there may or may not be forensic evidence; and that witnesses may or may not be able to remember. In my judgment, the reasons which the Judge then gave when considering whether extradition would be "unjust" after the lapse of 11 years (now more than 12 years) provide the answer to this ground of appeal. As the Judge pointed out, if there is no forensic evidence then no point arises about such evidence; but if there is forensic evidence the Appellant will be able to challenge it at trial. As to witnesses and their memories, the Judge said that he had little doubt that the trial process in Poland as well capable of allowing for such vagaries; and that if the witnesses cannot remember then there will be no evidence against the Appellant. The Judge said that the submission that the Appellant could not have a fair trial was entirely speculative and fell some way short of fulfilling the test of injustice by reason of passage of time. In my judgment, the correct outcome is to reject this bar on extradition. The Judge's reasons are applicable, and I adopt them because I agree with them.

Section 14: Oppression

36. The question is whether it is "oppressive" to extradite the Appellant by reason of the passage of time since May and October 2011, when he is alleged to have committed the extradition offences. Ms Woods submits that in all the circumstances this threshold is met. Again, I am evaluating this question afresh. Again, all of the passage of time is relevant, and none is excluded, because the Appellant was at no time a fugitive. As to the law, again, the Judge identified the key authorities, and no complaint is made about his discussion of the law. He rightly described oppression is "directed to hardship to the accused resulting from changes in [their] circumstances that have occurred during the period to be taken into consideration". He recorded that the test of oppression goes beyond ordinary hardship and one which will not easily be satisfied. The Judge recorded that culpable delay in the part of a requesting state is a relevant factor which may tip the balance where the requested person is not to blame. He recorded that the seriousness of the offence and the effect on other family members is also relevant in that an overall judgment on the merits is required. He recorded that all the circumstances must be considered; that delay will often be associated with other factors, such as the possibility of a false sense of security; that delay not explained by requesting state is not necessarily delay involving fault so as to entitle a requested person to be discharged; and that a requested person cannot take advantage of delay for which he himself is responsible.

37. I have well in mind the following in particular. The passage of time is substantial: more than a decade. The impact of extradition on the Appellant is serious and significant. There were 'missed opportunities'. It is possible that in 2013 the Respondent could have included the Alleged Index Offences within the scope of the 2013 Extradition. There was an unexplained failure between October 2013 and January 2016 to request the German authorities' consent (Article 27(3)(g)(4)) to the Appellant being prosecuted at that stage for the Alleged Index Offences. Because of these 'missed opportunities', the delay and passage of time after January 2016 were in a sense attributable to the Polish authorities. By contrast with his substantial record of offending (aged 18-20) in Poland, the Appellant has made great strides in his 7 years in the UK. He is settled here, with stable accommodation and work, with his family living in the vicinity and no family in Poland. If it had not been for the 'missed opportunity' 2013 Extradition, these matters would have long ago been dealt with. If convicted, there could have been a

continuation of an existing period of incarceration, with any appropriate downward adjustment as a combined or aggregated sentence. Although, for his part, he declined consent, that was the exercise of a legal entitlement arising out of the shielding safeguard of specialty.

38. In my judgment, the circumstances of this case are not such that extradition crosses the high threshold of oppression. The points to which I have referred – in combination with each other and alongside those other circumstances relating to the impact and implications of extradition – fall appreciably short of that characterisation, when seen alongside other features of the case. It is true that, viewed in terms of specialty protection, the Appellant was exercising an entitlement to decline his consent to being prosecuted in 2013. But, viewed in terms of speciality protection, the Respondent has itself been exercising an entitlement to pursue further extradition proceedings. The speciality rule could have been designed to preclude a second extradition, after the 45 Day Notice (Article 27(3)(a)). The rule contains no such prohibition, as is seen by Szlichting. A follow-up extradition is not "inherently" an abuse or oppressive. Then there is the important fact that the Appellant has had no "false sense of security". He was made aware, by virtue of the September 2013 court appearance, that it was intended to prosecute him for the Alleged Index Offences. He knew from October 2013 onwards that Poland intended to prosecute him for these two offences. He knew that they were not going to 'go away'. He knew about them when he was released from prison in Poland, and when he came to the UK in January 2016, and knew that the day of reckoning would one day dawn. All of that has unassailably been found by the Judge, as I have explained. And there was no freestanding unexplained or culpable delay on the part of the Respondent after January 2016. In terms of life changes and the impact of extradition, the Appellant does not have a partner or children. Then there is the question of seriousness. The alleged offence of assault as a matter of some real seriousness. The alleged fraud offence is not a trivial matter. The threshold of oppression is a high one. In my judgment, extradition in all the circumstances of this case does not meet the statutory test of being oppressive by reason of the passage of time.

Article 8

39. That leaves the Article 8 issue. The question is a distinct one: whether extradition would be incompatible with – by being a disproportionate interference with – any affected person or persons' Article 8 ECHR right to respect for private and family life. But the features heavily overlap. I approach the Article 8 balancing approach afresh. I do not exclude any of the features to which I have referred in the context of oppression. The Appellant plainly has a private life in the UK. His mother, two sisters and brother live in the nearby locality. As the Judge found, extradition would involve an enforced separation, anguish and upheaval. However, as the Judge explained, there is no partner or children; the other family members are not financially reliant on the Appellant; they are all self-sufficient; and they – like the Appellant himself – are in good health. The Appellant is not a fugitive. The familiar 'safe haven' idea – as it applies to fugitivity – does not weigh in favour of extradition. The very substantial passage of time does tend to reduce the weight to the public interest considerations in favour of extradition and tend to increase the weight of the private and family life considerations weighing against extradition. The Alleged Index Offences were 12 years ago and could, in the context of the 'missed opportunity' 2013 Extradition, have been pursued much earlier.

The Appellant has built a life in the UK, has employment here, has not committed any criminal offences here and has now been here for 7 years, only the last 18 months of which have post-dated his arrest in these extradition proceedings. He has been on tagged curfew (a feature of Prystaj at §46). But there are the constant and weighty public interest considerations, in honouring treaty obligations, and in ensuring mutual confidence and respect for decisions and requests the Polish judicial authority. There is also the fact that the Appellant is wanted for two offences, one of which is a serious assault, against the backcloth of a substantial record of the offending in Poland. There is the Appellant's awareness – with no false sense of security – that it was intended to prosecute him for the Alleged Index Offences; that they were not going to 'go away'; and that the day of reckoning would one day dawn. In my judgment, the combination of features weighing against extradition are decisively outweighed by the strong public interest considerations weighing in its favour. He must now return to Poland to face trial for the Alleged Index Offences of May and October 2011, under the Polish criminal process. He exercised an entitlement to decline to consent to that course in October 2013, as was his right. But he has subsequently been pursued by the Polish authorities, as was theirs. The outcome at which the Judge arrived was correct. Extradition would be a proportionate interference with private and family life. The Article 8 ground of appeal fails, and with it the appeal.