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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(DIVISIONAL COURT)

IN THE MATTER OF THE EXTRADITION ACT 2003

ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF BELFAST

BETWEEN:

GENERAL PROSECUTORS OFFICE OF LATVIA

Appellant:

-and-

MARIUS ANCEVSKIS

Respondent:

Representation

APPELLANT: Mr Tony McGleenan QC and Mr Stephen Ritchie, of counsel (instructed by the Crown Solicitor's Office)

RESPONDENT: Mr John Larkin QC and Mr Joseph O'Keefe, of counsel (instructed by Tiernans Solicitors)

Before: McCloskey LJ and Humphreys J

McCLOSKEY LJ (delivering the judgment of the court)

Introduction

[1] The parties to this appeal are the General Prosecutor's Office, Latvia (the "*requesting state*") and Marius Ancevskis (the "*requested person*"), appellant and respondent respectively. The requesting state appeals to this court with the

permission of the single judge, McFarland J. The hearing of this appeal was conducted on 4 November 2021. Having reserved judgement, the court gave directions for further written submissions. These have been received and the court acknowledges the quality of what has been provided. The main issue on which the court sought additional argument appears at [22]ff *infra*.

[2] The requested person is a national of the Republic of Latvia, aged 41 years. The European Arrest Warrant ("*EAW*") dated 25 September 2018 seeks the surrender of the requested person to the requesting state for the purpose of serving two sentences of imprisonment totalling two years and four months, imposed upon him in that jurisdiction on 04 December 2003 and 25 October 2016. The two offences of which he was convicted are hooliganism and driving a vehicle without a licence and while under the influence of alcohol. The EAW is, therefore, of the so-called "conviction" variety. It was executed on 18 November 2020 when the requested person was arrested. He remained in custody until granted bail by the County Court for the Division of Belfast on 2 June 2021.

[3] By its decision dated 16 September 2021 the judge of the County Court determined as follows:

> "*After due consideration of the totality of the evidence I have concluded that it would not be compatible with the* (requested person's) *human rights* [to be extradited] *and so in compliance with section 21 of the 2003 Act I order that the* (requested person) *should, therefore, be discharged.*"

That is the decision under appeal to this court. As will become apparent, this decision was based exclusively on Article 8 ECHR.

Chronology

[4] It is convenient at this juncture to rehearse certain key dates and events:

(a) 24 September 2003: date of first offence.

(b) 4 December 2003: sentenced to two years imprisonment, suspended for two years in respect of (a).

(c) 8 November 2005: date of the second offence in the sequence, namely driving a vehicle while under the influence of alcohol.

(d) 30 November 2005: the requested person is alleged to have admitted the second offence. By a judicial restraint measure he was required to obtain the consent of the court if proposing to alter his place of residence.

(e) December 2005 to April 2006: two court listings and two adjournments.

(f) 15 May 2006: the requested person left Latvia without the permission of the court and travelled to Northern Ireland.

(f) 17 May 2006: the requested person failed to attend court in Latvia.

(g) 12 December 2006: First EAW issued, for the purpose of prosecuting the requested person for the second offence (*supra*).

(h) 31st January 2013: Requested Person is arrested in respect of the first EAW and is remanded in custody.

(i) 10th May 2013: Requested Person's is released on bail having served 3 months and 10 days in custody.

(j) 21 June 2013: order of the County Court discharging the requested person in respect of the first EAW on the ground that the requirement of dual criminality was not satisfied.

(k) 25 October 2016: requested person is convicted in his absence in Latvia for the second offence.

(l) 25 September 2018: issuing of the subject EAW.

(m) 18 November 2020: execution of the subject EAW by arrest of the requested person in Crossmaglen.

(n) 2 June 2021: grant of bail.

(o) 16 September 2021: decision of the County Court Judge under appeal.

(p) 23 September 2021: order of this court granting the requesting state permission to appeal.

Statutory Framework

[5] The statutory regime governing extradition hearings and appeals has been rehearsed extensively in recent decisions of this court: see in particular *Dusevicius v Republic of Lithuania* [2021] NIQB 60 at [66] – [71]. In the context of the present appeal there are four particularly significant provisions of the Extradition Act 2003 (the "*2003 Act*"):

> **"S 11 Bars to extradition**
>
> **(In material part)**

"(1) If the judge is required to proceed under this section he must decide whether the person's extradition to the category 1 territory is barred by reason of—

…

(c) the passage of time …

…

S14 Passage of time

"A person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have –

(a) committed the extradition offence (where he is accused of its commission), or

(b) become unlawfully at large (where he is alleged to have been convicted of it)

…

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;

(c) 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.

…

21 Person unlawfully at large: human rights

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

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

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

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

The Decision Under Appeal

[6] At first instance the requested person's resistance to extradition was based on three grounds namely (a) the passage of time under section 14 of the 2003 Act, (b) Article 3 ECHR and (b) Article 8 ECHR. The judge found that the requested person is a fugitive within the meaning of the 2003 Act. The effect of this (he reasoned) was that he could not invoke the section 14 "*passage of time*" bar to extradition. At this juncture the judge set forth his approach to the issue of delay, at [34]:

> "*This does not mean, however that this Court should discount completely the impact that the elapse of 18 years since the commission of the original offence and the date of the current proceedings or the lesser period from when the RS first became*

> *aware of where the RP was living in 2008 to the present day. This may have a bearing on the overall assessment of the competing duties of the RS to honour international agreements and treaties and the RP's* ***Article 8*** *rights. Nevertheless, any such assessment is conditional upon the principle that those* ***Article 8*** *rights should not usurp the* ***S. 14*** *duties. In reaching my determination on the RP's rights to family I shall keep these principles to the forefront of my consideration."*

[7] The judge's second main conclusion was to reject the objection to extradition under Article 3 ECHR based on the asserted conditions of incarceration to which the requested person would be exposed in the event of his extradition. On appeal to this court this ground has faded away.

[8] The judge then gave consideration to the single remaining objection to extradition, namely the family life dimension of Article 8 ECHR. Having cited the decisions in *R (HH) v Westminster City Magistrate's Court* [2012] 3 WLR 90 and *Poland v Celinski* [2015] EWHC 1274 (Admin), the judge formulated the following self-directions:

> "*The public interest in extradition will outweigh the Article 8 rights of a person and/or his family unless the consequences of the interference with family life are exceptionally severe …*
>
> *Thus it is on those consequences that the court must focus attention and apply scrutiny ….*
>
> [In extradition cases] *there is reciprocity of obligation …*
>
> *Furthermore, there is a very strong sense that those accused of crime and, more so those convicted and sentenced, should be called to account and not escape the consequences of their wrongdoing …*
>
> *The best interests of the child are a primary but not necessarily a decisive consideration. …*
>
> *The necessarily high threshold required to tip the balance against implementing international obligations is not easily met and if this were the only argument advanced on the* [requested persons] *behalf, it would not be met in this case either.*"
> (See [48] – [50])

[9] The judge's next self-direction at [51], was that the extradition of the requested person would interfere with the respect for family life rights engaged, such interference would be in accordance with the law and it would pursue a legitimate aim. Accordingly, the crunch issue was that of proportionality.

[10] At [52] the judge set himself the task of preparing a balance sheet of "*points for and against extradition.*" On analysis, in the passages which follow he identifies only two factors favouring extradition. First, his assessment of the offences of which the requested person has been convicted as "*plainly serious.*" Second, his calculation that approximately three quarters of the sentence (roughly 15 months) remain to be served. However, one must overlook the passages reproduced in [8] above.

[11] With regard to the other side of the notional scales and with the aid of a degree of interpretation of the terminology employed by the judge, the following factors favouring the appellant were identified by him in the proportionality balancing exercise: following the discharge order of the court in 2013 a period of seven years elapsed until execution of the subject EAW in November 2020; although represented by a state appointed lawyer in the further criminal proceedings giving rise to his second Latvian conviction on 25 October 2016 there was "*no evidence*" that he was on notice of those proceedings and "*no suggestion*" that the lawyer had been able to contact him; these factors generated a "*legitimate expectation*" that his second prosecution would not be revived; thus the requested person "*… had neither knowledge of, nor was he given an opportunity to participate in, those proceedings or make submissions on his own behalf*"; while he had been convicted of 20 offences in this jurisdiction dating from December 2007 he had not reoffended since 2012; he has a wife and two children aged 15 and 16 years who are fully integrated in the local community; he has maintained a consistent work record since his arrival in Northern Ireland in 2006; and he "*… is clearly committed to his family and is working to support them.*"

[12] The judge then reasoned as follows, at [57] – [58]:

> "*(57) I turn now to the statutory requirements applicable to cases where the person has been convicted, as set out in* ***S. 20 of the Extradition Act 2003****. In so doing I confine myself to the proceedings in 2016 giving rise to the conviction warrant before this court for determination. In so doing I am not satisfied that Mr Anceviskis deliberately absented himself from his trial* ***(S.20 (3))*** *but in view of the contents of the* ***EAW, Part (d) at para 3.4*** *I am satisfied that he is entitled to a retrial or (on appeal) a review amounting to a retrial* ***(S. 20 (5) & (8)).*** *This being so I turn to the key provision, which is a consideration of* ***S. 21.***
>
> *(58) I accept that taken in isolation his personal circumstances per se do not reach the high threshold, as set out in* ***HH*** *but taken in conjunction with the various factors highlighted above the impact of the delay in bringing these proceedings is something that I should not overlook."*

He next formulated the following conclusion, at [59] – [60]:

> *"(59) I am satisfied that in carrying out the balancing exercise pursuant to* ***Celinski*** *this court is entitled to take these additional factors into account. Whereas I have found that the RP in leaving Latvia back in 2005 did so in an effort to escape justice thus rendering himself a fugitive, the position since 2013 has changed and the passage of time since then can and should be taken into account in his favour.*
>
> *(60.) After due consideration of the totality of the evidence I have concluded that it would not be compatible with the RP's human rights and so in compliance with* ***S. 21 of the 2003*** *Act I order that the RP should, therefore be discharged."*

Delay Principles

[13] The statutory provisions must be considered in conjunction with certain principles emanating from decisions of superior courts binding on this court. On behalf of the requesting state Mr McGleenan QC helpfully reminded the court of a series of decisions of the House of Lords and United Kingdom Supreme Court relating to delay, including delayed action on the part of requesting states in the specific context of the "unjust or oppressive" bar to extradition. Delay being the central issue before this court, we shall trace the trajectory of this jurisprudence in a little detail.

[14] In *Kakis v Cyprus* [1978] 1 WLR 779 the "unjust or oppressive" statutory provision in play was that contained in section 8 of the now obsolete Fugitive Offenders Act 1967. Section 8(3) thereof provided:

> *"… the high court … may … order the person committed to be discharged from custody if it appears to the court that …*
>
> *(a) By reason of the passage of time since he is alleged to have committed* [the offence] *… it would, having regard to all the circumstances, be unjust or oppressive to return him."*

Lord Diplock, delivering the unanimous judgment of the House, addressed this provision at 782h – 783d:

> *""Unjust" I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, "oppressive" as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but thereis room for overlapping, and between them they would cover all cases where to return him would not be fair. Delay in the commencement or conduct of extradition proceedings which is brought about by the accused*

> *himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied upon as a ground for holding it to be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of his defence in consequence of the delay due to such causes are of his own choice and making. Save in the most exceptional circumstances it would be neither unjust nor oppressive that he should be required to accept them.*
>
> *As respects delay which is not brought about by the acts of the accused himself, however, the question of where responsibility lies for the delay is not generally relevant. What matters is not so much the cause of such delay as its effect; or, rather, the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promptitude. So where the application for discharge under section 8(3) is based upon the "passage of time" under paragraph (*b *) and not on absence of good faith under paragraph (*c *), the court is not normally concerned with what could be an invidious task of considering whether mere inaction of the requisitioning government or its prosecuting authorities which resulted in delay was blameworthy or otherwise."*

In these passages three propositions are formulated in unambiguous terms. First, the "unjust or oppressive" ground of objection cannot be invoked where it is founded on delay in the commencement or conduct of the extradition proceedings brought about by the requested person fleeing the country, concealing his whereabouts or evading arrest. Second, the "unjust" limb might in principle have traction in a case where the requested person has difficulties in the conduct of his defence in consequence of the delay, but only in "*the most exceptional circumstances.*" Third, delay on the part of the requesting state is not "*generally*" or "*normally*" a material consideration. On careful analysis, the first and third of these propositions are reconcilable *inter se*.

[15] On the issue of "*inaction of the requisitioning government or its prosecuting authorities*" Lord Diplock found himself in a minority, albeit in narrow terms doctrinally. In the words of Lord Edmund-Davies, at 785c/d:

> *"… the answer to the question of where responsibility lies for the delay may well have a direct bearing on the issues of injustice and oppression. Thus the fact that the requesting government is shown to have been inexcusably dilatory in taking steps to bring the fugitive to justice may serve to establish both the injustice and the oppressiveness of making an order for his return …"*

Lord Russell of Killowen was of like mind: see 785g. Lord Keith, adopting the language of "*dilatoriness on the part of the requesting authority*" was of the same view (see 787e) and, on the facts of the case, attributed some weight to this factor (see 788e). Lord Scarman, on analysis, adopted the same approach: see 790d/e.

[16] The propriety of considering the conduct of the requesting state, where relevant, had previously been confirmed by the House in *Narang v India* [1978] AC 247. This was stated with particular clarity by Lord Fraser at 290e:

> "*The passage of time between the beginning of the criminal activities alleged against the applicants in February 1968 and the bringing of charges against them in 1976 is, of course, very considerable. But there is no evidence tending to show that it was due to any lack of diligence by the government of India, and, since the discovery in May 1976 that the applicants were involved, the government has acted promptly. With all respect to Slynn J., with whose opinion Lord Widgery C.J. and Talbot J. agreed, I do not think there is any evidence to support a conjecture that, if there had been greater expedition in the proceedings in India, the confession by Malik which apparently led to the discovery that the applicants were involved in the offences would have been made any sooner.*"

Notably, there was no disapproval of the following passage in the main judgment of the Divisional Court delivered by Slynn J, at 255d/e:

> "*It is clear that section 8(3) talks only of the 'passage of time' and does not say that any delay by the prosecution must be culpable. Nevertheless it seems to me that* ***on the material to which we have been referred*** *I am not satisfied that they did make real efforts, or that it can be said that the lapse of two years can be ignored because* [Naranj] *was putting himself out of the reach of the government.*"
> [Emphasis added.]

Although the total period of delay in that case was 13 years, measured from the beginning of the alleged offending, while the requested person had left India he did not do so until 11 years had elapsed.

[17] In *Gomes v Government of the Republic of Trinidad and Tobago* [2009] 1 WLR 1038 the central issue was whether it would be unjust or oppressive to extradite the appellants having regard to the substantial passage of time since their alleged offences, the periods in question being some five and eight years respectively. Lord Brown, pronouncing the unanimous decision of the Committee, stated at [26]:

> "*If an accused like Goodyer deliberately flees the jurisdiction in which he has been bailed to appear, it simply does not lie in his*

> *mouth to suggest that the requesting state should share responsibility for the ensuing delay in bringing him to justice because of some subsequent supposed fault on their part whether this be, as in this case, losing the file or dilatoriness or as will often be the case, mere inaction through pressure of work and limited resources. We would not regard any of these circumstances as breaking the chain of causation (if this be the relevant concept) with regard to the effects of the accused's own conduct.* ***Only a deliberate decision by the requesting state communicated to the accused not to pursue the case against him, or some other circumstance which would similarly justify a sense of security on his part notwithstanding his own flight from justice, could allow him properly to assert that the effects of further delay were not of his own choice and making.***"
> [emphasis added]

This passage is to be considered in conjunction with the four paragraphs which follow at [27] – [30]. In succinct terms, the stricter approach espoused by Lord Diplock in *Kakis* in the entirety of the passage reproduced above was endorsed by the Committee. This gives rise to the following governing principle (this court's formulation): *where the requested person flees the country, with resulting delay in the commencement or conduct of extradition proceedings, reliance upon such delay, even in cases where it is evident that the conduct, default or dilatoriness on the part of the requesting state has contributed to the overall period of delay, is not permissible in seeking to establish that to extradite the requested person would be unjust or oppressive, save in the most exceptional circumstances.*

Extradition and Article 8 ECHR

[18] While the orientation of *Gomes* is unambiguously clear, enunciating as it does a muscular, though not absolute, principle, it is appropriate to interpose an observation at this juncture. At this stage in the evolution of the relevant House of Lords and Supreme Court jurisprudence, the Human Rights Act 1998 and, in particular, Article 8 ECHR, had not made an appearance. This was soon to change.

[19] The compatibility of an extradition measure with the Article 8 ECHR rights of the individual was laid squarely before the Supreme Court soon afterwards, in *Norris v Government of the USA (No 2)* [2010] UKSC 9. There the requesting state sought the extradition of Mr Norris to the USA to be prosecuted for offences of conspiracy to obstruct justice. Mr Norris was not a well man. He suffered from a range of medical conditions, including prostate cancer. Mrs Norris was afflicted by depression. Their marriage was a long one and there was a heavy degree of mutual dependency. The House, in substance, acknowledged the potent public interest in extradition, while acknowledging that this could potentially be disproportionate in an individual case. However, in order to avoid extradition any interference with human rights would have to be extremely serious, involving "*some quite exceptionally*

compelling feature or combination of features": per Lord Phillips at [55]–[56]. Consistent with the rejection of an absolute rule or principle, the House further recognised that the gravity of the offence under consideration could be relevant – for example if it belonged towards the lower end of the notional scale: see [63]. Lord Hope expressed himself in similar terms at [89] – [93], as did Lord Mance at [108] – [109].

[20] The decision of the Supreme Court in *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25 followed soon thereafter. As will become apparent, this is a decision of particular importance in the exercise of considering a later decision of the same court: see [22]ff *infra*. This decision is a striking illustration of the discharge of the statutory judicial oath of office, giving rise to an outcome which many would regard as austere. Unlike *Norris,* three young children (aged 3, 8 and 11) were at the centre of the factual matrix (in two of the appeals). In the context of the instant appeal it is unnecessary to trace the factual frameworks in detail, it sufficing to observe that in the two appeals which were dismissed, which involved these three children, the gravity of the offending - serious cross border crime involving trading in narcotic drugs - loomed large while in the single successful appeal, involving a mother of five children, the two salient features were low level offending and conspicuous delay on the part of the prosecuting authorities. Lady Hale formulated the following governing principle, with others, at para 8(7):

> "*… it is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe.*"

None of the other members of the seven judge panel demurred.

[21] The Supreme Court treatment of the issue of delay in *HH* is a matter of particular interest in the present appeal. This issue receives the fullest attention in the judgment of Lady Hale, who stated at para 8(6):

> "*The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life.*"

And at [46]:

> "*While the district judge did find that the appellant fled Poland in order to avoid prosecution, and thus was not entitled to rely upon passage of time as a bar for the purpose of section 14 of the 2003 Act,* ***the overall length of the delay is relevant to the Article 8 question.*** *Whatever the reasons, it does not suggest any urgency about bringing the appellant to justice, which is also some indication of the importance attached to her offending.*"
> [Emphasis added.]

At [47] Lady Hale highlighted the "*new, useful and blameless life*" which this appellant and her family had developed during the period under scrutiny. As the family and family life evolved, neither parent had "*… any reason to believe that the Polish authorities were seeking the mother's return.*" Balancing these factors with the low level of the offending under consideration, Lady Hale concluded that the outcome of the proportionality balancing exercise was in favour of the family. See para [48]:

> "*In all the circumstances, the public interest in returning the appellant to face trial and sentence upon the charges in these two warrants is not such as to justify the inevitable severe harm to the interests of the two youngest children in doing so.*"

By the unanimous decision of the court the appeal in *F-K v Polish Judicial Authority* was allowed.

[22] In her consideration of the other two appeals, *PH* and *HH* (mother and father), Lady Hale stated at para [79]:

> "*The circumstances in this case can properly be described as exceptional. The effect upon the children, but Z in particular, of extraditing both their parents will be* ***exceptionally severe****. The effect of extraditing their mother alone would not be so severe and is clearly outweighed by the public interest in returning her to Italy. But the same cannot be said of the effect of extraditing their father. I have, not without considerable hesitation, reached the conclusion that it is currently so severe that the proportionality exercise requires the court to consider whether it can be mitigated.*"
> [emphasis added]

While the outcome espoused by Lady Hale was to dismiss the mother's appeal and allow the father's, the majority, notwithstanding the resulting "*heart rending … plight*" of the two children (per Lord Brown, para 96), their "*desperate plight*" (per Lord Judge, para 135), and the "*devastating effect*" on them (per Lord Wilson, para 150), favoured dismissing both parents' appeals. This was the "*firm if bleak*" outcome (Lord Wilson, para 172).

[23] The *excursus* through the leading cases of the highest United Kingdom court undertaken above provides the backdrop to this court's consideration of yet another Supreme Court decision, of more recent vintage, *Konecny v Czech Republic* [2019] UKSC 8. It is appropriate to preface our examination of *Konecny* by considering first what might be considered to be its main precursor (not overlooking *HH*), namely the decision of the English Divisional Court in *Wisniewski v Poland* [2016] EWHC 386 (Admin). There all three appeals raised issues relating to the availability of the passage of time/oppression bar to extradition under section 14 of the 2003 Act. Each appellant had departed the requesting state in circumstances of subjection to a

suspended sentence of imprisonment which, post-departure, was activated. The following passage in the judgment of Lloyd-Jones LJ, at [50], is of evident importance:

> *"It seems to me that two issues have become confused here. One is whether a person is unlawfully at large within s 14(b) of the 2003 Act. The other is whether a person is to be considered a fugitive in the particular sense in which that term is employed in* Gomes and Goodyer *to refer to a status which precludes reliance on passage of time as founding a statutory bar to extradition when it results from the fugitive's own conduct. Both issues have an important but distinct bearing on whether the passage of time may be invoked by a requested person as a bar to extradition."*

[24] As noted at [52], the definition of "*unlawfully at large*" in section 68A does not apply for the purposes of either section 14 or section 63. At [52], his Lordship opined that a person who is not subject to an immediate sentence of imprisonment is not "*unlawfully at large*" within section 14(b) adding at [54]:

> "*Whether a person is unlawfully at large within* [section 14(b)] *depends on whether he is at large in contravention of a lawful sentence under the applicable legal system. This is an objective state of affairs to which his knowledge and understanding are irrelevant.*"

Activation of a suspended sentence would be necessary in order to render unlawfully at large a subject who had left the jurisdiction. Finally, and of most interest in the context of the present appeal, Lloyd-Jones LJ highlighted the operation of Article 8 ECHR in the hypothetical case of serious delay on the part of the requesting state during a period when the requested person was not unlawfully at large, at [56]:

> "*… in such circumstances Article 8 ECHR would provide a safety net which would permit the effect of passage of time to be brought into account.*"

Notably, for this proposition His Lordship founded on the approach of Lady Hale in *HH* at [6].

[25] It is convenient to interpose here the decision of the English Divisional Court in *Polish Judicial Authorities v Celinski* [2015] EWHC 1274 (Admin), which features with regularity in extradition cases in this jurisdiction. It is to be observed that this was a decision of a three judge panel specifically designed to provide general guidance in the wake of the Supreme Court decisions in *Norris* and *HH*. This decision contains a valuable table of the principles to be applied by first instance

judges in every extradition case. As summarised by Lloyd-Jones LJ at [47] of *Wisniewski* [2016] EWHC [Admin] 386*:*

> "*More recently, in* Polish Judicial Authorities v. Celinski [2015] EWHC 1274 (Admin) *the Divisional Court (Lord Thomas of Cwmgiedd CJ, Ryder L.J. and Ouseley J.) emphasized that judges in extradition hearings, when applying the principles set out in* Norris *and* HH *should bear in mind a number of matters which may be summarized as follows.*
>
> *(1) HH concerned three cases each of which involved the interests of children.*
>
> *(2) The public interest in ensuring that extradition arrangements are honoured is very high. So too is the public interest in discouraging persons seeing the United Kingdom as a state willing to accept fugitives from justice.*
>
> *(3) The decisions of the judicial authority of a Member State making a request should be accorded a proper degree of mutual confidence and respect.*
>
> *(4) Decisions on whether to prosecute an offender in England and Wales are on constitutional principles ordinarily matters for the independent decision of the prosecutor save in circumstances set out in authorities such as* A (RJ) *[2012] 2 Cr. App. R. 8.*
>
> *(5) Factors that mitigate the gravity of the offence or culpability will ordinarily be matters that the court in the requesting state will take into account.*
>
> *(6) In relation to conviction appeals:*
>
> *(a) The judge at the extradition hearing will seldom have the detailed knowledge of the proceedings or of the background or previous offending history of the offender which the sentencing judge has before him.*
>
> *(b) Each Member State is entitled to set its own sentencing regime and levels of sentence. Provided it is in accordance with the Convention, it is not for a judge in the United Kingdom to second guess that policy.*
>
> *(c) It will therefore rarely be appropriate for the court in the United Kingdom to consider whether the sentence was very significantly different from what a UK court would have imposed, let alone to approach extradition issues by*

> *substituting its own view of what the appropriate sentence should have been. (at [7]-[13]).”*

The main contribution of *Celinski* to the now extensive jurisprudence in the sphere of extradition is its formulation of clearly expressed guidance, in the form of a code, to first instance courts. While there will be cases where the code does not illuminate the path to the correct outcome, because it is not designed to be exhaustive, it is difficult to conceive of any case in which a first instance judge should not pay careful attention to it.

The Supreme Court Decision in Konecny

[26] The immediately preceding paragraphs may be considered a preamble to this court's examination of the decision of the Supreme Court in ***Konecny***. It would appear that this decision has received limited attention in this jurisdiction, which might explain why it has not featured either in the decision under appeal in the present case or in other Article 8 ECHR appeals to this court. We shall, therefore, examine it at a little length.

[27] Before embarking upon more detailed analysis we would offer the following summary. The outcome was that the passage of time – on any showing very extensive – did not avail the requested person. There had been a conviction of the requested person in his absence from the territory of the requesting state in proceedings of which he had had no notice, as a result whereof he would become entitled to a retrial in the event of his surrender. His departure from the requesting state had been entirely lawful, his prosecution and conviction materialised approximately one year later, he was sentenced to eight years imprisonment for fraud offences some four years later and his EAW materialised some five years after his departure. The Supreme Court upheld the decision of the district judge that this was properly characterised a so-called “conviction” EAW. Full account of the passage of time had been taken and the appeal of the requested person would be dismissed.

[28] Lord Lloyd-Jones delivered the single, unanimous judgment of the court. It is necessary at the outset to consider the issue of law upon which the court was adjudicating. This was contained in the High Court certificate of the following point of law of general public importance:

> “*In circumstances where an individual has been convicted, but that conviction is not final because he has an unequivocal right to a retrial after surrender, is he 'accused' pursuant to section 14(a) of the 2003 Act, or 'unlawfully at large' pursuant to section 14(b) for the purposes of considering the 'passage of time' bar to surrender?*”

The terms of the certificate are reflected in [18] of the judgment:

> "*At the heart of the present appeal lies the issue of the characterisation of the appellant as an accused person or a convicted person.*"

At [28] the court concluded that EU law did not require that the appellant be treated as an accused (rather than convicted) person, thereby rejecting the first of the two central contentions advanced on his behalf. At [34] and [37] the court rejected the appellant's second central contention, namely that he should be treated as an accused (not convicted) person by virtue of his right to be retried under the law of the requesting state. At [39 –[48] the court considered a series of domestic decisions invoked on behalf of the appellant, concluding at [49] that none of these supported his case. At [50] Lord Lloyd-Jones formulated six governing principles to be applied in cases involving the accusation warrant/conviction warrant characterisation.

[29] At [51] – [57] Lord Lloyd-Jones addressed the issue of "Disadvantage to the Appellant?" He highlighted the distinction between accusation warrants and conviction warrants in the exercise of measuring the passage of time for the purpose of assessing this discrete bar to extradition. Having done so he stated at [53]:

> "*To my mind, there is more substance in this complaint. This bar to extradition operates very differently depending on whether the requested person is categorised as an accused person under section 14(a) (in which case he may rely on the entire passage of time since the date of the offence to found injustice or oppression) or as a person unlawfully at large after conviction under section 14(b) (in which case he may rely only on the passage of time since the date of the conviction). Mr Summers submits that in the present case this precluded any consideration of injustice in relation to the retrial and coloured the court's assessment of oppression.*"

Continuing at [54]:

> "*If, as I consider to be the case, a person with a right to a retrial is correctly classified as a convicted person for the purposes of the 2003 Act, I accept that this could work to his disadvantage in the operation of section 14 because the passage of time prior to his conviction is excluded from consideration. It seems to me that this is a deficiency in the drafting of the statute which requires consideration by the legislature at an early opportunity.*"

[30] At [57] Lord Lloyd-Jones made the following conclusion:

> "*It seems to me that until such time as section 14 can be amended by Parliament, article 8 provides an appropriate and effective alternative means of addressing passage of time*

resulting in injustice or oppression in cases where the defendant has been convicted in absentia. Passage of time is clearly capable of being a relevant consideration in weighing the article 8 balance in extradition cases. (See H (H) v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor intervening) [2013] 1 AC 338, paras 6 and 8, per Baroness Hale JSC.) It is capable of having an important bearing on the weight to be given to the public interest in extradition. In the article 8 balancing exercise, the relevant period of time will not be subject to the restrictions which appear in section 14. I note that in Lysiak v District Court Torun, Poland [2015] EWHC 3098 (Admin), a conviction case, the Divisional Court (Burnett LJ and Hickinbottom J) attached great weight to the nine years the criminal proceedings in Poland took to come to trial and the further 2½ years it took for the conviction to be confirmed in appeal proceedings, when concluding that it would be disproportionate under article 8 to return the defendant to Poland. Furthermore, in cases where it is maintained that passage of time would result in injustice at the retrial to which the defendant is entitled, this consideration could also be brought into account under article 8. The risk of prejudice at a retrial would be highly relevant in the balancing exercise which the extradition court would be required to undertake. Moreover, the threshold test to be satisfied would not be one of injustice or oppression but the lower one of disproportionality. This feature also makes reliance on article 8 a more effective solution than abuse of process where the burden on an appellant would be a much heavier one."

[31] While superficially para [57] of the judgment of Lord Lloyd-Jones has the appearance of an *obiter* passage, full analysis of the judgment as a whole quickly dispels this impression. As the preceding paragraphs hereof indicate, this part of the judgment follows three specific conclusions rejecting the two central pillars of the appellant's case and dismissing a third argument based on case law. The "Disadvantage to the Appellant?" chapter of the judgment follows these three conclusions and the formulation of six governing principles to be applied in determining the accusation warrant/conviction warrant contest. Can [51]–[57] be properly considered part of the essential reasoning of the court, thus belonging to the *ratio decidendi* of its decision?

[32] Had the judgment ended at [57] we would have been inclined to supply a negative answer. However, we have concluded that this would be incorrect by virtue of what follows at [58]–[71] under the title "Application to the Present Case" and [72]. In these passages the court formulates its reasons for upholding the first instance decision of the district judge. In particular, having noted that the judge had confined his consideration to the passage of time to the period post-dating the conviction he nonetheless took into account the broader period dating from the

commission of the offences when conducting the balancing exercise under Article 8 ECHR: see [67]. On appeal the High Court judge had adopted the same approach: see [68] – [69]. The Supreme Court concurred with the approach of both courts: see [70]. Finally, para [72] of the judgment must not be overlooked:

> "***For these reasons*** *I would dismiss the appeal.*"
> [emphasis supplied]

We consider that properly construed "*these reasons*" embrace the whole of the preceding text beginning at [16] and, therefore, encompass the reasoning and conclusions of the court relating to sections 14 and 21(1) of the 2003 Act.

[33] Lord Lloyd-Jones took as his cue the differential treatment in the two cohorts of requested persons. Those belonging to the accused person's cohort can, under section 14(1), pray in aid delay measured from the date of the alleged offending, whereas those belonging to the cohort of convicted persons can invoke delay but measured only from the later date of the conviction. Inevitably, any judicial decision, at whatever level of the several tiers of the legal system, which effectively nullifies a provision of primary legislation is something of no little moment: the more so where, in a Human Rights Act context, it involves no declaration of incompatibility under section 4. The Supreme Court clearly considered that the foregoing distinction wrought unfairness upon members of the convicted cohort. This view might not necessarily be universally shared. Furthermore, it is not clear that Lord Lloyd Jones' scepticism about whether the *prima facie* unequal treatment of the two groups can truly have been the legislature's intention is the only tenable assessment, given the clarity of the statutory language. Thirdly, recourse to the Framework Decision does not provide any obvious support for his approach. Fourthly, there was no invocation of the obligatory interpretive tool of section 3 of the Human Rights Act 1998.

[34] However we consider that none of the foregoing considerations is of any moment given that *Konecny,* by virtue of the doctrine of precedent, is binding on this court. Furthermore, while there is no reference in the judgment to section 3 of the Human Rights Act, this is a feature also of *Norris*, *HH* and *Wisniewski*. While this might be explained by the analysis that such reference would have been otiose having regard to the terms of section 21(1) and given that the 2003 Act represents the *lex specialis*, this is a point of academic interest only given the operation of the doctrine of precedent and, was the subject of limited argument.

[35] On behalf of the requesting state, in their further written submissions Mr McGleenan QC and Mr Ritchie have highlighted that none of the following decisions was considered in *Konecny*: *Kortas v Poland* [2017] EWHC 1356 (Admin), *T v Poland* [2017] EWHC 1978 (Admin) and *Germany v Singh* [2019] EWHC 62 (Admin). Each of these cases (it is said) concerned fugitives who were precluded from relying upon section 14 by reason of the decisions in *Kakis* and *Gomes*. In similar vein the more recent decisions in *Dumitrache v Italy* [2021] EWHC 958 and

Rybak v District Court in Lublin, Poland [2021] 1 WLR 3993 were cited. However neither what any of these cases, none of them binding on this court, decided nor their underlying reasoning is to the point. The brusque riposte to this submission is that it invites this court to engage in the heretical exercise of reviewing the binding decision of the Supreme Court in *Konecny* with a view to determining whether it was correctly decided. This court declines the invitation.

[36] At this juncture it is appropriate to juxtapose this court's analysis of *Konecny* with the recent decision of a different constitution of this court in *AB v Republic of Ireland* [2021] NI 96. In the latter decision there is a fleeting reference to, but no consideration of, *Konecny*. Delivering the unanimous decision of the court, McBride J rehearsed the governing principles in tabular form at [50]:

> *"We consider that the following principles regarding delay can be gleaned from the jurisprudence:*
>
> *(a) Delay in seeking extradition may reduce the weight to be attached to the public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentence; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no 'safe havens' to which either can flee in the belief that they will not be sent back.*
>
> *(b) The public interest always carries great weight although the weight can vary according to the nature and seriousness of the crime or crimes involved.*
>
> *(c) The passage of time may impact on the nature and extent of the private and family life developed by the requested person in this country. The burden remains on the requested person to demonstrate by evidence the actual impact the delay has had on his family and private life.*
>
> *(d) Culpable delay on the part of the Requesting State is not determinative of either s 14 or art 8. To be discharged under s 14 there must be evidence that the passage of time means that extradition is oppressive or unfair. In the art 8 proportionality balancing exercise culpable delay is but one of the factors to be taken into account, along with all the other relevant factors which include;- the nature and seriousness of the offence(s), the public interest in extradition and the effect of the delay on the requested person and his family's private and family life.*

> *(e)* *Culpable delay alone cannot be determinative of the art 8 balance otherwise art 8 could be used to dilute or circumvent s 14.*
>
> *(f)* *The public interest in extradition will outweigh the art 8 rights of the family unless the consequences of the interference will be 'exceptionally severe'.*
>
> *(g)* *In borderline cases, where the requested person is not a fugitive from justice, culpable delay on the part of the requesting state can tip the balance against extradition.*
>
> *(h)* *The requested court should not engage in what could be an invidious task of seeking to determine whether inaction on the part of the requesting state which resulted in delays was blameworthy or otherwise. It is only in very clear cut cases where there is obvious culpable delay that the court can use this in what is an otherwise borderline case to tip the balance against extradition."*

[37] While this court accepts the argument of Mr Larkin QC and Mr O'Keefe that the *AB* table requires an adjustment, we reject the contention that this should entail the deletion of subparagraph (e) as we are satisfied that this is compatible with *Konecny*. We consider that the import of the decision in *Konecny* will be properly addressed by the addition of a new subparagraph (i) in the following terms:

> *"(i)* *The distinction which section 14 of the Extradition Act 2003 purports to make between a person accused of an extradition offence and a person alleged to have been convicted of such an offence who has become unlawfully at large does not nullify the operation of Article 8 ECHR which (per* ***Konecny*** *at [57]) '… provides an appropriate and effective means of addressing passage of time resulting in injustice or oppression in cases where the Defendant has been convicted in absentia* [… as this …] *is clearly capable of being a relevant consideration in weighing the Article 8 balance in extradition cases.'"*

The Requested Person's Extradition Status

[38] A stand out feature of the present case is that the EAW seeking the surrender of the requested person to Latvia is based on two separate offences which have certain different features. As regards the first offence, which was admitted, the requested person fled the requesting state before he had been sentenced and, in consequence, is considered to be a fugitive from justice in the sphere of extradition law. In contrast, the further Latvian proceedings against him culminating in his

conviction in respect of the second offence materialised some ten years after he had departed Latvia. They had no discrete element of flight from justice. However, this court considers the correct analysis to be that there is an indelible nexus between the two. While the import of the EAW appears to be that, under Latvian law, the requested person is considered to be the subject of two convictions or, alternatively, an initial conviction generating a suspended sentence followed by a later judicial decision activating the latter, the first is the *causa sine qua non* of the second. The requested person fled the Latvian justice system in 2006 and his status *qua* fugitive has endured ever since. Thus, in juridical terms the two offences are indistinguishable.

[39] By reason of the decision in *Konecny* the effect of the foregoing analysis is not to expose the requested person to what would be for him the prejudicial impact of the section 14 dichotomy. Rather, its effect is to expose the requested person to the full rigours of the *Gomes* principle (see [17] *supra*) subject to such refinement of this principle as was undertaken via the Article 8 ECHR prism in the subsequent decisions of the Supreme Court in *Norris* and *HH*. In conducting the exercise upon which this court must now embark, the following starting points are identifiable. First, the only limb of the section 14 objection in play is that of *oppression*. Second, in the Article 8 ECHR balancing exercise the whole of the period between 2003 and 2020 falls to be considered. Third, the requested person's fugitive status must be weighed in the Article 8 balancing exercise. The basic building blocks thus identified, it falls to this court to examine how the first instance court applied the *HH* test of whether the interference with the right to respect for family life enjoyed by the requested person and his spouse and children gives rise to "*exceptionally severe*" consequences.

Extradition Cases and Art 8 ECHR: The Role of the Appellate Court

[40] The approach to be applied in the determination of extradition appeals on Article 8 ECHR issues has been determined in two previous decisions of this court. Before considering these it is necessary to pay respect to a decision of the Supreme Court binding on this court. In *Re B (A child)* [2013] UKSC 33 Lord Neuberger addressed *in extenso* the various ways in which an appellate court might review a trial judge's assessment of proportionality in the Article 8 balancing exercise. In broad terms, the choices were either full merits appeal or less intrusive review. The majority opted for the latter. Lord Neuberger provided the following guidance at [93] – [94]:

> *"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).*
>
> *[94]. 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."*

[41] The central theme emerging with most clarity from *In Re B* is the majority view of the Supreme Court that the exercise for the appellate court is to approach the first instance court's determination of the proportionality of an interference with one of the protected Convention rights as an appellate exercise rather than a *de novo* determination, a full merits appeal: see especially [35]–[36], [83]–[85], [93]–[94] and [205]. In *Michailovas v Lithuania* [2021] NIQB 60, a recent decision of a different constitution of this court, para [127] considers Lord Neuberger's notional spectrum:

> *"The third of these four references is to the judgment of Lord Neuberger PSC which crafted a spectrum of seven points on which the trial judge's determination of proportionality might lie. The sixth and seventh of these points concern cases where the appellate court considers the first instance determination either wrong or insupportable. The fourth and fifth points on the spectrum concern cases belonging to an intermediate grey area, in which, where appropriate, the reception of oral evidence at first instance will be a telling consideration. The first three points on Lord Neuberger's notional spectrum relate to cases where the appellate court considers the trial judge's determination of proportionality to be the only possible view or a view which the appellate court considers right or a view on which the appellate court, though entertaining some doubts, on balance considers to be the right one."*

[42] This decision was considered soon afterwards by the English Divisional Court in *Atraskevic v Prosecutor General's Office Lithuania* [2015] EWHC 131 (Admin), this decision espoused a threshold for appellate court intervention consisting of four disjunctive species of legal error by the first instance court, namely misapplying a relevant legal principle; making a relevant finding of fact which no reasonable court could have made on the evidence; failing to take into account a relevant fact or factor or permitting the intrusion of something immaterial; or, finally, making an irrational or perverse, overarching conclusion. The decision in *Velvin v France* [2015] EWHC 149 (Admin) promulgated on the same date, adopted an identical approach. Notably the Divisional Court founded on the judgment of Lord Wilson JSC in *Re B* at [36], without any consideration of that of Lord Neuberger (*supra*): see *Atraskevic* at [34].

[43] It is of note that the decisions which we have considered immediately above also featured in *Celinski*, where one can identify a favourable emphasis on Lord Neuberger's formulation, notwithstanding the succeeding concise statement of Lord Thomas CJ at [24]:

> "*The single question therefore for the appellate court is whether or not the district judge made the wrong decision.*"

This sentence cannot be considered in isolation, in view of all that precedes it and what immediately follows:

> "*It is only if the court concludes that the decision was wrong, applying what Lord Neuberger PSC said, as set out above, that the appeal can be allowed.*"

Consistent with all of the foregoing, Lord Thomas added that demonstrated errors or omissions in the decision of the first instance court do not *per se* impel to the conclusion that its decision on proportionality was wrong. Rather (we would add) any aberration of this kind must be qualitatively assessed and then weighed in the context of the decision as a whole.

[44] What can be confidently stated is that cases in which an appellate court may reverse the first instance court's determination of proportionality in an Article 8(2) ECHR balancing exercise include those where the court below misunderstood or misapplied the law, failed to have regard to some material fact or factor, took into account something immaterial or reached an irrational conclusion. While these are the touchstones formulated by Aikens LJ in *Atraskevic*, they fall to be considered in light of Lord Neuberger's essay in the Supreme Court which envisages a somewhat wider role for the appellate court. To summarise, it may be said that the role of the appellate court in such cases lies somewhere between the two extremes of mere review and merits appeal, with the inclination leaning more towards the former than the latter. This, of course, is to espouse a more limited role for the appellate court than that favoured by the House of Lords in *Kakis:* but the key distinction is that the advent of the Human Rights Act has provided the stimulus for a more nuanced

approach to the determination of Article 8(2) ECHR proportionality balancing exercises.

[45] We turn briefly to the Northern Irish jurisprudence on this topic. In the first of two decisions of this court in which this issue has been considered, *Republic of Poland v RP* [2014] NICA 59, the following approach was adopted, at [19]:

> *"An issue arose as to the approach of the court on appeal. This is an appeal under section 28 of the 2003 Act in which the appellant argued that the judge ought to have decided the relevant question differently and if she had decided the question in the way in which she ought to have done she would not have been required to order the person's discharge. An appeal under section 28 may be brought on questions of law and fact. Where the appropriate judge has made findings of fact the appeal court should hesitate before reaching a contrary conclusion, recognising the wide experience of those judges dealing with extradition cases (see Government of the United States v Tollman [2008] 3 All ER 350 at para 95). The striking of the balance between the Article 8 rights of the requested person and the public interest in extradition requires the court to form an overall judgement upon the facts of the particular case. The judgment of the lower court is entitled to respect but if after due consideration the appeal court forms a contrary view it is its duty to express that opinion as otherwise there would be little purpose in having an appeal (see Union of India v Narung [1978] AC 247 at 279)."*

[46] In the second of the relevant decisions of this court, *Poland v Tumkiewicz* [2015] NIQB 107, this court considered that the approach in *Atraskevic* was too narrow and not in harmony with *Re B*. See [22] especially:

> *"In substance the High Court in Atraskevic took the view that the assessment of proportionality should only be interfered with if the lower court had erred in law or reached a Wednesbury unreasonable decision. We do not accept that such an approach can be derived from Re B (A Child). The seven categories identified by Lord Neuberger at paragraph 93 of his opinion demonstrate an intensity of review in relation to the proportionality issue that is quite inconsistent with Wednesbury unreasonableness."*

It will bear little fruit to subject the above passages from *RP* and *Tumkiewicz* to minute textual analysis. It suffices, rather, to emphasise that the doctrine of precedent requires this court to follow the majority view in *Re B* in every appeal of the present *genre*.

[47] We agree with the submission of Mr Larkin QC and Mr O'Keefe that the decision of the Supreme Court in *In Re Reilly* [2014] AC 1115 is not in point. Fundamentally the conjoined appeals in that case were concerned with issues of procedural fairness, the right to an oral hearing and Article 5(4) ECHR. It is unsurprising that, on the face of the report, *Re B* does not feature among the voluminous number of decided cases considered.

[48] We remind ourselves of the potent public interests engaged, summarised by this court in *Michailovas* at [62]:

> *"The Framework Decision has its origins in one of the main objectives enshrined in the TEU namely the creation of an area of freedom, security and justice. Within this general objective there is a series of constituent principles which have featured with regularity in the jurisprudence of the CJEU and the leading United Kingdom cases since the Framework Decision replaced the European Convention on Extradition (1957). The key principles which have been identified are those of a high level of mutual trust and confidence between EU Member States and mutual recognition. Recital (6) of the Preamble to the Framework Decision describes the latter principle as the "cornerstone" of judicial co-operation in criminal matters. Article 1(2) gives effect to this by providing that Member States are in principle obliged to execute an EAW: see, amongst other cases, Melloni v Ministerio Fiscal (Case C-399/11) and Minister for Justice and Equality v Lanigan (Case C-237/15) at [36]."*

The potency of these inter-related public interests has been repeatedly emphasised.

The Governing Legal Rules and Principles Applied

[49] We return to the first instance decision at this juncture. Examination yields the following analysis of the judge's reasoning:

(i) The public interest in extradition will outweigh Article 8 rights unless the consequences of the interference with family life are exceptionally severe: see [48].

(ii) At [50] the judge, in substance, acknowledged the potency of the public interest favouring extradition and the correspondingly "*necessarily high threshold*" to be overcome in order to displace this.

(iii) While the extradition of the requested person would interfere with this right to respect for family life (and, this court would add, the corresponding rights of the other family members), such interference is in accordance with the law

and in pursuit of a legitimate aim, with the result that the crucial question was that of proportionality: see [51].

(iv The offences of which the requested person had been convicted were "*plainly serious*": see [53].

(v) At [56] the judge rehearsed the submissions of counsel for the requested person belonging to the other side of the notional balance sheet.

(vi) The judge found that but for the dual criminality factor the requested person would "*almost certainly*" have been extradited pursuant to the 2013 EAW: at [56](c).

(vii) With regard to the conviction of the requested person in Latvia in October 2016:

> "*The court notes that he was represented at his trial by a state appointed lawyer but there is no suggestion that she was briefed with his contact details, still less that any effort was made to contact him. In these circumstances it is arguable that he had a legitimate expectation that these proceedings had been concluded in 2013 and would not thereafter be revived. Therefore, Mr Anceviskis had neither knowledge of nor was he given an opportunity to participate in those proceedings or make submissions on his own behalf. This state of ignorance remained until his arrest on foot of the current EAW in November 2020.*"

[50] In his formulation of the *HH* principle and his related consideration of the potent public interest favouring extradition to the extent that Article 8 ECHR rights must be subordinated in every case bar those overcoming the "*exceptionally severe consequences*" threshold, the judge self-directed himself correctly. The basic question which this appeal raises is the manner in which the judge proceeded to apply the governing principles binding upon him. There are several particular features of what follows inviting comment. First, the judge made an assessment of events in the Latvian court in 2016 which had no evidential foundation; see [56](e). Second, he proceeded to make a conclusion favourable to the requested person based on such assessment: see [56](f). Third, the same observation applies to his "*legitimate expectation*" conclusion which, further, was expressed only in terms of something merely "*arguable*": see [56](e).

[51] Next (fourth) the judge identified the requested person's non-offending in this jurisdiction since 2012 as a factor to be reckoned in his favour, without relating this to any of the legal tests to be applied. This court considers that this does not sound on athe *HH* test of "exceptionally severe consequences." Furthermore, it is not easy to conceive of any circumstances in which, in the Article 8(2) proportionality

balancing exercise, a requested person should be given credit for obeying the laws of the land.

[52] The judge then (fifthly) described the family situation of the requested person: he is married, there are two children of the marriage aged 15 and 16 years respectively and all are "*fully integrated in the local community.*" Furthermore, the requested person "*… has maintained a consistent work record since coming to Northern Ireland over the past 15 years and he is clearly committed to his family and is working to support them.*" In our judgement, none of these factors, considered either individually or in combination, comes close to overcoming the *HH* threshold. Furthermore, the judge's observations about the requested person's work record are confounded by the objective evidence of his criminal record. The requested person, as a result of committing a total of 16 road traffic offences and one offence of perjury during the period December 2007 to March 2012, was sentenced by the imposition of *inter alia* immediate custodial disposals ranging from one month's imprisonment to six months' imprisonment. By definition he could not have been in gainful employment during any of these periods of incarceration.

[53] Sixthly, the judge stated at [58]:

> "*I accept that taken in isolation his personal circumstances per se do not reach the high threshold as set out in* ***HH*** *but taken in conjunction with the various factors highlighted above the impact of the delay in bringing these proceedings is something that I should not overlook.*"

Followed by at [59]:

> "*I am satisfied that in carrying out the balancing exercise pursuant to* ***Celinski*** *this court is entitled to take these additional factors into account. Whereas I have found that the RP in leaving Latvia back in 2005 did so in an effort to escape justice thus rendering himself a fugitive, the position since 2013 has changed and the passage of time* ***since then*** *can and should be taken into account in his favour.*"
> [Emphasis added.]

And finally at [60]:

> "*After due consideration of the totality of the evidence I have concluded that it would not be compatible with the RP's human rights and so in compliance with section 21 of the 2003 Act I order that the RP should therefore be discharged.*"

[54] Next, in repeating that the high *HH* threshold was <u>not</u> overcome, the judge can only have meant that the projected interference with family life affecting all family members concerned would not entail consequences of an exceptionally severe

nature: seethe extract from [58] above. In the "*but*" clause which follows at once – in [58] – and in the ensuing "*passage of time*" reference in [59] the judge was, on any reasonable interpretation, plainly concluding that the passage of time since 2013 was determinative of the Article 8(2) proportionality balancing exercise in a manner favourable to the requested person. This we consider irreconcilable with the *HH* principle. The application of this principle in favour of the requested person would have required the judge to spell out the combination of facts and factors giving rise to "*exceptionally severe consequences*" flowing from his proposed extradition. This exercise was not undertaken expressly and, while this *per se* is not fatal, there is nothing in the judgment to warrant by reasonable implication that the judge concluded that this is a case of exceptionally severe impact. Notwithstanding, if and insofar as the judge did so conclude we consider this legally unsustainable: *infra*.

[55] We have outlined above those aspects of the family life of the requested person and the other family members, together with the extent of their integration in the local community, noted by the judge. We accept that, albeit for a finite period, the surrender of the requested person to the requesting state will inevitably have an adverse impact on the family life of all concerned and, to a lesser extent, his private life. However, collectively, all of the ingredients in this discrete equation, can only be described as unremarkable, the kind of consequences which will typically follow in the extradition of every married man with two teenage children. On the most generous view they fall manifestly short of attaining the elevated *HH* threshold.

[56] Having identified above the standard for intervention by this appellate court, what is the effect of this court's analysis of the first instance decision in [49] - [55] above? While the judge's self-directions were broadly correct, his decision fails to give effect to them. Having regard to the decision in *Konecny* the judge was entitled, in the Article 8 ECHR proportionality balancing exercise, to have regard to the entirety of the period of delay in play, ie from 2006 to 2020, when the EAW was executed. In passing, while in one passage the judge measured the period of reckonable delay from 2013, in another he recognized that the period in fact began in 2006. This court is acting on the longer of these two periods, to the advantage of the requested person. The error of law which the judge committed was to fail to view the period of delay, in tandem with the other matters highlighted by him, through the prism of the *HH* test of "*exceptionally severe consequences*" for the requested person and his family members. On the facts of this case, the factor of delay had the potential to contribute to this exercise. However, on its own it could not conceivably have satisfied this test.

[57] When one searches for other material facts and factors in the judge's decision nothing of substance emerges. In summary: while the judge notes that the 2013 – 2020 delay was unexplained, he made no finding of culpable inertia on the part of the requesting state; his comments relating to the 2016 criminal proceedings in Latvia are mere conjecture and in any event do not sound on any Article 8 issue; his consequential assessment that the requested person had a legitimate expectation that there would be no further extradition action against him is therefore untenable – and

not an Article 8 factor in any event; his gloss relating to the requested person's significant criminal record in this jurisdiction did not engage with the frequency and gravity of the offending and, further, had no bearing on the Article 8 exercise he was performing; the judge failed to acknowledge that the offence involved in the Latvian 2016 criminal proceedings (drink driving) was, in tandem with other serious offences, one which the requested person had repeated twice in this jurisdiction; the judge's gloss on the requested person's work record in this jurisdiction is irreconcilable with the periods of imprisonment to which he was sentenced from time to time; and, finally, the judge's assessment of the factors of family life and integration in the community identified nothing out of the ordinary. It is necessary to highlight each of the foregoing elements in the judge's reasoning given that at [58] he expressly took all of them into account.

[58] We consider that the following passage in *Michailovas*, at para [134] is tailor made for the present case:

> *"Viewed superficially, this generates a temptation to condemn the conduct of the Lithuanian authorities as reprehensible. However, we consider this inappropriate, for two reasons. First, this court is not sufficiently equipped to make a critical assessment of this kind. We simply do not know the dense detail of the "story" between February 2013 and December 2019. Second, it is not the function of this court to engage in such an exercise in any event as a matter of principle, given that the language of sections 14 and 25 of the 2003 Act directs the attention of the court to the effect of delay on the requested person rather than its causes. This is reinforced unequivocally in the words of Lord Diplock in the binding decision of Kakis."*

In short, the search in every case is for oppression, demonstrated or to be reasonably inferred, occasioned partly or wholly by the delay in play.

[59] The panel is mindful of exhortations that this court must have "*a very high respect for the findings of fact*" and the evaluation of the expert evidence of the first instance court. See *United States of America v Giese (Number 1)* [2015] EWHC 2733 (Admin) at [15]. In the same case it was stated that the first instance decision "*… can be successfully challenged if it is demonstrated that it is 'wrong.'*" To like effect is the decision in *Dzgoey v Russian Federation* [2017] EWHC 735 (Admin) at [23] – [24]. While neither of these decisions is binding as a matter of precedent on this court, we draw attention to them given our understanding that they espouse the approach which has been generally adopted in this court in appeals under the 2003 Act. These exhortations have purchase in certain appeals. However, the first instance decision in the present case did not entail either judicial fact finding on disputed factual issues or the evaluation of expert evidence. Rather it was very largely the product of an exercise in evaluative judgement.

[60] Therefore this court's review of the first instance decision has not entailed any second guessing of the judge or any impermissible intrusion upon any domain occupied exclusively by him. This court has taken care to inform itself of the evidence considered by the judge. There was no evidence, sworn or otherwise, from the requested person or anyone else. His evidence was, rather, confined to the rather threadbare affidavit before this court. The remaining evidence assembled was all documentary in nature and it too has been reproduced on appeal. There is nothing in this evidence, considered sympathetically and as a whole, so much as tilting in favour of overcoming the *HH* threshold. To summarise, in the language of Lord Brown in *Gomes*:

> "*… The test of oppression will not easily be satisfied: hardship, a comparatively common place consequence of an order for extradition, is not enough.*"

On the most generous view the facts and factors which impelled the judge to discharge the requested person fall manifestly short of overcoming the daunting *HH* threshold.

[61] Adopting the terminology of Lord Neuberger in *Re B*, this court is driven inexorably to the conclusion that the judge's conduct of the Article 8 ECHR proportionality balancing exercise and the conclusion which he reached are wrong, unsupportable. If one were applying the narrower lens of *Atraskevic*, which in essence espouses the *Edwards v Bairstow* doctrine, our conclusion would be that the judge erred in his application of the applicable legal test (the *HH* principle), took into account immaterial matters while excluding material matters and made an overall conclusion which was not reasonably open to him and lacked a sustainable and rational foundation.

Section 29(3), 2003 Act

[62] This court must ask itself, in the language of section 29(3) of the 2003 Act, (a) whether the judge ought to have decided the relevant question differently and, if yes, (b) whether if he had decided the question in the way he ought to have done, he would not have been required to order the person's discharge. The "relevant question", in this context, is the determination of the Article 8(2) ECHR proportionality balancing exercise. For the reasons elaborated above, these two conditions are plainly satisfied. Furthermore, we are satisfied that the exercise we have conducted falls within the embrace of the single judge's grant of leave to appeal to this court.

Order

[63] In accordance with section 29(1) and (5) of the 2003 Act, the following order is made: the appeal of the requesting state is allowed, the first instance order discharging the requested person is quashed, the case is remitted to the first instance

judge and the judge is directed to proceed, in accordance with this judgment, as he would have been required to do if he had decided the Article 8(2) ECHR proportionality balancing exercise differently.

Ancillary Matters

[64] Having regard to section 29(7), the issue of remanding the requested person in custody or on bail, in tandem with the issue of costs, arises. These will be addressed separately.

A Foootnote: Brexit

[65] By virtue of the date of execution of the EAW in this case, 18 November 2020, both the Framework Decision and the 2003 Act apply fully to the determination of this appeal: see in particular Article 62 of the Withdrawal Agreement. Arrests postdating 31 December 2020 fall under a different legal regime.