Neutral Citation Number: [2024] EWHC 1337 (Admin)

Case No: CO/748/2023,
AC-2023-LON-000874

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/06/2024

Before :

THE HON. MRS JUSTICE THORNTON

- -

Between :

SEBASTIAN SZWARC	**Applicant**
- and -	
CIRCUIT COURT GLIWICE (POLAND)	**Respondent**

- -
- -

Mary Westcott (instructed by **Birds Solicitors**) for the **Applicant**
Gary Dolan (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing dates: 1 February and 1 May 2024.

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Approved Judgment

This judgment was handed down remotely at 14:00 on Tuesday 4 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HON. MRS JUSTICE THORNTON

Mrs Justice Thornton :

Introduction

1. The Appellant appeals against the decision of the District Judge ("Judge") to order his extradition to Poland to stand trial in relation to the trafficking of drugs between January 2005 – July 2006. The offending is punishable on conviction in Poland with imprisonment of up to 12 years.

2. Leave to appeal was granted on grounds that the Judge was wrong to conclude that:

   1) The arrest warrant complies with section 2 of the Extradition Act 2003;

   2) Extradition is not barred by section 12 of the Act and the principle of double jeopardy;

   3) Extradition is not barred by section 14 of the Act, by virtue of the passage of time; and

   4) Extradition is compatible with article 8 of the European Convention on Human Rights.

The arrest warrant and further information

3. The arrest warrant was issued on 30 July 2018, pursuant to arrangements under the Trade and Co-operation Agreement and certified by the National Crime Agency on 7 July 2022.

4. Box B of the warrant records that the decision on which the warrant is based is an enforceable decision on provisional arrest by the Court at Katowice.

5. The conduct underlying the warrant is set out at Box E. Between January 2005 and July 2006 in Zabre and Tarnowskie Góry, the requested person acted with the intention to gain material benefit. At short intervals of time, acting with intent he participated in trafficking in substantial amounts of narcotic drugs and psychotropic substances. Over a dozen transactions he bought no less than 3.5 kilograms of amphetamine, 1 kilogram of hashish and 4500 ecstasy tablets from Rafal Bugajski for the purpose of their further distribution, making this a permanent source of income. The conduct amounts to narcotic offences under Article 56 of the Act on Counteracting Drug Addiction in conjunction with Rrticles 12 and 65 of the Penal Code.

6. Further information issued by the Polish authorities dated 8 September 2022 provides additional detail of the offending as follows:

   "ii) The Requested Person is said to be suspected of being involved in trafficking in significant quantities of narcotic drugs and psychotropic substances, in not insignificant quantities. He is accused of placing on the market a total of no less than 3.5 kilograms of amphetamine, 1 kilogram of hashish, and 4,500 extasy tablets. He committed these acts in the Polish towns, named in the warrant, Zabrze and Tarnowskie Góry.

iii) The prosecution began after the collection of full evidence against him. This material had been collected since 12 May 2015. The decision to present the charges against him was issued on 15 September 2017.

……

v) The fact that the Requested Person had committed a crime Polish law enforcement authorities first became aware only on 12 May 2016. After verifying this information and collecting full evidence against him, on 15 September 2017 there was issued a decision to present him with charges.

……

ix) To the best of the prosecutor's knowledge, witnesses to the Requested Person's acts are still available and ready to testify against him."

The facts

7. The Appellant gave a written statement and oral evidence before the District Judge. His former partner gave a statement and oral evidence. Both were cross examined. Taking the facts from the judgment, the following background is common ground:

   a) Between 2003 and 2005 the Appellant was arrested for possessing drugs. He was a recreational drug user at that time. By 2004 his offending had escalated into supplying small amounts of drugs to other men in the area. On 7 March 2008 he was convicted in the District Court in Gliwice and received a sentence of three years imprisonment.

   b) After he had served his sentence, he decided to come to the UK in 2010 with the consent of his probation officer. The District Judge found the appellant was not a fugitive from justice.

   c) The appellant has lived and worked openly in the UK since he relocated here. He has settled status. He has done various work.

   d) He has two children with his former partner. His daughter was born in 2011 and his son was born in 2019.

   e) His daughter lives with him full time. His son stays with his mother during the week and with the Appellant at the weekends. The Appellant provides financial and material support to his former partner and has a close relationship with his children.

   f) In 2018 the Polish police contacted his mother about his whereabouts. He instructed a Polish lawyer and was told that there an outstanding case against him in Poland.

   g) He was arrested on 10 August 2022.

8. Further details of the Appellant's offending in 2008 are set out in the District Judge's ruling, obtained in turn from a Judgment of Gliwice District Court on 7 March 2008 (case reference IV K 217 107). The details are as follows:

> i. From 2004 to August 2006 in Tarnowskie Gory and in Strzybnica he supplied marijuana in pipes, amphetamines and ecstasy pills in an unspecified amount and for an unspecified price.
>
> ii. Between November 2005 and March 2006 in Tarnowskie Gory and Bytom he provided Tomasz Szal with drugs, namely two lines of amphetamine and two ecstasy tablets on each occasion.
>
> iii. In June 2006 in Tarnowskie Gory he supplied Amphetamines ten times to Armil Karjowej.
>
> iv. In June 2006 in Tarnowskie Gory he provided Klaudiusz Idzikowski with amphetamines, once or twice.
>
> v. From 2004 to August 2006 in Tarnowskie Gory and in Strzybnica and Bytom he provided Daniel Kwiatkowski with hashish, amphetamines and ecstasy tablets for an unidentified number and price.
>
> vi. From 2004 to August 2006 in Tarnowskie Gory and Bytom, he provided Daniel Kwiatkowski with a line of amphetamine and ecstasy tablets.
>
> vii. In May 2006 in Tarnowskie Gory in the Egipteka disco, he provided a minor, Jerzy Gorny, with an ecstasy tablet.
>
> viii. In April 2006 in Tarnowskie Gory in the Egipteka disco he provided Stanislaw Spinder with a line of amphetamine.
>
> ix. In May 2006 in Tarnowskie Gory in the Egipteka disco he provided Stanislaw Spinder with 5 ecstasy tablets.

9. In his written proof of evidence, the Appellant explained the background to the 2008 offending and its consequences as follows:

> "After leaving school I got in with a bad crowd of people and was taking drugs and partying. At some point between 2003 and 2005 I was arrested for possessing drugs. I was a recreational user. I did also have regular work going to a wholesale yard and collecting goods for a lady who ran a grocery store, but that was usually finished by the afternoon.
>
> By 2004 my offending had escalated into supplying small amounts of drugs to other young men in the local area.

> Essentially it was much cheaper to buy a larger amount and then share it out between us. On 7 March 2008 at the District Court in Gilwice I received a sentence of 3 years, reduced from 4 years on appeal, for a number of these offences, committed between 2004 and 2006…"
>
> (Underlining is the Court's emphasis)

10. At the hearing before me, Counsel for the Appellant and Respondent who appeared before the District Judge checked their notes of the oral evidence given by the Appellant before the Judge. There was agreement between them that the Appellant gave unchallenged oral evidence that he had admitted to additional drug related activity beyond that set out in the 2008 charges, in order for all matters to be dealt with in 2008.

The decision of the District Judge

11. In relation to Ground 1: The Judge reminded himself of the relevant legal principles, which are not in dispute at ¶20 – 23 before concluding that the arrest warrant and further information contained sufficient particulars of the alleged conduct to satisfy the requirements of section 2(4)(c) of the Extradition Act (¶19). Whilst the warrant contains a short and concise statement of the allegation, it is supplemented by the contents of the further information of 8 September 2022 which confirms that the requested person is suspected of being involved in trafficking in significant quantities of narcotic drugs and psychotropic substances in not in significant quantities. He is accused of placing on the market no less than 3.5 kilogrammes of amphetamine, 1 kilogramme of hashish and 4500 ecstasy tablets. He committed those acts in the Polish towns of Zabrze and Tarnowskie Gory. The Judge went on to address and reject the submissions advanced on behalf of the Appellant to the contrary, at ¶23-29 including the submission that further particulars were needed by virtue of the apparent similarity of the offending in the arrest warrant with the Appellant's previous offending in 2008.

12. In relation to Ground 2: the Judge explained that the Appellant relied upon the wider 'abuse of process' limb of section 12 of the Extradition Act. He concluded that the conduct for which the Appellant is being sought now is essentially different conduct from that for which he was convicted in 2008 (¶48). He explained his reasons as follows:

    i) He accepted there was an overlap in the offending in terms of the time period, albeit not an exact one (¶49).

    ii) He also accepted that the location of Tarnowskie Gory was the same in the 2008 offending and the offending in the warrant. However, the offending in the warrant also took place in Zabrze (¶49).

    iii) Whilst the nature of the offending - drug trafficking - is similar, the essence of the conduct alleged is different. The 2008 offending concerned the supply of drugs to named individuals, save for the final offence. The conduct set out in the warrant relates to purchase of drugs for the purpose of further distribution. In English law these two offences would be supply of controlled drugs and possession with intent to supply controlled drugs (¶49&51).

iv) The offending in 2008 and in the warrant are charged as distinct offences under Polish law. Whilst the distinction in legal definition of the conduct is not dispositive of this issue, the Judge considered it supported his conclusion that the conduct is not the same, nor sufficiently similar as to constitute an abuse of process (¶50).

v) There was nothing to make good the defence's assertion that by accepting his guilt in 2008 the Appellant was admitting to the offences for which he is now sought to stand trial (¶51).

vi) There is sufficient specificity in the 2008 conviction and the warrant itself to show that broader abuse of process jurisdiction is not engaged. There is nothing to show that the conduct alleged in the warrant and that underlying the 2008 conviction is the same or of such similarity that the proceedings would be stayed as an abuse of process. The defence suggest that all matters could have been dealt with together in 2008. However, the further information of 8 September 2022 makes clear that evidence of the offending for which he is now sought did not come to light until May 2016. It would not have been reasonable for the prosecutor to have known of those matters when the Appellant appeared before the Polish Court in 2008 (¶52).

vii) The domestic authorities relied on by the Appellant do not assist him. Both R v Dwyer [2012] EWCA Crim 10 and R v Nuh Bihe [2022] EWCA Crim 939 are illustrations of the principle that the court has a discretion to stay proceedings absent special circumstances where they are founded on the same or substantially the same facts as earlier proceedings. The facts of this warrant are not substantially the same, as those for which the Appellant was convicted in 2008 (¶53).

viii) In any event the Appellant can raise the principle of double jeopardy in his Polish trial. The fact that both the 2008 conviction and the present prosecution originate from the same court reduces the likelihood of such overlap occurring to virtually nil (¶54).

13. In relation to Ground 3 the Judge directed himself to Gomes and Goodyear v Trinidad & Tobago [2009] 1 WLR 1038. He accepted that the Appellant could rely on the passage of time as he was not a fugitive. The period of time from the end of the offending conduct (July 2006) to the extradition hearing was just under 17 years. He accepted that since 2010 the Appellant has lived openly in the UK, worked, has settled status, formed a relationship and had two children, one of whom lives with him. The separation and loss of family support consequent to his extradition would cause his former partner and their children to suffer hardship. He accepted that the polish authorities had not become aware of the offending until May 2016. He found there was no culpable delay in issuing proceedings. There was culpable delay in relation to the certification of the warrant by the NCA but this did not tip the balance.

14. He concluded that the bar was not made out either on the basis of oppression or injustice explaining that:

i) The Appellant had known since 2018 that he was wanted in Poland. He could not have enjoyed any false sense of security.

ii) He had taken into account the gravity of the offence alleged against him.

iii) There is a presumption that the Polish Courts will be able to protect the requested person from an unjust trial.

iv) The further information of September 2022 states that the witnesses are available and ready to testify against the requested person. The defence had not suggested that any key witnesses are not available.

15. In relation to Ground 4, the Judge directed himself to Norris v Government of the United States of America [2010] UKSC 9; H(H) v Italy [2013] 1 AC 338 and Polish Judicial Authorities v Celinski [2016] 1 WLR 551. He conducted the requisite balancing exercise, concluding that extradition would not be a disproportionate interference with the Article 8 rights of the Appellant and his family. His reasons were as follows:

i) He gave substantial weight to the public interest in extradition. The offending was serious and aggravated by the previous conviction from 2008.

ii) Extradition will cause hardship and distress and will result in the rupture of his relationship with his two children, and his former partner who will lose his emotional, practical and financial support. However, the impact did not make extradition disproportionate.

iii) The delay was not sufficient to outweigh the other factors weighing in favour of extradition.

iv) Any impact on the Appellant's settled status of extradition was a consequence of conviction.

The test on appeal

16. The High Court may allow an appeal if the first instance judge 'ought to have decided a question before him … differently' and that this would have required him to discharge the appellant (s27(3) Extradition Act). The single question for the appellate court is whether or not the District Judge made the "wrong" decision (Polish Judicial Authorities v Celinski [2016] 1 WLR 551 at ¶24).

Analysis and conclusions

Grounds 1 and 2

17. Grounds 1 and 2 are interrelated and are considered together.

Submissions on behalf of the parties

18. Ms Westcott submitted that the allegation against the Appellant in the warrant is not precise enough to satisfy section 2(4)(c) of the Extradition Act. There is no ceiling given in terms of the amount of drugs. The allegation is imprecise in terms of location. Although two Polish town names are given, the offence is "trafficking", implicit in which are additional places. There is no more than a bald omnibus description of the Appellant's role, in that there is a purchase with intent to supply for money; and the

time period is broad - 19 months. The offence is said to require additional precision given the context of the distinct 2008 conviction. The Appellant does not fully understand the details of the case against him and has been fettered in challenging extradition as a result. In particular, the lack of detail about the offences makes the double jeopardy argument difficult to engage with. If the extradition allegation included details of when and whom drugs were supplied to, it may reveal more clearly that the current allegation incorporates the same incidents that formed the basis of 2008 conviction. Relatedly, if extradited, then the lack of detail will make it difficult to enforce the Appellant's specialty rights, due to problems identifying precisely what extradition has been ordered for and distinguishing different matters. It would be problematic for the Appellant to identify whether the prosecution was travelling beyond the terms of the arrest warrant.

19. Ms Westcott submitted that the Judge was wrong not to find that this comparison fell into the "substantially the same" iteration of double jeopardy. She submitted that the lack of precision in both the 2008 convictions and the arrest warrant raises an arguable case on the balance of probabilities that in the same circumstances, a trial in this country on the current allegation would be stayed as an abuse of process. As the respective cases are framed, they relate to broadly the same incidents. By admitting supply of drugs that led to the 2008 conviction the Appellant was admitting to purchasing the same drugs in a broader conspiracy. In this jurisdiction, all the relevant conduct would amount to possession with intent to supply. The conspiracy offence alleged between January 2005 – July 2006 is loosely defined.

20. Ms Westcott supplied the Court with the table below comparing the two sets of offending which she submitted demonstrates the substantial overlap between the two. The same table was provided to the Judge.

	2008 Conviction	*Arrest warrant "preparatory proceedings"*
Date	2004 to August 2006	January 2005 to July 2006
Place	Taronwskie Gory and "various places"	Zabrze and Tarnowskie Gory
Supplier	Not specified, instead recipients specified – some for financial gain, some not for profit	"…brought from Rafal Bugasjski … for the purpose of further distribution, making of this a permanent source of income"
Offence	Variously: Article 58§1 and Article 59§1 of Counteracting Drug Addiction Act of 29 July 2005 in connection with Article 11§2 and Article 12 of the Penal Code	"Article 56 section 1 and 3 of 29 July 2005 on Counteracting Drug Addiction in conjunction with article 65§1 of Penal Code in conjunction with article 12 of Penal Code"

Drugs	(i) 5 ecstasy tablets (ii) 1 line of amphetamine (iii) 1 ecstasy tablet (iv) 1 line of amphetamine and ecstasy tablets (v) hashish, amphetamine and ecstasy tablets "of an unidentified number and price" (vi) "once or twice" 1 line of amphetamine (vii) 10 times, 1 line of amphetamine (viii) 2 lines of amphetamine and 2 ecstasy tablets (ix) marijuana, amphetamines and ecstasy pills "of unspecified amount"	"in total no less than 3.5 kg of Amphetamine, 1 kg of Hashish and 4500 ecstasy tablets"
Instances	9 instances – through (i) to (ix)	"over a dozen subsequent transactions"
Court	District Court in Gliwice	Arrest warrant issued by Circuit Court in Gliwice

(Underlining is the Court's emphasis)

21. On behalf of the Respondent, Mr Dolan submitted that the Judge was correct to find that the arrest warrant was sufficiently particularised considering the warrant in the round, with the assistance of the further information. There was not an exact overlap in terms of time and place of the offending in 2008 and that alleged in the warrant. The respective offending engaged different provisions of Polish law. Whilst the bulk of the 2008 conviction concerned selling drugs to named individuals, the instant accusation concerned the purchase of drugs for further distribution. There was an unequivocal statement in the further information that the Appellant's involvement in the matters leading to the instant accusation did not come to light until eight years after his conviction in 2008. The Appellant had not attempted to suggest that he would not be able to raise double jeopardy in Polish law. The Judge considered the domestic cases relied on by the Appellant and found that they were unable to assist his challenge. He considered all relevant matters and reached a conclusion that was plainly correct.

The relevant provisions of the Extradition Act 2003

22. Section 2(4)(c) of the Extradition Act provides in relevant part, as follows:

> "(2) A Part 1 warrant is an arrest warrant which is issued by a judicial authority of a category 1 territory and which contains-
>
> (a) ... the information referred to in subsection (4) ...
>
> (4) The information is-
>
> ….

(c) particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the category 1 territory under which the conduct is alleged to constitute an offence."

23. Section 12 of the Extradition Act provides:

"A person's extradition …. is barred by reason of the rule against double jeopardy if (and only if) it appears that he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction on the assumption –

(a) that the conduct constituting the extradition offence constituted an offence in the part of the UK where the judge exercises jurisdiction;

(b) that the person were charged with the extradition offence in that part of the United Kingdom."

Sufficiency of the particulars of the warrant

24. There was no challenge to the Judge's citation of the relevant legal principles. Particulars of a warrant need not be in great detail providing they give sufficient information to enable any point on a bar to be taken and the ability to judge whether dual criminality can be shown (King v Public Prosecutors [2015] EWHC 3670 (Admin)). The validity of a warrant is to be examined by the requested state in the round without undue technicality and having regard to the fact it is a document which is addressed to Courts in different national legal systems (Echimov v Romania [2011] EWHC 864 (Admin)). In certain circumstances, further information is admissible to support the validity of a warrant (Criminal proceedings against Bob-Dogi [2016] 1 WLR 4583).

25. Taken together, the warrant and the further particulars of September 2022 inform the Appellant of the following, as required by Section 2(4) of the Act:

i) The conduct alleged to constitute the offence ("bought drugs… for the purpose of their further distribution" and "placing [drugs] on the market").

ii) The location of the offending (Zabrze and Tarnowskie Gory).

iii) The time period of the transactions (January 2005 – July 2006).

iv) The number of transactions involved (over a dozen).

v) The individual from whom the drugs were purchased (Rafal Bugajski).

vi) The amounts of drugs (no less than 3.5 kilogrammes of amphetamine, 1 kilogramme of hashish and 4500 ecstasy tablets).

vii) The provision of Polish law under which the conduct is alleged to constitute an offence.

26. Ms Westcott submitted that the reference to "no less than…. 3.5 kilogrammes of amphetamine" creates difficulties in light of the specialty rule. In my judgment there is sufficient clarity about the conduct for which extradition is sought because the amounts of the drugs are linked to transactions with a named individual in two specific locations over a specified time period.

27. Ms Westcott also submitted that the warrant required further precision by virtue of the 2008 offending. However, the particulars have provided sufficient information for the Appellant to raise the bar of double jeopardy. Beyond this, the extent of the precision required in light of the 2008 offending falls to be considered in relation to the double jeopardy bar which I now turn to.

The principles of double jeopardy

28. As the District Judge noted, the legal authorities establish two circumstances in English law that offend the principle of double jeopardy:

> "i) Following an acquittal or conviction for an offence, which is the same in fact and law – autrefois acquit or convict; and
>
> ii) Following a trial for any offence which was founded on "the same or substantially the same facts", where the court would normally consider it right to stay the prosecution as an abuse of process and/or unless the prosecution can show "special circumstances" why another trial should take place."
>
> (Fofana v Deputy Prosecutor Thubin Tribunal de Grande Instance de Meaux, France [2006] EWHC 744 (Admin)).

29. The bar raised in the present case concerns the wider aspect of the principle set out in ii) above. The basis of the principle is explained by the Court in R v Dwyer [2012] EWCA Crim 10, relied on by Ms Westcott. It is oppressive to punish an individual twice for an offence arising out of the same or substantially the same set of facts. The Crown should decide at the outset, or, at the latest, before the conclusion of the first set of proceedings, what charges it wishes to bring against a defendant. It is the duty of the court to examine the facts of the first trial in case of any dispute, and to determine whether on the facts found there is, as a matter of law, a double jeopardy involved in the later proceedings As a general rule therefore a judge should stay an indictment when satisfied that the charges therein are founded on the same or similar facts as the charges in a previous indictment on which the accused has been tried, but a second trial on the same or similar facts is not always necessarily oppressive, and there may in a particular case be special circumstances which make it just and convenient in that case (¶18).

30. The words "the same or substantially the same facts" refer to the relevant state of affairs as they existed to the knowledge of the prosecutor at the date the proceedings were concluded (Dwyer at ¶25). They also extend to what a prosecutor could reasonably have known by the time the proceedings were concluded (R v Nuh Bihe [2022] EWCA Crim 939 at ¶22 citing R v Wangige [2021] Crim App R 6 at ¶69).

Are the charges in the warrant founded on "substantially the same facts" as the offending in 2008?

31. The Appellant was convicted in 2008 of a number of offences of supplying ecstasy, amphetamine, hashish and marijuana to individuals in the towns of Tarnowskie Gory and other towns between 2004 – August 2006. His extradition is now sought in relation to the purchase of amphetamine, hashish and ecstasy for onward supply between January 2005 to July 2006 in Tarnowskie Gory and Zabrze. The alleged offences for which the Appellant is now sought occurred within the period covered by the 2008 offending and relate, broadly, to the same drugs.

32. The supply offences for which the Appellant was convicted in 2008 necessarily imply possession of the drugs and hence obtaining them. The Appellant gave an unchallenged explanation in his witness statement that by 2004 his offending had escalated into supplying small amounts of drugs to other young men in the local area. He further explained that it was much cheaper to buy a larger amount and then share it out between his friends. His evidence that it was cheaper to buy a larger amount for onward supply is significant given the charges he now faces and was not referred to by the District Judge in his judgment. The Appellant contends that the drugs in both sets of offending concern the same supply chain but focus on different roles in the supply chain – on possession and onward supply in 2008 versus purchase for onward supply in the arrest warrant.

33. The location of the Appellant's activity in Tarnowskie Gory is the same for both sets of offending. The offending in 2008 takes place in a number of other places but this may be said to be consistent with the Appellant purchasing drugs in bulk from an individual in two locations and supplying smaller amounts of the drugs to a range of individuals in nightclubs in various locations, which forms the backdrop to the 2008 offending.

34. This appeal was listed for hearing on 1 February 2024. Having listened to submissions by Counsel on whether there is double jeopardy in these proceedings, I adjourned the hearing to request further information from the Polish authorities pursuant to Article 605 of the Trade and Cooperation Agreement (FK v German Judicial Authority [2017] EWHC 2160 (Admin)). The judgment of Gliwice District Court on 7 March 2008 (case reference IV K 217 107) was attached to the request. The further information requested was as follows:

    i) Whether any of the current allegations arise from the same or substantially the same case which resulted in the 2008 conviction and sentence?

    ii) How the Court first became aware on 12 May 2016 that the Appellant committed the crime which is the subject of the extradition request?

35. The Polish prosecuting authority responded to the Court's request as follows:

> "With regard to the first issue (i), I would like to kindly inform you that it may be that these allegations are related. But they are not the same.

> As a reminder, I would like to point out that Sebastian Szwarc is suspected of being involved in trafficking in significant quantities of narcotic drugs and psychotropic substances, total of no less than 3.5 kilograms of amphetamine, 1 kilogram of hashish, and 4,500 extasy tablets. He committed these acts in the period from January 2005 to July 2006. This offence was classified as Article **56** paragraphs 1 and 3 of the Polish Act on Counteracting Drug Addiction.
>
> 2008 conviction does not include all behaviours described above. It includes only a few dashes of amphetamines and less that then extasy tablets and a negligible amount of marijuana. The offences described in that judgment were also classified differently – not as a Article **56** paragraphs 1 and 3 of the Polish Act on Counteracting Drug Addiction, but Articles **58** and **59** of the Polish Act on Counteracting Drug Addiction. These crimes are different from each other. There is therefore no res judicata in this case.
>
> With regards to the second issue (ii), I would like to kindly inform you that we were informed about Sebastian Szwarc's criminal activities by a witness – Rafal Bugajski. This witness gave extensive testimony on this subject to the record of the hearing of 12 May 2016."

36. At the resumed hearing, in detailed and careful submissions, Ms Westcott argued that the response from the Polish prosecuting authority focuses on the differences between the offences without addressing the broad overlap, in particular, the proposition that supply offences necessarily imply possession and hence obtaining. Moreover, the response appears to proceed on the basis that the only presenting question is whether the offending may be said to be the same, which is the narrow version of autrefois convict (see Fofana above). On this basis, the prosecutor's acceptance that the cases "may be related" is of concern. The concern is not remedied by the prosecutor's statement that "the 2008 conviction does not include all of the behaviours described above". The offending in the arrest warrant appears to be based solely on the evidence of a co-defendant to the same conspiracy to supply who named the Appellant as someone who purchased the drugs from him a decade earlier. The current proceedings amount to an abuse of process.

37. Mr Dolan submitted that the statement from the prosecuting authority – "it may be that these allegations are related. But they are not the same"- is clear and should be accepted as such by the Court on the basis of the need for mutual trust and confidence. The further information confirms the present allegations relate to offending of a different scope to that leading to the 2008 convictions and different offences under the Polish Criminal Code. The evidence came to light in May 2016. The points raised by the Appellant as regards whether the prosecution ought to have been aware of the activity prior to May 2016 are not relevant to the question of double jeopardy. The late discovery tends to support the Respondent's position; namely, that the present allegations relate to conduct separate from that resulting in the 2008 conviction. These were all matters relied on by the District Judge in his deciding to order extradition.

38. I accept Ms Westcott's submission that the response of the prosecuting authority appears to proceed on the basis that the only question asked of it was whether the offending may be said to be the same. This is the narrow version of autrefois convict (see Fofana above). However, the defence case is put on the wider basis that the offending is based on substantially the same facts. This Court also asked if the allegations arise from "substantially the same case which resulted in the 2008 conviction". In this context, the prosecuting authority's response that the "allegations may be related" is troubling. The response does not enable the Court to assess the similarity of the offending and, more precisely, the question of whether the drugs in both sets of proceedings are part of the same supply chain and whether the arrest warrant focusses on a different aspect of the Appellant's conduct (purchase for onward supply) as compared with the charges in 2008 (supply).

39. The prosecuting authority's response places emphasis on the weight of the drugs in the arrest warrant as compared with the amounts in 2008 (characterised as "negligible" and "dashes"). Mr Dolan repeated this emphasis in his oral submissions at the resumed hearing. In particular, he submitted that 4500 ecstasy tablets is an order of magnitude greater than supplying drugs to friends in nightclubs as part of the Appellant's recreational use in 2008. However, this does not address the Appellant's unchallenged evidence that in 2004 it was much cheaper to buy a larger amount of drugs and share them out between his friends. Having undertaken some rapid calculations of the maths, Ms Westcott pointed out in response that the supply of three ecstasy tablets a night to ten friends, two to three times a week, over the 19 month period of offending would put the numbers of tablets involved at approximately 4500. Moreover, the details of the 2008 offending include reference to the Appellant supplying marijuana, amphetamines and ecstasy pills in an "unspecified amount" from 2004 to August 2006. On the evidence currently available to the Court, the offending in 2008 cannot necessarily be distinguished from the offending in the warrant on the basis of the amounts of drugs involved.

40. The prosecuting authority's statement that the "2008 conviction does not include all behaviours described above" does not address the issue of whether the drugs are part of the same supply chain. It was common ground that the prosecutor's response that the offending is charged under different provisions of Polish law could not be dispositive of matters.

41. The prosecuting authority also explain that the information forming the basis of the conduct alleged in the warrant only came to the attention of the prosecuting authority in May 2016 when the individual who supplied the drugs "gave extensive testimony on this subject". The Judge's rejection of the abuse of process bar was based in part on his acceptance of the chronological position in this regard (¶52). This information is of obvious relevance given a rationale for the principle of double jeopardy is that the Crown ought to decide the charges to be brought at the outset of proceedings. Here the evidence is said to have only been obtained after the first set of proceedings had finished.

42. However, the Appellant gave evidence before the Judge that he admitted to a broader range of offending in 2008 beyond that with which he was charged in order to have all matters dealt with at the same time. Whilst his evidence is in general terms, it was unchallenged. In the domestic case of R v Dwyer [2012] EWCA Crim 10, the Court found a second set of proceedings to be an abuse of process where a defendant had

made public admissions to the sentencing judge in the first set of proceedings, in relation to drug dealing, which went considerably beyond the culpability alleged in the charge sheet and which the defendant had asked to be sentenced upon (¶23 and 24). Ms Westcott submitted that the present case also has analogies with the case of R v Nuh Bihe [2022] EWCA Crim 939 as an example of the principle that additional and more serious offending should be pursued at the earlier stage. She pointed to the policy rationale for encouraging prosecutors to bring everything capable of being alleged against a defendant before the same judge at ¶34. Consistent with this rationale, the question is not only what the prosecuting authority knew at the time of the first proceedings but what it ought reasonably to have known (Wangige at ¶69). I accept that the evidence of the Appellant as to admissions was only in general terms whereas the admissions in Dywer were publicly and formally made before the sentencing judge. Much will depend on the facts of each case and on representations made at the point of sentence. However, in the present case the Appellant's evidence about admissions was unchallenged. Further, they expose a difficulty with the particulars within this extradition request. The Judge found at ¶51 that "there is nothing to make good the defence's assertion that by accepting his guilt in 2008 the requested person was admitting the offences for which his now sought to stand trial". Nonetheless, the Appellant has provided the relevant material available to him and it was unchallenged before the Judge. For a more forensic assessment, fuller particulars of the arrest warrant allegation are required.

43. Ms Westcott further submitted that the latest information indicates that the second set of offending appears to be based solely on the evidence of a co-defendant to the same conspiracy to supply who named the Appellant as someone who purchased the drugs from him a decade earlier. She further submitted that the Judge should have queried why and how it could have been that the Appellant's involvement in obtaining drugs could only have emerged so many years later, when he had made admissions and been convicted for the offences that he had. This she submitted is the sort of abusive prosecution the Court of Appeal considered in R v Dwyer [2012] EWCA Crim 10, because it should have been obvious when the Appellant on his own evidence admitted to offences of drugs supply that acquisition was an inherent part of the same offences.

44. She further submitted that placing events in this jurisdiction, there would be merit in the Appellant applying to stay the present prosecution for what appears to be substantially the same offending now, especially after he had a well-founded belief all matters had been concluded against him and he had completed the penalty. This brings into question the analysis of the false sense of security engendered and the passage of time (see below).

45. Mr Dolan submitted that the Court should afford appropriate trust and confidence to the clear and unambiguous statement in the prosecutor's response that "These crimes are different from each other. There is therefore no res judicata in this case". I accept and take account of the need to pay appropriate respect to the analysis of the prosecuting authority in its response. However, I have already found that the response appears to proceed on the basis of the narrow version of autrefois convict. In addition, Ms Westcott relied on Zabolotyni v Hungary [2021] UKSC 14 at ¶50 as authority for the proposition that information provided by a non-judicial authority should be freely evaluated by the Court in the context of the relevant evidence.

46. Accordingly, I have come to the view that, on the balance of probabilities, the charges in the warrant are based on substantially the same facts as the 2008 offending, albeit with a larger amount of drugs specified and the aggravating factor of an overall intent of making this a permanent source of income. The "substantially the same" iteration of double jeopardy, can apply where the extradition allegation is cast more widely (and seriously) than a previous conviction (Fofana v France [2005] EWHC 744 (Admin) at ¶26-30). The Judge was wrong to conclude that the conduct for which the Appellant is now sought is different from that for which he was convicted in 2008.

47. At ¶56 of his judgment, the Judge recorded, for completeness, that had he been persuaded that the bar was made out, he would have considered whether to limit extradition only to conduct where the bar was not established and to excise the conduct which was barred, in accordance with Osunta v Germany [2007] EWHC 1562 (Admin) at ¶17-29. During the resumed hearing I raised this question with Mr Dolan. In a series of exchanges between Mr Dolan and the bench it became apparent that it is not possible to "sever" the 2008 offending from the offending specified in the warrant. This is because the 2008 offending includes supply in "an unspecified amount" and because of the generality of the particulars in the arrest warrant. I understood Mr Dolan to concede to the same effect.

Grounds 3 and 4

48. By reason of the conclusions reached above it is not necessary for me to address Grounds 3 and 4 in any detail, save to say that my conclusions reached above impact on grounds 3 and 4 in terms of the exercise conducted by the Judge and reveal consequential errors in his analysis.

49. In relation to ground 3 and passage of time – the Appellant's unchallenged evidence that he had confessed to wider matters in 2008 required an assessment to be made as to whether he was lulled into a false sense of security that all proceedings against him had been concluded between 2009 when he was released from prison and 2018 when the Polish authorities contacted his mother in relation to the allegations of further offending. Further, the Judge's acceptance that the polish authorities only become aware of the offending in 2016 is cast in a new light by the same evidence and raises the unexplored question of whether the Polish authorities ought to have been aware of the wider offending earlier. These errors occur in the context of a passage of time of 18 years in the case of an Appellant who was 19 during the course of offending and is now 39 with two children and settled status in the UK. Similarly; in relation to Article 8, the weight placed by the Judge on the Appellant's previous conviction in 2008 as aggravating the seriousness of the offending in the warrant requires reassessment.

Conclusion

50. For the reasons set out above I allow the appeal and order the Appellant's discharge.