



Neutral Citation Number: [2022] EWHC 1697 (Admin)

Case No: CO/872/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday 1st July 2022

Before:

MR JUSTICE FORDHAM

Between:

GRZEGORZ SMULCZYK
- and -
JUDICIAL AUTHORITY OF POLAND

Appellant

Respondent

Amanda Bostock (instructed by JD Spicer Zeb) for the **Appellant**
Saoirse Townshend (instructed by CPS) for the **Respondent**

Hearing date: 21.6.22

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This is an extradition appeal on grounds invoking section 14 of the Extradition Act 2003 (injustice or oppression by reason of the passage of time) and Article 8 ECHR (disproportionate interference with private or family life). The hearing before me was a remote hearing by Microsoft Teams. That mode of hearing was requested by the representatives of both parties in the context of difficulties in relation to transport and travel to court. They were satisfied, as was I, that the mode of hearing involved no prejudice to the interests of their clients. Open justice was secured through the publication of the case, its start time and mode of hearing, together with an email address usable by anyone who wanted to observe the hearing, in the Court's cause list. I am satisfied that the mode of hearing was justified and appropriate.
2. Permission to appeal was granted by Sir Ross Cranston on 28 August 2019. The Appellant is aged 38 and is wanted for extradition to Poland. That is in conjunction with an accusation EAW (European Arrest Warrant) issued on 8 August 2017 and certified on 26 September 2017, on which he was arrested on 23 November 2017. He has been on conditional bail ever since. Extradition was ordered by DJ Robinson ("the Judge") for the reasons given in a judgment ("the Judgment") dated 16 February 2018, handed down on 22 February 2018. That was after an oral hearing on 15 February 2018. At that hearing, the Appellant and his partner ("the Partner") each gave oral evidence and was cross-examined, having put forward a proof of evidence dated 15 February 2018 (the Appellant) and witness statement dated 14 February 2018 (the Partner). In the Judgment, the Judge dealt with several issues. Among them were the section 14 and Article 8 grounds for resisting extradition, on the evidence as it then was.
3. By an order of this Court on 14 January 2019, the Appellant's legal aid representation order was extended to authorise the obtaining of a medical report from a neurologist. A report dated 15 March 2019 ("the Hart Report") was duly filed. Its author was Dr Paul Hart. He had been involved in the Appellant's case since 15 December 2016 when the Appellant first had a consultant's appointment in this country to evaluate his epilepsy and the seizures which he has had as a consequence of that condition. The Judge was aware of the epilepsy. He had seen documents including those relating to Dr Hart's diagnosis and the ongoing medical response to the Appellant's epilepsy and seizures. Naturally, he did not have the Hart Report. In addition to the Hart Report, there is a series of further material put forward before this Court on behalf of the Appellant, as 'fresh evidence'. It includes three further witness statements from the Partner dated 23 March 2018, 17 August 2020 and 1 June 2022. There are also 163 pages of medical records relating to the Appellant ("the Medical Records"), including notes and letters. There is a one-page private GP's letter dated 17 June 2022 ("the Private GP Letter") from Dr Mark Sarnicki who Ms Bostock tells me saw the Appellant and the Partner the week before the hearing, did not conduct tests, but reviewed the Medical Records and saw a video of one of the Appellant's seizures. There is also a letter relating to the Partner, from a consultant orthopaedic surgeon, dated 30 December 2019.
4. This is an appeal against an order for extradition made in February 2018 which has come to be the subject of a substantive hearing on 21 June 2022, 4 years and 4 months later. How come? What happened was that the Appellant's appeal was filed on 27 February 2018 and the Respondent's Notice on 9 April 2018. By order of Lewis J on

19 June 2018 a stay was granted pending the determination of a lead case (Lis v Poland [2018] EWHC 2848 (Admin)) regarding issues of judicial independence and the rule of law in Poland. The extradition bar raised in Lis did not succeed and judgment was delivered in that case on 31 October 2018. In the present case, the Hart Report was filed on 15 March 2019 and Sir Wyn Williams dealt with permission to appeal on the papers, refusing permission to appeal on 15 July 2019. Then on 28 August 2019 came Sir Ross Cranston's order after an oral renewal hearing granting permission to appeal, limited to the section 14 and Article 8 grounds. What happened next was that, prior to the hearing of the substantive appeal, new life was breathed into the judicial independence and rule of law issue in June 2020, by circumstances and materials which led this Court to grant permission to appeal in what became Wozniak v Poland [2021] EWHC 2557 (Admin). The Appellant sought, and obtained, permission to amend to raise the Wozniak point and a second stay of this appeal, pending final determination in Wozniak. By the beginning of 2022 the Wozniak point had been properly abandoned. The case was fixed for its substantive hearing and skeleton arguments were filed on 31 May 2022 (Appellant) and 7 June 2022 (Respondent). The Appellant's application to adduce the fresh evidence was made on 16 June 2022.

5. The index offending, of which the Appellant stands accused and in respect of which he is wanted to stand trial in Poland, concerns two matters. They are alleged to have been committed by him in conjunction with another individual ("the Other Man") involving drug dealing. The first matter is that between 1 December 2011 and 30 June 2012 (when the Appellant was aged 28), the Appellant is said to have "mediated" the dealing in 1kg of cannabis between the Other Man and a third party. The second matter is that between 1 March 2012 and 30 June 2012 (again, when he was 28), the Appellant is again to have "mediated" the dealing in a further 1kg of cannabis between the Other Man and a third party.
6. The following matters were evidenced by 'further information' evidence from the Respondent dated 21 December 2017 ("the Further Information"). The alleged criminal conduct was disclosed to the Polish law enforcement authorities for the first time "only in 2015 and 2016", when "the evidence appeared" that the Appellant was "dealing in trade of significant amounts of drugs in 2011 and 2012". The Appellant was the subject of a charging decision in relation to these matters on 7 March 2016. He was arrested and interrogated in relation to these matters on 9 March 2016. He was brought before a court on 10 March 2016. He was not at that stage indicted. The Polish Court at that hearing addressed whether "pre-trial detention" was justified. It decided that "evidence collected at that point in time was not a satisfactory basis to apply the most severe preventive measure ... for the conduction of the pre-trial proceedings". The "preventive measure in the form of a ban on leaving the territory of the Republic of Poland was not applied". However, the Appellant was obliged "to notify the authority holding the proceedings" of any change of address or whereabouts which lasted for more than 7 days, an instruction which he "received ... in writing" and "confirmed ... with his own signature" on 9 March 2017.
7. The following matters are recorded in the evidence and are uncontentious. In 2012 or 2013 the Appellant sustained a head injury in Poland in which he sustained a fractured skull. Subsequently, he developed epilepsy and began experiencing seizures. This was diagnosed and he was prescribed "Epilim". The relationship between the Appellant and the Partner began in Poland in 2015. That was after a three month period following the

breakup of a marriage which led in due course to divorce proceedings. The Appellant went to the Netherlands from Poland in April 2016. The Partner came to the UK from Poland in May 2016. The Appellant joined her here from the Netherlands in June 2016. He obtained a national insurance number that month. The Appellant worked as a builder. The Partner worked as a beautician. The Appellant registered with a GP and by December 2016 had been referred by the GP to Dr Hart. He had his appointment with Dr Hart on 15 December 2016. He told Dr Hart that he had stopped, 18 months earlier, taking the Epilim prescribed to him in Poland, because it made him drowsy. Dr Hart prescribed a new drug (“Kappra”) with an initial dose of 250mg twice a day (“bd”) increasing within a few weeks to 500mg bd.

Fugitivity

8. A first issue of substance which I have to address is whether the Appellant has properly been regarded as having left Poland as a “fugitive”. That was the Judge’s finding. The Judge found that the Appellant did leave Poland as a fugitive, in relation to the drugs matters which are the subject-matter of the extradition proceedings. Having reached that conclusion the Judge went on, “lest I am wrong”, to consider the further matters under section 14 namely injustice and oppression. Four things are common ground in relation to fugitivity. First, if the Appellant has properly been regarded as having left Poland as a fugitive, that is fatal to his arguments based on section 14 (injustice and oppression). Secondly, the key question in determining whether the Appellant left Poland as a fugitive is whether he “has knowingly placed himself beyond the reach of a legal process”: see Wisniewski v Poland [2016] EWHC 386 (Admin) [2016] 1 WLR 3750 at §59. Thirdly, the issue of whether the Appellant left Poland as a fugitive is also a relevant part of the Article 8 assessment. Fourthly, the issue of fugitivity is not the subject of material fresh evidence, so that the question on appeal is whether the Judge was wrong about this on the evidence adduced before him (section 27(3) of the Extradition Act 2003).
9. In relation to fugitivity, the Judge described and had regard to the evidence – to which I have referred – derived from the Further Information. He summarised the Appellant’s oral evidence. That oral evidence was to the effect that the Appellant had believed that the drugs matters which are the subject of the extradition had been suspended; that he was free to leave Poland; that he signed documents on 9 March 2016 but could not recall what they were; that he could not recall signing to say that he would keep in touch with the legal authorities dealing with the drugs matters; that he was not aware that the legal proceedings were ongoing; that he had lived openly in the UK; that the Polish authorities knew where he was; that he was the subject of probation supervision imposed by a different Polish court in sentencing for a different drug matter; that in relation to that probation requirement he had kept in touch with his probation officer from the UK and had notified the probation officer of his UK address and working arrangements; that an email from 2017 from that probation officer (in Lubartow) evidenced this action of remaining in contact; that a further document from 2018 evidenced that he had emailed the probation officer with his change of address in April 2017; and that another document from a divorce court (in Lublinie) dated 18 January 2018 evidenced that the Appellant had participated from the UK in Polish divorce proceedings and stated that the divorce court knew his UK address. The Judge recorded that, under cross-examination, the Appellant (whom he called “the RP”) had accepted that the authorities that he had kept in touch with were not those authorities dealing

with the proceedings into what are now the extradition offences: the probation officer was concerned with the sentence from a different court for a different offence; and the divorce matter was unconnected to the criminal allegations. The Judge then said this (§§29-33):

29. I found the RP to be a vague, unconvincing and unreliable witness in relation to his knowledge of the state of the proceedings regarding the (extradition) drug offences and the circumstances in which he came to leave Poland without notifying the appropriate authorities of his change of address. I found it implausible that he recalled being free to leave Poland and signing certain documents on 9 March 2016 yet not the requirement to keep the authorities informed of his whereabouts, in particular because he was produced before court the next day, in respect of what were serious allegations with potentially serious consequences for him, and because he was at a pivotal point in his life either planning or about to plan to move abroad. I am sure that the requirements upon him were not matters he would have been or was confused or forgetful about.

30. There was no reason for him to believe that the non-authorisation of his detention marked the end of any requirement to notify any change of address. Even on his own account he told me he thought the legal proceedings were suspended, not concluded.

31. I did not regard the facts that he did not conceal his UK address, made it available to some authorities, and lived in plain sight in the UK as persuasive in support of his contention that he was not avoiding the drugs proceedings. Instead I am satisfied that he chose to keep in touch with those authorities where it suited his purposes — the divorce court and the modest requirement to keep in touch with a probation officer in order to complete a sentence - but not those where it didn't, namely those concerning proceedings for serious drugs allegations that might result in an outcome adverse to his interests.

32. I did not believe his evidence and I am sure that he knew that he was a suspect facing charges in legal proceedings for serious allegations and, even if not in preventative pre-trial detention, was still required to inform the relevant authorities of his whereabouts in order that legal proceedings could continue. He deliberately did not do so and despite being permitted to leave and not actively hiding, he left Poland in the knowledge and hope that it would prove difficult to progress those proceedings with him being abroad and with the relevant authorities not knowing his whereabouts or address. He built his private and family life in the UK aware of the risk that the authorities would be seeking him and may eventually locate him.

33. Whilst not convicted of any offence I am nonetheless satisfied that in the circumstances he may properly be regarded as a fugitive both for the purposes of section 14 and for consideration of the Article 8 issue.

10. Ms Bostock for the Appellant submits that the Judge erred in his approach to fugitivity and reached a conclusion on fugitivity which was wrong and not sustainable on the evidence. At the forefront of her argument she puts the judgment of the Divisional Court (19 January 2018) in JK v Poland [2018] EWHC 197 (Admin). Ms Bostock was in the JK case (for the requesting state) and a month later appeared for the Appellant at the hearing before the Judge (15 February 2018). Nobody invited the Judge's attention to the JK judgment and so it is unsurprising that the Judge did not address it. What happened in JK was that the requested person had been interviewed as a suspect in Polish criminal proceedings (23 August 2012). There was "further information" which stated that he had been told he must notify the proper organ of the Polish state about any change of address, and that he had never done so. There was, however, evidence that he had made arrangements for his father to collect correspondence from the Polish address which he had given. There was also evidence that he was in contact, from the UK, with the Polish authorities dealing with two other sets of proceedings: one was a

criminal sentence (the conditions on a suspended sentence); the other was a set of proceedings in which he was a witness. In relation to this contact there were notes made by a probation officer in Poland. These features can be seen in the judgment in JK at §§7-9, 19 and 39. In FK, the extradition judge (“EJ”) had concluded that the requested person was a fugitive, for reasons which she had given: see JK at §19. The Divisional Court overturned that finding. It did so on the basis that the EJ had “placed undue emphasis on the fact that the requested person did not provide his address in the UK to the Polish authorities in the context of the particular matter which was the subject of the extradition proceedings” and had “viewed it in isolation from what else was going on”, in circumstances where the other matters went to the requested person’s “state of mind”. The matters on which the EJ had relied, said the Divisional Court, provided some “evidence of state of mind” that did not “necessarily” support the case that the requested person’s state of mind had involved “knowingly placed placing himself beyond the reach of the legal process”. All of this can be found in JK at §§40-41.

11. Ms Bostock pointed to the parallels between JK and the present case and submitted that the Judge in the present case made the same error as the EJ in JK. She submits that, like the EJ in JK, the Judge emphasised the fact that the Appellant did not provide his UK address to the Polish authorities who were dealing with the proceedings which are now the subject of the extradition offences, which the judge viewed in isolation from what else was going on. The Judge misappreciated that the evidenced keeping in touch with the Polish authorities, in the context of the other matters, as recorded in documents from the probation officer in Poland, undermined any finding – which needed to be to the criminal standard – that the Appellant’s state of mind was that he had knowingly placed himself beyond the reach of a legal process. She submits that the Judge’s adverse conclusion was a leap which was unjustified on the evidence and in the circumstances.
12. Leaving aside points arising from JK, Ms Bostock submits that taking a practical and common sense point of view, in relation to the evidence in the present case, the Appellant’s actions and the evidence could not and cannot sustain the conclusion – to a criminal standard – that he left Poland as a fugitive. From a practical perspective, and as a layperson, he would have considered it is sufficient that he kept in regular contact with his probation officer and provided his UK address. It may have been negligent not to keep in touch and provide the address to the authorities who had been dealing with the alleged index offending. But a default of that nature cannot reasonably be characterised or concluded to have involved the requisite state of mind for a finding of fugitivity, to the criminal standard. The Appellant could not – when the case is viewed in practical and common sense terms as to his position as a layperson – have anticipated the insufficiency of ongoing contact with probation. Nor is it fair to say or conclude that the Appellant was hiding from the authorities. Put another way, had he been acting “deliberately to place himself beyond the reach of the authorities”, he would not have acted to continue to provide an address – from the UK – to his probation officer.
13. I cannot accept these submissions. In my judgment, the Judge’s finding that the Appellant left Poland as a fugitive is unassailable. I start with the JK case. There, the EJ had made a finding of fugitivity based on reasoning which identified two points. The first was that the requested person had been told that he must notify the proper organ about any change of address. The second was that the requested person had never given a UK address in connection with those proceedings. The problem identified by the Divisional Court was that that reasoning, and that evidence, could not support a finding

as to the requisite “state of mind”, in circumstances where there was the evidence of the arrangements made with the father and the evidence of keeping in touch with relevant Polish authorities in the context of the other matters. The Divisional Court began the analysis by emphasising the importance of “state of mind” in relation to fugitivity. That is why the Court was contrasting the position relating to the test for being “unlawfully at large”, which turns on “an objective state of affairs” in which “knowledge and understanding are irrelevant” (JK §37). Fugitivity is different. The importance of “state of mind” in a finding of fugitivity as reflected in the word “knowingly” in the phrase “knowingly placed himself beyond the reach of a legal process” (JK §38). The EJ’s reasons (EK §19) did not address the requested person’s state of mind. The requested person’s other arrangements and contact with authorities in relation to other proceedings were matters which “went to the requested person’s state of mind (JK §40). The matters to which the EJ had referred were capable of providing “some evidence” of state of mind but did not of themselves “necessarily” mean that the requested person had the requisite state of mind (JK §41). What was missing in JK was the enquiry and evaluation into the key question of the requested person’s subjective state of mind, and the identification of those aspects of the evidence and findings of fact which could and did provide a reasonable and reasoned basis for a finding of fugitivity, to the criminal standard. The EJ’s reasoning did not do this.

14. By contrast, there was no such error of approach by the Judge in the present case. The Judge did not simply rely on the objective fact evidenced by the Further Information that the need to notify a change of address had been communicated to the Appellant, together with the objective fact of the Appellant’s default in notifying the relevant authorities dealing with the relevant proceedings. The Judge specifically addressed the Appellant’s subjective state of mind. The Judge recorded that the Appellant had accepted in cross-examination that the authorities with whom he had kept in touch were not those dealing with the proceedings into what are now the extradition offences, that the probation officer was concerned with the sentence from a different court and that the divorce matter was unconnected to the criminal allegations. But the Judge did not stop there. The Judge specifically considered the state of the Appellant’s mind. He found the Appellant to be “vague, convincing and unreliable” in relation to his “knowledge” of the state of the proceedings regarding the extradition drug offences and in relation to the circumstances in which he came to leave Poland without notifying the appropriate authorities of his change of address. The Judge found “implausible” the Appellant’s assertion that he recalled being free to leave Poland, and he recalled the signing of documents on 9 March 2016, but he did not recall the requirement to keep the authorities informed of his whereabouts. The Judge emphasised that this was in a context where the Appellant had been produced before a court the next day (10 March 2016), in respect of serious allegations with potentially serious consequences and was at a pivotal point in his life in planning to or be about to move abroad. The Judge emphasised that there was no reason for the Appellant to believe that the requirement to notify the change of address had come to an end when his pre-trial detention was not authorised by the Polish court on 10 March 2016. The Judge then made a finding of fact, being “satisfied” that the Appellant in making his UK address available to some Polish authorities and not others “chose to keep in touch with those authorities where it suited his purposes” – for the divorce and in order to complete a sentence – but that he chose not to do so where it did not suit his purposes, in relation to ongoing proceedings for serious drug allegations that might result in an adverse outcome. The Judge explained that he “did not believe” the Appellant’s evidence. The Judge was “sure” that

the Appellant “knew”: that he was a suspect facing charges in legal proceedings for serious allegations; and that he was still required to inform the relevant authorities of his whereabouts in order that those proceedings could continue. The Judge found that the Appellant “deliberately did not do so”. The Judge found that the Appellant had left Poland “in the knowledge and hope” that it would “prove difficult to progress those proceedings with him being abroad and with the relevant authorities not knowing his whereabouts or address”. This was what was missing in JK. It was a factual enquiry, based on evidence, into the Appellant’s subjective state of mind. It involved clear and reasoned findings as to that state of mind, based on the evidence, including in particular the Appellant’s oral evidence and its probing by cross-examination. The Judge did not make the error seen in JK but rather conducted the necessary factual enquiry into the subjective question of state of mind being emphasised as essential in JK.

15. There is in my judgment no basis for this Court to overturn that finding and those conclusions, arrived at in that way, with that advantage of that evidence and its probing. In those circumstances, there was a finding on the facts and the evidence, which was and remains fatal to the Appellant’s invocation of section 14. The Judge went on to consider whether, in case he was wrong to regard the Appellant as a fugitive, the section 14 bar arose on the evidence by reason of injustice or oppression. I will do likewise. I will consider the Judge’s assessment of the “injustice” and “oppression” points. It is particularly appropriate that I should consider those matters because they are in any event effectively adopted on behalf of the Appellant as informing the Article 8 proportionality balance.

Injustice

16. The argument as to why it would be “unjust” to extradite the Appellant by reason of the passage of time since he is alleged to have committed the extradition offences is in essence, as I see it, as follows. The main evidence in the prosecution case against the Appellant at any trial would be the Other Man. They would have been co-defendants if tried together. However, by reason of the passage of time, the Other Man has been convicted and sentenced. That was five years ago. He gave his testimony in those proceedings on 13 March 2017. Seeking to implicate the Appellant would have been in the Other Man’s interests. The Appellant was not there, to be able to counter the testimony. They were not tried as co-defendants. Now, the likelihood is that the Other Man would not be there, able to be challenged. It is highly likely that the Other Man will no longer be willing to take part in the proceedings. That means the main evidence against the Appellant is likely to be difficult to challenge. To put all of this into context, as the Appellant’s proof of evidence explains, he and the Other Man used to work together. The Other Man made a false claim for petrol expenses by forging the Appellant’s signature. He was found out and disciplined and made to pay back the money. That would explain why the Other Man may have had a grudge against the Appellant. He may have had some other motive for implicating the Appellant, such as to try and get a lower sentence.
17. At the time of the hearing before the Judge the passage of time since the alleged index offences was some 5 years 8 months. The Other Man had given his testimony in the criminal proceedings in Poland, 11 months earlier. The Judge concluded that the threshold of section 14 injustice was not made out. He said this:

It was submitted on the RP's behalf that it would be unjust to extradite him, because the opportunity for a joint trial with his accuser has now passed due to passage of time and the case is now based on hearsay. However the test for injustice is a high one. There is no reason to suppose that the RP will not have an opportunity to examine any witnesses against him. Neither in my view is there any basis for the assertion that a trial together with any co accused is a necessary component of a fair trial. Further and in any event Poland is bound by Article 6 of the ECHR and should readily be assumed to be capable of protecting the RP against an unjust trial. I do not consider that it would be unjust to extradite him within the context and meaning of section 14.

18. In my judgment, the Judge's conclusion was – again – unimpeachable. We are now four years and four months further on. But, in my judgment, the Judge's assessment has not become “wrong” by virtue of the ongoing passage of time and the evidence and circumstances as they now are. The fair trial implications of the nature of the evidence against the Appellant, and any testing of it, including if relevant prosecution evidence is said to emanate from a person who is not giving evidence as a witness at the trial, are all matters which directly engage the aspects of process and the standards of fair trial process which the Judge rightly had in mind. To that, I can add that no argument is advanced that the Appellant would be hamstrung by the passage of time from being able to show that the Other Man was “found out and disciplined” for making a “false claim for petrol expenses” by forging the Appellant's signature. In her oral submissions Ms Bostock accepted that the considerations relating to “injustice” could not in and of themselves satisfy the section 14 test for barring extradition. She submitted that the “injustice” considerations nevertheless constitute a strand of the overall argument relating to “oppression”. This seemed to me to be tantamount to acknowledging that the distinct “injustice” limb of section 14 is not met. In any event, that is what the Judge concluded and I think he was plainly right and that this is still right. I also have some difficulty seeing how matters going to the fairness of a trial process can, where they have convincingly been answered, stand as a strand in an argument about oppression. I accept, however, that all aspects of harm and prejudice arising from the passage of time need to be considered ‘in the round’ when the test of oppression is applied. That is what I will do.

Oppression

19. The arguments on behalf of the Appellant based on “oppression” included both (i) that the Judge's conclusion was erroneous on the evidence before him and ought to have been different on that evidence (section 27(3) of the 2003 Act) and alternatively (ii) that in light of the current circumstances and fresh evidence there is now a changed picture such that the outcome in relation to oppression ought now to be different (section 27(4)). In each respect, the essence of the argument relating to oppression focuses, as its mainstay, on the position relating to the Appellant's epilepsy and seizures. It focuses on the risks and implications of those, together with the impact of extradition viewed in the context of and in light of them. Ms Bostock approached this part of the case by looking at the entirety of the evidence, as it now stands, and as a whole. I think that does make best sense and will do the same.
20. I will seek to encapsulate here the essence of Ms Bostock's argument, as I saw it, in relation to the Appellant's epilepsy and seizures, together with the risks, implications and extradition impacts.

- i) What the extradition court is doing in considering whether extradition would be “oppressive by reason of the passage of time” is conducting a straight comparison between the position now and the position as it would have been “if the trial had taken place with ordinary promptitude”. The focus is on the effect which the passage of time has had, rather than on whether the requesting state was culpably responsible for it. All of this can be seen articulated in Symeou v Greece [2009] EWHC 897 (Admin) at §57.
- ii) At the time of the alleged index offending the Appellant was a 28 year old and in good health. By reason of the head injury in 2012/2013 he then experienced the onset of epilepsy with the seizures which he began to experience in consequence. At the time of Dr Hart’s diagnosis on 15 December 2016 it was recorded that following the head injury, and for the first two years, the seizures had occurred “twice a week”; but that in the last two years (2014-2016) they had been occurring “once a month”. On that basis, if the Appellant had been tried with promptitude after being charged in March 2016 it would have been at a time when he was experiencing seizures at a rate of about “once a month”. That has to be contrasted with the very different picture as it now is. The contrast is transformative.
- iii) The incidence of seizures can reliably be taken now to be at a rate of “3 to 4 per week”. The Hart Report reliably assesses for the Court the risks and implications of the seizures. The picture is one of seizures which are uncontrolled (or badly controlled), unpredictable and very dangerous. They involve risks of injury, and the Appellant sustains falls and injuries as a result of them. There is a risk to life, in particular if the Appellant were to be in a detention setting and unable to access an ambulance to hospital with sufficient speed. The Appellant’s condition has plainly worsened since February 2018 when the Judge considered it. This is reflected in the fact that the Appellant was working as a builder but was assessed as unfit for work in December 2018, and has been unfit for work ever since. Several different types of medication have been tried. But the condition and seizures remain uncontrolled (or badly controlled). The consequences of the seizures include vomiting, exhaustion and confusion. Those consequences are experienced for an extended period. There are also clear and significant mental health implications. There is no basis for any confidence looking forward. The seriousness of the condition is reflected in the fact that clinicians have tried many different doses of many different drugs. They are now looking at the possibility of surgery.
- iv) The Appellant is a vulnerable individual. He is strongly dependent on the Partner. It is she who provides the loving care and support that he needs. She is able at night to monitor his position and risks arising out of his day-time and night-time seizures. That includes intervening when he stops breathing during a seizure. The impact of extradition – being removed to Poland and potentially placed in custody there – constitute a huge impact. The Court does not even know that the Appellant would receive continuity of medication, and neurological review, which matters are essential and an imperative. The risks, harm and damage – especially in terms of safety at night but also more generally and by reference to mental health implications – are of so serious a nature that,

when the legally appropriate comparison is undertaken and the legal test of oppression is applied, extradition can and should be characterised as oppressive.

21. In her written and oral submissions, developing these essential points, Ms Bostock emphasised the following materials as key reference points, viewed in the context of all the evidence including the medical records read as a whole:
- i) The Hart Report. This is dated 9 March 2019 and arises out of a consultation with Dr Hart on 7 March 2019. The Hart Report begins by recording Dr Hart’s review of the medical correspondence from November 2016. It then deals with the interview and examination, the “opinion”, and the answers to 9 questions posed of Dr Hart by the Appellant’s solicitors.
 - ii) The January 2019 Letter. This is a letter written by the community epilepsy specialist nurse (Medina Southam) after a consultation to monitor seizure frequency. After recording the position in relation to seizures, the January 2019 Letter refers to the Appellant having had to stop work as a builder. It refers to the impact on mood as he spends his day at home unable to work in light of the current frequency of seizures. It also refers to “most of his week” being “spent trying to recover from seizures which has also impacted his memory”.
 - iii) The Private GP Letter. This is the letter dated 17 June 2022 written by Dr Sarnicki. It summarises what had been read from the Medical Records. It describes what Dr Sarnicki was told by the Appellant and the Partner. That letter describes matters which include the nature of the seizures and their frequency and impacts on mental health.
22. I think it is helpful to examine some of the key topics which arise in the evidence, taking illustrative references of what is reflected in these and other materials before the Court. I will start with the seizures themselves. The January 2019 Letter gives this as the description:

... starts shouting, loss of consciousness, falls, rigid with convulsions, eyes rolled with tongue biting, occasional incontinence of urine, vomits after and has no recollection of event. can last up to one and a half minutes.

The Hart Report references very similar description from a consultant’s letter in December 2018. The Hart Report records this as the description given at the consultation with Dr Hart:

Events now occur sometimes three times a day lasting between seconds and two or three minutes. Some are nocturnal events of which he is not aware. His fiancée describes his body, especially his legs start shaking at night. He will stop breathing. He is confused afterwards and can’t recognize his partner. He notices muscle pain after an event. He says that these events are associated with tongue biting but admits there is no visible mark on the tongue. There has never been any incontinence. He also reports how his legs start to shake, his breathing stops, she tries to keep his airway open by holding up his jaw. Episodes last from 20 to 25 seconds. She slaps him and splashes water on his face and he seems to start breathing, he sweats all over. After five or ten minutes he is well enough to have a drink and then might vomit.

During the daytime events are slightly different. The last event was five days ago. Previously they had been occurring one to three times per week. Again there is no warning. He comes to with myalgia. His fiancée describes how he screams at onset and falls to the floor and is

shaking all over. His teeth are clenched. There is bleeding into his mouth and definite tongue biting. Five minutes later he is back to normal.

The Private GP Letter records this description:

During the seizures which can last up to 3 minutes he suffers violent convulsions, tongue biting and breathing difficulties. During these attacks, he has sustained injuries to his head, body, hands and legs. Typically after an epileptic seizure he suffers post seizure disorientation and exhaustion, which can last for 12 to 14 hours. During this time he often has difficulty recognising familiar faces.

23. Next, there is the frequency of the seizures. Ms Bostock invites me to adopt and accept, as the most reliable description of the current position, the description of the appellant having “3 to 4 seizures every week”, as referenced in the private GP letter. The Hart Report records the description of events having been “two or three times per week, more in the summer and less in the winter”, with events now occurring “sometimes three times a day”. In the “questions” section of the Hart Report, Dr Hart says seizure frequency has varied over time but “currently” is at a “maximum of three per day”. In the January 2019 Letter – and the consultant’s December 2018 letter referenced in the Hart Report – seizures were described as “up to 3-4 per week”.
24. Next, there are falls and injuries. The January 2019 Letter describes seizures as events during which the Appellant “falls”, describing him as having lost his job as a builder “it being not safe to climb ladders”. The Hart Report says that “if seizures are not controlled then each seizure carried a risk of injury” and describes the Appellant as having “suffered one major injury during his eight years of epilepsy”. The Private GP Letter says that during the seizures “he has sustained injuries to his head, body, hands and legs”. The Medical Records reflect: in June 2017 a visit to a hospital emergency department “after a loss of consciousness episode where he fell on his back” (this being an item of medical correspondence referenced in the Hart Report); in December 2018 the Appellant as having had a “seizure last night as a result of which he fell and hit his upper back on the edge of the table”; in December 2019 the Appellant having injured his eye during a fall downstairs; in May 2020 a visit to a hospital emergency department following a seizure in the street in which the Appellant fell and hit his head and sustained a laceration, the wound being then cleaned and glued; in August 2021 a visit to a hospital emergency department following an epileptic seizure from which the appellant had sustained no injuries; in December 2021 a visit to a hospital emergency department after the Appellant fell at a stairway and injured his right hand as a result of which he was referred to a fracture clinic. The Private GP Letter describes two of three operations which the Appellant is currently awaiting as being procedures for his right wrist which he “injured following an epileptic attack”.
25. Next, there is the inability to work. The Medical Records reflect the first GP statement of unfitness to work as having been given on 5 December 2018 following the seizure from which the Appellant fell and hit his back on the edge of the table. The Hart Report refers to that statement of unfitness for work and Dr Hart had evidently reviewed those materials. Ongoing GP statements of unfitness to work have followed on a series of dates including 21 January 2019, 5 March 2019, 5 July 2019, 23 October 2019, 2 January 2020, 25 March 2020, for October 2021, 16 November 2021, 4 January 2022 and 2 March 2022. The Medical Records also reflect the Appellant’s frustration at being unable to work.

26. Next, there are the mental health implications. The Private GP Letter records the Appellant's physical conditions as having had a significant impact on his mental health resulting in symptoms of anxiety and depression such that he has been referred to talking therapies and is currently awaiting an available slot for cognitive behaviour therapy sessions; reference is made to awaiting stabilisation of both the physical and mental state. The Medical Records reflect that as at 11 May 2022 the Appellant was being put forward for individual cognitive behavioural therapy and was entering the waiting list. The January 2019 Letter records the Appellant and the Partner as having explained that the seizures and loss of job were having an impact on the Appellant's mood as he spent his day at home unable to work and with the frequency of seizures; there is also a reference to the Appellant as someone who would benefit from some counselling. The Medical Records include a GP telephone consultation (15 February 2021) in which the Partner reported the appellant as having appeared to have been of "low mood" for the "last 3-4 months" and there is reference to "depression".
27. Next there is medication. The Medical Records reflect the Appellant as having been prescribed "Epilim" in Poland but having stopped taking it 18 months before the December 2016 consultation with Dr Hart. At that stage he was prescribed "Kappra" (Levetiracetam) by Dr Hart. In March 2018 he was put back on Epilim. Doses have been changed. For example, the dose of Epilim was increased in December 2018 and again in August 2019. By September 2020 the Appellant was being prescribed "Epilim Chrono" (sodium valproate), the dose of which had been increased by December 2021 and had been further increased by May 2022. At that stage the Appellant was switched to "Topiramate". Putting the medication alongside the reported frequency of seizures gives a picture in which none of the four drugs have controlled the seizures in the sense of giving the Appellant the freedom from seizures and elimination of risk which Dr Hart describes in the Hart Report.
28. Against that picture of the evidence from the medical documents and written by clinicians, I turn to the Hart Report for the description of risks and implications. One key question, arising from all the material, concerns the extent to which the Hart Report – written 3 years and 3 months ago – can be taken by the Court as good and reliable evidence giving an independent expert assessment of risks, to assist the Court now, in the current circumstances. Ms Bostock submitted that, provided it was viewed alongside the other materials, particularly those which address the distinct issue of mental health implications, the Hart Reports does stand as a reliable description of the nature and implications of the risks. I agree.
29. Ms Bostock's submissions about what the Court derives from the Hart Report were a blend of summary and paraphrase. Included within it was a characterisation about seizures being "uncontrolled". Dr Hart was described as having assessed the Appellant's seizures (which "persist and are frequent") as being seizures which "are not controlled by current medication", putting him in the category of a person with "uncontrolled" (as well as "frequent") seizures. Although Dr Hart does not express himself in direct terms in precisely that way, in my judgment, Ms Bostock's characterisation of "uncontrolled" is a fair one when the Hart Report is read as a whole. In particular, having referred to seizures which "persist and are frequent", Dr Hart said this: "I would be relatively optimistic that his seizures could be controlled with adequate adjustments to his medication but this may take quite some time to achieve. With subsequent trials of anticonvulsant medication the chances of obtaining seizure-

freedom diminishes”. Dr Hart also says: “If seizures are not controlled then each seizure carries a risk of injury”. This description of seizures which “could be controlled” but which “may take quite some time to achieve” reflects the fact that that was not the position currently, in Dr Hart’s assessment. It is clear what Dr Hart is describing achieving. He is speaking of “obtaining seizure freedom” (which he says twice) and “becoming seizure free”. He links the two: “If seizures are not controlled then each seizure carries a risk of injury”. He also speaks of adjustments to “optimise seizure control” and about increased risk to life if seizures are “poorly controlled”. It is clear that, 3 years and 3 months on from the Hart Report, after several different drugs, control in the sense of obtaining seizure freedom has not been achieved. The risk of injury from seizures which persist and are frequent continues. All of this reinforces the fact that Dr Hart’s assessment of risk and implications, in the context of seizures which persist, are frequent and are not controlled provides a solid and apt expert appraisal on which the Court can and should rely in considering the Appellant’s condition and its implications.

30. Ms Bostock drew attention to what Dr Hart had said about increased risk of death if seizures are poorly controlled. There is a point in the Hart Report about the risk that the Appellant could stop breathing and not restart breathing. In her oral submissions Ms Bostock properly accepted, on reflection, that this could not be maintained objectively as a relevant risk. That is because Dr Hart expressed the view, in the “questions” section of the Hart Report, that although people with generalised seizures do become apnoeic (i.e. stop breathing) during the seizure, it is “exceedingly unusual for patients not to regain spontaneous respiration”. Ms Bostock drew attention to a different point relating to risk of death. It concerns what Dr Hart says about the risks where an ambulance and hospitalisation are called for but may not be deliverable in a custodial setting. Dr Hart said this, when answering a question about “when a seizure occurs what steps are necessary by person nearby to prevent”:

Seizures self-terminate in the vast majority of occasions. If a generalized tonic clonic persists for more than five minutes then an ambulance should be called. In some situations with appropriately trained staff or family members buccal Midazolam can be administered in the rare situation of generalized tonic clonic seizures persisting beyond five minutes.

In answer to a specific question “What is the risk to [the Appellant] if a seizure occurs in a prison environment?”, Dr Hart said this:

Epilepsy is common in inmates and many epilepsy websites provide information to help with the care of patients with epilepsy in prison (epilepsy action even provide a DVD with this information contained within). If it were necessary to take him to hospital (i.e. a generalized tonic clonic seizure persisting beyond five minutes) then the delay in hospitalization would put his health at risk.

Ms Bostock relied on this health risk, arising from urgent need of hospitalization. It is fair to say that Dr Hart was describing this as something which could conceivably happen in the Appellant’s case. He does not say there is no real prospect that it could. But nor does Dr Hart describe the nature of the health risk as meaning a substantial risk to life. It is also right to have in mind that Dr Hart described the Appellant’s seizures as being said to last “between seconds and two or three minutes” (and later described as “episodes lasting from 20 to 25 seconds”). The January 2019 Letter described the seizures as being events which “can last up to” a period of “one and a half minutes”. The Private GP letter refers to the seizures as being ones which “can last up to” a period

of “3 minutes”. On the subject of risk to life Dr Hart answered the question “What is the risk of serious damage to health or death occurring generally?” as follows:

As described above most seizures self-terminate. Many patients experience seizures without other people around and this often applies to nocturnal seizures obviously. It would be generally advantageous to have someone around to provide first-aid care in the event of a seizure. The seizures can on occasion result in death. This is termed sudden unexplained death in epilepsy (SUDEP). The risk of this is about 1.16 for every thousand patients with epilepsy per year although estimates vary. The risk of this is greatest for patients with uncontrolled or frequent seizures, or patients with generalised convulsive seizures and patients missing doses of medicine.

This risk, and the description of its incidence, is plainly relevant in the context of the Appellant with his “uncontrolled” and frequent seizures. There is also an important point to be made, to which I will return, about continuity of medication. But it is right to say that the Hart Report does not identify any specific increased risk to death from epilepsy, including from seizures or from sudden unexplained death in epilepsy, as a consequence of the Appellant being in a custodial setting, leaving aside the points made about risks in a prison environment and situations needing prompt hospitalisation.

31. Other passages in the Hart Report are relevant to risks, safety implications, appropriate arrangements including in a prison setting. I have touched on some of these already. Dr Hart explains that seizures which are not “controlled” carry, in the case of “each seizure”, “a risk of injury”. He describes the Appellant’s seizures as “unpredictable” and “not predictable”. He describes it as “imperative” that “all epilepsy medications are continued without interruption”, that “medications are taken as prescribed, at the correct dose and time”, and that it is “also recommended” that patients should “continue on the same brand of medication since the same drug provided by two different manufacturers can result [in] different blood levels”. He explains that “any interruption in medication” can “result in seizure recurrence”. Dr Hart explains that the Appellant’s “unpredictable” seizures “can put him at risk” and “therefore have significant safety implications”. Dr Hart describes as “routine” the advice to patients “to shower rather than to bath”, not to lock a bathroom door, and to “take care in situations where sudden loss of consciousness might put them at risk such as in a kitchen with sharp or hot objects”. Dr Hart says “patients with epilepsy may live alone or spend time alone” but that “it would be advisable to avoid this in the prison setting if possible”. He says that the persons nearby should “make the environment safe” by “moving away furniture or other objects that may put him at risk” or “perhaps put a pillow under his head”. Dr Hart says “seizures self terminate in the vast majority of cases”, that “epilepsy is common in inmates”, that “many patients experience seizures without other people around” and “this often applies to nocturnal seizures obviously”. He explains that it would be “generally advantageous to have someone around to provide first-aid care in the event of a seizure”. He says “it would be essential if he were in a prison environment that he receives his medication regularly”, “that the brand of medication is not changed” and “that he has regular access to neurological review”, “since these are all known to be associated with an improved outcome in patients with epilepsy”.
32. In my judgment, on a fair reading of the Hart Report as a whole, it is not expressing the opinion and does not support the conclusion that placing the Appellant in a custodial setting would be action which would seriously compromise the Appellant’s health, or place him at serious risk of serious physical injury, still less risk of death. By way of an example, Dr Hart’s expression of the opinion that “in the prison setting”, “it would be

advisable” – “if possible” – to avoid the situation where the Appellant is “alone” and “spend[ing] time alone” is a measured one. It is made alongside observations that “epilepsy is common in inmates”, and that “many patients experience seizures without other people around”, which “this often applies to nocturnal seizures obviously”. Dr Hart does not say, for example, that there is an “imperative” or it would be “essential” that the Appellant would need night supervision. This is significant in a report in which Dr Hart does use those words – “imperative” and “essential” – in the context of a specific point about continuity of medication. Even the points about continuity of medication and regular neurological review are expressed by reference to “improved outcome” and “seizure recurrence” (a clear reference to a loss of “seizure freedom” if that “control” has been achieved). As has been seen, Dr Hart recognises that epilepsy is common in inmates, that the vast majority of seizures self terminate, that it is exceedingly unusual for patients not to regain spontaneous respiration, that the need for arrangements for urgent hospitalisation would be triggered by a seizure persisting for more than five minutes. He also describes having someone around to provide first aid care as “generally advantageous”.

33. The features of the present case which have been raised on behalf of the Appellant call for careful consideration. But in my judgment, the medical evidence in this case, together with the evidence as a whole and the other factors capable of being relevant to the question of oppression – including all of the issues relating to mental health and vulnerability (which Dr Hart understandably is not discussing) – falls substantially short of the high threshold of oppression. It follows that, even leaving aside the question of fugitivity, the argument based on invoking section 14 cannot succeed. I will return at the end of this judgment to a question relating to informed transfer.

Article 8

34. There is, as is frequently the case, an overlap between the argument invoking Article 8 ECHR proportionality and points which have been made in the context of section 14. I take into account – without repeating – points which I have made and considered in the context of section 14, whether as to fugitivity, injustice or oppression. Extradition would undoubtedly constitute a substantial interference with the private and family life of the Appellant and the Partner. As with oppression, Ms Bostock submits both that the Judge was wrong on the evidence before him in relation to Article 8 and proportionality (section 27(3) of the 2003 Act) but also that the changed picture is such that the outcome should in any event now be different (section 27(4)). In relation to Article 8 Ms Bostock maintained her position that the Appellant could not and cannot be characterised, on the evidence, as a fugitive. I have dealt with that issue in the context of section 14. I turn to the other key points.
35. Ms Bostock submits that the Judge was wrong to characterise the index alleged offences in this case as involving “seriousness” being “two serious allegations of involvement in drug dealing” and involving “proceedings for serious drugs allegations”. She submits that by reference to the nature of the drug (cannabis), the amount of the drug (1kg) and the Appellant’s role (described as “mediating” the drug deals, with no reference to his being in receipt of either the drugs or the money that changed hands), it is not appropriate to characterise these as being “serious” drugs matters. This can and should be addressed by contrasting other criminal offending and other drugs offending. By analogy with Miraszewski [2014] EWHC 4261 (Admin) at §63, domestic sentencing standards by reference to our Sentencing Guidelines are the “appropriate starting point”

in an accusation Extradition Warrant case, when considering seriousness of the alleged index offending for the purposes of Article 8. The extradition court does not have the Polish court's evaluation of sentencing, unlike a conviction case where it can look at a sentence that was in fact imposed. By reference to the domestic Sentencing Guideline for drugs offences, Ms Bostock submits that an equivalent case here would be likely to be sentenced in the UK as "Category 4 Harm" and "Significant Role Culpability". That would mean a community sentence; not immediate custody. I interpose that "Category 3 Harm" and "Significant Role Culpability" would have a starting point here of 26 weeks and a range up to 18 months.

36. Next, there is the passage of time and its recognised tendency (i) to reduce the weight to be attributed to the public interest considerations in favour of extradition and (ii) to entail stronger ties of private and family life in the UK weighing against extradition. Ms Bostock relies on the fact that the Appellant and the Partner have been together in the United Kingdom since May 2016. Although at the time of the hearing before the Judge in February 2018 they had what the Judge described as "relatively shallow roots in the UK having lived here for less than two years", that picture has materially changed. They have now been together here for 6 years. Then there are other features of the case. There is the fact that the Appellant lived here – as the Judge put it – "in plain sight". He and the Partner worked and paid taxes while they were able to do so, in light of their health conditions. The Appellant has no convictions in the UK. He and the Partner have significant needs and, since 2021, have been receiving disability allowances on which they rely. They are strongly interdependent. The Partner suffers from diabetes, an overactive thyroid and an ankle condition (described in the orthopaedic consultant's letter of 30 December 2019). She can no longer work, as she did, as a beautician in a hair parlour. The fresh evidence includes the three further witness statements from her. In her latest statement (1 June 2022) she describes the 2017 ankle sprain and a November 2021 fall causing a fracture. She describes herself as "now totally housebound" she says that due to her immobility she is: "dependent on [the Appellant] for everything including food shopping and even my personal hygiene. Without his help I would not be able to manage. He goes out to get the food. I need him to take me to the toilet, to shower, to change my clothes". She also describes the long period of uncertainty and anxiety in the context of the extradition proceedings.
37. I pause to record that, at this point in the case, Ms Townshend for the Respondent invites the Court to proceed with some considerable caution. The reasons for caution are as follows. The Judge had the benefit of oral evidence from both the Appellant and the Partner, together with probing cross-examination. I have had neither of those advantages. The Judge said this:

[The Partner] stated that the fits occurred 2 or 3 times a week; that she wakes whenever they occur and that she had to be there or he could suffocate and die. I did not find her a credible witness as to the frequency and risk of harm involved in the RP's seizures. I concluded that she exaggerated these aspects of her evidence and that I could place limited weight on it in this respect.

The Judge went on to evaluate this evidence against the other evidence, including the fact that the Appellant had lived alone for three months in around 2015, between his marriage ending and forming the relationship with the Partner; and that he chose to go to the Netherlands alone for two months in March 2016 to earn money there. The Judge recorded this aspect of the cross-examination, which he found "telling":

Asked if she would return to live with him in Poland if he was surrendered and then bailed pending trial she said she would not because she would have no money or job and then reluctantly – which was telling, in my judgement – said she would return when it was pointed out that her evidence was that her presence was required to safeguard him at night.

This Court is being asked to accept written evidence from a witness who has been assessed by the Judge as having previously given unreliable and exaggerated evidence. What brings this concern into sharp focus is the following contrast. The Partner (witness statement, 1 June 2022) says of her dependence on the Appellant:

I am now pretty much housebound because of my immobility, and my consequent weight gain ... Due to my immobility, I am dependent on [the Appellant] for everything including food shopping and even my personal hygiene. Without his help I would not be able to manage. He goes out to get the food, I need him to take me to the toilet, to shower, to change my clothes.

The Private GP Letter (17 June 2022) records having been told this of the Appellant's dependence on the Partner:

As a result of his medical condition [the Appellant] generally leaves home only under supervision from his partner in case he suffers an unprovoked epileptic attack. His partner also supervises his bathing and toilet needs.

38. Ms Bostock submitted that I should accept the Partner's written evidence and the accuracy of the Private GP Letter. She submitted that the two descriptions are reconcilable because there is mutual dependence and the precise dependence at any time may depend on whether the Appellant is having or recovering from a seizure. or recovering from one. I cannot regard that as a satisfactory explanation. On the face of it there are inconsistent statements: one given when describing the Appellant's dependence on the Partner (the Private GP Letter) and the other when describing the Partner's dependence on the Appellant (the June 2022 witness statement). This is a concern which it is appropriate to register. Like the Judge, I accept that the Partner has the medical conditions which are described in the evidence. I can rely on the orthopaedic consultant's letter of 30 December 2019 which was the sole medical document put forward as encapsulating the medical position in relation to the Partner. I accept that she is in receipt of Personal Independence Payments.
39. The Judge accepted that the Partner suffers from the medical conditions that she has raised. He accepted that the medical condition was such that his surrender would make things "very much more difficult" for her. But he did not accept her assertion that she would be "unable to cope" if separated from the Appellant. He observed that her health difficulties are treatable and did not, at that time, preclude her from undertaking full-time employment. He also emphasised that she had travelled to and from Poland without the Appellant and had done so a few weeks before the oral hearing in February 2018. On that point, the Medical Records give me a further example: on 9 December 2021 the Partner is recorded to have been speaking to the nurse specialist (Medina Southam) from Poland, another individual having been left with the Appellant. The Judge recorded that the Partner had previously been eligible for, and had claimed, benefits in the UK, a point which is reflected by the present position as to Personal Independence Payments. The Judge's conclusion was that, although things would be more difficult for the Partner, she would be able to cope financially and in managing the consequences of her health conditions if the Appellant were surrendered. The Judge concluded that there were no substantial grounds for believing that the Appellant's surrender on extradition would involve a real risk to the Partner's health; that she would

have sufficient reasonable options; and that she would have the capability to be able to cope either in the United Kingdom or in Poland. Having considered all the evidence – including the updated position as to the Partner having stopped work and being in receipt of benefits – in my judgment, these same conclusions remain sound. I agree with them.

40. It is relevant when considering the passage of time to have in mind, in my judgment, that this cannot be said to be a case of ‘culpable delay’ on the part of the Polish authorities. The evidence from the Further Information, which the Judge accepted and so do I, is that the investigating and prosecuting authorities were not aware until 2015 of the factual basis on which the Appellant could have been prosecuted. He was interrogated in March 2016 and charged. He was brought before a Court and pre-trial detention was not imposed. By April 2016 he had left Poland for the Netherlands and two months later had come to the United Kingdom. The criminal proceedings against the Other Man went ahead in March 2017 and he testified at the trial. Pre-trial detention of the Appellant was authorised by the Polish court on 22 March 2017. The domestic arrest warrant was issued in Poland on 23 May 2017. The EAW was issued on 8 August 2017 and certified 26 September 2017. The Appellant was arrested on 23 November 2017. His extradition has been being sought ever since. As I explained at the outset of this judgment the appeal proceedings, following the Judge’s order for extradition on 22 February 2018, was attributable to the stays which the Appellant’s representatives properly sought and obtained. The passage of time and its implications are plainly relevant to Article 8 proportionality. But it is also relevant to have in mind that this is not a case in which any substantial delay is attributable to the respondent authority, still less that it is culpable on their part.
41. A further feature for consideration in the Article 8 balancing exercise emphasised by Ms Bostock on behalf the Appellant is the electronically monitored curfew imposed on the Appellant for four hours a night, between midnight and 4am, to which he has been subject now for 4½ years. That is a relevant factor which it is appropriate to include in the balance. But it is not directly quantifiable in the sense of constituting a ‘qualifying curfew’ or as having an identifiable impact in reducing any putative Polish sentence. Moreover, although a clear curtailment on personal freedom of movement and location, the nature of the restriction will necessarily have been during the night when the Appellant would in any event be expected to be at home.
42. I have weighed all of these matters in the balance, afresh, on all the evidence. In my judgment, having regard to all the evidence in all the considerations that weigh in the proportionality balance, in favour of extradition and against extradition, this is not a case in which the Appellant’s extradition would be a disproportionate interference with his Article 8 rights to respect for private and family life, or those of the Partner. The features which weigh in the balance against extradition are, in my judgment, decisively outweighed by those which weigh in the balance in its favour. The outcome identified by the Judge was not the wrong, but the right, one. I will not repeat what I have said already. But I add the following.
43. The alleged index offending is, in my judgment, a matter properly to be characterised – as the Judge did – as “serious”. No fresh evidence undermines that view. There are two separate accounts. Each relates to cannabis, and in each case 1kg of cannabis. The reference to having “mediated” the drugs transactions, on both occasions, is indicative of active participation in arrangements for supply. It is appropriately seen in the context

of the Further Information which describes evidence proving that the Appellant was “dealing in trade of significant amount of drugs”. I am going to return to the question of ‘hypothetical domestic sentencing’. But if I adopt the reference point of applying the domestic Sentencing Guidelines, in my judgment, this is a case which would be highly likely to lead to a sentence of immediate custody. I do not accept that it can safely be characterised as “Category 4/Significant”, but rather “Category 3/Significant”. Regard has to be had to the two separate offences each involving 1kg of cannabis. As the Appellant accepts, he has another drugs conviction involving a sentence imposing probation requirement. This is alleged index offending where I can have an appropriate degree of confidence that, if convicted in a Polish court, the Appellant would be likely to face an immediate custodial sentence.

44. There are the constant and weighty public interest considerations in support of extradition. And there is the finding – which I have explained there is no basis to overturn on appeal – that the Appellant left Poland as a fugitive. That is a significant feature. It engages the weighty public interest consideration in favour of extradition, that the United Kingdom should not be a safe haven for those who evade their responsibilities under foreign criminal process, as fugitives. As I have explained, the Judge unassailably found on the evidence (which has not changed) that the Appellant knew that he was a suspect facing charges in legal proceedings for serious allegations; knew that he was required to inform the relevant authorities of his whereabouts in order that legal proceedings could continue; deliberately did not do so and left in the knowledge and hope that it would be difficult to progress those proceedings with him being abroad and the relevant authorities not knowing his whereabouts or address. As the Judge found, the Appellant had built his private and family life in the UK aware of the risk that the authorities would be seeking him and may potentially locate him. This is a case, in my judgment, in which fugitivity matters. That feature is – in my judgment, looking at all the features informing the proportionality balance in the round – a material part of an overall evaluation which significantly strengthens the public interest considerations in favour of extradition. In light of this, and all the circumstances, the Article 8 proportionality ground of appeal fails.

Hypothetical domestic sentencing

45. I said I would return to the question of ‘hypothetical domestic sentencing’. As I have recorded, Ms Bostock submitted as follows: by analogy with Miraszewski §36, an evaluation of likely sentence by reference to the domestic Sentencing Guideline stands as an ‘appropriate starting point’ when the extradition court is considering seriousness of alleged offending in evaluating the Article 8 proportionality balance in an accusation Extradition Warrant case. As was common ground, Miraszewski was a 2014 case, concerned with the distinct ‘statutory proportionality’ bar which arises under section 21A(1)(b) of the 2003 Act. I asked Counsel to ascertain whether there was any readily accessible case in which the Miraszewski §36 ‘appropriate starting point’ has been said to be applicable, or inapplicable, to the distinct Article 8 proportionality evaluation. At the hearing, I was reminded of HH v Italy [2012] UKSC 25. That case preceded Miraszewski. In a passage at §132, Lord Judge cautioned against the extradition court imposing its view of seriousness but said that, in a case involving the best interests of a child, the question whether a domestic sentencing exercise would be likely in an equivalent case here to involve an immediate custodial sentence could assist in the Article 8 proportionality analysis. After the hearing, Ms Townshend’s speedy industry

enabled her to draw to my attention two cases which touch on the point in the context of accusation Extradition Warrants in Article 8. The first is Hein v Poland [2015] EWHC 2855 (Admin) at §19. There, in the context of Article 8 and in considering the seriousness of the alleged index offending, Supperstone J recorded the extradition judge as having observed that the requested person was facing serious allegations and if convicted in Poland a custodial sentence was likely to follow, adding that a custodial sentence would also be likely to follow in an equivalent case in this jurisdiction, based on the relevant Sentencing Guideline. The second is Swiercz v Poland [2019] EWHC 1387 (Admin) at §§35-38. There, again in the context of Article 8 and in considering the seriousness of the alleged index offending, Yip J identified an error on the part of the extradition judge in characterising the alleged index offence as “a serious case of fraud”. She concluded that the offending was no more than moderately serious, using as her reference point that it was “unlikely to attract a custodial sentence according to domestic standards”.

46. In my judgment, the position – reflected in the authorities which Ms Townshend found – is as follows. Seriousness – and relative seriousness – of the alleged crime or crimes is a relevant factor in the Article 8 evaluative exercise. A relevant question can be whether the extradition court is able to say that the alleged index offending would on conviction be likely or unlikely to attract an immediate custodial sentence in the requesting state court. A useful cross-check can be whether an equivalent case would be likely or unlikely to attract an immediate custodial sentence if it were a domestic sentencing exercise applying domestic Sentencing Guidelines here. Part of that useful cross-check could also involve considering the likely length (or range) of that sentence here. Seriousness is relative and the extradition court will be able to have in mind the range of offending capable of arising in the context of the type of alleged offence with which the case is concerned. None of this is the imposition, in an extradition context, of the view of the extradition court as to the appropriate sentence. And there must always be room for respecting the degree of seriousness of a matter as seen within the criminal justice system of the requesting state, where the extradition court has information from which it can identify that feature. In a conviction case, where the requesting state has convicted and sentenced the requested person for the index offending, there is a self-evidence and powerful reference point. In an accusation case, there may be no real reference point of that kind, and the requesting state’s statutory maximum sentence may be of very limited assistance.

Informed transfer

47. Both Counsel reminded me that it is open to this Court to take proactive steps to ensure that handover arrangements involve medical information being provided. On this topic, the Judge said that the Appellant – who was on bail and was having ongoing medical appointments – would have “ample opportunity to gather his own medical evidence to assist the Polish authorities”. Ms Townshend for the Respondent, very properly, acknowledged that it would be “a good idea” if the Court were to require the CPS to take positive steps in relation to medical information and transfer. I cannot accept Ms Bostock’s submission that it is necessary for the Court to elicit and receive a specific “assurance” that a specific type and brand of medication – on 20 May 2022 he was prescribed the new drug Topiramate – will be accessible to the Appellant in a Polish custodial setting. It is a fact that the UK clinicians who have been involved in his medical care have identified, over the course of time, four different drugs and various

different doses. That has been a matter of clinical judgment. So is the question of a potential surgical intervention. The appropriate course, in my judgment, is to ensure that those involved in the handover have a short document, translated into Polish, which records the key contents of the relevant and currently-applicable medical information and expert assessments, so that informed regard can be had to what has been said about the Appellant's condition. I will expect the parties to liaise and revert. But I would have thought it would make sense for this to draw on the Private GP Letter, a 20 May 2022 letter in which the switch to Topiramate is described and those paragraphs in the Hart Report which records what Dr Hart assessed as "imperative" and "essential" so far as concerns continuity of medication and access to neurological review. I will want a suitable reassurance that this is being done. One mechanism may be that a Court Order could include a suitable recital and have attached to it agreed documents, for translation into Polish.