Neutral Citation Number: [2022] EWHC 1306 (Admin)

Case No: CO/1144/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/05/2022

Before:

THE HONOURABLE MR JUSTICE DOVE

- -

Between:

Andrzej Dobbek	**Appellant**
- and -	
Regional Court in Torun, Poland	**Respondent**

- -
- -

Benjamin Seifert (instructed by **ITN Solicitors**) for the **Appellant**
Alex du Sautoy (instructed by **CPS Extradition**) for the **Respondent**

Hearing dates: 16th March 2022

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Approved Judgment

Mr Justice Dove :

1. On 23rd March 2021, following a hearing before District Judge Callaway on the 24th February 2021, the extradition of the Appellant to Poland was ordered in relation to a European Arrest Warrant ("the EAW") which was issued on 11th March 2019 and certified by the NCA on 25th March 2020. The sole ground for which permission to appeal was granted relates to the judge's treatment of Article 8. I am grateful, as I explained at the hearing, for the careful and focused written and oral submissions provided by both counsel, and the helpful way in which the materials have been presented in electronic form.

The background to the EAW.

2. The offences underlying the EAW in this case were committed in the period between 20th July 2001 and 20th May 2002 when, acting with another, the Appellant in the course of his business with that other person entered into leasing contracts in relation to various items of machinery/equipment and tools which were not returned when the leasing contracts were terminated causing a loss to the leasing company, ELF, of 70,437.53 PLN.

3. The Appellant's account of these matters, provided in his proof of evidence, is that the leasing contracts arose when he was running a construction company with his mother. The machines and tools were used on building sites. The construction company encountered financial difficulties and collapsed. The machinery and tools were stolen from a building site and the theft was reported to the police.

4. The charges in relation to the losses incurred by ELF were the subject of an accusation warrant issued by the Respondent on 19th November 2012 and certified on 13th December 2013. On 7th June 2013 the Appellant's extradition was ordered by District Judge Evans and an appeal against that decision was dismissed by Simon J on 2nd October 2013.

5. Prior to the EAW being issued the Appellant came to the UK in 2003 and was joined by his wife in 2004. Having initially had jobs in a warehouse and with an agency, he was working as a lorry driver at the time when this first EAW emerged.

6. The records demonstrate that, as recorded above, the Appellant was extradited to Poland on 24th October 2013. The original purpose of his extradition was to enable his trial to proceed. It appears from the EAW which forms the subject matter of the present proceedings, in box D, that the Appellant did not appear in person at the trial leading to the conviction and the sentence for which he is wanted. Box D goes on to specify as follows:

> "(b) the person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally established that he or she was aware of the scheduled trial, and was informed that a decision may be handed down if he or she does not appear for the trial; OR

> (c) being aware of the scheduled trial the person had given a mandate to a legal counsellor, who was appointed by the person concerned to defend him or her at the trial, and was indeed defended by that counsellor at the trial; OR
>
> (d) this person was served with the decision and was expressly informed about the right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case including fresh evidence to be re-examined, and which may lead to the original decision being reversed;"

7. This information was further amplified as follows:

> "Tomazs Dobbek was notified on the date of the trial by post advice. The sentence was adjudicated, and the accused was not present then. However, the attorney of the accused was present, and he submitted the request to be served the copy of the sentence with the statement of reasons. The copy of the sentence was sent to Tomazs Dobbek to the address: 12 Podgorna Street, Grudziadz. It was advised twice and was deemed as served on 20th March 2015. The attorney collected the sentence with the statement of reasons on 19th March 2015 and then he filed the appeal. By the sentence of 8th October 2015, the regional court in Torun upheld the sentence appealed from. The sentence became final on 8th October 2015."

8. The sentence with which the EAW is concerned arises from a judgment of the District Court in Grudziadz of 12th February 2015. Whilst the EAW does not specify with any particularity, it appears that this was a suspended sentence as the EAW does record that its execution was not ordered until a further decision of 25th January 2017. The sentence appears to have been one of 10 months imprisonment suspended, and when it was ordered to be executed on 25th January 2017, 9 months and 4 days imprisonment remained to be served.

9. In box F, in relation to other relevant circumstances, the EAW records as follows:

> "When summoned to come voluntarily to prison he failed to appear. The attempt to bring him by the police proved to be ineffective, so as the search thereof by a National Wanted Warrant. Time limitation of the penalty execution in the case shall take place on 9th October 2035. From the information obtained by the police it results that requested person may be staying in the territory of Great Britain. On 5th August 2015 he filed a passport application in the Embassy of the Republic of Poland in London stating the following residents address: Nunnery Lane 7, LU3 1XA, Luton, Telephone number: 07576158714."

10. Other documentation presented to the District Judge related to correspondence associated with the sentence. On 22nd February 2016 a Ms Becherka, a probation officer at the court, wrote to the Appellant in the following terms:

> "The District Court in Grudziadz, the Probation Officer Executing Judgment in Criminal Cases, hereby informs you that you have been obliged to settle the damage to EFL in the amount of PLN 20,473.53 within 1 year of the judgment becoming final, i.e. until 8th October 2016. Failure to fulfil this obligation within the time limit indication by the Court will have consequences in the form of ordering the penalty. In connection with the above, I am calling you to settle the amount awarded and to send confirmation of the payments made to this email address."

11. On 2nd October 2016 the Appellant wrote to Ms Becherka asking for the account number into which the compensation was to be paid. He advised that his sister had written to ELF and the Court requesting that the amount be divided into instalments, and indicating that the first instalment of £1000 would be paid immediately after receipt of the account number. He also observed that he had been repaying the costs of the proceedings also in instalments.

12. On 4th October 2016 Ms Becherka wrote back to the Appellant informing him that she did not have the account number of the leasing fund into which he was obliged to pay the compensation, but he could apply to ELF with the number of his lease contract to obtain that information. She also informed him that on 29th November 2016 the court would consider the application for the enforcement of a penalty "due to the lack of contact with yourself and failure to fulfil the obligation to repay the damage on time." On 21st November 2016 the Appellant (through his sister) wrote to ELF proposing to pay 1000 PLN per month and explaining that he was impecunious and unable to otherwise pay off the debt. If ELF did not agree he would not be able to pay and his conditional sentence would be revoked. On 21st November 2016, by return, an employee of ELF provided details of the account to which compensation should be paid and indicated that the request to pay by instalments would be referred on. On 18th January 2017 the proposal to pay by instalments was not agreed, and ELF explained that the debt was to be settled on the same terms specified by the judgment of the District Court of the 12th February 2015.

13. In addition to this material the District Judge received evidence from the Appellant in respect of his personal circumstances and life in the UK. As set out above, he had been living in the UK since 2003 and with his wife since 2004. He and his wife have two children who were also resident at their address in Luton and who at the time of the hearing were studying at university. The Appellant explained that he had no savings and was sending money regularly each month to support his mother financially who suffers from Parkinson's disease and who is cared for by his sister. The Appellant explained that he had problems with his health. He had heart disease involving strokes in 2008 and 2010 and had suffered from severe depression between 2003 and 2017.

The judgment.

14. The judge embarked upon his consideration of article 8 citing section 21A of the Extradition Act 2003. Unfortunately, this was the wrong provision, since it applies to accusation cases. The correct provision which the judge ought to have applied was section 21 of the 2003 Act. He went on to consider the seriousness of the offence in

accordance with section 21A(3)(a), however this provision was not in play by virtue of the fact that the Appellant had been convicted. The judgment continued as follows:

> "18. I am not sure I entirely agree with the submission canvassed in the case and summarised above. The case involved a significant breach of trust and the loss is not one of a minor character.
>
> 19. There is significant evidence, moreover, that the RP does fall into the category of a fugitive status, and in particular the fact that he failed to answer the verdict posted on 2 occasions to his home address, and attempts were made to ascertain his whereabouts. I have already commented upon this aspect of the case above. It is the case, as submitted that this matter is old. But a major contributing factor to that point is the reality that the RP left the jurisdiction of the JA at the latest in 2014 on his own accord. In this regard the well-known case of Kakis v Govt. of the Republic of Cyprus [1978] 1 WLR 779 becomes engaged and which has a direct influence upon passage of time cases especially where the RP himself has contributed to that delay. I judge this matter to be such a case.
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> …
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> 21. I am obliged to conduct the balancing exercise recommended by the LCJ in the case of Celinski & Others [2015] EWHC 1274 (Admin) and the need to provide sufficient, clear and adequate reasons for a decision in any case. This I shall now do.
>
> Factors against Extradition
>
> (i) the age of the case which took place nearly 20 years ago.
>
> (ii) the fact that it has taken a considerable time for the JA to activate the EAT before this court.
>
> (iii) the outstanding term to be served is short.
>
> (iv) the RP has no convictions in the UK and has made the UK his home along with his family.
>
> (iv) the RP experiences poor health
>
> Factors in favour of Extradition
>
> (i) the vital public interest of the UK adhering to its treaty obligations with other states.
>
> (ii) the requirement for UK court to respect the legal processes in other jurisdictions and here the JA in particular and their legitimate request.

> (iii) the RP is a fugitive.
>
> (iv) the offences for which the RP was sentenced are relatively serious and in full knowledge that he was required to serve a prison sentence he left the JA and established a life in the UK."

The new evidence.

15. As set out above, the judge delivered his judgment on 23rd March 2021. On the same date Further Information was received from the Respondent in response to a number of questions which had been raised prior to the hearing. Indeed, in the judge's judgment he referred to Further Information which had been requested but not received. The Respondent has made an application for this Further Information to be received as new evidence in the case. This is an application which is not resisted by the Appellant, and indeed the Appellant places reliance upon it. At this stage of the judgment it is sensible simply to set this material out prior to dealing with its admissibility.

16. The Further Information confirms that the Appellant was extradited to Poland on 24th October 2013. It goes on to provide the following in relation to his subsequent release from detention:

> "5. and 6. On 19th November 2013 the accused Tomasz Dobbek was released from the detention centre after being extradited from Great Britain, pursuant to the decision of the District Court in Grudziadz of 19th November 2013, file reference number II K 822/04 (decision on repealing of the detention on remand). The accused was released from the detention centre as he had made the statements before the Court in person and all activities requiring his presence had already been carried out. There was no justified threat of him obstructing penal proceedings, and, by the same, the prerequisites to apply detention on remand ceased to exist. At the same, Tomasz Dobbek, with reference to his release, was not subjected to any limitations relating to applying of any other preventative measures.
>
> …
>
> 9a - 9b. After the accused had been surrendered the following dates of trial were set up:
>
> - 19th November 2013 – the accused submitted the explanations, he availed himself the assistance of the attorney, he was informed about the next date of the trial on 7th January 2013, his detention on remand had been repealed;
>
> - 7th January 2014, the accused failed to appear, his defence attorney was present;

- 18th January 2014 – the notification was sent to the address of the legal office of the defence attorney; it was collected by the attorney in person; during that trial the witness was punished and the date of the trial was adjourned until 13th May 2014;

- 13th May 2014 – the accused did not come, the notification was sent to the address of the Legal Office of the solicitor Anna Kurek, the defence attorney did not come to the trial the accused did not come to the trial, he had been properly informed about the date; the trial was adjourned until 15th May 2014

- 15th May 2014 – the accused Tomasz Dobbek did not appear, the attorney – solicitor Lukas Kurek came to the trial, the trial was adjourned until 26th June 2014;

- 26th June 2014 – the notification for the accused was sent to the address of the Solicitors Legal Office; it was collected by the solicitor Lukasz Kurek;

- 19th August 2014 – the notification for the accused was sent to the address of the Solicitors Legal Office and it was collected by the solicitor Anna Kurek; the accused did not come to the trial; his attorney was present;

- 25th September 2014 – the notification for the accused was sent to the address of the Solicitors Legal Office and it was collected by the solicitor Lukasz Kurek; the accused did not come to the trial; his attorney – solicitor Lukasz Kurek was present. Two witnesses were interrogated at the trial and the trial was adjourned until 13th November 2014.

- 13th November – the accused did not come, the notification was sent to the address of the Solicitors Legal Office Anna Kurek; the accused, properly summoned, did not come to the trial; his attorney – solicitor Lukasz Kurek was present; at this trial the Court interrogated one witness and the case was adjourned until 16th December 2014;

- 16th December 2014 – the accused did not come, there is no returned confirmation of the receipt of the notification, the attorney of the accused solicitor Lukasz Kurek was present and he declared that the accused knew about the date of the trial, new date was set up *ex officio* for 12th February 2015;

- 12th February 2015 – the notification on the date of the trial was sent to the address of the Legal Office of solicitors and was collected by an employee of that office; the accused did not come, he was properly informed about the date, his attorney – solicitor Lukasz Kurek was present; the sentence

> was rendered at this trial; by the sentence of 8th October 2015 the Regional Court in Torun upheld the sentence of the District Court in Grudziadz; the appeal from the sentence was submitted by the defence attorney of the accused; after the sentence of the Regional Court in Torun became final it was delivered to the attorney of the accused on 6th November 2015, together with the statement of reasons"

17. The Further Information goes on to describe the proceedings after his release from detention in the following terms:

> "9.c. The District Court in Grudziadz informed the convict on the duty to redress the losses of the Europejski Fundusz Leasingowy (European Leasing Fund), indicating the address thereof: 12 Podgorna Street, Grudziadz. In the files of the case there is no return confirmation of the accused having received the correspondence. Page 1.016 of the files contains the letter entitled: "Tomasz Dobbek, 28/8 Droga Lawoka Street, 87-100 Torun" including the information that the convict knows the date of the sitting of the Court on ordering the execution of imprisonment penalty set up for 29th November 2016. The convict, with the intermediary of his sister Elwira Jurewicz, submitted the request to the wronged party to repay the damages in instalments at the amount of 1,000 PLN each. The letter is not signed in person by the convict, page 1.017 contains the confirmation of bank transfer of 23rd November 2016.
>
> Furthermore, the probation officer sent the correspondence to the convict at the address: 12 Podgorna Street, Lasin – this letter was also returned to the probation officer with the comment on incorrect address data. Furthermore, the probation officer at the District Court in Torun was requested to carry out interview at the address 28/8 Lawoka Droga Street in Torun. On 12th February 2016, during the interview the probation officer contacted the convict on the telephone. The convict stated he had been living in England (Luton) for 13 years. The convict was instructed by the probation officer on the duties and sanction resulting from the conditionally suspended penalty. The convict declared that as of then he had not begun the payment (redressing) of the damages in this case, he was surprised hearing about that matter. He stated that Europejski Fundusz Leasingowy received back all the money. He claimed these damages were sold to another company, probably also a leasing company. The convict gave telephone contact number: 00447795417745 and email address: tomaszdobbek@gmail.com
>
> 10. By the sentence of 12th February 2015 the penalty of 10 months of imprisonment was adjudicated towards the convict,

> the execution of this penalty was suspended for probation period of three years, and this period commenced on 8th October 2015."

18. The Further Information as set out above describes the correspondence which is set out above in relation to the proposals to repay the damages or compensation in instalments. As can be seen it explains that correspondence had initially been sent to the Appellant's previous address at 12 Podgorna Street, Gurdziadz in November 2015, however, following a visit to a different address the probation officer was able to contact the Appellant on the telephone on 12th February 2016. The Further Information records that the probation officer was told that the Appellant had been living in England for 13 years. The probation officer advised the Appellant of the duties and sanctions arising from the suspended sentence which had been imposed. The Appellant provided the probation officer with a contact mobile phone number and an email address and indicated that he believed ELF had received back all of the money.

19. The Further Information confirms that the sentence imposed on 12th February 2015 was one of 10 months' imprisonment suspended for a probation period of 3 years along with an obligation to compensate ELF for their financial losses in the sum of 20,437.53 PLN. The failure to repay the compensation led the court to execute the sentence on the 27th January 2017. Although there was a subsequent complaint by the Appellant's lawyer this did not lead to the matter being reopened. The Further Information advises that the Appellant has been illegally at large since 5th April 2017 when he failed to attend the Detention Centre in Torun to serve the outstanding period of the sentence. The need for the Appellant to be secured by warrant was ordered on 7th August 2017. The Further Information notes that the Appellant was obliged to appear at court or at the Probation Officer's premises to provide explanations as to the course of the probationary period and the duties imposed during the probationary period, and that most likely the Appellant received information about this during the telephone conversation of 12th February 2016.

20. Further new evidence is relied upon by the Appellant and, again, an application is made for this material to be adduced before the court. It comprises a court order dated 14th September 2021 in which it is recorded that the court refuses to repeal the penalty enforcement on the basis of a submission that there are new circumstances effecting the disposal of the matter. The court notes:

> "The convict has indeed redressed the damage at the stage of the enforcement proceedings, however, it was done only as of the moment the EAW procedure was initiated. Until then, he was in hiding before the judicial authorities in the period from January 2017 to 15th June 2021, he failed to make any payments, and therefore there are no grounds to repeal the decision."

The Parties' cases.

21. On behalf of the Appellant Mr Seifert submits that there are four key reasons why the judgement which was reached in the present case by the District Judge was wrong. Firstly, he submits that the Appellant was not a fugitive. The Appellant had not

knowingly placed himself beyond the reach of legal process: at the time when he left Poland and came to the UK he was effectively on the equivalent of unconditional bail, and there was no evidence before the District judge to support the suggestion made by the judge that the Appellant "in full knowledge that he was required to serve a prison sentence… left the JA and established a life in the UK". Indeed, quite the contrary was the case since at the time when he left Poland the trial had yet to happen and the sentence had yet to be imposed. Furthermore, the evidence before the District Judge demonstrated that the Respondent knew full well where the Appellant was at the time when he was both convicted and sentenced, and the sentence executed, on the basis of his passport application recorded in the EAW and the subsequent contact between the Appellant and the probation officer in early 2016. Thus, the conclusion which the District Judge reached at paragraph 21 (iii) and (iv) in respect of factors in favour of extradition were plainly wrong.

22. Secondly, Mr Seifert submits that the District Judge failed to take into account the fact that the Appellant had been extradited previously and, notwithstanding this, released by the Respondent when striking the Article 8 balance.

23. Thirdly, the District Judge was wrong in that he failed to properly assess whether or not the Appellant had made any contribution to the delay in the case. It was plain from the evidence before the District Judge that whilst there had been a delay in the case it could not all be attributed to the Appellant.

24. Finally, the judge was wrong to suggest that the offences involved in the present case were relatively serious in circumstances where they had been committed a substantial period of time ago and arose out of what were effectively commercial contracts. Mr Seifert submitted that the new evidence which is set out above further reinforces these conclusions and the validity of the Appellant's grounds of appeal.

25. In response Mr du Sautoy, on behalf of the Respondent, submitted that whilst it may have been incorrect for the judge to suggest that the Appellant had left in full knowledge he was required to serve a prison sentence, even were he not considered a fugitive that concession is still of little avail to the Appellant. The chronology of the matter demonstrated that the Appellant left Poland having been extradited prior to his trial, and avoided the trial for which he had been extradited. This behaviour was still a factor strongly favouring extradition. Furthermore, although the judge did not refer to the previous extradition this was a matter which cut both ways. The previous extradition demonstrated that the Appellant was well aware that he was to be tried for these offences and he left Poland before that trial occurred.

26. Turning to the Appellant's contribution to delay, Mr du Sautoy submitted that paragraph 21 of the judgment illustrated that the judge had taken account of the delay in the present case, and in any event in between the Appellant's first extradition and the sentence being executed it could clearly be considered that the Appellant had contributed to the delays in the case. Finally, in relation to the gravity of the offending whilst the judge may have used the language of breach of trust somewhat loosely, nevertheless the finding that the offences were relatively serious was a finding which was open to him in the circumstances of the case. Mr du Sautoy further submitted that the new evidence was not decisive. The Further Information provided by the Respondent effectively cut both ways on the issues of fugitive status, and the repayment of the compensation at a late stage was not a matter which had led the

Respondent to review the penalty. In those circumstances the court should be slow to go behind that decision in the context of the present appeal.

The law.

27. This is an appeal under section 26 of the Extradition Act 2003 and the powers of the court are provided by section 27 of the 2003 Act. The court may allow or dismiss the appeal, and it may allow the appeal only if the conditions under section 27(3) or section 27(4) are satisfied. Those conditions are specified as follows:

> "27(3) The conditions are that –
>
> (a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;
>
> (b) if he had decided the question in the way he ought to have done, he would have been required to order the persons discharge.
>
> (4) The conditions are that –
>
> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;
>
> (c) if he had decided the question in that way, he would have been required to order the persons discharge"

28. The provisions of section 27(4) bear upon the applications to adduce new evidence by both the Respondent and the Appellant. The leading authority in relation to the operation of these provisions is the decision of the Divisional Court in *Szombathely City Court and Others v Fenyvesi and another* [2009] 4 All ER 326; [2009] EWHC 231 (Admin). At paragraph 32 of the judgment the court observed as follows:

> "32. In our judgment, evidence which was "not available at the extradition hearing" means evidence which either did not exist at the time of the extradition hearing, or which was not at the disposal of the party wishing to adduce it and which he could not with reasonable diligence contain. If it was at the party's disposal could have been so obtained, it was available. It may on occasions be material to consider whether or when the party knew the case he had to meet. But a party taken by surprise is able to ask for an adjournment. In addition, the court needs to decide that, if the evidence had been adduced the result would have been different resulting in the persons discharge. This is a strict test, consonant with the parliamentary intent and that of the Framework Decision that extradition cases should be dealt

> with speedily and should not generally be held up by an attempt to introduce equivocal fresh evidence which was available to a diligent party at the extradition hearing. A party seeking to persuade the court the proposed evidence was not available should normally serve a witness statement explaining why it was not available. The Appellant did not do this in the present appeal."

29. In paragraph 34 of *Fenyvesi* the court observed that there may be a degree of latitude when, in occasional cases, the admission of material may lead to the avoidance of a breach of the ECHR. At paragraph 35 the court noted that the test was equally strict in relation to the position of respondents where the threshold remains high and the fresh evidence must be decisive.

30. In the recent case of *Zabolotnyi v Mateszalka District Court Hungary* [2021] 1 WLR 2569; [2021] UKSC 14 Lord Lloyd-Jones JSC, with whom the other members of the Supreme Court agreed, observed the following in paragraph 57 of his judgment, prior to going on to cite and reaffirm the decision in *Fenyvesi:*

> "In my view these conditions in section 27(4) are, strictly, not concerned with the admissibility of evidence. I agree with the observation of Laws LJ in *District Court of Slupsk v Piotrowski* [2007] EWHC 933 (Admin), with regard to the parallel provision in section 29(4) which applies to an appeal against discharge at an extradition hearing, that it does not establish conditions for admitting the evidence but establishes conditions for allowing the appeal. In my view this applies equally to section 27(4) which is not a rule of admissibility but a rule of decision. The power to admit fresh evidence on appeal will be exercised as part of the inherent jurisdiction of the High Court to control its own procedure. The underlying policy will be whether it is in the interests of justice to do so (*Zabolotnyi City Court, Hungary v Fenyvesi* [2009] 4 All ER 324, a decision in relation to section 29(4) of the 2003 Act, paras 4 and 6, per Sir Anthony May P; *FKV Stuttgart State Prosecutors Office, Germany* [2017] EWHC 2160 (Admin) at [26], per Hickenbottom LJ."

31. In this context, however, an important consideration will be the policy underpinning sections 26 – 29 of the 2003 Act that extradition cases should be determined speedily, and not delayed by attempts to introduce on appeal evidence which could and should have been relied upon below (*Fenyvesi,* paras 32-33*).*

32. It should be noted that similar provisions to those under section 27(3) and (4) also pertain to an appeal against discharge pursuant to section 28 of the 2003 Act within section 29(3) and (4).

33. Turning to consideration of the law relating to the status of being a fugitive, as Lloyd-Jones LJ (as he then was) observed in the case of *Wisniewski v Regional Court of Wroclaw, Poland* [2016] 1 WLR 3750; [2016] EWHC 386 (Admin), fugitive status is a non-statutory concept derived from the authorities in relation to a person subject to

extradition proceedings who is precluded from invoking the consequences of his conduct as a bar to extradition. In *Wisniewski* the court considered the application of the principles for defining fugitive status to circumstances where a convicted person was subject to a suspended sentence of imprisonment, failed to comply with the conditions of that sentence and left the jurisdiction before the sentence was activated. Lloyd-Jones LJ addressed the issues arising in paras 59 and 60 of his judgment in the following terms:

> "59. On behalf of the appellants, Mr Jones submits that in the passage in his speech in *Kakis's* case referred to in *Gomes's* case as Diplock para 1, Lord Diplock was limiting the concept of a fugitive to cases where the person had fled the country, concealing his whereabouts or evading arrest. However, I consider that these were merely examples of a more general principle underlying *Kakis's* and *Gomes's* cases. Where a person has knowingly placed himself beyond the reach of a legal process he cannot invoke the passage of a time resulting from such conduct on his part to support the existence of a statutory bar to extradition. Rather than seeking to provide a comprehensive definition of a fugitive for this purpose, it is likely to be more fruitful to consider the applicability of this principle on a case by case basis. Similarly, a process of sub-categorisation involving "quasi-fugitives" and "fugitives not in the classic sense" is unlikely to be helpful.
>
> 60. How does this work in relation to a breach of a suspended sentence? Mr Hardy submits that the district judge in each of the cases before us was entitled to find that the appellant had left Poland voluntarily with the inevitable consequence that he or she would not comply with his or her obligations pursuant to a suspended sentence, which in turn would inevitably result in its activation. Accordingly, he submits, the district judge was right to hold that each appellant was precluded from relying on the passage of time bar to extradition. In one respect this seems to me to suggest too stringent a test; the activation of the sentence need not be an inevitable consequence of the appellant's conduct. I consider that a person subject to a suspended sentence who voluntarily leaves the jurisdiction in question, thereby knowingly preventing himself from performing the obligations of that sentence, and in the knowledge that the sentence may as a result be implemented, cannot rely on a passage of time resulting from his absence from the jurisdiction as a statutory bar to extradition if the sentence is, as a result, subsequently activated. The activation of the sentence is the risk to which the person has knowingly exposed himself. In my view, such a situation falls firmly within the fugitive principle enunciated in *Kakis's* case [1978] 1 WLR 779 and *Gomes's* case [2009] 1 WLR 1038. The fact, if it be the case, that a person's motive for leaving the jurisdiction

> was economic and not a desire to avoid the sentence, does not make the principle inapplicable."

34. The concept was further reviewed in the case of *De Zorzi v Attorney General Appeal Court of Paris, France* [2019] 1 WLR 6249; [2019] EWHC 2062 (Admin). This case concerned a requested person who had resided in the Netherlands since 1985, and who was arrested during a visit to the UK in 2018 pursuant to an EAW issued in France with respect to her return to serve a sentence of 3 years imprisonment imposed in 2001. The requested person sought to rely upon the passage of time and contend that her extradition was barred under section 14 of the 2003 Act as being unjust or oppressive. The District Judge ordered her extradition and she appealed.

35. In giving the judgment of the Divisional Court, Garnham J provided the following in relation to the proper approach for determining fugitive status, along with setting out the judgment of Hamblen LJ in the case of *Pillar-Neumann* [2017] EWHC 3371 (Admin), at paragraphs 47 and following of his judgment:

> "47. The critical question in this appeal, in my view, is whether the district judge was wrong in his conclusion that Ms De Zorzi was a fugitive. If she was not a fugitive, delay becomes important in determining whether it would be oppressive to extradite her and in determining the balancing exercise under article 8.
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> 48. The test for fugitive status is whether the requested person knowingly placed himself beyond the reach of a legal process. It is to be noted that, unlike the test for being unlawfully at large (which is objective), the test for fugitive status is subjective – the requested person must be shown deliberately and knowingly to have placed himself beyond the reach of the relevant legal process.
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> 49. It is valuable to see how that question was addressed by Hamblen LJ in *Pillar-Neumann* [2017] EWHC 3371 (Admin):
>
> '65. In the present case, the appellant has been resident in this country, as the wife of a British citizen, since 1998, six years before the criminal investigation began. The UK is her home.
>
> 66. She has throughout lived in this country openly. She has taken no steps to conceal her identity or her location. She has been on the electoral role and has paid council tax and utility bills.
>
> 67. The respondent argues, and the judge found, that the appellant is a fugitive because in 2004 she became aware that a domestic warrant for her arrest had been issued in Austria and that, by failing to leave her home in the UK and go to Austria, so that she could be arrested pursuant to that warrant, she was evading arrest and was therefore a fugitive.

> 68. In my judgment, even if she was aware of the domestic warrant, which is disputed, lawfully remaining in her established country of residence does not mean she was evading arrest of was a fugitive.
>
> 69. She was not fleeing the country or concealing her whereabouts. She was not taking any positive steps to evade or avoid arrest. She was simply carrying on living in her country of residence, as she was lawfully entitled to do.
>
> 70. Nor was she knowingly placing herself beyond the reach of a legal process. She took no positive steps to place herself anywhere. The respondent's case is that she was somehow obliged to place herself within the reach of a legal process instituted in another country and to leave and give up her home and lawful residence in the UK in order to do so. Not surprisingly, we have been shown no case in which it has been found, or even suggested, that failing to act in this way makes someone a fugitive.
>
> 71. In fact, she could not have returned to Austria in any event as she had no passport.
>
> 72. In the context of a European arrest warrant, it is unsurprisingly not suggested that a person who fails to give himself up, go to the country seeking extradition and submit to arrest there is evading arrest or acting as a fugitive, but that is where the logic of the respondent's argument leads.
>
> 73. For all these reasons I have no doubt that the judge was wrong to find to the criminal standard that the appellant was a fugitive. If so, there is no bar to her relying on the passage of time under section 14.' "

36. Against the background of these principles Garnham J concluded that the judge had been wrong to find that the Appellant was a fugitive based on the particular facts of that case.

Conclusions.

37. The first issue which falls for determination is whether the judge was wrong when he concluded that the Appellant was a fugitive. It appears that this conclusion was founded upon "the fact that he failed to answer the verdict posted on two occasions to his home address, and attempts were made to ascertain his whereabouts". In my judgment there is considerable force in the submission made by Mr Seifert that on the basis of the evidence before the court at that time, the judge could not be sure to the criminal standard that the Appellant was a fugitive. There were other elements of the evidence which the judge neither records nor assesses which had an important material bearing on the question of whether the Appellant was a fugitive.

38. Firstly, it appears that he left Poland in 2013 prior to his trial without any adverse observation being recorded in the paperwork. There was no evidence before the District Judge that he was not allowed to leave Poland at that time, and indeed the judge clearly fell into error in connection with this issue when he concluded that "in full knowledge that he was required to serve a prison sentence" the Appellant left the Respondent's jurisdiction. That was simply not the case and it is difficult to conclude other than it was a finding which affected the judge's assessment of whether or not the Appellant was a fugitive. In fact, when he was sentenced in 2015 the evidence before the judge suggested that the sentence imposed was a term of imprisonment suspended upon payment of compensation. There was no reason why that compensation could not be paid from the Appellant's home in the UK. Thus, leaving Poland did not necessarily mean that the Appellant would not be able to comply with the suspended sentence.

39. Furthermore, the judge fails to address the fact that the evidence recorded in the EAW was that the Appellant had in fact provided the Polish authorities with details of his home in the UK, together with a mobile phone number, as part of his application for a passport in 2015. Notwithstanding the provision of this information, which was consistent with the home from which he had been extradited in 2013 on the earlier EAW, it seems that the authorities did not correspond with that address but communicated with the Appellant's lawyer. On the basis of the evidence I am satisfied that the District Judge's conclusion that the Appellant was a fugitive was wrong and that the reasons which he provided for reaching that conclusion are unsustainable.

40. It is accepted by Mr du Sautoy that the judge did not refer to the previous extradition proceedings. In my view those previous extradition proceedings, and indeed an analysis of the delay between the sentence being executed in the present case and the issuing of the fresh EAW, were matters which were relevant to the judge's conclusion. They appear to have been left out of account, albeit the judge did take account of the fact that the offences with which these proceedings are concerned are now 20 years old.

41. Finally, in my view the judge was wrong to suggest that the offences with which these proceedings are concerned were offences involving a significant breach of trust. Whilst the offences were not trivial and the losses were not inconsequential, the aggravating feature of breach of trust did not arise.

42. Stepping back, in my view the District Judge's conclusions on article 8 were wrong, principally because of his erroneous conclusion that he could be sure the Appellant was a fugitive on the basis of the evidence before him. In addition, as set out above, there were further features of the District Judge's conclusions which were inappropriate and which reinforce my view in relation to the article 8 conclusions he reached.

43. In any event, even were that conclusion incorrect on the basis of the material before the District Judge, then the new material in the form of the Further Information furnished by the Respondent is in my judgment decisive. This Further Information reinforces that at the time when the Appellant was released in 2013, he was released because all of the activities requiring his presence in the proceedings had been carried out, and to do so would not obstruct those proceedings. They further confirm what is implicit in the

material before the District Judge, namely that the Appellant was not subject at that time to any preventive measures, nor was he required to provide his address to the authorities. Furthermore, there was no suggestion that he was not entitled to return home to the UK and leave Poland. This was so notwithstanding the fact that he had had to be extradited to attend his trial. The Appellant had not therefore put himself deliberately beyond the reach of the judicial process. Furthermore the Further Information demonstrates that even though they did not use the address which they had for the Appellant in the UK through his passport application, it was relatively straight forward for the probation officer to find the Appellant, who was candid in relation to his whereabouts and the means of contacting him. All of this material further reinforces the conclusion that it was not justified to conclude that the Appellant was a fugitive.

44. In the light of these conclusions it is necessary for the court to reconsider the article 8 balance in the light of the findings which have been made and as a consequence of the District Judge's conclusions being in error. In restriking the balance it is very important to observe that the assessment of the merits of article 8 arguments are highly sensitive to the facts of individual cases, and this case is no exception: it creates no precedent. In favour of the ordering of the Appellant's extradition is the very powerful public interest in the UK adhering to its treaty obligations with other states which must carry very significant weight in the balancing exercise, along with the need to attach very great weight to the public interest in the UK not becoming a safe haven for criminals and the need for this jurisdiction to respect the outcomes of the legal processes in others. That said, in the particular circumstances of the present case, the other features which the District Judge placed on this side of the equation have to be discounted. For the reasons set out above, the Appellant is not properly to be regarded as a fugitive, the offences for which he is wanted were incorrectly characterised by the District Judge and he did not leave Poland and establish a life in the UK knowing that he was required to serve a prison sentence. No criticism can be made of the factors which the District Judge said favoured the Appellant's discharge. In my view considerable weight attaches in the particular circumstances to the combination of the factors in support of the appeal. These offences now occurred a very long time ago and there have undoubtedly been delays in the issuing of the EAW in this case. Allied to this, the sentence which is remaining to be served for the offences that were committed such a long time ago is relatively short. In addition there is no doubt that the Appellant and his family have been in the UK a long time and have a well-established family and private life here. Some, but not extensive, weight must attach to the poor health that the Appellant experiences. As the District Judge noted when he ordered extradition on the balance which he identified this is a case in a category where the decisions "are always difficult and the judgments invariably fine". In my view once the balance is readjusted to reflect my findings it favours the Appellant, and in the circumstances I am satisfied that his case in relation to article 8 must succeed and the appeal must be allowed.

45. I have not taken account of the new evidence in relation to the repayment of compensation in this case in reaching my conclusions, and in the light of my overall findings there is no need to do so. I simply note that it does bear upon the article 8 issues in the present case and supports to some extent the conclusion that the balance should be struck in a manner different from the way in which it was struck by the District Judge.

46. For the reasons set out above the Appellant's appeal must be allowed.