



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 36
HCA/23/000015/XM

Lord Justice Clerk
Lord Doherty
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD DOHERTY

in the application for leave to appeal under section 26 of the Extradition Act 2003

by

AH

Applicant

against

THE LORD ADVOCATE (for the Government of the Republic of Poland)

Respondent

Appellant: Loosemore; McCusker McElroy and Gallanagh
Respondent: C. Edward; Crown Agent (representing the Polish Authorities)

4 October 2023

Introduction

[1] The applicant is a male UK national aged 39. On 13 December 2017 the Wrocław-Srodmiemie District Court in Poland issued a domestic warrant for his arrest on three charges of VAT fraud. On 18 October 2018 the Polish judicial authority issued a European Arrest Warrant (“EAW”). The EAW - an accusation warrant - seeks the applicant’s arrest and surrender to stand trial for offences in Poland. It describes three VAT offences said to

have been committed “in Poznan, Wroclaw and other locations throughout Poland” in the period from 23 December 2013 to 31 March 2014. Each offence is said to have involved the applicant’s participation in an organised criminal group which contained at least three other persons. The sum involved is said to have been PLN 11,813,488 (approximately £2.3 million). The maximum penalties are 8 years’ imprisonment for the third charge and 5 years’ imprisonment for each of the other charges. On 9 April 2020 the National Crime Agency certified the EAW in terms of section 2(7) of the Extradition Act 2003. The applicant was arrested. He first appeared at Edinburgh Sheriff Court on 29 June 2020. He confirmed that he was the person referred to in the EAW and that he did not consent to extradition. He was admitted to bail and has remained on bail throughout these proceedings.

[2] Poland is a category 1 territory. Part 1 of the Extradition Act 2003 applies in respect of the EAW (section 1 of the 2003 Act).

[3] Following the applicant’s first appearance the case was continued on numerous occasions. There were far more continuations on the applicant’s motion than on the respondent’s motion. Some continuations were caused by the Covid-19 pandemic, and others were sought in order to await a decision in lead cases (*Wozniak v Poland* [2021] EWHC 2557 (Admin)) where it was argued that, because of controversial changes affecting the Polish judiciary, trials would not be Article 6 compliant. Eventually, the extradition hearing took place before the sheriff (Sheriff Dickson) on 29, 30 and 31 May 2023. At that hearing it was submitted that extradition was barred (i) by reason of forum (section 19B of the 2003 Act); and (ii) because it would be unjust or oppressive by reason of the passage of time (section 14 of the 2003 Act). It was also maintained that the applicant should be discharged because extradition would not be compatible with Article 8 of ECHR and would not be proportionate (section 21A(a) and (b) of the 2003 Act).

[4] The sheriff issued his judgment on 22 June 2023. He ordered the applicant's extradition, holding that it is not barred on the grounds suggested and that it is compatible with the Article 8 rights of the applicant and his 17 year old son, RH. The applicant now applies to this court for leave to appeal against that decision.

Relevant legislation

[5] The Extradition Act 2003 provides:

"Section 11 Bars to extradition

(1) If the judge is required to proceed under this section he must decide whether the person's extradition to the category 1 territory is barred by reason of—

...

(c) the passage of time;

...

(j) forum.

...

(3) If the judge decides any of the questions in subsection (1) in the affirmative he must order the person's discharge.

...

(5) If the judge decides those questions in the negative and the person is accused of the commission of the extradition offence but is not alleged to be unlawfully at large after conviction of it, the judge must proceed under section 21A.

Section 14 Passage of time

A person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have—

(a) committed the extradition offence (where he is accused of its commission) ...

...

Section 19B Forum

(1) The extradition of a person ("D") to a category 1 territory is barred by reason of forum if the extradition would not be in the interests of justice.

(2) For the purposes of this section, the extradition would not be in the interests of justice if the judge—

- (a) decides that a substantial measure of D's relevant activity was performed in the United Kingdom; and
- (b) decides, having regard to the specified matters relating to the interests of justice (and only those matters), that the extradition should not take place.

(3) These are the specified matters relating to the interests of justice—

- (a) the place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur;
- (b) the interests of any victims of the extradition offence;
- (c) any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence;
- (d) were D to be prosecuted in a part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence necessary to prove the offence is or could be made available in the United Kingdom;
- (e) any delay that might result from proceeding in one jurisdiction rather than another;
- (f) the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard (in particular) to—
 - (i) the jurisdictions in which witnesses, co-defendants and other suspects are located, and
 - (ii) the practicability of the evidence of such persons being given in the United Kingdom or in jurisdictions outside the United Kingdom;
- (g) D's connections with the United Kingdom;

...

(6) In this section “ D's relevant activity ” means activity which is material to the commission of the extradition offence and which is alleged to have been performed by D.

...

Section 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.

(5) The judge must order D to be extradited to the category 1 territory in which the warrant was issued if the judge makes both of these decisions —

- (a) that the extradition would be compatible with the Convention rights;
- (b) that the extradition would not be disproportionate.

...

(8) In this section “ relevant foreign authorities ” means the authorities in the territory to which D would be extradited if the extradition went ahead.

...

Section 26 Appeal against extradition order

(1) If the appropriate judge orders a person's extradition under this Part, the person may appeal to the High Court against the order.

(2) But subsection (1) does not apply if the order is made under section 46 or 48.

(3) An appeal under this section —

- (a) may be brought on a question of law or fact, but
- (b) lies only with the leave of the High Court.

...

Section 27 Court's powers on appeal under section 26

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

- (a) allow the appeal;
- (b) dismiss the appeal.

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

- (3) The conditions are that—
 - (a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;
 - (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.

- (4) The conditions are that—
 - (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
 - (b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;
 - (c) if he had decided the question in that way, he would have been required to order the person's discharge.

- (5) If the court allows the appeal it must—
 - (a) order the person's discharge;
 - (b) quash the order for his extradition."

The extradition hearing and the sheriff's decision

[6] The applicant has two children, RH, and a daughter, DH, aged 20. He separated from the children's mother, JM, in 2011. RH has resided with the applicant since April 2019.

[7] At the extradition hearing the sheriff heard evidence from the applicant; from DH; from the applicant's mother, JR; from his sister, LS; and from Dr Simon Petrie, a chartered clinical psychologist. There was also evidence in the form of a report from a social worker, RS, which was admitted under section 259(1) of the Criminal Procedure (Scotland) Act 1995. Further matters, including medical records relating to RH, were the subject of a joint minute of admissions. The Lord Advocate founded upon letters from the Wroclaw Prosecutor's Office dated 7 September 2022, 11 May 2023 and 18 May 2023. The letters indicated, *inter alia*, that a notary identified the applicant as having attended at her office on 23 December 2013 and executed documents referred to in the charges; and that a bank official identified him as having attended at a bank on the same day where he executed other documents

referred to in the charges. According to the witnesses, on both occasions he had verified his identity using his passport.

[8] In a full and carefully considered judgment dated 22 June 2023 the sheriff made

23 findings in fact. For present purposes it is sufficient to narrate the following findings:

“8. RH has a history of interaction with child mental health services relating to emotional, behavioural and mental health problems with occasional thoughts of self-harm and physical harm to others.

9. RH was diagnosed with Asperger’s syndrome in 2018 and ADHD (attention deficit hyperactivity disorder) in 2019. He is currently under the care of the CAMHS (Child and Adolescent Mental Health Service) team and is regularly reviewed by them.

...

12. By April 2019 RH’s relationship with his mother was difficult. In April 2019 RH went to live with the [applicant] and LS in [town A]. DH remained living with her mother, JM, in [town B].

13. The [applicant] was advised by medical professionals that it would be detrimental to RH’s structure and routine to move him from [town B]. On the basis of that advice the local social work department helped the [applicant] find a house in [town B]. In September/October 2019 the [applicant] and RH moved ... to a house in [town B]. The applicant and RH have lived at that house ... from September/October 2019 until the current day.

14. RH left school in March 2022 and is now working a couple of days a week ...

15. The [applicant] has been RH’s principal care giver since April 2019. RH is an emotionally and psychologically vulnerable young person who does not cope well with change. The [applicant] is RH’s main source of practical and emotional support. RH is heavily dependent on the [applicant] for almost all aspects of daily living. RH would be unable to live independently.

16. RH relies on the [applicant] to help him manage his mental health. RH currently has reasonably stable mental health but has significant vulnerability to the deterioration of his mental health.

17. RH’s move to live with the [applicant], since April 2019, has had a stabilising effect on RH.

18. DH currently stays overnight at the [applicant’s] house approximately twice a week. DH also attends the [applicant’s] house when the [applicant] is at work in order to make sure that RH has had something to eat and to make sure he is alright.

19. RH's mother, JM, now has a three year old son and is currently pregnant. JM currently lives in a three bedroomed house with DH and her three year old son. JM's house is located very close to the [applicant's] house. After April 2019 ... JM continued to support RH at medical appointments. RH currently visits his mother and three year old half-brother approximately twice a week for about half an hour each time. RH's relationship with his mother ... is currently better than it was in April 2019.

20. The extradition of the [applicant] would be likely to have a serious adverse effect on RH's health and well-being.

21. In the event of the [applicant] being extradited, the [applicant's] mother, JR, the [applicant's] sister, LS, and the [applicant's] daughter, DH, would provide support to RH. That support would include the possibility of RH moving in with JR or LS. It is also likely that RH's mother, JM, would provide support to RH. It was at least possible that RH could move back in with JM, although the limited space in the house would be problematic. The extent to which the support from RH's family would mitigate the impact of the [appellant's] extradition on RH is unknown.

22. In the event of the [applicant] being extradited, there is a possibility of [RH] moving to supported accommodation. The availability and suitability of such supported accommodation is unknown. It is not known whether such supported accommodation would mitigate the impact of the [applicant's] extradition on RH.

23. In the event of the [applicant] being extradited, RH would, despite his vulnerabilities, still be able to recall the [applicant] and look forward to his return to Scotland."

[9] It was submitted for the applicant that a substantial measure of his relevant activity was performed in the UK. That was so because during most of the period when the offences were said to have been committed he had been in the UK. Accordingly, the threshold test in section 19B(2)(a) of the 2003 Act was satisfied. When regard was had to the specified matters relating to the interests of justice (section 19B(2)(b), section 19B(3)) the conclusion should be that the extradition should not take place. It would be unjust and oppressive to extradite the applicant in view of the passage of time since the alleged commission of the offences (section 14 of the 2003 Act). It would be unjust because his ability to defend himself against the charges was now impaired because he no longer had access to emails and phone

records from the time of the alleged offences, and he no longer had a clear memory of events. He had no way of contacting the woman he had been with in Poznan. The time gap meant that the evidence of the notary and the bank official would be less reliable. It would be oppressive because of the family hardship which would result, particularly given RH's reliance upon the applicant. Given the likely effect on RH, extradition would be both incompatible with RH's Article 8 rights and disproportionate (section 21A).

[10] The sheriff did not accept that a substantial measure of the applicant's relevant activity was performed in the UK. The EAW described the offences as having been committed in Poland - it did not allege that the applicant carried out any activity in the UK. Even if, contrary to the sheriff's view, the threshold test had been met, the test in section 19B(2)(b) would not have been satisfied. A very weighty factor in favour of extradition was that the place where all the loss or harm occurred was Poland (section 19B(3)(a)). The victim of the alleged offences was the Polish exchequer. It had an interest in the applicant facing trial, and in the trial being of the least inconvenience to it. It was common ground that if extradition was refused it was unlikely that the applicant would be prosecuted in Scotland. The interests of the victim favoured extradition (section 19B(3)(b)). The third factor which the sheriff considered favoured extradition was the desirability of all prosecutions relating to the extradition offences taking place in one jurisdiction (section 19B(3)(f)). Ideally this would be in a single trial, but it was also more desirable and practicable for witnesses to give evidence from their home country and to be examined in their own language. On the other hand, the applicant's connections with the UK (section 19B(3)(g)) were an important factor against extradition. The factors listed in section 19B(3)(c), (d) and (e) were neutral. When the factors for and against extradition were weighed they did not indicate that extradition should not take place.

[11] The sheriff was not satisfied that extradition was barred by the passage of time. It would not be unjust. Even accepting what the applicant said about lack of access to the contemporaneous email account and phone records, and that his memory may have faded a little, he was still able to give a clear account of his movements in Poland, and he had access to his bank records. He had led no evidence about what enquiries, if any, had been made with the flight carrier or the Sheraton Hotel or to locate the email account and phone records. There was no information about what evidence would be disclosed to him in advance of a trial. There was nothing to suggest that the applicant could not obtain a fair trial in Poland, a Council of Europe country where Article 6 of ECHR applied. The applicant fell just short of satisfying the extremely high test for oppression. The most significant change during the period since the alleged offences was the development of the applicant's role as a carer and mentor for RH. Extradition would be likely to have a serious adverse effect on RH's health and well-being. However, he would be supported by CAMHS and by his family, and perhaps provided with supported accommodation, although it was not clear what such family support or supported accommodation would look like or do to mitigate the likely serious adverse effects. While it had been nine years since the alleged commission of the offences, there had been no culpable delay on the part of the Polish authorities. The alleged offences were serious and the public interest in extradition was weighty.

[12] Extradition would be an interference with RH's Article 8 rights - the issue was whether it was justified and proportionate. At paragraph [108] the sheriff listed factors which favoured extradition *viz.* (1) the public interest in extradition that those accused of crimes should be brought to trial; (2) the UK should honour its international obligations and not become a haven for criminals; (3) the alleged offences were serious - they involved being part of an organised crime group which had committed a £2.3 million fraud; (4) an

analogous crime in Scotland would be likely to be prosecuted in the High Court of Justiciary, and if there was a conviction a reasonably lengthy custodial sentence would be likely; (5) factors that mitigate the gravity of the offence or culpability will ordinarily be matters that the court in the requesting state will take into account; (6) in the event of extradition RH would be supported by his family and remain under the care of CAMHS; (7) RH would be able to recall the applicant and look forward to his return to Scotland. Factors against extradition were (para [109]) (1) RH had ADHD and Asperger's Syndrome; (2) RH had moved to live with the applicant in April 2019; (3) the move had had a stabilising effect; (4) RH was very dependent on the applicant for almost all aspects of daily living; (5) RH was an emotionally and psychologically vulnerable young person who was unable to live independently; (6) extradition would be likely to have a serious adverse effect on RH's health and well-being; (7) the delay between the alleged offences and the extradition hearing had increased the impact on RH's Article 8 rights (because it was not until April 2019 that RH moved in with the applicant); (8) that whilst his family would support RH and it may be possible for him to move in with a family member, the extent to which family support would mitigate the impact of extradition was unknown; (9) while there was a possibility of RH moving to supported accommodation, the availability and suitability of such accommodation and whether, if available and suitable, it would mitigate the impact of the extradition were unknown; (10) extradition would have some impact on DH and the applicant's family. At paragraph [110] of his judgment the sheriff balanced the factors. He had at the forefront of his mind that a primary consideration must be the best interests of RH. Having balanced all the factors for and against extradition he concluded that the interference with the applicant's and RH's Article 8 rights was outweighed by the public interest in extradition. At paragraphs [111] - [113] the sheriff considered whether extradition

would be disproportionate (section 21A(1)(b)). He determined that it would not be. The alleged conduct was serious (section 21A(3)(a)). The likely penalty if the applicant was convicted was a reasonably lengthy custodial sentence (section 21A(3)(b)). The sheriff was not satisfied that there was any reasonable possibility of the Polish authorities taking appropriate measures which were less coercive than extradition (section 21A(3)(c)).

The application for leave to appeal

[13] The application for leave to appeal contains five proposed grounds. The first ground (paragraph 5 of the application) is that the sheriff “erred in finding that a substantial measure of the [applicant’s] relevant activity was not performed in the United Kingdom.” The second ground (paragraph 6) is that the sheriff erred in failing to hold that it is in the interests of justice that extradition should not take place (section 19B(2)(b), 19(3)). In particular, he erred in finding that the factor mentioned in section 19B(3)(f) favoured extradition. The third ground (paragraph 7) is that the sheriff ought to have decided that it would be unjust to extradite the applicant by reason of the passage of time (section 14). The fourth ground (paragraph 8) is that the sheriff ought to have decided that it would be oppressive to extradite the applicant by reason of the passage of time (section 14). The fifth ground (paragraph 9) is that the sheriff erred in law in concluding that extradition is compatible with RH’s Article 8 rights. He ought to have decided that the interference with those rights is not justified.

[14] On 15 August 2023, two days before the hearing of this application, the applicant’s solicitors emailed to the court a supplementary report by Dr Petrie dated 14 August 2023. On 16 August 2023 they emailed to the court an affidavit by the applicant. On the morning of the hearing counsel for the applicant moved the court to allow these documents and a

note of an additional ground of appeal to be received. No prior intimation of the motion had been given to the court or to the respondent. The additional ground was that the supplementary report and the affidavit were evidence which was unavailable at the time of the extradition hearing, and that had they been available the sheriff would have decided matters differently (section 27(4)). He would have held that extradition would be oppressive because of the passage of time (section 14), and that it would be incompatible with the applicant's and RH's Article 8 rights. Counsel for the applicant apologised for the lack of any prior notice of the motion. The supplementary report and the affidavit had only recently been obtained. It had only occurred to her when preparing for the hearing that the motion was necessary. Counsel for the respondent indicated that although this was the first intimation he had had of each of the three documents, he did not oppose the motion. He was content that he could deal with them. In those circumstances, conscious of the desirability of expeditious justice, we granted the motion.

[15] In the affidavit the applicant deponed that RH had reacted badly to the news that the sheriff had made the extradition order. His behaviour had deteriorated. He had started taking drugs. He had stopped going to work. When preparing his supplementary report Dr Petrie interviewed the applicant and RH. He opined that RH's mental health had deteriorated since his previous assessment in May 2023. RH is now exhibiting signs and symptoms of clinical depression. Dr Petrie's view is that this "has developed in response to situational stressors - including his father's impending extradition to Poland." He observed:

"6.1.2 It is of extreme concern that [RH] has recently reported thoughts of suicide. He has become somewhat withdrawn and avoidant, with no clear plan for what he might do or where he might live should his father have to leave the UK. He reports a build-up of angry thoughts and feelings alongside poor personal coping mechanisms - including recent use of alcohol and illegal substances. ...

6.2.1 My opinion remains that the extradition ... will have a devastating impact on [RH's] mental health.

6.2.2 Given the recent stressors and [RH's] development of clinical depression, alongside his longstanding diagnoses of Asperger's Syndrome and ADHD and his associated dislike of and inability to cope with change, I would assess [RH's] current risk of harm to self as being mild. In my opinion this risk level will escalate significantly at the point that his father has to leave the UK.

6.2.3 [RH] continues to present as an emotionally and psychologically vulnerable young man. There is little or no evidence of him possessing the practical or emotional skills to be able to cope on his own without the support of his father. There would seem to be no clear plan in place for what will happen for him in the future if he is no longer able to live at home with [the appellant]. ...

6.3.1 There is currently a poor prognosis for [RH's] mental health. In the event that [the appellant] is extradited to Poland, I have grave concerns about [RH's] mental health and level of risk. In such circumstances he will need urgent reassessment by NHS CAMHS, with a crisis plan requiring to be formulated alongside his family members in order that he can be best supported."

Submissions

[16] The court had the benefit of written notes of argument and oral submissions. We are grateful for the assistance which they provided, but it is sufficient for our purposes to summarise them.

[17] In support of the first ground of appeal it was submitted that the sheriff ought to have decided that the threshold test (section 19B(2)(a)) was met. It was clear on the evidence that the applicant had been personally present in the UK for most of the period during which the alleged offences were committed. It followed that a substantial measure of his relevant activity was performed in the UK. In reply the respondent maintained that the sheriff had not erred in holding that the threshold test was not satisfied. The EAW alleged that the offences were committed in Poland by the applicant and others participating in an organised criminal group. There was no allegation of them having been committed in the UK.

[18] It was submitted that the second ground of appeal was well-founded. The sheriff had been wrong to conclude that the factor referred to in section 19B(3)(f) favoured extradition, because it was unlikely that the applicant and his co-accused would be tried together. Since that factor did not favour extradition, the balancing exercise ought to have indicated that extradition was not in the interests of justice. The response for the respondent was that the sheriff had been entitled to find that factor (f) favoured extradition and to strike the balance in the way which he had.

[19] In relation to the third ground of appeal, it was argued that the sheriff ought to have decided that a fair trial was now impossible by reason of the passage of time because the applicant no longer had access to all the evidence which he would need. The rejoinder for the respondent was that the sheriff had been entitled to decide, for the reasons which he did, that a fair trial was not impossible.

[20] As regards the fourth ground of appeal, the passage of time had been lengthy (but it was not suggested that the Polish authorities were culpable for any of the delay). The extradition offences were "very serious", but they were not of the gravest sort (e.g. murder, human trafficking, major drug dealing). The sheriff ought to have attached less weight to the public interest in extradition and more weight to the likely effects on RH. He ought to have held that extradition would be oppressive because of those effects. For the respondent it was submitted that the sheriff had been entitled to conclude that the high test of oppression was not met.

[21] The fifth ground of appeal should be sustained. The evidence relating to RH ought to have led the sheriff to conclude that extradition would be an unjustified interference with RH's Article 8 rights. He had erred in four respects. He had taken an irrelevant factor into account, namely that RH was of an age where he would remember his father when he

returned. He had omitted to have regard to a relevant factor, namely that RH may be separated from the applicant for a lengthy time. He had over-emphasised the seriousness of the extradition offences. While he said that he had treated the interests of RH as a primary consideration, the decision to extradite was inconsistent with that. If appropriate weight had been given to all of the relevant factors the conclusion should have been that extradition was a disproportionate interference with RH's Article 8 rights. The highly destabilising effect on RH ought to have outweighed the public interest in extradition, particularly given the time which had passed since the offences were said to have been committed. On the respondent's behalf it was submitted that the sheriff had been entitled to have regard to the fact that RH was 17 and would remember the applicant. It was clear that the sheriff understood that a separation might be lengthy. He gave appropriate weight to the gravity of the offences. He treated the best interests of RH as a primary consideration. Weighing the various factors he was entitled to conclude that extradition was proportionate.

[22] Finally, the additional ground of appeal should be upheld. The evidence in the affidavit and in Dr Petrie's supplementary report had not been available at the extradition hearing (section 27(4)(a)). RH's mental health and behaviour had worsened. Had that evidence been available the sheriff would have decided that extradition would have been oppressive because of the passage of time (section 14) and that it would not be compatible with RH's Article 8 rights (section 21A). On the basis of the evidence which he accepted the sheriff's view had been that the circumstances fell "just short" of amounting to oppression. The new evidence would have tipped the balance the other way. For the respondent it was submitted that the new evidence did not materially change the picture so far as the likely effects on RH were concerned. It would not have resulted in the sheriff deciding the oppression or Article 8 questions differently.

Decision and reasons

Forum bar

[23] The sheriff did not err in holding that the threshold test in section 19B(2)(a) was not met. The EAW alleges participation by the applicant in an organised criminal group to commit VAT offences in Poland. The invoices and returns referred to in the EAW all concerned Polish companies and there is no allegation that they were created or filed other than in Poland. The EAW contains no allegation of any relevant activity in the United Kingdom. In his evidence the applicant did not maintain that he had performed anything described in the EAW within the UK. (He maintained that he had spent 24 hours in Poznan at some time during the period 22-24 December 2013 and that (contrary to the evidence of his attendance at the notary and the bank), he went straight to the Sheraton Hotel and did not leave it until he travelled by taxi to the airport to return home.) The sheriff was not convinced that the test in section 19B(2)(a) was satisfied. That was largely a question of fact for him (*cf. Atraskevici v Lithuania* [2016] 1 WLR 2762 at [13]). We are not persuaded that he was wrong to conclude as he did.

[24] In any case, the sheriff held that even had the threshold test in section 19B(2)(a) been met, his consideration of the matters relating to the interests of justice specified in section 19B(2)(3) did not indicate that the extradition should not take place. Matters (a), (b) and (f) favoured extradition and (g) weighed against it. The applicant suggests that the sheriff required to treat (f) as being neutral. We disagree. He thought that it would be preferable for the applicant and another alleged member of the organised criminal group, IR, to be tried together. He was well aware that the prospects of the Polish authorities being able to do that remained unclear. However, on the basis of the material before him he was

not obliged to dismiss the possibility. Besides, whether or not the applicant could be tried together with IR or other co-accused, there are clear advantages in all prosecutions taking place in Poland. The witnesses are Polish and they live there. The documents are in Polish and are in Poland. The sheriff was entitled to conclude, as he did, that it would be more desirable and practical for the witnesses to give evidence from their home country and be examined in their own language. He did not err in treating (f) as favouring extradition. Nor did he err in deciding that when regard was had to the specified matters relating to the interests of justice the extradition could take place. That was an evaluative judgement which he was entitled to make. We detect no error.

Passage of time

[25] We reject the submission that the sheriff ought to have held that it would be unjust to extradite the applicant because of the passage of time. There was no proper basis for him to conclude that a fair trial in Poland would be impossible (*cf. Lagunionek v Lord Advocate* 2015 JC 300 at [14]). That is a high test. Where the requesting territory is, like Poland, a member of the Council of Europe, the presumption is that a trial would be in accordance with article 6 of ECHR (*Lagunionek*; [14]). The sheriff was not obliged to hold otherwise because the applicant does not (at least at present) have access to his former email and mobile phone accounts. He was entitled to have regard to the facts (i) that the applicant is still able to give a clear account of his movements in Poland; (ii) that he has access to his bank records; (iii) that he led no evidence about what enquiries, if any, have been made with the flight carrier or the Sheraton Hotel in Poznan or to locate the email account and phone records; and (iv) that there was no information about what evidence would be disclosed to him in advance of a trial.

[26] The sheriff held that it would not be oppressive to extradite the applicant by reason of the passage of time. The most material change had been the development of his role as a carer and mentor for RH. It is clear that the sheriff gave anxious consideration to the evidence relating to that, and to the likely devastating effect on RH were the applicant to be extradited. On the other hand, he bore in mind that RH remained under the care of CAMHS and that there was the possibility of other family support; that the extradition offences were serious; and that there had been no culpable delay by the Polish authorities. He considered that the applicant fell just short of proving that he met the extremely high test for oppression. We are not persuaded that he erred in making that judgement.

Article 8

[27] The applicant maintains that extradition contravenes his Article 8 rights and the Article 8 rights of RH. He focused mainly upon RH's Article 8 rights. It is not difficult to understand why. The interference with his own Article 8 rights is clearly justified and proportionate.

[28] We are not convinced by any of the applicant's criticisms of this part of the sheriff's decision. The fact that RH was of an age (17, nearly an adult for the purposes of ECHR) where he would remember the applicant on his return was a relevant consideration which the sheriff was entitled to have regard to (*cf. H(H) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, 2013 1 AC 338, [44]). On a fair reading of his judgment it is clear that he was well aware that if extradited the applicant might be separated from RH for a lengthy period; though of course, if convicted, there would be at least the possibility of part of his sentence being served in Scotland (Council of Europe Convention on the Transfer of Sentenced Prisoners of 21 March 1983). The sheriff did not "over-emphasise" the

seriousness of the extradition offences. There is no escaping that they are serious – and their seriousness is not diminished by pointing out that other offences, such as murder, are even more serious. There is not the slightest doubt that the sheriff treated RH’s best interests as being a primary consideration. He gave anxious consideration to the likely devastating effects of extradition on RH. He had the benefit of hearing evidence from several of the applicant’s relatives and was best placed to assess the potential value of support for RH from that source. By contrast, Dr Petrie interviewed only the applicant and RH. Balancing all the relevant factors as he required to (*H(H) v Deputy Prosecutor of the Italian Republic, Genoa, supra*; *BH v Lord Advocate* 2012 JC 308; *Polish Judicial Authority v Celinski* [2016] 1 WLR 551; *V v Lord Advocate* [2020] HCJAC 33, 2020 SLT 1161), the sheriff concluded that, though the effects on RH of extradition are likely to be devastating, his Article 8 rights are outweighed by the strong public interest in giving effect to the request for extradition: and that the interference with those rights is justified and proportionate. In our opinion that was an evaluative judgement that he was entitled to make. No error has been demonstrated.

The additional ground of appeal

[29] The additional evidence does not represent a material change of circumstances. The sheriff proceeded on the basis that extradition would be likely to have a devastating effect on RH. Dr Petrie’s evidence at the hearing was that extradition would be highly likely to cause RH to develop clinically significant levels of anxiety and depression, with the risk of self-harm increasing significantly. The additional evidence points to an adverse reaction by RH to the making of the extradition order; to him having developed signs and symptoms of clinical depression; and to there being a mild risk of self-harm, with a risk of that escalating significantly if extradition occurs. In our judgement that is not materially different from

what was anticipated at the time of the extradition hearing. The new evidence would not have resulted in the sheriff deciding that extradition would be oppressive because of the passage of time (section 14), or that it would not be compatible with RH's Article 8 rights (section 21A).

Conclusions and disposal

[30] We refuse leave to appeal for the first, second and third proposed grounds. We do not consider them to be arguable.

[31] We grant leave to appeal for the fourth ground, the fifth ground, and the additional ground. However, for the reasons already given, we dismiss that appeal.

[32] We add this. It is clear that urgent steps ought to be taken to plan for the support which RH will require from relatives, CAMHS and other agencies. It is in RH's interests that this be done promptly.