CO/1355/2017

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THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/01/2018

Before:

LORD JUSTICE SIMON
and
MR JUSTICE NICOL

- -

Between:

	Wojciech Malarz	**Appellant (Requested Person)**
	- and -	
	Regional Court of Opole, Poland	**Respondent (Judicial Authority)**

- -
- -

Manjit Gill QC and **Wojciech Zalewski** (instructed by **Coomber Rich**) for the Appellant
Peter Caldwell and **Jonathan Swain** (instructed by **CPS**) for the Respondent

Hearing date: 19 December 2017

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Judgment **Lord Justice Simon:**

1. This is an appeal from the decision of District Judge (Magistrates Court) Ezzat ('the District Judge') made on 10 March 2017 ordering the extradition of the appellant at the request of the respondent ('the JA').

Background

2. The history of this matter begins on 11 May 1998, when the appellant committed an offence of assault, which became the subject of a European Arrest Warrant: KOP 38/11.

It is convenient to refer to it as the 11 May offence.

3. On 31 October 1998, the appellant committed an offence of unlawful assembly. This too became the subject of an EAW: KOP 100/11. It is convenient to refer to this as the 31 October offence.

4. On 6 November 2000, he was sentenced by the JA to a term of 14 months imprisonment for the 11 May offence, ref. II K 62/99. The sentencing judgment became final on 3 July 2001.

5. In April 2001, the appellant came to live in this country with his partner, and began to work here.

6. On 20 December 2001, Regional Court in Poznan sentenced the appellant to 1 year imprisonment for the 31 October offence, ref. III K 132/00.

7. On 9 June 2011 an EAW, with file reference III Kop 38/11 ('the 1st EAW') was issued by the JA in respect of the 11 May 1998 offence, with a case reference number: II K 62/99. The offence was described as a joint assault by the appellant with 2 others in which the 3 victims were attacked with bottles, sustaining bodily injuries, which 'disrupted their bodily functions' for a period not exceeding 7 days. The appellant was stated to have committed the offence within 5 years of serving a prison sentence for a similar offence. The limitation period for enforcement was stated to be 15 years (because the sentence was for 5 years or less) and to expire on 4 July 2016. The EAW also stated that the appellant was present when sentence was announced; and that it had been established that he might be staying in the UK.

8. On 26 September 2011 a second EAW, with reference III Kop 100/11 ('the 2nd EAW') was issued in relation to the 31 October offence. The Requesting Authority was the Regional Court in Poznan. It is unnecessary to refer in detail to the 2nd EAW save to note that it sought the appellant's extradition to serve a sentence of 1 year imprisonment; and that it explained that the normal limitation expired on 27 December 2016, but that due to the appellant's evasion of his sentence, on 27 October 2003 the Poznan court had suspended the execution of the penalty so that the limitation period was extended to 27 December 2026.

9. On 5 March 2015, the NCA certified the 1st EAW; and on 22 March 2015, it certified the 2nd EAW.

10. On 3 March 2016, another EAW was issued and signed by a judge of the Opole Court in respect of the 11 May offence. The appellant has referred to this as the 3rd EAW; and the JA as the 2nd version of the 1st EAW. Its proper characterisation may be significant in view of arguments addressed to us on the day of the hearing. For present purposes, I shall refer to it as 'the 3rd EAW' while noting that it is in fact another version of the 1st EAW: with the same case number for the domestic proceedings (II K 62/99) and the same file reference as an EAW (III KOP 38/11). In addition, although formatted slightly differently, it had the same offence details and was materially the same.

11. It did, however, differ in two crucial respects. First, instead of reciting that the limitation period for enforcement expired on 4 July 2016, it stated in box F: 'the limitation period for sentence execution in case II K 62/99 shall expire as of 3 July 2026'. The limitation period had been extended by 10 years. Secondly, in box F, the relevant signature was dated 3 March 2016.

12. It is clear now that these changes were not drawn to the attention of the NCA and CPS who assumed that it was effectively the same as the 1st EAW.

13. In view of questions that arose as to the reasons for the issue of the 3rd EAW, evidence was placed before the Court so as to explain how it came into existence, to which I refer later in this judgment (see [56] below). In short, the limitation period had been extended because the appellant had evaded serving his sentence.

14. On 9 August 2016, the appellant was arrested on the 1st and 2nd EAWs. He appeared before the Westminster Magistrates Court and was bailed to attend on 30 August 2016.

15. On 30 August 2016, he appeared before DJ Ezzat for an extradition hearing. At this point it was accepted on behalf of the JA that the limitation period for enforcement of the sentence to which 1st EAW related (the 11 May offence), had expired and that the JA was not seeking extradition under this EAW. It followed that extradition was only sought in relation to the 2nd EAW.

16. The District Judge reserved his decision on KOP 100/11; and the appellant was bailed to attend court on 3 October 2016.

17. On 3 October 2016, the District Judge ordered the appellant's extradition on 2nd EAW. It appears that he made no decision on 1st EAW. Although in a subsequent decision (of 10 March 2017) he accepted that he should have formally discharged the appellant in relation to the 1st EAW. Both parties sensibly agreed that this was how the judgment should be read and the obvious typographical error ignored.

18. On 16 November 2016, the court in Poznan suspended the sentence on KOP 100/11 (apparently on the application of the appellant) and directed that, as the sentence of imprisonment which was the subject of 2nd EAW could not be enforced, there were no grounds to pursue the appellant under the EAW and the EAW could not be executed. On 18 November 2016, the Poznan Court wrote to the NCA withdrawing the 2nd EAW.

19. On 21 November 2016, the appellant was contacted by a police officer from the extradition unit who spoke Polish. He was told to go to a Police Station in Kent for the purposes of extradition on the 2nd EAW. This was in an accordance with the District Judge's previous decision of 3 October. The appellant explained to the officer that the EAW had been withdrawn: a fact that he had learned from his Polish lawyer.

20. On 22 November 2016, the appellant's Polish lawyer emailed with details of the decision of the Poznan court on 16 November.

21. Shortly after this, the appellant contacted his solicitors, who asked the court for an urgent hearing.

22. On 24 November, the appellant and his counsel attended Westminster Magistrates Court in order to obtain the CPS's agreement to the discharge of the warrant. This could not be achieved, and at about 11.30 am the appellant was arrested and taken to Biggin Hill airport, where his electronic tag was removed and he was placed on a plane to Poland.

23. In the meantime, his solicitors telephoned the CPS to say that they were intending to apply for an order of *habeas corpus*. This appears to have resulted in the CPS sending someone to the Magistrates Court and informing the judge that the Poznan court no longer wished to seek the appellant's extradition on KOP 100/11. Accordingly, the 2nd EAW was discharged on that date by District Judge Snow.

24. There was some lack of clarity about what the Court was told about KOP 38/11. However, we have now seen an extract from the Hearing Record Sheet. This indicates that the 2nd EAW was withdrawn and discharged; that the Court was told that the appellant had been removed from the plane; but that KOP 38/11 'is still a valid warrant'. The Hearing Sheet records the CPS advocate saying:

> The confusion arose because the JA on 12/8/2016 sent an English Translation of the KOP 38/11 but no one realised that this was an amended warrant with the date of limitation on box F has been amended to 3/7/2016. That is why the JA till today is saying it is a valid warrant.
>
> So, since it was not formally discharged by court I have asked DJ Izzat to list the matter and have the requested person to attend court to proceed with the valid warrant.

25. The CPS had received information that morning from the Regional Court in Opole that EAW III Kop 38/11 was 'valid and active.'

26. In the memorandum of entry entered in the Court Registry [156] the following was recorded:

> Adjourned to 01/12/2016 at 10.00 …
>
> Reason: non-standard reason: for requested person to attend and fix hearing on the amended warrant which is valid before DJ Ezzat.

27. In a 'notice of new date of hearing' made on 24 November the Court made an order directing the appellant to attend court on 1 December 'to fix hearing on the amended warrant which is valid before DJ Ezzat'.

28. On 25 November 2016, the appellant telephoned the Court to ask for his bail recognisance, on the basis that he was no longer to be extradited. He was informed orally

that there was an active case and that the money could not be returned.

29. On 26 November 2016, the appellant received the notice of the new date of directing his attendance on 1 December. On the same day, he went to Acton Police Station to sign on in accordance with his bail condition but was told not to come there anymore.

30. At 4.00 am on 28 November 2016, without prior warning, he was arrested at his home, because the police had been told by SERCO/EMS (who provided Electronic Monitoring Services) that there has been a breach of the curfew. The appellant explained that the tag had been removed by the police when he was put on the plane on 24 November.

31. Despite this explanation, which is not in dispute, he was arrested and taken to Southall Police Station and then to Ealing Magistrates Court where his case was heard at 4.00 pm. He was immediately released by the lay magistrates. He then tried to sign on at the Police Station, as he did not wish to be accused of breaching any bail conditions or curfew, but they could not find him on the system. At 6.00 pm, he called SERCO to ask about the tag; and the following day a new tag was fitted.

32. On 1 December 2016, the appellant attended Westminster Magistrates Court. The precise order of events is unclear and was not investigated before the District Judge. However, it appears that initially a decision was made by the District Judge that was reflected in a notice containing the following:

> The extradition proceedings to Poland have been today discharged
>
> Discharge reason:
>
> 1. Section 41. The Part 1 warrant has been withdrawn.

33. It is likely that it was following this order, but still on 1 December 2016, that the NCA certified the 3rd EAW (which had been signed on 3 March 2016).

34. Following the discharge of the 1st EAW the appellant was asked to wait, and sometime later a police officer arrived and he was arrested on the 3rd EAW which had been certified that day by the NCA. The appellant refused to consent to his extradition, and the District Judge gave directions for the hearing.

35. On 2 December 2016, another SERCO team came to his house and tried to remove the tag. He refused to allow them to do so because he was afraid that he would be arrested again for breach of curfew.

36. On 10 January 2017, there was an extradition hearing, at which the appellant represented himself, although there was a skeleton argument prepared by counsel on his behalf. This identified two arguments which the appellant had already advanced himself at the hearing on 1 December: first, an argument based on abuse of process; and secondly, an argument based on public policy and the appellant's rights under article 8 of the ECHR. At the conclusion of the hearing, the District Judge adjourned the case so that he could

consider the arguments.

37. On 10 March 2017, the District Judge ordered the appellant's extradition in relation to the 3rd EAW. With the permission of the Court, granted on 16 May 2017, he now appeals from that decision.

The judgment below

38. The Judge started by identifying the relevant warrant as being the conviction warrant issued on 3 March 2016, in other words the 3rd EAW. He recorded at [5] that in relation to his judgment of 3 October 2016:

> … I noted that the JA were not seeking the RP's extradition in relation to KOP 38/11 though I did [the word 'not' was omitted by mistake] formally discharge the [appellant] in relation to it. I should have done.

39. At [7], he noted that, shortly before KOP 100/11 was discharged, it was discovered by the NCA that the version of KOP 38/11, that had been before the Court on 30 August, was not the correct version. That one had been issued on 9 June. The updated version had been issued on 3 March 2016, with an expiry date of 3 July 2026.

40. At [17]-[19], the District Judge set out the appellant's evidence. (This was evidence that he had given at the hearing on 30 August 2016, and which he adopted for the purposes of the 2017 hearing).

41. The appellant had come to this country in April 2001 on a business visa; and was aware at the time that there were some ongoing court cases in Poland. He had been working in this country since 2004. He had one child (aged 15) with the partner with whom he came to this country. He was separated from his former partner but contributed to the child's expenses. He was currently employed as a builder/site manager in this country. He had been in a new relationship for the past 18 months; and, although he did not live with her, he makes some financial contribution to her.

42. The appellant was 42 at the time of the hearing and had a number of convictions in Poland. These included offences of violence; as well as robbery in 1993 and rape in 2000. On this basis, it had been suggested to him that he well understood the Polish criminal justice system; and that when he had come to the UK he had known that the case against him had not been concluded. He said he thought it had been concluded though it was some time ago and his memory was not as good as it had been. He denied that he had come to this country as a fugitive. He had come as a tourist and liked the country.

43. Having heard him give evidence the Judge concluded that the appellant was neither truthful nor credible:

> [18] … The answers given by him in relation to his knowledge of the progression of the case and his assertion that he believed the case had concluded do not bear scrutiny.

> [19] I am satisfied that RP knew of the proceedings and that he removed himself from the jurisdiction either in anticipation of the imposition of a custodial sentence or following such imposition.

The abuse issue

44. There were two issues before the Judge as there were before us. On the first of these, the abuse issue, the District Judge dealt with the matter shortly:

> [33] Although at first blush the circumstances behind the revised expiry day for the offence in KOP 38/11 may raise some suspicion as to how this came about, the reality is (as set out at the beginning of this judgment) it was an oversight by the JA and nothing more. Having realised their mistake, the JA rectified it promptly.

45. The explanation was set out in [7] of the judgment. Shortly before KOP 100/11 was discharged, it was discovered by the NCA that the version of KOP 38/11 that had been before the Court on 30 August 2016 was issued on 9 June 2011 and that there was an updated version issued on 3 March 2016. The main difference between them being that the version issued on 3 March 2016 had the limitation expiry date of 3 July 2026.

The appellant's submissions on abuse

46. Mr Gill QC for the appellant submitted that the District Judge was wrong to conclude that there had not been an abuse of the process.

47. He had failed to approach the issue on the basis, established by the authorities, that the abuse of process jurisdiction existed to guarantee that a requested person was not subject to oppressive conduct. It may be invoked in a case where the requesting authority raises in subsequent proceedings matters that could have been raised in earlier proceedings, see for example, *Henderson v. Henderson* (1843) 3 Hare 100, 115 and *Camaras v. Romania* [2016] EWHC 1766 (Admin) [2-16]. Although KOP 38/11 had been revised or reissued on 3 March 2016, no steps had been taken in relation to this revised or reissued warrant until 1 December 2016. There had been no explanation (as there should have been) for the difference between 1st and 3rd EAW, or for the inconsistency between the statement in the 3rd EAW that the limitation period would last until 2026 and the immediately preceding statement that it would expire in 15 years. Such an inconsistency, for the purposes of s.2(6)(e) of the EA requires an explanation, see *Zakrzewski v. Poland* [2013] UKSC 2 at [11] and [13].

48. The District Judge should have required an explanation as to why the JA had not brought forward its entire case and explained the inconsistencies in the warrant. Without a proper explanation, the District Judge could not have been satisfied that there was no abuse.

49. Even now, no proper explanation has been provided for what occurred. The explanation given is that, although on 19 July 2016, the NCA had received what is said to be the 'correct' EAW (some 4½ months after it had been issued), the Polish authorities had failed to advise the NCA that the EAW was in fact different to the one previously issued in June 2011, and the NCA itself did not check the document or ask the JA why it was sending a new EAW. The document was simply forwarded to the CPS which also failed

to notice that it was different in two material respects: the date and the expiry of the limitation period. This explanation simply confirms the abuse of process in the JA's failure to bring forward the entirety of its case on 30 August 2016. The JA failed to advise its representatives (the NCA and CPS) that the expiry date was now 3 July 2026 when it had previously been stated that it was 4 July 2016, and the NCA and the CPS failed to ask the JA why.

50. In public law terms, the JA, the NCA and the CPS failed to take into account relevant considerations and to appraise themselves of the relevant information, and thus ensure that no action was taken which would have the effect of bringing about the arrest, false imprisonment and possible extradition of the appellant on a false basis: see e.g. *R (Lumba) v. Secretary of State for the Home Department* [2012] 1 AC 245, [64]-[72].

51. Mr Gill also argued that the District Judge failed to acknowledge that the JA's conduct, and inadequate explanation, 'undermined or usurped' the process set out in the Extradition Act 2003.

52. The JA's conduct and failures cannot be overlooked by the Court as a mere 'oversight', without legal consequences. Not only was there a failure to present the JA's case fully at the hearing on 30 August 2016 (see *Auzins* and *Camaras),* there have been serious consequences for the appellant. Mr Gill invited comparison with the considerations that the Court thought relevant in *Camaras* at [49]-[53], many of which apply to the appellant's case. The Judge's conclusion that there was an 'oversight' by the JA is not an answer to the abuse argument; and it was wrong for him to suggest that the JA had 'rectified' its mistake, let alone rectified it 'promptly', as if that were enough to avoid the negative consequences of the abuse both for the court (and other court users) and the proper and orderly implementation of the 2003 Act, and for the Appellant. In adopting this approach, the District Judge unlawfully failed to recognise that the JA's conduct had seriously prejudiced the appellant. He was subjected to delay, had been the subject of two sets of proceedings in relation to the two versions of KOP 38/11, resulting in unlawful (or otherwise unnecessary) detention contrary to common law and to article 5 ECHR, to financial harm, to emotional distress and to a violation of his and his family's article 8 rights.

The JA's argument

53. Mr Caldwell's answer, in short summary, was that the facts relied on by the appellant did not come close to satisfying what was a high test before the Court would find an abuse of its process. Since Mr Caldwell made this point by reference to the cases, it is to these that I now turn.

Discussion and conclusion on abuse

54. It is important to keep in mind what the concept of abuse of process involves in the context of extradition. In its most obvious form it involves the use of an established process for illegitimate ends; or, to use the words of Lord Sumption in *Zakrzewski v. Regional Court in Lodz, Poland* [2013] 1 WLR 324 at [11], where the foreign authority 'has manipulated the process of the executing court for a collateral and improper purpose.' Mistakes made in extradition proceedings may invalidate them but mistakes as such are not abuses of the process, not even egregious mistakes, unless the abuse undermines the very nature of the extradition jurisdiction. The court will only exercise

the jurisdiction to stay the extradition proceedings as abuse of process if satisfied on (a) cogent evidence that (b) the requesting authority has acted in a way that subverts or impugns (the word 'usurped' is sometimes used) the integrity of the domestic process, acting in breach of the mutual trust that exists between Judicial Authorities. The need for cogent evidence in the context of European Arrest Warrants is that the domestic courts start from the premise that there must be mutual trust between Judicial Authorities, see *Belbin v. France* [2015] EWHC 149 (Admin) Aikens LJ at [59]. This will be particularly so, where a foreign court is seeking to invoke the assistance of the executing court in extraditing someone to serve a sentence that has been evaded. So far as the application of *Henderson v. Henderson* is concerned, I agree with the observations of Ouseley J in *Camaras* (see above) at [27] that it does not apply as such to extradition case, although the principles may feed into an abuse argument.

55. The appellant's lawyers have relied on the lack of an explanation before the District Judge about the 3rd EAW as giving rise to an inference of abuse. I would accept that there may be cases in which a lack of relevant information may give rise to such an inference, and require an answer. This is not the case here.

56. The appellant's argument has developed since the hearing; and, in the light of the way in which the issue has developed, the JA sought leave to put in a statement of Tim Burton dated 14 December 2017. He is a Senior Crown Prosecutor employed by the CPS. He produces a document dated 12 December 2017 from the JA, which provides an explanation for the 3rd EAW.

> The Regional Court in Opole - The Third Criminal Division in reply to your letter of 8 December 2017 hereby kindly informs you that there was indeed a change (a prolongation) of the limitation period from 4 July 2016 to 3 July 2026 of the European Arrest Warrant request issued for [the appellant] in the case with the court file reference number III Kop 38/11.
>
> This change results from the provision of Article 15 §4 of the Polish Executive Penal Code, which provides for the prolongation of the limitation period (by 10 years) in case of the penalty execution evasion. At the same time, the Regional Court in Opole by its decision of 25 January 2016 in the case of Ko 141/16 decided to suspend the executive proceeding concerning [the appellant] because the sentenced person evades the serving the sentence of imprisonment. This decision caused the necessity to change the EAW Kop 38/11 by indicating the new limitation period of 3 July 2026, which has been done in the EAW dated 3 March 2016.

The document has been signed by a Judge of the Regional Court

57. It is unfortunate that this explanation was not provided earlier; but even without the explanation the position does not come close to providing cogent evidence that the JA has acted in a way that seeks to subvert or impugn the integrity of the Extradition Act or EAW regime, nor in a way that can be properly characterised as manipulation or a proceeding tainted by bad faith. The 3rd EAW was a warrant in proper form and

substance, and the District Judge was bound to act on that basis. The new evidence sought at the request of the appellant makes this clear.

58. The CPS representative did not misrepresent the effect of the 1st EAW, on the contrary, he conceded before the District Judge in August 2016 that it had expired although in fact (and unknown to them) there was a revised version (the 3rd EAW) which contained the proper operative period.

59. There was certainly a lack of proper communication between the JA and those charged with securing the appellant's extradition in relation to the 3rd EAW; and it is clear that an error was made and that, as a result, there were delays in extradition process.

60. There was plainly a degree of inefficiency, which bordered on incompetence but, as Collins J said in *Jackowski v. Ostroeka* [2012] EWHC 3935 at [14]:

> I do not say it is impossible for incompetence to result in an abuse of process but it would take a strong case in my judgment to reach that state of affairs.

61. In my view, the appellant does not come close to establishing an abuse of the court's process. I would add that I have not overlooked Mr Gill's argument that the 3rd EAW is internally inconsistent. In my view the extension of the operation of the warrant is clear in its terms and is not inconsistent with general information within the warrant such as to render the warrant an abuse.

Section 21 of the EA and article 8

The appellant's argument

62. As an alternative, Mr Gill submitted that in all the circumstances, including the steps taken to remove the appellant under the 2nd EAW, the Court should conclude that the extradition would amount to an unlawful and disproportionate interference with his article 8 rights, see *Camaras* (above).

63. In that case the Court had to consider the balance between the 'constant and weighty public interest always present in upholding extradition rights', see [44] and the requested person's article 8 rights. It was a case in which abuse of process was raised and rejected as a free standing argument, see [13]-[35]; but the Court then went on to consider whether the extradition would constitute a disproportionate interference with article 8 rights.

64. There were five enumerated factors which led the Court in the *Camaras* case to conclude that extradition would be a disproportionate interference with the requested person's article 8 rights. These included his discharge during the course of the extradition hearings and the imposition of onerous bail conditions which had lasted for 10 months. It was following this that a new EAW was issued by the Romanian authorities.

65. The fourth factor which persuaded the Court that the balance came down in favour of

refusing extradition was described by Ouseley J at [51]:

> Fourth, the consequences of the discharge and re-arrest cannot be treated merely as aspects of delay. The Appellant felt a sense of relief that the proceedings were over; he was released from his bail conditions. He was not released on some technicality, in which a further EAW was a real possibility. He then faced re-arrest and a further long period on quite onerous bail conditions; and he and his family had to go through the whole process all over again, having believed it to be over in the UK at least. Life was again on hold. The Appellant was entitled to feel a real sense of unfairness. These problems were caused by the failure of the issuing judicial authority to put its case together properly. For some offences and with some errors, all this may have to be accepted in the public interest. But, whether diminishing the weight to be given to the public interest in extradition, or, probably more appropriately, increasing the weight to be given to the impacts on Article 8 rights, the conduct of the issuing authority itself in causing those impacts has to be taken into account as a factor weighing against the proportionality of extradition. Here, the issuing judicial authority was made aware early on in the proceedings, if it had not already alerted itself to this as a possible issue, that retrial rights would be an issue. It had ample opportunity to provide the evidence about those rights, before the March and then May hearings, and then again before the June 2014 decision. An adjournment was granted for that very purpose. It did nothing. It might have tried to appeal, after urgent discussions, though there would have been admissibility difficulties. It has not explained the reason for the inaction or apologised for it to court and Appellant. It has in effect used the necessity for a new EAW as the vehicle to do what it should have done nearly two years ago. Such conduct by the issuing judicial authority diminishes the proportionality of extradition though it does not of itself bar it.

66. In further support of his argument on proportionality, Mr Gill pointed out that the offence in the present case was assault, for which he was convicted more than 17 years ago. The delay in taking action against the appellant had diminished the public interest in extradition. The appellant had not been hiding from the public authorities in Poland and should have been easy to find. No action had been taken to issue an EAW until June 2011; and it was not certified until March 2015. That delay, both before and after 2011 was unexplained. It provides the context in which the further delay in relation to the 3rd EAW had to be considered.

67. The delay in relation to the 3rd EAW was also considerable. It was not issued until 3 March 2016 and was not certified until 1 December 2016. Although the District Judge considered the delays in relation to the 2nd EAW in his 3 October 2016 judgment, he did not consider the delays in relation to the 3rd EAW.

68. Over the last 16½ years the appellant has established a strong and deep seated private and family life in the UK. He has worked here and has behaved as a respectable and law-

abiding member of British society. In these circumstances, the JA needed, but failed, to explain why it was proportionate to seek the return of the appellant in relation to the 3rd EAW.

69. Mr Gill submitted that the Court should consider the lack of effective communication between the JA and the NCA, the CPS and SERCO, which has also resulted in the appellant being unlawfully detained on 24 November 2016 and subjected to other arbitrary interferences with his liberty. By that date, the appellant had been led to believe that there were no outstanding EAWs and that he was free to go home from the airport. He further argued that there may then have been a number of infractions of his legal rights: in relation to his bail recognisance and his arrest for allegedly not complying with his curfew.

70. Furthermore, he should have been discharged on 3 October 2016 in relation to the 1st EAW, as the District Judge himself later recognised. If the Court had failed to do this by oversight, the JA was itself bound to submit that appellant should be discharged, especially as he was unrepresented. It is possible that it was only because of this failure by the JA, and the suggestion that the 1st EAW was to be or had been 'amended', that it was able to persuade the Court (*ex parte*) on 24 November 2016 to issue the notice of the new hearing. In fact, the EAW had not been amended, it had been replaced with the 3rd EAW, and the appellant was discharged in relation to the 1st EAW on 1 December 2016.

71. In summary, the appellant has been subject to arbitrary and unlawful detention contrary to the common law and article 5 of the ECHR; and such matters are relevant to the proportionality issue under article 8.

The JA's argument on article 8

72. Mr Caldwell submitted in answer that the facts of the present case were materially different to those which existed in the *Camaras* case. There, the requested person had been discharged from three EAWs because it remained unclear whether he was entitled to a retrial on the basis that he had not been present at the time of his conviction, see s.20 of the Extradition Act. The Romanian Judicial Authority had failed to provide requested information in respect of his right to a re-trial; and subsequently re-issued the warrants, with the requisite information.

73. In the present case, there was no failure to provide requested evidence. The JA had acted to prevent a limitation period expiring in a decision that was for them. Those acting for the JA in this country had, through oversight, failed to pick this up.

74. Mr Caldwell submitted that the District Judge properly directed himself as to the law, and conducted the appropriate balancing exercise. He was right to conclude at [23-26] that there was a constant public interest that carried weight in extradition proceedings, with the weight varying according to the nature of the offence. In this case, the offending was serious: a number of people were attacked and injured. The public interest in honouring its extradition obligations was high, as was the interest in discouraging persons seeing the UK as a safe haven for fugitives [24]. He was also right to say that the public interest in extradition will outweigh article 8 rights unless the consequences are

'exceptionally severe' [25] and that the appellant was a fugitive [26].

75. The District Judge was right to give weight to these factors; particularly the serious nature of the offence and the fugitive status of the appellant.

76. He had rightly gone on to address those factors which weighed against extradition [27-30]: the length of time that the appellant had been in this jurisdiction [27], the fact that he had established a private life here [28] and was of good character in the UK [29], the fact that he provided a degree of support for his family and that his extradition would therefore have some impact upon them [30].

Discussion and conclusion on article 8

77. It seems to me that there are plainly distinctions to be drawn between the facts of the present case and the facts of the *Camaras* case.

78. In the present case, there was no failure to provide information which was central to an issue raised by a requested person and that had in fact been requested. Here the JA had acted perfectly properly to extend the limitation period in the case of a man who knew that he had been sentenced for an offence and who had been a fugitive from justice since then. The material error was committed by the CPS who had failed to pick this up. The problem in the present case was not one, to use the words of Ouseley J, 'caused by the failure of the issuing judicial authority to put its case together properly'.

79. Nevertheless, I would accept that even an inefficient oversight, such as occurred as in the present case, may be a factor which weighs against the proportionality of extradition, and that it does so in the present case. The issue is, how much weight?

80. Before passing from the *Camaras* case, I would note that, although the Court regarded the fourth factor as the most material factor, it was one of 5 factors which led it to conclude that the order for extradition was wrong in the 'very unusual combination of circumstances.'

81. So far as the other matters relied on by Mr Gill are concerned, I would not regard the delay once the appellant had been located as carrying the weight he seeks to give them. Nor do I consider there has been a failure to provide necessary information sufficient to bring down the balance decisively against extradition. The position is clearer than it was before the District Judge but that is because more information has been sought by the appellant.

82. I would accept the confusion over the effect of the 1st and 3rd EAW in respect of which the appellant was arrested was relevant as far as it goes; but this Court cannot determine the issue of whether the appellant was in fact unlawfully detained on 24 November 2016 or the extent to which he has other claims. I would also give weight to his confounded expectation between 24 November and 1 December 2016 that he would not be extradited.

83. These matters, as well as the fact that the appellant has lived an orderly life in this

country for many years, with a developed private life and the family life that was considered by the District Judge, all weigh in the balance. However, they do not, in my view, outweigh the public interest in extradition.

84. Applying the test set out in *Polish Judicial Authorities v. Celinski and others* [2015] EWHC 1274 (Admin) at [21]-[24], I do not regard the decision of the District Judge as the only possible view, but on balance I do not consider that on the issue of proportionality it was wrong.

85. Accordingly, I would dismiss the appeal.

86. I should add that I have seen the judgment of Nicol J below, and agree with it.

Mr Justice Nicol:

87. I agree with Lord Justice Simon's decision and his reasons regarding abuse of process and article 8.

88. During the hearing, I raised a separate issue concerning the validity of the 3rd EAW. I set out here what that issue was, but why, on reflection, I do not think that it avails the appellant.

89. As Simon LJ has noted, on 1 December the District Judge discharged the 1st EAW. In an email dated 5 January 2017, an officer of the NCA explained that she had conducted a review of the appellant's matters. She explained that 'EAW III Kop 38/11 had originally been issued on 9 June 201109/06/2011. It was amended, not re-issued, on 03/03/2016 (confirmed by IJA….') The point which I raised at the hearing was that EAW 38/11 was withdrawn and led to the appellant being discharged from that warrant on 1 December 2016. Once a warrant has been discharged and the time for appeal has expired, it is disposed of – see Extradition Act 2003 s.213(1). How, I asked, could the appellant's extradition be ordered on a warrant that had already been disposed of?

90. Mr Caldwell responded by saying that the 3rd EAW was effectively a new warrant that differed from the 1st EAW in two ways: first it included further information about the limitation period and secondly that it had been signed by the Judge in the Opole Court on a later date. The difficulty with this response is that it conflicts with the information contained in the NCA officer's review which I have just quoted and which said that the third EAW was *not* a reissued warrant.

91. However, there is a related response. As Simon LJ has described, on 24 November 2016, the JA explained to the Court that an amended version of EAW 38/11 had been issued and that it was intended to proceed with that amended warrant. The appellant was sent the letter by the Court of the same date, telling him that there would be a further hearing on the amended warrant on 1 December 2016. In those circumstances, the appellant cannot have been misled into thinking that the request for his return to serve the sentence imposed by the Court in Opole came to an end with his 'discharge' on 1 December 2016.

92. Mr Caldwell submitted that it was unnecessary for the 1st EAW to say anything about limitation. Certainly, Extradition Act 2003 s.2 does not require anything to be included in the warrant concerning limitation. There is also authority for the proposition that information about limitation which is included will not impugn the validity of the warrant – see *Filipek v. Provincial Court in Lublin, Poland* [2011] EWHC 506 (Admin) at [23]. At first sight, it may seem curious that the alteration of information as to limitation in the 3rd EAW – a superfluous matter, as Mr Caldwell submitted – should make all the difference.

93. However, as Simon LJ said in the course of the hearing, if the information as to limitation in the 1st EAW had remained unamended, it is unlikely that it would have been ignored by a District Judge. At the very least, the proportionality assessment for the purposes of article 8 would be significantly affected if, on return, the requested person could not actually be imprisoned because the limitation period had expired.

94.

Thus, it seems to me that the District Judge was not obliged to treat the proceedings on the 3rd EAW as having been brought to an end by the discharge decision on 1 December 2016: the amendment made a substantive difference to the request by the Court in Opole; and, of particular importance, the appellant was well aware that, despite his discharge on the 1st EAW, the JA was intending to press for his extradition on the 3rd EAW.

95. Accordingly, I too would dismiss the appeal.