

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

Case No: AC-2024-LON-000355
Neutral Citation Number: [2024] EWHC 3062 (Admin)

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Thursday, 31 October 2024

BEFORE: **MR JUSTICE LINDEN**

BETWEEN:

FURMAN

Claimant

- and -

POLISH JUDICIAL AUTHORITY

Defendant

MR GEORGE HEPBURN SCOTT (instructed by Taylor Rose) appeared on behalf of the Claimant

The Defendant did not attend and was not represented

JUDGMENT

Digital Transcription by Epiq Europe Ltd,
Lower Ground, 46 Chancery Lane, London WC2A 1JE
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

MR JUSTICE LINDEN:

1. This is a renewed application for permission to appeal against an order for the extradition of the applicant made on 29 January 2024 by DJ Law sitting at the Westminster Magistrates' Court. Permission to appeal was refused to the papers on 21 March 2024 by Sir Duncan Ouseley.
2. The extradition of the applicant is sought pursuant to a conviction warrant which was issued on 6 April 2023 and certified by the National Crime Agency on 1 August 2023. It relates to one offence of being concerned in the supply of Class B drugs (cannabis) which was committed on 5 September 2017.
3. On 9 January 2018 the applicant was sentenced to 2 years and 3 months' imprisonment. The sentence was made final on 2 March 2018 and the applicant came to this country as a fugitive shortly after that. One year, 10 months and 26 days of the sentence remain to be served at the time of the arrest warrant, the applicant having been remanded in custody in Poland for just over four months.
4. The applicant's argument on appeal, as it was before the Magistrates' Court, is that his extradition would be disproportionate and therefore incompatible with Article 8 of the ECHR. His principal basis for this contention is as follows. Under Polish law, and in particular Article 77 of the Polish Criminal Code, an offender may be granted discretionary conditional early release when he has served half or more of a custodial sentence. Article 77 identifies the considerations which are required to be taken into account by a Polish court in deciding whether to exercise its discretion in the offender's favour. It provides that the central issue is whether the offender will respect the legal order if he is released and will not re-offend, and that this question should be determined by reference to specified factors including the offender's attitude, personal characteristics and situation, his way of life prior to the commission of the offence, the circumstances of the offence and his conduct after the commission of the offence and whilst serving the relevant sentence.
5. The applicant has been remanded in custody in connection with the extradition proceedings since 13 September 2023. The halfway point for his sentence was

therefore reached on 27 June 2024 when he had served around 13.5 months. At the time of the District Judge's order he was 4.5 months away from reaching the halfway point. He has now been in custody for nearly two thirds of this sentence, having served a total of more than 17.5 months of a 27 month sentence.

6. In the present case, the District Judge applied *Dobrowolski* [2023] EWHC 763 (Admin). She considered the factors identified in Article 77 and accepted that the applicant had a good prospect of early release and that this would likely be granted by the Polish court. However, she said that she would not place any significant weight on this factor because the sentence had 4.5 months to run. She said that the position would have been different if the applicant had reached the point at which he would have been released immediately on his return.
7. Taking this approach and bearing in mind the other relevant factors in the case the District Judge held that the balance of relevant considerations came down in favour of the view that the extradition of the applicant would be proportionate. He is by his own admission a fugitive and he has a significant criminal record. This includes six convictions for extortion in 2008; supplying illegal drugs in 2008 for which he was sentenced to 1 year and 8 months' imprisonment; two offences of robbery and one of perverting the course of justice in 2010; making threats in 2017; and the supply of drugs offence which is the subject of the arrest warrant from 2018.
8. The District Judge accepted that there were factors which weighed against the extradition of the applicant. These included that he had been in the United Kingdom since April 2018 and had started a new and now settled personal and working life, and had friends in the United Kingdom; that he would have good prospects of early release under Article 77; that he was suffering from a debilitating knee injury which caused him pain and difficulty in walking; that there had been an overall delay of six years since the offence was committed; that his brother lives in the United Kingdom; and that he has not committed any offence since 2017. However, she held that these considerations did not outweigh the strong public interest in the applicant's extradition.

9. Mr Hepburne Scott submits, relying on *Grigaliunaite* [2021] EWHC 2068 (Admin) at [4], that the position in terms of whether the extradition of the applicant would be proportionate should be assessed as at the time of the appeal. As matters stand, the applicant has served more than half of his sentence and the effect of the District Judge's finding is that he has a good prospect of being released pursuant to Article 77 of the Polish Criminal Code if he is extradited. This, combined with the other Article 8 factors in the case which weigh in the *Celinski* balance, means that on any view it is now reasonably arguable that the extradition of the applicant would be disproportionate.

10. I do not necessarily agree with Mr Hepburne Scott as to the point in time at which the merits of a proportionality challenge under Article 8 should be assessed. In *Molik v Poland* [2020] EWHC 2836 (Admin), the court said that the position should be considered as at the date of the determination of permission. However, nothing turns on this at this stage.

11. I note that the question of the correct approach to the early release provisions under Article 77 is the subject of an appeal to the Supreme Court in *Andrysiewicz v Circuit Court in Lodz, Poland* UKSC 2024/0109 and that permission was granted on 17 October 2024. I also understand that the hearing of the appeal has been expedited and is due to take place in March 2025. In these circumstances, I canvassed the views of the parties by email in advance of the hearing as to whether it was appropriate to stay the present appeal and I drew attention to the judgment of Hill J in *Marich v Poland* [2024] EWHC 241 (Admin). This prompted Mr Hepburne Scott to apply yesterday for a stay of the appeal. He argues that what might be called the “early release” or “time served” point is potentially decisive in this case and that I should therefore stay the appeal pending the outcome of the *Andrysiewicz* case. He submits that I should do so with or without granting permission.

12. This application is opposed by the respondent. Mr Matthew Barrowcliffe, a Senior Crown Prosecutor at the Crown Prosecution Service, has produced written submissions in response to Mr Hepburne Scott's application, for which I am extremely grateful, not least given the lack of notice. In these submissions he argues that a stay should not be granted. He says that the applicant has not produced any evidence to

suggest that he has made an application for early release. He says that, in any event, questions were submitted to the Polish Ministry of Justice on 1 October 2024, albeit not in this case, which produced answers which indicate that a Polish judge cannot consider an application for early release under Article 77 unless the requested person has been surrendered.

13. Secondly, Mr Barrowcliffe argues that the District Judge recognised or dealt with the issue of early release and found that such an application would not be successful. There I am bound to say that he does not accurately reflect the District Judge's findings which were, as I have said, that he had good prospects of early release and, indeed, that she would have taken a different view on the question of proportionality had he, at the stage of the Magistrates' Court hearing, reached the halfway point in his sentence.

14. Thirdly, Mr Barrowcliffe draws attention to the fact that Sir Duncan Ouseley, in refusing permission on the papers, expressed surprise that the District Judge had felt able to reach the conclusion that the applicant had good prospects of the discretion under Article 77 being exercised in his favour given his previous criminal record, his deliberate evasion of his sentence and the circumstances more generally.

15. On these bases Mr Barrowcliffe submits that, even if the *Dobrowolski* approach is correct, the applicant does not have an arguable case based on the early release or time served point.

16. Having considered Mr Barrowcliffe's submissions carefully, on balance I consider that the appropriate course is to stay the appeal but without giving permission at this stage. In my view, the *Dobrowolski* approach is arguable given that this is a decision of the High Court, notwithstanding that it has been rejected in at least two subsequent cases. If that approach is permissible, it may well be decisive in the present case given that the applicant has served nearly two thirds of his sentence, and given the finding of the District Judge that he has good prospects of early release under Article 77. Indeed, the implication of the District Judge's statement that the position would have been different had he passed the halfway point may be that she would have been likely to reach a different conclusion on proportionality.

17. This is not a case in which, without further guidance from the Supreme Court, it would be appropriate to decide at the permission stage that, even assuming that the *Dobrowolski* approach is correct, the appeal is not reasonably arguable. The issue of whether this was a permissible approach and whether the likelihood of early release was a relevant factor are due to be considered by the Supreme Court shortly as I have said. Rather than grant permission it seems to me that it is appropriate to await the views of that court.
18. I note that, were it not for the early release or time served point, I would with very little hesitation have refused permission to appeal. Applying *Molik* and assuming no early release, there is still a significant part of the applicant's sentence to be served. The applicant is a fugitive. He has a poor criminal record and the factors on which he relies as militating against extradition, absent the time served point, do not begin to outweigh the public interest in his extradition. If, therefore, the approach of Swift J in *Andrysiewic* and Farbey J in *Dablevsky* [2024] EWHC 973 (Admin) is upheld by the Supreme Court, Mr Hepburne Scott and the applicant should think very carefully before persisting in this appeal.
19. With this in mind, I will order that this judgment is transcribed at public expense and submitted for my approval within 28 days so that the basis on which I have stayed the appeal is clear to any court which considers this matter in the future.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 46 Chancery Lane, London WC2A 1JE

Email: civil@epiqglobal.co.uk