Neutral Citation Number: [2021] EWHC 2735 (Admin)

Case No: CO/3399/2020 & CO/3852/2020 & CO/3941/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/10/2021

Before:

MR JUSTICE SWIFT

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Between

(1) PAWEL JOZEF LITWINCZUK
(2) DAMIAN LUKASZEK
(3) DANIEL ADAM TADASZAK **Appellants**

- and –

(1) REGIONAL COURT, ZAMOSC, POLAND
(2) CIRCUIT COURT, TARNOBRZEG, POLAND
(3) REGIONAL COURT, GDANSK, POLAND **Respondents**

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(1) Ben Joyes (instructed by Sonn Macmillan Walker) for the **First Appellant**
(2) Stefan Hyman (instructed by Taylor Rose McMillan Williams) for the **Second Appellant**
(3) Catherine Brown (instructed by Taylor Rose McMillan Williams) for the **Third Appellant**

Alexander dos Santos (instructed by **CPS Extradition Unit**) for the **Respondents in all the appeals**

Hearing date: 29 September 2021

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Approved Judgment on Application for permission to amend

MR JUSTICE SWIFT:

A. Introduction

1. Each of the Appellants is the subject of an extradition order which requires his surrender to a judicial authority in Poland to serve a sentence of imprisonment. By these applications each Appellant seeks permission to amend his Grounds of Appeal to include a claim that extradition to Poland would be in breach of ECHR article 3. The specific article 3 issue is overcrowding in Polish prisons. If the space available per prisoner in a multi-occupancy cell is less than $3m^2$ there is a presumption that the prison conditions do not meet the minimum required for compliance with ECHR article 3: see *Mursic v Croatia* (2017) 65 EHRR1 at paragraphs 122 – 128 and 136 to 141. The Appellants' contention is that if they are surrendered to serve the sentences of imprisonment imposed on them, they will do so in overcrowded prisons in cells where the space per person would be less than the minimum personal space necessary for presumed compliance with article 3. None of the Appellants raised this matter at his extradition hearing. The contention was first raised by Mr Litwinczuk in Perfected Grounds of Appeal dated 17 November 2020.

2. Mr Litwinczuk's surrender is sought pursuant to a European Arrest Warrant issued on 30 March 2020 which was certified by the National Crime Agency on 14 May 2020. The warrant is a conviction warrant. It rests on two judgments of the Polish Court: one which became final on 17 March 2014, imposing a 7-month suspended sentence; the other which became final on 23 November 2013 imposing a 1 year suspended sentence. Both sentences were activated on 10 October 2016 after Mr Litwinczuk had failed to comply with the conditions of the suspension order. An extradition order was made against him on 16 September 2020. In addition to the proposed article 3 ground, the grounds of appeal against the extradition order included the contention that the effect of recent judicial reform in Poland was such that the relevant requesting court had ceased to be a Judicial Authority for the purposes of section 2 of the Extradition Act 2003, and a claim that extradition would be in breach of his rights under ECHR article 8. These grounds were considered on the papers by Johnson J on 21 January 2021. He refused permission to appeal on the article 8 ground and stayed consideration of the section 2 ground of appeal pending judgment of the Divisional Court in *Wozniak v Regional Court in Gniezno, Poland* (CO/4299/2019). So far as concerned the application for permission to amend to rely on the article 3 ground, Johnson J extended the representation order to permit an expert report to be obtained and stayed consideration of the application for permission to amend.

3. Mr Lukaszek has lived in the United Kingdom since 2012. He is the subject of an extradition order made on 16 October 2020. That order was made based on a European Arrest Warrant issued on 18 July 2019 and certified by the National Crime Agency on 1 October 2019. The warrant is a conviction warrant in respect of a sentence imposed on 12 September 2011 of 8 months imprisonment suspended for 4 years. The sentence was activated on 12 December 2012. Mr Lukaszek's application for permission to appeal against the extradition order was considered on the papers by Steyn J on 18 February 2021. She refused permission to appeal on an article 8 ground and stayed a section 2 argument pending judgment in *Wozniak*. Renewed Grounds of Appeal (dated 24 February 2021) included a proposed article 3 ground of appeal. An application to amend to add the article 3 ground of appeal was made on 12 March 2021. On 5 March 2021 Mr Lukaszek had also made an application for permission to instruct an expert to

provide a report in support of the proposed article 3 ground of appeal. Murray J considered all these applications at a hearing on 18 March 2021. He made an order joining this appeal with Mr Litwinczuk's appeal and staying consideration of both the renewed application for permission to appeal on the article 8 ground and the application for permission to amend.

4. Mr Tadaszak's appeal is against an extradition order also made in respect of a conviction warrant. The order was made on 22 October 2020. The European Arrest Warrant had been issued on 8 July 2020 and had been certified by the National Crime Agency on 31 July 2020. The warrant rested on two convictions: the first dated 9 January had resulted in a sentence of 15 months suspended for 4 years; the second dated 3 June 2013 led to an 8-month sentence of imprisonment suspended for 3 years. The first sentence was activated on 20 March 2014, the second on 26 March 2014. Mr Tadaszak's application for permission to appeal against the extradition order was considered on the papers by Lane J on 15 February 2021. He refused permission to appeal on an article 8 ground and stayed a section 2 ground of appeal pending the judgment in *Wozniak*. The application for permission to appeal was renewed by notice dated 22 February 2021. On 10 March 2021 submissions filed in support of the renewed application for permission to appeal included an application for permission to amend the article 3 ground of appeal. At the same time an application was made for permission to instruct an expert to provide a report in support of the article 3 ground. By an order made on 18 March 2021, Eady J refused the renewed application for permission to appeal on the article 8 ground, and stayed the application for permission to amend, and joined Mr Tadaszak's appeal with the appeals of Mr Litwinczuk and Mr Lukaszek.

B. Decision

5. The factual premises for the applications for permission to amend (relied on by all the Appellants) are *first*, a report dated 29 August 2019 of the United Nations Committee against Torture (the Committee of Experts established under article 17 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to monitor compliance by States who are parties to the Convention, with the obligations arising under that Convention); *second*, an expert report dated 8 March 2021 prepared pursuant to the permission granted by Johnson J, by Maria Radziejowska, a Polish advocate specialising in criminal defence and extradition cases and human rights law; *third*, an addendum to that report dated 23 March 2021; and *fourth*, a transcript of evidence given by Mikolaj Pietrzak at an extradition hearing at Westminster Magistrates' Court on 30 June 2021 in the case of *Pawel Muntian v Polish Judicial Authority*. Mr Pietrzak is a Polish lawyer. He also specialises in criminal defence and extradition cases and human rights law. At the hearing in Mr Muntian's case, he was questioned based on a report dated 3 March 2021 that he had prepared jointly with Ms Radziejowska. I am told that this report is, in all material respects, identical to Ms Radziejowska's report of 8 March 2021.

6. I approach these applications by asking whether there is a case to answer that the surrender of any of the Appellants to serve sentences of imprisonment in Poland will expose them to a real risk of article 3 ill-treatment. I have been referred to a number of judgments of the Divisional Court and the Court of Justice of the European Union including: *Aranyosi* [2016] QB 921, *Dorobantu* [2020] 1 WLR 2485, *Krolik v Polish Judicial Authority* [2012] EWHC 2357 (Admin), and *Visha v Criminal Court of Monza, Italy* [2019] EWHC 400 (Admin). The cumulative effect of these decisions is as

follows. There is a presumption that Council of Europe States and states within the European Union are willing and able to fulfil their obligation not to subject any person to article 3 ECHR ill-treatment. This presumption of compliance is strong and will prevail save where "exceptional circumstances" are demonstrated.

7. The nature of the presumption and the circumstances in which it may be displaced are set out in full in the judgment of the CJEU in *Dorobantu*: see between paragraphs 42 and 69. The presumption of compliance will be displaced if there is information that is:

> "52. … objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing member state and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the European Court of Human Rights, judgments of courts of the issuing member state, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations …"

In *Krolik* the Divisional Court described the standard as one requiring "clear cogent and compelling evidence" which showed "something approaching and international consensus" that prison conditions in the country concerned presented a real risk of article 3 ill-treatment.

8. When exceptional circumstances arise, a court must assess the existence of the risk of article 3 ill-treatment for the individual concerned were he to be surrendered to the requesting judicial authority. The question is whether there are substantial grounds to believe the appellant would be at risk of article 3 ill-treatment referred. In the case law this is commonly described as an inquiry as to whether the *Aranyosi* threshold is passed. If that threshold is passed the court may request further information and /or assurances from the requesting Judicial Authority before reaching an overall conclusion on the article 3 issue.

9. Fitting this approach into the context of an application for permission to amend raises conceptual snags. The authorities establish the multi-stage approach I have described: at stage one the issue is whether the presumption of compliance is displaced; if so, the stage two issue is whether there are substantial grounds to believe that any of the Appellants would be exposed to the risk of article 3 ill-treatment; if so, stage three involves the court requesting further information and/or assurances from relevant Judicial Authorities to reach a final conclusion on the article 3 issue. One possibility would be to consider only whether there was an arguable case that the presumption was displaced, and grant permission if that arguable case existed. This is not the approach I have taken. I have considered these applications for permissions to amend by reference to the Appellants (or any of them) has made out a case of exposure to risk of article 3 ill-treatment that would require a request for further information/or assurances to be made – i.e., has the *Aranyosi* threshold been passed. The applications were argued before me on that basis. The Appellants' counsel submitted that the further information required concerned the use in the past two years of a power under article 110(2)(B) of

the Polish Criminal Enforcement Code ("the CEC"). This provision is described further below, but in outline it permits prisoners to be detained in conditions where less than $3m^2$ of space is available per prisoner.

10. That approach was both pragmatic and correct; the Appellants have already obtained and served the expert evidence they wish to rely on in support of their article 3 case. That being so the proper approach for me on these applications is to consider whether the case presented, which is the Appellants' entire article 3 case, is such that it meets the *Aranyosi* threshold and should therefore be considered for further with the benefit of information from the requesting authorities.

11. I do not consider the Appellants' case meets the *Aranyosi* threshold. The UNCAT Report of 29 August of 2019 (the Committee's "Seventh Periodic Report of Poland") contains no details or specific information. At paragraph 29 of the report the Committee expresses concern

> "… at the increase in the prison population during the period under review to an occupancy rate of around 92%; and that some prisoners are housed in facilities that fall below the national legal standard of $3m^2$ per person in cells that are too narrow"

At paragraph 30(c) the Committee states

> "The State Party should … prevent overcrowding, with a view with to bringing conditions of detention into line with international standards enshrined in the Nelson Mandela Rules … and ensure that prisoners have living space in accordance with the national standard"

The Report contains no further explanation. There is no narrative either identifying or explaining the evidence relied on by the Committee; it is not stated whether the Committee has relied on its own inspection of prison facilities or in reports provided to it by others. No information is provided as to the period covered by the information relied on; no particular prison is identified. Although the information the Appellants rely on is contained in a report published by an authoritative international source, I do not consider any significant weight can be attached to a bare and unevidenced statement that "some prisoners" are housed in conditions where the space per prisoner is less than $3m^2$.

12. Ms Radziejowska's report does not take matters too much further. The matters arising from that report may be summarised as follows. *First*, conditions vary between prisons. Not all prisons in Poland are overcrowded. Older prisons are more likely to be affected by lack of space than more modern buildings, and some (unnamed) older prisons have been renovated during a modernisation programme carried out between 2017 and 2020. *Second*, Polish law includes a $3m^2$ minimum space requirement: article 11(2) CEC. However, Ms Radziejowska makes the point that article 110(2) is subject to exceptions at article 110 (2)(A) and (B), respectively. These provisions set out circumstances in which, for prescribed periods, prisoners may be detained in no less than $2m^2$ of space. Ms Radziejowska lists the circumstances in which either article may apply but does not suggest either article would cover Mr Litwinczuk's circumstances. In submissions, counsel for Mr Litwinczuk submitted that he may be within the scope of article 110(2)(B). Article 110(2)(B) permits prescribed categories of prison to be detained in

space that is no less than $2m^2$ "if there is a need to immediately place a person in prison… with no space in a housing cell available" ("the no space precondition"). One of the prescribed classes or prisoner is " a prisoner who has fled". When it applies, article 110(2)(B) permits relevant prisoners to be detained in space no less than $2m^2$ for no more than 14 days on the authorisation of the director of the prison, and for up to a further 14 days if authorised by a "penitentiary judge". The suggestion that article 110(2)(B) may be applied to Mr Litwinczuk (or for that matter, to either Mr Lukaszek or Mr Tadaszak) is entirely speculative. There is no evidence suggesting that the no space precondition for the application of that article would be met. I note that Miss Radziejowska states that as at February 2019 the overall prison occupancy rate in Poland was 92.8%. While this does not rule out the possibility that the occupancy rate in any specific prison might be higher, it does tend to suggest that it is less likely rather than more likely that the no space precondition would be met. Nor, for that matter, is there any material to suggest that persons regarded as fugitives for the purposes of extradition proceedings fall into the class of "prisoners who have fled" for the purposes of article 110(2)(B) CEC. This matter is not covered by the expert evidence.

13. *Third,* Ms Radziejowska's report refers to information from the Polish prison service to the effect that in 2018 and 2019 there were a significant number of cells designated for occupation by 10 or more prisoners. However, Ms Radziejowska goes on to point out that she has no personal experience of any situation in which a prisoner was held in conditions that did not guarantee minimum space of $3m^2$, and she also refers to information provided by the prison service to the effect that as at February 2021, "every prisoner serving a sentence has the standard of living" required by article 110(1) CEC.

14. *Fourth,* Ms Radziejowska's report refers to case law from Poland and from the European Court of Human Rights. The Polish cases are claims for compensation for imprisonment contrary to the provisions required by article 110(1) CEC (i.e., in conditions where the space permitted less than $3m^2$). Ms Radziejowska refers to 11 judgments. Yet it is notable that the underlying facts of these claims all concern imprisonment during the period 2009 to 2013. In his evidence at the hearing in *Muntian*, Mr Pietrzak suggested that there might be more claims as the relevant record of decisions might be incomplete. Be that as it may, I can only access the strengths of the applications before me by reference to the evidence that is available. Three judgments of the European Court of Human Rights are relied on. In *Walasek v Poland* (Application 33946/15, judgment 18 October 2018) the court considered an article 3 claim arising out of imprisonment in 2012 in conditions which did not comply with the minimum $3m^2$ space requirement under Polish law. Mr. Walasek had made claim to the Polish court for compensation. That claim had succeeded. His article 3 claim, made to the European Court of Human Rights, also succeeded. That court made a declaration to that effect but awarded no further compensation. In *Zareba v Poland* (Application 59955/15, judgment 10 October 2019) the complaint concerned detention between August and October 2009. The court relied on findings made in proceedings before the Polish court that during the relevant period, Mr Zareba had been held in conditions permitting him less than $3m^2$ personal space. The article 3 claim succeeded and the court awarded compensation. Lastly, *Rasinski v Poland* (Application 42969/18, judgment 28 May 2020). In that case the claim to the European Court of Human Rights concerned detention between July 2013 and April 2015 said to be in breach of article 3 because Mr Rasinski was held in multi-occupancy cell without $3m^2$ of personal space. The court upheld the article 3 claim, relying on findings of fact made by the Polish court

(which had also found in favour of Mr Rasinski). The court awarded compensation. Even taken together, these three claims add little strength to the Appellants' case on this application. All the claims concern detention that occurred sometime ago; two of them (*Zareba* and *Walasek*) concerned detention at remand centres rather than detention in a prison.

15. Considering all this case law together, I am not satisfied that it identifies any relevant likelihood that systemic overcrowding is present in Polish prisons.

16. *Fifth*, Ms Radziejowska report provides information on the effect of the COVID-19 pandemic on the prison population in Poland. None of the Appellants places specific reliance on this material. In any event, while this part of the report indicates the strains placed on the prison system in 2020 and early 2021, it does not indicate difficulties reaching the level required to amount to article 3 ill-treatment.

17. I have also considered the transcript of Mr Pietrzak's evidence but that adds nothing material to the information to Ms Radziejowska's report.

18. Overall, the Appellants' case does not indicate any prevailing pattern of article 3 ill-treatment by reason of overcrowding. The proposed article 3 claim is put on a systemic basis – that generally, overcrowding means that prison conditions in Poland are not article 3-compliant. However, the evidence available does not make out this claim. There is no sufficient basis for a conclusion that there is a real risk that prison conditions give rise to article 3 ill-treatment. The case law relied on provides some examples of overcrowding, but none is less than 6 years old and each also pre-dates the modernisation programme. The observation in the UNCAT report are general and the evidence that supports it is not explained. Against all this, the most recent evidence is the statement from the Polish prison authorities referred to in Ms Radziejowska's report, that as a February 2021 all prisoners are in conditions that meet the $3m^2$ minimum space required by article 110(1) CEC. There is no evidence to the contrary that approaches the standard required – i.e., that is objective, reliable, specific and properly updated. The Appellants submit that this lack of information is because no information is published by the Polish prison service. I do not attach weight to this submission. It is apparent from Ms Radziejowska's report that she has made a number of requests for information (under freedom of information rules) and has obtained replies to all save one. The one outstanding information request was made on 23 March 2021, the date of the addendum report. There is no evidence either way as to whether a response to that request has been provided.

19. In the premises, the applications for permission to amend to add the article 3 ground are refused.

C. A further point on Mr Lukaszek's appeal

20. Mr Lukaszek's renewed application for permission to appeal on his article 8 ground remains outstanding. This ground is not now advanced by way of challenge to the District Judge's conclusion based on the evidence relied on at the extradition hearing. Rather, the submission for Mr Lukaszek is that since the extradition hearing new matters have emerged which would render his extradition a breach of his article 8 rights,

and the article 8 rights of his partner. The extradition order was made on 16 October 2020. Mr Lukaszek now relies on his partner's ill health. In March 2021 she was diagnosed as having a stone in her urinary tract. She is due to find out shortly if this condition will require surgery and the likely prognosis. Mr Lukaszek also relies on his own mental health. A statement from him refers to three suicide attempts; one in the mid-1990's; a second in 2010; and a third attempt in March 2020.

21. However, the evidence relied on in support of all these matters is incomplete. One obvious omission is that there is no medical evidence, for example to explain the future medical or care needs (if any) of Mr Lukaszek's partner, or by way of assessment of Mr Lukaszek's mental health and any medical treatment that he may require. Rather than decide the renewed application for permission to appeal on the article 8 ground without this information I have decided to allow a further short period of time for any further evidence relied on in support of this ground of appeal to be obtained and filed. Subject to any further submissions counsel may wish to make on the timetable, I propose to order that any such evidence be obtained, filed and served 6 weeks from the date in which this judgment is handed down.
