Neutral Citation Number: [2021] EWHC 2261 (Admin)

Case No: CO/4823/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/08/2021

Before:

MR JUSTICE CHAMBERLAIN

- -

Between:

IONUT BURGHELEA **Appellant**

- and –

BUCHAREST TRIBUNAL ROMANIA **Respondent**

- -
- -

Jonathan Swain (instructed by **Lloyds PR Solicitors**) for the **Appellant**
David Ball (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing dates: 6 July 2021

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Approved Judgment

Mr Justice Chamberlain:

Introduction

1 The appellant is sought by Romania pursuant to a European Arrest Warrant ("EAW") issued on 22 January 2020 and certified on 27 February 2020. The warrant seeks the appellant's extradition to serve a sentence of 3 years and 8 months' imprisonment for four fraud-related offences. The value of the fraud was over €500,000.

2 There was a lengthy delay between the commission of the offences and the appellant's conviction. The offending took place in 2008 and proceedings commenced in 2011. The appellant had by that point moved to the US. His extradition was sought but not ordered, as he had the "special status" of a "protected witness" in the US, owing to his cooperation with the US authorities by providing information about a criminal gang with which he had previously been affiliated. The appellant's trial in Romania took place in 2018. There were several hearings. The sentence was handed down on 6 July 2018 and became final by the decision of the Bucharest Court of Appeal on 20 December 2019.

3 On 15 January 2020, the appellant was ordered to "self-deport" from the US. He chose to move to the UK, where he intended to live with his partner and daughter. He arrived at Heathrow Airport on 28 February 2020, where he was arrested under the EAW.

4 After a hearing at Westminster Magistrates' Court on 30 November 2020, District Judge Hamilton ("the judge") gave a judgment on 21 December 2020 in which he ordered the appellant's extradition. The appellant challenged that decision on four grounds:

(a) The Romanian authority was not a "judicial authority" for the purposes of s. 2 of the Extradition Act 2003 ("the 2003 Act") (Ground 1).

(b) The appellant ought to be discharged under s. 20 of the 2003 Act, as he was tried in his absence and will not be entitled to a retrial (Ground 2).

(c) Extradition would be contrary to the appellant's rights under Articles 2 and 3 of the European Convention on Human Rights ("ECHR") because the Romanian authorities would be unable or unwilling to protect him from attacks (Ground 3).

(d) Extradition would be contrary to the rights of the appellant and his family under Article 8 of the ECHR (Ground 4).

5 Ground 1 was raised as a fresh argument on appeal. Permission on that ground was granted by Sir Ross Cranston, sitting as a High Court judge, on 26 May 2021, with proceedings stayed pending the judgment of the Divisional Court in *Tiganescu* (CO/741/2020). Permission was refused on the other grounds and the appellant now renews his application for permission on those grounds and adds a further ground (Ground 5), based on recent authority, that extradition is barred under s. 21 because prison conditions in Romania would breach the appellant's rights under Articles 2 and 3 ECHR.

Ground 2: Section 20 of the 2003 Act

The law

6 Section 20 applies where a requested person is sought under a conviction warrant. It provides, insofar as material, as follows:

> "**20 Case where person has been convicted**
>
> (1) If the judge is required to proceed under this section… he must decide whether the person was convicted in his presence.
>
> …
>
> (3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial.
>
> …
>
> (5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial.
>
> …
>
> (7) If the judge decides that question in the negative he must order the person's discharge…"

The judge's findings

7 It is common ground that the appellant was not personally present at his trial in Romania. He was then living in the US. It is also common ground that there were two lawyers present at various parts of the appellant's trial: a privately-appointed lawyer, Mr Lungu Marian, and a court-appointed lawyer.

8 The judge's discussion of s. 20 appears at [64] of his judgment. In a section dealing with the question whether the appellant is a "fugitive", the judge said:

> "I would add at this stage that the skeleton submitted on behalf of the RP referred to an argument that Mr Burghelea's non-fugitive status and his lack of retrial rights would act together as a bar under s.20 of the 2003 Act. This point was not pressed at the final hearing but in any case it also falls away as a result of my finding that Mr Burghelea is a fugitive."

Submissions for the appellant

9 Mr Swain, for the appellant, submits that the judge was wrong to dismiss the ground on the basis that the appellant is a fugitive. First, the appellant cannot be properly characterised as a "fugitive". There was no information before the judge to suggest that he was ever made aware of the allegations against him whilst in Romania. That being so,

he could not have become a fugitive by learning of the proceedings in the US and thereafter failing to return to Romania: *Pillar-Neumann v Public Prosecutor's Office of Klagenfurt* [2017] EWHC 3371 (Admin), [67]-[70].

10 Second, the test under s. 20 is not whether the requested person is a "fugitive" but whether he was deliberately absent from his trial. The appellant was not able to be personally present at his trial as he was unable to leave the US without the approval of the US authorities. He did not waive his right to be present and the further information from the Romanian authorities shows that, at the hearings on 23 and 30 May 2018, the appellant indicated, through Mr Marian, that he wanted to participate via video conference. Despite this request, the appellant played no part in his trial.

11 The presence of Mr Marian did not mean that the appellant was "present" through his legal representative. The appellant maintains that he never instructed Mr Marian to act for him. The judge, having heard from the appellant, found this to be untrue. However, even if the judge's finding is accepted, the further information shows that Mr Marian indicated that he was not authorised to present conclusions on the case as long as the appellant wanted to be heard before the court. At the very least it can be said that, once the appellant requested and was denied the opportunity to participate in the trial via video conference, Mr Marian was not instructed to represent him. Further, it is not apparent that Mr Marian was present at all of the hearings – he was absent from the hearing on 15 June 2018 and the further information is silent as to whether he was present at the final hearing on 6 July 2018.

12 Having been convicted in Romania, the appellant lodged an application for permission to appeal. This was rejected by the Romanian court on 20 December 2019 on the basis that it was filed late. However, the judicial authority had failed properly to notify the appellant of the minutes of the first instance decision. The practice in Romania is to serve the minutes at the defendant's home address or, if unknown, to display a notice at the judicial body's office to inform the defendant that he needs to collect them in person. The judicial authority was aware that the appellant was living in the US but failed to notify him of the minutes of the trial. It said that the appellant had a duty to provide his address, but there is no evidence that the appellant was ever made aware of such a duty. Accordingly, the appeal court's decision to dismiss the appellant's application amounts to a denial of a retrial due to circumstances not attributable to his conduct.

13 In summary, the judge was wrong to focus on the question of whether the appellant was a fugitive. He ought instead to have followed the steps in s. 20. Had he done so, he would have concluded that: (i) the appellant was convicted in his absence; (ii) that absence was not deliberate; (iii) he would not be entitled to a retrial. Under s. 20(7), the judge therefore ought to have ordered the appellant's discharge.

Submissions for the respondent

14 Mr Ball submits that s. 20 must be read alongside the Framework Decision of 13 June 2002 (2002/584/JHA) ("the Framework Decision"). Article 4a(1)(b) of the Framework Decision provides that a requested person's extradition may be ordered notwithstanding his personal absence from his trial if, being aware of the scheduled time for the trial, he gave a mandate to a legal counsellor, appointed by him or the State, to defend him at trial and was indeed defended by that counsellor at trial. Accordingly, and citing the

Divisional Court's judgment in *Cretu v Romania* [2016] 1 WLR 3344 at [34(iii)], Mr Ball submits that "an accused who has instructed…a lawyer to represent him in the trial is not, for the purposes of section 20, absent from his trial, however he may have become aware of it".

15 Even if the appellant is found not to have instructed a lawyer, and therefore cannot be deemed to have been present at his trial, this does not mean that the judge ought to have ordered his discharge. Section 20(7) only applies where the requested person would not be entitled to a retrial. In *BP v Romania* [2015] EWHC 3417 (Admin) the Divisional Court considered the Romanian Code of Criminal Procedure and concluded that Article 466 provides an entitlement to a retrial if the appellant is found not to have instructed a lawyer (see [44]).

16 Alternatively, Mr Ball submits that, if the appellant is not entitled to a retrial, that is due to a lack of diligence on his part. He filed his appeal late. It was his own fault that he did not receive the minutes of the trial as he ought to have notified the Romanian authorities of his home address in the US. In any event, even if Mr Marian was not authorised to present closing remarks in the appellant's absence, he was nonetheless present at the trial and was able to pass on the details to the appellant. The appellant's contention that he had not instructed Mr Marian was "unhesitatingly" rejected by the judge as incredible: see [62] of the judgment.

Discussion

17 The judge's trenchant findings that the appellant had been a dishonest and unreliable witness mean that the judge was entitled to place very little or no weight on anything he said. However, it is reasonably arguable that the further information from the Romanian authority shows that Mr Marian told the court that he was not instructed to appear for the appellant if the latter could not participate in his trial. In those circumstances, it is reasonably arguable that the presumption of presence in *Cretu* does not apply. The Romanian authority may succeed in showing that, in those circumstances, the appellant would nonetheless be entitled to a retrial. But the on the materials currently before the court the contrary is reasonably arguable.

18 I shall therefore grant permission to appeal on this point. The application to adduce further evidence in the form of the statement of Mr Nitu will be considered at the substantive hearing.

Ground 3: Articles 2 and 3 ECHR – attacks in Romania

The arguments before the judge

19 At the extradition hearing, the appellant argued that extradition would interfere with his rights under Article 3 ECHR (freedom from torture and inhuman or degrading treatment) as his cooperation with the US authorities put him at a real risk of harm from non-State actors, specifically members of the gangs against which he had acted as an informant.

20 In *Bagdanavicius v SSHD* [2005] UKHL 38, [2005] 2 AC 668, Lord Brown (with whom the other members of the Appellate Committee of the House of Lords agreed), held at [24] that:

> "…any harm inflicted by non-state agents will not constitute article 3 ill-treatment unless in addition the state has failed to provide reasonable protection…
>
> Non-state agents do not subject people to torture or the other proscribed forms of ill-treatment, however violently they treat them: what, however, would transform such violent treatment into article 3 ill treatment would be the state's failure to provide reasonable protection against it."

21 The Romanian authorities provided an assurance and further information dated 31 August 2020. The judge summarised it (in terms to which the appellant does not object) at [66] of his decision as follows:

> "The National Administration of Prisons explain that under Article 35 of Law No. 254/2013 there is a committee in charge of 'establishing, individualising and changing the sentence service system' of anyone considered to be vulnerable. A specific category of vulnerability is where there is 'provision of information' in relation to a situation that may render a detainee vulnerable. The prisons can take a variety of measures to protect such a vulnerable individual, which obviously vary depending on the nature and level of risk. They can include:
>
> • Taking measures to restrict the people the detainee comes into contact with
>
> • Designating experienced staff for security, escorting, accompanying and operational interventions
>
> • Creating a system and decision making to eliminate any potential danger
>
> • Make sure there is "operational verification" of any concerns raised by the detainee or their family members to ensure that necessary legal measures can be taken
>
> • Conducting adequate educational programmes and activities psychological and social assistance"

22 However, the judge considered it unnecessary to rely on the assurance. At [67]-[68] of his judgment, he took the view that:

> "…Mr Burghelea himself did not provide any compelling evidence of a history of threats or risk of attack by the crime ring. His allegations on this point were vague and kept changing. Even the attack in 2008 or 2010 which apparently necessitated subsequent surgery was couched in confusion – with the date altering from 2008 to 2010 and the surgeries required changing from 4 to 2. The attack in any event was said to have been because Mr Burghelea owed money and not because he was acting as an informant.
>
> I therefore dismiss the submission that s. 21 of the 2003 Act and Mr Burghelea's Article 3 rights together create a bar to extradition."

Submissions for the appellant

23 Mr Swain submits that the judge erred in his conclusion that there was no compelling evidence of a risk of attack. The judge's finding that the appellant was not a credible witness clouded his judgment of the other evidence before him, specifically a letter from Richard Donoghue, a US attorney who had written to the US courts setting out the appellant's involvement in criminal activities for which he was due to be sentenced in the US and his cooperation with the authorities. The letter said that:

> "His time in Romania came to a violent end…when one of [the other gang members] was arrested and the police seized $22,000…When the defendant was unable to pay back the boss to whom the money was owed, the defendant was kidnapped in Romania at gunpoint, beaten the with blunt end of an ax [sic] and…suffered permanent injuries to his right knee from this incident.
>
> The defendant fled to Mexico and then crossed the border illegally in the United States in approximately December 2010…
>
> While in California, the defendant continued to be threatened for money…
>
> [In 2011 he] walked into the offices of the Costa Mesa County Police Department and admitted his criminal activity to the detectives and an assistant district attorney…
>
> The defendant's cooperation since his initial contact with law enforcement authorities has been prolific and extremely productive. After interviewing him several times in California to assess the value of his information and his credibility, the FBI New York field office assisted in moving him to the greater New York area so that he could engage in proactive cooperation… the defendant met or communicated with the FBI more than 250 times."

24 Mr Swain submits that the judge ought to have afforded this letter significant weight, rather than dismissing it (at [43] of his judgment) on the basis that it merely repeated the appellant's claims. To say that the letter "merely repeats" the appellant's account ignores the fact that the appellant's credibility had been assessed several times by the US authorities. The letter requested that it be filed under seal on the basis that:

> "…The defendant has provided detailed information implicating powerful crime figures in Romania… The defendant's family still resides in Romania and has received multiple threats from his co-conspirators who remain at large. The U.S. government cannot ensure their safety."

25 Having tested his credibility, the US authorities were sufficiently convinced of the appellant's account to issue him with an alternative identity.

26 It is not clear why the judge found that the appellant's account of the kidnapping was inconsistent. In his proof, the appellant said it occurred in 2010 and it is not apparent where the judge's reference to "2008" came from.

27 The appellant also seeks to rely on fresh evidence which lends credence to his account, in the form of a statement that he gave to HMP Wandsworth on 5 January 2021 about an attack against him by some Romanian men, a statement of Douglass Morris and a letter dated 1 July 2021 from the US Justice Department. Mr Swain submits that this evidence meets the admissibility criteria as set out in *Szombathely City Court v Fenyvesi* [2009] EWHC 231 (Admin) as it relates to events which post-dated the extradition hearing. It is capable of being decisive because of the weight it lends to the appellant's account about the real risk of danger he faces if extradited to Romania.

28 The letter of 31 August 2020 is general in terms and does not address the specific risks faced by the appellant. It does not mitigate the real risk of a breach of the appellant's Article 2 and 3 rights.

Submissions for the respondent

29 Mr Ball submits that, whilst the fact of the appellant's cooperation with the US authorities is not disputed, the effect of that cooperation on the appellant's safety is. The judge, having heard live evidence from the appellant, found him to be "thoroughly dishonest" (at [39]). There is no documentary evidence, such as police reports, to support the appellant's account of threats made to him or his family members.

30 The fresh evidence should be approached with the utmost circumspection. The appellant was in custody for well over 6 months at a time when, according to his own evidence, the criminal gang knew that he had been acting as an informant. He received no threats during those six months, and the first suggestion that threats had been made came only after the appellant's case was rejected by the judge. The fresh evidence should be seen in the context of the judge's finding that "Mr Burghelea had no hesitation in lying when it suited him" (at [41]).

31 Romania is a signatory of the ECHR. There is a presumption of compliance with the Convention which will not be displaced without "strong evidence": *Krolik v Poland* [2013] 1 WLR 490. There is no such evidence in this case. The pilot judgment, *Rezmiveş v Romania* (61467/12) rebuts the presumption only in relation to prison conditions, not in relation to violence from non-State actors. On the contrary, there is further information from the respondent affirming the statutory mechanisms in place to ensure that vulnerable individuals are properly protected whilst in prison.

Discussion

32 In my judgment, the judge was entitled to reach the findings he did about the appellant's honesty, having seen and heard him give evidence. There is nothing to indicate that his summary of the appellant's oral evidence was inaccurate. He considered Mr Donoghue's letter. Although that letter provided good evidence that the appellant had given valuable assistance to the US authorities, and that they had taken steps to safeguard his identity, the judge was entitled to conclude that the references in the letter to the attacks on the appellant were based on things he had said to the US authorities.

33 In the light of the judge's clear finding that the appellant had been a dishonest witness, and in the absence of any independent corroboration of the attacks he claimed had occurred, he was entitled to conclude that the factual basis for the appellant's Article 2

and 3 submissions was not made out. The fresh evidence on which the appellant seeks to rely does not satisfy the test in *Fenyvesi* because it too relies on the appellant's account, an account which the judge was able to evaluate and was entitled to reject. The application to adduce it is therefore refused. So, the question of the Romanian authorities' ability to protect prisoners from attacks did not arise. Even if it had, there was no material on the basis of which to rebut the presumption that the Romanian authorities would comply with their ECHR obligations to protect prisoners from such attacks.

34 Permission to appeal is therefore refused in respect of this ground.

Ground 4: Article 8 ECHR

The judge's findings

35 The judge dealt with the appellant's Article 8 argument at [69]-[78] of his judgment, citing *Norris v Government of the USA (No.2)* [2010] UKSC 9, [2010] 2 AC 487; *HH v Italy* [2012] UKSC 25, [2013] 1 AC 338 and *Celinski and others v Polish Judicial Authorities* [2015] EWHC 1274 (Admin), [2016] 1 WLR 551. He conducted a "balance sheet" approach, setting out the factors in favour of and against extradition.

36 The factors in favour of extradition were:

(a) the constant and weighty interest of those convicted of crimes serving their sentences and the UK fulfilling its obligations under the EAW scheme;

(b) the need for the UK not to be seen as a "safe haven" for those accountable to judicial authorities abroad;

(c) the appellant's status as a fugitive;

(d) the custodial sentence of 3 years and 8 months, all of which remains to be served.

37 The only factor weighing against these was the fact that the appellant had expressed a wish to establish a settled private life in the UK. As to that, the judge said this at [70]:

> "It is hard to understand exactly what family and private life right Mr Burghelea is seeking to protect. He has only been in this country since February 2020 and has been in custody until 20 August 2020. His partner is an Austrian citizen who until very recently has been resident in Vienna and only moved to the UK once Mr Burghelea had been released on bail. They have expressed a desire to reside permanently in the UK. The skeleton on behalf of Mr Burghelea asserts that his daughter who was 'unable to visit the US due to safety concerns' will be able to visit the UK. The claim in relation to the daughter and 'safety concerns' would appear to be utter nonsense given what Mr Burghelea told me about his daughter residing with him in the US for 5 years."

38 Accordingly, the judge found that extradition would be "entirely compatible" with Article 8.

Submissions for the appellant

39 Under this ground, Mr Swain repeats his submissions set out above, that the judge was wrong to find that: (i) the appellant was a "fugitive" (at [9]); and (ii) there was no compelling evidence of a real risk to the appellant if returned to Romania (at [21]-[24]). Further, he submits that the judge ought to have weighed the passage of time since the offences were committed, and the fact that the appellant has offered considerable assistance to the US authorities during that time, in the balance as factors tending against extradition.

Submissions for the respondent

40 Mr Ball submits that there is no reasonable basis on which the judge's conclusion on Article 8 ECHR can properly be characterised as wrong:

(a) The appellant was arrested on entry to the UK and has not established any meaningful family or private life here.

(b) The offence was serious. The appellant conspired to defraud a bank of over half a million euros, and a lengthy custodial sentence remains to be served.

(c) There is no reason to suppose that he will not receive adequate protection against non-State actors if such protection is required.

41 Even if the passage of time since the offending is taken into consideration, the above factors mean that this is a case in which the balance falls firmly in favour of extradition.

Discussion

42 There is nothing in this ground. The judge directed himself correctly in accordance with the key authorities. He correctly identified this case as one where the Article 8 arguments were very weak, since the appellant was arrested on entry to the UK and his partner had come to the UK even more recently. The judge was entitled to conduct the balancing exercise on the basis of the factual findings he had made. These included the finding that the appellant was a fugitive and that there was no compelling evidence of a risk of attacks. They also included the judge's rejection of the appellant's evidence about his daughter. In those circumstances, it is fanciful to suggest that the judge could properly have reached any view other than that the public interest in extradition outweighed the appellant's right to respect for his private and family life under Article 8 ECHR.

Ground 5: Article 3 – prison conditions

43 This ground was not among those originally pleaded and was therefore not considered by Sir Ross Cranston. It relates to the conditions in two prisons: Rahova (where he is likely to be detained for a short period after arrival) and Iasi (where he is likely to be detained in the longer term). When it was first raised, the submission was that this ground should be stayed pending the judgment of the Divisional Court in *Popoviciu v Romania*. That judgment has now been given: [2021] EWHC 1584 (Admin).

44 However, there are a number of cases before the Court in which prison conditions at Rahova and Iasi prisons, and the adequacy of assurances in respect of the same, are in issue. In some of these cases (CO/4162/2020, CO/4507/2020, CO/4353/2020, CO/3483/2021), permission to appeal has been granted, though in CO/4507/2020 and CO/4353/2020 proceedings were stayed pending judgment in *Popoviciu*.

45 Since it is at present unclear what case management orders will be made in these cases, and proceedings in respect of ground 1 have been stayed pending judgment in *Tiganescu*, the most sensible course of action is to stay proceedings in respect of ground 5 (including the application to rely on fresh evidence on prison conditions in the form of the statement of Popovei Leontin) for the time being and reconsider the position when judgment is given in *Tiganescu*. The order will make provision for that reconsideration.

Conclusion

46 For these reasons:

(a) Proceedings in respect of ground 1 remain stayed pending judgment in *Tiganescu*.

(b) Permission to appeal is granted in respect of ground 2. The application to adduce fresh evidence on this ground (in the form of the statement of Mr Nitu) is adjourned to be considered at the substantive hearing.

(c) Permission is refused in respect of grounds 3 and 4.

(d) Proceedings in respect of ground 5 (including the application to rely on fresh evidence on prison conditions in the form of the statement of Popovei Leontin) are stayed pending judgment in *Tiganescu*.