CO/5580/2011

Neutral Citation Number: [2012] EWHC 1747 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 14 June 2012

B e f o r e:

MR JUSTICE BURTON

Between:
DANIEL LACKI

Claimant

v

REGIONAL COURT OF GDANSK, POLAND

Defendant

Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

MR S GILL QC and **MR M HENLEY** (instructed by Guney, Clark & Ryan Solicitors) appeared on behalf of the **Claimant**
MR D STERNBERG (instructed by the Crown Prosecution Service) appeared on behalf of the **Defendant**

J U D G M E N T S
(As Approved)

1. MR JUSTICE BURTON: This has been listed today before me as an extradition appeal by Mr Daniel Lacki in which the Respondents are the District and Regional Courts in Gdansk Poland. There are three European arrest warrants (EAWs) outstanding in this case, and I shall identify them as EAW 1, EAW 2 and EAW 3.

2. In respect of EAW 1, that warrant was ordered to be effected by the District Judge, and an appeal against the enforcement of the warrant was dismissed by Collins J in the Administrative Court. There is a suggestion in the papers before me that there may be an application to reopen the appeal if the defences to EAW 2 and EAW 3 are viable.

3. In respect of EAW 2, in which again the District Judge enforced the warrant and no substantive defences were put forward before him, the appeal is said by the Respondent to have been served out of time. The Respondent asserts that there is no jurisdiction in the Court to hear that appeal, in the sense that there is, as found by the Supreme Court as the Respondents assert, no power in this Court to give an extension of time, as the Appellant would otherwise wish. If the appeal is not out of time the Appellant relies upon defences not submitted below by reference to sections 21 and 25 of the Extradition Act 2003 ("the 2003 Act").

4. So far as EAW 3 is concerned, the appeal is in time and those defences are put forward.

5. The point taken by the Respondent is that EAW 2 is out of time by reference to a combination of two decisions of the House of Lords and the Supreme Court: Mucelli v Government of Albania [2009] UKHL 2 and Lukaszewski v The District Court in Torun, Poland [2012] UKSC 20. The Appellant asserts that, notwithstanding those two decisions, the Court should, or does, have power to extend time in relation to this Appellant. This is a point which plainly would require consideration by a Divisional Court with a direct appeal to the Supreme Court if appropriate. This is the view I have clearly formed and it is not one with which either counsel has sought to disagree. As I shall indicate, Mr Sternberg, for the Respondent, agrees to the course, which I have proposed to adopt, arising out of that conclusion, whereas Mr Gill QC and Mr Henley, for the Appellant, do not.

6. The course that I have proposed, and which, as I have indicated, has been opposed by Mr Gill, is that I should deal with the merits of the two appeals, EAW 2 and EAW 3, without prejudice to the question as to whether the notice of appeal was served out of time, so that there can be a resolution of those issues today, one way or the other. If there is an arguable defence on the merits, then EAW 3 would fall away, and the jurisdiction question in EAW 2 would need to be resolved by a Divisional Court, which could be convened in due course. If there is no substance in the defences on the merits, then I would dismiss the appeal in EAW 3 and the question as to whether the appeal is, or is not, out of time in EAW 2 would fall away.

7. The arguability of the defence, as I have indicated, is relevant to all three appeals, or at any rate certainly to the two which are presently issued. I can, therefore, deal on any basis with EAW 3, and I can assume in the Appellant's favour the time point taken by the Respondent in EAW 2. The Respondent is content with this course.

8. Mr Gill in a skeleton argument put together at very short notice yesterday with Mr Henley's assistance, and for which I am very grateful, and argued before me again orally today, opposes that course. He says:

(i) I cannot deal with the appeal in EAW 2 if I have no jurisdiction to do so;

(ii) The 2003 Act - this is really another way of saying the same thing - does not permit an assumption of jurisdiction;

(iii) If I decide in the Appellant's favour on the merits, then there is the possibility of a subsequent inconsistent view by the Divisional Court when dealing with the question of jurisdiction, if the Divisional Court were to come to a different conclusion, so far as the merits are concerned, which, he asserts, they would be free to do.

(iv) I should not exercise my discretion, if I had one, to take the course, because the point as to time is important. This is an opportunity to resolve it, even if it were academic because of the lack of merit in the appeal, if such were the case. I should accordingly take the opportunity to ensure that it can be resolved by sending the matter off to the Divisional Court unsevered.

(v) If I adjourn the whole case, as he submits I should, then it might give the opportunity for the Divisional Court to look at the Article 8 case. This forms a part of Mr Gill's submission in relation to the Appellant, by reference to his son, who lives with his ex-partner in this country, because of a possible impact on that argument if the decision presently expected in HH (Italy) from the Supreme Court had relevance to it.

9. I am not persuaded. This is against the background that in my judgment, in any case, whether it relates to ordinary proceedings, which are almost all the subject of statute in the end under the Supreme Court Act, or a statutory jurisdiction, or whether it relates to the jurisdiction of the English Court against those outside the jurisdiction - for example, civil proceedings where there is service out - or those who are already in the jurisdiction, there is always the power of the Court to take a sensible course pursuant to the Overriding Objective. Mr Gill of course indicates that the Overriding Objective may fall away if there was a question of construing a statute, such as, for example, in this very line of country he sought to argue in Mucelli v Government of Albania, namely that the question as to whether there was power to extend time under a statute should be construed in accordance with the Overriding Objective. The answer in that case was that the statute fell to be construed in accordance with its own terms.

10. But I am not construing a statute. I am deciding how to deal with a case in which there has been a technical point taken by the Respondent, which goes to jurisdiction, and the issue is simply whether the merits should be taken first, or the jurisdiction should be taken first.

11. I posed to Mr Gill the example of a situation in which notice of appeal (not this case) contained apparently, on its face, no arguable case at all, if, for example, it simply said that the Appellant would like to remain in England, and was served out of time. It

seems to me plain that it would make a nonsense for the jurisdiction point to have to be taken against a background of an appeal which was bound to fail.

12. I also put to Mr Gill a scenario in which foreign residents, or companies, are brought, very often 'kicking and screaming', within the jurisdiction of the Court by virtue of the extraterritorial jurisdiction of the Court. That jurisdiction is then challenged, and yet the Court in the meanwhile makes interlocutory orders, sometimes of a drastic nature, for disclosure, cross-examination and surrender of passports, all against the background of the question that jurisdiction is not yet construed or decided.

13. I need to deal with EAW 3, in any event. There is no jurisdictional point raised in EAW 3, and I am faced on EAW 2 with a point taken by the Respondent, which I am prepared to assume in favour of the Appellant.

14. Mr Gill says in his skeleton:

> "*17. The Appellant is entitled to know whether he has an appeal or not.*"

15. I propose to deal with that question, as to whether he has an appeal, first of all, by looking at the merits and secondly, by looking, if necessary, at the jurisdiction, although that second aspect will go off to a Divisional Court, if I were to decide that the defence is right or that it is arguable. Since I have not heard argument yet I assume, at this stage, that that is an entire possibility, or that I might at any later stage during this hearing conclude that the matter should, after all, be sent off in totality to the Divisional Court. If I am of the view that the defence is unarguable, or at any rate that it should fail, then I would dismiss EA W 3 and I would not need to trouble the Divisional Court in relation to EAW 2.

16. If I were to decide the defence is correct or arguable, then there might be the possibility of inconsistency, such as Mr Gill has raised. If I then sent it off to the Divisional Court two possibilities arise. The first is that I should simply indicate that I am sending it off to the Divisional Court and have formed the provisional view that the appeal has merit, or I could actually decide that the appeal did have merit, but that it seems to me that a two judge Divisional Court could still disagree with me if they chose to do so. None of that would, in my judgment, prevent my taking the sensible course which I have proposed.

17. As for HH Italy, it has not been put before me in the bundle of authorities. I have no view as to whether any considerations in HH Italy, if and when judgment is given by the Supreme Court, might impinge upon my decision on the relevance of the existence of the Appellant's son within the jurisdiction, and I shall decide the case on the present law. Indeed the pending decision by the Supreme Court has not been put forward of itself as any basis for an adjournment. But for my conclusion that the jurisdiction point should go off to a Divisional Court I would have resolved the whole matter today, irrespective of the probability of a relevant decision in HH Italy. If subsequently the decision in HH Italy gives any ground for consideration while the Divisional Court is pending, or otherwise, then no doubt the Appellant's advisers will take any appropriate

course. But in my judgment it is not conceivably a reason for my not following what is plainly the sensible course.

18. That course is that while we are here I should deal with the merits. If there are merits, then the matter goes forward to the Divisional Court to consider jurisdiction. If there are no merits EAW 3 falls away and there is no point in the resolution of the jurisdictional question with regard to EAW 2.

(Proceedings continue with submissions by both counsel)

19. MR JUSTICE BURTON: I repeat and incorporate in this part of my judgment the judgment that I gave at the beginning of the hearing in which I described the three European arrest warrants, EAW 1 and EAW 2 and EAW 3, in general terms. As I there said, no defences were put forward below in relation to EAW 1 or EAW 2 when the relevant District Judges made their orders, and the defences have only been run in relation to EAW 3, although, as clarified by Mr Sternberg, subject to the out-of-time point, he has not objected to the raising of defences on the merits, though not raised below in relation to EAW 2. As I indicated earlier, there is at present no life in EAW 1, the appeal having been dismissed, and there could only be a prospect of its being reopened if there was anything in the defences being considered today.

20. Those defences fall essentially into two categories, although they have been described as three. The first is described as "suicide risk", the second is "mental health condition", both combined, in the person of the Appellant, in this case, although not in every case. The third relates to such argument as can be raised by reference to Article 8, with reference to the presence within the jurisdiction of the Appellant's child, now aged five, with his ex-partner.

21. The defences arise under ss21 and 25 of the 2003 Act. S21 requires a judge considering extradition to decide whether the person's extradition will be compatible with his Convention rights within the meaning of the Human Rights Act 1998. If he decides the question in the negative, he must order the person's discharge. The Convention arises in this case with regard to the child, as I have earlier indicated under Article 8. With regard to the first two matters, relating to the Appellant himself, it arises by reference possibly to Article 8 - although that issue has not been separately argued by virtue of the existence of s25, to which I shall refer - but also by reference to the alleged risk that if he is sent back to Poland there will be a breach of Article 3.

22. The second relevant section is s25 of the Act

23. "*This section applies if at any time in the extradition hearing it appears to the judge that the condition in subsection (2) is satisfied*."

That condition is:

> "*that the physical or mental condition of the person in respect of whom the warrant is issued is such that it would be unjust or oppressive to extradite him*."

If such be the case the judge must order the person's discharge.

24. Evidence was called by the Appellant before the District Judge in the person of Dr Horne, a well-known psychiatrist, to whom I will make reference. He was examined and cross-examined, and his evidence goes to the first two of the defences, to which I have referred. So far as the third defence is concerned, the position of the Appellant's child, there was a statement put in by the Appellant's ex-partner, Miss Marta Miaskiewicz, together with annexed documents. She was not called to give evidence or cross-examined, but the District Judge took account of what she said.

25. So far as the medical evidence is concerned, there were before the District Judge reports from Dr Horne for the Appellant, to whom I have referred, and a report from a Dr Gupta, a consultant psychiatrist at the South London and Maudsley NHS Trust. In addition, I have permitted to be admitted what was not before the District Judge: a referral letter from Dr Coleman, who was part of the healthcare team at Wandsworth prison, addressed to Dr Gupta, which led to Dr Gupta's report. So far as the facts are concerned, Dr Gupta's role was to consider - and, in the event, to decline to make - an order for transfer of the Appellant from Wandsworth to a mental hospital.

26. The learned District Judge, as I shall describe, clearly considered the matter very carefully, but I shall, for the purposes of this judgment, simply summarise relevant parts of the evidence that was contained in those reports. So far as Dr Horne is concerned, he wrote his first report in November 2011. He described how the Appellant had had treatment in Poland for depression, including two psychiatric admissions to hospitals in Poland. He had never been given a diagnosis of psychiatric illness, at any rate of schizophrenia; he had also never had any psychiatric treatment in the United Kingdom.

27. Dr Horne described how the Appellant had made four attempts at suicide: two overdoses in Poland some years ago, and then two attempts to hang himself in Wandsworth Prison once he was in custody and awaiting extradition, during what has in fact been, by virtue of the existence of the three warrants and a number of adjournments of hearings, a prolonged period. He was kept on A wing, which is an ordinary prison wing, on constant observation to ensure that he did not commit suicide.

28. The opinion of Dr Horne was that the Appellant was suffering in November 2011 from a very severe depressive illness, and that there was a very serious risk of suicide. He was unable to discern whether he was getting better or worse. Dr Horne concluded that the Appellant needed urgent treatment in hospital, but, as I have earlier indicated, after referral to Dr Gupta, who did not so agree, he was not given urgent treatment in hospital, although plainly he has been given treatment within the prison. Since November 2011 there have been no further attempts at suicide.

29. In Dr Hillman's referral letter to Dr Gupta, Dr Hillman recorded that the Appellant continued to "*harbour chronic ideas of suicide*" and had experienced what his colleague, Dr Patil, appears to have described as a "*severe psychotic depression*". Dr Hillman concluded that the Appellant was depressed and posed a high risk of suicide,

especially closer to the extradition hearing, although, as I have indicated, fortunately that risk has not eventuated.

30. By the time the matter came before Dr Gupta there had been a further report from Dr Horne, dated 8 February 2012. This was primarily for the purpose of concluding, at the invitation of the Appellant's solicitors, whether the Appellant had the capacity to give instructions, and it is apparent that Dr Horne was firmly of the view that he did have such capacity. Indeed he summarised the position in paragraph 10 of his report by saying that the Appellant had strong, clear views about the aim of his case, was able to take in information with appropriate additional help and was able to make a decision according to his own views and there was no evidence of interference by symptoms of his mental illness. Dr Horne recorded that there had been no significant change in the Appellant's mental state, but it was "*cheering that he is not now actively contemplating suicide*." He concluded that he remained a serious suicide risk and this would increase in the event of his deportation being ordered, but that he is clearly determined to fight deportation as effectively as he can.

31. The opinion of Dr Gupta is set out in his report of 7 March 2012. To prepare it he had plainly had a much shorter time of examination than had Dr Horne. He was critical of the Defendant's apparent co-operation in the sense that he regarded him as "*an extremely reluctant gentleman*", although he was satisfied that the Appellant was able to comprehend his questions, as his replies were both relevant and appropriate. He noted no abnormality in his presentation. His conclusion was:

> "*My impression of* [the Appellant's] *presentation is one of depressive symptoms that may well qualify for the diagnosis of a depressive disorder*."

but that he concluded, effectively summarising his conclusion, that that may have been, indeed was very likely to have been, exaggerated so as to secure a favourable legal outcome as one of hospitalisation in order to "*circumvent the legal consequences of his actions*". His opinion was that hospital based assessment or treatment was unlikely to resolve the very difficult circumstances that the Appellant found himself in, such that his presentation and behaviour would undoubtedly resurface as soon as he was faced with extradition to Poland, or a return to prison. It is plain that his view was that there was a depressive disorder, but not one which could be described, as Dr Horne had described it, as *severe*.

32. The offences, which form part of the EAW 1, 2 and 3 are varied. There were originally two offences in EAW 1, one of which was dismissed by the District Judge and one of which remained, namely the theft of a handbag, and he was sentenced to one year and two months in custody to be served on his return on 11 March 2003.

33. So far as EAW 2 is concerned, that related to a number of offences of supply of amphetamines between 2001 and 2002, and again on two further occasions in the summer of 2002, and in addition to obtaining various items of television equipment by deception in 2004. He was sentenced to a period of imprisonment by the District Court

in Gdansk and the District Court in Malbork, totalling three years' imprisonment: two years for the amphetamines and one year for the obtaining of property by deception.

34. His commission of the offence, which led to EAW 3, was on 8 February 2006 when he committed an offence of fraud relating to, it seems, a relatively small sum in sterling of approximately £200, but apparently carrying with it a maximum sentence of up to eight years' imprisonment. He has not yet been tried with regard to that charge, so EAW 1 and EAW 2 relate to sentences to be served, and EAW 3 relates to the desire of the Polish authorities to prosecute him for the fraud offence.

35. He has been in custody awaiting the outcome of these appeals and consequently has not been living what could be called a normal life in this country. If, or when, returned to Poland he will, on any basis, face, subject to 50 per cent remission which I am told that there is, the need to serve what is left of the sentences already imposed and to face the charge, the subject matter of EAW 3.

36. The other evidence that was before the District Judge on the first two defences was put in by the Respondent. That related to the availability of treatment in Poland within the prison system for psychiatric conditions. The form in which the evidence is contained is a letter, dated 17 January 2012, relating to another proposed extradition. The letter stands in its entirety, save that the name of the appellant in that case has been blacked out. At considerable length a description is given as to the availability of such treatment. It is described how in case of surrender by, what is described as the "British Party":

> "*... to serve the penalty of imprisonment, he shall be - pursuant to art 79b par 1 Penal Execution Code - placed in the transit custody for a period not exceeding 14 days in order to get preliminary medical examination*."

37. The letter describes that there are in fact 15 diagnostic centres in Poland, which are aimed solely at making psychological and psychiatric examination and testing of persons in prison. The letter attaches a list of actual prison hospitals, in 14 different prisons throughout Poland. The letter confirms that, if needed due to mental condition, that appellant could "*receive any medical help in the prison hospital psychiatric ward*". There is a reference made to the Polish prisons which have access to prison hospitals with psychiatric wards, namely the 14 prisons to which I referred, and:

> "*...if it is not possible to execute the penalty of imprisonment against the convict due to his/her mental illness or any other serious illness, then a break in penalty serving is granted*."

It further continues:

> "*the convict serving the penalty in Polish prison could count on help and professional aid of Polish prison medical services*."

38. The other evidence that was before the District Judge relates to the third defence, so far as concerns the Appellant's son. I have referred to the fact that his ex-partner made a statement. They have been separated now for quite some time. Indeed, the occasion

when he was originally brought to a Court in this country, which led to the issue of EAW 1, was because he was facing charges of domestic violence in relation to alleged assault by him against his ex-partner.

39. The evidence of his ex-partner describes the health of her son by the Appellant. She looks after the boy, and indeed is only in part-time work in order to do so. The school recognises the boy's medical condition, which is diagnosed as ADHD (Attention Deficit Hyperactivity Disorder).

40. The ex-partner plainly has had concerns with the young boy and has had community help. There are assessment reports which I have seen, and which were before the District Judge. There is reference in the reports to the boy's father. They describe how the ex-partner states that their relationship broke down approximately two years ago. They had been together for three years prior to that.

41. The summary describes how the boy had significant difficulty with his behaviour and difficulty with inattention and a short concentration span, and how the boy had had a lot of difficult experiences and changes within the last six months with his father being arrested and imprisoned, his having to move to a hostel with his mother and then starting a new school. Prior to that he had been a witness to domestic violence for two years as his parents' relationship broke down. The ex-partner describes how she has visited the Appellant in prison and taken the boy with her. She wants the boy to have continuing contact with his father.

42. District Judge Purdy delivered a ruling after the last hearing, which culminated after a number of adjournments, on 24 April 2012. He describes how the proceedings had now been somewhat protracted and that the Appellant had been held in prison throughout. He referred to the fact that he heard live evidence from Dr Horne, and that Dr Gupta had declined to agree or sanction a section 48 transfer. He set out in paragraph 3 the material that he had considered, which included reports from Dr Horne, letters from South London and Maudsley NHS Trust, including Dr Gupta's report, from which he quotes, and the statement from the ex-partner. In relation to Article 8 the learned District Judge said as follows:

> "*There is no dispute that the Article 8 right to family life is engaged by the extradition process. However, similarly it is clear an otherwise valid Request may, in law, only be discharged if it is disproportionate to extradite set against the presumption of enforcing cross border criminal justice - see* Norris ***v USA [****2010] UKSC9 [[2010] 2 AC 487"]*.

43. He accepted obviously that the Appellant had a five-year-old son and that the ex-partner wished to preserve the bond between father and son, notwithstanding that she and the father had parted company following his first extradition arrest in March 2011. He accepted that mother and son visited him in prison:

> "*However, as a direct consequence of extradition proceedings - on 3 EAWs - [the Appellant] has now been in custody over 12 months. Any support or otherwise to the family unit is minimal. I cannot, applying*

> ***Norris*** *(supra) find, unhappy and distressing though any enforced separation is, that this Request, for fraud, is disproportionate in any way. This challenge must therefore fail.*"

44. He turned to consider the section 25 mental health/suicide risk challenge and referred to the statutory test:

> "*Ill health, even severe ill health, is not per se a bar. With all extradition treaty partners there is the presumption of adequate internationally acceptable standards of medical treatment (not necessarily the best known to medical science). The presumption is stronger still in ECHR jurisdictions, as all 27 EU/EAW nations are. Specifically the threat of suicide in extradition cases is now a well trodden legal path.*"

He referred to the lengthy evidence of Dr Horne and referred to it "*as being concern for a seriously sick man whose condition requires compulsory treatment in a specialist (secure) psychiatric unit*." He referred to Dr Horne's reference to the fact that Dr Horne could not say that there was a near risk of suicide, but that there was no sign of malingering and that the "*condition being treatable, taking '6 months* [for him] *to be properly well, or more than 12 months once medication is correctly balanced.*" He recorded that Dr Horne disagreed with Dr Gupta's conclusion, to which I have already referred.

45. He then set out in paragraph 6 the submissions of counsel and what he called "*the rather macabre suicide cases*", in particular, Jansons v Latvia [2009] EWHC 1845 (Admin), Griffin v France [2011] EWHC 943 (Admin), the careful guidance in Wrobel v Poland [2011] EWHC 374 (Admin) and other cases. He referred to Jansons and referred to the fact that:

> "*a real risk of suicide is not sufficient, unless or almost unless he 'will succeed in committing suicide, whatever steps are taken.*"

Although he was not persuaded by Mr Sternberg's contention that psychiatric facilities were better in Poland, he certainly noted the information as to the number of prison-based psychiatric units in Poland, and found that that was the case, not least because Dr Horne made clear that he had no knowledge or opinion about them. He reached this conclusion:

> "*Even accepting Dr Horne's appraisal of the concerns over Dr Gupta the suicide concern is not such as to, in my judgment, amount to it being 'unjust or oppressive' to extradite him.*"

46. I have had the great benefit of submissions from Mr Gill QC today, who is now leading Mr Henley, and from Mr Sternberg. I can deal with two aspects of the case very shortly. The first relates to any reliance that can be placed, by reference to Article 8, on the position of the Appellant's son. I entirely respect Mr Gill's submission, experienced as he is in these cases, that the approach in Norris v the USA may require to be amended as a result of the subsequent decisions of ZH Tanzania v the Secretary of State for the

Home Department [2011] UKSC 4, albeit that that was a deportation case rather than an extradition case, and that the pending decision in HH (Italy) in the Supreme Court may affect the position in Norris, and, as Mr Gill puts it, water it down. Even assuming, notwithstanding the normal approach of accepting what the law is at present, rather than trying to stargaze as to what it might become as a result of future decisions, and even assuming that that watering down occurs, I am satisfied that even applying ZH Tanzania in its full rigour, and ignoring or subsuming the approach in Norris, this does not begin to be a case in which the impact of the five-year old child will make a material difference to the outcome of this case. What is said by Lady Hale in ZH is that the best interests of the child must be of primary consideration, but they can of course be outweighed by the cumulative effect of other submissions, and, in particular, what is said by Lord Kerr is:

> "*Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them*."

47. There is, in my judgment, no evidence before me as to what the best interests of the child clearly favour. The child clearly needs help and is getting it from the community, as I can see from the various reports, and from living with his mother, who clearly gives up a good deal of her time to do so, as she does now and ever since she parted from the Appellant more than a year ago. There is no evidence in the reports, which I have seen, that any particular benefit is gained by the child over and above the benefit that any child gains from having additional adults as part of their circle, or their family. I am told, and the District Judge accepted, that there were visits by the ex-partner and the child to the Appellant, and that may or may not be good for the child. I also quoted the passage which makes it clear that the child in the past has not benefited from life when the Appellant and the ex-partner lived together.

48. However, try as I might in looking not only at the statement of the ex-partner, but also at the reports, there is no indication at all of any particular area in which it is said either that the Appellant has made a contribution to the good of the child, or that the child has particularly benefited from, or had any particular relationship with, the father which is to the child's advantage. I certainly am wholly unsatisfied that the best interests of the child clearly favour a certain course on the evidence before me, even before I then engage with the matters such as that this is an extradition case, the father has been in prison in England, not living with the family, and would be, if returned to Poland, serving out a sentence there.

49. I am satisfied that, in any event, I am not here to substitute my own judgment for that of the District Judge. I have to be satisfied that the District Judge was wrong. I am not only not satisfied that the District Judge was wrong, but I am satisfied that he was right in his approach to the Article 8 question with regard to the Appellant's son.

50. As for Article 3, there are cases of course in which, if the English Court is sending someone back to a country which has no facilities to deal with a particular condition that the person has, or the foreseeable conditions in which he or she will be returned, such that there is concern as to the future health of that person, that Article 3 may be

engaged. This is plainly not such a case. There is the evidence, to which I have referred, as to the existence of both facilities for examination in prison and availability of prison hospitals and treatment. I shall return to the question of undertakings, but, subject to that, I am entirely satisfied that there is no arguable case by reference to Article 3.

51. I turn to address the question of section 25. The evidence is that the Appellant has a mental psychiatric disorder considered to be serious by Dr Horne, but not so by Dr Gupta, which clearly requires, and is assisted by, treatment. In addition, and perhaps as a concomitant of that mental condition, he has been a suicide risk and has attempted suicide on two occasions, many years ago in Poland, and two occasions while in custody. Mr Sternberg refers to the fact that there is, as the District Judge noted, no evidence of any condition in this country for the five years, or so, prior to his being in custody for potential extradition. The only evidence is of treatment for a disorder in Poland, which of course is further evidence of the availability there of such treatment, and the availability within Poland and understanding of the mental condition of this Appellant. Mr Gill points to the non-medical evidence of the ex-partner, which is no doubt fuelled by her being allegedly the victim of violence at his home, as to his having had mental problems, albeit undiagnosed and untreated in this country prior to his being taken into custody. It is, as Mr Sternberg has submitted, not unknown, far from it, for those in custody to be suffering from mental disorder, indeed possibly for mental disorder to be caused or exacerbated by a person being in custody.

52. As for the suicide risk, the District Judge addressed this, and of course has very considerable experience of the suicide arguments that are sadly often raised by people who clearly do not want to be returned by way of extradition or deportation to countries where it is proposed they will be sent.

53. So far as suicide risk is concerned, and indeed for that matter mental disorder, there is now considerable jurisprudence as to the high threshold which the Court must apply before concluding that section 25 is applicable. In paragraph 55 of The Government of the Republic of South Africa v Dewani [2012] EWHC 842 (Admin) the President of the Queen's Bench Division referred to the risk of suicide being not uncommon in extradition cases, referring to a number of authorities, including those referred to by the District Judge, and continued:

> "*The risk of suicide does not mean that extradition would be a breach of Articles 2 and 3*."

54. In Mazurkiewicz v Rzeszow Circuit Court, Poland [2011] EWHC 659 (Admin) Jackson LJ, giving the judgment of the Divisional Court, referred to the fact that the Court held that there was a suicide risk, indeed that the Appellant was at real risk of suicide, but concluded that that risk was not "so high as to warrant quashing the extradition order". He continued:

> "*In those circumstances the UK prison authorities must exercise the utmost vigilance from the moment the Appellant is told about this judgment until the moment when extradition is completed. He must be thoroughly searched to ensure he has no access to instruments for self*

harm. He must be prevented from gaining access to such instruments. Finally, the terms of this judgment should be drawn to the attention of the Polish Judicial Authority and the Polish Prison Authorities."

No doubt the same will apply in this case.

55. Over and over again, and thus indicating that there may be a finding of a high risk of suicide and yet nevertheless extradition is ordered, the emphasis in the authorities is on the high threshold before the existence of risk of suicide will lead to a conclusion that it will be contrary to section 25 to extradite the Appellant.

56. Mr Gill submits that in this case the position is, as he puts it, unusual because there is a combination of mental disorder and a risk of suicide. Once again a high threshold applies, as he accepts, to the mental condition: see, for example, paragraph 16 of a decision of Ouseley J in Mikolajczyk v Poland [2010] EWHC 3503:

> "*The threshold for showing that it would be oppressive to extradite someone on account of their physical condition is a high one*".

But he submits that that should not, or may not, apply where there is both a risk of suicide and mental condition.

57. It seems to me that it is not at all unusual for there to be a case in which the two are coupled together. Indeed, of course there may be circumstances in which someone is driven to suicide without any kind of mental imbalance, but particularly where, as here, the mental disorder is, on any basis, a serious depressive disorder, depression and suicide may go hand in hand. I do not see that it is arguable that the fact that in this case there is both a finding of serious depressive disorder and a risk of suicide makes this in any way unusual, because the threshold is a high one in relation to the applicability of the whole of s25, namely that the presumption is that a Court will extradite, unless on the basis of the evidence applicable to the particular Appellant it would be oppressive to extradite.

58. The District Judge, in my judgment, fully considered the evidence and cannot be faulted. The way in which he arrived at his conclusion was to accept the evidence, and accept the view of Dr Horne in terms of his appraisal of the concerns over Dr Gupta. Nevertheless, even after accepting that appraisal, his concerns were not concluded by the District Judge to lead to its being unjust or oppressive to extradite. This is a case in which he was entitled to balance Dr Gupta's evidence against the evidence which he had heard tested of Dr Horne, but, in particular, he was entitled to take a view about the evidence of Dr Horne in the light not only of his reports, but also in the light of having heard him cross-examined, which I have not done. I must be careful of necessarily accepting that what is said in Dr Horne's statement remains the impression given to the District Judge after he had heard him cross-examined. The District Judge was in a much better position than I to reach a conclusion about the unjustness or oppressiveness of extradition in the light of the particular circumstances of the Appellant.

59. That said, he was faced with a case in which, although there had been a worry about suicide, nevertheless, as Mr Sternberg has pointed out, there had been no further attempt at suicide since November 2011. It may be that the treatment has been having some ameliorative effect on the state of mind of the applicant.

60. But for the point which I am about to consider, I would be able to leave my conclusions there, that the District Judge was entirely able to reach the conclusion that he did, that the high threshold imposed by the authorities, which he properly considered, was not met in respect of the condition of this Appellant. But Mr Gill has further submitted that, in order for the Court to be satisfied that an appellant should be extradited, there must be more than a situation in which there is available treatment in the country, to which the Appellant is proposed to be returned, and that there needs to be what he called "*individual specific consideration*" of such appellant's condition. Effectively what he really is submitting is that there should be in each case an undertaking given, or what he called, by reference to one or two authorities, "a guarantee" of the proposed treatment of an appellant.

61. Mr Sternberg has pointed to authorities in which no undertaking has been given, and yet the appellant has been returned, in relation to cases where the conditions have been worse than those before me.

Mr Gill is perhaps understandably sceptical about the fact that the evidence, to which I have referred, about the availability of prison hospitals and prison treatment has been given in the form of a letter in someone else's case, amended so as to delete the name of that person. It is then simply so served in this case, when there could have been a specific undertaking given by the Polish prison authorities that they would actually make available, if appropriate, to this Appellant that treatment, or those prison hospitals.

It may be that the evidence could have been dealt with in a different way, and that in future it will be so dealt with, but I am satisfied that Mr Sternberg is right that this is not a question of what could be, or might be, or what is convenient, but a matter of law. As the District Judge himself described, we start in these cases with a presumption that the extradition treaty partner will comply with, in particular, the Convention of Human Rights. As is made clear by Toulson LJ in Targosinski v Judicial Authority of Poland [2011] EWHC 312 (Admin), as further adopted by Sullivan LJ in Agius v of Court of Magistrates, Malta [2011] EWHC 759 (Admin), the starting point is an assumption or a presumption that the requesting state is able to, and will, fulfil its obligations under the Human Rights Convention.

62. In this case there is no doubt that Poland will, as the starting point, comply with those obligations. If there were evidence, as there sometimes is, and as there, in particular, was in Dewani, that conditions in the requesting country's prisons are such as to cast doubt on that assumption or presumption, then the requesting state is likely to have to make good what is challenged. It looks as though in Dewani, although in the end the issues was resolved by an adjournment, that there was issue joined as to the prison conditions in South Africa. In this case, no case is put forward by the Appellant to discharge the assumption and, if anything, the requesting state has gone further than it

need in establishing that it indeed is in a position to comply with its obligations, so that the presumption is well-founded by reference to the evidence, to which I have referred.

63. I do not conclude that it is necessary for the requesting state to do more than it has done in this case, namely make clear not only that it does intend to comply with its obligations, but that it is in a position to do so, by virtue of the availability of the treatment and the prison hospitals, to which I have referred.

64. It is not, therefore, necessary in each case for there to be an undertaking by the requesting state to comply with its obligations, unless and until there is reason to doubt that there is an intention, or an ability, to comply with those undertakings and that this is not such a case. Nevertheless, I have heard Mr Sternberg say, and accept, his assurance that his solicitors will indeed pass to the judicial and prison authorities in Poland the contents of the medical reports in this case, so that there can be no doubt that they are knowledgeable about the mental condition of the Appellant. Therefore, if appropriate, the facilities, to which I have referred, can be, and, I have no doubt pursuant to their obligations under the Human Rights Act legislation, will be, made available.

65. Mr Gill has submitted, as a fall-back, that I should either adjourn this application, or recommend postponement of return to allow the Appellant's condition to be ameliorated before he is returned to Poland. I conclude that this is not a case in which that would be appropriate; indeed that it may well be very much to the Appellant's disadvantage. This is not a case in which he has, for example, a physical condition, which only requires treatment to resolve, or, as in Dewani, that there was evidence of a realistic prognosis in a reasonable period of time. All that we have here, as indeed the District Judge addressed in his judgment, is the possibility that if treatment is found within some months the Applicant may improve. Of course that can occur just as well in Poland as it can here.

66. After the lengthy period of time that has been taken while these three arrest warrants have wended their way to their conclusion, I consider that in fact it would be counterproductive to delay matters further; but that there is absolutely no justification for, and possibly every justification for not, adjourning or delaying or deferring the fate of this Appellant any further.

67. Mr Gill in his submissions briefly mentioned, although it did not xxx in his skeleton argument, that the offences in this case are not of the most serious, in the sense that clearly the amphetamines offences must be treated as serious, but that the frauds and deceptions did not lead to a loss of a great deal of money, on the face of it. This is plainly a matter in which the District Judge was much better able to judge than I. Had I been in any doubt along the grounds of argument, with regard to any of the matters before me, I might, indeed I would, be encouraged by the authorities to take that into account in the balancing act. As it is, I am entirely satisfied that, quite apart from the nature of the offences for which Poland wishes to prosecute, and in some cases has already sentenced the Appellant, he has no grounds for challenge to the EAW 3 and/or would have no ground for challenge to EAW 2 if in fact it were in time.

68. For those reasons I dismiss the appeals and conclude that there is no need for the issue of whether EAW 2 was in time to be considered by the Divisional Court.

69. MR STERNBERG: There is simply one very brief correction. I think that your Lordship said Dr Gupta was instructed by the Respondent, I wish simply to make clear he was not instructed by the Respondent.

70. MR GILL: My Lord, I think that means the appeal is formally dismissed. I do not think that there is any further order that is necessary, so far as representation.

71. MR JUSTICE BURTON: Legal aid does not arise.

72. MR GILL: There is a representation order that already covers the matter. There is one matter that I would like to raise and that is this: in these cases it is only a period of 14 days that we have in which to ask the Court, if we wish to, to grant leave to appeal and/or certify a question. The problem that often arises is that the transcript is not available speedily enough. I do not know whether it is possible for your Lordship to order an expedited transcript to enable my instructing solicitors to consider the position.

73. MR JUSTICE BURTON: Yes, I can certainly do that. In any event, can I extend the 14 days, probably I cannot.

74. MR GILL: I am afraid it is not extendable.

75. MR JUSTICE BURTON: I shall certainly, if it is not too inconvenient, direct an expedited transcript of both judgments, because although the first one does not go any further, clearly I have referred to the first judgment and they both ought to be typed up.