APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 25
HCA/2024/000004/XM

Lord Doherty
Lord Matthews
Lord Beckett

OPINION OF THE COURT

delivered by LORD DOHERTY

in

NOTE OF APPEAL UNDER SECTION 26 OF THE EXTRADITION ACT 2003

by

PK

Appellant

against

LORD ADVOCATE, REPRESENTING THE REPUBLIC OF POLAND

Respondent

Appellant: Loosemore; Dunne Defence Lawyers
Respondent: McCulloch; Crown Agent

25 June 2024

Introduction

[1] The appellant is a Polish national. On 19 February 2015 he left Poland with his wife and three children and came to the United Kingdom. He obtained employment here. His wife suffered from ill-health which became increasingly incapacitating. In late 2020 he became her registered carer and he gave up work to look after her.

[2] In early 2015 criminal proceedings were commenced against him in Poland. The first court hearing at the District Court in Dabrowa Tarnowska in relation to those proceedings was on 15 May 2015. The appellant instructed a lawyer to represent him at that hearing, but he did not return to Poland to attend it or subsequent hearings. The hearing was continued to a later date on two occasions, and on 7 August 2015 the appellant, through his lawyer, voluntarily submitted to judgment being given against him on four charges. Charge 1 was threatening the complainer that he would disseminate pictures of her naked and involved in sexual activities if she refused to pay him money. Charge 2 was insulting a police officer in connection with the exercise of his official duties by addressing to him words commonly perceived as offensive. Charge 3 was a charge that in order to cause personal harm, he pretended to be the same complainer as in charge 1 and posted an advertisement on a website purporting to offer sexual services, giving her phone number and address accompanied by naked pictures of her. Charge 4 was a charge that he had accessed information on an email account, overcoming the protection of a password, to the detriment of the same complainer. The offences were committed in November and December 2014. The court sentenced the appellant to 6 months' imprisonment for charge 1, 2 months' imprisonment for charge 2, 8 months' imprisonment for charge 3, and 5 months' imprisonment for charge 4. That judgment became final and binding on 8 September 2015. The court modified the aggregate sentence from 21 months' imprisonment to 18 months' imprisonment. However that sentence was suspended for a probation period of 3 years provided that the conditions of the voluntary submission were met. One of those conditions was that the appellant paid compensation ("moral damages") to the complainer in charges 1, 3 and 4. The appellant did not satisfy that condition. As a result, on 29 March 2016 the court

ordered that the sentence of 18 months' imprisonment be served. The appellant required to present himself at prison to begin that sentence. He did not do so.

[3] The Polish authorities concluded that the appellant had gone into hiding and was illegally avoiding serving the sentence. An arrest warrant to search for him in Poland was issued. Attempts to locate him in Poland were unsuccessful. Eventually, inquiries ascertained that he may be in the United Kingdom. On 30 May 2019 the Regional Court in Tarnow issued a European Arrest Warrant ("EAW") requesting that the appellant be arrested and surrendered to serve his sentence.

[4] Poland is a designated Category 1 country in terms of section 1 of the Extradition Act 2003. The EAW is a Part 1 warrant in terms of section 2 of the Act. It was duly certified in accordance with that section. The appellant was arrested in Aberdeen in late 2021 and he first appeared at Edinburgh Sheriff Court on 23 February 2022. He accepted that he was the person referred to in the EAW but he did not consent to extradition. He was granted bail. Over the course of the next 2 years there were fifteen procedural hearings, including several motions by the appellant to postpone full hearings which had been set down.

The relevant legislation

[5] The Extradition Act 2003 provides:

> "**2 Part 1 warrant and certificate**
>
> (1) This section applies if the designated authority receives a Part 1 warrant in respect of a person.
>
> (2) A Part 1 warrant is an arrest warrant which is issued by a judicial authority of a category 1 territory and which contains—
>
> (a) the statement referred to in subsection (3) and the information referred to in subsection (4),
>
> …

(4) The information is—

…

(c) particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the category 1 territory under which the conduct is alleged to constitute an offence;

…

10 Initial stage of extradition hearing

(1) This section applies if a person in respect of whom a Part 1 warrant is issued appears or is brought before the appropriate judge for the extradition hearing.

(2) The judge must decide whether the offence specified in the Part 1 warrant is an extradition offence.

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

…

21 Person unlawfully at large: human rights

(1) If the judge is required to proceed under this section … 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.

…

26 Appeal against extradition order

(1) If the appropriate judge orders a person's extradition under this Part, the person may appeal to the High Court against the order.

(3) 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.

…

27 Court's powers on appeal under section 26

(1) On an appeal under section 26 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 appropriate judge ought to have decided a question before him at the extradition hearing differently;

(b) if he had decided the question in the way he ought to have done, he would 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 appropriate judge deciding a question before him at the extradition hearing differently;

(c) if he had decided the question in that way, he would have been required to order the person's discharge.

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

(a) order the person's discharge;

(b) quash the order for his extradition

…

65 Extradition offences: person sentenced for offence

(1) This section sets out whether a person's conduct constitutes an 'extradition offence' for the purposes of this Part in a case where the person—

(a) has been convicted in a category 1 territory of an offence constituted by the conduct, and (b) has been sentenced for the offence.

(2) The conduct constitutes an extradition offence in relation to the category 1 territory if the conditions in subsection (3) or (4) are satisfied.

(3) The conditions in this subsection are that—

(a) the conduct occurs in the category 1 territory;

(b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom if it occurred in that part of the United Kingdom;

> (c) a sentence of imprisonment or another form of detention for a term of 4 months or a greater punishment has been imposed in the category 1 territory in respect of the conduct. …"

The extradition hearing

The evidence

[6] A full hearing took place on 8 and 29 February 2024. The appellant gave evidence. He deponed that his lawyer "forgot to tell him" that it was a condition of probation that he pay compensatory damages. He had come to the United Kingdom to find work. He had worked initially. However, Mrs K had chronic back problems and she had become increasingly disabled, requiring him to spend more and more time looking after her. Eventually in 2020 he gave up work to be at home to look after her. He has to lift her in and out of the bath. She cannot dress. She cannot prepare breakfast. She is bedbound. She has mental health problems - anxiety and depression - which exacerbate her physical health problems. He is her sole carer. No one else can provide care. He helps her with everything. He makes the family meals. The flat they live in has been adapted for use by a disabled person and wheelchair user. There is a lift to the flat. Mrs K chooses not to use a wheelchair. She is heavy, about 110 kg, so lifting her requires strength and effort.

[7] The appellant spoke to a number of documentary productions. A Personal Independence Payment ("PIP") award letter from the Department for Work and Pensions dated 8 June 2020 awarded Mrs K a PIP of £62.25 per week. Ten daily living activities were assessed - the higher the score, the greater the need. For six of those activities (eating and drinking, managing treatments, communicating, reading, making budgeting decisions) she was assessed as having no need for assistance. In relation to four other activities she was assessed as in need of some assistance (preparing food (4 out of 8), washing and bathing

(3 out of 8), managing your toilet needs (2 out of 8), dressing and undressing (2 out of 8)). Her total score of eleven points for the daily living part entitled her to an award at the standard rate rather than the higher rate. Two mobility activities were also assessed. For planning and following a journey she was assessed as having no needs. However, for "moving around" ("you can stand and then move more than 1 metre but no more than 20 metres either aided or unaided") she was given the maximum need score (12 out of 12). That score entitled her to the enhanced rate to assist with mobility difficulties. The PIP award was for an initial period of 3 years and it was under review at the time of the extradition hearing. An award letter from the Disability and Carer's Service of the same Department dated 26 March 2021 vouched that the appellant was awarded a carer's allowance of £67 per week. The only other production for the appellant which was referred to in evidence was a letter to Mrs K's GP from Dr Dorgham, a locum consultant in pain management, dated 14 April 2020, which referred to her having chronic back pain and left sciatica. The letter followed a telephone consultation with her at which the appellant acted as her interpreter. It suggested that at that time the precise cause of the pain was undetermined, with sacro-iliac joint dysfunction or a facetogenic origin being possibilities which had been considered. Pain relief options were proposed. The letter noted that Mrs K had been referred to spinal physiotherapy but that she reported that her pain at the time of consultation was such that she was unable to keep up the physio exercises at home. She indicated that the pain was still bad both in her back and in her left thigh, but that there were not many symptoms below her knees. She stayed in bed most of the day.

[8] The appellant explained that he and his wife have three children, aged 14, 16 and 23. The adult child is a student and is in employment. She lives in her own accommodation about 2 miles from the family home. She has infrequent contact with the family and is not

able or available to assist with caring for her mother. The younger children live at home and have very limited ability to help, but they can make meals. The children cannot lift their mother. They do not help their mother bathing or dressing because of privacy issues.

[9] The sheriff heard submissions for the appellant at the hearing on 8 February 2024 and submissions for the respondent at a continued hearing on 29 February 2024.

The submissions for the appellant

[10] Charges 2 and 4 were not extradition offences. They were not crimes known to the law of Scotland. Moreover, the sentence on charge 2 was only 2 months' imprisonment, which was less than the minimum sentence of 4 months' imprisonment required for extradition in terms of section 65(3)(c) of the Extradition Act 2003. It was submitted each of these defects vitiated the EAW. Finally, it was submitted that extradition was barred by section 21 of the 2003 Act because it would be incompatible with the article 8 ECHR rights of the appellant, his wife and their children. There would be an exceptionally severe impact on their family life if he was extradited. Most significantly, Mrs K would lose her sole carer upon whom she was dependent, and the younger children would lose the care and support and guidance of their father, who was the only parent who was fit to care for them. While it was accepted that the local authority would have statutory obligations to provide a degree of support for Mrs K and the children were the appellant to be extradited, there was no guarantee that adequate support would be provided. Even if some support was provided it was highly unlikely that it would replicate or be nearly as comprehensive or satisfactory as the care and services which the appellant currently provided to his wife and children.

The submissions for the respondent

[11] Charges 2 and 4 were extradition offences. The equivalent Scottish offence to that described in charge 2 was a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, and the equivalent crime to that described in charge 4 was fraud, theft, or a contravention of section 1 of the Computer Misuse Act 1990. It was nothing to the point that the individual sentence for charge 2 had been 2 months. The EAW sought extradition for the aggregate sentence of 18 months. So far as article 8 was concerned, while extradition would be an interference with the rights of the appellant and his family, that interference was justified and proportionate. The local authority would have statutory duties to provide some assistance. The balance came down firmly in favour of the public interest in the extradition request being given effect to.

The sheriff's decision

[12] On 29 February 2024 the sheriff delivered an *ex tempore* judgment ordering the appellant's extradition. Thereafter he provided an appeal report dated 22 March 2024.

Extradition offences?

[13] The sheriff was satisfied that charge 2 was an extradition offence, and that the Scottish equivalent would be a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. In his view charge 4 was also an extradition offence, which, had it occurred in Scotland, could have been prosecuted as a common law offence such as fraud or as an offence under the Computer Misuse Act 1990. He opined that even if one or both of charges 2 and 4 were not extradition offences that did not vitiate the EAW because

the sentence for the remaining offences would still have exceeded the 4 months threshold in section 10 of the 2003 Act.

The appellant's knowledge and the circumstances of his departure from Poland

[14] The sheriff rejected as implausible (and unvouched) the appellant's evidence that he had not been told by his lawyer of the requirement to pay moral damages. He proceeded on the basis that the appellant left Poland in the knowledge that he had committed the crimes which were the basis of the EAW and with a view to evading justice.

Contravention of article 8?

[15] In considering this aspect of the case the sheriff was guided by *Norris* v *Government of the United States of America* [2010] 2 AC 487 and *H(H)* v *Deputy Prosecutor of the Italian Republic* [2013] 1 AC 338. He conducted a balancing exercise which weighed the factors for and against extradition.

[16] When coming to a view as to the extent of Mrs K's disabilities and care needs he attached considerable weight to the contents of the PIP letter of award. He noted:

> "That letter explained how her PIP award was calculated which is done by scoring 10 daily living activities and two mobility activities. If a person has any inability to carry out the activity, the person may be given points according to the degree of need. She scored four points out of a maximum of eight for the criterion concerning preparation and cooking of a simple meal. She scored three points out of eight as regards washing and bathing. She scored two points out of eight regarding managing toilet needs and two points out of eight regarding dressing and undressing. She scored no points for needs relating to: communicating; eating and drinking; managing her medical treatment; reading; mixing with other people; making budgeting decisions. So she scored 11 points for the daily living component and was awarded the standard rate of benefit. As for mobility, she needed no assistance to plan and follow a route of a journey unaided. However, she was assessed as being unable to walk more than 20 metres either aided or unaided and scored 12 points which means she was awarded the enhanced rate."

His conclusions on the evidence included the following findings:

> "[32] … Mrs [K] has a significant long-standing disability related to her back, which causes significant disabilities in connection with her day-to-day living activities, and that she is frequently in pain as a result. That condition is unlikely to improve. As regards the effects of that disability on her ability to self-care, on the basis of the PIP award letter, I accepted that Mrs [K] has some difficulties in connection with preparing food, washing and bathing, managing toilet needs and dressing and that she reasonably requires some assistance in connection with those activities. However, the restricted award of the points scored under those headings (all of them being scored at rather less than the maximum) demonstrates that she does have some independent ability to carry out those functions. Further, on a similar basis, I find that she has no difficulty and no need for assistance in connection with communicating, reading, mixing with people, making budgeting decisions, eating and drinking. I did not accept the evidence of the requested person that the extent of the help provided by him to her was as great as he claimed, that being unvouched. However, I accepted that he does offer some assistance in connection with those activities for which points were awarded. That is consistent with the fact that the requested person is in receipt of Carer's Allowance which was claimed on the basis that he provides care to his wife and she is in receipt of PIP. I also accepted, on a similar basis, that Mrs [K] has a significantly reduced ability to walk: although she is able to stand and walk short distances of up to 20 metres. That is consistent with her not using a wheelchair in the flat. I accept nonetheless that the effect of her disability is very significant. I find that her disability however does not prevent her from leaving the flat, assisted by another person, to attend for example hospital appointments."

[17] The sheriff noted (paragraph 33 of his report) that no evidence had been led about the likely effects on the children were their father to be extradited. Nevertheless, he was prepared to accept that the effects were likely to be significant, particularly for the two younger children. He treated the two younger children's best interests as a primary consideration. He took account of the fact that the local authority would have statutory obligations to provide some support and assistance to Mrs K and the two younger children were the appellant to be extradited (paragraph 35). He found that the children would be able to provide some limited support for their mother (paragraphs 38-39), although in the case of the adult child this was likely to be restricted by her study and work commitments. He also had regard to the fact that Mrs K's home had been adapted for the needs of a

disabled person (paragraph 37); that her PIP award was available to fund a modest amount of care support; and that the appellant's absence would not be a prolonged one given that the sentence was only 18 months.

[18] The sheriff rejected the suggestion that the extradition offences were of a low gravity. In his view they were serious and might well have attracted a custodial sentence in Scotland had they been committed here.

[19] Balancing the factors for and against extradition, the sheriff concluded that the public interest factors favouring extradition were not outweighed by the interference with the article 8 rights to family life of the appellant, Mrs K, or the children. Extradition was justified and proportionate.

The application for leave to appeal

[20] The appellant seeks leave to appeal to this court against that decision.

The appellant's submissions

Extradition offences?

[21] The sheriff had erred in holding that charges 2 and 4 were extradition offences. So far as charge 2 was concerned, it could not be said from the information contained in the EAW that had the conduct occurred in Scotland it would have constituted a breach of section 38 of the 2010 Act. That was now conceded by the respondent. Similarly, there was insufficient detail in the EAW to conclude that the conduct in charge 4 would constitute the crime of fraud or a contravention of section 1 of the 1990 Act if committed in Scotland. It was accepted that even if one or both of these charges were not extradition offences that

would not vitiate the EAW. Rather, the correct course would be to discharge the appellant in respect of offences which were not extradition offences.

Adjournment?

[22] The sheriff had been asked to grant an adjournment at the outset of the extradition hearing to enable the appellant to obtain one or more expert reports relating to the care needs of Mrs K. He had erred in refusing the motion. Counsel recognised that she faced several difficulties in relation to this ground. First, the sheriff indicates that no such motion was made. Second, given what the sheriff described as the "lamentable history" of the case (paragraph 47 of his report) it may readily be inferred that he would not have granted the motion had it been made. Third, despite the period of months which had now passed since the hearing, no reports had yet been obtained. While counsel did not formally abandon this ground, we did not understand her to press it.

Article 8

[23] The sheriff had erred in determining that the interference with the article 8 rights to family life of the appellant, his wife, and his children was outweighed by the public interest factors favouring extradition. First, he had been wrong to proceed on the footing that the appellant had come to the United Kingdom in order to escape justice. There had been no evidence that criminal proceedings had been commenced at the time of the appellant's departure. While it was accepted that he had not returned to Poland once proceedings were commenced, that was materially different from having come to this country as a fugitive. Second, the sheriff had erred in failing to give any weight to the age of the offences. While it was not suggested that there had been any unreasonable delay or lack of diligence by the

Polish authorities, the antiquity of the offences was nevertheless a factor which ought to have been placed in the balance. Third, the sheriff had over-estimated the seriousness of the extradition offences. They were not trivial, but he was wrong to regard them as being as serious as he had. If the appellant were being sentenced in Scotland for similar offences a non-custodial disposal would have been the likely outcome in view of his roles as the carer for his wife and younger children and the fact that he has not previously been sentenced to imprisonment. The appellant's failure to pay moral damages ought not to be particularly significant when it came to the balancing exercise. Fourth, the sheriff had under-estimated the gravity of the interference with the rights to family life of Mrs K and the two younger children. He had erred in coming to the view that the extent of Mrs K's disability and the care which she needed were not as great as the appellant suggested. He had misdirected himself in having regard to the possibility of assistance being provided by the local authority. He had not given enough weight to the effect the appellant's absence would be likely to have on the welfare of the younger children. As a result of these errors the balancing exercise carried out by the sheriff was flawed. The court should carry out the exercise *de novo*. If appropriate weight was given to the various factors the correct conclusion ought to be that the interference with the article 8 rights of Mrs K and the children was not justified and proportionate.

Additional evidence

[24] Very shortly before the appeal hearing the appellant produced an affidavit from Mrs K which outlined her disabilities and the ways in which the appellant assisted her. Counsel moved that it be admitted, and that it was new evidence. She accepted that an affidavit could have been put in evidence at the extradition hearing. The reason an affidavit

had not been obtained earlier was that in the lead up to the hearing the focus had been on trying to get expert reports. Had such an affidavit been put in evidence at the hearing it would have confirmed the appellant's evidence about the extent of Mrs K's disabilities and the amount of care which he provided. The court should have regard to the affidavit and it should allow the appeal.

The respondent's submissions

Extradition offences?

[25] So far as charge 2 was concerned, it was conceded that it could not be said from the information in the EAW that if the same conduct occurred in Scotland it would constitute a breach of section 38 of the 2010 Act. On the other hand, the conduct in charge 4 would constitute the crime of fraud and/or a contravention of section 1 of the 1990 Act if committed in Scotland.

Adjournment?

[26] No motion for an adjournment had been made. That was clear from the sheriff's report and from the terms of the interlocutor of 8 February 2024. It was also the recollection of the procurator-fiscal depute who had appeared for the respondent at the hearing. In any case, given the history of the proceedings outlined by the sheriff in paragraph 47 of his report, it is highly unlikely that he would have granted such a motion had it been made.

Article 8

[27] The sheriff had not erred in any of the suggested respects. He had been entitled to find that the appellant had left Poland with a view to avoiding criminal proceedings. So far

as the age of the offences was concerned, the principal reason for the passage of time since they were committed was that the appellant had left Poland. The sheriff had not over-estimated the seriousness of the offences. He had due regard to Mrs K's disabilities and to her care needs and to the younger children's interests. He had the advantage of hearing the evidence and his findings in relation to it ought to be respected. He had applied the correct test. He had balanced the factors for and against extradition and had found that the former outweighed the latter. That was a conclusion he had been entitled to reach.

Additional evidence

[28] The court ought not to allow the affidavit evidence to be received. It could easily have been adduced at the extradition hearing. The requirements of section 27(4) of the 2003 Act were not satisfied.

Decision and reasons

Extradition offences?

[29] In our opinion the respondent's concession that the conduct described in charge 2 is not an extradition offence was correctly made. It cannot be said from the information contained in the EAW (as to the requirements of which see section 2(4)(c) of the 2003 Act and *Nicholls, Montgomery and Knowles on the Law of Extradition and Mutual Assistance* (3rd ed), paragraphs 4.15 and 5.31), that had the conduct occurred in Scotland it would have constituted a breach of section 38 of the 2010 Act (cf *Wozniak* v *Regional Court in Bydgosgcz* [2022] EWHC 1820 (Admin)). In particular, it is not possible to say from the limited information about the behavior that it would be likely to cause a reasonable person to suffer fear or alarm (section 38(1)(b) of the 2010 Act). It follows that the condition in

section 65(3)(b) of the 2003 Act is not satisfied. The consequence is that the appellant should be discharged in respect of charge 2 (section 10(3) of the 2003 Act as modified by the Extradition Act 2003 (Multiple Offences) Order 2003 (SI 2003/3150), article 2(2) and paragraph 2).

[30] On the other hand we are satisfied that the conduct described in charge 4 is an extradition offence. We agree with the respondent that the information in the EAW provides a basis for concluding that the conduct would have constituted a common law fraud, the false pretence being that he was the email account holder with a right to access the account. That false pretence had the practical result that he gained access to the account. It is less clear from the information in the EAW whether the conduct would have constituted a contravention of section 1(1) of the Computer Misuse Act 1990. The appellant used a computer to secure unauthorised access to data, but it is not apparent whether that data was held on a computer (even allowing for the extended definition of data held on a computer in section 17(6) of the 1990 Act). However, we are conscious that we did not have the benefit of developed submissions on this point. It is unnecessary to decide it given our view in relation to fraud.

Adjournment?

[31] We are satisfied that no motion to adjourn was made. The sheriff is clear on the point, and his recollection is consistent with the terms of the interlocutor of 8 February 2024 and with the recollection of the procurator-fiscal depute who represented the respondent at the extradition hearing. Moreover, given the history of the proceedings, had such a motion been made we think it very unlikely that it would have been granted, and a decision to refuse it would have been wholly justifiable. In any case, the issue is now somewhat

academic because even at the time of the appeal hearing expert reports had not been instructed, let alone obtained.

Article 8

[32] It was common ground that extradition would interfere with the article 8 rights to family life of Mrs K, the children and the appellant. Of those rights to family life, the rights of Mrs K and the two younger children were weightier than those of the appellant and of the adult child who lived independently. The best interests of the two younger children required to be treated as a primary consideration. It is not in dispute that the sheriff was right to engage in a balance sheet approach in determining whether the interference with article 8 rights was outweighed by other considerations (*DV* v *Lord Advocate* [2020] HCJAC 33, 2020 SLT 1161, 2020 SCCR 355, at paragraph 34, approving *Poland* v *Celinski* [2015] EWHC 1274 (Admin), [2016] 1 WLR 551). The criticisms advanced are that he erred in his approach to a number of the factors which he weighed.

[33] The article 8 issue was undoubtedly the most challenging issue the sheriff had to grapple with. Ultimately, for the reasons which follow, we have concluded that he reached the wrong conclusion, but we have sympathy for him. We recognise that the issue was a difficult and borderline one, and that he was not favoured with submissions which were as fully developed as those which we heard.

[34] We deal first with two criticisms of the sheriff which we believe are unfounded, *viz* that he erred (i) in having regard to the possibility of care being provided by the local authority; and (ii) in rejecting the appellant's evidence that his lawyers did not inform him of his obligation to pay compensatory damages.

[35] In our opinion the sheriff was entitled to have regard to the possible provision of local authority assistance. He recognised that there was no guarantee it would in fact be timeously provided or that any provision made would be adequate. We detect no error in this aspect of his reasoning.

[36] The sheriff rejected as implausible the appellant's account of not having been informed by his lawyer of the obligation to pay compensatory damages. The account was a remarkable one, which invited scepticism in the absence of vouching. The sheriff was entitled to reject it. The fact that the appellant had an opportunity to avoid imprisonment by paying damages but did not avail himself of it was not to his credit. It was a factor which the sheriff was entitled to have regard to.

[37] The appellant maintains that the sheriff was wrong to proceed on the basis that he had left Poland in order to evade the Polish justice authorities (paragraph 43 of his report). It was common ground before us that there was no evidence at the extradition hearing that criminal proceedings had been commenced against the appellant before he left Poland, or that he knew at that time that such proceedings would be commenced. Indeed, even at the hearing before us the respondent was unable to clarify when the proceedings had been commenced. We accept that there is force in this criticism of the sheriff's reasoning (cf *DF* v *Amtsgericht Nurnberg, Germany* [2022] EWHC 2224 (Admin), at paragraph 57). It is significant that the appellant was not a fugitive when he came to the UK, and that he has lived a law-abiding life here with his family since then.

[38] The age of extradition offences may a relevant consideration in some cases, especially where there has been unexplained delay by authorities in the requesting state. However, even in cases where there has not been unexplained delay, the antiquity of the offences may still diminish the weight to be attached to the public interest in extradition and increase the

impact upon private and family life (*H(H)* v *Deputy Prosecutor of the Italian Republic*, Baroness Hale at paragraphs 8, 46, 47; Lord Kerr at paragraph 147; Lord Wilson at paragraph 128). The sheriff appears not to have appreciated that. He concluded "the fact that the offences are nine years old is a consequence of [the appellant's] evasive behavior and not a factor to be advanced in his favour in assessing proportionality" (paragraph 43 of the appeal report). In our view the sheriff's reasoning on this point contains two errors. First, he proceeded on the basis that the appellant had come to the United Kingdom as a fugitive. Second, he did not apply his mind to the correct question, which was whether in the whole circumstances the antiquity of the offences ought to diminish the weight to be attached to the public interest and increase the impact on private and family life. Had he done so, his conclusion ought to have been that the age of the offences did point to at least a slight diminution in the public interest in extradition and at least a small increase in the impact upon family life. In the time since the offences the appellant and his family have made a new and blameless life for themselves in this country (cf *H(H)* v *Deputy Prosecutor of the Italian Republic,* paragraph 47) and Mrs K has become increasingly dependent upon the appellant.

[39] We examine next the sheriff's approach to the gravity of the offences. He concluded that the offences, particularly charges 1 and 4, were "serious offences which in Scotland might have attracted custodial sentences". It is common ground that the offences were not trivial. The crucial question was where in the spectrum of criminal offences they lay. We agree with the appellant that the sheriff treated the offences as being graver than they in fact were. The offences were not trivial or even minor. Charges 1 and 3 in particular were despicable and were likely to have been very distressing for the complainer. Nevertheless, they were very much closer to the lower end of the gravity spectrum than to the higher end.

This is not one of those cases where an extraditee's criminality is clearly at too high a level of gravity to be outweighed by even very substantial article 8 rights (cf *H(H)* v *Deputy Prosecutor of the Italian Republic*, Lord Brown at paragraph 96). The offences were not of the kind that ought to be described as "seriously criminal" (cf *H(H)*, Lord Hope at paragraph 91). They appear to us to be less serious than the offences in *F-K* v *Polish Judicial Authority*: see *H(H)*, Baroness Hale at paragraph 35). Were they to have been prosecuted here we doubt whether they would have resulted in custodial sentences given the appellant's role as the carer for his wife and younger children and the fact he would have had the benefit of section 204 of the Criminal Procedure (Scotland) Act 1995. That was a relevant consideration, though not a decisive factor because the Polish court's view as to the appropriate sentence for the offences requires to be respected (*H(H)*, Lord Judge CJ at paragraph 132).

[40] That brings us to the sheriff's findings about Mrs K's disabilities and care needs. He accepted that Mrs K suffered from very significant disabilities and that the appellant was her carer. However, he did not accept that her disabilities were as severe or that her need for care and assistance was as great as the appellant suggested.

[41] The appellant took some steps to vouch Mrs K's disabilities and her care and support needs, but the documentary material lodged was neither recent nor comprehensive. In so far as it might provide an objective basis against which to assess the appellant's evidence, its age and other limitations required to be borne in mind. In particular, the PIP award and the assessment upon which it was based were more than three and a half years old at the time of the extradition hearing.

[42] There are two respects in which we consider that the sheriff erred in his assessment of this part of the evidence. First, he seems to have treated the mobility assessment for the

"moving around" activity as evidence that Mrs K could walk up to 20 metres. However, the activity description was "You can stand and then move more than 1 metre but no more than 20 metres either aided or unaided". Mrs K scored 12 points out of 12 for the activity. The assessment was not an assessment that she could walk up to 20 metres. The appellant's evidence was that Mrs K's mobility was much more limited than that. The assessment was not at odds with that part of the appellant's evidence and it did not provide a good basis for rejecting it. Second, given the three and a half years since the PIP award, the assessments in the award letter might well not fully reflect Mrs K's condition and needs at the time of the hearing. The appellant spoke to there being greater disabilities and greater care needs. Since the assessment he had given up work to look after her and he had been awarded a carer's allowance. That was objective evidence which tended to support the appellant's evidence about the extent of Mrs K's disability and need and which suggested that it would not be right to be guided solely by the assessments in the 2020 award. These errors resulted in the sheriff under-estimating Mrs K's disabilities and care needs.

[43] We recognise that the consequences of interference with article 8 rights must be exceptionally serious before the interference can outweigh the importance of extradition (*Norris* v *Government of the United States of America (No 2)*, Lord Phillips at paragraph 56). However, it is easier to meet the threshold required to outweigh the importance of extradition where the offences are not of great gravity. In *Norris* Lord Phillips observed:

> "65 Indeed, in trying to envisage a situation in which interference with article 8 might prevent extradition, I have concluded that the effect of extradition on innocent members of the extraditee's family might well be a particularly cogent consideration. If extradition for an offence of no great gravity were sought in relation to someone who had sole responsibility for an incapacitated family member, this combination of circumstances might well lead a judge to discharge the extraditee under section 87 of the 2003 Act."

An example of such a scenario occurred in *Prostko* v *District Court of Suwalki Poland* [2014] EWHC 2667 (Admin). Mr Prostko had come to the United Kingdom as a fugitive knowing that he had half of a 26 months sentence of imprisonment still to serve, with some possibility of early release. He and his fiancée had a very severely disabled young son. She looked after him during the day and he looked after him at night. Sir Stephen Silber concluded that it would be an infringement of the article 8 rights of the appellant and his family for him to be extradited.

[44] In the present case the sheriff was wrong to treat the appellant as having come to this country as a fugitive. He left out of account the age of the offences. He treated the extradition offences as being graver than they were. He ought not to have treated charge 2 as being an extradition offence: had he not done so the relevant aggregate sentence would have been marginally reduced. Taking these factors together, we are satisfied that the sheriff materially over-weighed the factors favouring extradition. On the other side of the scales, he materially under-weighed features counting against extradition. He under-estimated the extent of Mrs K's disabilities and needs. She has very significant disabilities and care needs and the appellant is her sole carer. Her needs are such that he had to give up work in order to be with her at all of the times of day when assistance is required. Were he to be extradited she would lose the essential care and assistance upon which she depends. There is no guarantee that replacement care and assistance would be provided timeously by the local authority, or if it is, that it would be even adequate, let alone as full or as satisfactory as the care and assistance currently provided to her by the appellant. He also under-estimated the interference with the two younger children's article 8 rights which would be caused by extradition. The appellant is the only parent who is physically fit enough to care for them. In that regard he is tantamount to a single parent. While the

interference with the children's rights would not be a weighty consideration if the appellant would have been bound to have received a custodial sentence for the offences had they been committed in the United Kingdom (*H(H)* v *Deputy Prosecutor of the Italian Republic*, Lord Judge CJ at paragraphs 130-133), it is a material consideration where, as here, that is not the case.

[45] The cumulative effect of these errors causes us to conclude that the appeal should be allowed. The likely consequences of extradition for Mrs K and the two younger children would be exceptionally severe. Had the sheriff not made the errors we have described, and had he given appropriate weight to each of the relevant factors, we are satisfied that he ought to have decided that the factors favouring extradition do not outweigh the interference with the article 8 rights of Mrs K and the two younger children (sections 27(2) and 27(3)(a)), and that he would have been required to order the appellant's discharge (section 27(3)(b)). The legitimate aim pursued by his extradition does not outweigh the interference with family life (cf *H(H),* Lord Kerr at paragraph 153). The public interest in returning him to Poland is not so great as to justify the severe harm which this would cause to Mrs K and the two younger children (cf *H(H),* Lord Hope at paragraph 91).

[46] We add this. We enquired of the parties as to the position in relation to early release in Poland. They were not able to assist us. However, since the hearing we have become aware of the decision in *Dobrowolski* v *District court in Bydgoszcz, Poland* [2023] EWHC 763 (Admin). In that case the court considered a line of cases concerned with the Polish early release regime. The cases indicated that under Polish law the Polish authorities had a discretion to allow release after one-half or two-thirds of a sentence had been served (paragraph 10). Article 77(1) of the Criminal Code empowered the court to order early conditional release:

> "only when [the prisoner's] attitude, personal characteristics and situation, his way of life prior to the commission of the offence, and while serving the penalty, justify the assumption that the perpetrator will after release respect the legal order, and in particular that he will not re-offend".

The court held that it was familiar that what one extradition court might uncover in relation to matters such as early release could be read over and relied upon in other cases (paragraph 18). There was no suggestion in *Dobrowolski* that the picture identified in the relevant line of Polish authorities and the applicable criteria had become outdated or unreliable. We do not rely on this factor because it was not put in issue, but we observe that, having regard to the appellant's blameless life in the United Kingdom, there may be good reason to think that he would be likely to benefit from early release. If that is so then, in the circumstances of this case, it would be a factor which diminished the public interest in extradition more than it diminished extradition's impact on family life.

Additional evidence

[47] In light of our conclusions on the appeal the motion to adduce additional evidence is rather academic. However, we refuse it. No good reason has been advanced which persuades us Mrs K's affidavit is evidence that was "not available" at the extradition hearing in terms of section 27(4)(a)(*Miklis* v *The Deputy Prosecutor General of Lithuania* [2006] EWHC 1032 (Admin), paragraph 3; *Three Hungarian Judicial Authorities* v *Fenyesi* [2009] EWHC 231 (Admin), paragraphs 32-36). It is clear that it could have been prepared and lodged for the hearing had the appellant exercised reasonable diligence.

Disposal

[48] We refuse leave to appeal for the adjournment ground (paragraph 5 of the Note of Appeal) and for the ground maintaining that charge 4 is not an extraditable offence (part of paragraph 6 of the Note of Appeal). We grant leave to appeal on the other grounds and we allow the appeal. We order the appellant's discharge and quash the order for his extradition.