



Neutral Citation Number: [2024] EWHC 2441 (Admin)

Case No: AC-2024-LON-000757

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/09/2024

Before :

MRS JUSTICE HILL DBE

Between :

ARTUR JÓSEF MARCISZ

Appellant

- and -

THE REGIONAL COURT IN BIELSKO- BIAŁA
REPUBLIC OF POLAND

Respondent

Stefan Hyman (instructed by **Berris Law**) for the **Appellant**
Laura Herbert (instructed by **CPS**) for the **Respondent**

Hearing date 17 September 2024

JUDGMENT

Approved Judgment

This judgment was handed down remotely at 2:00 pm on 26th September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HILL

Mrs Justice Hill DBE:

Introduction

1. The Appellant seeks permission to appeal against an order for extradition made by District Judge Zani (“the Judge”) on 28 February 2024. He advances a single ground of appeal, relating to section 21 of the Extradition Act 2003 (“the 2003 Act”) and the right to respect for family and private life under Article 8 of the European Convention of Human Rights (“Article 8”).
2. Part of the Appellant’s submission that extradition would be a disproportionate interference with his Article 8 rights relates to the time he may spend in prison in Poland if extradited, given Article 77 of the Polish Penal Code. That gives the Polish court the power to release a prisoner early on licence. Prisoners can be so released after serving half or two-thirds of their sentence. The Appellant’s submission is that the possibility that he might only have 9½ months to serve in Poland, if granted early release, supports his argument that extradition is disproportionate.
3. On 13 May 2024 Bourne J refused permission to appeal. The Appellant has renewed his application for permission to appeal. He now seeks a stay of his application pending the conclusion of the “lead” cases of *Andrysiewicz v Circuit Court in Lodz, Poland* [2024] EWHC 1399 (Admin) and/or *Tujek v Regional Court in Szczecin, Poland* (AC-2024-LON-001555), which also involve the Polish early release provisions. The Respondent opposes the application for a stay.
4. This is my judgment on the application for a stay. I was greatly assisted by the written and oral submissions from both counsel on these issues.

The current position on the case law

5. There is currently a tension in the case law around the extent to which the court should consider the likely outcome of an application under the Polish early release provisions. The approach taken in this regard by Fordham J in *Dobrowolski v District Court in Bydgoszcz, Poland* [2023] EWHC 763 was not followed by Farbey J in *Dablewski v Regional Court in Lublin, Poland* [2024] EWHC 957 (Admin) or Swift J in *Andrysiewicz*.
6. On 19 July 2024, in *Andrysiewicz*, Swift J certified the following as raising points of law of general public importance:

“When the court is considering whether extradition pursuant to a conviction warrant would be a disproportionate interference with Article 8 rights,

(a) what weight can attach to the possibility that, following surrender, pursuant to the warrant, the requesting judicial authority might in exercise of its power under articles 77, 78, 80 and 82 of the Polish Penal Code, permit the requested person’s release on licence (“the early release provisions”); and

(b) to what extent (if at all) should the court assess the likely merits of an application under the early release provisions, either that the requested person has made, or that he may make”.

7. Swift J refused permission to appeal, observing that the Supreme Court should have the opportunity to decide for itself whether the issue of law identified is one it wishes to consider.
8. He observed that this issue would, if arguable, raise a point of importance and general application because a very significant proportion of extradition requests considered under Part 1 of the 2003 Act come from Polish judicial authorities; many rest on conviction warrants; and Requested Persons regularly rely on the possible application of the early release provisions.
9. On 9 August 2024, in *Tujek*, Morris J granted permission to appeal on a single ground relating to Article 8. He identified that the issue for the appeal will be the time served on remand and the prospects of early release taking account of *Dobrowolski* and *Dablewski*. *Tujek* is currently due to be heard by the Divisional Court in January 2025.

The legal framework

10. The court's power to stay an extradition appeal derives from Crim PR 50.18(1) which specifies that the High Court has the same duties and powers of case management as under Part 3. Under Crim PR 3.5(2)(f) and (g), the court has power to "fix, postpone, bring forward, extend, cancel or adjourn a hearing" and to "shorten or extend (even after it has expired) a time limit fixed by a direction".
11. In *Czach v Poland* [2016] EWHC 1993 (Admin), Irwin J considered the power to stay extradition appeals behind lead cases. At [9]-[10] he cited the approach to the granting of stays in immigration and asylum cases set out by Jackson LJ in *AB (Sudan) v Secretary of State for the Home Department* [2013] EWCA Civ 921, which he considered analogous to the extradition context. At [24], he distilled the following test for the granting of a stay:

"Every case must be dealt with as expeditiously as possible and a case should only be stayed pending an appeal in another case if it is clear that the pending appeal is likely to be decisive or determinative in the instant case. A rigorous approach must be taken to the grant of a stay in this context".
12. At [25] Irwin J concluded that the cases he was considering did not involve a "bright line criterion" such that they might be suitable for "administrative" stay, even under active judicial supervision. Rather, judicial assessment was necessary on a "case by case basis". In my judgment the same approach applies here, because the relevance of the Polish early release provisions to a particular case will inevitably be fact-sensitive.
13. Irwin J then gave the following practical guidance, which also applies to cases involving the Polish early release provisions:

"26. It will be convenient for the Administrative Court office to indicate that a question of stay may arise for consideration in a given case, and refer the matter to a judge.

27. The question of a stay should then be considered by a judge alongside the application for permission. The question is whether the outcome of any appeal in [the lead case] is likely to be decisive...If such a different outcome is likely to be decisive or determinative in a given case, then it may be appropriate to conclude the interests of justice require a stay. If not, not.

28. In any case where a stay is ordered, it seems to me likely that a judge will adjourn the question of permission. If the outcome of any appeal to the Supreme Court is properly to be regarded as potentially decisive, it would seem unlikely that a judge would be content to grant or withhold permission without knowing the outcome.

29. I am not attracted by the submission that appeals should be progressed on other grounds, leaving open an application to stay if the appeal fails on those grounds. I understand the objective of avoiding delay, particularly where an applicant may be detained but such an approach would add much time and cost. In my view, the better approach is either to proceed or to stay where appropriate.

30. In any case where a judge concludes that a stay is the appropriate course, but where the parties have not made submissions on the point, provision should be made for either party to make representations if they wish to do so. This need not be more than an Order that a case will be stayed unless within a specified period either party makes representations in writing opposing a stay, in which case the stay will be reconsidered.

31. I accept that it is a relevant consideration whether the requested person was unrepresented at first instance, and no doubt judges will bear that in mind.

32. The Administrative Court Office will no doubt wish to keep under review any matters stayed pending such prospective appeal, and on a regular basis report to the judge in charge of the Administrative Court”.

The procedural history

14. The Judge ordered the Appellant’s extradition pursuant to a warrant issued on 5 September 2023 and certified by the National Crime Agency on 21 September 2023. Part 1 of the 2003 Act and the Trade and Cooperation Agreement apply.
15. The warrant is a “conviction” warrant which seeks the Appellant’s surrender for two offences of robbery committed on 28 May 2007. The Applicant, acting with another individual, used “threats of beating and killing” in the commission of the robberies. In the first, an individual was knocked to the floor and held down, whilst two others were threatened. Three mobile phones were stolen. In the second, threats were used against two individuals and two mobile phones stolen.
16. A sentence of 2 years and 3 months imprisonment was imposed, of which 1 year, 10 months and 29 days remains to be served.

17. On 12 October 2023 the Appellant was arrested pursuant to the warrant. He appeared for his initial hearing the following day. He did not consent to extradition and proceedings were opened. The Appellant was granted conditional bail, and he has remained on conditional bail throughout. On 20 February 2024 the final extradition hearing took place. The only issue raised at the extradition hearing related to the Appellant's rights under Article 8.
18. In the judgment handed down on 28 February 2024 the Judge concluded that extradition amounted to a proportionate interference with the Appellant's Article 8 rights for the purposes of section 21 of the 2003 Act. He assessed the Article 8 issue by reference to the guidance in *Polish Judicial Authorities v Celinski* [2015] EWHC 1274 (Admin); [2016] 1 WLR 551.
19. The Judge addressed the possibility of early release under the heading "Article 8 Findings and Ruling":

“Albeit return is sought for the [Appellant] to serve a term of 1 year 10 months and 29 days, it appears that the [Appellant] should be able to apply for early release, either after two-thirds or halfway through the sentence (see [**Dobrowolski**] v **Poland (2023) EWHC 763** which adopted the decision of, inter alia, **Borkowski v Poland (2015) EWHC 804 (Admin)** where at paragraph 16 King J in that earlier decision stated...‘*The court is entitled to take into account the well-known fact that the Polish authorities have a discretion to allow release after 1/2 or 2/3 of the sentence has been served*’.

Any such reduction would clearly be welcomed by the [Appellant] and his family and reduce the impact of extradition. It remains unclear, however, whether the fact that the [Appellant] is a fugitive may count against him in respect of this discretion”: [emphasis in the original]: [48(ix)].
20. The perfected grounds of appeal contend that this was a finely balanced case and that the overall decision on Article 8 was wrong in light of the approach the Judge took to the early release provisions, as well as the impact Brexit may have on the Appellant's ability to return to the UK, his family responsibilities in the UK, the age of the underlying convictions, his relative youth when he committed the offences and his good character since in both Poland and the UK.
21. The Appellant sought funding for, and the admission of, expert Polish law evidence on the early release provisions in Poland.
22. Bourne J refused permission, saying as follows in relation to the early release element of the grounds:

“3. It is not suggested that there was anything more than a possibility of early release in Poland. The [Judge] took that possibility into account. Since early release is discretionary (as the perfected grounds state) it is speculative to suggest that a Polish legal expert report would establish that there is anything other than the possibility which has already been taken into account. There is no reasonable prospect that such a report

would persuade this court that the [Judge] reached the wrong decision overall”.

23. On 20 May 2023 the Appellant renewed his application for permission to appeal. He no longer pursues the applications in relation to expert Polish law evidence.

The application for a stay

Submissions

24. As the Supreme Court has not yet granted permission to appeal in *Andrysiewicz*, and may not do so, in oral submissions counsel for the Appellant sensibly limited his application to seeking a stay behind the case of *Tujek*.
25. The Appellant submitted that a stay was appropriate because resolution of the tension in the authorities could have a significant impact on his application for permission to appeal. Notwithstanding the Judge’s assessment that the conduct was serious and that the Appellant is a fugitive at common law, there are significant factors which militate against his extradition including delay, the impact on family members in the jurisdiction including a dependent child and his positive character. The Appellant has not offended in the UK or Poland since 2007. On that basis it was reasonably arguable that the Judge erred in not placing greater weight on the prospects of early release under Article 77 in conducting the Article 8 balancing exercise.
26. The Respondent contended that a stay should not be granted because this case can be distinguished from the line of authorities in which there is a tension. The Appellant is on conditional bail and has, at the very least, 9½ months left to serve. By contrast, the Appellants in the other cases had been remanded in custody and were coming up, or had actually passed, a potential release date in Poland under Article 77. As time is not “running down” in this case, any decision on early release is even more squarely one for the Polish authorities. Further, the Judge had already considered the case on a *Dobrowolski* basis, which is the line of authority in the Appellant’s favour, at [48(ix)]: see [19] above. For these reasons, and the other persuasive factors in favour of extradition, it is not reasonably arguable that any different approach to the early release provisions would have a material impact on the Article 8 assessment.

Analysis and decision

27. The parties agreed that in order to decide whether to grant a stay, it was appropriate to **(1)** assume that the approach in the case law most favourable to the Appellant is ultimately the one that will be adopted by either the Supreme Court or the Divisional Court; **(2)** assume the most favourable factual scenario for the Appellant, namely the earliest release date possible under Article 77; and then **(3)** ask whether, in light of those assumptions, the pending appeals are likely to be decisive or determinative of the application for permission.
28. As to **(1)**, counsel for the Appellant contended that the approach most favourable to him is that taken by Fordham J in *Dobrowolski* at [14]-[15]. That requires the court to “have regard to the reality” of an early release application, “without ‘second-guessing’ a discretionary decision which would be for the Polish authorities”, by reference to the criteria in Article 77.

29. As to (2), for the purposes of the stay application the parties agreed that the most favourable factual scenario is that the Appellant might be released at the half-way point; and thus have 9½ months to serve if extradited (the ½ way point in the initial sentence of 2 years and 3 months being 1 year and 1½ months, and the Appellant already having served 4 months of that).
30. The central dispute between the parties was as to (3).
31. Having considered the competing arguments I do not consider that the factual differences between this case and the authorities under appeal are necessarily fatal to the application. The fact that this Appellant is on bail, and will have longer to serve before being considered for early release than those in the other cases, may make reliance on the *Dobrowolski* approach less straightforward. However I cannot say at this stage that such an argument has no reasonable prospect of success.
32. In my judgment a more difficult issue in the application is that the Judge did, in fact, refer to the possibility of early release in the Appellant's case, citing *Dobrowolski*. I can therefore well understand why the Respondent contended that the Judge had effectively adopted the approach most favourable to the Appellant already; such that awaiting the resolution of the tension in the authorities would make no difference.
33. However, on balance, I accept the Appellant's submissions to the effect that the position is a little more nuanced: namely that it is reasonably arguable that while the Judge observed that early release may be of benefit to the Appellant, he did not specifically identify how long the Appellant might have to serve on the most generous calculation; nor specifically weigh this as a factor relevant to the seriousness of the offences or the proportionality of extradition.
34. It is therefore reasonably arguable that the Judge did not fully apply the *Dobrowolski* approach; and that had he done so, the Article 8 determination might have been different, bearing in mind the other factors against extradition noted at [20] and [25] above. I note, in this regard, the observation in *Dobrowolski* at [15] that the Polish criteria for early release focus in particular on the likelihood that the requested person would "respect the legal order", such that "substantial periods of law-abiding conduct in the UK" can have a particular relevance. Counsel for the Appellant placed significant reliance on that factor here.
35. Moreover it remains possible that the approach that will prevail is the "third option" described by Swift J in *Andrysiewicz* at [33], which goes even further than *Dobrowolski*, and requires the court to "form a view on the likely merits of the requested person's application under article 77".
36. On that basis, if the tension in the authorities is resolved in favour of *Dobrowolski*, or indeed the "third option" referred to above, this is likely to be decisive or determinative of the application for permission in the instant case. I note that the early release provisions are the key factor relied on in the application for permission.

Conclusion

37. For these reasons I consider it appropriate to stay this case behind the lead case of *Tujek*.