Neutral Citation Number: [2022] EWHC 660 (Admin)

Case No: CO/959/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/03/2022

Before

MR JUSTICE SWIFT

- -

Between :

MAREK JAKUBOWSKI — **Appellant**

- and –

REGIONAL COURT IN BIALYSTOK III CRIMINAL DIVISION, POLAND — **Respondent**

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- -

Graeme Hall (instructed by **Cheesemans Solicitors**) for the **Appellant**
Jonathan Swain (instructed by **CPS**) for the **Respondent**

Hearing date: 24 February 2022

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Approved Judgment

MR JUSTICE SWIFT

A. Introduction

1. This is an appeal against an extradition order made on 3 March 2020. The order rested on a European Arrest Warrant ("EAW") issued on 15 January 2015 and certified by the National Crime Agency on 16 February 2015.

2. The warrant is a conviction warrant which rests on four convictions.

   (a) The first (Case III K 274/96) occurred on 27 August 1997 and was a conviction for criminal damage committed in July 1996. The EAW states that Mr Jakubowski was present at the trial. He was sentenced to serve 1 year in prison. The sentenced was suspended for 3 years, but on the 20 December 2000 was activated by reason of further offending.

   (b) The second conviction (Case III K 603/00) occurred on 8 June 2000. Mr Jakubowski was convicted of driving when disqualified. That offence occurred in September 1999. Mr Jakubowski was sentenced to 4 months in prison, and the sentence was "adjourned" on grounds of Mr Jakubowski's health. But in October 2006 the sentence was activated. The EAW states that Mr Jakubowski was present at trial when he was convicted and sentenced.

   (c) The third conviction (Case III K 2131/01) was on 27 January 2003. The offence had been committed in February 2001 and is described as an offence of theft aggravated by threats to the shopkeeper with a razor. Mr Jakubowski was sentenced to serve 1 year in prison. The sentenced was "adjourned" to June 2004 by reason of Mr Jakubowski's health. The EAW explains that Mr Jakubowski failed to collect the summons that subsequently required him to surrender to serve the sentence. In respect of this offence too, the EAW states that Mr Jakubowski was present at trial.

   (d) The fourth conviction (Case III K 1793/05) resulted in a sentence of 2 years 2 months in prison. This too was an offence of theft aggravated by threats made to the shopkeeper, this time using a knife. One year and 330 days of that sentence remains to be served. The EAW again states that on this occasion Mr Jakubowski was present at his trial.

3. The present EAW is the second warrant issued in respect of these matters. The first warrant was issued on the 14 September 2007 and was certified by the National Crime Agency on 6 December 2010. Mr Jakubowski was arrested pursuant to that warrant on the 4 August 2014. However, that warrant was then withdrawn because it did not comply with amendments made to the Framework Decision that had come into force between the date the warrant was issued and the date it was certified.

4. At the extradition hearing Mr Jakubowski contested extradition on two grounds: *first* that his extradition was barred by section 20 of the Extradition Act 2003 ("the 2003 Act"); *second*, that extradition would be a disproportionate interference with his ECHR article 8 rights. The judge found against Mr Jakubowski on both issues. Both are now pursued on this appeal.

B. The section 20 ground of appeal

(1) General points

5. Section 20 of the 2003 Act aims to ensure that a convicted person will not be surrendered to serve a sentence of imprisonment passed in circumstances that breached the requested person's right to be present at trial and defend himself. Section 20 poses a series of questions. The first is whether the requested person was present when convicted. If he was not, the court must then decide if the requested person deliberately absented himself from the trial. If he was absent but did not deliberately absent himself, the court must decide whether the requested person would on surrender, be entitled to a retrial or some form of equivalent review.

6. It is well established that section 20 of the 2003 Act is intended to give effect to article 4a of the Council Framework Decision of 13 June 2002 (2002/584/JHA, "the Framework Decision"), and that article 4a of the Framework Decision is to ensure protection of ECHR article 6 rights. This point was made by Irwin LJ in his judgment in *Szatkowski v Regional Court in Opole, Poland* [2019] 1 WLR 4528

> "30. Section 20 of the Act represents the domestic legislature's reflection of Article 4a(1). That said, it is plain that the terms of section 20, and in particular the terms of section 20(5) and (7) of the Act are not congruent with the terms of Article 4a(1). That brings into play the principle of conforming interpretation. It is therefore the obligation of the English Court, to interpret section 20 so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues.
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> 31. In our judgment the result that is pursued by Article 4a(1) is self-evident: it is to make provision to ensure that the Article 6 rights of a person who is potentially subject to extradition because of a trial at which he was not present are protected. This is replicated to a substantial extent by the terms of section 20. The first question under both the Article and the Act is whether the appellant was present at his trial. If he was not, there are potential Article 6 concerns. Those concerns are met if he was deliberately absent and the procedure then follows that laid down by section 21. If he was not deliberately absent then there are potential Article 6 concerns unless there has been or will be provision for a retrial. Article 4a(1)(c) deals expressly with the position where there was past provision for an effective retrial; Article 4a(1)(d) separately makes express provision for a future effective retrial. S. 20 does not expressly distinguish or discriminate between past and future effective retrials: in other words, it does not expressly replicate the separate provisions of Article 4a(1)(c) and (d)."

7. On the facts of that case, the court interpreted section 20 as not providing a bar to extradition in circumstances where the requested person had been convicted *in absentia* and would not be entitled to a retrial on surrender but had already, after being served with the trial decision, failed to exercise a right to retrial or appeal. At paragraphs 33 and 34 Irwin LJ stated as follows:

> "33. The clear intent section 20 of the Act is to give proper protection to the appellant's Article 6 rights. That intent cannot reasonably be said to be "contradicted" by an interpretation which allows a person to be extradited, when the only reason that he will not have the opportunity of a retrial on his return is that he had such an opportunity previously and chose not to take it. Nor is any guidance on this point to be gained from the fact that Parliament has not seen fit to amend section 20 in the light of Article 4a. On the basis that our conforming interpretation is correct, there was no need for amendment and it would be idle and irrelevant to investigate whether and if so why a decision not to amend was taken. In our judgment, for the reasons we have set out, the intent of Article 4a and Section 20 are essentially the same, so that an interpretation which leads to extradition on the facts of the present case goes with the grain of the legislation and does not contradict it. Indeed, the contrary reading would involve the absurd proposition that a potential extraditee can be returned if he has a right of appeal which he might waive, but cannot be returned if he has already waived it.
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> 34. We recognise that our proposed interpretation involves departure from the strict, literal or narrow interpretation of the words that the legislature has elected to use; and that it involves the implication of words necessary to comply with Community law obligations. But these are not impediments to conforming interpretation, as *Vodafone 2* makes clear … The necessary sense can be achieved economically, as Ms O'Raghallaigh herself recognised in her written submissions, so that the subsection can be taken by implication to read "…whether the person *was or* would be entitled to a retrial …""

The reference to the *Vodafone* case is to the judgment of the Court of Appeal [2009] EWCA Civ 446 at paragraph 37.

(2) The facts so far as they concern this part of the appeal, and the decision of the District Judge

8. The section 20 submission in this appeal concerns only the third conviction (Case III K 2131/01, of 27 January 2003). Mr Jakubowski was present at the trial when he was convicted and sentenced. That was in January 2003. He then appealed. He was present at the appeal hearing. No date has been provided for that hearing, but there is no dispute either that the appeal took place or that Mr Jakubowski was present when it did. The appeal failed. On both these occasions Mr Jakubowski was represented by court-appointed lawyers.

9. Those lawyers then made an application on his behalf to the Polish Supreme Court in its capacity as a cassation court ("the cassation appeal"). Very little information indeed has been provided about those proceedings. Neither I nor the District Judge was provided with a copy of the cassation appeal documents. Further information provided by the Requesting Judicial Authority (dated 29 April 2020) states that the appeal was rejected by the Supreme Court "*without the participation of the parties*" pursuant to Article 535 of the Polish Code of Criminal Procedure ("the PCCP"). The gist of the information seems to be that under the PCCP such applications were, as at 2005, considered first on the papers and that it was open to the court to reject an appeal at that stage if it considered the appeal to be "evidently groundless". If an application was determined to be groundless it was refused without more, and the Supreme Court did not give reasons for that decision. The 20 April 2020 further information stated in relation to the proceedings that, the Supreme Court dismissed the "*written cassation of the legal attorney for* [Mr Jakubowski] … *at the hearing on 5 May 2005 ...*" and that "*... the hearing took place without the participation of the parties so the parties had not been notified of the schedule date and they did not participate in that hearing ...*". The further information went on to explain that this was in accordance with the provisions of Article 535(2) PCCP, as then in force.

10. The submission for Mr Jakubowski is that the way in which the cassation appeal was conducted requires, for the purposes of section 20(1) of the 2003 Act, the conclusions: (a) that he was convicted in his absence, and (b) that he did not deliberately absent himself from the cassation appeal. It is then submitted that as the Requesting Judicial Authority has provided no information to the effect that on return Mr Jakubowski will be entitled to a retrial (i.e. a further opportunity to make the cassation appeal), section 20 of the 2003 Act is a bar to his extradition.

11. The District Judge dealt with the section 20 issue at paragraph 59 of his judgment in this way:

> "59. I am satisfied that:
>
> (i) In relation to that later appeal, I agree with the submissions made by Mr Swain that there is no evidence that what took place was an actual hearing as opposed to an adjudication by the court on the papers.
>
> (ii) Further and in the alternative, even if there was, in fact, an actual hearing, then I am satisfied that by summonsing MJ as is stated in paragraph 55 above, the Polish authorities had complied with their objections so as to take steps (per *Bialokowski* and *Stryjecki*) … *that would acquaint a non-evasive accused with the time and place of the trial.*
>
> (iii) MJ chose not to collect the summons, preferring to leave the country and failing in his obligation to inform the Polish authorities of his UK address.
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> (iv) MJ says that he was in Polish custody at the relevant time – apparently serving three months of the sentence imposed for Case 4 – and that, accordingly he was unable to collect the

> summons regarding the appeal. No corroborative evidence has been provided as to when he actually served that term. Even if this commenced on the date of sentence the Case 4 (i.e. 6 June 2005), he will have been released 1 September 2005 and there is no evidence that he made any effort to collect the summons upon or after his release from prison and before he left the country (according to him) sometime in October 2005. Furthermore, there is no corroboration of when he arrived in the UK.
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> (v) Since arriving in the UK, MJ has, on occasions, provided the UK police with alias names/dates of birth and place of birth (see paragraph 36 above)."

Thus, his first conclusion was that the proceedings on the cassation appeal did not offend any requirement within section 20. His alternative conclusion at (ii) – (v) was that if section 20 applied to those proceedings, Mr Jakubowski had deliberately absented himself from them.

(3) Decision

12. I do not consider the latter conclusion can stand. Mr Jakubowski was absent when the Supreme Court dismissed the cassation appeal but that was not because he had attempted to evade notice of the proceedings. Rather, the nature of the initial stage of a cassation appeal under Article 535 PCCP, as at 2005, was a process conducted on the basis of consideration of written representations only, to determine whether the case fell outside the category of "evidently groundless" applications. As Mr Jakubowski had not been asked to attend the court's consideration of the cassation appeal he cannot, on that occasion, be said to have deliberately absented himself.

13. So far as concerns the Judge's first conclusion, Mr Jakubowski did participate in the cassation appeal through written representations filed by his lawyers. That was in accordance with the usual process at the time for initial consideration of a cassation appeal by the Supreme Court. He did therefore participate in the cassation appeal to the full extent permitted under the PCCP.

14. The ground of appeal comprises the complaint that Mr Jakubowski should have been permitted to be present, and presumably participate by way of oral representations made by his lawyers, at the proceedings to determine whether or not the appeal was "evidently groundless". The question is whether that complaint engages section 20 of the 2003 Act, and if so how.

15. As already stated, section 20 of the 2003 Act is to be read and applied to give effect to article 4a of the Framework Decision. Article 1 of the Framework Decision requires Member States to execute EAWs "*on the basis of the principle of mutual recognition and in accordance with the provisions of* [the Framework Decision]". The provisions of the Framework Decision are also to be applied consistent with Convention rights (see generally, article 1(2) and (3) of the Framework Decision, and the judgment of the CJEU in *Tupikas* [2017] 4 WLR 188 at paragraphs 59 to 63).

16. Article 4a of the Framework Decision derogates from the article 1 requirement. The obligation to execute an EAW does not apply *"... if the* [requested person] *did not appear in person at the trial resulting in the decision ...*". The "decision" is the decision to impose the sentence of imprisonment or detention. Where the requested person was dealt with *in absentia*, the executing judicial authority "may" but is not required to refuse to execute the EAW. Article 4a of the Framework Decision then identifies four classes of case in which, notwithstanding the requested person was dealt with *in absentia*, the executing authority must execute the EAW: where the person had actual notice of the proceedings; where he gave a mandate to a lawyer to represent him at the proceedings; where the person dealt with *in absentia* has, on being informed of his rights to a retrial, either stated he did not contest the decision or failed to exercise his right to a retrial; and where a person will, following surrender, will be entitled to a retrial.

17. It is well-established that outside such situations it is for the executing authority to decide whether or not to refuse to execute the EAW, and that the issue will always be whether the person's rights of defence, i.e. his fair trial rights under ECHR article 6, have been impaired by reason of his being dealt with *in absentia*. This is the point made for example, by Recital (8) to Council Framework Decision 2009/299/JHA the instrument which introduced article 4a into the Framework Decision, and in the judgment of CJEU in *Dworzecki* Case-108/16 PPU at paragraphs 50 and 51. This identifies the function performed by section 20 of the 2003 Act. As stated by Ouseley J at paragraph 28 of his judgment in *Dziel v District Court in Bydgoszcz, Poland* [2019] EWHC 351 (Admin) the purpose of section 20 is to ensure that no one is surrendered where that would mean a breach of their fair trial rights.

18. Mr Hall's submission starts with the judgment of CJEU in *Criminal Proceedings against Tupikas* (above). In this judgment, the CJEU explained the correct approach to the words in article 4a(1) "*the trial resulting in the decision*". These words identify the scope of the article 4a derogation from article 1 of the Framework Decision. In *Tupikas* the CJEU concluded these words referred to "… *the proceedings that led to the judicial decision which finally sentenced the person whose surrender is sought* …" (see judgment at paragraph 74). At paragraphs 98 to 99 of the judgment the CJEU addressed the situation where there are successive hearings.

> "98. In the light of all of the foregoing, the answer to the question referred is that, where the issuing member state has provided for a criminal procedure involving several degrees of jurisdiction which may thus give rise to successive judicial decisions, at least one of which has been handed down in absentia, the concept of "trial resulting in the decision", within the meaning of article 4a(1) of the Framework Decision, must be interpreted as relating only to the instance at the end of which the decision is handed down which finally rules on the guilt of the person concerned and imposes a penalty on him, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case.
>
> 99. An appeal proceeding, such as that at issue in the main proceedings, in principle falls within that concept. It is none the

> less up to the referring court to satisfy itself that it has the characteristics set out above."

19. Thus, although the words have been held to be capable of applying not just to the trial, but also to appeal proceedings and other proceedings such as those that consolidate multiple sentences into a single sentence, the relevant occasion must be one that "*rules on guilt*" and "*imposes a penalty*" "*following a re-examination in fact and the law of the merits of the case*". Hearings not possessing these characteristics do not engage the article 4a derogation and therefore ought not to attract the operation of section 20 of the 2003 Act.

20. One further point should also be made. Following the judgment in the Divisional Court in *Szatkowski* (above) a court should be astute to apply the section 20 bar to extradition to ensure proper protection of a requested person's article 6 right to be present at trial. No less, but no more.

21. Logically, the first question is whether, applying the reasoning in *Tupikas*, the cassation appeal and the determination that took place in this case is a hearing of the type that engages article 4a of the Framework Decision. If it is not such a hearing the bar at section 20 of the 2003 Act could not apply. I strongly suspect that the cassation appeal did not – at least in this case – lead to a determination capable of engaging the application of article 4a. Ordinarily, cassation appeals are available only on very restricted grounds, usually for reasons which go to the jurisdiction or qualification of the court to hear the proceedings. Cassation appeals do not ordinarily depend on re-examination of the merits of the case either on fact or law.

22. However, in this case, the parties have failed to provide evidence explaining the application and effect of the material parts of the PCCP. Mr Jakubowski's legal representatives did instruct an expert Mr Mikolaj Pietrzak, a member of the Warsaw Bar. But they failed to instruct Mr Pietrzak to explain the nature of proceedings on a cassation appeal. I reject Mr Hall's suggestion that he was not responsible for providing the court with assistance on this matter. Mr Jakubowski's case rests on the premise that section 20 of the 2003 Act applies to the cassation appeal. Ordinarily it is for an appellant to advance evidence to demonstrate the premise of his appeal. That is certainly true in this instance. Mr Hall's Skeleton Argument for the appeal asserted "*there was a hearing before the Supreme Court* [i.e. the cassation appeal] *which clearly fell within the concept of trial which resulted in the decision …*" (see at paragraph 40). Since this was Mr Jakubowski's case this needed to be supported by evidence. It is the responsibility of those instructed by a party to proceedings to identify the evidence a court is likely to need to determine the issues in those proceedings and ensure that evidence is available. This is part and parcel of the obligation to assist the court in the fair determination of the issues in the appeal. In this case it is obvious that Mr Jakubowski's legal team did not properly turn their minds to the evidence that was necessary. Having gone to the trouble of seeking public funding to instruct an expert on Polish law, they ought to have realised that explanation was required of the nature and scope of a cassation appeal under the PCCP. As it was, the instructions to the expert were not properly formulated; the consequence being that the expert evidence did not come close to covering the ground it ought to have covered.

23. However, even assuming, in Mr Jakubowski's favour that this cassation appeal did, in principle, fall within the category of proceedings on which article 4a of the Framework Decision (and hence section 20 of the 2003 Act) operate, my conclusion is that the section 20 ground of appeal fails. This is for two reasons.

24. *First*, the decision on the cassation appeal was not a decision reached *in absentia*. At the material time (i.e. 5 May 2005) Article 535(2) of the PCCP permitted the Supreme Court to undertake preliminary consideration of a cassation appeal on the papers, to determine whether the appeal was "evidently groundless". For this purpose the Supreme Court considered the appeal papers as filed by Mr Jakubowski's lawyers. The decision was not, therefore, *in absentia*. Mr Jakubowski participated in the process through his lawyers' written submissions. This participation was to the full extent then permitted by the PCCP.

25. In submissions, Mr Hall relied on the description in the 29 April 2020 further information of the proceedings before the Supreme Court on the cassation appeal as "*a hearing*". He submitted that since there had been "*a hearing*", section 20 applied because Mr Jakubowski had not been notified of the date of the hearing or being given the opportunity to attend. On the facts of this case that submission is entirely artificial. A debate on whether a process for determination of a threshold issue on the basis only of consideration of written representations could or should be described as a hearing serves no purpose at all. What is relevant for the purposes of section 20 of the 2003 Act is whether, and to what extent, the requested person has participated in the relevant proceedings. In this instance Mr Jakubowski did participate, fully, in a written procedure. That being so, nothing material turns on either the fact that in the further information the Supreme Court's consideration on the papers is described as a "*hearing*", or on the fact that neither Mr Jakubowski nor his lawyers were told the date on which the Supreme Court considered the case papers to determine whether the cassation appeal was "evidently groundless". It follows that there is no conflict between what is said in the 29 April 2020 further information that there was "*a hearing*" on 5 May 2005, and the Judge's observation (at paragraph 59(i) of his judgment) that there was an adjudication on the papers and not an "*actual hearing*". Mr Hall's submission to the contrary is a linguistic point, not a matter of any substance.

26. The *second* reason the section 20 ground of appeal fails is because on the facts Mr Jakubowski has not established any *prima facie* case that his surrender to serve the sentence for the third conviction would mean surrender to serve a sentence imposed in breach of ECHR article 6. As explained in *Szatkowski* (above) section 20 of the 2003 is an implementation of article 4a of the Framework Decision, and its self-evident purpose is protection of ECHR article 6 rights.

27. In the present appeal, so far as concerns the third conviction, it is accepted that Mr Jakubowski was present at his trial and at the appeal on the merits that followed. The only point raised concerns the conduct of the cassation appeal. As I have said already (see above at paragraph 9) only sparse information has been put before the court on the nature of cassation appeals under the PCCP. Mr Pietrzak's report goes no further than indicating that a cassation appeal may be pursued only on the basis of "*violations listed in Article 439 of the* [PCCP] *or other egregious infringement of law*". No further explanation is provided. No information at all has been provided about the grounds of Mr Jakubowski's appeal. All that is known is that the appeal was

dismissed on 5 May 2005 having been determined to be "evidently groundless". In these circumstances, there is no reason to accept that there was any failure to meet the requirements of ECHR article 6.

28. Mr Hall contended it was for the Requesting Judicial Authority to prove compliance with article 6. In the circumstances of the present case I do not agree. It is accepted that Mr Jakubowski was present at his trial, and at the appeal. It is not suggested that either of those proceedings failed to meet the requirements of ECHR article 6. So far as concerns the cassation appeal, Mr Jakubowski participated in those proceedings to the full extent permitted. The circumstances of the present appeal are therefore very different to the usual case where the starting point is that the requested person was not present at trial or at an appeal intended to consider substantive merits of the conviction or sentence. There is no evidence of any *prima facie* failure to permit Mr Jakubowski to exercise his right of defence. If he wished to pursue such a case by reference to the cassation appeal, he should, at the least, have provided some evidence to explain the substance of the argument pursued on that appeal.

29. Mr Hall reminds me of the burden of proof: if there is doubt about either whether a requested person deliberately absented himself from trial, or about whether on return he would be entitled to a retrial, the burden of proof rests on requesting judicial authority and proof is required to the criminal standard. Logically also, if there was a dispute on whether any part of the process had occurred *in absentia* the burden of proof on that point would also fall on the requesting judicial authority. But none of this assists Mr Jakubowski. For reasons explained, no part of the proceedings took place *in absentia*. In the premises, it was for Mr Jakubowski to produce evidence that his conviction and sentence had arisen in circumstances in breach of ECHR article 6.

30. Nor is it any answer to say, as Mr Hall attempted to say, that Mr Jakubowski was at the time of the cassation appeal represented by different lawyers. Those lawyers could and should have been contacted. Copies of the documents filed in support of the cassation appeal could have been obtained. There was no evidence to suggest any attempt to take any such steps occurred.

31. The further point made by Mr Hall was made by reference to a decision of the Polish Constitutional Tribunal in Case SK 30/05. That decision was given on 16 January 2006, some months after the cassation appeal in issue in these proceedings. I have already commented unfavourably on the approach to expert evidence in this appeal. This part of Mr Hall's submission reveals further deficiency in that evidence.

32. The expert, Mr Pietrzak was instructed to answer the following questions:

> "1. Please confirm whether in Mr Jakubowski's case a hearing took place before the Supreme Court on the 5 May 2005 or was the application considered "on the papers"? Please explain why you have come to this conclusion?
>
> 2. Please confirm what the Supreme Court considered at that hearing?"

The answer to the first question was "on the papers", which he explained by reference to Article 535(2) of the PCCP, as in force at the material time. His answer to the second question was that the decision was made on consideration of written submissions filed by Mr Jakubowski's lawyers in support of the cassation appeal. The report then went further, explaining that the decision given in unrelated proceedings on 6 January 2006, Case SK 30/05, the Constitutional Tribunal of Poland concluded that Article 535(2) of the PCCP (which provided for initial consideration of cessation appeals on the papers only) was contrary to provisions in the Polish Constitution, namely Article 2, Article 45(1), and Article 31(3). This a was a matter beyond the scope of instructions given. Mr Pietrzak did not provide a copy of the judgment in SK 30/05 with his report. The report included only two brief extracts from the Constitutional Tribunal's reasons.

33. Nevertheless, Mr Hall's submission in support of the appeal relied on the decision in SK 30/05 in support of the proposition that there was a need for a "retrial" i.e. a further opportunity to pursue the cassation appeal. The point made (at paragraph 40 of the Skeleton Argument) was that the conclusion in SK 30/05 that the Article 353(2) procedure lacked "transparency" tended to show that the cassation appeal fell within the notion of a "trial which resulted in the decision" for the purposes of article 4a of the Framework Decision. That submission is a little difficult to follow. However, I can see it may be possible to advance a submission that the Constitutional Tribunal's conclusion on the procedure at Article 535(2) of the PCCP could go to whether Mr Jakubowski's surrender to serve the sentence passed following the third conviction might give effect to a punishment imposed in breach of ECHR article 6.

34. However, the way this point comes before the court in this appeal is irregular. There was no reason for Mr Pietrzak, when preparing his report, to go outside the scope of his instructions in the way I have described. The Constitutional Tribunal's judgment in SK 30/05 was not a recent event, it had been given in January 2006 years before the instructions to Mr Pietrzak were settled (which must have been at some point after the Order by Martin Spencer J on 12 February 2021 which extended the representation order to permit instruction of an expert). Whether or not it was appropriate for consideration of the judgment of the Constitutional Tribunal to form part of the expert evidence should have been determined when the instructions were settled. This would have assisted to identify precisely how the judgment was relevant to any issue in this appeal. A clear focus would, I expect, have assisted Mr Pietrzak. It would have certainly assisted the other parties to the appeal and the court.

35. Next once those who had instructed Mr Pietrzak (i.e. the lawyers instructed by Mr Jakubowski) had seen the report and appreciated that Mr Pietrzak had referred to the judgment in SK 30/05, they should have considered whether that case addressed any point or decided any matter relevant to the present appeal. If they thought it did not, that could have been made clear when the expert report was filed and served. If, however, they considered this part of the report to be relevant, they should have ensured a copy of the English language translation of the judgment was provided to assist the court properly to understand the significance of the decision the purposes of the present appeal and the significance of Mr Pietrzak's evidence.

36. Having read the material part of Mr Pietrzak's report I obtained a document from the Constitutional Tribunal's website in English, which sets out the Tribunal's principle reasons for its decision in SK 30/05. This document runs to 11 paragraphs and just

over two pages. I provided a copy of the document to counsel the morning of the hearing. Mr Hall objected to any consideration of the document. Relying on the judgment of Julian Knowles J in *Kotsev v Sofia District Public Prosecutor's Office Bulgaria* [2019] 1 WLR 2353, he submitted it was not open to me to consider the Constitutional Tribunal's English language summary document without the assistance either of an expert, or evidence provided by the Requesting Judicial Authority. Mr Swain for the Requesting Judicial Authority raised no objection to consideration of the document prepared by the Constitutional Tribunal.

37. I consider Mr Hall's submission rests on a misapplication of the judgment of *Kotsev*, and a misapprehension of the purpose of the expert evidence so far as it is relevant to the present appeal. In many instances evidence on foreign law is admitted because, in the proceedings before the English court, the court is required to decide a point of foreign law and for that purpose needs to predict the likely decision of the foreign court on that point. That was the position on the proceedings in *Kotsev* when the issue was whether under the provisions of the Bulgarian Criminal Procedure Code the requested person would be entitled to a retrial if surrendered pursuant to the EAW. In that context, the District Judge had attempted to construe the provisions in the Bulgarian Code without assistance of a lawyer familiar with the practical application of Bulgarian law. That was – quite obviously – a perilous endeavour. Even if the black letter meaning of a provision in a foreign law Code may appear certain, what matters is the way in which the provision concerned has been applied in practice. That is what the English court needs to know to make the relevant prediction, and that knowledge can only be gained from those with experience of how the foreign law concerned is applied.

38. In his judgment in *Kotsev*, Julian Knowles J quoted the well-known passage of Cranston's J judgment in *R(Mucelli) v Secretary of State for the Home Department* [2012] EWHC 95 (Admin) at paragraph 50:

> "At the outset I underline the point my Lord, Toulson LJ, made in the course of argument: the court's assessment of Albanian law and practice must turn on an evaluation of the expert evidence. Toulson LJ drew on his experience in the Commercial Court, where English lawyers were sometimes tempted to offer their own interpretation of foreign law. There, as here, that temptation must be resisted. The obvious reason is that neither the English lawyer nor the English court can have a full understanding of the context of foreign constitutional and statutory instruments or judicial decisions. The experts have that understanding. Their views may be in conflict and the court may have to reconcile them but not primarily through its own interpretation of the foreign law materials."

Julian Knowles J then said the following at paragraph 52 of his own judgment:

> "But in my judgment district judges should not attempt to decide questions of foreign law for themselves, unaided by any assistance from the issuing judicial authority. The question of

> retrials is a notoriously difficult topic which has given rise to numerous cases where this court has had to grapple with the meaning and effect of foreign law … These cases illustrate in a practical way the difficulties which foreign legislation can cause and hence why district judges should not try and decide foreign law for themselves without clear assistance from the issuing judicial authority, who can be taken to be expert in the law of their country. Another difficulty is that (as I know from my own experience) foreign laws are often available in English in a number of different translations, and sometimes those translations differ. The district judge may not know which, if any, of the available translations is the correct or authoritative one."

39. I do not disagree with any of that, but that is all some way distant from the situation in the present appeal. Determining this ground of appeal does not require consideration of the application of the PCCP in any relevant sense. In this case there is no need to predict how the Polish court would apply the PCCP in the present case. The only question is whether Mr Jakubowski's extradition to serve the sentenced imposed following the third conviction would rest on proceedings conducted in breach of ECHR article 6 rights. For that purpose, I do not need to consider how passages in the PCCP would be applied. I only need to consider a judgment of the Polish Constitutional Tribunal. The English language summary of the judgment published by the Tribunal itself, through its website, is for all practical purposes an official document. Finally, Mr Pietrzak has already opined on the judgment. By having regard for the Tribunal's summary of its own judgment I am doing no more than what I should have been able to do had the expert report been properly prepared – i.e. considering the judgment of the Constitutional Tribunal in case SK 30/05 with the assistance of the observations contained in Mr Pietrzak's report.

40. On the substance of the point, I do not consider the judgment of the Polish Constitutional Tribunal in SK 30/05 is sufficient to make good the submission that in this case there is *prima facie* evidence that Mr Jakubowski's extradition would entail permitting enforcement of a sentence imposed in breach of article 6. In his report Mr Pietrzak refers first to the conclusion in case SK 30/05 that Article 535(2) PCCP was inconsistent with Article 2 of the Polish Constitution read in conjunction with Article 45(1) and Article 31(3), and then to two parts of the Constitutional Tribunal's decision: (a) its recognition that in 2001 a large proportion (80%) of cassation appeals had been dismissed as evidently groundless; and (b) its conclusion in the absence both of an oral procedure and any requirement for written reasons supporting the conclusion that an appeal was "evidently groundless", the parties are unable to know the specific basis for the decision to dismiss the appeal.

41. The Tribunal's overall reasoning focused on the lack of transparency which was the cumulative consequence of the absence of an oral procedure and the Supreme Court's practice of not giving reasons when ruling a cassation appeal to be "evidently groundless". The Tribunal placed particular emphasis on the obligation to give reasons and concluded that the phrase "evidently groundless" would not *per se* unambiguously explain the reason for the conclusion reached, case by case. The

Tribunal concluded that the preliminary procedure set out in Article 535(2) of the PCCP did not meet the requirements of Article 2 of the Polish Constitution (a requirement that the state is governed by "the rule of law") read with Article 45(1) (a fair hearing provision) notwithstanding Article 31(3) (which permits limitations to be placed on constitutional rights subject to a proportionality requirement). However, the Tribunal did accept that in principle, some form of summary procedure could be applied to filter cassation appeals. For that reason, the Tribunal suspended its order, to permit legislative reconsideration and revision of Article 535(2).

42. Of necessity, the Constitutional Tribunal considered and ruled on the generic effect of Article 535(2) of the PCCP. The judgment did not consider whether, in any particular case, the application of that provision was such as to render the proceedings in breach either of ECHR article 6 or for that matter Article 45 of the Polish Constitution. It is well established that when considering whether a person's ECHR article 6 rights have been infringed, the European Court of Human Rights will consider all stages of the proceedings in hand. On the facts of this case, looking at the proceedings concerning the third conviction, from the beginning to end, there is no *prima facie* case that surrender would expose Mr Jakubowski to serving a sentence imposed following proceedings that did not comply with article 6.

C. The ECHR article 8 ground of appeal

43. The Judge's reasons for his conclusion that extradition was not a disproportionate interference with ECHR article 8 rights are set out from paragraph 61 of his judgment. He approached this issue applying the *Celinski* balance-sheet (*Polish Judicial Authority v Celinski* [2016] 1 WLR 551 per Lord Thomas CJ at paragraphs 15 to 17). Summarised very briefly, Mr Jakubowski has been in the United Kingdom since October 2005. Two years later he was joined by his wife and children. His children are now aged 22, 21 and 15 years old, respectively. The family's life is now in the United Kingdom. The family has no substantial ties with Poland. The Judge concluded that Mr Jakubowski has been a fugitive since he left Poland in 2005. Further, based on information held on the Police National Computer the Judge concluded as follows:

> "43. In this court's view a reasonable inference from a measured reading of MJ's UK criminal convictions is that, on different occasions when stopped by the UK police, he provided false details provided regarding his correct name, date and place of birth.
>
> 44. A further reasonable inference is that MJ's reason for providing the UK police with such personal false information is that he was well aware that (as he accepts) he was a fugitive from Polish justice and he would not have wanted the Polish authorities to locate him. In this court's view, such conduct does MJ no favours and has not enhanced his challenges to extradition. I shall return to this later in this ruling."

44. The judge's "finding and ruling", at paragraph 63, were as follows:

> "I find that it will not be a disproportionate interference with the Article 8 rights of the requested person for extradition to be ordered.
>
> My reasons and findings are as follows:
>
> (i) It is very important for the UK to be seen to be upholding its international extradition obligations. The UK is not to be considered a "s*afe haven*" for those sought by other Convention countries either to stand trial or to serve a prison sentence.
>
> (ii) In my opinion, the robbery offences set out in the EAW are serious and, in the event of a conviction in the UK for like criminal conduct, a prison sentence of some length may well be imposed. So far as the other crimes set out in the request are concerned, one related to a deliberate disobeying of a court order (drive disqualified) and the other was an act of criminal damage which resulted initially a suspended sentence being imposed. This was later activated as MJ failed to abide by the conditions of suspension. Had that been the only offence of which extradition had been sort then there may have been an argument that extradition for that alone might be considered Article 8 disproportionate, but of course that is only one of four offences in the warrant. I also take into account the fact that these offences occurred a number of years ago.
>
> (iii) This court finds that the requested person is a fugitive who remained unlawfully at large for some considerable time. The reasons for these findings are set out earlier in this ruling document. I also find that he has sought to evade the authorities by providing the UK police with false personal particulars, on occasions when he was stopped by them.
>
> (iv) It is appreciated that there will be hardship caused to MJ and to his wife and their youngest (15-year old) child. However, that in itself is insufficient to prevent an order for extradition from being made. No evidence has been produced to suggest that they would be unable to manage financially in his absence. It is noted that MJ's two adult sons (who are said to reside at the family home) are in employment.
>
> (v) As this court has found as a fact that MJ is a fugitive from justice, this finding brings paragraph 39 of the binding decision in *Celinski* about into consideration. I do not find that, per that ruling, there are such strong counter-balancing factors as would render extradition Article 8 disproportionate in this case."

45. The submission for Mr Jakubowski is that the Judge placed the wrong weight on the matters relevant to determining whether extradition would be a disproportionate interference with Article 8 rights. The specific points made are as follows. *First* the judge attached insufficient weight to the passage of time to since the offending took place. The earliest offence was committed in 1996 and was the subject of a conviction in 1997. The latest offence took place in March 2005 shortly before Mr Jakubowski left Poland for the United Kingdom. The submission for Mr Jakubowski further relies on the passage of time (5 years) between his discharge from the first warrant on 6 August 2015 and his arrest pursuant to the second warrant (issued January 2015, certified February 2015) on 21 October 2019. It is submitted the Judge should have said the passage of time went to diminish the public interest in surrender and to increase the weight attaching to the family life developed in the United Kingdom. *Second* it is submitted the judge incorrectly said that "over 5 years" in prison remains to be served when the cumulative time remaining to be served under the four warrants comes to 4 years and 85 days. *Third* it is submitted the judge was wrong to conclude that Mr Jakubowski had provided false details to the police when in the United Kingdom (see judgment at paragraphs 38 to 39 and 44). This was then referred to in the conclusion at paragraph 63. The Judge was also wrong to say that Mr Jakubowski had been a fugitive at all times since 2005. It was submitted that he ceased to be a fugitive in 2014 when he was arrested pursuant to the first warrant.

46. Mr Hall also submitted that other matters weighed in the balance in support of the conclusion that extradition would be a disproportionate interference with article 8 rights: (a) the possibility that after serving his sentence he might not be able to return to the United Kingdom; (b) the fact that his bail conditions have since October 2019, included a curfew condition (electronically monitored); and (c) that at the time of offending leading to conviction Mr Jakubowski was on medication for "mental health problems".

47. I am not satisfied that any of these matters render the Judge's conclusion wrong. Overall, Mr Jakubowski's article 8 case was not a strong one. He came to the United Kingdom in 2005 as a fugitive. That is not disputed. Although his family then joined him to live in the United Kingdom, the family life that followed and the establishment of family life in the United Kingdom fell under the cloud of Mr Jakubowski's fugitive status. If he is extradited that will interfere with his family and personal life. No doubt his wife and children will also be deeply distressed. But this is a sadly common place consequence of extradition. In this regard there is nothing to distinguish the situation here from that in many other cases where extradition is ordered.

48. Set against this there is a weighty generic public interest in giving effect to extradition arrangements such as those contained in the Framework Decision. In this case, Mr Jakubowski's surrender is requested to serve a significant prison sentence. The Judge's remark at paragraph 61(ii) of his judgment that the sentence remaining was "over 5 years" when in fact Mr Jakubowski would be required to serve a little over 4 years, was an immaterial error. I accept that the passage of time between 2014 when the first EAW was discharged, and 2019 when Mr Jakubowski was arrested pursuant to the second EAW is unexplained. The second EAW was issued and certified in 2015. I am prepared to assume it could have been executed shortly after. However, I do not consider this matter is sufficient either materially to reduce the public interest in giving effect to the EAW or materially to increase the weight attaching to the

family life Mr Jakubowski and his family established in the United Kingdom. I do not attach weight to the submission that from 2014 Mr Jakubowski "ceased to be a fugitive". This does not really capture the substance of what happened. The substance of the matter is that in the absence of an explanation from the Requesting Judicial Authority, it must be assumed that Mr Jakubowski's arrest pursuant to the second EAW was delayed. However, in the context of all the circumstances of this case I do not consider much significance attaches to this matter. Nothing was said to Mr Jakubowski to cause him to believe that his extradition would not be sought. Although the passage of time during this period is unexplained I do not infer from that, that any lesser significance attaches to the sentence of imprisonment that remains to be served.

49. Although Mr Hall criticises the Judge's conclusions at paragraphs 43 and 44 of his judgment, based on Mr Jakubowski's conduct when dealing with the police in the United Kingdom, the inferences the Judge drew were ones that were reasonably open to him to draw. He heard and saw the evidence, and it is notable that when Mr Jakubowski was given the opportunity to give evidence to explain the information the Judge relied on, the declined to do so. If there was any innocent explanation it is conspicuous that no evidence to that effect has ever been given.

50. The further points made by Mr Hall do not advance the position further. Most were matters put the Judge at the extradition hearing and no doubt weighed in the balance at that time. Two points that were not raised at the extradition hearing were: (a) that having served his sentence in Poland, Mr Jakubowski may not be permitted to re-enter the United Kingdom; and (b) that since his arrest in 2019, his bail conditions have included an electronically monitored curfew.

51. As to the latter point, it is correct that in some cases monitoring conditions attached to bail have been material when considering whether the interference with article 8 rights consequent on extradition is justified: e.g. *R(Einikis) v Lithuania* [2014] EWHC 2325 (Admin); and *Bicioc v Baia Mare Local Court, Romania* [2017] EWHC 3391 (Admin). But all depends on the circumstances of the case. In each of *Einikis* and *Bicioc* the period on bail and subject to the monitoring condition came close to or exceeded the time to be served if extradited. That is not this case.

52. The former point is speculative. Any future difficulty in re-entering the United Kingdom is not realistically described as a consequence of extradition: i.e. of a decision said to amount to the interference with article 8 rights. It would be a consequence of the United Kingdom's departure from the European Union. In any event, if in future Mr Jakubowski applies for permission to enter the United Kingdom, that application would have to be determined consistently with his article 8 rights and those of his family in the United Kingdom. If Mr Jakubowski's convictions in Poland counted against him that would not be the consequence of extradition but the consequence of the convictions themselves.

53. The question for me on this appeal is whether the conclusion that extradition would not be a disproportionate interference with article 8 rights was wrong. When considering that question I have well in mind the guidance given by Lord Neuberger in his judgment in *Re B* [2013] 1 WLR 1911 at paragraphs 90 to 95. As will be clear from what I have said so far, I am not satisfied that the Judge's conclusion on the article 8 issue was wrong. Although Mr Hall has said all that could be said to the

contrary, I am satisfied that the Judge was correct to conclude that Mr Jakubowski's surrender pursuant to the EAW will not be a disproportionate interference with article 8 rights.

D. Disposal.

54. For the reasons set out above, this appeal is dismissed.
