Neutral Citation Number: [2023] EWHC 2777 (Admin)

Case No: CO/1814/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/11/2023

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

DISTRICT COURT IN KRAKOW, POLAND	**Appellant**
- and -	
KAMIL PULTORAK	**Respondent**

- -
- -

Catherine Brown (instructed by **CPS**) for the **Appellant**
Martin Henley (instructed by **AM International Solicitors**) for the **Respondent**

Hearing dates: 17 January 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 15 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Julian Knowles:

Introduction

1. This is an appeal by the Appellant (the Requesting Judicial Authority) with the permission of Hill J.

2. The Respondent's extradition has been requested pursuant to two arrest warrants, as follows:

   a. III Kop 62/20: this conviction warrant was issued on 9 June 2020 and certified by the NCA on 3 February 2021. It seeks the surrender of the Respondent in order to execute a custodial sentence of two years and four months' imprisonment, of which all but one day remains to be served. The warrant states in Box D that the Respondent appeared at his trial. The offending comprises of one offence of a joint enterprise assault, committed on 30 January 2016.

   b. III Kop 49/21: this accusation warrant was issued on 29 April 2021 and certified by the NCA on 20 May 2021. The warrant seeks the surrender of the Respondent to prosecute him for one offence of murder by stabbing said to have been committed on 10 June 2017. A maximum sentence of life imprisonment is set out in the warrant. The district judge ordered the Respondent's surrender in respect of this Warrant. The Respondent lodged an application for permission to appeal in respect of the order for his extradition (CO/1828/2022). Permission to appeal was refused by Hill J and the application was not renewed.

3. Following an extradition hearing under Part 1 of the Extradition Act 2003 (EA 2003), on 18 May 2022 the district judge discharged the Respondent in respect of the conviction warrant. This appeal is brought against that decision. Extradition was ordered in respect of the murder accusation warrant and an application for permission to appeal was refused by Hill J and not renewed

4. It follows that even if this appeal is unsuccessful, the Respondent is liable to be extradited to Poland to stand trial for murder.

Procedural history

5. The procedural history is as follows (italicised entries come from further information from Poland submitted after the extradition hearing which the district judge did not consider (see below)):

30 January 2016	The assault offence in the conviction warrant was committed. The Respondent, along with a group of others, were involved in an attack on another person causing him personal injury. The attack was perpetrated with weapons including a machete and tear gas.

9 February 2016	Respondent arrested and interviewed and charged with the assault offence on the conviction warrant. Released on conditions, including not to travel abroad.
16 June 2016	Interviewed again.
31 January 2017	*Respondent present at first hearing in the assault matter.*
10 June 2017	Offence of murder in the accusation warrant was committed. Shorty afterwards the Respondent leaves Poland and enters the UK.
22 June 2017	*The Respondent did not appear at the next hearing in the assault matter on this date, despite being served notice of the trial date. He was represented in court by his counsel.*
10 May 2018	*The Respondent did not appear at the next hearing in the assault matter, despite being served notice of the trial date (there were two attempted deliveries of the notification which failed). He was represented in court by his counsel, however, his counsel terminated his powers of representation.*
4 June 2018	*The Respondent was not present for the next hearing in the assault matter. He had not been served with notice of that day as the proceedings had been put on hold, rather than adjourned, following his failure to attend on 10 May. The trial was 'closed', and the sentencing was deferred until 18 June 2018.*
9 June 2020	The conviction warrant was issued.
3 February 2021	The conviction warrant was certified.
3 February 2021	The Respondent was arrested in the UK pursuant to the previous version of the murder accusation warrant.
23 March 2021	The Respondent was arrested in England pursuant to the conviction warrant. The initial hearing took place in respect of that warrant (and the previous version of the murder accusation warrant). District Judge Zani discharged the Respondent in respect of the murder accusation warrant pursuant to s 4 of

	the EA 2003 as the Respondent had not been produced before him in a timely fashion. Preliminary matters were resolved in favour of the Appellant in respect of the conviction warrant. At that time, the Respondent had ongoing domestic matters and so the case was adjourned pursuant to s 8A.
29 April 2021	III Kop 49/21 issued.
20 May 2021	III Kop 49/21 certified.
16 June 2021	The Respondent was arrested pursuant to III Kop 49/21. The initial hearing took place the same day, preliminary issues were resolved in favour of the Appellant and the case was adjourned under s 8A.
9 July 2021	The Respondent was sentenced at Harrow Crown Court to six months' imprisonment for possession of CS spray (deemed time served). The Crown offered no evidence in respect of possession with intent to supply class B drugs. Consequently, the domestic matters were concluded.
4 July 2021	The case was brought back before the extradition court for consent to be put. Consent was put and refused in respect of both warrants. The extradition hearing was listed and directions were set.
5 April 2022	The case came before District Judge Calloway for extradition hearing. The case was adjourned to 18 May 2022 for judgment.
9 May 2022	Further information from the Appellant served by the CPS to the court and the Respondent's solicitor asking that it be adduced. The district judge replies that an application to re-open would need to be made by the CPS on notice to the Respondent. No such application is made.
18 May 2022	Judgment was handed down. The Respondent's discharge was ordered in respect of the conviction warrant and his extradition was ordered in respect of the accusation warrant.
21 September 2022	Permission to appeal granted by Hill J in respect of the conviction warrant and refused in respect of the accusation warrant (and application not then renewed).

Factual background

6. The relevant background is as follows.

7. The district judge summarised the bars being relied upon by the Respondent at [10] and said at [10(ii)] (*sic*):

> "s.20 EA 2003 Conviction in Absence: (This head of challenge is raised in relation to the assault conviction alone. In short it is contended that far from the being present at the specified date on the 18th June 2018, the RP asserts he left the JA in June 2017. This fact is said to be corroborated by the Further Information served in relation to the murder allegation and supports the case deployed on behalf of the RP."

8. The judge dealt with this challenge at [15] onwards. At [21] et seq he said (*sic*):

> "21. The JA make the short point that the RP was present for his trial and the contents of the EAW are unambiguous. By comment concerning the assertion maintained by the RP to the effect that case happened in his absence, the JA maintain that this is not a clear assertion, is based upon supposition and the court should not go behind the clear wording of the EAW regarding presence of the RP at the trial following which he was convicted.
>
> 22. The RP points out within his submissions, however. that the details within the EAW are contradicted by the details set forth within the Further Information supplied in connection with the murder allegation. The sequence of events is as follows:
>
> (i). RP asserts that he departed the JA in June 2017.
>
> (ii). A murder, and in respect of which the RP is said to be involved, occurred on the 10th June 2017.
>
> (iii). The RP is said not to have been questioned in respect of the murder allegation since he departed the JA immediately after committing the murder offence
>
> (iv). The trial which is the subject of EAW 1 took place in June 2018.
>
> 23. The basic contention made by the RP is that the submission does not depend upon the contention of the RP as to his absence at any trial, but is predicated upon the information supplied by the JA which corroborates the

> assertion of absence which he maintains. As a straight matter of fact this appears to me to be a correct analysis.
>
> 24. The next question I must address is what further details should be sought from the JA in order to deal with the lacuna as appropriate. In short do I seek further information in order to establish how the RP was present in person at the trial and further details appertaining thereto?
>
> 25. I take the point made by the RP that the lacuna which found this head of challenge was identified within the Statement of Issues and the RP was arrested over 14 months ago, and no adjournment has been sort in order to seek further information or clarification.
>
> 26. In my judgment it would not be appropriate to seek further information appertaining to the contradiction in the JA material and to delay these proceedings further than they have already been delayed. However. there is another aspect of consideration about which I should comment and that is the accusation of murder contained within EAW 2. Naturally, the challenges in relation to this aspect of the case I shall determine entirely separately, but given the serious nature of that allegation, I do not think further time should be expended upon the conviction warrant given the more pressing concerns which arise in relation to EAW 2.
>
> 27. Accordingly, the RP falls to be discharged in relation to EAW 1 pursuant to …"

Ground of appeal

9. The Appellant was granted permission to appeal the discharge of the Respondent in respect of the following ground:

> "Section 20, EA 2003: the District Judge erred both in his consideration and conclusion as to the Respondent's presence or otherwise at his trial, on the evidence before him. He further erred in failing to consider the further information dated 29 April 2022."

10. In granting permission, Hill J said:

> "(1) It is arguable that the Judge erred in his approach to the issues to be determined under the EA, s 20 based on the information that was before him, in the ways alleged in the Amended Grounds of Appeal at [21]-[29].
>
> (2) While the Judge's decision as to whether to admit the further evidence provided after the hearing was a matter of

> case management, and while the Respondent did not accept the Judge's invitation to make a formal application in relation to it, on balance permission is also granted in relation to the arguments advanced in the Amended Grounds of Appeal at [30]-[40], such that the entirety of the Judge's approach to the s 20 issue is before the appeal court."

11. Paragraphs 30-40 of the Amended Grounds of Appeal were to the effect that the district judge should have admitted further information from the Appellant submitted after the hearing but before judgment was handed down, and that he erred in not doing so.

The legal framework

12. This appeal is brought under s 28 (appeal against discharge at extradition hearing). The Court's powers are spelled out in s 29. I can allow the appeal only if I consider that the district judge should have decided a relevant question differently and that, had he done so, he would have been required to order the Respondent's extradition (s 29(3)). Appeals can also be allowed if the conditions in s 29(4) (new evidence, etc).

13. Section 20 provides:

> "20 Case where person has been convicted
>
> (1) If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence.
>
> (2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 21.
>
> (3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial.
>
> (4) If the judge decides the question in subsection (3) in the affirmative he must proceed under section 21.
>
> (5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial.
>
> (6) If the judge decides the question in subsection (5) in the affirmative he must proceed under section 21.
>
> (7) If the judge decides that question in the negative he must order the person's discharge.

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

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

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

14. Probably the leading domestic authority on s 20 is *Cretu v Local Court of Suceava, Romania* [2016] WLR 3344. The Divisional Court said at [34]-[37]:

"34. In my judgment, when read in the light of article 4a, section 20 of the 2003 Act, by applying a Pupino conforming interpretation, should be interpreted as follows:

(i) 'Trial' in section 20(3) of the 2003 Act must be read as meaning 'trial which resulted in the decision' in conformity with article 4a(1)(a)(i) . That suggests an event with a 'scheduled date and place' and is not referring to a general prosecution process, Mitting J was right to foreshadow this in *Bicioc*'s case.

(ii) An accused must be taken to be deliberately absent from his trial if he has been summoned as envisaged by article 4a(1)(a)(i) in a manner which, even though he may have been unaware of the scheduled date and place, does not violate article 6 of the Convention.

(iii) An accused who has instructed ('mandated') a lawyer to represent him in the trial is not, for the purposes of section 20, absent from his trial, however he may have become aware of it.

(iv) The question whether an accused is entitled to a retrial or a review amounting to a retrial for the purposes of section 20(5), is to be determined by reference to article 4a(1)(d).

(v) Whilst, by virtue of section 206 of the 2003 Act, it remains for the requesting state to satisfy the court conducting the extradition hearing in the United Kingdom to the criminal standard that one (or more) of the four exceptions found in article 4a applies, the burden of proof

will be discharged to the requisite standard if the information required by article 4a is set out in the EAW.

35. It will not be appropriate for requesting judicial authorities to be pressed for further information relating to the statements made in an EAW pursuant to article 4a save in cases of ambiguity, confusion or possibly in connection with an argument that the warrant is an abuse of process. The issue at the extradition hearing will be whether the EAW contains the necessary statement. Article 4a is drafted to require surrender if the EAW states that the person, in accordance with the procedural law of the issuing member state, falls within one of the four exceptions. It does not contemplate that the executing state will conduct an independent investigation into those matters. That is not surprising. The EAW system is based on mutual trust and confidence. Article 1 of the 2009 Framework Decision identifies improvement in mutual recognition of judicial decisions as one of its aims. It also contemplates surrender occurring very shortly after an EAW is issued and certified. To explore all the underlying facts would generate extensive satellite litigation and be inconsistent with the scheme of the Framework Decision. Article 4a provides additional procedural safeguards for a requested person beyond the provision it replaced in the original version of the Framework Decision, but it does not call for one member state in any given case to explore the minutiae of what has occurred in the requesting member state or to receive evidence about whether the statement in the EAW is accurate. That is a process which might well entail a detailed examination of the conduct of the proceedings in that other state with a view to passing judgment on whether the foreign court had abided by its own domestic law, EU law and the Convention. It might require the court in one state to rule on the meaning of the law in the other state. It would entail an examination of factual matters in this jurisdiction, on which the foreign court had already come to conclusions, but on partial or different evidence. None of that is consistent with article 4a of the Framework Decision.

36. Should a requested person be surrendered on what turns out to be a mistaken factual assertion contained in the EAW relating to article 4a, he will not be helpless. He would have the protections afforded by domestic, EU and Convention law in that jurisdiction. Furthermore, article 4a does not require the executing judicial authority to refuse to surrender if the person did not appear at his trial, even if none of the exceptions applies. No doubt that is because it can be assumed that whatever may be the

> circumstances of a requested person on his surrender, he will be treated in accordance with article 6 of the Convention in an EU state.
>
> 37. In the event that the requesting judicial authority does provide further information I can see no reason why that information should not be taken into account in seeking to understand what has been stated in the EAW."

15. *Cretu* was considered in *The Court in Mures (Romania) v Zagrean* [2016] EWHC 2786 (Admin). The Divisional Court held at [77], [81]:

> "77. Our reading of the decision of the Luxembourg Court in *Dworzecki* [C-108/16 PPU, *Openbaar Ministerie* v. *Dworzecki*, 24 May 2016] is that it does not alter the principles enunciated in *Cretu v Local Court of Suceava, Romania* [2016] 1 WLR 3344. The overall objective of Article 4a(1) of the Framework Decision is to ensure the right to a fair trial by a person summoned to appear before a criminal court by requiring that he has been informed in such a way as to allow him to organise his defence effectively. The list in Article 4(a)(1)(i) is designed to that end so that if one or more of the conditions set out there are satisfied, an executing judicial authority under an EAW must extradite the requested person, even if he did not appear at the trial resulting in the decision.
>
> …
>
> 81. Moreover, the CJEU was also clear that the executing judicial authority can have regard to the conduct of the person concerned, what the court described in paragraph [51] as a manifest lack of diligence on his part, notably where it transpires that he sought to avoid service of the information the court sent. Thus the approach in Cretu in interpreting section 20 remains good: a requested person will be taken to have deliberately absented himself from his trial where the fault was his own conduct in leading him to be unaware of the date and time of his trial. Finally, we are clear that the emphasis in Cretu on the wording of the EAW, and the significance of the statements made within it as to the facts of the requested person's absence, accord with the decision in *Dworzecki*, in particular in paragraph [34]."

16. *Cretu* has been considered and applied in a number of cases including *Stryjecki v District Court in Lublin, Poland* [2016] EWHC 3309 (Admin); *Tyrakowski v Regional Court in Poznan, Poland* [2017] EWHC 2675 (Admin); *Dziel v District Court in Bydgoszcz, Poland* [2019] EWHC 352 (Admin); *Szatkowski v Regional Court in Opole, Poland* [2019] EWHC 883 (Admin) and *Bialkowski v Poland* [2019] EWHC 1253 (Admin).

17. The principles in *Cretu* have been more recently reaffirmed by the Divisional Court in, eg, *Domi v The Public Prosecutor's Office, Court of Udine, Italy* [2021] EWHC 923 (Admin); *Tiganescu v The County Court of Suceava, Romani*a [2022] EWHC 1371 (Admin) and *Galusca v Italian Judicial Authority* [2022] 1 WLR 1615; [2021] EWHC 3345 (Admin).

Further information

Further information in respect of the conviction warrant; further information that was before the district judge

18. The first piece of further information in respect of the conviction warrant was dated 12 August 2021. It was prepared by Regional Judge Skrzypski-Slowik and states *inter alia*:

    a. The Respondent was arrested by police on 9 February 2016 and was interviewed twice on that date, firstly by the police and then by the prosecutor. He was charged with the offence on the conviction warrant.

    b. The Respondent was placed on bail and was under police supervision. He was ordered not to travel abroad; not to contact the victim; and his family and was required to report three times per week to the Police Department in Wieliczka. He was not subject to electronic monitoring or required to surrender travel documents, however, in line with the order for him not to travel, he was precluded from obtaining documents to enable him to cross the border.

    c. The Respondent was interviewed by the police again on 16 June 2016. There were no reports of the Respondent failing to comply with the requirements in the course of the investigation or trial.

    d. Following his conviction, the requirements of police supervision and not to contact the victim and his family were lifted. The order not to travel abroad was not lifted because the court became aware that the Respondent was wanted in separate proceedings (not the murder charge, but something else) to serve a prison term of two years and four months.

    e. As the order not to leave Poland had not been lifted, nor had the requirement not to obtain travel documents, it follows that the Respondent breached the requirement not to leave Poland.

    f. The sentence in the case was not suspended.

    g. Considering the length of the prison term imposed, and the fact that the Respondent was not staying at his residential address, he was not served with a notice to surrender to custody, a warrant of commitment to prison was handed down.

    h. The Respondent is considered to be a fugitive because he left Poland in breach of the restrictions on travelling to foreign countries.

Further information in respect of accusation warrant – further information that was before the district judge.

19. The second piece of further information is dated 18 August 2021 and was prepared by a prosecutor, Mr Babinski. Although this further information related to the murder accusation warrant, the Respondent relied on it as showing he could not have been present at his trial in Poland in 2018 for the assault because it said he had left Poland in 2017 and entered the UK:

> "Kamil Pultorak has not yet been questioned in connection with the crime. As was established in the course of the investigation, the suspect left the territory of Poland immediately after the committing of the offence alleged against him.
>
> …
>
> The suspect's leaving the territory of Poland immediately after the committing of the offence alleged against him should be considered as evidence that the suspect is a fugitive from justice.
>
> The findings made by the Section for the Search and Identification of Persons of the Provincial Headquarters in Krakow on 5 July 2017 show that the suspect, after committing the offence alleged against him, entered the territory of the United Kingdom (relevant document attached).
>
> The above findings were confirmed when the suspect Kamil Pultorak was detained on 3 February 2021 in London, in connection with drug possession (information from the International Police Cooperation Bureau of the National Police Headquarters attached)."

Further information in respect of the conviction warrant - not considered by the district judge

20. The third piece of further information in respect of the conviction warrant was dated 26 April 2022, and prepared by Mr Babinski. It stated:

    a. The Respondent and his counsel were present at the first hearing on 31 January 2017.

    b. The Respondent did not appear at the next hearing on 22 June 2017, despite being served notice of the trial date. He was represented in court by his counsel.

    c. The Respondent did not appear at the next hearing on 10 May 2018, despite being served notice of the trial date (there were two attempted

deliveries of the notification which failed). He was represented in court by his counsel, however, his counsel terminated his powers of representation'.

d. The Respondent was not present for the hearing on 4 June 2018 which was the next hearing. He had not been served with notice of that day as the proceedings had been put on hold, rather than adjourned, following his failure to attend on 10 May. The trial was 'closed', and the sentencing was deferred until 18 June 2018.

e. As per Article 374.1 of the Polish Code of Criminal Procedure, it was not mandatory for the Respondent to be present, unless the court so required, which had not occurred in the Respondent's case. Instead, the court heard the case whilst the Respondent was absent, ensuring he was duly served notice of each trial date.

21. The covering letter from Mr Babinski stated, *inter alia*:

a. 'The Respondent was only physically present at the first hearing on 31 January 2017 during which he 'had the opportunity to respond to the allegation made against him in the course of the proceedings'.

b. The Respondent was not physically present at the hearings on 22 June 2017, 10 May 2018 and 4 June 2018. The judgment was handed down on 18 June 2018. The Respondent was properly notified each time about the subsequent hearings. At the hearings on 22 June 2017 and 10 May 2018 he was represented by defence counsel. His counsel terminated his power of attorney on 10 May 2018. As a result, it was concluded that the Respondent had voluntarily absented himself from the proceedings.

c. The absence of the Respondent did not prevent the proceedings continuing under Polish law.

d. 'Therefore, the information contained in the warrant with file reference number III Kop 62/20 that Kamil Pultorak participated in the proceedings conducted by the District Court for Krakow – Nowa Huta in Krakow under file reference number II K 168/17/N does not contradict the information contained in the warrant with file reference number III Kop 49/21 about the departure of the named individual from the territory of the Republic of Poland immediately after 10 June 2017, taking into account the abovementioned circumstances.'

Submissions

22. On behalf of the Appellant, Ms Brown submitted as follows.

23. At the extradition hearing, it was contended on behalf of the Appellant that the warrant clearly stated in Box D that the Respondent was present at his trial (as noted by the district judge at [21] of his judgment). As a matter of law, as per *Cretu*, Box D of the warrant had been properly completed and there was no

ambiguity within the warrant itself. The district judge was invited to follow the principles in *Cretu*, [35].

24. It was further submitted to the district judge that the Respondent's contention that the warrant was incorrect to state that he was present for his trial was predicated on the notion that once an individual leaves a country, it is be impossible for that person to re-enter. It was submitted on behalf of the Appellant that it was perfectly possible that the Respondent returned to Poland after he left in 2017 (these submissions were made prior to sight of the further information dated 29 April 2022) without the knowledge of the prosecuting authorities dealing with the murder accusation. Alternatively, it was possible that the Respondent had participated in the 'trial' aspects of the hearings prior to leaving Poland. It was submitted that even if there was another explanation, Box D of the Warrant was clear and the court ought to follow *Cretu* and accept the contents of Box D at face value. There was no cogent reason to go behind the statements made by the Appellant in Box D. Paragraph 36 of *Cretu* specifically referred to the avenues of redress open to a requested person in the event that s/he is returned on the basis of a 'mistaken factual assertion' made by an issuing judicial authority.

25. In contrast, the Respondent invited the district judge to go behind the wording in Box D of the Warrant. The district judge accepted those submissions and indicated during discussions with counsel at the hearing that he was minded to look beyond the contents of Box D. It is respectfully submitted that the district judge was wrong to look beyond the contents of Box D and that in doing so, he acted contrary to the principles in *Cretu*.

26. The district judge discharged the Respondent at [27] of the judgment. It was submitted by Ms Brown that the district judge did not properly engage with s 20 and make specific findings by reference to the section justifying the Respondent's discharge.

27. Although, the District Judge set out some of the relevant law in respect of s 20 at [15] to [20] of the judgment, Ms Brown contended that he did not follow the staged approach and in particular did not consider whether he was to be regarded as present (for example) by virtue of the presence of his lawyer, and whether he was deliberately absent.

28. Consequently, the Appellant contends that the district judge erred in his consideration of the s 20 issue based on the material before him.

29. Ms Brown further submitted in the alternative that the judge should have considered the post-hearing further information. The further information dated 29 April 2022 was served over a week before the judgment was due to be handed down (it was served on 9 May 2022; judgment was due to be handed down on 18 May 2022). The CPS made an appropriate application for the further information to be adduced in the body of the email serving the material:

> "Dear Parties,

> This matter was last before District Judge Calloway for substantive extradition hearing on 5th April 2022. Judgment is due to be handed down on the 18th May 2022. However, we've received the attached supplemental information from the Judicial Authority. It provides clarification on section 20. To that end we suggest that it will be of assistance to the Court and invite the Court to admit it into evidence.
>
> Westminster IJO – We would be grateful if the attached and this email were placed before District Judge Calloway.
>
> Thank you.
>
> Kind regards"

30. The court responded on the same day:

> "Dear CPS,
>
> Please find response below from District Judge Callaway:
>
> 1. The case was concluded on the 5th April 2022 and the evidence heard on that date.
>
> 2. I am unwilling to admit other evidence and/or material following the conclusion of the case without a separate on notice hearing and in the presence of the parties. It may be the case that the RP and his representatives wish to object.
>
> 3. The judgment has been completed in readiness for handing down on the 18th May 2022. It is of no assistance to the court and/or the case for material to be received post the event.
>
> 4. In the event that the JA wish to admit fresh material into evidence, then they need to make a separate application for the case to be made the subject of reopening.
>
> I hope that this assists."

31. The CPS did not take any further action following the court's email. However, the Appellant submitted that there was little to add to the application made within the body of the email serving the further information. The CPS had already set out that the basis for the application was that the further information may assist the court in determining the s 20 argument.

32. Ms Brown acknowledged that it is plainly undesirable for evidence to be served by either party following the substantive hearing and she did not contend that a district judge should always accede to an application to admit evidence received at that stage. As above, that is a case management decision

for the court to consider in each case. However, in this case, it is of note that the district judge considered whether to seek further information regarding the conviction warrant (at [26]). Ultimately, he declined to do as he considered that it may cause further delay. However, prior to sight of the written judgment, mindful of the district judge's oral observations at the extradition hearing, the further information was sought by the CPS. The resulting information was served over a week before judgment was due to be handed down. It was in the interests of justice that it should have been admitted.

33. It does not appear that the district judge considered the contents of the further information *de bene esse* for the purposes of determining its admissibility. If he had done so, he would have been aware that it explained in some detail the level of personal participation by the Respondent in the trial; the participation by his lawyer; and the relevant domestic law in Poland requiring personal presence of defendants during trial proceedings. Ultimately, the further information confirmed the basis upon which the Appellant had completed the relevant sections of Box D and provided no arguable basis for the Respondent to be discharged pursuant to s 20.

34. In all the circumstances, the Appellant said that the district judge ought to have admitted the further information and he erred in failing to do so. Had that error not occurred, the district judge would have ordered the Respondent's extradition.

35. On behalf of the Respondent, Mr Henley submitted as follows.

36. He did not disagree with the legal framework as set out in the Appellant's skeleton argument and in particular [34] of the judgment of Burnett LJ in *Cretu*, which the district judge referred to at [17] of his judgment.

37. He said that the Appellant's complaint appears to be that on the invitation of the Respondent the district judge went behind the face of the warrant when he should not have done so. The evidence before the district judge was clear, as the further information on the murder accusation warrant dated 18 August 2021 stated that the police enquiries in Poland, 'on 5 July 2017 show that the suspect, after committing the offence [murder] alleged against him, entered the territory of the United Kingdom…'. As stated in the conviction warrant, the final decision in that case was delivered on 18 June 2018.

38. The district judge was very clear at [21]-[23] that he was relying on the evidence from the Appellant in their further information of 18 August 2021.

39. Mr Henley said the judge's 'cogent' finding of fact was indisputable, and it was clear the Respondent could not have been present at his assault trial, having left Poland (on the Appellant's own case) in 2017. The conviction warrant at box D simply stated that the person appeared in person at the trial resulting in the decision. The rest of box D is unused. This was not a *lacuna*, but a serious and fundamental error, as demonstrated by the further information, which, *per Goluchowski v District Court in Eblag, Poland* [2016] 1 WLR 2665, was admissible to show that the Respondent had not, in fact, been present in June 2018.

40. Mr Henley said that the criticism had been made by the Appellant that the district judge had not engaged with the requirements of s 20. He said this criticism was without foundation. There was no evidence from which the district judge could have been sure that the Respondent had deliberately absented himself from trial nor could he be sure that there was a right to a retrial.

41. Mr Henley further submitted that the district judge had been right not to admit the post-hearing further information following the CPS's email. The district judge was concerned with fairness to both sides, and the need to give the Respondent the opportunity to respond to the new information. He had been right to say if the CPS wished to rely on the further information then a formal application needed to be made. No such application was made by the CPS and therefore, (my words) 'it only has itself to blame'. There could be no criticism of the judge's approach. He was not wrong and not irrational. The way the judge had approached the matter lay well within the bounds of his case management discretion, and there was no basis for me to interfere with his decision.

Discussion

The test on an extradition appeal

42. The question for me on this appeal is whether the decision of the district judge to discharge the Respondent was wrong in the sense explained in *Polish Judicial Authorities v Celinski* [2015] EWHC 1274, [34]; *Love v Government of the United States of America* [2018] 1 WLR 2889, [26].

43. In respect of case management decisions, such as that of the district judge not to admit the post-hearing further information from the Appellant, appellate courts are particularly reluctant to intervene for sound pragmatic reasons: see eg *Re TG (A Child)* [2013] EWCA Civ 5, [35]-[36]; *Deripaska v Cherney* [2012] EWCA Civ 1235, [17]-[30]; *Stokors SA v IG Markets Ltd* [2012] EWCA Civ 1706, [25], [45], [46].

Analysis of the district judge's judgment and my decision

44. For the avoidance of doubt, I have left out of account the April 2022 further information, and I have reached my conclusions solely on the basis of the information which was before the district judge. However, on the basis of that information alone I have reached the conclusion that the district judge was wrong to have discharged the Respondent under s 20 of the EA 2003.

45. It seems to me that there is real doubt as to whether the Respondent was indeed present for his trial as indicated in Box D of the conviction warrant. That assertion is called into question by the August 2021 further information from Poland, which was to the effect that he left Poland in 2017 immediately after the murder was committed. Mr Henley was right to say that this information was admissible and that the Respondent had been entitled to rely upon it.

46. I am unable to say why Box D was completed as it was. It may have been a mistake; or that because under Polish law the Respondent was deemed to be present at his trial; or for some other reason. There is no clear evidence about it, and I cannot speculate.

47. Hence, because the burden lay on the Appellant to prove the Respondent's presence at trial beyond reasonable doubt, it seems to me that the district judge was right to conclude that this matter had not been proved. I take into account what was said in *Cretu*, [35], that issuing judicial authorities should not be pressed for further information except where there is ambiguity, etc, on the warrant. But in this case, for better or worse, the Appellant was asked for further information, and the information it supplied did cast ambiguity over what was stated in Box D of the warrant. It would not have been right or fair for the judge to have ignored that further information.

48. However, it seems to me that where the judge fell into error was his failure to consider next, as he was required to by s 20(3), the question whether the Respondent had deliberately absented himself from his trial. To re-state s 20(1)-(3):

> "(1) If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence.
>
> (2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 21.
>
> (3) If the judge decides that question in the negative he *must* decide whether the person deliberately absented himself from his trial." (emphasis added).

49. If the judge had asked himself the question under s 20(3) then there could only have been one answer, even on the information then before him and ignoring the April 2022 information. That information shows that the Respondent was arrested and questioned for the assault in 2016 and was subject to conditions, including not to leave Poland. He then did so in breach of those conditions in 2017 (as he himself admitted: see judgment at [22]), and thereby became a 'fugitive', the word used in the first piece of further information.

50. It follows that the Respondent must be taken to have waived his right to be present at his trial for the assault matter, which he must have known was still ongoing when he left Poland, because he was still subject to conditions in relation to it. Hence, applying the principles in *Cretu*, whilst he may not have known the date and time of his trial (assuming that that took place in May or June 2018 after he had left Poland), that was through his own deliberate actions and choice. He must, per *Cretu* at [34(ii)], be taken to have waived his right to be present at his trial, and so his conviction in absence did not breach Article 6 of the European Convention on Human Rights. As was said in *Zagrean*, [81]:

> "… a requested person will be taken to have deliberately absented himself from his trial where the fault was his own conduct in leading him to be unaware of the date and time of his trial."

51. Although the judge did refer to the relevant statutory provisions in his judgment (see eg at [16] and[18]), it seems to me that he did not properly apply them. Had he done so, as I have said, he would have been bound to rejected s 20 as a bar to extradition and he was therefore wrong to have discharged the Respondent.

52. That conclusion makes it unnecessary to consider whether the judge should have admitted the April 2022 information. However, it seems to me that the judge's approach cannot be faulted. He simply pointed out that which should have been self-evident, namely, that if the Appellant wanted to rely upon the information then a proper application would have to be made on notice to the Respondent for the matter to be re-listed for argument in court. That was not done. The judge was right not simply to have acceded to the Appellant's emailed request to adduce the information, because there may have been arguments which the Respondent would have wished to raise about why the information ought not to be admitted.

53. The appeal is therefore allowed; the order for discharge is quashed; and the matter is remitted to the district judge for him to proceed per s 29(5)(b) and (c) of the EA 2003.