Neutral Citation Number: [2023] EWHC 763 (Admin)

Case No: CO/1079/2022

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

Friday, 31st March 2023

Before:
MR JUSTICE FORDHAM

- -

Between:

LUKASZ ADRIAN DOBROWOLSKI **Appellant**
- and -
DISTRICT COURT IN BYDGOSZCZ, POLAND **Respondent**

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- -

Ben Joyes (instructed by Taylor Rose TW) for the **Appellant**
Hannah Burton (instructed by CPS) for the **Respondent**

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Hearing date: 8.3.23
Written submissions: 13.3.23 & 14.3.23

- -

Approved Judgment

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

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This is an extradition appeal on Article 8 ECHR (the right to respect for private and family life) where the issues raised include questions about time left to serve, the prospect of discretionary early release, and reliance on evidence about foreign law as discussed in earlier case-law. The Appellant is aged 33 and is wanted for extradition to Poland. That is in conjunction with a conviction Extradition Arrest Warrant ("the ExAW") issued on 15 June 2020 and certified on 27 July 2020, on which he was arrested on 21 September 2020. The index offending comprises four domestic burglaries in December 2012, an assault on police officers in February 2013 and an attempted burglary that same month. They were all committed aged 23. The Appellant was arrested in Poland and interviewed in relation to the offences. He was convicted and sentenced in March 2014 and was due to attend prison to commence serving his sentence in mid-December 2014. The sentence was two years 10 months (34 months). He came to the UK in November 2014 as a fugitive. After an oral hearing on 16 March 2022, District Judge Callaway ("the Judge") ordered extradition on 22 March 2022, for reasons explained in a 37-paragraph judgment ("the Judgment").

The Picture in March 2022

2. The Judge was considering the picture as at March 2022. He described the "case as a whole" as being "of huge concern". At its heart were concerns about the Appellant's mental health and the risk of suicide. The Appellant had worked in the UK in the construction industry after coming here in November 2014. In September 2019 he sustained a serious head injury at work. After his arrest in September 2020 he was remanded in custody in these extradition proceedings. He was placed on the ACCT (Assessment Care in Custody and Teamwork) programme for the first few weeks, and was initially prescribed anti-psychotic medication. From November 2020 he remained on anti-depressant medication. The Judge had a February 2021 psychiatric report from Dr Penny Brown and a April 2021 neuropsychiatric report from Dr Con Cullen. The Judge unassailably found that the high threshold for section 25 "oppression" on grounds of health or mental health was not crossed and permission to appeal to this Court was refused on that issue. But the Judge recognised the deleterious impact that extradition would have in the light of the Appellant's mental health and depressive illness. The Judge conducted the requisite 'balance-sheet' exercise for the purposes of Article 8 ECHR (interference with private and family life). At the time of the Judgment the Appellant had served 18 months of qualifying remand, leaving 16 months of the 34 month sentence still to serve in Poland. The Judge included the Appellant's serious mental health condition, together with the 18 months qualifying remand, within the balance sheet. He decided that the public interest considerations weighing in support of extradition outweighed the combined effect of those capable of weighing against it.

The Picture in July 2022

3. In granting permission to appeal on the Article 8 issue, on 15 July 2022, May J found it arguable that the balance had now shifted so that Article 8 was an arguable basis for resisting extradition. She envisaged the question of Article 8 justification and proportionality being re-evaluated on an up to date basis at a substantive appeal. Two things loomed large and featured in May J's reasoning. The first was that the ongoing

period of qualifying remand was by now 20 months served, with 14 months still to serve. The second were the remaining concerns regarding the Appellant's health and mental health, as to which she gave directions for an updated psychiatric report from Dr Brown, so that it could be taken into account as appropriate by this Court.

The Picture in March 2023

4. I am giving judgment at the end of March 2023, after a substantive hearing on 8 March 2023. I have Dr Brown's updated psychiatric report, as directed by May J. It is dated 29 November 2022. It is the nature of this appeal that this Court is looking, as permitted by section 27(4)(a) of the Extradition Act 2003, at all the evidence now available – including as to qualifying remand and mental health – to decide whether the case should now be "decided differently" and the Appellant "discharged". It is common ground that it is appropriate for this Court to receive and consider Dr Brown's new report, and should consider the current picture on qualifying remand, to see whether the fresh evidence is capable, alongside other features of the case, of being decisive. Four key features have clearly emerged in the present case as being of primary significance, alongside the circumstances of the case as a whole, in examining whether extradition is Article 8 compatible. But first, some elementary warnings.

Warnings

5. Alongside invoking case-law which authoritatively identifies legal principles, there can be scope in extradition cases for a Court to find assistance in 'working illustration' cases. But I remind myself that these can be no more than examples of the application of principles on the facts of a case. It is essential always to remember that cases always turn on their own particular facts and circumstances. As does this one. There is never a direct read-across. In the context of Article 8 in particular, it is the weighing of the different features – for and against extradition – which provide the answer. That is what the famous Article 8 extradition 'balance sheet' is about. The fact that one case has a feature which strikes a chord for the instant case does not begin to mean that the outcome will be the same. To fixate on cosmetic resemblance, and to forget these basic lessons, is what can make the use of 'working illustration' case-law misleading and dangerous. When looking for assistance, and in comparing and contrasting, we must therefore proceed with great caution. There are further basic warnings. 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. The statutory human rights question that Parliament has identified through the Extradition Act 2003 section 21(1) is a very particular one. It focuses on the interference with family life or private life which extradition constitutes, and asks whether that interference for the purposes of extradition is justified as proportionate.

Mental Health and Suicide Risk

6. I turn to the first key feature. It is the position in relation to health and mental health, and the impact of extradition. It is common ground that these are matters which fall within the ambit of Article 8 (respect for private and family life). The position is as follows. The updated evidence of Dr Brown records that the Appellant has made a "near full recovery" from the serious head injury. There is now no evidenced cognitive

impairment. The Appellant still has depressive symptoms, but these are currently "mild". As to the risk of suicide, this is assessed as "low" to "moderate". If the Appellant is extradited, assesses Dr Brown, the "symptoms of his mental disorder will get worse", and the suicide risk will increase to "moderate". I accept this evidence. It means that the situation in relation to this feature is appreciably better than it was in March 2022. By way of comparison with a working illustration case, there is not in this case the evidence of a present "moderate depression" with a risk of suicide assessed as becoming "high" on extradition, as was the evidence in Kruk v Poland [2020] EWHC 620 (Admin) (Steyn J 26.2.20) at §§17, 27. Having said that, mental health and suicide risk remain a significant concern needing to be given proper weight in the proportionality balancing exercise.

Qualifying Remand

7. The second key feature is the position so far as concerns qualifying remand. Having heard this appeal (8.3.23) a requested period for written submissions (13.3.23 and 14.3.23) and time for circulating the confidential draft judgment, my Order and judgment mean there is now qualifying remand of just over 30 months served, leaving just under 4 months of the 34 month sentence to be served. This is very different from the picture in March 2022, and July 2022. It is also relevant to have in mind that surrender would not be immediate: it would involve at least a week or two. Mr Joyes makes three points about qualifying remand, by reference to other working illustration cases:

   i) First, there are around 4 months left to serve. That is comparable to the 5 months (out of 16 months) which was left to serve in Gruszecki v Poland [2013] EWHC 1920 (Admin) at §§1, 10 (Ouseley J 12.6.13); the 5 months (out of 16 months) which was left to serve in Chmura v Poland [2013] EWHC 3896 (Admin) at §§1, 13 (Ouseley J 20.11.13); and the 4 months (out of 14 months) which was left to serve in Chechev v Bulgaria [2021] EWHC 427 (Admin) (Singh LJ & Jay J 26.2.21). It is much less than the 9 months (out of 24 months) which was left to serve in Kruk at §§4, 23. In all of these cases, the Article 8 appeals succeeded and the time to serve was a significant feature in the overall evaluation why.

   ii) Secondly, the proportion of sentence served is around 90%. Proportion can be relevant to an Article 8 analysis. As Singh LJ put it in Chechev at §79: "the crucial factor which now tips the balance is that [the requested person] has already served in actual custody the large part [14 months out of 18 months] of his sentence". As Steyn J said in Kruk at §23: "the fact that the appellant has served 15 months (that is, well over half) of his sentence [of 24 months] is a weighty factor in the Article 8 balance". Wilkie J in Jesionowski v Poland [2014] EWHC 319 (Admin) (29.1.14) referred at §20 to "the fact that [the requested person] has now served significantly longer than half the sentence". In Jesionowski, what had been served were seven out of eight months, which as a proportion happens to be just under 90%. All of these cases were Article 8 appeals which succeeded. Having said that, the proportion is not to be viewed in isolation, but rather alongside the period of time left: Murawska v Poland [2022] EWHC 1351 (Admin) at §62 (Linden J, 1.6.22).

iii) Thirdly, the period of 4 months is the familiar statutory cut-off point, elsewhere in the Extradition Act 2003, constituting the minimum sentence for extradition to be permissible. That point was made in the context of Article 8 by Ouseley J in Gruszecki at §40. That does not mean it constitutes a "tipping point": see Ziembinski v Poland [2022] EWHC 693 (Admin) at §§43-45. In Ziembinski there were 4 months and 1 week to serve out of a 2 year sentence (§§40, 45), which was "a factor" but not one which in that case had "material effect" (§45).

8. Ms Burton rightly reminds me that there is a line of authority which explains why extradition to serve even a relatively short remaining period can be fully justified in Article 8 terms. She cites Molik v Poland [2020] EWHC 2836 (Admin) at §11 where I said this:

> ***The fact that the Appellant has the period left to be served of 6 weeks does not in my judgment fall within the category described in the authorities, deliberately, as "a very short period of time": see Kasprzak [2010] EWHC 2966 (Admin) at §21 and the subsequent cases quoting and endorsing that approach. The Court considering Article 8 proportionality must, in principle, respect the time left to be served and which is required, by the requesting state authorities, to be served there: see Kasprzak again at §21 ("If a sentence has been passed this court should take the view that the sentence is, all things being equal, to be served") and Ostrzycki [2020] EWHC 1634 (Admin) at §34 ("There is a high public interest in honouring extradition arrangements and that public interest is not diminished by reason of the length of time left to be served in custody"). The court does not evaluate whether sufficient time has been served: see Kloska [2011] EWHC 1647 (Admin) §27 ("except in most unusual circumstances, it cannot be for the courts in England to form a view on whether the person to be extradited has or has not served enough of his sentence that was imposed by the requesting judicial authority") and Zakrzewski [2012] EWHC 173 (Admin) at §48. This is not a case like Jesionowski where, although there was still a month of an eight-month sentence to be served, the Court was satisfied that early release provisions applicable in the requesting state would irresistibly have been applied to entitle the appellant to immediate release upon return: see §19. I accept that all cases are fact sensitive … But, in my judgment, a reliable illustrative working example is the case of Malar [2018] EWHC 2589 (Admin) at §13. In that case Supperstone J explained that "there is nothing inherently disproportionate in the surrender of the appellant to serve a sentence that amounts to weeks rather than months". On the facts of that case the appellant had served 4 months 1 week and 2 days of a 5 month term. His extradition was held to be proportionate and Article 8 compatible. That conclusion … serves to illustrate and reinforce the points made about mutual respect and "a very short period" being capable of being a factor (Kasprzak §21).***

Prospect of Early Release

9. The third key feature is the position so far as early release in Poland is concerned. Subject to a principled objection raised by Ms Burton, Mr Joyes relies on a line of cases concerned with the Polish early-release regime and a judicially perceived likelihood of early release. The line of cases start with Janaszeck v Poland [2013] EWHC 1880 (Admin) (Foskett J 3.7.13). What happened in Janaszeck was that Foskett J reserved judgment on the appeal (on 15.4.13) with a view to the CPS obtaining clarification about a limitation period point and a sentence aggregation point (§39). The Respondent then produced a letter to the Court (21.5.13) (§40) from which some information emerged (§41):

> ***The further information that did emerge from my own request for information was that, whatever custodial sentence is in force in relation to the Appellant (either now or as a result of some "aggregation" in due course), she has the right to apply for any release after she has spent half of the sentence in custody. Unlike in the UK, release at the half-way point is not automatic, but depends on Article 77(1) of the Criminal Code which empowers the court to***

> ***order early conditional release: "only when [the prisoner's] attitude, personal characteristics and situation, his way of life prior to the commission of the offence, the circumstances thereof, as well as his conduct after the commission of the offence, and whilst serving the penalty, justify the assumption that the perpetrator will after release respect the legal order, and in particular that he will not re-offend".***

This information describing Article 77 of the Polish Criminal Code, as described by Foskett J in Janaszeck §41, has been referred to in several later judgments from 2013 to 2022: see Chmura at §15 (20.11.13); Jesionowski §12 (29.1.14); Lange v Poland [2019] EWHC 1796 (Admin) at §12 (Garnham J, 18.6.19); Kruk at §19 (26.2.20); Murawska at §60 (1.6.22). In Chmura Ouseley J drew both Counsel's attention to the significance of Janaszeck §41, in this post-judgment observation (Chmura §35):

> ***MR JUSTICE OUSELEY: Both of you, I think, appear for prosecutors. Given that paragraph 41 of Foskett J is likely to be cited by you or those sitting in your side of the court it might be useful to find out what the release provisions actually are and whether they are graded by length of sentence so that you get out earlier on a short sentence or possibly later and, in particular, whether there is an automatic two thirds, four fifths release point.***

10. In Borkowski v Poland [2015] EWHC 804 (Admin) (King J, 29.1.15), the Court's judgment included this reference to a "well-known fact" (at §16):

> ***[T]he 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.***

When the Divisional Court (Burnett LJ and Ouseley J) gave their reserved judgment in RT v Poland [2017] EWHC 1978 (Admin) (1.8.17) – a case which centred on the impact of extradition for a child – King J's Borkowski "well-known fact" featured as the underpinning for the following imperative (at §65), under a heading "the likely time to be served in Poland":

> ***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 at paragraph 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.***

The Divisional Court continued by citing another case from which information about Polish law was derived:

> ***It is also apparent from information referred to in AB v Regional Court in Poznan, Poland [2014] EWHC 1560 (QB) paragraph 9 that a convicted person can be granted release on temporary licence for important personal and family reasons…***

11. In Sobczyk v Poland [2017] EWHC 3353 (Admin) (Gross LJ & Nicol J, 20.12.17) Counsel had submitted (§27) that "that matters have now moved on since the District Judge made her decision in the sense that the Appellant has been in custody in the UK for a longer period (about 9 months) and is only 11 weeks short of the half way point of his sentence when he would be able to apply for discretionary release". The Divisional Court in Sobczyk recorded (§28) that: "We thought it right to find out what the position was". On the Court's behalf, the CPS posed questions, including (§28ii):

> ***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?***

The Court said this about the way in which the question had been asked by the Polish authorities (at §29):

> ***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.***

The Court added this (§29):

> ***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.***

12. This line of authority involves the Judges of this Court relying on information about the operation of the Polish provisions, including information as elicited and recorded in earlier judgments, and then making material observations about the likely implications of Polish law as perceived by the Judge in this jurisdiction. In Chmura, Ouseley J's view was that early release appeared to have "good prospects". He said (at §25):

> ***the circumstances of this case … which weigh particularly with me are … 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 Jesionowski, Wilkie J said he found it "difficult to see" why there would not be early release (at §19):

> ***without in any way seeking to second-guess decisions that might be made in Poland, it is difficult to see how, applying the criteria for early release to which I have referred, an application by him for immediate release upon his return could fail. Indeed, it is hard to see how any such application would not have succeeded had he been in Poland serving his sentence and had applied after the expiration of four months of the eight months. As it is, by being in this country, he has in fact served two months longer than that and that is an important factor.***

In Borkowski, King J said at §22 that there "could well be" early release. In RT, Burnett LJ and Ouseley J said at §65 that "there is no reason to suppose that [the appellant] would not benefit from [the early release] provisions". In Kruk, Steyn J said at §27 that: "It is likely, in my judgment, that the Polish courts would find the appellant eligible for early release". This is a chorus of material judicial perception of early release prospects.

13. To these Polish cases about early release after an extradition surrender can be added the Bulgarian case of Chechev where the Divisional Court said this (at §79):

> ***In Bulgarian law [the requested person] would be entitled to apply to be released at the halfway point, although this would not be a matter of right since the decision would be a discretionary one: see Article 439a of the Criminal Procedure Code. The likelihood is***

> ***therefore that, even if he were to be returned in the next four months or so, he would be released from custody almost immediately.***

14. Relying on this line of authority, Mr Joyes submits that – without 'second-guessing' a discretionary decision which would be for the Polish authorities – this Court should "have regard to the reality" (RT §65). He relies on the criteria from Article 77 of the Polish Criminal Code (Janaszeck §41) and the focus on whether the Appellant "will after release respect the legal order" and "will not re-offend". He emphasises that the Appellant is significantly beyond both the half-way and the two-thirds mark, that he has no convictions since coming to the UK in 2014 aged 24, notwithstanding his previous convictions and custodial sentences (aged 18-23) in Poland, including the 6 years with no convictions when he was at liberty living in the UK, between November 2014 and September 2020 (aged 24-30). Mr Joyes says 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".

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".

An Objection of Principle

16. In arriving at that conclusion, I am rejecting a principled objection raised by Ms Burton. It concerns the source of information on which this Court can rely. Ms Burton says it is wrong in principle to go down the road seen in the line of authorities on which Mr Joyes relies. She says the Appellant needed to adduce evidence of foreign law, to satisfy this Court as to the criteria applicable to discretionary early release in Poland. She says it is quite wrong to piggy-back on a discussion in earlier judgments of information elicited in other cases. She relies on Jankowski v Poland [2016] EWHC 3792 (Admin) (Simon LJ and Flaux J, 10.3.16), where the district judge had sought to rely on "further information" which had been given in another case (Grabowski). The Court rejected that course, on the basis that what was needed was "clarifying evidence" filed in the instant case. The reasons were reasons of principle. Simon LJ said this:

> ***In the absence of such clarifying evidence, I do not accept that findings of fact in one case can legitimately be read across to another case as was done here. On the contrary, there is high judicial authority that the circumstance that a fact has been proved in one case does not enable the court to take judicial notice of it in another case; see Phipson on Evidence 18th Edition 3-20 and the speech of Lord Wright, with which all other members of the House of Lords agreed, in Lazard Brothers & Co v Midland Bank [1933] AC 289 at 297-298. The strictness of this rule is reflected in the criminal context in Archbold 2016 edition at 10-61. This is not a case in which evidence was unnecessary; on the contrary, evidence was necessary and could not be found by referring to another case or cases where the facts had been proved. To this extent, I disagree with the approach of Sir Stephen Silber in Jaroszynski v Polish Judicial Authority [2015] EWHC 335 (Admin) at paragraph 33. I should add that Ms Iveson made a late application for the matter to be adjourned so that confirmation could be obtained from the requesting state. In my judgment, that application was made much too late and I would refuse it.***

Neither Jankowski nor Lazard were cited in any of the early-release cases. Those cases took a wrong turn, because an important issue was unargued and undecided, rendering them legally unsafe. The cases which relied on the letter of further information in Janaszek should no more have been doing so than the district judge in Jankowski relying on Grabowski. Foreign law is a question of fact, requiring expert evidence. The Court needs a case-specific, accurate and up to date picture.

17. I am unable to accept those submissions. 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.

18. What the early-release cases illustrate is that there are other contexts in which the ability to 'read across' from evidential materials, judicially accepted and discussed in another case, is a positive virtue. It is not necessary for repeat, bespoke expert reports to be obtained and adduced. It is not necessary for repeat requesting state information to be obtained and adduced. Adjournments can be avoided. So can the burden to the public purse. It is familiar that what one extradition court may uncover – including as to arrangements in the requesting state – can be relied on in other cases. To take an example, there is an established practice of identifying 'lead cases' to address points of principle, whether about judicial independence or prison conditions or something else. The assessment is at least capable of being relied on to other 'stayed' extradition cases. The Courts do not require the constant repetition of identical materials produced for different judges in each individual case. Nor would the Courts countenance in a human rights case the requesting state disavowing as irrelevant an identifiable parallel factual picture, which would or may render extradition incompatible with human rights, simply because there has not been the production of a parallel or identical expert witness statement or volume of domestic instruments. Such an approach would neither promote

human rights nor the coherence of the legal system nor the overriding objective, including considerations of cost and burden to the public purse.

19. In fact, in the line of Polish cases on early release the Court was not receiving expert evidence filed by the legal representatives acting for the requested persons. What they instead involved was the Courts having elicited a reliable description emanating from the respondent requesting state. It was requesting state's further information that gave rise to Janaszek §41. It was with requesting state counsel that Ouseley J put down his marker in Chmura at §35. It was with the requesting state that the Court in Sobczyk raised its question at §28. In any case – including one in which a requested person draws attention to a discussion in previous case-law – there is nothing to stop the respondent requesting state to check the position, and to provide the court with a reliable updated picture. The requesting state is perfectly placed to do that. There is no reason why an adjournment would not, if needed, be provided to that end. There is no suggestion in the present case that the picture identified in the relevant line of Polish authorities as to the halfway or two thirds eligibility point for applying for discretionary early release, and as to the applicable criteria, has become outdated or unreliable.

20. This approach to Jankowski is supported by recent authority. In Stanciu v Armenia [2022] EWHC 3368 (Admin) (Bean LJ and Jay J, 23.12.22), the Divisional Court was addressing Article 3 ECHR arguments about prison conditions in Armenia. Reliance was sought to be placed on the evidence of three witnesses: an Armenian lawyer, the head of the CPT delegation which had undertaken prison visits; and a legal expert and national consultant of the Council of Europe. Their evidence was the subject of judicial evaluation in the judgment of Deputy Chief Magistrate Ikram (§65). That was a much clearer case to raise the principled objection based on Jankowski. It concerned making reference to expert evidence which had been given in another case, as discussed in the judgment in that case. The objection was raised. The argument was that the expert evidence was inadmissible (§71) based on Jankowski. The Divisional Court rejected that argument, reasoning as follows (§§72-74):

> ***We have no doubt that Jankowski was correctly decided on its particular facts. The question was whether the EAW disclosed an extradition offence. On its face, the EAW possessed a lacuna in relation to blood alcohol levels, and this Court held that the gap could not properly be filled by referring to technical evidence called in another case. In such a situation, the strict rules of evidence applicable to criminal proceedings are pertinent. But the present case raises an issue under the ECHR, and in that regard it is established practice in extradition cases that the courts will allow a relaxation of the ordinary rules of evidence. A broad approach is taken to the nature and basis of the expert evidence that may be admitted… In the present situation, where Judge Ikram received evidence from highly authoritative witnesses in relation to the identical prison and very similar issues, we are not required to impose an exclusionary rule of evidence effectively compelling us to ignore both the evidence and the judicial findings based upon it. Indeed, it would be odd if we should not be taking into account to this Appellant's advantage the fact that Judge Ikram's assessment of the three witnesses he saw and heard was favourable… We recognise, of course, that matters may have moved on in certain respects since the date of Roca and that his personal circumstances were in any event different from those of the Appellant. These are factors which go to weight and not to admissibility.***

That reasoning authoritatively explains the specific context in which the evidence was excluded in Jankowski, confining that case to that context. It also explains why the ordinary rules of evidence ought to be relaxed where there is an issue under the ECHR.

The present case naturally raises an issue under the ECHR, albeit by reference to the qualified right of Article 8.

Passage of Time

21. The fourth and final key feature of the present case relates to the passage of time. This did not loom large before the Judge or in the Judgment. The point that is raised is this. The Further Information filed by the Respondent in October 2020 says this:

> ***on January 8, 2015 the convicted person has been ordered to be brought to the penitentiary unit, which proved to be unsuccessful, and then, on 13 March 2015, a search for the convicted person was ordered by means of an arrest warrant, and in the course of the search undertaken, it was established that the convicted person was on the territory of Great Britain.***

The argument is as follows. The EAW was not issued until 15 June 2020. It was promptly certified (27.7.20) and within a further two months (21.9.20) the Appellant had been arrested. That is a substantial period – five years – of "unexplained delay". True it is that the Appellant came to the UK in November 2014 as a fugitive. Nevertheless, the passage of time is capable of tending to add to the weight of features capable of weighing against extradition; as well as being capable of tending to undermine the weight of the public interest considerations capable of weighing in its favour. True it is that the Polish authorities acted promptly, in January 2015 and March 2015. But the March 2015 search was successful in locating the Appellant as being on UK soil. That means the Respondent has wholly failed to account for a five year period 2015-2020. In that period, he was living a crime-free and hard-working life in the UK. Moreover, there was in that period a very significant event, so far as the impacts of extradition are concerned. An extradition at any time during the first four years would have been prior to the Claimant's serious head injury in September 2019. Because extradition has been pursued only after a lengthy period of unexplained delay, he has faced extradition – and imprisonment on remand – with a serious health and mental health condition. These circumstances, which in Article 8 terms tend to reduce the weight of the public interest considerations in favour of extradition and tend to increase the weight of those capable of weighing against it, are all properly part of the Article 8 evaluation.

22. I accept that argument. Ms Burton points out that the Further Information does not say that it was "established" in "March 2015" that the Appellant was "on the territory of Great Britain". Rather, what is said is that this was "established" during "the course of" the search that was "ordered" in March 2015. I have not been persuaded by this answer. I can see that there would have been three distinct things: (a) the ordering of the search (March 2015); (b) the start of the search; and (c) the establishing of the Appellant's whereabouts. In theory, the search ordered in March 2015 could have been commenced in May 2020. In theory, the search ordered in March could have been commenced in March 2015 but the Appellant's whereabouts established only in May 2020. In my judgment, neither of these is a natural understanding of the Further Information. The clear message is that a January 2015 order promptly failed but a March 2015 search promptly succeeded. Had there been years of fruitless searching and only belated discovery, I think the Respondent would have wanted to spell this powerful point out and would have done so. Nor has it done so. The interpretation of the Further Information invited by the Appellant was identified in a skeleton argument (7.12.22)

and there has been ample opportunity to provide information of clarification or contradiction.

Discussion

23. In my judgment, the present case is a model example of why Article 8 operates as a 'balancing' and 'balance-sheet' exercise. It is also a model example of how Article 8 cases are intensely fact-specific. If I were to weigh each of the four features which I have emphasised, individually, against the public interest considerations in favour of extradition, this appeal would fail. But what matters is putting all four features onto the scales, so that they can weigh collectively and cumulatively in the balance. That combined effect, moreover, reflects the special facts of the present case. I prefer not to speak of one or more factors 'tipping the balance'. They only do so because of what is already included in the balance, and logically it does not matter whether a factor is being placed in the balance first, or last.

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.