



Neutral Citation Number: [2022] EWHC 1507 (Admin)

Case No: CO/3985/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/06/2022

Before:

MR JUSTICE CHAMBERLAIN

Between:

IONUT-BOGDAN MERTICARIU

Appellant

- and -

JUDECATORIA ARAD, ROMANIA

Respondent

Malcolm Hawkes (instructed by **National Legal Service**) for the **Appellant**
Stefan Hyman (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 8 June 2022

Approved Judgment

Mr Justice Chamberlain :

Introduction

- 1 Ionut-Bogdan Merticariu is sought pursuant to a European arrest warrant (EAW) issued on 7 May 2019 and certified on 8 July 2019. The EAW seeks his surrender to serve a sentence imposed on 11 April 2019 for a burglary committed on 5 March 2016. The burglary was of commercial premises and the appellant, acting with others, entered using a key which they had as employees of the business concerned. Goods to the value of EUR 1,500 were originally taken, but some of these were later returned.
- 2 The appellant was arrested pursuant to the EAW on 25 September 2019, with the consequence that, under the UK-EU Withdrawal Agreement, the provisions of Framework Decision 2002/584/JHA as amended (the Framework Decision) apply.
- 3 After a hearing at Westminster Magistrates' Court, the appellant's extradition was ordered by District Judge Ezzat (as he then was) for reasons contained in a judgment handed down on 26 October 2021.
- 4 Permission to appeal was granted by Morris J on the papers on ground 1 (right of retrial) and by Holman J after a hearing on grounds 2 (Article 8 and proportionality) and 3 (passage of time and oppression).

Ground 1: Right to a retrial

The domestic statute

- 5 Section 20 of the Extradition Act 2003 (the 2003 Act) is headed "Case where person has been convicted". It provides in material part as follows:
 - “(1) If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence.
 - (2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 21.
 - (3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial.
 - (4) If the judge decides the question in subsection (3) in the affirmative he must proceed under section 21.
 - (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.
 - (6) If the judge decides the question in subsection (5) in the affirmative he must proceed under section 21.
 - (7) If the judge decides that question in the negative he must order the person's discharge.”

- 6 The judge must be satisfied that the requested person was convicted in his presence (s. 20(1)), failing which that he deliberately absented himself from his trial (s. 20(3)), failing which that he would be entitled to a retrial or (on appeal) to a review amounting to a retrial (s. 20(5)).
- 7 On each of these questions, the requesting authority bears the burden of proving the relevant matter to the criminal standard: s. 206 of the 2003 Act.

The Framework Decision

- 8 Article 4 of the Framework Decision sets out a number of optional grounds on which a state may decline to execute an EAW. In 2009, Article 4a was inserted. Insofar as material, it provides as follows:

“1. The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:

(a) in due time:

- (i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial;

and

- (ii) was informed that a decision may be handed down if he or she does not appear for the trial;

or

- (b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;

or

- (c) after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:

- (i) expressly stated that he or she does not contest the decision;
- or
- (ii) did not request a retrial or appeal within the applicable time frame;
- or
- (d) was not personally served with the decision but:
 - (i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed;
 - and
 - (ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.”

9 EAWs are prepared on a proforma, which reflects the provisions of Article 4a.

The EAW in this case

10 In this case, the EAW has an “X” next to box 3.2, which says that “being aware of the scheduled trial, he had instructed a lawyer who was either appointed by the person concerned or ex officio to defend him at the trial, and was indeed defended by that lawyer at the trial”, indicating that, in the view of the requesting judicial authority, this was a case to which Article 4a(1)(b) of the Framework Decision applied.

11 There is another box, 3.4, which does not have an “X”, but says this:

“the person was not personally served with the decision but:

- decision will be personally served without delay after surrendering; and

- when served with the decision, the person will be expressly informed about the right to a retrial or an appeal, in which has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined and which may lead to the cancellation of the original decision; and the person will be informed of the time he has to request a retrial or appeal, which is 10 days.”

12 So, the judicial authority had the opportunity to indicate that Article 4a(1)(d) of the Framework Decision applied, but did not do so.

- 13 In box 4, information is required to be provided if any of boxes 3.1b, 3.2 or 3.3 is checked. The information is as follows:

“the defendant Bogdan Ionut-Merticariu was not present in court during the trial, he was represented at the hearings by public defender appointed by the court.”

- 14 Later on in the EAW, there is reference to a “legal pledge” in these terms:

“According to Article 466 Penal Procedure Code: Reopening criminal proceedings in case of an in absentia trial of the convicted person par. (3) ‘In the case of the person with a final conviction, tried in absentia, related to whom a foreign state ordered extradition or surrender based on the European arrest warrant, the time frame provided under par. (1) shall begin from the date when, following their bringing into country, they receive the conviction verdict.’”

- 15 Article 466 is not spelled out in full in the EAW, but it is common ground that its material provisions include those cited by the Divisional Court in *BP v Romania* [2015] EWHC 3417 (Admin), at [38]:

“Reopening criminal proceedings in case of an in absentia trial of the convicted person

(1) The person with a final conviction, who was tried in absentia, may apply for the criminal proceedings to be reopened no later than one month since the day when informed, through any official notification, that criminal proceedings took place in court against them.

...

The convicted person who had appointed a retained counsel or a representative shall not be deemed tried in absentia if the latter appeared at any time during the criminal proceedings in court...

(4) The criminal proceedings in court may not be reopened when the convicted person had applied to be tried in absentia.”

The District Judge’s judgment

- 16 The District Judge noted at [15] of his judgment that, despite box 3.2 being checked, no evidence had been provided on how the appellant had been informed of the trial and the judicial authority “do not appear to be arguing that the RP was properly informed”. The respondent did not submit that the District Judge could be satisfied to the criminal standard that the appellant had been properly informed of the proceedings. Thus, as Mr Hyman expressly confirmed in his oral submissions before me, there is no challenge to the District Judge’s finding at [16] that:

“I cannot be satisfied on the evidence before the court that the RP was properly informed of proceedings. Therefore, I cannot and do not make a

finding that the RP was deliberately absent from proceedings. Consideration must now be given as to whether the RP has a right to a retrial.”

17 It is clear, therefore, that the District Judge had reached the third of the questions in s. 20 (that posed by s. 20(5)).

18 On this question, the District Judge noted that box 3.4 had not been checked. It was common ground that, despite the “legal pledge” and the reference to Article 466 of the Romanian Code of Criminal Procedure, the EAW did not clearly show that the appellant would have the right to a retrial. The District Judge provisionally agreed and so asked for further information. This was provided on 24 September 2020 in these terms:

“...we specify that in accordance with the provisions of art. 466 of the Romanian Code of Criminal Procedure, the convicted person may request the reopening of the criminal proceedings, under the conditions of article 466 paragraphs 1-4 of the Code of Criminal Procedure.

In the case of trial in the absence of the convicted person based on art. 466 para. (3) ‘For a person convicted definitively tried in absentia against whom a foreign state has ordered his extradition or surrender on the basis of the European arrest warrant, the term provided in paragraph (1) shall run from the date on which, after being brought into the country, he was communicated the conviction decision’.” (Emphasis added.)

19 The District Judge accepted that the further information “could have been more helpfully phrased”, but found the Mr Hyman’s submissions to be “of significant assistance”. He then cited a passage from *Cretu v Romania* [2016] EWHC 353 (Admin), [2016] 1 WLR 3344, at [42], in which the Divisional Court said that it was “common ground that art 466 [of the Romanian Code of Criminal Procedure] was introduced by way of amendment to. Transpose into Romanian law the relevant parts of art 4a of the Framework Decision. It can be assumed that Romanian law will provide the right to a retrial in appropriate cases.”

20 The District Judge concluded as follows:

“22. In the EAW and FI the JA rely on the rights conferred on the RP by article 466. Article 466 has been found to confer a right to a retrial for defendants tried in absentia.

23. I therefore find that the RP has a right to a retrial and that his extradition should not be prevented because of a lack of retrial rights.”

Submissions

21 For the appellant, Malcolm Hawkes submits that the judge misunderstood *Cretu*. In that case, the requesting authority had put an “X” in box 3.4. The key point established by *Cretu*, he submits, was that the Article 4a of the Framework Decision required compliance with that provision to be judged by reference to the EAW. It was common ground that the EAW did not show that the appellant would have a right to a retrial. Nor did the further information provide the necessary certainty.

- 22 For the respondent, Mr Hyman cited *BP v Romania* at [44] for the proposition that Article 466 confers an “entitlement” to a retrial and that, where a judicial authority affirms that such an entitlement exists, nothing more can be required of it.

Discussion

- 23 Subject to two authorities considered below, there is considerable force in Mr Hawkes’ submission:
- (a) The starting point must be the language of s. 20 of the 2003 Act. Parliament could have said that the judge must consider whether the person would be entitled to a retrial unless the courts of the requesting state decide that he was deliberately absent from his original trial. It did not. Instead, it posed three distinct questions, each of which was to be answered separately by the UK judge, applying the criminal burden and standard of proof. In a case such as the present, where the UK judge is not satisfied that the requested person deliberately absented himself from his trial, s. 20(5) requires the UK judge to decide only one question, namely “whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial”. On a natural reading of the words Parliament used it may be argued that, if the answer is contingent upon some other decision whose outcome cannot be predicted to the requisite standard of certainty, the question must be answered in the negative.
 - (b) Whether a person is “entitled” to a retrial depends on whether he has the “right under law” to a retrial: *Da An Chen v Romania* [2006] EWHC 1752 (Admin), [8] (Mitting J). A right to a retrial has to be automatic and is inconsistent with the existence of a discretion whether to grant a retrial: *Bohm v Romania* [2011] EWHC 2671 (Admin).
 - (c) A requested person may have the right to a retrial even if the domestic law of the requesting state requires him to take “procedural steps” in order to invoke the right: see e.g. *Benko v Hungary* [2009] EWHC 3530 (Admin) (where, on the evidence, a retrial would be granted if applied for, but would not take place unless requested: [18]). But if the entitlement to a retrial is conditional on a preliminary finding that the requested person was not deliberately absent from his trial, the proceedings leading to that finding would not naturally be referred to as a “procedural step”; it may be argued that those proceedings should be regarded as involving a decision on a substantive issue.
- 24 The case law establishes that s. 20(5) may be satisfied even if the domestic law of the requesting state confers on a judicial authority a power to refuse a retrial, provided that the court is sure on the facts that the power would not be exercised. So, for example, s. 20(5) was satisfied where the prosecuting authorities of the requesting state expressed the firm view that the appellant was not deliberately absent from his trial and thus should be entitled to a retrial. In those circumstances, the “theoretical possibility” that the court might take a different view was “so remote that it can be discounted”: *Ahmetaj v Italy* [2010] EWHC 3924 (Admin), [14]. See also *Rexha v Italy* [2012] EWHC 3397, [43]-[46].
- 25 In *Nastase v Italy* [2012] EWHC 3671 (Admin), the Divisional Court concluded that s. 20(5) was satisfied in a case where the law allowed a request to be refused if it was

positively proved that the requested person had knowledge of the original trial but, on the facts, there was nothing to indicate such knowledge: [44]-[45]. This can be seen as a case where the court was satisfied on the facts that a retrial would be granted.

- 26 In this case, however, there is no evidence to indicate that a retrial would be granted if the appellant requested one. The EAW contains a positive indication that, in the view of the Romanian judicial authority, the appellant had instructed a lawyer who defended him at his trial. The further information provides an assurance that the appellant can “request” a retrial, but says nothing about the likelihood of the request being granted. Article 466(1) of the Code of Criminal Procedure, as set out in *BP*, provides: “The convicted person who had appointed a retained counsel or a representative shall not be deemed tried in absentia if the latter appeared at any time during the criminal proceedings in court.” So, the possibility of the request being refused, far from being “so remote that it can be discounted”, appears to be a real one, if the court accepts the facts alleged by the prosecuting authority.
- 27 *Cretu* takes the matter no further. In that case, boxes 3.2 and 3.4 had been checked: see [4]. The Divisional Court considered it conceivable that Romanian law provided a right to a retrial even where the appellant had been properly served with the proceedings and had instructed a lawyer who had represented him at his trial: [38]. The court rejected the argument that there was no right to a retrial on a proper construction of Article 466 of the Romanian Code of Criminal Procedure because this contradicted what was said in the EAW and, under the scheme of Article 4a of the Framework Decision, the EAW was to be treated as determinative: [42]. In the present case, as noted, the EAW does not say that the appellant will have the right to a retrial; nor does the further information.
- 28 There are, however, two cases which pose considerable difficulty for Mr Hawkes’s argument. The first is *Zeqaj v Albania* [2013] EWHC 261 (Admin), where, at [12], Gloster J said this:

“Under sub-section 85(5) of the 2003 Act, if a judge decides that a person, who was convicted in his absence by the requesting state, has not deliberately absented himself from his trial, the judge must go on to decide

‘... whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial.’

However I point out that such a decision is necessarily based on the premise, or hypothesis, that, as found by the judge, there has been no deliberate non-attendance at trial. It does not seem to me that, under the subsection, the judge is required to conclude (before ordering extradition) that, even if the requesting Court were to reach a different conclusion on that factual issue, it would have to afford an automatic right of retrial to the person subject to the extradition request.”

- 29 The second case is the Divisional Court’s decision in *BP*. In that case, as here, the District Judge had decided that the appellant was not deliberately absent from his trial: [38]. The argument for the requested person (who, as here, was represented by Mr Hawkes) was recorded at [40] as follows:

“Mr Hawkes contended that the appellant would not be considered to have been tried in absentia under Article 466, since it was quite clear that the Romanian judicial authority is of the view that Mr Octavian was acting for the appellant in her defence. The warrant alleges that he was delegated to do that, and the further information of 30 October 2014 states that the appellant's parents-in-law instructed him on her behalf and that her mother attended almost every court hearing. The latest letter of 22 September 2015 does not resile from that position. In other words, submitted Mr Hawkes, on the Romanian view there would be no entitlement to a retrial given Articles 466(2) and 466(4). Despite the District Judge's finding that the appellant did not agree to her ex-husband's lawyer acting on her behalf in this way, and did not instruct or receive advice from him, the Romanian judicial authority has only conceded that the finding can be adduced in the application for a retrial but, as per the letter of 22 September 2015, it will not be ‘mandatory’. In summary, Mr Hawkes submitted, the appellant is in a position of uncertainty about whether she will be afforded a retrial. Since her absence from the trial, which led to her conviction, was not deliberate, and since she does not have any guarantee that it may be reopened, in accordance with [section 20\(7\)](#) of the 2003 Act the warrant must be discharged.”

- 30 The argument in *BP* was materially identical to the argument here. The only difference between the facts of *BP* and those here was that, in the former, the Romanian judicial authority had filed evidence, which was summarised at [36]:

“The letter of 22 September 2015 states that the appellant's evidence regarding this could be presented to the Romanian Court, before it considered the matter, but it was not possible to regard the finding of District Judge Purdy as ‘mandatory’. The letter of 2 November 2015 restates Mr Octavian's account, and that ‘therefore’ the appellant could not assert she was unaware of the trial.”

- 31 The Divisional Court cited the decisions in *Nastase* and *Zeqaj*. Then, at [44], it said this:

“To my mind the appellant has an entitlement in this case to a retrial in Romania. Article 466 provides that. There is no discretion in the Romanian court to deny that right. Admittedly the Romanian court could decide that the appellant had appointed Mr Octavian to represent her, through her mother or otherwise, and therefore does not qualify for a retrial under Article 466. But that is a ‘procedural step’, as it was described in *Nastase*. There Rafferty LJ held that, although the Italian court could theoretically refuse a retrial where it was satisfied that a requested person knew of the original proceedings and voluntarily absented himself, that was a procedural step which did not detract from the unconditional nature of the legal right. In this case the Romanian Judicial Authority has stated that in making the decision under Article 466 it will take into account the District Judge's conclusion that the appellant did not know Mr Octavian was acting for her and that it seemed that her mother was unaware of what was going on, but it is not ‘mandatory’. Nothing more can be required on the Romanian Judicial Authority. We work on the basis of mutual trust between Convention states, especially if EU members. If the Romanian court finds that the appellant had not instructed the lawyer she is

entitled under their law to a retrial. Consequently, the District Judge was correct in his conclusion that the [section 20\(5\)](#) is satisfied.”

- 32 In my judgment, this passage makes clear that the Divisional Court in *BP* regarded *Nastase* and *Zeqaj* as authority for the proposition that a right to a retrial which is conditional on a finding by the judicial authority of the requesting state that the requested person was not deliberately absent is sufficient to satisfy s. 20(5). The Court did not proceed on the basis that the possibility of the Romanian Court refusing a retrial was remote, or that it could be sure on the facts that a retrial would be granted. Neither of these conclusions could be or was inferred from the assurance that the Romanian court would take into account the magistrate’s finding. If the Divisional Court’s decision in *BP* is correct, it determines ground 1 against the appellant.
- 33 There is no relevant distinction between this case and *BP*. I have not been referred to any statutory provision or authority which was not before the Divisional Court in that case. If there is ever a case where it is appropriate for a single judge to depart from a Divisional Court authority (as to which see *R v Greater Manchester Coroner ex p. Tal* [1985] QB 67, 81), this is not it. Judicial comity requires me to follow the Divisional Court’s reasoning. Ground 1 must therefore fail.

Ground 2: Article 8 ECHR

The District Judge’s analysis

- 34 In relation to Article 8 ECHR, at [25] the District Judge directed himself in accordance with the relevant authorities: *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 v Poland* [2015] EWHC 1274 (Admin), [2016] 1 WLR 551. The question was whether the interference with the appellant’s private and family life was outweighed by the public interest in extradition.
- 35 As to the factors militating in favour of extradition, at [27], the District Judge noted that the offence was “relatively serious”. This was a commercial burglary committed with others and a sentence of 1 ½ years’ imprisonment had been imposed. At [28], he said that the UK should honour its international obligations and should not become a safe haven for “fugitives”. At [30], he noted that the appellant accepted that he had taken the property without permission but maintained that he had done so in order to satisfy a debt which he said he was owed by his employer.
- 36 As to the factors militating against extradition, at [31], the District Judge noted that the appellant had lived in the UK since 2015, had established a private life and was not a fugitive. At [32], he noted that the appellant had been in a relationship with his partner for the past five years and that his partner had 3 children (then aged 12, 13 and 14). The appellant contributed financially to the household and gave practical assistance with to his partner in looking after the children. At [32], he noted that the appellant’s partner had previously suffered from depression and was concerned that this may recur if the appellant were extradited. At [33], he noted that the appellant sent money back to Romania to support his family there. At [34], the District Judge noted that the appellant had not committed any offences while in the UK.

- 37 Finally, at [35], he noted that, if the appellant's extradition were ordered, he may have difficulty in returning to the UK following the end of the transitional period.
- 38 Balancing the considerations in favour of and against extradition, the District Judge accepted that the appellant's absence would undoubtedly be felt by his partner and her children emotionally, practically and financially (see [37]), but noted that his partner had been a single parent before the relationship with the appellant began and had provided for her children without support from him during this time (though she had then been receiving support from her brother and sister, which was no longer available) (see [38]). The District Judge found it unclear why the brother and sister should be unable to continue to provide support because of the former's relocation and the latter's having a pacemaker fitted (see [39]). The District Judge noted that the appellant's partner had referred to the couple saving up to get married and said that these savings could presumably be called upon if the appellant were extradited (see [40]).
- 39 The District Judge held that, while the children would inevitably suffer (and there was no reason to go behind the suggestion that he played a central role in their lives), they were old enough that it could be explained to them "what is taking place and that the RP's absence is going to be temporary" (see [41]). There was no evidence that the effect on the appellant of extradition would be exceptionally severe (see [42]). The interference with the appellant's Article 8 rights would not be disproportionate (see [43]).

The appellant's submissions

- 40 Mr Hawkes submits that the District Judge fell into error in his determination of the gravity of the conduct (this being essentially a case of theft from an employer in circumstances where the appellant believed he was owed money by his employer), failed to take into account the delay between the offending and the proceedings and was confused as to whether the appellant was a fugitive. Mr Hawkes emphasises that the appellant's partner and her family have no connection whatsoever with Romania and her evidence as to her inability to cope financially without the appellant was not challenged in cross-examination. In addition, there was a strong question mark over the appellant's ability to return to the UK if extradited, given the effect of Brexit on the immigration position of persons in the appellant's position.
- 41 Mr Hawkes relied on amended statements from the appellant and his partner and invited me to admit these as fresh evidence pursuant to s. 27(4) of the 2003 Act.

The respondent's submissions

- 42 For the respondent, Mr Hyman submitted that there was no suggestion that the appellant's partner and her children would relocate, so it did not matter that they were Polish, not Romanian. The impact on their Article 8 rights was the effect of the appellant's absence for at least 18 months. Although the appellant's partner was not cross-examined, the District Judge was entitled to draw common sense conclusions from her statement, including that she had coped financially before the relationship with the appellant began. Anyway, the effect on the appellant's partner and her children was considered. There was no basis for the suggestion that the District Judge was wrong to find the offence "relatively serious": the facts and any mitigation were for the Romanian court; and at this stage it was permissible to take into account the fact that an 18-month custodial sentence

had been passed. The District Judge was well aware of the fact that the appellant was not a fugitive.

- 43 As to the Brexit uncertainty point, Mr Hyman submitted that the District Judge cannot be criticised for failing to deal with this point. It is unclear how the Secretary of State will respond if the appellant seeks to return after serving his sentence. In any event, had the point been considered it would have made no difference.
- 44 As to the fresh evidence, Mr Hyman submitted that it should not be admitted because it is not decisive. Taken as a whole, it shows that the appellant's partner will suffer some hardship and that this falls short of what would be required to render extradition disproportionate.

Discussion

- 45 On this aspect of the appeal, I must focus on “what the judge ought to have decided differently, so as to mean that the appeal should have been allowed”, bearing in mind that “extradition appeals are not... mere repeats of how factors should be weighed”. The overall question is whether “crucial factors should have been weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed”: *Love v USA* [2018] EWHC 172 (Admin), [2018] 1 WLR 2889, [25]-[26].
- 46 In my judgment, the District Judge cannot be criticised for regarding the offence for which the appellant is sought as “relatively serious” by reference to the fact that it was a commercial burglary, committed with others for which a custodial sentence of 18 months had been imposed. He was entitled to base his assessment of the seriousness of the offence on the facts contained in the EAW, rather than the appellant's account of the circumstances.
- 47 The reference to the public interest in ensuring that the UK did not become a safe haven for “fugitives” was, in context, clearly an erroneous repetition of a factor identified in the authorities as a factor capable of militating in favour of extradition. It was not, however, a significant error because the District Judge made plain that he understood that the appellant was not a fugitive and, fugitive or not, there remained a strong public interest in the UK being seen to honour its international obligations.
- 48 As to the effect of extradition on the appellant's partner and her three children, the District Judge took this into account. He was entitled to draw common sense inferences from the evidence. He accepted that there would be emotional, financial and practical consequences; and he weighed these against the factors militating in favour of extradition.
- 49 There was some delay between the events giving rise to the charge and the date when the sentence was imposed, but the period between the offence and the conviction was less than 3 years and the period between the offence and the imposition of the sentence just over three years. Unlike in some extradition cases, there was no significant delay in issuing the EAW and the delay since then is attributable to the extradition proceedings in this jurisdiction and is, in any event, unremarkable for proceedings during the Covid-19 pandemic. Mr Hawkes urged me not to gauge the delay in the Romanian criminal proceedings by reference to the delays sometimes seen in this jurisdiction. He submitted that I should proceed on the basis the latter were often unacceptable too. In my judgment,

however, some sense of comparative perspective is required here. A delay of less than 3 years between the offence and the conviction is not so egregious when compared with what is seen in other extradition cases as to be of critical significance to the Article 8 balancing exercise in a case where the offence resulted in a custodial sentence of 18 months. In my judgment, this delay – even if it could be regarded as culpable on the part of the requesting state – does not tip the Article 8 balance in the appellant’s favour.

- 50 The only feature of the District Judge’s judgment which could potentially constitute an error that would justify interfering with his decision is his assumption that the separation of the appellant from his partner and her children would be temporary. This is what was referred to in argument as the “Brexit uncertainty” point.
- 51 In *Pink v Poland* [2021] EWHC 1238 (Admin), at [52], I accepted that there was a prospect that the appellant would not be readmitted after being extradited. However, I then said this:

“I do not think that this can properly be regarded as a consequence of extradition. It is, rather, a consequence of (i) the appellant’s criminal convictions in Poland and (ii) the change to the immigration rules as a result of Brexit. Mr Hawkes said that the appellant could expect to acquire settled status if discharged from the existing warrant by this court. He was not, however, able to point to any policy document indicating that the Home Office’s attitude to applications by persons with criminal convictions in EU Member States would be affected by whether the applicant had been extradited in respect of those offences. In the absence of any such document, I do not think it would be safe to make the assumption that extradition would make a difference to a person such as the appellant, who has been in the UK for a continuous period of more than 5 years since his release from prison in Poland in 2015.”

- 52 Mr Hawkes drew my attention to two earlier cases in which a different view had been taken: the decisions of Fordham J in *Antochi v Germany* [2020] EWHC 3092 (Admin) and of Sir Ross Cranston in *Rybak v Poland* [2021] EWHC 712 (Admin). The issue was considered in two more recent decisions of Linden J in *Piekarski v Poland* [2022] EWHC 1088 (Admin) and of Swift J in *Gurskis v Latvia* [2022] EWHC 1305 (Admin), by which time the likely immigration position of those extradited without settled status had become a little clearer.
- 53 In *Piekarski*, Linden J noted at [23] that a person who was extradited and wished to re-enter the UK would have to identify a ground for entry and, even if he could, would be met by rule 9.4.1 of the Immigration Rules, which provides that an application for entry clearance, permission to enter or permission to stay must be refused where the applicant has been convicted of a criminal offence in the UK or overseas for which they have received a sentence of 12 months or more. At [25], Linden J recorded that he had asked for a joint note on the question whether the appellant (who satisfied the five-year residence requirement) would be subject to deportation action in the event that he was not extradited.

54 In *Gurskis*, at [33], Swift J said this:

“Drawing these matters together, Fordham J’s notion of Brexit uncertainty has now been overtaken by events. When the judgment in *Antochi* was given it was not yet clear what immigration rules would apply to EU nationals. Now there is a settled position. Requested persons who have settled status under Appendix EU will in most instances be able to show that extradition will entail interference with their article 8 rights; absent extradition it is unlikely that they would be subject to immigration removal on account of a foreign conviction. But the duration of the interference is likely to be finite; having served the sentence it is likely that an application to re-enter the United Kingdom would succeed. Requested persons who do not have settled status are subject to the immigration rules other than Appendix EU. The assessment of the extent to which extradition will interfere with article 8 rights should take account not only of the obstacles to any future application to re-enter the United Kingdom (see, for example, the rules at paragraph 26 above), but also the counterfactual – i.e., the likelihood that, absent extradition, the foreign conviction could provide grounds for immigration removal. In some instances, there may be a difference between the scenario in which an extradition order is made and the counterfactual. There may be situations where if no extradition order is made no interference with article 8 rights would be likely for any other reason. When that is so the article 8 analysis must take account of that difference. But other cases may make good what Chamberlain J suspected in his judgment in *Pink* – that interference with article 8 rights may be the same whether or not the extradition order is made.”

55 I respectfully agree with the reasoning of both Linden J and Swift J. The only point I was seeking to make in *Pink* was that post-Brexit changes to the Immigration Rules might affect cases of this kind (i.e. those involving conviction warrants) in more than one way: by making it more likely that the requested person will be deported if he is not extradited, as well as by making it more likely that he will be denied leave to re-enter if he is. The question in all cases is whether there is – to adopt Swift J’s language – “a difference between the scenario in which an extradition order is made and the counterfactual”. That is a question which needs to be addressed by evidence about the appellant’s current immigration status and by reference to the Immigration Rules in force at the relevant time. In some cases, the appellant’s position in the event of extradition or non-extradition might depend to some extent on the exercise of a discretion and so may be in some respects uncertain. If so, it may be relevant to compare the degree of uncertainty in the two situations. Uncertainty may also give rise to worry, which is also a matter that can potentially be relevant to the Article 8 balancing exercise.

56 Although there is much less evidence here than in *Piekarski* about the appellant’s likely position in the event of extradition, I am prepared to accept on the basis of the provisions in the Immigration Rules referred to by Linden J that there is a strong possibility that the appellant would not be re-admitted to the UK if he were extradited and served his sentence (or another sentence imposed after a retrial, if the sentence were one of 12 months or longer). Equally, I am prepared to accept for the purposes of this argument (without making any finding to this effect) that there is no particular reason to believe that he would be deported if he is not extradited. That being so, and on the basis that his family remain here, there is a strong possibility that extradition would have a material effect on his ability to reunite with his family after serving his sentence in Romania.

57 Given that this point was not developed before the District Judge in the way it has been developed before me, it would be wrong to criticise the District Judge for failing to deal with it. I do not underestimate the importance of the appellant's extended separation from his partner and her children. But, having considered the point myself, I do not think it is so significant that it would have tipped the scales in the appellant's favour. The appellant's children are now 14, 15 and 16. If he is extradited and serves a substantial sentence in Romania, they will be older still. Although they are not Romanian and do not speak the language, there will be nothing to stop them travelling to Romania to visit the appellant with their mother or, particularly once they are over 18, on their own. This does not eliminate, but does mitigate, the effect of extended separation on the family unit. The effect must, moreover, be balanced against the public interest in honouring the UK's international commitments, which the District Judge rightly regarded as important.

The fresh evidence

58 The appellant has applied for permission to adduce two statements not before the District Judge: one from him and one from his partner. I have considered those statements *de bene esse*, with a view to deciding whether they satisfy the test for admission in *Hungary v Fenyvesi* [2009] EWHC 231, [2009] 4 All ER 324, at [35]. In my view the fresh evidence is not "decisive" in the sense that it would have resulted in the District Judge deciding to discharge the appellant. The appellant's partner's statement indicates that the couple's savings have been used up. However, although that appears to be a new development, the District Judge acknowledged that there would be some level of financial and emotional harm to the partner and her children if the appellant were extradited. The new evidence does not change the position in a "decisive" way. Accordingly, the test for admitting the fresh evidence is not met. I refuse permission to adduce it.

Ground 3: Passage of time (s. 14 of the 2003 Act)

59 In the course of argument, Mr Hawkes accepted that he could not rely on the passage of time as a freestanding ground on which to challenge the District Judge's decision, though he emphasised that it was relevant to the Article 8 balancing exercise. I have already explained why the delay between the offence and the conviction in Romania was not such as to affect the Article 8 balance.

Conclusion

60 For these reasons, none of the grounds of appeal is made out. The appeal will therefore be dismissed.