Neutral Citation Number: [2024] EWHC 726 (Admin)

Case No: AC-2023-LON-002279

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/03/2024

Before:

Mr Justice Bennathan

- -

Between:

MATEUSZ KAZIMIERZ SWIATEK	**Appellant**
- and -	
REGIONAL COURT IN LODZ, POLAND	**Respondent**

- -
- -

Georgia Beatty (instructed by **HP Gower Solicitors**) for the **Appellant**
Stefan Hyman (instructed by **Extradition Unit, Crown Prosecution Service**) for the **Respondent**

Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 27 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE BENNATHAN

Introduction

1. In this appeal Mateusz Kazimierz Świątek ['the Appellant'] appeals against the decision of District Judge Callaway ["the Judge"] dated 19 July 2023 to order his extradition to Poland pursuant to an Arrest Warrant ["AW"] issued by the Regional Court of Łódź ["the Respondent"].

Procedural history

2. The Appellant was first arrested on an AW on 19 October 2021. He was produced at Westminster Magistrates' Court for an initial hearing on 21 October. He did not consent to his extradition. Bail was refused, and the Appellant has remained in custody ever since.

3. The first extradition hearing proceeded before the Judge on 11 February 2022, with judgment handed down on 23 March 2022.The Appellant was discharged on the basis that his extradition would be unjust or oppressive as a result of the passage of time pursuant to section 14 of the Extradition Act 2003 ["the Act"].

4. The Respondent lodged an application for permission to appeal against the decision to discharge the Appellant on 29 March 2022. Permission to appeal was subsequently granted on 27 June 2022. The appeal hearing took place on 17 November 2022 before Fordham J. Judgment was reserved and handed down on 25 November 2022. Fordham J allowed the Respondent's appeal and held as follows at paragraph 19 of his judgment:

> For the reasons I have given, I have reached the clear view that the Judge ought to have decided the question of section 14 oppression (and injustice) by reason of the passage of time differently and, doing so, would not have been required to order the RP's discharge on the section 14 ground. In those circumstances, I am going to quash the order discharging the RP and remit the case to the Westminster Magistrates Court for a hearing. That will be a hearing at which the Article 8 ECHR issues can be evaluated, on an up-to-date basis. As I explained in the context of the cross-appeal, that is something which the RJA accepted would be the appropriate consequence were its appeal on section 14 to succeed, as it now has.

5. The matter was then remitted back to Westminster Magistrates' Court on 20 December 2022, and the second extradition hearing took place on 9 June 2023. The sole issues raised were the questions of proportionality arising under section 21A of the Act, namely:
   (1) Whether the Appellant's extradition would be compatible with his rights pursuant to section 21A(1)(a) of the Act and Article 8 of the European Convention on Human Rights, and
   (2) Whether the Appellant's extradition would be proportionate pursuant to section 21A(1)(b) of the Act.

6. The second judgment of the Judge was handed down on 19 July 2023 and the Appellant's extradition was ordered.

7. An application for permission to appeal was lodged on 25 July 2023, and perfected grounds of appeal were served on 9 August 2023. The Respondent filed a

Respondent's Notice and supporting submissions on 22 August 2023. On 27 October 2023 Choudhury J granted the Appellant permission to appeal on all issues raised.

Offence alleged.

8. The allegations made by the Respondent are in the AW issued on 26 May 2021 and certified by the National Crime Agency on 4 October 2021. It states:

> From June 2010 to at least 28 April 2014, an organised criminal group operated in Łódź, whose members manufactured and traded drugs in the form of amphetamine and marijuana. The group was headed by Krzysztof Wejchan-Rotowicz, who coordinated its activity, organised financing and supplying drugs in the Province of Łódź and organised an illegal drug ring. One of the persons involved in the described drug trafficking and belonging to the said drug ring was Artur Ziarko, with whom Mateusz Świątek cooperated. Artur Ziarko dealt in amphetamine and marijuana sourced from Krzysztof Wejchan-Rotowicz. Once or twice a week, Mateusz Świątek and his partner Karolina Brzezińska bought 5 (five) to 10 (ten) grams of amphetamine and then sold the drug. Between January 2013 and 28 April 2014, Artur Ziarko sold them at least 600 (six hundred) grams of amphetamine. They informed him that they intended to sell the amphetamine. All of the described drug transactions took place in Karolina Brzezińska's flat in Zachodnia Street in Łódź

9. Some further information about the Respondent's attitude to the Appellant and his alleged offending was provided in the former's response to the latter's request to be interviewed by the Polish authorities while remaining in the UK. In the course of declining that offer, the Respondent wrote:

> It was a result of a long-lasting international search that the wanted person's residence address in Great Britain was established. The suspect's attitude and conduct during the criminal proceedings impeded the course of the said proceedings conducted and resulted in a stay of the investigation for a few years. Mateusz SWIATEK is charged with being involved in trading in significant quantities of psychotropic substances in the form of amphetamine sulphate, i.e., an offence characterised by a high level of harm to society which carries a severe custodial sentence. The circumstances concerning the fleeing and going into hiding as well as severity of the anticipated penalty constituted the reasons for the Polish courts to deliver the order to apply a pre-trial detention against the aforementioned person and subsequently, the Arrest Warrant.
>
> In the assessment of the Public Prosecution Service, it is only by bringing Mateusz SWIATEK to Poland as a result of an extradition and by conducting procedural actions with him in Poland by the public prosecutor will it be possible for the investigation to return to its due course and to complete the criminal proceedings which have been pending for many years.

Hearing before the Judge

10. In the hearing before the Judge in June 2023 the Appellant relied on the report of an expert witness, Lukasz Lasek, a lawyer qualified in both Poland and the UK. His report was not challenged by the Respondent. As the Appellant's arguments in this appeal are almost all founded on it, I need to set out a number of sections from Mr Lasek's report. In setting out what material he had been able to see, he wrote [his paragraph 9]:

> Given that the investigation against Mr Świątek is in its early stage (i.e., prior to his first questioning and prior to indictment being filed with the court), access to the case files was highly restricted. ln total, the case files against all defendants amount to 25 volumes (each volume has approx. 200 pages), however we have been granted access only to the documents which pertain strictly to the charge against Mr Mateusz Świątek and served as evidence for the court to order Mr Świątek's preliminary detention. ln summary, we have been granted access to 203 pages out of 4,865 pages in the case files. The files of the investigation with respect to other suspects involved in the proceedings were not made available to us.

11. In seeking to discover the reasoning behind the suspended sentence passed on Karolina Brzezińska, Mr Lasek wrote [within his paragraph 10]:

> The case files of the investigation contained only the sentencing parts of both the judgments (without written motives for the conviction, which is a separate part of the judgment issued only upon request of the party to the proceedings) ……. Therefore, we do not possess the written motives for this judgment, and we are unable to opine on the reasoning and factual background of Ms Brzezińska's conviction.

12. Central to the arguments before the Judge was argument as to what sentence the Appellant might receive were he extradited and convicted. Mr Lasek's conclusion on the issue was [his paragraph 37]:

> Providing an exact and certain answer to the question of what sentence might be imposed on Mr Świątek if he were found guilty is not possible, since the court has a wide margin of discretion when deciding on the penalty, being bound only by statutory limits of minimum and maximum penalty, which are widely framed, While deciding on a penalty, the court will be taking into account many factors, both prescribed by law and resulting from the individual circumstances of the case and Mr Świątek's personal situation and his personal traits, about which we do not have any information. The court will also have a wide range of applicable measures, which it may apply when considering a sufficient penalty, including suspension of prison sentence

13. Thereafter Mr Lasek set out a series of reasons why the sentence passed in the event of the Appellant's conviction might be aggravated or mitigated by a number of factors. The one factor he was able to dismiss as mitigation was the delay.

14. The Judge produced a written judgment, ordering the Appellant's extradition. His key findings on the arguments that had been advanced on the Appellant's behalf were set out at his paragraphs 18 to 21, using the initials JA for the judicial authority, the Respondent, and RP for the requested person, the Appellant.

> 18. I accept that since I considered this case back in March 2022 much has moved on and most particularly the fact that the RP has remained in custody and, in the ordinary course, would be entitled to have this further period taken into account as part of what might be described as 'early release provisions in this JA I have been referred to the case of Dubrowolski v Poland [2023] EWHC 763 Admin and whilst, unlike the position that pertains in the UK, a defendant is not entitled to automatic release once he has served half of any sentence imposed, the Polish

Criminal Code permits a discretionary release at the half-way point, but I have no evidence as to whether the JA would consider this case in that form.

19. The difficulty I have found in this difficult and finely balanced case, however, is the emphasis which is placed by the RP upon what the JA is likely to do in this case were extradition to take place. For example, the expert evidence filed in this matter and already made the subject of comment is restricted in the material available to the author and the JA submit that the weight that can be placed upon the same is, therefore, minimal. Further, this court is asked to make comparisons with other defendants in the case, and in particular a co-defendant. I do not think that this court is able to affect such an exercise upon the limited material before it and that before the RP expert.

20: The difficulty does not end at that point. I am asked to consider this case from the perspective that any conviction 'would not result in a substantial custodial sentence …', and in this context to factor the time already spent in custody over and above that which he has served as of the date of the last hearing. Whilst the point is well taken, I question whether this is a matter which this court can properly take into account given that this is not a court of trial but an extraditing court. In short, I do not consider it is the business of this court to investigate an accusation and seek to pre-judge or to predict how a court of trial would judge the role of this RP, especially given the absence of evidence or material that would make this possible.

21. I have considered the personal circumstances of the RP Whilst there are undoubtedly sad aspects of the matter especially relating to the Iost or minimal contact he has with his daughter, he is not a primary carer for this child, contact with the mother has been lost and a significant time has elapsed since meaningful contact has been experienced. Naturally the latter point is not fault based on the part of the RP, but the reality is that family ties such as they may be described in this case are weak.

15. Before concluding that he would order the Appellant's extradition, the Judge carried out a *Celinski* balancing exercise to assess the Article 8 argument [from *Polish Judicial Authorities v Celinski and other cases* [2015] EWHC 1274 (Admin)]. Given this appeal does not complain of the terms of that assessment [as opposed to the reasoning that preceded it], I do not set it out in this judgment.

Submissions

16. I pause to thank Counsel for the Appellant and the Respondent for their written and oral submissions. Both sides' arguments were set out with clarity and force.

17. On behalf of the Appellant, Ms Beatty advanced four grounds of appeal:
Ground 1: The Judge failed to ascribe proper weight to the expert evidence of Mr Lasek.
Ground 2: The Judge failed to conduct a proper assessment of the likely sentence upon conviction by reference to domestic sentencing guidelines, and accordingly failed to account for the real possibility that the 2 years and 4 months the Appellant has spent in custody to date may exceed any sentence that he would receive if convicted.

Ground 3: The Judge erred in concluding that there was no information from the Requesting State on the issue of likely sentence upon conviction, and consequently failed to account for the fact that the Appellant's co-defendant received a suspended sentence in respect of identical conduct.
Ground 4: The Judge failed entirely to address the required question of proportionality under section 21A(1)(b) of the Act and the specified matters set out at section 21A (3).

18. The Respondent, in summary, submitted that grounds 1 to 3 did not survive a fair reading of the Judge's written decision and the limitations on his report that Mr Lasek himself made clear. On ground 4, the Respondent conceded that the Judge had failed to rule on the section 21A proportionality issue but suggested that the rejection of that argument was inevitable in the light of the Judge's [correct] findings on the Appellant's Article 8 submissions.

Law

19. Section 21A of the Act provides, insofar as relevant to this litigation, as follows:

> 21A Person not convicted: human rights and proportionality
> (1) If the judge is required to proceed under this section (by virtue of section 11), the judge must decide both of the following questions in respect of the extradition of the person ("D")—
> a. whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998.
> b. whether the extradition would be disproportionate.
> (2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); but the judge must not take any other matters into account.
> (3) These are the specified matters relating to proportionality—
> a. the seriousness of the conduct alleged to constitute the extradition offence.
> b. the likely penalty that would be imposed if D was found guilty of the extradition offence.
> c. the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D.
> (4) The judge must order D's discharge if the judge makes one or both of these decisions—
> a. that the extradition would not be compatible with the Convention rights.
> b. that the extradition would be disproportionate.

20. The effect of Article 8 rights in extradition law was considered by the Supreme Court in *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25. The key principles were summarised by Baroness Hale [who dissented in one of the cases, but whose legal analysis was approved by the remainder of the Court] at her paragraph 8:
    (1) There may be a closer analogy between extradition and the domestic criminal process than between extradition and deportation or expulsion, but the court has still to examine carefully the way in which it will interfere with family life.
    (2) The question is always whether the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition.
    (3) There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve

their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back.

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

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

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

21. Lord Judge, CJ, in *HH*, drew an analogy between extradition and sentencing in domestic law [at 132]:

> The extradition process involves the proper fulfilment of our international obligations rather than domestic sentencing principles. So far as the interests of dependent children are concerned, perhaps the crucial difference between extradition and imprisonment in our own sentencing structures is that extradition involves the removal of a parent or parents out of the jurisdiction and the service of any sentence abroad, whereas, to the extent that with prison overcrowding the prison authorities can manage it, the family links of the defendants are firmly in mind when decisions are made about the establishment where the sentence should be served.
>
> Nevertheless, for the reasons explained in *Norris* the fulfilment of our international obligations remains an imperative. *ZH (Tanzania)* did not diminish that imperative. When resistance to extradition is advanced, as in effect it is in each of these appeals, on the basis of the article 8 entitlements of dependent children and the interests of society in their welfare, it should only be in very rare cases that extradition may properly be avoided if, given the same broadly similar facts, and after making proportionate allowance as we do for the interests of dependent children, the sentencing courts here would nevertheless be likely to impose an immediate custodial sentence: any other approach would be inconsistent with the principles of international comity. At the same time, we must exercise caution not to impose our views about the seriousness of the offence or offences under consideration or the level of sentences or the arrangements for prisoner release which we are informed are likely to operate in the country seeking extradition. It certainly does not follow that extradition should be refused just because the sentencing court in this country would not order an immediate custodial sentence: however, it would become relevant to the decision if the interests of a child or children might tip the sentencing scale here so as to reduce what would otherwise be an immediate custodial sentence in favour of a non-custodial sentence (including a suspended sentence).

22. I note that in that passage Lord Judge was not laying down any process that a Judge considering a contested extradition had to follow, nor was he suggesting that in all cases an analysis of the English sentencing regime was required.

23. The Divisional Court considered the effect of section 21A of the Act in *Miraszewski v Poland* [2014] EWHC 4261 (Admin). From that decision I extract the following

principles as being of relevance to this appeal [with paragraph references being to the Divisional Court's judgement]:

(1) Section 21A creates two separate bars to extradition in an accusation case, whether extradition would be incompatible with a Convention right *and* whether extradition would be disproportionate. While the factors influencing those decisions may overlap, they require separate consideration [paragraph 29].
(2) The words in brackets in section 21A (2) ["*so far as the judge thinks it appropriate to do so*"] mean that the judge is permitted to arrive at their conclusion without regard to one or more of the specified matters in subsection 3 [seriousness, likely penalty, less coercive measures] but should explain their reasons for proceeding in that way [paragraph 33].
(3) The Court referred to the District Judge considering domestic criminal law, stating that in the assessment of seriousness [for subsection 3a] the conduct is initially to be judged against domestic standards [paragraph 36], and in the assessment of the likely penalty [for subsection 3b] the judge was "*entitled*" to have regard to domestic sentencing practice [paragraph 38]. The Court reached those conclusions after hearing submissions founded on Lord Judge's judgment in *HH*, as extracted above.

24. In my view it is a mistake to treat the judgments of Lord Judge in *HH* and Lord Justice Pitchford in *Miraszewski* as laying down an immutable procedure whereby a District Judge considering section 21A (3) will fall into error and be liable to being overturned on appeal if they choose not to embark on a detailed analysis of domestic sentencing guidelines. I do not think Lord Justice Pitchford's reference to an initial assessment of seriousness need amount to any more than a Judge making clear [possibly based, explicitly or implicitly, on no more than their everyday experience of the criminal courts] that allegations such as drug dealing over a prolonged period of time are clearly "serious". The use of the word "*entitled*" makes clear that in assessing "*likely penalty*" a judge can look at domestic sentencing policy only if he or she thinks fit to do so. Neither judgment suggests any more prescriptive approach.

25. The role of the High Court in an appeal from a District Judge's decision in an extradition case was considered by the Divisional Court in *Love v USA* [2018] EWHC 172 (Admin). At paragraphs 25 and 26 the Court stated that:

> 25.The statutory appeal power in section 104(3) permits an appeal to be allowed only if the district judge ought to have decided a question before him differently and if, had he decided it as he ought to have done, he would have had to discharge the appellant. The words "*ought* to have decided a question differently" (our italics) give a clear indication of the degree of error which has to be shown. The appeal must focus on error: what the judge ought to have decided differently, so as to mean that the appeal should be allowed. Extradition appeals are not re-hearings of evidence or mere repeats of submissions as to how factors should be weighed; courts normally have to respect the findings of fact made by the district judge, especially if he has heard oral evidence. The true focus is not on establishing a judicial review type of error, as a key to opening up a decision so that the appellate court can undertake the whole evaluation afresh. This can lead to a misplaced focus on omissions from judgments or on points not expressly dealt with in order to invite the court to start afresh, an approach which risks

detracting from the proper appellate function. That is not what *Shaw* or *Belbin* was aiming at. Both cases intended to place firm limits on the scope for re-argument at the appellate hearing, while recognising that the appellate court is not obliged to find a judicial review type error before it can say that the judge's decision was wrong, and the appeal should be allowed.

26.The true approach is more simply expressed by requiring the appellate court to decide whether the decision of the district judge was wrong. What was said in *Celinski and Re B (A Child)* are apposite, even if decided in the context of article 8. In effect, the test is the same here. The appellate court is entitled to stand back and say that a question ought to have been decided differently because the overall evaluation was wrong: crucial factors should have been weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed.

Discussion

26. I turn to consider the grounds of appeal in turn.

27. Ground 1 [failed to ascribe proper weight to the expert evidence of Mr Lasek]. In my view the Judge was entirely justified in setting out the serious limits to the weight he could attach to Mr Lasek's report for the very reasons the witness gave for his inability to arrive at firm conclusions on both the probable sentence that the Appellant would receive if convicted and the basis for the decision to pass a suspended sentence on Ms Brzezińska. While the minority of papers made available to Mr Lasek were those that formed the basis of the application to extradite the Appellant, the Judge was entitled to proceed on the basis that there might be other papers that were also of relevance. Above all, and at the risk of repetition, once an expert has stated in terms that they cannot predict the sentence that would be passed on the Appellant nor state with confidence why a co-defendant received a suspended sentence, the Judge was actually giving ample weight to the expert's views in that he was accepting them and acting on the basis they were correct.

28. Ground 2 [Judge failed to conduct a proper assessment of the likely sentence upon conviction by reference to domestic sentencing guidelines]. This ground is broad enough to encompass both whether the offence was properly regarded by the Judge as serious and the likely penalty, which two matters have relevance to both the potential bars to extradition within section 21A. The two aspects overlap, but I deal with them in turn:
    (1) Seriousness: The Judge concluded the offence was serious, as was made clear within his *Celinski* assessment where [at paragraph 22 of his judgment] he wrote, "*the allegations in this case are serious and involve the RP being part of a criminal enterprise appertaining to drug smuggling over a significant period of time"*. For the reasons I have set out in my consideration of both *HH* and *Miraszewski,* while a judge can perfectly properly make reference to domestic sentencing guidelines, there is no obligation to do so. In my view the Judge was expressing, as a matter of judicial common sense, an obvious conclusion.
    (2) Likely penalty: I accept that if the Judge had reached the conclusion that the Appellant was likely to have served all, or almost all, of any likely prison sentence then that would have been a powerful argument in any consideration of both the section 21A bars to extradition. Once more, I refer back to my consideration of

both *HH* and *Miraszewski* and conclude that the Judge was not obliged to refer to domestic sentencing guidelines. In his judgment, however, the Judge gave a sound reason for not being able to take a view on a likely sentence when, at paragraph 20 of his judgment, he wrote, "*I question whether this is a matter which this court can properly take into account given that this is not a court of trial but an extraditing court. In short, I do not consider it is the business of this court to investigate an accusation and seek to pre-judge or to predict how a court of trial would judge the role of this RP".* A trial that results in a conviction will shed light on the role of the accused, and that role will be central to the sentence that follows. Without knowing what role, the trial court would assign to the Appellant, the Judge was simply not in a position to proceed on the basis that was urged upon him, that the Appellant would be found to have played a minor role such that no severe punishment would follow. In consequence the Judge was faced not only with an expert who was unable to predict what sentence the Polish court would pass, but he had no sound basis to assess where in the domestic guidelines the Appellant would fall, given the role of the offender is a central feature therein.

29. Ground 3: [Judge erred in concluding that there was no information from the Requesting State on the issue of likely sentence upon conviction, and consequently failed to account for the fact that the Appellant's co-defendant received a suspended sentence in respect of identical conduct]. Although the Appellant and Ms Brzezińska faced the same charge and were operating from the same premises, there is no sound basis to suggest that they necessarily engaged in "*identical conduct*". It is entirely possible to have two such defendants who, under domestic law, might receive very different penalties. For example, and simply to illustrate the point, the sentencing court might find that one was the leading light who profited financially and the other was pressurised into playing a minor and subordinate role. I do not suggest that was the situation here, but there was simply no basis that would permit the Judge to conclude what role was played by either person: in the Appellant's case the Judge did not know what role the trial court might ascribe to him, and in Ms. Brzezińska's case the expert report [at its paragraph 10] made clear that Mr Lusak had not been able to discover the basis for the Court passing the suspended sentence on her.

30. Ground 4: [Judge failed entirely to address the required question of proportionality under section 21A(1)(b)]. It is clear that the Judge did not address the section 21A(1)(b) argument in his judgement, and the Respondent properly concedes that to be the case. In fairness to the Judge, I note that Mr Justice Fordham only referred the Article 8 argument back to him, but if the Judge felt that limitation deprived the Appellant of the right to advance the "proportionality" argument, he ought to have ruled on that basis. In my view, however, that omission does not make the Judge's decision to order the Appellant's extradition wrong for the following reasons:
    (1) On the facts of this case the proportionality ground was always weaker than the Article 8 ground, as the latter had all the same arguments plus the Appellant's family connection in the UK. As such, once the Judge had reached his conclusions on the section 21A(2)(a) submissions, it was inevitable he would also dismiss the section 21A(2)(b) argument.
    (2) In *Love v USA* the Divisional Court [at paragraph 25] spoke of "*a misplaced focus on omissions from judgments or on points not expressly dealt with".* While the Judge's failure to deal with one of the two substantive submissions being advanced may be a larger omission than the Court had in mind, in my view the

overlap between the two arguments is such that this omission should not lead me to take a fresh decision in the substantive merits of this case.

(3) Any decision on proportionality would have been founded on seriousness, on which the Judge had taken a sensible view, as above. The Judge in terms declined to take a stance on the likely penalty, a decision he was entitled to take, for reasons set out above, and his reasons for declining to take that stance were fully justified in his written judgment. Given those decisions, his conclusion on the section 21A(1)(b) argument would inevitably have been to reject it.

(4) In the alternative, were I to have to take the decision afresh I would arrive at the same conclusions as the Judge given the "*constant and weighty public interest in extradition*" [to quote Baroness Hale in *HH*, as above].

(5) While the decisions taken in other appeals are fact sensitive, I note that in one of the three cases considered in *Miraszewski* the Divisional Court accepted the District Judge had failed to address the section 21A(1)(b) submissions but simply expressed the view the proportionality argument failed for the same reasons as the article 8 submissions [*Miraszewski*, paragraphs 16 and 45]. Thus, the obvious overlap in the two distinct arguments may on occasions permit a judge on appeal to deal with the argument briefly.

31. For all these reasons, and while repeating my gratitude to Ms Beatty, Counsel for the Appellant, for the clarity and economy of her submissions, I dismiss this appeal.