Trinity Term
[2025] UKSC 23
On appeal from: [2024] EWHC 1399 (Admin)

JUDGMENT

Andrysiewicz (Appellant) *v* Circuit Court in Lodz, Poland (Respondent)

before

Lord Lloyd-Jones
Lord Sales
Lord Stephens
Lady Simler
Lord Burnett

JUDGMENT GIVEN ON
11 June 2025

Heard on 13 March 2025

Appellant
Ben Cooper KC
Ania Grudzinska
Mary Westcott
(Instructed by Hollingsworth Edwards (London))

Respondent
Louis Mably KC
Natalie McNamee
(Instructed by Crown Prosecution Service Appeals & Review Unit (Westminster))

LORD LLOYD-JONES AND LORD STEPHENS (with whom Lord Sales, Lady Simler and Lord Burnett agree):

Introduction

1. This appeal concerns the relevance of early release provisions in the Polish Penal Code to the question whether extradition from this jurisdiction to Poland on a conviction warrant is a proportionate interference with the requested person's right to private and family life under article 8, European Convention on Human Rights ("ECHR"). This is a matter on which divergent and inconsistent approaches have developed in the King's Bench Division.

2. On 23 May 2023 District Judge Turnock sitting at Westminster Magistrates' Court ordered the extradition of the appellant, Ewa Andrysiewicz, to Poland to serve a two year sentence imposed by the Circuit Court in Lodz ("the respondent") for fraud offences. An appeal against that order was dismissed by Swift J in a comprehensive and insightful judgment dated 11 June 2024: [2024] EWHC 1399, [2024] 4 WLR 74. On 19 July 2024 Swift J certified two points of law of general public importance relating to the correct approach to be taken to the possibility of early release in Poland:

> "When the court is considering whether extradition pursuant to a conviction warrant would be a disproportionate interference with article 8 rights,
>
> > a) what weight can attach to the possibility that, following surrender pursuant to the warrant, the requesting judicial authority might, in exercise of its power under articles 77, 78, 80 and 82 of the Polish Penal Code, permit the requested person's release on licence ("the early release provisions"); and
> >
> > b) to what extent (if at all) should the court assess the likely merits of an application under the early release provisions, either that the requested person has made, or that he may make."

Factual background

3. By an arrest warrant issued on 23 September 2020 the respondent sought the appellant's extradition to serve a two year penalty imposed on 5 October 2016 and made

final on 14 March 2017 in relation to four connected fraud offences committed between 2007 and 2008. The penalty was initially suspended for a period of five years subject to various conditions including payment of a fine. On 14 November 2018 the District Court in Pabianice, which was responsible for supervising the suspended sentence, ordered the two year sentence to be served in full because the appellant had not complied with the conditions of suspension.

4. The appellant was arrested in London on 21 January 2023 and produced in custody at Westminster Magistrates' Court the same day. She was remanded in custody. Following an extradition hearing an order for the appellant's extradition was made on 23 May 2023. She was further remanded in custody.

5. The appellant lodged an application for permission to appeal on 25 May 2023 on the single ground that the District Judge was wrong in her assessment of the article 8 ECHR issue. Permission to appeal was refused by Johnson J on 3 October 2023 but granted by Morris J on a renewed application on 7 December 2023.

6. The appeal was heard by Swift J on 21 May 2024 and dismissed in a reserved judgment on 11 June 2024. On 19 July 2024 Swift J certified the points of law of general public importance set out above but refused permission to appeal to this court.

7. On 17 October 2024 this court (Lord Lloyd-Jones, Lord Sales and Lord Stephens) granted permission to appeal and ordered an expedited hearing which was fixed for 13 March 2025.

8. By 21 January 2025 the appellant, by virtue of her remand in custody during the extradition proceedings, had served the equivalent of the entire sentence imposed by the Polish court. (See Article 624, EU-UK Trade and Co-operation Agreement 2020.) As a result the Polish judicial authority withdrew the extradition warrant and on 10 February 2025 this court ordered the appellant's discharge and quashed the extradition order.

9. Nevertheless, on the application of both parties, this court decided that it should hear and rule on the appeal, notwithstanding the withdrawal of the arrest warrant, in order that the points of law on which there are conflicting decisions in the King's Bench Division might be decided.

Legal framework

10. Section 10(2) of the Extradition Act 2003 ("the 2003 Act") under the heading "Initial stage of extradition hearing" provides that "[t]he judge must decide whether the

offence specified in the Part 1 warrant is an extradition offence." Section 65 of the 2003 Act "sets out whether a person's conduct constitutes an 'extradition offence' for the purposes of [Part 1] in a case where the person— (a) has been convicted in a category 1 territory of an offence constituted by the conduct, and (b) has been sentenced for the offence." Section 65(2) and (3), in so far as relevant, provide that:

> "(2) The conduct constitutes an extradition offence in relation to the category 1 territory if the conditions in subsection (3) … are satisfied.
>
> (3) The conditions in this subsection are that—
>
> (a) the conduct occurs in the category 1 territory;
>
> (b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom if it occurred in that part of the United Kingdom;
>
> (c) a sentence of imprisonment or another form of detention for a term of 4 months or a greater punishment has been imposed in the category 1 territory in respect of the conduct."

11. We set out section 65(2) and (3) not because there was any dispute as to whether the conduct of the appellant constituted an extradition offence. Her conduct clearly did do so as it occurred in Poland, a category 1 territory, the conduct would constitute an offence in England and Wales if it occurred in that part of the United Kingdom and a sentence of imprisonment for a term of more than 4 months had been imposed in Poland in respect of the conduct. We set out these provisions to emphasise that the requirements in section 65(3)(c) include "a sentence of imprisonment … for a term of 4 months or a greater punishment". The condition in section 65(3)(c) relates to the total sentence imposed and not to the part of the sentence which remains to be served. Therefore, the minimum threshold of seriousness, before extradition can be considered, is met if any period remains to be served provided the total sentence imposed was more than four months.

12. In this case the appellant resisted an extradition order on the basis that it was incompatible with her Convention rights under article 8 ECHR. In relation to a category 1 territory, such as Poland, if there are no bars to extradition under section 11 of the 2003 Act and if the judge answers any of the questions in section 20 of the 2003 Act in the affirmative then the judge must proceed under section 21 of that Act. Under section 21(1)

the judge "must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998." If the judge decides that extradition is incompatible with the Convention rights, then the judge "must order the person's discharge": section 21(2). However, if the judge decides that extradition is compatible then the judge "must order the person to be extradited to the category 1 territory in which the warrant was issued.": section 21(3).

13. If a judge orders a person's extradition under Part 1 of the 2003 Act, then section 26 makes provision for an appeal and section 27 sets out the court's powers on appeal under section 26.

14. Title VII of Part Three of the EU-UK Trade and Co-operation Agreement 2020 has the objective of ensuring that the extradition system between the EU Member States, on the one hand, and the United Kingdom, on the other, is based on a mechanism of surrender pursuant to an arrest warrant. Article 597 embodies the principle of proportionality and provides:

> "Cooperation through the arrest warrant shall be necessary and proportionate, taking into account the rights of the requested person and the interests of the victims, and having regard to the seriousness of the act, the likely penalty that would be imposed and the possibility of a State taking measures less coercive than the surrender of the requested person particularly with a view to avoiding unnecessarily long periods of pre-trial detention."

15. Article 8 ECHR, under the heading of "Right to respect for private and family life", provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In paras 31-43 below we consider the role of article 8 ECHR in extradition cases.

16. The Polish Penal Code empowers a Polish court to order the early release of offenders from prison on probationary licence which may be accompanied by licence conditions. To resolve the points of law on which there are conflicting decisions in the King's Bench Division it is necessary to set out and to make observations in relation to several provisions of the Polish Penal Code. It is appropriate to do so in a section of our judgment immediately before we resolve the points of law. It is sufficient at this stage to state that the early release provisions in Poland are not automatic, but the possibility of early release is a discretionary act of grace on the part of the Polish courts.

The appellant's reliance on the possibility of early release

17. The District Judge observed in her judgment of 23 May 2023 (at para 56) that it was suggested that the appellant might be eligible for early release at the half-way point of her sentence. The District Judge considered, however, that even accounting for the four months spent on remand in the United Kingdom, that would still leave eight months' imprisonment to be served. In the District Judge's view that was not insignificant and did not substantially reduce the public interest in ordering extradition. No direct criticism is made of that reasoning: see Swift J at para 19, section 65(3)(c) of the 2003 Act and para 11 above.)

18. The appellant's case was that by the time her appeal was heard by Swift J events had moved on. In his judgment of 11 June 2024 Swift J explained (at para 17) that the appellant made an application for early release under article 77 of the Polish Penal Code to the Polish court on 7 November 2023. We set out and discuss the relevant articles of the Polish Penal Code between paras 47 and 63 below. Swift J observed that if that application were to succeed the Polish court might convert the whole of the remaining eight-month sentence to a licence period, or it might permit part of the remaining sentence to be treated as a period to be spent on licence.

19. At the hearing before Swift J, the judge declined to admit evidence of the appellant's application for early release. On the present appeal both the appellant and the respondent applied for fresh evidence to be admitted. The evidence was considered de bene esse but, in the light of our conclusion, it is not necessary or appropriate to admit it.

The submissions of the parties in outline

20. On behalf of the appellant, it is submitted that in extradition proceedings the length of sentence left to be served may be material to the question of interference with article 8 rights. A judge can give weight to the possibility that the requested person may be released on licence. It is submitted that extradition judges routinely address whether or not a requested person is a favourable candidate for early release. It is submitted that the court should be able to assess broadly the most probable outcome of an early release

application; a judge is entitled to make an educated prediction without purporting to decide the outcome or trespassing on foreign law.

21. On behalf of the respondent it is submitted that little weight can attach to the possibility of early release and that courts in this jurisdiction should not seek to assess the likely merits of an application for early release, being poorly placed to conduct an assessment and not required to do so in order to resolve any issue under article 8 ECHR. It is submitted that early release is properly a matter to be assessed in Poland.

Different approaches in the King's Bench Division

Dobrowolski v District Court in Bydgoszcz, Poland (Fordham J)

22. The appellant relied in the present proceedings, both before Swift J and before this court, on the judgment of Fordham J in *Dobrowolski v District Court in Bydgoszcz* [2023] EWHC 763 (Admin); [2023] ACD 67 ("*Dobrowolski")*. The extradition of Mr Dobrowolski to Poland was sought to serve a sentence of two years and ten months' imprisonment of which four months remained to be served. Although no application under article 77 had been made, Fordham J accepted that he should have regard to the reality which was that there were good prospects that an application for early release would succeed. He stated (at para 15):

> "I accept those submissions. True, the appellant is a fugitive, as were the requested persons in *Chmura v District Court in Lublin, Poland* [2013] EWHC 3896 (Admin) (at [8]), *T v Circuit Court in Tarnobrzeg, Poland* [2017] EWHC 1978 (Admin); [2017] 4 WLR 137 (para 58), and *Kruk v Poland* [2020] EWHC 620 (Admin) (at [25]). True, the appellant has previous convictions in Poland as did the requested person in *Borkowski v District Court in Lublin, Poland* [2015] EWHC 804 (Admin) (at [6]). True, the index offences are matters of seriousness, as were those in *T* (para 58) and *Kruk* (para 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* para 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 eight years in the UK of having 'respected the legal order' in *Chmura* (paras 10–11, 22); eight years as a good and responsible citizen with no criminal activity in the UK in *Jesionowski v Regional Court in Gdansk, Poland*

> [2014] EWHC 319 (Admin) at [18]; seven years of law abiding life in the UK in *Borkowski* (para 18); 13 years in the UK having not re-offended in *T* (para 64); and a five-year clean record since coming to the UK in *Kruk* (para 27). In the present case, the appellant had—by the time he was placed on remand in these extradition proceedings—lived six 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'."

23. Fordham J then considered other aspects of the submission that extradition would be a disproportionate interference with article 8 rights and stated his conclusion (at para 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 four 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."

Andrysiewicz v Circuit Court in Lodz, Poland (Swift J)

24. In the present proceedings Swift J declined to follow *Dobrowolski*:

> "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."

He noted (at para 23) that 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. He identified (at para 29) the following problem with *Dobrowolski*:

> "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."

25. Swift J then identified three possible options as to how the court might proceed. We set out the options which he identified.

26. *Option one*. At para 30, Swift J expressed this option as follows:

> "… 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."

Swift J considered this option to be the logical consequence of the judgment of the Divisional Court in *Sobczyk v Circuit Court in Katowice, Poland* [2017] EWHC 3353 (Admin). Under this option a court in this jurisdiction does not seek to predict the outcome of an application for early release in Poland and places no weight on the possibility of release in the article 8 ECHR assessment of proportionality.

27. *Option two.* Swift J stated, at para 31, that "[this option] rests on the premise that it is unrealistic not to recognise the existence of article 77 of the Polish Penal Code." As Swift J acknowledged there were several cases in which the existence of article 77 had been recognised: see *Borkowski v District Court in Lublin, Poland* [2015] EWHC 804 (Admin); [2015] ACD 59 at para 16, *Janaszek v Circuit Court in Plock, Poland* [2013] EWHC 1880 (Admin) at para 41, *Chmura v District Court in Lublin, Poland* [2013] EWHC 3896 (Admin) at para 16 and *T v Circuit Court in Tarnobrzeg, Poland* [2017] EWHC 1978 (Admin); [2017] 4 WLR 137, at para 65. However, Swift J considered that under this option the existence of a power to release on licence in the requesting state only raises the possibility that the requested person will be so released. The existence of that possibility is to be taken into account but adds "little weight" in determining whether extradition is a disproportionate interference with article 8 ECHR rights (para 32). Accordingly, Swift J envisaged that under this option a judge in this jurisdiction is confined to acknowledging the existence of and attributing little weight to the possibility and should not, except in a rare case, embark on the task of seeking to predict the outcome of an application for early release in Poland so as to attribute any greater weight to that factor in the article 8 ECHR assessment of proportionality. (paras 34 and 36).

28. *Option three.* Swift J stated, at para 33, that:

> "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 support of this option Swift J referred to *Chmura, Borkowski* and *Dobrowolski.* Under the third option Swift J envisaged that if a court in this jurisdiction takes the view that there are "good prospects" (*Chmura* at para 25) or "a real possibility" (*Borkowski* at para 16) of the release of the requested person on licence by the courts of the requesting state or indeed if "there is no reason to suppose that [the requested person] would not benefit from" early release on licence in the requesting state (*T* at para 65) then a court in this jurisdiction could attach significant weight on that factor in support of the conclusion that extradition would be a disproportionate interference with article 8 rights.

29. Swift J then stated his conclusion (at para 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."

In relation to the second option Swift J entered several qualifications. First, whilst acknowledging that a court in this jurisdiction could seek to predict the approach of a court in the requesting state to an application for early release, it would only be in *rare cases* that it would be appropriate to do so. Secondly, Swift J referred to the case management role of a court in this jurisdiction to determine at a preliminary stage whether it is appropriate to embark on the task of gathering evidence so that it can anticipate the approach of a court in the requesting state to an application for early release. Thirdly, Swift J referred to the necessity for there to be appropriate evidence before embarking on the task of anticipating the approach of a court in the requesting state to an application for early release.

Talaga v Polish Judicial Authority (District Court in Bydgoszcz, Poland) (Sir Duncan Ouseley)

30. Since the decision of Swift J in the present proceedings, the same point arose for consideration once again in *Talaga v Polish Judicial Authority (District Court in Bydgoszcz, Poland)* [2024] EWHC 3015 (Admin). There, Sir Duncan Ousley considered (at paras 50, 51) the options identified by Swift J in the following terms:

> "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.
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> 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 role of article 8 in extradition cases

31. The purpose of extradition arrangements is to secure the return of an individual to another State to stand trial for an alleged criminal offence or to serve a sentence imposed under the laws of that State. In a conviction case such as the present, the purpose is to restore the defendant into the control of the requesting State, whose laws the defendant has been found to have broken, in order to serve a sentence lawfully imposed in that State. Subject to considerations of human rights in the law of the requested State, it is for the requesting State to decide issues of punishment and rehabilitation. In the present case the Polish judicial authority sought the return of the appellant to serve a custodial sentence which was originally suspended but subsequently implemented after she failed to comply with its conditions. The consequences of such a breach are matters for the Polish authorities.

32. The certified questions need to be considered against the background of the role of article 8 in extradition cases. What does article 8 require?

33. In *Norris v Government of the United States of America (No 2)* [2010] UKSC 9; [2010] 2 AC 487, the role of article 8 in extradition proceedings was addressed in detail by this court. The US Government sought the extradition of Mr Norris to stand trial on three counts of conspiracy to obstruct justice. It was common ground that, as in most extradition cases, the extradition of Mr Norris would interfere with his exercise in the United Kingdom of his right to respect for his private and family life under article 8 and that this interference would be in accordance with the law. In his judgment Lord Phillips of Worth Matravers explained (at para 9) that the critical issue in the case was whether this interference was necessary in a democratic society for the prevention of disorder or crime. Resolving that issue involved a test of proportionality: the interference must fulfil a pressing social need and it must also be proportionate to the legitimate aim relied upon to justify the interference. Having surveyed the Strasbourg and domestic jurisprudence he expressed the following conclusions.

> (1) While there can be no absolute rule that any interference with article 8 rights as a consequence of extradition will be proportionate, the public interest in extradition nonetheless weighs very heavily indeed. It carries special weight when considering the interference extradition would cause to article 8 rights. It was

certainly not right to equate extradition with expulsion or deportation in this context. It is of critical importance in the prevention of disorder and crime that those reasonably suspected of crime are prosecuted and, if found guilty, duly sentenced. Extradition is part of the process for ensuring that this occurs on a basis of international reciprocity (paras 51, 52).

(2) Referring to the exceptions to the right to liberty under article 5 in the case of the arrest and detention of a suspect and detention while serving a sentence following conviction, he observed that such detention will necessarily interfere drastically with family and private life. However, in practice it was only in the most exceptional circumstances that a defendant would consider even asserting his article 8 rights by way of challenge to remand in custody or imprisonment. "Normally it is treated as axiomatic that the interference with article 8 rights consequent upon detention is proportionate." (para 52). Until recently it had also been treated as axiomatic that the dislocation to family life that normally follows extradition as a matter of course is proportionate. (para 54).

(3) Rejecting a submission that it was wrong for the court when approaching proportionality to apply a categorical assumption about the importance of extradition in general he observed: "Such an assumption is an essential element in the task of weighing, on the one hand, the public interest in extradition against, on the other hand, its effects on individual human rights. This is not to say that the latter can never prevail. It does mean, however, that the interference with human rights will have to be extremely serious if the public interest is to be outweighed." (para 55) "The reality is that only if some quite exceptionally compelling feature, or combination of features, is present that interference with family life consequent upon extradition will be other than proportionate to the objective that extradition serves." (para 56).

(4) Referring to the judgment of the European Commission on Human Rights in *Launder v United Kingdom* (1997) 25 EHRR CD 67, 73, he continued:

> "'Exceptional circumstances' is a phrase that says little about the nature of the circumstances. Instead of saying that interference with article 8 rights can only outweigh the importance of extradition in exceptional circumstances it is more accurate and more helpful, to say that the consequences of interference with article 8 rights must be exceptionally serious before this can outweigh the importance of extradition. A judge should not be criticised if, as part of his process of reasoning, he considers how, if at all, the nature and extent of the impact of extradition on family life would differ from the normal consequences of extradition." (para 56).

(5) Deciding whether extradition will be compatible with Convention rights is a fact-specific exercise. "[A]t this point … it is legitimate for the judge to consider whether there are any relevant features that are unusually or exceptionally compelling. In the absence of such features, the consideration is likely to be relatively brief. If, however, the nature or extent of the interference with article 8 rights is exceptionally serious, careful consideration must be given to whether such interference is justified." (para 62).

(6) In such a situation the gravity, or lack of gravity, of the offence may be material (para 62). Rejecting a submission that the gravity of the offence can never be of relevance where an issue of proportionality arises in the human rights context, Lord Phillips continued: "The importance of giving effect to extradition arrangements will always be a significant factor, regardless of the details of the particular offence. Usually the nature of the offence will have no bearing on the extradition decision. If, however, the particular offence is at the bottom of the scale of gravity, this is capable of being one of a combination of features that may render extradition a disproportionate interference with human rights. Rejecting an extradition request may mean that a criminal never stands trial for his crime. The significance of this will depend upon the gravity of the offence." (para 63).

(7) "When considering the impact of extradition on family life, this question does not fall to be considered simply from the viewpoint of the extraditee." (para 64) After referring to an immigration case, *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39; [2009] AC 115, he continued: "[T]he family unit had to be considered as a whole, and each family member had to be regarded as a victim. I consider that this is equally the position in the context of extradition." (para 64) "Indeed, in trying to envisage a situation in which interference with article 8 might prevent extradition, I have concluded that the effect of extradition on innocent members of the extraditee's family might well be a particularly cogent consideration. If extradition for an offence of no great gravity were sought in relation to someone who had sole responsibility for an incapacitated family member, this combination of circumstances might well lead a judge to discharge the extraditee under section 87 of the 2003 Act." (para 65).

> "One has to consider the effect on the public interest in the prevention of crime if any defendant with family ties and dependencies … was thereby rendered immune from being extradited to be tried for serious wrongdoing. The answer is that the public interest would be seriously damaged. It is for this reason that only the gravest effects of interference with family life will be capable of rendering extradition disproportionate to the public interest that it serves." (para 82).

34. In a concurring judgment, Lord Hope of Craighead, at para 87, stated:

> "It would not be right to say that a person's extradition can never be incompatible with his right to respect for his family life under article 8 of the European Convention on Human Rights. But resisting extradition on this ground is not easy. The question in each case is whether it is permitted by article 8(2). Clearly some interference with the right is inevitable in a process of this kind, which by long established practice is seen as necessary in a democratic society for the prevention of disorder or crime. That aim extends across international boundaries, and it is one which this country is bound by its treaty obligations to give effect to."

Lord Hope did not think that there were any grounds for treating extradition cases as falling into a special category which diminished the need to examine carefully the way the process would interfere with the individual's right to respect for his family life (para 89). He considered, at para 91, that:

> "…[T]he reality is that it is only if some exceptionally compelling feature, or combination of features, is present that the interference with the article 8 right that results from extradition will fail to meet the test of proportionality. The public interest in giving effect to a request for extradition is a constant factor, and it will always be a powerful consideration to which great weight must be attached. The more serious the offence the greater the weight that is to be attached to it. … Separation by the person from his family life in this country and the distress and disruption that this causes, the extent of which is bound to vary widely from case to case, will be inevitable. The area for debate is likely to be narrow. What is the extra compelling element that marks the given case out from the generality? Does it carry enough weight to overcome the public interest in giving effect to the request?"

35. In his concurring judgment Lord Brown of Eaton-under-Heywood agreed (at para 95) that it would be only in the rarest cases that article 8 would be capable of being successfully invoked under section 87 of the Extradition Act 2003. He expressly endorsed the observation of Lord Phillips that only the gravest effects of interference with family life will be capable of rendering extradition disproportionate to the public interest it serves. Referring (at para 95) to Lord Phillips' example concerning impact on innocent family members at para 65 (para 33(7) above) as a rare case where the "defence" might

succeed, he added that it was difficult to think of many others, particularly where the charges were plainly serious. He concluded (at para 99):

> "Seemingly it is now the section 87 (section 21 in Part 1) 'defence' based on the extraditee's article 8 rights which is regularly being invoked. The incidence of this too may be expected to decline in the light of the court's judgments on the present appeal. The reality is that, once effect is given to sections 82 and 91 of the Act, the very nature of extradition leaves precious little room for a 'defence' under section 87 in a 'domestic' case. To my mind section 87 is designed essentially to cater to the occasional "foreign" case where (principally although not exclusively) article 2 or 3 rights may be at stake."

36. This court returned to the question of article 8 in the context of extradition in *H(H) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2013] 1 AC 338 ("*H(H)"*). In the joined appeals before the Supreme Court the return of the individual was sought pursuant to a European arrest warrant in order that they might either stand trial or serve custodial sentences in the requesting State. Each resisted extradition on the ground that it would be incompatible with their and their children's rights to respect for their private and family life under article 8. One issue was therefore: where the rights of children of a defendant are arguably engaged, how should their interests be safeguarded?

37. In her judgment, at para 8, Baroness Hale of Richmond drew the following conclusions from *Norris*.

> "(1) There may be a closer analogy between extradition and the domestic criminal process than between extradition and deportation or expulsion, but the court has still to examine carefully the way in which it will interfere with family life. (2) There is no test of exceptionality in either context. (3) The question is always whether the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition. (4) There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back. (5) That public interest will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes

> involved. (6) The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life. (7) Hence it is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe."

We consider that the shift from the reference to "private and family life" in (6) to "family life" in (7) was deliberate.

38. We also note the following particularly relevant note of caution sounded by Lord Judge CJ (at para 132):

> "At the same time, we must exercise caution not to impose our views about the seriousness of the offence or offences under consideration or the level of sentences or the arrangements for prisoner release which we are informed are likely to operate in the country seeking extradition."

39. In *Polish Judicial Authority v Celinski* [2015] EWHC 1274 (Admin), [2016] 1 WLR 551 ("*Celinski*") a Divisional Court of the Queen's Bench Division (Lord Thomas of Cwmgiedd CJ, Ryder LJ and Ouseley J) took the opportunity to restate the correct approach to article 8 in extradition cases in the light of *Norris* and *H(H)*. It considered that, in applying the principles set out in those cases the following matters should be borne in mind:

(1) *H(H)* was concerned with the interests of children (para 8).

(2) The public interest in ensuring that extradition arrangements were honoured was very high (para 9).

(3) The decisions of the judicial authority of a Member State of the EU making a request should be accorded a proper degree of mutual confidence and respect (para 10).

(4) The independence of prosecutorial decisions must be borne in mind when considering issues under article 8 (para 11).

(5) In the case of accusation warrants, it should be borne in mind that factors that mitigate the gravity of the offence or culpability will ordinarily be matters that the court in the requesting State will take into account. Although personal factors relating to family life will be factors to be brought into the balance under article 8 by a court considering extradition, these will also form part of the matters considered by the court in the requesting State in the event of conviction (para 12).

40. Turning to conviction warrants the court made the following observations (at para 13):

> (1) "The judge at the extradition hearing will seldom have the detailed knowledge of the proceedings or of the background or previous offending history of the offender which the sentencing judge had before him."
>
> (2) "Each member state is entitled to set its own sentencing regime and levels of sentence. Provided it is in accordance with the Convention, it is not for a UK judge to second guess that policy. The prevalence and significance of certain types of offending are matters for the requesting state and judiciary to decide; currency conversions may tell little of the real monetary value of items stolen or of sums defrauded. For example, if a state has a sentencing regime under which suspended sentences are passed on conditions such as regular reporting and such a regime results in such sentences being passed much more readily than the UK, then a court in the UK should respect the importance to courts in that state of seeking to enforce non-compliance with the terms of a suspended sentence."
>
> (3) "It will therefore rarely be appropriate for the court in the UK to consider whether the sentence was very significantly different from what a UK court would have imposed, let alone to approach extradition issues by substituting its own view of what the appropriate sentence should have been."

41. The Divisional Court went on to point out (at para 14) that these basic principles had not always properly been taken into account at extradition hearings. In particular, a structured approach had not always been applied to the balancing of factors under article 8. It suggested, in para 16, that:

> "The approach should be one where the judge, after finding the facts, ordinarily sets out each of the 'pros' and 'cons' in what

> has aptly been described as a 'balance sheet' in some of the cases concerning issues of article 8 which have arisen in the context of care order or adoption: see the cases cited at paras 30—44 of *In re B-S (Children) (Adoption Order: Leave to Oppose)* [2014] 1 WLR 563. The judge should then, having set out the 'pros' and 'cons' in the 'balance sheet' approach, set out his reasoned conclusions as to why extradition should be ordered or the defendant discharged."

The Divisional Court also stated, at para 14, that it should rarely, if ever, be necessary to cite to the court hearing the extradition proceedings or on an appeal, decisions in other individual cases which are invariably fact specific. The principles to be applied were those set out in *Norris* and *H(H)*.

42. Contrary to Lord Brown's prediction in *Norris*, the incidence of extradition cases in which article 8 is invoked has shown no sign of declining. On the contrary, it appears that it is continuing unabated. We were told by Mr Louis Mably KC that a random and unscientific sample of contested extradition hearings before the Westminster Magistrates' Court between 10 and 21 March 2025 showed that article 8 was invoked in 22 out of 23 cases examined. It seems that an article 8 "defence" is raised almost as a matter of course in virtually every extradition case.

43. We have set out above relevant passages in *Norris*, *H(H)* and *Celinski* at some length because it is clear that there is a need to reiterate the essential points they make. Cases in which a submission founded on article 8 ECHR may defeat the public interest in extradition will be rare. It is most unlikely that extradition will be held to be disproportionate on the ground of interference with private life. Even in cases where interference with family life is relied upon, it will only be in cases of exceptionally severe impact on family life that an article 8 ECHR "defence" will have any prospect of success.

The possibility of early release

44. Against this background we turn to consider the relevance in conviction cases of the possibility of early release under the law of the requesting State.

45. There will be some cases in which early release from a sentence under the law of the requesting State will operate automatically so that early release can be precisely calculated and predicted. If this is agreed between the parties or can be proved as a matter of the law of the requesting State, taking this factor into account in determining whether extradition is a disproportionate interference with article 8 ECHR should present fewer difficulties than in situations where early release is discretionary. If it is possible to calculate with confidence how such an automatic rule will operate it should be possible

to proceed to an article 8 assessment on that basis. In an extreme case, in combination with other exceptionally compelling features it might possibly outweigh the public interest in extradition; that might be so, for example, if it is shown that on an arithmetical calculation a requested person would be entitled to be released within a very short period of time. However, even in the case of an automatic rule as to release on licence, conditions can be attached to the licence for the benefit of, amongst others, the public. Breach of the conditions of a licence may lead to a return to prison. Therefore, in the "pros" list of features which militate in favour of extradition on the "balance sheet" approach adopted in *Celinski,* at para 16, (see para 41 above) will be the feature that if the requested person is not extradited, the court in the requesting state will be deprived of the opportunity to impose appropriate licence conditions and the offender will be at liberty in this jurisdiction without any such conditions having been imposed.

46. However, cases where early release involves the exercise of judgment or discretion by judicial or executive authorities in the requesting state, such as the present case, cause greater difficulty. In such cases, the judgment or discretion is essentially that of the requesting State and must be exercised by it in accordance with its own law and standards. To what extent, if at all, is it open to a court in this jurisdiction, faced with an extradition application, to second guess the operation of the sentencing regime of the requesting State? As we have indicated there are conflicting decisions in the King's Bench Division in relation to this question with reference to the early release provisions in Poland. Before resolving that conflict, it is appropriate to set out and to make observations in relation to some of the relevant provisions of the Polish Penal Code which empower a Polish court to order the early release of offenders from prison on probationary licence.

The Polish Penal Code

47. Article 77 of the Polish Penal Code, headed "Release on licence", provides that:

> "1. The court may only release on licence an offender sentenced to imprisonment from serving the balance of the penalty, if his or her attitude, personal attributes and features, lifestyle prior to carrying out the offence, the circumstances of the offence and the offender's conduct after committing the offence and while 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 re-offend.
>
> 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 78."

48. We make several observations about article 77 of the Polish Criminal Code.

49. First, the Polish court's jurisdiction to release on licence only arises if there is an assumption that "the offender will, after release, respect the legal order, and in particular that he or she will not re-offend." In deciding whether to arrive at that assumption the Polish court must consider a wide-ranging list of matters, covering every aspect of the offender's behaviour both prior to and following conviction. The judge in this jurisdiction at an extradition hearing will seldom have detailed knowledge of those matters let alone detailed knowledge of the methods of assessment and the weight to be attached by a Polish court to each of the matters. So, for instance, how does a Polish court assess the likelihood that the offender will "respect the legal order" and "will not reoffend" and in performing that assessment what weight does it ascribe to a period of post-conviction nonoffending? Does the Polish court assess the likelihood that the offender will not reoffend simply by adding up the years so that the longer the period since the offence, the better the evidence that the offender will not reoffend? In *Dobrowolski*, at para 15, Fordham J assumed that a Polish court would assess the likelihood of reoffending on that basis. Or does the Polish court adopt a less mechanistic, more evaluative approach to the assessment of the risk of reoffending? Or does it assess the risk of reoffending by adopting both approaches? These questions serve to illustrate that a judge in this jurisdiction lacks detailed knowledge of: (a) the matters in article 77; (b) the methods of assessment of each of the matters; and (c) the weight to be attached to each of them in arriving at the overall decision as to whether "the offender will, after release, respect the legal order, and in particular that he or she will not re-offend." The practical consequence of this lack of knowledge is that, save in the most exceptional circumstances, there cannot be any accurate prediction by a judge in this jurisdiction as to the outcome of an application in Poland for early release on licence. Furthermore, the evaluation of these matters is for the Polish courts.

50. Secondly, when considering matters such as the offender's attitude, personal attributes and features, and lifestyle the applicable standards are Polish standards, and it is a matter for the Polish court to arrive at a view based on those standards. Again, a judge in this jurisdiction at an extradition hearing will not have detailed knowledge of the applicable standards in Poland with the same practical consequence that, save in the most exceptional circumstances, there cannot be any accurate prediction by a judge in this jurisdiction as to the outcome of an application in Poland for early release on licence. Furthermore, it is for the Polish courts to form an assessment as to the applicable standards.

51. Thirdly, when considering the offender's conduct after committing the offence it is for the Polish Court to consider the impact, if any, on whether to order early release if, as in this case, the offender "left Poland with her eyes 'wide open' knowing what the likely sentence would be in [her] case and then deliberately [failed] to comply with the terms of the suspended sentence imposed." (see para 51 of the judgment of District Judge Turnock). A judge in this jurisdiction at an extradition hearing will not have detailed

knowledge as to whether a Polish Court would be disinclined, as a matter of Polish public policy, to order early release on licence where the offender had left Poland in such circumstances. Again, the practical consequence of this lack of knowledge is that save in the most exceptional circumstances, there cannot be any accurate prediction by a judge in this jurisdiction as to the outcome of an application in Poland for early release on licence. Furthermore, the application of Polish public policy is a matter for the Polish courts.

52. Fourthly, even if a Polish court arrives at the assumption after considering all the matters set out in article 77, it is still a matter of discretion to be exercised by the Polish court as to whether and if so when to order the offender's release on licence. A judge in this jurisdiction at an extradition hearing will seldom have detailed knowledge of how those discretions are exercised by a Polish judge. Again, the practical consequence of this lack of knowledge is that, save in the most exceptional circumstances, there cannot be any accurate prediction by a judge in this jurisdiction as to the outcome of an application in Poland for early release on licence. Furthermore, it is for the Polish courts to exercise this discretion.

53. Fifthly, if a Polish court orders the offender's release on licence it is then a matter of discretion as to what licence conditions to impose on the offender during the probationary period, not only for the benefit of the offender but also for the benefit of the public. A Polish court in considering early release is considering the exercise of four discretions: whether and if so when to order early release, what licence conditions to impose and the appropriate length of the probation period (see paras 55 and 59 below). If a judge in this jurisdiction attaches significant weight in the article 8 ECHR proportionality assessment to the chances in Poland of early release on licence and does not order extradition, then the consequence is that an extradition court in this jurisdiction effectively prevents a Polish court from exercising any of those discretions. This is significant for two reasons. First, as a matter of international comity Polish courts should not be impeded in this way. Secondly, the length of an appropriate probationary period and the imposition of appropriate licence conditions can only be determined by a Polish court. There is an important public interest both in Poland and in this jurisdiction that appropriate probationary periods and licence conditions are imposed on offenders for their assistance, for protection of the public and to maintain confidence in the administration of criminal justice. So, a "pro" factor in favour of extradition on the *Celinski* "balance sheet" approach must be to enable the Polish court to determine the appropriate probationary period and to impose appropriate licence conditions on the offender if ordering early release.

54. Article 78 of the Polish Penal Code, headed "Conditions", makes provision as to how much of a sentence must be served before an offender can be released on licence. It provides:

> "1. An offender may be released on licence after serving at least half of the sentence, and not less than six months.
>
> 2. The offender specified in article 64, para 1 may be released on licence after serving two-thirds of the sentence, and the offender specified in article 64, para 2, after serving three-quarters of the sentence; the release on licence may not occur before the lapse of one year.
>
> 3. A person sentenced to 25 years imprisonment may be released on licence after serving 15 years of the sentence, and a person sentenced to life imprisonment can be released on licence after serving 25 years of the sentence."

Ordinarily, it should be possible for a judge in this jurisdiction at an extradition hearing to determine under article 78(1) whether the requested person has served "at least half of the sentence, and not less than six months". Therefore, ordinarily a judge in this jurisdiction should be able to determine whether the time has arrived or will shortly arrive at which an article 77 application can be made to a Polish court.

55. Article 80 of the Polish Penal Code, under the heading "Probation period" makes provision for probationary periods following the release of an offender on licence. It provides:

> "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.
>
> 2. If the convicted offender is the person specified in article 64, para 2, the probation period may not be shorter than three years.
>
> 3. Following the release on licence of a person sentenced to life imprisonment, the probation period is 10 years."

56. We make several observations about article 80 of the Polish Criminal Code.

57. First, if the requested person is not extradited to Poland, then the consequence is that no probation period will be imposed on the offender. A "pro" factor in favour of

extradition must be to enable the Polish court to impose a probation period on the offender: see para 53 above.

58. Secondly, a judge in this jurisdiction at an extradition hearing will not have detailed knowledge of the operation of article 80(1) of the Polish Criminal Code. On a literal reading of article 80(1) it appears that the probation period, following a release on licence, may not be shorter than two years or longer than five years. On that reading, even if the remainder of the sentence is shorter than two years, the Polish court must impose at least a two year probation period and exercise discretion, no doubt tailored to the circumstances of the particular offender, to impose a longer probation period of up to five years.

59. Thirdly, on a literal reading of article 80(1) of the Polish Criminal Code the duration of the probation period, provided it is between two and five years, is in the discretion of the Polish court. So, if the requested person is not extradited to Poland, then the consequence is that an extradition court in this jurisdiction effectively prevents a Polish court from exercising not only its discretion as to whether and if so when and on what conditions to order early release but also prevents the Polish court from exercising its discretion as to the length of the probation period. This is significant for two reasons. First, as a matter of international comity. Second, as a "pro" factor in favour of extradition in order to enable the Polish court to impose at least a two year probation period and to exercise its discretion as to the length of the period.

60. Article 82 of the Polish Penal Code, under the heading "Sentence deemed as served" makes provision for the date upon which sentences are deemed to have been served if the release on licence has not been revoked. It provides:

> "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.
>
> 2. 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."

61. We make some observations in relation to article 82 of the Polish Penal Code.

62. First, release on licence can be revoked by the Polish courts, presumably on the basis of the offender re-offending or on the basis of the offender failing to comply with

licence conditions. So, if the requested person is not extradited to Poland, then the consequence is that an extradition court in this jurisdiction effectively prevents a Polish court and the Polish authorities from managing an offender when released on licence and effectively prevents a Polish court from returning an offender to custody. Again, this is significant for the same two reasons: international comity and as a "pro" factor in favour of extradition to enable the Polish authorities and the Polish court to manage the offender whilst released on licence and if appropriate to return the offender to prison to serve the remaining part of the sentence.

63. Secondly, on a literal reading of article 82(1) the remaining part of the sentence of imprisonment appears to remain outstanding during the whole of the probation period which must be at least two years. If that literal reading is correct then even though the remaining part of the sentence as at the date of early release is say four months and if the licence was revoked after say 18 months, the offender would still have to serve four months in prison. In effect, under Polish law, there would be a sword of Damocles over the offender for the whole probation period. Again, this is significant for the same two reasons: first, international comity respecting the way in which the Polish courts enforce compliance with early release on licence and secondly, as a "pro" factor in favour of extradition to enable the Polish authorities and the Polish court to manage the offender whilst released on licence and if appropriate to return the offender to prison to serve the remaining part of the sentence.

The options considered by Swift J

64. We will consider options one and three before considering option two. However, before doing so we make two preliminary observations.

65. The first and more fundamental observation is that the potential for early release on licence is only one minor factor in a list of potential factors which may militate against ordering extradition as being a disproportionate interference with article 8 ECHR rights. The significance to be attached to this factor is to be seen in the overall context that it is likely that the constant and weighty public interest in extradition will outweigh *all* the factors militating against ordering extradition in the balance sheet of the "pros" and "cons" "unless the consequences of the interference with family life will be exceptionally severe.": see *H(H)*, at para 8, which is set out at para 37 above.

66. Secondly, the issue arises in this appeal in the context of the potential outcome of an application by the requested person to a judge in Poland for early release on licence with reference to the provisions of the Polish Penal Code. However, the issue is one of principle which we anticipate can be read across to early release provisions in other requesting states.

(a) Option one

67. Option one is consistent with conceptions of international comity and reflects strong practical considerations.

68. In relation to international comity, it can hardly be regarded as a matter of comity if the courts of this country in dealing with an extradition request effectively usurp decisions which fall to be made by a court in the requesting state: see paras 53, 59, 62 and 63 above.

69. We have set out the strong practical considerations leading to the conclusion that save in the most exceptional circumstances there cannot be any accurate prediction as to the outcome of an application in Poland for early release on licence: see paras 49 to 52 and 58 above.

70. Whilst we acknowledge considerable merit in option one, we reject it. As Swift J stated, at para 31, "it is unrealistic not to recognise the existence of article 77 of the Polish Penal Code." Realism dictates that the existence of the provision should be given some weight in the article 8 ECHR proportionality assessment.

(b) Option three

71. We also reject option three.

72. We agree with Swift J that there is an internal contradiction in the reasoning of Fordham J in *Dobrowolski*: see para 24 above. It is a contradiction for a court in this jurisdiction (a) to accept that a decision as to early release is to be made by a Polish court; (b) then to evaluate the merits of the application being made to the Polish court; and (c) thereafter to prevent the Polish court from making the decision by failing to extradite the offender by attributing significant weight to the evaluation.

73. Early release on licence under article 77 of the Polish Penal Code is to be distinguished from automatic early release on licence after an offender has served a fixed proportion of a sentence: for which see para 45 above. As early release under article 77 is not automatic there are strong practical considerations which mean that, save in the most exceptional circumstances, there cannot be any accurate prediction by a judge in this jurisdiction as to the outcome of an application in Poland for early release: see paras 49 to 52 and 58 above. In *Talaga*, at para 53, Sir Duncan Ouseley recognised these practical considerations by stating that a court in this jurisdiction "will not be fully informed as to how the decision-making process would turn out or the timetable for it." We agree with

that part of his judgment. For those practical considerations and because a judge in this jurisdiction cannot put him or herself in the position of a Polish judge in order to decide how a Polish judge would want Polish law to be applied, we consider that any conclusion in this jurisdiction as to the likelihood of a Polish court ordering early release on licence would be speculative.

74. We have identified the matters to be considered and the four discretions which are to be exercised by a judge in Poland when determining an application for early release on licence under article 77. If a judge in this jurisdiction attaches significant weight in the article 8 ECHR proportionality assessment to the chances in Poland of early release on licence and does not order extradition, then the consequence is that an extradition court in this jurisdiction effectively prevents a Polish court from evaluating those matters and exercising any of those discretions. We consider that this amounts to a breach of international comity by effectively usurping the function of the Polish court: see paras 53, 59, 62 and 63 above.

75. We reject option three for an additional reason. In *Dobrowolski* Fordham J, at para 24 (see para 23 above) correctly referred to the fact that he could not "achieve an early release on licence or conditions." A court in this jurisdiction cannot impose licence conditions on a foreign offender when discharging the offender. However, it is important for both the offender and for the public that appropriate conditions are imposed, and that the offender is subject to an appropriate probationary period. The fact that a court in this jurisdiction cannot impose licence conditions or impose any probationary period when discharging an offender should not drop out of the *Celinski* "balance sheet". Rather, these factors should be included as "pro" factors in favour of extradition. If they are so included, then whatever speculative assessment is made under option three as to the likelihood of a Polish court ordering early release on licence featuring on the "cons" side of the balance sheet will be outweighed by these important countervailing public interests on the "pros" side of the balance sheet. Option three does not take into account, let alone recognise the importance of, the countervailing public interest in the "balance sheet" which inevitably outweighs any speculation as to the outcome of an application for early release in Poland.

(c) Option two

76. In agreement with Swift J we consider that option two is the appropriate option. We also agree with the qualifications which he imposed: see para 29 above.

77. It is unrealistic not to recognise the existence of article 77 of the Polish Penal Code so ordinarily it will be appropriate to take account of the bare possibility of early release in Poland. However, again in agreement with Swift J, save in rare cases, a court in this jurisdiction should not embark on predicting the likelihood of the outcome of the application in Poland. This is for reasons of international comity and because of the strong

practical considerations which mean that, save in the most exceptional circumstances, there cannot be any accurate prediction by a judge in this jurisdiction as to the outcome of an application in Poland for early release. It is also because account should be taken in the *Celinski* "balance sheet" of the fact that a court in this jurisdiction cannot impose licence conditions or impose any probationary period when discharging an offender. If these factors are included as "pro" factors in favour of extradition then whatever assessment is made as to the likelihood of a Polish court ordering early release on licence featuring on the "cons" side of the balance sheet, will be outweighed by these important countervailing public interest on the "pros" side of the balance sheet.

78. Because (save in rare cases) a court in this jurisdiction should not embark on predicting the likelihood of the outcome of the application in Poland, the bare possibility of early release on licence adds "little weight" in determining whether extradition is a disproportionate interference with article 8 ECHR rights.

79. Swift J did not close the door entirely on the possibility of exceptional circumstances in which a court in this jurisdiction would embark on the task of predicting the approach of a Polish court to an application for early release and then to attributing greater weight to that factor in determining whether extradition is a disproportionate interference with article 8 ECHR rights. We agree that there can be cases in which a court in this jurisdiction would embark on that task and that such cases will be rare. However, this raises the question as to what is a rare case?

80. We envisage that a rare case is confined to cases where there is agreed or uncontested evidence sufficient to demonstrate an overwhelming probability: (a) that the requested person would be released under article 77 of the Polish Penal Code upon an application; (b) as to when that release would take place; (c) as to what the probation period and conditions attached to that release would be; and (d) that the inability of a court in this jurisdiction to provide for such a probationary period and to attach such conditions would not adversely affect the interests of the offender or of the public.

Conduct of cases in future

81. In *Celinski*, in 2015, the Divisional Court pointed out that the basic principles in relation to the role of article 8 ECHR had not always been properly taken into account at extradition hearings. Unfortunately, a decade later, that remains the position: see para 41 above. We emphasise again that "the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life be exceptionally severe." Lord Brown's prediction that the incidence of reliance on the article 8 "defence" "may be expected to decline" will only materialise through robust case management directions and an appreciation by the legal aid authorities as to the hurdle

which must be surpassed before deciding to make public funds available to advance such a defence.

82. We endorse Swift J's approach that a court in this jurisdiction should determine, on a case management basis, whether the case is potentially a rare case so that it is appropriate to embark on the task of anticipating the response of a court in the requesting state to an application for the early release on licence of the requested person. Furthermore, even if the case is potentially a rare case, then on a case management basis it is appropriate to consider whether there is any chance, taking the offender's case at its highest, that any additional weight to be attributed to the possibility of early release in conjunction with other factors could outweigh the public interest in extradition. If not, then there is no need to embark on what would be an unnecessary process which merely causes delay and adds to expense.

Conclusion

83. As we have indicated, at para 8 above, the Polish judicial authority withdrew the extradition warrant and this court ordered the appellant's discharge and quashed the extradition order.

84. We endorse the approach set out by Swift J (option two) as to the relevance of early release provisions in the Polish Penal Code. We answer the certified points of law in accordance with option two and in accordance with what we envisage as being a rare case.