Neutral Citation Number: [2023] EWHC 1587 (Admin)

Case No: CO/4173/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 29th June 2023

**Before**:
**MR JUSTICE FORDHAM**

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**Between:**

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| **ARKADIUSZ KRAMPA** | **Appellant** |
| **- and -** | |
| **REGIONAL COURT IN GDANSK (POLAND)** | **Respondent** |

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**Natasha Draycott** (instructed by Lawrence and Co) for the **Appellant**
**Alexander dos Santos** (instructed by CPS) for the **Respondent**

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Hearing date: 27.6.23
Judgment circulated 27.6.23 for hand-down 29.6.23

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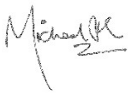
# Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

## MR JUSTICE FORDHAM:

Introduction

1. The Appellant is aged 43 and wanted for extradition to Poland. That is in conjunction with an Extradition Arrest Warrant issued on 23 June 2022 on which he was arrested on 28 July 2022, in relation to which he is wanted to serve the balance of an aggregated 6 year 6 month custodial sentence for fraud and robbery offences committed in 2009 and 2011. District Judge Curtis ordered his extradition on 7 November 2022 after an oral hearing on 24 October 2022, finding that the Appellant had come to the UK in November 2019 as a fugitive and that his extradition was compatible with the Article 8 ECHR rights of himself and other relevant family members. The Article 8 ground of appeal, which alone featured in the original grounds of appeal, has been abandoned.

2. The viability of any resistance to extradition through an appeal to this Court now rests on an Article 3 ECHR argument, on amended grounds of appeal (15.3.23), based on a series of materials constituting putative fresh evidence and said to be capable of being decisive. In particular, there are January 2023 and February 2023 Reports of the KMPT (the Polish national mechanism for the prevention of torture), which have been translated pursuant to an Order for extension of the representation order, granted by this Court on 6 April 2023. A further extension to the representation order is sought, so as to instruct an expert, not for the purposes of commenting on available materials, but rather for the purposes of eliciting such further material as may be available and being able to deal with the moving picture from what is known to be an ongoing investigation by Polish prosecutors. At the heart of the case is a concern as to whether it could be right and just in the present known circumstances, including by reference to the information gaps and that moving picture, for the Appellant to be extradited into a custodial setting where his fundamental and absolute Article 3 human rights protections are imperilled.

3. I am grateful to Counsel and the other legal team members on both sides for their focused assistance. I decided to deliver my judgment in writing, circulating it the parties as a confidential draft later on the day of the hearing, rather than have everyone return to the court-room in the afternoon to listen to an ex tempore judgment.

Law and Litwinczuk

4. When Swift J considered the case of Litwinczuk v Poland [2021] EWHC 2735 (Admin) in September 2021, he was dealing with an application to amend the grounds of appeal to raise Article 3 ECHR. That was in the specific context of Polish prison overcrowding and the well-known criteria relating to minimum personal space. It was in circumstances where the materials being relied on could be characterised as the requested persons' "entire Article 3 case" (§10). It was also in circumstances where a previous Judge had extended the representation order to permit an expert report, staying consideration of the application for permission to amend (see §2). Ms Draycott distinguishes the present case, which is concerned with violence by prison officers at Barczewo Prison ("the Prison"), where an extension of representation order is being sought, and where the evidential picture is a dynamic and emerging one.

5. In his judgment in Litwinczuk, Swift J distilled the essence of applicable legal principles which govern "whether there is a case to answer that the surrender of [requested persons] to serve sentences of imprisonment in Poland will expose them to a real risk of Article 3 ill-treatment" (§6). First, he first identified what I will call the Displacement Threshold. That is the threshold requiring exceptional circumstances having been demonstrated, such as to displace from prevailing the strong presumption that a Council of Europe and EU state is willing and able to fulfil its obligation not to subject any person to Article 3 ill-treatment. The Displacement Threshold requires information which is objective, reliable, specific and properly updated demonstrating deficiencies, whether systemic or generalised, or whether affecting certain groups or affecting certain places of detention, constituting clear and cogent and compelling evidence (§§6-7). Secondly, he identified the Aranyosi Threshold. That is the threshold which requires the extraditing court to request further information and/or assurances from the requesting state. The Aranyosi Threshold involves asking whether there are substantial grounds to believe that the relevant requested person(s) would be exposed to the real risk of Article 3 ill-treatment (§9). If so, extradition would be incompatible with Article 3, but extradition human rights law requires the extraditing court to give the requesting state an opportunity to address the risk relating to the requested person or persons, by further information or assurances (§§8-10). In Litwinczuk, Swift J approached the question of permission to amend by asking whether there was "a case to answer" (§6), but as to the Aranyosi Threshold, and not by asking whether it was arguable that the Displacement Threshold had been met (§§8-10).

6. It is, I think, important to be alive to the fact that there are a number of different 'moving parts' within the machinery of the law in the area of Article 3 and extradition. One feature is the distinction between an assessment of arguability (a permission-stage test) and a substantive assessment (a substantive-stage test). Another feature is the distinction between evidence which is "systemic or generalised" on the one hand (and therefore would stand to impact in the same way any requested person), and evidence which relates to certain "groups" or certain "people" or certain "places of detention" (and therefore would stand to impact on a requested person falling within a group, being a person of a particular nature, or facing incarceration and a particular place or places of detention). Another feature is the distinction between the Article 3 argument being decisively answered through the prevailing "presumption of compliance" on the one hand, and the Article 3 argument being answered in circumstances where the Displacement Threshold has been crossed and that presumption of compliance has been displaced. A further feature is the distinction between the source of ill-treatment being state actors (or state agents) on the one hand, or non-state agents where the Article 3 incompatibility arises solely out of an insufficiency of state protection. All of these and other features operate to inform the ultimate question of whether there are substantial grounds for believing that a requested person, if extradited, would face a real risk of treatment constituting torture or inhuman or degrading treatment or punishment.

Premise

7. Ms Draycott adopts as a premise for the Article 3 analysis that there is arguably a legally sufficient prospect, on the evidence, of the Appellant being incarcerated at the Prison (rather than elsewhere) following extradition. She points to the putative fresh

evidence in the form of two short statements from Polish lawyers who express views of a likelihood, or strong likelihood, of that consequence in the Appellant's case. There is also putative fresh evidence from the Appellant to the effect that he was previously incarcerated at the Prison. That premise, and the quality and sufficiency of that evidence, are not accepted by Mr dos Santos for the Respondent. But nor does Mr dos Santos take his stand on that premise being unsound. I am satisfied that it is appropriate to proceed on the basis of assuming the premise. I will focus on the evidential and legal picture as it relates to a requested person who stands to be incarcerated at the Prison, as one of the inmates at this establishment with its 746-inmate capacity.

Materials

8. The focus then squarely turns to the evidence regarding violence by prison officers towards inmates at the Prison. There are before the Court three documents published by KMPT. There is a First Report dated 17 January 2023 from a visit at the Prison. There is a Second Report dated 17 February 2023 from a further visit at the Prison. There is then a KMPT Public Information Bulletin (February 2023) relating to those visits and the response of the regional prosecutor's office at Olsztyn (the "RPO"). Also before the Court is a publication dated 30 January 2023 by the Helsinki Foundation for Human Rights, relating to the First Report. There are then two news reports. A news reports dated 2 February 2023 refers to the First Report. A news report dated 21 April 2023 refers to a Radio Olsztyn interview with the Lead Prosecutor at the RPO. I have, in the usual way, received that body of material on a provisional basis, to see what its implications are, before ruling on its admissibility. I will avoid the Latin.

9. This is a body of material within which there are descriptions of specific alleged incidents of serious ill-treatment, and within which there are also references to alleged practices. To illustrate the second of these, borne out of the first, the Second Report (17.2.23) refers to the visiting panel having raised "arguments" with the Head of the Facility "that individual cases highlighted in the report from the first visit could stand as evidence of an organised apparatus of violence within the facility".

10. The relevant substance of the First Report can, in my judgment, be summarised as follows. Under Poland's July 1987 national mechanism, a three-person panel had made a four-day unannounced visit to the Prison, between 17 and 20 October 2022. They had inspected the facility and conducted interviews with relevant members of staff and with prisoners. They had inspected documentation and CCTV. Their Report identified 5 "systemic issues" and a further 5 "areas" requiring "improvement". Within a section of their Report on torture or inhuman or degrading treatment, they described "specific incidents involving acts of violence by some officers".

    i) There was information about what was said to have been an assault on an inmate by prison officers which resulted in cardiac arrest during the incident, the ambulance was not called, but officers gave CPR to the prisoner and restored his vital functions.

    ii) There was information about what was said to have been an incident where a prisoner alleged that he was taken to an unmonitored medical room situated on the medical ward, subjected to torture by waterboarding, which involved

forcefully bringing him down to a lying position, placing a towel over his face and spraying him with water from a bowl. CCTV showing him being taken back to his cell showed him removing wet clothing.

iii) There was information about what is said about a June 2022 incident. An inmate was pushed onto a wall and placed in a position facing the wall with his arms twisted back. Then two officers pulled his legs from underneath him which led to him falling to the floor, after which he was dragged along the floor, his arms twisted back held by his legs and lifted up while lying on his stomach, while another officer was putting pressure on the back of his neck with his knee and hitting him with his hand over his head. Then officers poured water into a black bin bag, lifted his head up and put it in the bag and water boarded him. This led to him passing out. When he came to, officers put his head on the side and proceeded to pour water over his head.

iv) There was information about what is said about an incident where officers brought an inmate into a cell with marks resulting from an assault to his legs, such that he was not able to stand, and that he had admitted reluctantly that he had been assaulted by officers.

11. The First Report describes the panel as "finding" incidents involving acts of violence on the part of some officers against prisoners which include torture, inhuman and degrading behaviour. There is the following description: inmates are taken out of their cells and into unmonitored rooms where they are assaulted, insulted, threatened, choked or even water boarded, and that in some cases officers put black bags or wet towels over the inmates' heads. There is also a description, according to prisoners, of a room with no cameras within the facility where offenders are assaulted under pretence of going to see a doctor.

12. What the KMPT did in the First Report was to make recommendations to the Head of the Prison to take immediate action to investigate and eliminate acts of torture, inhuman and degrading behaviour, with monitoring and training programmes. The KMPT then published its report of the visit. It made referrals to the RPO on 7 November 2022 and 19 December 2022 in relation to the inmate's crime report complaint of the alleged incident of waterboarding in the medical room, pursuant to the applicable (mandatory) referral mechanism.

13. The KMPT then decided to conduct its follow-up visit. The relevant substance of the Second Report can, in my judgment, be summarised as follows. Under the same national mechanism a 4 person panel – including the same 3 who had visited in October 2022 – now conducted another four-day unannounced visit to the Prison. That was on 23 to 26 January 2023. They inspected and again conducted interviews. The purpose was specifically to follow up regarding the topic of acts of violence by prison officers within the First Report. The panel also wanted to check that no repressive measures had been visited on any of the previous interviewees. The Report records that the panel was satisfied that there was no evidence of any repercussions. The Second Report included this:

i) There was information about a further reported incident involving a crime report complaint. The prisoner alleged that they had been choked by an officer

by applying a neck grip, hit to the face, kicked and pushed to the floor, with their arms twisted back, and subjected to abusive and offensive words.

ii) Later in the Second Report – in discussing record-keeping and the prison's own complaints procedure – there was information about an alleged incident in which 3 officers removed inmates from a cell, took them to an unmonitored room where they were assaulted, thrown against the wall and "slapped about".

iii) In that same record-keeping section of the Second Report there was a description of the January 2023 incident where a prisoner alleged that he had been taken to an unmonitored room, restrained and brought down to a lying position, handcuffed in a rear stack, his arms twisted back, and offensive language and intimidation used against him. The panel emphasised that this and the previously described incident had not been recorded.

14. Within the Second Report the panel recorded its finding that the Head of the Facility had failed to take "significant", and more importantly "holistic", action in order to investigate the allegations raised in the First Report and prevent similar incidents from happening in the future. The Panel recorded that the Head of the Facility had elicited and accepted the officers' account of the 'crime report complaint' incident of waterboarding in the medical room and had decided to await the final decision of the Prosecutor investigating the referrals. The panel recorded that the Head of the Facility did not accept that the individual cases could "stand as evidence of an organised apparatus of violence within the facility" rendering it "essential to conduct a thorough investigation" of the relationship between prisoners and officers.

Discussion

15. I accept, of course, that this material presents a troubling picture of a pattern of alleged incidents which would constitute serious human rights breaches by state agents in a custodial setting. As the Divisional Court explained in Miklis v Lithuania [2006] EWHC 1032 (Admin) at §11 even the fact of human rights violations taking place is not of itself evidence that a particular individual would be at risk of being subjected to such a future human rights violation in the country in question. The Court went on to explain (at §11) that the answer that question will depend on the circumstances, of which it identified three as relevant to that case: the extent to which the violations were systemic; their frequency; and the extent to which a particular individual in question could be said to be specifically vulnerable to exposure to them.

16. I am unable to accept that the evidential picture relating to the incidents – including patterns and themes, including the references to a practice, a room or an apparatus, and including the position adopted by the head of Facility at the Prison in light of the First Report – give rise to an arguable Article 3 basis of resisting extradition on the basis of substantial grounds before believing that the Appellant faces a real risk of torture or inhuman or degrading treatment or punishment. I cannot accept Ms Draycott's submission, as put in her skeleton argument: that "objective, reliable and specific evidence has been served in this case which demonstrates that there is a real risk that the Appellant's Article 3 rights will be breached if he is incarcerated at [the Prison]". I accept Mr dos Santos's submission, as put in his Note of submissions, that there is no "international consensus" nor "specific evidence sufficient for a court to

determine that surrender would give rise to a real risk that the Appellant would be subjected to inhuman or degrading treatment, nor is it reasonably arguably so".

17. There is, in my judgment, an insufficient justification for an extension of the representation order, nor for the delay which it would entail. Ms Draycott rightly accepts that expert evidence would not be justified for the purposes of commenting on accessible material. The material that has been gathered shows that it is possible to obtain from the public domain material from KMPG and material relating to the position of the RPO and others. That material can be obtained, translated and considered. That is what has happened. It gives clarity as to what is KMPT's published position in relation to these matters is. I see no justification for some further 'gathering' exercise, still less for an exercise of 'waiting to see' what may come into the public domain next.

18. I keep well in mind that this is a case of alleged serious ill-treatment in a custodial setting at the hands of state agents, where there is a direct engagement with Article 3 standards, rather than purely a prism of sufficiency of state protection (as with inter-prisoner violence).

19. It is, in my judgment, nevertheless compelling in the present case to examine what has happened by way of response:

    i) Under the applicable National Preventive Mechanism against Torture – for the purposes of the Optional Protocol to the Torture Convention – the relevant state agency was able to make and continue to make unannounced visits at times considered appropriate. It has sent multi-person panels. It was able fully to inspect and to interview staff members and inmates, as well as to examine documents and CCTV. It was able to satisfy itself that there was no evidence of any repercussion of repressive measures against any inmate interviewee. It was able to conduct a follow-up visit 3 months after the first visit. It was able to visit the Prison over an extended period.

    ii) The compulsory mechanism for referral to the RPO is in place. It was actioned by the follow-up referrals of November 2022 and December 2022, and a referral following the crime report complaint of the incident of choking hitting and kicking described in the Second Report.

    iii) KMPT's reports were published. They were picked up in the news media. The Helsinki Foundation has published its concerns and has announced that – following the First Report – letters were written to the RPO as well as to the Head of the District Prison Service, the Director-General of the Prison Service and the Head of the KMPT. Those letters are described as having reiterated the absolute prohibition on torture and inhuman or degrading treatment.

    iv) The Head of Facility at the Prison is well aware of the investigation by the RPO and is monitoring its progress.

    v) It is also right to recognise that when the First Report described 5 "systemic issues" this was not among them. Instead the First Report described this as one of the "areas requiring improvement", making clear that it was describing incidents of alleged acts of violence by "some" officers. It is also right to

record that the description in the Second Report was to an "argument" that individual cases may stand as evidence of an organised apparatus of violence within the facility.

vi) The most recent material, a news item published on 21 April 2023, involves the Lead Prosecutor from the RPO giving a radio interview describing the investigation into possible irregularities at the Prison. He has there stated publicly that the investigation was looking into some 40 victims of which had been interviewed as at 21 April 2023 and the other half were yet to be interviewed. He also referred to the interviews to be conducted with a few dozen of the witnesses. He says evidence gathering proceedings were ongoing and that an extensive body of evidence had been collected. He referred to statements from victims and witnesses, as well as documentation relating to inmates. He explained that individuals were being interviewed as victims or witnesses albeit that they may now be situated in different parts of the country or the prison estate. He said that the investigation was being extended to the end of July and referred to the possibility that it might be necessary to extend it further.

20. In my judgment it is of significance that, far from arguably displacing the presumption of compliance under the Displacement Threshold, there is here cogent evidence of agencies and authorities unmistakably treating the concerns as being of the utmost seriousness with an investigatory searchlight, clear to everyone concerned, and reflected in the public domain. The allegations of the incidents engage standards of human rights protection and also the human rights effective official investigation which starts with establishing the facts and identifying any perpetrators so as to bring them to justice. It is also in that context where KMPT considered it necessary to conduct a four-day January 2023 visit 3 months after the first visit followed by a promptly published report on 17 February 2023. There is not said to be any further report or public statement.

21. Looking at the materials, their nature and implications, it is not arguable in my judgment that this evidence – conscientiously and properly gathered by the Appellant's representatives and placed before this Court – crosses the Displacement Threshold. That is fatal to the viability of the proposed Appeal. But nor for that matter do the materials arguably cross the Aranyosi Threshold applied by Swift J in Litwinczuk. And, as I have explained, I do not accept that there is a relevant information gap which the instruction of an expert is necessary or appropriate to seek to fill, still less that it is appropriate to allow time to pass for further materials to be written and published and for further developments to be known.

22. It is not, in my judgment, arguable with any realistic prospect of success that there are "substantial grounds" for considering that the Appellant would if extradited face a "real risk" of torture and inhuman or degrading treatment as an inmate at the Prison, on the premise that this is where he would be headed. The standards of Article 3 human rights protection are robust and exacting of state authorities. But the Article 3 thresholds for resisting extradition based on evidence of ill-treatment in a custodial setting are robust and exacting of requested persons. The legal standards are well established. The material relating to the concerns at the Prison, serious though those concerns and alleged incidents are, falls substantially short of viability as being capable of arguably constituting a bar to extradition.

Outcome

23. I will refuse (a) permission to amend the grounds of appeal (b) permission to adduce the fresh evidence (c) permission to appeal and (d) the extension of the representation order. In those circumstances there is no bar to the Appellant's extradition.