



Neutral Citation Number: [2022] EWHC 2725 (Admin)

Case No: CO/2151/2020

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

In the matter of an Appeal under Section 26 of the Extradition Act 2003

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2022

Before :

MR JUSTICE LANE

Between :

SYLWESTER HOJDEN

Appellant

- and -

**DISTRICT COURT, GORZOW, WIELKOPOLSKI,
POLAND**

Respondent

Mr Malcolm Hawkes (instructed by **Langfield Law**) for the **Appellant**
Ms Hannah Burton (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing date: 5 October 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on 4 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html>).

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MR JUSTICE LANE

Mr Justice Lane :

A. INTRODUCTION

1. The appellant appeals with permission against the decision of District Judge Ezzat on 9 June 2020 to order the appellant's extradition to Poland, in order to serve a sentence of 1 year six months imprisonment in respect of three offences of theft from motor vehicles, committed between 30 and 31 July 2015. The appellant and his brother broke the windscreen of a vehicle and stole items from it. These included car keys to a second vehicle, which they entered, stealing various items including a laptop computer, a smartphone, personal documentation and debit cards. The appellant and his co-defendant also broke the windscreen of a third vehicle and stole various items from it.
2. According to the judgment of the District Judge, the appellant was interviewed about the offences of 9 December 2015 and held in pre-trial detention between 6 and 12 July 2017. He was interviewed again on 12 July. He denied the offences. He was placed under an obligation to report once a week to the police. That condition came to an end on 16 May 2018. According to the appellant, however, he came to the United Kingdom in August 2017.
3. The sentence of 18 months imprisonment was imposed on 13 September 2018, becoming final on 9 October 2018.
4. The appellant was required to surrender to that sentence on 14 November 2018, but failed to do so. Accordingly, an EAW was issued on 18 September 2019, once it had been established that the appellant had left Poland.

B. THE HEARING BEFORE THE DISTRICT JUDGE

5. Before the District Judge, the appellant (who was not then represented by Mr Hawkes) raised a single ground; namely, section 21 of the Extradition Act 2003/Article 8 of the ECHR. The appellant's case was that his extradition would constitute a disproportionate interference with his (and, presumably, his family's) right to respect for private and family life.
6. The appellant adopted his proof of evidence. He confirmed that he had come to the United Kingdom in August 2017 "to work and to support my family". His Polish partner and his daughter joined the appellant in the United Kingdom in the summer of 2018. They now have a second daughter, born in the United Kingdom.
7. The appellant said that "the only offences I committed in Poland were ...the offences in the Warrant which is theft from three motor vehicles during one night on 30 July 2015. I regret these offences".
8. The appellant went on to say that his elder daughter was sickly and, since she needed special powdered milk that was expensive, he "committed the offences out of desperation". He said that when he was apprehended "I admitted my crime. I eventually

received a sentence of 18 months. My brother also received the same sentence but his was suspended and mine was not”.

9. The appellant told the District Judge that he found out about the sentence in September 2019, from his brother. Prior to the sentence he had paid restitution for the offences. The appellant “had thought that the sentence would be suspended as it was my first offence”.
10. In an addendum proof of evidence, the appellant said that there was an error in his previous proof. Instead of reading “I did admit my guilt”, it should have read “I did not admit my guilt”. The appellant had paid compensation through his brother after he learned of his sentence.
11. The District Judge also heard evidence in the form of an unchallenged statement from the appellant’s partner. She said that the appellant “regrets the fact that he stole items from vehicles in Poland”. She did not plan to return to Poland as “we are settled in the UK and I pray [the appellant] is [allowed] to stay here with us”.

C. THE DISTRICT JUDGE’S JUDGMENT

12. At paragraph 18 of his judgment, the District Judge noted that most of the evidence given by the appellant was unchallenged. It was common ground that the effect of extradition “will be negative“. On balance, so far as concerned the issue of the appellant’s knowledge of the proceedings, the District Judge said he was “more inclined to accept the timeline as set out by the [respondent]”.
13. From paragraph 22, it is clear that the District Judge was sceptical of the appellant’s evidence that part at least of the reason why he did not receive letters from the police concerning the offence was that he had been “deregistered from his parent’s address”. The District Judge noted that “despite ample opportunity to obtain proof supporting this assertion, none has been put before the court”.
14. At paragraph 23, the District Judge concluded that the appellant “knew of the proceedings” before the point at which he said that his brother had told him about a sentencing hearing, to be held the following day.
15. At paragraph 25, the District Judge reminded himself of the case of Polish Judicial Authorities and Celinski and others [2015] EWHC 1274 (Admin). At paragraphs 27 to 31, the District Judge set out the factors in favour of extradition. As regards the public interest in extraditing those convicted of crimes, in order to serve their sentences, the judge specifically noted that the weight to be accorded to that interest “varies according to the nature and seriousness of the crime involved”. He considered that the crimes in the present case were “not the most serious”.
16. At paragraph 28, the District Judge said that the United Kingdom should honour its international obligations and should not become a safe haven for fugitives. Mr Hawkes particularly relies upon this passage.
17. At paragraph 29, the District Judge noted the observations from the judgment of Lady Hale in HH v Deputy Prosecutor of the Italian Republic [2012] UK SC 25, that it is

likely the public interest in extradition would outweigh Article 8 rights “unless the consequences of the interference of family life will be exceptionally severe”.

18. At paragraph 30, the District Judge noted that the appellant had been living in the United Kingdom for only a relatively short period of time and his family had been living in this country for even less time. The appellant’s partner had demonstrated she had been able to care for their elder daughter whilst the appellant and she had been apart. At paragraph 31, the District Judge considered that, although during that time the appellant was providing financial support to his partner and daughter, “this demonstrates that [the appellant] and [his partner] are adaptable and have made pragmatic choices in order to raise their family even if that means them living in different countries for an extended period of time”.
19. At paragraphs 32 to 37, the District Judge set out the factors militating against extradition. The offences were of some age and were not of the most serious nature. The District Judge noted that the appellant “has no previous convictions in the UK or elsewhere, other than the matters to which Poland is seeking his return”. The appellant had remained in full time employment for the past twenty months and was the sole provider in terms of income for the family. If extradited, the appellant’s partner would struggle to continue with her life in its current form. That was not, the District Judge considered, “in any way different to most families should they lose a key member, especially if that key member is the main breadwinner”. Changes would have to occur in the family setup “that may include relocation”. In paragraph 36, the District Judge went on to say that this “may result in them having to move back to Poland”. The appellant had lived in the United Kingdom for less than two years. The elder daughter had lived most of her life in a country other than the United Kingdom and the younger daughter was of an age when she would have no real comprehension of the country that she is in. The District Judge noted that the financial impact on the family “is likely to be considerable”, particularly since the partner did not work.
20. At paragraphs 38-45, the District Judge set out the reasons why he had decided that extradition would not be a disproportionate interference with Article 8 ECHR. He said that it was not for him to determine whether the appellant “was acting nobly when he broke into cars in July 2015” in order to provide for his family. It was not for Westminster Magistrates’ Court to go behind the sentence imposed in Poland.
21. At paragraph 39, the District Judge noted that both the appellant and his partner had chosen to settle in the United Kingdom “knowing that he had outstanding criminal matters in Poland”. He also considered that they “chose to have a second child in the knowledge that the matter in Poland was unresolved”. Mr Hawkes makes criticism of that last finding.
22. At paragraph 40, the District Judge emphasised that he did not make light of the struggles that the appellant’s partner would face in raising her children without the appellant’s support for the period when he was serving his sentence. Such difficulties were not, however, insurmountable. Despite the age of the parents of the partner, the District Judge did not consider that they could be ruled out “as a source of strength and support” during that time.
23. At paragraph 42, the District Judge had specific regard to the position of the appellant’s daughters, albeit that “the point has not been laboured” before him. The elder daughter

had received medical care in Poland as well as in the United Kingdom and could continue to receive such care if she were to return to Poland.

24. At paragraph 44, the District Judge considered to be “most revealing” the appellant’s statement in his proof of evidence that he “came to the UK to work and did not come to avoid justice. I had thought the sentence would be suspended as it was my first offence”.
25. The District Judge considered that this showed the appellant “chose to establish and build a life in the UK with his partner knowing that the criminal charges were unresolved”. Accordingly, at paragraph 45, the District Judge concluded that the effects of extradition would not be so grave as to constitute a disproportionate interference with Article 8 ECHR Rights.

D. EVIDENCE ETC THAT WAS NOT BEFORE THE DISTRICT JUDGE

26. On 3 October 2022, the appellant applied to adduce fresh evidence. This included further proofs of evidence from the appellant; a Poland country fact sheet September 2022; the ECtHR enhanced supervision report in respect of deficiencies in the criminal justice system in Poland; a Home Office publication of 29 June 2022 entitled EU Settlement Scheme: suitability requirements (Version 8.0); a report of the Polish Helsinki Committee of July 2020 and that Committee’s submission of 2019 to the European Court of Human Rights; and the appellant’s bail conditions (showing him to be subject to electronic curfew).
27. Insofar as the appellant’s further proofs of evidence seek to deal with his present circumstances, there is no impediment to them being relied upon by the appellant on appeal, provided that they would have resulted in the District Judge deciding the relevant question differently and ordering the appellant’s discharge (section 27(4)(b) and (c)). They therefore fall to be considered *de bene esse*, pending resolution of that matter.
28. The appellant’s further proofs also seek to deal with an International Conviction Certificate relating to the appellant. This Certificate is a document upon which the respondent seeks to rely. It was filed with Westminster Magistrates’ Court and served on the appellant on 16 April 2020. It does not, however, appear to have found its way to the District Judge. Had it done so, the District Judge would have been bound to have referred to it, for the reasons I shall give.
29. The hurdles set by section 27 of the 2003 Act, and the related case law concerning the circumstances in which fresh evidence can be admitted, do not apply to the respondent: see paragraphs 31 to 40 of FK v Germany [2017] EWHC 2160 (Admin). The respondent must, however, in practise satisfy this court that is in the interests of justice to admit fresh evidence tendered by it.
30. I am in no doubt that it is in the interests of justice for the International Conviction Certificate to be admitted. Despite the appellant’s assertions before the District Judge that the extradition offences were the first offences he had committed in Poland or anywhere else, the International Conviction Certificate shows that to be a lie. The appellant has six convictions in Poland, including the matter giving rise to the EAW. The other convictions relate to offences of burglary, theft, misappropriation of movable

property and falsification of documents committed between 2012 and 2017. It appears from the Certificate that the offences giving rise to the EAW were committed during the course of a suspended sentence imposed in respect of a conviction of the appellant for theft, after unlawful entry into property. As Mr Hawkes accepted, to determine this appeal in the absence of the International Conviction Certificate would be wholly unjust.

31. In an unsigned witness statement of 3 October 2022, the appellant says that it was “incorrect” to say in his proof of evidence of 18 May 2020 that “the only offences I committed in Poland were the offences in the warrant which is theft from three motor vehicles during one night on 30 July 2015”. The appellant says that he has “recently been provided by a Certificate of Convictions from Poland which shows 6 in total including the offences concerning the EAW which is shown as conviction 6”.
32. The effect of the appellant’s earlier dishonesty on this issue has been profound. Amongst other things, it has caused Mr Hawkes, in his skeleton argument of 20 September 2022, to proceed on the mistaken basis that what the appellant had said in evidence to the District Judge on this subject was true.
33. In his submissions to me, Mr Hawkes questioned whether there might be errors in the Certificate. It is, however, not credible that the Certificate would be so defective as to impute to the appellant a whole range of offences that he did not commit.
34. So far as concerns problems with the Polish criminal justice system, I agree with Mr Hawkes that the appellant is entitled to refer to the pilot judgment of Rutkowski v Poland (App nos 72287/10, 13927/11 and 46187/11) of October 2015. This is judicial authority, rather than evidence. Some, but not all, of the other materials sought to be introduced on this subject post-date the District Judge’s judgment.
35. In the particular circumstances of this case, it would have been potentially confusing to have had regard to some but not all of the materials on the issue of delays in the criminal justice system in Poland. In order to enable the appellant to deploy his case effectively, I admitted all the documents *de bene esse*. However, for the reasons I shall give, I do not consider that, upon analysis, they would have caused or contributed to a finding that the District Judge should have answered the Article 8 question differently and discharged the appellant.
36. Given that the appellant had seen fit to raise section 14 of the 2003 Act as a ground of appeal and had been granted permission on that ground, the CPS sought additional information from the authorities in Poland. In the circumstances, I considered that it was in the interests of justice to admit this material.

E. DISCUSSION

(1) Section 14

37. Mr Hawkes puts the section 14 ground on the basis that the District Judge did not make a finding to the criminal standard that the appellant was a “fugitive”, in the sense described by Lloyd-Jones LJ in Wisniewski and others v Poland [2016] [EWHC] 386 (Admin).

38. The problem with this, however, as Mr Hawkes accepts, is that the starting point for determining whether delay has had an oppressive or unjust effect is – in the case of a conviction *in absentia* - when the person concerned became unlawfully at large. In the present case, that was 14 November 2018. This interpretation of section 14 emerges from the judgment of the Supreme Court (Lord Lloyd-Jones) Konecny v District Court in Brno-Venkov, Czech Republic [2019] UK SC8.
39. Since the appellant admitted to the District Judge that he had committed the offences in respect of which extradition is sought, he has no case for contending that any delay between 14 November 2018 and the District Judge’s judgment on 9 June 2020 could have caused injustice. Nor could that delay have caused the appellant’s case to reach the high threshold, whereby his extradition would be oppressive. Although, during the period in question, the appellant and his partner had had a second child, that that did not fundamentally alter the nature of the family life which previously existed between the appellant, his partner, and their elder daughter.

(2) Article 8 ECHR

40. As paragraph 57 of the judgment in Konecny makes plain, however, the issue of delay in a non-fugitive case can be addressed in considering whether extradition would constitute a breach of Article 8 ECHR. That is how Mr Hawkes proceeded to put the appellant’s case in this appeal.
41. Given that section 14 was not raised as a ground before the District Judge, it is unsurprising that he did not make a specific finding, to the criminal standard, on the narrow issue of fugitivity. That did not, however, prevent the District Judge, in carrying out the holistic Article 8 balancing exercise, from having regard to aspects of the evidence which pointed clearly to the appellant having contributed to the delay between the commission of the offences and the extradition hearing. After hearing the appellant give evidence, the District Judge made a finding of fact that the appellant’s reporting obligations came to an end in May 2018 (paragraph 21 of his judgment). Since the appellant arrived in the United Kingdom in 2017, it follows that he did so in breach of those reporting obligations, with obvious consequences concerning the progression of his case in Poland.
42. At paragraph 23 of his judgment, the District Judge noted the appellant’s assertion that he had come to the United Kingdom in order to work and “not to avoid justice. I thought the sentence would be suspended...”. Since we now know that the appellant had a significant number of previous convictions, and that the EAW offences were more likely than not committed during the currency of a suspended sentence, the District Judge would have been bound, in my view, to have made an even stronger finding against the appellant on this issue. The International Conviction Certificate shows that the appellant had the clearest motivation for leaving Poland before he was dealt with in respect of the EAW offences. The disparity between his sentence and that given to his brother and co-defendant – far from being a reason for puzzlement or complaint on the appellant’s part – can now be seen to have a compelling justification.
43. Mr Hawkes’ criticises the District Judge for not making a finding whether the appellant committed the EAW offences in order to obtain money to purchase special food for his daughter. But this criticism is undermined by the belated revelation of the full extent of the appellant’s criminal behaviour in Poland. That behaviour also undermines the

appellant's attempt to portray the EAW offence as, in any event, a minor infraction. Although the District Judge correctly categorised the offence as not being the most serious, he found it still serious in nature. Not only was that right; seen in its true context, the EAW offending represents the continuation of a pattern of criminal behaviour on the part of the appellant which is plainly serious, when viewed from an international standpoint. In all the circumstances, therefore, the appellant can derive no assistance from the observations of Lady Hale at paragraph 45 of HH or from the judgment of this court in Lipski v Poland 1220 [EWHC] 1257 (Admin), which encourage a comparison between the EAW offending and "other conduct on the [international] spectrum of criminal behaviour" (Fordham J at paragraph 43).

Future delay

44. I turn to the question of future delay. As explained earlier, I have had regard to the cases and materials concerning delays in the criminal justice system in Poland.
45. Mr Hawkes submits that there is, at least, a real prospect of the appellant being entitled to a retrial, if extradited, in view of the fact that he was convicted in absence. Despite the statements in the recent materials emanating from Poland, which indicate that this point is not clear-cut, I shall assume that there is such a right.
46. I agree, however, with Ms Burton that it is no more than speculation whether there will be any significant further delay in the appellant's case. Whether or not he has a right to a re-trial, the appellant has not put forward any explanation why, given that he admitted the offences to the District Judge (albeit pleading mitigating circumstances, which must now be viewed with intense scepticism), he would insist upon a full retrial. If he were merely to seek to have the sentence revisited, he has produced no evidence to show that, despite the difficulties in Poland, a re-sentencing hearing is likely to take a significant amount of time.
47. In the period starting with the commission of the EAW offences, the appellant has established a private and family life in the United Kingdom. I am satisfied that the District Judge correctly analysed the appellant's private and family life (and that of his partner and children); and that the District Judge's conclusions were sound. In short, there would be hardship to the family if the appellant were extradited but that hardship would not be so severe as to constitute a disproportionate interference with Article 8 Rights. In reaching that conclusion, the District Judge found that the entire family would be able to go to Poland.
48. The appellant raises two matters, which were not part of his Article 8 case, as advanced before the District Judge. I must consider whether either or both of these, in combination with other factors weighing on the appellant's side of the balance, would have caused the District Judge to have reached a different conclusion on Article 8, and so discharged the appellant.

Curfew

49. The first matter is the electronic curfew, imposed upon the appellant as a bail condition. It is uncontroversial that a curfew of less than 9 hours' duration (which is the position here) can play a part in deciding whether extradition would violate Article 8, even though the curfew would not have a direct impact on sentencing, were the person

concerned to be sentenced for the EAW offending in this jurisdiction: Einkis v Lithuania [2014] EWHC 2325 (Admin). In the present case, Mr Hawkes places considerable emphasis on the fact that the curfew has been in place for some 2 years and seven months.

50. The significance to be afforded to curfew conditions will vary, depending on all the circumstances. Where there is evidence that a curfew has had a material effect on a person's ability to work or study or to maintain a family life, it is likely to be afforded greater weight than where the effect has merely been to prevent late-evening socialising. Even in the latter scenario, a long-standing set of restrictions may make the difference, if the case would otherwise be finely balanced. The present case is not, however, of this nature. The public interest in extradition is strong, particularly in the light of the true nature of the appellant's offending. The factors weighing in favour of the appellant are, conversely, of no great weight. In this regard, the District Judge made, as I have said, the important finding that the appellant's family could go to Poland, in order to minimise the effects of separation.

“Brexit uncertainty”

51. I turn to the issue which Mr Hawkes categorises as “Brexit uncertainty”. A good deal of case law has rapidly accumulated on this topic: Antochi v Germany [2020] EWHC 3092 (Admin); Rybak v Poland [2021] EWHC 712 (Admin); Pink v Poland [2021] EWHC 1238 (Admin); Piekarski v District Court in Lublin, Poland [2022] [EWHC] 1088 (Admin); and Gurskis v Latvian National Authority [2022] EWHC 1305 (Admin).
52. Whilst the United Kingdom was a member of the European Union, it was subject to Directive 2004/A/EC) on Citizens' Free Movement. In this country, effect to that Directive was given by domestic Regulations, of which the last composite set were the Immigration (European Economic Area) Regulations 2016.
53. Freedom of movement into the United Kingdom in order to work, job-see, study etc was not unqualified. In particular, Article 27 of the Directive enables Member States to restrict the freedom of movement and residence of Union citizens and their family members, on grounds of public policy, public security or public health. Measures taken on grounds of public policy or public security have to comply with the principle of proportionality and be based exclusively on the personal conduct of the individual concerned. Article 27 further specifically provides that “previous criminal conviction shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”.
54. Accordingly, whilst the United Kingdom was a member of the EU, a Union citizen who had been extradited from the United Kingdom to the country from which that citizen had come, could exercise their right of free movement in order to re-enter the United Kingdom, subject only to exclusion on the grounds described by Article 27 (as implemented by regulation 27 of the 2016 Regulations).
55. Now that the United Kingdom is no longer a member of the EU, this country can set its own conditions for entry or re-entry by Union citizens because the latter no longer have a right of free movement to the United Kingdom. Those conditions can be more

restrictive than the regime contained in the 2004 Directive and the former Regulations. Importantly, however, they must not be contrary to the ECHR; in particular, Article 8.

56. The fact that the immigration rules have, in recent years, been drafted so as to take account of ECHR rights does not mean that those rules should be regarded as a complete code: Hesham Ali v Secretary of State for the Home Department [216] UKSC 60. As a result, there is still scope for a person to make a case for re-entry outside the immigration rules, relying upon Article 8 ECHR.
57. Originally, the focus of “Brexit uncertainty” was, as the label suggests, upon the fact that it was not clear how the Secretary of State for the Home Department would exercise her powers under the Immigration Act 1971 to make immigration rules affecting EU citizens’ ability to enter the United Kingdom, after the end of the transition period on 31 December 2020: see paragraphs 49 and 50 of Antochi. Arguments based on “Brexit uncertainty” have, however, continued to be advanced in the extradition jurisdiction, with the focus now being on the question of whether the individual, if extradited, would be likely to be permitted by the Secretary of State for the Home Department to re-enter the United Kingdom at the end of their sentence, having regard to current immigration rules and other policy. That is, however, a question which has always been relevant, given the terms of the 2004 Directive and the domestic Regulations, just as it has always been relevant in the case of category 2 countries under the 2003 Act.
58. Nevertheless, in the case of EU citizens (and citizens of other countries that operate by reference to EU free movement rights), the question has achieved greater practical significance because of the new ability of the Secretary of State for the Home Department to prevent the re-entry into the United Kingdom of a person whose criminality would not have made him or her fall foul of Articles 23 and 27 of the Directive and the related domestic Regulations.
59. Swift J made the above points at paragraphs at paragraphs 15, 16 and 31 of Gurskis. He also made the important point that if an individual wishes to raise their immigration position as an issue to be considered in the Article 8 balance, then they must do so in a way that is “fully formulated, takes account of all relevant statutes, regulations and immigration rules, and that relevant authority is provided to the court” (paragraph 22). If they ever existed, the days when it was sufficient merely to refer to “Brexit uncertainty” in order to have it added to the Article 8 mix are over.
60. Even if it is properly advanced, it is perhaps doubtful whether the immigration issue is one that will carry significant weight of its own, as opposed to being a factor that could make the difference in cases that are otherwise finely balanced. True it is that the less the prospect of being able to return, the greater may be the likely interference with private and family life. However, to the extent that the prospects of return are dependent upon (a) the operation of immigration rules that are themselves based on the seriousness of the criminal offending; and/or (b) the operation of Article 8 outside those rules, the overall balance might not, in the end, be significantly affected. This is because, as a general matter, the greater the seriousness of that offending, the stronger the public interest is likely to be in extradition.
61. There is also the consideration identified by Swift J in Gurskis concerning what he described as:-

“the counterfactual – i.e., the likelihood that, absent extradition, the foreign conviction could provide grounds for immigration removal. In some instances, there may be a difference between a scenario in which an extradition order is made and the counterfactual. There may be situations where if no extradition order is made no interference with Article 8 Rights would be likely for any other reason. When that is so the Article 8 analysis must take account of that difference. But other cases may make good what Chamberlain J suspected in his judgment in *Pink* - that interference with Article 8 Rights may be the same whether or not the extradition order is made. (paragraph 33).”

62. In the present case, Mr Hawkes sought to rely upon the EU Settlement Scheme Suitability Requirements (version 8.0), published for Home Office staff on 29 June 2022:

“Referral to Immigration Enforcement

This section tells you when an application under the EU Settlement Scheme is to be referred from UK Visas and Immigration (UKVI) to Immigration Enforcement. Where the result of the check of the Police National Computer (PNC), Warnings Index (WI) or immigration records indicates that:

For conduct committed either before or after 11pm on 31 December 2020:

- the applicant has, in the last 5 years, received a conviction which resulted in their imprisonment
- the applicant has, at any time, received a conviction which resulted in their imprisonment for 12 months or more for a single offence (it must not be an aggregate sentence or consecutive sentences)
- the applicant, in the last 3 years, has received 3 or more convictions (including convictions that resulted in non-custodial sentences) unless they have lived in the UK for 5 years or more. At least one of these convictions must have taken place in the last 12 months and at least one of these convictions must be in the UK
- the case is of interest to Criminal Casework in respect of deportation or exclusion, for example where the applicant is in prison and the case is awaiting deportation consideration
- the applicant has entered, attempted to enter or assisted another person to enter or attempt to enter into a sham marriage, sham

civil partnership or durable partnership of convenience (or IE is pursuing action because of this conduct)

- the applicant has fraudulently obtained, attempted to obtain or assisted another person to obtain or attempt to attempt to obtain a right to reside in the UK under the EEA Regulations 2016, as saved, (or IE is pursuing action because of this conduct)
- the applicant has participated in conduct that has resulted in them being deprived of British citizenship

For conduct committed after 11pm on 31 December 2020:

- the applicant has committed a serious harm offence which resulted in a non-custodial sentence

A sentence of imprisonment does not include a suspended sentence (unless a court subsequently orders that the sentence or any part of it, of whatever length, of whatever length is activated).

UKVI must refer the case to IE for a case by case consideration as to whether or not the individual in question ought to be deported or excluded.”

63. Mr Hawkes submitted that, in the case of the appellant, he would not be referred to Immigration Enforcement for deportation because he had not “in the last five years received a conviction which resulted in [his] imprisonment”. Although the appellant had been sentenced to 1 year 6 months imprisonment in Poland, he had not served any part of that sentence.
64. I reject that interpretation. It is plain that the reference to imprisonment is to a sentence of immediate imprisonment, as opposed to a suspended sentence. If that were not so, it is difficult to see the point of the paragraph which begins “A sentence of imprisonment does not include a suspended sentence...”.
65. Furthermore, as Swift J held at paragraphs 26 and 32 of Gurskis, the immigration rules are used by the Secretary of State for the Home Department as a guide to deciding whether a foreign conviction and sentence of imprisonment will lead to deportation (my emphasis).
66. I therefore consider that, if the appellant were not to be extradited, he is likely to face deportation action by the Secretary of State.
67. Let me, however, assume I am wrong about that. In this scenario, the appellant’s criminal offending would not result in his deportation. But extradition would place him outside the United Kingdom, with the likelihood that he will not be permitted re-entry under the immigration rules. His ability to rely on Article 8 ECHR to gain entry outside those rules will need to be considered by reference to his family and private life as it is at that time. At that point, however, the Article 8 case may be weaker than it is now, because of the effects of separation occasioned by extradition.

68. On the basis of the facts found by the District Judge, this scenario does not, however, represent reality. The District Judge found that, if the appellant is extradited, his partner and children can go to Poland. The District Judge was fully entitled to that conclusion. In the light of it, the immigration position of the appellant could not have led the District Judge to discharge the appellant, either alone or by reference to other factors. The only difference is that the appellant will be imprisoned and so physically separated from his family in Poland; whereas if not extradited he will not be subject to imprisonment. Given the nature of the offending and the importance of giving effect to this country's international obligations in the extradition realm, I am in no doubt that such a difference cannot enable the appellant to succeed by reference to Article 8.
69. This appeal is dismissed.