



Case No: AC-2024-LON-002306

Neutral Citation Number: [2025] EWHC 232 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2025

Before :

MR JUSTICE LINDEN

Between :

PIOTR MARZEC

Appellant

- and -

WARSAW REGIONAL COURT, POLAND

Respondent

Tihomir Mak (instructed by **Bullivant Law**) for the **Appellant**
Adam Squibbs (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 21st January 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 07/02/2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Linden :

Introduction

1. This is an appeal from an Order for the extradition of the Appellant which was made by District Judge Pilling, sitting at the Westminster Magistrates' Court, on 28 June 2024. The Appellant is sought on a conviction warrant ("the AW") in respect of a total sentence of 2 years, 8 months and 15 days' imprisonment for 7 offences which were committed in Poland in 2009/2011. A total of 1 year, 11 months and 11 days remain to be served. The AW was issued on 25 January 2022 and certified by the National Crime Agency on 28 March 2023. The Appellant was arrested on 21 October 2023 and has since been in custody.
2. There are two grounds of appeal, in respect of which permission was granted on the papers by Sir Peter Lane on 24 July 2024:
 - i) First, that the District Judge was wrong to find that section 20 of the Extradition Act 2003, which is concerned with fair trial rights, was satisfied in relation to three of the offences which were the subject of the AW ("Offences 1-3") ("Ground 1").
 - ii) Second, assuming Ground 1 to be correct, so that the Appellant is discharged in respect of Offences 1-3, his extradition in respect of the remaining offences ("Offences 4-7") would be disproportionate and therefore incompatible with Article 8 of the European Convention on Human Rights ("ECHR") ("Ground 2").
3. Mr Mak appeared for the Appellant, and Mr Squibbs for the Respondent, on appeal and before the Magistrates' Court. I am grateful to them for their clear and helpful submissions.

The basis for the Arrest Warrant

4. The 7 offences which are the subject of the AW, to all of which the Appellant had pleaded guilty, are as follows. I set them out in the order in which they appear in the AW and the judgment of the District Judge (rather than chronological order). There were also Further Information documents on 5 March ("the First FI") and 17 April 2024 ("the Second FI") on which the District Judge relied:
 - i) On 9 October 2010:
 - a) driving whilst disqualified by an order of the court made on 18 February 2009. On 4 August 2011 the Appellant was sentenced by the District Court of Dabrowa Gornicza to 1 year's imprisonment, suspended for 3 years, for this offence. This was case file VII K 376/11 ("Offence 1").
 - b) theft of a wallet with PLN 800 in cash, an ID, an ATM card, a health insurance card, and a driver's license. On 19 June 2011 he was sentenced by the District Court of Sosnowiec to 6 months' imprisonment for this offence. The sentence has been served in full. This was case file VII K 607/10. ("Offence 2").

- ii) On 17 August 2010, driving whilst disqualified. On 20 January 2011 the Appellant was sentenced by the District Court of Strzelce Opolskie to 3 months' imprisonment for this offence, suspended for 3 years. This was case file II K 1319/10 ("Offence 3").
 - iii) On 18 November 2009, driving whilst disqualified. On 20 April 2010 he was sentenced to 3 months' imprisonment for this offence by the District Court of Katowice. The sentence has been served in full. This was case file III K 120/10 ("Offence 4").
 - iv) On 16 October 2009:
 - a) giving a police officer a bribe of PLN 300 to refrain from carrying out his duty ("Offence 5");
 - b) possession of 0.02 grammes of amphetamine ("Offence 6");
 - c) driving whilst disqualified ("Offence 7").
 - v) Offences 5-7 were the subject of case file IV K 203/11. On 19 March 2014, the Appellant was sentenced as follows for these offences by the District Court for Warsaw:
 - a) 1 year's imprisonment for Offence 5;
 - b) 3 months' imprisonment for Offence 6; and
 - c) 1 year's imprisonment for Offence 7.
5. On 7 February 2012, i.e. after the sentences on Offences 1-4 but before the sentences for Offences 5-7, the Appellant initiated an application for cumulative sentences to be considered.
6. On 4 December 2014, the District Court in Warsaw imposed two cumulative sentences on the Appellant as follows:
- i) In respect of Offences 1-3, 1 year and 3 months' imprisonment;
 - ii) In respect of Offences 4-7, 1 year and 7 months' imprisonment.
7. This was the enforceable decision relied on in the AW. It became unappealable on 12 December 2014. The questions in Box 3 of the AW – which address the fair trial issues – were answered by reference to this decision.
8. These two cumulative sentences were to be served consecutively and the total sentence at this stage was therefore one of 2 years and 10 months. In a decision dated 23 September 2015, however, the same court then reduced the cumulative sentence for Offences 1-3 to 1 year, 1 month and 15 days' imprisonment so that the total sentence on all 7 Offences was 2 years 8 months and 15 days.
9. The following periods of time spent in custody were offset against the cumulative sentences:

- i) In respect of Offences 1-3, the Appellant was in custody between 19 May and 3 June 2011 and between 3 June and 17 November 2012. The period which therefore remained to be served was 7 months and 15 days.
 - ii) In respect of Offences 4-7, he was in custody on 18 November 2009 and between 9 October 2010 and 8 January 2011 in respect of Offence 4, and on 16 October 2009 and between 18 and 19 April 2013 in respect of Offence 5. The period which remained to be served was therefore 1 year 3 months and 27 days.
10. The District Judge made findings as to the Appellant's presence at trial, which were not challenged before me, as follows:
- i) Offence 1: the Appellant was not present at the handing down of the judgment but had been informed of the hearing as he was in custody at the time. The penalty imposed was one to which he had already consented.
 - ii) Offence 2: the Appellant was present at trial.
 - iii) Offence 3: the Appellant was not present although he was notified of the hearing, collected the judgment and agreed to the penalty.
 - iv) Offence 4: the Appellant had been notified of the hearing but chose not to collect the notification from the post office.
 - v) Offences 5, 6 and 7: the Appellant participated in the hearing but was not present at the announcement of the judgment.
11. The Appellant's written evidence was that he had left Poland to come to the United Kingdom in 2010 but the District Judge did not make any specific finding about the timing of his departure. However, on the evidence, he pleaded guilty to all 7 offences, had been present at the trial in relation to Offence 2 in June 2011 and had been in custody in Poland for the periods of time in 2011, 2012 and 2013 which I have identified at [9] above. He had also attended his trial on Offences 5-7, the sentence for which was imposed on 19 March 2014 and became final on 4 June 2014. Before me, Mr Mak therefore did not dispute that it appeared that the Appellant had absconded after the sentence on Offences 5-7 but before the hearings on cumulative sentences on 4 December 2014 i.e. at some point between March and December 2014.
12. As to what is known about the September 2015 hearing, the First FI states that what is described as a "ruling":

"..was issued at a court session of which the parties were not notified. The ruling ... was delivered to the convicted person - with an information note about the right to appeal and the method of and deadline for appealing - to the address indicated by the convict in the course of the proceedings. The mail was not collected by the convict (he was correctly notified twice by a notice left in the mailbox that the mail would be waiting to be collected at the nearest post office). The uncollected mail with an official copy of the ruling was deemed to have been delivered correctly on 15 October 2015."

Ground 1

Section 20 of the Extradition Act 2003

13. Section 20 of the Extradition Act 2003 is the domestic law provision governing the impact of a trial in a requested person's absence on whether extradition should nonetheless proceed. It was intended to implement Article 4a of the Council Framework Decision of 13 June 2002 (2002/584/JHA), as amended by the Council Framework Decision of 26 February 2009 (2009/299/JHA) ("the Amended Framework Decision"), which, itself, reflects the requirements of Article 6 of the European Convention on Human Rights ("ECHR"). In *Cretu v Local Court of Suceava, Romania* [2016] EWHC 353 (Admin); [2016] 1 WLR 3344 at [14]-[18] the Divisional Court confirmed that section 20 should be interpreted in conformity with these provisions, and this position has been preserved by the EU-UK Trade and Cooperation Agreement 2020 which was implemented by the European Union (Future Relationship) Act 2020 and by amendments to the 2003 Act.

14. Section 20 provides as follows:

"20 Case where person has been convicted

(1) If the judge is required to proceed under this section he must decide whether the person was convicted in his presence.

(2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 21.

(3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial.

(4) If the judge decides the question in subsection (3) in the affirmative he must proceed under section 21.

(5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial.

(6) If the judge decides the question in subsection (5) in the affirmative he must proceed under section 21.

(7) If the judge decides that question in the negative he must order the person's discharge.

(8) The judge must not decide the question in subsection (5) in the affirmative unless, in any proceedings that it is alleged would constitute a retrial or a review amounting to a retrial, the person would have these rights—

(a) the right to defend himself in person or through legal assistance of his own choosing or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required;

(b) the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

15. Section 21 of the 2003 Act provides that:

“If the judge is required to proceed under this section (by virtue of section 20) he must decide whether the person’s extradition would be compatible with the Convention rights withing the meaning of the Human Rights Act 1998 (c 42).”

The arguments on the section 20 issue before the District Judge

16. Mr Mak’s position before the District Judge was that the requirements of a fair trial include that the person should be present or represented at any hearing which modifies the penalty imposed as a result of offending. In this case there were two such hearings at which the Appellant was not present or represented i.e. the hearings of 4 December 2014 and 23 September 2015. Moreover, deemed or substituted service of notice of a hearing (e.g. by leaving notifications at a post office) is not sufficient to establish that a requested person had actual knowledge of the date of the hearing. It was submitted to the District Judge that it had not been unequivocally established that the Appellant was aware of the scheduled hearings in respect of either of these decisions, nor that he was informed that decisions would be handed down if he failed to appear. The Respondent was therefore unable to establish that the Appellant had “deliberately absented himself” from either of these hearings for the purposes of section 20(3) of the 2003 Act.

17. Mr Squibbs accepted that the Respondent was required to satisfy section 20 in respect of both of the hearings relied on by the Appellant. His case was that:

- i) As far as the 4 December 2014 hearing was concerned, the Appellant had deliberately absented himself and section 20(3) of the 2003 Act was therefore satisfied. Reliance was placed on the evidence of the Appellant who, in his written evidence at least, appeared to admit that he left Poland knowing that he was due to be sentenced on Offences 5-7 and/or was aware of the ongoing proceedings for a cumulative sentence which he had issued on 7 December 2012. The circumstances in which he fled to the United Kingdom therefore effectively amounted to a waiver of his Article 6 ECHR rights.
- ii) For the same reasons, section 20(3) was satisfied in relation to the 23 September 2015 hearing. Alternatively, section 20(5) was satisfied on the basis that the Appellant had been served with the judgment, indictment and information concerning his right to appeal this decision but had not lodged an appeal. It did not matter, for these purposes, whether he had been personally served with these documents.

The District Judge’s reasons for rejecting the section 20 argument

18. When considering the issue of fugitivity the District Judge summarised the Appellant’s evidence about his attendance at the hearings which formed part of the criminal proceedings in Poland. She considered that his evidence was lacking in clarity and credibility and she found that he had altered and embellished his evidence in the course of the hearing. She noted that the Appellant had said that he had appealed against one of his sentences with a view to it being reduced to under a year, and capable of being served by an electronically monitored curfew. At [23] she noted that:

“...The RP accepted that the case had been set down for another date and he decided to leave Poland at that stage as he was worried about being sent back to prison...”

19. At [27] she found that:

“...he understood very well that he had been sentenced to a period of immediate custody, that the appeal would go ahead in his absence, and he came to the UK in order to avoid being sent back to prison.” (emphasis added)

20. At [31]-[33] she found as follows:

“31.I accept the evidence of the JA that the cumulative sentences resulted from an application made by the RP. I am therefore satisfied that he knew the sentences which had been passed and was hoping for a reduction or at least a delay in the imposition of immediate custody.

32.In my assessment the changes and embellishments in his evidence were not due to a genuine loss of memory, but because he now understood the significance of not being present at, or aware of, a particular court hearing. The RP had to concede that when he left Poland, he knew that he could not and would not receive any correspondence, unless he took steps to seek information through his grandmother.

33.He accepts leaving Poland to avoid being sent to prison “so that he could continue to care for his sick grandmother”. He agreed with Mr Squibbs that he knew the hearing would proceed in his absence and that if he was not successful, he would have to serve that sentence of imprisonment. I am satisfied to the high criminal standard so that I am sure that he came to the UK in order to avoid being returned to prison in Poland. By leaving and not providing any address at which he could be contacted, he placed himself deliberately and knowingly beyond the reach of the legal process. I therefore agree with the JA that he is a fugitive.” (emphasis added)

21. Later in her judgment the District Judge dealt with the section 20 issue. She set out the section in full and noted that she had been referred to *Bertino v Public Prosecutor’s Office, Italy* [2024] UKSC 9, [2024] 1 WLR 1483 (“*Bertino*”). She then made findings about the Appellant’s attendance or otherwise at trial in respect of each of the Offences which were the subject of the AW. I have set these findings out at [10] above. She went on to say this:

“59 I am satisfied that the RP initiated the application for cumulative sentences to be considered on 7 February 2012, but that he had no intention of ever attending any such hearing, in case the sentences were activated and he was returned to custody.

60.Box D of the AW states that the RP did not appear at the trial resulting in the decision, that is the cumulative sentence of the District Court for Warsaw handed down and dated 4 December 2014. Mr Mak submits that the RP had not been deliberately absent because it was a notice of substitute serve (sic) delivered at his address; the notice was left at the nearest post office instead.

61. *The RP was twice sent a notice “of the date of the trial resulting in the cumulative judgement” to the address he had given in respect of offences 3, 4 5, 6 and 7. He had given the same address when leaving prison. This was not collected from the post office by the RP. He cannot escape “service” by simply ignoring the fact he had been sent correspondence from the court.*

62. *The RP had been aware of the requirement for him to notify any change of address and warned that if failed to do so, he would be considered to have been served with documents sent to him at the address provided. The RP was clear in his evidence that he knew he would be dealt with in his absence.*

63. *I have set out above why I have found the RP to be a fugitive and I am satisfied that once he left for the UK, his goal was that he could not and would not receive any post from the JA and therefore this can be regarded as his “expression of an intention not to respond to summonses.”*

64. *I agree with Mr Squibbs that in a case of deliberate absence I have to consider whether it was reasonably foreseeable that the hearing could proceed in his absence. The RP's evidence was clear - he believed if he could not collect the documents, if he did not attend, and if he left the jurisdiction **these cases could, and would, go ahead in his absence. He did not engage with the process but left Poland and waived his rights to attend any hearing.***

65. *The arguments on section 20 therefore fail” (emphasis added)*

Summary of the arguments in the appeal on Ground 1

22. In his careful and realistic submissions, Mr Mak confirmed that there was no challenge to the District Judge’s finding that there had been compliance with section 20 in relation to the 4 December 2014 hearing. Ground 1 relates to the 23 September 2015 hearing alone. In summary, his argument was that:
- i) Although it was common ground before the District Judge that section 20 required to be satisfied by the Respondent in respect of the September 2015 hearing she had failed to make any material finding or reach any conclusion in relation to this issue. Her decision only addressed the December 2014 hearing.
 - ii) There was no dispute that the Appellant was not present at the September 2015 hearing.
 - iii) As far as section 20(3) is concerned:
 - a) Fugitivity alone is not a sufficient basis for a finding that the Appellant deliberately absented himself from his trial: see *Sejdovic v Italy* (Application No 56581/00) 2006 WL 5003056 at [87] (“*Sejdovic*”). For there to be a waiver of Article 6 rights by a failure to attend, there has to be a knowing, voluntary and intelligent act done with sufficient awareness of the relevant circumstances, and it must be shown that the defendant could reasonably have foreseen what the consequences of his conduct would be: *Sibgatullin v Russia* (Application No 143/05) 24 April 2012 at [48] (“*Sibgatullin*”).

- b) Here, the Appellant accepted the District Judge's finding that he waived his Article 6 rights in relation to the December 2014 hearing but this was in the context of her finding that he had initiated the cumulative sentence process which had resulted in the judgment of 4 December 2014. He had left the jurisdiction after the hearing in relation to Offences 5-7, at which he was present, and knowing that the cumulative sentence process was ongoing and that hearing(s) in the course of that process would proceed in his absence.
- c) However, the District Judge's finding in relation to the December 2014 hearing could not and should not be extended to the September 2015 hearing. Although Mr Mak accepted that, if he was right that she did not address the September 2015 hearing, I should reach my own conclusion based on her findings and the evidence, the September 2015 hearing was a different proceeding of which there was no evidence that the Appellant was aware. There was no evidence as to how this decision came about, nor to the effect that it was a continuation of the cumulative sentence proceedings which had concluded on 4 December 2014. Applying the criminal standard, I therefore could not and should not be sure that the Appellant had sufficient awareness of this hearing and the consequences of not attending for it to be said that he waived his Article 6 rights in relation to it.
- d) As for any argument that section 20(5) of the 2003 Act applies in the alternative, there was no evidence that the Appellant was aware of his right of appeal from the September 2015 decision and he therefore could not be held to have waived this right. The First FI stated that the ruling and the information about his right of appeal and the deadline for doing so were delivered to the address which he had provided in the course of the criminal proceedings. He was therefore deemed to have been correctly served but that was not enough for the purposes of waiver.
- e) Accordingly, I should discharge the Appellant on Offences 1-3.

23. In response, Mr Squibbs argued that:

- i) Reading the judgment as a whole, it was plain that the District Judge had considered the September 2015 hearing and her finding that the Appellant had waived his rights to attend "*any*" hearing was intended by her to apply to this hearing as well as the 4 December hearing. This was also apparent from the reference to "*these cases*" in [64] of her judgment (cited at [21], above). The parties agreed that section 20 applied to the September 2015 decision and she was addressed on this basis. It is inconceivable that she did not have that hearing in mind.
- ii) Even if the District Judge did not have the September 2015 hearing in mind when she made her finding at [64], this was a case in which the Appellant had left Poland knowing that the sentence which he would be required to serve in respect of his offending was under consideration by the Polish courts, that there would be further hearings, and that those hearings would proceed in his absence.

There was therefore a clear waiver of his Article 6 rights and I could be sure that section 20(3) was satisfied.

- iii) In any event, section 20(5) of the 2003 Act was satisfied. The section should be read as applying when the requested person “*was or would be entitled to a retrial*”: see the decision of the Divisional Court in *Szatkowski v Regional Court in Opole, Poland* [2019] EWHC 883 (Admin), [2019] 1 WLR 4528 at [33]-[34] (“*Szatkowski*”). The Appellant had been given a right of appeal from the September 2015 decision but had not exercised it. The *Szatkowski* principle does not require the requested person to have actual knowledge of the right of appeal. It is sufficient that they have constructive knowledge in that they have been notified but have chosen not to receive notifications in the context of the ongoing proceedings of which they are aware.

Discussion of Ground 1

The powers of the High Court in this appeal

24. Sections 27(2) and (3) of the Extradition Act 2003 provide:

“(2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.

(3) The conditions are that—

(a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;

(b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.”

Did section 20/Article 6 apply to the September 2015 decision?

25. The basis for Mr Squibbs’ concession, below and in the appeal, that the Respondent was obliged to satisfy section 20 of the 2003 Act in relation to the September 2015 hearing is the decision of the Court of Justice of the European Union (“CJEU”) in *Criminal proceedings against Zdziaszek* (Case C-271/17PPU), [2017] 4 WLR 189. At [96] the CJEU held that:

“the concept of a “trial resulting in the decision”, within the meaning of article 4a(1) of Framework Decision 2002/584, must be interpreted as referring not only to the proceedings which gave rise to the decision on appeal, where that decision, after a fresh examination of the case on the merits, finally determined the guilt of the person concerned, but also to subsequent proceedings, such as those which led to the judgment handing down the cumulative sentence at issue here, at the end of which the decision that finally amended the level of the initial sentence was handed down, in as much as the authority which adopted the latter decision enjoyed a certain discretion in that regard.”

26. The reference to “discretion” in this passage reflects what was said by the CJEU at [88]. Having said that Article 6 ECHR applies to the determination of sentence, and that compliance with fair trial rights entails the right of the person concerned to be present

at the hearing because of the significant consequences which it may have on the quantum of the sentence to be imposed ([87]) the CJEU added:

“88. This is the case with respect to specific proceedings for the determination of an overall sentence where those proceedings are not a purely formal and arithmetic exercise but entail a margin of discretion in the determination of the level of the sentence, in particular, by taking account of the situation or personality of the person concerned, or of mitigating or aggravating circumstances....”

27. It was irrelevant whether the court concerned had jurisdiction to increase a sentence which had previously been imposed [89]. And it was also irrelevant that the outcome might be more favourable to the offender:

“92.....since the level of the sentence is not determined in advance but depends on the assessment of the facts of the case by the competent authority and it is precisely the duration of the sentence to be served which is finally handed down which is of decisive importance for the person concerned.”

28. Although little is known about the nature of the September 2015 decision – what the court considered and why it reduced the sentence, for example – I will assume without deciding that Mr Squibbs’ concession is correct. It is possible, for example, that the Warsaw District Court was simply correcting a technical or arithmetical error which it had made in the December 2014 judgment but there is no evidence that this is all that it was.

Is section 20(5) the answer?

29. If section 20(3) of the 2003 Act was not satisfied/there was no waiver in relation to the September 2015 hearing, the Respondent would need to show, in the words of section 20(5), “that the [Appellant] would be entitled to a retrial or (on appeal) to a review amounting to a retrial”. Mr Squibbs appeared to accept that the Appellant would not be entitled to a retrial of the issue: hence his argument, based on *Szatkowski* (supra) at [34] and [35], that section 20(5) also applies where the requested person was entitled to an appeal amounting to a retrial but did not exercise this right. However, there were two difficulties with a direct application of *Szatkowski*:

- i) First, as Mr Squibbs accepted, there is no information as to the nature of the appeal from the September 2015 decision which was available to the Appellant: did he have a right to a rehearing of the issue or would he have been limited, for example, to asking for a review or establishing an error of law?
- ii) Second, in *Szatkowski* the position was that the requested person had received notice of his conviction and sentence when in Poland and, having taken advice from a lawyer, decided not to challenge it. He accepted that he could have appealed the decision but chose not to do so. The basis for the decision in *Szatkowski* was therefore that, as Irwin LJ said:

“33. The clear intent of section 20 of the 2003 Act is to give proper protection to the requested person's Article 6 rights. That intent cannot reasonably be said to be “contradicted” by an interpretation which allows a person to be extradited, when the only reason that he will not have the opportunity of a

retrial on his return is that he had such an opportunity previously and chose not to take it.” (emphasis added)

- iii) By contrast, in the present case, the Appellant did not actually receive notice of the September 2015 decision – hence Mr Squibbs’ reliance on the fact that he was deemed to have been served – and he did not choose not to exercise his right to appeal, at least in the sense in which Mr Szatkowski specifically chose not to exercise a right of appeal of which he was well aware.
30. It therefore seemed to me that the real issue in the appeal was whether the Appellant waived his right to be present at any hearing in relation to the September 2015 decision. If he did, the issues in relation to the nature of the appeal and his knowledge of his right of appeal would not matter.

The applicable legal principles in relation to waiver in this context

31. In *Bertino* (supra) Lords Stephens and Burnett (with whom Lords Hodge, Sales and Burrows JJSC agreed) said, at [45]:

“...Just as the Amended Framework Decision reflects the provisions of article 6 of the Convention, as interpreted by the Strasbourg Court, on the right to be present at trial so too does section 20. The phrase “deliberately absented himself from his trial” should be understood as being synonymous with the concept in Strasbourg jurisprudence that an accused has unequivocally waived his right to be present at the trial.” (emphasis added)

32. I accept that it does not follow from the fact that a requested person is a fugitive that they necessarily waived their Article 6 rights in relation to the criminal proceedings in the requesting state when they fled. But it is important to bear in mind the limits of this point. *Sejdovic* was a case where the requested person, who had been convicted of murder in his absence, had been identified by witnesses as the killer but had immediately disappeared. He had not been arrested or questioned in connection with the offence and was unaware of the criminal proceedings. It was in this context that the European Court of Human Rights (“ECtHR”) said:

“87. The Court has held that where a person charged with a criminal offence had not been notified in person, it could not be inferred merely from his status as a “fugitive”., which was founded on a presumption with an insufficient factual basis, that he had waived his right to appear at the trial and defend himself (see *Colozza* , cited above, § 28).” (emphasis added)

33. Similarly, *Colozza v Italy* (1985) 7 EHRR 516, to which the ECtHR referred in the passage above, was a case in which the requesting authority relied merely on the fugitive status of the requested person in circumstances in which he had not been arrested and was not aware of the criminal proceedings against him. He had been deemed to be aware of these proceedings by reason of notifications delivered to his last known address in circumstances where he had not been traced. At [28] the ECtHR emphasised that “*waiver of the exercise of a right guaranteed by the Convention must be established in an unequivocal manner*” whereas the position, on the facts, was equivocal.

34. *Bertino* was also a case in which the requested person had left Italy knowing that he was under investigation but had never been officially informed that he was being prosecuted, nor notified of the time and place of his trial. This factual context is important when considering what the Supreme Court said: although the Supreme Court considered other types of case, the focus was on the position where the requested person did not know that he was being prosecuted. Moreover, the Supreme Court was considering the following question, which had been certified by Swift J:
- “For a requested person to have deliberately absented himself from trial for the purpose of section 20(3) of the Extradition Act 2003, must the requesting authority prove that he has actual knowledge that he could be convicted and sentenced in absentia?”
35. In *Bertino* the requesting judicial authority had argued, and Swift J had accepted, that the court should draw an inference that the requested person could reasonably have foreseen that, by failing to notify the authorities of his change of address whilst under investigation, he might be prosecuted, convicted and sentenced in his absence.
36. In identifying the relevant principles the Supreme Court reviewed the relevant domestic decisions as well as the Article 6 ECHR jurisprudence and the caselaw in relation to the Article 4a of the Amended Framework Decision. At [33] their Lordships noted that in *Sejdovic* (supra) at [86]-[87] the ECtHR said that:
- “86. Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial .. However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner...
- 87.....before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be....”
37. At [34] their Lordships noted that in a series of cases involving Russia the Strasbourg Court elaborated on the concept of reasonable foreseeability of the consequences in this context. There has to be a “*voluntary, ...knowing and intelligent relinquishment of [the] right*”. The Russian cases included *Sibgatullin* (supra) where the ECtHR had made 2 related points:
- i) “there can be no question of waiver by the mere fact that an individual could have avoided, by acting diligently, the situation that led to the impairment of his rights” [47].
 - ii) “the waiver of the right must be a knowing, voluntary and intelligent act, done with sufficient awareness of the relevant circumstances.” [48]
38. At [36]-[38] the Supreme Court noted that, at *Sejdovic* [89], the ECtHR emphasised the importance of the right of the accused, under Article 6(3)(a) ECHR “*to be informed promptly ... of the nature and cause of the accusation against him*”. The question in that case was “*whether Sejdovic could be regarded as having sufficient awareness of*

the prosecution and trial to be able to decide to waive his right to appear at trial..” (emphasis added). At [99] the ECtHR said this:

“99. In previous cases concerning convictions *in absentia*, the Court has held that to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights; vague and informal knowledge cannot suffice... ..The Court cannot, however, rule out the possibility that certain established facts might provide an unequivocal indication that the accused is aware of the existence of the criminal proceedings against him and of the nature and the cause of the accusation and does not intend to take part in the trial or wishes to escape prosecution. This may be the case, for example, where the accused states publicly or in writing that he does not intend to respond to summonses of which he has become aware through sources other than the authorities, or succeeds in evading an attempted arrest.....or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces.” (emphasis added)

39. In the light of this passage the Supreme Court noted that:

“This paragraph of its judgment sees the Strasbourg Court, in language that is familiar, carefully avoiding drawing hard lines. Cases are fact specific. It leaves open the possibility of a finding of unequivocal waiver if the facts are strong enough without, for example, the accused having been explicitly told that the trial could proceed in absence...” (emphasis added)

40. At [39] their Lordships also noted the decision of the CJEU in *Criminal Proceedings against IR* (Case C-569/20) EU:C:2022:401 at [48] which considered equivalent provisions, under Articles 8 and 9 of Directive 2016/343, to Article 4a of the Amended Framework Decision:

“It is only where it is apparent from precise and objective indicia that the person concerned, while having been officially informed that he or she is accused of having committed a criminal offence, and therefore aware that he or she is going to be brought to trial, takes deliberate steps to avoid receiving officially the information regarding the date and place of the trial that the person may ... be deemed to have been informed of the trial and to have voluntarily and unequivocally foregone exercise of the right to be present at it. The situation of such a person who received sufficient information to know that he or she was going to be brought to trial and, by deliberate acts and with the intention of evading justice, prevented the authorities from informing him or her officially of that trial in due time...[may be tried in their absence].” (emphasis added)

41. Ultimately, the Supreme Court was able to decide the *Bertino* case on the basis of the importance, under Article 6(3)(a) ECHR, of the requested person knowing that there are criminal proceedings against him: his having been notified “*of the nature and cause of the accusation against him*”. At [50], their Lordships said:

“50. The appellant's dealings with the police ..fell a long way short of being provided by the authorities with an official “accusation”. He knew that he was

suspected of a crime and that it was being investigated. There was no certainty that a prosecution would follow. When the appellant left Italy without giving the judicial police a new address there were no criminal proceedings of which he could have been aware, still less was there a trial from which he was in a position deliberately to absent himself.”

42. At [58], however, the Supreme Court returned to the question which had been certified by Swift J (see [34], above), which focussed on the offender’s knowledge of the consequences of failing to attend the trial. Their Lordships said:

“The Strasbourg Court has been careful not to present the issue in such stark terms although ordinarily it would be expected that the requesting authority must prove that the requested person had actual knowledge that he could be convicted and sentenced in absentia. As we have already indicated, in *Sejdovic* ... the court was careful to leave open the precise boundaries of behaviour that would support a conclusion that the right to be present at trial had been unequivocally waived. The cases we have cited provide many examples where the Strasbourg Court has decided that a particular indicator does not itself support that conclusion. But behaviour of an extreme enough form might support a finding of unequivocal waiver even if an accused cannot be shown to have had actual knowledge that the trial would proceed in absence. It may be that the key to the question is in the examples given in *Sejdovic* at para 99. The court recognised the possibility that the facts might provide an unequivocal indication that the accused is aware of the existence of the criminal proceedings against him and of the nature and the cause of the accusation and does not intend to take part in the trial or wishes to escape prosecution. Examples given were where the accused states publicly or in writing an intention not to respond to summonses of which he has become aware; or succeeds in evading an attempted arrest; or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces. This points towards circumstances which demonstrate that when accused persons put themselves beyond the jurisdiction of the prosecuting and judicial authorities in a knowing and intelligent way with the result that for practical purposes a trial with them present would not be possible, they may be taken to appreciate that a trial in absence is the only option....” (emphasis added)

The application of these principles to the present case

43. As I have noted, the focus in the present case is not precisely the same as it was in *Bertino*. There, as in *Sejdovic*, the Supreme Court was concerned with the position where the requested person was not specifically aware that he was being prosecuted when he left the country and it cannot be shown that he had actual knowledge that he would be tried in his absence. By contrast, in the present case, the Appellant was well aware of the criminal proceedings in Poland and had participated in them in the ways identified above, up to and including the hearing which led to the sentence in relation to Offences 5-7 in 2014. Moreover, on a fair reading of her judgment, the District Judge in the present case made an unchallenged finding that the Appellant understood that the consequence of failure to attend hearings would be that they would proceed in his absence. The issue raised in the question certified by Swift J in *Bertino* therefore does not arise and the facts in the present case are distinguishable from *Sejdovic* and *Bertino*, and more supportive of the conclusion that the Appellant waived his Article 6 rights.

44. Second, as noted above, for the purposes of the appeal it is now conceded that the Appellant did waive his right to attend hearings in the course of the cumulative sentencing process up to and including the December 2014 hearing, whether or not he was aware of the time or the place of such hearings. There is no challenge to the District Judge's finding that, by leaving Poland in the circumstances in which he did, and deliberately choosing not to receive notification of hearings, there was an unequivocal waiver in relation to that hearing. I agree with that concession. The only question is therefore whether the District Judge's finding applied to, or should be applied to, the September 2015 decision.
45. Third, I accept Mr Mak's submission that neither I nor the District Judge can be sure that the September 2015 hearing was part of, or a continuation or extension of, the cumulative sentence process which the Appellant initiated. On the evidence, this hearing may well have been separate or additional to that process. Mr Mak also relied on the fact that the Appellant was not aware of the date and place of the September 2015 hearing or his right of appeal, but this is a less compelling point given that he had left Poland and had chosen not to receive notifications in relation to the ongoing proceedings. It is clear from the discussion in *Bertino* that knowledge of the precise time and place of trial is not a necessary condition of waiver in all cases. Moreover, the Appellant's lack of knowledge of the time and place of the hearings in the cumulative sentence process was not said to prevent a finding of waiver in relation to those hearings. The real issue is whether the assumed facts that (a) the September 2015 was an additional stage of the criminal proceedings (b) of which the Appellant was not specifically aware when he left Poland, matter.
46. Fourth, given that no hearing appears to have been offered to the parties in relation to the decision on 23 September 2015, there is a degree of artificiality in the suggestion that the Appellant deliberately absented himself from the "court session" at which that decision was taken. However, no specific point was taken on this. This was presumably because, if the Appellant waived his right to attend the September 2015 hearing the fact that he was not invited to attend cannot sensibly be a matter of complaint.
47. Fifth, I agree with Mr Mak that the District Judge did not specifically address or analyse the September 2015 decision by reference to section 20 of the 2003 Act or Article 6 ECHR. The only specific reference to this decision in the judgment is at [4], where the District Judge merely noted, as part of the *Introduction*, that:
- "Box F of the AW states that subsequently, in a judgment dated 23 September 2015, the District Court for Warsaw reduced the cumulative sentence of 1 year 3 months' imprisonment (relating to offences 1, 2, and 3) to a cumulative sentence of 1 year 1 month and 15 days' imprisonment."*
48. Moreover, [59] and [60] of the judgment, cited at [21] above, suggest that she had the 4 December 2014 decision in mind when she wrote [61]-[64]. This interpretation would also be consistent with the fact that this was the decision on which the AW was based.
49. Sixth, however, whether or not the District Judge specifically had the September 2015 decision in mind, as noted above:
- i) She had repeatedly found that the Appellant understood that if he did not attend hearings he would be dealt with in his absence.

- ii) At [63] she found that the Appellant’s “*goal was that he could not and would not receive any post from the JA and therefore this can be regarded as his “expression of an intention not to respond to summonses.”* This quotation from *Sejdovic* [99] and *Bertino* [58] was clearly intended to identify the present case as being in the category where there may be waiver on the basis that the offender has chosen, with knowledge of the consequences, not to be aware of hearings or to participate in them. In this regard, the District Judge’s analysis was also consistent with the passage from *Criminal Proceedings against IR* (supra) at [48] (quoted at [39], above) where the CJEU referred to “*deliberate steps to avoid receiving officially the information regarding the date and place of the trial*” or “*[preventing] the authorities from informing him or her officially of that trial*” potentially leading to the conclusion that there has been a waiver of the right to attend. In *Bertino* the Supreme Court also recognised that it was possible, in principle, for there to be a waiver where the evidence establishes that the requested person has knowingly taken steps to prevent a trial with them present, or has elected not to participate in the trial.
- iii) This feature of the case is also referred to at [64] of the District Judge’s decision where, as noted above, she found that:

“The RP’s evidence was clear - he believed if he could not collect the documents, if he did not attend, and if he left the jurisdiction these cases could, and would, go ahead in his absence. He did not engage with the process but left Poland and waived his rights to attend any hearing.”

50. Seventh, as I read “*these cases*” in [64], the District Judge was referring to the five cases against the Appellant in relation to the 7 Offences. The final sentence which the Appellant would be required to serve in relation to these offences had not yet been determined and proceedings for the purposes of deciding this question were ongoing, as the Appellant was aware. On a fair reading of her judgment she concluded that he had decided to leave the country and not to take any steps to receive notifications of hearings which were concerned with deciding his final sentence. He did not wish to take any further part in those proceedings and he understood that future hearings would take place in his absence. He therefore unequivocally waived his right to attend “*any*” such hearings.
51. Eighth, I therefore do not accept that Mr Mak’s submission that, in effect, the District Judge’s conclusion should be confined to any hearings in the cumulative sentence proceedings which the Appellant initiated. When the Appellant left Poland he was aware that the final sentence which he was required to serve in relation to Offences 1-7 remained to be determined and he decided that he did not wish to participate in the process of determining it: in “*any*” hearings which formed part of that process.
52. Ninth, I agree with Mr Squibbs’ submission that the logic of the District Judge’s decision applies equally to the September 2015 hearing even if the District Judge did not have it specifically in mind. The Appellant did not know of the December 2014 hearing, only that the question of his sentence was not finally determined and that there would be further hearing(s). The fact that one of those hearings may not have been part of the cumulative sentence proceedings does not seem to me to be material in the circumstances of this case. The suggestion that although this was the Appellant’s position in relation to the cumulative sentence proceedings one cannot be sure that his

position was or would have been the same in relation to the September 2015 hearing seems to me to be artificial. Mr Mak suggested that the Appellant might have instructed someone to appeal against the September 2015 decision, but this is inherently implausible given that it resulted in a reduction in sentence. In any event it is fanciful to suggest that the Appellant would have taken a different approach to the September 2015 decision, had he been aware of it, given that he did not seek to be represented in relation the key decision on 4 December 2014 or to appeal against the outcome. The Appellant had, in effect, decided that he did not want or need to take any further part in the criminal proceedings against him. He could simply avoid serving the final sentence which was imposed by leaving the country and not leaving any effective means of contacting or tracing him. The same thinking would have led him to conclude that he need not take any part in the September 2015 hearing or decision.

Conclusion on Ground 1

53. So for all of these reasons I have concluded that the District Judge found, in effect, that there was a general waiver by the Appellant of his right to participate in the final determination of his sentence for the 7 Offences. In my judgment that finding was equally applicable to the September 2015 decision and/or any appeal from that decision whether or not the District Judge had that decision specifically in mind.
54. I therefore reject Ground 1.

Ground 2

55. Mr Mak made clear that Ground 2 was advanced on the basis that he was correct on Ground 1. His argument was that if the Appellant was discharged on Offences 1-3 it would be disproportionate, and contrary to Article 8 ECHR, to extradite him on Offences 4-7 given, inter alia, that there would only be a matter of days to serve on the sentence for these offences. However, his position was that if Ground 1 failed, Ground 2 also failed.
56. I therefore dismiss Ground 2.

Conclusion

57. It follows that I dismiss the appeal.