Neutral Citation Number: [2023] EWHC 201 (Admin)

Case No: CO/73/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/02/2023

Before :

MRS JUSTICE FARBEY

- -

Between :

RAFAL DROZDOWSKI

Appellant

- and -

(1) REGIONAL COURT IN WARSAW, POLAND

(2) REGIONAL COURT IN LUBLIN, POLAND

Respondents

- -
- -

Ms Émilie Pottle (instructed by **JD Spicer Zeb Solicitors**) for the Appellant
Mr Jonathan Swain (instructed by the **Crown Prosecution Service**) for the Respondents

Hearing date: 6 December 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on 3 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Judgment Approved by the court for handing down.

Mrs Justice Farbey :

Introduction

1. The appellant is a Polish national born on 12 May 1980. He appeals under section 26 of the Extradition Act 2003 ("the 2003 Act") against the decision of District Judge Bristow (sitting at Westminster Magistrates' Court) to order his extradition to Poland. The decision was made on 4 January 2022 following a hearing on 9 December 2021.

2. The appellant is the subject of two European arrest warrants ("EAWs"). They are "accusation" warrants relating to six alleged offences. The first warrant ("EAW1") was issued by the Regional Court in Warsaw on 13 April 2018 and certified by the National Crime Agency on 15 May 2018. The second warrant ("EAW2") was issued by the Regional Court in Lublin and certified on 11 August 2019.

3. Before the District Judge, the appellant submitted (among other wide ranging grounds) that his extradition would breach his right to respect for private and family life under article 8 of the European Convention on Human Rights ("the Convention"). The District Judge rejected the appellant's submissions and found that the appellant's extradition would be compatible with his Convention rights.

4. By order dated 13 April 2022, Hill J granted permission to appeal on the papers. The grounds of appeal are that the District Judge erred in concluding that the appellant's extradition was compatible with article 8 in so far as:

    i. He failed to accord sufficient weight to the significant delay since the offences were allegedly committed;

    ii. He failed to accord sufficient weight to the evidence of an expert regarding the impact of extradition on the appellant's children;

    iii. He failed to take account of the risk of permanent separation of the appellant from his partner and children because of Brexit.

Background

EAW1

5. EAW1 seeks the appellant's surrender in relation to one offence. It is alleged that on 27 June 2004 the appellant assaulted an individual. The particulars of the offence are set out in the warrant itself. The appellant is alleged to have beaten the individual with his fists, kicked him all over the body and "stabbed him several times with a knife." The individual received stab wounds in the area of his right shoulder blade, in the right thigh, in the right lumbar area, in the costal arch area and in the head. The wounds gave rise to serious injuries.

6. In Further Information dated 7 May 2020, the Polish authorities confirmed that the decision to prosecute and present charges was made on 3 April 2017. A domestic arrest warrant was issued on 13 April 2017. Between the initiation of the investigation on 27 June 2004 and the decision in 2017 to prosecute, actions were taken to secure evidence and look for witnesses, including verification of the testimony given by the main witness and their links to the appellant.

7. Proceedings had been discontinued on 25 October 2004, due to the failure to identify the perpetrator. On 28 August 2015, information was received that identified the appellant. Attempts were made to locate him, which were unsuccessful. On 5 March 2018, information was received that the appellant was located in the UK.

EAW2

8. EAW2 seeks the surrender of the appellant in relation to five offences. It is alleged that:

    i. From March 2004 until 7 July 2004, the appellant participated in a criminal group to deal in narcotic and psychotropic drugs and to distribute forged bank notes.

    ii. During that same period, he participated in trading at least 1 kilogram of amphetamine, at least 1500 ecstasy tablets and at least 6 kilograms of marijuana.

    iii. During the same period, he had firearms in his possession, namely a Beretta pistol, without the required licence, and an undefined quantity of ammunition.

    iv. On 15 June 2004, the appellant with two others committed an armed robbery, taking (among other things) cash with a value of 4,000 PLN. In carrying out the robbery, the appellant threatened the victim, constraining his arms and legs with self-adhesive tape and gagging him with tape.

    v. On 17 June 2004, the appellant, with two others, robbed the owner of a newspaper stand using a firearm, taking (among other things) cash with a value of 4,000 PLN.

9. In Further Information dated 10 January 2020, the respondent confirmed that the offences were committed by an organised criminal group "operating in many localities in Poland." The group came to light in 2010 and members have been "successively prosecuted." The case was "multithreaded" in that the organised, armed criminal group of which the appellant was part had carried out activities in "different personal configurations" as revealed during the course of investigations. The appellant "is one of the last persons to be involved in this case." The proceedings had been discontinued owing to a failure to determine the perpetrator of the offence. The investigation had been resumed and the evidence had been supplemented. On 3 January 2018, it was ascertained that the appellant was in the UK. A domestic arrest warrant was issued on 10 December 2018.

The extradition proceedings

10. On 17 October 2019, the appellant was arrested pursuant to the EAWs. On the following day, the initial hearing took place in Westminster Magistrates' Court. The full extradition hearing was listed to take place on 6 January 2020 but was adjourned on that date in order to enable the judicial authorities to obtain Further Information and to enable the appellant to obtain further evidence relevant to article 8 of the Convention.

11. Hearings took place on 16 March 2020, 5 May 2020 and 18 November 2020. I have not been provided by either party with a full account of why the case was repeatedly adjourned. At a resumed hearing on 29 July 2021, the judge who had heard the case (District Judge Ikram) explained that he no longer had any recollection of the matter and so the case was again adjourned for a fresh hearing on 9 December 2021.

12. District Judge Bristow was provided with a bundle of documents. He heard evidence from Professor Jenny Shaw who is a Consultant Forensic Psychiatrist; from Dr Tom Grange who is a Chartered Psychologist; from the appellant; and from Ms Paulina Matkowska who is the appellant's partner.

The District Judge's judgment

13. In a detailed section of the judgment (paras 34-55), the District Judge set out the evidence and made findings of fact about the appellant's private and family life. He noted that on 30 June 2005, in the Regional Court in Bydgoszcz, the appellant was sentenced to 4 years and six months' imprisonment for armed robbery and illegal possession of firearms. His associates were Tomasz Ruban and Dariusz Gornicki, who are named as the appellant's accomplices in one of the drug offences and the robbery of the newspaper stand alleged in EAW2. The appellant served 3 years and 6 months in prison but was released in February 2008 for good behaviour.

14. In March 2008, the appellant asked his probation officer for permission to leave Poland. Permission was granted. The appellant travelled to Austria but he could not find work. In June 2008, he entered the United Kingdom. Within two years, he had married Joanna Marcichowska. On 24 May 2010, the couple had a daughter whom I shall call AAD. In November 2013, the appellant and Ms Marcichowska divorced. She returned to Poland with AAD.

15. On 10 December 2010, the appellant was convicted of driving a motor vehicle with excess alcohol. He was fined £180 and disqualified from driving for 18 months.

16. In October 2013, the appellant met Ms Matkowska who is a Polish national with settled status in the United Kingdom. In May 2014, they moved to Cornwall. On 20 October 2014, their daughter VBD was born. In March 2015, the family moved to Bristol. They subsequently moved to Crewe to live in the former home of Ms Matkowska's parents who had returned to Poland. On 7 July 2019, their daughter, MD, was born.

17. On 20 October 2020, the appellant attempted to take his own life. He was hospitalised. About 6 days after his discharge from hospital, he went somewhere to commit serious self-harm (or take his life) but did not do so. He went instead to a police station from where an ambulance was called. The appellant was discharged from hospital after a conversation with the mental health support team. He decided to take his own life on another occasion but Ms Matkowska found him and summoned help.

18. On 25 December 2020, the appellant was admitted to hospital in light of his mental health. The District Judge noted that he was discharged in time for New Year's Eve. He saw a psychiatrist on 11 January 2021. On 1 July 2021, the appellant and his family left their home in Crewe as they could no longer afford the mortgage payments. They settled in Wrexham.

19. At the date of the hearing, the appellant had two jobs. Ms Matkowska was 34 years of age. She did not work. She had in the past been diagnosed with depression for which she was prescribed medication. She stopped taking the medication in early 2021. By the time of the hearing before the District Judge, she was no longer receiving treatment for her mental health.

20. The District Judge summarised Professor Shaw's evidence and accepted her conclusion that the appellant had symptoms consistent with a diagnosis of depression and anxiety. He had low mood, hopelessness, worthlessness, weight loss, sleep disturbance, poor concentration and suicidal ideas. Separation from his family and from life in the United Kingdom would lead to a deterioration in his depression and anxiety. His extradition would be likely to lead to an exacerbation of suicidal ideas.

21. The District Judge summarised Dr Grange's written and oral evidence. Dr Grange was of the opinion that both VBD and MD would probably suffer severe harm caused by the trauma of separation from the appellant. The appellant was exhibiting signs of moderate to severe depression and there was a high risk of suicide.

22. The District Judge noted that much of Dr Grange's opinion about harm to VBD and MD was based on an expected deterioration in Ms Matkowska's mental health if she were to be separated from the appellant. The District Judge noted that Dr Grange's written reports were dated 28 February 2020 and 11 May 2020 (i.e. Dr Grange's written evidence had not been updated for the hearing.) Ms Matkowska was called to give evidence and was cross-examined about her medication after Dr Grange had given evidence. She had said in cross-examination that she had stopped taking antidepressant medication at the beginning of 2021. As he had already been released, Dr Grange was not available to be asked about how her current mental state might affect his view.

23. Among other issues, the District Judge considered whether the appellant's extradition was barred by the passage of time under sections 11(1) and 14 of the 2003 Act. He observed that the appellant was not a fugitive and so could rely on the 17-year period since the offences in the EAWs were alleged to have been committed. He reminded himself of the case law on how to approach the question of whether it would be unjust or oppressive to extradite a person by reason of the passage of time. He considered the appellant's personal and family circumstances in the United Kingdom, the appellant's mental health problems including the risk of suicide, the effect of separation on Ms Matkowska and the effects on VBD and MD.

24. In the context of sections 11(1) and 14 of the 2003 Act, the District Judge went on to give a detailed analysis of the causes of the 17-year delay based on the Further Information. He held that:

    i. Between 27 April 2004 and 3 April 2017, the Polish authorities sought to secure evidence and traces of the offence in EAW1 and to look for witnesses. When information had been obtained indicating that the appellant participated in the offences, the Polish authorities sought to verify the testimony of the main witnesses and they made enquiries as to any criminal links between the witnesses and the appellant.

ii. On 25 October 2004 the proceedings in relation to the offence in EAW1 were discontinued because no suspect had been identified.

iii. The offences described in the EAW2 came to light in 2010. They were committed in many localities in Poland. The case was "multithreaded." As the proceedings progressed "offences involving the activities of suspects in different personal configurations were revealed." The Polish authorities charged and prosecuted individuals "successively" and "systematically."

iv. The Prosecutor's Office received evidence that the appellant may have been involved in the offence described in EAW1 on 28 August 2015. The authorities made attempts to summon the appellant. Attempts were also made to apprehend and detain him.

25. The District Judge concluded:

> "73. In view of the further information I am not satisfied that it can be said that there has been culpable delay by the Judicial Authority.
>
> 74. The alleged offences are serious. They include serious offences of violence, possession of firearms and ammunition and participation in a criminal organisation.
>
> 75. Poland is a signatory to the Convention. The right to a fair trial is enshrined in Article 6. In such circumstances, Poland is a state which can be presumed to have rules and processes to protect the defendant against unfairness resulting from the passage of time in the trial process."

26. In all the circumstances, the District Judge found that it would not be unjust or oppressive to extradite him by reason of the passage of time.

27. In his consideration of article 8, the District Judge accepted that the appellant had established a private and family life in the United Kingdom and that extradition would amount to an interference with his article 8 rights. He stated that the key question was whether the interference was proportionate.

28. In considering proportionality, the District Judge properly directed himself that the best interests of VBD and MD, as children, were a primary consideration. He found that it was in their best interests not to be separated from their father and not to have their family life disrupted by his extradition.

29. The District Judge adopted the balance sheet approach in *Polish Judicial Authority v Celinski* [2015] EWHC 1274 (Admin), [2016] 1 WLR 551. He held:

> "89. I find that the following factors favour extradition:

> a. the public interest in ensuring extradition arrangements are honoured is very high;
>
> b. the offences described in the EAWs are serious;
>
> c. they can be punished with significant custodial terms;
>
> d. the Requested Person has been convicted of and served sentences for serious offences in Poland; and
>
> e. the Requested Person has committed an imprisonable offence in the UK.
>
> 90. I find that the following factors militate against extradition:
>
> a. there will be an interference with the Requested Person's family life. He will be separated from his family. There will be an interference with his private life in the UK, a private life of around 13 years and 06 months duration;
>
> b. the Requested Person has diagnosed mental health issues, including a risk of suicide;
>
> c. there will be an interference with the private and family life of his family. They will be separated from the Requested Person;
>
> d. it is not in VBD's or MD's best interests to be separated from the Requested Person;
>
> e. the uncertainty of his re-entry into the UK; and
>
> f. there is a delay of some 17 years since the offences were allegedly committed."

Weighing the competing factors on each side of the balance sheet, the District Judge concluded that "significantly greater weight" attached to the factors in favour of extradition. He concluded that the appellant's extradition would be a proportionate interference with his article 8 rights.

30. In reaching his conclusion on article 8, the District Judge did not set out again all the evidence that he had considered in the section of his judgment on whether extradition was barred by passage of time under sections 11(1)(c) and 14. However, in the section of the judgment in which he weighed the relevant factors under *Celinski*, he expressly referred to the earlier paragraphs of his judgment.

The appellant's application to rely on fresh evidence

31. By written application notice dated 5 December 2022, the appellant applied to rely on fresh evidence which I considered on a *de bene esse* basis during the appeal hearing. The evidence aims to update the court in relation to the appellant's physical and mental

health and in relation to his family situation, which are relevant to the question of whether his extradition would be proportionate.

Legal framework

32. Section 11(1) of the 2003 Act lays down a number of bars to a person's extradition which includes (under section 11(1)(c)) the passage of time. Section 14 of the 2003 Act provides in so far as relevant:

> "A person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have–
>
> (a) committed the extradition offence (where he is accused of its commission).."

33. Section 21A(1)(a) of the 2003 Act establishes a bar to extradition if a judge decides that extradition would not be compatible with a person's Convention rights. In *H(H) v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25, [2013] 1 AC 338 the Supreme Court considered the correct approach to article 8 of the Convention in the context of extradition where the interests of children were affected. Baroness Hale of Richmond JSC summarised, at para 8, the principles that can be taken from the earlier case of *Norris v Government of the United States of America (No.2)* [2010] UKSC 9, [2010] 2 AC 487:

> "We can, therefore, draw the following conclusions from *Norris*:
>
> (1) There may be a closer analogy between extradition and the domestic criminal process than between extradition and deportation or expulsion, but the court has still to examine carefully the way in which it will interfere with family life.
>
> (2) There is no test of exceptionality in either context.
>
> (3) The question is always whether the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition.
>
> (4) There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no 'safe havens' to which either can flee in the belief that they will not be sent back.

(5) That public interest will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved.

(6) The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life.

(7) Hence it is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe."

34. In *Konecny v Czech Republic* [2019] UKSC 8, [2019] 1 WLR 1586, Lord Lloyd-Jones JSC (with whom the other members of the court agreed) observed (at para 57) that the passage of time is capable of being a relevant consideration in weighing the article 8 balance in extradition cases and is capable of having an important bearing on the weight to be given to the public interest in extradition.

The court's function on appeal

35. Section 27 of the 2003 Act deals with the court's powers on appeal under section 26 and provides in so far as relevant:

"(1) On an appeal under section 26 the High Court may—

(a) allow the appeal;

(b) dismiss the appeal.

(2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.

(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 person's 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 person's discharge.

36. The court in *Celinski* considered the grounds on which this court may interfere with the conclusions of a District Judge who has determined the proportionality of extradition under article 8. Lord Thomas of Cwmgiedd CJ held at para 24:

> "The single question . . . for the appellate court is whether or not the district judge made the wrong decision. It is only if the court concludes that the decision was wrong . . . that the appeal can be allowed. . . In answering the question whether the district judge . . . was wrong to decide that extradition was or was not proportionate, the focus must be on the outcome, that is on the decision itself. Although the district judge's reasons for the proportionality decision must be considered with care, errors and omissions do not of themselves necessarily show that the decision on proportionality itself was wrong."

The parties' submissions

37. On behalf of the appellant, Ms Émilie Pottle submitted that the District Judge ought to have concluded that the delay between the dates on which the alleged offences took place and the issuing of the EAWs was culpable and of such magnitude that it rendered the appellant's extradition disproportionate. The investigation into the offences in EAW1 was dormant for more than 10 years. No investigations took place between October 2004 and September 2015. The investigation only resumed because information was given to the Prosecutor by a co-accused. The total absence of activity on the part of the prosecuting authority to progress the investigation was culpable.

38. Ms Pottle emphasised that, once information regarding the appellant's participation in the offence in EAW1 was received, there was a further 20-month delay in presenting charges and a further year in issuing the EAW. Although the Polish authorities state that they took actions to locate the appellant, it appears that those actions were limited to the territory of Poland even though the appellant had informed his probation officer that he was leaving Poland.

39. In respect of EAW2, the offences are not so complex as to justify an 8-year delay in the issue of the accusation warrant. A picture emerges of a judicial system in the early 2000s where investigations were discontinued because the authorities were unable to make progress. Ms Pottle drew my attention to the pilot judgment of the European Court of Human Rights in *Rutkowski and Others v Poland* (Application no 72287/10) which was issued against Poland for excessive delays in criminal proceedings amounting to a breach of article 6 of the Convention.

40. Ms Pottle submitted that the District Judge had failed to take proper account of Dr Grange's evidence which demonstrated the severe harm that would be caused to MD. Dr Grange's evidence demonstrated that the appellant's extradition would

fundamentally undermine MD's relationship with her father. The Judge had failed to distinguish between VBD and MD at all and had not considered the effects on Ms Matkowska's mental health that would be triggered by her separation from the appellant.

41. Ms Pottle submitted that following the United Kingdom's exit from the European Union it is uncertain whether the appellant, who has been convicted of a serious offence in Poland and sentenced to imprisonment of 4 years and 6 months, would be permitted to re-join his family in the United Kingdom. The Home Office has published guidance on the refusal of entry for EU nationals with settled status who have been convicted of certain crimes. The guidance provides for the cancellation of indefinite leave to enter the United Kingdom for EU nationals where it would be conducive to the public good. It is normally appropriate to cancel leave where the foreign national has committed a crime overseas and received a custodial sentence of 12 months or more.

42. Ms Pottle directed me to *Antochi v Germany* [2020] EWHC 3092 in which Fordham J held (at para 52) that the uncertainties surrounding re-entry to the United Kingdom because of Brexit ought to weigh in favour of an individual facing extradition both as a subjective factor (the anguish of not knowing whether one could be reunited with family) and an objective factor militating against extradition. That approach has been followed in other cases: *Rybak v Poland* [2021] EWHC 712, paras 34 and 36; *Ziembinski v Poland* [2022] EWHC 69, para 70.

43. Ms Pottle relied on the fresh, updating evidence to support and bolster her submissions that the appellant's extradition would breach his article 8 rights.

44. On behalf of the respondents, Mr Jonathan Swain submitted that the District Judge properly referred to the information provided by the respondents which provided proper explanations for the delay in the prosecution of the allegations. The District Judge was entitled to find that the delay was not culpable in the circumstances and had in any event treated the delay as being a factor tending away from extradition. There was no error in his consideration of the material before him or in the conclusions that he reached.

45. Mr Swain submitted that the District Judge took full account of the position of all the children and of Ms Matkowska on the basis of all the expert evidence. Although the analysis of that evidence was to a large degree recorded in the judgment in the context of section 14 of the 2003 Act, it would have informed his conclusions as regards article 8. The analysis of the best interests of the children in the section of the judgment on article 8, while not lengthy, could not properly be divorced from the earlier consideration given.

46. Mr Swain submitted that the District Judge had properly dealt with the effect of Brexit on the appellant's prospects of re-entry to the United Kingdom. The Judge specifically referred to the uncertainty of re-entry as a factor militating against extradition but was entitled to concluded that it was a consequence of the United Kingdom's political decision to leave the EU and the changes to the immigration rules. That reasoning reflected the decision of Chamberlain J in *Pink v Poland* [2021] EWHC 1238 (Admin), paras 34 and 52. The appellant is, moreover, an accused person. If he is not convicted of any of the extradition offences, his re-entry would not be hampered by any conviction that would allow him to be excluded as conducive to the public good. Ms Pottle's submissions were therefore speculative.

47. Mr Swain submitted that, overall, the decision of the District Judge was not wrong. There was no reason to conduct the balancing exercise afresh. The District Judge's decision properly dealt with all the issues raised by the appellant. There were no grounds for this court to interfere.

48. Mr Swain submitted that the fresh evidence on which the appellant now sought to rely would not have resulted in the District Judge deciding a question before him at the extradition hearing differently and would not have led to the appellant's discharge. The statutory conditions for the admissibility of fresh evidence, in section 27(4) of the 2003 Act, were not therefore met. I should refuse to admit it.

Analysis and conclusions

49. The District Judge gave detailed consideration to the question of proportionality and in my judgment reached conclusions that were open to him. Ms Pottle submitted that the analysis of the evidence relevant to article 8 was in large part set out in the wrong section of the judgment: the Judge's findings on issues relating to sections 11(1) and 14 of the 2003 Act could not be transposed into the section on article 8 which ought to have contained its own, separate findings. There was, however, a considerable overlap between the evidence relevant to the passage of time under sections 11(1) and 14 and the evidence relevant to article 8. There was no need for the Judge to lengthen his judgment by repetition of findings.

50. In any event, the District Judge expressly referred to the relevant paragraphs in the earlier section of his judgment when drawing his conclusions on article 8. He clearly and succinctly signposted his findings when dealing with the question of proportionality. There can be no real complaint that the appellant did not know the reasons for the District Judge's conclusion that his extradition was compatible with article 8 or that he did not know the findings of fact on which that conclusion was based.

51. Ms Pottle has emphasised the factors against extradition but the District Judge was correct to weigh those factors in the overall balance. In carrying out the balancing exercise, the District Judge was entitled to give very considerable weight to the seriousness of the offences for which extradition is sought. The stabbing which forms the subject of EAW1 involved the infliction of wounds in five areas of the victim's body including his head. The victim's injuries included a haematoma in the left pleural cavity, bleeding in the pleural cavity, a haematoma in the retroperitoneal space, cutting through an abdominal muscle and a haemorrhage in the right eye. The offences alleged in EAW2 concern the organised supply of drugs, the supply of forged banknotes, the possession of a Beretta pistol, the possession of ammunition and the possession of a rifle during a robbery.

52. In addition to the seriousness of the extradition offences, the appellant has previously served a prison sentence for armed robbery and illegal possession of firearms. The Judge regarded the appellant's previous serious offending in Poland as a factor to be given considerable weight in favour of extradition. He was entitled to do so.

53. As I have set out above, the District Judge took the 17-year delay into consideration and weighed it in the balance as a factor against extradition. Ms Pottle submitted that the delay caused by the Polish authorities was culpable, emphasising that they already knew of the appellant's criminal associates from the armed robbery of which he had

been convicted. Their knowledge of the appellant's previous accomplices ought to have enabled them to progress their investigations more quickly. The appellant had lived and worked openly in the United Kingdom so that efforts to track him down ought to have succeeded more quickly. Ms Pottle's submissions in my judgment amount to no more than a disagreement with the way in which the District Judge analysed and weighed the evidence before him. I am not persuaded that they identify any error of approach in the judgment.

54. Nor may the *Rutkowski* judgment be regarded as evidence of culpable delay in the present case. As Mr Swain pointed out, *Rutkowski* concerns delay in judicial procedures and so is less apt to cover delays in police investigation. In any event, the longest period of delay was between October 2004 and August 2015 (the period in which the investigation relating to the offence in EAW1 was discontinued). The District Judge was entitled to find that that delay was the result of a lack of evidence rather than culpability on the part of the Polish authorities.

55. Contrary to Ms Pottle's submissions, the District Judge gave express and separate consideration to the evidence relating to VBD and to MD. He accepted that it would not be in their best interests to be separated from the appellant and weighed this in the balance as a factor against extradition.

56. Ms Pottle submitted that the District Judge's conclusions failed to set out or deal with the full force of Dr Grange's evidence. She emphasised in particular Dr Grange's evidence that a child's separation from a parent is particularly harmful if it occurs when the child is between the ages of 6 months and 4 or 5 years. In this "critical period" of attachment, there may be irreversible harm because early parent-child relationships are thought to play an important role in brain development.

57. VBD was in the critical period of attachment when Dr Grange wrote his first report. However, she was 7 years old at the date of the hearing before the District Judge and so outside that period. Ms Pottle's submissions lack force in relation to VBD.

58. MD has been within the critical attachment period at all material times. Dr Grange concluded that she will not form an "attachment relationship" with the appellant if he is extradited which will have implications for their relationship in the long term. I accept that the evidence before the District Judge demonstrated that the appellant's extradition is likely to have a long term impact on MD's relationship with her father. However, the District Judge took into account and referred to the "severe harm" to MD indicated by Dr Grange's report.

59. In relation to MD, Dr Grange's main concern was that "she will be extremely vulnerable to changes in mother's mental state…therefore there is also the potential for harm to be of a severe intensity." However, Dr Grange did not give evidence about the up-to-date situation as his written reports were not up to date and he had left court before Ms Matkowska was cross-examined about her mental health. On the evidence before him, the District Judge was entitled to conclude that the improvement in Ms Matkowska's mental health since Dr Grange's written reports would be a "stabilising factor for MD."

60. I have considered Dr Grange's evidence about MD with care. I am not persuaded that the passages to which my attention was drawn show that the Judge's decision on proportionality was wrong.

61. In her reliance on changes to immigration law after Brexit, Ms Pottle drew my attention to Home Office documents showing that the appellant was on 5 February 2009 accepted onto the Accession State Worker Registration Scheme. He received a worker registration certificate authorising him to work for the employer specified in the certificate (Red Rock OSS LLP). No other evidence about the appellant's immigration status was in the documents before me; nor was I directed to any specific evidence about the appellant's immigration status that was before the District Judge.

62. Ms Pottle's submissions rested in the main on Home Office guidance on the suitability requirements to be applied to those who apply to enter or stay in the United Kingdom under the post-Brexit EU Settlement Scheme. The guidance must be used when considering whether the suitability requirements in Appendix EU to the Immigration Rules are met, as opposed to other routes of re-entry. It was unclear whether this guidance would apply to the appellant. As I understood the submissions, the appellant is concerned about the cancellation of settled status but there is no evidence that he has ever been granted indefinite leave to remain so that submissions on loss of settled status carry no force.

63. I agree with Mr Swain that any submissions on the appellant's ability to re-enter the United Kingdom ought to have been focused on consideration of the actual position and analysis of the relevant immigration rules. The appellant has not engaged in that process and the court should not make assumptions (*Pink*, above, para 52).

64. The appellant has been convicted of serious offending in Poland and has a conviction for drink driving in the United Kingdom. I am not persuaded that in these circumstances any future refusal of entry to the United Kingdom would be the result of his extradition rather than these other elements of his past conduct. I would respectfully agree with Chamberlain J's observation in *Pink*, para 52, that the risk of refusal of entry cannot properly be regarded as a consequence of extradition. Unless and until the appellant is convicted of the extradition offences, the risk arises as a consequence of (i) the appellant's previous convictions and (ii) the change to the immigration rules as a result of Brexit.

65. Further and in any event, the District Judge weighed the uncertainty of the appellant's re-entry to the United Kingdom as a factor against extradition. Ms Pottle's submissions amount to an attempt to persuade the court to undertake its own balancing exercise and to give greater weight to immigration uncertainty than the District Judge. That is not the purpose of an appeal.

The fresh evidence

66. The fresh evidence includes a letter from Dr S Mayura, a consultant psychiatrist, to the appellant's GP. The letter is dated 20 September 2021 (which I note is about 6 months after Professor Shaw reached her conclusions about the appellant's mental health problems). Dr Mayura records that the appellant had suffered a lot of emotional difficulties because of the prospect of return to prison in Poland which would mean that he would "lose his children." The letter continues:

> "Apart from this **we could not find any evidence of a mental illness**. He was admitted to hospital to see if there were any underlying conditions and we could not establish that and our

> role has always been supportive **as it would be to any other person without any mental health issues**." (Emphasis added.)

67. Given its date, this letter would have been available at the date of the hearing before the District Judge and so it is not admissible as fresh evidence before me (section 27(4)(a) of the 2003 Act). In addition, it cannot possibly advance the appellant's case.

68. By way of further fresh evidence about his mental health, in a letter dated 5 December 2022, the appellant's GP confirmed that the appellant is taking medication for stress. In a review in the GP surgery on 11 November 2022, the appellant was noted to have anxiety and thoughts of self-harm "but no plans of doing anything." He was noted to be panicky and to have difficulty sleeping and so was referred urgently to the Community Mental Health Team. The appellant was certified by his GP as unfit to work between 28 October 2022 and 6 December 2022. The three certificates covering this period refer respectively to "stress related problem", "knee pain, back pain" and "anxiety/stress."

69. In my judgment, these documents do not show any material deterioration in the appellant's mental health since the hearing before the District Judge. They do not advance the appellant's case to any material degree.

70. The appellant has submitted fresh documents about his physical health. They show that he was the subject of a referral for an urgent suspected cancer in the breast but there is no evidence before me to suggest that he needs to remain in the United Kingdom for medical treatment. He had a lipoma in the left para lumbar region which could be excised by attending hospital as a day patient and which could not affect whether or not he is extradited.

71. In additional witness statements produced for this appeal, the appellant and Ms Matkowska say that Ms Matkowska is pregnant. Ms Pottle asked me to consider the effect of a third child on Ms Matkowska's mental health if the appellant were to be extradited. However, I was supplied with no medical evidence to suggest that her mental health would deteriorate and I am not prepared to make such an assumption in the absence of any evidence.

72. For these reasons, I agree with Mr Swain that none of the fresh evidence would have resulted in the District Judge deciding a question before him at the extradition hearing differently (section 27(4)(b) of the 2003 Act) or would have required him to order the appellant's discharge (section 27(4)(c)). I would in the exercise of my discretion refuse to admit the fresh evidence.

Conclusion

73. In my judgment, the District Judge made adequate findings of fact in relation to the issues before him and directed himself properly in law. The fresh evidence does not provide grounds for allowing the appeal. There are no grounds to hold that the District Judge ought to have decided any question differently. There are no grounds to hold that he ought to have ordered the appellant's discharge.

74. Accordingly, this appeal is dismissed.