Neutral Citation Number: **[2023] EWHC 18 (Admin)**

Case No: CO/4004/2021

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

IN THE MATTER OF AN APPEAL UNDER
SECTION 26 OF THE EXTRADITION ACT 2003

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 January 2023

Before :

THE HONOURABLE MR JUSTICE MURRAY

- -

Between :

TODOR IVANOV ATANASOV	**Appellant**
- and -	
DISTRICT PROSECUTOR'S OFFICE, KARLOVO, BULGARIA	**Respondent**

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- -

Mr James Stansfeld (instructed by **Janes Solicitors**) for the **Appellant**
Ms Amanda Bostock (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing date: 6 December 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down are deemed to be 11 January 2023 at 10:30 am.

Mr Justice Murray :

1. The appellant, Mr Todov Ivanov Atanasov, appeals against the extradition order made on 16 November 2021 by DJ(MC) Leong at the Westminster Magistrates' Court. Bennathan J granted permission to appeal on a single ground at a hearing on 12 July 2022 of the appellant's renewed application for permission to appeal.

2. The single ground of appeal is that the district judge erred in concluding that the extradition of the appellant was compatible with his and his family's rights under Article 8 of the European Convention on Human Rights (ECHR). A second ground of appeal based on Article 3 ECHR is no longer pursued in light of the Divisional Court's decision in *Mihaylov v Bulgaria* [2022] EWHC 908 (Admin).

Applications to adduce additional evidence

3. The appellant has made two applications to adduce for this appeal evidence that was not before the district judge, namely:

    i) an application dated 20 June 2022 to adduce the witness statement dated 16 February 2022 of Ms Veliyana Nikolova, who is the appellant's partner and the mother of his son, who is now four years old; and

    ii) an application dated 25 November 2022 to admit a further witness statement dated 25 November of Ms Nikolova, together with two exhibits.

4. In his order dated 12 July 2022, Bennathan J directed that the appellant's first application to adduce additional evidence be considered at this appeal hearing. In his application notice for the second application, the appellant states that further evidence of Ms Nikolova is needed to provide context for the evidence in her earlier witness statement and to exhibit important documentation.

5. The principles that apply to the admissibility of additional evidence on appeal in the context of extradition appeals are, unsurprisingly, similar to the principles that apply in other contexts. The principles applicable in this context were set out by the Divisional Court in *Hungary v Fenyvesi* [2009] EWHC 231 (Admin). That case involved an appeal by a judicial authority under section 28 of the Extradition Act 2003 against the discharge of the respondents at an extradition hearing. The court was therefore required to consider the terms of section 29 (Court's powers on appeal under section 28), which sets out conditions that must be satisfied if the court is to allow the judicial authority's appeal, including as to the availability of evidence that was not available at the extradition hearing.

6. In *Zabolotnyi v Hungary* [2021] UKSC 14, [2021] 1 WLR 2569 (SC), the Supreme Court affirmed the *Fenyvesi* principles at [56]-[61]. It also confirmed (if confirmation was needed) that the principles apply equally to an appeal by a requested person against an extradition order under section 26 of the Extradition Act 2003, which requires the court to consider the terms of section 27 (Court's powers on appeal under section 26), including the conditions set out there, which parallel those in section 28.

7. In *Fenyvesi* at [4], the Divisional Court described the underlying policy as "often" being that "fresh evidence may be received when it is just to do so; or perhaps when it would

be unjust not to do so". In respect of evidence "that was not available at the extradition hearing", the Divisional Court held at [32] that a requested person must demonstrate that:

> "32. … [the] evidence … either did not exist at the time of the extradition hearing, or … was not at the disposal of the party wishing to adduce it and which he could not with reasonable diligence have obtained."

8. As to the general approach to be taken, the Divisional Court in *Fenyvesi* gave the following guidance at [34]-[35]:

> "34. Section 29(4) of the Extradition Act 2003 is not expressed in terms which appear to give the court a discretion; although a degree of latitude may need to be introduced from elsewhere. As Latham LJ said in *Miklis* [*v Lithuania* [2006] EWHC 1032 (Admin)], there may occasionally be cases where what might otherwise be a breach of the European Convention on Human Rights may be avoided by admitting fresh evidence, tendered on behalf of a defendant, which a strict application of the section would not permit. … ."

> "35. Even for defendants, the court will not readily admit fresh evidence which they should have adduced before the district judge and which is tendered to try to repair holes which should have been plugged before the district judge, simply because it has a human rights label attached to it. The threshold remains high. The court must still be satisfied that the evidence would have resulted in the judge deciding the relevant question differently, so that he would not have ordered the defendant's discharge. In short, the fresh evidence must be decisive."

9. I have read the additional evidence *de bene esse*. I will return to the appellant's applications to adduce additional evidence at the end of this judgment.

Background

10. The appellant's extradition is sought pursuant to an international arrest warrant issued on 7 June 2018 by the District Prosecutor's Office, Karlovo in Bulgaria. The arrest warrant was certified by the National Crime Agency under section 2(7) of the Extradition Act 2003 on 28 June 2021. The respondent provided a response dated 25 August 2021 to a request for further information ("the Further Information").

11. The appellant was arrested on 28 July 2021, having, by appointment, attended voluntarily with his solicitor at a police station. Following his production at court that day, he did not consent to extradition. The extradition hearing was adjourned to 8 November 2021. He was remanded on conditional bail and has been on bail throughout.

12. The arrest warrant relates to two offences of which the appellant was convicted and for which he was sentenced in Bulgaria. The total sentence imposed, and which it remains for him to serve, is two years' imprisonment, comprised of one year's imprisonment for each offence, to be served consecutively.

13. The two offences are set out in reverse chronological order in the arrest warrant, but I will summarise the details here in chronological order, based on the information in the arrest warrant as supplemented by the Further Information:

    i) The first offence ("First Offence") was a public order offence contrary to Article 325 of the Bulgarian Penal Code, committed on 17 July 2014, when the appellant was 21 years old. The appellant "committed obscene acts, grossly violating public order and expressing obvious disrespect for society" against two employees of the Karlovo Regional Police Department. The appellant and his father were apparently creating a disturbance in a restaurant in Banya in Plovdiv Province, Bulgaria. The appellant and his father were making noise, banging on window displays and tables, and quarrelling with staff. A waitress called the restaurant owner, who in turn called the police. Two police officers in uniform arrived initially. The appellant and his father refused to cooperate with them and acted in a "frankly threatening manner" towards them, including telling one of the police officers that they knew him, knew that he had a family, and knew where he lived. Eventually, another patrol car was summoned to assist, and two further police officers arrived. During the incident, the appellant and his father shouted, behaved "indecently", and threatened, insulted and pushed police officers. The appellant and his father were in due course taken to the police station. At the police station, the appellant and his father again threatened a specific officer, saying that they knew where he lived, knew that he had a wife and child, and threatened that after they were released, they would go to his house and "rape him".

    ii) The second offence ("Second Offence") was driving a motor vehicle after the use of drugs, committed on 19 June 2017, when the appellant was 24 years old. The appellant was stopped by police after they had observed him driving "uncertainly". Having observed that the appellant's eyes were red, his pupils dilated, his gait unsteady, and his speech slurred and unintelligible, the police administered a roadside test, which identified that he had been driving having used tetrahydrocannabinol and amphetamine, contrary to Article 3436 of the Bulgarian Penal Code.

14. According to the Further Information:

    i) The appellant pleaded guilty to the First Offence on 26 February 2015 in the Karlovo District Court and was sentenced to one year's imprisonment, suspended for three years. He was present at the hearing where he was convicted and sentenced.

    ii) On 22 June 2017, the appellant was present at a hearing before the Plovdiv District Court in relation to the Second Offence, at which he was represented by Bulgarian counsel, during the course of which he was made subject to a pre-trial detention order (referred to in the Further Information as "Supervision with signing") under which he was subject to:

a) an obligation to notify the judicial authorities of his change of address; and

b) an obligation not to leave his place of residence without the permission of the relevant authority.

iii) The appellant was present at the hearing on 26 September 2017 in the Plovdiv District Court where he was convicted of the Second Offence. The court sentenced him to one year's imprisonment, imposed a fine of BGN 500 (Bulgarian Leva) and imposed a driving ban of eight months. It also activated the suspended sentence imposed for the First Offence, the two sentences to be served consecutively for a total of two years' imprisonment.

iv) Subsequently, the appellant's sentence for the Second Offence was appealed by the appellant and "protested" by the prosecutor. The appellant was not present at the appeal hearing. He was, however, represented at the hearing by counsel. Following the appeal hearing, on 19 February 2018 the Plovdiv District Court increased the custodial sentence from one year to one year six months' imprisonment and the driving ban to two years. The remainder of the sentence was confirmed. From that date, the sentence was final, was not subject to appeal, and was enforceable (but see below regarding the "extraordinary procedure").

v) In relation to the appellant's non-appearance at the hearing, a summons for him to appear had been issued. The summons was served on the appellant's father, who undertook to notify his son of it. The Further Information makes clear that the participation of a defendant in appeal proceedings is not mandatory if it relates to a charge that is not a "serious offence" (page 7 of the Further Information) or is a "minor offence" (page 8 of the Further Information), meaning in each case an offence that is punishable by imprisonment for five years or less. I note that the maximum sentence for the First Offence was five years. The maximum offence for the Second Offence was three years. Accordingly, although summonsed, the appellant was not required to attend the appeal hearing, and, as I have already noted, he did not attend it.

vi) Following the appellate decision of 19 February 2018, the appellant, through his lawyer, made a request to the appellate court in Plovdiv for a review of his sentence "under the extraordinary procedure for the resumption of completed criminal proceedings". The extraordinary procedure involved a further hearing before the appellate court at which the appellant did not attend but was represented by counsel. Following this hearing, the appellate court in a decision dated 9 May 2018 reverted the sentence for the Second Offence to one year's imprisonment but confirmed the fine of BGN 500 and the driving ban of two years. It also confirmed the activation of the sentence of one year's imprisonment for the First Offence.

vii) Once again, the appellant had been summonsed to participate in the hearing before the appellate court under the extraordinary procedure, the summons having been served on his grandmother, who undertook to deliver it to him. And, as in the case of the first appeal hearing, the appellant's presence was not mandatory as the offences were punishable by imprisonment for five years or less.

viii) The Further Information notes, however, that as the appellant initiated the appeal and the extraordinary procedure through his counsel and as he had been "regularly summoned", it was considered that he deliberately failed to appear at either hearing and therefore neither hearing was conducted "in absentia". Where a hearing is conducted in absentia, a convicted person has the right, within six months of becoming aware of the final sentence, to request the re-opening of the case on the ground of his non-participation. That did not, however, apply in this case, and therefore the two-year sentence confirmed by the decision of 9 May 2018 was final.

ix) After the Plovdiv District Court issued its decision on 19 February 2018 the penalties were enforceable. The appellant was sought at the address known to the authorities, but he was not present. His relatives informed the authorities that he was in England.

15. The appellant was not subject to any specific prohibition on leaving Bulgaria, however, as noted above, he was subject to "supervision with signing", requiring him to notify the judicial authorities of his change of address and not to leave his place of residence without permission of the relevant authority.

The appellant's personal circumstances

16. The appellant moved to the United Kingdom in 2015. He is a self-employed builder and runs a business called Tariya Construction Ltd. It has been a successful business, and he has developed a good reputation for his work.

17. His partner, Ms Nikolova, also came to the United Kingdom in 2015. Their son was born in Leytonstone on 26 May 2018. He is now four years old.

18. The appellant has one other conviction in Bulgaria in February 2015 for a drugs offence for which he received a fine. He has not committed any offences in the United Kingdom.

19. Both Ms Nikolova and their son have been granted "pre-settled status" under the EU Settlement Scheme in the United Kingdom (that is, limited leave to remain in the United Kingdom for five years under Appendix EU to the Immigration Rules). Although in the appellant's proof of evidence, he states that he, too, has pre-settled status, it appears that this is incorrect and that his application remains outstanding.

20. The family are settled in England, living in London. Save for the appellant's uncle, they have no other family in the United Kingdom.

21. The appellant says that he has no contact with either of his parents, who have separated, and has no other relatives in Bulgaria.

22. Since being in this jurisdiction, the Appellant has lived openly and has registered with the authorities. He has worked to improve his qualifications, undertaking training, including qualifying as a Mobile Vertical and Mobile Boom operator and obtaining a Level 2 NVQ Diploma in Associated Industrial Services Occupations – Passive Fire Protection (Construction).

The extradition hearing

23. In her judgment setting out her reasons for making the extradition order, the district judge noted that the appellant claimed to have no recollection of having attended the hearings in Bulgaria at which he was sentenced or of having been informed by the Bulgarian authorities, his lawyer in Bulgaria, or anyone else of his appeal hearing on 19 February 2018 or his obligation to notify the Bulgarian authorities of any change of address.

24. The district judge found the appellant not to be a credible witness. She considered that it was "palpably clear" that he was trying to tailor his answers in cross-examination to ensure that the court did not make any adverse findings against him, particularly in relation to his evidence about non-attendance at and lack of awareness of hearings. She disbelieved his evidence that he was not aware of his obligation to notify the judicial authorities of his change of address or his obligation not to leave his place of residence without permission of the relevant authority. She noted that he sought to blame his lawyer in Bulgaria for failing to inform him or for giving him poor advice. She rejected his evidence as "untruthful and designed to ensure that he is not to be seen as a fugitive".

25. The district judge considered that the appellant's status as a fugitive was relevant to consideration of his objection to extradition based on his rights under Article 8 of the ECHR. She was sure that he did knowingly place himself beyond the reach of the legal process. She was satisfied that he was present at:

    i) the hearing on 22 June 2017 when he was informed that he was under an obligation to inform the Bulgarian authorities of any change of address and an obligation not to leave his place of residence in Bulgaria without the permission of the relevant authority; and

    ii) the hearing on 26 September 2017 when he was sentenced for the Second Offence.

26. The district judge then dealt in her judgment in some detail with the appellant's objection to extradition on the basis of Article 3 of the ECHR, which is not pursued on this appeal, before turning to his objection on the basis of Article 8. In relation to the latter, she briefly summarised the leading authorities and relevant principles from *Norris v United States of America (No 2)* [2010] UKSC 9, [2010] 2 AC 487 (SC), *HH v Italy* [2012] UKSC 25, [2013] 1 AC 338 (SC), and *Celinski v Poland* [2015] EWHC 1274 (Admin). No issue is taken by the appellant with her summary of the relevant principles.

27. The district judge found the following factors to weigh in favour of extradition:

    i) the very high public interest in ensuring that extradition arrangements are honoured, it being important that the United Kingdom not be seen as a safe haven for fugitives from justice; and

    ii) the need to accord a proper degree of confidence and respect for the decisions of the judicial authority of a Member State making a request for extradition.

28. In relation to the first of the two factors listed at [27] above, the district judge noted that the appellant was a fugitive who is wanted to serve two consecutive sentences totalling two years' imprisonment. She also found that the delay in these extradition proceedings being brought was due to the appellant's having left Bulgaria, and therefore the delay had not diminished the very high public interest in ensuring that extradition arrangements are honoured.

29. In relation to factors against extradition, the district judge found that:

    i) the appellant has not offended since he has been in the United Kingdom;

    ii) the appellant has a partner and a young son to support; and

    iii) the appellant has a good job working as a self-employed builder.

30. The district judge concluded that it would not be disproportionate to order the extradition of the appellant for the following reasons:

    i) It is very important for the United Kingdom to be seen to be upholding its international extradition obligations and that it not be considered a safe haven for fugitives. She had found the appellant to be a fugitive.

    ii) The appellant's conduct amounting to the First Offence involved a public order disturbance and offences against the police. This was not trivial offending, but it was also not the most serious of offending. This was reflected in the original sentence, which was a custodial term suspended for three years. The appellant aggravated the position by reoffending by driving while unfit through drugs, which is a serious offence. The total sentence of two years' imprisonment reflected the gravity of the offending, including the breach of the suspended sentence order. The entire sentence remained to be served.

    iii) The appellant was aware of the sentence as he was present at the hearing on 26 September 2017 at which it was imposed, but he chose to leave Bulgaria knowing that he was wanted to serve a custodial term. He did not have a sure foundation to set up home in the United Kingdom. Any delay in these extradition proceedings being brought was occasioned by the appellant's having left Bulgaria without informing the authorities. Thus, the very high public interest in extradition was not diminished by the delay.

    iv) The appellant did not call any evidence from his partner, Ms Nikolova. The district judge had seen a notice to Ms Nikolova requiring her to submit her self-assessment tax return, leading the district judge to infer that she is in employment and able to support herself. There was no evidence before her that Ms Nikolova would not be able to care for her son in the event that the appellant were extradited.

    v) The district judge acknowledged that extradition would cause hardship for the family, but the appellant had not demonstrated on a balance of probabilities that any interference with family life would be severe, "never mind *exceptionally* severe" (emphasis in original).

31. The district judge found that there were no strong counterbalancing factors against ordering extradition. Accordingly, she ordered the extradition of the appellant to Bulgaria under section 21(3) of the Extradition Act 2003.

Legal principles

32. The court's powers on an extradition appeal are set out in section 27 of the Extradition Act 2003, which provides that the court may allow the appeal if the court is satisfied that either (i) or (ii) is true, namely:

    i) the district judge ought to have decided a question before her differently, and had she done so, she would have been required to order the requested person's discharge; or

    ii) an issue is raised that was not raised at the extradition hearing, or evidence is available that was not available at the extradition hearing, and that issue or evidence, had it been before the district judge, would have resulted in the district judge answering a question before her differently such that she would have been required to order the requested person's discharge.

33. The test on appeal is whether the district judge's decision was wrong, namely, whether the district judge erred in such a way that she ought to have answered the statutory question differently: *Surico v Italy* [2018] EWHC 401 (Admin) at [30]-[31].

34. In *Love v United States of America* [2018] EWHC 172 (Admin), [2018] 1 WLR 2889 (DC), which concerned an appeal under section 103 of the Extradition Act 2003 against a decision of the Secretary of State for the Home Department to order a requested person's extradition, the Divisional Court (Lord Burnett of Maldon CJ and Ouseley J) stated at [26] that the task of the appellate court is:

> "… to decide whether the decision of the district judge was wrong. What was said in the *Celinski* case and *In re B (A Child)* are apposite, even if decided in the context of article 8. In effect, the test is the same here. The appellate court is entitled to stand back and say that a question ought to have been decided differently because the overall evaluation was wrong: crucial factors should have been weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed."

35. As noted by the district judge, the principles regarding the application of Article 8 in extradition proceedings were set down in *Norris*, *HH* and *Celinksi*. In *Belbin v France* [2015] EWHC 149 (Admin), a case decided a few months before *Celinski*, the Divisional Court (Aikens LJ and Edis J) gave the following helpful guidance at [66] on the correct approach of the appellate court to an extradition appeal:

> "66. … If, as we believe, the correct approach on appeal is one of review, then we think this court should not interfere simply because it takes a different view overall of the value-judgment that the District Judge has made or even the weight that he has attached to one or more

> individual factors which he took into account in reaching that overall value-judgment. In our judgment, generally speaking and in cases where no question of 'fresh evidence' arises on an appeal on 'proportionality', a successful challenge can only be mounted if it is demonstrated, on review, that the judge below: (i) misapplied the well established legal principles, or (ii) made a relevant finding of fact that no reasonable judge could have reached on the evidence, which had a material effect on the value-judgment, or (iii) failed to take into account a relevant fact or factor, or took into account an irrelevant fact or factor, or (iv) reached a conclusion overall that was irrational or perverse."

36. In *Celinski*, the Divisional Court (Lord Thomas of Cwmgiedd CJ giving the judgment of the court) summarised the general principles arising out of *Norris* and *HH* at [5]-[13]. At [15]-[17], the Divisional Court indicated that the judge hearing a case where reliance is placed by a requested person on his or her Article 8 rights should adopt a "balance sheet" approach, setting out the factors for and against extradition together with his reasoned conclusions.

37. The Divisional Court in *Celinski* then considered at [18]-[24] the proper approach of the appellate court to an appeal against a district judge's decision on an Article 8 ground of opposition to extradition. During the course of that discussion, it quoted at [21] the following passage from the judgment of Lord Neuberger PSC in *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911 (SC) at [93]-[94] regarding how an appellate judge might approach the appellate review of the trial judge's conclusion on proportionality:

> "93. There is a danger in over-analysis, but I would add this. An appellate judge may conclude that the trial judge's conclusion on proportionality was (i) the only possible view, (ii) a view which she considers was right, (iii) a view on which she has doubts, but on balance considers was right, (iv) a view which she cannot say was right or wrong, (v) a view on which she has doubts, but on balance considers was wrong, (vi) a view which she considers was wrong, or (vii) a view which is unsupportable. The appeal must be dismissed if the appellate judge's view is in category (i) to (iv) and allowed if it is in category (vi) or (vii).
>
> 94. As to category (iv), there will be a number of cases where an appellate court may think that there is no right answer, in the sense that reasonable judges could differ in their conclusions. As with many evaluative assessments, cases raising an issue on proportionality will include those where the answer is in a grey area, as well as those where the answer is in a black or a white area. An appellate court is much less likely to conclude

> that category (iv) applies in cases where the trial judge's decision was not based on his assessment of the witnesses' reliability or likely future conduct. So far as category (v) is concerned, the appellate judge should think very carefully about the benefit the trial judge had in seeing the witnesses and hearing the evidence, which are factors whose significance depends on the particular case. However, if, after such anxious consideration, an appellate judge adheres to her view that the trial judge's decision was wrong, then I think that she should allow the appeal."

38. After considering, among other things, the above passage from *Re B*, the Divisional Court in *Celinski* at [24] summarised the approach the appellate court should take when considering a ground of appeal alleging error by a district judge in determining the Article 8 issue:

> "24. The single question therefore for the appellate court is whether or not the district judge made the wrong decision. It is only if the court concludes that the decision was wrong, applying what Lord Neuberger PSC said, as set out above [in *Re B* at [93]-[94]], that the appeal can be allowed. Findings of fact, especially if evidence has been heard, must ordinarily be respected. In answering the question whether the district judge, in light of those findings of fact, was wrong to decide that extradition was or was not proportionate, the focus must be on the outcome, that is on the decision itself. Although the district judge's reasons for the proportionality decision must be considered with care, errors and omissions do not of themselves necessarily show that the decision on proportionality itself was wrong."

Submissions

39. Mr James Stansfeld on behalf of the appellant submitted that the district judge made five errors in her assessment of the appellant's objection to extradition on the basis of disproportionate interference with his rights and those of his family under Article 8 of the ECHR. As a result of these errors, she made the wrong decision. It was necessary, therefore, for her decision to be quashed and the decision to be made afresh in accordance with the correct principles.

40. Mr Stansfeld submitted that the district judge's first error was that she misdirected herself that, due to her finding that the appellant is a fugitive (a conclusion that is not accepted by the appellant, although it is not formally contested), the delay in this case cannot diminish the public interest in extradition.

41. Mr Stansfeld says that the district judge's second error is that the district judge failed to take into consideration, or assess, the impact of the extradition order on the appellant and his family in light of their respective immigration positions. Ms Nikolova and their

son have pre-settled status, however the appellant does not. His application remains outstanding. If he is absent from the United Kingdom for two years due to serving his sentence in Bulgaria, he will not have been resident in the United Kingdom with a continuous qualifying period. If and when his application for pre-settled status is granted, his limited leave to enter or remain under Appendix EU of the Immigration Rules would be liable to be cancelled if the Secretary of State is satisfied it is proportionate to do so. This would be a real risk.

42. Mr Stansfeld further submitted that, in any event, if the appellant is granted pre-settled status at any time before or after extradition, his limited leave to remain would lapse under Article 13(4) of the Immigration (Leave to Enter and Remain) Order 2000 and Appendix EU to the Immigration Rules if he is outside the United Kingdom for more than two years. Given his extradition is sought to serve a two-year sentence, this is a substantial risk.

43. For the foregoing reasons, according to Mr Stansfeld, it is very likely that in order to return to the United Kingdom, the appellant would have to make an application to enter under the route provided for Entry Clearance as a Partner under Section EC-P.1.1.(c) of Appendix FM to the Immigration Rules. Section EC.1.1. requires a person to be refused entry clearance on grounds of lack of suitability if any of paragraphs S-EC.1.2. to S-EC.1.9. apply. S-EC.1.4. provides that:

> "The exclusion of the applicant from the UK is conducive to the public good because they have:
>
> (a) …
>
> (b) been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 12 months but less than 4 years, unless a period of 10 years has passed since the end of the sentence; …
>
> (c) … ."

44. Mr Stansfeld submitted that the ultimate effect of this, if applied to the appellant due his serving a two-year custodial sentence in Bulgaria, would be the appellant's inability to return to the United Kingdom for 10 years. The only exception to this rule applying to the appellant would arise if he could satisfy the Entry Clearance Officer that there are "exceptional circumstances" in his case that would mean that refusal of entry clearance or of leave to enter or remain would amount to a breach of the Article 8 rights of the appellant, his partner, their son and/or another family member due "unjustifiably harsh consequences" for any such person arising from the refusal (Appendix FM, GEN.3.2.(2)).

45. Mr Stansfeld submitted that there is no realistic prospect of the appellant meeting this high threshold. Accordingly, the consequences of the extradition order would be far-reaching, with the effective permanent removal of the appellant from the United Kingdom and either an enforced long-term separation from his family or the enforced removal of his family from the United Kingdom. Recent case law demonstrates that the ability of an individual to return to the United Kingdom post-extradition is a relevant factor in the Article 8 balancing exercise. Mr Stansfeld submitted that the district judge

failed to include these considerations in her assessment, and that is a clear error on her part.

46. Mr Stansfeld further submitted that if the appellant is extradited due to this error of the district judge, then the family will be faced with a decision either (i) to uproot the family home and move to Bulgaria or (ii) remain separated from the appellant for over 12 years. Effect of either decision on the appellant's child, whose best interests are a primary consideration, is stark. Mr Stansfeld submitted that, as in *Rybak v Poland* [2021] EWHC 712 (Admin), 1 WLR 3993 (QBD), the consequences of extradition for the family are potentially so severe that extradition would be disproportionate.

47. Mr Stansfeld submitted that the district judge's third error was to apply the wrong test in reaching her decision. In assessing the impact on the family, she held at paragraph 59(e) of her judgment that the appellant had failed to demonstrate on a balance of probabilities that any interference with family life will be severe, "never mind exceptionally severe" (emphasis in the original). This meant, he submitted, that the district judge erroneously considered that the appellant had an evidential burden to discharge to prove on the balance of probabilities that interference with his family life will be exceptionally severe. He referred to a passage in the judgment of Lord Mance JSC in *Norris* at [108] where Lord Mance JSC rejected the notion that for a person to succeed in resisting extradition they had to discharge some form of legal burden to overcome a "high threshold" or to establish "striking and unusual facts" or "exceptional circumstances". Given the district judge's error, her decision should be discharged so that a new assessment applying the correct test can be made.

48. Mr Stansfeld submitted that the fourth error made by the district judge was in her assessment of the severity of the offending. Whilst she recognised that the offences are "not … the most serious of offences", she found that they were not trivial and that the two-year sentence reflected "the gravity of the offending". Whilst the court is required to respect the sentence imposed by the Bulgarian court (*Celinski* at [13]), it is relevant to determining the level of public interest in extradition that neither offence in this jurisdiction would cross the custodial threshold. The First Offence is "no more than pushing and being abusive towards a police officer". Whilst the driving offence is more serious, there is no suggestion that the appellant's driving was dangerous. The custodial threshold was not crossed. The appellant's extradition would have the effect of separating a father from his young child for offences that are not so serious as to merit a custodial sentence.

49. Mr Stansfeld submitted that the district judge's fifth error was that she gave no consideration to the competing public interest identified by Baroness Hall in *HH* at [33] of children being brought up in a stable family so that they have the best chance of becoming productive members of society in the future. The district judge gave no indication in her judgment that the rights of the appellant's son were a primary consideration, and she undertook no analysis of the emotional harm that a four-year-old child will suffer from the sudden and, from his perspective, incomprehensible disappearance of his father for two years, which will inevitably be distressing and undoubtedly have a significant impact on him. The only assessment made by the district judge was that Ms Nikolova would be able to care for him.

50. Finally, Mr Stansfeld submitted that taking these five errors together it was clear that the district judge reached the wrong decision and that extraditing the appellant would

have a disproportionate effect on the appellant's family and, in particular, his young son.

51. Ms Amanda Bostock for the respondent disagreed that the district judge had erred in her analysis and application of the law to the facts of the appellant's case and had therefore reached the wrong decision. The district judge was entitled, on the evidence before her, to identify the factors for and against extradition that she set out in her judgment at paragraphs 57-58 and to reach the conclusions she set out at paragraphs 59-60. It was a proper balancing exercise carried out in accordance with the correct principles as set out in the relevant case law. The district judge could not be said to have reached the wrong decision, and therefore the appeal failed the relevant test in section 27 of the Extradition Act 2003.

52. Ms Bostock submitted that, in relation to the appellant's partner and their son, the district judge accepted that he supported them. At paragraph 59(d) of her judgment, she inferred that Ms Nikolova had an income, and this has not been shown to be wrong. Even if it is an overstatement, there is evidence that she is able to work and also has access to state benefits should she need them.

53. In relation to the five errors alleged by the appellant, Ms Bostock submitted as follows:

    i) In relation to the first alleged error, which was alleged to be an error of law (a self-misdirection), that is plainly incorrect. The district judge's finding was one of fact. She found that, in this case, the fact that the appellant was a fugitive has not diminished the public interest in extradition. She was entitled to come to that conclusion. It was relevant that the arrest warrant was issued on 7 June 2018, within a month of the decision made under the extraordinary procedure by the appellate court in Plovdiv on 9 May 2018, under which the sentence of two years' imprisonment became final and not subject to further appeal. Given her finding that the appellant left Bulgaria in breach of his obligations to notify the Bulgarian authorities of his change of address and to seek permission of the relevant authority to leave his place of residence, the district judge was entitled to conclude that the public interest in extradition was not reduced in this case. If anything, it was arguably increased where he knowingly fled Bulgaria (having, by further offending, already rejected the opportunity he had been given of a suspended sentence) in order to establish a life in another jurisdiction so as to avoid his sentence.

    ii) In relation to the second alleged error, the appellant asserted no impact from the effect of the immigration rules in his evidence at the extradition hearing. The judge cannot be considered to have erred in this respect. Mr Stansfeld's submissions in this regard were speculative. The rules that Mr Stansfeld cited regarding entry clearance as a partner provide the opportunity to challenge a refusal of entry clearance or leave to enter or remain where it would otherwise "breach Article 8 of the ECHR" on the basis of occasioning "unjustifiably harsh consequences" for an applicant, the applicant's partner, or their child. Mr Stansfeld was wrong to suggest that there was no realistic prospect of the appellant meeting this threshold. This court must trust that a future tribunal would deal with the matter fairly and in accordance with Article 8. It was not an error by the district judge to fail to give consideration to this pure speculation.

iii) In relation to the third alleged error, the district judge was not wrong to use the term "exceptionally severe" (the term used by Baroness Hale in *HH* at [8(7)]) when analysing the severity of the impact of extradition at paragraph 59(e) of her judgment. The district judge correctly noted at paragraph 55(2) of her judgment that there is no test of exceptionality. Reading the judgment as a whole, it is clear that she applied the correct test.

iv) In relation to the fourth alleged error, the argument that neither the First Offence nor the Second Offence would cross the custodial threshold was not accepted. We have minimal facts, the appellant is a repeat offender, and he offended again while subject to a suspended sentence.

v) In relation to the fifth alleged error, it is wholly incorrect that the district judge gave "no consideration" to the competing public interest in the appellant's son having his father in his life instead of in custody for two years and that she did not analyse the emotional harm this would cause the child. She specifically noted the appellant's partner and son as factors weighing against extradition. The impact on them is obvious, and she plainly considered it. As in the case of domestic sentencing practice in relation to punishing criminals, the public interest in extradition of criminals does regularly outweigh the impact on their children.

Application to admit new evidence

54. I begin by considering the application to admit new evidence on this appeal, namely, the witness statements of Ms Nikolova dated 20 June 2022 and 25 November 2022, respectively, together with the exhibits to the later witness statement. To determine whether this evidence is admissible in accordance with the principles set out in *Fenyvesi*, I have read the evidence *de bene esse*, as I have already indicated.

55. For purposes of this case, the test that I need to apply may be expressed as follows. The new evidence should be admitted if:

i) it was "not available at the extradition hearing" for the purposes of section 27 of the Extradition Act 2003; and

ii) the evidence, had it been available, would have resulted in the district judge reaching a different decision on whether it would be disproportionate to order the appellant's extradition having regard to his Article 8 rights and/or those of his partner and/or child, such that she would have been required to order the appellant's discharge.

56. Following the guidance in *Fenyvesi* at [34]-[35], the first limb of the above test should be applied with a "degree of latitude" if "otherwise [there may] be a breach of the European Convention on Human Rights" even if the new evidence does not satisfy section 27(4) of the Extradition Act 2003 on a strict application of the test. In relation to the second limb, the relevant question is, in essence, whether the new evidence is decisive.

57. In relation to the first limb of the test, it was accepted by Mr Stansfeld that the information in Ms Nikolova's first witness statement could have been put before the

district judge, but he relies on the appellant having received incorrect advice from his prior solicitors, who represented him at the extradition hearing.

58. The appellant's current legal representatives, who did not represent him below, sought an explanation for the omission from the prior solicitors. In essence, the appellant was advised that Ms Nikolova's evidence would not assist as she could not give evidence regarding the offending behaviour that preceded the appellant's relationship with her and the establishment of their private and family life. It would be sufficient for him to give his evidence as to the existence of their private and family life without a further witness statement from his partner, which "could be interpreted as avoidable duplication of facts that were not in issue".

59. Mr Stansfeld submitted that this advice was clearly wrong, as it would not be duplicating the appellant's advice about his private and family life. It would enable Ms Nikolova to give evidence about their child, the appellant's role as a father, and the impact of extradition on the family, all of which was of critical relevance to the Article 8 assessment the district judge was required to make. It is therefore in the interests of justice to admit this evidence. Ms Nikolova's second witness statement dealt with developments since the extradition hearing, and therefore was clearly not available at the time of the extradition hearing.

60. Even if Ms Nikolova's first witness statement is admissible in the interests of justice notwithstanding that it could have been given at the extradition hearing (a question I do not decide), the application to admit the new evidence fails on the basis that the new evidence is not decisive.

61. I have carefully considered both of Ms Nikolova's witness statements and the exhibits to the second witness statement.

62. The appellant gave evidence of his private and family life, which the district judge considered. Ms Nikolova's evidence adds detail but does not offer any evidence of impact beyond the impact that is necessarily occasioned by extradition of a man who has a partner and a young child.

63. The district judge, with her general experience of extradition matters, will have been well aware of the likely nature of this impact. There is nothing in the first witness statement that leads me to believe that the district judge would or should have reached a different decision on the Article 8 question had she had this evidence before her. The evidence does not show that she was wrong to infer that Ms Nikolova was capable of supporting herself and of caring for their son in the event of the appellant's extradition. The district judge did not lay particular emphasis on the absence of evidence from Ms Nikolova as a factor favouring extradition. In my view, she was simply recording that absence.

64. The second witness statement of Ms Nikolova provides more detail regarding her income, which is limited. But it also demonstrates that she has been able to get cleaning work. Although she states that she was unsuccessful in finding further cleaning work between 17 October and 21 November 2022, she notes that she did a further shift on 21 November, four days before the date of her second witness statement, for which she was paid £30.

65. The other issue raised by Ms Nikolova's second witness statement is the determination that their son has "delayed language skills" and is behind in both English and Bulgarian. His speech is said to be equivalent to that of a two-year-old, even though he was four and a half years' old at the time of that assessment.

66. One of the exhibits to the second witness statement is an Initial Assessment Care Plan dated 27 July 2022 ("the IACP") prepared by a member of the Speech and Language Therapy Team at Memorial Hospital in Shooter's Hill, London SE18 3RG. This relates to an assessment of the appellant's son carried out on 27 July 2022. The IACP notes that Ms Nikolova had reported that his language was behind his peers, but she considered that this was because his first language was not English, he had only been exposed to English for the first time 7 months earlier when he started nursery, and she was therefore "only a little concerned about his language development". The initial assessment set out in the IACP suggested that their son presented with delayed language skills and made various recommendations of ways to interact with the child in order to help his development. In my view, this evidence falls a long way short of showing that the appellant's extradition would have an exceptionally severe impact such that the Article 8 rights of the family would outweigh the "constant and weighty" public interest in extradition: Baroness Hale in *HH* at [8], summarising the conclusions to be drawn from *Norris*.

67. There is nothing in Ms Nikolova's second witness statement, either in combination with the first witness statement or standing alone, that leads me to believe that the district judge would or should have reached a different decision on the Article 8 question had she had that evidence before her. Accordingly, the appellant's applications dated 20 June 2022 and 25 November 2022, respectively, to admit new evidence on this appeal are each refused.

Did the district judge reach the wrong decision on the Article 8 question?

68. Despite the eloquent written and oral submissions of Mr Stansfeld, I have not found any error, including any error by omission, in the reasons given by the district judge for making the extradition order.

69. In relation to the alleged first error, I agree with Ms Bostock that the district judge did not misdirect herself that, because she had found the appellant to be a fugitive, the delay in this case *could not* diminish the public interest in extradition. She simply found that, in this case, it *did not* do so. I cannot conclude that no reasonable judge could have reached that view on the evidence.

70. In relation to the alleged second error, it is unfair to criticise the district judge for failing to consider a fairly complex set of related arguments on the possible future impact of extradition on the appellant's immigration status in the United Kingdom when those were not raised by the appellant at his extradition hearing and are, in any event, to a certain extent speculative. I also agree with Ms Bostock's submission that these considerations are, in any event, mitigated by the Article 8 safeguard that is built into the relevant immigration rules.

71. In relation to the third alleged error, I find no error in the district judge's approach or analysis. She cannot be faulted for using the words "exceptionally severe", which were used by Baroness Hale in *HH* at [8(7)]. She made clear that there was no exceptionality

test. In her judgment at paragraph 59(e), the district judge, in substance, acknowledged the hardship generally caused for families by extradition but found that there was nothing in this case that led her to conclude that the consequences of interference with family life would be exceptionally severe.

72. In relation to the fourth alleged error, I bear in mind the principle summarised by Baroness Hale in *HH* at [8(5)] that the weight to be attached to the public interest in an Article 8 assessment "does vary according to the nature and seriousness of the crime or crimes involved". I also bear in mind the following passage from the Divisional Court's judgment in *Celinski* at [13(iii)]:

> "…
>
> (iii) It will … 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. … ."

73. In his oral submissions, Mr Stansfeld laid particular emphasis on the appellant's young age when he committed each of the First Offence and the Second Offence and what he characterised as the relatively minor nature of each of the offences, one being, in essence, simply a drunk and disorderly charge and the other being a charge of driving "uncertainly" (but not dangerously) having used certain substances but not necessarily to a level that would equate, in the United Kingdom, to driving while impaired by specified controlled drugs.

74. The district judge was not in a position to second-guess the sentences imposed by the Bulgarian courts, and she was entitled to weigh in the balance that the sentence for the First Offence was originally suspended, reflecting the mitigation of the appellant's age and the nature of the conduct, and that the sentence was activated following conviction of the Second Offence. The district judge was aware of the appellant's age when having committed each offence. She had the Further Information but not the full facts considered by each of the Bulgarian courts that convicted the appellant of the First and Second Offences. I do not find that she made an error by failing to conclude that the custodial threshold was not crossed for these offences. This was not one of those rare cases where such a conclusion would have been justified on the evidence before her.

75. In relation to the alleged fifth error, it is clear that the district judge weighed in the balance that the appellant had a partner and a young son to support, that he had not offended in the United Kingdom, and that he had a good job working as a self-employed builder. There was no error in her approach, and it cannot be said that no reasonable judge could have reached the conclusion she did on the question of proportionality for Article 8 purposes of ordering the extradition of the appellant.

76. Standing back, as this court is entitled to do according to the Divisional Court in *Love v USA* at [26], I do not find that the district judge ought to have weighed any factor so significantly differently that as to make her decision on proportionality for Article 8 purposes wrong.

Conclusion

77. For the reasons above, I do not consider that the district judge erred in any material respect in relation to her determination of the Article 8 question, and therefore this appeal is dismissed.