Neutral Citation Number: [2019] EWHC 985 (Admin)

Case No: CO/2782/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/04/2019

Before :

THE HONOURABLE MR JUSTICE LEWIS

- -

Between :

DISTRICT COURT IN KRAKOW, POLAND	**Appellant**
- and -	
JOANNA ELZBIETA PAWLIKOWSKA-ZAWADA	**Respondent**

- -
- -

Daniel Sternberg (instructed by **CPS Extradition Unit**) for the **Appellant**
Robert Dacre (instructed by **ITN Solicitors**) for the **Respondent**

Hearing dates: 21 March 2019

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Approved Judgment

The Honourable Mr Justice Lewis:

INTRODUCTION

1. This is an appeal by the Judicial Authority (the District Court in Krakow, Poland) against a decision of District Judge Rebecca Crane in the Westminster Magistrates' Court on 9 July 2018. By that decision, the District Judge ordered the discharge of the respondent, Ms Joanna Pawlikowska-Zawada, pursuant to section 14 of the Extradition Act 2003 ("the Act") on the grounds that extradition to Poland would be oppressive. The District Judge indicated that, if she had not discharged the respondent on that basis, she would have discharged the respondent under section 21 of the Act on the ground that extradition would have amounted to a disproportionate interference with her right to respect for her family and private life under Article 8 of the European Convention on Human Rights ("ECHR").

2. In brief, the respondent was convicted of 18 offences in Poland and was sentenced to a term of imprisonment. She appealed against the decision of the Polish court. She left Poland and did not know the outcome of the appeal. She came to believe that the appeal must have been successful. The District Judge concluded that the respondent was not a fugitive in the sense that that word was used in the case law and that to extradite her to Poland would be oppressive. The Judicial Authority submits that where a person she is unlawfully at large because an appeal has been dismissed, and where a person leaves a jurisdiction, knowing that she has been convicted and without being informed that an appeal has been successful, any time spent outside the jurisdiction after dismissal of the appeal cannot be relied upon for the purposes of section 14(2)(b) of the Act in deciding whether extradition would be oppressive. Further, the Judicial Authority submits that the District Judge's conclusion that extradition would be oppressive was wrong in any event. The Judicial Authority also submits that the approach of the District Judge to Article 8 ECHR was flawed as the District Judge failed properly to assess the significance of the passage of time between the appeal being dismissed and the extradition hearing. Permission to appeal was granted by Sir Stephen Silber.

THE FACTUAL BACKGROUND

The Background

3. The respondent is a Polish national aged 51. The Judicial Authority seek her extradition to Poland pursuant to an European Arrest Warrant ("EAW") issued on 22 December 2017 to serve the outstanding balance (2 years, 6 months and 11 days) of a sentence of 3 years and 6 months' imprisonment imposed for 18 offences of fraud committed in Poland between August 1998 and January 2004.

4. As appears from the EAW, and further information provided by the Judicial Authority in a document dated 3 July 2018, the respondent was present at a sentencing hearing on 22 December 2004. She filed a motion seeking a written justification of the conviction on 23 December 2004. She collected a transcript of the judgment containing the written justification on 7 February 2005. She personally filed an appeal against the judgment. By order of the district court in Krakow, that appeal was dismissed on 14 October 2005.

5. The further information confirms that there was, therefore, no doubt that the respondent knew that a custodial sentence had been imposed. She was not required to inform the probation officer of a change of address. The respondent knew that she was required to serve the prison sentence if the appeal was not allowed (the further information describes the issue of serving it as “non-negotiable”). Following the dismissal of the appeal, 7 attempts were made from 2005 onwards to locate the appellant to ensure that she would serve the sentence. These were unsuccessful. On 1 September 2017, the District Court in Krakow was informed that the respondent was in London. The procedure for issuing an EAW was started immediately and an EAW was issued on 22 December 2017. That was certified by the National Crime Agency in the United Kingdom on 8 February 2018. The respondent was arrested on 26 April 2018 and brought before the Westminster Magistrates’ Court on 27 April 2018.

The Judgment of the District Judge

6. The District Judge in her judgment summarised the contents of the EAW and the 18 offences of fraud for which the respondent had been convicted and set out the history of the proceedings. She summarised the evidence given by the respondent at the extradition hearing. This included the respondent’s evidence that she had moved to the UK in March 2006. The respondent said that she lives with her partner who has two adult children (one of whom lives with the respondent and her partner; the other of whom she has no contact with). The District Judge referred to the medical condition of the respondent’s partner and the fact that the respondent had had a car accident in about 2012 and she had been diagnosed with post-traumatic stress disorder. The District Judge records the respondent as giving evidence that she was released from prison on 22 December 2004 after a court hearing and that she had not applied for a written justification for the conviction and had not collected the transcript of the judgment containing that justification. She accepted that she had appealed against the sentence herself. She gave evidence that she had not received any correspondence from the court about the date of the appeal and was not informed it was to take place on 14 October 2005. The respondent said that she had telephoned the court once but was given no information. She said that in October 2015 she was living with her family in Poland at the address where she had lived all her life and did not receive any correspondence to say that the appeal had been unsuccessful. She said that she thought the court had accepted her appeal. She said that she renewed her Polish ID card in December 2005 and travelled from the UK to Poland regularly and would have travelled twice a year to Poland between 2007 and 2011.

7. The District Judge accepted that the respondent’s only address in Poland had been her mother’s house until she left to come to the UK in March 2006. She accepted that the respondent had worked legally in the UK, was in a relationship with her partner and that his partner had the health issues described. She accepted that the respondent had been diagnosed with post-traumatic stress disorder and was receiving treatment for that condition. The District Judge found:

> “9. There is no dispute that the RP was sentenced on 22.12.04. She was released from prison on 20.12.04, having served 346 days of the sentence. No details have been provided for the reason for her release. There is no suggestion that there were any conditions to her release. The JA further information

> confirms that the RP was not under any obligation to notify a change of address.
>
> 10. I found the RP's evidence that she did not receive any correspondence from the court, and that none had been received by her mother at the family address in Poland, regarding the appeal and its outcome to be credible and reliable. She has travelled frequently to Poland and elsewhere since 2006 and renewed her ID card in December 2005. I accept that she genuinely believed that the appeal must have been successful. However, she did not make any enquiries regarding with the court, other than one phone call, and she was aware that there was an outstanding custodial sentence pending an appeal. She was unlawful at large from 14.10.05, the date the appeal was dismissed. However, she did not knowingly place herself beyond the reach of the trial process. Therefore, the JA have not proved beyond reasonable doubt that the RP was a fugitive."

8. The District Judge then turned to section 14 of the Act. She concluded that the respondent had been unlawfully at large since 14 October 2005 (when the appeal against conviction was dismissed). The material conclusions are at paragraphs 14 to 17 of her judgment where she said:

> "14. I have already made findings that the JA have not be proved that the RP was a fugitive. The RP became unlawfully at large on 14.10.05. The delay from that date to the issue of the EAW is 12 years, 2 months and 22 days.
>
> 15. I note the length of the outstanding sentence and that the offences were multiple frauds.
>
> 16. However, in support of the RP's argument that it would be oppressive to extradite her are:
>
> a) The JA has not given any details of the attempts made to track the RP.
>
> b) The RP was unaware of any correspondence or checks at the family home in Poland over the period.
>
> c) the RP renewed her Polish ID and travelled regularly to Poland since the appeal judgment, and was never challenged by the Polish authorities. Therefore, the RP reasonably believed that her appeal was successful.
>
> d) The RP has an established family life in the UK.
>
> e) Due to a road traffic accident, the RP has developed PTSD.

17. Given the duration of the delay, and the factors set out above, I conclude that it would be oppressive to extradite the RP. Therefore, I discharge her pursuant to section 14 of the Extradition Act 2003. ”

9. The District Judge then turned to Article 8 ECHR. She referred to the relevant case law and set out the factors favouring the grant of extradition as follows:

“21. **Factors favouring extradition being granted:**

a) The public interest in this country complying with its international extradition treaty obligations and not being regarded as a haven seeking to avoid criminal proceedings in other countries.

b) the mutual confidence and respect that should be given to a request from the judicial authority of a Member State.

c) The RP has been convicted of 18 fraud offences, between 1998 and 2004.

d) The RP received a sentence of 3 years and 6 months imprisonment, of which 2 years 6 months and 11 days are outstanding.

e) the RP has been unlawfully at large since the appeal court decision on 15.10.05.

f) The RP failed to follow up with the appeal court the outcome of the appeal.

g) the RP’s partner will be able to provide for himself financially and care for himself. “

10. The District Judge then set out the factors against the grant of extradition in the following terms:

“22. **Factors against extradition being granted:**

a) The RP has an established family life in the UK since March 2006. She lives with her partner and his adult son.

b) There has been delay since the appeal court decision on 14.10.05 of over 12 years.

c) The RP did not receive any notification or correspondence from the appeal court regarding the appeal hearing or the outcome of that hearing.

d) The RP was not under any obligation to notify any change of address to the Polish authorities.

e) The RP was unaware the Polish authorities were looking for her. Having renewed her Polish ID card and travelled regularly to Poland, she believed that her appeal had been successful.

f) The RP has PTSD, following a road traffic accident.

g) The RP's partner has some health issues and she provides some care for him.

h) The RP has no convictions in the UK."

11. The District Judge set out her conclusion on Article 8 ECHR in paragraph 23 of her judgment in the following terms:

"23. **Conclusions on Article 8**

I am satisfied that the Article 8 rights of the RP and her partner are engaged. Balancing the factors set out above, I am satisfied, particularly given the delay since the appeal court decision and the life the RP has established in the UK, that extradition would amount to a disproportionate interference with the RP's article 8 rights."

12. In the light of that conclusion, the District Judge discharged the respondent pursuant to section 14 of the Act. She indicated that, if she had not already discharged the respondent under that section, she would have discharged her under section 21(2) of the Act.

THE LEGAL FRAMEWORK

13. The material provisions of the Act are as follows. Part 1 of the Act applies to extradition to territories described as category 1 territories which includes Poland. Section 3 of the Act provides for the arrest of a person the subject of an EAW. Section 4 requires the person to be brought before a court. Section 11 of the Act requires that court to consider whether extradition is barred by one of certain specified statutory provisions. They include sections 14 and 21 of the Act which provides that:

"14 **Passage of time**

A person's extradition to a category 1 territory 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–]1 [(a) committed the extradition offence (where he is accused of its commission), or (b) become unlawfully at large (where he is alleged to have been convicted of it."

And

"21 **Person unlawfully at large: human rights**

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

(2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.

(3) If the judge decides that question in the affirmative he must order the person to be extradited to the category 1 territory in which the warrant was issued.

(4) If the judge makes an order under subsection (3) he must remand the person in custody or on bail to wait for his extradition to the category 1 territory.

(5) If the person is remanded in custody, the appropriate judge may later grant bail."

14. The relevant provision is Article 8 ECHR which provides:

" Right to respect for private and family life

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

15. In terms of the role of this court on appeal, the relevant statutory provisions in this case are sections 28 and 29 of the Act which provide:

28 Appeal against discharge at extradition hearing

(1) If the judge orders a person's discharge at the extradition hearing the authority which issued the Part 1 warrant may appeal to the High Court against the relevant decision.

(2) But subsection (1) does not apply if the order for the person's discharge was under section 41.

(3) The relevant decision is the decision which resulted in the order for the person's discharge.

(4) An appeal under this section -

(a) may be brought on a question of law or fact, but

(b) lies only with the leave of the High Court.

(5) Notice of application for leave to appeal under this section must be given in accordance with rules of court before the end of the permitted period, which is 7 days starting with the day on which the order for the person's discharge is made.

"29 **Court's powers on appeal under section 28**

(1) On an appeal under section 28 the High Court may—

(a) allow the appeal;

(b) dismiss the appeal.

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

(3) The conditions are that—

(a) the judge ought to have decided the relevant question differently;

(b) if he had decided the question in the way he ought to have done, he would not have been required to order the person's discharge.

(4) The conditions are that—

(a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;

(b) the issue or evidence would have resulted in the judge deciding the relevant question differently;

(c) if he had decided the question in that way, he would not have been required to order the person's discharge.

(5) If the court allows the appeal it must—

(a) quash the order discharging the person;

(b) remit the case to the judge;

(c) direct him to proceed as he would have been required to do if he had decided the relevant question differently at the extradition hearing.

(6) A question is the relevant question if the judge's decision on it resulted in the order for the person's discharge.

(7) If the court allows the appeal it must remand the person in custody or on bail.

(8) If the court remands the person in custody it may later grant bail."

THE GROUNDS OF APPEAL AND THE ISSUES

16. In the light of the perfected grounds of appeal, and the written and oral submissions of the parties, the issues that arise are these:

(1) In relation to section 14 of the Act, did the District Judge err in concluding either that:

(a) The respondent was entitled able to rely upon the passage of time since her appeal against the judgment of the Polish court was dismissed as she was not a fugitive from justice as she reasonably believed that the appeal had been concluded in her favour; or

(b) The extradition of the respondent to Poland would be oppressive;

(2) In relation to section 21 of the Act, and Article 8 ECHR, did the District Judge err in her treatment of the passage of time between the passage of time between the dismissal of the appeal in Poland in 2005 and the issuing of the EAW in December 2017?

17. The appellant also seeks to permission to adduce further information from the Judicial Authority contained in a document dated 28 August 2018, that is, after the District Judge gave judgment in this case.

THE FIRST ISSUE – SECTION 14 OF THE ACT

18. Mr Sternberg for the Judicial Authority submitted that the District Judge erred in concluding that the respondent was not a fugitive from justice in the sense that that word is used in the case law dealing with section 14 of the Act. He submitted that the respondent left Poland knowing that an appeal against conviction had been lodged. She was not entitled to assume that any appeal had been successful. She was not entitled to assume that she would no longer be required to serve a sentence in the absence of a deliberate decision communicated to her that the case would no longer be pursued against her. By absenting herself from Poland in such circumstances, she was a fugitive in the sense that she had placed herself outside the reach of the Polish authorities. Furthermore, the District Judge had erroneously failed to have regard to the further information provided at the extradition hearing that unsuccessful attempts to locate her had been made by the Polish authorities from 2005 onwards and it was in 2017 that the Polish authorities were informed that the respondent was in the United Kingdom and, thereafter, the authorities immediately started the process of obtaining an EAW. In any event, Mr Steinberg submitted that the District Judge erred in concluding that extradition would be oppressive within the meaning of section 14 of the Act.

19. Mr Dacre, for the respondent, submitted that the District Judge had found as a fact that the respondent reasonably believed that her appeal had been successful. In those circumstances, the respondent was not, he submitted a fugitive from justice and was entitled to rely upon the passage of time between the appeal being dismissed and the issuing of the EAW (when she learned for the first time that the appeal had not been successful) in deciding whether it was oppressive to extradite the respondent to Poland. Further, he submitted that the District Judge was entitled to find that extradition would, in the circumstances of this case, be oppressive.

Analysis

20. Section 14 of the Act provides that a person's extradition is barred "by reason of the passage of time (and only if) it appears that it would be unjust or oppressive to extradite" that person where he or she is either alleged to have committed an offence (not the situation here) or is unlawfully at large. Here, the respondent became unlawfully at large once her appeal was dismissed on 14 October 2005 and she was required to serve the sentence, irrespective of whether or not she knew that the sentence had become enforceable: see *Wisniewski v Poland* [2016] EWHC 386 (Admin), [2016] 1 W.L.R. 3750 at paragraphs 52 to 56.

21. The courts have considered the circumstances in which a person may rely on passage of time for the purposes of section 14 of the Act (or its predecessor). The matter was

considered in *Kakis v Government of the Republic of Cyprus* [1978] 1 W.L.R. 779. There, the appellant, Mr Kakis, was accused of unlawfully killing a man on 5 April 1973. Mr Kakis was said to be a member of a particular political organisation and the victim was said to be a member of a rival organisation which supported the existing government of Cyprus. After the killing, Mr Kakis escaped to the mountains of Cyprus and remained in hiding for 15 months. Following a coup and a change of government, Mr Kakis emerged from hiding. He was granted an exit permit and left with his family for England on 9 September 1974. Following another coup, which saw the rival party return to power, Mr Kakis was able to visit Cyprus in January 1975 and remained there for some weeks to wind up his affairs. He was granted a visa by the Cypriot government to enter Cyprus and an exit permit to leave. In August 1975, a witness upon whom Mr Kakis relied for an alibi, left Cyprus. On 11 February 1976, the Attorney-General of Cyprus commenced extradition proceedings against Mr Kakis. In considering whether the passage of time meant that it would be unjust or oppressive to extradite him to Cyprus, Lord Diplock said this at page 782G to 783D:

> "My Lords, the passage of time to be considered is the time that passed between the date of the offence on April 5, 1973, and the date of the hearing in the Divisional Court on December 15, 1977, for that is the first occasion on which this ground for resisting extradition can be raised by the accused. So one must look at the complete chronology of events that I have summarised above and consider whether the happening of such of those events, as would not have happened before the trial of the accused in Cyprus if it had taken place with ordinary promptitude, has made it unjust or oppressive that he should be sent back to Cyprus to stand his trial now
>
> "Unjust" I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, "oppressive" as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there *783 is room for overlapping, and between them they would cover all cases where to return him would not be fair. Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied upon as a ground for holding it to be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of his defence in consequence of the delay due to such causes are of his own choice and making. Save in the most exceptional circumstances it would be neither unjust nor oppressive that he should be required to accept them.
>
> As respects delay which is not brought about by the acts of the accused himself, however, the question of where responsibility lies for the delay is not generally relevant. What matters is not so much the cause of such delay as its effect; or, rather, the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promptitude. So where the application for discharge under section 8(3) is based upon the "passage of time" under paragraph (b) and not on absence of good faith under paragraph (c), the court is not normally concerned with what could be an invidious task of considering whether mere inaction of the requisitioning government or its prosecuting authorities which resulted in delay was blameworthy or otherwise. Your Lordships have no occasion to do so in the instant case."

22. Lord Diplock considered that the failure to begin proceedings against Mr Kakis during THE first 15 months, that is from 5 April 1973 to July 1974, was the result of his own actions going into hiding. Events arising during that period of that passage of time would not justify refusing extradition. After that, however, he had been granted

an exit visa to leave Cyprus, and, after the coup bringing his political rivals to power, he had been granted a visa to come to Cyprus and an exit permit to allow him to leave. That justified him in thinking that he and his family could settle safely in England which they did. He set up home and obtained regular employment. The other significant event was that his principal witness, who provided him with an alibi, had left Cyprus and would not return to testify on his behalf. Lord Diplock concluded that Mr Kakis should be discharged as it would be unjust (having regard to the absence of a significant witness) and oppressive (given the circumstances in which he had settled in England) to extradite him. Lord Edmund-Davies, Lord Russell of Killowen and Lord Scarman agreed (although Lord Edmund-Davies disagreed on whether culpability on the part of the prosecuting authorities was relevant). Lord Keith of Kinkel dissented on the question of whether extradition was oppressive or unjust although he, too, considered no account should be taken of the time that passed by reason of the actions of the fugitive himself, as when Mr Kakis was in hiding in the mountains.

23. The next detailed consideration by the House of Lords of the question of the passage of time in extradition proceedings came in *Gomes and Goodyer v Government of the Republic of Trinidad and Tobago* [2009] UK HL 21, [2009] 1 W.L.R. 1038. Mr Goodyer was prosecuted in connection with the possession of cocaine for the purposes of trafficking. He was bailed on13 January 2003 to appear at court on 28 February 2003. He did not surrender to bail. The authorities issued a domestic arrest warrant on 24 April 2003. Thereafter, the authorities lost the prosecution file and it was not until June 2006 (a month or two after the file had been located) that an extradition request was made. In the meantime, Mr Goodyer had left Trinidad and was living at his home address in England. Mr Gomes was also bailed in relation to offences of possession of firearms and ammunition. He left Trinidad on 16 December 1999. He could not be located. In May 2006, he came to the attention of the United Kingdom authorities as he left a flight which had landed at Heathrow. He was arrested and a request for extradition made. The issue that arose was whether the appellants in that case could rely on the passage of time where the appellants had themselves sought to avoid justice but the passage of time could also be said to be attributable to blameworthy conduct (or culpable delay) the part of the prosecuting authorities. That arose in the case of Mr Goodyer, for example, where he failed to comply with his bail conditions in February 2003 but where the prosecuting authorities then lost the file for two years. The House of Lord decided that Mr Goodyer was not entitled to rely on events occurring during the period of time when he was evading justice, notwithstanding the fact that the authorities were also at fault for part of that time. Lord Brown, giving the opinion of the House, said this:

> "26….. This an area of the law where a substantial measure of clarity and certainty is required. If an accused like Goodyer deliberately flees the jurisdiction in which he has been bailed to appear, it simply does not lie in his mouth to suggest that the requesting state should share responsibility for the ensuing delay in bringing him to justice because of some subsequent supposed fault on their part, whether this be, as in his case, losing the file, or dilatoriness, or, as will often be the case, mere inaction through pressure of work and limited resources. We would not regard any of these circumstances as breaking the chain of causation (if this be the relevant concept) with regard to the effects of the accused's own conduct. Only a deliberate decision by the requesting state communicated to the accused not to pursue the case against him, or some other circumstance which would similarly justify a sense of security on his part notwithstanding his own flight from

justice, could allow him properly to assert that the effects of further delay were not "of his own choice and making".

24. The House recognised that it would necessary to prove beyond reasonable doubt that the accused had deliberately fled the country. Whilst there would be exceptional cases where extradition would be oppressive or unjust, notwithstanding the fact that the responsibility for the passage of time was the accused person, Lord Brown recognised at paragraph 30 of his speech that:

> "in the great majority of cases where the accused has sought to escape justice, however, he will be unable to rely upon the risk of prejudice to his trial or a change of circumstances, brought about by the passing years, to defeat his extradition."

25. In *Kakis,* and in *Gomes* and *Goodyer,* the inability of the relevant authorities to take action to bring the individual to justice depended on clear and obvious steps taken to avoid prosecution. In one case, the individual hid in the mountains, in the other cases, the individuals failed to surrender to bail. It is unsurprising, therefore, given the facts, that the case law talked in terms of fugitives from justice or persons fleeing justice.

26. More difficult problems can arise where individuals take action which mean that the relevant authorities would not at some future date be in a position to taken action to prosecute, or to enforce a sentence of imprisonment. At the time that the individual takes that action, there may be no obligation on him to remain in the jurisdiction and he may even be unaware that a sentence of imprisonment has been imposed or activated and that he is now unlawfully at large. Examples include situations where a person leaves a country when he or she is subject to a suspended sentence. He may be acting in breach of the terms of the suspended sentence by leaving the country or by failing to inform the authorities of his or her whereabouts but until the sentence is activated the individual is not unlawfully at large. The question then is whether the individual can rely on events occurring during the passage of time after the sentence was activated. Similarly, as in this case, the individual may be subject to a sentence. There may be an appeal which may have the effect of suspending the sentence. There maybe no inhibition on the individual leaving the country and no obligation to inform the authorities of that fact or of the individual's address. In those circumstances, given that the individual knew he or she was facing a sentence which might become enforceable, can the individual rely on events occurring during a period of time when he or she is unlawfully at large and the judicial authorities are unable to enforce the sentence because the person is outside the reach of the authorities?

27. That position was considered in the context of suspended sentences by the Divisional Court in *Wisniewski v Poland* [2016] EWHC 386 (Admin). [2016] 1 W.L.R. 3750. There, the individual, Mr Wisniewski, was subject to a sentence of imprisonment which had been suspended. The conditions of suspension included conditions that the individual notify the authorities of any change of address and also that he pay compensation. He left Poland and settled in the United Kingdom in January 2005 (having been in Sweden for a few months prior to that). He had failed to pay the compensation and the sentence was activated on 2 September 2005. The individual was unaware that the sentence had been activated. He had not informed the authorities of his change of address and his address in the United Kingdom. The Divisional Court held that he was unlawfully at large from 2 September 2005 when the sentence of

imprisonment was activated. In terms of the individuals' ability to rely upon events occurring after that date, when he was in England and unaware that the sentence had been activated, Lloyd Jones L.J. as he then was, and with whom Holroyde J., as he then was, agreed said this:

> 58. "Fugitive" is not a statutory term but a concept developed in the case law, in particular in Gomes and Goodyer which elaborates the principle stated in Kakis . In the context of Part 1 of the 2003 Act it describes a status which precludes reliance on the passage of time under section 14 . Before this rule can apply, a person's status as a fugitive must be established to the criminal standard (Gomes and Goodyer at [27]).
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> 59. On behalf of the appellants, Mr. Jones submits that in the passage in his speech in Kakis referred to in Gomes and Goodyer as Diplock 1, Lord Diplock was limiting the concept of a fugitive to cases where the person had fled the country, concealing his whereabouts or evading arrest. However, I consider that these were merely examples of a more general principle underlying Kakis and Gomes and Goodyer . Where a person has knowingly placed himself beyond the reach of a legal process he cannot invoke the passage of time resulting from such conduct on his part to support the existence of a statutory bar to extradition. Rather than seeking to provide a comprehensive definition of a fugitive for this purpose, it is likely to be more fruitful to consider the applicability of this principle on a case by case basis. Similarly, a process of sub-categorisation involving "quasi-fugitives" and "fugitives not in the classic sense" is unlikely to be helpful.
>
> 60. How does this work in relation to a breach of a suspended sentence? Mr. Hardy submits that the District Judge in each of the cases before us was entitled to find that the appellant had left Poland voluntarily with the inevitable consequence that he or she would not comply with his or her obligations pursuant to a suspended sentence, which in turn would inevitably result in its activation. Accordingly, he submits, the District Judge was right to hold that each appellant was precluded from relying on the passage of time bar to extradition. In one respect this seems to me to suggest too stringent a test; the activation of the sentence need not be an inevitable consequence of the appellant's conduct. I consider that a person subject to a suspended sentence who voluntarily leaves the jurisdiction in question, thereby knowingly preventing himself from performing the obligations of that sentence, and in the knowledge that the sentence may as a result be implemented, cannot rely on passage of time resulting from his absence from the jurisdiction as a statutory bar to extradition if the sentence is, as a result, subsequently activated. The activation of the sentence is the risk to which the person has knowingly exposed himself. In my view, such a situation falls firmly within the fugitive principle enunciated in Kakis and Gomes and Goodyer . The fact, if it be the case, that a person's motive for leaving the jurisdiction was economic and not a desire to avoid the sentence, does not make the principle inapplicable. "

28. In that case, therefore, Mr Wisniewski was in breach of the conditions of his suspended sentence by his failure to notify the authorities of his address when he left Poland. He became a fugitive on doing so (and similar conclusions were reached in respect of the other two appellants in that case). He could not, in those circumstances, rely upon events occurring during the time after the activation of the suspended sentence in seeking to establish that extradition would be oppressive or unjust. It is correct that a key factor was that the appellant in that case was in breach of his suspended sentence by failing to notify the authorities of his address. It was that factor which meant that the authorities were unable to locate him to enforce the sentence.

29. The first issue under section 14 of the Act is whether a similar principle applies in the present case. There was no obligation on the respondent to remain in Poland pending

the outcome of her appeal. There was no obligation on her to notify the Polish authorities of any change of address. The question is whether the fact that the respondent chose to leave Poland, at a time when she knew she had been convicted, she knew an appeal had been lodged, but she had not been informed of the outcome (and in particular, did not know that the appeal had been unsuccessful) means that she cannot rely on events occurring during the passage of time after dismissal of the appeal but when the Polish authorities did not know that she had left Poland and did not know that she was in England and when they could not realistically have enforced the sentence?

30. In my judgment, the approach in *Wiesniewski* applies in this case. In general, in circumstances, where an individual knows that a sentence of imprisonment will be activated if an appeal fails, and if that individual leaves the jurisdiction and the judicial authorities are unable to locate the individual and unable to enforce the sentence, events occurring during the passage of time after dismissal of the appeal and when the individual cannot be located will not give rise to a claim that it would be oppressive or unjust to extradite the individual. Although the individual is not prohibited from leaving the country, if the individual does not take steps to find out the outcome of the appeal, or do not provide the authorities with an address in the new country of residence (even if not obliged to notify the authorities of a change of address), the individual has by his or her own actions made it difficult or impossible for the authorities to enforce the sentence. In those circumstances, the individual cannot, as a general rule, rely on events occurring during the passage of time after the dismissal of the appeal when the individual is out of the country and the authorities cannot enforce the sentence because they do not know where the individual is.

31. In the circumstances, therefore, the District Judge in the present case did err in her approach to section 14 of the Act and the events that occurred during the time between the activation of the sentence and the issuing of the EAW (or the extradition hearing). The District Judge, as appears from paragraph 9 and 10 of her judgment, set out above, placed reliance on the fact that there were no conditions on the respondent's release and that she was not under obligation to notify the judicial authorities of a change address. Breach of conditions of that nature, when attached to a suspended sentence for example, may reinforce the conclusion that an individual is not entitled to rely on events occurring during the passage of time after activation of a sentence following breach of a condition. But that, with respect, does not address the question of whether, in cases such as the present, an analogous approach applies where the person has been convicted, appeals, has not been informed of the outcome of the appeal but leaves the country so that the authorities are not able (because of the actions of the individual) to enforce the sentence. For the reasons given, an analogous approach does apply.

32. Furthermore, the District Judge erred in basing her conclusion on her view that the respondent "genuinely believed that the appeal must have been successful" and the respondent "reasonably believed that her appeal was successful". The genuineness of the belief is not the issue. The issue is, ultimately, whether the respondent created the state of affairs whereby the authorities were unable to enforce the sentence in the event that her appeal was dismissed. She did. The District Judge also erred in her conclusion that the respondent reasonably believed that the appeal had been successful. The respondent had done nothing (apart from one telephone call) to

establish the result of the appeal. Even assuming that the judicial authorities had not written to her at her last known address in Poland (where her mother still lived), that means that the respondent must have believed that she had received no official communication to confirm the fact that the appeal had been successful. So far as the respondent renewed her Polish identity card in December 2005, the fact is that the respondent had obtained a transcript of the judgment dealing with conviction on 7 February 2005 and appealed some time after. She had not received any communication from the court, on her evidence, to tell her that the appeal had been dismissed. There was, therefore, no basis for her to conclude that the issuing of an identity card in December 2005 must have meant that the appeal had been successful. Similarly, the fact that the respondent travelled from the United Kingdom to Poland on a regular basis could not provide any objective or reasonable basis for believing that the appeal had been successful. There is no basis on the evidence before the District Judge for concluding that the police or border force dealing with the entry of Polish nationals would inform the court of individuals returning to Poland who had unenforced sentences of imprisonment outstanding against them. In truth, the belief that the District Judge found that the respondent had that the appeal must have been successful was a hope or wish to believe that, having heard nothing from the court, and having been back and forth to Poland, the court proceedings had in some way resulted in her not having to serve the rest of her prison sentence. There was no objective or reasonable basis for that belief. For that additional, and separate, reason the District Judge erred in her approach to the interpretation and application of section 14 of the Act.

33. For those reasons, in the absence of exceptional circumstances, the respondent would not be able to rely upon events occurring during the passage of time between her appeal being dismissed and the issuing of the EAW for the purpose of section 14 of the Act. It is not suggested that there are any exceptional circumstances here.

34. There is a second, and separate reason, why the decision of the District Judge on this issue is wrong. There is no proper or reasonable basis for concluding that the extradition of the respondent to Poland would be oppressive within the meaning of section 14 of the Act. As the House of Lord noted in *Gomes* at paragraph 31, "the test of oppression will not be easily satisfied: hardship, a comparatively commonplace consequence of an order for extradition, is not enough".

35. In the present case, the factors said to amount to oppression were that the respondent had established a family life in the United Kingdom (with her partner, and with the one adult son who lives with them, and a second son albeit that the second son does not live with them and they presently have no contact with him) and the fact that she had been diagnosed with post-traumatic stress disorder following a road traffic accident in 2012. Those factors could not, on any reasonable view, amount to oppression. The District Judge referred to the length of time and the absence of evidence of steps taken to enforce the sentence. The fact is that the respondent left Poland and, as appears from the further information which was before the District Judge, unsuccessful attempts had been made to track her to ensure she served the sentence and it was only on 1 September 2017 that the authorities learnt that the respondent was in England and took immediate steps to obtain an EAW. Further, the offences involved multiple frauds (18 offences) committed over a period in excess of four years. The gravity of the offences is relevant to whether changes in

circumstances which have occurred during the relevant period of time would render it oppressive to extradite a person: see paragraph 31 of *Gomes*. In all the circumstances, the District Judge was wrong to conclude that the extradition of the respondent to Poland to serve her sentence would be oppressive.

36. For completeness, I note that the Judicial Authority also submitted that the District Judge was wrong to find that respondent suffered post-traumatic stress disorder and that a district judge was not competent to make such a medical diagnosis. In fact, the District Judge accepted the evidence of the respondent that she had been diagnosed as having post-traumatic stress disorder. It is not possible to say that the District Judge was wrong to accept that, as a matter of fact, the respondent had had such a diagnosis. I proceed on the basis, therefore, that the respondent was diagnosed as having post-traumatic stress disorder. It is always preferable for a person to produce properly documented medical evidence of any medical condition. If a person does not produce appropriate medical evidence, a district judge may not believe that such a medical condition exists or may think that a person has misunderstood the medical significance of the condition. Furthermore, in the absence of detailed medical evidence, a district judge may have no adequate evidence about the seriousness or significance of a medical condition or its prognosis. A bare statement that a person has received a particular diagnosis may not be of much, if any, significance.

THE SECOND ISSUE – SECTION 21 OF THE ACT

37. The District Judge indicated that if she had not discharged the respondent under section 14 of the Act, she would have discharged her under section 21(2) of the Act as extradition would be disproportionate to the right to respect for the family life of the respondent and her partner. The District Judge correctly identified the relevant case law, in particular the decisions in *Norris v Government of USA (No. 2)* [2010] UKSC 9, [2010] 2 AC 487; *HH* [2012] UKSC 25, [2013] ! A.C. 338 and *Celinski and Others v Slovakian Judicial Authority* [2015] EWHC 1274 (Admin), [2016] 1 W.L.R. 553. The District Judge correctly identified the need to balance the factors favouring extradition and against those factors militating against extradition. In my judgment, however, there are serious errors in her assessment largely as a result of the failure properly to assess the relevance and impact of the passage of time in considering the factors against extradition.

38. First, in assessing the significance of the passage of time, the District Judge failed fundamentally to recognise that this was a situation where the respondent had, by her own actions, prevented the Polish authorities from being able to enforce the sentence. She knew that she had been convicted and sentenced to imprisonment. She left Poland having appealed the judgment. She was not obliged to notify the authorities but she had appealed, and made no attempt (apart from one telephone call) to discover the outcome of the appeal. The Polish authorities were making unsuccessful attempts to track her down from 2005 until 1 September 2017 when they learnt that she was in England and they took steps to obtain an EAW immediately. The reference to "delay" in paragraph 22(b) of the District Judge's judgment does not therefore address the question of responsibility for the passage of time without steps being taken to enforce the sentence. The fact that the respondent was not under a legal obligation to notify a change of address does not alter the fact that this was the respondent's appeal, in circumstances where she knew of the conviction, and, unless informed that the appeal had been successful, she could not rely on there being no enforcement action in

future. The fact that the respondent was unaware that the Polish authorities were looking for her is, again, not something that can weigh heavily, if at all, in the balance when it was the respondent who created that situation. In the circumstances, the real issue was whether the interference with the respondent and her partner's right to respect for family life was outweighed by the public interest factors favouring extradition. The family life stemmed from the fact that the respondent lived with her partner and his adult son. She provided some care for her partner and had herself suffered post-traumatic stress disorder following a road traffic accident. That family life had been established over 12 years. But the reason why the sentence had not been enforced was, largely, due to the fact that the respondent, having appealed, then left Poland. It is difficult to conclude that the passage of time indicated any view on the part of the Polish authorities that the offending was regarded as not particularly significant given that they had made unsuccessful attempts to track the respondent down in Poland and, as soon as they learnt that she was in England, they took immediate action to obtain an EAW. In the circumstances, the District Judge would have been wrong to discharge the respondent on the basis that extradition involved a disproportionate interference with her and her partner's family life.

ANCILLARY MATTERS

39. The Judicial Authority sought permission to admit further information, provided after the extradition hearing, as to the steps taken to serve notice of the appeal hearing and the number of visits (19) to the respondent's home in Poland from about May 2006 in an effort to locate her. The approach to whether or not to admit new evidence adduced by the Judicial Authority is set out in *Szombathely City Court and others v Fenyvesi* [2009] EWHC 231 (Admin). In the circumstances, it has been possible to resolve this appeal without reference to the new evidence upon which the Judicial Authority seeks to rely. In those circumstances, it is not necessary to deal with that application.

CONCLUSION

40. The District Judge erred in her conclusion that extraditing the respondent would be oppressive by reason of the passage of time. First where, as here, the respondent knew that a sentence of imprisonment would be activated if her appeal failed, and if she leaves the jurisdiction and the judicial authorities are unable to locate the individual and unable to enforce the sentence, events occurring during the passage of time after dismissal of the appeal and when she could not be located cannot be relied upon as evidence that it would be oppressive or unjust to order extradition. Secondly, and in any event, the District Judge could not reasonably have concluded in the present case that extradition would be oppressive. The District Judge also erred in her approach to the question of whether respect for the family and private life of the respondent and her partner was outweighed by the public interest in extradition. In those circumstances, the appeal will be allowed, the order for discharge of the respondent will be set aside and the matter will be remitted to the District Judge, if available to sit in the Westminster Magistrates' Court, or another district judge. I direct the judge to proceed as the judge would have been required to do if the question under section 14 (relating to passage of time) and section 21 (relating to Article 8 ECHR) had been decided differently at the extradition hearing.