Case No: AC-2023-LON-003098

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2024] EWHC 3015 (Admin)

(In the matter of an appeal pursuant to part 1 of the Extradition Act 2003)

The Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 30 October 2024

BEFORE:

SIR DUNCAN OUSELEY
(Sitting as a Judge of the High Court)

BETWEEN:

LUKASZ TALAGA

Appellant

-and-

POLISH JUDICIAL AUTHORITY
(DISTRICT COURT IN BYDGOSZCZ, POLAND)

Respondent

MR G HEPBURN SCOTT (Bark & Co) appeared on behalf of the Appellant.

MR A SQUIBBS (instructed by Crown Prosecution Service, Extradition Unit) appeared on behalf of the Respondent.

JUDGMENT
(Approved)

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1. SIR DUNCAN OUSELEY: This is an appeal against the decision of District Judge Cieciora at Westminster Magistrates' Court on 18 October 2023 to order the extradition of the appellant to Poland to serve two consecutive sentences, each of one year, on an arrest warrant issued under the 2003 Extradition Act, as amended by the European (Future Relationship) Act 2020 and the Trade and Cooperation Agreement.

2. Mr Talaga, the appellant, has been in custody since his arrest on 23 May 2023. Two applications for bail were refused on the basis that he had given a false name on arrest and was, accordingly, a flight risk.

3. Permission to appeal was granted by Kerr J on 12 April 2024 following refusal on paper by Jay J on 29 February 2024.

4. The offences were committed many years ago, on 12 February 2002, when Mr Talaga was 18, and, on 4 February 2004, when he was 20. He is now 41.

5. The first offence was the attempted theft of a car by a group of which he was one, opening the door of the car, as the arrest warrant puts it, “in a not established way”, where they caused some damage to the car trying to get it started but were stopped by the police.

6. On 4 August 2003, he received a one-year sentence suspended for three years, subject to conditions which included not committing any further offence and keeping in touch with probation, including notifying them of any change of address. Mr Talaga was notified in writing and in person of these requirements.

7. The second offence was the fraudulent obtaining of six mobile phones with an accomplice, on 4 February 2004, to a value, on the estimate of Mr Squibbs, who appeared before me for the respondent, of some £2,600, I believe at current value. This involved a fraud on Mr Talaga’s employer.

8. On 6 January 2006, he received a further one-year sentence, also suspended for three years, and upon the same conditions as the suspension of the sentence for his 2002 offence.

9. On 29 May 2006, the two suspended sentences were activated. The first sentence was activated because of the commission of the February 2004 offence and the second sentence was activated because of his failure to maintain contact with the probation service.

10. The district judge found that he had "personally participated" in these activation proceedings based on further information from the Polish authorities.

11. He appealed against the activation of the suspended sentences, but the appeal was dismissed on 21 July 2006. This means that, as from July, if not May 2006, Mr Talaga was subject to two years' imprisonment. A much more recent attempt to have the two sentences aggregated to a lower total has failed.

12. The only ground of appeal is that the appellant's extradition would be a disproportionate interference in his article 8 ECHR rights and with those of his partner and their now nearly 13-year old son.

13. The appellant gave evidence to the district judge that he came to the UK in 2003. This is not entirely easy to follow, in view of the 2004 offence and his personal participation in the suspended sentence activation proceedings in 2006. The district judge did not comment on that and, having raised it with Mr Hepburne Scott, who appears for the appellant, I am going to proceed on the basis that he came to the UK to settle in 2006.

14. The district judge concluded that he came as a fugitive from justice, a conclusion which naturally informed her assessment of the proportionality of his extradition. It was not contended that that finding was not open to her on the facts and her findings. I make my decision on this appeal on that same basis.

15. The particular factors that the district judge had to bear in mind, in addition to her finding that the appellant was a fugitive who had lied to the court in a number of respects related to what he knew of proceedings and his obligations in Poland, related to the delay in proceedings after the activation of the suspended sentences, the relative young age at which the offences were committed, their gravity, the absence of subsequent convictions and, submitted Mr Hepburne Scott, the absence of earlier ones as well, and the impact of extradition on his partner and their son, born in 2011 and nearly 12 at the time of the

district judge's hearing. One issue, which understandably did not then feature and has played little part in the written submissions on appeal, is the effect on the proportionality of extradition of the 17 months that Mr Talaga has served in custody in the United Kingdom. This is more than two thirds of his sentence.

16. The district judge heard evidence from the appellant and his partner. I set this out in a little detail as there was a contested application for the admission of further evidence on the physical and mental wellbeing of Mr Talaga, his partner and their son. The two principal issues upon which the appellant relied were the significant, substantial and unexplained delay between the activation of the sentences in 2006 and the issuing of an EAW in 2011, ("supplemented in 2018"), and the further delay between 2011 and the re-issuing of the warrant as an arrest warrant in 2020, followed by a delay in it being certified by the NCA in April 2003, which led to his arrest in May 2003. The appellant claimed that he had been living openly in the UK since 2003 and so had not occasioned the delay by being a fugitive out of contact with the authorities.

17. The second issue relied upon strongly by Mr Talaga are the close family ties he has in the United Kingdom with his partner of 15 years and their now nearly 13- year old son who would suffer continued financial and emotional hardship if Mr Talaga were extradited. He has no family in Poland, although his partner has family in the UK and in Poland.

18. The district judge found in paragraphs 66 to 73 of her judgment that nothing would particularly hinder Mr Talaga's reintegration into Polish society, partly because his partner's family also lived there. His mental and physical health were satisfactory "at present". The sentences were relatively lengthy for offending which was neither trivial nor of the most serious kind. He had been a young man when he committed them and had not been convicted of any offences here or in Poland.

19. The district judge said at paragraph 68:

> "I have considered the impact of extradition on the Requested Person's family. I accept that he is in a loving, committed, relationship, and that he plays an active role as a father, and has a good relationship with his son. To that end, I accept that extradition is likely to have an adverse impact on the best interests of the child. I also note that the Requested Person has been in custody since May. It is clear that his partner is coping financially even if the Requested Person's absence has had an adverse effect and may lead to changes in accommodation. The

> Requested Person's son, I am told, is doing well at school and has a strong friendship base. I have no doubt there will be support available from the school in the event of the Requested Person's extradition. Whilst this does not replace the Requested Person's role as a father, it does operate as mitigation against the adverse effects of extradition. I further note that the Requested Person's partner and son will be able to visit Poland, even if they are unwilling to return there".

20. The district judge accepted that the delay was lengthy and unexplained, despite the requesting judicial authority having had ample time to proffer an explanation. An uncertain degree of the delay could be attributed to efforts to locate Mr Talaga. The district judge rejected his contention that he had been living openly in this country and it could not be said that he was easy to find, save for the period after the reissue of the warrant in 2020 and certification in 2023.

21. In paragraphs 71 to 73 of her judgment, the district judge said this,

> "71. Ultimately, even with the Requested Person's status as a fugitive and lack of 'open living' in the UK, the delay is so lengthy that it does carry significant weight in the balancing exercise.
>
> 72. In summary a significant sentence has been imposed for offending which is not trivial. There will be an adverse impact, both emotional and finance, on the Requested Person's family, but they have already demonstrated that his absence from the family is not fatal to their circumstances and, if extradited, the impact can be further mitigated. The weight to be attached to the delay, although substantial, does not outweigh the public interest in extradition in circumstances where the Requested Person is a fugitive and has not lived the open life in the UK that he claims he has.
>
> 73. Although I do not doubt that the Requested person's extradition will present challenges, there is nothing that goes beyond the usual hardship from extradition or that outweighs the public interest in extradition. I am satisfied so that I am sure that greater weight attaches to the factors in favour of extradition and that the interference with the Requested Person's Convention rights is outweighed by the public interest in extradition".

22. The further evidence which the appellant applies to adduce comprises:

> (1) a further proof of evidence from him dated 6 October 2024 dealing with his time in custody, his medical conditions, supported by his medical records from prison, and his relationship with his partner and son;

> (2) a further proof from his partner of September 2024, explaining her difficulties over the period that the appellant has been in custody and the impact on their son;
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> (3) a clinical psychologist report on all three dated 8 July 2024, but focusing on the son, from Dr Stewart of D R Grange & Associates;
>
> (4) a letter dated 8 October 2024 from a healthcare unit officer in Wandsworth HMP in which unit the appellant works and referring to his good behaviour in custody; and
>
> (5) a few documents intended to contradict the district judge's conclusion that he had not been living "openly" in the UK

I granted the application to admit in evidence the first four items but refused permission to admit the fifth.

23. There has been a significant change over time since the district judge's decision. Had I been reaching the appeal decision on the same basis as she did, I would have dismissed the appeal and, indeed, I would have refused permission, as did Jay J, but the passage of time has meant that, by the time of this hearing on 30 October 2024, the appellant has now been in custody for 17 months and one week, over two thirds of his sentence, and more than a year after he was before the district judge. He has just under seven months to serve. He has experienced significant punishment for his offending. Nor is this some cynical endeavour to serve his sentence here rather than in Poland, as his two unsuccessful bail applications show. That period of time served of itself has to weigh significantly in the balance against extradition. That change has meant that it is necessary to see how that longer period in custody has affected the family, the development of the son as a teenager, changing schools from primary to secondary education, making their problems graver. It has also meant changes in the mental and physical condition of the appellant himself which need to be considered.

24. There is some force in the point made by Mr Squibbs that, to a large extent, the outcome of that evidence is what could reasonably have been predicted and so cannot demonstrate a new and decisive point, but, where there has been such a change in the background against which proportionality is being considered, in the context of an ECHR right, as is constituted by the further year in custody in respect of a two-year sentence, the relevant factors for the proportionality balance must properly be considered with updated

evidence and the criteria in *Szombathely City Court and Others v Fenyvesi* [2009] EWHC 231 (Admin) are justly to be applied with greater leeway.

25. I refused permission for the fifth item of evidence to be admitted, because it was all available at the time of the hearing before the district judge and no explanation was proffered as to why it had not been produced; nor on the facts of this case, in the light of the evidence and findings which the district judge made about the openness of Mr Talaga's life in the UK, could it have carried very much weight.

26. The first item of fresh evidence concerns the physical and mental wellbeing of Mr Talaga himself. He has been diagnosed with irritable bowel disease after a distressing early, but incorrect, diagnosis of cancer. This IBD makes time in custody worse because of the nature of the treatment which he has to give himself, which would normally require sanitary and private conditions for twice-daily enemas. He does not receive the correct diet for his disease. This is not of itself a basis for refusing extradition, but it is relevant that his time in custody here has been made harsher for him for some months and imprisonment in Poland would be a harsher experience as well.

27. Mr Talaga also gives evidence of the effect of custody on his mental wellbeing, in very large part because of the worsening effect of his continuing absence on his family and particularly on his son's wellbeing, which has caused him distress and greater anxiety. This, of course, is his fault, but his actions as a fugitive have meant that his time in custody, as a 41-year old with a family, is undoubtedly tougher than it would have been had he served his time as, say, a 24-year old, so he is paying in some further measure for his failure to face up to his obligations when he was a much younger man. This is in addition to the activation of the suspended sentence for not complying with the contact conditions of his suspended sentence, and becoming instead a fugitive.

28. Relevant to another issue is his conduct in prison about which he speaks and in which he is supported by a glowing reference from the healthcare unit officer referring, among other matters, to his respect for prison authority. In short, he has undertaken various skills-relate courses and achieved enhanced status. He worked for 15 months in the prison canteen and then as a cleaner maintenance worker in the mental health section of the healthcare unit, dealing with vulnerable and difficult prisoners in, at times, tense

situations. He had one negative behaviour entry and several positive behaviour entries in the prison log.

29. Mr Talaga's partner's further evidence refers to the continuing strain on her physically and mentally, but it is not just the continuation of the same, as in some kind of steady state; the continued draining of her resources, physical, mental, emotional and financial, makes matters worse. She struggles to make ends meet. She has to take on extra jobs, exhausting her. Eventually, she could no longer afford the rent on her flat and they had to move out. Their son has become withdrawn, his academic performance has suffered and he sometimes refuses to go to school. The school has referred him to a psychologist. He experiences mood swings and often seems depressed. He has been bullied because his father is in prison. He repeatedly asks when his father will come home and does not quite understand why his father cannot be there with them. He needs his father's presence to develop properly as an adolescent, a development which cannot be achieved over the brief telephone calls to his father in prison. His mother said that the son could never go to live in Poland -- he is a UK citizen at school here -- nor could she now make for herself a permanent life in Poland.

30. The district judge had accepted the evidence of Mr Talaga and the evidence of his partner about their personal circumstances. Mr Talaga's evidence in that respect was available for cross-examination. His partner could not attend, gave evidence about the impact that extradition would have on her and their son, and was evidence which the district judge accepted. In those circumstances, I see no reason not to accept the truth of the further evidence from them which I have summarised already. This evidence was more detailed and more concerning -- with the added experience of the further year in custody -- than the district judge had had. This was particularly so in respect of the effect on the son, the effect on family finances and the overall draining effect on the partner's wellbeing, draining from a well which is inevitably not bottomless.

31. The report of Dr Stewart concludes in its summary:

> "7.42. My assessment suggests that Mr Lukasz Talaga was a significant member of the family system and that he had a present and active role in the care and life of [his son]. Since his imprisonment 13 months ago, it would seem that both [his partner and their son] have experienced the deterioration in their mental health and wellbeing and that they lack a

> sense of containment and stability, necessary for healthy growth and development.
>
> 7.43. On the basis of my assessment and in consideration of protective factors, it is my clinical opinion that all members of the family are vulnerable to suffering moderate to severe emotional harm were Mr Talaga to be extradited and his separation from the family extended".

32. The report had referred to Mr Talaga as "presenting with symptoms consistent with moderately severe anxiety and depression". Extradition might "significantly increase his risk of further decline in regard to his mental health and wellbeing".

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33. The report stated that his partner had a history of good mental health, but the arrest and the prospect of extradition were having "a significant impact on her mental and physical health … She was currently presenting with symptoms consistent with moderate to moderately severe depression and anxiety". At paragraph 7.20, the report stated that:

> "significant to her presentation are the uncertainty of the current situation, the loss of the stability and containment likely provided to her by her partner over the past 15 years and the increased responsibility placed on her in regard to [her son's] needs and the management of home and finances. It is my opinion that [her] lack of support network will act as a further perpetuating factor to her difficulties. Current protective factors to [her] presentation include her strong will, a positive and supportive relationship with the family -- albeit over telephone or messages -- and the regular visitation contact and telephone contact that she is having with Mr Talaga".

Further separation could lead to a deterioration in her mental health, because of the added parental, financial and emotional pressures she would face.

34. There were no significant concerns for the son intellectually, behaviourally or developmentally. He was in line with his peers. However he seemed to be

> "presenting with emotional difficulties that seemed to have been precipitated by the imprisonment of his father and perpetuated by the extended and unknown period of separation from him. It is my clinical opinion based on my assessment that [he] is currently presenting with symptoms consistent with mild to moderate depression and anxiety. Symptoms include, but are not limited to, persistent sadness, a lack of motivation, inattention, fatigue, headaches, uncontainable worries and social isolation. It would seem that the frequency and intensity of [his]

> symptoms have increased in line with the period of separation from his father.
>
> 7.25. My assessment would suggest that [the son] has found the transition to secondary school challenging in regard to his capacity to attend to lessons and to make and maintain friendships. It is my clinical opinion that the absence of his father during the significant life transition may be a perpetuating factor to these challenges. It is also likely that [his] mental health presentation over the past academic year has acted as a further barrier to him being able to make and maintain friendships and meet his full academic potential in the educational setting".

She elaborated this later in her report.

35. The son was particularly vulnerable to an extended separation from his father. He was already experiencing significant emotional, social and educational difficulties resulting from the current period of separation. His vulnerability was heightened by his developmental stage, transition to secondary school and approaching adolescence. The further separation from his father would have a significant impact on his sense of stability. His mother's ability to protect her son from her own stresses would be affected and the son was vulnerable to suffering moderate to severe harm were the appellant extradited.

36. In the light of the further year, which the appellant has spent in custody since the district judge's decision and with the updated evidence, I have come to the conclusion that the decision to extradite him can no longer be regarded as proportionate. I emphasise that I would not have taken that view but for the further year in custody, making a total of more than 17 months served out of a maximum of 24 months, coupled with a continued and increasing harmful effect on the son, and also on the partner more generally, and the increasing difficulties which the appellant's illness causes him to face during further time in custody.

37. I elaborate: the starting point is not just treaties should be respected, but that Mr Talaga is a fugitive from justice. It takes a very strong case for a court to accept that someone evading the court processes should ask a court to hold that his efforts meet success. Mr Squibbs was right to emphasise that no message should be sent which could suggest that evasion of court processes should be crowned with success by a court.

38. However, first, Mr Talaga has now already been significantly punished. He has served more than two thirds of his sentence. In the UK, he would have been released at the half-way point five months ago. He has now had to serve that time when the disruption to his life and responsibilities has been much greater than it would have been had he not been a fugitive, and had he served his time when he was, say, 24, single and childless, as opposed to 40 or 41 with a child and partner whom he has caused to suffer alongside him. He now experiences an unpleasant illness in prison.

39. Secondly, the offences were committed when he was very much younger, at 18 and 20 years old. He is now obviously older and more mature, as the evidence of his partner and from prison demonstrates. He has had no further convictions here or elsewhere. Prison has not just interrupted his adult life in a significant way, but the purpose of a prison sentence in bringing home to a young person the need to mature, to be honest, hardworking and to accept personal responsibilities had already largely been met by his 20 years of endeavour, family life and keeping out of trouble. I say "largely" because the district judge did find that he had given a false name on arrest and had not told her the truth in a number of respects about his living "openly".

40. Thirdly, where there has been an extended passage of time between offence or conviction or flight and the extradition hearing, in the context of the proportionality balance under article 8 ECHR, what has happened over that period cannot be ignored and may matter rather more than the attribution of blame to one party or another, or the absence of explanation for why there was such a lapse of time on the part of the requesting state. There is, I observe, no rule that the passing of time is irrelevant to article 8 once a person has been found to be a fugitive. That goes to the weight to be attached to what has happened. Here, the most significant change, which is part of but not entirely the same as his maturing in the 20 years plus since the offences were committed, is that he has had a child in a continuing stable relationship with his partner. The adverse impact of extradition on this child is a primary consideration. It is quite clear that there has been a significant adverse effect on the son, who has suffered emotionally, and it is likely that all that would worsen in the event of extradition in view of his age, and stage in life and at school. One notable factor behind the problems that he faces is the uncertainty as to when his father will be able to re-join their family life. The impact on his partner matters

not just for her own sake but for how it affects her ability to provide for their son emotionally and financially.

41. It is, in any event, impossible to apportion the blame between the unknown effect of his leaving Poland without contact and the possible failure of the Polish extradition machinery to operate at maximum, or even at a reasonable, level of effort and efficiency; and it is of little value to expend time and effort exploring that. The events which have happened and the problems they create would still have to be dealt with.

42. Fourth, I do not consider it useful to spend much time considering the precise gravity of the offences. What matters is that the Polish authorities decided that they could be met with one-year suspended sentences but, as their system operated, they would be activated for non-compliance with straightforward conditions. Those conditions were breached here. But the very activation of the sentences, which has led to Mr Talaga being in custody, reflects the Polish form of punishment for those breaches. No further punishment awaits on that account

43. Fifth, the proportionality of extradition has to take account not just of time served but of the early release provisions in Poland, were he to be extradited. The nature and extent of the further disruption to family life for a comparatively short period of further imprisonment, on top of what he has already served, is plainly a circumstance relevant to the balance to be struck. There is a variety of authorities older, and not the worse for that, and more recent ones, which express differing views about whether and how those provisions can be taken into consideration in the proportionality balance case. There was a debate about the significance of the early-release provisions in Poland.

44. The terms of the Polish Penal Code for such early release are known. They provide a discretionary power to be exercised by the Polish courts. Articles 87 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 prison from serving the balance of the penalty if his or her attitude, personal attributes and features, life style prior to carrying out the offence, the circumstances of the offence and the offender's conduct after committing the offence and upon 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 reoffend.

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 8." [There is no evidence of any such stricter requirements having been imposed when sentence was passed.]

"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." [That is the position here.]

45. Article 78 paragraphs 2 and 3 deal with offenders specified in article 64, paragraphs 1 and 2; these only apply to persons who are released having served a specified period in custody and then commit another offence within a specified period. They do not apply here.

The Polish Penal Code provides in article 84 for a probation period in these terms:

"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".

The other paragraphs do not matter here.

"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. If a judgment covers combined penalties from which the offender has been released on licence, the combined penalty will include only the period of the sentence actually to be served".

It appears from the reference to "probation" that, as the probation here would be bound to be less than two years, there would be no probation period.

46. Here, the existence of the discretionary power has undoubtedly arisen, as a discretionary power arises in this case when the half-way stage is reached. Some authorities suggest that the existence of those provisions is merely to be noted, but to what end is unclear, as seemingly no further consideration can be given to them. The main question, in my judgment, raised by the authorities is whether this court can consider whether the

requested person will be likely, on return, to benefit from the exercise of the discretionary powers and, if likely to benefit, can then take that prospect into account in judging the proportionality of extradition. It arises here, because having been served, Mr Talaga as served two thirds of his sentence and so would be immediately eligible for release, perhaps on terms, after an application process which would take some time to conclude in the normal way of court applications. As I have said, it does not appear that a probation period could be imposed because the remaining term to be served is less than two years.

47. The Polish Courts will treat time served in custody in England as counting towards service of the sentence in Poland, a day for a day. It is not known how the Polish courts approach the period of custody spent in England, when considering how to exercise the criteria in its discretionary release powers, when they cannot rely on their own observations and assessment of the behaviour of a prisoner in custody, during the very time spent in custody which brings those discretionary release provisions into play and which would normally be used for assessment purposes. It is, of course, impossible to know how they would react in any particular case, but a view can be formed about the prospects of success, based on the criteria, given the time served, personal circumstances, and the offending and custody records of an individual in the England.

48. The differing views in the Administrative Court about how these discretionary powers should be considered, in the exercise of the English court's obligation to consider the proportionality of the return of a requested person, are set out at length in *Andrysiewicz v Circuit Court in Lodz, Poland* [2024] EWHC 1399 (Admin): Swift J, who said:

> "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….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.
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> 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)…[which said] (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". [Swift J then said that that approach was the one commonly taken in extradition proceedings]

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 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:…

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'.

[Swift J continuing] In submissions for the Appellant, Ms Grudzinska also referred to paragraph 65 of the judgment in *RT* [Burnett LJ and Ouseley J]

> '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] *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. …'

[Swift J] 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. …

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. …"

49. I do not consider it fruitful to add much to the debate. I gather that the issue is to be further considered in 2025 by a Divisional Court. I regret, however, that whilst I agree with Swift K in rejecting the first option, I disagree with the way in which he expresses his preference for the second option over the third option. I do not consider them to be true alternatives. I prefer the approach of Fordham J, which is perhaps not surprising as it is in line with decisions which I have taken or participated in on this very issue.

50. As I say, I do agree that option 1 is to be rejected. Option 1 treats as legally irrelevant what is plainly material to the judgment on proportionality, a judgment which it is for this Court to reach in the fulfilment of its human rights and extradition obligations. I consider that the judgment of Swift J, in relation to both options two and three, show not just that one can have regard in a bare but immaterial way to the existence of a power of early release, but that it is a material factor. As a material factor, the weight to be given to it depends upon all the circumstances of a case and, in particular, the evidence available to the extradition court on the relevant criteria, allied to the fact that the actual decision on discretionary release is obviously not one for this court. The English court is fulfilling its duty to assess the proportionality of extradition in cases where the duration of sentence and the period remaining to be served is an obvious component of the public interest to be weighed against the harm done through the interference with article 8 rights.

51. It is not usurping another court's function to consider all factors relevant to the extradition court's function; it is the fulfilment of the latter court's function. The possible

exercise of the discretionary power is not the same as determining a question of foreign law. Nor is it an issue simply to be left for the reading of the warrant, since the time served is not expressly allowed for in the warrant and the warrants do not contain an up to date appraisal of the requested person's personal circumstances; the sentencing decision, as here, may have been taken decades ago. To treat it as an issue of comity between courts would be to draw an irrational distinction between cases where the early release provisions are for the prison authorities or a parole board and those where they are for a court. Taking them into account and still allowing extradition does not deprive or even affect the discretionary release powers of the requesting state; discharging any requested person, for whatever reason, deprives the courts of the requesting state of the ability, at least while the requested person is in the UK , to exercise their powers.

52. When Swift J states that no significant weight can be attached to an early release provision, except rarely, and on appropriate evidence, that shows that it is not an issue of law as to whether the fact is relevant, but is advice as to how the issue should be approached. If regard can be had to the existence of the discretionary release power, in any way other than a purely and pointless way by formal noting it, it is necessary to ascertain when the release provisions would arise, and then to make an assessment of the prospects of an appellant benefiting from the early release. The difficulty I find with what Swift J says lies in the way in which options 2 and 3 are differentiated by him when both "options" accept the legal relevance of the prospects of release. The difference is in the approach to how they should be assessed and weighed. But this turns on the evidence and circumstances. There may be practical reasons in relation to the available information as to why no sensible or useful judgment can be reached, but that is a matter for the evidence that is available in an individual case. The judgment is a fact-specific matter dependent on the facts in each individual case, and not one to be squeezed into the into a priori categories of rare or exceptional. The words of warning spoken by both Swift J and Fordham J are both relevant and largely similar, and in essence I do not disagree with them; but they are not different categories of options.

53. The duty on the English courts to reach a balanced assessment of proportionality is not one which should be trammelled by the fact that an actual decision-making power in respect of one factor belongs to the Polish courts. The duty belongs to the English courts

to consider the likely duration of a further period in custody because of the disruption and uncertainty which extradition creates. As it is for this court to make an assessment of this factor, it is for this court to judge its weight in the decision-making process. It would do so acknowledging that it is not the decision maker in that process and will not be fully informed as to how the decision-making process would turn out or the timetable for it. None of that prevents a reasonable assessment being made by the court that it has sufficient information to deal with the criteria in article 7, nor is it an usurpation of the Polish court's rights. If discharge is ordered, it is an exercise of the English court's duty under the Extradition Act.

54. The risk with the second option, as preferred by Swift J, is that it would realistically preclude, except in exceptional cases, any weight being given to eligibility for and the prospects of early release even though the English court would know of the different but effective Polish early-release provisions. Whether the English court considers that it has a sufficient evidence base to make a reasonable judgment about the weight to be given to that factor depends on the facts of the case.

55. But if exceptionality is required, I consider it to be present here.

56. In this case the important factor for this issue are that this court has knowledge that the Polish courts simply does not have. He has been in the United Kingdom engaged in work since at least 2006. It is here that he has developed his family life, had his child and is responsible, as the father, for their wellbeing. It is in this country that there is clear evidence of his absence of propensity to reoffend over a long period of time. His personal attributes and features are known to the extradition courts in some detail, but not to the Polish courts. This court can now judge his respect for the legal order through what it has been told about his offending record or absence of further offending, his prison record and, indeed, is informed by the district judge's assessment that he lied about his openness. The Polish courts have already considered the nature of the offence, the impact of his further offending and breach of his probation conditions because they activated the suspended sentence.

57. It is difficult to see how long it would take the Polish courts to understand what his personal attributes and features and re-offending risks were, so as to put itself in a better position than this court is at present to make a judgment on what are essentially perfectly

obvious matters to consider for early release, and which English courts do the whole time when considering sentence. It seems unduly harsh and unfair that, through serving a large part of his sentence in the UK, a requested person cannot benefit from the early-release provisions in the UK, nor from those in the country of the requesting judicial authority unless he goes through what may be a disproportionate extradition, serving a further period in custody waiting for the release process to conclude, and bearing the risk the while that the Polish authorities would require greater time for their own observations and assessments in custody in Poland which he would not have had to serve without extradition, or, alternatively, would release him very quickly after the pointless disruption of extradition. In this context, I repeat that he has already paid the price for leaving Poland without providing his contact details; that is what has led to the activation of one of the sentences, in the first place.

58. In this case, with over two thirds of the sentence served, eligibility for early release is clear. There has been a long period of 20 years without further offending, after offences committed by him when he was aged 18 and 20. He now has the stabilising factor of a partner and child. He has earned a good and positive prison record. I consider that I can judge his prospects of early release as favourable. It is clear that he has already been punished for the further offending in 2004 and his breach of probation, since that is why his suspended sentences were activated. It is difficult to see that that could hold up early release in any way which would make his return less disproportionate.

59. But, after all that, it may be that this issue does not make very much difference in this case to the outcome. The very factors which are relevant to the judgment of the prospects of early release are relevant independently to the proportionality of extradition. Either way, I am satisfied that this extradition, after so long and unexplained a delay, after 20 years without offending since he was 20, with all the changes and responsibilities which he has assumed since fleeing as a fugitive, and the significant impact on his child and also on his partner and for which he has already served over two thirds of his sentence, would now be a disproportionate interference in his article 8 rights.

60. Accordingly this appeal is allowed and the appellant is discharged.

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proceedings or part thereof.

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