Neutral Citation No: [2018] NIQB 63	***Ref:*** **STE10650**
Judgment: approved by the Court for handing down (subject to editorial corrections)*	***Delivered:*** **3/9/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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MICHAL JANKOWSKI

Appellant:

v

REPUBLIC OF POLAND

Respondent:

_____

Before: Stephens LJ and Keegan J

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STEPHENS LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal pursuant to Section 26 of the Extradition Act 2003 ("the Act") with leave of McBride J to the Queen's Bench Division of the High Court against the decision of HHJ McFarland, the Recorder of Belfast ("the Recorder") dated 21 February 2018 whereby he ordered the extradition of Michal Jankowski to Poland.

[2] Mr Sean Devine appeared on behalf of the appellant and Ms Marie-Claire McDermott appeared on behalf of the respondent, the Requesting State.

Background in relation to the offences, the arrest warrant and the EAW

[3] On 28 December 2001 under reference II K 458/01 the appellant (now 38, DOB: 27 August 1979) was convicted before the District Court in Plock, Poland of two drug offences ("the 2001 offences"). The first of these was committed on 16 November 2000 and consisted of possession of 49.42 grams of marijuana and attempting to place it on the market. The second was committed between 15 and 30 September 2000 and consisted of collecting poppy straw and processing it by drying

and powdering it. On 28 December 2001 the appellant was sentenced for the 2001 offences to the aggregate sentence of 1 year 4 months' deprivation of liberty with its conditional suspension for 5 years of probation. The enforcement of the sentence was ordered by a decision of the District Court of Plock of 19 October 2006 which was amended by a decision of the Circuit Court in Plock of 6 February 2007 so that the suspension was removed. In relation to that sentence we were informed that he has 8 months and 17 days remaining to serve.

[4] On 13 September 2004 under reference II K 348/04 the appellant was convicted before the District Court in Plock of a violent offence committed on 22 January 2004 when he, acting jointly and in concert with four identified men, "participated in a beating of Grzegorz Wojtan by punching and kicking him all over his body, by which they exposed him to the immediate danger of the loss of life or to a consequence referred to" in an article of the penal code ("the 2004 offence"). The appellant was sentenced on 13 September 2004 which was then amended by the sentence of the circuit Court in Plock on 21 January 2005 by which he was sentenced to 1 year 8 months' deprivation of liberty. In relation to that sentence we were informed that he has 1 year, 1 month and 9 days remaining to serve.

[5] The appellant was present in court at the trials resulting in both decisions and the initial sentences.

[6] By a decision of the District Court in Plock of 10 October 2007 "searching for (the appellant) with an arrest warrant was ordered." The respondent states that "the searches in the country aiming to place (the appellant) in prison did not result in his arrestment." No details are given as to the searches in the country.

[7] On 12 July 2017 a European Arrest Warrant ("EAW") was issued which was certified on 26 July 2017.

[8] On 2 August 2017 the appellant was arrested at Belfast International Airport when he arrived back from holiday in Spain.

[9] Also on 2 August 2017 the appellant was admitted to bail and he remained on bail until 21 February 2018.

[10] The hearing took place before the Recorder on 8 December 2017 and judgment was reserved. An opportunity was then afforded before judgment was delivered for the appellant to make an application in Poland to have the sentences suspended. That application did not succeed and on 21 February 2018 the Recorder gave an ex tempore judgment and remanded the appellant in custody.

[11] On 15 March 2018 McBride J granted the application for leave to appeal and granted an extension of time within which to appeal.

[12] On 23 April 2018 the CSO issued a "request for further information" seeking a timeline of actions by the Requesting State to find and pursue the appellant. There was no response to that request before the hearing of this appeal.

The issues in the appeal

[13] The appellant had not contended before the Recorder and did not contend before us that his extradition would be oppressive for the purposes of section 14 of the Act. Rather the appellant contended that his extradition would violate his rights and those of his immediate family as guaranteed by Article 8 ECHR. Disproportionality under Article 8 is a lower threshold than that for oppression under section 14, see paragraph [33] of *Lysiak v District Court Torun of Poland* [2015] EWHC 3098 (Admin). In relation to the issues under Article 8 Mr Devine stated that he did not challenge any of the Recorder's factual findings.

[14] The issues in the appeal under Article 8 are:

(a) whether the Recorder erred in failing to take into account the effect on the public interest in extradition and on the article 8 ECHR rights of the appellant and of his family of delay on the part of the Requesting State in issuing an EAW;

(b) whether the Recorder erred in failing to attribute significant weight to the absence of any explanation from the Requesting State for the delay in issuing an EAW;

(c) whether the Recorder erred in not pressing for an explanation for the delay in issuing an EAW;

(d) whether the Recorder arrived at an inappropriate decision in relation to proportionality.

The appellant's evidence before the Recorder

[15] There was no affidavit evidence by or on behalf of the appellant before the Recorder and the appellant did not give oral evidence. There was a 3 page document containing some 17 paragraphs in the form of an affidavit though it had not been sworn. No explanation was provided as to why a draft affidavit had been prepared but not sworn. It was treated as the appellant's statement and by implicit agreement was admitted in evidence before the Recorder ("the statement").

[16] As indicated in *Gorny v Republic of Poland* [2018] NIQB 50 at paragraph [3] the obligation is for the person concerned to place on oath his assertions of fact. The statement should not have been admitted in evidence. In paragraph [33] of this judgment we also emphasise the nature and quality of factual detail required from the person concerned given the likelihood that the public interest in extradition will

outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe. The obligation was on the extraditee to put forward his best case before the Recorder. He had plenty of time to do so and this should have been done though the likely explanation is that there were no exceptionally severe consequences in this case as Mr Devine accepted so that it was perceived that more detail would not have added anything to this particular case.

[17] The appellant's statement contained what we would describe as some sparse details of the appellant's, and other members of his family's, private and family life.

[18] The appellant states that "We have been in Ireland since 2005." Elsewhere in the statement there is reference to Northern Ireland and to his time in Northern Ireland as opposed to Ireland. The issue as to whether the appellant first came to the Republic of Ireland as opposed to Northern Ireland is not expressly addressed in the statement. However there are references to events which took place in Northern Ireland in 2010 and the inference is that at least from 2010 to date the appellant has been in Northern Ireland.

[19] No information was given as to the appellant's state of mind and in particular as to whether the appellant felt a false sense of security in Northern Ireland given the passage of time that had occurred since the convictions and the sentences which had been imposed on him. No information is given as to the appellant's qualifications. No information is given as to the appellant's extended family or as to the practical or emotional support that they could give to the appellant's family if he was extradited.

[20] The appellant asserts that he has a passport and a driver's licence though he does not state whether these are Polish. We proceed on the basis that the passport is likely to be Polish and the driving licence is likely to have been issued in Northern Ireland. These documents were said to have been provided to the police but the appellant took no steps to secure copies of them so that they could be made available to the court. There was no information as to whether the passport had been renewed by the Requesting State during the period of time since 2007.

[21] The statement sets out that the appellant has a partner though her name, nationality and qualifications, if any, are not given. There is a potential inference from the assertion that "we have been in Ireland since 2005" that the partner is also from Poland. The appellant's partner is stated to work for 16 hours (presumably per week) but no details are given as to the nature of the job, the identity of her employer, how long she has been in this employment, the amount that she is presently paid and the nature of any previous employment, including whether it was full time or part time, that she may have had. There is reference to a health problem from which she suffers. An extremely badly photocopied medical note was attached to the statement from which one can just discern her surname which name supports the inference that she is Polish. There is no affidavit from the partner setting out what she considers would be the impacts on her if the appellant was extradited and what if any steps she could take to mitigate those impacts. Apart

from some sparse details in relation to the partner's brother there is no information as to her extended family or as to the practical or emotional support that they could give if the appellant was extradited.

[22] The appellant's partner has a brother whom we assume also lives in Northern Ireland though his address and his name is not given. It is stated that he has his own family, is a lorry driver and is away for long periods of time. His employer is not identified. His income is not given. There is no information as to the other members of his family. There is no attempt to give details as to the practical and emotional support that may or may not be capable of being provided by the brother or by his family to the appellant's family in the event of the appellant's extradition to Poland.

[23] The appellant and his partner have a son who was born in 2010 and who is stated to be in good health. The appellant states that he is "with my son every day and play and full role in his life" (sic). No details are given as to that role. The school which his son attends is not identified and no details are given as to how long he has been at that school or how he is doing. The primary carer for the son is not expressly stated but we consider that this role is most probably undertaken by the appellant's partner given the age of the child and the full time employment of the appellant and what we take to be the part time employment of his partner. No unusual features are identified in relation to the appellant's son. As we have indicated there is no affidavit from the appellant's partner so there is no evidence as to her views as to the impact on the child if the appellant was extradited to Poland and what if any steps she could take to mitigate that impact.

[24] The appellant asserts that he earns approximately £300 net per week and can often earn more with overtime. He states that his "family are completely dependent upon" him which we take to be a financial dependence. We note that the appellant's partner also works on a part time basis. No information is given as to whether the appellant or his partner have any savings and if so the amount of those savings.

[25] In relation to where and with whom the appellant lives the statement sets out the appellant's address though it did not indicate for how long he had lived there. It did not expressly state who else lived at that address. By implication his partner and his son live with him at that address as the statement also contains the assertion that the appellant was "with (his) son every day." We proceed on that basis. No information is given as to whether the accommodation is rented or owned. There is no information as to any outgoings in respect of the accommodation such as rental payments or mortgage payments. Indeed there is no information in relation to any financial outgoings.

[26] In relation to the appellant's employment the statement contained the assertion that the appellant had been working legally using his correct name for the last 8 years as a machine operator/forklift driver with a particular company. However, the company carries on business at a number of locations and the place at which he was presently employed was not identified. A typed but unsigned

document was attached to the statement purporting to be confirmation from the appellant's supervisor that the appellant had worked for 8 years. No other document from the employer, such as wage slips, was attached. It was also asserted that the appellant had always worked during his time in Northern Ireland apart from a brief period between jobs.

[27] The statement contained the assertion that the appellant has a national insurance number though the number and when it was acquired was not given. There was no documentary evidence attached to the statement to support that assertion.

[28] Also the statement contained the assertion that the appellant had travelled freely in and out of airports to international destinations such as Majorca (twice), Spain (4 times) and Turkey. It stated that the appellant travelled to England by boat. The purpose of the assertions of international air travel was to establish that if an EAW had been issued at an earlier date then his presence in Northern Ireland could have been ascertained as he returned through passport control. In this manner his arrest would have come at a stage before he had developed greater ties in the community in Northern Ireland. However, no dates were given for his travel to Majorca, Spain or Turkey so that it is not clear as to when these opportunities to arrest him at an earlier stage were lost. It was left to the court to infer that this travel did not all occur during the course of one year but rather was spread evenly over the entire period from 2005 to 2017. We are prepared to proceed on that basis.

[29] The appellant also stated that he travelled to Poland in 2012 to visit family. No information was given as to whether he travelled by plane passing through passport control, for how long he remained in Poland, where he stayed in Poland, how far that place was from Plock and whether there was any reasonable likelihood of persons in authority in Poland knowing of his return.

[30] Mr Devine stated that the appellant was not making any application to admit further evidence on the hearing of the appeal.

The judgment of the Recorder

[31] In outline the Recorder's ex tempore judgment was structured as follows:

(a) The nature of the offences, the dates of the convictions and the relevant sentences were set out as were the later court decisions in 2006 and 2007 relating to the enforcement of the sentence of imprisonment for the drugs offences. The Recorder also set out the date of the arrest warrant in Poland, and the dates of the EAW and its certification together with the date of the appellant's arrest in Northern Ireland.

(b) The Recorder held that the appellant was a fugitive from justice.

(c) The applicable legal principles were referred to by reference to decided cases such as *Polish Judicial Authority v Celinski* [2016] 1 WLR 551 and *Norris v The Government of the United States of America (No.2)* [2010] 2 AC, 487.

(d) The Recorder held that as a fugitive from justice the appellant could not claim the protections afforded by section 14 of the Act. However he expressly stated that "delay in a wider context can be taken into account when one is considering … whether or not his human rights will be infringed by his surrender."

(e) The Recorder then turned to "the balancing exercise looking at the factors in favour of surrender and the factors against surrender to ensure that if surrender is ordered it is an appropriate proportionate response."

(f) Before listing out the factors for and against surrender the Recorder stated that in accordance with the decision in *Norris* "the consequences of any interference with a person's human rights would need to be extremely serious if the public interest in surrender or extradition was to be outweighed."

(g) The Recorder then listed out the factors against surrender as being (i) the offences were of some vintage with the sentencing exercise appearing to have been completed in 2007 so that some 10 years or more had passed since that date; (ii) in the context of (this) delay his life in Northern Ireland had been open; (iii) his well-established life in Northern Ireland with employment which funds his family life for his partner and his child; and (iv) his enforced separation, if ordered, will have an impact on his family life, although no specific evidence as to that impact had been placed before the court.

(h) The Recorder then listed out the factors in favour of his surrender as being (i) he has been convicted of serious offences; (ii) there are no exceptional issues raised in his evidence as to his enforced separation from his partner and child; (iii) there has been no evidence given about exceptional issues in relation to other aspects of his private or family life; and (iv) there is a strong public interest in the enforcement of international treaties and the mutual respect for judicial decisions in Poland and elsewhere in the European Union.

(i) The Recorder having considered all the factors held that the appellant had not established that the consequence of interference with family life was exceptionally severe and accordingly the balance was in favour of extradition.

(j) The Recorder returned to the issue of delay stating that in his view "it is unfair for him to claim delay in this way when he takes no steps to alert the authorities as to his whereabouts when he knows that a prison sentence has been imposed on him, and … his travel to Northern Ireland was for the purpose of avoiding the prison sentence."

(k) The Recorder ordered the appellant's extradition.

Legal principles

[32] This court set out a summary of the applicable principles in *Gorny* at paragraphs [21] - [24]. We incorporate those paragraphs into this judgment but for ease of reference repeat the legal principles obtained from *Norris v The Government of the United States of America (No.2)* [2010] 2AC, 487 and *HH v Deputy Prosecutor of the Italian Republic Genoa [2013] 1AC, 338.* In *HH* at paragraph 8, Lady Hale set out the conclusions that she drew from the earlier case of *Norris*:

> "(1) There may be a closer analogy between extradition and the domestic criminal process than between extradition and deportation or expulsion, but the court has still to examine carefully the way in which it will interfere with family life.
>
> (2) There is no test of exceptionality in either context.
>
> (3) The question is always whether the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition.
>
> (4) *There is a constant and weighty public interest in extradition*: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back.
>
> (5) *That public interest will always carry great weight*, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved.
>
> (6) The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life.
>
> (7) Hence it is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference

with family life will be exceptionally severe." (emphasis added).

[33] The balancing exercise set out by Lady Hale at (3) is fact specific in each particular case subject to the constant element at (4). The nature and quality of factual detail required from an extraditee is informed by the likelihood of extradition unless the consequences of interference with family life will be exceptionally severe. As set out at (6) delays since the crimes were committed may both diminish the weight to be attached to the public interest in extradition and increase the impact on family life. This means that delays which have resulted in the concerned person building and consolidating a life with his family in this country will increase the weight to be attached to family life in the balancing exercise. Depending on the facts delays which are culpable or unexplained may substantially call into question the weight to be attached to the public interest in extradition even allowing for the fact that the concerned person is a fugitive. The authorities in the Requesting State cannot simply do nothing: they must make some reasonable inquiries as to the person's whereabouts.

[34] We emphasise that because the concerned person is a fugitive who has not informed the authorities in the Requesting State of his whereabouts does not create a bright line so as to exclude consideration of the impact of delay by the Requesting State on the public interest in extradition and on family life. As we have indicated where an individual is such a fugitive it is incumbent on the Requesting State to have made some reasonable enquiries as to the person's whereabouts and to provide an explanation for the passage of time. If there is a failure to detail the enquiries which have been made as to the person's whereabouts or to provide an explanation to the court for the passage of time then there will simply be no evidence of any steps having been taken by the Requesting State so that the passage of time will be classified as "delay" and as "culpable." Culpable delay being when something ought to have been done earlier than it was and there is no good explanation for why it was not.

[35] The longer the passage of time the greater the need for an explanation.

[36] The longer the passage of time the greater the *potential* impact diminishing the weight to be attached to the public interest in extradition. However in considering the *potential* impact it is necessary to recognise that this public interest is in part fact specific and in part a constant. In so far as fact specific the weight to be attached in the particular case varies according to "the nature and seriousness of the crime or crimes committed" and accordingly the potential impact of delay will take into account that fact specific element. The reasons for the constant element is that "people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back." Those reasons mean that there is "a constant and weighty public interest in extradition" which "will always

carry great weight." The potential impact of delay diminishing the public interest in extradition will operate in relation to the fact specific element of that public interest.

[37] The longer the passage of time the greater the *potential* impact of increasing the weight to be attached to the interference with the private and family lives of the extraditee and other members of his family. However whilst generally speaking the longer the passage of time the greater the impact the enquiry is still fact specific in each particular case. This means that the extraditee should set out the facts in sufficient detail to demonstrate how his and other members of his family's private and family lives have been built or consolidated over the period of delay.

[38] We were referred to the passage in the judgment in *Stryjecki v District Court in Lublin, Poland* [2016] EWHC 3309 at paragraph 70 (vi) which stated that "… long unexplained delays can weigh heavy in the balance against extradition." We agree that such delays *can* weigh heavy but whether they do so depends on a consideration of the particular case. The impact of delay on the balance in favour of article 8 ECHR is fact specific in each particular case and the balance in relation to the public interest in extradition is in part fact specific and in part constant.

[39] In so far as the ground of appeal in paragraph [14] (b) above purports to suggest that the Recorder was *bound* to attribute significant weight to the absence of any explanation from the Requesting State for the delay in issuing an EAW we reject that ground of appeal. Delay and the lack of explanation are factors to be taken into account in the balancing exercise and the weight to be attached to those factors depends on the particular circumstances of each individual case.

[40] Mr Devine on behalf of the appellant urged that the principles set out by the European Court of Justice (Grand Chamber) in *Aranyosi* (cases C-404/15 and C-659/15 PPU) suitably adapted should be applied in this case so that there would be an obligation on the executing court to postpone its decision until it had obtained an explanation from the Requesting State in respect of the delay. The decision in *Aranyosi* concerned extradition in circumstances where there was initial objective information that in the places of detention in the Requesting State there were substantial grounds to believe that, following the surrender of an individual to the Requesting State, he would run a real risk of being subject, in that member state, to inhuman or degrading treatment within the meaning of article 4 of the Charter. In such circumstances the executing authority had to postpone its decision on the surrender of the individual concerned until it obtained the supplementary information that allowed it to discount the existence of such a risk. The context here is entirely different from *Aranyosi*. There is no risk of inhuman or degrading treatment which is the risk that gave rise to the obligation to obtain supplementary information. Moreover the effect of delay is on the article 8 rights of the individual concerned which can be assessed without any information from the Requesting State which in any event has an opportunity to furnish whatever explanation for the delay that it wishes to the executing court. We consider that a judge is not required to order or ask or press a Requesting State for an explanation for the passage of time.

The obligation is on the Requesting State to present its case including its explanation. No doubt those appearing on behalf of the Requesting State will anticipate the consequences if an explanation is not sought or provided and will take steps at an early and therefore an appropriate stage so that an explanation is available to the court. If an explanation has not been provided but is anticipated then the Requesting State might wish to apply for an adjournment in which circumstance it would be in the discretion of the judge to determine whether to adjourn and if so whether it should be on any and if so what conditions. We dismiss that part of the appellant's appeal which is based on the proposition that the Recorder erred in not pressing for an explanation for the delay in issuing an EAW. There is no legal obligation on the Recorder to have done so. Delay and the lack of explanation are factors to be taken into account in the balancing exercise and the weight to be attached to those factors depends on the particular circumstances of each individual case.

Discussion

[41] Mr Devine realistically proceeded on the basis that the consequences of the interference with the private and family lives of the appellant and other members of his family would not be exceptionally severe. He stated that he was not suggesting that "the impact here would be particularly severe over and above that which is the standard impact on a family with the father being sent to custody in another jurisdiction." We consider this to be an appropriate concession but would add that the sparse evidence gives no opportunity for the court to independently evaluate the degree of the inevitable adverse impact or whether it can be mitigated for instance by support from members of the appellant's or his partner's extended family. We consider that the appellant has not only failed to establish any exceptionally severe consequences but has failed to put before the court sufficient evidence to establish the degree of adverse impact, that is whether it is severe, normal, or in comparative terms can be accommodated. We agree with the Recorder's assessment as to the lack of specific evidence as to the impact on the appellant and other members of his family.

[42] Before us it was said that the Recorder's judgment was based on a misdirection in law in relation to the impact of delay on the weight to be attached to the public interest in extradition and on the weight to be attached to private and family life. Delay may both diminish the weight to be attached to the public interest and increase the impact upon private and family life. That is so even if the individual concerned is a fugitive and even if he has taken "no steps to alert the authorities as to his whereabouts when he knows that a prison sentence has been imposed on him." Delay is to be taken into account in respect of the individual concerned even if he is such a fugitive. Furthermore as Girvan LJ stated in *King (Drew Robert) v Sunday Newspapers Ltd* [2011] NICA 8 the "private and family life of an individual is multifaceted. It is of the nature of any relationship between two or more persons that the relationship has effects on each of the parties to the relationship. The rights arising under Article 8 include the right to establish and

develop relationships with others. Where that relationship is that of an intimate partnership or is a parent/child relationship the impact of what happens in respect of one of the parties has clear repercussions and consequences in respect of the relationship generally." Delay impacts not only on the fugitive but on other members of his family. We consider that there is substance in the point that the Recorder approached the impact of delay on the basis that it was unfair of the appellant to "claim delay in this way" rather than considering what if any impact it had on the public interest and on family life. In that respect we consider that there was a misdirection which was potentially significant and operative. We set aside the Article 8 assessment made below and make a fresh assessment of the competing interests in the light of the evidence available to us, see paragraph [11] of *Oreszczynsi v Krakow District Court, Poland* [2014] EWHC 4346 (Admin) and paragraph [32] of *Lysiak v District Court Torun of Poland*.

[43] We proceed on the basis that there had been some 10 years delay between 2007, the year during which the prison sentence for the 2001 offences was activated and 2017 when the EAW was issued. There was no evidence that the Polish Authorities made any enquiries as to the appellant's whereabouts. The appellant did not conceal his whereabouts. He was living openly in Northern Ireland working and paying taxes with his son attending school here. He was openly travelling out of and returning to Northern Ireland and if an EAW had been issued earlier then he would have been arrested at an earlier stage. How much earlier is hard to determine given the lack of information in the appellant's statement. The delay is entirely unexplained. We consider that there was some 10 years culpable delay and that if EAW had been issued earlier that the appellant would have been arrested earlier.

[44] It is a natural consequence that the longer the delay the greater the adverse impact on private and family life but it is still a fact specific enquiry. The evidence in this particular case is sparse and does not establish exceptionally severe consequences even when that culpable delay is taken into account. We proceed on the basis that there was some increase in the impact on private and family life but not a sufficient increase to establish exceptionally severe consequences.

[45] In relation to the impact of delay on the public interest in extradition we have considered the nature and seriousness of the crimes involved. The Recorder assessed the crimes as serious. We consider that the offences could not be considered to be at the most serious end of the spectrum and in that respect we consider that the Recorder's assessment could have been overstated. We consider that they remain significant criminal offences which commanded not insubstantial custodial sentences. There remains despite culpable delay a strong public interest that the appellant who punched and kicked another all over his body with a risk including a risk to the life of that individual should face the consequences. There remains the constant element of the public interest in extradition.

[46] We consider that even when culpable delay is taken into account that the balance is in favour of extradition. We consider that the Recorder's conclusion even

allowing for culpable delay was a conclusion which we consider to be right. On that basis we do not consider the misdirection was significant or operative on the sparse facts available in this case.

Conclusion

[47] We dismiss the appeal.