Neutral Citation Number: [2024] EWHC 1399 (Admin)

Case No: AC-2023-LON-001635

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/06/2024

Before

MR JUSTICE SWIFT

- -

Between

EWA ANDRYSIEWICZ **Appellant**

-and-

CIRCUIT COURT IN LODZ, POLAND **Respondent**

- -
- -

Ania Grudzinska (instructed by **Hollingsworth Edwards Solicitors LLP**) for the **Applicant**
Natalie McNamee (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing date: 21 May 2024

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Approved Judgment

This judgment was handed down remotely at 9.30am on 11 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE SWIFT

A. Introduction

1. This is an appeal against an extradition order made on 23 May 2023. The order rests on a warrant issued by the Requesting Judicial Authority on 23 September 2020 and certified by the National Crime Agency on 31 March 2021. The warrant is a conviction warrant. On 5 October 2016, the Appellant was convicted of offences of fraud, having obtained credit through false representations. That judgment became final on 14 March 2017. The court passed a sentence of two years imprisonment, suspended for a period of five years. The sentence was activated on 14 November 2018.

2. In this appeal, the Appellant contends that her extradition would be a disproportionate interference with her article 8 rights. It is submitted that the District Judge's conclusion to the contrary was wrong for two reasons. The first is that the District Judge either did not consider or afforded insufficient weight to the passage of time. The offending that led to the conviction in October 2016 took place between 2007 and 2008. The Appellant relies on the passing of time between the date the offences were committed and the date of conviction. Next, it is submitted, the suspended sentence imposed in October 2016 was not activated until 2018. The Appellant contends that there has been no explanation why the suspended sentence was not activated until 2018. Finally in this regard, the Appellant submits that the warrant was not issued until September 2020. It is contended that the warrant could and should have been issued earlier and the delay has not been explained. The Appellant has been living in the United Kingdom since September 2016. The private and home life interests that the Appellant relies on to ground her article 8 claim, have arisen and developed since that time. The Appellant's submission is that as time has passed, those interests have become more significant such that interference with them now consequent on her extradition would be disproportionate. The Appellant further submits that the periods of time she points to are periods of culpable delay. These periods of time, that delay, undermines any argument the Requesting Judicial Authority could make that there is any significant public interest in her extradition to Poland.

3. The second part of the Appellant's submission that extradition would be a disproportionate interference with article 8 rights relies on the time she may spend in prison in Poland if extradited. The Appellant was arrested pursuant to the warrant on 20 January 2023; she has been held in custody since. Giving credit for the time she has spent on remand so far; eight months of the two-year sentence remain to be served. On this premise, the Appellant then relies on articles 77 and 78 of the Polish Penal Code. Article 77 of that Code gives the Polish court the power to release a prisoner on licence. As it applies to the Appellant's offending, article 77 would permit the Polish court to decide to release the Appellant on licence once she has served half her sentence. In November 2023, the Appellant made an article 77 application to the Polish court. That application remains pending. Were that application to succeed, the Appellant might, if surrendered, not be required to spend further time in prison, but might instead be released on licenced. The Appellant's submission is that this possibility supports her article 8 submission that extradition is disproportionate.

4. The facts set out in the District Judge's judgment, so far as they are material to the issues in this appeal, may be summarised as follows. The warrant covers three offences committed between February 2007 and December 2009. The total amount obtained by deception was equivalent to £68,403.79. The sentence imposed by the Polish court was suspended subject to a probation condition and a requirement to pay a fine. The suspended sentence was activated in November 2018 when the Appellant, having moved to the United Kingdom, ceased to comply with the probation condition. She had also, by that time, failed to pay the required fine. Once the sentence was activated the Appellant was required to report to prison on 25 February 2019 to commence serving the sentence. She did not report. On 23 April 2020 a domestic arrest warrant was issued. In May 2020 the Polish authorities became aware that the Appellant was serving a sentence of imprisonment in the United Kingdom.

5. The Appellant has lived in the United Kingdom since September 2016. For the last eight years, her life has been here. The Appellant has no family in the United Kingdom, but she has worked here and built her personal life here. She has not returned to Poland since 2020. Her evidence is that she has no family in Poland and that her entire personal and home life is here in the United Kingdom.

6. The District Judge considered the article 8 submission from paragraph 40 of her judgment. She approached the issue applying the well-established balance sheet approach recommended by the Divisional Court in *Polish Judicial Authority v Celinski* [2016] 1 WLR 551. The District Judge identified matters relevant to either side of the balance sheet at paragraphs 53 and 54 of her judgment. The District Judge approached the application of the *Celinski* balance on the premise that the Appellant was not a fugitive. However, the Judge did say this in her judgment.

> "50. For the reasons set out above, I think there are very strong grounds to believe that the Requested Person has deliberately placed herself out of the reach of the Polish authorities in this case. However, I recognise that she did so prior to the suspended sentence being handed down and I am cognisant of the fact that fugitivity was not a submission advanced on behalf of the CPS in this case. I do not therefore intend to conclude that the Requested Person is in law a fugitive for the purposes of the Article 8 balancing exercise.
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> 51. That being said, I am entirely satisfied that the Requested Person falls into the category of persons, envisaged alternatively by the Divisional Court in the case *Ristin*, who left Poland with her eyes *"wide open"* knowing what the likely sentence would be in this case and then deliberately failing to comply with the terms of the suspended sentence imposed.
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> …
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> 52. Accordingly, and although I do not regard the Requested Person as a fugitive for the purposes of the Article 8 balancing exercise, I do regard the circumstances in which the

> Requested Person left Poland to be relevant to the public interest which applies in favour of ordering extradition in the case."

7. In concluding that the Appellant's surrender would not be a disproportionate interference with article 8 rights, the District Judge stated that the Appellant had very limited ties to the United Kingdom notwithstanding having lived here (at that time) for some seven years, and that throughout her time in United Kingdom the Appellant had been aware of the sentence that had been passed in Poland. The District Judge also concluded that although the Appellant had recently suffered a mental break down, there was no medical evidence to suggest that the Appellant's health was relevant to whether extradition should be ordered. The District Judge accepted there had been delays but concluded that these were not such as to have any material bearing on the application of article 8. To the extent time had passed and there had been no sufficient explanation of why it has passed, that had not exacerbated the interference with article 8 rights that would be consequent on extradition. Taking all these matters into account, the District Judge's conclusion was that extradition would not be a disproportionate interference with the Appellant's article 8 rights.

B. Decision

8. In this appeal, the overarching issue is whether the District Judge's conclusion on the application of article 8 was wrong. Any application of article 8, conducted by reference to the *Celinski* balance, will entail consideration and evaluation of several matters on each side of the balance sheet. The present case is no exception. In this appeal, the Appellant relies on two matters considered in this balancing process. Her submission, essentially, is that the District Judge attached the wrong weight to either or both. While I must consider each in turn, my conclusion on whether the District Judge answered the article 8 issue incorrectly must consider all the relevant 8 article factors. In this case, the District Judge listed those matters at paragraphs 53 and 54 of her judgment.

> "53. **Factors said to be in Favour of Granting Extradition**:
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> (i) There is a strong and continuing important public interest in the UK abiding by its international extradition obligations.
>
> (ii) The conviction in relation to which the EAW has been issued relates to serious criminal conduct. The offence concerned a persistent course of fraudulent behaviour involving sophisticated group activity and a total loss in excess of £68,000.
>
> (iii) The total sentence outstanding against the Requested Person is two years (less any time that she has spent in custody in connection with these proceedings).

(iv) I have found that the Requested Person left Poland in full knowledge of these criminal proceedings and that she deliberately failed to comply with the terms of her suspended sentence order from July 2017 onwards, knowing that it would be liable to activation. I have made a finding of fact that she has remained in the UK in order to avoid facing up to her responsibilities in Poland.

(v) The Requested Person has been convicted of similar offending in Poland previously for which she has imprisoned and had been convicted of a criminal offence in this jurisdiction (although be it of an unrelated and less serious nature).

(vi) The Requested Person has a limited connection with the UK, she has no dependants or immediate family in the UK.

54. **Factors said to be in Favour of <u>Refusing</u> Extradition**:

(i) The Requested Person has been living and (she had been working) in the UK since September 2016.

(ii) The offending for which the EAW has been issued dates back to 2007 to 2010 when the requested person was just 26 to 30 years of age and there has been some delay in enforcing this conviction, since the suspended sentence was activated on 14 November 2018. The suggestion that her whereabouts were unknown was wholly undermined by the information that is contained in the EAW, that she had told her probation officer in July 2017 that she had moved to the UK.

(iii) She feels settled in the UK and has friends here. She no longer has any family in Poland and has recently suffered a mental breakdown in relation to the bereavements she has suffered, and she has only minimal contact with friends in Poland.

(iv) The Requested Person has served almost four months on remand in custody in connection with these extradition proceedings. It is submitted by Ms Grudzinska that she is therefore likely to be eligible for early release provisions in Poland and/or she could be released at the halfway point of her sentence."

No submission has been made to the effect that any matter was incorrectly included or excluded from the Judge's analysis.

(1) The significance of the passage of time

9. When the submission is that extradition would be a disproportionate interference with article 8 rights, the passage of time may be relevant for either or both of two reasons: the passing of time may mean that the protected article 8 interests are stronger and better developed and therefore weigh more heavily in the balance; and/or it may be possible to infer from the passage of time that the public interest in the extradition of the requested person concerned may be lower than would otherwise be assumed, such that the public interest in giving effect to established extradition arrangements might weigh less heavily in the balance.

10. The District Judge addressed the Appellant's delay submission at paragraph 58 of her judgment.

> "58. Ms Grudzinska suggested that there had been some unexplained delay in this case. I accept that the offending was committed a considerable time ago – however, the suspended sentence of imprisonment was only handed down in 2016 and was not activated until 14 November 2018. Whilst I do not accept the Judicial Authority's statement in EAW, that they were unaware of the whereabouts of the Requested Person (as this is contradicted by the information contained in the warrant that the Requested Person had told her probation officer that she was living in the UK in July 2017), I am unable to accept that any delay in this case is sufficiently significant to have any material bearing on the Article 8 balancing exercise. Taking the case at its highest, there was a delay of two years between the decision to activate the suspended sentence and the issuance of the EAW, and then a further delay of just over two years in certifying and enforcing the warrant by the UK authorities. Ms Grudzinska has not been able to demonstrate to me any personal circumstances particular to the Requested Person that emerged or existed during this period of time that impact upon her family or her private life in the UK. In fact, by contrast it would seem that during this period of time the Requested Person ended her relationship(s), lost her employment and ceased living in her own accommodation. The delay appears therefore to have weakened her ties with the UK rather than having strengthen them."

11. There is no reason to conclude that this evaluation of the position was wrong. The passage of time between 2010 (when the last offence charged was committed) and 2016 (when the Appellant was sentenced) could not logically serve to increase the weight attaching to the article 8 interests in play. Those interests comprise the Appellant's personal and home life in the United Kingdom; the Appellant did not

move to the United Kingdom until September 2016, shortly before the sentenced was passed. So far as concerns this period the Appellant's submission relies on the reasoning of William Davis J in *Adamek v Judicial Authority*, Poland [2018] EWHC 578 (Admin). In that case, six years passed between the issue of the domestic warrant and the decision to issue the European Arrest Warrant, and a further two years passed before the warrant was certified by the National Crime Agency. In the absence of explanation for either period, William Davis J inferred each was a period of culpable delay. From that inference, he concluded the appeal on article 8 grounds should be allowed.

12. It is trite that each case must turn on its own facts. In this case the District Judge did not draw any inference of culpable delay in respect of the period from 2010 to 2016 such as might serve to diminish the public interest in favour of giving effect to extradition arrangements made between the United Kingdom and EU states. She was right not to draw that inference. The Appellant's offending, as explained in the warrant, took the form of involvement in a conspiracy to defraud. The activity in aid of the conspiracy was complex and took place over an extended period. In these circumstances there was no room for an inference of culpable delay simply because it took time to investigate what had happened and then charge and prosecute those concerned, including the Appellant.

13. The remaining periods of time relied on neither suggest that the public interest in extradition is less significant than it might otherwise be, nor permit the conclusion that the weight attaching to the Appellant's article 8 interests has increased. As to the latter, there is no basis for me to go behind the District Judge's assessment of the extent and significance of the article 8 protected interests at paragraph 58 of her judgment. The Appellant's positive article 8 case was not a strong case and, in any event, any article 8 interests she could rely on had developed under the shadow of her departure from Poland just before she was sentenced. This was the point made by the District Judge at paragraphs 50 to 52 of her judgment. As to the former, the premise for the extradition request did not arise until November 2018 when the suspended sentence was activated. The District Judge recognised that there had been some delay from that time but concluded it had no material bearing on the article 8 balancing exercise having regard to all article 8 considerations. I agree with that conclusion.

14. Overall, there is no force in the submission that the District Judge's evaluation of the significance of the passage of time in this case was wrong or that materially different significance should be attached to these matters. I agree with the District Judge's assessment of the matter. Had this issue been one for me to decide from scratch, I would have reached the same conclusion.

(2) Article 77 of the Polish Penal Code: the possibility of release on licence

15. When the warrant is a conviction warrant, the length of time the requested person will serve in prison if surrendered is material matter to the article 8 *Celinski* balance. Credit is routinely given for any time spent on remand pending extradition proceedings. Any court will also want to be sure that it has up to date information from the requesting judicial authority on any other matter affecting the sentence to be served on surrender. One common example is information on the consequences of decision made to aggregate sentences where the warrant covers multiple convictions.

The Appellant's submission in this case, which rests on articles 77 and 78 of the Polish Penal Code, extends a little further.

16. Articles 77 and 78 of the Polish Penal Code provide as follows.

"**Article 77. Release on licence**.

1. The court may only release on licence an offender sentenced to imprisonment from serving the balance of the penalty, if his or her attitude, personal attributes and features, lifestyle prior to carrying out the offence, the circumstances of the offence and the offender's conduct after committing the offence and while serving the sentence, justify the assumption that the offender will, after release, respect the legal order, and in particular that he or she will not re-offend.

2. In particularly justified cases, when passing a sentence of imprisonment, the court may impose stricter restrictions to prevent the possibility of the offender benefiting from a release on licence, other than those specified in Article 78.

Article 78. Conditions.

1. An offender may be released on licence after serving at least half of the sentence, and not less than six months.

2. The offender specified in Article 64 § 1 may be released on licence after serving two-thirds of the sentence, and the offender specified in Article 64 § 2, after serving three-quarters of the sentence; the release on licence may not occur before the lapse of one year.

3. A person sentenced to 25 years imprisonment may be released on licence after serving 15 years of the sentence, and a person sentenced to life imprisonment can be released on licence after serving 25 years of the sentence."

17. Allowing credit for time the Appellant has spent on remand since her arrest in January 2023, eight months of the two-year sentence of imprisonment remain to be served. The Appellant made an article 77 application to the Polish court on 7 November 2023. If that application succeeds, the Polish court might convert the whole of the remaining 8-month sentence to a licence period, or it might permit part of the remaining sentence to be treated as a period to be spent on licence. Further provisions in the Polish Penal Code may also be relevant to the duration of any licence period. These are as follows.

"**Article 80. Probation period**.

> 1. Following a release on licence, the remainder of the sentence constitutes a probation period, and may not be shorter than two years or longer than five years.
>
> 2. If the convicted offender is the person specified in Article 64 § 2, the probation period may not be shorter than three years.
>
> 3. Following the release on licence of a person sentenced to life imprisonment, the probation period is 10 years.
>
> …
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> **Article 82. Sentence deemed as served**.
>
> 1. If the release on licence has not been revoked in the probation period or the subsequent six months, the sentence will be considered to have been served at the time of the release on licence.
>
> 2. If a judgment covers combined penalties from the which the offender has been released on licence, the combined penalty will include only the period of the sentence actually to be served."

18. The Appellant's submission is that when considering whether extradition would be a disproportionate interference with article 8 rights, the court should take account of the likely outcome of her article 77 application.

19. The District Judge dealt with this matter briefly, at paragraph 56 of her judgment.

> "56. It is very important for the UK to be seen to be upholding its international extradition obligations and the UK is not to be considered a '*safe haven*' for those sought by other Convention countries either to stand trial or to serve a prison sentence. These offences are serious in nature and there is a significant amount of time left to be served by the Requested Person. It is suggested on behalf of the Requested Person that she may be eligible for early release at the half-way point of her sentence but, even for accounting for the four months which have been spent in remand in the UK, that would still involve a further 8 months' imprisonment to be served. This is not insignificant and does not in my view, operate to substantially reduce the public interest in ordering extradition."

There is no direct criticism of that reasoning. The Appellant's case is that the District Judge's reasons have been overtaken by events, that the matter has now moved on

because a year has passed, and the outcome of the article 77 application could be that the Appellant would not be required to serve any time in prison.

20. The point this submission raises, is whether this court, for the purposes of its article 8 proportionality decision should seek to anticipate the decision a Polish court might take applying article 77 of the Polish Penal Code. The Appellant relies on the judgment of Fordham J in *Dobrowolski v District Court in Bydgoszcz*, *Poland* [2023] EWHC 763 (Admin). In that case, some 4 months of a 2-year 10-month sentence of imprisonment remained to be served. Mr Dobrowolski had not made an article 77 application. However, the submission made was that "… without second-guessing a discretionary decision which would be for the Polish authorities – this court should have regard to the reality" (see at paragraph at 14 of the judgment). The "reality" suggested to the court was that there were "good prospects" that an article 77 application would succeed. Fordham J's conclusion on this submission was as follows.

> "15. I accept those submissions. True, the Appellant is a fugitive, as were the requested persons in *Chmura* (§8), *RT* (§58) and *Kruk* (§25). True, the Appellant has previous convictions in Poland as did the requested person in *Borkowski* (§6). True, the index offences are matters of seriousness, as were those in *RT* (§58) and *Kruk* (§3). A feature of these 'working illustration' cases, in a context where the Polish criteria for early release focus in particular on the likelihood that the requested person would "respect the legal order" (*Chmura* §22), is that there are substantial periods of law-abiding conduct in the UK. This was the context for a positive judicial perception of the prospect of early release in Poland. So, there were 8 years in the UK of having "respected the legal order" in *Chmura* (§§10-11, 22); 8 years as a good and responsible citizen with no criminal activity in the UK in *Jesionowski* (§18); 7 years of law abiding life in the UK in *Borkowski* (§18); 13 years in the UK having not re-offended in *RT* (§64); and a 5 year clean record since coming to the UK in *Kruk* (§27). In the present case, the Appellant had – by the time he was placed on remand in these extradition proceedings – lived 6 years of law-abiding life with no convictions, since coming to the UK in 2014. I am satisfied – in all the circumstances – that I can properly form the judicial perception that the Appellant would have "good prospects" of early release, that it is "difficult to see" why there would not be early release, and that early release is "likely"."

The article 77 issue was one of four matters relied on in that case in support of a submission that extradition would be a disproportionate inference with article 8 rights. Fordham J's overall conclusion on that submission was this.

> "24. I recognise of course that there are strong public interest considerations in favour of extradition: the public interest in honouring extradition arrangements; in respecting the pursuit of the Polish authorities of an individual wanted in relation to matters of seriousness, to discharge the responsibility of serving the custodial sentence properly imposed; the public interest in the UK not standing as a safe haven, specifically for fugitives, and more generally for those seeking to avoid facing their responsibilities under foreign criminal process. The 34-month custodial sentence is to be respected in its entirety. The period of nearly 4 months to serve is not a period so short as to provide a standalone basis for finding a disproportionate interference with Article 8 rights. This is not a case involving the impacts on a partner, or on a child or children. The relevant Article 8 rights are the private law rights of the Appellant. I remember that it is not my function to decide early release under the Polish Criminal Code, nor in any event can I achieve an early release on licence or conditions. It is irrelevant whether I would – had I the jurisdiction to do so – direct that the Appellant serve the remainder of the sentence in the UK. It is not my function to ask whether the Appellant has been punished enough, by serving so substantial a proportion of his prison sentence, at a time of serious mental health and suicide risk concerns, and during the additional punitive effects of the pandemic. However, when I put into the balance the fact-specific combination of the four features of this case – each of which I have identified and examined in detail earlier in this Judgment – I am persuaded by Mr Joyes that extradition of the Appellant would be incompatible with his Article 8 rights. The appeal is allowed, and the Appellant will be discharged."

This reasoning suggests that material weight was attached to the possibility or likelihood that an article 77 application would succeed such that all or some part of the remaining sentence would become a period spent on licence.

21. In this case, the Appellant's submission is that the same approach should be taken, leading to a like conclusion on the application of article 8. In support of this the Appellant applies to rely on new evidence in the form of reports from HMP Peterborough, of her good behaviour and constructive conduct. It is apparent from this information (provided under cover of an Application Notice dated 17 May 2024) that the Appellant has made good use of the opportunities available to her as a remand prisoner.

22. I regret that I do not agree with the approach taken in *Dobrowolski*. The final step in the reasoning in that case is that this court should assess for itself the likelihood that the application of article 77 of the Polish Penal Code would result in the requested person's release on licence, and then attach weight to that assessment when deciding

whether extradition would be a proportionate interference with article 8 rights. This step in the reasoning is a wrong turn.

23. There is no objection in principle to an English court deciding questions of foreign law when it is necessary to decide an issue properly before the English court. This applies to extradition proceedings as to any others. However, in practice, and in particular in proceedings under Part 1 of the Extradition Act 2003 (i.e., extradition requests previously underpinned by Council Framework Decision 2002/584/JHA and now premised on provisions in Title 7 Part 3 of the 2021 Trade and Cooperation Agreement), it is rare for a court to decide any issue of foreign law when that issue could and would ordinarily fall to be decided by the requesting judicial authority.

24. To give only one example, this was the approach taken by the Divisional Court in *Sobczyk v Circuit Court in Katowica, Poland* [2017] EWHC 3353 (Admin). In that case, and in the context of the submission that extradition would be a disproportionate interference with article 8 rights, the appellant submitted the court should attach weight to the fact that, allowing for time spent on remand, he was almost at the halfway point of his sentence and would soon be able to make an application under article 77 of the Polish Penal Code. The court requested information from the Polish requesting judicial authority on the possibility of early release. The information provided and the courts assessment of it was as follows.

> "28. We thought it right to find out what the position was in relation to the first of these points. On our behalf, the CPS posed the following questions to Eurojust and obtained the following answers:
>
> > (i) Question: Please confirm how Article 26 of the Framework Decision 2002/584/JHA is applied in Poland. For each day spent in custody in the executing authority (UK), what period of time is counted against a requested person's sentence in Poland? EG if he spent 9 months in custody in UK does that count as 9 months of his sentence in Poland? Or some other period, and if so, what?
> >
> > Answer: The period of time spent in custody is counted on a day-by-day basis, i.e. if 9 months are spent in custody that would count as 9 months of the sentence in Poland.
> >
> > (ii) Question: If someone has been sentenced to 2 years imprisonment and has 1 year 11 months and 29 days left to serve, at what point during that sentence is he eligible for release? Is the release automatic (and, if so, at what point of the sentence) or discretionary? E.g. will he automatically be released after serving half the sentence? Or at some other point? Or is it discretionary? And if so, at what point during the sentence can the discretion be exercised.

> Answer: After half of the sentence is served in Poland, the subject can apply to the court to have the sentence reduced or the remainder suspended but this is not automatic and is a decision for the court. There are some cases (such as organised crime) where the sentence will specify that such an application can be made until two thirds of the sentence has been served.
>
> 29. On the basis of these answers it would seem that (i) the time which the Appellant has spent on remand in the UK will count against the remainder of the sentence which he has left to serve, but (ii) even taking account of that period on remand in the UK, the Appellant will still by some margin be short of the half way point in his sentence, and (iii) even at the half way point it will be a matter for the discretion of the Polish court as to whether the remainder is reduced or suspended. It is not for us to anticipate how any such discretion may be exercised. Nor is it for us to forejudge how the Polish court might respond to his application to be allowed to serve the remainder of his sentence in the UK. For the time being, we must deal with the request, as embodied in the EAW for his return to Poland."

The approach taken by the Divisional Court in *Sobczyk* is the one commonly taken in extradition proceedings.

25. This approach was recognised in the judgment in *Dobrowolski*. At paragraph 5 of the judgment, under the heading "Warnings", Fordham J emphasised that this court ought not to attempt to second-guess how a Polish court might apply article 77 in any case.

> "5. … It is not for this Court to ask or answer the question whether someone should have early release. Nor to ask or answer the question whether they have served sufficient of their term of imprisonment or whether they have sufficiently been punished. These are all questions for the Polish authorities, not for the United Kingdom authorities, and not for this Court. …"

This approach reflects principles of comity, and strong practical considerations. The former requires no further explanation. As to the latter, article 77 of the Polish Penal Code gives a working example of matters that can arise.

26. Article 77 permits the possibility of release on licence depending on a risk assessment. The court taking this decision is concerned to decide whether the offender will "… respect the legal order and particular that he or she will not reoffend". The matters the court must consider, specified in article 77(1), are wide-ranging, covering every aspect of the offender's behaviour both prior to conviction and following conviction.

27. In the ordinary course, an English court, in extradition proceedings, will be very poorly placed to undertake the assessment article 77 requires. The information available to the English court in such proceedings will generally comprise only what is in the warrant and any further information provided by the requesting judicial authority. While the English court will also be able to establish how much of the sentenced passed remains to be served, for the purpose of an article 77 application that information would go no further than showing whether the time to make the article 77 application had arrived. The court will not have evidence on other factual matters relevant to the decision on whether the offender may re-offend, or information as to the matters habitually considered by Polish courts (for example, are decisions on the risk of re-offending informed by reports akin to parole reports?).

28. Moreover, an English court will, as likely as not, have no information at all on how the Polish court might approach the exercise of the article 77 power. That is certainly the position in this case. One such issue emerges from paragraph 15 of the judgment in *Dobrowolski* (set out above at paragraph 20), namely the weight that ought to attach to a period of post-conviction non-offending when assessing the likelihood that the offender will not re-offend (in the language of article 77, will "respect the legal order"). The assumption in *Dobrowolski* appears to have been that it was simply a matter of totting up the years – the longer the period since the offence, the better the evidence that the person would not reoffend. This might be correct, but it was an assumption made without evidence. Might a Polish court adopt a less mechanistic, more evaluative approach? Might any weight attaching to a period of non-offending be reduced in a case such as the present when the Appellant had failed to report to serve her sentence of imprisonment, having left the country? It is impossible to know.

29. The problem with the approach in *Dobrowolski* is that while that judgment accepts that an English court ought not to anticipate the decision on article 77 that will fall to be made by the Polish court, it then accepts the submission that the court should evaluate the merits of a requested person's position for the purposes of article 77 giving appropriate weight to that conclusion when deciding if extradition is a disproportionate interference with article 8 rights. This is a contradiction; it is like requiring a court to look in opposite directions at the same time.

30. The important issue is the weight that ought properly attach to a submission based on article 77 of the Polish Penal Code for the purposes of the article 8 proportionality balance. I consider there are three possible options. One is the option that is the logical consequence of the judgment of the Divisional Court in *Sobczyk*. This is that any application of article 77 of the Polish Penal Code is solely a matter for the Polish court. It would follow that no weight would attach to the possibility of release on licence pursuant to article 77.

31. The second option rests on the premise that it is unrealistic not to recognise the existence of article 77 of the Polish Penal Code. In his judgment in *Dobrowolski*, Fordham J referred to several cases where this approach was taken: *Borkowski v District Court in Lublin, Poland* [2015] EWHC 804 (Admin) per King J at paragraph 16 ("… the well-known fact that the Polish authorities have a discretion to release after one half or two thirds of a sentence has been served."); *Janaszek v Circuit Court in Plock, Poland* [2013] EWHC 1880 (Admin) per Foskett J at paragraph 41 (information provided by the judicial authority confirming the terms of article 77 and

the right to apply for release on licence); *Chmura v District Court in Lublin, Poland* [2013] EWHC 3896 (Admin) per Ouseley J at paragraph 16 ("… the appellant would have the right to apply for release upon return to Poland", relying on what was said in *Janaszek*); and *RT v Circuit Court in Tarnobrzeg*, *Poland* [2017] 4 WLR 137, Divisional Court (Burnett LJ and Ouseley J) at paragraph 65, referring to paragraph 16 of the judgment in *Borkowski.* In *Dobrowolski*, Fordham J's conclusion was that considering this case law, formal proof of the existence of article 77 of the Polish Penal Code is not required.

> "17. … In my judgment there is no exclusionary bar prohibiting a requested person from pointing to an instrument of the requested state's law, discussed in a judgment in an earlier extradition case, especially in the context of a human rights argument. True, the Court may need to proceed with caution. True, there may be limits on the reliance which can be placed on such matters. But this caution and those limits engage weight rather than admissibility. The case of *Jankowski* was concerned with a specific problem. The EAW there needed to comply with the rigours of the statutory scheme, to the criminal standard. As is familiar in extradition law, the EAW was said to be deficient in its substantive content, viewed against prescribed requirements. Established principles apply to when and to what extent a "lacuna" or "gap" in an EAW can be treated as filled by reference to a requesting state's "further information" or "external" evidence. That was what *Jankowski* was about. It was the context in which the impermissibility was being identified."

That conclusion was pragmatic, and I agree with it.

32. However, accepting the simple existence of the article 77 power only permits a requested person to point to the bare possibility that that power to release on licence might be exercised in her favour. This will add little weight to the submission that extradition would be a disproportionate interference with article 8 rights.

33. The third option requires the court to form a view on the likely merits of the requested person's application under article 77 of the Polish Penal Code. It is only this option that allows the possibility that reliance on article 77 might add significant weight in support of the conclusion that extradition would be a disproportionate interference with article 8 rights. There are cases where it does seem that the court did take this course. In *Chmura*, Ouseley J, on consideration of the circumstances available to the court (see the judgment at paragraphs 16 – 22) concluded as follows"

> "25. I have come to the conclusion that it would be disproportionate in all the circumstances of this case. Those which weigh particularly with me are the suspension of the sentence for a substantial period, the fact that it was not activated because he had left Poland since activation occurred while he was still in there and shortly after he left the army,

> where he could easily have been contacted, the period of time which he has served in custody in this country, which would at least give him the right to apply under Article 77 for release and the circumstances which I have referred to which mean that release would have good prospects. I cannot, of course, be certain."

In her judgment in *Borkowski*, having referred to article 77, King J said:

> "16. As indicated, it is also a relevant factor that the sentence which is to be served is a short one, maximum seven months. Further, the court is entitled to take into account the well-known fact that the Polish authorities have a discretion to allow release after one half or two-thirds of the sentence has been served. There must be a real possibility here that the actual time to be served by the appellant will be significantly less than seven months."

In submissions for the Appellant, Ms Grudzinska also referred to paragraph 65 of the judgment in *RT*:

> "65. In considering that question in this case, as in others, the court must have regard to the reality of the sentence that a requested person will serve. In *Borkowski v District Court in Lublin, Poland [2015] EWHC 804 (Admin)* at [16], King J referred to the "well-known fact that the Polish authorities have a discretion to allow release after one half or two-thirds of the sentence has been served." That was a reference to articles 77 and 78 of the Polish Penal Code which, in the context of this appellant, would allow but not guarantee his release after serving half of the sentence. There is no reason to suppose that he would not benefit from those provisions. …"

However, since that is the only reference to the matter in the judgment, it is difficult to know how the Divisional Court approached this issue.

34. Notwithstanding the approach taken in *Chmura*, *Borkowski* and *Dobrowolski*, I do not consider the court should go further than the second option I have described above. There is practical sense that favours recognising the existence of the power of the Polish court under article 77 of the Polish Penal Code to release prisoners on licence. But I can see no good reason for going further. In principle it ought to be a rare case in which it will be appropriate for this court to take an approach that anticipates the Polish court's application of article 77. In practice, even if a court decided it was appropriate to embark on such a task, it ought to do so only on provision of appropriate evidence.

35. For sake of completeness, Ms McNamee, for the Requesting Judicial Authority, drew my attention to the judgment in *Dablewski v Regional Court in Lublin, Poland* [2024] EWHC 957 (Admin) which was handed down on 25 April 2024. In that case Farbey J,

faced with submissions on similar lines to the ones made in this appeal stated, *obiter* but following the approach of the Divisional Court in *Sobczyk* that the "… firmer and surer footing is that this court should not prejudge …" applications to the Polish Court under article 77 of the Polish Penal Code (see at §50 of the judgment).

36. Returning to the present appeal, for the reasons I have given and while recognising the possible effect of article 77 and the fact that the Appellant has made an application to the Polish court that remains pending, I do not consider any significant weight should attach to the possibility that the article 77 application the Appellant has made might result in a decision that some or all of the remaining part of her sentence be converted to a period of release on licence. In the premises, I do not consider that the District Judge's conclusion that extradition would not be a disproportionate interference with article 8 rights was wrong.

37. It is also necessary to look beyond the two matters the Appellant relies on in support of her appeal and consider the District Judge's overall reasoning on the application of article 8. The District Judge considered the matters listed at paragraphs 53 and 54 of her judgment (set out above at paragraph 8). She concluded that the Appellant's article 8 interests in the United Kingdom were "very limited" and that the offending leading to the conviction was "serious". On any view, the Appellant's article 8 submission was an uphill challenge. Looking at the matter in the round, and applying the approach explained at paragraphs 90 – 94 of the judgment of Lord Neuberger in *Re B (a minor)* [2013] 1 WLR 1911, I am satisfied that the conclusion reached by the District Judge was correct.

38. In case I am wrong on the issue of principle that the court ought not when considering whether extradition would be a disproportionate interference with article 8 rights make findings that anticipate the application of article 77 of the Polish Penal Code by the Polish court, I will consider the application of article 8 on the alternative premise, forming a view on the merits of the article 77 application presently pending in Poland.

39. That application does not appear to me to be a particularly strong application. The material part of the Appellant's application to the Polish court (as provided to me, in translation) is as follows

> "I am currently serving my sentence in Peterborough Prison.
>
> On the 20th of January I was arrested and then I learned that I was to be imprisoned for two years for a case I did not know about.
>
> From 2017, I regularly flew to Poland, and I was in touch with my parents when there was no difficulty crossing the border.
>
> It can be verified because I flew with Rayan Air Łódź- East Midland and East Midland – Łódź.
>
> I flew every six months until 2020.
>
> I stopped flying to see my parents in my family home in Pabianice because of COVID 19.

> Vaccination became mandatory and I refused to be vaccinated.
>
> In 2022, my closest family members passed away, i.e. my mother, my father and my brother.
>
> We used to live together in Pabianice in a condominium in a block of flats the address being …
>
> I automatically inherited the apartment, however, the procedures regarding other matters relating to inheritance have not been completed yet. The rent for the apartment has not been paid and every month the arrears are higher.
>
> Therefore, I am asking you to allow my application for a conditional early release from prison so that I can stay and work in England.
>
> I have already spent ten months in Peterborough Prison. After being released, I will be offered work by an employment agency in Leicester.
>
> I declare I will report to the nearest police station in Leicester every time I will be expected to do so, and I pledge to pay off the judgement even though I don't know how much it is.
>
> The stay in Peterborough prison is very stressful for me because I am worried that I might lose my apartment and registered permanent residence in Poland.
>
> I would like to say that I have taken up an English language course and I wish to continue attending classes.
>
> I have attached a photocopy of my certificates and a description of the courses I have completed."

As stated in the application, the Appellant can point to good behaviour on remand since January 2023. However, the point made at the beginning of the application - that the sentence passed related to "… a case [the Appellant] did not know about" is untrue. In the extradition proceedings the Appellant's evidence has been that she did know about the criminal proceedings. In her statement for the extradition hearing, the Appellant accepted she attended the hearings leading to conviction. It was only shortly before the sentencing hearing that she left Poland. Further, the evidence in the application addressing the generality of the criteria listed in article 77(1) is scant. I do not have any confidence at all that the Appellant's article 77 application is likely to succeed. On this basis too, therefore, the District Judge's conclusion on the article 8 issue was correct.

C. Disposal

40. For the reasons set out above, the Appellant's application to rely on fresh evidence made on 17 May 2024 is refused, and the appeal against the extradition order is dismissed.