Neutral Citation Number: [2022] EWHC 80 (Admin)

Case No: CO/3443/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL
18th January 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

AIVARAS TOMKEVICIUS	**Appellant**
- and -	
KAUNAS REGIONAL COURT	**Respondent**

- -
- -

Malcolm Hawkes (instructed by Frank Brazell & Partners) for the **Appellant**
Katie Mustard (instructed by CPS) for the **Respondent**

Hearing date: 7/12/21

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM :

Introduction

1. This is an appeal in an extradition case. The mode of hearing was in-person. The Appellant is aged 41 and is wanted for extradition to Lithuania. Extradition was ordered by DJ Griffiths ("the Judge") on 18 September 2020, following an oral hearing on 22 July 2020 at which the Appellant and his wife gave oral evidence. The extradition is in conjunction with a conviction European Arrest Warrant ("EAW") issued on 4 November 2014. The EAW relates to a sentence of 2 years and 6 months. All but 2 days of that period remain to be served, after credit for 2 days remand in Lithuania from which the Appellant was released on 27 November 2009. The sentence was imposed by a Lithuanian criminal court (the Kaunas Regional Court) on 28 December 2012. The Lithuanian appeal court refused an appeal on 20 May 2013. There was a subsequent appeal to the Lithuanian Supreme Court determined on 30 December 2013. Petitions to stay execution were dismissed by the Lithuanian courts on 17 February 2014 and 2 May 2014. The Judge found that the Appellant had come to live permanently in the United Kingdom "sometime in or after 2012", and that his wife and son (born in May 2004) joined him here a few months after his arrival. The Judge referred to bank statements which she described as evidencing the Appellant having travelled between the UK and Lithuania in the period 2011 to 2013. As the Judge also recorded, there was further information from the Respondent which explained that the EAW was issued following attempts to trace the Appellant by the Lithuanian police who provided a report to the Lithuanian court dated 24 October 2014. That report recorded that they had established that he was "in the UK" and "in hiding there". The EAW was certified by the NCA on 9 January 2018 and the Appellant was arrested on 4 September 2019.

The "index offending"

2. The index offences to which the EAW relates are six offences which were aptly described by Mr Hawkes as "fraud, theft and squandering". They are set out in detail in the EAW, and the Judge summarised them as follows: (i) failing to disclose information regarding a company's economic activities between January 2009 and February 2009 resulting in it not being possible to establish what the company's legal activities were; (ii) misappropriation of another's property with a value of the equivalent of approximately £54,000; (iii) causing damage to (squandering) property belonging to another with a value of the equivalent of approximately £2,800; (iv) selling property which he held on trust for one company to another and misrepresenting the origin or ownership of that property; (v) failing to disclose the company's VAT invoices between March and April 2019; and (vii) failing to disclose a VAT invoice dated 30 March 2009 causing a loss in the amount of approximately £9,700 equivalent.

The "Alytus matters"

3. As the Judge found, the Appellant had previously been convicted and sentenced in Lithuania for similar offending. That had resulted in the imposition on 15 September 2011 by another Lithuanian criminal court – the Alytus Local Area District Court – of a 17-month custodial sentence, which was a suspended sentence. On the evidence, the conditions of the suspension, of that sentence imposed for those matters, involved supervision by the Vilnius Regional Probation Division from 18 October 2011 to 15 March 2013.

A new ground: Article 3 (prison conditions)

4. Lane J granted permission to appeal on 20 May 2021, on three grounds which had been pursued in Perfected Grounds of Appeal dated 15 October 2020. Those grounds concerned: section 14 of the Extradition Act 2003; Article 8 ECHR; and section 2 of the 2003 Act. When filing a skeleton argument for this substantive appeal on 27 September 2021, the Appellant's representatives also made an application for permission to amend the grounds of appeal, so as to adopt the Article 3 ECHR prison conditions issue which had been raised in the case of Kaleckas CO/4393/2020 and was apparently, at one stage, listed for hearing on 18 November 2021.

5. By an application dated 29 November 2021 the Appellant's representatives applied to vacate the substantive appeal hearing in the present case, in light of the facts that: (a) Besan CO/818/2021 and Bazys CO/3234/2020 were now due to be heard by a Divisional Court and would be addressing the Article 3 prison conditions issue; and (b) the hearing which had been due to take place in those cases (on 8.12.21) had been vacated to be relisted given the position regarding awaited further expert evidence. The Respondent resisted the hearing of the substantive appeal being vacated, indicating that it would maintain the position taken in its skeleton argument, namely that this Court should determine the three grounds of appeal, and also the Article 3 prison conditions issue, and should reject them all. I indicated, having considered the application on the papers, that I was not prepared to vacate the hearing, especially having regard to the fact that other grounds of appeal were being raised in the present case, but that any request for an adjournment or stay could be ventilated at the hearing. It was.

6. At the appeal hearing, Mr Hawkes for the Appellant adopted as his "primary" position that this Court should adjourn the entirety of the appeal, pending the outcome of Besan and Bazys. His "fallback" position was that this Court should grant a stay of the application to amend the grounds of appeal to raise the Article 3 (prison conditions) issue (or alternatively should give permission to amend but with a stay of the application for permission to appeal), pending the outcome of Besan and Bazys in the Divisional Court. Ms Mustard for the Respondent adopted as her "primary" position that this Court should deal with the Article 3 prison conditions issue on this substantive appeal, alongside the other three grounds, and should dismiss them all. She accepted, however, that addressing the Article 3 (prison conditions) issue on its substantive merits was not a practical possibility at the 2½ hour hearing which had been fixed for the substantive appeal hearing. Ms Mustard's "fallback" position, ultimately, was that I should allow a period of time (14 days) for her to provide the Court with further information about the 'bigger picture', with Mr Hawkes having a period of time (14 days) to respond, after which I should then deal with the question of any stay on the papers. I ruled on these contentions at the hearing, giving brief reasons, which I now amplify.

7. I was not prepared to adjourn the entirety of the hearing and rejected Mr Hawkes's primary position. In my judgment, there was no reason at all why the Court ought not to deal with the existing three grounds of appeal, on which permission to appeal was granted, and for the determination of which the 2½ hour hearing had been fixed. The parties were ready, willing and able to assist the Court in relation to those issues. It was not in the interests of justice or in the public interest for those matters to be left unresolved and stayed. They were 'freestanding' points, not inter-connected with Article 3 and prison conditions. Nor was I prepared to proceed straight to a stay in

relation to the Article 3 (prison conditions) point, and so I did not adopt Mr Hawkes's fallback position. I wanted visibility as to what position was being adopted in other Lithuanian cases, so far as this apparent point of principle is concerned. I did not want a 'left-hand' and 'right-hand' problem. If I were the first Judge to consider the question of a stay, I wanted to do that with 'eyes open', especially given the prospect that others would rely on that course. I looked to the Respondent, as the 'repeat player' in all Lithuanian extradition cases, for assistance as to the 'bigger picture'. I wanted to know what was being said in and about Besan and Bazys: whether they were a 'lead case' on a 'point of principle' having a 'knock-on effect' on other Lithuanian extradition cases. I suspected that they did warrant that description. That was because there could be an inexorable legal logic, given the known nature of the issues, recognised as requiring and awaiting resolution, which – if well-founded – could mean that ordering the surrender of anyone to face imprisonment in Lithuania would be incompatible with the fundamental human rights protection against inhuman or degrading treatment, as applicable in the extradition context.

8. I am aware that it has been said, in the context of case-law in the immigration field, that those representing the Home Office "are inherently better placed than even the most diligent practitioner to know of the most recent case-law in the immigration and asylum field", that being "because the Home Office is involved in every case", and that what is needed is "a robust system for ensuring that its … solicitors and counsel when instructed, are aware of the latest developments in the case-law": Laci v Secretary of State for the Home Department [2021] EWCA Civ 769 [2021] 4 WLR 86 at §85. I felt it was fair, in a rather similar way, to expect the Respondent to provide the Court with greater visibility about what was happening in other Lithuanian extradition cases.

9. I adopted Ms Mustard's fallback position and gave the Respondent a deadline of 14 days from the hearing, and the Appellant a deadline of 14 days thereafter, for further information to be provided. I did not accept Ms Mustard's primary position. It was not workable at the substantive hearing. In any event, I would not have embarked into consideration of a point which I knew was due to be addressed by a Divisional Court, with relevant evidence being awaited. That would have been entirely inappropriate. After the hearing, Counsel reverted with creditable promptness, well ahead of their deadlines. In the event, it became common ground that the application for permission to raise Article 3 (prison conditions) should be stayed in this case, behind Besan and Bazys, which I was told was now fixed for a rolled-up hearing on 9 February 2022. Mr Hawkes sent me an example of such a stay (16 December 2021) in the case of Mudragelov CO/3589/2021, the substance of whose essential terms I will match. Mr Hawkes asked for 21 days for notification and submissions, but I agree with the Mudragelov 7 days, to ensure suitable discipline and expedition. The Order I will make is as set out in the final paragraph of this judgment.

Section 14

10. On this first ground of appeal, Mr Hawkes submits that extradition would be oppressive by reason of the passage of time, and so precluded by section 14 of the 2003 Act (passage of time), which relevantly provides:

> ***A person's extradition … is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since***

he is alleged to have … become unlawfully at large (where he is alleged to have been convicted of [the extradition offence]).

There are two key submissions made by Mr Hawkes, which are sequential. First, that the Judge was wrong to find that the Appellant had been unlawfully at large as a "fugitive", so as to be unable to invoke section 14 protection and left to rely on passage of time considerations only through the prism of Article 8 ECHR. Secondly, on that premise, that the circumstances relating to the passage of time are such that the threshold of "oppression" is crossed in the present case. Mr Hawkes submits that on the evidence the Appellant was "unlawfully at large" from 30 December 2013, when the Lithuanian Supreme Court disposed of the appeal. He submits that it would be "oppressive" to extradite the Appellant by reason of the passage of time since then. Ms Mustard for the Respondent submits that Mr Hawkes is wrong on each of his two key points, either of which is fatal to the success of this ground of appeal.

11. I turn to the question of fugitivity. Mr Hawkes submits that the Appellant was not, on the evidence, 'knowingly placing himself beyond the reach of the Lithuanian authorities' when he left Lithuania having attended his trial for the index offending (on 28 December 2012); nor was he doing so when he left Lithuania after subsequently attending his unsuccessful appeal court hearing (on 20 May 2013). Mr Hawkes submits that there is a parallel between the present case and the circumstances in Pillar-Neumann v Austria [2017] EWHC 3371 (Admin), a case which held that there is no obligation on a person living abroad voluntarily to surrender to serve a prison sentence in a foreign country, even where they are aware of foreign proceedings seeking to secure that outcome. Mr Hawkes submits as follows. The Appellant, on the evidence, had been travelling "freely" between Lithuania and the United Kingdom up to (and immediately after) 20 May 2013, under his true identity and using his own passport. Although there is further information from the Respondent which speaks of the Appellant having been 'unlawfully at large' from 28 December 2012, that same further information elsewhere recognises that the sentence of 2½ years custody in relation to the index offending did not 'enter into force' until the appeal court dismissed the appeal on 20 May 2013. The Appellant "freely" left Lithuania after the sentence on 28 December 2012. He "freely" left Lithuania again after the appeal court decision on 20 May 2013. On each occasion he had a right of appeal, which he subsequently invoked. Nothing was done to inhibit his "freely" coming and leaving. Although a written commitment not to depart is said to have been given by the Appellant when he was released from the 2 days' remand on 27 November 2009, there is no evidence that this was ever 'renewed' or 'explained' in any subsequent occasion. There was never any summons to attend prison. Far from being evasive, the Appellant was returning – in December 2012 and again in May 2013 – to engage in the process. Viewed from a 'human perspective', he was at no stage a fugitive, still less to the necessary criminal standard of proof. Although he never notified a UK address to the authorities who were dealing with the index offending, the context was that the Alytus matters had previously been dealt with in September 2011, leading to the period of probation supervision through to March 2013. And in relation to the Alytus matters, the Appellant had given a UK address – in Leyton E10 – to the Vilnius Regional Probation Division. The authorities dealing with the index offending could readily have obtained the Appellant's UK address from the Vilnius Regional Probation Service. In so far as they failed to do, that was a problem of coordination between different Lithuanian authorities. The Appellant was never a "fugitive". He was, rather, only ever someone who did not return to Lithuania to serve a custodial sentence.

12. I cannot accept these submissions. The Judge found, on the evidence, that the Appellant was a fugitive. She had the benefit of oral evidence and cross-examination. She found that the Appellant was not a credible witness. She found that he had been present at the hearing in the appeal court on 20 May 2013. She found that he was personally served on that occasion with that determination, the effect of which was that the custodial sentence – previously imposed on 28 December 2012 – now came into force. The Judge disbelieved the Appellant, whose written and oral evidence claimed that he had not been present in the appeal court on that occasion. She found as a fact that the Appellant came to the UK straight after that hearing, in the knowledge that he had received an immediate term of imprisonment. The Judge also found, on the evidence, that the Appellant was subject to a restrictive measure not to leave his place of residence without permission of the Court. She rejected his evidence which had disputed this. The Judge found that he was the subject of a written commitment not to depart, which continued, and which placed him under an obligation to notify his change of residence. She found that he deliberately left Lithuania after the hearing on 20 May 2013 knowing, not only that he had a sentence of imprisonment to serve which was now in force, but also that he was under an obligation to notify his change of address, which he failed to do. In relation to the Appellant notifying an address in Leyton E10 to the Vilnius Regional Probation Division, in the context of supervision and the Alytus matters, the Judge did not accept the Appellant's statement that he had told the Vilnius Regional Probation Service that he was living in the UK. But she went on to find that, even if she was wrong about that, the Appellant had an obligation to notify his change of residence to the court dealing with the index offending, and that he had failed to do so.

13. In my judgment, the Judge's findings of fact on the evidence – including the oral evidence of the Appellant – are unimpeachable, as is the Judge's finding of fugitivity in the light of those findings. In my judgment, Mr Hawkes's submissions – to a very large extent – involve inviting this Court to prefer a version of events and circumstances which had been raised by the Appellant in his evidence before the Judge, but which the Judge rejected. By way of example, Mr Hawkes says that this Court should proceed on the basis that the Vilnius Regional Probation Division had received from the Appellant a UK address in Leyton E10. But that was one of the many points on which the Judge did not accept the Appellant's evidence. Another striking example of his evidence was his denial that he had been present in the appeal court on 20 May 2013. Mr Hawkes now accepts that presence, as per the Judge's finding of fact, but he puts forward factual contentions about what did and did not happen at that hearing. Before the Judge, there was reliable evidence from the Respondent – which the Judge was plainly entitled to accept – which recorded that he had indeed been present on that occasion. The Judge referred to airline boarding passes which evidenced the Appellant's travel to Lithuania on the day before the appeal court hearing on 20 May 2013, with him travelling back to the UK on the evening after the appeal hearing. Looking at the position as at 20 May 2013, when the Appellant was present in court at his unsuccessful appeal, the evidence – which the Judge unimpeachably accepted – involves this clear picture. At the hearing at the appeal court, the appeal was dismissed; the custodial sentence came into force; the Appellant was personally served with the decision. So, there was a custodial sentence to serve, and he knew it. He went to the airport and got on the plane to return to the UK. He did so, moreover, without giving an address to any authority concerned with the index offending, as he was required to do by virtue of a prior commitment. His actions led to the police authority being unsuccessful in trying to locate him, and describing him as being in "hiding", as was recorded in the October 2014 report. This

conduct has all the familiar indicia of fugitivity. It amply supports the Judge's finding of fugitivity, to the relevant standard of proof.

14. There are further points to make. (1) The information said to have been provided by the Appellant to the Vilnius Regional Probation Division – even were it accepted that a Leyton E10 address was provided – would provide no answer in the other circumstances of the case, as the Judge convincingly concluded. That was a "Regional" probation division. It was dealing, and only dealing, with different matters – the Alytus matters – on which the Appellant had been sentenced by a different court. The Appellant knew that. The Appellant either was, or was not, a fugitive in relation to the circumstances relating to the proceedings concerning the index offending. Those circumstances included: the presence in the appeal court; the personal service with the decision; and in any event the commitment to notify an address. If the Appellant was not a fugitive in relation to the circumstances relating to the proceedings concerning the index offending, the position with the Vilnius Regional Probation Division could not condemn him. But if he was, nor in this case could it save him. (2) I see no inconsistency between the Judge's analysis regarding 20 May 2013 and the description in the further information about the 28 December 2012 sentence having been in force on that earlier date. This is consistent with the idea that a subsequent appeal had a suspensive effect once that appeal was filed. In any event, it does not follow that an individual can choose to leave after being subsequently (20 May 2013) personally served with a decision whose effect is that he now has a sentence of imprisonment to serve, which sentence is now in force – still less that he can choose to leave without notifying an address when he is under an obligation to do so – and then convincingly claim not to be a fugitive, by reference to the unsuccessful pursuit of a further appeal and reliance on <u>Pillar-Neumann</u>. (3) Next, Mr Hawkes was unable to point to any evidence of the Appellant supposedly continuing to travel "freely" between Lithuania and the UK after coming back to the UK on the evening immediately after the appeal court hearing (20 May 2013). In my judgment, that discontinuation of travel from that date is itself striking and supportive of the Judge's findings in relation to fugitivity after leaving the appeal court on 20 May 2013. (4) There is then this further concern. The Appellant's evidence (about his living "openly") includes emphasis on his having given the DVLA an address in Ilford, as can be seen from the driving licence issued to him in January 2015. What transpired however – as Ms Mustard points out – is that this Ilford address was the address of his company's accountant. It was an address used for invoicing. It was an address at which he had never lived or been based. The obvious question is why an individual who says he was permanently in the UK with his family from 2012 onwards, and "living openly", would give the DVLA an address which was not his actual residential address.

15. There is no basis for this Court, in its appellate jurisdiction, overturning the Judge's findings on the evidence. There is no basis for elevating the Appellant's description of events above the findings of fact of the Judge – the front-line judge – dealing carefully and thoroughly with factual matters, having heard oral evidence with cross-examination, and having made material and adverse findings as to credibility. The Judge's unimpeachable finding as to fugitivity is fatal to the section 14 passage of time argument.

16. It follows that Mr Hawkes's second key point on section 14 does not arise. But I add this, in relation to "oppression". Mr Hawkes emphasises the impact of the Appellant's

extradition viewed in terms of the Appellant, his family, his business, his employees and the independent contractors who work for or with the business. He says there have been significant and material changes in circumstances, in the 8 years since December 2013, during which time there has moreover been "a total lack of urgency" on the part of the Lithuanian authorities and the NCA. Mr Hawkes emphasises that, during that time, the Appellant, his wife and their son have been established here. He emphasises the business, employment and business relationships which the Appellant has built up in the UK. Against that factual backcloth, Mr Hawkes submits that the impact and implications of extradition in this case, viewed in the context of the passage of time, cross the threshold of constituting "oppression". I cannot accept that submission. I accept that the implications of the passage of time and the impact of extradition against the backcloth of the passage of time are features which will inform the Article 8 proportionality balancing exercise. I will return to Article 8, and to factoring them in, in the context of the Article 8 ground. I cannot accept that they are features which cross the high threshold of "oppression". Even if the Appellant had succeeded on the question of his not being a fugitive, I would not have upheld the section 14 ground of appeal. In my judgment, on that premise, extradition would not be "oppressive" by reason of the passage of time since the Appellant became unlawfully at large.

Article 8

17. On this ground of appeal, Mr Hawkes relies – through the prism of Article 8 ECHR – on all relevant circumstances, including the passage of time and its implications, and the impacts of extradition. His primary position in the Article 8 context, as with section 14, was that these matters fall to be considered on the basis that the Appellant is not a fugitive. But that submission fails for the reasons which I have given above. In the alternative, Mr Hawkes submits as follows: the passage of time – including the entirety of the period back to the index offending in 2008-2010 – together with its implications, and the linked questions regarding the impact of extradition, must all serve to inform the assessment of Article 8 proportionality, even if the Appellant is a fugitive. I accept that submission. The question is: where does it lead?

18. Mr Hawkes submits that the Judge was wrong to conclude that extradition in this case is compatible with the Article 8 ECHR rights of the Appellant and/or of affected member(s) of his family. In Article 8 ECHR terms, Mr Hawkes relies on a number of key features of the case in particular. There is, as I have said, the passage of time. That includes consideration of the passage of time and its implications. Mr Hawkes emphasises the 11-13 years to the present, from the index offending in 2008-2010 (when the Appellant was aged 27-30). He emphasises the 7½ years to the present, from the time since the appeals and petitions were finally disposed of in Lithuania (May 2014). He also emphasises the 3 years 2 months between the issuing of the EAW (November 2014) and its certification by the NCA (January 2018). As to that passage of time, Mr Hawkes submits that this is unexplained delay on the part of the NCA which is "unacceptable", citing Juszczak v Poland [2013] EWHC 526 (Admin) at §14, where Collins J described as "unacceptable" the unexplained delay including the 3½ years between the issuing of the EAW and its certification by the NCA. Mr Hawkes also referred to Article 17 of the Framework Decision (the duty to execute an EAW as a matter of urgency) and disputed the applicability in the present case of the observation in RT v Poland [2017] EWHC 1978 (Admin) at §62 ("neither the foreign authority nor

the NCA can be expected to explore the byways and alleyways of British officialdom to discover whether someone is in this country"), given Article 17 and Juszczak.

19. Alongside the passage of time, there is the impact which extradition will have for the Appellant and for his family, together with the impact so far as concerns the business and those working for or with it. Mr Hawkes emphasises that the Appellant's son, now aged 17½, is in his A-level year at school. He emphasises that the family will lose the Appellant as its principal breadwinner, which will result in hardship for the Appellant's wife with the modest salary which she earns as a cleaning supervisor. He submits that the wife and the family stand to lose the family home, during the son's A-level year.

20. As to fugitivity (if it arises, as I have found that it does), Mr Hawkes characterises a passage found in Celinski v Poland [2015] EWHC 1274 (Admin) at §39 – which passage was referred to by the Judge – as being an observation confined to the facts of that case. The passage in question says this (Celinski at §39):

> ***The important public interests in upholding extradition arrangements, and in preventing the UK being a safe haven for a fugitive as Celinski was found to be, would require very strong counterbalancing factors before extradition could be disproportionate.***

The Judge quoted that passage, saying "I remind myself of [this] dicta", and then describing "those factors" (ie. "very strong counterbalancing factors") as ones which "do not exist in this case". Mr Hawkes submits that this was to take out of context a fact-specific composite observation, referable to the particular combination of public interest considerations arising on the facts of the Celinski case, where Mr Celinski had committed serious and multiple offences relating to multiple dwelling burglary and drugs offences.

21. Mr Hawkes emphasised other features of the present case. They included the long period since 4 September 2019 on which the Appellant has been on bail on an electronically monitored curfew (3 hours from midnight to 3am), a period of some 2 years and 3 months, albeit that Mr Hawkes accepts that this would not be a "qualifying curfew" for the purposes of a deduction from a custodial sentence in a domestic UK case. They included the subjective and objective implications post-Brexit, so far as concerns the uncertainty in the Appellant being able to return to the UK after serving a sentence in Lithuania. They included the fact that the Appellant has no convictions in the UK. Mr Hawkes also commended, in the context of Article 8, the 'necessity' formulation of the then Jonathan Sumption QC, recorded by the Supreme Court in Norris v USA [2010] UKSC 9 at §12.

22. I will start with the three authorities which I have mentioned, which are emphasised by Mr Hawkes in the Article 8 context. (1) As to the 'Sumption necessity formulation' in Norris, I accept Ms Mustard's submission: the necessity test arising by virtue of Article 8 ECHR in the extradition context is subsumed within the balancing exercise, authoritatively described in the Article 8 case-law. That is where the principled focus lies. I need say no more about the 'Sumption formulation', which I have discussed in Barcelos v Portugal [2021] EWHC 2036 (Admin) at §6. (2) I cannot accept that there was any error of approach by the Judge in citing the passage – which she described as containing "dicta" – from Celinski. Language such as "very strong counterbalancing factors" – like other language such as "exceptionally severe" consequences for family life – is context-specific. The passage in Celinski has to be understood against the

principles in Norris and HH. But the Judge clearly recognised those principles. Indeed, earlier in her judgment, she had faithfully set out the principles which Celinski had derived from Norris and HH. There was no error of approach, and certainly no material error of approach. (3) I accept that Juszczak illustrates that several years of delay by the NCA in certifying an EAW can be in the nature of an "unacceptable delay" which then materially informs the Article 8 ECHR analysis. But, in that very respect, Juszczak is a paradigm case reflecting the intensely fact-specific nature of Article 8 cases. In the next paragraph, I will explain why.

23. Mr Juszcsak's previously suspended sentence had been activated in early June 2006 (§§2, 11). He was in touch with the Polish probation service which, aware that he was now wanted to serve the sentence, told him to return to Poland from the UK. It was "not disputed" that his whereabouts in the UK were, in the light of this, known (§13). He was declining to return to Poland because he was the sole wage earner and wanted to look after his family (§11). In those circumstances, it was known by the Polish authorities that Article 8 ECHR was going to be relied on to resist extradition (§14). The Court's finding was that the 3½ years between the EAW (12.08) and its certification by the NCA (6.12) was "unacceptable" delay involving "failing to do anything for some three and a half years" (§14). But that was specifically because this was the "sort of case" where the requested person's "whereabouts have been known" (§19). The Court made clear that different considerations would apply "in many cases", where there would be "a good excuse for delay" because "whereabouts are unknown" (§19). There is therefore no inconsistency between Juszczak (a case expressly about the situation where whereabouts are found as a fact to have been known throughout) and the observation in RT (a passage about where whereabouts are unknown). In Juszczak, the "unacceptable delay" (identified as explained above) "tipped the balance" (§18), because of the "circumstances" (§10). They included a severely disabled daughter who Mr Juszczak's wife could no longer lift (§6), because of difficulties which arose in 2008 (§15). They also included a 3 year old (§2) (born in 2009/2010) whose needs made it much harder for the wife to gain employment (§8). If matters had been pursued in 2006, when "all this ought to have been pursued" (§15), Mr Juszczak would at that stage have served the 2-year sentence for which his extradition was sought.

24. The present case has its own facts and circumstances. The facts unassailably found by the Judge are very different from Juszczak. The Judge did not accept the Appellant's evidence that he even had given an address in the UK to the Vilnius Regional Probation Division. But, in any event, she found that he departed Lithuania without providing an address to the authorities concerned with the index offending, as he was required to do. Those authorities dealing with the index offending did not know his location. The police authority had eventually made a report on 24 October 2014 saying it had now been established that the Appellant had left for the UK and "went into hiding there". In the terms expressed by Collins J in Juszczak, this was not the "sort of case" where the "whereabouts" were known. The Judge did not characterise as "unacceptable" the 3 years 2 months between issue of the EAW and its certification by the NCA. There was here no error of approach on the part of the Judge – and certainly no material error of approach – in light of Juszczak or otherwise.

25. The Judge, rightly, recognised that the passage of time was relevant in Article 8 terms – as tending to weaken the public interest in extradition and tending to strengthen the impact on private and family life – and it, and the impacts of extradition which are a

function of it, are all relevant to the Article 8 balancing exercise. She conducted a conscientious and thorough proportionality 'balance sheet' exercise of identifying, weighing and evaluating the features of the case in support of extradition and those weighing against it. She listed factors favouring extradition being granted: the strong public interest in this country complying with its international extradition treaty obligations; and in not being regarded as a haven for those fleeing foreign jurisdictions or seeking to avoid criminal proceedings in other countries; the mutual confidence and respect that should be given to a request from the judicial authority of a member state; the strong public interest in discouraging or being seen the UK as a state willing to accept fugitives from justice; the appropriateness of according a proper degree of confidence and respect to decisions of the issuing judicial authority; the independence of prosecutorial decisions; the fact that extradition is sought in this case for six offences which are not insignificant, which attracted the prison term of 2½ years, all but two days of which remain to be served; the fact that, when sentenced in relation to those matters, the Appellant was the subject of a suspended sentence for similar offences; and the fact that the Appellant is a fugitive.

26. The Judge identified factors against extradition being granted: that the Appellant had come to the United Kingdom sometime in or after 2012; that his wife and son had joined him in the UK a few months later; that whilst the Appellant and his wife had not been in a relationship and had lived separately for around six years (from around 2013) they had recently reconciled (in 2020); that they and their son now lived together as a family; that they had a settled intention to remain in the UK; that the Appellant works full-time, having a business in the UK which employs a number of full-time staff and subcontractors; that he works hard and provides financial support for his family and that if extradited he would lose his employment and it is possible that the business would not continue (albeit that sub-contractors and staff could continue to do the work currently obtained through the business, that the business had been set up in full knowledge of the custodial sentence to serve in Lithuania and that since being on bail the Appellant has had time to look for other options so far as concerns his staff and the continuation of the business); that there would be emotional distress and financial hardship to the wife and son if he was extradited; that they would be financially worse off; that they were in the process of buying a property with a mortgage; that if the Appellant were extradited there would be financial hardship and emotional distress (albeit that they have had lived six years apart, that the son would remain in the care of his mother and that the circumstances post-reconciliation in 2020 had all arisen with full knowledge of the EAW on which he had been arrested in September 2019); that the Appellant has no convictions in the UK; and that there has been delay in this case (albeit delay which at least in part is because the Appellant left Lithuania knowing that he had been sentenced to a term of imprisonment and did not inform the authorities of his address as he was required to do).

27. Having set out the various factors, the Judge explained that she gave substantial weight to the interests of the Appellant's son and, in particular, to the emotional distress that the son would suffer if the Appellant were extradited. She then explained that this is not, however, a sole carer case and that the son would remain in the care of his mother. She emphasised that the son was by then 16 years of age (now 17½) and would suffer emotional distress, but the Judge found that he would cope with the support of his mother and friends. The Judge next accepted that there would be emotional distress for the Appellant and his wife should he be extradited; but she explained that they had been

separated for six years from about 2013 and she had coped without the emotional support of her husband during the time when they were not in a relationship; in addition to which, they had reconciled in full knowledge that he was awaiting the outcome of these extradition proceedings. The Judge explained that she gave weight to the financial hardship that the wife and son would suffer if the Appellant were extradited, but found that the wife would be able to cope. She explained that the property at that time occupied by the wife with the son had been a rental property in her sole name and concluded that they would have accommodation in the UK. She addressed the evidence that the family was in the process of buying a home and had obtained a mortgage offer, pointing out that that was something which had been done in full knowledge of the extradition proceedings and implications. She then considered, in detail, the position of the Appellant's business and the employment of a number of full-time staff and subcontractors. The Judge observed it was not clear why the subcontractors and staff could not continue to work for the large organisation from whom the business obtained work. She also described the fact that the Appellant had been on bail with time to look at other options for his staff and his business. She accepted that the Appellant had been of good character since being in the United Kingdom. She then bore in mind that the offences in the EAW are not insignificant, as reflected in the term of 2½ years imprisonment, a sentence itself preceded by a suspended sentence for similar offences. The Judge found, on the evidence, that the negative impact of extradition on the Appellant and his family was not of such a level that the court ought not to uphold this country's extradition obligations.

28. I accept Ms Mustard's submission that there is no basis for this Court to overturn the Judge's evaluative assessment of Article 8 proportionality and its outcome. Indeed, even if I were to revisit the balancing exercise 'afresh', and conduct it myself, I would arrive at the same outcome on Article 8 as did the Judge. This is a case where the strong public interest considerations in favour of extradition decisively outweigh the various factors which can weigh in the balance against extradition. In those circumstances, and for those reasons, the Article 8 ground of appeal fails.

Section 2

29. The third and final ground of appeal invokes section 2 of the 2003 Act. Mr Hawkes submits that the evidence before the Court, on changes in sentencing law in Lithuania, renders "uncertain" and "unclear" what period the Appellant would in fact need to serve were he surrendered by way of extradition. He submits that this feature of the case has the legal consequence of robbing the EAW of the certainty and particularisation required to satisfy the standards of section 2. Mr Hawkes accepts that there is further information before this Court, provided by the Respondent and dated 28 September 2021, which states – in terms – that modifications of the laws that came into effect on 1 July 2020 have no effect on the sentence imposed on the Appellant and do not reduce the term that he will have to serve in custody. Mr Hawkes submits that that material is not admissible, applying the familiar Fenyvesi v Hungary [2009] EWHC 231 (Admin) criteria for fresh evidence in extradition appeals, it having been available to be supplied at an earlier stage. He also submits that the further information is not capable of being decisive, since it fails to give clear reasons for the conclusion stated, and thus fails to answer the detailed analysis of the Lithuanian lawyer who had raised the question-marks.

30. In my judgment, there is nothing in this ground of appeal. The background and circumstances are as follows. (1) The Appellant's Lithuanian lawyer, by a letter 10 July 2020, had referred to the new law in force in Lithuania from 1 July 2020, the aim of which was to promote non-custodial forms of criminal responsibility. In light of that new law, steps were envisaged as being pursued on the Appellant's behalf, to seek to postpone the implementation of his custodial sentence and/or to secure, in place of the custodial sentence, a replacement sentence (a conditional release described as being "on parole"). (2) A further letter dated 16 July 2020 from the Lithuanian lawyer then set out the relevant new legislation. (3) In response to the specific point raised in the letter of 10 July 2020, further information was produced on 22 July 2020 from the Respondent which referred to the new Lithuanian law and explained that conversion of the sentence into a replacement sentence involving conditional release (ie. a suspended sentence) was not a course which, under the new law, was available in the present case. (4) Next, at the oral permission hearing before Lane J on 20 May 2021, a specific point of concern was raised. It was whether the sentence might be reduced in length (rather than replaced and suspended) by the operation of the new legislation, to which the Lithuanian lawyer had referred in setting it out in the letter of 16 July 2020. (5) Following the grant of permission to appeal, that further and specific point of concern was specifically addressed, in the further information constituting the putative fresh evidence. There, it is explained that the new legislation will leave the Appellant's sentence unreduced.

31. That sequence of events provides a clear justification for the information having been provided when it has been. This is a point on which the permission stage judge envisaged that the assistance was appropriate. The question was raised and it was appropriate to answer it. It is in my judgment entirely appropriate for this Court to admit the further information, in the interests of justice. My doing so is fortified by the approach identified in the case which Ms Mustard cited: FK v Germany [2017] EWHC 2160 (Admin) at §37. I do not accept that the further information is rendered unreliable by the absence of reasons or particulars. Nor was there anything in the letter of the Lithuanian lawyer's letter of 16 July 2020 – a letter which simply set out the relevant Lithuanian law – constituting a reasoned legal analysis calling for a reasoned analytical answer. The point was a short one. A clear and emphatic answer has been given by the appropriate authority, which it is clearly appropriate for this Court to accept. That is a complete answer to this ground of appeal.

Conclusion

32. For the reasons which I have given, the three grounds of appeal in this case fail and the appeal is dismissed by reference to each of them. What remains is the extant application to amend the grounds of appeal to take the Article 3 (prison conditions) point, on which I make this Order: (1) The application for permission to amend to raise Article 3 ECHR (prison conditions) as a ground of appeal is stayed until judgment is handed down by the High Court in Besan CO/818/2021 and Bazys CO/3224/2020. (2) Following the hand down of that judgment (i) within 7 days of the judgment hand-down the Appellant must notify this Court and the Respondent whether the application to rely on Article 3 ECHR (prison conditions) is maintained and, if it is, must also file and serve updated submissions in support (ii) to which the Respondent may within 7 days thereafter respond.