Neutral Citation Number: [2020] EWHC 1257 (Admin)

Case No: CO/1030/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2020

Before :

MR JUSTICE FORDHAM

- -

Between :

KASPER LIPSKI	**Appellant**
- and -	
(1) REGIONAL COURT IN TORIN, POLAND	
(2) REGIONAL COURT IN RZESZOW, POLAND	**Respondents**

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DANIELLE BARDEN (instructed by **GT STEWART SOLICITORS**) for the **APPELLANT**
NATALIE McNAMEE (instructed by **CPS**) for the **RESPONDENTS**

Hearing date: 5 May 2020

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Approved Judgment

Introduction

1. This is a case about fresh evidence and the impact of extradition on a 9 year-old boy. The case came before me as an appeal against the ruling on 8 March 2019 by the extradition judge ("the judge") ordering extradition of the appellant to Poland. Permission to appeal, together with permission to rely on an expert psychological report dated 10 October 2019, was granted by Steyn J on 21 February 2020. The hearing before me was a Skype video conference hearing during the Covid-19 pandemic. It and its start time were listed in the cause list, with contact details available to anyone seeking permission to observe the hearing. I was addressed by Counsel in exactly the same way as if we were in the court room. The appellant attended the hearing. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

2. The appeal is brought on the basis that the judge would have found, had the fresh evidence been before him, that the appellant's extradition was a disproportionate interference with his and his son's rights to respect for private and family life. The fresh evidence relied on comprises the psychological report for which Steyn J gave permission, and two addendum proofs of evidence from the appellant, permission to rely on which was unopposed and the contents of which were unchallenged by the respondents. The respondents' case is that the fresh evidence is insufficiently compelling, whether viewed alone or with the other evidence in the case, to justify allowing the appeal and ordering the appellant's discharge. Whether that is right is the central issue on the appeal.

The Case in Outline

3. The appellant is a 30-year-old man who has been in the United Kingdom since October 2013. He met his wife Anita in 2009, when he was 19, and they married. Their son Aleks was born in December 2010 and is now 9 years old. The offending to which the extradition relates is described in two European Arrest Warrants (EAW1 and EAW2). It took place on 14/15 May 2011 and 24 August 2011. The appellant was 21. On the night of 14/15 May 2011 he entered a house through an open window and unsuccessfully tried to steal money (the equivalent of just under £200), shoes and the keys to an Audi car. Earlier, on 15 May 2011, he had been in possession of 0.40g of amphetamine in a car, a Kia (which he is not said to have broken into). The same night he broke into two other cars, a Peugeot and a Renault, failing to start either of them. He took from the Renault a car warning triangle and pair of gloves (together worth the equivalent of £6). Then on 24 August 2011, the appellant obtained a sum (the equivalent of £190) for the supposed sale online of a mobile phone, which he never delivered.

4. The May 2011 conduct constituted three offences of attempted burglary (the house, the Peugeot and the Renault) and a fourth offence of possession of drugs (in the Kia), of which the appellant was convicted on 24 January 2012, which together led to a sentence of 15 months custody. There was some confusion as to whether, on the evidence, that was a suspended sentence. The appellant's evidence is that he understood it to be a suspended sentence. Ms McNamee for the respondents, correcting her skeleton argument, submitted that the correct characterisation of the evidence from her client is that it was a non-suspended custodial sentence, which the appellant could be called on to serve by summons. Ms Barden, for the appellant, accepted that the evidence supports

that conclusion, but submits that the evidence from the appellant is that he believed it to have been a suspended sentence, and no adverse finding of fact was made against him by the judge in relation to that belief. The unserved sentence of 15 months custody for the May 2011 offences is the subject of EAW1. That is a conviction warrant. EAW1 was issued on 24 July 2018 and certified by the NCA on 24 October 2018. It refers to a summons, by which the appellant was called upon to serve his sentence of 15 months. However, the date of that summons has never been identified in this case. Ms McNamee accepts that she cannot maintain – on the evidence – that the summons preceded the appellant coming to the United Kingdom in October 2013. She also accepts that she cannot maintain – on the evidence – that the appellant was aware of the summons prior to his arrest on 18 December 2018 on EAW1 and EAW2. I accept the agreed characterisation of both counsel, on the evidence: that this was not a suspended sentence; that there has at some stage been a summons, but that this did not precede the appellant coming to the UK; and that he was not aware of it prior to his arrest in December 2018. In consequence, I accept – as was common ground between the parties – that the appellant is not "a fugitive" so far as the matters which are the subject of EAW1 are concerned.

5. The August 2011 conduct has been characterised in the evidence as the offence of 'swindling'. The appellant was convicted on 8 October 2012 and sentenced to a period of 6 months custody, which sentence was suspended for 3 years. So, the appellant was not – at that stage – being summoned to serve the 15-month sentence in respect of the May 2011 offending, nor being subjected to immediate custody in respect of the August 2011 offending. The suspension of the 6-month sentence was on conditions, requiring compliance by the appellant. In the event, it was the subject of an application on 4 May 2015 for activation. That application was granted, and the sentence was activated on 22 December 2015, so that the appellant now had to serve his 6 months custody. It is the activated sentence of 6 months custody which is the subject of EAW2. That is another conviction warrant. It was issued on 16 August 2018 and certified by the NCA on 13 September 2018.

6. There is no precise description in the evidence as to what it was that was relied on by the Polish authorities for the 2015 activation of the 6-month suspended sentence imposed for the August 2011 offence. In the evidence before the court from the respondents as requesting judicial authorities, reference is made to two things, relied on in combination: (i) the commission of a further offence; and (ii) the failure to comply with conditions regarding supervision by the probation service. It has been possible to identify a reliable picture as to what is meant by (ii), the non-compliance. It relates to failure to maintain contact with the Polish probation service from the UK. However, the date and nature of (i), the further offending, has not been identified. The respondents invite me to draw these inferences from the evidence: that it involved what in Poland constitutes a crime; that that criminal conduct was distinct from the non-maintenance of contact with probation; that it was conduct which took place in Poland at some time between October 2012 when the suspended sentence was imposed and October 2013 when the appellant left Poland for the UK in October 2013; and that it was this offence together with the failure to comply which in combination had the consequence in 2015 of activating the suspended sentence. Ms Barden did not contest that characterisation. I accept it.

7. So much for (i), the commission of the offence. I return to (ii), the non-compliance. I have explained that it is common ground what that non-compliance was, on the evidence. It was a failure on the part of the appellant to continue, after about April 2014, to keep in monthly written contact with the Polish probation service, from the United Kingdom. The respondents' own documentary evidence recognises that the appellant came to the United Kingdom in October 2013 with the knowledge of the Polish probation service; that he provided them with a UK address; and that he kept in contact with them from the UK after that, "for some time". The appellant's evidence is that this contact was by means of a monthly letter, and that he continued to write such letters for six months, until stopping in April 2014. Ms McNamee accepts that – on the evidence – that April 2014 discontinuance of monthly letter writing is what is to be taken to be the relevant non-compliance, for the purposes of the activation of the suspended sentence. Ms Barden agrees. Again, I accept that characterisation. Again, I am satisfied that it is a sound inference on the evidence before the Court, giving the mutual respect which is due to the formal extradition information provided to the UK courts by the respondent requesting judicial authorities.

A "fugitive" in relation to EAW2?

8. It is at this point that I encounter the first controversy in the case. I have explained that the nature of the non-compliance is common ground. The appellant's state of knowledge in relation to that non-compliance is controversial. The appellant's evidence was and is that he understood six months to be the extent of his obligation to maintain contact with probation, and that is why he carried on for six months and then stopped. If that is what he thought, he was wrong, as I have explained. But is that what he thought? There was no express finding of fact by the judge adverse to the appellant on this point. The judge did not expressly reject the appellant's evidence about having genuinely believed that six months was the extent of his obligation.

9. If the appellant's evidence on this point were to be rejected, it would mean he was, from April 2014, "a fugitive in relation to the matters which are the subject of EAW2. Ms McNamee submits that the judge is to be inferred to have rejected that evidence, because the judge is to be inferred to have found the appellant to be a fugitive, and that both of these inferences are sound on the evidence that was before the judge, who heard oral evidence under cross-examination from the appellant. Ms McNamee accepts that neither of these points – the rejection of the appellant's evidence as to his genuine belief regarding his compliance obligation and the finding that he was a fugitive – was the subject of any express or explicit finding by the judge anywhere in the judgment.

10. It is common ground that, if the appellant's evidence as to his genuine belief about his compliance obligation were to be rejected, it would follow that he was a fugitive in relation to EAW2 from April 2014. Relying on Wisniewski v Regional Court of Wroclaw, Poland [2016] EWHC 386 (Admin) at paragraph 60, Ms McNamee submitted that failing from the United Kingdom to comply with an obligation which is a condition of a suspended sentence would suffice to constitute the appellant a "fugitive", provided that it was done "knowingly". She accepts that the individual would not, however, be a fugitive if the non-compliance arose from a "genuine misunderstanding" on their part. Ms Barden agreed with that analysis of the law. But which side of the line does this case fall? That turns on whether the non-compliance after April 2014 was a "knowing" act or involved a "genuine misunderstanding".

11. Ms McNamee accepts that the appellant's evidence was of a genuine misunderstanding. The context, moreover, is worth recalling. He had told the Polish probation authorities about his move to the UK; he had given his UK address; and he had written monthly letters. As I have explained, the judge heard oral evidence from the appellant, who was cross-examined, but the judge made no express finding of fact rejecting that evidence. He did not find that the appellant had "knowingly" failed to perform the contact condition. He did not address the distinction between "knowingly" being non-compliant and non-compliance through a "genuine misunderstanding". Nothing in the formal documentation from the respondent requesting judicial authorities, which the UK court will accept out of mutual respect, described "knowing" non-compliance. The judge did not say that he disbelieved or rejected as unreliable the appellant's evidence that there had been a genuine misunderstanding; still less did he give reasons for arriving at such a conclusion.

12. The invitation to infer an adverse finding that the appellant was a fugitive is based on the following passages in the judgment. (1) The judge's description of the appellant as having "believed that he had fulfilled the further obligations" but that "the only confirmation he had that he had fulfilled his obligations was a telephone call". (2) The judge's inclusion within the factors in support of extradition the "strong public interest in discouraging person seeing the UK as a state willing to accept fugitives from justice". (3) The judge's inclusion within the factors in support of extradition that "the [appellant] failed to comply with the terms of his suspended sentence – he committed a further offence and failed to comply with the supervision requirements of the sentence". (4) The judge's inclusion within the factors in support of extradition that "whilst there has been delay this is consequent upon the conduct of the [appellant]". (5) The judge's inclusion within the factors militating against extradition that "there has been delay in this case albeit a consequence of the conduct of the [appellant] in leaving the jurisdiction of the [requesting judicial authority]".

13. I am not persuaded that I should infer that the judge made a finding of fact that the appellant had "knowingly" been non-compliant, rather than non-compliant by reason of a "genuine misunderstanding". I am not persuaded that I should infer that the judge made a finding of fact, on that basis, that the appellant is "a fugitive" from April 2014, in relation to the matters covered by EAW2. Nor am I persuaded that I should infer that the judge made a finding of fact, on a sound basis or at all, that the appellant is "a fugitive".

14. To record, as the judge did, that "the only confirmation [the appellant] had that he had fulfilled his obligations was a telephone call" goes nowhere near finding that the appellant was "knowingly" non-compliant and did not genuinely believe that he had fulfilled his obligations. The judge's statement that of the "strong public interest in discouraging person seeing the UK as a state willing to accept fugitives from justice" is familiar and does not of itself specifically reflect a finding of fact about the individual case; and, to be fair to her, Ms McNamee rightly did not place strong reliance on that passage. To say, as the judge did, that "the [appellant] failed to comply with the terms of his suspended sentence – he committed a further offence and failed to comply with the supervision requirements of the sentence" reflects the fact of non-compliance. But that is not the key point. It raises, but it does not answer, the question whether that non-compliance was "knowing" or "genuinely mistaken". The judge's references to "delay" being "consequent upon the conduct of the [appellant]" and "a consequence of the

conduct of the [appellant] in leaving [Poland]" is problematic. In the first place, it is not the act of leaving Poland (October 2013) but discontinuance of correspondence six months later (April 2014) that is said to have been the non-compliance whose "knowing" nature supports the inferred finding of fact. This means the judge was looking in the wrong place. Moreover, to say that delay in pursuing the appellant is attributable to non-compliance may be an objective fact, just as the non-compliance is an objective fact, but that does not carry with it the necessary finding that the non-compliance involved a "knowing" state of mind. It is necessary to remember that it does not suffice for Ms McNamee to say 'the judge must have thought the appellant was a fugitive'. She has to say that the judge made a finding of fact on that issue, on a sustainable basis on the evidence. She does not seek to maintain that the judge is to be inferred to have found as a fact that the appellant was a fugitive in relation to a summons issued regarding the sentence for the May 2011 offences and EAW1. She has to say, in relation to EAW2, the April 2014 discontinuance of correspondence with the Polish probation authorities was a "knowing" non-compliance and not a "genuine misunderstanding". She has to say that the judge was satisfied, to the appropriate standard of proof, of that fact. He would need a proper, reasoned basis for that finding. It is a specific, focused point. Nowhere did the judge address it. If and insofar as the judge did think the appellant was a fugitive, I have no way of knowing on what question, and for what reasons, that view was arrived at.

15. So, in my judgment, there is no basis for the invited dual inference – that the judge found the appellant to be a fugitive, and that he found the April 2014 non-compliance to have been "knowing" – soundly to be drawn. This court, as an appeal court, recognises the presumptive primacy to be afforded to the findings of fact of the extradition judge who hears the evidence, including oral evidence and cross-examination. But the other side of that coin is that the appeal before this Court proceeds on the basis of the framework of reasoned findings which the first instance judge makes and not those which, and reasons for which, are invisible from the judgment below. In short, had the judge been making a finding of "knowing" non-compliance from April 2014, he would have said so. Ms NcNamee rightly recognises that, if the judge did not make one, I am in no position on this appeal (with no oral evidence and no cross-examination) to make my own adverse finding of fact: that the appellant's non-compliance after April 2014 was "knowing", rather than as the result of a "genuine misunderstanding" on the part of the appellant. Accordingly, the only safe basis on which to proceed for the purposes of this appeal is that the appellant is not a fugitive, in respect of the matters in EAW1 or in EAW2, after April 2014 or at all. I shall return to the significance of this topic when considering the lapse of time since the crimes were committed.

The Law

16. The principled parameters of an Article 8 extradition appeal to this court are the subject of the very well-known, authoritative exposition in the case of Celinski v Polish Judicial Authority [2015] EWHC 1274 (Admin) [2016] 1 WLR 551 at paragraphs 5 to 24. I have also found it helpful to remind myself of what the Divisional Court (Lord Burnett CJ and Ouseley J) subsequently said in Love v United States of America [2018] EWHC 172 (Admin) at paragraph 26:

> The appellate court is entitled to stand back and say that … the overall evaluation was wrong: crucial factors should have should have been weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed.

17. I said at the outset that this is an appeal based on fresh evidence. It is section 27(4), read with section 27(1)(a) and (2), of the Extradition Act 2003 which provides the basis for an appeal to succeed on fresh evidence. Those provisions, so far as material, are as follows:

> On an appeal under section 26 the High Court may – (a) allow the appeal… (2) The court may allow the appeal only if the conditions in… subsection (4) are satisfied… (4) the conditions are that – (a)… evidence is available that was not available at the extradition hearing; (b) the… evidence would have resulted in the appropriate judge deciding the question before him at the extradition hearing differently; (c) if he had decided the question in that way, he would have been required to order the person's discharge.

These provisions read as though the Court is engaging in an exercise in hypothetical prediction, as to what the judge below would have made of the fresh evidence, such that the outcome of that hypothetical prediction provides the answer to the appeal. In my judgment, that is an over-simplistic view. What the phrase "would have resulted" connotes is surely the feeding in of the fresh evidence, as an objective exercise, to the framework of the judge's analysis and findings of fact, giving appropriate respect to that analysis and those findings. That exercise must, moreover, result in an outcome which the appeal court is satisfied is sound in article 8 terms. The appeal Court will not, and is not driven by the statute to, uphold a hypothetically predicted outcome by the judge below, with the fresh evidence having been fed in, if the Court on appeal concludes that it involves an outcome, adverse to the requested person, which would be "wrong". That would be an outcome which the Court on appeal would then be overturning on appeal, had the judge had the fresh evidence and reached that decision with it. In other words, the guidance of the Divisional Court in Love, which I have cited above, about standing back and looking at whether the overall outcome is wrong, is relevant to an article 8 appeal with fresh evidence, and not just to an appeal without fresh evidence.

18. Ms Barden and Ms McNamee were in agreement that a guiding description of the nature of the seriousness of the impact, relevant to the present case, which would be necessary in order to render extradition article 8-incompatible is authoritatively encapsulated in two key passages in judgments of the Supreme Court. The judge agreed and referred to these same passages in his judgment. The first key passage is in the case of Norris v Government of the United States of America (No.2) [2010] UKSC 9 [2010] 2 AC 487 at paragraph 56. There, Lord Phillips said this:

> I can see no reason why the district judge should not, when considering a challenge to extradition founded on article 8, explain his rejection of such a challenge, where appropriate, by remarking that there was nothing out of the ordinary or exceptional in the consequence is that extradition would have the family life of the person resisting extradition. 'Exceptional circumstances' is a phrase that says little about the nature of the circumstances. Instead of saying that interference with article 8 rights can only outweigh the importance of extradition in exceptional circumstances it is more accurate and more helpful, to say that the consequences of interference with article 8 rights must be exceptionally serious before this can outweigh the importance of extradition. The judge should not be criticised if, as part of his process of reasoning, he considers how, if at all,

the nature and extent of the impact of extradition on family life would differ from the normal consequences of extradition.

The second key passage is in H (H) v Deputy Prosecutor of the Italian Republic [2012] UKSC 25 [2013] 1 AC 338 at paragraph 8(7), where Lady Hale said this:

> … It is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe.

19. These references to "exceptionally serious" and "exceptionally severe" consequences do not mean that there is a "test of exceptionality", as Lady Hale explained at paragraph 8(2) in H (H) and as the judge in the present case rightly recorded. Nor are they indicating the application of a single, fixed and universally-applicable threshold of harm, with cases being decided by determining on which side of that single fixed line the consequences fall. The balancing exercise in an article 8 case weighs in the scales all the factors in favour of and against extradition. It is a balancing exercise in which those factors are of their nature capable of having a variable weight, that weight being capable of depending on relevant aspects of the particular context and circumstances of the case. Ultimately, the nature of the consequences which will – or will not – be sufficiently weighty to lead to the overall conclusion that extradition is incompatible with article 8 will depend on (a) how weighty are the various factors in support of extradition and (b) how weighty are the various other factors against extradition.

20. There are public interest considerations in favour of extradition that have been described as "constant and weighty". The public interest considerations are "constant" because they are universally present features. They are "weighty" in the sense that they will always be given significant weight. But none of this means that the same considerations have a universal, "constant weight". That is why it is said that the public interest in extradition attracts a weight which varies depending on circumstances such as "the nature and seriousness of the crime or crimes", and why it is said that circumstances relating to the lapse of time since the crimes were committed can "diminish the weight to be attached to the public interest" (as well as serving to "increase the impact upon private and family life"). The balancing exercise is a dynamic one. The dynamic exercise, with which the court is concerned, is reflected in this passage from Lady Hale's judgment in H (H), at paragraph 8(3)-(6):

> (3) The question is always when the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition. (4) There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; the people convicted of crimes should serve their sentences; the United Kingdom should honour its treaty obligations to other countries; and that there should be no 'safe havens' to which either can flee in the belief that they will not be sent back. (5) That public interest will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved. (6) the delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life.

That was the context – it was the same paragraph – in which Lady Hale was referring to "exceptionally severe" family life consequences as being "likely" to be necessary in order to outweigh "the public interest in extradition". This is therefore a classic,

dynamic balancing exercise, involving giving appropriate weight to the relevant factors but one in which the language of "exceptionally severe" and "exceptionally serious", from Lord Phillips and Lady Hale serve as authoritative guides.

21. The 'dynamic' exercise within which "exceptionally serious" or exceptionally severe" consequences play within the article 8 balancing exercise is well illustrated by the individual case considered by the Supreme Court in the H (H) case.

   i) In the first individual case, discussed by Lady Hale at paragraph 41, we find a description of "severe detrimental consequences psychologically and for their developmental trajectories" which were "very likely" to be experienced by an 8 year old and 3 year old, upon the extradition of their mother and primary carer, constituting exceptionally severe effects (see paragraph 44), on accusation warrants relating (see paragraph 36) to thefts of clothing worth an equivalent of in excess of £4300 and three fraud offences which were characterised (see paragraph 45) as "by no means trivial" but "offences of dishonesty which can properly to be described as 'of no great gravity'", in a case of "considerable" delay (see paragraph 46), albeit in circumstances where there was a clear finding that the mother was a fugitive from justice (see paragraph 37). In that case, the Supreme Court concluded that extradition was disproportionate. There, the impact and harm were sufficiently serious and weighty to mean that the factors against extradition outweighed those in favour.

   ii) In the other individual case before it in H (H), the Court had to consider the implications of extraditing both parents of three young children. Lady Hale described the consequences, on the evidence, as inevitably causing the children "intense and long-lasting distress", akin to being taken compulsorily into care and representing "massive emotional and psychological challenge" (paragraph 68). She characterised the circumstances as "exceptional" and the effect as "exceptionally severe" (paragraph 79). By a majority, the Supreme Court concluded that the extradition of both parents was proportionate and article 8 compatible. That was in circumstances of clear findings that the parents were fugitives, that theirs was a case of conviction warrants relating to very substantial prison sentences (see paragraph 53), in the context of having engaged in "serious professional cross-border crime" (Lord judge at paragraph 135). As Lord Kerr put it (paragraph 148): "The anticipated plight of these innocent children, the momentous upheaval to their lives and the inevitable emotional damage that they will suffer are… heart-rending. That pitted against those circumstances of the extremely serious crimes of which both [parents] were convicted; the nature of their participation in those crimes; and the fact that they have exploited the criminal justice system in Italy in their attempts to avoid punishment". Here, the impact and harm were not sufficient, when put alongside other factors against extradition, to outweigh the factors in support of extradition.

These examples – of cases decided at the highest judicial altitude – illustrate in a principled, authoritative and practical way, that "exceptional severity" and "exceptional seriousness" are, ultimately, not a constant litmus test. Rather, they are a feature to be evaluated and then given weight in the overall multi–faceted balancing exercise.

22. As has been seen, Lord Phillips spoke of the "ordinary" or "normal" consequences of extradition. But, just as there is no "exceptionality test", nor are Article 8 cases to be decided by constructing a series of hypothetical extradition cases, or researching and illustrating a series of real-life extradition cases, in order to evaluate the candidacy of the instant case as being far removed from "the ordinary" or the "normal". I was, rightly, not invited to engage in any such exercise. I remind myself that the appeal court will always start from a position of respect for the evaluative judgment of the front-line extradition judge. I ask whether the nature of the consequences for Aleks, viewed against what is to be regarded as inherent in extradition of a parent and what is to be expected in the context of family life, constitutes harm so serious to be capable of outweighing the strong public interest in extradition, when all considerations in favour and against extradition are balanced in the circumstances of the individual case, and whether it does have that outweighing consequence.

Consequences for Aleks I: The position before the judge

23. The extradition hearing before the judge took place on 15 February 2019, and the judge gave judgment on 8 March 2019. Relied on at the hearing was a proof of evidence given by the appellant in January 2019. Its essence, in my judgment, was as follows. It explained Anita's struggle with her arthritis condition, and that she had finally managed to get proper medical care. It described the role played by the appellant in the household and in looking after Aleks. It explained that the relationship and communications between the appellant and Anita had recently completely broken down, but that Anita and the appellant were resolved to do everything possible to ensure that Aleks did not suffer as a result of that breakdown. It described the appellant's involvement in the care and upbringing of Aleks, with the appellant spending of all of his free time with his son, and it described Anita's language difficulties. At the hearing, it was confirmed that the appellant and Anita had now very recently split up. The evidence before me is that Anita and Aleks had by then moved out to live temporarily with a friend. As I have explained, the judge had the advantage of considering the written evidence and hearing oral evidence from the appellant.

24. In the judgment, the judge describes the appellant's evidence and his belief that he had responsibility for Aleks. The judge recorded that the appellant "takes a role in the care of his child and provides emotional and financial support to his former partner". Having considered the written evidence and the appellant's oral evidence, the judge referred to 'emotional and financial difficulties for the appellant and his family'. Ultimately, the judge arrived at two findings so far as Aleks was concerned. First, the judge concluded that Anita "will have to look after [Aleks] alone, but there is no evidence that she is not able to do so." Secondly, the judge concluded that this was a case of "realities [which] are sadly commonplace in cases of extradition", adding: "I have observed nothing raised by the [appellant which] amounts to more than the commonplace hardship that is sadly experienced in cases of extradition". The core submission, as I saw it, made on this appeal by Ms McNamee is that those two findings remain secure, in the light of and notwithstanding the fresh evidence, and that they are fatal so far as reliance on the impact of extradition on Aleks is concerned.

Consequences for Aleks II: The material before this Court

25. By the time of the hearing of this appeal before me, more than a year had passed since the hearing before the judge. Anita and Aleks had moved into a council flat in March

2019. She has a new partner. The appellant had continued to live in what had been the family home, before moving on 24 February 2020 to be closer to his work. He too now had a new partner. The appellant and Anita have continued to co-parent Aleks. There is a very detailed, updating body of evidence relating to the circumstances of Aleks and how he is cared for. The appellant has adduced two further addendum proofs of evidence, given in October 2019 and April 2020. In July 2019 – that is to say five months after the appellant and Anita split up in the run up to the hearing before the judge, four months after Anita's move to the council flat, and four months after the judge's judgment – Aleks was the subject of the detailed psychiatric assessment to be found in the expert report for which Steyn J gave permission. It is to that body of integrated evidence that I must now turn.

26. The expert report was co-written by Dr Sinead Marriott, consultant clinical psychologist, and Ms Marta Neil, principal child and adolescent psychotherapist, each within the Parenting and Child Service in the Department of Child and Adolescent Mental Health of Great Ormond Street Hospital NHS trust. I will call them "the clinicians". The clinicians' description is based on their encounters with and assessment of the appellant and of Aleks, together with contact with Aleks's school. They have drawn substantially upon the description given by the appellant himself, and they comment about that. They explain that they have not separately assessed Anita. Nor is there any witness evidence from Anita. The appellant's evidence tells me that she has an unwillingness and reluctance to become involved in these proceedings on the appellant's behalf, which he explains that he understands in the light of their separation. I am satisfied that the clinicians have arrived at a reliable expert evaluation, in accordance with their professional duties and duties to the court, in the light of what they have been told and what they have observed and assessed. In my judgment, there is no reason to reject or dilute any of the substantive contents of the report. Indeed, the report links to the appellant's evidence, itself before the court and which the respondents neither oppose nor challenge as to its veracity or reliability. That means the fresh evidence, as a whole, is a body of material which provides a sound and reliable factual platform for the analysis on this appeal. I accept its accuracy and reliability. This court therefore now has a clear and detailed picture of the position so far as Aleks is concerned. The evidence from the appellant can be linked, in the material respects, to the contents of the expert report. It is neither necessary nor proportionate for me to set out in this judgment swathes of passages from the addendum proofs of evidence and from the expert report. What is sufficient, suitable, and in my view more appropriate, is that I encapsulate the thrust of the evidence as, having heard submissions about it, I see it.

27. Looking at the overall picture, Aleks is a healthy intellectually able boy with the potential to achieve academically. He is developing well, with no significant emotional or behavioural difficulties. He has an attachment vulnerability, but it is not impacting on his current functioning to a significant degree. The appellant, Aleks's father, is a confident able young man who is a competent and caring parent. He has a capacity to reflect upon his parenting and to receive advice. The appellant and Aleks share a strong, affectionate bond. The position as regards Anita is that there are some concerns about Anita's ability to provide appropriate care for Aleks, without the appellant's support, having regard to Anita's chronic health condition and social isolation.

28. After Anita and the appellant separated, the pattern of parenting was as follows. Aleks would stay with the appellant every weekend from Friday after-school until Sunday evening. The appellant would help Aleks with his homework, during the course of the weekend for the following week. The appellant makes a lot of effort to take Aleks out in order to be around other people. They do a lot of activities together, so that Aleks does not miss out on them, such as cooking together and playing games together. Aleks is able to confide in his dad when he has worries or is upset. They regularly speak when Aleks is concerned about anything, such as issues with school or when he has become upset. It is the appellant who is the point of contact for all the professionals involved in Aleks's life. Contact with the school is with the appellant. It is he who makes arrangements to pay for school clubs, lunches and activities when Aleks need picking up from school, for example when he is unwell the school contacts the appellant. The appellant is also the first point of contact for any appointment which Aleks has such as with the doctor or dentist. The appellant provides Anita with £200 per month to help with looking after Aleks and it is he who buys school equipment school clothes shoes and other items.

29. Anita's position and circumstances involve particular challenges. As Aleks's class teacher confirmed in a conversation with the clinicians, Anita speaks very little English. This makes it very difficult for her to communicate with the school or with professionals in Aleks's life. It means she cannot engage with him in his principal language, the language in which he is being educated, and the language in which he needs to do his homework. She has an ongoing condition called Psoriatic Arthritis, affecting her neck, fingers, hands, toes, knees and arms. She receives treatment to alleviate the symptoms and manage the pain, but her painkillers bring challenges of their own. She struggles with depression and social isolation, struggles to have the confidence to interact with people particularly in English. She and Aleks do not leave the house often and if they do it is usually to go to the supermarket she regularly sleeps in the afternoons when Aleks gets home from school, leaving him to watch TV or play computer games. Anita is described as a mother who rarely cooks so that she and Aleks usually eat ready-made food such as pizza or McDonald's. It is in the light of all of these realities that the appellant describes taking the special care in his own support and activities with Aleks.

30. During the current Covid 19 pandemic, Anita was advised by letter dated 30 March 2020 that she was assessed as being in a medium to high risk category and was advised to "stay at home at all times and avoid all face-to-face contact for at least 12 weeks from today". In the light of that development, Anita and the appellant arranged that Aleks should stay with the appellant and the appellant's partner full-time. Anita's particular vulnerability arises from the immune-suppressant consequences of the medication which she is required to take for her arthritic condition.

31. The clinicians conducted an 'attachment assessment' of Aleks, for which he was separated from his dad. He engaged well with it, sustaining his attention in giving coherent responses for the most part. The storytelling examples, enabled the clinician to explore with the child issues relating to parental comfort and support, experience of domestic life and of caregiving and relationships within a family. The clinicians say this:

> Themes associated with attachment insecurity were… present. For instance, Aleks made reference to adults being unavailable when children needed them and in several examples, he described the mother in his stories as being 'not well' or 'worried' or 'tired' and

> therefore unable to respond to the child. In one story, Aleks referred to the mother in the story as being 'too sick to walk as 'and he again referred to the child feeling scared. In a story where parents have a minor argument Aleks augmented the argument showing the parents engaging in a physical fighting and getting hurt. He showed the child running to his room to hide and he referred to the child feeling scared. Themes associated with attachment disorganisation featured in two of Aleks's responses but were not prominent otherwise. In one example when he referred to the parents 'shouting and screaming at each other' he referred to 'all the furniture [being] broken'. In another when the mother and the story was ill he said that the child 'had to stay home in the messy house with no food and so he died'.

The clinicians' analysis from this exercise reflected Aleks's perception of adults as 'mostly available to him in relation to his need for care, comfort and affection', with 'an experience of parenting that has enabled him to develop a sense of safety security and stability', but with 'responses [which] highlighted underlying anxiety about parental vulnerability (the mother in his stories whom he portrayed as being ill or tired) and about parental conflict (associated with fear of injury and death)' and with a 'sense of safety and security that Aleks's relationships with his parents provide… undermined at times both by his concerns about his mother's well-being and by his experience of conflict between them and their resultant separation'.

32. The ultimate opinion and conclusions of the clinicians can be broken down into three topics. First, as to the relationship. The clinicians concluded that the relationship between the appellant and Aleks involves a 'close affectionate bond' with 'high-level involvement in his son's life' and a 'demonstrated awareness of and sensitivity to Aleks's feelings and needs'; with Aleks turning to his father 'when unsure or anxious', the appellant's parenting having 'enabled Aleks to develop a fairly secure attachment to his father' and where for Aleks's long-term emotional development and well-being it is 'important' that he 'experience a stable continuous relationship with each parent'.

33. Secondly, as to the likely short-term effects on Aleks of separation from the appellant, if extradited to face a 21-month prison term in Poland. The clinicians concluded that this would involve a significant effect on attachment security and psychological well-being and development; which would 'almost certainly' be compounded by 'additional stressors such as suboptimal care resulting from his mother's health condition and/or inability on her part to help him to adjust to his father's absence and/or any limitation she may have in facilitating his access to education and/or support services if needed'; even if being helped to prepare for the separation may lessen the shock, Aleks 'can be expected to experience distress and a prolonged sense of loss', is 'likely to worry about his father's safety and well-being', and is 'likely to be concerned about his mother's welfare and … ability to cope'; that it seems very likely that Anita will be under considerable stress in trying to manage a hospital appointment and school liaison, without the appellant's support; that Aleks may be put into the role of interpreter may feel he has to care for a struggling mother, and may adopt 'maladaptive coping strategies including presenting himself as having fewer needs than he has and as coping when he is not'; that if Anita were to become unwell and unable to care for Aleks , he would be at risk of becoming 'a looked after child', with 'unnecessary disruption and hardship, and the increased risk of school failure , mental health problems and crime'; that Aleks's current 'mild symptoms' of a clinical condition (possibly autism spectrum disorder), are not at present significant enough to warrant further investigation but would certainly require monitoring, and may make it more difficult for Aleks to cope

with distress and communicate his needs and feelings; that his combined difficulties make it likely that Aleks will need more support from his parents than other children, and the impact of extradition of his father would be greater on Aleks than on another child; that Aleks, an academically able child with the potential to do very well, is likely to have his engagement in education adversely affected if the appellant is not able to support his learning, given Anita's language difficulties and inability to provide Aleks with education support.

34. Thirdly, as to the likely long-term effects following a 21 month separation from extradition. The clinicians concluded that such effects will depend on three things: the preparation provided to help him understand (including an age appropriate, accurate and balanced explanation); the quality and consistency of support provided to cope with the decision (including reassurance and confirmation that the appellant is safe and well); and the quality of care received by Aleks from Anita during the appellant's absence (where inadequate support and care , in the light of Aleks's young age and particular vulnerability would reduce the likelihood of a positive developmental outcome for Aleks in the longer term').

The impact on Aleks III: Discussion

35. I turn to the submissions on this issue. The essence, as I saw it, of the position adopted by Ms Barden on behalf of the appellant came to this. She submits that this body of material before the Court is sufficiently weighty materially to alter the analysis of the judge as to the key two findings relating to the impact on Aleks: as to Anita's 'ability to look after Aleks'; and as to there being 'nothing in the evidence of impact beyond commonplace realities' experienced in extradition cases. Ms Barden submits that the body of evidence describes consequences for Aleks capable, depending on the weight to be given to the factors in support of and against extradition, of meaning extradition is incompatible with article 8. She says it is capable, in the overall article 8 balancing exercise, of constituting sufficiently serious harm to be of a nature reflected in the authoritative guiding observations of Lord Phillips and Lady Hale.

36. The essence, as I saw it, of the position on this body of material adopted by Ms McNamee on behalf of the respondents, came to this. She submits that this body of material does not describe consequences of a nature which is capable of having such an effect. Ms McNamee says that the material, although giving a fuller picture and considerable detail compared to that which was before the judge, does not undermine and would not have changed either of the two findings made by the judge in relation to impact. She emphasises that Aleks would not be left alone, upon extradition of the appellant; that the appellant is not Aleks's sole carer, not even his primary carer, except during the 12-week period of the Covid 19 related self-isolation of Anita due to end in mid-June 2020. She says the prospect of Aleks becoming a 'looked after child' is a 'speculative' one. She emphasises that Anita has a partner, was able to move in with a friend in February 2019, has been able to secure council housing, and has a medical condition (the arthritis) which is manageable with the medication that she accesses. She submits that the clinicians' recommendations, in the passages concerned with long-term risk, are capable of being implemented at the appropriate time. She emphasises that Aleks has no specific mental health condition or formal diagnosis, but symptoms described as 'mild'. She submits that the practical difficulties, as to liaison with school and professionals, can be addressed by putting appropriate arrangements in place. Ultimately, she submits that the judge's conclusion stands that on the evidence Anita

could care for Aleks and is capable of doing so, albeit with challenges and limitations. She submits that there is in this evidence nothing going above and beyond the hardship to be found, sadly, in any extradition case; and that there is nothing here which is 'unique'. The judge, she submits, would have reached the same conclusion had this body of material been available to him, namely that "such realities are sadly commonplace in cases of extradition ", and that there is here to be "observed nothing raised by the [appellant which] amounts to more than the commonplace hardship that is sadly experienced in cases of extradition", and that such a conclusion, had he reached it on the entirety of the material, would not be one which should be overturned by this court on appeal.

37. In relation to the nature of the evidenced consequences for Aleks, I accept the submissions of Ms Barden. In my judgment, the evidenced consequences for Aleks are capable, depending on the weight to be given to the factors in support of and against extradition, of meaning that extradition is incompatible with article 8. They are capable, in the overall article 8 balancing exercise, of constituting sufficiently serious harm to be of a nature reflected in the observations of Lord Phillips and Lady Hale. I emphasise that that does not of itself get the appellant home on article 8. It is not the position that the body of evidence, in and of itself would necessarily render article 8-incompatible an act of extradition of the appellant, whatever the context and circumstances. But, as I have explained, seriousness of the consequences is not a universal 'litmus test'. The evidence, in my judgment, is of consequences so serious as to be capable of rendering extradition disproportionate. It is material which is significantly different in its detail, content, support, evaluation and current applicability, to be capable of making a difference to the approach in this case. It is not necessary, in my judgment, for Aleks's position to be demonstrably "unique", when put alongside other extradition cases. I do not accept that the body of evidence, nor the hardship inherent in any parental extradition case so concerning, are such as to render the detailed, supported and updated evidence as being no more than a picture of 'commonplace hardship' and 'commonplace realities'.

38. Ms McNamee is right to point out that the evidence does not say or support the conclusion that it is "likely" that Aleks would become a "looked after child" if the appellant is extradited. The clinicians have not said that. It would also, in my judgment, be an overstatement to characterise the evidenced consequences as constituting "severe harm" for Aleks as being "likely", still less as being inevitable, if the appellant is extradited.

39. In my judgment, the evidenced position as to the consequences for Aleks are accurately to be described as follows. There is "likely" to be "serious harm" to Aleks, in the shorter-term of the next two years, that being a period of real significance in the life and development of a 9 year-old. There is, in addition, a "substantial risk" of "severe harm" in that shorter-term period; and a "substantial risk" of "serious harm" over the longer-term period thereafter. I so find, as a fact and a matter of evaluative judgment, addressing objectively what evidentially-sound conclusions the judge would have arrived at in the light of the fresh evidence. In arriving at those conclusions, I have had to consider, in particular, the picture convincingly painted by all of the evidence, as to Aleks's life with and without the appellant. I have considered the position with the appellant as a devoted father, continuing to exert such a positive influence and conduct so positive a role; with Anita and the appellant co-parenting Aleks in the way described

in the evidence as having happened since their separation, with his welfare promoted and needs secured, and supporting his potential to thrive and develop. I have considered the position with the appellant removed, and with Aleks's welfare, happiness and ability to prosper in his education and development seriously compromised.

40. As I have explained, this is not the end of the case in the appellant's favour. It does not mean – standing alone – that any and all action of extraditing the appellant is incompatible with article 8. There is, I repeat, no fixed 'litmus test' as to seriousness of consequences. The overall evaluation is fact-sensitive and case-specific. The question is whether the act of extraditing the appellant, in the context and circumstances of the present case, would be an article 8 breach. What the evidence of impact for Aleks does, in my judgment, is to call for a careful reappraisal of the article 8 balancing exercise, because it is evidence of sufficiently serious consequences to be capable of rendering extradition disproportionate for the purposes of article 8. If, however the various factors in support of extradition, viewed against the other facts and circumstances of this case, are sufficiently strong to support the conclusion that extradition is justified as proportionate, the appeal would still fail. I must re-evaluate the proportionality balance, in the light of the fresh evidence and against the framework of the judge's findings and reasons, giving those findings and reasons appropriate respect, in the light of all relevant features of this case, and ultimately then 'stepping back' and evaluating the outcome. In doing so, two features of the case call for particular consideration.

Nature and seriousness of the crimes involved

41. As Lady Hale put it in H (H) at paragraph 8(5), the public interest in extradition, although it "will always carry great weight", "the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved". What are the "nature and seriousness" in the present case?

42. Ms McNamee reminds me that the seriousness of the offending in this case is reflected in the sentences of 15 months custody for the May 2011 offences and 6 months custody for the August 2011 offence; and that the Polish authorities have satisfied themselves of the appropriateness of the first sentence being served and the second (originally suspended) sentence being activated and served, in circumstances of a further offence and failure to maintain communication with probation. Ms McNamee rightly reminds me, by reference to paragraph 13 of the judgment of the Divisional Court in Celinski, that it is not for a UK judge to "second-guess" the sentencing level adopted in the requesting state, that the court should "respect the importance to courts in that state of seeking to enforce non-compliance with the terms of the suspended sentence" and that it will "rarely be appropriate for the court in the UK to consider whether the sentence was very significantly different from what a UK court would have imposed, let alone to approach extradition issues by substituting its own view of what the appropriate sentence should have been". It is not, therefore, the question of what the court in the UK considers that the sentences in the UK courts would have been, or what the UK authorities here would have done about activation. I accept all of that. So did the judge, who explained that he was not going to 'second guess' the Polish authorities, so far as the nature of the offending was concerned. He said this:

> the [appellant] sought to put an explanation for his offending before me. I consider that was a matter for the [requesting judicial authority]. What was apparent was that he had committed a further offence which had led to the suspended sentence being invoked.

> Further that he had failed to keep in touch with his probation officer as required. I had mutual respect for the decisions of the [requesting judicial authority] and there [were] no grounds for me to withhold the [appellant]'s extradition on the basis of his evidence before me with regard to the nature and causes of his offending in Poland.

43. The fact that the court in the UK does not 'second-guess' the decisions of the requesting judicial authority, so far as sentencing and activation are concerned, restricts the contentions that can be made by an appellant as to his conduct and as to how it is to be viewed. But Lady Hale's observation remains intact. It remains appropriate, without 'second-guessing' the authorities of the requesting state, to weigh in the balance "the nature and seriousness of the crime or crimes involved", in evaluating the weight to be attached to the public interest in extradition in the particular case. In the event, before me, both counsel were agreed as to the way in which that exercise is appropriately performed. The appropriate comparison to be conducted is not between (a) the way in which the Polish authorities have characterised and responded to criminal conduct and (b) the way in which the UK authorities would do so. The appropriate comparison, rather, is between: (i) the conduct in the present case, including the way in which it has been characterised by the Polish authorities; and (ii) other conduct on the spectrum of criminal behaviour. That is an entirely appropriate, indeed necessary, exercise for the UK court to conduct.

44. Again, the point is well illustrated by considering the H (H) case. In the individual case which succeeded before the Supreme Court Lady Hale was considering that issue when she described the theft and fraud offences as "by no means trivial… But… offences of dishonesty which can properly be described as 'of no great gravity'" (paragraph 45). She returned to the same issue when (paragraph 71) contrasting the "comparatively routine crimes of dishonesty" in that case, with the "major drug smuggling conspiracy, persisted in over many months" in the individual case which failed. Lord Hope was considering the same issue when (paragraph 95) he referred to the offences of dishonesty in the first case as "not trivial,… Relatively minor and certainly not of the kind that could be described as seriously criminal", and went on to consider (paragraph 92) the case of "serious professional cross-border crime involving trading in narcotic drugs". They were not comparing what the requesting state's sentencing court would do about criminal conduct with what a UK sentencing court would do with that same conduct. They were comparing crimes with other crimes. That is the relevant exercise. It is the way in which "weight" is "attached … in the particular case", to the public interest in extradition, to "vary according to the nature and seriousness of the crime or crimes involved".

45. Ms McNamee rightly accepted all of this. But it means, in my judgment, that Ms Barden is right to submit that the judge did not carry out an explicit evaluation of "the nature and seriousness of the crimes" involved. He said, in effect, that he had mutual respect for the seriousness attributed to them by the Polish authorities, which the appellant's description did not warrant going behind. In my judgment, and in circumstances where I am revisiting the article 8 balancing exercise in the light of the fresh evidence, it is appropriate and necessary that I revisit this issue.

46. I accept that there is force in Ms McNamee's description of the May 2011 offending as an overnight "spree" of "dishonesty". The appellant attempted to steal several vehicles, having broken into two of them. He then entered a property, which was a dwelling, in which the occupier was present, and there he attempted to steal cash and car keys. Then

there is the August 2011 offence, which was a further offence of dishonesty. The appellant is a repeat offender, and indeed I have agreed that it is safely inferred that he committed a further but unidentified offence relevant (in combination with the non-compliance as to contact with probation from the UK) in the activation of the six-month suspended sentence. All of that is true and Ms McNamee is right to remind me of it.

47. On the other hand, it is right to say – based on the evidence – that the only success in the overnight 'spree' was the removal of a warning triangle and pair of gloves collectively worth the equivalent of £6. The appellant was at the time 21 years old. He was an amphetamine user. He has described the circumstances which he faced having been very young, with a young child, and with no money and in a frame of mind which led him to want to adopt a new identity and escape his circumstances. There is also support for the fact that he was experiencing mental health difficulties, in the fact that it is known that the sentence of the Polish court included counselling which the appellant undertook, following a mental health assessment. There is nothing to gainsay the evidence of the appellant, who vividly describes having been encountered by the homeowner, following entry into the dwelling by climbing through an open window. So concerned was the homeowner about the state in which he found the appellant intruder, that he acted to calm the appellant down, made him a cup of coffee and they waited together for the police to arrive, following which the appellant cooperated in describing voluntarily to the officers the other events of earlier the same night involving the various vehicles.

48. In my judgment, the correct and evidenced description of the nature and seriousness of the crimes involved in the present case, is that they are "not trivial", nor "minor", but they are properly to be described as being "of no great gravity" and not of a kind that could be described as "seriously criminal". I so find, as a fact and as a matter of evaluative judgment, approaching the evidence objectively and placing – within the framework of the judge's findings of fact and reasoning a sound and evidence-based conclusion.

49. It is in no way 'going behind' the sentencing policy, approach or decision-making of the Polish authorities in this case, to which – like the judge – I attribute the applicable mutual respect, to evaluate the relative seriousness of this offending in the way that I have. The judge made no adverse finding of fact – having heard the appellant give oral evidence with cross-examination – that his account of the offending was disbelieved or unreliable. Rather, he held that it did not justify him going behind the seriousness of the offending as reflected in the sentencing decisions of the Polish authorities. Ms McNamee did not invite me to infer, still less to make, any adverse finding of fact as to the truthfulness of what the appellant says in his evidence. It is correct that the criminal conduct in May and August 2011 was sufficiently serious in the evaluation of the Polish authorities to warrant, respectively, 15 months custody and 6 months custody suspended for 3 years. It is also right that an unspecified subsequent offence together with the non-compliance after April 2014 were sufficiently serious, in the evaluation of the Polish authorities to warrant the activation of the suspended sentence. I do not 'go behind' any of that. It is not impugned by, and nor does it undermine, the description and characterisation of the offending as I have encapsulated it above.

<u>Delay since the crimes were committed</u>

50. In re-evaluating the article 8 proportionality balance in the light of the fresh evidence, I turn next to the lapse of time and the circumstances relating to it. This is the well-known feature described by Lady Hale in H (H) in these terms: "The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life."

51. I am satisfied, in circumstances where I am revisiting the article 8 balance, that I undertake an evidence-based examination of the features of this case concerning the lapse of time, to test what is the sound overall evaluation – objectively – in the light of the fresh evidence and what I have said above about the consequences for Aleks and the nature and seriousness of the offending. The position in the present case so far as the lapse of time is concerned is, in my judgment, correctly encapsulated on the evidence as follows.

52. The criminal offending was in 2011 when the appellant was aged 21. The convictions and sentences were passed by the Polish court in 2012, when the appellant was 22. Since the 15-month sentence imposed in early 2012 in respect of the May 2011 offending was an immediate custodial sentence, the Polish authorities could have called upon the appellant to serve that sentence at any time from the beginning of 2012. In the event, as I have explained, a summons was issued at a subsequent time, at some time after the appellant had come to the UK in October 2013 aged 23, and unknown to him until his arrest. The six-month sentence, imposed on conviction in October 2012 in respect of the August 2011 offence, was suspended for 3 years. Although an unspecified further offence was committed by the appellant at some subsequent stage while the appellant was in Poland, prior to October 2013 no step was taken, on that basis, to activate the suspended sentence at that time nor to summons him to serve the 15-month sentence. The appellant came to the United Kingdom, making the Polish probation service aware of that. The arrangement was that the appellant was required to keep in contact with them, which he did for six months up to April 2014. The appellant gave the probation service his UK address. The respondents' own documents also record that in December 2013, Anita, who at that stage was still in Poland, informed the Polish probation authorities that the appellant was in England. It was in the light of the discontinuance of contact between the appellant and probation after April 2014 that the decision was subsequently made to apply in May 2015 to activate the six months suspended sentence, as happened in December 2015. Anita and Aleks (aged 3½) had meanwhile come to the United Kingdom, in June 2014, to join the appellant here. From June 2014 onwards they lived here as a family, and Aleks started school.

53. In her written and oral submissions Ms McNamee invited me to conclude that the weight of the points in the appellant's favour arising out of the 'lapse of time' is greatly undermined if the court accepts that he is a fugitive in relation to the EAW2 matter. I dealt with this point at the start of this judgment. As I explained, Ms McNamee accepted she could not sustain the contention that the appellant is a fugitive in relation to the EAW1 matters. I rejected her contention, for the reasons I explained above, that he is to be taken as being a fugitive from April 2014 in relation to the EAW2 matters.

54. I therefore reject the contention that the lapse of time features are undermined by reference to fugitivity. That, and the difficulties with the judge's reasoning, also justifies my revisiting the question of 'lapse of time'. In doing so, I add in some further colour, based on the evidence. The starting point is the appellant's evidence of genuine misunderstanding: that he discontinued his monthly letter of communication with

Polish probation in April 2014, because he understood that to have been the limit of the responsibility which he owed. Added to this, on the evidence, is the fact that this discontinuance of communication with Polish probation did not coincide with any activity capable, on the evidence, of involving the appellant 'going under the radar' so as to 'evade' Polish justice. He continued to use his name openly, continued to live in the same locality, and continued to undertake employment arranged by the same agency. He was and would have been, on the evidence, readily traceable. He had, moreover, returned to Poland in April 2014, to set up the arrangements for Anita and Aleks to join him in the UK. He was able to enter and leave Poland. He came back, to the same place in the UK. Anita and Aleks joined him two months later.

55. On this part of the case, I agree with Ms Barden that the detailed evidence of the officer who arrested the appellant on 18 December 2018 materially assists the court. That evidence confirms that there was no great difficulty in tracking down the appellant, in conjunction with the arrest warrants certified just a couple of months earlier. He was living openly in the United Kingdom under his genuine name and they were able to trace him through an estate agent to his current address in the same town as the previous address, and were able to confirm his vehicle showed up on the system as belonging to and insured by him. The officer records:

> [the appellant] was clearly very shocked by his arrest. He told us that he lived in the UK for 6 years and he had no idea that he would have a warrant out for his arrest. He even told me that he had been told by his wife that we had attended his address the day before and he stated that he rang rugby police station to find out why. [He] was fully cooperative with officers… He explained that he got into trouble in Poland but was under the impression that his sentence was suspended. He said that he came over to the United Kingdom under the impression that he was not in any trouble at all.… In my opinion [the appellant] seemed a genuine person who settled well in the UK… It appears that he has made no attempt to hide away and when he realised the police were looking for him he did not try and evade police and in fact called the station to ask why officers were looking for him.

56. I do not find that the lapse of time was "culpable" on the part of the Polish authorities. But this is not a necessary finding, in order for the observations made by Lady Hale in H (H) about lapse of time to be relevant and applicable. I accept Ms Barden's submission that there were significant periods of lapse of time and they are not satisfactorily explained. So far as concerns the developments which have occurred during the period since the 2011 offending and 2012 convictions and sentences, I also accept the description given by Ms Barden. Since coming to the United Kingdom in October 2013, the appellant has obtained qualifications as a reach truck and counterbalance operator; he has developed a well-established career, where he is respected and relied upon by the business for which he has been working; he brought his family to the United Kingdom and his wife and son established a life here with him; he developed a close relationship with his son and took on fully his responsibilities as a parent; his son learned English as his first language, was attending school and excelling; his wife obtained settled, part-time employment; and they had established a settled home life, having stable accommodation and financial stability.

57. That leaves two points in the present case which, in my judgment, are of particular significance. They serve to evidence the way in which the individual who carried out the criminal conduct in Poland in 2011 as a 21 year old has, with conspicuous success,

turned himself around into the 30 year old living today in the United Kingdom, from the repeat offender he was as a young man in Poland.

i) The first is that the appellant is of good character in the United Kingdom with no criminal conduct to his name since arriving here in 2013.

ii) The second is the way he is described. The former warehouse manager at Tesco describes the appellant as "one of the best employees I have ever had the pleasure to work with"; the supervisor who worked with the appellant for over 3 years describes him as "an exceptional worker" who is "extremely professional, dependable and responsible, and "known to be the one person within our team who is always willing to help others"; other colleagues describe him as "one of the kindest guys you could meet, [who] would literally do anything for anyone, go out of his way for anyone" and "a valid member of the team, hard-working and loyal".

The appellant has, to his credit, plainly turned his life, his approach to drugs and criminality, and his approach to parenthood, completely around.

58. I find as a fact and as a matter of evaluative judgment, viewed objectively and based on the evidence, that the delay since the crimes were committed, and the circumstances relating to what has happened during that period, "substantially" diminishes the weight to be attached to the public interest, and that it "substantially" increases the impact upon the appellant's private and family life. I do not, however, 'double-count' here the impact on Aleks, which I have already separately addressed and evaluated.

Conclusion and 'balance-sheet'

59. I have weighed all of these matters in the balance, against the framework of the judge's findings of fact, and in light of all of the circumstances of the present case. In my judgment, the balance in this case comes down decisively against extradition. Viewed objectively, armed with the fresh evidence the judge would, in my judgment, have held extradition to be disproportionate and discharged the appellant. In my judgment, had he failed to do so, and bearing in mind the criticisms that can properly be directed at the way in which offending and the lapse of time were addressed in the judgment, I would have overturned the decision on appeal looking at the matter in the round, on the basis that the outcome was in my judgment "wrong".

60. The Divisional Court in Celinski explained at paragraphs 16-17, for the benefit of district judges dealing with extradition hearings involving article 8, the virtues of the discipline of conducting a "balance sheet approach", involving "pros" and "cons". That same discipline is of value to this court in its appellate jurisdiction, in particular when it is revisiting the article 8 balance in the context of fresh evidence. My own balance-sheet approach, in arriving at the conclusion which I have is as follows:

i) The principal factors militating in support of extradition are the following: (1) the strong, constantly-present and always-weighty public interest in extradition, so that people convicted of crimes should serve their sentences; (2) the strong, constantly-present and always-weighty public interest in extradition, that the United Kingdom should honour its treaty obligations to other countries; (3) the overall 21 month custodial sentence imposed and activated by the judicial

authorities of Poland and in respect of which those authorities consider it appropriate to pursue the appellant's extradition, in which decisions and evaluations this Court must and does place mutual confidence, trust and respect.

ii) The principal factors militating against extradition are the following: (1) the serious harm likely to be caused by extradition to the appellant's 9 year old son Aleks in the next two years, together with the substantial risks of greater or enduring harm; (2) the nature and seriousness of the crimes, as being not of "great gravity" and not "seriously criminal", committed at the age of 21; (3) the significant lapse of time, in a non-fugitive case, which lapse of time materially diminishes the weight to be attached to the public interest in extradition and increases the impact upon the appellant's private and family life, all in the context of the successful steps taken by the appellant, now aged 30, to turn completely around his life and role in society and as a parent.

61. My conclusion, by reference to article 8 and the fresh evidence, alongside the other evidence in the case, is that this appeal is to be allowed and the appellant is to be discharged. This does not connote any lack of 'confidence, trust or respect' in those judgments entrusted to the judicial authorities of the requesting state; nor any lack of appropriate respect for the evaluative judgments of the judge. The legal regime applicable in this area requires the Courts of the requested state to evaluate the human rights-compatibility of extradition, and the treaty obligations between the requesting and requested state include that as a recognised feature. The design of section 27(4) of the Extradition Act 2003, moreover, involves the recognition by Parliament that there will be cases where it is appropriate, by reference to fresh evidence and the other evidence in the case, exercising the judgment entrusted to this Court, to allow an article 8 appeal. Steyn J considered it reasonably arguable that this was such a case. I have concluded, for the reasons I have given, that it is such a case.