APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 11
HCA/2024/16/XM

Lord Matthews
Lord Beckett
Lord Clark

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

Appeal under Section 26 of the Extradition Act 2003

by

JAKUB KARCZEWSKI

Appellant

against

THE LORD ADVOCATE (representing the Republic of Poland)

Respondent

Appellant: Stein; MSM Solicitors, Glasgow
Respondent: Edward KC; the Crown Agent

18 February 2025

Introduction

[1] On 31 October 2024 at Edinburgh Sheriff Court, the sheriff ordered the extradition of the appellant to Poland. He is subject to an outstanding sentence passed by the district court of Warsaw on 18 December 2013 of 11 months and 27 days imprisonment. The offence for which he was convicted and sentenced was a course of domestic violence over a period from

October 2011 until January 2012, contrary to Articles 207(1) and 64(1) of the Polish Criminal Code.

[2] The appellant was tried, convicted and sentenced in his absence. He contends that he ought not to be extradited to Poland to serve the sentence because (i) his discharge from the European Arrest Warrant is required by virtue of section 20 of the Extradition Act 2003; and (ii) balancing the public interest in extradition against the appellant's rights under Article 8 ECHR favours his discharge.

Background

[3] The appellant was born in Bialystok, Poland in 1983. He was sentenced to 10 years imprisonment in Poland in 2000. In or around 2006 he was released from custody on probation and on licence. He travelled to the United Kingdom for work in 2009 but returned to Poland in 2010 when he started a relationship with ML.

[4] In January 2012, the appellant was arrested by the Polish authorities following a complaint of domestic violence made by ML. The appellant was detained for 72 hours and was released on bail with conditions to sign on at a police station at regular intervals. The address held by the Polish police for the service of official documents was the appellant's mother's address in Bialystok. An indictment was issued by the Polish public prosecutor on 30 May 2012 and was duly served at the address in Bialystok on 18 June 2012. In a letter sent by the district court in Warsaw to UK authorities in 2023, it was confirmed that a summons including a trial date had been issued to the address in Bialystok and to the address at which the appellant was living with ML. Both summonses had been returned to the district court as "not receipted".

[5] The appellant travelled to the United Kingdom in July 2012 where he remained. In 2013, the district court in Warsaw, in absence, imposed on him, for the offence against ML, a sentence of imprisonment for 1 year.

[6] In 2015, the suspended part of the appellant's sentence relative to the 2000 conviction was activated. He was extradited from the United Kingdom to Poland where he remained in custody for over 3 years between October 2015 and October 2018.

[7] A few weeks after his incarceration, the Polish authorities sought his consent to enforce the extant sentence. He refused, as was his right. About 18 months into his sentence, in May 2017, the regional court in Warsaw sought such consent from the United Kingdom as the extraditing state. No consent was forthcoming and there is no suggestion that this was followed up.

[8] The appellant was released from custody in October 2018. He travelled to the United Kingdom 10 days after his release. Had he stayed in Poland beyond 45 days then his sentence could have been activated: UK/EU/Trade and Cooperation Agreement, Article 265 (3)(a). He travelled to Glasgow to live with his wife, EK, whom he had married during his time in prison. They had a child together in 2019.

[9] The appellant and EK separated in 2021. Contact proceedings commenced in the Sheriff Court relative to the child. The appellant was convicted of two instances of breach of bail conditions not to approach or contact EK. The appellant has been in another relationship for about 3 years. He lives with his partner and her daughter.

The European Arrest Warrant and Associated Documents

[10] A European Arrest Warrant was issued on 15 February 2022 relative to the 2013 sentence at the district court in Warsaw. Part d)2 of the EAW specifies that the

appellant was not present at the trial, when the judgement was issued, while part d)4 states that: "The convict did not make any receipt of the correspondence with the summons to the main hearing."

[11] A letter dated 12 July 2023 from the district court in Warsaw says that the summonses for the trial scheduled for 18 December 2013 were sent to the appellant at both addresses provided by him in the preparatory proceedings and both were returned marked "not receipted in due time". They were accepted by the sentencing court as duly delivered. That letter also states that "the convict receipted in person of a certified copy of the indictment act" sent by the court on 18 June 2012 at the address in Bialystok, therefore he knew the proceedings had been opened.

Proceedings in the Sheriff Court

[12] The appellant was arrested on the EAW in March 2022 and appeared at a preliminary hearing at Edinburgh Sheriff Court on 13 April 2023. There he made a plea in bar of extradition in terms of section 11(1)(f) of the 2003 Act. He argued that, because of the speciality rules set out in section 11 of the 2003 Act and Article 265 of the UK/EU TCA, he could not be extradited. That plea was repelled and is not the subject of appeal.

[13] A substantive hearing was held on 4 July 2024. The appellant gave evidence during which he explained, amongst other things, that, while he had lived for a time with his mother and then a friend, ML had withdrawn her statement, after which he went back to live with her. The authorities knew her address and he was waiting for a letter as to whether the case would proceed or not. Neither he nor his mother received any correspondence. She had his authority to receive letters from the prosecutor. When he had gone to the UK in 2012 there had been no condition of bail preventing him. He had not

consented when asked about serving the outstanding sentence because he had not been aware of it. A supervisor in prison gave him to understand that the authorities were not concerned about his consent or the sentence.

The sheriff's decision

[14] As we have indicated, the sheriff ordered the appellant's extradition. It was not in dispute that there were offences in Scotland which were directly analogous to those contained within the EAW. The sheriff found that the appellant was a fugitive between 2012 and 2015. No specific finding was made about any later period. The appellant knew about the indictment served in June 2012 prior to his travel to the United Kingdom in July 2012. He had engaged with the police earlier in the year and had accepted bail conditions. It must have been obvious that a prosecution remained a strong possibility. That being so, it was not open to the appellant to argue that the extradition ought to be barred on the basis of an oppressive lapse of time. In any event, the only relevant period of time that was unexplained was the period between the indictment being served in 2012 and the appellant being extradited in 2015. Such a period of time, in all the circumstances, was not such as to render the extradition oppressive or unjust. We note that, in fact, no argument based on section 14 of the 2003 Act was advanced and none figured in the appeal. The public interest in extradition outweighed the appellant's Article 8 Convention rights. Whilst the appellant relied on family life with his daughter, it was apparent that contact with his daughter had been problematic and was a matter of dispute between him and EK. His current partner, and her child, were not dependent on the appellant any more than usual. There was no evidence that separation for a 1-year period would cause hardship or emotional suffering beyond that inherent in extradition. A submission that there had been a "missed

opportunity" by the Polish authorities was an attempt to re-open the sheriff's determination of April 2023. That decision could not be revisited at the substantive hearing. That having been said, the sheriff accepted that potentially some of the facts relied on might be relevant in the Article 8 balancing exercise and he took account of them in conducting that exercise. The Sheriff had regard to the decision of the UK Supreme Court in *Bertino* v *Italy* [2024] UKSC 9 but distinguished it on the facts.

Submissions

Appellant

[15] The sheriff erred in determining that the appellant was a fugitive. Whilst the sheriff had referred to the Supreme Court's decision in *Bertino,* he had failed properly to engage with the principles laid out therein. There was no separate determination of section 20(3) of the Act. The sheriff was incorrect to report, as he had, that "it was accepted that, at the minimum, the appellant had notice of the indictment." While the indictment was served at the address in Bialystok, the sheriff did not find that the summons, including the date and time of trial, was received by the appellant. At most, therefore, the appellant had notice of the indictment. In order for the appellant to waive his Article 6 Convention rights, he required to have had actual knowledge of the fact that his failure to appear would result in a trial in absence, without representation, and without a right to a retrial. Article 6 Convention rights could only be waived in an informed fashion. Travelling to the United Kingdom, having only received an indictment, was not behaviour of such an extreme form as to support a finding of unequivocal waiver. The trial was not until 18 months later. At its highest, it could be said that the appellant's conduct led him to be unaware of the date and

time of his trial. The Supreme Court in *Bertino* expressly determined that this was not enough unequivocally to waive Article 6 Convention rights: See paragraph 56.

[16] The sheriff erred in determining that the matter of "missed opportunity" had been determined at the preliminary hearing in April 2023. The sheriff in 2023 had only determined that the plea in bar of extradition based on speciality (section 11(1)(f) of the 2003 Act) was not made out. He had not engaged with arguments anent "missed opportunity": *Baciejowski* v *District Court in Koszalin, Poland* [2023] EWHC 764. That the appellant's extradition for the 2013 sentence could have been pursued in conjunction with the 2015 extradition was a material factor which the Sheriff failed to consider. The sheriff, when considering delay under section 14 of the 2003 Act, failed to engage with the culpable conduct of the authorities. Had he done so, he ought to have found that the failure on the part of the Polish authorities to deal with the matter promptly and, at least, during the 2015 extradition process, weighed in favour of the appellant.

[17] The sheriff was required to consider the appellant's Article 8 Convention rights: section 21 of the 2003 Act. In doing so, the sheriff failed to give material factors appropriate weight. He failed to consider that the age of the offence diminished the weight to be applied in favour of the public interest in extradition and increased the weight to be given to the impact on family life: *PK* v *The Lord Advocate* 2024 HCJAC 25 at paragraph 38. The delay was not caused by the appellant. Rather than considering the "missed opportunity" on the part of the Polish authorities and applying appropriate weight in favour of the appellant's Article 8 Convention rights, the sheriff instead shifted the question of culpability to the appellant and imposed obligations on him which had no foundation in fact or law. The sheriff wrongly criticised the appellant for not enquiring with the Polish authorities whether the 2012 proceedings were still ongoing. There was no legal obligation on the appellant to

make such enquiries. The delay caused by the Polish authorities engendered a false sense of security within the appellant's family life: *Baciejowski*, paragraph 8. The Polish authorities' failures and the consequent delay ought to have weighed in favour of the appellant: *Baciejowski*, paragraph 25. The sheriff's finding that "the appellant's presence in the UK was precarious" was an unreasonable conclusion. It was reasonable for the appellant to conclude that the sentence could not be enforced without his consent. He had not received any further communication from the authorities until the EAW was issued. Too much weight had been placed on the nature of the offence. It was not clear from the sheriff's report that he had considered the fact that the appellant had been tried in absence without legal representation. Greater weight should have been placed on the best interests of the appellant's child. Given the child's young age, an interruption of one year would likely form a severe interruption to the bond between father and child. It was not in the child's best interest to grow up without a connection to its father. In all of the circumstances, the sheriff placed too little weight on the appellant's Article 6 Convention rights and, instead, placed too great a weight on the public interest in extradition. His proportionality assessment was flawed.

Respondent

[18] The sheriff's reasoning could not be impugned. In terms of section 20 (1) and (3) of the Extradition Act 2003, he required to consider whether the appellant was convicted in his presence: section 20(1). If the answer was in the negative, as it was in this case, then the sheriff had to decide whether the appellant had deliberately absented himself from the trial: section 20(3). The matter was indeed discussed in *Bertino* but, in the circumstances, under reference to paragraphs 38, 45 and 58 of *Bertino,* the sheriff was entitled to find that the

appellant had deliberately absented himself from the trial and unequivocally waived his Article 6 right to be present. So far as the Article 8 assessment was concerned, the sheriff had considered all of the matters referred to in the appellant's grounds of appeal and had attached appropriate weight to them. While he did not consider that the passage of time from October 2015 was relevant, it could be inferred that he must have considered that the appellant was still a fugitive. He could not have been arrested on release from prison, since he left Poland within 10 days. Having done so, he became a fugitive again. The sheriff was entitled to find, as he reported at paragraph 23 of his report, that the appellant knew the authorities were still interested in him. He was entitled to place no weight on what an unnamed prison official had apparently told the appellant.

Analysis

[19] The sheriff's original report in this case was addressed to the Note of Appeal as it originally stood. The first ground in that Note was that the sheriff erred in concluding that the requesting state had fulfilled its legal duties when a request was made of the appellant to consent to his extradition when he was within the Polish prison. They allowed him to leave prison and then leave Poland in the full knowledge that the "said warrant was extant." It is not entirely clear what all this means. There was no European arrest warrant issued for the earlier matter by the time the appellant was released from prison so we presume that "said warrant" is a reference to the outstanding sentence. However, neither having received the appellant's consent nor that of the UK authorities, the requesting state had no option but to allow the appellant to leave Poland, provided he did so within 45 days, as he did. No separate argument was presented in support of this ground. We reject it.

[20] The second ground attacked the sheriff's Article 8 considerations and once again his report addressed this. On 9 January the court allowed the appeal to be amended by the addition of a ground attacking the sheriff's analysis of *Bertino.* In response to that he provided us with a supplementary report. The appeal therefore proceeded in a somewhat disjointed fashion and it was not always easy to understand the respects in which the sheriff's decision was being attacked.

[21] We propose to set out the statutory scheme in an effort to place the arguments and the sheriff's decision in their appropriate context. It is convenient to start with section 11. That provides as follows:

> "11 (1) If the judge is required to proceed under this section he must decide whether the person's extradition to the category 1 territory is barred by reason of –
>
> …
>
> (c) the passage of time;
>
> …
>
> (f) speciality."

[22] Poland is a category 1 territory. The only requirement made of the sheriff in this case was to decide whether the extradition was barred by speciality. That was disposed of at an earlier diet and is not before us for reconsideration.

[23] Passage of time, the requirements for which are set out in section 14, was not raised as a separate consideration and did not have to be addressed as such. The sheriff, however, uses the language of section 14 in considering the passage of time, which, in any event, is something to be considered in the Article 8 balancing exercise. In these circumstances we can see why it might be thought that he had not properly considered what was said in *Bertino*. We shall come back to this.

[24] The main areas of dispute which are focussed in this case arise in connection with sections 20 and 21. These are in the following terms:

"20 **Case where person has been convicted**

(1) If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence.

(2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 21.

(3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial.

(4) If the judge decides the question in subsection (3) in the affirmative he must proceed under section 21

(5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial.

(6) If the judge decides the question in subsection (5) in the affirmative he must proceed under section 21.

(7) If the judge decides that question in the negative he must order the person's discharge.

(8) The judge must not decide the question in subsection (5) in the affirmative unless, in any proceedings that it is alleged would constitute a retrial or a review amounting to a retrial, the person would have these rights—

(a) the right to defend himself in person or through legal assistance of his own choosing or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required;

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

21(1) If the judge is required to proceed under this section (by virtue of section 20) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998…"

[25] Section 21 goes on to indicate that if the answer to that question is in the negative the judge must order the person's discharge while if it is in the affirmative he must order the extradition.

[26] It is plain that the sheriff decided that the appellant deliberately absented himself from his trial, albeit his findings were couched in the language of a passage of time consideration. He then proceeded under section 21 and carried out an Article 8 balancing exercise.

[27] The questions for us are whether the sheriff was correct in his finding that the appellant deliberately absented himself from his trial and if so whether he correctly carried out the Article 8 balancing exercise required by section 21.

[28] We deal with these questions in turn.

[29] The most recent binding authority is the case of *Bertino* to which both parties made reference. The central question in that case was whether Mr Bertino had "deliberately absented himself from trial" for the purposes of section 20(3).

[30] The circumstances were that an allegation of sexual offending was made against him in the province of Venice. The police seized his mobile phone and told him that he was under investigation but he was not arrested or formally questioned. While in Sicily he signed a document confirming his domicile as Italy and undertook to inform the Italian authorities of any intended change to his domicile. He left Italy in November 2015 and came to United Kingdom where he worked and moved around. The prosecution in Italy was commenced on 8 June 2017 and a writ summoning him to a hearing was issued on 12 June. He was to appear at a court on 28 September 2017 and the summons included a warning that non-attendance without lawful impediment would lead to a judgement in his absence. He did not receive the summons. The requesting judicial authority at that stage knew that he was no longer at the address he had provided and service of the document failed because he was untraceable. He was convicted in absence and sentenced on 16 April 2018 to imprisonment for 1 year.

In due course an EAW was issued by the Italian authorities.

[31] The district judge concluded that, in light of the document signed by Mr Bertino in Italy, the police had imposed an obligation on him, of which he was aware, to notify them of a change of address. He found that he was aware from then that "criminal proceedings were a possibility" and accepted that court papers could be served on an appointed lawyer. He also found it to be no coincidence that Mr Bertino had left his address without notifying a forwarding address and emigrated within months of being released from the police station. He had left the country so he could not be served with court papers. In any event, the judge was satisfied that he demonstrated a "manifest lack of diligence" in moving address without notifying of a change of address. His extradition was ordered on 18 January 2021 and he appealed to the High Court. That appeal was limited to consideration of the consequences of his not being warned that he might be tried in his absence. The appeal was refused and the following point of law certified for consideration by the Supreme Court:

> "For a requested person to have deliberately absented himself from trial for the purpose of section 20(3) of the Extradition Act 2003, must the requesting authority prove that he has actual knowledge that he could be convicted and sentenced in absentia?"

[32] Having considered a number of authorities, European and domestic, the Supreme Court allowed the appeal. At paragraph 45 we find the following:

> "… the phrase 'deliberately absented himself from his trial' should be understood as being synonymous with the concept in Strasbourg jurisprudence that an accused has unequivocally waived his right to be present at the trial. If the circumstances suggest a violation of Article 6, the answer to the question in section 20(3) would be 'no' and the judge would be required to go on to consider the question in section 20(5) on retrial or appeal in accordance with section 20(8). By contrast, if the circumstances suggest that the trial of the accused in his or her absence did not give rise to a violation of Article 6 of the Convention, then the person is taken to have absented themself deliberately from the trial. The answer to the question section 20(3) would

> be 'yes' with the consequence that the judge must proceed to section 20(4) to consider wider compatibility with the Convention under section 21."

[33] At paragraph 55 the court noted that:

> "It appears from the reasoning of the district judge that he may have regarded a general manifest lack of diligence which results in ignorance of criminal proceedings as itself being sufficient to support a conclusion that an accused had deliberately absented himself from trial (in the language of section 20(3) of the 2003 Act) or unequivocally waived his right to attend (in the language of the caselaw on Article 6 of the Convention). *Dworzecki*, to which he referred … is not authority for that proposition. Indeed, *Sibgatullin* makes clear at para 47 that 'there can be no question of waiver by the mere fact that an individual could have avoided by acting diligently, the situation that led to the impairment of his rights.'"

[34] The Divisional Court in *Zagrean* v *Romania* [2016] EWHC 2786 (Admin) put the point too widely at para 81 in saying that: "a requested person will be taken to have deliberately absented himself from his trial where the fault was his own conduct leading him to be unaware of the date and time of trial."

[35] The appellant in *Bertino* was not under investigation, had not been arrested and had not been questioned. A prosecution was no more than a possibility. He was never officially informed that he was being prosecuted nor was he notified of the time and place of his trial. His dealings with the Italian police were a long way short of his being provided by the authorities with an official accusation.

[36] At paragraph 54 the court said the following:

> "It is apparent from these cases that the standard imposed by the Strasbourg court is that for a waiver to be unequivocal and effective, knowing and intelligent, ordinarily the accused must be shown to have appreciated the consequences of his or her behaviour. That will usually require the defendant to be warned in one way or another. A direct warning was expected from the judges in the exclusion cases. The amended Framework Decision, reflecting an understanding of the obligations imposed by Article 6, requires the summons to warn the accused that the failure to attend might result in a trial in absence. In *Sibgatullin* there was no reason to conclude that the applicant should have been fully aware of the consequences of his actions."

[37] However, it is important to consider what is contained in paragraph 58. Having set out the certified question as quoted above that paragraph runs as follows:

> "The Strasbourg Court has been careful not to present the issue in such stark terms although ordinarily it would be expected that the requesting authority must prove that the requested person had actual knowledge that he could be convicted and sentenced in absentia. As we have already indicated, in *Sejdovic* at para 99…the court was careful to leave open the precise boundaries of behaviour that would support a conclusion that the right to be present at trial had been unequivocally waived. The cases we have cited provide many examples where the Strasbourg court has decided that a particular indicator does not itself support that conclusion. But behaviour of an extreme enough form might support a finding of unequivocal waiver even if an accused cannot be shown to have had actual knowledge that the trial would proceed in absence. It may be that the key to the question is in the examples given in *Sejdovic* at para 99. The court recognised the possibility that the facts might provide an unequivocal indication that the accused is aware of the existence of the criminal proceedings against him and of the nature and the cause of the accusation and does not intend to take part in the trial or wishes to escape prosecution. Examples given were where the accused states publicly or in writing an intention not to respond to summonses of which he has become aware; or succeeds in evading an attempted arrest; or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces. This points towards circumstances which demonstrate that when accused persons has put themselves beyond the jurisdiction of the prosecuting and judicial authorities in a knowing and intelligent way with the result that for practical purposes a trial with them present would not be possible, they may be taken to appreciate that a trial in absence is the only option. But such considerations do not arise in this appeal, where the facts are far removed from unequivocal waiver in a knowing and intelligent way."

[38] As is said in paragraph 38 of *Bertino*, the argument for unequivocal waiver in *Sejdovic* was more than the applicant's absence from his usual address, coupled with an assumption that the evidence against him was strong. The court did not consider that he had sufficient knowledge of the prosecution and charges against him. He did not unequivocally waive his right to appear in court.

[39] It seems to us that, while the principles are clearly enunciated in *Bertino,* the matter becomes ultimately fact specific, as indeed is said in that case at paragraph 38.

[40] In this case, it was not disputed before the sheriff nor before us that the indictment had been served. That made it clear that there was to be a prosecution. The letter from the district court dated12 July 2023 confirms the appellant's knowledge that court proceedings had been opened. It was sent on 18 June 2012 and in July 2012 the appellant left the country. He was subject to bail conditions which required him to sign on at regular intervals, albeit he said that that did not always happen. The sheriff accepts in his supplementary report that he did not refer in terms to section 20 nor give an entirely separate consideration of section 20(3). In his opinion the evidence which bore on the question of the passage of time and on whether he deliberately absented himself substantially overlapped and fell to be dealt with at the same time. The sheriff points out that when the appellant left Poland in July 2012 he not only had knowledge of the police investigation, having been arrested and questioned in custody, but also of the fact that there were live court proceedings, albeit not yet a date for trial. In that respect his position was different from that of the requested person in *Bertino.* The evidence was that he was not a first offender and when he had been arrested in 2012 he had already served a lengthy custodial sentence for other offences. The sheriff tells us that he did not approach the evidence in the case from the perspective of whether his conduct amounted to a general manifest lack of diligence.

[41] We agree with the sheriff that the facts in this case can easily be distinguished from those of *Bertino.* Indeed they are equivalent to those in the case of *IR* [2022] C-569/20 (Judgment of 19 May 2022) a case from the European Court of Justice referred to at paragraph 39 of *Bertino*.

[42] At paragraph 48 of *IR* the court said the following:

> "It is only where it is apparent from precise and objective indicia that the person concerned, while having been officially informed that he or she is accused of having committed a criminal offence, and therefore aware that he or she is going to be

> brought to trial, takes deliberate steps to avoid receiving officially the information regarding the date and place of the trial that the person may,…, be deemed to have been informed of the trial and to have voluntarily and unequivocally foregone exercise of the right to be present at it. The situation of such a person who received sufficient information to know that he or she was going to be brought to trial and, by deliberate acts and with the intention of evading justice, prevented the authorities from informing him or her officially of that trial in due time by means of the document referred to in paragraph 41 of the present judgement is thus covered by Article 8(2) of the directive".

[43] As was explained by the Supreme Court, the document referred to at paragraph 41 is one that refers unequivocally to the date and place fixed for trial and, in the absence of a mandated lawyer, to the consequences of non-appearance. Article 8(2) of the directive is the analogue of Article 4a(i)(a) and (b) of the amended Framework Decision, which is effectively the basis for section 20(3). In all the circumstances, we are satisfied that the sheriff was entitled to find that the appellant had unequivocally knowingly waived his right to be present at the trial.

[44] As for the Article 8 assessment, the sheriff found that the appellant was a fugitive from July 2012 until he was returned to Poland in June 2015. He was entitled to make that finding. No specific finding is made as to the appellant's status following his release in October 2018. Counsel argued that he could not then be said to be a fugitive and that is clearly the case during the time of his incarceration: *Zapala* v *Poland* [2017] EWHC 322 (Admin), referred to in *Baciejowski*. We are satisfied, however, that he can be said to have been unlawfully at large, in the language of the 2003 Act, following his return from Poland. The matter was still outstanding. The sheriff was entitled to find, as he did, that the authorities expressly drew his conviction to his attention while he was in prison and he could have been in no doubt at that stage at least about the authority's continuing interest in him. The sheriff did not accept that the evidence showed that he could have left Poland with any reasonable belief that the authorities were no longer interested in him. At the very

least it must have been obvious that that remained a strong probability. The sheriff was entitled to make these findings. In this respect the case is not on all fours with *Zapala*, where it was found that the appellant was labouring under a false sense of security.

[45] We have considered *Baciejowski* and the authorities referred to therein, all decisions of single judges which turned on their own facts. They deal with the question of "missed opportunity". While that is not a term of art, it is a fact to be borne in the balance. We note that in the instant case, the Polish authorities asked the appellant for his consent at an early stage at his incarceration. About halfway through his sentence they applied to the UK authorities for consent, in terms of Article 27 of the framework decision. In the absence of either of these consents being forthcoming there was nothing which could have been done, at least while he was in custody. It is not entirely clear what happened following the appellant's leaving Poland at the end of his sentence and the issuing of the EAW on 15 February 2022. That having been said, the warrant indicates that while the sentence was enforceable since 22 January 2014, the appellant did not appear voluntarily at the prison in order to serve the penalty. A search was commenced for him locally and then in the whole country by use of a wanted notice. In the course of searching for him it was found that he was staying abroad in Great Britain.

[46] On the face of it, it seems strange that an EAW was not issued almost as soon as he left the country after the expiry of his sentence.

[47] Even if we were to take the view, however, that the appellant was no longer a fugitive at the expiry of his sentence and that the authorities were dilatory, the fact still remains that a balancing exercise had to be carried out by the sheriff. We have already set out the appellant's personal circumstances. There is a clear public interest in extradition, especially where offences are serious, as this course of conduct undoubtedly was. We

regard the counterbalancing features of the appellant's case as being weak. He has not been law abiding in this country, as his convictions here reveal. He has separated from his partner and his contact with his child of that union is sporadic. There was no suggestion that any features of his current relationship would give rise to anything other than the usual hardship implicit in extradition.

[48] In short, the balance comes down in favour of extradition in this case.

[49] For all these reasons, although we shall grant leave to appeal in respect of the grounds of appeal, the appeal is refused.