Neutral Citation Number: [2025] EWHC 602 (Admin)

Case No: AC-2023-LON-002535

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/03/2025

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE DBE CB

- -

Between :

PAWEL KALANDYK **Appellant**

- and -

DISTRICT COURT IN GDANSK (POLAND) **Respondent**

- -
- -

Mr Stefan Hyman (instructed by Hollingsworth Edwards Solicitors) for the **Appellant**
Mr Thomas Williams (instructed by CPS Extradition Unit) for the **Respondent**

Hearing date: 18th February 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 14 March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

THE HONOURABLE MRS JUSTICE COLLINS RICE DBE CB

Mrs Justice Collins Rice:

Introduction

1. Mr Kalandyk appeals, with the permission of the Court, a judicial decision to order his extradition to Poland to serve a prison sentence passed on him there.

Background

(a) The extradition proceedings

2. Mr Kalandyk's extradition is sought pursuant to an arrest warrant issued by the Polish judicial authority on 2nd January 2023 and certified by the UK National Crime Agency on 18th March 2023.

3. The warrant states that it relates to a sentence imposed by a court in Gdansk, Poland, on 30th October 2015. The sentence was for a period of imprisonment of 1 year and 3 months, all of which remains to be served. The warrant states that it relates to offences of driving while disqualified (1st June 2013); assaulting, injuring and threatening to kill Anna Siezieniewska with whom Mr Kalandyk had been in a relationship (2nd June 2013); and driving while disqualified (2nd June 2013).

4. Extradition was ordered by District Judge Cieciora after a hearing on 27th July 2023. Mr Kalandyk attended that hearing and addressed the Court in person; he was unrepresented. Before the District Judge, Mr Kalandyk had resisted extradition on grounds relating to his absence from criminal proceedings in Poland, and to the impact of extradition on his private and family life. The District Judge considered and rejected his objections. Her decision and reasons are recorded in a written judgment dated 24th August 2023.

(b) Mr Kalandyk's appeal

5. Mr Kalandyk then obtained legal representation, and sought permission to appeal the District Judge's decision, on both original bases of objection. He wished to argue that the District Judge was wrong to conclude that extradition was compatible with (a) his having been proceeded against in his absence in Poland and (b) his rights to respect for his private and family life.

6. Sir Peter Lane refused permission on the second of those grounds (and no renewal was pursued). He granted permission on the first ground, observing as follows:

> I have granted the respondent's application to adduce fresh factual evidence in the light of the CJEU's judgment in *LU and PH v Ministry of Justice and Equality* (C-514/21 and C515/21), an issue not raised by the appellant before the District Judge but which, in the circumstances, I do not consider he can be criticised for not raising. In order to deal comprehensively with ground 1, it is necessary to adduce this evidence. I agree with

> the appellant that the assessment of this evidence by reference to the criminal standard requires a hearing. It is in any event desirable that the High Court should hear full argument on the implications of *LU and PH* as regards an individual not present at certain criminal legal proceedings.

7. This appeal is accordingly founded on section 20 of the Extradition Act 2003 ('the Act'). Section 20 provides that, in relation to a conviction warrant, if a judge finds that a requested person was not '*convicted in his presence*', the judge must go on to decide whether the person '*deliberately absented himself from his trial*'. Unless the judge can be satisfied of that, a bar to the extradition may be raised (subject to potential issues about possible retrial which do not arise in the present case).

8. The Act permits the High Court to allow an extradition appeal if it finds (a) the District Judge ought to have decided a question before her at the extradition hearing differently, and (b) if she had decided the question in the way she ought to have done, she would have been required to order the person's discharge. As Sir Peter Lane noted, the matters on which this appeal is agreed to turn were not fully ventilated before the District Judge, and subsequent evidence has been admitted into the proceedings. So I am not engaged on the more usual appellate exercise of considering the District Judge's decision on its own terms, strictly acting as a court of review.

9. The parties agree that the questions to be answered on this appeal, in these circumstances, are (a) whether Mr Kalandyk was, in a legally relevant sense, tried in his absence and, if so (b) whether I can be satisfied on the evidence, to the criminal standard of proof, that he deliberately absented himself.

10. As regards the evidence, and any disputed facts, appellate courts '*normally have to respect the findings of fact made by the district judge, especially if [s]he has heard oral evidence*' (*Love v USA [2018] EWHC 172 (Admin); [2018] 1 WLR 2889* at [25]). As signposted by Sir Peter Lane, I also received oral evidence from Mr Kalandyk under cross examination (through an interpreter) at the appeal hearing, and must make my own mind up about that, in so far as it is relevant.

(c) The Polish criminal proceedings

11. The following parts of the relevant procedural history are not in material dispute.

12. The trial of the offences for which Mr Kalandyk was convicted and sentenced, and for which his extradition is requested, took place over three hearings in Gdansk in 2015. The first two of these, on 17th June 2015 and 18th September 2015, Mr Kalandyk attended. He gave evidence himself at the first.

13. He did not attend the third hearing, on 30th October 2015. The District Judge found as a fact that he had been notified of the date of that hearing on the previous occasion, on 18th September 2015. She found that he had deliberately absented himself from the hearing on 30th October 2015. That finding is not challenged on this appeal.

14. That hearing proceeded in his absence. Mr Kalandyk was convicted on all four counts and sentenced to 15 months' imprisonment, with a '*conditional suspension of*

its execution' for a period of 3 years. He was also fined, and required to pay compensation to Ms Siezieniewska.

15. A little over six months later, on 9th May 2016, Mr Kalandyk was charged, at a court hearing he attended, with having two days previously driven while disqualified and intoxicated. He admitted the offence.

16. Shortly afterwards, he left Poland for Germany. A few days later, on 19th May 2016, Mr Kalandyk was arrested in Germany in relation to allegations that he had, the previous day, been driving without a licence and aiding and abetting the theft of the stolen motor vehicle he was driving. He was remanded into custody the next day.

17. Meanwhile, on 22nd June 2016, Polish prosecutors commenced '*injunctive verdict*' proceedings against Mr Kalandyk, in his absence, in relation to the Polish driving offences with which he had been charged and which he had admitted before leaving for Germany. He was sentenced on those counts in a Polish court on 7th July 2016, and given a 2 year community sentence to include regular unpaid work.

18. On 19th September 2016, Mr Kalandyk was tried in Germany for the offences for which he had been remanded. He was convicted and sentenced, on 6th October 2016, to one year's immediate imprisonment.

19. It appears that, on release from prison, Mr Kalandyk worked in Germany for a few months, before moving to the UK in October 2017 to join his wife, who had arrived 6 months previously.

20. On 22nd May 2018, a hearing was held in a Gdansk court to consider the activation of Mr Kalandyk's suspended sentence. He did not attend. The court noted his conviction and sentence for the subsequent driving offences in Poland, and the offending in Germany. It also noted he had not paid the compensation ordered to Ms Siezieniewska. It decided to remove the suspension and activate execution of the sentence of 15 months' imprisonment passed in October 2015.

Consideration

(a) Legal analysis

(i) Introductory

21. The principal dispute on this appeal, put simply, is about which are the relevant hearings for the purposes of section 20 of the Act.

22. Mr Williams, Counsel for the Polish judicial authority in these proceedings, says the only relevant hearing is the conviction and sentencing hearing on 30th October 2015, cited in the warrant, at which Mr Kalandyk's suspended sentence was handed down to him. He was present on two of the three days of that trial, and has been found to have been deliberately absent on the third. In those circumstances, Mr Williams says, the section 20 bar does not apply, Mr Kalandyk's extradition must go ahead, and that is the end of the matter.

23. But Mr Hyman, Counsel for Mr Kalandyk, says that is not the (only) relevant hearing. There are two principal relevant hearings in this case, neither of which Mr Kalandyk

attended: (a) the one on 22nd May 2018, at which his suspended sentence was activated, and (b) the one on 7th July 2016, when he was convicted and sentenced in the Polish '*injunctive verdict*' proceedings while he was in a German prison, and which formed part of the basis of the activation of his suspended sentence. If that is right, then the question of whether or not he deliberately absented itself from *those* hearings falls to be determined. Unless he can be established, to the criminal standard of proof, to have deliberately absented himself, then, says Mr Hyman, section 20 requires him to be discharged from extradition.

24. Much of the jurisprudence relevant to section 20 of the Act is underpinned by the guarantees of fair trial procedure provided by Article 6 of the European Convention on Human Rights. Art.6 sounds in UK law in a number of ways. It binds the courts through the Human Rights Act 1998. By the same route, the UK courts may have regard to the caselaw decisions of the European Court of Human Rights (ECtHR). Art.6 also sounds in EU law through its Charter of Fundamental Rights. Since Brexit, decisions of the Court of Justice of the European Union (CJEU) no longer bind UK courts, but the courts may still have regard to CJEU caselaw if considered of assistance (see section 6(2) of the European Union (Withdrawal) Act 2018).

25. Sir Peter Lane gave permission to appeal in this case with particular reference to a recent CJEU decision, *LU & PH [2023] 1 WLR 3392*, on which Mr Hyman places some reliance. I begin therefore by looking at that case in its immediate context, before standing back to consider its potential relevance and the application of section 20 to this case more generally.

(ii) The CJEU caselaw - Ardic

26. Before *LU & PH*, the leading CJEU authority on the status of suspended sentence activation hearings in an extradition context was *Openbaar Ministerie v Ardic (C-571/17 PPU)*. This was a reference from a Dutch court for a preliminary ruling on the question:

> If the requested person has been found guilty in final proceedings conducted in his presence and has had imposed on him a custodial sentence, the execution of which has been suspended subject to certain conditions, do subsequent proceedings, in which the court, in the absence of the requested person, orders that suspension to be revoked on the grounds of non-compliance with conditions and evasion of the supervision and guidance of a probation officer, constitute a "trial resulting in the decision" [for the purposes of the relevant EU Framework Decision]?

27. In other words, does the bar on extradition raised by trial *in absentia* potentially apply to suspended sentence activation hearings? The CJEU held it did not. For extradition purposes, 'the decision' had to be understood as '*referring to the proceeding that led to the judicial decision which finally sentenced the person whose surrender is sought*' (at [64]), and as referring to '*the last instance in those proceedings during which a court, after assessing the case in fact and law, made a final ruling on the guilt of the person concerned and imposed a penalty on him.*' (at [65]). In other words, it was only the original trial leading to conviction and sentence that was relevant.

28. The CJEU considered the position would be different '*only where, following a finding of guilt of the person concerned and having imposed a custodial sentence on him, a new judicial decision modifies either the nature or the quantum of sentence previously imposed, as is the case when a prison sentence is replaced by an expulsion measure.*' (at [76]). The CJEU continued:

> [77] …the concept of 'decision' … does not cover a decision relating to the execution or application of a custodial sentence previously imposed, except where the purpose or effect of that decision is to modify either the nature or quantum of that sentence and the authority which adopted it enjoyed some discretion in that regard. …
>
> [78] As regards, in particular, decisions to revoke the suspension of the execution of previously imposed custodial sentences, such as those at issue in the main proceedings, it is apparent from the case file before the Court that, in the present case, those decisions did not affect the nature or the quantum of custodial sentences imposed by final conviction judgments of the person concerned …
>
> [79] Since the proceedings leading to those revocation decisions were not intended to review the merits of the cases, but only concerned the consequences which, from the point of view of the application of the penalties initially imposed and whose execution had, subsequently, been partially suspended subject to compliance with certain conditions, it was necessary to consider the fact that the convicted person had not complied with those conditions during the probationary period.
>
> [80] In that context, under the relevant national rules, the competent court only had to determine if such a circumstance justified requiring the convicted person to serve, in part or in full, custodial sentences that had been initially imposed and the execution of which, subsequently, had been partially suspended. …while the court enjoyed a margin of discretion in that regard, that margin did not concern the level or the nature of the sentences imposed on the person concerned, but only whether the suspensions should be revoked or could be maintained, with additional conditions if necessary.
>
> [81] Accordingly, the only effect of the suspension revocation decisions, such as those in the main proceedings, is that the person concerned must at most serve the remainder of the sentence initially imposed. Where, as in the main proceedings, the suspension is revoked in its entirety, the sentence once again produces all its effects and the determination of the quantum of the sentence still remaining to be served is derived from a purely arithmetic operation, with the number of days already served in custody being simply deducted from the total sentence imposed by the final criminal conviction.

> [82] In those circumstances, and in the light of what was stated in paragraph 77 of the present judgment, suspension revocation decisions, such as those at issue in the main proceedings, are not covered … since those decisions leave unchanged the sentences imposed by the final conviction decisions with regard to both their nature and level.

29. The logic of the CJEU's analysis in *Ardic* is that the relevant Art.6 rights – including the prima facie right not to be convicted and sentenced *in absentia* – apply at the point of sentence fully, and only. How a sentence is carried out thereafter is another matter altogether. That is so even if further discretionary judicial decisions may be involved – provided only that those decisions cannot alter the original sentence itself. When a conditionally suspended prison sentence is imposed, therefore, it is imposed with all the potential consequential outcomes of its own conditionality fully factored in for Art.6 purposes. The CJEU took the view in *Ardic* that any other approach would risk undermining the effectiveness of the European arrest warrant mechanism. *Ardic* is the case on which Mr Williams principally relies.

30. Mr Kalandyk sought permission to appeal in part on the basis that *Ardic* is no longer good law, or at least should not be preferred, as a result of *LU & PH*. Mr Hyman said that case was now support for the proposition that both the activation hearing, and the '*injunctive verdict*' hearing of the matter which postdated the original sentencing exercise and which formed part of the basis for its activation, should now be regarded as the relevant 'hearing' for extradition purposes, including for the application of s.20 of the Act.

31. Starting with Mr Hyman's criticism of *Ardic* on its own terms, he focuses my attention on the summary conclusion in that case at [92], where the CJEU said this:

> …the concept of 'trial resulting in the decision' … must be interpreted as not including subsequent proceedings in which that suspension is revoked on the grounds of infringement of those conditions during the probationary period, provided that the revocation decision adopted at the end of those proceedings does not change the nature or the level of the sentence initially imposed.

32. Of this passage, he said this, in his written submissions:

> The 'difficulty' with the Fifth Chamber's decision is that it focuses on outcome instead of discretion. i.e. if the judicial authority activates the sentence in full then it is not a '*trial resulting in the decision*' whereas if it activates, say, half, then it is. Such logic is, with respect, unprincipled. Instead, the existence of a discretion defines whether a hearing is a '*trial resulting in the decision*' or not.

Mr Hyman claims the authority of *LU & PH* for that latter proposition. But before turning to examine that case, I note that Mr Hyman's criticism of *Ardic* appears misconceived in its own terms. As is plain from the passages from the CJEU judgment set out above, the proviso at the end of [92] – about not changing the nature

or level of the sentence originally imposed – has nothing to do with whether the sentence is activated in whole or in part, or with the exercise of judicial discretion in activation at all. The distinction the CJEU had made was between hearings which *activate* suspended prison sentences and those which *alter* them.

33. If a court at an activation hearing had a power to operate on the *original* sentence when it revoked suspension – by, say, adding to its length or, to use the CJEU's own example, '*when a prison sentence is replaced by an expulsion measure*' – then that would constitute a form of resentencing and attract Art.6 protections. But if all a court at an activation hearing is doing is revoking suspension (in whole or in part) within the terms of the original sentence itself – the more familiar scenario in our own jurisdiction at least – then it would not: '*those decisions leave unchanged the sentences imposed by the final conviction decisions with regard to both their nature and level*'. That is at least both principled and logical within its own terms. And, as *Ardic* itself underlined, it keeps extradition a streamlined and manageable procedure, focused on straightforwardly verifying the propriety of the sentencing and not concerning itself with what happens after that.

(iii) The CJEU caselaw – LU & PH

34. Turning then to *LU & PH* itself, this was a case whose facts differed from those in *Ardic*. In *Ardic* the suspended sentence activation had been based on simple breach of conditions. In *LU & PH*, the activation was based on a subsequent conviction for a criminal offence.

35. In a passage to which Mr Hyman drew my particular attention, the CJEU said this:

> [53] … a decision in relation to the execution or application of a custodial sentence previously imposed does not constitute a 'decision' … except where it affects the finding of guilt or where its purpose or effect is to modify either the nature or quantum of that sentence and the authority which adopted it enjoyed some discretion in that regard. It follows that a decision revoking the suspension of a custodial sentence on account of the breach by the person concerned of an objective condition attached to that suspension, such as the commission of a new offence during the probation period, does not fall within the scope of [the relevant EU law], since it leaves that sentence unchanged with regard to both its nature and its quantum (see, to that effect, *Ardic* paras 77, 81, 82 and 88).

36. Mr Hyman sees the expression of the proviso in the middle of that paragraph – '*or where its purpose or effect is to modify either the nature or quantum of that sentence and the authority which adopted it enjoyed some discretion in that regard*' as a significant development from the formulation in Ardic, giving consequences to the discretionary nature of decision-making in activation hearings and thus bringing the generality of them within the scope of Art.6.

37. I do not consider that a permissible reading. This passage expressly derives from, quotes, and approves, the *Ardic* analysis. It signifies that *if* a court at an activation hearing has a power (discretion) to operate on the *original* sentence at that point, *then*

that will be an *exception* to the *general* rule that activation hearings do not attract Art.6 rights, including the right to attend them, for extradition purposes. Operating on the original sentence is a form of resentencing, and must be conducted as such.

38. If there were any doubt about that, it would be dispelled by two further parts of the *LU & PH* analysis. First, this:

> [54] Furthermore, since the authority responsible for deciding on such a revocation is not called upon to re-examine the merits of the case that gave rise to the criminal conviction, the fact that the authority enjoys a margin of discretion is not relevant, as long as that margin of discretion does not allow it to modify either the quantum or the nature of the custodial sentence, as determined by the decision finally convicting the requested person (see, to that effect, *Ardic*, para 80).

That passage is clear that the fact that a court considering suspended sentence activation has a *general* discretion in *that* matter is not relevant.

39. And second, there is the analysis of the questions referred to the CJEU for a preliminary ruling, and which forms the *ratio* of the case:

> [68] …where the suspension of a custodial sentence is revoked, on account of a new criminal conviction and a European arrest warrant, for the purpose of executing that sentence, is issued, that criminal conviction, handed down in absentia constitutes a 'decision'… That is not the case for the decision revoking the suspension of that sentence.

40. Put simply, therefore, *LU & PH* is authority for the proposition that *if* a court activates a suspended sentence *because of* a subsequent conviction, then *that* conviction must itself arise from Art.6-compliant procedure. It explicitly reaffirms the position in *Ardic* that the activation hearing itself is *not* a relevant hearing for extradition purposes.

41. *LU & PH* does not support the proposition for which Mr Hyman contends in relation to activation hearings themselves – it expressly confirms that activation hearings remain irrelevant for extradition purposes. It does not matter for those purposes, including for the purposes of s.20 of the Act, whether an individual attended them or not. That is a proposition which may at first sight feel counterintuitive in the England & Wales criminal law context. We are used to the idea that the judicial fact-finding and exercises of discretion which may be engaged in suspended sentence activation hearings themselves import rights to attend, give evidence and make representations as to the exercise of discretion. But what this strand of CJEU caselaw affirms is that these kinds of safeguards do not fall to be imported into extradition proceedings.

42. Nor is there any other relevant authority which compels or encourages a different view. *Ardic* has been cited domestically at Divisional Court level (*Murin v Czech Republic [2018] EWHC 1532 (Admin)*). I was shown no ECtHR authority squarely on the point.

43. Nevertheless, *LU & PH* does represent something of a development from *Ardic*. On the face of it, the pure logic of *Ardic* is that an extradition court need concern itself solely with the original sentencing hearing – with the imposition of the sentence and not with its execution. It may not be hard to see why the CJEU in *LU & PH* was troubled at the thought of the activation of a suspended sentence on the basis of a conviction which was not itself properly and fairly reached. But on the CJEU's own logic, extradition warrants are founded on trials resulting in *conviction and sentence* not on proceedings which activate sentences. Of course, if sentences are not activated, warrants cannot be applied for. But it is not the activation, but the sentence, which has otherwise been the focus of the relevant caselaw.

44. *LU & PH* itself, however, includes this sort of analysis:

> [63] …a criminal conviction handed down in absentia in respect of the person who is the subject of a European arrest warrant and without which, as is the case here, that warrant could not have been issued, constitutes a necessary element for the issue of that warrant, which is liable to be affected by a fundamental defect seriously undermining the right of the accused to appear in person at his or her trial …

and again:

> [65] … the executing judicial authority must be able to take into account, in order to assess whether the surrender of the requested person should be refused … not only the possible in absentia proceedings leading to the final conviction, for the execution of which the European arrest warrant was issued, but also any other in absentia proceedings leading to a criminal conviction without which a warrant could not have been issued.

45. That sort of analysis is not straightforward to reconcile with the logic of *Ardic*. Plainly, an issue of fairness or indeed lawfulness could arise in a situation where sentence activation is based on a conviction which is itself procedurally unfair. That is, however, only one example of a number of circumstances in which sentence activation could be tainted by procedural unfairness or indeed illegality. It could have been based on findings of fact, about, say, breach of suspension conditions, which are wrong, or at any rate properly contestable. It could be based on no good reason at all. But where all of that leads to is where both *Ardic* and *LU & PH* itself says extradition law does not go – investigating the basis of activation, and inevitably the activation process itself.

46. The logic of *Ardic* is a simple one which *is* recognisable in our own domestic law: a suspended sentence is a sentence of imprisonment. It may be served wholly in the community or it may not. Extradition warrants are however based on the sentence itself: if that has been properly passed then the individual is subject to a custodial sentence and may be extradited as such. The individual's susceptibility to loss of liberty is inherent in the sentence all along.

47. It is a clear logic. But it is a tense logic because, as the passages from *LU & PH* cited above illustrate, while extradition is based on sentence, it is the revocation of

suspension which renders an individual unlawfully at large and which constitutes the fulfilment of the necessary condition for a conviction warrant to be issued. Sentence may be the *basis* of the warrant, but activation is the proximate *cause* of the warrant. The inherent susceptibility to loss of liberty is one thing, but actual loss of liberty is another.

48. The anxiety apparent in the analysis in *LU & PH* about suspended sentences activated on the basis of unfair subsequent convictions picks up on that tension. If it would be unfair to convict and sentence an individual – including potentially to imprisonment – on the basis of a trial in his absence, how can it be fair for that same conviction and sentence to trigger the individual's liability to activation of a suspended sentence and to extradition?

49. The answer to that question to be inferred from the *Ardic* logic is that that is a matter for the domestic courts of the requesting state to satisfy themselves about, including through any relevant appeal proceedings, and not a matter for an extradition court to inquire into. *LU & PH* takes a different view. Its analysis remains, however, problematic both in principle and in practice. It says on the one hand that the discretion of an activating court – including necessarily its discretion to revoke suspension and order immediate loss of liberty – is not legally significant, and does not found trial rights for an individual, in an extradition context. But it says on the other hand that the violation of an individual's trial rights in a subsequent conviction on which an activating court relies may, or perhaps must, vitiate that activation for extradition purposes.

50. Where that leaves an extradition court facing a challenge on this ground is far from clear. It appears that it would have to investigate the Art.6 compatibility of the activating conviction, but that it need not, or perhaps must not, investigate how the activating court itself dealt with it. But the extradition court would have to be satisfied that the activating conviction *was* in fact the basis, or perhaps the sole basis, for the activation in the first place. That inevitably involves some kind of assessment of the activating court's decision-making, including perhaps its entitlement to activate on alternative grounds. And that is hard to reconcile with *LU & PH*'s own position, following *Ardic*, that that decision-making is not the concern of an extradition court. Some of these problems are illustrated in the analysis I set out below.

(b) Applying the law

(i) General approach

51. I start with the general principle about the status of suspended sentence activation hearings in extradition law. I was shown no authority – domestic, Strasbourg or Luxembourg – suggesting that a convicted and sentenced individual has rights to attend such a hearing, guaranteed by Art.6 ECHR, such that if he does not attend, an extradition court must investigate the circumstances of that for the purposes of considering whether his extradition may be barred within the terms of section 20 of the Act. *LU & PH* is not authority for any such proposition. Such authorities as there are which are squarely on this point, including *Ardic* and *LU & PH* itself, say the opposite. Mr Hyman very fairly accepted that his submissions on this point did cantilever out somewhat beyond the present state of the law.

52. In those circumstances, a District Judge would have had no legal basis for investigating the circumstances of Mr Kalandyk's absence from his sentence activation hearing on 22nd May 2018. Nor do I have any such basis on appeal. That hearing does not fall within the terms of section 20, and Mr Kalandyk's extradition cannot be barred on this basis.

53. Extradition 'conviction' warrants are founded on conviction and sentence, and on the fact of an individual's being certified as unlawfully at large. There is no dispute in this case about Mr Kalandyk's trial, conviction and sentencing hearings on 17th June 2015, 18th September 2015 and 30th October 2015. He was present at the first two of those hearings and it is not disputed he was deliberately absent from the third.

54. The sole remaining question for this appeal therefore is the relevance, if any, of the '*injunctive verdict*' proceedings on 7th July 2016, at which Mr Kalandyk was convicted in his absence of subsequent driving offences and given a non-custodial sentence.

55. On the question of whether this is relevant at all, I was shown no authority, apart from *LU & PH*, to suggest it is. Pre-*LU & PH*, the settled state of the authorities, and practice in the UK extradition courts, appears to have been that the relevance of such a trial belonged in the sphere of the anterior, and post-sentence, *reasons* for sentence activation, whereas an extradition court was concerned solely with the *fact* of sentence activation.

56. I am not bound to follow *LU & PH*. On the analysis set out above, I consider there are good reasons to be cautious about doing so. It is a decision sitting uneasily between the established model of extradition based on conviction and sentence, and one demanding investigation of the fairness of subsequent discretionary decision-making about the revocation of conditional liberty. It professes adherence to the former model, but, notwithstanding the limits of its terms (considered more fully below) yields to the magnetic pull of the latter in ways which both strain its own internal logic and raise unanswered, and possibly substantial, questions about its operability in practice. It may be that the CJEU will return to some of those questions, and to the reconciliation of *LU & PH* and *Ardic*, in due course. The proper weight to be given to the persuasiveness of *LU & PH*, as a case capable of sounding practically in UK/European extradition proceedings more generally, may be attenuated accordingly meanwhile.

57. Had it been strictly necessary to do so, I might have been minded not to follow *LU & PH*, and to decline to investigate the proceedings held in Mr Kalandyk's absence on 7th July 2016. But I do not consider the present case to have the necessary quality of a test case on this point. That is partly because, notwithstanding that I have the benefit of some material not before the District Judge, including some oral evidence from Mr Kalandyk himself, the testing and clarity of the necessity of making a decision about whether or not to follow *LU & PH* is harder to achieve where the issue arises for the first time at an appellate stage and lacks the benefit of a full contextual exploration at first instance. But it is principally because, for the reasons set out below, following the *LU & PH* path (a) helps expose some of its problems and (b) on the facts of this case leads to the same place.

(ii) The limits of LU & PH

58. An attempt to apply *LU & PH* to this case has to start by testing the limits of its own *ratio*.

59. In the first place, the case locates the requirement for an extradition court to investigate an activating conviction squarely within the territory of an exception to a general rule:

> [47] … execution of the European arrest warrant constitutes the rule, whereas refusal to execute is intended to be an exception which must be interpreted strictly..
>
> …
>
> [55] That strict interpretation of the concept of 'trial resulting in the decision' … is an exception to the rule requiring the executing judicial authority to surrender the requested person to the issuing member state and must, therefore, be interpreted strictly.

LU & PH itself has to be interpreted accordingly also. It deals with an exception to an important rule and falls to be narrowly construed.

60. Next, the decision is itself expressed in self-limiting terms. It deals with subsequent convictions *without which a warrant could not have been issued* – see [63] and [65] cited above. On a strict interpretation, it therefore applies *only* to convictions which form the whole basis for the activation and therefore of the warrant.

61. That is, within the terms of *LU & PH*, set out as a logical and principled position. It is the *reliance* on an unfair conviction which is capable of rendering the activation of a suspended sentence, and an individual's consequent status as being unlawfully at large, unfair, that is the problem. (That of course assumes in the first place that the warrant, as such, *relies* relevantly on the subsequent conviction as a *reason for* activation rather than simply relying on the *fact* of activation.)

62. It follows that if the warrant would have been issued anyway, including because there were *other* reasons for the activation of the suspended sentence, *LU & PH* does not demand investigation of a subsequent trial, as it would if that had been the *sole* reason. A failure of Art.6 rights in such a trial would not be 'causative' of the warrant in itself.

63. I was not taken in any detail in this case to the source documentation of the activation decision (which may be an issue in itself). But all the evidence I have seen – including in the Polish authorities' responses to requests for further information, and in a report commissioned by Mr Kalandyk from an expert in Polish law and procedure – is that the activation decision in this case was based on three factors: (a) the Polish driving offence for which he was convicted on 7th July 2016; (b) the German driving and theft offences for which he was convicted on 6th October 2016 and subsequently imprisoned; and (c) the fact that he had not complied with the order imposed in relation to his index offending, on 30th October 2015, to pay compensation to Ms Siezieniewska, the victim of his violence.

64. My understanding of the evidence such as it is, is that the activating court gave particular weight to the second and third of these. The German convictions involved not only driving offences of the sort which had formed part of the index offending for which the suspended sentence had been imposed in the first place (a matter the activating court evidently considered defiant of that sentence) but also an 'audacious' offence of dishonesty. And the breach of the requirement to pay compensation was regarded as a violation of the explicit conditions of suspension.

65. On any basis, the (undisputed) evidence I have is that the conviction *in absentia* for the Polish driving offences was not the sole reason for the activation of the suspended sentence. From the evidence, I can and do infer that it was not even the principal reason. The German convictions were for more serious offending and no complaint is made about the trial procedure leading to them – Mr Kalandyk was present throughout. The failure to pay compensation was a breach of conditions which provided an independent basis for activation not reliant on trial procedure of any sort outside the activation hearing itself.

66. Whether Mr Kalandyk *had* failed to make the compensation payment was a disputed matter of fact before me. But there is no basis in *LU & PH* or anywhere else for an extradition court to expect to investigate *that* matter – ie a finding of breach of conditions – as a potential breach of Art.6. It was a matter purely for the activating court. (Although if I *had* been required to make a finding of fact about it, I would have been satisfied so that I was sure that the compensation had not been paid. That is confirmed in the further information provided by the Polish authorities as being the state of the court records. That is confirmed by the expert witness who also examined the files. I found Mr Kalandyk's assertions to the contrary in his proof of evidence dated 10th October 2023 and in his oral evidence to me entirely unconvincing. He said in his proof that he had paid the compensation in two instalments but 'given the passage of time I had lost the payment receipts'. He told me he lost the receipts when decorating his home. I found Mr Kalandyk generally to be an unreliable witness of objective fact, his oral account under cross-examination not supporting his written evidence with clarity and consistency. I note that the District Judge found his accounts, particularly where they relied on forgetfulness, to be self-serving and not genuine. That was my own assessment also.)

67. I return after that digression to the point that *LU & PH* does not suggest that *any* form of reliance by an activating court on a conviction *in absentia* must be investigated. It indicates that *sole* reliance on such a conviction must be investigated. And this is not a '*sole* reliance' case. On that basis, I would distinguish *LU & PH* in any event.

68. However, the digression into the evidence about the reasoning of the activating court needed to determine even that much, illustrates some of the practical issues raised by *LU & PH*. Moreover, in the present case, on such evidence as I have, I might have been able to reach a view that the Polish conviction *in absentia* was not even a materially operative 'cause' of the warrant – the suspended sentence could or would have been activated in any event. I make no such finding because I do not need to, and it is to a degree a speculative or at best inferential exercise. But in another case in which a disputed conviction *in absentia* played a more dominant role in, even if not standing as the sole reason for, activation, I can see that difficult issues might arise.

(iii) The disputed hearing

69. Finally, for completeness, and to demonstrate why I do not consider this a test case for attempting any definitive position on *LU & PH*, I turn to the question of Mr Kalandyk's absence from the hearing on 7th July 2016 at which he was convicted of the Polish driving offences. If, contrary to my analysis above, I considered I had a legal basis, or obligation, to investigate this matter, it would be on the following basis.

70. Mr Kalandyk's extradition is sought on the basis of a suspended, and subsequently activated, sentence of conviction, properly imposed upon him after trial and conviction on 30th October 2015. The District Judge found as a fact that Mr Kalandyk was present for two days of the hearing of that trial, but absent on the third day, which was when the sentence was pronounced. She made two important findings of fact, to the criminal standard of proof, about that. The first was that Mr Kalandyk was aware of that final hearing date and deliberately absented himself from it. The second was that he was aware that the suspended sentence had been passed, and aware that further offending may lead to the sentence being activated.

71. I have no basis for disturbing those findings. They were clearly available to the District Judge on the evidence before her. They are not formally challenged on this appeal. Mr Kalandyk stated in his subsequent written evidence that he did not seek to challenge those findings – although he gave a variant oral description to me about being told only of the compensation payment and not the suspended sentence, a version of a similar account he gave to the District Judge, who rejected it as not credible. I reject it also for the same reasons as the District Judge gave.

72. The undisputed evidence before me – from the court records, and confirmed by Mr Kalandyk under cross examination at the appeal hearing – was that he was arrested in Poland less than six months later, on 7th May 2016, for driving while disqualified and intoxicated. He was brought before a court two days afterwards on 9th May 2016 and formally charged. He admitted the offence. And he was told that if he changed his address he was obliged to tell the authorities. In fact he left for Germany shortly afterwards, without telling the authorities, where, within a matter of days, he was arrested for the German offences. Mr Kalandyk told me he had intended at the time to spend settled time working in Germany. That is what he did, briefly, on release from prison and before travelling to the UK. He also told me he had intended all along to return to Poland. Since leaving, however, he has not returned there, nor made any attempt to contact the Polish authorities before being arrested on the extradition warrant in the UK.

73. The '*injunctive verdict*' proceedings conducted against Mr Kalandyk, in his absence, in relation to the Polish driving offences culminated in conviction and sentence on 7th July 2016. They appear to have been conducted on the basis of his admission of the offence. If these proceedings are relevant for the purposes of section 20 of the Act, then the question for me is whether I can be satisfied, to the criminal standard, that he deliberately absented himself from them.

74. At one level of course Mr Kalandyk's absence from court on that day can be accounted for by the simple fact that he was in prison in Germany at the time. But that is not the level of explanation required for the purposes of section 20. The question is not whether he was otherwise engaged at the time, for whatever reason voluntary or involuntary. It is a more fundamental question than that.

75. It is not controversial that the question of deliberate absence must now be approached applying the guidance of the Supreme Court in *Bertino v Italy [2024] 1 WLR 1483*. In that case, the Supreme Court tied its analysis of section 20's test of deliberate absenting to the jurisprudence of Article 6 ECHR – the right to a fair trial. It noted (at [33]) that neither the letter nor the spirit of Article 6 prevents a person from waiving of his own free will, either expressly or implicitly, the entitlement to the guarantees of a fair trial. But to be effective for those purposes, waiver of the right to take part in the trial must be unequivocal. As a minimum that requires that he could reasonably have foreseen what the consequences of his conduct would be.

76. From its survey of the jurisprudence, the Supreme Court noted (at [54]) that for deliberate absenting to be regarded as equivalent to an individual defendant's waiver of the right to attend criminal proceedings, it had to be '*unequivocal and effective, knowing and intelligent*'. A general manifest lack of diligence which results in ignorance of criminal proceedings will not by itself be enough: '*there can be no question of waiver by the mere fact that an individual could have avoided, by acting diligently, the situation that led to the impairment of his rights*.' (*Ibid* at [55]). Fugitivity alone is not a sufficient basis for a finding that an individual deliberately absented himself from his trial.

77. For unequivocal waiver to be established, '*ordinarily the accused must be shown to have appreciated the consequences of his or her behaviour. That will usually require the defendant to be warned in one way or another.*' (*Ibid* at [54]). And '*ordinarily it would be expected that the requesting authority must prove that the requested person had actual knowledge that he could be convicted and sentenced in absentia*' (*Ibid* at [58]). But, the Court continued in the same paragraph,

> behaviour of an extreme enough form might support a finding of unequivocal waiver even if an accused cannot be shown to have had actual knowledge that the trial would proceed in absence. … the facts might provide an unequivocal indication that the accused is aware of the existence of the criminal proceedings against him and of the nature and the cause of the accusation and does not intend to take part in the trial or wishes to escape prosecution. Examples given were where the accused states publicly or in writing an intention not to respond to summonses of which he has become aware; or succeeds in evading an attempted arrest; or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces. This points towards circumstances which demonstrate that when accused persons put themselves beyond the jurisdiction of the prosecuting and judicial authorities in a knowing and intelligent way with the result that for practical purposes a trial with them present would not be possible, they may be taken to appreciate that a trial in absence is the only option. ...

78. In *Bertino* itself, the appellant was under investigation. He had not been arrested, questioned or charged in connection with his alleged offending when he absented himself, and '*a prosecution was no more than a possibility*'. He was never officially informed that he was being prosecuted nor was he notified of the time and place of his trial. There were no criminal proceedings of which he could have been aware, still less was there a trial from which he was in a position deliberately to absent himself. On those facts, the Court concluded he could not have been found to have deliberately absented himself from his trial.

79. In the present case, my starting point is that Mr Kalandyk was knowingly under the penalty of a recently-imposed suspended sentence. He knew that further offending could result in the activation of the prison term imposed. He was arrested for further, relevant, offending. He *admitted* that offending in person when 'presented a charge and … heard as a suspect'. He knew he was required to stay in touch with the authorities (including under jeopardy of deemed service) and remained subject to their jurisdiction. But instead of doing so, he shortly afterwards left the country for what he had planned to be at least a few years living and working in Germany, during which time he did not return to Poland or make contact with the Polish authorities, and had no intention of doing so.

80. These facts are very far removed from those of *Bertino*. Mr Kalandyk was not a stranger to the Polish criminal justice system. He had admitted his most recent offending in court. He knew he could – indeed would – be treated as on notice of future proceedings if he did not make himself available for service. The court records indicate that he was served at his last address. Mr Kalandyk told me no papers were delivered – he knew that, because his wife was living in the house at the time. I found that account self-serving and lacking credibility. But in any event, this is not a case of 'mere', ignorant or reckless fugitivity, or simple failure of due diligence in ensuring he received notifications at the address he had provided. I am satisfied, so that I am sure, that Mr Kalandyk made a deliberate calculation that the jeopardy he faced by remaining engaged with Polish criminal proceedings was worse than the hope of avoiding that jeopardy by disengaging and leaving the country.

81. There is a high bar to be cleared by a requesting state in establishing waiver of attendance to the necessary standard. Article 6 is engaged, and waiver cannot be equivocal. It must be *knowing* – importing the foreseeability of the outcomes of the absence, and a commensurate understanding and assumption of the risks of non-attendance. *Bertino* is, however, careful to stop short of requiring *actual knowledge* that a hearing would take place in an individual's absence – much less of the precise details of any such hearing – before unequivocal waiver can be established. A person's behaviour '*of an extreme enough form*' might support an inference of unequivocal waiver, even so, on appropriately established facts.

82. The inferential case raised on the present facts in my judgment admits of only one conclusion. The reason Mr Kalandyk was not present for the remainder of the proceedings in relation to which he had just been charged was because he had unequivocally waived his right to attend future hearings by deliberately absenting himself from them through a calculated course of conduct. He left the jurisdiction, quickly, knowingly and intelligently, with a specific view to avoiding both the immediate consequences of his admitted offending and the consequences for his suspended sentence. '*This points towards circumstances which demonstrate that*

when accused persons put themselves beyond the jurisdiction of the prosecuting and judicial authorities in a knowing and intelligent way with the result that for practical purposes a trial with them present would not be possible, they may be taken to appreciate that a trial in absence is the only option.' (Bertino, [58]).

83. I am sure on the facts of this case, as found at first instance by the District Judge and as found on appeal by me, that Mr Kalandyk unequivocally waived his rights, knowing he was *due* to face penal consequences on two levels and almost inevitably *would*, and evinced a plain and firm intention to take no part in any related criminal procedure in order to try to avoid those consequences, whatever they might be. He waived any rights to be present at and engage with judicial decision-making about those penal consequences. He deliberately absented himself for the purposes of s.20 of the Act. He has no entitlement to be discharged from extradition on this basis. That result is fully consistent with his Article 6 rights, which by his own actions he unequivocally waived.

Conclusions

84. Mr Kalandyk is not entitled to be discharged from extradition. The bar in section 20 of the Act does not apply. It does not apply to the trial at which he was convicted and sentenced, because he was present for two-thirds of the proceedings and deliberately absent from the final part. It does not apply to the hearing at which his suspended sentence was activated, because that was not a legally relevant hearing. And it does not apply to the Polish proceedings at which he was convicted of offences during the period of his suspended sentence, because (a) he admitted his offending in person when 'presented a charge and … heard as a suspect' (b) in relation to the rest of the proceedings, *either* section 20 does not apply as a matter of law *or*, in any event, he was deliberately absent from those proceedings, having unequivocally waived his right to continue to be involved in them.

85. Mr Kalandyk's appeal is dismissed. There is no barrier remaining to his extradition.