Neutral Citation Number: [2016] EWHC 3309 (Admin)

Case No: CO/4028/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/16

Before :

MR JUSTICE HICKINBOTTOM

- -

Between :

TOMASZ STRYJECKI

Appellant

- and -

DISTRICT COURT IN LUBLIN, POLAND

Respondent

- -
- -

Mary Westcott (instructed by **Lansbury Worthington Solicitors**) for the **Appellant**
Benjamin Seifert (instructed by **CPS Extradition**) for the **Respondent**

Hearing date: 13 December 2016

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Approved Judgment

Mr Justice Hickinbottom :

Introduction

1. This is an appeal against the decision of District Judge Zani of 19 August 2016 to order the Appellant's extradition to Poland, brought with the permission of Dingemans J granted at an oral hearing on 25 October 2016.

2. Poland is a category 1 territory, and thus Part 1 of the Extradition Act 2003 ("the 2003 Act") applies. The application for the Appellant's extradition is based upon two conviction European Arrest Warrants ("EAWs") issued by the District Court in Lublin, Poland. The first in time of issue ("EAW1"), issued on 4 April 2006 and certified by the National Crime Agency on 16 October 2014, is in respect of a two year six month sentence imposed on 6 November 2003 for the theft of a television and PLN 1000 in cash from a bar on 7 January 2000. In respect of those offences, the Appellant was both convicted and sentenced in his absence. The second warrant ("EAW2"), issued on 29 July 2014 and also certified on 16 October 2014, is the second in time of issue but relates to an earlier conviction for a commercial burglary committed on 8-9 January 1998, for which the Appellant was sentenced on 25 October 1999 to two years' imprisonment suspended for five years. That sentence was activated on 23 March 2004. No part of either of those sentences has been served.

3. Miss Westcott for the Appellant relies upon three grounds, namely:

   (i) The District Judge erred in finding that it would not be unjust and/or oppressive to extradite the Appellant due to passage of time, and consequently holding that the Appellant's extradition was not barred by the passage of time (section 14 of the 2003 Act). In particular, it is said that he erred in finding, in relation to both EAWs, that the Appellant was fugitive, and thus he could not rely upon any significant part of the lapsed time for these purposes.

   (ii) In relation to EAW1 only, the District Judge erred in finding that the Appellant deliberately absented himself from his trial (section 20 of the 2003 Act).

   (iii) The District Judge erred in finding that extradition would not constitute a disproportionate interference with the rights of the Appellant and his family under article 8 of the European Convention on Human Rights ("the ECHR") (section 21 of the 2003 Act).

The Factual Background

4. The Appellant was born on 20 August 1980. He is therefore now 36 years of age. He is a Polish national. In 1996, when he was 15 years old, he met his future wife Dorota Romanuik. On 17 January 1998, they were married. Their son was born on 31 May 1998. They lived with the Appellant's parents at the family home, an address in Chopina Street, Lublin.

5. On 8-9 January 1998, a week before the Appellant's wedding, the offices of a firm called Boka Company sc were burgled, and computer and other electrical equipment was stolen to the value of PLN 4,444 (about £1,300). With several others, the

Appellant was arrested. Although he denied being involved, he was convicted at a trial at which he was present; and, on 25 October 1999, he was sentenced to two years' imprisonment suspended for five years. The Appellant says that he cannot recall being present when sentenced; but EAW2 states that that was the case. There is no reason to question that confirmation, and I find that he was present. In any event, the Appellant accepts that he knew of the suspended sentence from his mother and, accordingly, he kept in touch with his assigned probation officer.

6. The conditions of the suspension are not set out in any document. The Appellant of course knew that, if he committed another crime within the suspension period, he would be in breach of the suspension conditions and would be liable to serve the two years' custodial sentence.

7. Furthermore, as I understand it, the Appellant accepts that he knew that there was an obligation to keep in touch with his probation officer. He makes clear in his statement of 28 April 2015 that he was assigned a probation officer as part of the suspended sentence, that he did not inform the officer of moving to the United Kingdom, but that he wrote to the officer "explaining his circumstances" when he arrived in the United Kingdom. I appreciate that such a condition is not mentioned in the Further Information provided by the Respondent Judicial Authority dated 9 April 2015, in response to a request which included a specific request for the conditions attached to the suspended sentence. However, in the circumstances, it is inherently unlikely that the Appellant would have been in contact with a probation officer other than as the result of an obligation of the suspended sentence to do so. On all the evidence, I am satisfied to the requisite standard that, as a condition of his suspended sentence, the Appellant had an obligation to keep in touch with the Polish probation service; and that he was well aware of that obligation and that, if he were not to comply with it, the sentence was liable to be activated.

8. Additionally, the Further Information confirms that the Appellant had an obligation attaching to the suspended sentence to notify each change of address. There is no specific evidence that he was told of that requirement. Nevertheless, he was present when he was sentenced, and there is nothing to suggest that he was not then properly notified of all the requirements that were imposed and the consequences of a failure to comply. The Appellant's own evidence on this point is not of any assistance, because he cannot remember even being present at the sentencing hearing which, as the EAW states and I have found, he was. Therefore, I am also satisfied, to the requisite standard, that the Appellant was informed of the obligation to notify the Polish authorities of each change of address; and, again, he was aware that, if he failed to comply with it, the sentence was liable to be activated.

9. Less than three months later, on 7 January 2000, when the Appellant was 19 years old, some young men stole a television and PLN 1000 from the Alibaba Bar in Lublin. With some friends, the Appellant was arrested and taken to the police station. There, he says he was interviewed and beaten. One of his friends had the television remote control in his pocket; but the Appellant denied he was involved in the theft. The Appellant says that he was the subject of an identification procedure; and he was taken to the Prosecutor's Office, where was told that "they would press charges and the matter would go to court". The Appellant said he would not plead guilty.

10. He was released; but, again, the conditions upon which that happened are not the subject of any documentary evidence. The Further Information indicates that, in replication of the suspended sentence condition, one obligation attached to his release was that he notified each change of address. It seems that the Appellant accepts that, on release, he gave a "registered address", i.e. with his parents in Chopina Street. I am again satisfied that he was told of the obligation to notify a change as a condition of his release. In any event, thereafter for two months, the Appellant says that he stayed at his "registered address".

11. The Appellant was a building worker. His brother was living in England, and he found a job for the Appellant on a building site. The Appellant says that he regarded this as a good opportunity to earn some money to keep his family. On 3 March 2000, two months after his arrest in relation to the bar theft, under his own passport, he travelled by bus to London, "for economic reasons". He says that he was under no obligation to remain in Poland – and there is no evidence before me that he was under such an obligation. Although he did not tell the Polish authorities (including his probation officer) that he was moving to the UK before he left Poland, he says that he wrote to the officer telling him of his move to the UK once he was here, presumably at some time in mid-2000. He did not keep a copy of any letter sent, and the Polish authorities have no record of it. There is no evidence that it was ever received. It is not clear whether that letter contained the Appellant's then-current address – presumably, that of his brother (see below) – but, for the purposes of this appeal, I shall assume that that letter was sent and that it did contain that address, although it does not appear to have been received. There is no evidence that the Appellant contacted, or attempted to contact, the Polish probation officer – or notified any change of address – at any time thereafter.

12. Initially, in the UK, the Appellant stayed with his brother. His wife and their child joined him a year later. They all stayed with the Appellant's brother for a while, before moving to their own rented accommodation. In May 2006, they moved to different rented accommodation at an address in London NW2, where they still live.

13. In the meantime, the Appellant was prosecuted in Poland for the theft from the bar. The EAW states that the trial was on 6 November 2003. The Appellant did not attend, although the Further Information says that:

> "… [H]e was properly notified about the trial date. The Police regularly searched the sentenced through visiting his place of whereabouts in order to detain him at the place of his register, that Lublin, street Chopina 11/2."

14. That translation is less than perfect. However, it seems from this response from the Judicial Authority that:

    (i) despite any letter that the Appellant sent to the relevant Polish authorities, they still had his "registered address" as his parents' house in Chopina Street;

    (ii) the police regularly visited that address with a view to arresting him, but they did not find him there; and

(iii) the Polish authorities had "properly notified" him about the trial date, no doubt in accordance with Polish law and procedure, but in a manner that is not specified.

15. In the event, the Appellant was found guilty in his absence; and, on 6 November 2003, also in his absence, he was sentenced to two years six months' immediate imprisonment. That sentence was the subject of a domestic arrest warrant issued on 25 November 2003; and EAW1 was issued in respect of that sentence on 4 April 2006.

16. The Appellant says that he did not know about the bar theft proceedings or trial at the time; but he must have known about them soon afterwards, because he says that, from 2004, he hired a lawyer on Poland who has made numerous applications for the postponement, re-suspension and annulment of both his sentences, the most recent of which was made in 2014, and all of which have been refused by the court.

17. Those applications apparently having run their course, on 23 March 2004, as a result of the bar theft conviction having occurred during the suspension period, the suspended sentence for the commercial burglary was activated. That activation too was appealed, but that appeal was apparently refused on 17 May 2004. It seems that a domestic arrest warrant was issued the following day. EAW2, in respect of that activated sentence, was issued on 29 July 2014.

18. As I have indicated, from 2004, the Appellant lodged various appeals and applications with the Polish court. It would be odd if, during the course of those proceedings, he did not have to declare his current address, then of course in the UK. In any event, from August 2005, the court was certainly aware that he was in the UK: paragraph 5 of the Further Information says that the police then confirmed to the court that he had not been at "his place of residence" (i.e. Chopina Street) for three years, and had "left for England for economic purposes". Whilst in the UK, the Appellant has not concealed himself, in the sense that he has used his own name and identity for the purposes of obtaining rented accommodation, services, employment and tax.

19. The Appellant was arrested on the EAWs on 20 March 2015. The statement of the arresting officer (DC Andrew Dowsett) dated that day, says that earlier attempts at arresting him at his home address had been unsuccessful, and, on 20 March 2015, the Appellant was caught running from the back of the property when the police attended early in the morning.

20. I now turn to the three grounds of appeal.

Ground 1: Section 14

21. Miss Westcott submits that the District Judge erred in finding that the Appellant's extradition was not barred by the passage of time under section 14 of the 2003 Act, which provides:

> "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), or
>
> (b) become unlawfully at large (where he is alleged to have been convicted of it)."

22. In relation to the period after conviction, that expressly introduces the concept of "unlawfully at large", which was recently illuminatingly discussed by Lloyd Jones LJ in Wisniewski v Regional Court in Wroclaw, Poland [2016] EWHC 386 (Admin) at [35] and following, particularly by reference to the common law concept of "fugitive".

23. In the context of section 14, "unlawfully at large" means at large in contravention of a lawful sentence under the applicable legal system, in this case that of Poland (*ibid* at [54]). For the purposes of section 14, it is therefore in a requested person's interests to establish that he was unlawfully at large at the earliest possible date, because by doing so he invokes the longest possible period of time as a bar to extradition which commences from the date the individual becomes unlawfully at large (*ibid* at [51]).

24. "Fugitive" is not a term used in the statutory scheme, but a common law principle that, in order to resist extradition on the basis of passage of time, an accused person cannot rely upon delay which he himself has caused, as developed in particular in Kakis v Government of the Republic of Cyprus [1973] 1 WLR 779 and Gomes and Goodyer v Government of the Republic of Trinidad and Tobago [2009] UKHL 21. A person has fugitive status is he has knowingly placed himself beyond the reach of legal process (Wisniewski at [59]). Before this principle applies, a person's status as a fugitive must be established to the criminal standard (Gomes and Goodyer at [27]).

25. In this case, the Further Information clearly states that the Polish authorities consider the Appellant became a fugitive from 18 May 2004, when the suspended sentence which was activated on 23 March 2004 became final.

26. The District Judge found that the Appellant was a fugitive. He said this:

> "33. I find that [the Appellant] is a fugitive from justice and set out my reasons elsewhere in this document and I refer the parties thereto. In brief, re EAW 2 (the 1st in time), he is said to have been present at the sentencing hearing on 25 October 1999 when he received a suspended sentence of imprisonment. He will have been well aware that if he re-offended during the currency of that period, this would almost certainly result in the activation of the suspended term. He did so offend.
>
> 34. Regarding EAW1, [the Appellant] knew that charges and court process was to follow. He chose to leave Poland some 2 months afterwards without notifying the Polish authorities. Indeed it is said by the UK police that he made efforts to avoid capture here, with the assistance/connivance of his wife.

> 35. As a result of the foregoing, in according with the rationale in Kakis, I am of the view that [the Appellant] is a fugitive from Polish justice such that he is unable to rely on the protection otherwise afforded to him by s.14 in relation to either/both EAWs. This challenge must therefore fail.
>
> 36. If it were to be considered elsewhere that [the Appellant] is not to be considered as a fugitive then I am of the view that his extradition would not be unjust or oppressive per Kakis."

Later, when dealing with article 8, he added this (at paragraph 61(iv)):

> "I find that [the Appellant] is a fugitive from Polish justice. He was well aware of both matters in relation to which extradition is sought. He was arrested and taken in to police custody regarding both sets of allegations. He was interviewed regarding both allegations.
>
> … [The Appellant] was told that (EAW1) the matter would result in criminal prosecution and would result in court proceedings.
>
> [The Appellant] appeared in court (according to him) once or twice in respect of the EAW2 matter. Subsequently he had obligations either to remain in Poland or to notify the Polish authorities of his change(s) of address. He failed to do so. He also failed to attend probation as required (EAW2). His actions therefore satisfy me of his fugitive status…".

27. Thus, the District Judge appears to have found that, in respect of EAW1, the Appellant was a fugitive as a result of re-offending during the period of a suspended sentence, in the knowledge that that would almost certainly result in the activation of the suspended term; and, in respect of EAW2, he was a fugitive from the moment he breached the obligation of his release on 7 January 2000 by leaving Poland shortly afterwards without properly notifying the Polish authorities of his new whereabouts.

28. Miss Westcott submits that the District Judge was wrong to make those findings about the Appellant's fugitive status.

29. We know from our experience in these courts that suspended sentences of imprisonment are often imposed on offenders by the Polish courts, as in the Appellant's case, with no requirement to stay in Poland, but with obligations attached that require the offender to keep in touch with the Polish probation service and notify each change of address. Breach of those obligations is sufficient to enable the Polish court to activate the sentence that has been suspended.

30. Given that there is no restriction preventing the offender from leaving Poland, those obligations are vital. If he moves abroad during the suspension period, as he is entitled to do, and then breaches the requirement to keep in contact with his probation officer and notify each change of address, the offender's whereabouts become

unknown to the authority which is entitled to know them, putting it beyond that authority's power properly to supervise the suspension and deal with the offender for any breaches of its terms; in other words, beyond the reach of Polish justice (see Salbut v Circuit Court in Gliwice, Poland [2014] EWHC 4275 (Admin) at [8] per Ouseley J, approved by the Divisional Court in Wisniewski at [43] and following per Lloyd Jones LJ). That is no doubt why the failure by an offender to keep his probation office informed and to notify changes of address is, in itself, regarded by the Polish authorities as sufficiently serious to be a breach of the suspended sentence such that the court can activate the whole of the sentence that has been suspended. As Lloyd Jones LJ said in Wisniewski at [60], the activation of a suspended sentence in these circumstances is not inevitable; but we know, again from experience in these courts, that it is certainly anything but unusual or unexpected.

31. As Lloyd Jones LJ emphasised in Wisniewski at [59], whether an individual is a fugitive is a fact-specific question – it will depend upon the circumstances of a particular case – but the question is determined on an objective basis.

32. In considering fugitive status in the context of a breach of a suspended sentence, in Wisniewski at [60], Lloyd Jones LJ said:

> "… 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 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 and Gomes and Goodyer. 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."

With that, I respectfully agree. It seems to me that the key point made is that, where a requesting authority seeks extradition in respect of an activated suspended sentence, for the purposes of section 14, the offender cannot rely upon the passage of any time from the date on which he knowingly breached the terms of his suspension.

33. There are three additional points worth emphasising. First, the principle applies however, and whenever, the breach of the suspended sentence occurs. Where there is an obligation of a suspended sentence to keep in contact with the Polish probation service, the principle will apply whether the obligation is breached immediately after the person has left the Polish jurisdiction by the person failing to make any contact whilst abroad, or breached after period of compliance whilst abroad followed by a failure to continue to keep in contact.

34. Second, because of the objective nature of the status of fugitive, an individual can be a fugitive without being aware that a suspended sentence has been activated. As Lloyd Jones said in Wisniewski at [62]:

> "It is not necessary, in order that a requested person be treated as a fugitive, that he knows that his sentence has been activated. It is enough that he knows that the sentence is liable to be activated because of his breach of the terms of its suspension".

35. Third, the status of fugitive is not affected by any action, inaction or even fault on the part of the requesting or requested authorities. As Lord Brown put it in Gomes and Goodyer (at [26]):

> "This is an area of the law where a substantial measure of clarity and certainty is required. If an accused like Goodyer deliberately flees the jurisdiction in which he has been bailed to appear, it simply does not lie in his mouth to suggest that the requesting state should share responsibility for the ensuing delay in bringing him to justice because of some subsequent supposed fault on their part, whether this be, as in his case, losing the file, or dilatoriness, or, as will often be the case, mere inaction through pressure of work and limited resources. We would not regard any of these circumstances as breaking the chain of causation (if this be the relevant concept) with regard to the effects of the accused's own conduct. Only a deliberate decision by the requesting state communicated to the accused not to pursue the case against him, or some other circumstance which would similarly justify a sense of security on his part notwithstanding his own flight from justice, could allow him properly to assert that the effects of further delay were not 'of his own choice and making'."

That case concerned an accused and conditions of bail; but the same approach applies to a convicted offender who is subject to (e.g.) a suspended sentence upon terms (see Auzins v Prosecutor General's Office of the Republic of Latvia [2016] EWHC 802 (Admin) at [50] per Burnett LJ, where these observations of Lord Brown in the context of section 14 were expressly endorsed).

36. Miss Westcott challenges the finding that the Appellant was, in respect of each EAW, a fugitive, on a number of grounds, which I will deal with in turn.

37. First, she submits that the obligations attaching to both the Appellant's suspended sentence and his release after arrest in January 2000 are uncertain, and I cannot be satisfied to the criminal standard that conditions of keeping in contact with the Polish probation service, and notifying changes of address were attached. I have already dealt with that issue. I am satisfied as to those matters, and to the requisite standard of proof.

38. Second, she submits that the District Judge failed, or may have failed, to make his findings to the appropriate standard of proof, i.e. the criminal standard (see section

206 of the 2003 Act). It is true that nowhere in the District Judge's judgment is it said that he is applying the criminal standard of proof in respect of issues under section 14; but I agree with Mr Seifert's submission that it can properly be assumed that a judge experienced in extradition matters (as the District Judge was) would know, and apply, the appropriate standard of proof. There is nothing to suggest that he did otherwise.

39. Third, Miss Westcott submits that the District Judge proceeded on the wrong basis as to why the Appellant was fugitive. Paragraph 7 of the Further Information makes clear that the suspended sentence was activated because the Appellant had committed another "intentional offence" within the suspension period (i.e. the offence which forms the basis of EAW1); not because he had failed to comply with obligations to keep in contact with his probation officer and/or notify a change of address. However, for the reasons I have given, the fugitive status of the Appellant was not dependent upon when the Polish court activated the suspended sentence, or the grounds upon which it did so. It was dependent upon whether the Appellant had breached the conditions of the suspension of which he was aware, notably the conditions in respect of keeping in contact with the Polish probation service and notifying changes of address. He did breach those conditions, shortly after arriving in the UK, by not keeping in touch with his probation officer or notifying changes of address after 2000. On the basis of the principles set out in Wisniewski, that meant that, for section 14 purposes, he could not rely upon the passage of time from shortly after he arrived in the UK when he failed to keep in touch with his probation officer and failed to notify changes of address.

40. Even if I am wrong in considering that a fugitive cannot rely on time from the date he knowingly breaches his suspended sentence, but only from the activation of that sentence, in this case the Appellant's suspended sentence was activated in 2004. Consequently, the vast majority of the time that has passed will not count towards relevant time for the purposes of section 14.

41. Fourth, Miss Westcott submits that the Appellant did nothing positively to conceal his whereabouts, and the Polish authorities knew by 2005 that he was in the UK. However, although that may be relevant to other grounds, it is not relevant to the status of the Appellant: even if the Polish and/or UK authorities did not take all reasonable (or, indeed, any) steps in finding out where the Appellant lived, resulting in delay in serving the EAWs, that does not affect his status of fugitive.

42. For those reasons, I am unpersuaded by Miss Westcott's submissions. I am satisfied to the criminal standard that the Appellant was a fugitive in relation to the matters which found each EAW, from the time, in 2000 (and, certainly, no later than 2001), when he failed to keep in contact with his probation officer – alternatively, from 2004 when his suspended sentence was in fact activated – and later, when he failed to notify changes of his address in the UK. That is almost all of the relevant period. In the circumstances, it would not be arguably oppressive to extradite the Appellant on the basis of passage of time under section 14.

43. The first ground consequently fails. The District Judge did not err in finding that the Appellant was, for almost all of the relevant period from 2000, a fugitive, such that he could not rely upon section 14. However, simply because time was not relevant for

those purposes, does not mean that it is not relevant for other purposes, notably article 8 (with which I deal below: see paragraphs 63 and following).

Ground 2: Section 20

44. As her second ground, which relates to EAW 1 only, Miss Westcott submits that the District Judge erred in finding that the Appellant deliberately absented himself from his trial in respect of the bar theft charge at which he was convicted.

45. Section 20 of the 2003 Act provides, in relation to cases where a 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."

46. It is uncontroversial that the Appellant was absent when he was convicted and sentenced in respect of that theft. Consequently, by virtue of section 20(3) of the

2003 Act, the District Judge was required to decide whether the Appellant had deliberately absented himself from his trial; because, if he did, then the judge was required by section 20(6) to proceed to section 21, i.e. to consider the question of whether the Appellant's extradition would be contrary to the article 8 rights of him and his family members. If it were found that he did not deliberately absent himself, then the judge was required by section 20(5) to determine first a different question, namely whether the Appellant would be entitled to a retrial or a review amounting to a retrial in Poland on his return.

47. Those provisions have to be read in the light of the European Union Council Framework Decision on the European Arrest Warrant and Surrender Procedures between Member States 2002/584/JHA, as introduced by way of amendment by Council Framework Decision 2009/299/JHA. As explained by this court in Cretu v Local Court of Suceava, Romania [2016] EWHC 353 (Admin) at [15]-[17], the result of the United Kingdom opting back into the Framework Decision under Title VI of the Lisbon Treaty from 1 December 2014, is that the Framework Decision has the status of a Directive. The consequence is that the 2003 Act is subject to the principle of conforming interpretation in EU law.

48. So far as relevant to this appeal, article 4a(1) of the Framework Decision provides:

> "The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:
>
> (a) in due time:
>
> (i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial;
>
> and
>
> (ii) was informed that a decision may be handed down if he or she does not appear for the trial; …"

49. The proper approach to the concept of a person "deliberately absenting himself from his trial" in this context has been considered in a number of recent cases to which I was referred, notably (in chronological order) Cretu (especially at [19], [34](i) and [35]), the judgment of the Court of Justice of the European Union in Openbaar Ministerie v Dworzecki (2016) C-108/16 PPU (24 May 2016), and The Court in Mures and the Bistrita-Nasaud Tribunal, Romania v Zagrean [2016] EWHC 2786 (Admin) (at [62] and following). Cretu and Zagrean were each heard by a Division of this court.

50. In respect of section 20(3), read in the light of article 4a(1), the following propositions, relevant to this appeal, can be drawn from these cases.

    i) It is for the requesting judicial authority to prove, to the criminal standard, that the requested person has "deliberately absented himself from his trial".

    ii) "Trial" is not a reference to the general prosecution process, but rather the trial as an event with a scheduled time and venue which resulted in the decision.

    iii) The EAW system is based on trust and confidence as between territories. Consequently, where the EAW contains a statement from the requesting judicial authority as required by paragraph 4A(1)(a) of the Framework Decision, that will be respected and accepted by the court considering the extradition request, unless the statement is ambiguous (or, possibly, if there is an argument that the warrant is an abuse of process). If the statement is unambiguous, the court will not conduct its own examination into those matters, nor will it press the requesting authority for further information.

    iv) If the statement in the EAW is ambiguous or confused (*a fortiori*, if there is no statement at all), then it is open to the court considering the request to conduct its own assessment of whether the requested person was summoned in person or, by other means, actually received official information of the scheduled date and place of that trial, on the evidence before it, the burden being born by the requesting authority to the criminal standard.

    v) "Summoned in person" means personally served with the relevant information. If there has not been such service, generally the requesting authority must unequivocally establish to the criminal standard that the person actually received the relevant information as to time and place. It is insufficient for the requesting authority to show merely that the domestic rules as to service of such a summons were satisfied, if it is not established that the person actually received the trial information.

    vi) Establishment of the fact that the requested person has taken steps which make it difficult or impossible for the requesting state to serve the requested person with documents which would have notified him of the fact, date and place of the trial is not in itself proof that the requested person has deliberately absented himself from his trial.

    vii) However, where the requesting authority cannot establish that the person actually received that information because of "a manifest lack of diligence" on the part of the requested person, notably where the person concerned has sought to avoid service of the information so that his own fault led the person to be unaware of the time and place of his trial, the court may nevertheless be satisfied that the surrender of the person concerned would not breach his rights of defence.

51. In this case, unfortunately, the relevant section of EAW1 (section 6) was in an outdated form, and in any event it was not completed, in that no part of it had been struck out or marked. The section simply said:

> "D. Decision rendered in absentia and:
>
> 1. The person concerned has been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia but has the following legal guarantees after surrender/such guarantees can be given in advance/:-----
>
> OR
>
> 2. The person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia but has the following legal guarantees after surrender/such guarantees can be given in advance/:-----"

52. That probably does not amount to a statement for the purposes of paragraph 4a(1)(a), at all: it is for the judicial authority to set out in the EAW the basis upon which it is said that the person concerned actually received information relating to the date and place of his trial (Dworzecki at [49]). Insofar as it is a statement, it is clearly ambiguous.

53. In its Request for Further Information, the CPS attempted to clarify the position by asking, in relation to that trial (as request 1):

> "… [P]lease confirm whether [the Appellant] was present at court for the (a) trial (b) conviction/judgment".

The response to that request simply confirmed that he was not present; but the response to request 6 added:

> "… but he was properly notified about the trial date."

There is no further evidence available.

54. It cannot assumed from the sparse information available that "proper notification about the trial date", in accordance with Polish procedure, amounted to either personal service or notification such the Appellant actually received the relevant information as to time and place of the trial; particularly in the light of Dworzecki. That case proceeded on the basis that, in respect of service of criminal process, article 132 of the Polish Code of Criminal Practice states that:

> "In the event of the addressee's absence from home, the process is to be served on an adult of the addressee's household – if also absent, the process can be served on the landlord or the caretaker of the village chief – on condition they undertake to pass the process on to the addressee."

The summons was sent to the address given for service by the individual, and was collected from there by his grandfather. The Court of Justice held that, for the purposes of article 4a(1)(a), that did not amount to "personal service"; and, to satisfy

the second limb, the judicial authority would have to establish unequivocally that the third party actually passed on the summons (see [47]-[48]). It is clear from that case that compliance with that provision of the Polish Code does not of itself unequivocally establish that the criteria in article 4a(1)(a) have been met. In the case before me, there is no evidence that article 132 is not still the relevant provision in the Polish Code; nor that it was under some other provision that the Appellant was notified of the relevant details of his trial.

55. I accept that the Appellant left Poland knowing that a suspended sentence was hanging over him and he had recently been arrested for a further offence which the authorities had indicated they intended to pursue. He was also aware that, by not keeping in touch with his probation officer and not notifying the Polish authorities of changes of his address, he was failing to comply with obligations attached to both suspension and release. I accept that, by moving to the UK, the Appellant made it more difficult for the authorities in Poland to serve him with documents relating to his trial. However, he took no steps to conceal himself or his identity in the UK; and when, in 2005, the Polish authorities went to his address they learned that he had moved to the UK three years earlier. It seems that, before then, they had taken no steps to find out where he was. Even when they found out he was in the UK, there is no evidence that they took any steps whatsoever to find out his precise address, which could have easily been ascertained from the UK authorities, e.g. the Home Office, or the UK tax authorities with which he was registered. In all of the circumstances, I am not satisfied that the Appellant's surrender would not breach his rights of defence.

56. In any event, there is no evidence at all that the Appellant was informed that a decision may be handed down if he did not appear for the trial, and so the criterion in article 4a(1)(a)(ii) was not met.

57. Therefore, on the evidence, the Judicial Authority has failed to satisfy me that the requisite criteria for notification set out in article 4a(1)(a) were met in this case. In my judgment, the District Judge was therefore wrong to find that the Appellant deliberately absented himself from his trial.

58. There is no evidence before me as to the Appellant's right to a retrial upon his return to Poland. Mr Seifert submitted that, as Poland is a signatory to the European Convention on Human Rights, given that the Appellant was not notified of the details of his trial in accordance with article 4a(1)(a), I can safely assume that the guarantee of a retrial or, on appeal, to a review amounting to a retrial in section 20(5) will be met in Poland. In making that submission, he relied upon R (Tous) v District Court in Nymburg, Czech Republic [2010] EWHC 1556 (Admin), in which Cranston J said this:

> "… [I]n cases were a person has been tried in his absence, evidence that article 6 has been incorporated into the law of the requesting state and that that state recognises the case law of the European Court of Human Rights supports a finding that the requirement of section 20(5) of the 2003 Act is satisfied. The statutory safeguard in section 20(8) is satisfied where the requesting state can show that its law complies with article 6. For a requested person to succeed in an argument that he

> should be discharged under section 20, he must show that subsequent proceedings would not comply with article 6.
>
> As far as the burden of proof is concerned, it is on the judicial authority to satisfy the court about answering the questions in section 20 in the affirmative and to do that to the criminal standard (section 206). However, in my view, the requested person must adduce some evidence at least which raises an issue that the guarantee in section 20(5) might not be met in the requesting state. It is not for the requesting state to prove affirmatively in the absence of such evidence that the guarantee will not be met."

Those observations were quoted with approval by Ouseley J in Malinowski v District Court of Legnica, Poland [2012] EWHC 2618 (Admin).

59. However, in my view, Tous is easily distinguishable. In that case, the relevant judicial authority had given some form of retrial guarantee. In the EAW, in paragraph (d) of the warrant, in response to the rubric, "State here more proximate data on legal guarantees", there was set out part of article 306(a) of the Czech Republic Criminal Code, as follows:

> "If the proceedings against the fugitive has been finished by a judgement of conviction in force and later the reason will expire, for which the proceedings against the fugitive had been conducted, the Court of the first instance will cancel such a judgement on the ground of an application of the convict submitted within Eight days after the delivery of the judgement and in the extent mentioned in paragraph 1 the trial will be carried on again. The convict must be informed about the right to suggest the cancellation of the judgement in force. Adequately proceeds the Court, if it is required by an international treaty, which is binding for the Czech Republic."

60. The District Judge had considered that sufficient a guarantee. Cranston J agreed. He said:

> "16. Reaching a conclusion in this case is not helped by the quality of the warrant. We are not told the derivation of article 306, although the District Judge, perhaps because of his greater knowledge of these matters, attributed it to the Czech Criminal Code. The sex of the appellant is wrongly stated as female in several crucial passages. The translation of article 306 is such that its meaning is far from being clear.
>
> 17. Notwithstanding these difficulties, however, my view is that the passage in paragraph (d) of the warrant was sufficient for District Judge Evans to conclude that the appellant will be afforded a retrial on return to the Czech Republic."

61. However, in the case before me, there is no reference to any right to, or even possibility of, retrial in Poland, in either the EAW or the Further Information. I cannot assume that there will be such, given the following.

    i) The burden of proof is on the Judicial Authority, and it is to the criminal standard.

    ii) They have adduced no evidence that there will be any right to a retrial.

    iii) In Pogorzelski v Regional Court in Warsaw, Poland [2015] EWCHC 1076 (Admin), another section 20 case, the part of the standard form EAW used in that case, had a section confirming the right to a retrial, which had been crossed through; and the further information provided by the judicial authority confirmed that "generally [the requested person] will not have a right to a retrial", although it went on to say that he could apply for cassation or the reopening of the trial as an "extraordinary remedy at law". Holroyde J found that, on the evidence before him he could not be satisfied that the question posed in section 20(5) could be answered positively. I do not see how the Judicial Authority in this case can be in a better position, having lodged no evidence on the issue at all.

    iv) Whatever the position under article 4a(1)(a), on the basis of the evidence before me and the legal position in Poland as suggested in Dworzecki, it seems that, under Polish law, the trial summons was properly served on the Appellant. That may possibly have an effect upon any right to a retrial the Appellant may have in Poland.

62. On the (sparse) evidence before me, therefore, I cannot be satisfied that the Appellant would be entitled to a retrial or, on appeal, to a review amounting to a retrial. In those circumstances, in accordance with section 20(7) of the 2003 Act, I must discharge the Appellant in respect of EAW1.

Ground 3: Article 8

63. Third and finally, Miss Westcott submitted that the District Judge erred in the manner in which he approached the article 8 of the ECHR, and his conclusion.

64. Article 8, "Right to Respect for Private and Family Life", provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

65. It is well-settled that extradition engages article 8, because of its potential to interfere with the family and private life rights of both the individual and his family. An exercise is therefore required of balancing the interference with those rights which would result from the extradition on the one hand, and the public interest in extraditing offenders to serve lawful sentences for offences they have committed. This exercise was recently considered by a Division of this court, presided over by the Lord Chief Justice, in Polish Judicial Authority v Celinski [2015] EWHC 1274 (Admin). Lord Thomas emphasised that, on an extradition appeal where an article 8 issue arose, this court has to consider just one question, namely, did the District Judge make the wrong decision; but he stressed the very strong public in ensuring extradition arrangements are honoured particularly in Part 1 cases, where the principle of mutual confidence and respect between EU territories which underpins the arrangements must be recognised and acted upon, such that it will be a rare case in which article 8 rights outweigh the State's international treaty obligations to extradite. He also commended a structured approach of balancing pros and cons of extradition. Where the District Judge has erred in his approach, then this court itself will engage in that balancing exercise afresh.

66. The District Judge dealt with the article 8 issue in paragraphs 45 and following of his judgment. He set out the relevant authorities, including Celinski which he said gave "very important guidance in relation to the proper approach to be adopted by our courts in article 8 challenges", and which he then proceeded to apply by setting out the factors for and the factors against extradition. His general approach cannot be faulted.

67. However, Miss Westcott submitted that he erred in applying Celinski, in a number of ways, notably by proceeding on the basis that the Appellant deliberately absented himself from the trial in respect of the bar theft, and in the way in which he dealt with delay, the impact of the Appellant's extradition on his family members and the seriousness of the charges.

68. Even leaving aside the way in which the District Judge dealt with delay – in respect of which Miss Westcott's submissions appear to me to have had some force – on the basis of my finding that the Appellant did not deliberately absent himself from the trial, I agree that it is in any event necessary for me to reconsider the proportionality balancing exercise.

69. In respect of factors in favour of granting extradition, the District Judge rightly referred to the strong and continuing public interest in the UK honouring its international extradition obligations, particularly (I add) where the requesting state is a member of the EU. Furthermore, the offences, if not the most serious, were not trivial, as reflected in the sentences imposed by the Polish court. I am not overly impressed by Miss Westcott's submission that the District Judge erred by referring to the offences as "serious" – necessarily a relative term – and placing that under the "pro" extraction column. The Appellant was also, for at least most of the relevant time, a fugitive.

70. However:

    i) I have found that the Appellant cannot be extradited in EAW1, and so we are concerned primarily with EAW2. The offence was one of commercial

burglary, with others, in which about £1,300-worth of electrical equipment was taken. This was not a trivial, but nor was it a major, crime.

ii) The sentence imposed was two years. It was originally suspended. Although it was open to the Polish court to have activated the sentence for breach of the conditions requiring reporting and notifying the authorities of changes of address, it was in fact activated on the basis of a further conviction in absentia in circumstances in which, under the Framework Decision, the Appellant was not deliberately absent from his trial.

iii) The offence was committed in January 1998 – 18 years ago – when the Appellant was just 17 years old. He is now 36. It has been rightly said that, "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" (HH v Deputy Prosecutor for the Italian Republic, Genoa [2012] UKHL 25 at [8(6)] per Baroness Hale).

iv) Since 2000 (i.e. for the last 16 years), the Appellant has been living in the UK where, on the evidence, he has committed no offence, and has made a proper life for himself, his wife and their two children. The evidence of the consultant clinical psychologist, Dr Sharon Pettle, is that his daughter has "clinically significant" emotional difficulties, and is receiving extra help at school. The Appellant's son is now just 18 years old, and his studies have been upset by the extradition proceedings against his father. Dr Pettle says that he is likely to be deeply distressed and struggle emotionally, if his father were extradited. The Appellant's wife has limited support in this country. The family will, clearly, be very distressed – it would be wrong to put it higher – if the extradition were to proceed.

v) Furthermore, in this case, the length of the delay is such that, in my view, the weight to be attached to the public interest is dramatically reduced. The crime was committed 18 years ago. Even taking into account the fact that the Appellant left Poland and did not indicate where he was going, the delays have been egregious. Although I am focusing on EAW2, eight years passed between issue and certification of EAW1. Nearly nine years passed between the Polish authorities knowing that the Appellant was in the England (August 2005 at the latest), and the issue of EAW2 (29 July 2014). These delays are entirely unexplained. They are not explained by the fact that the Appellant was a fugitive: he did not positively conceal his whereabouts, which the Polish authorities could have easily found, given that they knew he was in England and he was in fact working and paying tax here. The authorities do not appear to have taken any steps at all to find him.

vi) Whilst of course the article 8 proportionality balancing exercise is quintessentially fact specific. However, the cases show that long unexplained delays can weigh heavy in the balance against extradition. In Jankowski v Regional Court in Bialystok, Poland [2015] EWHC 2522 (Admin), an unexplained seven year delay between issue and certification of an EAW carried considerable weight with King J in his decision that it would be disproportionate to extradite the appellant. In Miller v Polish Judicial Authority [2016] EWHC 2568 (Admin), Collins J described an unexplained

six year delay between issuing and certifying a conviction EAW in respect of a two year sentence for drug supply as "disgraceful"; and, although each case is of course fact sensitive, apparently sufficient on its own to conclude that extradition was disproportionate. Where a concerned person is known to be in the UK – as was the Appellant in this case – as Blake J emphasised in Oreszczynski v Krakow District Court, Poland [2014] EWHC 4346 (Admin), even where the concerned person is a fugitive, the authorities cannot simply do nothing: they must make some, reasonable enquiries as to the person's whereabouts. In the case before me, there is no evidence that the authorities made any such enquiries. The evidence is, firmly, that they took no steps to find the Appellant.

vii) The delays in this case – in respect of each warrant – appear to be greater than in those other cases to which I was referred. They are culpable. They are unexplained, despite the Judicial Authority being given every opportunity to provide an explanation: indeed, when a specific Request for Further Information was made of the Judicial Authority to account for the delay, none was forthcoming. The delays have resulted in the Appellant notably building and consolidating a life with his family in this country.

viii) Compared with those delays, the evidence of the Appellant being evasive and difficult when arrested is, in my view, of relatively little moment.

71. In all the circumstances, balancing all of the factors in this case – and, of course, this case turns entirely upon its own facts – I am satisfied that it would be disproportionate to extradite the Appellant on EAW2; or, indeed, if EAW1 were still extant, on either EAW. The District Judge erred in finding otherwise.

Conclusion

72. For those reasons, this appeal is allowed in respect of both EAWs.