



Neutral Citation Number: [2024] EWHC 2540 (Admin)

Case No: AC-2023-LON-000250

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/10/2024

Before :

MR JUSTICE JULIAN KNOWLES

Between :

JAZEPS BIRSKIS

Appellant

- and -

**GENERAL PROSECUTOR'S OFFICE,
LATVIA**

Respondent

Fred Mackintosh KC (Scot) (instructed by Freemans Solicitors) for the Appellant
Laura Herbert (instructed by CPS) for the Respondent

Hearing dates: 16 May 2024

Approved Judgment

This judgment was handed down remotely at 10:30 on 11 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Julian Knowles:

Introduction

1. This is an appeal under Part 1 of the Extradition Act 2003 (EA 2003) with the permission of Heather Williams J following an oral hearing, permission having been refused on the papers. The order appealed from is that of District Judge Tempia dated 20 March 2023 ordering the Appellant's extradition to Latvia.

2. The Latvian warrant was issued on 8 November 2021 and certified by the NCA on 10 December 2021. The Appellant was arrested on 16 October 2022 having been arrested for alleged domestic offences which resulted in no further action being taken against him.
3. He then appeared at Westminster Magistrates' Court for an initial hearing on 17 October 2022. The final hearing took place on 10 March 2023 with judgment reserved to 20 March 2023.

The factual background

4. The following is taken from the district judge's judgment.
5. The Latvian warrant is an accusation warrant. It contains one offence which was characterised below (in English law terms) as a conspiracy to burgle. It is described on the warrant as 'theft'. It is alleged that the Appellant instigated the theft of property by a group of persons pursuant to a prior agreement to burgle the complainant's home.
6. It is said that on 17 August 2019, whilst under the influence of alcohol, and in order to acquire property, the Appellant called Aleksandrs Magdusenoks and Aldis Blaxeivics and asked them to steal money from the complainant Aleksanders Rogozov's house, which they agreed to do. They then went to the complainant's house in the village of Brigi and stole €65, and after that returned to the Appellant's house and gave him €20 out of it.
7. The maximum sentence for the offence is five years imprisonment.
8. The issues raised before the district judge were s 21A/Article 8 of the ECHR and proportionality.
9. The district judge rejected these challenges. She held, in summary:
 - a. That she was not satisfied that the Appellant was a fugitive.
 - b. He had been living in the UK since December 2019 and is a man of good character in the UK.
 - c. The Appellant is in a relationship and lives with his partner in in shared accommodation. They have plans to marry.
 - d. Regarding Article 8/s 21A, the factors in favour of extradition outweighed the factors against, and extradition would not be a disproportionate interference.
 - e. It would not be disproportionate to extradite the Appellant to Latvia having regard in particular to the nature of the offence, which was a domestic burglary of a neighbour. He was also subject to a community penalty in Latvia when the instant offence was committed.
10. The Appellant has three criminal convictions in Latvia as disclosed in the ACRO record:
 - a. The first, from 26 March 2019, was for drink driving and at that point that resulted in disqualification from driving. He was also made subject to a community penalty, which it would appear he was subject to when he committed the theft involved in this appeal. The ACRO record discloses that this was converted into 19 days imprisonment on 5 October 2019, but there it does not appear that this

was ever implemented.

- b. The second is from 24 October 2019 for drink driving, for which he received a three-month and 10 day prison sentence and revocation of his driving licence. Again, there is no suggestion that it has ever been implemented.
- c. The third is for attempted theft from 10 December 2019 for which he received six months imprisonment. Again, there is no suggestion that it has ever been implemented.

Grounds of appeal and submissions

- 11. The single ground of appeal advanced by the Appellant is that the district judge's decision on proportionality should have been decided differently.
- 12. The statutory provisions relating to appeals under Part 1 are ss 26 and 27 of the EA 2003. They are well known and I need not set them out. They require this Court to be satisfied that a decision the district judge decided should have been decided differently and that if it had been, she would have been required to order the Appellant's discharge.
- 13. The question for me is whether the district judge's decision was 'wrong': *Love v Government of the United States of America* [2018] 1 WLR 2889, [22]-[26].
- 14. In relation to proportionality under s 21A of the EA 2003, the judge said this at [67]-[69] of her judgment:

“67. The leading case when looking at proportionality is *Mirazewski v Poland* [2014] EWHC 4261 (Admin). I have also considered the Lord Chief Justice's guidance in Criminal Practice Directions Amendment No 2 [2014] EWCA 1569. 68. I have to consider the following specified matters and no others:

(a) The seriousness of the conduct alleged to constitute the extradition offence: Mr Mackintosh submitted that whilst the Lord Chief Justice's Practice Direction does not exclude burglary from the category of 'Minor Theft' the Divisional Court in *Miraszewski* clearly stated that the guideline exists to identify a floor rather than a ceiling for the assessment of seriousness. In this case the value stolen was low and it is not alleged that the RP entered the property and there is no suggestion that the property was broken into. I consider the offence to be serious because the allegation is that the RP asked others to enter the complainant's property and stole money. This is a domestic burglary. The complainant was the RP's neighbour with whom he was drinking at the time. I agree the warrant is silent as to whether the property was broken into but given the nature of the offence, it is safe to infer that permission was not given for anyone to enter the home. The amount taken was low but it may not have been so to the complainant.

(b) The likely penalty that would be imposed if D was

found guilty of the extradition offence: I have not been told by the JA the exact sentence the RP would be looking at but at so I can have regard to domestic sentencing. I agree with Mr Mackintosh's assessment that on the domestic burglary guidelines this would fall into lower culpability C and category 3 harm which has a starting point of a high level community order with a range of a low community order to 6 months custody. Mr Mackintosh accepted that the RP's previous convictions may move the case up the range but this was a less serious burglary and in the general nature of a burglary was not particularly serious. In my opinion there are aggravating factors that could result in the offence moving up in the range and those are the RP's previous conviction for theft for which he received an immediate custodial sentence and that he was subject to a community order when this alleged offence was committed. A further factor that should be taken into account is the fact that the burglary was committed against the RP's neighbour's home and at the time when the neighbour was drinking with him. These factors could result in a sentence of imprisonment according to domestic guidelines.

(c) The possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D: The evidential burden is on the RP to show there would be less coercive measures than extradition. I have not been told of any and I am unaware of any request being made pursuant to section 21B of the Act.

69. When considering these specified matters, I have come to the conclusion that it would not be disproportionate to extradite the RP to Latvia.”

15. On behalf of the Appellant, Mr Mackintosh KC that the district judge should have found the Appellant's extradition to be disproportionate, and should he have discharged him.
16. He said there were two errors which demonstrate that the district judge's decision was 'wrong' in a way that, had the decision been made correctly, would have obliged her to discharge the Appellant. He said that the errors were that the district judge:
 - a. failed to reach a conclusion on the likelihood of imprisonment and instead restricted herself instead to a conclusion that the various factors she had identified 'could result in a sentence of imprisonment according to domestic guidelines' (judgment, [68(b)], emphasis added); and
 - b. when the district judge identified factors relevant to the question of the likelihood of imprisonment, she ignored significant factors that would reduce the seriousness or reflect personal mitigation, and also the question of whether a suspended sentence would be imposed in England and Wales.
17. At [18] of his Skeleton Argument he said in relation to the first point:

“18. The District Judge decided that application of the *Sentencing Council's guideline for Domestic Burglary* gives a Category Range from a range of a low community order

to 6 months custody and was correct so to do. It is therefore correct that the appellant ‘could’ receive a custodial sentence because a custodial sentence sits at the top of the range, but the District Judge has not addressed is how probable that outcome is. That assessment of probability is required by *Miraszewski* and its absence is not only a clear error, but also means that the District Judge has failed to complete the assessment process. If there is no assessment of how likely imprisonment is then an appropriate judge cannot decide whether it would be proportionate to order the extradition of a person who is not likely to receive a custodial sentence in the requesting state.”

18. In relation to the second point, he said at [19] that ‘... it was common ground that the District Judge should draw inferences from contents of the EAW and to apply domestic sentencing practice as a measure of likelihood (Pitchford J in *Miraszewski* at para. [38]’.
19. He went on to argue that the district judge had ignored three further factors that would reduce seriousness or reflect personal mitigation. These are (a) that the Appellant is not said, by the terms of the AW, to have entered the property and (b) the appellant has been of good behaviour in the UK for many years since his return the UK on 15 December 2019 and (c) the appellant has been subject to a curfew since October 2022.
20. He said at [29] of his Skeleton Argument:

“The essential point here is that the District Judge did not actually assess the likelihood of a custodial sentence, but limited herself to the truism that custody could result. Had she fully considered the test required by section 21A(3)(b) as described by Pitchford J in *Miraszewski* she would have to had properly apply Step 3 of the guideline process and therefore not conclude by implication that there should be an upward adjustment in the sentence from the starting point of a High-Level Community Order. Over and beyond this is clearly the sort of offence where for this appellant suspension of any custodial sentence is a very likely outcome. Had the District Judge properly applied the domestic guidelines she would have considered that custody was not likely.”
21. On behalf of the Respondent, Ms Herbert submitted that the district judge had properly considered the specified matters in accordance with the Act. She said that at [69] of her judgment, the district judge had drawn them succinctly together, and found that extradition would be not be disproportionate.
22. Hence, Ms Herbert submitted at [32] of her Skeleton Argument:

“32. The Judge considered the seriousness of the offence as ‘In this case the value stolen was low and it is not alleged that the RP entered the property and there is no suggestion that the property was broken into. I consider the offence to be serious because the allegation is that the RP asked others to enter the complainant’s property and

stole money. This is a domestic burglary. The complainant was the RP's neighbour with whom he was drinking at the time'. The Judge has not been absolutist in her conclusion and made an error by stating 'a domestic burglary is serious'. She has properly assessed the nature and quality of the offending and the Appellant's role and culpability (per Miraszewski [37]) and concluded that the offence is serious for the reasons she has given."

Legal principles

23. In relation to proportionality as a free-standing extradition bar, there are two principally relevant provisions.

24. Where an arrest warrant is received from a requesting judicial authority under Part 1, s 2 requires the NCA to certify it provided the statutory conditions in s 2 are met. However, s 2(7A) provides:

"(7A) But in the case of a Part 1 warrant containing the statement referred to in subsection (3), the designated authority must not issue a certificate under this section if it is clear to the designated authority that a judge proceeding under section 21A would be required to order the person's discharge on the basis that extradition would be disproportionate. In deciding that question, the designated authority must apply any general guidance issued for the purposes of this subsection.

(7B) Any guidance under subsection (7A) may be revised, withdrawn or replaced.

(7C) The function of issuing guidance under subsection (7A), or of revising, withdrawing or replacing any such guidance, is exercisable by the Lord Chief Justice of England and Wales ..."

25. I will come back to the guidance referred to in s 2(7C) later. As I shall explain, it is now to be found in the Criminal Practice Directions 2023 (as amended).

26. Section 21A of the EA 2003 provides:

"21A Person not convicted: human rights and proportionality

(1) If the judge is required to proceed under this section (by virtue of section 11), the judge must decide both of the following questions in respect of the extradition of the person ('D') -

(a) whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998;

(b) whether the extradition would be disproportionate.

(2) In deciding whether the extradition would be disproportionate, the judge must take into account the

specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); but the judge must not take any other matters into account.

(3) These are the specified matters relating to proportionality -

(a) the seriousness of the conduct alleged to constitute the extradition offence;

(b) the likely penalty that would be imposed if D was found guilty of the extradition offence;

(c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D.

(4) The judge must order D's discharge if the judge makes one or both of these decisions -

(a) that the extradition would not be compatible with the Convention rights;

(b) that the extradition would be disproportionate."

27. The leading authority in relation to the application of the statutory proportionality bar in s 21A is *Miraszewski v District Court in Torun, Poland* [2015] 1 WLR 3929. The principal leading judgment was given by Pitchford LJ.

28. At [28]-[33] he said:

"28. I accept the submission made by Mr Fitzgerald QC on behalf of the appellants that it is appropriate for judges to approach the Lord Chief Justice's guidance as identifying a floor rather than a ceiling for the assessment of seriousness. The test for the designated authority is whether "it is clear ... that a judge proceeding under section 21A would be required to order the person's discharge on the basis that extradition would be disproportionate". The Lord Chief Justice's guidance is, it seems to me, deliberately aimed at offences at the very bottom end of the scale of seriousness about which it is unlikely there could be any dispute. It must be so, otherwise the judge's freedom to apply the statutory criteria of proportionality would be unlawfully fettered. The guidance states that in the identified cases the triviality of the conduct alleged would *alone* require the judge to discharge the requested person. Subject to the exceptional circumstances identified in paragraph 17A.4, the NCA's decision-maker can assume that the judge *would be required to discharge* the requested person if he is sought for an extradition offence in one of the categories listed. However, a judge making the proportionality decision is not limited by these categories. He may conclude that an offence is not serious even

though it does not fall within the categories listed in the guidance. If so, the proportionality decision may depend on the paragraph (b) or (c) factors. It is noticeable, for example, that none of the offences of violence to the person, even the least serious, is captured by the guidance, but the terms of paragraph 17A.2 ("the judge will determine the issue on the facts of each case as set out in the warrant, subject to the guidance in 17A.3 below") make it clear that other offences may be assessed by the judge as being non-serious or trivial offences. Further, the fact that one of the paragraph 17A.4 defined "exceptional circumstances" applies, causing the NCA to certify the EAW, does not preclude the judge from holding that extradition would be disproportionate. The judge has responsibility for weighing relevant factors for himself.

29. I also accept the submissions of both counsel that section 21A(1) creates two separate bars to extradition in an accusation case. It may be that the factors influencing an Article 8 balance under section 21A(1)(a) will overlap with an assessment of proportionality for the purpose of section 21A(1)(b), but that they require separate consideration is made plain by the terms of section 21A(2) and (3). Subsections (2) and (3) require a free standing judgment that (subject to the bracketed words in subsection (2), to which I shall return) is formed upon consideration of, and only upon consideration of, the seriousness of the conduct alleged, the likely sentence and alternative methods of securing the requested person's attendance at the court of the Category 1 territory.

30. The Home Office minister, Damien Green MP, when introducing the section 21A amendment to the House of Commons on 16 July 2013, identified the mischief at which the amendment was aimed as:

'... the disproportionate use of the EAW for trivial offences ... New clause 23 means that UK courts will be able to deal with the long-standing issue of proportionality, which is a fundamental principle of EU law. It will require the judge at the extradition hearing to consider whether extradition would be disproportionate. In making that decision the judge will have to take into account the seriousness of the conduct, the likely penalty, and the possibility of the issuing state taking less coercive measures than extradition; for example issuing a court summons. Putting that proportionality bar in the legislation will ensure that extradition, which, of course, entails a person being sent to another country and being arrested and likely to be detained, happens only when the offence is serious enough to justify it.'

31. The starting point is that, provided the EAW complies with the formal requirements of section 2 of the

Extradition Act 2003, the UK has an obligation under the Framework Decision, subject to the statutory bars, to enforce the warrant by extradition. Section 21A(2) does not otherwise place a specific burden either on the requesting state or on the requested person. The proportionality of extradition is for assessment by the judge. Mr Summers QC, for the respondent, submitted that the proportionality test should be treated as "a simple test to weed out obviously and clearly trivial and/or unnecessary EAWs that the Issuing Judicial Authority would obviously never have voluntarily issued but for the principle of legality". Mr Fitzgerald QC responded that the task of "weeding" out obviously trivial EAWs would, under the scheme, be performed by the designated authority under section 2(7A). It is, in my view, important to note that section 21A(1)(b) applies to all accusation EAWs and not only to those issued by member states that apply the principle of legality. The ambit of judicial judgment is constrained only by the factors identified in section 21A(2) and (3). There are in subsection (3) three factors capable of affecting proportionality of which "seriousness" is just one. I agree with the appellants' argument. The test is identified in straightforward terms but the exercise of the judge's task is not further constrained by any particular standards of 'triviality' – the Lord Chief Justice's guidance recognises this in paragraph 17A.2. Within the boundaries set, the scope for judgement is comparatively broad. The judgement will be made against a background of mutual respect between the UK court and the issuing authority but I cannot accept that the judge will be engaged in an attempt to locate what would have been the action of the issuing authority had the principle of legality not been engaged. The court may, depending on its evaluation of factors, conclude that "extradition would be disproportionate" if (i) the conduct is not serious and/or (ii) a custodial penalty is unlikely and/or (iii) less coercive measures to ensure attendance are reasonably available to the requesting state in the circumstances.

[I interpolate here that [17A.2] referred to is now [12.2.1] of the Criminal Practice Directions 2023, set out below]

32. Mr Summers QC argued that paragraphs (a) – (c) create a hierarchy of importance. He reasoned that only seriousness was capable of measurement against a standard. Since the Lord Chief Justice had issued guidance that defined triviality, the fact that an offence came within its ambit would be enough to meet the test of disproportionality. I agree that the guidance identifies offences that are trivial but I do not agree that the guidance defines triviality or that the statutory test is triviality. As I have said, the guidance sets the threshold at which the NCA can assume the judge would be required to discharge the requested person, whatever the paragraph (b) and (c)

factors may be. An offence outside the categories listed in the guidance may also be identified as non-serious (or trivial) but that finding will not necessarily be conclusive. The bracketed words in subsection (2) make clear that it is the task of the judge to place weight where he assesses it is due. Since I do not accept that only those offences identified in the Lord Chief Justice's guidance could be treated by the judge as non-serious, other subsection (3) factors (such as a likely custodial sentence or the availability of other means of coercion) might become determinative. I do not accept that the draftsman created a predetermined rank of importance although I do accept that in most cases the seriousness of the offence will be determinative of the likely sentence and, for that reason, of proportionality.

33. Mr Fitzgerald QC did not in opening the appeal address the court upon the significance of the bracketed words in subsection (2) whose full context I repeat for convenience:

'(2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); ...'

In writing it was suggested on behalf of the appellants that, if the judge does not give consideration to a subsection (3) factor, reasons should be given. The question arises whether the bracketed words mean that the judge has a complete discretion whether to consider all or any of the subsection (3)(a) – (c) factors or that the judge must consider them all but is free to make an assessment of their comparative weight. In my opinion, the breadth of the expression used within brackets is such that the judge may decline to give consideration to the subsection (3) factors at all but, since section 21A(1)(b) requires the proportionality decision to be made, it is a decision that must be made judicially. For example, there may be a concession made on behalf of the requested person that upon considered advice no point on proportionality is taken; or the answer to the proportionality issue may be so obviously apparent on the face of the EAW that no analysis of the subsection (3) factors is necessary. However, in the overwhelming number of cases in which the point is taken it seems to me that the statutory function could not be performed unless the judge expressly addresses the subsection (3) issues. I also consider that the bracketed words enable the judge to give differential weight to subsection (3) factors depending upon the circumstances of the case. For example, the judge may not be able to reach a conclusion as to the likely sentence. If the judge cannot resolve the issue one way or the other, necessarily the weight to be given to the paragraph (b) factor will be reduced. I accept the submission that the

judge should give reasons both when he examines the subsection (3) factors and when he finds it inappropriate to do so.

29. The reference to the Lord (now Lady) Chief Justice's Guidance is to the guidance mentioned in s 2(7C) (see above), which is now to be found in the Criminal Practice Directions 2023 (as amended). (The Lady Chief Justice has the power, including under the Courts Act 2003 and the Constitutional Reform Act 2005, to make directions as to the practice and procedure of the criminal courts.)

30. Paragraphs 1.1.3 and 1.1.4 provide:

“1.1.3 The Criminal Procedure Rules and the Criminal Practice Directions are the law.

1.1.4 They provide a code of current practice that is binding on the courts to which they are directed.”

31. The relevant paragraphs in [12.2] provide:

“12.2.1 When considering under s 21A(3)(a) of the Act the seriousness of conduct alleged to constitute the extradition offence, the judge will determine the issue on the facts of each case as set out in the warrant, subject to paragraph 12.2.2 below.

12.2.2 Where the conduct alleged to constitute the offence falls into one of the categories in the table at paragraph 12.2.4 below, unless there are exceptional circumstances, the judge should generally determine that extradition would be disproportionate. It follows under the terms of s.21A(4)(b) of the Act that the judge must order the person's discharge.

12.2.3 The exceptional circumstances referred to above in paragraph 12.2.2 include:

- a. vulnerable victim;
- b. crime committed against someone because of their disability, gender-identity, race, religion or belief, or sexual orientation;
- c. significant premeditation;
- d. multiple counts;
- e. extradition also sought for another offence;
- f. previous offending history.”

32. The Table at [12.2.4] is this:

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Category of offence	Examples
Minor theft – (not robbery/burglary or theft from the person)	<p>Where the theft is of a low monetary value and there is a low impact on the victim or indirect harm to others, for example:</p> <p>(a) theft of an item of food from a supermarket;</p> <p>(b) theft of a small amount of scrap metal from company premises;</p> <p>(c) theft of a very small sum of money.</p>
Minor financial offences (forgery, fraud and tax offences)	<p>Where the sums involved are small and there is a low impact on the victim and/or low indirect harm to others, for example:</p> <p>(a) failure to file a tax return or invoices on time;</p> <p>(b) making a false statement in a tax return;</p> <p>(c) dishonestly applying for a tax refund;</p> <p>(d) obtaining a bank loan using a forged or falsified document;</p> <p>(e) non-payment of child maintenance.</p>
Minor public order offences	<p>Where there is no suggestion the person started the trouble and the offending behaviour was, for example:</p> <p>(a) non-threatening verbal abuse of a law enforcement officer or government official;</p> <p>(b) shouting or causing a disturbance, without threats;</p> <p>(c) quarrelling in the street, without threats.</p>
Minor criminal damage (other than by fire)	For example, breaking a window.
Possession of a controlled substance (other than one with a high capacity for harm such as heroin, cocaine, LSD or crystal meth)	Where it was possession of a very small quantity and intended for personal use.

33. At [35] Pitchford LJ said:

“35. Mr Fitzgerald QC made two submissions as to the practical approach to assessment of proportionality

between which, at first sight, there may be some tension. The first was that in making the assessment of seriousness and the likely penalty on conviction the judge should first consider whether a custodial sentence would be imposed for the extradition offence by a court in England and Wales. This, he argued, is the approach taken when considering the compatibility of extradition with the requested person's Convention rights under Article 8. Mr Fitzgerald relied on passages in the judgment of Lord Judge CJ in *H (H) v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25; [2012] 1 AC 338 at paragraphs 131 - 132. At issue in *H (H)* was the degree to which the interests of children dependent upon the care of a requested person should weigh in the decision as to whether extradition would be a proportionate performance of the UK's international obligations, having regard to the consequential interference with the requested person's right to respect for his family life under Article 8 ECHR. The court accepted that delay was a material consideration in the judgment of proportionality for Article 8 purposes because, during that period of delay, family ties and the nature of the dependency may have changed to such an extent that the effects of interference would have become exceptionally severe. However, in the passage to which the court was referred, Lord Judge did not suggest that sentencing decisions in England and Wales were the primary measure of seriousness or penalty; he said that it would be in very rare cases that extradition could properly be avoided if the sentencing courts in this country would, despite the interests of dependent children, impose an immediate sentence of imprisonment. At the same time the UK should be careful not to impose its own standards on the requesting state, particularly when informed that the requesting state was likely to impose such a sentence. When, however, the courts of England and Wales would either not impose a sentence of imprisonment or would suspend a sentence of imprisonment, that knowledge remained a relevant consideration to be weighed against the degree of interference with family life established, including the interests of dependent children. Secondly, Mr Fitzgerald QC argued that, "where appropriate" the judge should seek information from the requesting state as to the likely penalty in that state. The issue of practical importance for judges raised by these submissions is whether they are obliged to require advice upon the seriousness of the conduct alleged and/or the likelihood of a custodial sentence on conviction. I shall confront this issue in the following paragraphs."

34. The two paragraphs referred to from Lord Judge CJ's judgment in *H(H)* were these:

"131. ... the starting point in the sentencing decision involves an evaluation of the seriousness of the crime or crimes and the criminality of the offender who committed them or participated in their commission and a balanced

assessment of the countless variety of aggravating and mitigating features which almost invariably arise in each case. In this context the interests of the children of the offender have for many years commanded principled attention, not for the sake of the offender, but for their own sakes, and the broader interests of society in their welfare, within the context of the overall objectives served by the domestic criminal justice system. Sadly the application of this principle cannot eradicate distressing cases where the interests even of very young children cannot prevail.

132. The extradition process involves the proper fulfilment of our international obligations rather than domestic sentencing principles. So far as the interests of dependent children are concerned, perhaps the crucial difference between extradition and imprisonment in our own sentencing structures is that extradition involves the removal of a parent or parents out of the jurisdiction and the service of any sentence abroad, whereas, to the extent that with prison overcrowding the prison authorities can manage it, the family links of the defendants are firmly in mind when decisions are made about the establishment where the sentence should be served. Nevertheless for the reasons explained in *Norris* the fulfilment of our international obligations remains an imperative. *ZH (Tanzania)* did not diminish that imperative. When resistance to extradition is advanced, as in effect it is in each of these appeals, on the basis of the article 8 entitlements of dependent children and the interests of society in their welfare, it should only be in very rare cases that extradition may properly be avoided if, given the same broadly similar facts, and after making proportionate allowance as we do for the interests of dependent children, the sentencing courts here would nevertheless be likely to impose an immediate custodial sentence: any other approach would be inconsistent with the principles of international comity. At the same time, we must exercise caution not to impose our views about the seriousness of the offence or offences under consideration or the level of sentences or the arrangements for prisoner release which we are informed are likely to operate in the country seeking extradition. It certainly does not follow that extradition should be refused just because the sentencing court in this country would not order an immediate custodial sentence: however it would become relevant to the decision if the interests of a child or children might tip the sentencing scale here so as to reduce what would otherwise be an immediate custodial sentence in favour of a non-custodial sentence (including a suspended sentence).”

35. Going back to *Miraszewski*, Pitchford LJ said as follows about the statutory criteria in s 21A(3):

“*Subsection (3)(a) – seriousness of the conduct alleged*

36. I have already considered the general approach to seriousness in paragraphs 30 – 33 above. Section 21A(3) (a) requires consideration of 'the seriousness of the conduct alleged to constitute the extradition. I agree that, as Mr Fitzgerald QC argued, paragraphs (a), (b) and (c) of subsection (3) all assume an approximate parity between criminal justice regimes in member states that embrace the principles of Articles 3, 5 and 6 of the ECHR and Article 49(3) of the Charter of Fundamental Rights of the European Union. In my view, the seriousness of conduct alleged to constitute the offence is to be judged, in the first instance, against domestic standards although, as in all cases of extradition, the court will respect the views of the requesting state if they are offered. I accept Mr Summers QC's submission that the maximum penalty for the offence is a relevant consideration but it is of limited assistance because it is the seriousness of the requested person's conduct that must be assessed. Mr Fitzgerald QC's identification of 7 years imprisonment as the maximum sentence for theft in England and Wales makes the point. Some offences of theft are trivial (see the Lord Chief Justice's Guidance); others are not. In my view, the main components of the seriousness of conduct are the nature and quality of the acts alleged, the requested person's culpability for those acts and the harm caused to the victim. I would not expect a judge to adjourn to seek the requesting state's views on the subject.

Section 21A(3)(b) – the likely penalty on conviction

37. Section 21A(3)(b) requires consideration of 'the likely penalty that would be imposed if D was found guilty of the extradition offence'. Since what is being measured is the proportionality of a decision to extradite the requested person under compulsion of arrest, I consider that the principal focus of subsection (3)(b) is on the question whether it would be proportionate to order the extradition of a person who is not likely to receive a custodial sentence in the requesting state. The foundation stone for the Framework Decision is mutual respect and trust between member states. The courts of England and Wales do not treat as objectionable the possibility that sentence in the requesting state may be more severe than it would be in the UK. Raised in the course of argument was the case of a member state that imposed minimum terms of imprisonment for certain offences by reason of the particular exigencies of the crime in the territory of that state. Appropriate respect for the sentencing regime of a member state is required under subsection (3)(b); the UK has itself imposed minimum terms of custody as a matter of policy. However, in the extremely rare case when a particular penalty would be offensive to a domestic court in the circumstances of particular criminal conduct, it is in my view within the power of the judge to adjust the weight

to be given to 'the likely penalty' as a factor in the judgement of proportionality.

38. It would be contrary to the objectives of the Framework Decision to bring mutual respect and reasonable expedition to the extradition process if in every case the judge had to require evidence of the likely penalty from the issuing state. Furthermore, the more borderline the case for a custodial sentence the less likely it is that the answer would be of any assistance to the domestic court. Article 49(3) of the Charter of Fundamental Rights of the European Union requires that the severity of penalties must not be disproportionate to the criminal offence. The EAW procedure has since 2009, when the Charter came into effect, been the common standard for members of the Union. In my judgment, the broad terms of subsection (3) (b) permit the judge to make the assessment on the information provided and, when specific information from the requesting state is absent, he is entitled to draw inferences from the contents of the EAW and to apply domestic sentencing practice as a measure of likelihood. In a case in which the likelihood of a custodial penalty is impossible to predict the judge would be justified in placing weight on other subsection (3) factors. However, I do not exclude the possibility that in particular and unusual circumstances the judge may require further assistance before making the proportionality decision.

39. While the focus of subsection (3)(b) is upon the likelihood of a custodial penalty it does not follow that the likelihood of a non-custodial penalty precludes the judge from deciding that extradition would be proportionate. If an offence is serious the court will recognise and give effect to the public interest in prosecution. While, for example, an offence against the environment might be unlikely to attract a sentence of immediate custody the public interest in prosecution and the imposition of a fine may be a weighty consideration. The case of a fugitive with a history of disobeying court orders may require increased weight to be afforded to subsection (3)(c): it would be less likely that the requesting state would take alternative measures to secure the requested person's attendance.

Section 21A(3)(c) – less coercive measures

40. Section 21B of the Extradition Act 2003, inserted by section 159 of the Anti-Social Behaviour, Crime and Policing Act 2014, enables either the requesting state or the requested person to apply to the court for the requested person's return to the requesting state temporarily or for communication to take place between the parties and their representatives. Section 21A(3)(c) is concerned with an examination whether less coercive measures of securing the requested person's attendance in the court of the

requesting state may be available and appropriate. His attendance may be needed in pre-trial proceedings that could be conducted through a video link, the telephone or mutual legal assistance. The requested person may undertake to attend on issue of a summons or on bail under the Euro Bail scheme (if and when the scheme is in force) or the judge may be satisfied that the requested person will attend voluntarily and that extradition is not required.

41. It would be a reasonable assumption in most cases that the requesting state has, pursuant to its obligation under Article 5 (3) ECHR, already considered the taking of less coercive measures. I accept the submission made by Mr Summers QC that there is an evidential burden on the requested person to identify less coercive measures that would be appropriate in the circumstances. Where the requested person has left the requesting state with knowledge of his obligations to the requesting state's authorities but in breach of them, it seems to me unlikely that the judge will find less coercive methods appropriate. On the other hand, as the Scott Baker report recognised at paragraph 5.153 there may be occasions when the less coercive procedure is appropriate. If the requested person fails to respond to those alternative measures the issue of a further warrant and extradition could hardly be resisted.”

36. In *Vascenkovs v Latvian Judicial Authority* [2023] EWHC 2830 (Admin) Swift J said:

“10. I consider the position in light of the judgment in *Miraszewski* to be this. Section 21A(1)(b) and (3) establish a bespoke notion of proportionality which is a condition for extradition pursuant to an accusation warrant. The Practice Direction contains guidance on seriousness but is not exhaustive and does not remove the court's responsibility to apply its own assessment of this notion of proportionality. The proportionality assessment required is an overall appreciation of a situation rather than an exercise of precise calibration. While information offered by a requesting judicial authority may be considered, the court is under no obligation to request information and such requests will be relatively rare. In most instances a court will apply this proportionality requirement using domestic practice as a measure. Resort to domestic practice is inevitable since even if an English court were to be equipped with information from the requesting judicial authority it would, from the perspective of the principle of mutual recognition, ill-behave it to subject that information to anything approaching penetrating analysis. Moreover, the same principle of mutual recognition requires, so far as this proportionality analysis rests on consideration of domestic practice, the court should allow a significant margin before concluding extradition would be disproportionate, since reaching such a conclusion too readily could call into question the requesting authority's decision to issue the warrant (as a disproportionate use of

that court's power). A conclusion that extradition would be disproportionate would not necessarily be at odds with the notion of mutual recognition. For example, it might rest on information not available to the requesting authority when it made its decision to issue the warrant. However, the principle of mutual recognition means that a conclusion that extradition is disproportionate in this sense will be an occurrence more rare than common, likely to arise only in unusual circumstances.

11. Putting the matter another way, the judgment *Miraszewski* does not suggest that the bar on extradition contained within section 21A(1)(b) exists to pursue a purpose that goes any further than explained by the Home Secretary in her statement in parliament in July 2013 and the statement by the Home Office Minister made when the amendment was introduced (see, the judgment in *Miraszewski* at paragraph 30): i.e., to provide a further brake on extradition for ‘very minor offences’. A further brake because the definition of extradition offence in section 64 of the 2003 Act already excludes the possibility of extradition for some types of minor offending.”

Discussion

37. I have carefully considered all of the points made by the parties both orally and in writing. Despite Mr Mackintosh’s able submissions, I am not persuaded that the district judge was wrong in her determination.
38. The central point underlying the submissions on behalf of the Appellant is that the district judge misapplied English sentencing rules and in particular the relevant Sentencing Guideline and did not reach specific conclusions about what sentence the Appellant would receive in this jurisdiction, or did not fully and precisely apply the Sentencing Guideline.
39. He asserted in [19] of his Skeleton Argument, that below it had been ‘common ground that the District Judge *should* draw inferences from contents of the EAW and to apply domestic sentencing practice as a measure of likelihood’ (my emphasis). Even if this was common ground below, I do not think that it accurately sets out the right approach.
40. In *Swiatek v Regional Court in Lodz, Poland* [2024] EWHC 726 (Admin), Bennathan J said:

“38. In my view it is a mistake to treat the judgments of Lord Judge in *HH* and Lord Justice Pitchford in *Miraszewski* as laying down an immutable procedure whereby a District Judge considering section 21A(3) will fall into error and be liable to being overturned on appeal if they choose not to embark on a detailed analysis of domestic sentencing guidelines. I do not think Lord Justice Pitchford's reference to an initial assessment of seriousness need amount to any more than a Judge making clear [possibly based, explicitly or implicitly, on no more than their everyday experience of the criminal courts] that allegations such as drug dealing over a prolonged period

of time are clearly serious'. The use of the word '*entitled*' makes clear that in assessing '*likely penalty*' a judge can look at domestic sentencing policy only if he or she thinks fit to do so. Neither judgment suggests any more prescriptive approach."

41. So in the present case, the judge was entitled to - but not required to - consider the Sentencing Guidelines in her assessment of seriousness. But she did so, and the question is whether her approach was so erroneous that it should lead this appeal being allowed.
42. As I said, the essentials of the Appellant's case is that the district judge did not properly apply the Guidelines and that, had she done so, she would have been bound to conclude that custody was not likely.
43. I consider this submission to be at odds with what Swift J indicated was the correct approach in *Vascenkovs* in the following paragraphs, and especially in [23]:

"22. The submission for Mr Vascenkovs is in two parts: *first*, that the District Judge wrongly applied the Sentencing Council's Guideline for the section 111A offence; and *second*, that she ought not to have decided the proportionality issue without information from the Latvian judicial authority on whether it was likely that a custodial penalty would be imposed on Mr Vascenkovs in the event of conviction.

23. The Sentencing Council Guideline provides a sentencing range by reference to culpability and harm. No point arises so far as concerns harm which is measured by the reference to the value obtained or intended to be obtained. The submission on culpability is that the District Judge was wrong to conclude the allegation against Mr Vascenkovs was in the "high culpability" bracket because the conduct described in the warrant did not entail anything comprising "significant planning" which is the relevant rubric contained in the Sentencing Council Guideline. If the offending was not high culpability it would not, given the amount involved, attract a custodial sentence as the starting point.

23. I do not consider this submission assists. Any resort to the Sentencing Council Guidelines to consider the type of sentence that might be imposed for similar offending in England is undertaken only to obtain a general idea of the seriousness of the allegation and the likely consequence of conviction. It is a hypothetical exercise. A district judge is not in a position to undertake the sort of precise sentencing exercise that would be performed following a trial. There has been no trial and the precise circumstances of the offending and of the accused when the offending took place are not known. Given the absence of this information the conclusion reached by the District Judge at paragraph 42 was an appropriate conclusion. The task for this court, on appeal, is not to mark the judge's approach to a sentencing exercise as if she had passed

sentence following trial and this appeal court was acting as the Court of Appeal Criminal Division. There is no need to determine matters of fine detail when resort is had to the Sentencing Council Guidelines for this purpose. On appeal, the only issue is whether the approach taken to the hypothetical application of the Guidelines was one that, in broad terms, was appropriate and fitted with a correct assessment of proportionality for the purposes of section 21A of the 2003 Act. I am satisfied that the District Judge used the Guidelines correctly. I do not consider that the conclusions she reached both as to the likely outcome had the same matters happened in England or as to the likely outcome for Mr Vaschenkova in the event of conviction, should be reversed.

25. The second submission for Mr Vaschenkova is that in 'borderline cases' (i.e. cases where the sentence of an English court for like offending could be either custodial or non-custodial) a court must, before deciding the section 21A(1)(b) proportionality question, ask the requesting judicial authority whether it would impose a custodial sentence. This, it was submitted, is a 'hard-edged' requirement.

26. I do not agree. A hard-edged requirement would be arbitrary, and would be wrong in principle. It would be arbitrary because, as I have already said, the Sentencing Council Guidelines are applied in this context without the full facts that would ordinarily be available to a sentencing court."

44. I consider that, in line with the approach in [23], that the judge's approach was correct.
45. As to seriousness (s 21A(3)(a)), what she said was in accordance with [36] of *Miraszewski*, where Pitchford LJ said that in assessing seriousness the focus on the conduct should be on the nature and quality of the acts alleged; the defendant's culpability for those acts; and the harm caused to the victim.
46. She rightly acknowledged that the amount stolen was low and that it was not alleged that the Appellant had entered the property. As to this second point, I do not think it weighs in the Appellant's favour. This was a joint enterprise in which he is alleged to have incited others to commit the burglary from which he personally benefitted. He is therefore every bit as culpable as they are irrespective he did not enter the neighbour's house himself. The judge's assessment of why the alleged offence is serious was correct for the reasons she gave. The Appellant took advantage of his neighbour's absence from his home to commission a burglary of his house. This was an opportunistic targeting of the neighbour. She rightly concluded the home must have been broken into. As to value, viewed through English eyes the amount stolen might seem relatively small, there was no information about the effect of the victim. For all that is known, it might have represented his savings, or his entire weekly income.
47. As to likely sentence, the district judge rightly looked to the Guidelines for a measure of guidance and rightly reached the conclusion that the offence might attract a custodial penalty here. She was not required to do any more and certainly was not required to conduct the sought of precisely calibrated exercise contended for on behalf

of the Appellant. She was not in a position to do so for all of the reasons set out by Swift J. Even so, the possibility of a non-custodial sentence would not of itself render extradition disproportionate: *Miraszewski*, [39]. Along the same lines, and as to the point that any custodial sentence would be suspended, this again does not, of itself, make extradition disproportionate: *Kemp v Spanish Judicial Authority* [2016] EWHC 69 (Admin), [19].

48. Mr Mackintosh placed some reliance *Swiercz v The Regional Court in Poznan, Poland* [2019] EWHC 1387 (Admin), in which Yip J overturned the district judge's finding that extradition would not be disproportionate on the basis that she committed a 'material error' by overstating the seriousness of the offence and not recognising that a custodial sentence would not be likely by domestic standards (at [21]-[23]).
49. I do not consider that this decision materially assists the Appellant. Every case turns on its own facts. The judge did not criticise the district judge's finding that a custodial sentence was 'possible' in this country. Yip J differed from the district judge because the appellant was a man of good character, and therefore she concluded that there was a 'strong likelihood' that a custodial sentence would *not* be imposed, and this infected the district judge's overall assessment in a way that meant the appeal had to be allowed. The present Appellant is not a man of character, and has been sentenced to prison before. The clear factor which led Yip J to her conclusion is therefore missing in this case.
50. Overall, this was not a trivial or un-serious offence. The Appellant organised or incited the burglary of a neighbour's house when he knew he was absent. It did not fall within the Table I set out earlier, and although this of itself is not determinative (the 'floor not a ceiling' point), it is a factor to be borne in mind. The Appellant has previous convictions and was subject to a community penalty when he allegedly committed this offence. The district judge was not wrong to conclude that a custodial sentence could be imposed in this country. She had a measured and appropriate regard to the Guideline. The judge was therefore entitled to find that extradition would not be disproportionate.

Conclusion

51. For these reasons, this appeal is dismissed.