Neutral Citation Number: [2019] EWHC 333 (Admin)

Case No: CO/5884/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2019

Before :

MR JUSTICE OUSELEY

- -

Between :

JAN SIWAK	**Appellant**
- and -	
PROSECUTOR GENERAL'S OFFICE, POLAND	**Defendant**

- -
- -

MS SAOIRSE TOWNSHEND
(instructed by **ORACLE SOLICITORS**) for the **Claimant**
MR ALEX TINSLEY
(instructed by **THE CROWN PROSECUTION SERVICE**) for the **Defendant**

Hearing date: 24 January 2019

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Approved Judgment

MR JUSTICE OUSELEY:

1. This is the rolled-up hearing of an application for permission to appeal and, if granted, the appeal against the decision dated 18 December 2017 of District Judge Radway at Westminster Magistrates' Court, ordering the extradition to Poland of the Appellant. It followed a hearing on 15 November 2017. I grant permission. The appeal, as with the issue before the District Judge, is based on Article 8 ECHR. The hearing of the appeal had however been stayed to await the judgment of the Divisional Court in *Lis and Others v Regional Court in Warsaw and Others* [2018] EWHC 2848 (Admin) in relation to Article 6 ECHR and changes to the law governing Polish judiciary. Hence the time the extradition process has taken after Mr Siwak's arrest in this country.

The chronology

2. Extradition was ordered on two conviction EAWs. The chronology is important. In December 2008, Mr Siwak, aged 20, committed the commercial burglary to which EAW 1 relates, forcing the door to a disco and stealing three televisions. In July 2009, he admitted the offence and submitted voluntarily to a penalty. He was present at the court hearing in November 2009, and pleaded guilty. He was notified of the sentencing hearing in January 2010, but was not present at it when he was sentenced to 1 year and 6 months, suspended for 5 years. Further Information from the Polish Court on this EAW said that Mr Siwak's obligations during this period included the payment of compensation. It also said that he was served with this information in July 2010, through a letter received by his sister, and other information about his probation obligations, which included informing his probation officer of any changes to his place of residence, which he had failed to do.

3. In May 2009, Mr Siwak, by now aged 21, committed the four commercial burglaries to which EAW 2 relates. He forced entry into bars at night, taking cash, alcohol and other items, and breaking open gaming machines to steal the cash inside. (I calculate the value of cash and items taken, and damage done, from the PLN amounts in EAW 2, to be of the order of £3500 at 2009 exchange rates, though that may well not be equivalent in monetary value.) In August 2009, he appeared at his trial, and was sentenced to 2 years imprisonment, suspended for 5 years. There is no further information about the conditions of suspension. He was therefore sentenced for the later offending, EAW2, before being sentenced for the earlier offending, EAW1.

4. In July 2010, he left Poland for England. His partner, AP, had preceded him by some months and, around the time of his arrival, gave birth to their eldest child. They have two more children, one born on 9 February 2012, and the third on 26 December 2014. Mr Siwak is 30 and will turn 31 in March this year.

5. On 21 April 2011, the same Court activated both of the suspended sentences. The further information in EAW 1 states that the sentence in EAW 1 was activated for non-payment of the compensation, and because his address was not known. There is no further information explaining why the suspended sentence in EAW 2 was activated. His sister received the summons in May 2011 for Mr Siwak to go to prison to start serving his sentence.

6. A domestic arrest warrant was issued in respect of the offences in EAW 2 in October 2011, and another one was issued for the offence in EAW 1 in April 2012. (A bench warrant had been issued in relation to the EAW 1 offence in May 2011, but had not been executed because Mr Siwak was abroad.) EAW 1 was however issued first, on 18 February 2013, but was not certified by the NCA until 15 September 2017. Meanwhile, EAW 2 was not issued until 25 July 2016, but was certified on 19 September 2016, before EAW1 was certified. Mr Siwak was arrested on EAW 2 on 5 September 2017. Each EAW contained wording to the effect that Mr Siwak was currently probably living in England, but his exact address could not be established.

7. Mr Siwak gave evidence to the District Judge and AP provided a statement.

The District Judge's decision

8. It was common ground before the District Judge that Mr Siwak was not a fugitive in relation to EAW 2. The District Judge also found that the Requesting Judicial Authority, RJA, had not proved that he was a fugitive in relation to EAW 1. Although the timing of Mr Siwak's departure was suspicious, the fact that AP had moved to England earlier and was about to have their first child meant that the District Judge could not be sure that Mr Siwak had deliberately fled the jurisdiction. As Ms Townshend for Mr Siwak submitted, the District Judge, although not expressly dealing with the Further Information about EAW1, must have accepted the evidence of Mr Siwak about the extent of his knowledge of the conditions of the suspension of his sentence. There is no RJA challenge to the District Judge's finding that Mr Siwak was not a fugitive on EAW1, or his implicit finding that he lacked knowledge of the condition requiring changes of address to be notified; the District Judge never found that he had known of it, and would surely have done so had he so concluded. He did find however that Mr Siwak had taken no steps to find out what the sentence was for the EAW1 offence; he said that he was in prison for another offence at the time. His sister had told him in late 2014 that correspondence about a suspended sentence had been sent to the family home in Poland, but he had not followed it up as he had no address for the court. The District Judge found that he ought to have taken the obvious step of following up this correspondence.

9. The District Judge found that Mr Siwak played an active part in bringing up his children in a close family. He had been employed since arriving in July 2010, leading a settled life. AP suffered from anxiety and migraines because of the extradition proceedings, which he regarded as neither surprising nor an unusual consequence: "There is no evidence that this is so severe she has had to seek medical assistance to cope." AP did not work, although she had done so when she first arrived before she became pregnant. The District Judge did not accept Mr Siwak's evidence that she would be unable to work because she could not speak English. The family would suffer significant financial hardship without his income, but with the older children at school, and a certain amount of either free nursery care for the youngest or assistance from her siblings, AP would have time and opportunity to obtain some paid employment. There were benefits she could apply for, and she would not become homeless on the street. The District Judge specifically found that the support her parents and siblings would be able to provide her and the children "had been downplayed." Her parents were still healthy enough to work 12 hour shifts in a bakery 4 days a week; they and her adult siblings, resourceful people who lived about 10

miles away, were unlikely to ignore the plight of AP and her children. Her parents were attentive to their children and grandchildren. The District Judge found that the "inevitable hardship that would arise in the circumstances of this case is no more than that concomitant with the usual consequences of incarcerating a father who is the family's main breadwinner."

10. The District Judge accepted that the offence in EAW 1, taken alone, might not be serious enough to attract a prison sentence in the UK; he did not accept Ms Townshend's submission to that effect in relation to the offending in EAW 2, and, taken together, along with the sentences imposed, he concluded that the offences "were serious ones for which his age at the time does not provide any real mitigation." He accepted that Mr Siwak had not offended during his time in the UK.

11. The District Judge spelt out the lapse of time since these "relatively old" convictions. But he did not consider the timescales "unreasonable in the circumstances or to attract the epithet unwarranted delay." The delay of nearly 5 years from October 2011 until July 2016 in issuing EAW 2 had not been properly explained, nor had the delay in the certification of each warrant by the NCA. Delay, he accepted, could diminish the weight to be attached to the public interest and increase the impact on private and family life. But he also found that Mr Siwak, having been alerted in late 2014 to the authorities' attempt to contact him about the sentences "shares responsibility for the delay arising since then by doing nothing but burying his head in the sand. Looking at this global picture, I do not find the delay carries a great deal of weight in the scales."

12. When the District Judge carried out the balancing exercise he referred to those in favour of extradition as being (a) the "constant, weighty" public interest that those convicted should serve their sentences and that the UK should fulfil its treaty obligations, (b) mutual confidence and respect for decisions of the judicial authority, (c) "the UK should not become or be seen as a safe haven for those accountable to judicial authorities abroad", and (d) the gravity of the offences, marked by the significant prison sentences to be served. Against extradition, were Mr Siwak's settled private and family life in the UK since 2010, his work, the fact that he did not come to avoid his sentence, and his blameless life here. The District Judge found that extradition would cause emotional harm to his wife and their children "who will be deprived not only of his economic and moral support but also his day-to-day contribution to caring for them; imprisoning a parent of a child with whom he has a close relationship usually has an adverse impact on those children and will do so in this case, though these children will remain cared for within their family by their mother, her wider family also being available to them not very far away." Further, his wife "may find it difficult to cope with looking after the children on her own. [The middle child] is asthmatic and she has anxiety." The RJA "share some responsibility for part of the delay…."

13. The District Judge concluded that there were "no compelling features in this case which overrides the persistent and strong public interest in extradition."

The further evidence

14. On the same day that the District Judge delivered his decision, Mr Siwak's solicitors obtained a letter from AP's GP dated 18 December 2017. The District Judge did not see it. Its terms show that it had been requested earlier, but the date of the request is

unknown. The GP said that he had been requested to write an urgent letter. AP had seen the doctors first on 13 September 2017 when she was found to have a "tension type headache" after Mr Siwak's arrest, which had left her "very upset, stressed and anxious." Nothing significant was found on examination, and a painkiller was prescribed. This was before the extradition hearing. She returned to the GP on 4 December 2017; the headache had been continuing for 2 months, and woke her up at night; she was stressed about the extradition. Mr Siwak was translating for her. Again nothing of significance was found on examination; a different painkiller was prescribed. There was no referral for counselling or therapy; a scan found nothing abnormal.

15. AP's witness statement for the extradition hearing did not refer to her headaches, or her first visit to the doctor. She said that she would be unable to cope; it was difficult for a few days when Mr Siwak was arrested; she had no idea what to do. She did not know who would look after the children; she would lose her house, have a nervous breakdown, and be devastated and stressed. They could not marry because Mr Siwak did not have his Polish ID. Mr Siwak's evidence to the District Judge had however explained that AP suffered from migraine because of anxiety over the extradition.

16. He also proffered this background to the offending: alcoholic parents, poverty, limited social service support, rent arrears; he had to work and steal to feed himself.

17. The letter from the GP should have been sought earlier, in my judgment. But it adds very little and by itself, I would not admit it. It serves however as the introduction to later material which I am prepared to admit, and it is right that its development should be understood, and so I admit it.

18. AP produced two further statements. One was dated 16 January 2018 which referred to her continuing headaches, but the medication did not help. The second, dated 12 December 2018, referred to strong painkillers she now bought, which did help. She still experienced poor appetite, lack of sleep and she had lost weight. She attributed it to the stress, but she was also suspected of having a thyroid problem. The children had not been told of the prospective extradition. The idea of Mr Siwak being extradited distressed and scared her.

19. Following the lodging of the appeal, the representation order was extended for a report from a clinical psychologist. Dr McKail, DclinPsy, MSc, BSc, produced a report dated 3 March 2018 and an updated report dated 10 January 2019. I am not concerned with what she has to say about Mr Siwak, none of which is new or surprising, and could make no difference to the decision, let alone show that the District Judge's decision was wrong. Much of what she has to say in each report is drawn from what Mr Siwak and AP told her. The interviews were carried out on 10 February 2018. There is nothing in the first report which is dependent on events after the date of the hearing. I am not persuaded that there is any basis upon which this report should be admitted, if it stood alone. There is no reason why it should not have been obtained for the extradition hearing, beyond that it appears easier to obtain legal aid for such reports at the appeal stage. However, with the passage of time since the extradition decision, and with the best interests of the young children as a primary consideration, I admit the later report so that this Court's judgment on the proportionality of extradition in the light of the interference with family life, including the effect on the children, is made on up-to-date information. This means that I have

to consider to some extent what is said in the first report; the second report says that it should be read in conjunction with the first report. I am also prepared to consider AP's witness statement of 12 December 2018, for the same reason. If I am considering the first report to the extent indicated, I am prepared also to consider her first statement.

20. Dr McKail summarised her first report, at the outset of the second report, in relation to AP and the children in this way. "AP was also experiencing high levels of psychological distress, including anxiety, stress, low mood/depression which was impacting [significantly] on her physical health. The report concluded a likely [significant] deterioration in her mental health should Mr Siwak be extradited, along with the increased financial, practical and emotional burden on her life. It was also concluded that Mr Siwak's extradition would have a negative impact on the family's financial situation, leading to a negative impact on their well-being and quality of life. Finally, the report concluded that the extradition would lead to a disruption of his children's secure attachments and could consequently impact negatively on their social and emotional development, educational attainment and opportunities for their future." (The actual summary of conclusions in the first report itself includes the words in square brackets omitted from its summary in the second report.)

21. It is also notable that Dr McKail's comments on the family's financial problems, and their impact, state that there would be no support financially or otherwise from members of the family. That is what Mr Siwak and AP told her. But that was not a point on which their evidence was accepted by the District Judge. His judgment is also not one of the documents which Dr McKail lists as having been read by her. She should have read it, and recognised that it was not for her to make comments which go behind the findings of the District Judge on the evidence he heard.

22. Mr Siwak and AP did not permit Dr McKail to interview the children because they remained unaware of the situation; she had no more than a brief conversation with them about their lives generally. Apart from the middle child's asthma, which meant that he could get out of breath after 5 to 10 minutes exercise, there were no anxieties or problems to mention, apart from the consequences of extradition.

23. Dr McKail's second report concluded that there had been no significant changes to the information in the first report. The detail of the second report indicated problems with housing benefit because of the changes in moving to Universal Credit; and the family had moved into a new and more expensive property to give themselves another bedroom. AP was often consumed by her thoughts about the extradition, which affected her sleep on a daily basis; she felt terrified, feared the worst and was unable to relax. She immersed herself in household duties, and she was experiencing high levels of stress.

24. The loss of Mr Siwak's practical support would be likely to exacerbate AP's mental health difficulties; she would have to deal with all household duties and care for the three children. Her physical exhaustion and pain, with the additional responsibilities, stress and anxiety following extradition would make it more challenging for her to fulfil the duties. All this "may have an impact on her capacity for parenting children." The strain following extradition "could impact on her emotional availability for the children and consequently on her relationship with them." This in turn would make her feel guilty, affecting her mood and beliefs about herself as a parent. AP's English

remained limited which would affect her ability to cope with the increased practical and financial demands following the extradition of Mr Siwak, and in particular her ability to help the children in relation to homework and arrangements with the school.

25. This second report concluded that AP's mental health continued to be adversely affected by the potential extradition; she continued to experience high levels of anxiety, stress, and low-mood/depression in relation to the extradition. Her depression was "severe." The effect of stress on her physical health included headaches and tiredness. The absence of certainty at present could exacerbate her feelings of anxiety "and lead her to catastrophise the situation and conclude the very worst outcomes." This led her to feel irritable, at times intense fear, and high levels of perceived stress, which also led to some physiological symptoms, as well as hypervigilance and high sensitivity, for example to a knock at the door. There was now an evident increase in their sense of hopelessness for the future should Mr Siwak be extradited, with AP feeling overwhelmed and unable to cope. A deterioration in AP's mental and physical health was likely were Mr Siwak to be extradited, with a consequent adverse impact on the children's well-being and the family's overall quality of life. There would be likely to be a significant disruption in the children's secure attachment to their father, "which could have detrimental outcomes on their mental health and well-being and subsequent relationships."

26. Extradition would place additional financial and practical burdens upon AP, as she would become responsible for all three children with, it was said, no additional practical or emotional or financial support. She might not be able to pay rent and might have to move to a smaller property or become homeless. Financial difficulties, concluded Dr McKail, could have an extensive impact on the children's well-being. AP continued to say she had no contact with her extended family, and that they could offer no financial support or childcare. (I have already commented on that observation in the first report and the District Judge's finding.)

27. Keeping the family together after extradition would "be extremely challenging due to the practical and financial limitations the family will face, and thus the likely outcome is for the family to separate." This latter point involved Dr McKail relaying what she was told by Mr Siwak about the difficulties which he said he faced in returning to the UK, if it had left the EU. His explanation to her included that he had lost his Polish ID. Mr Siwak saw no way of avoiding a family break up were he extradited. He had surrendered his Polish ID to the police as part of his bail conditions, Ms Townshend told me and I accept. Ms Townshend said that a variation of condition so as to retrieve it, for the purposes of applying for permanent residence or settled status, was unlikely to be granted. For the same reason concerning the Polish ID, there would be difficulties obtaining passports for the children if they did want to go to Poland, together with difficulties in him and AP marrying, and then there would be difficulties in his returning to the UK after what could be an absence of more than two years.

28. The final items of further evidence were the Home Office guidance: "Settled and pre-settled status for EU citizens and their families" and "Existing UK residents documents for EU citizens." These are admissible because they were not available at the extradition hearing, and are relevant to the submission that extradition would lead to the family breaking up permanently, because of the difficulty Mr Siwak would face in entering the UK after serving his prison sentence.

The submissions

29. Ms Townshend for Mr Siwak criticised the way in which the balancing exercise had been carried out by the District Judge. She focused on that summary exercise rather than on his preceding and fuller analysis, which did cover these issues:

(1) He had not taken into account Mr Siwak's youth when he committed the offences, the short offending period, how long ago they were committed and the complete change in his life in the subsequent decade, in which he had obtained a full-time job as a kitchen porter, and provided emotional, practical, and financial support for his partner and their three young children. The District Judge had wrongly treated the offences as serious because of the significant prison sentences imposed.

(2) The District Judge had correctly identified the periods of delay, but had failed to give them sufficient weight: 4 ½ years between the issue of EAW 1 and certification by the NCA on 19 September 2017; 5 years between the domestic arrest warrant in October 2011 and the issue of the related EAW 2 in July 2016 when, in 2013, EAW 1 had been issued by the same court. During the first period, straightforward enquiries by the NCA would readily have located Mr Siwak, who was living and working openly, paying taxes and NICs. There was no explanation for the second period of delay and the RJA should have been found culpable for it. He did not treat those periods as diminishing the public interest in extradition, nor did he recognise the changes in family life over that time which would increase the impact of extradition.

(3) He did not give sufficient weight to the evidence of AP. But the primary focus of Ms Townshend's submission was the further evidence as to AP's mental health whom she described as having "particularly serious" mental health problems, and extradition would be "significantly deleterious." The consequences for the family would be "exceptionally severe."

(4) Ms Townshend submitted that Mr Siwak could not apply for settled status in order to continue to live in the UK after June 2021 as the EU Settlement Scheme would not open fully until 30 March 2019, nor could he apply for permanent residence because his bail conditions prevented him obtaining the necessary documents. He would have to deal with Home Office bureaucracy at a difficult time. AP and the children were unlikely to visit him in prison in Poland or move there permanently for financial and logistical reasons. AP had no family in Poland, nor a job; the children were at school in the UK, and could only obtain passports if Mr Siwak could present his ID card. A period of separation of 3 ½ years or perhaps more, without a visit, was a cause of great distress, and would be to the children also when they found out.

(5) Ms Townshend submitted that the District Judge was wrong to find that AP had downplayed the support potentially available from her family in the UK, on the basis of the evidence Mr Siwak and AP had given, set out in his judgment at [16]. Her parents worked part-time and had health problems, and her siblings all had their own families and jobs; there was no room for them in the parents' overcrowded flat because a sister, the sister's partner and two children were also living there. She also relied on Dr McKail's report as showing that the District Judge was wrong. That last point is in my view untenable: direct further evidence from AP simply saying that the District Judge was wrong in concluding as he did would be inadmissible; it does not

become admissible because it is provided indirectly through the medium of a psychologist's report.

(6) Ms Townshend also submitted that the District Judge had applied an "exceptionality test", although he had not used such a word nor had he referred to the need for features to be "striking and unusual" if they were to make extradition disproportionate. His language, that there were "no compelling features" to override the strong public interest in extradition, was however an exceptionality test in substance.

30. Mr Tinsley submitted that the District Judge had identified the correct principles to apply in judging the proportionality of extradition which interfered with Article 8 ECHR rights, and in dealing with delay between offence and extradition. His decision, taken with such fresh evidence as is admitted, on the outcome was not wrong. The real issue on delay was not culpability but the effect of delay on the development of family life.

31. He accepted that both EAWs stated that Mr Siwak was probably in England, albeit without a specific address, and that the NCA did not then locate him promptly, which to a degree lessened the public interest which could be asserted in his extradition. But Mr Tinsley pointed to the failure on the part of Mr Siwak to contact the Polish authorities in late 2014, and submitted that he, knowing himself to be subject to criminal proceedings, had not exercised the reasonable diligence to be expected of such a person. He could not just bury his head in the sand. The five year gap between activation of the suspended sentence in EAW 2 and the issue of EAW 2 was unlikely to have made much difference to the speed at which the NCA proceeded in the light of its handling of EAW 1. No absence of activity by the Polish authorities could be inferred in view of the communication in 2014, and something must have triggered the issue of EAW2 in 2016. Mr Tinsley accepted that the impact would have been less had extradition occurred in 2013, but commented that the delay had strengthened Mr Siwak's hand in relation to Article 8. The NCA process, and data available for certifying an EAW, changed in 2015, but the steps taken by the Polish authorities showed that they had had a continuing interest in Mr Siwak.

32. Mr Siwak was a young man when he committed the offences, not a child. The District Judge was entitled to reject Mr Siwak's submission that the offences would not have attracted a custodial sentence in England. The District Judge was also entitled on the evidence to conclude that AP's family's ability to provide support had been downplayed in view of the work they did, their proximity, and the absence of any explanation for their asserted inability to assist.

33. Mr Tinsley submitted that the additional evidence did not take the position much further than it had been before the District Judge, when he reached his conclusion, which could not be said to be wrong. The reports depended on what Mr Siwak and AP told Dr McKail, who, in the absence of the parents' consent, was also unable to assess the children directly or in any detail. She had to rely instead on general information about the children and children generally. Concerns about AP's ability to care for the children, were Mr Siwak to be extradited, did not show that their welfare would be in jeopardy. Dr McKail did not mention the District Judge's finding that the potential role of AP's family as help for AP had been downplayed, and the reasons given for their asserted lack of support were not explored.

34. The lack of certainty about the extradition proceedings was an important factor in the psychological problems, which the reality of extradition would end, save for those more recently associated with the UK leaving the EU. But it was accepted that uncertainty was not the only problem; at least some of the fears for the future on extradition could be realised as the practical effect of extradition.

35. Mr Tinsley accepted that there was now no less uncertainty over the position of EU citizens in the UK, as 29 March 2019 neared, than there had been at the time of the District Judge's judgment. But the rights of those who, like Mr Siwak, had accrued five years' residence, and acquired the right to permanent residence, were clearer. The delay by the authorities, and his inaction in 2014 had in fact improved his position in that respect; action in 2014 would also have meant that he could have returned by now. The real problem is the difficulty of giving effect to his right without the relevant Polish ID.

36. The impact on Mr Siwak individually was not weighty. The greater detail, and the more professional framework for its assessment did not mean that greater weight should be attached to the impact on AP and the children than the District Judge had attached to that issue; he had considered most of the points of impact raised by Dr McKail, and the new material would not have led to a different decision on Article 8. However, Mr Tinsley did accept that AP's mental health was not much of an issue before the District Judge. The McKail reports did not show that AP's situation was markedly worse than at the time of the extradition hearing. Her problems had not been shown to be unmanageable, even if medical assistance were required.

Conclusions

37. The principles governing proportionality under Article 8 are well known, and are usefully set out in *RT v The Circuit Court in Tarnobrzeg Poland* [2017] EWHC 1978 (Admin), at [57-59]. In view of Ms Townshend's criticism of the language of the District Judge, and certain of her other submissions, I repeat them here from:

> "57. The law is well settled and was distilled by the Lord Chief Justice in the judgment of the court in *Polish Judicial Authority v Celinski* [2015] EWHC 1274 (Admin); [2016] 1 WLR 551. We would not wish anything we say to qualify the clear statements of principle found between paragraphs 5 and 13 which for convenience we reproduce:
>
> "(a) The general principles in relation to Article 8"
>
> (I have omitted 5-11)
>
> 12. Fifth, factors that mitigate the gravity of the offence or culpability will ordinarily be matters that the court in the requesting state will take into account; it is therefore important in an accusation warrant for the judge at the extradition hearing to bear that in mind. Although personal factors relating to family life will be factors to be brought into the balance under Article 8, the judge must also take into account that these will also form part of the matters considered by the court in the requesting state in the event of conviction.
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> 13. Sixth in relation to conviction appeals:

(i) The judge at the extradition hearing will seldom have the detailed knowledge of the proceedings or of the background or previous offending history of the offender which the sentencing judge had before him.

(ii) Each member state is entitled to set its own sentencing regime and levels of sentence. Provided it is in accordance with the Convention, it is not for a UK judge to second guess that policy. The prevalence and significance of certain types of offending are matters for the requesting state and judiciary to decide; currency conversions may tell little of the real monetary value of items stolen or of sums defrauded. For example, if a state has a sentencing regime under which suspended sentences are passed on conditions such as regular reporting and such a regime results in such sentences being passed much more readily than the UK, then a court in the UK should respect the importance to courts in that state of seeking to enforce non-compliance with the terms of a suspended sentence.

(iii) It will therefore rarely be appropriate for the court in the UK to consider whether the sentence was very significantly different from what a UK court would have imposed, let alone to approach extradition issues by substituting its own view of what the appropriate sentence should have been. As Lord Hope of Craighead DPSC said in *HH* [2013] 1 AC 338 at para 95 in relation to the appeal in the case of *PH*, a conviction warrants:

'But I have concluded that it is not open to us, as the requested court, to question the decision of the requesting authorities to issue an arrest warrant at this stage. This is their case, not ours. Our duty is to give effect to the procedure which they have decided to invoke and the proper place for leniency to be exercised, if there are grounds for leniency, is Italy.'

Lord Judge CJ made clear at para 132, [of *HH*] again when dealing with the position of children, that:

'When resistance to extradition is advanced, as in effect it is in each of these appeals, on the basis of the article 8 entitlements of dependent children and the interests of society in their welfare, it should only be in very rare cases that extradition may properly be avoided if, given the same broadly similar facts, and after making proportionate allowance as we do for the interests of dependent children, the sentencing courts here would nevertheless be likely to impose an immediate custodial sentence: any other approach would be inconsistent with the principles of international comity. At the same time, we must exercise caution not to impose our views about the seriousness of the offence or offences under consideration or the level of sentences or the arrangements for prisoner release which we are informed are likely to operate in the country seeking extradition. It certainly does not follow that extradition should be refused just because the sentencing court in this country would not order an immediate custodial sentence: however it would become relevant to the decision if the interests of a child or children might tip the sentencing scale here so as to reduce what would

> otherwise be an immediate custodial sentence in favour of a non-custodial sentence (including a suspended sentence).' " ….
>
> 59. In paragraph 8 of her judgment in *HH* Lady Hale explained that delay may be relevant for two reasons when considering Article 8. First, delay in seeking extradition may reduce the weight to be attached to the public interest in surrendering a person for prosecution. We observe that something similar would weigh in the public interest balance considered by prosecuting authorities in this jurisdiction before prosecuting, if they were dealing with an old, relatively minor offence. Delay may also reduce the weight to be accorded to the public interest in surrendering a person to serve a sentence following conviction, even when he has deliberately absconded to avoid serving the sentence, but its impact will obviously be less than in an accusation case. Secondly, the passage of time may have an impact on the nature and extent of the private or family life developed by the requested person in this country. This appeal concerns the interests of a child born after the appellant became a fugitive."

38. As Ms Townshend herself pointed out, Baroness Hale concluded, as the District Judge had directed himself, that delay could both diminish the weight to be attached to the public interest and increase the impact upon private and family life. In that judgment, the best interests of the child were a primary consideration. But it was likely that the public interest would outweigh the rights of the family unless the consequences of the interference with its rights was "exceptionally severe", without creating some potentially misleading exceptionality test; see [8] of Baroness Hale in *HH*. "Exceptionally" is an expression of degree. This is all in line with the Supreme Court's decision in *Norris*, in which the various expressions of the right approach were drawn together by Lord Judge CJ at [111].

39. I also accept the correctness of the approach towards the absence of an explanation for delay, as set out in *RT* at [61 – 62]. This decision of a Divisional Court presided over by Burnett LJ was cited by Mr Tinsley. Ms Townshend cited a number of earlier single judge cases, each following the other, which have to be regarded as superseded by *RT*. There were in any event other single judge cases taking a different line in emphasis at least, such as *Jabczynski v Circuit Court in Olsztyn, Poland* [2013] EWHC 1803 (Admin), at [12]. Selective citations of single judge cases, from among the large number available, is of little assistance; they rarely do or should lay down principles. The Divisional Court decisions are all that need be cited for the general propositions. I cite the relevant passage from *RT* so it may become better known:

> "61.The Framework Decision does not contemplate that requesting judicial authorities will routinely explain the chronology of proceedings and, save perhaps in a pure delay case relying upon section 14 of the 2003 Act, it would not be appropriate to request information from them. They might provide some explanation once they were aware that an issue had arisen. Yet the chronology upon which the appellant relies

> is not unusual. An EAW will not be issued until the requesting judicial authority believes that the wanted person has left the country and is elsewhere in the European Union. Until there is clear information of his location here the NCA will not consider certification. To behave in any other way would result in the waste of resources in dealing with cases which may not have any practical worth. Evidence before us confirms that intelligence about the appellant's presence in the United Kingdom was received on 6 November 2013. The EAW was certified eight days later and sent to the relevant police force for execution.
>
> 62. 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. In this case, it is true that the local police took a long time to arrest the appellant, although as we have noted the evidence suggests they had tried earlier and the appellant was taking steps to avoid them."

40. I agree with Mr Tinsley that the true focus in considering delay and Article 8 is on developments that have occurred during the lapse of time between the offence and extradition. Delay is also relevant for what it may show for the public interest in extradition. Responsibility for the delay is obviously a factor which weighs in favour of extradition where the requested person is a fugitive, in the colloquial sense. But where the requested person is not a fugitive, and has not contributed to delay through failing to fulfil his obligations to maintain contact with the authorities or provide them with his address, it may still not be necessary or useful to assign responsibility for delay to the requesting authority or the NCA before it can diminish the public interest in extradition. And plainly developments in family life, during such a period of delay, will always be relevant and may be weighty, even decisive, if the circumstances are sufficiently compelling.

41. *RT* held that, once fresh evidence is admitted, it is for the appeal court to make its judgment on all the available material, in deciding whether the condition in s27(4) Extradition Act 2003 is satisfied. This condition is that evidence not available before the Magistrates' Court would have led it to decide the question of the proportionality of extradition under Article 8 differently, and in consequence to have ordered the discharge of the requested person, see [69-72]. I have set out briefly why I am admitting further evidence. I now have to consider in the light of all the material, and the other relevant factors, whether the District Judge ought to have decided that extradition would be disproportionate.

42. I do not accept Ms Townshend's submission that the District Judge applied in substance some "exceptionality" test. He neither did so in terms or in his description of how he appraised the factors to be balanced. He referred to the absence of "compelling" features to override the public interest in extradition. No complaint can be made of that formulation. It is no more demanding than the speeches in *Norris* and *HH* require.

43. The District Judge appears to have put into the scales in favour of extradition, as factor (c), that the UK should not be a safe haven for those wanted abroad. But that was not relevant here in the light of the findings that Mr Siwak was not a fugitive in respect of either EAW. I do not think that the District Judge forgot his findings; rather he has simply used an habitual formulation with insufficient overt adjustment for the case. This is not uncommon but should be guarded against. In the same vein, factor (b), the mutual confidence and respect between judicial authorities, seems an unlikely additional factor itself favouring extradition, although it may be important for the appraisal of other factors, such as the significance of sentence for the gravity of the offence, and the way in which Further Information is approached.

44. The District Judge did not err in assessing of the gravity of the offending as "serious" including by reference to the total sentence to be served of 3 years and 6 months. One can become overmuch attached to gradations by adjective; I might have described them as "moderately but not particularly serious", but it would not have advanced matters much, and the District Judge pointed to a number of aggravating features: targeted premises, equipment carried, night time. The level of sentence is a good guide to how grave they were in the eyes of Poland. Mutual confidence and respect is important here, as was made clear in *Celinski*; see *RT* [57] referring to *Celinski* [13 (ii) and (iii)]. The District Judge, as is usually the case, knew nothing of the background to the offending or the offender other than what Mr Siwak had to say, or of the basis for the Polish court's judgment about what offences at that time or place merited what sentence. It is a commonplace for moderately serious offences in Poland to receive a suspended sentence initially, but for the suspension to be activated readily for breach of condition, rather than further offending, and for such activated sentences to lead to successful extradition requests, respecting the Polish system.

45. The District Judge did consider, as [13(iii)] in *Celinski* supports him doing, the seriousness of the offending as judged by the England and Wales sentencing guidelines, but only because the interests of children were involved, and for the purpose of seeing whether the England and Wales courts were likely to have imposed an immediate custodial sentence, notwithstanding the interests of the children. Extradition would rarely be avoided if that were the case. He considered for careful reasons, and in my view rightly, that an immediate custodial sentence would have been imposed for the second set of offences, at least in 2009. The fact that a UK sentence may very well have been rather less, particularly after guilty pleas is not of importance in the light of *Celinski*. However, the Polish sentencing or activating Court could not have been aware of Mr Siwak's as yet unborn children, or of how his life would develop over the ensuing decade.

46. The District Judge also considered Mr Siwak's age when the offences were committed and sentenced. It cannot be said that he was wrong to say that Mr Siwak's age at the time did not provide any real mitigation; more importantly, it must be assumed that the Polish Courts gave that point the weight they thought fit in passing sentence and activating it.

47. The District Judge recognised that the offences were now "relatively old." The age of the offences for which it is now sought to imprison him is important for what he has done since 2009, when he had admitted them all. The important consequences were recognised by the District Judge as telling against extradition. First, in the period of 9 years or so since Mr Siwak came to the UK, he has been in regular employment,

has committed no offences, and has settled down, starting a family with children. Whatever the limitations of his age as mitigation, during his twenties and over a sustained period, he has turned his life around in a wholly constructive way. He has reformed himself.

48. Second, he did not come as a fugitive to the UK, to avoid process and punishment. Where there is such a lapse of time between offence or conviction and extradition proceedings in the UK, the fact that the requested person is not a fugitive is of some considerable importance. The District Judge did not find that he breached any conditions of any suspension in relation to the notification of changes to his address. This was not an issue explored further before me, and I have to take the absence of adverse finding as it stands. This is a very significant and rather unusual state of factual affairs where the activation of suspended sentences is involved.

49. Third, the District Judge also perhaps unusually found that the RJA shared "some responsibility for part of the delay." He also found that Mr Siwak "shares responsibility" for the delay since late 2014 "by doing nothing but burying his head in the sand. Looking at this global picture, I do not find the delay carries a great deal of weight in the scales." I have a qualification to that first finding. As Mr Siwak is not a fugitive, and is not said to have acted in breach of any obligations in relation to informing the Polish authorities of his whereabouts, he is not responsible at all for any of the delay from activation of the suspended sentences in 2011 to late 2014. If responsibility is to be apportioned, as the District Judge thought that it should be, none of it goes to Mr Siwak before late 2014. So the RJA/NCA are wholly responsible, if anyone is, for that part of the delay. Moreoever, it is only the delay after late 2014 to 2017 for which the District Judge holds Mr Siwak even partly to blame, and he treats the RJA/NCA as equally to blame. Even on that assessment of the position after late 2014, it means that the bulk of the responsibility for the overall delay should have been placed by the District Judge with the RJA/NCA, and it should not have been evenly shared as the overall factor put into the balance by the District Judge suggests. Further, it is clear that the delay after late 2014 was more than just the consequence of not knowing where Mr Siwak was: the same Polish Court issued the EAWs with a gap of three years between them: 2013 and 2016. EAW 2 was certified rapidly in 2016; EAW 1 was not certified until after Mr Siwak's arrest on EAW 2. If an apportioning exercise is to be undertaken, I would apportion a greater share of the responsibility for delay post late 2014 to the RJA/ NCA.

50. Fourth, however, I firmly disagree with the assessment that the delay here does not carry a great deal of weight in the scales. Delay matters for what it signifies about the public interest, and for the way in which circumstances changed. It might not be decisive, but it cannot be judged without looking at those two factors. Those two aspects are of considerable importance here in the scales against the extradition of someone who is not a fugitive and has not been found to be in knowing breach of any obligations in relation to contact. First, there is plainly a moderately diminished public interest in his extradition because of the lack of urgency shown by the Polish authorities up to late 2014. Thereafter, the fact of the delay is in part attributable to him, and in part to the RJA and NCA. But it is not at all equivalent to a fugitive or someone in knowing breach of his contact obligations blaming the authorities for not bending their endeavours to find him. To the extent that Mr Siwak is not responsible for the delay, even on the basis that the District Judge was holding them equally

responsible after late 2014, the weight to be attached to the public interest in his extradition is diminished. The District Judge did not put that factor into the balance.

51. Second, by late 2014, Mr Siwak had been in responsible employment for some years, and had committed no offences since those in EAW2. There was already evidence that, during the period of delay which is in no part to be attributed to him, he was turning his life around. During the further delay, although he is partly to blame, this reformation has continued, reinforcing the absence of any gain in punishment so far as its purpose would be to reform his character. By late 2014, before he bore any responsibility for any delay, he had had the middle child, and AP's pregnancy with the third child, would have been well advanced. In the circumstances where Mr Siwak is only partly to blame for part of the delay, and in the light of what had happened while he was blameless, the District Judge ought to have attributed much greater significance to the delay than he did.

52. I now turn to what I regard as the most important aspect of this appeal: the effect of extradition on the young children and especially on the younger two. I would not regard the impact on Mr Siwak, were he not a parent, as sufficient to make extradition disproportionate, nor the effect on AP, if they had no children. I shall consider all the evidence together on this.

53. I start however by repeating my acceptance of the District Judge's finding of fact that AP's family would assist, whether with care, accommodation, or to a degree financially. I see no basis to reject his appraisal that Mr Siwak had downplayed their potential contribution, if they had to face the fact that Mr Siwak had been extradited. By the same token, I regard the reports and assessment of Dr McKail as too pessimistic in that respect. Second, none of the three children has any problems, mental or physical of any significance. None were interviewed. None of them knows of the possibility of Mr Siwak having to leave the family. The evidence of the impact on them from the reports therefore is in a general form, and of a nature and degree which is readily understood, without a psychologist's report.

54. I have no doubt, however, that there would be a significant disruption to the children's attachment to their father which could have a detrimental outcome on their mental health and well-being and on their subsequent relationships. They would experience extradition as the loss of a father who plays a full part in their care and secure upbringing, and in the context of the problems which the loss of his income, and housing and benefit uncertainty would bring. I refer later to the real problems which the family are likely to experience in maintaining contact with Mr Siwak while he was in prison in Poland. Mr Siwak is also able to cope with some aspects of the children's daily life, in particular with the schools, which AP is much less well-placed to do with her limited English. There is no more than a possibility that AP might be able to obtain part-time employment, which would be some mitigation of the financial loss.

55. The other major problem in relation to the children is the effect which extradition would have on AP's ability to care for them, as their sole carer. I accept what Dr McKail says about the impact on AP caused by the uncertainty over extradition, what would then happen to her, and the problems of maintaining contact with Mr Siwak. This uncertainty could lead her at present to envisage the very worst outcomes, with associated intense fear, irritability, and stress. Dr McKail's report gives no very clear

picture, and I doubt that one could be given, of how much of that would resolve itself, were extradition to take place, and how much would be a permanent problem.

56. Dr McKail's first report concluded that there was likely to be a significant deterioration in AP's mental health should Mr Siwak be extradited, along with increased financial, practical and emotional burdens. Her second report stated that at present AP felt overwhelmed and that she would be unable to cope in the event of extradition. It also stated, as did the first, that a significant deterioration in AP's physical and mental health was likely were Mr Siwak to be extradited. I consider that in probability and degree the outcome would be within but at the lower end of the broad range Dr McKail's words indicate, because there would be greater support from the family in a variety of aspects, than Dr McKail has allowed for. To whatever extent that impact on AP occurs, there would be an impact on the children's well-being and the more so on the younger ones, in addition to that which the loss of their father of itself would bring. Dr McKail's second report spells out the detail of physical exhaustion and pain, stress, responsibilities and anxieties, which would "impact on [AP's] capacity for parenting children." It could affect her "emotional availability" for her children and consequently her relationship with them. She would in turn feel guilty, affecting her mood.

57. Although Mr Tinsley is in some respects correct that the evidence is not very different in substance from what was before the District Judge, save that it now has a professional framework and more detail, the full and up to date picture is undeniably graver, more pessimistic and problematic than the District Judge's appraisal allowed for. Extradition would be much less readily coped with by AP than he envisaged, as a single mother, albeit with some family assistance, possibly with part-time work and benefits. She would experience a deterioration in her mental and physical health as detailed in the second report, though not to quite the degree assessed by Dr McKail. This would obviously have an adverse impact on her ability to care for the children, which could be significant, in turn obviously affecting them. This would be additional to that which would follow from the absence for some years of their father, itself a significant disruption to their attachment.

58. To my mind, it is clear that uncertainties would continue for a while, and the difficulties of the loss of income and effect on benefits and housing would have to be coped with. AP would have to deal with the emotional distress and behavioural problems which the three children would experience on being without their father for a number of years. Full parental responsibilities would be borne by her. Those are the circumstances in which the children would experience the adverse effect of the extradition of Mr Siwak on AP's parenting capacity.

59. The hardship would not be "exceptionally severe", as Ms Townshend but not Dr McKail put it, nor would it be simply the usual concomitant of imprisoning the main breadwinner, as the District Judge put it; it would be significantly more serious than that.

60. I also consider that the District Judge needed to grapple with the degree of separation. There appears to be quite sound evidence of problems in obtaining Polish passports or Identity cards for the children so as to permit travel to Poland and return to the UK, and in any event considerable financial difficulties in the way of it for the purpose of visits anyway. Such visits could not be a common occurrence. So, face to face contact

between the children and their father is likely to be minimal, and the same is likely of AP's contact. I am unable to make any findings about the extent to which telephonic communication, much less satisfactory anyway in maintaining the bond with young children, would be available. This is rather different in degree from the problems faced by a family in the UK with a prisoner relative in the UK. There is understandably no finding that AP and the children would return to Poland to live, given the way in which they are settled here, and the absence of any close family there – work, housing and benefit problems apart.

61. The final piece of new evidence concerned the effect of the UK leaving the EU. The first point is that although Mr Siwak appears to be entitled to obtain settled status, he cannot apply without his identity documents, which are not available because of his bail conditions. The process does not fully open until 30 March 2019; the deadline for applying is 30 June 2021. I am not satisfied that I can conclude what risk there is, if any, to Mr Siwak's return to the UK on this material. I am not satisfied that the bail conditions could not be varied; no application has been made for that purpose, nor am I satisfied that the documents could not be made available after extradition. I do not think that the material permits any safe conclusion about the effect of a three year absence on the entitlement of someone to apply for settled status who has already spent five years here. The ability of AP to apply for settled status has not been discussed, nor the effect which that would have on Mr Siwak's return. I do not see that that level of uncertainty permits weight to be attached to the risk. Second, I do not doubt however that there would be problems and costs associated with the Home Office bureaucracy, which, with the uncertainty itself, would add somewhat to the stress faced by both Mr Siwak and AP. I am not prepared to treat that additional stress as a significant factor, though it adds to the case against extradition.

62. In summary, therefore, the factor favouring extradition is that of the public interest in honouring the Framework arrangements, one purpose of which is to ensure that criminals serve the term of imprisonment which they have received. That public interest is somewhat diminished in view of the delay in the proceedings from 2011 to 2017, for part of which after late 2014, Mr Siwak bears some responsibility. The strong public interest in preventing the UK being a safe haven for criminals has no application here as Mr Siwak is not a fugitive and has not been found to have breached any obligations to notify the Polish courts of changes to his address. The public interest is not increased by reference to the gravity of these offences or their sentences, whether as "serious" or "quite serious" but nor is it to be diminished by them as "not serious" either. The length of the prison sentences weighs heavily in each direction: gravity of offending, and impact on the family. This is also a case in which an immediate custodial sentence in 2009 would have been likely in England and Wales, though a court would have been able to adjust the length of any custodial sentence it imposed in 2019 to reflect the events of the intervening years.

63. A compelling case is required for that strong interest to be overcome by the impact on Mr Siwak's private and family life, and the family life of his family members. The factors prayed in aid of that case are first, the changes to Mr Siwak over the last 9 years, becoming a responsible employee, law- abiding with no further offending, a reformed man with a young family. That would be interrupted, and to a reduced purpose, to the extent that achieving such a change would have been an object of

punishment. That also affects the weight to be attached to the public interest in extradition.

64. I do not attach significant weight to the impact on Mr Siwak's own private and family life, nor to the impact as such on AP. The question is whether the impact on the children, and the younger two especially, none of whom has any particular needs beyond those of all young children, adds sufficient to make the compelling case. They would be affected directly, practically and in their emotional development, and overall well-being through the loss of their father for 3 years 6 months, his care, support and income, and probably through the loss of at least face to face contact with him for the same period, and quite possibly all save written contact and occasional telephone contact. There would then be a significant and adverse effect on AP's well-being, and mental and physical health, which would affect in turn her capacity to provide the parental care, in which she would have sole responsibility.

65. I consider that the District Judge's judgement on the material he had was not wrong, especially with the downplaying of the extent to which AP's family in the UK, 10 miles away, could and would actually help in various ways. On the evidence now as a whole, I consider however that it would be wrong to treat this as a case in which the impact was no more than that which any family would face with a father going to prison to serve his sentence. I think that it is rather more severe than that, without being by itself "exceptionally compelling." But I also give greater weight than did the District Judge to the period of separation without any face to face contact being likely, and with no evidence of the availability of telephone contact.

66. All of these cases turn on the particular circumstances and evidence. The fact that Mr Siwak was not a fugitive is important when considering the impact of delay on the public interest and on the development of his family life. The fact that he was not responsible for the delay or lapse of time to late 2014, by which time the important changes to his private life and family life were already in place is also important. And thereafter, he was only partly responsible for the further delay. Had he been a fugitive, or knowingly breached his obligations to maintain contact, I would have dismissed the appeal, notwithstanding the effect on the young children. But as he is not, the change in Mr Siwak's character, behaviour, and family life come to the fore. The impact on the young children would be quite severe.

67. Would it be a disproportionate impact on their family life for their father now to be extradited to be sent to prison and largely out of their lives for three and a half years? I have not found it an easy case at all. I do disagree with the District Judge's appraisal of the significance of the delay, and I attach considerable importance to the development of the family during the period for which no one suggested that Mr Siwak was responsible. I also consider that the further evidence shows that the impact on the children would be significantly more severe than he allowed for. I have to give some weight to the lapse of time, and to his reformed character.

68. In the end I have decided that, in the particular circumstances of this case, extradition would be disproportionate, and I allow the appeal.