

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 17/11/2020

**Before :**

**MR JUSTICE FORDHAM**

**Between :**

**DANIELA ANTOCHI**

**Appellant**

**- and -**

**RICHTERIN AM AMSTEGERICHT OF THE  
AMSTGERICHT MUNCHEN (MUNICH),  
GERMANY**

**Respondent**

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**MARY WESTCOTT** (instructed by **Lawrence & Co Solicitors**) for the Appellant  
**JONATHAN SWAIN** (instructed by **Crown Prosecution Service**) for the Respondent

Hearing date: 14 October 2020

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**FINAL JUDGMENT**

**MR JUSTICE FORDHAM :**

## **I. INTRODUCTION**

### This appeal

1. This is a substantive appeal in an extradition case. The Appellant is 36 and is wanted for extradition to Germany. That request for extradition is in conjunction with an accusation European Arrest Warrant (EAW) issued on 29 May 2019. That EAW promptly replaced an earlier EAW issued on 18 September 2018 (after the Court of Justice of the EU had held on 27 May 2019 that the issuing authority did not constitute a ‘judicial authority’). The index offending of which the Appellant is accused in the EAW took place in March 2009. It involved a series of supermarket distraction thefts and cashpoint withdrawals. The Appellant’s extradition to Germany was ordered by DJ Jabbitt (“the Judge”) on 24 January 2020 after an oral hearing on 19 December 2019. Permission to appeal was granted by Thornton J on 16 March 2020.

### Mode of hearing

2. This was a remote hearing by BT conference call. Both Counsel were satisfied, as was I, that this mode of hearing involved no prejudice to the interests of their clients. The open justice principle was secured, through publication of the case and its start time in the cause list together with an email address usable by any member of the press or public who wished to observe the hearing. By having a remote hearing we eliminated any risk to any person from having to travel to or be present in a court-room. I am satisfied that a remote hearing was necessary and proportionate.

## **II. FACTUAL ANALYSIS**

### Whether evidence in chief set out in the judgment is to be taken as accepted

3. In this judgment I will start by addressing a number of topics relating to the facts and evidence in this case, before turning to analyse the three grounds of appeal. The first topic concerns whether evidence which the Judge set out in the judgment should be taken on this appeal as having been accepted. At the hearing the Judge heard live evidence from the Appellant and her mother, each of whom adopted their written statements as their evidence-in-chief. Each was cross-examined. The approach taken by the Judge in the judgment, so far as the evidence of the two witnesses was concerned, involved three stages. I will call them stages (a), (b) and (c). Stage (a) involved the Judge setting out in full the contents of the witness statements which were adopted as evidence-in-chief by the Appellant and her mother. Stage (b) involved the Judge recording certain points which were put to the witnesses in cross-examination. Stage (c) involved the Judge’s reasoned analysis on the issues in the case, touching on the evidence as appropriate in the course of that analysis. That three-stage approach by the Judge raised a question for this Court dealing with this appeal. How should I approach the evidence of the witnesses, set out at stage (a)? Was the Judge to be taken as having accepted the evidence-in-chief recorded at stage (a), unless qualified by what was said at stage (c), read in the light of what he said as to stage (b)? I raised this question with both Counsel and the answer was common ground.

4. Mr Swain for the Respondent accepted that the Judge should for the purposes of this appeal be taken to have accepted, and found as facts, the contents of the witness statements set out at stage (a), except insofar as any feature of that evidence was subsequently the subject of clear (I interpose – that would include clear as a matter of necessary implication) rejection or qualification by the Judge at stage (c), in the light of stage (b). I put to Mr Swain that this would mean, in effect, approaching the Judge’s judgment as though his stage (a) narrative of the witness evidence adopted in-chief had been followed by this statement (this is my encapsulation):

***The Judge: “I accept all of the evidence which I have set out above, except where it is the subject to rejection or qualification within the reasons that follow”.***

The Judge did not say this, but Mr Swain submits that I should proceed as though he had done so. Ms Westcott did not disagree with this approach, subject to specific controversies arising out of what were said to be ‘rejections’ or ‘qualifications’ by the Judge. I shall deal with those specific points separately, below. I accept Mr Swain’s submissions and I will adopt this principled approach in the analysis which follows.

#### Evidence concerning the circumstances regarding the alleged offending

5. One area of contention between the parties concerned what this Court should make of the evidence of the Appellant and her mother, in light of what the Judge said at stage (c), so far as concerns the circumstances surrounding the alleged offending in March 2009. The Judge said this: *“in terms of my findings of fact, the [Appellant] is wanted on an accusation warrant for alleged involvement, with two others in 2009, in so-called ‘distraction thefts’, some involving elderly women, and also the fraudulent withdrawal of cash with stolen debit cards. Plainly the alleged offending is reasonably serious”*. The Judge then added this ‘qualification’:

***“It would be a matter for the German court as to what weight it attaches to her account of why she participated in the alleged offending.”***

The Judge later said *“the [Appellant] has made submissions [as] to participation in the offending”*, adding this ‘qualification’:

***“... whether her account, if accepted, amounts to duress or is mitigation, is a matter for the German criminal justice system.”***

This was the context for a dispute about whether this Court should take any account of the factual description given by the Appellant in her evidence and corroborated by her mother, recorded as their evidence in-chief by the Judge at stage (a) in the judgment, regarding the circumstances in which the Appellant came to be involved in the March 2009 distraction thefts and cashpoint withdrawals.

6. Ms Westcott submitted that, in the particular circumstances of the present case, the Court – in addressing the issues in the appeal – should take into account, and rely on, the Appellant (and her mother)’s evidence at the Judge’s stage (a) regarding the circumstances of the alleged criminal conduct in March 2009. Mr Swain identified two specific ‘no go’ areas for this Court, in relation to the stage (a) evidence of the Appellant and her mother. (1) I should not go behind the Judge’s two ‘qualifications’ (which I have just set out), for the reasons I described in the previous section of this judgment. (2) I should not go behind anything expressly stated as alleged against the

Appellant on the face of the EAW, for reasons of appropriate mutual respect for the Respondent and the German judicial process. Mr Swain's two specific 'no go' areas would, in my judgment, have this consequence (this is my encapsulation):

**Mr Swain's two specific 'no go' areas:**

- (1) *It is not appropriate for this Court – based on the evidence set out by the Judge at stage (a) – to conclude that this is a case (i) where the Appellant was acting under duress, and so was not guilty of any crime, in March 2009; or (ii) where a court would sentence the Appellant, if convicted of criminal offences in March 2009, based on an acceptance of her account as mitigation.*
- (2) *It is not appropriate for this Court – based on the evidence set out by the Judge at stage (a) – to conclude that the Appellant in her conduct in March 2009 lacked an “intent to procure for herself the source of revenues of some importance and of some duration by the continuous committing of these offences” (that being expressly stated in the EAW).*

I accept Mr Swain's submissions. In my judgment, they constitute a principled basis on which to proceed. That is how I shall proceed.

7. But that is as far as this point goes. There is, in my judgment, no wider 'no go' area. The account given by the Appellant and her mother, recorded by the Judge at stage (a), regarding the background and circumstances can and should be taken into account – to the extent relevant to the issues on this appeal – provided that to do is consistent with Mr Swain's two specific 'no-go areas' with the consequence that I have described. Contents of documents can also (except insofar as for good reason disputed) be relied on, as can the contents of the EAW (including the recognition within it that the Appellant was acting at the “direction” of Mr Carbune). I am satisfied that this is the correct approach. It involves following the Judge's judgment (in the principled way I have described), and the EAW, respecting the functions of the German judicial authorities, but also properly discharging my own.
8. Mr Swain's submissions at times ranged much more broadly and suggested a wider 'no go area'. He suggested that (i) any and all evidence about the background or circumstances of the alleged offending and (ii) any and all factors which would fall to be considered and evaluated by a sentencing court if the Appellant were to be convicted of the alleged offending, were in principle areas of 'forbidden territory' and should not in principle be taken into account by this Court. I cannot accept that wider submission. I have explained the principled approach. In my judgment, where there is evidence which was recorded by the Judge and is taken to have been accepted by him, and where there is evidence from documents which are not for good reason disputed, and where relevant to the issues on the appeal, then – subject to the two specific 'no go' areas identified above – it is, in principle, appropriate to consider that evidence even if it is about background or circumstances and even if it concerns a factor which would fall to be considered and evaluated by a sentencing court. The position in principle can be tested by taking examples. Evidence as to how old somebody was at the time of alleged criminal conduct would be a matter to be taken into account by any sentencing court following a conviction. So would evidence as to whether they have other convictions. Evidence as to circumstances could include a description of homelessness, drug addiction, alcoholism, mental health difficulties or trafficking. Where there is proper evidence – in this case in documents and set out by the Judge at

stage (a) – then there is no bar to the Judge having considered, and this Court considering, that evidence. Mr Swain submitted that there could be limitations on what a Respondent’s Counsel has ‘instructions’ to ‘challenge’. I am unpersuaded by that point. If the Respondent takes the position that evidence has no relevance to the issues before the extradition court it may decide not to challenge that evidence, but the court will have to decide relevance. If the evidence is relevant to the issues before the extradition court then, if the Respondent does not accept the evidence, it should be challenged.

9. I mention in this context that Ms Westcott relied on Rinkevicius v Prosecutor General’s Office, Lithuania [2018] EWHC 145 (Admin), where – as I read it – Ouseley J recorded (at paragraph 7) that the appellant had given evidence about what a penalty in the requesting state had been, and (at paragraph 9) that the appellant had provided no information about the offence (because he denied knowledge of it), which may suggest that an appellant might in other circumstances give evidence – which might have been accepted. I did not find that working example of any real assistance. Ms Westcott relied on Z v Polish Judicial Authority [2014] EWHC 1242 (Admin). In that case, Mitting J recorded (paragraph 7) that the appellant had given evidence before the district judge about the circumstances in which the alleged offending had occurred. He took into account (paragraph 17), apparently on the basis of the EAW and the appellant’s evidence combined, that “*the appellant was a single 19 year-old woman of Lithuanian origin, staying for a short time in a foreign country with friends who, according to the Polish authorities, turned out to be serious criminals*”, before going on to identify the issue of whether she had been trafficked, and commenting that he would have expected the Polish authorities to have done. This was in relation to oppression which he left open (paragraph 18) having already found injustice (paragraph 15). I do not regard Mitting J’s observations and approach as inconsistent with the one I have adopted. Finally, Ms Westcott cited Simulescu v Criminal Court in Valence, France [2014] EWHC 3285 (Admin). In that case, at paragraph 11, Nicola Davies J (as she then was) considered – in the context of Article 8 – features of the case which would have been relevant mitigation in the context of sentence, including “*positive character*” demonstrated by lack of convictions and “*military record*”. This case tends to undermine that part of Mr Swain’s wider ‘no go’ area submissions concerning factors constituting mitigation. Simulescu was not discussing the circumstances of alleged offending. Again, I see no inconsistency with my approach.

#### The Appellant’s knowledge in November 2018

10. There was one other area of controversy about fact and evidence, but it resolved itself at the hearing before me. It related to something the Judge said at stage (b), when discussing points put in cross-examination. When I come to recount the key facts of the case, as I will in the section immediately below, I shall refer to the Appellant’s state of knowledge in November 2018 when she left Romania and returned to the United Kingdom. The area of (resolved) controversy was this. In his judgment the Judge at stage (b) recorded the Appellant having been cross-examined by Mr Swain about her state of knowledge at that time. The judgment puts it this way:

***“in cross-examination, [the Appellant] was referred to when she was arrested in Romania, she was legally represented and released after a short time. The judge said the time in Romania to pursue the charges had run out. From what the judge said in Romania, this did not apply in Germany.”***

At the hearing before me Mr Swain, very properly, recognised that he could not maintain that the Judge was making (or could sustainably have made) a finding of fact that the Appellant knew in November 2018, from what the Judge had said in Romania, that the charges could still be pursued so far as the German authorities were concerned. That concession is properly made. Mr Swain and Ms Westcott had both appeared at the hearing before the Judge. They both had a note of Mr Swain's cross examination. They were able to agree that the Judge was doing no more, in the passage which I have quoted, than recording a question put in cross-examination by Mr Swain. The Appellant had not agreed with what was put to her and the Judge did not reject her answer. Mr Swain had had put to the Appellant that she knew 'from what the judge said in Romania that this did not apply in Germany'. But her answer to that question was that she had come to understand that only "afterwards" (Ms Westcott's note) or "after that" (Mr Swain's note). I proceed on the basis that the Appellant did not know in November 2018, from what the Judge had said in Romania, that the charges could still be pursued so far as the German authorities were concerned.

### The key facts of this case

11. Having addressed these topics, I can now proceed to give a description of the key facts of the present case. As I have explained, this is based on two sources. The first is the Judge's judgment, approached in the principled way that I have described. The second source are the documents. That includes the EAW but also the contemporaneous documentation, put before the Judge and before me, accepted by the parties as reliable. Here, then, are what I take as the key facts of this case, approached in the principled way described above (this is my encapsulation):

#### Key Facts

*(1) The Appellant was born in Romania on 7 May 1984 as Daniela Arseni. In 2003, when she was 18 or 19, she went to Italy with her mother and other family members. In January 2009, aged 25, she met online a Romanian man called Mr Carbune who was in Germany. She thought Mr Carbune was a man with whom she might begin a relationship. So, she drove from Italy to Germany in late February 2009 to meet him. Mr Carbune was a violent and manipulative man and within a month she was escaping from him. Mr Carbune directed the Appellant and an accomplice (Mr Arseonaiei) to carry out a string of dishonest crimes in March 2009. There were 13 distraction thefts (10 of them at supermarkets and 3 outside banks), and then there were a series of dishonest cashpoint withdrawals. Many of the victims were elderly. Although directed by Mr Carbune, the Appellant and Mr Arseonaiei acted at the time with a view to getting serious money for themselves. In the event, having managed to get her car keys back from Mr Carbune the Appellant needed to secure an emergency transfer of €300 from her mother to be able to get away, as she did. Having driven back to Italy, she told her mother that she had been forced to commit thefts by the man she was visiting, who had also hit her. The Appellant has never acted to put herself beyond legal process in Germany. She is not a fugitive. She has lived openly, and travelled openly, since the events of March 2009. She has no criminal convictions relating to any period before the March 2009 events, and no criminal convictions in the period since then. Unknown to the Appellant, on 12 June 2009 the German authorities made a decision to prosecute her, having registered her as a suspect based on information they elicited in 2009 from Mr Arseonaiei. On 9 October 2009 they issued an arrest alert.*

*(2) Much has happened in the Appellant's life since 2009. In 2012 she got married and became Daniela Antochi, after which she successfully applied for a new Romanian identity card in her new name. In 2013 she travelled to Germany again, to try to secure work. She was unsuccessful because she could not speak German, and so she returned to Italy. In early 2015 her husband came to the United Kingdom and in the spring of 2015 she followed him here. In the United Kingdom, they lived together in Thetford. She obtained a national insurance number in June 2015. On 13 December 2015 she gave birth to their daughter (who I shall call Anita), now aged 4.*

*(3) Back in Germany, unknown to the Appellant but in fact 4 days after Anita's birth, the German authorities on 17 December 2015 issued another national arrest warrant, constituting an order for the Appellant's pre-trial detention, in conjunction with the events of March 2009. Nobody has been able to say whether and how the 17 December 2015 arrest warrant (order for pre-trial detention) differs from the 9 October 2009 domestic arrest alert issued 6 years earlier. It was, however, the December 2015 national arrest warrant (order for pre-trial detention) that in due course formed the basis for the first EAW issued nearly 3 years later on 18 September 2018 and then the replacement EAW issued on 29 May 2019.*

*(4) Back in the UK, in 2016 the Appellant's mother joined the Appellant and her husband from Italy. Later that year the Appellant got a job as a cleaner. The family subsequently moved from Thetford to Rugby and then to Barking. In July 2018 the Appellant and her mother travelled together to Romania in connection with her mother's health. They stayed in Romania for 4 months, returning to the United Kingdom in November 2018. During that 4-month period the first EAW was issued on 18 September 2018 and an international alert was issued on 1 October 2018. As a consequence, the Appellant was arrested in Romania on 30 October 2018 in conjunction with the first EAW, as a person wanted in relation to the events of March 2009. She appeared before a Romanian court. She was released. The Romanian judge said that the March 2009 matters were time-barred in law. The Appellant obtained 'discharge papers'. She subsequently carried them with her whenever she travelled, in case there was any problem. When she returned to the United Kingdom in November 2018 she did not know that, according to German law, she could still be pursued for extradition to Germany. That was something which she learned only afterwards. In May 2019 the Appellant travelled to Romania for a wedding, carrying her 2018 Romanian discharge papers with her. She was stopped during the course of her outward travel to Romania, and again during the course of her travel back to the United Kingdom. She was, however, able to show the authorities the discharge papers. She was advised that there was an entry against her on the Interpol system and that she should take steps to remove it. Back home in the United Kingdom, in June 2019, she instructed a Romanian lawyer to take steps to remove the Interpol entry.*

*(5) In July and August 2019 the Appellant found she was being pursued for extradition to Germany again. On 15 July 2019 the German prosecutor had written to the Appellant at a Romanian address associated with the Appellant's family. That address had been provided on 20 May 2019 to the German authorities by the Romanian authorities. The German prosecutor's letter of 15 July 2019 gave her until 15 September 2019 to exercise her right to provide a written response. The letter also stated that she could request an interview. It named the German public defender who had been appointed as her defence lawyer. That letter was collected in Romania by someone connected with the family and was forwarded to the Appellant in the United Kingdom. She became aware of it in August 2019. In the meantime, she had been arrested on 24 July 2019. That was in the course of leaving the United*

*Kingdom to go to another wedding in Romania. She was released on conditional bail. She told the authorities that ‘the matters had already been dealt with in Romania’.*

*(6) It was also in August 2019 that the Appellant’s husband moved out of the family home. By then, she had become aware of the letter of 15 July 2019 from the German prosecutor. Having received the letter, she tried to make contact with the German prosecuting authorities by telephone. She was told to speak to her German public defender. So, she attempted to contact her German public defender, several times, as in due course did her UK solicitors. She and they have found the German public defender unresponsive. Indeed, after the oral hearing on 19 December 2019 that Judge gave a specific direction to allow further updating evidence by 16 January 2020, but that was to no avail. The German public defender remained unresponsive.*

*(7) Legal aid had been granted on 27 August 2019 and the Appellant’s UK lawyers got to work. As well as unsuccessfully trying to get a response out of the Appellant’s German public defender, on 13 September 2019 they raised with the CPS for onward transmission to the Respondent German authorities the prospect of seeking a formal interview with the authorities pursuant to section 21B of the Extradition Act 2003. That request was subsequently amplified in a letter dated 19 September 2019. The Respondent formally declined the section 21B interview request on 11 October 2019, on the grounds that it would involve damaging delay into a criminal process involving elderly witnesses. Some of those witnesses are known to have been questioned on 27 August 2018. Not much is known about what happened to Mr Carbune and Mr Arseonaiei. The German authorities have referred to ‘taking action’ against both of those individuals. Nobody has been able to say whether Mr Carbune was ever located. Nor what happened in relation to Mr Arseonaiei who, back in 2009, gave the German authorities information about the Appellant’s involvement. By November 2019 the Appellant’s relationship with her husband had completely broken down. Since then he has been seeing Anita every other weekend, and has been giving some financial support. The Appellant and Anita live in a busy family home. There are several adult family members, including the Appellant’s mother (Anita’s grandmother). It is a supportive family.*

### III. LEGAL ANALYSIS

#### The s.21A(1)(b) issue

12. Three grounds of appeal have been advanced in this case. They are freestanding but they overlap, as is often the way. Each involves looking at this case through a distinct legal prism prescribed by a provision of the Extradition Act 2003. I will start with the ground of appeal based on the special proportionality test in section 21A(1)(b). When section 21A(1)(b) is read with section 21A(2), (3) and (4)(b), the picture which emerges is as follows (this is my encapsulation): *The extradition judge must order discharge if she concludes that the extradition would be disproportionate, taking into account – only, and so far as the judge considers it appropriate – three statutorily-specified matters: (a) the seriousness of the conduct alleged to constitute the extradition offence; (b) the likely penalty that would be imposed if the requested person were found guilty of the extradition offence; and (c) the possibility of the requesting state authorities taking less coercive measures than extradition.*
13. The Judge decided that extradition would not be disproportionate under these statutory provisions. The question for this Court on this appeal is whether the Judge’s



conclusion was ‘wrong’, in the light of the Judge’s approach but giving appropriate respect for factual and evaluative assessments by the Judge. The Judge set out section 21A in full. He then referred to the Lord Chief Justice’s guidance (*Criminal Practice Directions (Amendment No.2)*) “as to the type of offences for which a Judge (absent exceptional circumstances) should generally determine that extradition would be disproportionate”, before turning to the guidance on section 21A(1)(b) proportionality given by the Divisional Court in Miraszewski v District Court in Torun, Poland [2014] EWHC 4261 (Admin).

14. As to the first statutorily-prescribed matter (the seriousness of the conduct alleged to constitute the extradition offence), the Judge recorded that: “*The main components of seriousness of the nature and quality of the acts alleged, the requested person’s culpability for those acts and the harm caused to the victim*” (citing Miraszewski at paragraph 36). The Judge observed that: “*The alleged criminal conduct in this case is reasonably serious, in part targeting elderly, and therefore vulnerable, victims, distracting them and stealing their personal property and the subsequent withdrawal of cash from the stolen cards... Although the total loss is not high, namely 4313 Euros (£3,644 at current exchange rate), the manner in which the money was obtained is clearly a relevant consideration*”. It was in that context that the Judge observed that the Appellant: “*has made some admissions to participation in the offending*” but “*whether her account, if accepted, amounts to duress or is mitigation, is a matter for the German criminal justice system*”.
15. As to the second statutorily-prescribed matter (the likely penalty that would be imposed if the Appellant were found guilty of the extradition offence), the Judge recorded that: “*where information [from the issuing state] is absent, [t]he judge is entitled to draw inferences from the contents of the EAW and to apply domestic sentencing practice as a measure of likelihood*” (citing Miraszewski at paragraph 38). He recorded that: “*The principal focus is on whether it would be proportionate to order the extradition of a person who is not likely to receive a custodial sentence in the requesting state*” (citing Miraszewski at paragraph 37), adding that: “*It does not follow that the likelihood of a non-custodial penalty precludes the Judge from deciding that extradition would be proportionate*” (citing Miraszewski at paragraph 39). His conclusion was that: “*there is, in my view, a realistic possibility of a custodial sentence*”.
16. As to the third statutorily-prescribed matter (the possibility of the German authorities taking less coercive measures), the Judge recorded that: “*It is a reasonable assumption to make that the requesting state has pursuant to its obligation [to do so], already considered taking less coercive measures*” (citing Miraszewski at paragraph 41: I interpose, as Ms Westcott points out, that this proposition in that paragraph is in fact subject to the qualification “*in most cases*”). The Judge recorded that: “*The evidential burden is on the Requested Person to identify less coercive measures that would be appropriate in the circumstances*”; and that “*Where the Requested Person is a fugitive it is unlikely that the Judge will find less coercive methods appropriate*” (citing Miraszewski at paragraph 41). His conclusion was that he “*accepted the reasoning of the [Judicial Authority], in not accepting a s.21B invitation, on the basis that this would cause further delay*”. That was a reference back to earlier reasoning that: “*I consider it is a reasonable response of the [Judicial Authority] to the s.21B request, that this would cause further delay*”.

17. Central to Ms Westcott’s challenge to the Judge’s analysis and conclusion is the Judge’s approach to the second statutorily-prescribed matter (the likely penalty that would be imposed if the Appellant were found guilty of the extradition offence). She submits that the Judge did not analyse that specified matter in a legally correct manner, and that this Court needs to look at that issue again. I accept that submission.
18. The first problem relates to the application of domestic sentencing practice, in the absence of information from the Respondent as to likely penalty. The Judge rightly recorded the proposition that the extradition judge can apply domestic sentencing practice “*as a measure of likelihood*”, drawing “*inferences from the contents of the EAW*”. The Judge did not, however, then say he was undertaking that exercise or show that (and how) he was conducting it. Nor did he say there was some good reason for not undertaking it. The exercise has been undertaken by Counsel on this appeal and there is common ground as to what arises from it, as I shall explain.
19. The second problem, in my judgment, is that the Judge’s conclusion that there was “*a realistic possibility of a custodial sentence*” did not focus on the statutory question: “*the likely penalty that would be imposed*”. It did not follow the “*principal focus*” of asking whether the Appellant was not “*likely to receive a custodial sentence*”. It did not follow the approach (using the domestic sentencing practice) “*as a measure of likelihood*”. The fact that the Judge referred to “*a realistic possibility of a custodial sentence*” strongly suggests, in my judgment, that he was not putting it any higher than “*realistic possibility*”. He could not say, and was not saying, that a custodial sentence was “*the likely penalty*”. Logically, that would mean the “*likely penalty*” was “*a non-custodial sentence*”, as the relevant answer to the relevant question. That would then bring into the spotlight whether, and if so why, in this case “*it would be proportionate to order the extradition of [the Appellant as] a person who is not likely to receive a custodial sentence in the requesting state*”, that being the necessary “*principal focus*”. It would bring into focus whether, and if so for what reason, this is a case in which extradition is proportionate, notwithstanding the “*likelihood of a non-custodial penalty*”, that conclusion being described as something which is not ‘precluded’.
20. All of these points arise from the Judge’s reasoning when put alongside the legal propositions which the Judge himself recorded. I am satisfied that, in the light of all of this, it was and is appropriate for this Court to look closely at the question of likely penalty, analysed objectively in accordance with the applicable legal principles, and then put alongside the other two statutorily-prescribed matters (seriousness of the conduct and possibility of less coercive measures). At the hearing I was greatly assisted by both Counsel on the question of what outcome the application of domestic sentencing practice, “*as a measure of likelihood*” of penalty, would produce. Ms Westcott submitted that the appropriate application of the Sentencing Council’s Definitive Guideline for Theft Offences would place the Appellant within ‘harm category 3’ and ‘culpability category B’. That would mean a starting point of a ‘high level community order’, and a category range from a ‘low level community order’ to ‘36 weeks custody’. She submitted that the likely sentence, were there a conviction and based on what is alleged in the EAW, would be a short custodial sentence which would be suspended, not least in the light of the absence of any previous convictions. In support of this analysis under those domestic sentencing guidelines Ms Westcott pointed to the Appellant’s ‘good character’ and her role as ‘primary carer’ for Anita.

Mr Swain accepted all of this. He accepted, even based on his ‘no go areas’ approach to the evidence, that the likely sentence in this case would be a short custodial sentence which would be suspended. I accept the correctness of this approach.

21. There was further important common ground before me. Ms Westcott submitted, and Mr Swain accepted, that a suspended sentence (the agreed likely penalty applying the appropriate measure) is to be regarded as falling on the ‘non-custodial’ side of the line, for the purposes of applying the guidance in Miraszewski. That analysis was derived from Miraszewski reading paragraphs 35 and 39 together. Since it was common ground I will deal with the point briefly. At paragraph 35 of Miraszewski Pitchford LJ was discussing (at the end of the paragraph) the question of whether a domestic England and Wales court would “*either not impose a sentence of imprisonment or would suspend sentence of imprisonment*”, those two situations being distinct from the imposition of a sentence of ‘*immediate custody*’. He also said he would “*confront this issue in the following paragraphs*”. Then at paragraph 39 Pitchford LJ referred to “*the likelihood of a custodial penalty*”, distinct from “*the likelihood of a non-custodial penalty*”. During the course of that discussion he described a situation which might be “*unlikely to attract a sentence of immediate custody*”. Reading all that together, say Ms Westcott and Mr Swain, it can reliably be taken to follow that in the receiving of “*a custodial sentence*” for the purposes of the “*principal focus*”, and in “*the likelihood of a non-custodial penalty*” as something which does not ‘preclude’ a finding that extradition would be proportionate, a suspended sentence is placed on the ‘non-custodial’ side of the line. I accept the correctness of this approach. I observe that in HH v Deputy Prosecutor of the Italian Republic [2012] UKSC 25 [2013] 1 AC 338 at paragraph 132, in the context of Article 8, Lord Judge CJ contrasted “*an immediate custodial sentence*” with “*a non-custodial sentence (including a suspended sentence)*”.
22. The agreed upshot, applying what is agreed to be the correct legal approach, is that the “*likely penalty*” in this case is a “*non-custodial*” penalty. It is important to emphasise that this does not involve entering Mr Swain’s two specific ‘no go’ areas. He accepted this conclusion while maintaining those two specific ‘no go’ areas (and indeed, he did so maintaining his ‘wider no go area’). This approach – identifying the likely penalty as non-custodial – posits that there would be a conviction (and a defence of coercion rejected). It involves no assumption that the sentencing court would accept, or give weight to, the Appellant’s explanation as mitigation. It assumes that she has been found to have acted “*with the intent to procure for herself a source of revenue of some importance and of some duration*”. It also involves assuming, against the Appellant, that – for the purposes of the Definitive Guideline – she is not to be characterised as having been “*involved through coercion, intimidation or exploitation*” on the part of Mr Carbone. Were that the case, it would be a basis for placing her in ‘culpability category C’, which would lead to a ‘starting point’ of a band C fine and a category range from a ‘band B fine’ to a ‘low level community order’. This therefore illustrates what I said at the outset of this judgment about accepting the Respondent’s submissions and not going behind the Judge’s observation that “*whether her account, if accepted, amounts to... mitigation, is a matter for the German criminal justice system*”. I am not finding that the Appellant did not act through ‘coercion, intimidation or exploitation’ by Mr Carbone. I am not finding that she is “*likely*” to be convicted, or that her mitigation would be “*likely*” to be rejected. Instead, I am accepting the submission of both Counsel that, even assuming all of these things

against her, the ‘measure’ of the ‘likely penalty’ in this case is a short, non-custodial (suspended) sentence.

23. As I have explained, “*the principal focus*” under the Miraszewski guidance is on “*whether it would be proportionate to order the extradition of a person who is not likely to receive a custodial sentence*”. However, under Miraszewski, the conclusion that a non-custodial penalty is likely applying the appropriate measure of likelihood does not ‘preclude’ the decision that extradition would be proportionate. I put to Mr Swain this question: what is it, on the facts and in the circumstances of the present case, which renders it proportionate to extradite the Appellant in circumstances where she has been evaluated as not likely to receive a custodial sentence? His answer was that it was the strength of the weight to be attributed to the facts and circumstances relating to the other two statutorily-prescribed matters: the seriousness of the conduct alleged to constitute the extradition offence; and the possibility of the relevant foreign authorities taking measures that would be less coercive than extradition. He submitted that, in combination, the weight to be attributed to these factors is such as to support the overall conclusion that extradition would be proportionate, even though there is no likely custodial sentence. The Judge did not reason it out in this way and I will need to evaluate this answer myself.
24. I entirely understand why Mr Swain gave that answer. That is because the three statutorily-specified matters are exhaustive on the issue of proportionality: see section 21A(2). Nothing else can be taken into account. But there does need to be something about the weight to be given to the position regarding one or both of the other statutorily-specified matters, to explain why extradition of a person to face what has been assessed as a likely non-custodial penalty is proportionate. In Miraszewski at paragraph 39, Pitchford LJ gave some illustrative guidance on this. He spoke of the high public interest in pursuing extradition for a serious offence against the environment (even if custody was unlikely) as an example where seriousness would have added weight. He also spoke of the case of a fugitive with a history of disobeying court orders as involving ‘no less coercive measures’ having increased weight. These examples illustrate the need for something sufficiently weighty. Mr Swain needs something of that kind. Absent something sufficiently weighty, the mere invocation of the other two statutorily-prescribed matters would undermine the “*principal focus*” in Miraszewski. It would alter the message that: “*It does not follow that the likelihood of a non-custodial penalty precludes the Judge from deciding that extradition would be proportionate*”. It would dilute the illustrative examples given. In my judgment, Miraszewski reflects a recognition that there ought in principle to be some weighty feature in the evaluative judgment regarding one or both of the other two statutorily-prescribed matters, if extradition to face a likely penalty assessed as non-custodial is going to be section 21A(1)(a) proportionate.
25. In my judgment, there is nothing in the Judge’s reasons which identifies some weighty feature of this kind, nor has Mr Swain been able to point to some weighty feature. I start with the seriousness of the alleged conduct. The Judge described the conduct alleged to constitute the extradition offence as “*reasonably serious*”. There is no reason at all for this Court to go behind that measured characterisation and I adopt it. It is not, however, suggestive of a particularly weighty feature. Moreover, although the three statutorily-prescribed matters are distinct, it is relevant to bear in mind that the conduct, alleged to constitute the extradition offence, when analysed produces the

result that the likely penalty that would be imposed is non-custodial. And that is even assuming, against the Appellant, her mitigation narrative not being accepted by a sentencer. It needs to be remembered that the EAW itself records that the Appellant acted under the “*direction*” of Mr Carbune. Moreover, even assuming that she acted with “*wilful and conscious cooperation*” and “*with the intent to procure for herself a source of revenues of some importance and some duration by the continuous committing of these offences*”, as it is described in the EAW, it is relevant to have in mind that very shortly after the offences had taken place she was in a position of requiring an emergency €300 transfer from her mother in order to be able to get out of Germany and back to Italy. Those features are, in my judgment, consistently with the principled approach which I have identified in relation to the evidence, relevant to the component of seriousness described in Miraszewski at paragraph 36: “*the requested person’s culpability for [the] acts [alleged]*”. In the circumstances, on the facts and on the evidence of the present case and notwithstanding the nature of the experience and the (economic and non-economic) harm caused to the victims, many of whom were elderly, I find it impossible to accept Mr Swain’s submission that there is something in the ‘seriousness of the alleged conduct’ attracting such weight as to support the conclusion that extradition in this case would be proportionate notwithstanding that the likely penalty would be non-custodial.

26. I turn to special weight and the question of less coercive measures. As I have explained, the Judge addressed that matter by asking himself whether the German authorities’ response to the s.21B invitation for an interview was “*reasonable*”. He concluded that the German authorities’ reference to the wish to avoid ongoing delays in the context of elderly victims and witnesses, was a “*reasonable response*”. Ms Westcott, accepting that “[g]enerally speaking it will not be for this court to question... reasons” for refusing such an invitation (see Komar v District Court of Torun, Poland [2015] EWHC 2547 (Admin) at paragraph 31), submits that in this case this Court should do precisely that. She submits that there was no “*reasonable*” basis for the refusal, so that the position on this third statutorily-specified matter should weigh against extradition. Mr Swain, as I have explained takes the opposite position: he submits that the German authorities position in relation to less coercive measures can bear such weight, when placed alongside the seriousness of the alleged conduct, as to justify as proportionate – this conclusion not being ‘precluded’ – the Appellant’s extradition notwithstanding the assessed non-custodial likely penalty. In my judgment, the correct analysis lies between these two extremes.
27. It is one thing for the Court to accept that the Respondent authority has put forward its reasons for refusing the request, which decision this Court “*will not ... question*”; and therefore to conclude that there is on the material before the Court no possibility of the German authorities taking less coercive measures. On that, I prefer Mr Swain’s submission to that of Ms Westcott. But it is another thing for this Court, unquestioningly and without critical evaluation, to accept that the Respondent authority’s position on ‘less coercive measures’ is a sufficiently weighty consideration – alongside the seriousness of the alleged conduct – as to justify as proportionate the extradition of an individual assessed as likely to face a non-custodial penalty if convicted. That I cannot accept. In my judgment, whether the Respondent’s position on ‘less coercive measures’ can bear the special weight claimed for it calls for an objective evaluation. That is how I approach the matter. It fits with Pitchford LJ’s illustrative example in Miraszewski at paragraph 39, where he spoke of the Court

being satisfied in the case of a fugitive with a history of disobeying court orders as one where ‘no less coercive measures’ is especially weighty. I must therefore evaluate whether the German authorities’ position as to no less coercive measures, in the circumstances of this case, is one to which enhanced weight can be attributed.

28. I am very clear that it is not. Approaching the question of ‘less coercive measures’ in this way there are, in my judgment, patent weaknesses – viewed objectively – with the German authorities’ position adopted in relation to the refusal of a section 21B invitation and the invocation of delay. The first weakness relates to the content of the letter written by the German prosecutor on 15 July 2019 together with the timing of the notification from the Appellant’s UK legal representatives that they were intending to seek an interview under section 21B. The letter of 15 July 2019 from the German prosecutor invited a written response by 15 September 2019 and stated: “*In the event that you do not respond within the aforesaid timeframe, it will be inferred that you are abusing your right to stay silent in regards to the offence you are charged with. Beyond that date, a decision will be reached based on the situation in your case file.*” Mr Swain submits that the letter straightforwardly gave an opportunity to give a written explanation, and gave a clear warning that it was the last chance to do so. I can put to one side the facts that the letter was written to the Appellant’s family address in Romania, that it only came to her attention in August 2019, that she was granted legal aid in the United Kingdom on 27 August 2019, and that the German public defender whom the Appellant had been instructed in the letter to contact, and which she did try to contact – as subsequently did her UK legal representatives – was unresponsive. What matters most, in my judgment, is the fact that the letter of 15 July 2019 from the German prosecutor stated, in terms, that: “*you have the right to be questioned in regards to the offence you are charged with*” (I interpose – albeit not a legal right to an interrogation conducted by a judge or prosecutor); it also stated, in terms, that: “*If you want to be interviewed, you are kindly requested to notify the competent authority mentioned*” (I interpose – that is the Munich Public prosecutor’s office). Mr Swain submits that the letter was not communicating that the Appellant had until 15 September 2019 to request an interview. The difficulties with that submission are (i) that the letter expresses 15 September 2019 as the date for responding, (ii) that it expresses the right to request an interview as an alternative to submitting a response in writing, and (iii) that it does not give any alternative deadline for requesting the interview.
29. This makes the German authorities’ decision to reject the section 21B invitation a striking position, in my judgment, to adopt. It came in circumstances where the newly-instructed UK lawyers could clearly be seen: (i) to have alerted the Crown Prosecution Service, acting as agent for the Respondent in the extradition proceedings; (ii) to have given notice of the Appellant’s wish to pursue the mechanism of section 21B (which is the formal mechanism for interview in extradition proceedings); and (iii) to have done so on 13 September 2019, which was a date within the specified timeframe which was the only timeframe given in the German authorities’ own letter referring to an interview as an option open to the Appellant if requested by her. The UK representatives’ email of 13 September 2019 to the CPS said this:

*We wish to put the parties on notice that in accordance with the [Appellant]’s instructions and the contents of the RFFI [ie. Request for Further Information] response dated 19 August 2019, which refers to an opportunity for the [Appellant] to*

*provide a statement of the German authorities, we will be making a formal s.21B request in this case.*

The RFFI response dated 19 August 2019 was a document emanating from the Munich district court which had recorded: “On 15 July 2019 letter in the Romanian language was sent to the suspect person in which the facts and circumstances she is charged with were explain to her and opportunity was given to her to make a statement”. This means, on the face of it, and within the timeframe set out within the key letter, to which letter reference was being made on both sides, a request for interview was communicated. It was then followed up and amplified on 19 September 2019. Ironically, when the request was then refused by the German authorities on 11 October 2019 the refusal letter included, within the reasons for the refusal, this statement: “Opportunity has been given already to the suspect person to make a statement about the fact she is charged with at any moment”.

30. So, the Appellant notifies a wish to have an interview, within the stated timeframe in a letter, which letter refers to the option of having an interview if requested by her, and is then told no because she had her opportunity through that letter. In my judgment, Mr Swain was not able to come up with any convincing reason why the Appellant’s in-time notification of the wish to request an interview should have been refused, in circumstances where an interview had been communicated as something she was entitled to request, which request would be accommodated. Viewed in this light, I would not be able to share the Judge’s characterisation of the refusal as having been “a reasonable response”, if that were the question. However, as I have explained, that is not the question. The question is rather this. Can Mr Swain point to the position relating to the absence ‘less coercive measures’ – together with the seriousness of the alleged conduct – as features worthy of carrying such weight in the present case to justify as proportionate the extradition of the Appellant to face what has been assessed and recognised to be a likely non-custodial penalty, if convicted? In my judgment, he cannot.
31. There is, in my judgment, another key weakness with the Respondent’s position on this aspect of the case. The reasoning in the refusal letter of 11 October 2019 says this: “We believe that an interrogatory of the suspect person by video-conference or any further correspondence with the accused would lead to unnecessary delays in these proceedings”. I put to one side the points I have already made. It is, in my judgment, extremely difficult to characterise this reasoning as cogent in the context of this case. In the first place, the invocation of delay is being relied on by German authorities whose sole act – so far as the evidence which they chose to place before the Judge and before me is concerned – between 9 October 2009 (the German arrest alert) and 18 September 2018 (the first EAW) was the issue (or reissue) of a national arrest warrant (order for pre-trial detention) on 17 December 2015. That is a 9 year delay with a single act. Moreover, nobody has been able to explain what the new national arrest warrant did that was different from what the old German arrest warrant had done. Not only that, but it is not said that the German authorities knew anything more in December 2015 or September 2018 that they did not already know in October 2009. This is a feature which, viewed objectively, seriously undermines the invocation – as a reason to decline an interview – of urgency and an imperative of ‘avoiding unnecessary delays in the proceedings’. The German authorities had evidently been in contact from the start with the victims of the criminal offending, many of whom were

said to be elderly. Moreover, it is known from the papers that some of them were questioned on 27 August 2018.

32. There is a third weakness. By engaging with the Appellant through a video-conference (or other interview) the German authorities would be able to consider her side of the story. In doing so, moreover, they would have found that she was not denying the conduct in the supermarkets and at the banks. Her story was about the coercive pressure under which she had been put, raised either as to criminality or as to culpability and mitigation. All of this is relevant to concerns about the evidence of witnesses, some of them elderly, some already questioned. This is not a hindsight point. A formal proof of evidence had been filed and served on 6 September 2019 in these extradition proceedings, in which the Respondent is the relevant German authority. In that proof of evidence, the Appellant said this:

*“I met someone online in 2009 and went to Germany in February 2009 to see him. When I was in Germany I was forced to participate in the offending described in my EAW. When I refused to do so I was beaten up. I managed to run away in March 2009 and I returned to Italy.”*

This description of events – corroborated by the Appellant’s mother so far as concerns what the Appellant said on return from Germany in 2009 and the emergency transfer of funds needed to get her out – was known to the German authorities, through their participation in these proceedings. It was also consistent with the Respondent’s own description in both of the EAWs about the Appellant (and Mr Arseonaiei) having been “*acting by order of Carbune*”.

33. In all the circumstances, and for all these reasons, I cannot accept that so cogent are the two other statutorily-prescribed matters (the position as possible non-coercive measures and the position as to the seriousness of the alleged conduct) that they can bear the weight of rendering proportionate the extradition of the Appellant to face what, on accepted analysis, is to be assessed as a likely non-custodial penalty. For these reasons, the section 21A(1)(b) ground of appeal succeeds. The Judge’s conclusion has been demonstrated to have been wrong. The Appellant falls to be discharged. That is sufficient for the purposes of this case, to determine the appeal in the Appellant’s favour.
34. However, two further grounds of appeal were fully argued on both sides, and I will address them. In doing so, moreover, I will assume that my conclusion on the section 21A(1)(b) proportionality issue is wrong. I will, however, carry forward the features of the section 21A(1)(b) analysis which are relevant to the other issues: to do otherwise would be artificial.

#### The s.14 issue

35. The Appellant appeals against the Judge’s conclusion that extradition was not barred by reason of section 14 of the 2003 Act. In an accusation EAW case the statutory test under section 14 poses the question whether “*it would be unjust or oppressive to extradite [the Appellant] by reason of the passage of time since [s]he is alleged to have – (a) committed the extradition offence*”.



36. It is a curious feature of the Judge's description of the relevant law that he set out the part of section 14 applicable to a conviction EAW case, for this is an accusation EAW case. Also curious is that the Judge set out lengthy passages from the authorities predominantly addressing the relevance of the situation where an individual is found to be a 'fugitive': yet the Judge immediately went on to explain that he was satisfied that the Appellant in this case is not a fugitive. Another problem is that he was taken into error in recording that "*oppression does not arise when [requested persons] accept their involvement in the offences*", citing Stebbins v Government of Latvia [2006] EWHC 1272 (Admin). Mr Swain accepted that the citation of Stebbins was inaccurate. It is "*injustice*" and not "*oppression*" which does not arise under the proposition in Stebbins, and it was Mr Swain's skeleton argument before the Judge which had contained the error, but in fact it was in a paragraph about "*injustice*" that the Judge repeated the error. More importantly, as Mr Swain also accepted, the (corrected) citation of Stebbins would be inapposite in this case. That is because the Appellant does not accept criminal guilt in relation to the events of March 2009: she is putting forward a defence of duress. Elsewhere in the judgment the Judge recorded that fact. These features in the judgment may be unfortunate but I am satisfied that they do not undermine the Judge's reasoning on this part of the case. I am able to put all of these points to one side and focus on questions of substance, including in the Judge's reasoning.
37. Of the authorities cited to me in relation to section 14, I have found particular assistance the exposition of the law by the then Leggatt LJ in Eason v Government of the United States of America [2020] EWHC 604 (Admin) at paragraphs 24 to 29 in particular. The Eason case post-dates the Judge's judgment, though it discusses some of the authorities to which the Judge referred. The key points from the authorities relevant to the application of section 14 in the present case, very largely reflected in the Judge's exposition, are in my judgment as follows. (1) 'Unjust' is directed primarily to the risk of prejudice to the Appellant in the conduct of the trial itself. (2) 'Oppressive' is directed to hardship of the Appellant resulting from changes in her circumstances that have occurred during the period to be taken into consideration. (3) There is room for overlap between 'unjust' and 'oppressive', which between them would cover all cases where extradition would not be fair. (4) That aspect of 'injustice' which relates to 'a risk of prejudice in the conduct of the criminal proceedings in the requesting state' extends beyond the question of whether a fair trial is now impossible, the question not being whether it is unjust to try the Appellant but whether it would be unjust to extradite her. (5) 'Oppression' in the form of 'hardship' requires more than mere ordinary hardship which is a comparatively common consequence of an order for extradition and will not easily be satisfied. (6) Where there has been culpable delay on the part of the requesting state that is a relevant factor may tip the balance in a case where the Appellant is not herself to blame. (7) In assessing 'oppression' in the form of 'hardship', other relevant factors will include the seriousness of the offence and the impact of extradition on other family members. (8) The test of oppression will not be easily satisfied: hardship, a comparatively commonplace consequence of an order for extradition, is not enough. (9) Ultimately, an overall judgment on the merits is required and it is important to stay focused on the words of the statute itself. (10) Each case must turn on its own facts.
38. The Judge approached the section 14 issues in the following way. (1) He accepted that the Appellant is not a 'fugitive', accepted that she had not avoided arrest or concealed

her whereabouts, and accepted that she had travelled openly and lived openly. (2) The Judge recognised key events in the Appellant's life which had taken place during the period since 2009. They included having married her husband in 2012, her arrival in the United Kingdom in the Spring of 2015, and the subsequent birth of Anita in December 2015, together with the more recent circumstances regarding the breakdown of the marriage. (3) The Judge found: "*I am unable to find any culpable delay on the part of the German authorities*".

39. The Judge's conclusions in relation to 'injustice' were as follows. He was not persuaded that the Appellant's loss of the opportunity to give a contemporaneous account of the circumstances regarding the offending would cause her injustice. He described that as a not uncommon position and articulated his confidence that Germany as a fellow EU member state would afford the Appellant an opportunity to set out her defence. He emphasised that it was not so much her actions that she challenged but her state of mind and the degree of pressure that she was under. He was satisfied that the Appellant would be able to put her case to a German court, who would take into account any disadvantage she did face from not being able to challenge the accounts of her co-defendants.
40. Ms Westcott relied on Z as a working illustration in support of her arguments that the Judge was wrong about 'injustice'. I am not persuaded that he was. I cannot see this as a case which can cross the 'injustice' threshold, having regard to the passage of time (including my conclusion as to culpable delay) and the implications for any German trial process, asking whether extradition would now be 'unjust'. The real section 14 issue in this case, in my judgment, concerns oppression, when directed to hardship of the Appellant resulting from changes in her circumstances that have occurred during the relevant period. That is where the section 14 merits lie.
41. On the question of oppression – and recalling, as I have explained, that the Judge had found an absence of any culpable delay – the Judge analysed the case as follows. He reminded himself that the test for oppression is high and hardship is not sufficient. He found that there would 'plainly be an emotional impact' on the Appellant and Anita, which position moreover was aggravated by the recent separation and consequent loss of support from the Appellant's husband and Anita's father. However, the Appellant's mother and Anita's grandmother was clear that she and the Appellant's adult sisters would be able to care for the child in the same settled family household while the Appellant is in Germany. For those reasons, the Judge said he was unable to find that there was evidence of oppression sufficient for the purposes of section 14.
42. In my judgment, the Judge started from a place which has proved – on analysis – not to be sustainable. He said he was "*unable to find any culpable delay on the part of the German authorities*". This was also a strong theme in the context of Article 8, as will be seen. Ms Westcott challenged that finding and, in my judgment, Mr Swain was unable to provide any proper basis for supporting it. This is a case of 9 years delay between 2009 and 2018. That 9 years of delay is wholly unexplained. As I have already said, the German authorities – as Mr Swain accepted – are not said to have been in any different position on 18 September 2018 when they issued the first EAW than they were on 9 October 2009 when they issued the domestic arrest alert. This Court does not know whether the German authorities were aware, having interviewed the co-defendant Mr Arseonaiei prior to June 2009, that the Appellant was a Romanian woman who had been living in Italy. The point is that whatever they knew

on 18 September 2018, it is not suggested that they did not already know it on 9 October 2009. Nothing material is identified as having come across the German radar in the 9 year period. All that was known was that the 2009 arrest alert, and the replacement 2015 national arrest warrant (order for pre-trial detention) bore no fruit. No explanation and no justification is put forward for the delay in any document before this Court. The Judge did not refer to any. The Judge did say (in the context of Article 8) that “*the German authorities did not have until 2019 an address where [the Appellant] could be living*” and that “[*p*]roceedings were issued in Romania, after her arrest on 30 October 2018”. Mr Swain, rightly, does not submit that this provides an answer to why the German authorities did not do what they did on 18 September 2018 at any stage between 2009 and 2018. That is the critical question, in my judgment, so far as culpable delay is concerned. I have found no answer to it.

43. In my judgment, this is a clear case of culpable delay. This is a long period of what the Divisional Court in Kovac v Regional Court in Prague [2010] EWHC 1959 (Admin) at paragraph 19 called “*wholly unexplained delay*”. In Eason, Leggatt LJ explained at paragraph 34 that: “*No sensible explanation or excuse has been given for the 6 year delay... between the grand jury indictment and the making of the extradition request*”. He went on to record that Counsel for the Respondent, “*with appropriate realism*”, did not seek to argue that the delay was other than culpable. In this case, Mr Swain did make that argument. I respect that, of course. He had a finding to that effect from the Judge. But, in my judgment, Mr Swain was able to identify nothing in the materials or in the Judge’s judgment which supports the contention that the delay was other than culpable. In circumstances where the Judge did not regard this as a case as involving ‘culpable delay’, it is perhaps unsurprising that he was unpersuaded by the question of ‘hardship’ arising by reference to developments in the Appellant’s life during the period of relevant delay. I am satisfied, in these circumstances, that this Court should look again at the evaluation of section 14 oppression to see whether the outcome was ‘wrong’.
44. Both Counsel made helpful submissions on whether the Court, in approaching section 14, has regard to a comparison between: (a) the timeline in which the matters have been pursued by the authorities of the country seeking extradition; and (b) the position as it would have been had events been pursued with appropriate promptitude. As it seemed, and still seems, to me there is some support for that in the summary given by Laws LJ in Symeou v Greece [2009] 1 WLR 2384 at paragraph 57, a passage on which Ms Westcott relied, when he said: “*The focus is on the effect of events which would not have occurred if the trial had taken place with ordinary promptitude*”. It seemed to me, and still does, that if the legal prism requires the Court to look at oppression based on delay through hardship arising from changes in circumstances that have occurred during the relevant period, it is inescapable that some element of comparison is needed. A simple illustration lies in this idea: ‘because they acted with such inordinate and culpable delay, I am facing extradition which removes me from the daughter for whom I am primary carer’. Neither Counsel favoured a comparative exercise, except insofar as inescapable. Ms Westcott’s submission was that the Court should avoid fixing a hypothetical point of time and analyse the case by reference to that. I accept these submissions and will stick to an approach by reference to the ten propositions I listed earlier.

45. I have explained that a significant feature of the analysis under section 14 of the 2003 Act, when the court is considering delay and ‘oppression’, is the focus on *“hardship to the [Appellant] resulting from changes in [her] circumstances that have occurred during the period to be taken into consideration”*. That focus derives originally from Lord Diplock in Kakis v Government of the Republic of Cyprus [1978] 1 WLR 779 at 782. What the case-law makes clear is that developments in an individual’s life arising from familiar changes in circumstances occurring during the relevant period – marriage, birth of children, relocation, onset of ill-health – can support a conclusion of relevant hardship supporting a conclusion that extradition, in light of the passage of time, would involve oppression. Oppression is not excluded, simply because developments in a life are commonplace occurrences in human lives. In illustrative support of this, Ms Westcott cited Kovac at paragraphs 14 and 20, Eason at paragraph 44 and Majewski v District Court of Ostroleka, Poland [2013] EWHC 2097 (Admin) at paragraph 22. Mr Swain accepted that hardship can be the basis for a finding of oppression, notwithstanding that it arises from some ‘commonplace’ event (for example, the birth of children from whom there is then separation), provided always that the hardship from that change of circumstance can be linked to delay, at least where that delay is *“culpable delay”*. The focus has to be on the passage of time, the changes of circumstances during the relevant period of delay, and the particular hardship arising by reason of those changes and that passage of time, applying the ‘high threshold’ of ‘oppression’ in deciding whether extradition is to be so characterised.
46. In my judgment, the key points in the present case – viewed through the section 14 ‘oppression’ prism – are these. (1) The German authorities had identified the Appellant by 9 October 2009 at the latest. (2) She was at that stage living openly in Italy, as the holder of a Romanian identity card, and continued to retain her family name until 2012 when she married. (2) It was three years later, in 2012, that the Appellant got married and applied to obtain a replacement for her previous Romanian identity card in her unmarried name, with one in her married name. (3) As at 2013, 4 years had already elapsed since the distraction thefts and cashpoint withdrawals of March 2009. The Appellant was now married but had no children. She was mobile. At this stage, she travelled back to Germany and unsuccessfully sought employment there. She was not at that stage picked up by the German authorities (cf. Smreczanski v Regional Court of Warsaw, Poland [2013] EWHC 3893 (Admin) at paragraph 28). (4) The key events in her life, relevant in considering whether extradition would visit her and other family members with hardship, in the light of changed circumstances during the period of (culpable) delay, such that extradition would be oppressive, were that she came to the United Kingdom in 2015 to join her husband here, gave birth to baby Anita in December 2015, established a family household of mutual support, and has experienced the breakdown in her marriage.
47. In my judgment, the consequences for the Appellant and for Anita, viewed through the prism of section 14, make extradition oppressive. The implications of the gear-change in the pursuit of the Appellant in September 2018, when looked at in the context of culpable delay in not having made that gear-change at any stage after 2009 and in the context of the changes in her life during that period, are very substantial, very serious and very severe. I refer to what I say below, under the topic of Article 8 ECHR, about the position regarding the impact of extradition for the Appellant and Anita in particular. I have relied on it here. Having regard to all of these features of the case,

and all the facts and circumstances of the case, I am quite satisfied that the extradition of the Appellant would be oppressive in the sense of hardship, and that the outcome before the Judge was ‘wrong’.

‘False sense of security’

48. I mention this feature of the section 14 analysis separately. Ms Westcott submitted that this is a case which should be characterised as having given rise to ‘a false sense of security’, a phrase used in some of the cases. She submitted that a ‘false sense of security’ need not involve any positive act or communication, and can arise from the passage of time, citing Kovac. Mr Swain submitted that any ‘false sense of security’ in this case could only have arisen from the events of November 2018 and was very short-lived since by the summer of 2019 the Appellant knew that she was amenable to pursuit, and was being pursued, by the German authorities. In my judgment, it is not necessary to decide who is right about ‘false sense of security’. Ms Westcott succeeds, in my judgment, on oppression without ‘false sense of security’ and even if Mr Swain’s submission is correct. In those circumstances, I say no more about it.

‘Brexit uncertainty’

49. I have left this topic out of account in my analysis of oppression and the passage of time. I am satisfied that the Appellant succeeds on oppression even if all issues relating to Brexit are disregarded. I heard argument on the point, in the context of Article 8 ECHR. Before turning to Article 8, I will deal with this as a discrete question. The uncertainty for the Appellant and Anita arising from Brexit was a topic which the Judge addressed in the context of Article 8. In his Celinski ‘balance sheet’ (Polish Judicial Authority v Celinski [2015] EWHC 1274 (Admin) [2016] 1 WLR 551), the Judge recorded as a factor against extradition: “*The uncertainty inherent in the UK’s departure from the EU*”. In his subsequent reasons, he went on to say this: “*I do not consider it is appropriate to speculate about the consequences of the U.K.’s departure from the EU*”. I agree with those observations. The question, however, as it seems to me, is whether the ‘inappropriateness of speculation’ means that no substantial weight is to be given to the ‘uncertainty’. The Judge said no more. I have been assisted by submissions on the point from Counsel on both sides.
50. The question is whether it is appropriate to factor ‘Brexit uncertainty’ into the Article 8 analysis and, if so, in what way. Nobody disputes that the uncertainty in relation to Brexit raises a very real question as to whether or not the Appellant would be able to come back and re-establish her family life in the United Kingdom, were she to be extradited to Germany and present thereafter for whatever time it takes for the legal process to be completed, including any penal measure requiring the Appellant to be in Germany. Mr Swain accepted that this is a factor which can properly be taken into account as relevant, as a subjective matter, to the “*anguish*” which the Appellant (and other family members) will experience through extradition taking place. He cited Zapala v Circuit Court, Warsaw, Poland [2017] EWHC 322 (Admin) at paragraph 23(ix). I agree. Beyond that, submitted Mr Swain, it is ‘harder to say’ that it feeds into the Article 8 analysis as an objective feature. He pointed out that it could arise in very many cases. Ultimately, his submission was this: a district judge ‘may’ look at the risks arising from Brexit uncertainty as an objective factor, but is not ‘obliged’ to do so; the District Judge was entitled to, but this Court should not. Ms Westcott, drew my attention to Sobczyk v Circuit Court in Katowice, Poland [2017] EWHC 3353

(Admin) at paragraph 22, a case in which the Divisional Court said that an argument based on Brexit uncertainty had “no merit” because the position was “highly uncertain” and “it would be quite wrong for this Court to speculate as to what ... arrangements would apply”.

51. In my judgment, Mr Swain is correct to accept that – in principle – Brexit uncertainty should be taken into account in the Article 8 analysis as a subjective factor (relevant to “anguish”), and that it can be taken into account in the Article 8 analysis as an objective factor, and that all of this is so, notwithstanding that the Court should not speculate. What I cannot accept is his submission that this Court should not take Brexit into account as an objective factor. Mr Swain’s submission was that it is ‘impossible to say’ what the future holds: it is ‘impossible to say’ that the Appellant would be able to come back to the family home in the United Kingdom; and it is ‘impossible to say’ that she would not be. Once it is accepted – rightly, in my judgment – that the uncertainty should feature as a subjective factor, and can feature as a subjective factor, it is in my judgment unpersuasive to shut out the objective factor in this appeal. Especially where the Judge (i) listed it as a factor against extradition (ii) recorded that it was inappropriate to speculate but (iii) said no more about whether he was discounting any substantial weight (subjective or objective) in the light of (ii).
52. In my judgment, there is no reason why the uncertainty should be taken into account only as a ‘subjective’ factor (relevant to ‘anguish’) and not as an objective factor. In my judgment, it risks distortion to speak or speak in terms of ‘temporary absence’ from the family home of the Appellant as mother and primary carer, with Anita meanwhile enjoying the stability of home, aunts, grandmother, school and friends, and totally ignore the accepted risk (it being ‘impossible to say’) that mother will not be allowed back to the United Kingdom to the family home. The Judge explained that the Appellant’s “family, namely her mother and sisters, will be able to look after Anita, for the period that [the Appellant] is in Germany”, “within the maternal family”. But the objective risk from the Brexit uncertainty concerns what would happen next. That ‘risk’ is one of a situation in which Anita, born and brought up in the United Kingdom, leaves behind all these things (the stability of home, aunts, grandmother, school and friends) to go somewhere – perhaps Romania – in order to be reunited with mum. The Article 8 case-law tells extradition courts that we must all focus, in a concrete way, on what will happen to the child if a primary carer is extradited. In HH, Lady Hale put it this way (paragraph 33): “Careful attention will ... have to be paid to what will happen to the child if her sole or primary carer is extradited”. I note that Sobczyk was not a primary carer case. In my judgment, that “close attention” as to “what will happen” should, at least in the present case, be informed by the objective substantial risk that (a) the Appellant as primary carer would not be able to return to be reunited with her daughter in the family home in the United Kingdom so that (b) Anita would only be reunited with her mother by moving to another country. Ms Westcott so submitted and I accept that submission.

The s.21A(1)(a)/Article 8 ECHR issue

53. I have considered in the sections above (i) the section 21A(1)(b) proportionality of extradition viewed in the prescribed terms of seriousness of the alleged criminal conduct, likely penalty and less coercive measures; and (ii) the question of oppression arising from hardship from changes of circumstances during a period of lapse of time including a 9 year period of culpable delay. I turn now to (iii) the question of Article 8

ECHR compatibility. Both Ms Westcott and Mr Swain submitted that, the reality, in a case such as the present, it was likely that question (ii) oppression and (iii) Article 8 would ‘stand or fall together’, given the overlap in the factors to which regard falls to be had. That common position is realistic. The legal prisms are not identical, but there is a very substantial overlap, at least in this case. Ms Westcott submitted that ‘oppression’, like Article 8, involves looking at the cumulative effect of relevant factors. She also submitted that Article 8 brings a special focus on the welfare and best interests of children. I accept those submissions. Given the overlap, I do not consider it appropriate to approach Article 8 on the basis that ‘even if I am wrong in my conclusion under section 14, as to ‘oppression’. That would be artificial. Rather, I will approach Article 8 as though section 14 did not exist, but carrying forward the evaluative points I have made in discussing section 14. I will also carry forward the evaluative points I made in discussing the section 21A(1)(b) proportionality issue but, as I have said, on the basis ‘even if I am wrong in my conclusion’ on that issue.

54. The Judge faithfully conducted a ‘balance sheet’ approach in line with Celinski. He set out the factors for and against extradition and then reasoned out his conclusion, namely that the public interest in extradition outweighs the Article 8 rights of the Appellant and Anita.
55. One feature which fed into the Judge’s Article 8 analysis was the conclusion that, although he accepted that “[t]he relative serious nature of the alleged offending is diminished by the passage of time, namely 10 years”, and later “[t]he delay is a powerful factor”, he promptly added the qualifications (respectively) that “[t]here is no substantial culpable delay” and “I am satisfied that there has been no substantial culpable delay”. Having been addressed by both Counsel on this topic, and for reasons already given in the context of the section 14 issue, I cannot accept that characterisation. This is, in my judgment, a case of 9 years of unexplained, and culpable, delay. In Article 8 terms this is also a classic case, in my judgment, in which the delay – remembering that the Appellant has been found as a fact not to have been a fugitive and to have lived and travelled openly – has both of the consequences, aggravated by the culpability of the delay rather than qualified by its non-culpability, described by Lady Hale in HH at paragraph 8. The delay since the alleged crimes were committed – in the context of non-fugitivity and substantial culpable delay – has, very substantially: (a) diminished the weight to be attached to the public interest and (b) increased the impact upon private and family life.
56. In Love v United States of America [2018] EWHC 712 (Admin) the Divisional Court said this at paragraph 26: “*The appellant court is entitled to stand back and say that a question ought to have been decided differently because the overall evaluation was wrong: that crucial factors should have been weighed so different significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed*”. This Court has had before it fresh and updating evidence, to which no objection was raised. Features such as the fact that the Appellant and her husband (already separated) are currently divorcing, and that Anita has now started school, are matters which in my judgment it is plainly right that this Court should have been asked to have in mind. I have done so.
57. In my judgment, at the heart of the Article 8 case is Anita, who turns 5 next month. She was born in the United Kingdom has just started school. The Appellant is her mother and primary carer, and has been since her birth. Anita’s father has in recent

times left the family home and she now sees him every other weekend. As I have already mentioned, as Lady Hale said at paragraph 33 of HH: “Careful attention will... have to be paid to what will happen to the child if her sole or primary care is extradited.” Lady Hale added this at paragraph 34: “One thing is clear. It is not enough to dismiss these cases ... by accepting that the children’s interests will always be harmed by separation from their sole or primary care but also accepting that the public interest in extradition is almost always strong enough to outweigh it. There is no substitute for the careful examination envisaged by Lord Hope in Norris”. The Judge was, in my judgment, quite right to recognise, as the family had realistically accepted, that Anita could and would be cared for by adult family members (grandmother and aunts) within the same household while her mother was away in Germany following extradition. Ms Westcott criticises the Judge for the following characterisation: “there is plainly a strong emotional bond, and there will be a substantial emotional impact upon both of them if extradition is ordered”. Ms Westcott says the impact should be characterised as “devastating” and will be more than “emotional”. Ms Westcott points out that in HH at paragraph 44 Lady Hale recognised that deprivation of a child’s “primary attachment figure”, in that case where the child was under the age of four, could have “lasting effects upon a child’s development”, in a case in which the absence of any family with “the psychological resources to fill the gap”, the apt characterisation was one of “exceptionally severe” effects of extradition. She also points to Lord Wilson in HH at paragraph 160, referring to the “[s]evere psychological damage” which “may occur” if the “bond or attachment with the primary caregiver is severed between the age of six months and four years”. All cases turn on their facts. Anita is now nearly five. She has the settled household in which grandmother and maternal aunts would look after her. I do not accept “devastating” or “exceptionally severe”. In my judgment, the appropriate description is “very substantial impact”, which includes “emotional” impact, but also “psychological” impact. The Appellant’s most up to date proof of evidence, tells me: “I often cry when I think about separating from Anita. It usually happens when I am on my own. I feel helpless and completely overwhelmed by the situation...” I have paused to reflect on that description. I have considered the way in which Brexit uncertainty features subjectively, as an accepted relevant aspect of the “anguish” which the Appellant is experiencing about the prospect of extradition to Germany. I have also considered the Brexit uncertainties – without speculating – as an objective factor as I described when I discussed that topic.

58. Ms Westcott submits that I should have regard to the Covid-19 pandemic and what it means for the Appellant’s extradition to Germany, whether she would there be incarcerated or in the community (perhaps on bail). The pandemic post-dates the Judge’s analysis and I agree with Ms Westcott that I should have it in mind. One encapsulation would be to say that the impact of extradition for a requested person is likely to be heavier during the current pandemic (cf. *R v Manning* [2020] EWCA Crim 592 at paragraph 41). That is a factor. No more, but no less.
59. The Judge rightly had regard, as do I, to factors like the following: the fact that the Appellant has no previous convictions either prior to the alleged criminal offending in 2009 or subsequently; that she is not a fugitive; she has lived openly in the United Kingdom; that she has been in employment here. I take into account the non-responsiveness of the German public defender and the refusal of the German authorities to entertain an in-time notification of a request for interview; all in



circumstances where the Appellant has an explanation to put forward about the alleged offending.

60. I do not, however, place any substantial weight on the fact, relied on by Ms Westcott, that the Appellant has now been on a nightly four-hour electronically-monitored curfew for 15 months as part of her bail conditions. Ms Westcott points out that this is a factor that a sentencer could take into account: see JZ v Prokuratura Rejonowa Lodz – Srodmiescie Case C-294/16 PPU paragraph 55. That does not in my judgment carry her any significant distance in terms of Article 8, at least in the present case.
61. Ms Westcott submitted that the fact that this case is to be assessed as one where the likely penalty is a suspended sentence – which is to be characterised as non-custodial – is a factor which can and should properly weigh against extradition. The Judge did not do so. The essence of the submission, as I saw it, runs as follows. In HH at paragraph 132, Lord Judge CJ said this:

*“When resistance to extradition is advanced ... on the basis of the article 8 entitlements of dependent children and the interests of society in their welfare, it should only be in very rare cases that extradition may properly be avoided if, given the same broadly similar facts, and after making proportionate allowance as we do for the interests of dependent children, the sentencing courts here would nevertheless be likely to impose an immediate custodial sentence: any other approach would be inconsistent with the principles of international comity.”*

It is common ground that in this case the Court would not impose an immediate custodial sentence. Lord Judge CJ continued:

*“At the same time, we must exercise caution not to impose our views about the seriousness of the offence or offences under consideration or the level of sentences or the arrangements for prisoner release which we are informed are likely to operate in the country seeking extradition. It certainly does not follow that extradition should be refused just because the sentencing court in this country would not order an immediate custodial sentence: however it would become relevant to the decision if the interests of a child or children might tip the sentencing scale here so as to reduce what would otherwise be an immediate custodial sentence in favour of a non-custodial sentence (including a suspended sentence).”*

It is common ground that in this case the Court does not have information as to the arrangements likely to operate in Germany. Caution is appropriate. There is no question of refusal to order extradition “just because” the sentence here would be non-custodial. However, the likely penalty has – by the appropriate measure – been assessed as non-custodial. So, in this case, just as in HH (Lord Judge CJ at paragraph 133), it is relevant that:

*“... it can safely be said that an immediate custodial sentence would not be in contemplation ...”*

I accept the submission, put in this way.

62. Viewed in terms of the Appellant’s right to respect for private and family life, and Anita’s right to respect for private and family life, the Court arrives at the crux. I think the ultimate question can be put in this way (the encapsulation is mine):

*The Article 8 Question.*

*Do the strong and ever-present public interest considerations in support of extradition outweigh the very substantial impacts of removing the 36 year old primary carer Appellant from her 4 (nearly 5) year-old daughter; bearing in mind that the daughter has a stable home with aunts and grandmother who will look after her; bearing in mind that this is a case involving ‘reasonably serious’ alleged criminal conduct; but bearing in mind that the Appellant is recognised to have been acting under the direction of another and would be raising a defence of duress and, in any event, putting forward substantial mitigation; in circumstances where even taking the case against her at its highest, it is agreed that the appropriate assessment as to the likely penalty is that it would be non-custodial; that is, moreover, because it can be said with confidence that a sentencing Court in this country would not impose a sentence of immediate custody; in circumstances where the Appellant has been able to obtain no assistance from the unresponsive German public defender; in circumstances where the requesting state authorities have effectively withdrawn the offer previously made to allow a right to be interviewed; in a case where the criminal conduct in question is more than a decade old, was followed by 9 years of culpable delay by the German prosecuting authorities; where she is otherwise person of good character, with no previous convictions before or since; where she was not and never has been a fugitive; where she has built a positive and productive family life in the United Kingdom; where extradition to Germany will be during the Covid-19 pandemic; and where she will face both anguish (subjectively) and (objectively) the risk of harm for her and her young daughter given the uncertainties as to what will happen to them about where they will be reunited (it being accepted that it is ‘impossible to say’) after she has been in Germany?*

In my judgment, the Article 8 analysis produces a clear answer: “no”. Extradition would not, in this case, be proportionate in Article 8 terms. In my judgment, having stood back, this is a case where the Article 8 question ought to have been decided differently because the overall evaluation was wrong, because crucial factors should have been weighed so significantly differently as to make the decision wrong. In consequence, the appeal should be allowed on the Article 8 ground too.

Conclusion

63. The appeal succeeds on all three grounds and the Appellant will be discharged.