Neutral Citation Number: [2023] EWHC 1489 (Admin)

Case No: CO/1490/2022

IN THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/06/2023

Before:

THE HONOURABLE MR JUSTICE MORRIS

- -

Between:

DAMIAN PACZKOWSKI	**Appellant**
- and -	
REGIONAL COURT OF SZCZECIN, POLAND	**Respondent**

- -
- -

Rebecca Hill (instructed by **Shearman Bowen**) for the **Appellant**
Stefan Hyman (instructed by **CPS (Extradition)**) for the **Respondent**

Hearing dates: 18 January 2023 and 9 February 2023

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Approved Judgment

Mr Justice Morris :

1. This is an appeal against the decision of District Judge Turnock ("the Judge") dated 21 April 2022 ("the Decision") to order the extradition of Damian Paczkowski ("the Appellant") to Poland. Permission to appeal was granted by Hill J on 23 September 2022. The Respondent is the Regional Court in Szczecin, in Poland.

2. The sole ground of appeal is that the Judge was wrong to conclude that extradition is not barred by reasons of forum under s.19B Extradition Act 2003 ("the 2003 Act").

3. In her order, Hill J refused the Respondent's application to adduce fresh evidence dated 7 June 2022. The Respondent has now applied, afresh, for this evidence to be admitted. In this judgment, after setting out the legal and factual background, I consider this application first, before going on to address the substance of the appeal.

The relevant legal background

The forum bar

4. Section 19B of the 2003 Act is headed "forum" and provides as follows:

> "(1) The extradition of a person ("D") to a category 1 territory is barred by reason of forum if the extradition would not be in the interests of justice.
>
> (2) For the purposes of this section, the extradition would not be in the interests of justice if the judge—
>
> (a) decides that a substantial measure of D's relevant activity was performed in the United Kingdom; and
>
> (b) decides, having regard to the specified matters relating to the interests of justice (and only those matters), that the extradition should not take place.
>
> (3) These are the specified matters relating to the interests of justice—
>
> (a) the place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur;
>
> (b) the interests of any victims of the extradition offence;
>
> (c) any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence;

(d) were D to be prosecuted in a part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence necessary to prove the offence is or could be made available in the United Kingdom;

(e) any delay that might result from proceeding in one jurisdiction rather than another;

(f) the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard (in particular) to—

(i) the jurisdictions in which witnesses, co-defendants and other suspects are located, and

(ii) the practicability of the evidence of such persons being given in the United Kingdom or in jurisdictions outside the United Kingdom;

(g) D's connections with the United Kingdom.

(4) In deciding whether the extradition would not be in the interests of justice, the judge must have regard to the desirability of not requiring the disclosure of material which is subject to restrictions on disclosure in the category 1 territory concerned.

(5) If, on an application by a prosecutor, it appears to the judge that the prosecutor has considered the offences for which D could be prosecuted in the United Kingdom, or a part of the United Kingdom, in respect of the conduct constituting the extradition offence, the judge must make that prosecutor a party to the proceedings on the question of whether D's extradition is barred by reason of forum.

(6) In this section "D's relevant activity" means activity which is material to the commission of the extradition offence and is alleged to have been performed by D."

5. In relation to section 19B, I have been referred to a number of the leading authorities including *Dibden v France* [2014] EWHC 3074 (Admin) at §§8, 18, 25, 30, 48; *Shaw v USA* [2014] EWHC 4654 (Admin) at §48; *Atraskevic v Lithuania* [2016] 1 WLR 2762 at §39*; Love v USA* [2018] EWHC 172 (Admin) at §§34 and 35; *Ejinyere v USA* [2018] EWHC 2841 (Admin); *Wyatt v USA* [2019] EWHC 2978 (Admin) at §5; *Scott v USA* [2019] 1 WLR 774 at §§28 to 31; and *USA v McDaid* [2020] EWHC 1527 (Admin) at §§43 and 44. The following propositions are derived from these authorities:

(1) The purpose of the forum provision is to prevent extradition where the offences can be fairly and effectively tried in the UK.

(2) Where the threshold condition in s.19B(2) is satisfied, the court must go on to consider, and consider only, the six specified matters relating to the interests of justice. The relative importance of each varies from case to case.

(3) Where the majority of the harm is felt in the UK, this is a factor of some weight against extradition.

(4) As regards s.19B(3)(c) and the belief of a UK prosecutor, where no view is expressed, this is a neutral factor: see *Scott* at §31 (not following *Lov*e at §§34 and 35).

(5) As regards s.19B(3)(g), connections cover family ties, employment and studies, property, duration and status of residence and nationality.

The approach on appeal from a district judge

6. In relation to the approach on appeal with particular reference to a forum bar issue, I have been referred to *Celinski v Poland* [2015] EWHC 1274 (Admin) citing *Belbin v Regional Court of Lille, France* [2015] EWHC 149 (Admin) as well as to *Shaw* at §§42-43, *Love* at §25, *Wyatt* at §6 and *McDaid* at §15. The following summary principles emerge. As regards appeals from a district judge, the threshold question is on "what basis can the Court interfere with the judge's value judgment" as to whether it is in the interests of justice that extradition should not take place. The Court can interfere where the judge has misconstrued the statutory wording of one of the specified matters or has failed to have regard to a specified matter or has had regard to other matters or if the overall value judgment is irrational or unreasonable. The question for the Court is whether the judge was wrong; it is not to unpick the reasoning with a view then to inviting the appeal court to make a primary decision.

The Factual Background

The Arrest Warrant

7. The Respondent seeks the extradition of the Appellant pursuant to an Arrest Warrant ("AW") issued by the Respondent on 13 September 2021. The AW was certified by the National Crime Agency on 8 November 2021. The AW is underpinned by the Respondent's domestic arrest warrant of 26 July 2021.

8. The AW seeks the Appellant's return to face trial. The alleged conduct relates to three offences: one against the public order contrary to Article 258 of the Polish Criminal Code and two offences contrary to various provisions of the Prevention of Drug Addiction Act of 29 July 2005. In more detail the three offences founding the AW are as follows:

(i) In the period from the beginning of 2019 to 25 July 2019, on the territory of Poland, Spain and other European Union countries, the Requested Person was a member of an organised criminal group directed by Kamil Szymański, whose purpose was to import controlled drugs (namely cannabis, cocaine and methamphetamine) into the territory of the European Union. I refer to this as

Offence 1. The Requested Person's role in this conspiracy is particularised to have been "the organisation of the transport of drugs, their hiding and their loading as well as passing over the money". The AW specifies that the maximum sentence for this offence is five years' imprisonment.

(ii) On a day on or before 16 June 2019, the Requested Person conspired with others to import 1171kg of methamphetamine into Spain for the purpose of its further distribution. I refer to this as Offence 2. The AW specifies that the maximum sentence for this offence is fifteen years' imprisonment.

(iii) Between 23 May and 5 June 2019, in Spain, France and other unidentified places, the Requested Person conspired with others to import 391kg of methamphetamine into Great Britain. I refer to this as Offence 3. The drugs in question were intercepted in France on 5 June 2019. The Requested Person's role in this conspiracy is particularised to have been "organising transport and supervising on the territory of Spain the packing of the drugs and their hiding in pallets with door, the delivery of the drugs to the place of loading as well as their loading onto a trailer of a truck." The AW specifies that the maximum sentence for this offence is twelve years' imprisonment.

9. The Appellant came to the UK in 1998.

10. The Appellant was arrested on 11 November 2021. He was initially remanded in custody but released on conditional bail on 18 November 2022. The Respondent forwarded supplementary information on 4 January 2022 ("the General SI"). There was also the Respondent's response dated 28 February 2022 to the Appellant's request to be interviewed in the UK ("the Section 21B response").

The General SI and the Section 21B response

11. In terms of the Appellant's role within the organised crime group ("OCG"), the General SI provides (at Answer B) as follows:

> "Information gathered in the course of the investigation shows that [the Appellant] took direct action in Germany and Spain. In addition, a number of contacts and arrangements were made via telephone and the internet. As part of the group, [the Appellant] participated in meetings related to the purchase of drugs, was in contact with persons from South America - Colombia (with one of them he was [identified] on 30 June 2019 during a police check in the town of Vigo in Spain), who were probably involved in the delivery of drugs into the territory of the European Union and was directly responsible for hiding the drugs and organizing their transport. [The Appellant], claiming to be the owner of the company *INNECENTER DORTMUND*, ordered, through the company *Schnellfracht*, the transport of the pallets with the doors in which the drugs were hidden, from Spain to Germany (in fact the drugs were then to be transported to the [UK]), and personally ordered the purchase of the doors from the company *Puertas Olmos L[ó]pez SL* in Spain, Alicante, handed over the

> money for their purchase to the owner and arranged all the details related to this. He and Gracjan Paczkowski were also present at the time the drugs were loaded. The suspect together with other suspects drove and after a few days picked up another member of the group from the place where the drugs were hidden in pallet [doors]. (emphasis added)

12. The General SI makes clear that, although offences 1, 2 and 3 are framed as separate "*Acts"* in Polish law, each is part and parcel of the Appellant's participation in the OCG (Answer C). Thus, at the extradition hearing, the Respondent put its case on dual criminality (section 10(2)/section 64(4) of the 2003 Act) as a single extraterritorial conspiracy to import drugs.

13. The OCG, whose operations spanned Poland, Germany, Spain, and the UK, was comprised exclusively of Polish nationals. This is a factor which Public Prosecutor's Office underscores on multiple opportunities given the broad discretion in Polish law to charge own nationals with offences wherever committed (Answer F). Members of the OCG communicated with each other via telephone, including through ENCROCHAT (Answer C).

14. The principal of the OCG, Kamil Szymański, resided in Poland and travelled across other countries, from where he "gave orders and managed the activities of the group and its other members, who could be in different countries at a given time, including Great Britain, where [the Appellant] was" (Answer C). In Answer E, the Respondent affirms that Kamil Szymański did certain acts in furtherance of the group's aims in Poland. His whereabouts are currently unknown.

15. In terms of role, the General SI (Answer D) states that the Appellant participated in a meeting with 'the Colombians' in Vigo (Galicia). He is also said to have discussed with Kamil Szymański the modus operandi of the operation and contacted 'the Colombians' and 'the Mexicans'. This and the reference to '[making] settlements' suggests a leading role within the conspiracy.

16. The Section 21B response provides the following information:

    (1) The OCG intended on smuggling the drugs from Spain to Germany (via France) with the ultimate destination being the UK.

    (2) Not all members of the OCG have been arrested. In particular, the director, Kamil Szymański, remains in hiding. The Respondent has availed itself of international cooperation measures, including European arrest warrants (EAW) to seek the detention of other OCG members.

    (3) Given that the Appellant and others are at liberty, there are concerns that the Appellant could share information with those in hiding from the authorities. This could hinder the investigation and prevent the detection and detention of others wanted.

(4) The case against the Appellant is well grounded.

The Extradition hearing

17. The extradition hearing took place on 30 March 2022. The Appellant resisted extradition on grounds of forum bar and on Article 8 ECHR grounds.

18. The Judge refused an application by the Respondent to adjourn the hearing in order to secure further information relating to the interests of justice factors set out at section 19B(3) of the 2003 Act. The judge explained that the Respondent had been on notice of the point since 24 January 2022. The CPS had had two months in order to make further enquiries. Any further information sought would be unlikely to have material weight to the factors arising under the forum bar. She was doubtful whether anything that Poland would say would change the fact that the offence was international by nature and that it was more likely the evidence would be in other jurisdictions, such as France or Spain. (As set out below, the Respondent has now applied to this Court for further information, subsequently obtained, to be admitted).

19. At the hearing, the Appellant gave evidence, and the witness statements of his partner and his mother were also adduced.

The Judgment

20. In her judgment dated 21 April 2022 ("the Judgment"), the Judge first summarised the evidence before her (§§9 to 13). In dealing with the forum bar, the Judge made the following findings.

21. As regards the threshold criterion in section 19B(2), she concluded that, in relation to Offences 1 and 2, a substantial measure of the Appellant's relevant activity was performed in the UK (§§28 and 33). However in relation to Offence 3 (conspiracy to import drugs into the UK) she was not satisfied that a substantial measure of the conduct took place from within the UK. However, in the event that she was wrong she undertook to consider the interests of justice in respect of this offence as well (§37).

22. The Judge then moved on to consider each of the specified matters in section 19B(3) of the 2003 Act (§38). In summary, she concluded:

(a) The harm relating to Offence 1 was intended to occur throughout the European Union (including but not limited to the UK) and, in Offence 2, in Spain. No explicit finding was made in respect of Offence 3.

(b) Whilst there were no identified victims of the offences, taking account of the location of distribution, the victims in relation to Offence 1 would be throughout Europe, including but not limited to the UK, and in relation to Offence 2, in Spain. No explicit finding is made in respect of Offence 3.

(c) No belief of a prosecutor had been declared and so this specified matter is not relevant to the present case (as per the case of *Scott v USA*).

(d) When considering whether the evidence necessary to prove the offences is or could be made available in the UK, the Respondent's concession regarding evidence in the UK or available through mutual legal assistance was acknowledged. However, "this must be balanced against the fact that relevant evidence has already been gathered by the Polish authorities for the purpose of investigating these offences". In addition to evidence from Poland, the Judge considered the evidence emanating from France and considered that "there is likely to be time and expense involved in making that evidence available in the UK". It would need to be requested from Poland and would need to be translated into English.

(e) There is likely to be more delay if the Appellant were to be prosecuted in the UK rather than Poland. "It is unlikely that there would be substantial delay if the [Appellant] were extradited to face prosecution in Poland in relation to these matters".

(f) It would be inappropriate for prosecutions relating to the wider conspiracy to take place in multiple jurisdictions. Given all members of the group are Polish and efforts are being made to prosecute all of them in Poland, it is most likely a trial would proceed there and that increases the desirability of the Appellant being prosecuted there. The Judge could not see that any other co-defendants were in the UK. Further none of the witnesses are likely to be in Poland and it is unclear that any would be in the UK. The location of witnesses is therefore a neutral factor.

(g) The Appellant has a strong connection to the UK.

23. At §§42 to 44, the Judge drew together her findings on the interests of justice factors. She accepted that factor (g) militated in the Appellant's favour. She observed that no harm was intended in Poland whilst limited harm was intended in the UK. She placed considerable weight on the decision of the Polish authorities to avail themselves of their extraterritorial jurisdiction over their own nationals to investigate and prosecute the case, relying on mutual legal assistance mechanisms where appropriate. She found it more likely that any co- conspirators would be arrested and tried in Poland and did not accept that there were any in the UK. The existence of the Polish co-conspirators lessens the importance of the Appellant's connection with the UK. She acknowledged that whilst "other conspirators do not yet appear to have been arrested and returned to Poland", the prosecution of all persons in the same jurisdiction (even if their trials take place at different times) is clearly desirable. She went on to conclude:

> "I do not accept that it is more desirable to prosecute this international conspiracy case in the UK simply because one of the many conspirators has a strong connection here, particularly when Poland has already decided to prosecute this matter based on the single nationality of all conspirators."

At §43, the Judge concluded:

> "I accept that some of the harm in relation to Offence 1 (via Offence 3) was intended to occur in the UK. However, that forms only a small part of this wider conspiracy. It is clear from the information provided that this was an international conspiracy to import drugs into the European Union as a whole and that drugs were to be distributed in countries other than the UK, such as Spain. And so I do not consider that this factor weighs particularly strongly in favour of prosecution in the UK in this case. Moreover, whilst I accept also that it would be possible for all relevant evidence to be obtained in the UK and for the Requested Person to be prosecuted here, this would inevitably cause delays to his prosecution as all of the evidence has already been obtained (via MLA) through the Polish authorities, this further supports the conclusion that extradition would be in the interests of justice."
> (emphasis added)

In conclusion, the Judge did not consider that there is a bar to extradition under section 19B. She then went on to reject the Appellant's case under Article 8 ECHR and ordered his extradition.

Application to admit further supplementary information: the Forum SI

Introduction: the issue and the parties' submission in outline

24. Following the Judgment, the Respondent provided further supplementary information dated 7 June 2022 ("the Forum SI"). The Respondent applied for this Forum SI to be admitted into evidence. This was opposed in writing by the Appellant. In her decision granting permission to appeal, Hill J refused the Respondent's application for the Forum SI to be admitted into evidence on this appeal. The Respondent has now applied afresh to this Court for that material to be admitted. The Appellant opposes this application.

25. The application gives rise to two distinct issues:

    (1) Is this Court entitled to consider this application to admit the Forum SI into evidence?

    (2) If it is so entitled, should this Court admit the Forum SI into evidence?

26. The Respondent submits, in summary, that:

    (1) The Court does have power to consider the application; it is not precluded from doing so by the decision of Hill J refusing the application; and

    (2) Applying the relevant principles for admission of evidence at the behest of a respondent, the Court should admit the Forum SI into evidence either because (a) it is entitled to consider the application afresh and reach its own view or (b) because the decision of Hill J was wrong in law and/or was an unreasonable exercise of discretion.

27. The Appellant submits that:

(1) The Court does not have power to consider the application; Hill J's decision refusing to admit the Forum SI was a "case management" decision within Part 50 of the Criminal Procedure Rules and, as such, is final and cannot be revisited – applying principles of res judicata.

(2) Even if the Court does have power to consider the application, it is on the basis of a review of Hill J's decision which can only be impugned if it amounted to a wrong exercise of discretion on usual principles. Hill J's decision was not wrong – it was a proper exercise of discretion, based on taking account of relevant factors.

The Forum SI itself

28. By request dated 24 May 2022, the CPS sought the following information:

> "In relation to the 'Acts' described in Box E of the AW:
>
> i. Does the evidence suggest that the organised criminal group intended on importing drugs specifically to the UK or, instead, that the drugs were generally destined for EU/European countries, which included the UK?
>
> ii. In broad terms, how much evidence is contained in the case file? (I.e., *approx*. how many pages)?
>
> iii. In broad terms, how much evidence originates from Poland and how much comes from other countries (e.g., France, Spain, the UK)?
>
> iv. In general terms, is the evidence in the case file in the Polish language or another language?
>
> v. If proceedings were to take place in the UK, what percentage (roughly) of the case file would require translation into English (whether from Polish or another language)?
>
> vi. Are most of the witnesses in Poland, the UK or another European country?
>
> vii. Do the Polish authorities wish to try all suspects together?
>
> viii. Are certain parts of the case file subject to restriction under Polish law due to sensitive content?"

29. The Forum SI responds to these questions as follows:

(i) The authorities cannot definitively identify the destination of the methamphetamine. Police officers in Spain seized approximately 631

kilogrammes of methamphetamine from a warehouse in Badalona. Police officers in France retained 391 kilogrammes of methamphetamine bound for Germany. "Part of [the drugs] could be planned to be transported to the [UK] but it has not been ascertained beyond doubt whether it was supposed to be like that, possibly which part of the drugs was supposed to be further transported, how, by whom and when". But indisputably the drugs were intended to be transported to Spain and Germany, and in the earlier period drugs were transferred from Germany to Poland. The drugs were generally intended for the European countries (EU).

(ii)/(iii)There are approximately 4,000 pages of evidence in the main file and 8,000 pages of enclosures. This includes material obtained from France (1,190 pages) and Spain (200 pages). There are also haulage manifests (approximately 1,395 pages). There are several dozen oral recordings in Polish. None of the materials comes from the UK.

(iv) All evidence is in Poland save for that received from abroad as above. The authorities have already translated the French/Spanish evidence into Polish.

(v) If the proceedings were transferred to the UK, the UK authorities would have to receive around 2,500 pages of material which are in Polish, Spanish or France, plus several recordings in Polish.

(vi) Most witnesses (and suspects) are in Poland and all preliminary proceedings against the OCG have taken place there. There are no witnesses in the UK and no activities have been and are not planned to be conducted in the UK. The only reason to involve the UK authorities is the fact that the Appellant is hiding in the UK.

(vii) The Appellant's cousin is charged with similar offences and remanded in custody in Poland. It is hoped that the proceedings against the Appellant and he can be combined.

(viii) Part of the secured telephone calls are kept in confidence and care should be taken about disclosing materials given that Szymański is in hiding.

The relevant legal principles applicable to the admission of evidence at the behest of a respondent

30. The position as to the admission of further evidence on appeal *at the behest of a respondent seeking to uphold* the decision of the district judge is set out in *FK v Germany* [2017] EWHC 2160 (Admin), at §§ 31 to 40, as recently summarised in *Stanciu v Armenia* [2022] EWHC 3368 (Admin) at §81. That position is to be contrasted with that applicable to admission of further evidence at the behest of an appellant, which is set out in *Hungary v Fenyvesi* [2009] EWHC 231 (Admin) and *Zabolotnyi v Mateszalka District Court, Hungary* [2021] 1 WLR 2569 at §57. I have also been referred to *Bertino v Italy* [2022] EWHC 665 (Admin), Swift J at §§9-11. The principles, derived from these authorities, can be summarised as follows.

31. First, as regards *an appellant* seeking adduce new evidence in support of a contention that the district judge's decision was wrong, it must be demonstrated (a) (in general)

that the evidence was not available at the extradition hearing and (b) in any event that the evidence would have resulted in the judge deciding the relevant question differently, so that he would not have ordered the defendant's discharge i.e. the fresh evidence must be decisive: see *Fenyvesi* and sections 27(3)(b) and (c) of the 2003 Act.

32. Secondly, by contrast, the position of a respondent (whether the requesting state or the requested person) seeking new evidence in support of the decision below is different and less restrictive. The approach in *Fenyvesi* does not apply (*Stanciu* §81(1)).

(1) There is no restriction on the inherent jurisdiction of the court to admit evidence from a respondent to an extradition appeal in support of decision of district judge. (*FK* §39).

(2) The decisiveness test in *Fenyvesi* does not apply.

(3) The admission of the new evidence, rather than delaying, may well expedite matters. It may avoid a situation where the warrant is discharged because of some defect but followed by a re-issue of the warrant with the benefit of the new information. (*FK* §38).

(4) Where the court admits such new evidence, it is likely to admit evidence from the appellant in rebuttal. Questions of prejudice to the appellant will be relevant. (*FK* §38 and *Stanciu* §81(2)).

(5) It is not contrary to Art 6 ECHR or common law, to allow a party to submit evidence in support of decision below, whilst proscribing the unsuccessful party from submitting evidence to support a case that the decision below was wrong. (*FK* §38).

(6) Availability of the evidence before the district judge is still a relevant factor, but it is only one of several material considerations: *FK* §40. Ultimately the question is whether the admission of new evidence is "in the interests of justice": *FK* §38.

(7) Where new evidence merely confirms a factual finding made by the judge or clarifies an issue of fact or law, it may be straightforward to persuade the court that its admission is in the interests of justice: *FK* §40 and *Stanciu* §81(4).

(8) The Court can bear in mind its own ability to seek further information from the requesting state at any stage: *Stanciu* §81(3) and also *FK* §43.

(9) There is a suggestion that the respondent should seek to introduce further information as soon as possible and not wait until the currency of the appeal: *Bertino* §§9-11.

Criminal Procedure Rules

33. Part 50 of the Criminal Procedure Rules ("CPR") addresses Extradition specifically. Section 3 is headed "Appeal to the High Court". CPR 50.17 provides, inter alia, as follows:

"Exercise of the High Court's powers

50.17.—(1) The general rule is that the High Court must exercise its powers at a hearing in public, but—

(a) that is subject to any power the court has to—

(i) impose reporting restrictions,

(ii) withhold information from the public, or

(iii) order a hearing in private;

(b) despite the general rule, the court may determine without a hearing—

(i) an application for the court to consider out of time an application for permission to appeal to the High Court,

(ii) an application for permission to appeal to the High Court (but a renewed such application must be determined at a hearing),

(iii) an application for permission to appeal from the High Court to the Supreme Court,

(iv) an application for permission to reopen a decision under rule 50.27 (Reopening the determination of an appeal), or

(v) an application concerning bail; and

(c) despite the general rule the court may, without a hearing —

(i) give case management directions,

(ii) reject a notice or application and, if applicable, dismiss an application for permission to appeal, where rule 50.31 (Payment of High Court fees) applies and the party who served the notice or application fails to comply with that rule, or

(iii) make a determination to which the parties have agreed in writing.

…

(4) If the High Court gives permission to appeal to the High Court—

…

(c) the court must give such directions as are required for the preparation and conduct of the appeal, including a direction as to whether the appeal must be heard by a single judge of the High Court or by a divisional court.

…

(6) The High Court may—

(a) shorten a time limit or extend it (even after it has expired), unless that is inconsistent with other legislation;

(b) allow or require a party to vary or supplement a notice that that party has served;

(c) direct that a notice or application be served on any person; and

(d) allow a notice or application to be in a different form to one set out in the Practice Direction, or to be presented orally.

…" (emphasis added)

34. CPR 50.18 headed "Case management in the High Court" provides as follows:

"50.18.—(1) The High Court and the parties have the same duties and powers as under Part 3 (Case management), subject to—

(a) rule 50.2 (Special objective in extradition proceedings); and

(b) paragraph (3) of this rule.

(2) A master of the High Court, a deputy master, or a court officer nominated for the purpose by the Lord Chief Justice—

(a) must fulfil the duty of active case management under rule 3.2, and in fulfilling that duty may exercise any of the powers of case management under—

(i) rule 3.5 (the court's general powers of case management),

(ii) rule 3.12(3) (requiring a certificate of readiness), and

(iii) rule 3.13 (requiring a party to identify intentions and anticipated requirements) subject to the directions of a judge of the High Court; and

(b) must nominate a case progression officer under rule 3.4.

(3) Rule 3.6 (Application to vary a direction) does not apply to a decision to give or to refuse

(a) permission to appeal; or

(b) permission to reopen a decision under rule 50.27 (Reopening the determination of an appeal)."

(emphasis added)

35. In Part 3 of the CPR, CPR 3.5 headed "The court's case management powers", provides, inter alia, as follows:

"3.5.—(1) In fulfilling its duty under rule 3.2 the court may give any direction and take any step actively to manage a case unless that direction or step would be inconsistent with legislation, including these Rules.

(2) In particular, the court may—

(a) nominate a judge, magistrate or justices' legal adviser to manage the case;

(b) give a direction on its own initiative or on application by a party;

(c) ask or allow a party to propose a direction;

(d) receive applications, notices, representations and information by letter, by live link, by email or by any other means of electronic communication, and conduct a hearing by live link or other such electronic means;

(e) give a direction—

(i) at a hearing, in public or in private, or

(ii) without a hearing;

(f) fix, postpone, bring forward, extend, cancel or adjourn a hearing;

> (g) shorten or extend (even after it has expired) a time limit fixed by a direction;
>
> (h) require that issues in the case should be—
>
> (i) identified in writing,
>
> (ii) determined separately, and decide in what order they will be determined; ...
>
> (i) specify the consequences of failing to comply with a direction;
>
> (j) request information from a court dealing with family proceedings by—
>
> (i) making the request itself, or
>
> (ii) directing the court officer or a party to make the request on the criminal court's behalf; and
>
> (k) supply information to a court dealing with family proceedings as if a request had been made under rule 5.8(7) (Request for information about a case) by—
>
> (i) supplying the information itself, or
>
> (ii) directing the court officer or a party to supply that information on the criminal court's behalf.
>
> …" (emphasis added)

Applications for extension of a representation orders pursuant to an extradition appeal (now Criminal Practice Directions 2023 at §12.4) may be determined by a single judge and do not generally have a right of appeal or to an oral hearing 50C.2. However such applications are regarded as a "case management" matter.

The application and the decision of Hill J

36. By formal application notice dated 15 June 2022 the Respondent applied to introduce into these appellate proceedings the Forum SI as fresh evidence. By written submissions dated 29 June 2022, the Appellant opposed the application. In those written submissions, the Appellant, inter alia, accepted that the stricter test in *Fenyvesi* did not apply to respondents. The Appellant submitted, first that the evidence was "available" at first instance and, secondly, no good reason had been offered for the failure to secure that evidence then. Thirdly, the Judge refused the Respondent's application to adjourn; the present application is a collateral attack on that case management decision and thus this application is very different to that in *FK*.

37. The application for permission to appeal and the Respondent's application to admit the Forum SI was then referred to Hill J for decision on the papers.

38. In refusing the Respondent's application to admit the Forum SI, Hill J gave the following reasons, in the standard template form EXTR 3, in the section entitled "Observations":

> "4. It is noted that (i) the Respondent was on notice of the potential relevance of this evidence from the date of the service of the Appellant's statement of issues on 24 January 2022, which identified forum as an issue; (ii) the evidence could therefore have been obtained before the extradition hearing; (iii) no good reason has been advanced for the evidence not being so obtained; and (iv) the Judge made the case management decision to refuse the Respondent's application to adjourn the hearing to obtain this evidence, for the reasons recorded at [6(iii)] of the Applicant's response to the application dated 27 June 2022.
>
> 5. Accordingly I consider that the fresh evidence does not meet the requirements set out in Szombathely City Court v Fenyvesi [2009] EWHC 231 (Admin) and that, applying FK v Stuttgart State Prosecutor's Office, Germany [2017] EWHC 2160 (Admin), it is not in the interests of justice for the evidence to be admitted on the appeal."

39. Hill J's order in the standard template form then continued, in a separate section entitled "Case management directions", to set out directions (in the standard form eight number paragraphs), including in particular the timetable for service of materials leading up to the date of the hearing of the appeal.

The parties' submissions

40. The Respondent submits the Court has jurisdiction to consider the application, despite the decision of Hill J. Otherwise the Respondent would have no other remedy, and there would be an incentive to delay an application for further evidence until the substantive hearing of the appeal. The general rule in CPR 50.17(1) applies; there should be a hearing in public. The decision not to admit this evidence is not a case management direction within CPR 50.17(1)(c)(i) nor within CPR 50.17(1)(b). Strictly therefore there was no jurisdiction for the application to have been determined on the papers without a hearing.

41. As to the substance of the application, Hill J wrongly applied *Fenyvesi*, rather than *FK,* or at least elided the two cases. She did not appear to appreciate the fundamental difference between an application by a respondent (*FK*), and one by an appellant (*Fenyvesi*). Paragraph 4 of her reasons is the operative part of her decision. The present case falls squarely within §40 of *FK*. If the evidence is not admitted, if need be, the Respondent can re-issue the warrant supported by the Forum SI. That would only result in delay and costs. Further the Appellant will suffer no prejudice if the Forum SI is admitted; and no rebuttal evidence is required in this case.

42. The Appellant submits, first, that the issue of the admissibility of the Forum SI is res judicata. The precise same application as was determined by Hill J is renewed afresh in the hope of securing a different outcome from a different judge. Thus cause of

action estoppel applies. The Respondent's application offends against the principle of good administration of justice and the interests of the public and the parties in certainty of outcome. Moreover the CPR do not allow for reconsideration of the decision of Hill J. It was a case management decision; which the CPR expressly provide may be determined without oral hearing. The CPR do not provide for any right to an oral hearing following an adverse decision. It was not an "application" within the Criminal Practice Directions**.** Ms Hill accepts that this was a situation which had not arisen before: admissibility of such evidence is usually dealt with at or just before the substantive appeal hearing. Nevertheless her submission is that it is not possible to challenge a decision made on paper as to the admissibility of evidence.

43. As to substance, even if the above is wrong, there is no proper basis to revisit the decision of Hill J. This Court can only review her decision, and on the basis of an error of law or an unreasonable exercise of discretion. Her decision was made by reference to the representations of the Respondent and the Appellant which correctly identified the relevant principles of law. Hill J clearly had in mind the lead decision in *FK* and was aware of §40. Her decision is within the reasonable exercise of her discretion on the grounds set out at paragraph 4 of her reasons. Moreover there would be real prejudice to the Appellant if the Forum SI was admitted. He had been advised and has taken decisions on the basis of the position following the order of Hill J. He was entitled so to do, with confidence in the finality of that decision.

Discussion and conclusions

Issue (1): can the issue be considered by this Court?

44. In my judgment, it is open to this Court to consider the Respondent's application to admit the Forum SI into evidence, despite the fact that Hill J refused to admit it in her decision made on the papers.

45. First, the starting point is that parties have a right to a public oral hearing in relation to any disputed issue. There is a presumption that where an application is dealt with by a judge on the papers and without hearing oral argument, any decision can be reconsidered at a subsequent oral hearing; see for example, applications for permission to appeal from the County Court to the High Court. In my judgment in such circumstances, a decision on the papers in such circumstances is not res judicata – neither cause of action estoppel nor issue estoppel apply. Moreover in the circumstances here, it is not an abuse of process for the Respondent to seek effectively to renew its application at an oral hearing.

46. Secondly, turning to the specific provisions of the CPR as they apply to extradition cases, this general presumption is made express in the "general rule" in CPR 50.17(1) – the Court is under an obligation to exercise "its powers" at a hearing in public. That general rule is then made subject to certain exceptions, where the Court may make a decision without a hearing. One of those exceptions, and relied upon by the Appellant here, arises when the Court "may give case management directions". In my judgment, that exception does not apply to an application to admit evidence at an appeal. Such an application relates to the underlying substantive issues of the appeal. By contrast, a case management direction is a direction relating to *the procedure* followed by the court in disposing of the substantive appeal e.g. directions for filing and service of skeleton arguments, bundles, fixing the hearing date and for *the timing*

of filing and service of evidence (not as to whether such evidence is admissible): see also CPR 51.17(4)(c), 50.18(2)(a) and 3.5(1) and (2). This is reflected in the separate section of the standard template order (where permission to appeal is granted on the papers) which is headed "case management directions". This section was used by Hill J in the present case, *after* she had made her decision and given her reasons in relation to the application to admit evidence. Nor do I accept Ms Hill's argument that because an application to admit evidence is not listed as a specific application in the Criminal Practice Direction, it must therefore be a "case management direction". Such an application is not expressly covered by the CPR or the CPD and so the general rule in CPR 50.17(1) applies.

47. On one view that might suggest that it was not possible for the present application to be determined on the papers at all, and thus that Hill J acted without jurisdiction. I do not go that far. Neither the CPR nor the general principle suggests that such an application cannot be considered in the first place by a judge on the papers; but any such decision cannot be final. What CPR 50.17(1) requires is that, unless one of the exceptions applies, the Court's powers must ultimately be exercised at a public hearing. That means that in any event it is proper and necessary for this Court to consider the application at such a hearing.

Issue (2): (a) If so, on what basis should this Court approach the application – afresh or by way of review of the decision of Hill J

48. In my judgment, this Court should consider the Respondent's application to admit the Forum SI afresh ("de novo"). That is the position in any case where a decision taken on the papers is renewed at an oral hearing, and before a different judge (e.g. oral renewal of permission to appeal in extradition cases, in judicial review cases and in appeals from the County Court to the High Court – and even in the case of appeals to the Court of Appeal Criminal Division). At the later stage, the judge has had the benefit of oral argument from the parties who, in turn, have had the opportunity to address the reasons for the initial decision made on the papers. In none of these cases, can it be objected that the second judge is wrong to reach a different view from that of the first judge – his or her colleague. The approach is not for this Court to "review" the first judge's decision, although of course it will consider the reasons given by the judge, with which it is entitled to agree or disagree.

Issue (2): (b) Should the Forum SI be admitted into evidence?

49. In my judgment, having considered the content of the Forum SI de bene esse, it is in the interests of justice that the Forum SI should be admitted into evidence. This is an application by the Respondent to admit evidence *in support of* the Decision below. Thus, the principles set out in *FK* apply (see paragraph 32 above). The principles set out in *Fenyvesi* and sections 27 and 29 do *not* apply at all. Contrary to Hill J's view at paragraph 5, the fresh evidence does not need to meet the requirements set out in that case.

50. Applying the principles in *FK*, first, as regards availability of the material before the Judge, strictly, it was not available. Even if non-availability was due to the Respondent's inaction, and thus it could or should have been available, availability below is just one factors to be taken into account, Secondly, and most significantly, the material in the Forum SI in part confirms findings of the Judge and in part clarifies

certain issues of fact that were unclear in the General SI. The Forum SI clarifies the position as regards the location and destination of the drugs as being across Europe (factors (a) and (b)); gives more detail about the location and availability of the evidence (factor (d)); and for the first time discloses that one of the co-defendants is in Poland and can only be tried there (factor (f)). Thirdly, I have difficulty in concluding that the Appellant will suffer any real prejudice as a result of its admission. Evidence in rebuttal has not been sought, nor is said no longer to be available. The Appellant says he has taken certain unspecified steps as a result of advice received *on the basis of Hill J's decision*. However this is not prejudice arising from failure to adduce the evidence before the Judge. At most it may have been an argument under Issue 1 above. In any event, given the novelty of the situation, advice based on the assumption that the application could not be re-opened could not have been without risk. Fourthly, this Court could have itself requested the information. Finally, if the Forum SI were not to be admitted, and the appeal were to succeed, the Respondent would be in a position to re-issue the warrant with the benefit of the information.

The substantive appeal

51. I now turn to consider the substance of the Appellant's appeal. Each party made its submissions on the alternative bases, depending upon whether the Forum SI was admitted into evidence. However, in the light of my decision to admit the Forum SI, it was common ground that I should consider the Judge's findings, but with the benefit of the additional information provided by the Forum SI.

The Parties' submissions

The Appellant's case

52. The Appellant's initial case, absent the Forum SI, was, in summary, first, the Judge was wrong to conclude that the threshold question was not passed in relation to Offence 3. Having found that a substantial measure of the conduct founding the wider conspiracy in Offence 1 took place within the UK, it was illogical to conclude that the acts pursuant to that conspiracy involved in Offence 3 did not take place within the UK. Secondly, the Judge erred in a number of ways in relation to the specified matters in s.19B(3). As to (a), the intended harm for each of the three Offences was the UK and the fact that the harm was directed at the UK must be treated as weighty. As to (b), the Judge was wrong to conclude that the theoretical victims would have been throughout Europe. As to (d), there is no reason to believe that evidence could not be obtained by the UK authorities. The Judge wrongly conflated the issue of availability of evidence with the possible delay in securing it. As to (e), there is no reason that preparing to prosecute in the UK should cause anything but minor delay. As to (f), this is an international conspiracy, and the UK is better placed than Poland to conduct a trial of the allegation. The only defendant arrested to date is the Appellant who is in the UK. The Judge was wrong to conclude that there is no evidence of co-defendants also being in the UK. The General SI states that other members could be in different countries including Great Britain. The Judge was wrong to conclude that it is unclear that any witnesses would be in the UK. As to (g) the Appellant has extensive ties in the UK. The Judge did not engage in any meaningful analysis of the weight of this factor.

53. This Judge made material errors in her conclusions in respect of almost all of the s.19B(3) factors. Had she not erred, she would have been bound to conclude that, in this case of a conspiracy to import drugs into the UK, perpetrated by a UK resident, and in significant part facilitated from the UK where the only apparent link to Poland is the nationality of the accused and the location of one other, it is in the interests of justice that the prosecution take place here.

54. However, Ms Hill accepts that the Appellant's case is more difficult in the light of the Forum SI. Her contention about the threshold question in s.19B(2) remains the same. As regards factors (a) and (b), location of harm and victims, and in relation to the transport to the UK, she submits that there is an inconsistency between Answer (B) in the General SI and what is now said in the Forum SI. The Respondent's first response should be preferred. As to factor (d), it appears from the Forum SI that a significant percentage of the evidence comes from Spain and France, and not Poland, and that the UK authorities could obtain this evidence just as easily as the Polish authorities have been able to do so. As to factor (e), whilst there would be delay in the UK, the Judge was wrong to say that delay in Poland is "unlikely"; Poland is subject to an ECHR Pilot Judgment in respect of delays within its trial process. As to factor (f), witnesses and co-defendants, the statement in the Forum SI that there are no witnesses, and there were and are no activities, in the UK is inconsistent with Answer C in the General SI that other members of the OCG were in GB. As to factor (g), the Appellant's position is compelling. He came to the UK when he was about 13 years old; he is now 38. He is highly integrated here. Overall, taking account the fact that the primary harm is in the UK and of factors (a), (b) and (g), the balance of factors overall establishes the forum bar. The Judge was wrong not so to find.

The Respondent's case

55. The Respondent submits that, whether or not the Forum SI is admitted, the Judge's decision was not wrong. Certainly on the basis that the Forum SI is admitted, the Judge's inferences from the material before her, and her conclusion, were correct.

56. As regards the threshold question in s.19B(2), the primary submission is that the Judge was wrong in respect of Offences 1 and 2; the threshold was not met at all. However, if I do not accept that, then Mr Hyman does not dispute that it was illogical for the threshold not to be met in respect of all three offences.

57. As to the interests of justice factors (a) and (b), the Judge was correct to find that the case involved a pan-European conspiracy. There is no inconsistency here between the General SI and the Forum SI. The latter merely explains in more detail the nature of the pan-European conspiracy. As to (c), the Judge was correct as a matter of law. As to (d), as the Forum SI demonstrates, the evidence is in Poland, is largely in Polish and the Polish authorities have sought the detention and surrender of other persons. As to (e), there would be delay in transferring evidence from Poland to the UK, in obtaining translations, in considering 2500 pages of material, taking a charging decision and initiating criminal proceedings. As to (f), Poland is the only feasible venue for a trial. There are no other co-conspirators in the UK and there are other Polish nationals across Europe. Answer C in the General SI is not to be interpreted to the contrary. There is one individual – the Appellant's cousin - already remanded in custody in Poland. He could not be surrendered to the UK. The only location in which both he and the Appellant could be tried as co-conspirators is Poland. As to

(g), whilst this does strongly militate in favour of the forum bar, nonetheless the Appellant is a Polish national, who speaks Polish, being extradited to Poland; that is not the same as being a non-Polish speaking UK national.

Discussion

58. First, as regards the threshold question, I consider that the Judge was entitled to conclude that the threshold issue was satisfied in respect of Offences 1 and 2 and further that there is force in the Appellant's contention that the Judge should have gone on to find the threshold issue to have been satisfied also in respect of Offence 3. I do not accept the Respondent's case that the threshold test was not met in respect of any of the Offences. Nevertheless this has limited effect on the outcome of this appeal, first, because it leaves outstanding the issue of the "interest of justice" under section 19B(3), and, secondly, because the Judge expressly stated that her analysis of that issue applied equally to Offence 3 (§37).

59. Thus, the sole issue on this appeal is whether the result which the Judge reached on balancing the s.19B(3) factors was wrong, taking into account the further information in the Forum SI. I address the Judge's analysis of each of the factors in s.19B(3) in turn, in the light of the Forum SI, and bearing in mind the correct approach set out in paragraph 6 above.

60. As to factors (a) and (b), in my judgment the Judge was entitled to find that this was a pan-European conspiracy and that, as such the harm was intended to occur throughout the EU; and further entitled to conclude that the victims of that conspiracy would, commensurately, be located in the same area where the drugs were distributed. I accept the Respondent's contention that such a conspiracy produces harm in every country which it touches. The Judge's conclusion is further supported by the Forum SI, and in particular, that the intended destination of the drugs was Spain and Germany and the final actual destination of some of the drugs was, variously, Spain, France, Germany and Poland. Given the nature of the question (i) asked, the response (i) that it could not be stated that the drugs were intended specifically for the UK amounts to further clarification of Answer B to the General SI, rather than an inconsistency with it. The Forum SI is a more detailed explanation of the pan European nature of the conspiracy, and supports the Judge's conclusion.

61. As to factor (c), it is not disputed that the Judge's conclusion on this issue was correct. As to factor (d), availability of the evidence, the Judge was entitled to conclude that the evidence was largely in the hands of the Polish authorities, which included evidence provided to them by the French authorities. In fact the position on this factor is now more strongly in favour of extradition. The Judge thought that there may be some UK-based evidence. However the Forum SI makes it clear that none of the evidence had come from the UK. Whilst evidence from France could be obtained by the UK authorities, this would require translation, something which had already been done by the Polish authorities. This links with factor (e), delay, and to that extent, the Judge was entitled to take such delay into account under factor (d).

62. As to factor (e) itself, on the material before her, the Judge was entitled to conclude that there would be more delay if the Appellant were to be prosecuted in the UK rather than in Poland. In my judgment, this conclusion is put beyond doubt by the information in the Forum SI that there is 2500 pages of material in Polish, Spanish or

French. The UK authorities would have to obtain the information, make requests for, and then translate that information. The case would have to be considered by the police and then by the CPS to make a charging decision. The Appellant is on bail. A trial for a person on bail in the UK at the moment involves a lengthy delay. Moreover, given the type of evidence relied upon by the Polish authorities, there would be considerable disclosure challenges within the context of a domestic criminal case. In these circumstances, the Judge's finding that proceedings would not take a similar length of time in the UK as it would in Poland is not wrong.

63. As to factor (f), on the information before her, the Judge was entitled to conclude, first, that the most likely location for any trial against any co-conspirators was Poland, since they are all Polish nationals and there was no evidence of any of them being in the UK, and, secondly, that the location of witnesses was a neutral factor, given that there was no evidence that any were based in the UK. Since they were likely to be based in Spain, France and Germany, they would have to travel equally to Poland or the UK. As regards the location of the co-defendants, two further points arise. First, whilst I accept that there may be a tension between Answer C in the General SI and the Forum SI as to whether other co-conspirators might have entered the UK in the course of the relevant events, nothing in either document establishes that other co-conspirators are *now* at large in the UK. Secondly, and in my judgment importantly, the Forum SI provides the further information that one of the co-conspirators is not only in Poland, but has been remanded in custody and awaits trial there. As a matter of law, since Poland has enacted a mandatory nationality bar, the co-defendant could not be surrendered to the UK to be tried together with the Appellant. It follows that the only location where both could be tried together as co-conspirators is Poland. This additional material provides strong support for the Judge's conclusion that factor (f) favours extradition.

64. Finally, as to factor (g), the Judge found this to militate in the Appellant's favour. I do not accept the Appellant's submission that she should have placed greater weight on it. The Judge placed substantial emphasis on it twice, describing the Appellant as having a 'much stronger connection' to the UK in the operative part of the Judgment (§42). In considering this factor at §38, the Judge expressly cross-referred to her subsequent detailed consideration of the Appellants' private and family life in relation to the Article 8 balance (at §§50(i) to (iii) and 51(iii)). She clearly took full account of the nature and depth of the Appellant's history and his family life in this jurisdiction.

65. In these circumstances, I conclude that, taking account of the Forum SI, there was no error in the Judge's assessment of the interests of justice factors and thus no basis to interfere with the Judge's value judgment of those factors, leading to her conclusion that extradition is not barred under section 19B of the 2003 Act. I should add that, in any event, I would not have been persuaded that the Judge erred, even on the basis of the material which was before her at the time, and leaving out of account the Forum SI.

Conclusion

66. For these reasons, I am not satisfied that the Judge's conclusion was wrong and this appeal is dismissed.

67. Finally I am most grateful to counsel for their presentation of the case and the quality of the argument, in part touching upon areas previously unexplored.