Neutral Citation Number: [2021] EWHC 506 (Admin)

Case No: CO/1221/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/03/2021

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MRS JUSTICE MCGOWAN DBE

- -

Between:

Flavius-Florin SAPTELEI	**Appellant**
- and -	
HUNEDOARA LAW COURT OF ROMANIA	**Respondent**

- -
- -

Mr David Josse QC & Mark Smith (instructed by **Paytons Solicitors**) for the **Appellant**
Mr Joel Smith & Ms Hannah Burton (instructed by **the Crown Prosecution Service, on behalf of the Romanian Judicial Authority**) for the **Respondent**

Hearing dates: 17th February 2021

- -

Approved Judgment

Lord Justice Fulford V.P.:

Background

1. Romania seeks the extradition of Flavius Florin Saptelei ("the appellant") to serve a combined sentence of 1 year 5 months' imprisonment in respect of two convictions for driving without being the holder of a driving licence.

2. The extradition of the appellant has been requested by the Hunedoara Court of First Instance via a European Arrest Warrant ("EAW") dated 26 November 2018 pursuant to the European Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between member states (2002/584/JHA) ("the Framework Decision"). Romania is a designated Category 1 territory pursuant to section 1 of the Extradition Act 2003 ("the 2003 Act"), by the Extradition Act 2003 (Designation of Part 1 Territories) Order 2003 (SI 2003/3333), as amended by the Extradition Act 2003 (Amendment to Designations) Order 2004 (SI 2004/1898). Part 1 of the 2003 Act, as amended, applies in this case.

3. On 3 July 2015 in Calan, Romania, the appellant drove a car (a Lancia) without a licence. The appellant noticed that police officers were trying to stop him and drove away. He was subsequently found by the police. On 16 October 2015 the defendant again drove a car (a Citroen) in Calan without a licence. He was stopped by police officers. He was "*personally summoned*" at his Calan residential address to stand trial. The district judge who considered the extradition request inferred that he had been notified by post at his last known registered address in Romania.

4. He did not attend his trial, but he was legally represented. He was convicted and sentenced in his absence on 11 September 2018. He was sentenced to 1 year's imprisonment for the first offence and 1 year and 1 month's imprisonment for the second. These sentences have been amalgamated, resulting in a total sentence of 1 year and 5 months' imprisonment. The European Arrest Warrant ("EAW") was issued on 26 November 2018 and it was certified by the National Crime Agency ("NCA") on 28 December 2018. The sentence became final on 25 September 2018. For the purposes of the issues that arise on this appeal, it is important to bear in mind that the appellant had been convicted **and** sentenced.

5. If extradited, the appellant has an unfettered right to request a retrial pursuant to Article 466 of the Romanian Penal Procedure Code.

6. The appellant was arrested in this country on 21 November 2019. He was granted and has remained on conditional bail.

The Decision of the District Judge

7. The appellant's extradition hearing took place on 3 March 2020. The district judge delivered his ruling on 20 March 2020 and ordered the extradition of the appellant. The judge observed that the judicial authority did not appear to have been satisfied that the appellant had "*voluntarily absented himself from the trial process*" and he concluded

that it had not been established to the criminal standard that he should be regarded as a "*fugitive*". The appellant did not given evidence during the hearing, and he relied on an original and an addendum proof of evidence. He suggested in his original proof of evidence that he came to the UK from Romania in June 2016 for economic reasons. He has worked mainly as a cleaner but also in food distribution. He is a single man with no children. He gave contradictory accounts as to his personal relationships, indicating in the Personal Information form that as of 21 November 2019 he had been in a two-month relationship with Alexandra Danciu (see [19]), whereas in his signed proof of evidence dated 3 January 2020 he suggested he had been in a serious six-month relationship with Nubeillah Cassandra (see [20]). In the addendum proof of evidence, the appellant (unconvincingly, in the view of the judge) asserted that Alexandra Danciu and Nubeillah Cassandra were the same person (see [22]). The applicant failed to provide any explanation as to the different time periods he had provided for the length to the relationship (see [23]). As to the present criminal proceedings, the appellant asserted in his proof of evidence that he recalled being interviewed by the police at a police station when he was released "*without charge or ticket*" (see [26]). There was, as the judge observed, no independent confirmation of his date of arrival in the UK, the work he has undertaken since then and his personal relationship. In those circumstances, the judge determined that the appellant's decision not to testify meant that "*the weight to be given to uncorroborated facts*" set out in his proofs of evidence was "*considerably diminished*" (see [27]).

8. He bore in mind that the aim of the Framework Decision was "*to facilitate and hasten the extradition process of those persons wanted either to stand trial and/or to serve a sentence of imprisonment/detention previously imposed in the requesting State*" (see [28]). The judge highlighted *Norris v Government of the United States of America (No 2)* [2010] UKSC 9; [2010] 2 WLR 572 had decided that the public interest in upholding bilateral extradition treaties would be significantly damaged if those who faced serious offences were not extradited, even if there were consequences for the individual's close family ties and dependents (see [31]). He reminded himself that the "*court needed to embark upon a careful balancing exercise in weighing the matters raised in favour of, as well as against, ordering extradition in an Article 8 context*" (see [35]), bearing in mind the approach approved in *Polish Judicial Authorities v Celinski & Others* [2015] EWHC 1274 (Admin); [2016] 1 WLR 551, which for completeness is as follows:

> "15. […] it is important in our view that judges hearing cases where reliance is placed on article 8 adopt an approach which clearly sets out an analysis of the facts as found and contains in succinct and clear terms adequate reasoning for the conclusion arrived at by balancing the necessary considerations.
>
> 16. 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.

> 17. We would therefore hope that the judge would list the factors that favoured extradition and then the factors that militated against extradition. The judge would then, on the basis of the identification of the relevant factors, set out his/her conclusion as the result of balancing those factors with reasoning to support that conclusion. As appeals in these cases are, for the reasons we shall examine, common, such an approach is of the greatest assistance to an appellate court."

9. I note at this stage that it is suggested by the appellant that the judge inappropriately focussed on two passages in *Celinski* that referred to the position of fugitives, and particularly the public interest in discouraging the perception that the UK is a state willing to accept fugitives from justice (at [36] and [39]). Nothing of substance turns on this point, given the judge clearly approached the case on the basis of the UK's broad international extradition obligations as regards persons "*unlawfully at large*" rather than narrowly focussing on whether he was, strictly speaking, to be considered to be a "*fugitive"*.

10. The judge reminded himself that the public interest in ensuring that extradition arrangements are honoured is "*very high*" and that the member state making a request should be accorded a proper degree of mutual confidence and respect (see [37]). He referred to the fact that it will rarely be appropriate for the court in this country to consider whether the sentence imposed was very significantly different from the sentence which would have been imposed in England and Wales (see [38]). The judge carried out the balance sheet approach (at [43] and [44]). He had in mind in favour of granting extradition, first, that there is a strong and continuing important public interest in the UK abiding by its international extradition obligations and, second, the seriousness of the offences in respect of which the appellant was convicted and sentenced. In favour of refusing extradition, there was the fact that he had been settled in the UK since 2016, he maintained he had been working, had fixed accommodation and is in a stable relationship, he would not have received a prison sentence in the UK and more generally he has led a law-abiding life since settling in this country. We interpolate to observe that the judge erred in favour of the appellant in taking into account, as just set out, that the criminal conduct could not result in a prison sentence if committed in the UK (see [44 (b) (ii)]). However, in other passages the judge clearly adopted the correct approach to this issue (see [38] and [46]).

11. The judge concluded that extradition would not be a disproportionate interference with the appellant's Article 8 ECHR rights because it was important for the UK to uphold its international extradition obligations, and that this country should not be considered a safe haven for either those awaiting trial or those sentenced to imprisonment. The offences had been sufficiently serious to warrant imprisonment of some length (see [45]). Any hardship to the appellant was insufficient to prevent an order being made. The offences had been committed in the relatively recent past. The appellant's assertions as to his personal circumstances had been untested following his decision not to give evidence, but the judge observed he had lived in the UK for under four years and his financial position was unclear. The judge stressed that a court in this country will seldom have detailed knowledge of the proceedings or the sentencing regime in the requesting country. Furthermore, it will rarely be appropriate for the judge seized of the extradition request to consider whether a different sentence would have been passed in

the UK (see [46]). The judge expressly addressed issues relating to proportionality as part of the Article 8 assessment (see [54] and [55]).

12. The judge rejected the suggestion that the relevant guidance in *Polish Judicial Authorities v Celinski & Others* had been, in effect, "*overtaken*" by the decision of the Supreme Court in *Konecny v Czech Republic* [2019] UKSC 8; [2019] 1 W.L.R. 1586. The judge observed that the latter case concerned whether a convicted individual with an absolute right to a retrial was entitled to rely on the passage of time since the offence was committed as opposed to when he became unlawfully at large (*Konecny* was convicted in his absence), and he stressed there is no similar argument advanced in the present case (see [47]). (For completeness, by section 14 Extradition Act 2003 ("the Act") extradition is barred if it would be unjust or oppressive to extradite an individual because of the passage of time. This applies to the period since the individual committed an offence if **accused** of the crime or to the period since the individual became unlawfully at large when he or she is alleged to have been **convicted** of the offence). Finally, the judge rejected what he understood to have been the submission that it had been an abuse of process for the Romanian court to try the appellant in his absence (see [50]). There is no ground of appeal based on this contention, perhaps unsurprisingly given Mr Josse submits that the submission was never advanced as an argument in the court below. Instead, the appellant had merely been highlighting to the district judge that he was less well placed than someone who was able to rely on section 21A.

13. The application for permission to appeal was refused on 13 July 2020 on the papers by Swift J. Fordham J granted permission at an oral hearing on 25 August 2020 ([2020] EWHC 2341 (Admin)).

The Issue

14. The appellant appeals on the sole ground that extradition would be a disproportionate interference with his and his partner's rights under Article 8 of the ECHR.

The Appellant's Submissions

15. The primary arguments on behalf of the appellant are twofold. First, it is contended that the two offences are so minor that the appellant's private and family life outweigh the factors in favour of extradition. Second, it is submitted the appellant is disadvantaged by the wording of the Act. Despite his unqualified right to retrial, he is not entitled to rely on the approach to proportionality (the "*proportionality bar*") under section 21A(1)(b) of the Act as he has been convicted. Section 11(5) of the Act only allows recourse to section 21A if the individual "*is not alleged to be unlawfully at large after conviction*". Given this is a conviction, rather than an accusation, case section 21 of the Act applies. Section 68A of the Act stipulates that a person is unlawfully at large if he is alleged to have been convicted of the offence and his extradition is sought for the purposes of being sentenced for the offence or of serving the sentence of imprisonment. Mr Josse Q.C. on behalf of the appellant accepts this is a conviction case and submits that section 11(5) should be amended to avoid prejudice to those convicted of offences

who have a right to a retrial because they are unable to rely on what are said to be the protections provided by section 21A.

16. Sections 21 and 21A are in the following terms:

> "**21 Person unlawfully at large: human rights**
> (1) If the judge is required to proceed under this section (by virtue of section 20 he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c. 42).
> (2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.
> (3) If the judge decides that question in the affirmative he must order the person to be extradited to the category 1 territory in which the warrant was issued.
> (4) If the judge makes an order under subsection (3) he must remand the person in custody or on bail to wait for his extradition to the category 1 territory.
> (5) If the person is remanded in custody, the appropriate judge may later grant bail.
>
> **21A Person not convicted: human rights and proportionality**
>
> (1) If the judge is required to proceed under this section (by virtue of section 11), the judge must decide both of the following questions in respect of the extradition of the person ("D")—
> (a) whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998;
> (b) whether the extradition would be disproportionate.
> (2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); but the judge must not take any other matters into account.
> (3) These are the specified matters relating to proportionality—
> (a) the seriousness of the conduct alleged to constitute the extradition offence;
> (b) the likely penalty that would be imposed if D was found guilty of the extradition offence;
> (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D.
> (4) The judge must order D's discharge if the judge makes one or both of these decisions—
> (a) that the extradition would not be compatible with the Convention rights;
> (b) that the extradition would be disproportionate.
> (5) The judge must order D to be extradited to the category 1 territory in which the warrant was issued if the judge makes both of these decisions—
> (a) that the extradition would be compatible with the Convention rights;
> (b) that the extradition would not be disproportionate.
> (6) If the judge makes an order under subsection (5) he must remand the person in custody or on bail to wait for extradition to the category 1 territory.

> (7) If the person is remanded in custody, the appropriate judge may later grant bail.
> (8) In this section *"relevant foreign authorities"* means the authorities in the territory to which D would be extradited if the extradition went ahead."

17. It is submitted that until section 11(5) is amended and following the decision in *Konecny*, there should be a modified approach to the seriousness of the conduct and the likely penalty in respect of a convicted person with a right to retrial (a category which Fordham J referred to when granting leave as "*retrial-conviction cases*"). As indicated above, the appellant in *Konecny* had also been convicted in his absence and had an unqualified right to retrial. However, since he was subject to a legally effective conviction, the wording of section 14 of the Act only allowed him to rely on the passage of time since he was alleged to have become unlawfully at large, rather than since the date of the offending (which for the reasons rehearsed above would have applied if he had been an accused person). In light of that restrictive approach to the length of the period that can be taken into account (*viz.* since conviction), the Supreme Court considered whether Article 8 provided a sustainable remedy. Lord Lloyd-Jones (with whom the other Supreme Court Justices agreed) put the matter thus:

> "57. It seems to me that until such time as section 14 can be amended by Parliament, article 8 provides an appropriate and effective alternative means of addressing passage of time resulting in injustice or oppression in cases where the defendant has been convicted in absentia. Passage of time is clearly capable of being a relevant consideration in weighing the article 8 balance in extradition cases. (See *H (H) v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor intervening)* [2012] UKSC 25; [2013] 1 AC 338 per Baroness Hale JSC at paras 6, 8.) It is capable of having an important bearing on the weight to be given to the public interest in extradition. In the article 8 balancing exercise, the relevant period of time will not be subject to the restrictions which appear in section 14. I note that in *Lysiak v District Court Torun, Poland* [2015] EWHC 3098 (Admin), a conviction case, the Divisional Court (Burnett LJ and Hickinbottom J) attached great weight to the nine years the criminal proceedings in Poland took to come to trial and the further two and a half years it took for the conviction to be confirmed in appeal proceedings, when concluding that it would be disproportionate under article 8 to return the defendant to Poland. Furthermore, in cases where it is maintained that passage of time would result in injustice at the retrial to which the defendant is entitled, this consideration could also be brought into account under article 8. The risk of prejudice at a retrial would be highly relevant in the balancing exercise which the extradition court would be required to undertake. Moreover, the threshold test to be satisfied would not be one of injustice or oppression but the lower one of disproportionality. This feature also makes reliance on article 8 a more effective solution than abuse of process where the burden on an appellant would be a much heavier one."

18. Lord Lloyd-Jones thereafter described the approach of the district judge as follows:

> "67. […] the district judge returned to the issue of delay when carrying out the balancing exercise under article 8 ECHR. He listed this among the factors

militating against extradition. He noted that "the delay since the crimes were committed" could both diminish the weight to be attached to the public interest and increase the impact upon private and family life. Here the offending had been some 12–13 years earlier when the appellant had been considerably younger. The passage of time would have served to mature him and in the intervening period he had worked peaceably. There was no evidence he had any knowledge of the proceedings against him. There was no explanation for the considerable delay in finding him, bearing in mind that he was living openly in another member state. Nevertheless, the public interest factors in favour of extradition outweighed his family and private life considerations, even when the delay was taken into account."

And he expressed the conclusion that:

> "70. I am satisfied that in this case full and appropriate account was taken of the entire passage of time since the offences were allegedly committed, albeit in the context of section 21 of the 2003 Act and article 8 ECHR as opposed to sections 11(1)(c) and 14 of the 2003 Act. I am also satisfied that this appellant has not been disadvantaged in any way as a result. […] I might have been more troubled than the district judge about the length of delay in this case, but I am unable to say that the decision of the district judge was wrong."

19. Against that background, Mr Josse submits that "*the Konecny approach*" is applicable to the appellant's case and his "disadvantage" should be addressed within the Article 8 balancing exercise. We are reminded that the *"proportionality bar*" established by section 21A(1)(b) is distinct from the Article 8 balancing exercise in section 21A(1)(a), and his disadvantage in this regard should be compensated within the scope of the court's consideration of Article 8. As to the availability of this argument, Mr Josse highlights that at the conclusion of the judgment, Lord Lloyd-Jones observed:

> "71. Finally, I should record that in his case Mr Summers points to what he says are further instances of substantive unfairness which might result from the characterisation of a case as a conviction case where the person whose return is sought has a right to a retrial. These relate to double criminality, prematurity, issues of forum and proportionality. However, as it is accepted on behalf of the appellant that they do not arise in this case and as they were not developed in argument, I do not propose to address them."

20. In particular, it is contended that if the district judge had considered section 21A in the context of the Article 8 exercise, he would have ordered the appellant's discharge. The latter assertion is founded on the Criminal Practice Direction, which addresses the operation of section 21A (to be found in the current version at Part 50A.2 *et seq*). This provides, as relevant:

> "50A.3 In any case where the conduct alleged to constitute the offence falls into one of the categories in the table at 50A.5 below, unless there are exceptional

circumstances, the judge should generally determine that extradition would be disproportionate. It would follow under the terms of section 21A(4)(b) of the Act that the judge must order the person's discharge.

50A.4 The exceptional circumstances referred to above in 50A.3 will include:

1. (i) vulnerable victim;
2. (ii) crime committed against someone because of their disability, gender- identity, race, religion or belief, or sexual orientation;
3. (iii) significant premeditation;
4. (iv) multiple counts;
5. (v) extradition also sought for another offence;
6. (vi) previous offending history."

21. The table referred in paragraph 50A.5 includes "*minor road traffic, driving and related offences*", where there is "*no injury, loss or damage was incurred to any person or property, for example (a) driving whilst using a mobile phone, (b) use of a bicycle whilst intoxicated*".

22. Mr Josse submits, therefore, that "*but for the wording of the Act*", the appellant would have been discharged given the nature of the offence (*viz.* "*minor road traffic*") and it is noted that the maximum sentence he could receive in the UK is a fine. In those circumstances, the appellant should have been discharged as part of the Article 8 evaluation, to rectify his disadvantage as being in the category of retrial-conviction cases.

23. Additionally, although not raised before the district judge, it is suggested that it has become clear that the appellant will be disadvantaged by his inability to claim settled status under the EU Settlement Scheme ("*EUSS"*), because his extradition could potentially interrupt what would otherwise be a "*continuous qualifying period*" of at least five years. This is a period of residence in the UK that began before 11.00 pm on 31 December 2020 which was not interrupted by an absence of more than six months in any 12-month period (except for an important reason), a sentence of imprisonment in the UK and a deportation order (or similar exclusion decision) (see Annex 1 – Definitions to Appendix EU (other EEA and Swiss citizens and family members) to the Immigration Rules, published 25 February 2016 and updated thereafter). It is argued that if he is extradited, his period of residence may be broken on account of his inability to return to the UK within six months. He has not yet applied for pre-settled status and would need to do so by 1 July 2021 (given the rights and status of EU, EEA and Swiss citizens living in the UK by 31 December 2020 will remain the same until 30 June 2021).

24. In his written submissions, Mr Josse raised the EU-UK Trade and Co-operation Agreement ("TCA") and the EU Future Relationship Act 2020 ("the 2020 Act") arguing that these provisions had an impact on the correct disposal of this case. However, as the respondent highlights, the legal framework relevant to this appeal is

entirely unaffected by the UK's departure from the EU on 31 December 2020. Instead, pre-existing EAWs executed prior to 1 January 2021 continue to be governed by the Framework Decision, pursuant to regulation 57 of the Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019 and article 62(1)(b) of the EU Withdrawal Agreement. The latter provides:

> *"Council Framework Decision 2002/584/JHA shall apply in respect of European arrest warrants where the requested person was arrested before the end of the transition period for the purposes of the execution of a European arrest warrant, irrespective of the decision of the executing judicial authority as to whether the requested person is to remain in detention or be provisionally released"*

25. In *Polakowski and others* [2021] EWHC 53 (Admin), this court observed:

> 23. (The relevant) provisions make clear that the intention was that the 2003 Act should continue to apply – in its unamended form – to extradition cases coming before the courts after 11 p.m. on 31 December 2020 where the arrest took place before that time.
>
> […]
>
> 29. The combined effect of (the relevant) provisions is that the Withdrawal Agreement provides a clear basis in international law for the application of the Framework Decision after 11 p.m. on 31 December 2020 to EAW cases where the arrest took place before that time.
>
> […]
>
> 32. […] domestic legislation expressly provides that the amendments to the 2003 Act made in consequence of the TCA do not apply in EAW cases where the arrest occurred before 11 p.m. on 31 December 2020. […]"

26. In consequence, Mr Josse's oral submissions materially diluted his original written arguments on this issue. Indeed, he initially submitted that "*the Konecny approach*" is even more apposite in post-Brexit extradition. He suggested that the TCA provides for the principle of proportionality to be applied in both accusation and conviction arrest warrants. He argued that as a consequence the court's approach to Article 8 ought to have been modified, if not re-interpreted, under the TCA. In contrast, by way of oral submissions Mr Josse simply asks this court, if we are required to conduct a balancing exercise, to have in mind "*what the future will hold*". Given we have not needed to undertake such an exercise, it is unnecessary to set out the rival contentions on this point in any greater detail or to consider whether the court's approach to section 21A and proportionality will require any adjustment in the future, in light of the TCA. We simply observe that Mr Joel Smith, for the respondent, substantively resists Mr Josse's contentions in this regard.

27. The respondent's submissions are reflected, in part, in the analysis set out hereafter.

The Permission Decision

28. Mr Josse relied substantially on the summary of his submissions as described by Fordham J. I equally register my thanks for the clear exposition provided by the judge of the issues that arise on this appeal. (To avoid confusion, I highlight that Mr Mark Smith appeared for the appellant on the permission application):

> "5. In my judgment, there is force in Mr Smith's essential argument which, as I see it, runs as follows. The District Judge took the position that the case-law was to be taken and applied based on the issues which the Courts have thus far determined, observing that the point being raised by Mr Smith had not been determined by the Supreme Court in Konecny but rather specifically left open by that Court (see paragraph 71). The District Judge proceeded to address the question of seriousness of the conduct and likely penalty (ie. the matters relevant to consideration of the proportionality bar, if it applied) only through the conventional prism of Celinski [2015] EWHC 1274 (Admin) paragraph 13(iii). Understandable though that may be on the part of a District Judge in the magistrates' court, it is reasonably arguable that the law now, on further analysis, requires a modified approach. That is properly an issue for this Court on appeal.
>
> 6. Next, in principle, it can work 'substantive unfairness' for a retrial-conviction appellant to be disqualified from the same statutory protection as would arise in the case of an accusation warrant. That was so in the context of section 14: see Konecny. But there are other features of the statutory scheme where the problem also arises. The statutory proportionality bar is one of them, as the Supreme Court explicitly recognised might be the case (see Konecny at paragraph 71). That is because, if the appellant were facing an accusation warrant to be extradited to face a trial, he would be entitled to invoke the proportionality bar in section 21A(1)(b), (2), (3) and (4)(b). He would be entitled to have the court evaluate the seriousness of the "specified matters" including conduct, and moreover to do so pursuant to the guidance in Practice Direction 50A. That means if the case falls within a specified category in the Guidance, and absent "exceptional circumstances", the court "should generally determine that extradition would be disproportionate". All of this is denied him, even though he is being extradited to face a trial, because it is a retrial-conviction pursuant to a conviction EAW.
>
> 7. That 'substantive unfairness' requires that the Article 8 proportionality evaluation accommodate the same features, and eliminate the substantive unfairness. Taking "full and appropriate account" of all this, is a modified position, which goes further than Celinski paragraph 13(iii), albeit that it uses the existing gateway of Lady Hale in HH paragraph 8(5) (referenced in Celinski at paragraph 6) to get there.
>
> 8. Those are the essential building blocks, as I see it, of the central argument."

Discussion

29. As indicated by Pitchford LJ in *Miraszewski v Poland* [2014] EWHC 4261 (Admin);

[2015] 1 WLR 3929, the mischief at which the section 21A amendment was aimed was explained by the Home Office minister, Damian Green MP, when introducing the provision to the House of Commons on 16 July 2013 (Hansard (HC Public Bill Committee Debates) col 459) during the passage of the Anti-Social Behaviour, Crime and Policing Bill:

> "[…] the disproportionate use of the EAW for trivial offences […] New clause 23 (*viz.* section 21A) means that UK courts will be able to deal with the long-standing issue of proportionality, which is a fundamental principle of EU law. It will require the judge at the extradition hearing to consider whether extradition would be disproportionate. In making that decision the judge will have to take into account the seriousness of the conduct, the likely penalty, and the possibility of the issuing state taking less coercive measures than extradition; for example issuing a court summons. Putting that proportionality bar in the legislation will ensure that extradition, which, of course, entails a person being sent to another country and being arrested and likely to be detained, happens only when the offence is serious enough to justify it."

30. On 11 December 2013, whilst the bill was being considered in the House of Lords, Lord Hodgson of Astley Abbotts proposed Amendment 82 which would have applied the proportionality bar to both accusation/prosecution EAWs **and** conviction EAWs. He set out the justification for the amendment, as follows (Hansard, 11 December 2013, column 842):

> "The background to these amendments is the existence of two different types of European arrest warrant: a prosecution warrant where a person is to be prosecuted for a crime, and a conviction warrant where a person has been convicted and has fled to another country, knowingly or unknowingly. As drafted, the Bill provides for a proportionality check for prosecution warrants but not for conviction warrants. Amendment 82 seeks to remedy this by inserting the new clause shown. The amendment creates a proportionality check for EAWs to parallel the existing human rights bar in Section 21 which will, under the Bill, be relevant only to prosecution EAWs."

31. Lord Ahmad of Wimbledon, replying, explained why such an amendment was unnecessary:

> "My Lords, as my noble friend has said, Amendment 82 seeks to introduce a proportionality bar for post-conviction cases. […] Clause 138 will allow the UK courts to deal with the long-standing issue of proportionality, which is of course a fundamental principle of EU law in cases where a person **is sought for prosecution**. Under the EAW framework decision, an EAW can be issued in a post-conviction case only if a sentence of at least four months has been imposed. We believe that this is a sufficient proportionality safeguard in such cases." (emphasis added)

32. Lord Hodgson asked for clarification that the government intended the proportionality bar to be available only in accusation cases. Lord Ahmad repeated that:

> "For clarification, I repeat that I said that under the EAW framework, an EAW can only be issued in a post-conviction case if a sentence of at least four months has been imposed. We believe that is the sufficient proportionality safeguard in such cases."

33. Upon receipt of that explanation, Lord Hodgson sought leave to withdraw his amendment, whilst he absorbed the government's response.

34. As a consequence, the clear legislative purpose of section 21A is that the court in an accusation/prosecution case (as opposed to a conviction case) may, depending on its evaluation of factors, conclude that "*extradition would be disproportionate*" if (i) the conduct is not serious and/or (ii) a custodial penalty is unlikely and/or (iii) less coercive measures to ensure attendance are reasonably available to the requesting state in the circumstances (see *Miraszewski v Poland* [2014] EWHC 4261 (Admin); [2015] 1 WLR 3929, last sentence of [31]). Therefore, section 21A established a scheme that is designed to act as a filter to prevent the courts from giving effect to accusation/prosecution EAWs in any of these three circumstances.

35. I accept Mr Joel Smith's submissions that the suggested recourse to section 21A in the circumstances of the present case is wholly inapposite. The sentence imposed by the Hunedoara Court has resolved whether the conduct is serious, and the other two questions (*viz.* whether a custodial penalty is unlikely and whether less coercive measures to ensure attendance are reasonably available to the requesting state in the circumstances) are clearly otiose.

36. Indeed, if Mr Josse's submissions are correct, the Magistrates' Court in the present case would have been placed in an unsustainable position. On the one hand, the court would have needed to give effect to the proportionality safeguard established for conviction EAWs, namely that the appellant must have been sentenced to a term of imprisonment of 4 months or more. Section 65(3) of the Act provides that one of the conditions of an "*extradition offence*" for an individual who has been convicted and sentenced is that a sentence of imprisonment or another form of detention for a term of four months or longer has been imposed. On the other hand, notwithstanding the clear answer to that question provided by the Hunedoara Court, applying Mr Josse's approach the district judge would nonetheless have needed to assess i) the seriousness of the conduct alleged; ii) the likely penalty that would be imposed if the appellant was found guilty; and iii) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of the appellant. This would have amounted to a wholly artificial exercise, since the answers to these questions had been provided by the Hunedoara Court when imposing the sentence of 1 year 5 months' imprisonment. The first two questions – the seriousness of, and likely penalty for, the offending – were conclusively disposed of by the not insignificant prison term imposed. Indeed, as Pitchford LJ observed in *Miraszewski* at [37], "[…] *(s)ince what is being measured is*

the proportionality of a decision to extradite the requested person under compulsion of arrest, I consider that the principal focus of subsection (3)(b) is on the question whether it would be proportionate to order the extradition of a person who is not likely to receive a custodial sentence in the requesting state […]" (emphasis added). As regards the third question, the extradition of the appellant is self-evidently necessary to enable that sentence to be served. The "*proportionality bar*" in section 21A, as a consequence, would not have afforded the appellant any additional protection.

37. Mr Joel Smith is correct to argue that the reliance on Part 50A of the Criminal Practice Direction in the context of this case is equally misplaced. As stated by this court in *Miraszewski* (at [32]) the guidance provided by Part 50A serves the purpose of identifying offences that are trivial. The guidance sets the threshold at which the National Crime Agency can assume the judge would be **required** to discharge the requested person. Therefore, the guidance at Part 50A identifies a floor rather than a ceiling for the assessment of seriousness. Pitchford LJ set out at [28]:

> "[…] The Lord Chief Justice's guidance is, it seems to me, deliberately aimed at offences at the very bottom end of the scale of seriousness about which it is unlikely there could be any dispute. It must be so, otherwise the judge's freedom to apply the statutory criteria of proportionality would be unlawfully fettered. The guidance states that in the identified cases the triviality of the conduct alleged would *alone* require the judge to discharge the requested person. Subject to the exceptional circumstances identified in (the relevant) paragraph […], the NCA's decision-maker can assume that the judge *would be required to discharge* the requested person if he is sought for an extradition offence in one of the categories listed. However, a judge making the proportionality decision is not limited by these categories. He may conclude that an offence is not serious even though it does not fall within the categories listed in the guidance. […]"

38. In light of these considerations, the Criminal Practice Direction self-evidently has no application to the present case. The sentence imposed in Romania indicates that this offending could not properly be categorised as being at the very bottom end of the scale of seriousness about which it is unlikely there could be any dispute.

39. I would stress, however, that it may be arguable that different considerations apply if the individual has been convicted but not sentenced. In those circumstances it might be necessary to address whether the extradition would be disproportionate because (i) the conduct is not serious and/or (ii) a custodial penalty is unlikely and/or (iii) less coercive measures to ensure attendance are reasonably available to the requesting state. I express no view as to the merits of such an argument or how the court should undertake that assessment, if it is appropriate.

40. There was certainly no need for the district judge to modify the approach to Article 8 in the context of the appellant's case, given that all the matters on which the appellant relies under the concept of proportionality were covered by a conventional assessment of his Article 8 rights. In *Konecny,* Article 8 provided the appropriate means to address the suggested disadvantage created by the wording of section 14 of the Act because the passage of time is already a relevant factor in the Article 8 balancing exercise (see [67], [69] and [70]). Similarly, the suggested lack of seriousness of the offences in the instant

appeal is already relevant factor in the Article 8 balancing exercise and therefore it was similarly appropriate to address any disadvantage to the appellant in that way. The district judge addressed the seriousness of the offences and the penalty as part of his **Article 8 Findings and Rulings** (see [45]), observing that the Romanian authorities regarded the offences as serious enough to warrant imprisonment of some length. The judge set out:

> "The criminal conduct for which (the appellant) has been convicted are not particularly stale. He was found to have been driving by police in Romania on 2 separate occasions within a period of a few months. The Romanian authorities considered it appropriate to impose an immediate prison sentence for each of these offences, albeit having merged the sentences, the period to be served was reduced by several months."

41. This court in *Celinski* stated:

> "13. Sixth in relation to conviction warrants:
>
> (i) 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.
>
> (ii) 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 […]. 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.
>
> (iii) 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. As Lord Hope of Craighead DPSC said in *HH [2013] 1 AC 338* , para 95 in relation to the appeal in the case of PH, a conviction warrant:
>
> > "But I have concluded that it is not open to us, as the requested court, to question the decision of the requesting authorities to issue an arrest warrant at this stage. This is their case, not ours. Our duty is to give effect to the procedure which they have decided to invoke and the proper place for leniency to be exercised, if there are grounds for leniency, is Italy."

Lord Judge CJ made clear at para 132, again when dealing with the position of children, that:

> "When resistance to extradition is advanced, as in effect it is in each of these appeals, on the basis of the article 8 entitlements of dependent children and the interests of society in their welfare, it should only be in very rare cases that extradition may properly be avoided if, given the same broadly similar facts, and after making proportionate allowance as we do for the interests of dependent children, the sentencing courts here would nevertheless be likely to impose an immediate custodial sentence: any other approach would be inconsistent with the principles of international comity. 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. It certainly does not follow that extradition should be refused just because the sentencing court in this country would not order an immediate custodial sentence: however it would become relevant to the decision if the interests of a child or children might tip the sentencing scale here so as to reduce what would otherwise be an immediate custodial sentence in favour of a non-custodial sentence (including a suspended sentence)."

42. The district judge expressly referred to this part of the decision in *Celinski*. He then concluded:

> "54. (The appellant) has also taken advantage of the right he has to raise Article 8 as a challenge to this extradition request, incorporating an assessment of proportionality as provided for by that Article.
>
> 55. Having taken all the competing matters into account in the Article 8 balancing exercise, as mentioned heretofore, I am entirely satisfied that it will **not** be a disproportionate interference with (the appellant's) Article 8 Rights for him to return to Romania in accordance with this extradition request."

43. I consider this to have been an entirely supportable decision, and the approach of the district judge is not to be faulted for the reasons suggested by Mr Josse. The distinction that has been drawn between conviction and sentence warrant cases, on the one hand, and accusation warrant cases on the other, in the context of section 21A of the 2003 Act, has not – certainly in the instant extradition request – introduced a substantively unfair distinction into the law that requires an adjusted Article 8 proportionality analysis.

44. The extradition order would not have been different had the judge been asked to consider the appellant's potential inability to claim settled status under the EUSS. For the reasons set out above (see [25]), the TCA and the 2020 Act are essentially irrelevant in the present context.

45. I would dismiss this appeal.

Mrs Justice McGowan DBE:

I agree.