SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2021] SC EDIN 63

E43/20

JUDGMENT OF SHERIFF T WELSH QC

in Extradition Proceedings by

THE LORD ADVOCATE ON BEHALF OF THE REPUBLIC OF POLAND

Pursuer

against

RM

Defender

Act: Jajdelski Adv; Crown Office, Edinburgh
Alt: Mackintosh QC; Livingston Brown, Glasgow

Edinburgh, 3 December 2021

The issue.

[1] The requested person, RM, is married with nine children. He has lived with his family in Lanarkshire for 11 years. He appeared at Edinburgh Sheriff Court on 30 July 2020 on a European Arrest Warrant [EAW] issued by the District Court in Wrocław, Poland on 7 September 2016. The EAW was certified by the National Crime Agency on 15 September 2016. He is wanted by the requesting judicial authority in Poland to serve a 6 month custodial sentence, for two mercantile frauds (total value 8044,21 PLN) committed on 27 December 2007. He was convicted in his absence on 26 September 2011.

[2] He opposes extradition in execution of the EAW on five grounds:

(i) The District Court in Wrocław is not a judicial authority for the purposes of s2 of the Extradition Act 2003 [the Act].

(ii) Extradition would be unjust or oppressive under s 14 of the Act, by reason of the passage of time.

(iii) He was convicted in his absence with no possibility of a retrial contrary to s 20 of the Act.

(iv) Extradition will be incompatible with article 6 of the European Convention on Human Rights [ECHR]

(v) Extradition will be disproportionate and incompatible with Article 8 of the ECHR and his own and his family's right to a family life.

The facts.

Evidence of the requested person.

[3] RM (45) gave evidence. He is married to EM and they have 9 children. He married on 3 February 2001. He explained that for a time from 2007 until 2010 he operated his own small business as a builder installing bathrooms in Wroclaw, in Lower Silesia, Poland. He had a young family. His wife has never worked but always looked after the children. In Poland, the family lived in a single room in an apartment. They had a shared external bathroom and the kitchen was a cupboard in the corner of the room they lived in. He has always worked. He said in early 2010 he got a job as a building site manager but the contract ended and he was out of work. In Poland, he worked a 6-day week. He has two elderly parents and a sister in Poland. He has a brother who lives in his own household in Lanarkshire where he works. In 2010, his brother got work in Scotland and an opportunity arose to join him here. RM arrived on 7 June 2010. He started working in a foundry in Lanarkshire the following Monday and has worked there ever since. He is part of a 9-man team smelting and moulding metal. He started on the foundry floor and is now a

supervisor. He learned the job on site and operates the crane. He has little formal education. He left school at 14 to get a job to help support his parents and family.

[4] He has a large family, the youngest 5 of whom, live with him. The second oldest boy is abroad working in Sweden. Three older children live together in their own nearby local authority tenancy. They support themselves. The youngest 5 dependent children, live with their parents in a local authority rented 4 apartment house. They are all in full time education. The 4 youngest children, are at school. All the children, except T. are settled here. The tenancy is in joint names with his wife EM. The family comprises:

i P (27) who is a manager in an insurance company.

ii T (26) who worked in Glasgow for a bank but has now moved to Sweden, where he works as a manager in a company producing parts for cars.

iii C (22) lives with P and R. She works in a soft drinks factory.

iv R (21) is an agency worker.

v S (18) is at college. She wants to be a teacher.

vi M (15) is at High School. He enjoys sports and wood sculpting.

vii D (13) is at High School. He wants to be a maths or physics teacher. He enjoys sport.

viii K (7) is at Primary School. He enjoys writing short stories in English.

ix ER (6) is at the same school as K. She enjoys dancing.

The 4 oldest children are fluent in Polish and English. S is not fluent in Polish. M and D understand Polish but cannot speak well or write in Polish. K and ER have no Polish. They speak, read and write in English only. RM understands English better than he can speak it.

[5] RM explained how the family finances work. His income taken along with Child Benefit [originally transferred from Poland to the UK] and Tax Credit amounts to

approximately £2500 per month net. After rent, council tax, utility bills, car expenses, clothes and food for all 7 there is nothing left. The oldest four children support themselves. The 5 younger children, are dependent on RM's wages from the foundry. That pays the rent and household expenses. The family has no savings. Members of his own wider family have visited Scotland. Members of his wife's family have been over here but he has not returned to Poland since he left, because there is no money in the family budget for foreign travel. He has applied for settled status in the UK from the Home Office but his application is paused at present. The rest of the family, except ER, now have settled status. Why ER (and K for that matter) need settled status no one could explain, as, they were both born here and are UK citizens with a right of abode in this country. RM has penalty points on his driving licence arising from a misunderstanding about UK law in relation to car insurance when he came to the UK. Apart from that, he has never been in trouble with the police in the UK.

[6] RM stated that when he operated his own bathroom installation company he had a credit account with a builder's merchant, which is the complainer company, in the Polish prosecution. The EAW alleges that he was found guilty, in absence, of taking goods on credit and not paying for them, to the tune of 8044,21 PLN [about £1500 at the time]. RM disputes this. He says, he was never allowed credit of that amount, which at the time was a significant amount of money in Poland. He says, that before he left Poland he did pay an outstanding account with the company, which was approximately £850. The EAW further states that RM was cited to court at the Polish address which the court had for him: *Komorniki, Sroda Slaska commune, Lipowa 10 street.* RM stated, that after he moved to Scotland, his wife still lived at that address until June 2011. By then, RM had established himself in Lanarkshire, settled in his new job and applied to the local authority for a house. By

March 2011 he had an offer of a house and was made arrangements for his wife and family to join him here. This included, he said, telling the Polish school his children were registered at and attended, about the pending move, to Scotland. Once settled here, the children's new Scottish school wrote to the Polish school confirming that they were attending school here. RM said he was obliged to deregister the children from their Polish school. He said, if he did not do that the local Polish police would make inquiries about why the children were not attending school. According to RM, he was told, by phone, by his wife, in early 2011 that a letter had arrived, citing him as a witness for interview at the prosecutor's office. He said that, by September 2010, he had decided to move his family to Scotland. He said he returned to Poland in April 2011. His counsel showed him 2 documents, which are at pages 67 and 68 of the Joint Bundle of documents. The first one is a copy witness summons addressed to him at *ul.Lipowa 10, 55-300 Komorniki.* The summons states he has to attend the office of the prosecutor at 10.00hrs, on 28 April 2011, under pain of fine or arrest. The second document, is timed at 11.20hrs, on 28 April 2011 and appears to be a two-page note of an interview, between the prosecutor Krystyna Lenart and the requested person. It bears to be signed in three places by someone with the same name as the requested person. It mentions the signatory's wife, who has the same name as the requested person's wife. It also, contains a denial of fraud and an explanation by the interviewee, of trading on credit terms at the material time with the complainer company, the interviewee, having cash flow problems due to clients not paying for work done and not being able to pay for building supplies; an admission that instalment payments were made to a director of the complainer company and an assertion the a lawyer named Anna Kurylo wrote to the complainer company about the alleged debt stating that the claim was "time-barred". The document also states, the interviewee, was informed about his rights and

obligations to notify the authorities of a change of address in terms of the Polish Criminal Code articles 300, 301, 74, 75, 138 and 139. RM, denied he attended the prosecutor's office for interview on 28 April 2011. He denied he signed the document proffered and he stated the signatures on the document were not his. He stated they were forgeries. The document states the suspect received a written copy of it. RM stated he went to the prosecutor's office, in May 2011. At that meeting, he had a general discussion with the prosecutor about the debt but nothing was written down and he did not receive a copy of a typed minute of that meeting. He said the prosecutor only took notes. At the end of the meeting, he said, the prosecutor told him she believed him. He said he told the prosecutor he paid the bill, which was 1680 PLN [about £370] in total but the company complainer tried to get him to pay twice. He said, he never had a lawyer called Anna Kurylo. RM said he was in Poland towards the end of May 2011. He saw his parents. He visited the prosecutor, whom he told he was moving to Scotland and gave her the address of his new local authority tenancy here. He collected a new ID card from the local Registration Department. Then he flew to Scotland on 3 June 2011 with his wife and then, 7 children. He said, he was not told that he could be prosecuted and that if he failed to appear at trial he could be convicted in his absence. He said, that after he left Poland there was nowhere mail could be sent to him, in Poland. His sister-in-law lived near to where he used to lived, in Wroclaw. He did not provide her address as a forwarding address because he told the prosecutor the address of his new Scottish tenancy. He said, he was never summoned to a trial in September 2011 and did not attend because he did not know about it.

[7] He stated his intention is to remain in Scotland with his family. He said his family's life will be ruined if he were to be returned to Poland. Also because he does not have settled status in the UK, he is concerned about being allowed back into the UK, if he had to go back

to Poland, to serve the 6-month sentence. He would then have a criminal record and might not get an entry visa. He said his wife could not earn enough to support the family, in his absence. He was concerned about losing his job, if he was extradited. His younger children do not speak Polish and their education would be prejudiced if he could not re-enter the UK and the family had to move to Poland. It would set the youngest children back because they would need to learn Polish. It would take years for the youngest children to catch up, if the family was forced to relocate in Poland. He said, 11 years of hard work to settle and establish themselves in Scotland would be wasted. He said, if extradited he did not think he would be allowed back in. He would lose his job.

[8] In cross examination, RM repeated he knew nothing about the document of 28 April 2011. He said he never signed it and the signatures were different from his. He insisted he gave the prosecutor his Scottish address and he did not receive a written minute of the meeting containing his version of events and warning him of the consequence of failing to attend a trial, if one was fixed and informing him of the obligation on him to inform the prosecutor of any change of address. He was shown a summons addressed to him at *ul.Lipowa 10, 55-300 Komorniki*, which indicated he was summoned to the prosecutor's office on 27 May 2011 at 10.00 to be interrogated as a suspect. He denied ever seeing this document. He said he was due to be in Poland between 29 May 2011 and 3 June 2011. He was shown a file note from the prosecutor's dossier indicating that on 17 May 2011 EM had contacted the police and told them her husband, who had been summoned for interrogation, this time as a suspect, on 27 May 2011, would not be there as he was coming back to Poland between 29 May 2011 and 3 June 2011. He said he also gave the address of his employer in Lanarkshire to the prosecutor, when he met her, which he said was in May 2011. He left the interview with the impression he would not be prosecuted. He said, that after 3 June 2011

he did not have a Polish address. It was put to him, that under Polish criminal procedure documents served at the address provided by a suspect are regarded as delivered. He repeated he gave his Scottish address to the prosecutor.

Evidence of the Polish expert witness Mikolaj Pietrzak

[9] The witness is a Polish lawyer. He is senior partner of the firm of Pitrzak Sidor & Wyspolnicy in Warsaw. He is very experienced and included in his CV the following:

> "I am the former Chairman of the Human Rights Council of the Polish Bar Council and, as of November 2016, the Dean of the Warsaw Bar Association. In 2016 I was appointed by the Secretary-General of the UN to the Board of Trustees of the UN Voluntary Fund for Victims of Torture, and I was the Chairperson of this Board in 2018 and 2019. I am the recipient of the Edward Wende award and in 2018 I was awarded the Human Rights Award of the Council of Bars and Law Societies of Europe (CCBE). I am a member of the European Criminal Bar Association, the National Association of Criminal Defence Lawyers in the USA and the Legal Experts Advisory Panel for Fair Trials International. I specializes in criminal law, constitutional law and human rights. My experience includes defence and representation of victims in cases concerning terrorism, espionage, murder, corruption, and business crimes. I have extensive experience in self-governance of legal professions. I have taken part in numerous high-profile criminal cases dealing with international and transjurisdictional issues. I participated in many proceedings before the Constitutional Tribunal and the European Court of Human Rights. I regularly appear before the Supreme Court and I was admitted to the List of Counsel of the ICC and the STL."

The witness, was asked to report and express an opinion on the following matters:

i. Whether there is a real risk, connected with a lack of independence of the courts of Poland on account of systemic or generalised deficiencies there, of the right to a fair trial being breached.

ii. A short description of recent developments in the Polish government's judicial reform measures (particularly any since *Openbaar Ministerie*), and any proposed future developments.

iii The new disciplinary system for judges, how it works, and any comment you might have on its increased financing and any impact this may have on lower-level judges.

iv Whether substantial grounds exist in RM's particular case that there is a real risk that he will deprived of his legal guarantee to a fair trial before an impartial and independent tribunal, if returned to the District Court in Wroclaw.

v. If it is within your knowledge, whether RM would be entitled to a rehearing of his case by the District Court in Wroclaw.

In his evidence the witness spoke to the contents and terms of his report. I will deal with this where appropriate below.

EM the wife of the requested person gave evidence

[10] EM (49) gave evidence. She repeated the evidence given by her husband, about the family circumstances and how they arrived in Scotland. She confirmed her husband worked while she looked after the family home and the children still living there. With regard to her departure from Poland, she said the local school was informed of their departure and the accommodation the family used was effectively abandoned. She stated that the Police had been looking to speak to her husband about a matter and she spoke to the letter sent summoning him as a witness to the local prosecutor's office. She gave the Police a forwarding address in Scotland she said. The record of RM's meeting with the prosecutor was put to her but she denied the three signatures on the document were those of her husband. She denied that she telephoned the local Police to inform them her husband would not attend for interview in May 2011. She stated that if her husband was returned to Poland to serve the sentence and was subsequently, on release, denied an entry visa to

return to the UK, "post-Brexit", she would choose to remain in Scotland and would not remove the youngest 4 dependent children, who could not speak Polish, from school and relocate to Poland. In that event, she considered her marriage would be over, because RM could not live in the UK. Nor could she countenance returning to Poland after 10 years building a life for her family in Scotland. She said she would put the children first and stay with them in Scotland.

Assessment of the witnesses

[11] Mr Mackintosh QC, invited me find all three witnesses led to be credible and reliable. Counsel of the Lord Advocate, invited me to find the defence expert credible and reliable but disbelieve RM and EM in relation to their evidence about the investigation in Poland and because of that treat their evidence about their domestic circumstances with caution. In the event, I found the expert to be credible and reliable. I was satisfied he gave his evidence in a helpful and professional manner. He was honest and conscious of his duties as an expert witness. That said, I did not accept his opinion in relation to a possible retrial in Poland, for reasons I explain below. With regard to RM and EM, I found them to be credible and reliable in the evidence they gave about their family life in Poland, their reasons for leaving Poland to create a better life for themselves and their family in Scotland and the present arrangements for the care of their children. However, I did not believe either of them in relation to the record of RM's interview with the Polish prosecutor, that is signed in three places. I thought they were lying about that. The reason they lied, is because they both know that it proves RM knew an investigation about the alleged mercantile fraud was ongoing about the time the family was moving to Scotland to start a new life. It is plain to me, that RM decided to start a new chapter of his life in 2011. He left Poland, abandoned

his domicile of citation, which was the official address he had in Poland and came to Scotland turning his back on the then live criminal investigation. I considered it highly improbable, that the prosecutor in the requesting state would have forged the signature of RM on an official record in a case involving a relatively minor fraud. I thought it much more probable that RM when confronted with the proof, that showed he knew about the investigation has lied to avoid being returned to Poland, to serve the sentence he faces under Polish law. The meeting with the prosecutor, was scheduled to begin at 10.00hrs on 28 April 2011 and the record of the meeting is timed as ending at 11.40hrs. The expert witness confirmed the Polish procedure in relation to this interview, which takes the form of a question and answer session, which is then typed up to form a record of interview and signed by the interviewee. The expert stated that, in his opinion, the interview including the time needed to type up the record could have been completed in 1 hour 40 minutes. The documentary record, seemed to be a comfortable fit with the time frame allocated. The alternative of forgery, to my mind, was far fetched and implausible.

The legal submissions

Ground 1 – That Wroclaw District Court is not a judicial authority for the purposes of s2 of the Act.

[12] Mr Mackintosh QC, did not advance this argument with any enthusiasm before me. He relied on submissions made by senior counsel to the Divisional Court in *Wozniak* v *Poland*, 2021 WL 04379454 (2021). To these submissions, he added additional material taken from the evidence of the expert who in his report, traces the entire history of the judicial independence crisis, in Poland. This, is also set out in exhaustive detail in *Wozniak* v *Poland* where the court tracks the history in forensic detail. In short, as was recognised by counsel

for the Lord Advocate, the nub of senior counsel's argument, is that the particular circumstances of any given extradition request, no longer counts because the general situation with regard to judicial independence, is so toxic in Poland, that no one should be returned. The difficulty for Mr Mackintosh, as he candidly accepted, is that this argument was roundly rejected by the Divisional Court. It said:

> "218. It seems to us that this passage undermines the premise of Ms Montgomery's argument. The foundation of her argument is the proposition that systemic deficiencies leading to a lack of independence which can be taken to have specifically infected the Appellants' individual cases, *ipso facto*, give rise to the real risk of a breach of the essence of their fundamental right to a fair trial as guaranteed by the second paragraph of Article 47 of the Charter , and a flagrant denial of justice. This paragraph shows that proposition to be unsound. Even where a tribunal is not independent and impartial, there may not be a flagrant denial of justice. All of the facts have to be considered as part of an overall assessment. The Court in *Orabator* went on to consider the evidence and concluded at [108] that 'to the extent that the court lacked independence and impartiality, this did not of itself give rise to a flagrant denial of justice."

The passage being referred to in *Orobator* v *Governor of HMP Holloway* [2010] EWHC 58 (Admin) is the one where Dyson LJ states:

> "99. It is a striking fact that there is no case of which we are aware in which this test has been successfully invoked in any context in relation to article 6 on the grounds of lack of independence and impartiality of a court. We recognise that judicial independence and impartiality are cornerstones of a democratic society and that their absence will without more involve a breach of article 6. But we cannot accept that lack of judicial independence and impartiality will necessarily involve a flagrant denial of justice or the 'nullification or destruction of the very essence of the right guaranteed' by article 6. Whether the lack of independence and impartiality has that effect must depend on the particular facts of the case, examined critically as a whole. Regrettably, there are many states throughout the world where judges are less independent and less impartial than they are in the UK and other democratic societies which are fully committed to the rule of law. But even where the judiciary are not fully independent and impartial, it is possible for a trial to take place which does not involve the complete nullification or destruction of the very essence of the right guaranteed by article 6"

Thus, at the general level, no matter how lacking in independence the judiciary in Poland may be, that in itself, is not enough to prevent extradition. The Divisional Court, went on to

affirm the two-stage test laid down by the CJEU in *Minister for Justice and Equality* v *LM* (C-216/18 PPU) EU:C:2018:586, [2019] 1 W.L.R. 1004, [2018] 7 WLUK 548 and stated:

> "204. Turning to Ms Montgomery's principal submission, we are satisfied that it is not permissible to extrapolate from the general situation in Poland and the systemic threats to independence identified in the material we have set out, serious though they are, that there is specific and real risk of breach of the Appellants' fundamental right to a fair trial, so as to make it unnecessary to carry out a specific and precise assessment on the facts of their particular cases. In other words, it is still necessary, per LM at [75], to make an assessment that…… [has] regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant."

The court then referred to *LM* where the two stage test is articulated thus:

> "68. If, having regard to the requirements noted in paras 62-67 of the present judgment, the executing judicial authority finds that there is, in the issuing member state, a real risk of breach of the essence of the fundamental right to a fair trial on account of systemic or generalised deficiencies concerning the judiciary of that member state, such as to compromise the independence of that state's courts, that authority *must*, as a second step, assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing member state, the requested person will run that risk: see, by analogy, in the context of article 4 of the Charter , *Aranyosi's* case [2016] QB 921, paras 92 and 94."

As counsel for the Lord Advocate reminded me, there is no evidence, at all, based on the type of case (minor commercial fraud), the notoriety of the case or the identity of the judges who would be dealing with it, that RM would not get a fair trial in Poland. Counsel for the Lord Advocate, relied on the evidence of the expert in this regard who stated in his report at para 55:

> "Furthermore, the description of the acts for which RM is sought by the issuing authority indicates that the case concerns the crime of fraud, which is subject to a penalty of imprisonment of up to 8 years. The description of the particulars of the case, according to which RM, acting with a view to gain financial benefit led a trading and service company to a disadvantageous disposal of its property in an amount equal to £1200, having no intention of acquitting himself of the obligation, along with the sentence delivered (6 months of imprisonment), suggest that the case was devoid of any political background and it is reasonable to assume, that there is little risk that RM's fair trial rights might be threatened in this respect upon his surrender to Poland."

Notwithstanding the clear test, set out in *LM,* applied and approved in *Wozniak* v *Poland* no evidence was led in this case to address the second part of the test. On the contrary, the relevant opinion evidence, if accepted, refutes the suggestion RM, specifically and precisely, will not get a fair trial. That, to my mind is fatal to this ground of opposition. All that was presented, was a general argument based on structural criticisms of the constitutional changes affecting the judiciary in Poland, all of which, are set out in *Wozniak* supplemented by the expert in relation to the latest spat between the Polish Supreme Court and the CJEU about the supremacy of European Law. Many public domain documents critical of the present arrangements, regarding the appointment and discipline of judges in Poland, were referred to in the note of argument submitted for RM. All that, in my view, is completely inadequate, to specifically and precisely satisfy the second limb of the two-stage test. I only add, that, based on the evidence of the expert in his comprehensive report, augmented by his oral testimony and the reasoning in *Wozniak* v *Poland*, 2021 WL 04379454 (2021), I consider the first stage of the test in *LM,* is obviously satisfied. The Lord Advocate, did not concede that the first stage of the test was met, albeit the Divisional Court with which I agree found that it had. Accordingly, this ground of appeal fails.

Ground 2 – Extradition would be unjust or oppressive by reason of the passage of time in terms of s14 of the Act

[13] The relevant time line is set out in the case and argument for the Lord Advocate. It is not disputed. It is as follows:

27/12/2007	Commission of the crime
08/10/2010	Report of the crime to the authorities

31/05/2011	Filing of the indictment with the court after preparatory proceedings
26/09/2011	Judgment delivered – the respondent convicted of the crime and sentenced to 6 months' imprisonment suspended for a probationary period of 2 years
06/03/2014	Order of the court requiring execution of the sentence of 6 months' imprisonment in view of the respondent failing to comply with the obligation to redress the damage, followed by (i) a summons voluntary to report to prison to serve the sentence and, subsequently, (ii) orders for the respondent to be brought to prison
08/09/2014	Order for the convicted person to be searched for under a warrant (or "wanted") notice, following the summons to report to prison and orders for the respondent to be brought to prison
08/04/2015	Decision to request the issuing of an EAW from the District Court in Wrocław, in light of police enquiries leading to the conclusion that the respondent may be staying in Scotland
07/09/2016	Issuing of the EAW by District Court in Wrocław
15/09/2016	Certification of the EAW
30/07/2020	Arrest of the respondent pursuant to the EAW and appearance in Edinburgh Sheriff Court

[14] The law in this area is conveniently stated in *Zengota* v *Circuit Court of Zielona Gora, Poland & Ors* [2017] EWHC 191 (Admin), [2017] 1 W.L.R. 3103, by Cranston J.

> "32. Drawing the threads together, the law regarding the bar of oppression through passage of time is as follows: (i) oppression is not easily satisfied and hardship is not enough; (ii) the onus is on the requested person to satisfy the court that it would be oppressive to extradite him by reason of the passage of time; (iii) the requested person must establish a causal link between the passage of time and its

> oppressive effects through the change in circumstances; (iv) the gravity of the offence is relevant to whether changes in the circumstances of the requested person have occurred which would render his return to stand trial oppressive; (v) if the requested person is a fugitive, he cannot take advantage of oppression, save in the most exceptional circumstances; (vi) the requesting authority must establish that the requested person is a fugitive to the criminal standard; (vii) delay brought about other than by the requested person is not generally relevant since the focus is the effects of events which would not have happened, for example a false sense of security; (viii) it is only in borderline cases, where the accused himself is not to blame, that culpable delay by the requesting state may tip the balance against extradition."

[15] Mr Mackintosh QC, advanced an argument, based on the passage of time between the alleged commission of the offence and the issue by the requesting judicial authority of the EAW. He said, RM is said to have committed the offence on 27 December 2007. The EAW, was issued on 7 September 2016 and certified on 15 September 2016. RM, was arrested and appeared before Edinburgh Sheriff Court on 30 July 2020. There has been a substantial delay of almost nine years between commission of the alleged offence and the issue/certification of the EAW, and a further delay of almost four years before RM's arrest and the commencement of these extradition proceedings. He said, there is no apparent explanation for that delay. Further, he stated RM was simply not informed of any proceedings against him and took reasonable steps to ensure that he would be informed if any such proceedings were intimated to him, by leaving his Scottish address with the Polish prosecutor, having taken his children out of school and informed the education authorities they were moving to Scotland. This argument, was entirely based upon me believing that RM had genuinely informed the Polish authorities of his Scottish whereabouts before he left Poland and was unaware of the live proceedings into the fraud. However, on the facts, I believe he did know about the investigation. I am satisfied, to the criminal standard, that he was questioned about it on 28 April 2011 [albeit he was summoned to the prosecutor's office

as a witness, he was questioned there as a suspect] as the signed record of the interview demonstrates. He was informed, of his obligation to inform the authorities of any change of address. I am satisfied he did not inform the Polish prosecution authorities that he was leaving the country, or where he was going and is a fugitive from justice. The requested person's motive for leaving is irrelevant, if he knows the investigative process implicating him is initiated:

> "I consider that a person subject to a suspended sentence who voluntarily leaves the jurisdiction in question, thereby knowingly preventing himself from performing the obligations of that sentence, and in the knowledge that the sentence may as a result be implemented, cannot rely on passage of time resulting from his absence from the jurisdiction as a statutory bar to extradition if the sentence is, as a result, subsequently activated. The activation of the sentence is the risk to which the person has knowingly exposed himself. In my view, such a situation falls firmly within the fugitive principle enunciated in Kakis and Gomes and Goodyer. The fact, if it be the case, that a person's motive for leaving the jurisdiction was economic and not a desire to avoid the sentence, does not make the principle inapplicable." *Wojciech Wisniewski, Tomasz Sapor, Karolina Wirynska v Regional Court of Wroclaw, Poland, Regional Court of Poznan, Poland, District Court in Torun, Poland* [2016] EWHC 386 (Admin), 2016 WL 00750596

The same principle applies here where the requested person leaves after having been interviewed, as a suspect. RM took the risk that these proceedings might come back to haunt him. Accordingly, the passage of time has no purchase in his favour, as he himself created the delay by leaving the Polish jurisdiction when he knew proceedings were extant. Further, I did not consider, nor was it suggested, that there was anything exceptional in the circumstances of this case, which would permit a fugitive not to be extradited. Nor, for that matter, has the exceptionally high test for establishing oppression set out in sec 14 of the 2003 Act been met, see *Lagunionek (Slawomir)* v *Lord Advocate* [2015] HCJAC 53. In fact, there was no evidence offered which addressed or identified any issue of oppression. The expert witness, gave evidence to the contrary. Thus, I decided the question in s11(4) of the Act in

the negative and did not discharge RM on that ground. Instead, I was required to consider s20 of the Act.

Ground 3 – There has been a conviction in absence with no possibility of a retrial contrary to s20 of the Act.

[16] It was not disputed that RM was subject, to a "default judgment" on 26 September 2011 and sentenced to 6 months custody [the minimum] suspended for 2 years. He was not present at the trial.

[17] For all the reasons I have articulated in support of my view that RM is a fugitive, I consider, these apply equally to the question of his deliberate absence from Poland for his trial. I do not repeat the reasoning but it applies with equal force. Accordingly, I decided the question posed in s20(3) in the affirmative, which required me then to proceed under s21 of the Act.

Ground 4 -Article 6 of the ECHR

[18] Before addressing s21 of the Act, I should state that RM's position was that he did not know the trial was taking place, nor did he deliberately absent himself and he was accordingly, convicted in his absence, in ignorance of the Polish proceedings and if extradited, on that basis, he is entitled to a retrial in terms of s20(5) of the Act, which it was argued could not be a fair trial because (1) of the various reasons submitted above that a fair trial was no longer possible in Poland given the constitutional lack of independence of the Polish judiciary and (2) on a narrow point of Polish law, spoken to by the expert, namely, a default judgement having been pronounced, that could not be reopened under Polish domestic law and accordingly RM's right to a retrial, if convicted in absence, was

undeliverable. Again, this ground of opposition to extradition proceeds upon the basis that RM did not deliberately absent himself [which I rejected] and were he to be returned, any retrial he received, would amount to a flagrant denial of justice for all the same reasons that the Polish judiciary lacks independence. Mr Mackintosh QC re-hashed the arguments relating to the general structural lack of independence of the Polish judiciary and argued that was enough to justify discharge of the requested person. He asserted that *LM* and *Wozniak* were wrongly decided, partly under reference to recent ECtHR jurisprudence relating to litigation by Polish judges. However, I considered that *LM* was binding on me and that *Wozniak* was highly persuasive. The test which had to be applied in deciding whether a flagrant denial of justice would arise in any given case, was the two-stage test articulated in *LM*, which was approved and applied in *Wozniak*. Furthermore, the expert stated, there was no reason relating to the identity of the judge who granted the EAW, the nature of the offence and its lack of notoriety, in any way, that indicated RM could not get a fair trial in Poland. Further, the random nature of the appointment of judges to cases meant it was impossible to say who would hear any re-trial in his case. In my opinion, this ground of opposition also fails because the requested person has not even tried to demonstrate specifically and precisely how he would not get a fair trial if returned. Notwithstanding that, I rejected the factual basis of this ground of opposition, that RM did not deliberately absent himself. Thus I rejected this ground also.

Right to a retrial in terms of s20(5) of the Act.

[19] The expert gave oral evidence, which reflects his report where he states:

> "[36] Article 540b § 1 of CCP [Polish Criminal Code] provides that judicial proceedings concluded with a final and binding court judgment may be reopened at the request of the accused, submitted within a final time limit of one month as of the

> day on which he learns of the judgment issued against him, if the case is heard in the absence of the accused, who was not served a notification of the date of the hearing or trial, or such a notification was not served on him personally and he is able to prove that he was not aware of the date and the possibility of a judgment being delivered in his absence. However, this right is limited. According to Art. 540b § 2 CCP, the right to request re-opening of proceedings, does not apply in cases of presumption of delivery of the judgement (Art. 133 § 2 CCP), when the sentenced person was unable or unwilling to confirm receipt of the delivery (Art. 136 § 1 CCP), and when the sentenced person changes address and does not inform the authority conducting the proceedings about such change (Art. 139 § 1 CCP), and also if the defence counsel has participated in the trial or hearing. Consequently, it is not certain that RM will be given the opportunity to reopen the case."

As I understood this argument, RM is saying that because the "default judgment" against him was served on him at his deemed address in Poland [his domicile of citation], if the Polish courts, on his return, holds, that he left without informing them of a change of address then he is not entitled to a re-trial. This argument only has traction, in my opinion, if he had not deliberately absented himself, which, I hold on the facts he did. Further, I do not consider that the point is sound under reference to *The Lord Advocate Italian Republic Court of Trieste* v *Shkelquim Daja* [2021] HCJAC 31 citing Rafferty LJ in *Nastase* v *Italy* [2012] EWHC 3671 (Admin) at paragraphs 45 and 48 where she stated:

> "The existence of procedural steps does not remove the entitlement to a retrial. Rather, the Italian authorities must be permitted to regulate their own proceedings by imposition of their own rules. Section 20 may create entitlements, but procedural rules set parameters within which such rights are exercisable…" "A tribunal re-opening proceedings and renewing the evidence should be permitted to regulate evidence as it sees fit. Such a course would plainly be Article 6 compliant."

Had I required to decide this issue, I would have followed the same reasoning in relation to the Polish courts. However, the issue was irrelevant standing my decision that RM deliberately absented himself. Counsel for the Lord Advocate, informed me that the position of the requesting judicial authority was that RM had not attended for trial when duly summoned ,at the only domicile of citation they had. He was informed, of the legal

requirement to intimate a change of address at the interview of 28 April 2011. He did not do that. The default judgment, which passed against him, due to his failure to appear for trial was unexceptional. In my opinion, any argument about RM's inability to re-open the case against him, if extradited, is academic on the facts of this case. The expert said, that RM was cited to the interview of 28 April 2011, as a witness but interviewed as a suspect. He said, this was not an uncommon practice in the 1990s and 2000s in Poland. However, the Polish Appeal Court tended to excuse this kind of irregularity. Whether RM was treated fairly at that interview, was not a matter for me because he deliberately absented himself.

[20] Mr Mackintosh QC, argued that RM had not deliberately absented himself and told the Polish authorities of his Scottish address. Thereafter, he had heard nothing of the proceedings against him in Poland, until the EAW was executed. Counsel for the Lord Advocate, invited me to make a finding to the contrary effect and relied on a number of authorities which plainly demonstrate that a requested person who has deliberately absented himself cannot benefit from a procedural hiatus, based on non-personal service of the court summons. These include *Dziel* v *District Court in Bydgoszcz, Poland* [2019] EWHC 351 (Admin) [2019] 2 WLUK 339 *per* Ousley J:

> "28. The upshot of the authorities is quite clear. The relationship between the proper interpretation or application of 'deliberate absence' and the fair trial rights in article 6 ECHR is referred to in [34(ii)] of *Cretu* and [80-81] of *Zagrean* . S20 is intended to ensure that a person whose extradition is sought to serve a sentence after a conviction in his absence has the right to a retrial unless he has already been present at his trial or was properly notified of it and deliberately absented himself. Its purpose is to ensure that no one is surrendered where that would mean a breach of their fair trial rights. A person will be taken to have deliberately absented himself from his own trial where the fault was his own conduct in leading him to be unaware of its date and place, through deliberately putting it beyond the power of the prosecutor or court to inform him. This includes breaching his duty to notify them of his changes of address, deliberately ignoring the court process. In such circumstances, there is no need for the further questions in s20(4) and onwards of the Extradition Act to be considered. Extradition follows."

I agree that is the consequence of RM's failure to notify the Polish authorities of his change of address. Furthermore, counsel for the Lord Advocate, relied on certain observations of Hickinbottom J in *Stryjecki* v *Lublin District Court* [2016] EWHC 3309 (Admin) [2016] 12 WLUK 637 particularly article vii, below, which was approved by the Divisional Court in *Bialkowski* v *Regional Court in Kielsce, Poland* [2019] EWHC 1253 (Admin) [2019] 5 WLUK 281:

> "49. The proper approach to the concept of a person 'deliberately absenting himself from his trial' in this context has been considered in a number of recent cases to which I was referred, notably (in chronological order) Cretu (especially at [19], [34](i) and [35]), the judgment of the Court of Justice of the European Union in Openbaar Ministerie v Dworzecki (2016) C-108/16 PPU (24 May 2016), and *The Court in Mures and the Bistrita-Nasaud Tribunal, Romania v Zagrean [2016] EWHC 2786 (Admin)* (at [62] and following). Cretu and Zagrean were each heard by a Division of this court.
>
> 50. In respect of section 20(3) , read in the light of article 4a(1) , the following propositions, relevant to this appeal, can be drawn from these cases.
>
> i) It is for the requesting judicial authority to prove, to the criminal standard, that the requested person has 'deliberately absented himself from his trial'.
>
> ii) 'Trial' is not a reference to the general prosecution process, but rather the trial as an event with a scheduled time and venue which resulted in the decision.
>
> iii) The EAW system is based on trust and confidence as between territories. Consequently, where the EAW contains a statement from the requesting judicial authority as required by paragraph 4A(1)(a) of the Framework Decision, that will be respected and accepted by the court considering the extradition request, unless the statement is ambiguous (or, possibly, if there is an argument that the warrant is an abuse of process). If the statement is unambiguous, the court will not conduct its own examination into those matters, nor will it press the requesting authority for further information.
>
> iv) If the statement in the EAW is ambiguous or confused (*a fortiori* , if there is no statement at all), then it is open to the court considering the request to conduct its own assessment of whether the requested person was summoned in person or, by other means, actually received official information of the scheduled date and place of that trial, on the evidence before it, the burden being born by the requesting authority to the criminal standard.

> v) 'Summoned in person' means personally served with the relevant information. If there has not been such service, generally the requesting authority must unequivocally establish to the criminal standard that the person actually received the relevant information as to time and place. It is insufficient for the requesting authority to show merely that the domestic rules as to service of such a summons were satisfied, if it is not established that the person actually received the trial information.
>
> vi) Establishment of the fact that the requested person has taken steps which make it difficult or impossible for the requesting state to serve the requested person with documents which would have notified him of the fact, date and place of the trial is not in itself proof that the requested person has deliberately absented himself from his trial.
>
> vii) However, where the requesting authority cannot establish that the person actually received that information, because of 'a manifest lack of diligence' on the part of the requested person, notably where the person concerned has sought to avoid service of the information so that his own fault led the person to be unaware of the time and place of his trial, the court may nevertheless be satisfied that the surrender of the person concerned would not breach his rights of defence."

I am satisfied that there had been a manifest lack of diligence on the part of RM. He left Poland without telling the authorities where he could be contacted. In my opinion, this was largely to seek a better life in Scotland but also to turn his back on the fraud case, which he was questioned about. Accordingly, it was his own deliberate act, which led to him being unaware of the precise time date and place of his Polish trial. The requesting authority sought to lodge further proof of service of the summons at the Polish domicile of citation of RM, on the morning of the proof. This was objected to and I disallowed this as it had not been translated from Polish to English and it came too late. Counsel also referred me to a case of the CJEU In Case C-108/16 PPU Paweł Dworzecki, which confirms the position in EU law:

> "50 Furthermore, as the scenarios described in Article 4a(1)(a)(i) of Framework Decision 2002/584 were conceived as exceptions to an optional ground for non-recognition, the executing judicial authority may in any event, even after having

> found that they did not cover the situation at issue, take into account other circumstances that enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence.
>
> 51 In the context of such an assessment of the optional ground for non-recognition, the executing judicial authority may thus have regard to the conduct of the person concerned. *It is at this stage of the surrender procedure that particular attention might be paid to any manifest lack of diligence on the part of the person concerned, notably where it transpires that he sought to avoid service of the information addressed to him*." [Emphasis added].

During his submissions, counsel for the Lord Advocate stated, in line with the expert's opinion, that RM could not reopen his case according to Polish domestic law because the default judgment against him followed on deemed service at his official address albeit that had been abandoned before the summons arrived. Having held RM was deliberately absent I considered this to be irrelevant.

Ground 5 – s21 and Article 8 of the ECHR; the Celinski balance.

[21] As a preliminary, I repeat that in relation to their family circumstances in Scotland and Poland before their arrival here, I found RM and EM to be credible and reliable. I only disbelieved them in relation to their evidence about the circumstances surrounding the potential prosecution of RM in Poland and what they knew and did in response to that. I watched EM very carefully when she was giving evidence, she was obviously telling the truth, when she explained that she would not relocate the children to Poland.

Submissions.

[22] Mr Macintosh QC, referred me to the test in *Polish Judicial Authorities* v *Adam Celinski & others [2015] EWHC 1274 (Admin)*. He argued that there was a strong argument for discharging RM, on the basis of an Article 8 breach. He reminded me that RM had never

been in serious trouble in this country, which I accepted. He referred to RM's large dependent family, his good job from which he supports his wife and children and has done so since his arrival in Scotland. RM is the main breadwinner for the family. He has been employed in a position of responsibility, by the same employer, for the decade he has been in Scotland. His wife does not work and stays at home to raise the children. The family would suffer serious financial and other hardship if RM were to lose his job upon extradition. He said the crime committed, while not trivial was not in a league with the crimes dealt with in *HH, Norris, Celinski* and *H* involving as they did international drug dealing and serious crime. He said RM's crime was one of low scale financial value. He recognised the public interest inherent in extradition obligations being seen to be met and the importance of the UK not being seen to be a haven for criminals. He argued that the passage of time, some 14 years, since the fraud reduced the weight of the public interest in enforcing the judgment. He also referred to "Brexit uncertainty", if RM were returned to Poland to serve his sentence. The question being whether he would be able to return to this country with a criminal record. I thought this raised the danger of speculation about the future. I was referred to *Antochi* v *Germany* [2020] EWHC 3092 (Admin), *per* Fordham J at paras 50-51, where he said:

> "50. The question is whether it is appropriate to factor 'Brexit uncertainty' into the Article 8 analysis and, if so, in what way. Nobody disputes that the uncertainty in relation to Brexit raises a very real question as to whether or not the Appellant would be able to come back and re-establish her family life in the United Kingdom, were she to be extradited to Germany and present thereafter for whatever time it takes for the legal process to be completed, including any penal measure requiring the Appellant to be in Germany. Mr Swain accepted that this is a factor which can properly be taken into account as relevant, as a subjective matter, to the *'anguish'* which the Appellant (and other family members) will experience through extradition taking place. He cited *Zapala v Circuit Court, Warsaw, Poland [2017] EWHC 322 (Admin)* at paragraph 23(ix). I agree. Beyond that, submitted Mr Swain, it is 'harder to say' that it feeds into the Article 8 analysis as an objective feature. He pointed out that it could arise in very many cases. Ultimately, his submission was this: a district

judge 'may' look at the risks arising from Brexit uncertainty as an objective factor, but is not 'obliged' to do so; the District Judge was entitled to, but this Court should not. Ms Westcott, drew my attention to *Sobczyk v Circuit Court in Katowice, Poland [2017] EWHC 3353 (Admin)* at paragraph 22, a case in which the Divisional Court said that an argument based on Brexit uncertainty had '*no merit*' because the position was '*highly uncertain*' and '*it would be quite wrong for this Court to speculate as to what … arrangements would apply*'.

51. In my judgment, Mr Swain is correct to accept that – in principle – Brexit uncertainty should be taken into account in the Article 8 analysis as a subjective factor (relevant to '*anguish*'), and that it can be taken into account in the Article 8 analysis as an objective factor, and that all of this is so, notwithstanding that the Court should not speculate. What I cannot accept is his submission that this Court should not take Brexit into account as an objective factor. Mr Swain's submission was that it is 'impossible to say' what the future holds: it is 'impossible to say' that the Appellant would be able to come back to the family home in the United Kingdom; and it is 'impossible to say' that she would not be. Once it is accepted – rightly, in my judgment – that the uncertainty should feature as a subjective factor, and can feature as a subjective factor, it is in my judgment unpersuasive to shut out the objective factor in this appeal. Especially where the Judge (i) listed it as a factor against extradition (ii) recorded that it was inappropriate to speculate but (iii) said no more about whether he was discounting any substantial weight (subjective or objective) in the light of (ii).

52. In my judgment, there is no reason why the uncertainty should be taken into account only as a 'subjective' factor (relevant to 'anguish') and not as an objective factor."

Mr Mackintosh further relied on *Rybak* v *Poland* [2021] EWHC 712 (Admin), *per* Cranston J at para 36:

"36. In my view, the District Judge ought to have taken into account the potential difficulties in the appellant returning to the UK as an express factor in the *Celinski* balancing exercise. His decision was handed down on 21 January 2020, two days before the European Union (Withdrawal Agreement) Act 2020 became law. It was clear that free movement between the UK and the European Union would come to an end at some point. Well before the decision, the offer to EU citizens of settled status was in the public domain. The appellant's wife had applied for and obtained it in July 2019. Although there are some doubts about whether or not the appellant could have applied, he did not, and he has given an explanation. In any event, it seems that EU citizens without settled status will be on a similar footing as others seeking entry clearance to the UK and it has been common knowledge for many years that criminal convictions, and other signs of poor character, negatively affect applications for leave to enter the UK."

Counsel stated, the present offence would almost certainly not have attracted an immediate custodial sentence in the United Kingdom. The sum defrauded would fall within the "minor financial offences" category of offences detailed in para 50A.5 of Criminal Practice Direction 2015 [2015] EWCA Crim 1567, under which, according to para 50A.3 and barring exceptional circumstances:

> *"The judge should generally determine that extradition would be disproportionate. It would follow under the terms of s 21A(4)(b) of the Act that the judge must order the person's discharge".*

It was submitted that, although applying to accusation cases, I should regard the Practice Direction as persuasive on this point *Czerwinski* v *HM Advocate* [2015] HCJAC 73.

[23] Counsel for the Lord Advocate, invited me to reject these arguments. He said there was no exceptionally compelling feature in this case which would be capable of outweighing the strong public interest in extradition, so that the UK is seen to honour its international obligations and the UK does not become a safe haven for criminals. Even if the public interest is diminished, by the passage of time, it still carries great weight. I asked about remission of sentence. Counsel indicated the requested person was entitled to apply for release after one-half of his sentence was served. Counsel said he was unaware of any reason why RM would be denied early release standing his personal circumstances. He argued that the sum defrauded was a lot of money in Poland at the time. This was not a large scale fraud but neither was the offence trivial. It was 8044,21ZLT or £1500 at the time (£2300 in today's money). He said, albeit this was a minimum sentence I should have due respect for the Polish court. Sentence was a matter for it. He acknowledged that the Brexit uncertainty would cause anxiety and distress but in extradition cases there is always anxiety distress and disruption of family life. That is the norm in these cases. The children he said, could be looked after by EM and even if there is loss of income from RM's employment,

state benefits would be available for the short time the requested person would be incarcerated. He said the risk of the practical breakdown of the marriage was a speculative risk should RM be denied entry to the UK on his release and EM decide to remain with the children in Scotland, rather than join him abroad because the youngest children did not speak Polish and their education would be disrupted by a move to Poland. He said the older children could also help care for the younger children in the absence of their father.

Discussion.

[24] I approached the Article 8 issue as follows. I considered the right to a family life from the perspective of RM, his wife and the 5 children living with them and dependent on him as part of the family unit. I did not consider the interests of the 3 older children because they were not dependent upon him and they were self-sufficient and out with the family unit.

[25] I considered a number of cases. In *HH* v *Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25 a case dealing with the specific consequences to children caused by the extradition of their parents Baroness Hale said at paras [8] and [30] :

> "(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) There is no test of exceptionality in either context.
>
> (3) 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.
>
> (4) 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.

> (5) 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.
>
> (6) 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.
>
> (7) 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……. the court would be well advised to adopt the same structured approach to an Article 8 case as would be applied by the Strasbourg Court. First, it asks whether there is or will be an interference with the right to respect for private and family life. Second, it asks whether that interference is in accordance with the law and pursues one or more of the legitimate aims within those listed in Article 8.2. Third, it asks whether the interference is 'necessary in a democratic society' in the sense of being a proportionate response to that legitimate aim. In answering that all-important question it will weigh the nature and gravity of the interference against the importance of the aims pursued. In other words, the balancing exercise is the same in each context: what may differ are the nature and weight of the interests to be put into each side of the scale."

Like guidance is also contained in *Norris* v *Government of the United States of America (No.2)* [2010] 2 AC 487. Further authoritative guidance was given in *Polish Judicial Authorities* v *Adam Celinski & others [2015] EWHC 1274 (Admin)* as to how judges in England and Wales should proceed in principle when Article 8 issues are raised in extradition proceedings. The court ruled:

> "(1) The general principles in relation to the application of Article 8 in the context of extradition proceedings are set out in Norris (above) and HH (above). In future, absent further guidance from a specially constituted Divisional Court or the Supreme Court, it would not be necessary to cite any other authorities. In the latter case at [8] (above) Baroness Hale JSC made clear, at subparagraphs (3), (4) and (5), that the question raised under Article 8 was whether the interference with private and family life of the person whose extradition was sought was outweighed by the public interest in extradition; that there was a constant and weighty public interest in extradition that those accused of crimes should be brought to trial; that the UK should honour its international obligations; that the UK should not become a safe haven; and that the public interest would always carry great weight, but that the weight varied according to the nature and seriousness of the crime involved (emphasised again by Baroness Hale JSC, and also by Lord Judge LCJ, Lord Kerr JSC and Lord Wilson JSC).

(2) It was important that the judge bore in mind, amongst other things, that:
(i) HH was concerned with cases that involved the interests of children, and the judgments must be read in that context.

(ii) The public interest in ensuring that extradition arrangements are honoured is very high, as is the public interest in discouraging persons seeing the UK as a state willing to accept fugitives from justice (both of which factors would be expected to be addressed in the judgment).

(iii) The decisions of the judicial authority of a Member State making a request should be accorded a proper degree of mutual confidence and respect – particularly since the UK has been subject to the CJEU (which has stressed the importance of mutual confidence and respect) since 1 December 2014.

(iv) The independence of prosecutorial decisions must also be borne in mind.

(v) It is also important for the judge to bear in mind that 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; and the judge must also take into account that personal factors relating to family life which will need to be brought into the balance under Article 8, will also form part of the matters considered by the court in the requesting state in the event of conviction.

(vi) A structured approach to Article 8 cases is essential, given that each case will turn on the facts found by the judge and the balancing of the considerations set out in Norris and HH."

(vii) The approach should be one in which the judge, after finding the facts, sets out a list of the 'pros' (militating for extradition) and 'cons' (militating against extradition) in 'balance sheet' fashion, and then sets out his reasoned conclusion as to the result of the balancing exercise and why extradition should be ordered or the defendant discharged."

[26] I derived some important guidance as to how to approach the issue in this case from the decision of the appeal court in *H* v *Lord Advocate* [2011] HCJAC 77; 2011 S.C.L. 978 which was subsequently affirmed in the UK Supreme Court *S or H* v *Same (Same intervening)* [2012] UKSC 24 [2013] 1 A.C. 413. The Scottish appeal court in interpreting the approach of the UK Supreme court in *Norris* indicated that the default position is that in furtherance of the legitimate social aim of suppressing and prosecuting crime extradition will virtually always

be proportionate with interference with family life, unless some exceptionally compelling factor is present in the specific factual mix under consideration. Two further aspects of the analysis of *Norris* (which was a Part 2 case under the 2003 Act) by the appeal court in my opinion are relevant. The court refers to these as subsidiary issues of principle. I need to quote only two of these for the purposes of the present case. The appeal court stated:

> "[73]…..Lord Phillips accordingly concluded, at pp.510–511, para.56, that it was only if some quite exceptionally compelling feature, or combination of features, was present that interference with family life consequent upon extradition would be other than proportionate to the objective that extradition serves. In the absence of such features, a judge's consideration of whether extradition would be compatible with Convention rights, pursuant to s.87 of the 2003 Act, was likely to be relatively brief. If, however, the nature or the extent of the interference with art.8 rights was exceptionally serious, careful consideration must be given to whether such interference was justified (p.512, para.62).
>
> [74] In relation to situations where such consideration is necessary, Lord Phillips addressed three subsidiary issues of principle. First, the gravity, or lack of gravity, of the offence may be material: 'The importance of giving effect to extradition arrangements will always be a significant factor, regardless of the details of the particular offence. Usually the nature of the offence will have no bearing on the extradition decision. If, however, the particular offence is at the bottom of the scale of gravity, this is capable of being one of a combination of features that may render extradition a disproportionate interference with human rights. Rejecting an extradition request may mean that a criminal never stands trial for his crime. The significance of this will depend upon the gravity of the offence' (p.512,para.63). Secondly, when considering the impact of extradition on family life, this question does not fall to be considered simply from the viewpoint of the extraditee:
>
> > "64 … This issue was considered by the House of Lords in the immigration context in *Beoku-Betts* v *Secretary of State for the Home Department* [2009] AC 115. After considering the Strasbourg jurisprudence the House concluded that, when considering interference with Article 8, the family unit had to be considered as a whole, and each family member had to be regarded as a victim. I consider that this is equally the position in the context of extradition (p.512).
> >
> > "65. Indeed, in trying to envisage a situation in which interference with Article 8 might prevent extradition, I have concluded that the effect of extradition on innocent members of the extraditee's family might well be a particularly cogent consideration. If extradition for an offence of no great gravity were sought in relation to someone who had sole responsibility for an incapacitated family member, this combination of circumstances might well

> lead a judge to discharge the extraditee under section 87 of the 2003 Act"(p.512)."

Decision.

[27] Having decided the question in s20(3) in the affirmative I have to consider the human rights issue contained in s21 of the Act. It is not easy to avoid extradition on this ground. I took account of the strong and weighty public interest in favour of extradition, so that the UK, is seen to fulfil its international obligations and to prevent criminals achieving safe haven in this jurisdiction.

[28] I considered the gravity of the offence committed and concluded this while not trivial, it did not involve serious crime, on the scale of criminality that courts see regularly, although I was careful to avoid trivialising the offence or the sentence imposed by the Polish court. RM, gave evidence, that the sum of money defrauded was a lot of money by Polish standards, in 2007. However, the sentence was at the low end of the sentencing scale for this crime. Notwithstanding that, the sentence of the Polish court is entitled to be respected. I took that into account. I also took into account, counsel for the Lord Advocate's submission, that half remission would likely apply to the sentence.

[29] Mr Mackintosh QC, said the public interest wanes with the passage of time. However, I found RM to be a fugitive from justice, so I did not consider that the passage of time weighed in his favour in the balancing exercise although it did influence my judgement when looking at the case and balancing the equities from the perspective of the 4 most dependent children.

[30] I considered the question of hardship. In extradition cases there is always hardship if extradition is granted. Lives are disrupted. Pain is caused. It is inevitable in these cases. In this case, it may only be for 3 months. However, I thought it likely RM would lose his job

that he had worked hard at for 10 years, if extradited and incarcerated abroad. If that happened, I considered that EM did not have the skills to find a job that paid an equivalent wage. I judged that the family, with no savings, would likely go on benefits until RM returned to the UK, if he qualified for a visa.

[31] I considered the Brexit uncertainty point. I concluded there would be distress and anguish for RM not knowing whether he would be allowed access to the UK after he served his sentence. However, if that happened, it was not Brexit, which caused his extradition but his own conduct and flight from Poland when there was a live case against him, so I attached no weight to that aspect of the case from his perspective.

[32] If RM was a single man, with no dependents or a man with dependents facing a higher sentence, in my opinion, the balance would have come down clearly in favour of extradition.

[33] In relation to the proportionality assessment, when examined from the perspective of his 6 dependents, to my mind, a material factor is the length of sentence to be served which might be 90 days with remission. As RM will be incarcerated abroad, I considered it likely he would lose his job. Albeit, I accepted he had done well in his position with the foundry he is not irreplaceable. However, he is clearly a grafter and the only breadwinner in the family. There would be hardship suffered by the children following the loss of income but that is inevitable and does not bar extradition, in the main. Then, there is Brexit uncertainty looked at from their perspective. That, was an objective factor I took into account in the balancing exercise. I was conscious it was not possible to say definitively what would happen after RM was released from prison, if extradited and whether he could get an entry visa to return to the UK. However, from the perspective of the dependents, especially the children, there is a real risk that the family will be split. I believed EM, when she said she

would not take the children out of school in Scotland and relocate them in Poland because they cannot speak Polish adequately. I also believed her when she said that her marriage of 20 years would be over because her husband would be separated from the rest of the family. I considered the combination of factors, to be such that, on balance, I did not consider the serious and weighty public interest that extraditees must be returned to do their sentence, unless there were exceptional circumstances, was such, that it required to be vindicated in this case, to the point of potentially fracturing this family, standing the passage of time from the commission of the crime, some 14 years, (when examined in the context of the dependents' Article 8 rights), the gravity of the offence and the length of the likely sentence to be served, with remission. I gave some but not determinative weight to the Brexit uncertainty point. I considered that the vindication of the public interest, while always a legitimate aim in extradition matters, including this one, produced a disproportionate result, if the family was broken or the children had to relocate to Poland where they cannot read or write Polish, proficiently. Obviously, if it came to that, they could all learn. Children are quick language learners and resilient but the fact of the matter is I accepted that they are all settled at school and doing well here. I was conscious of the observations of Judge J in *HH* where he said:

> "125…….Self-evidently theft by shoplifting of a few items of goods many years earlier raises different questions from those involved in an armed robbery of the same shop or store: possession of a small quantity of Class C drugs for personal use is trivial when set against a major importation of drugs. Equally the Article 8 considerations which arise in the context of a child or children while nearly adult with the advantages of integration into a responsible extended family may be less clamorous than those of a small baby of a single mother without any form of family support. Ultimately what is required is a proportionate judicial assessment of sometimes conflicting public interests."

[34] There are conflicting public interests in this case. Every case is fact specific. However, the combination of factors here, especially, when examined against the level of sentence likely to be served and the potential for family fracture (though it is impossible to quantify this but it is a serious possibility not a fanciful speculation), marriage breakdown and the consequences for the dependent school children, if separated from their father, or the damage to their education, if instead, they are relocated to Poland, struck me as, not just an unfortunate but inevitable necessary consequence of the enforcement of a legitimate public interest but rather, this extradition, if granted, crossed a line and became a disproportionate infringement of the dependents right to a family life, with father and spouse. This conclusion, is not one I would have reached if the sentence to be served was materially higher, even taking account of the dependents circumstances and the consequences for their family life.

[35] Accordingly, I conclude that in this case extradition is disproportionate and answer the question posed in s21(2) of the Act in the negative and discharge RM.