Neutral Citation Number: [2022] EWHC 1914 (Admin)

Case No: CO/3157/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/07/2022

Before

MR JUSTICE SWIFT

- -

Between

ADAM KACZOR **Appellant**

- and –

KALISZ REGIONAL COURT (POLAND) **Respondent**

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- -

Danielle Barden (instructed by **Corker Binning**) for the **Claimant**
Hannah Burton (instructed by **Crown Prosecution Service Extradition Unit**) for the **Respondent**

Hearing date: 5 July 2022

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Approved Judgment

MR JUSTICE SWIFT :

A. Introduction

1. This is an appeal against an extradition order made on 8 September 2021. The extradition hearing concerned two European Arrest Warrants, referred to in the judgment as EAW1 and EAW2. This appeal concerns only EAW1.

2. EAW2 was a conviction warrant issued on 31 August 2018 and certified by the National Crime Agency on 19 September 2018. The conviction (on 30 October 2013) was in respect of three offences which dated back to the period October 2000 to June 2001. A sentence of 2 years 3 months imprisonment was imposed. Following the extradition hearing the District Judge discharged the Appellant on EAW2. The primary reason for this conclusion was that time spent by the Appellant in prison on remand in Poland between 2001 and September 2002, and March 2006 and September 2007, was sufficient to extinguish the sentence imposed for the offending covered by EAW2 (see the judgment of the District Judge at paragraph 69).

3. An extradition order was made in respect of EAW1. EAW1 is also a conviction warrant. It was issued on 17 April 2013 and certified on 30 April 2015. The Appellant was arrested on the basis of this warrant on the 29 October 2020. The warrant concerns a sentence of 1 year 6 months imprisonment imposed on 19 May 2008 following conviction of an offence of stealing a car. The offence had been committed on 14 December 2007.

4. The ground of the appeal pursued is that extradition to serve that sentence would be an unjustified interference with article 8 rights. By way of brief detail, the Appellant has lived in the United Kingdom since April 2008. It appears that since then he has worked consistently. Presently he is involved in a number of businesses either as owner or manager. Those businesses include (a) wholesale supply of dietary supplements; (b) property development; (c) tanning salons; (d) provision of cosmetic beauty treatments. Since May 2020 the Appellant has been in a relationship with KM (they married in January 2022). KM has two children, aged 11 years old and 3 years old. The evidence is that the Appellant has a very close relationship with these children. The Appellant also maintains a very close relationship with the son of his former partner. Between 2012 and 2019 the Appellant was in a relationship with MB. She died in 2019. She had two children, a daughter who is now an adult and a son, IB now aged 14. After MB's death IB was adopted by MB's sister. However, the Appellant continues a close relationship with IB, seeing him every week.

(1) The article 8 ground of appeal

5. In the Appellant's Skeleton Argument, the article 8 ground of appeal is put in this way. *First*, that the District Judge failed to consider a number of matters: (a) whether, having discharged the Appellant on EAW2 it remained proportionate to extradite the Appellant to serve the sentence relevant to EAW1; (b) that the Appellant had served 3 months on remand in Poland that ought to be offset against time to be served on the sentence that is the subject of EAW1; (c) the impact on KM and her two children if the Appellant is extradited, and the impact on the Appellant's extradition on IB; (d) the impact on the Appellant's extradition on the businesses on which the Appellant is involved and the persons employed in those businesses.

6. So far as concerns the impact on the Appellant's personal relationships, it is further submitted that if he is extradited, the duration of the interference with article 8 rights could be indefinite because there can be no certainty that, having served the sentence in Poland, the Appellant will be permitted to re-enter the United Kingdom. The Appellant has made an application for settled status in the United Kingdom as an EU national resident in the United Kingdom for 5 years or more prior to December 2020, but that application remains outstanding. Further still, the Appellant seeks permission to rely on a report dated 15 November 2021 by Dr Helen Wain, a registered clinical psychologist which, it is said, further explains the likely impact of the Appellant's extradition on family and personal ties. Lastly in this regard, the Appellant seeks permission to rely on two further witness statements made by KM, dated 23 March 2022 and 4 July 2022, respectively. These statements record matters that have occurred since the extradition hearing.

7. *Second*, issue is taken with the District Judge's reference at paragraph 68 of his judgment that "… the factors militating the other way are insufficient to overcome the imperative of extradition". It is submitted this overstates the public interest that the United Kingdom should adhere to extradition arrangements made with states such as the Polish Republic. *Third*, the Appellant relies on a period of delay between 2010 and April 2013 when EAW1 was issued, and also on the submission that the offence that is the subject of EAW1 is not an offence of the most serious order. Both these matters it is submitted, go to reduce the public interest on extradition on the basis of EAW1.

(2) The judgment of the District Judge

8. The District Judge approached the article 8 issue applying the well-known *Celinski* balance-sheet analysis (see [2016] 1 WLR 551 at paragraphs 15-17). He considered both EAW 1 and EAW 2 together. Between paragraphs 66 and 69 of his judgment he stated as follows:

> "Factors which favour extradition
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> 66. In favour of extradition, I find that there are the following factors:
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> (i) The constant and weighty public interest in extradition: those convicted of crimes should serve their sentences; there is very high public interest in ensuring that the United Kingdom honours its treaty obligations to other countries; there is a very high public interest in ensuring that the UK is not regarded as a 'safe haven' for fugitives from justice;
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> (ii) Whilst there has been considerable delay since the offences and to some extent in progressing the extradition requests, the RP's flight was the initial cause;

(iii) The decision of the JA to make an extradition request should be accorded a proper degree of mutual confidence and respect;

(iv) The total outstanding sentence is not inconsiderable and reflects repeated offending of different kinds.

Factors militating against extradition

67. Against extradition, I find that there are the following factors:

(i) The RP has a settled life in this country, he has put down roots in his local community since 2008, he has matured and led an entirely blameless life, contributing to society;

(ii) The RP's partner and her children are in this country. Their lives would be uprooted in the event of extradition. [IB]'s wellbeing would be detrimentally affected; the children's interests are a primary consideration;

(iii) The RP's mother is likely to be detrimentally affected because the RP would not be able to continue to provide her with financial support;

(iv) There has been considerable delay since the commission of the offences and in the time that elapsed before EAW1 and EAW2 were issued and certified;

(v) The RP served 2 years and six months' pre-trial detention which is greater than, and it appears ought to count towards, the outstanding sentence the subject of EAW2 and he has been subject to a few more days custody as well as stringent bail conditions restricting his liberty in the UK;

(vi) The offences are not of great seriousness;

(vii) There is a risk that the RP may not be able to return to live in the UK after he has served his sentences.

Decision on article 8

68. I have concluded that the factors which favour extradition outweigh those which militate against it in respect of EAW1. Very strong counter-balancing factors are required before the extradition of a fugitive, as I have found Mr Kaczor to be, could be disproportionate. The factors militating the other way are insufficient to overcome the imperative of extradition.

> In particular, whilst he plays an important role in the lives of [IB] and [KM's] children, the RP is not their father, nor is he otherwise their primary carer. In respect of the RP's mother, the requesting state must be trusted to provide for her with at least a minimal level of care consistent with her needs.
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> 69. My conclusion in respect of EAW2 is different notwithstanding my findings as to fugitivity. The strongest factor militating against extradition is the time the RP served on remand, which extinguishes the sentence of 2 years 3 months. This must be determinative factor. I am driven to take that remand time into account in fairness to Mr Kaczor. JA2 have had more than sufficient time ought to be treated and they have failed to do so. Ms Burton fairly accepted that it was open to me to conclude that remand time should be offset against the sentence. The considerable age of the offences (more than 20 years) together with the other, lesser, factors identified above further support the conclusion that the article 8 rights engaged outweigh extradition."

B. Decision

9. I do not accept the Appellant's submission that the District Judge's decision on the application of article 8 was wrong. The correct approach on such a question on an appeal such as this is the one set out by Lord Neuberger in his judgment in *Re B* [2013] 1 WLR 1911 between paragraphs 90-94.

> "90. The argument that the Convention or the 1998 Act requires the Court of Appeal to form its own view in every case where a trial judge's decision on proportionality is challenged, appears to me to be wrong in principle and potentially unfair or inconvenient. The argument is wrong in principle because, if the function of the Court of Appeal is as I have described, then, in my view, there can be no breach of the Convention or the 1998 Act, if it conducts a review of the trial judge's decision and only reverses it if satisfied that it was wrong. The only basis for challenging that view is, on analysis, circular, as it involves assuming that the Court of Appeal's primary function is to reconsider not to review. The argument is potentially unfair or inconvenient, because in cases where the appeal court could not be sure whether the trial judge was right or wrong without hearing the evidence and seeing the witnesses, it would either to have to reach a decision knowing that it was less satisfactorily based than that of the judge, or it would have to hear the evidence and see the witnesses for itself.
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> 91. That conclusion leaves open the standard which an appellate court should apply when determining whether the trial judge was entitled to reach his conclusion on proportionality,

> once the appellate court is satisfied that the conclusion was based on justifiable primary facts and assessments. In my view, an appellate court should not interfere with the trial judge's conclusion on proportionality in such a case, unless it decides that that conclusion was wrong. I do not agree with the view that the appellate court has to consider that judge's conclusion was "plainly" wrong on the issue of proportionality before it can be varied or reversed. As Lord Wilson says in para 44, either "plainly" adds nothing, in which case it should be abandoned as it will cause confusion, or it means that an appellate court cannot vary or reverse a judge's conclusion on proportionality of it considers it to have been "merely" wrong. Whatever view the Strasbourg court may take of such a notion, I cannot accept it, as it appears to me to undermine the role of judges in the field of human rights.
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> …
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> 93. There is a danger in over-analysis, but I would add this. An appellate judge may conclude that the trial judge's conclusion on proportionality was (i) the only possible view, (ii) a view which she considers was right, (iii) a view on which she has doubts, but on balance considers was right, (iv) a view which she cannot say was right or wrong, (v) a view on which she has doubts, but on balance considers was wrong, (vi) a view which she considers was wrong, or (vii) a view which is unsupportable. The appeal must be dismissed if the appellate judge's view is in category (i) to (iv) and allowed if it is in category (vi) or (vii).
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> As to category (iv), there will be a number of cases where an appellate court may think that there is no right answer, in the sense that reasonable judges could differ in their conclusions. As with many evaluative assessments, cases raising an issue on proportionality will include those where the answer is in a grey area, as well as those where the answer is in a black or a white area. An appellate court is much less likely to conclude that category (iv) applies in cases where the trial judge's decision was not based on his assessment of the witnesses' reliability or likely future conduct. So far as category (v) is concerned, the appellate judge should think very carefully about the benefit the trial judge had in seeing the witnesses and hearing the evidence, which are factors whose significance depends on the particular case. However, if, after such anxious consideration, an appellate judge adheres to her view that the trial judge's decision was wrong, then I think that she should allow the appeal."

In her submissions for the Appellant Ms Barden referred me to paragraph 26 of the judgment of the Court of Appeal in *Love v Government of the United States of*

America [2018] 1 WLR 2889, which is materially to the same effect. In their judgment in that case, Lord Burnett CJ and Ouseley J put the matter in terms of whether "crucial factors should have been weighed so significantly differently as to make the decision wrong".

10. I do not consider the District Judge's assessment in this case was wrong. Taking the Appellant's submissions at their highest, the case might fall into Lord Neuberger's category (iii); my conclusion is that this case falls into his category (ii). Contrary to the submission in the Skeleton Argument I do not consider there were material matters the District Judge did not consider. Reading paragraphs 66 – 69 of the judgment, in the round, I am satisfied he did consider the matters identified in the Skeleton Argument. As such, this appeal is about the weight properly attaching to those matters as an exercise of assessment, not about whether the evaluation undertaken left one or more material matters out of account.

11. Ms Barden submitted that the District Judge had left out of account the effect of the Appellant's extradition on the various businesses he is involved in. The District Judge did refer to this matter, for example at paragraph 62 of the judgment (first and second sentences) and then again at paragraph 67(i) by the reference to the Appellant's "contributing to society". I doubt the District Judge attached much weight to this matter for the purposes of identifying the extent to which the Appellant's extradition would interfere with article 8 rights. He was right not to do so. Ms Barden's submission was that if any of the businesses might falter because of the Appellant's surrender to extradition, that might be to the prejudice of others in those businesses – employees, or in the case of the property development business the Appellant's business partners – and might be to the prejudice of their own article 8 rights. This is speculative. There is no evidence to support the point. There is evidence from the Appellant's business partners in the property development business but that is to the effect that the business might suffer in the absence of the Appellant. That is not the territory of article 8, and to the extent the evidence might go only to the future profitability of that business it may not even fall within the scope of article 1 of Protocol 1 to the ECHR.

12. Some of the other specific matters advanced in support of the appeal can also be disposed of shortly.

13. I do not think any significance is to be attached to the reference at paragraph 68 of the judgment to the "imperative of extradition". That reference is no more than a shorthand for the point set out more fully at paragraph 66(i) of the judgment. On fair reading of the judgment, the District Judge did not approach the application of article 8 on the assumption that some form of exceptionality was required as a pre-condition to a conclusion that interference with article 8 rights was unjustified.

14. Next, the public interest in the ordinary application of extradition arrangements was not, in this case, diminished by the nature of the offending. The theft of a car may not be the most serious offence that can be committed. However, it is a significant matter, and in this case, it resulted in a significant sentence of imprisonment.

15. Nothing material attaches to the submission that some allowance should be given for 3 months served by the Appellant on remand in Poland in connection with the offence addressed by EAW2. As explained already, the District Judge discharged the

Appellant on EAW2 because he had already spent time on remand in Poland pending trial on the relevant charges, time which exceeded the sentence then imposed by the Polish Court, by 3 months. Ms Barden submits this 3-month period was relevant as to whether extradition pursuant to EAW1 would be a justified interference with article 8 rights. I disagree. The period on remand has no connection with the offence referred to by EAW1 and pre-dated the commission of that offence.

16. Next, I do not consider that in this case the public interest in surrender in accordance with the usual course of extradition arrangements is diminished by the passage of time. The Appellant left Poland arriving in the United Kingdom in April 2008, before the sentence imposed for the EAW1 offence was imposed. The District Judge was satisfied that the Appellant was a fugitive: see his judgment at paragraphs 37 and 48. That was a conclusion he was entitled to reach, and it is a conclusion I agree with. The Appellant took no steps to inform the Polish authorities of his whereabouts. After the sentence was passed his lawyers sought and obtained from the Polish courts two deferments of the date the Appellant was due to commence service of the sentence. It was only on the occasion of a third application that it became apparent to the Polish court that the Appellant had left Poland and that his lawyers had no contact details for him. At the extradition hearing the Appellant gave evidence that he thought the sentence that had been imposed was a suspended sentence. The District Judge rejected that evidence as entirely inconsistent with the deferment applications made in February and October 2009. One particular point is made to the effect that the Polish authorities delayed between February 2010, when the third deferment application was refused, and April 2013 when EAW1 was issued. This is an opportunistic submission. The Appellant had absented himself; from 2008 he was a fugitive. I suspect his case was not the only one being handled within the Polish judicial system at that time; it must have been one of thousands. I do not consider there is any sufficient basis to conclude there was any period of culpable delay on the part of the Polish authorities. All this being so, the passage of time since 2008 does not in this case diminish the public interest in favour of extradition.

17. The last point that may be addressed shortly is the submission that when the District Judge considered whether the interference with article 8 rights consequent on extradition was justified, he did so on the basis that the Appellant was due to serve a sentence equal to the combined length of the sentences under EAW1 and EAW2. Ms Barden submits that the District Judge did not state expressly when he considered extradition pursuant to EAW1, that he dissociated the sentence of imprisonment relevant to that EAW from the sentence relevant to EAW2. This submission does not rest on a fair reading of the District Judge's judgment. Between paragraphs 57 and 69 of the judgment the District Judge considered the submission that extradition would be a disproportionate interference with article 8 rights taking EAW1 and EAW2 together. The *Celinski* balance-sheet, at paragraphs 66 and 67 contained matters relevant to each EAW. At paragraph 66(iii) the District Judge referred to the total sentence as "not inconsiderable"; at paragraph 67(v) he noted that the Appellant had served two years six months in pre-trial detention in respect of the EAW2 offences. Next, the District Judge proceeded to consider EAW1 and EAW2, each in turn. So far as concerns EAW2 he accepted that the time served on remand extinguished the sentence imposed and concluded for that reason that extradition to serve that sentence would be a disproportionate interference with article 8 rights. Consistency of reasoning requires that paragraph 68 of the judgment is properly understood on the

same basis – i.e. a consideration of whether extradition pursuant to EAW1 to serve the sentence imposed relevant to that warrant would be consistent with appropriate protection with article 8 rights.

18. The primary submission in this appeal concerns the interference consequent on extradition with the relationships between the Appellant, KM, and her two children, and IB. The District Judge took these matters into account and clearly attached significant weight to them.

19. The first point taken is that the District Judge mis-evaluated the evidence before him. Ms Barden places particular emphasis on his observation (at paragraph 68 of the judgement) that the Appellant "… plays an important role in the lives of [IB] and [KM's] children [but] is not their father [or] otherwise their primary carer". She submits this shows a complete misunderstanding of the Appellant's relationship with KM's children and, to an extent also, of his relationship with IB. I do not agree. What the District Judge said is a fair summary of the Appellant's relationship with IB. It is consistent with the Appellant's own evidence on this point (see the reference at paragraph 26 of the judgment), and the evidence given by AK, who adopted IB (see at paragraph 27 of the judgment).

20. I also consider the District Judge's observation at paragraph 68 to be an appropriate evaluation of the relationship between the Appellant and KM's children as at the time of the extradition hearing. That was in September 2021. The Appellant's relationship with KM was relatively recent, dating back only to May 2020, and had commenced only a few months before the Appellant's arrest pursuant to the EAWs, on 29 October 2020. It is also important to recognise that KM's evidence at the extradition hearing was that in the event the Appellant was extradited, her intention was to return to Poland and that her children and parents would move with her. On that assumption, the opportunity would exist for KM's children to maintain contact with the Appellant while he served the prison sentence and thereafter. This evidence also explains the reference at paragraph 67 of the judgment to KM's children being "uprooted".

21. Moreover, the District Judge's overall conclusion on EAW1, does not indicate any serious mis-evaluation of the evidence available to him. Set against the undoubted interference with article 8 rights that would be the consequence of extradition, the Appellant (a) was sought to serve a significant prison sentence, and (b) had been a fugitive from the Polish judicial authorities since 2008. The public interest in giving effect to established extradition arrangements in such circumstances is strong.

22. The Appellant's second point relies on the report of Dr Wain. The application to admit that report falls to be decided. The principles to apply on that application are set out in *Fenyvesi* [2009] EWHC 231 (Admin): the evidence must be evidence that did not exist at the time of the original hearing or could not, with reasonable diligence, have been obtained at that time; and it must be evidence that is decisive. Neither limb of that test is met so far as concerns Dr Wain's report. That report, which concerns the functioning of the family unit comprising the Appellant, KM and her two children, could have been obtained for the purposes of the extradition hearing. The submission to the contrary is that it could not have been because it had been entirely unforeseeable that it would be needed. At paragraph 14 of the Skeleton Argument in support of the application to admit the report the matter is put in this way:

> "This evidence is key due to the detailed exploration of their relationship with the Applicant, which was necessitated by the District Judge's improper and outdated approach to this, made plain by way of his statement that the Applicant "*is not their father nor is he otherwise their primary carer*". It could not have been foreseen that the District Judge would take this approach, given the substantial unchallenged evidence of the role that the Applicant plays in their lives and the understanding of the courts in recent years of the role of a father figure in what may be considered to be a non-traditional family setting."

The passage from the judgment quoted within the skeleton argument is the passage in the penultimate sentence of paragraph 68 of the judgment to which I have already referred. The submission made rests on a significant over- reading of the sentence. The District Judge made two factually accurate points while recognising that the Appellant had played an important part in the lives of KM's children in the period following May 2020. What the District Judge said was not out of the ordinary or an expression of any antediluvian opinion. That being so there is no proper basis for this application to admit Dr Wain's report based on this part of the District Judge's decision.

23. Moreover, even if the report is considered *de bene esse*, the contents of the report are not decisive. In very short summary, the matters arising from Dr Wain's report are as follows. She refers to the family unit comprising the Appellant, KM and her children as "a healthy family unit" and refers to the benefits of this for KM and her children. The context for this is that KM's previous relationship with the father of her children had been an abusive relationship which had caused emotional and other harm to KM and the children. Dr Wain notes that the younger child displays some developmental delay which she attributes to developmental trauma resulting from KM's previous relationship. Dr Wain says that separation from the Appellant consequent on extradition would be "very difficult for KM"; and traumatic for the children, in particular the younger child (in consequence of his age and the experience of KM's previous relationship). Dr Wain concludes this will be the case even if KM relocated to Poland. Dr Wain describes likely short-term emotional and behavioural reactions of sadness, anger and anxiety for KM and her older child. So far as concerns the younger child, Dr Wain predicts he will suffer anxiety and depression which could be longer-term problems and, if he remained in the United Kingdom, may give rise to the need for assistance from the NHS Child and Adolescent Mental Health Service.

24. These matters are significant but I do not think they describe a state of affairs that is an uncommon consequence of extradition on a family unit that contains young children. Such matters are real, they are relevant and they are deeply regrettable. In the present case the additional circumstance is the vulnerability of KM's children in consequence of her previous abusive relationship. However, looking at matters in the round, including the weight attaching in this case to the public interest in giving effect to extradition arrangements, I do not consider Dr Wain's evidence to be decisive.

25. Having reached that conclusion I do not need to consider Ms Barden's further submission, based on paragraph 34 of the judgment in *Fenyvesi* that there might be cases where even if the *Fenyvesi* criteria (themselves based on section 29(4) of the Extradition Act 2003) were not met, late evidence might be admissible if admitting it would avoid an outcome that might otherwise be in breach of Convention rights. Whatever that case may be, it is not this case.

26. In reaching the conclusion that Dr Wain's report is not decisive, I have also considered the information in KM's two recent witness statements of March and July 2022. For the most part these statements are updating statements. One point emerging from the March 2022 statement is that it now appears that KM is undecided whether or not to return to Poland in the event of the Appellant's extradition. I do not consider this amounts to any material change in circumstances. A further point in the July 2022 statement is that KM is now pregnant, the due date is in February 2023. Ms Barden submitted this was material to article 8 because the child will be born when the Appellant is in prison and may be affected by that. I consider this too speculative a point to carry any material weight on the application of article 8 in this case. So far as concerns the application to admit the March and July 2022 statements, I accept they contain information that was not and could not reasonably have been available at the extradition hearing. However, since that information is not decisive the second of the *Fenyvesi* requirements is not met, and I refuse the application to admit these statements.

27. Lastly, in reaching the conclusion that the article 8 ground of appeal should be refused, I have taken account of the possibility that after serving the sentence in Poland the Appellant may not be able to return to the United Kingdom. This matter was considered by the District Judge, and is a common consideration consequent on the United Kingdom's departure from the European Union and the ending of free movement rights. What the position will be for this Appellant is not certain. He has an extant immigration application for settled status under Appendix EU to the Immigration rules. If that application succeeds he will have the right to enter the United Kingdom. His removal from the United Kingdom pursuant to the EAW will not, *per se*, prejudice his application for settled status. If the application under Appendix EU is refused on its merits, and the Appellant wished to return to the United Kingdom, he would need to make an application under the Immigration Rules.

28. All this being so, the District Judge was correct to weigh this point in the balance, as he did see paragraph 67(vii) of the judgment. At the time of the extradition hearing this was not a matter likely to carry any material weight since KM had made clear her intention to return to Poland with her children in the event of the Appellant's extradition. As I have said, KM is not now certain that she will return to Poland. If she does not return to Poland it is possible, if the Appellant's application for settled status is refused, that he may need to make an application under the Immigration Rules in order to return to the United Kingdom following service of the sentence. If such an application is made it is also possible that it may not succeed, notwithstanding the family ties between the Appellant, KM, and her children. This possible scenario is a relevant consideration for the purposes of assessing whether extradition would a justified interference with article 8 rights. However, I do not consider that this possibility ultimately affects the outcome of the article 8 balancing exercise in this case.

29. As I have said already, the question for me is the one explained by Lord Neuberger in *Re B*. I may not simply second-guess the District Judge's assessment; I must be satisfied that his assessment of the Convention rights position is wrong in the sense Lord Neuberger described. I do not consider the District Judge's decision falls into that class of case, and that being so this appeal is dismissed.
