



Neutral Citation Number: [2024] EWHC 2754 (Admin)

Case No: AC-2023-LON-001836

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/10/2024

Before:

MR JUSTICE CHAMBERLAIN

Between:

**DISTRICT COURT OF BRATISLAVA
(SLOVAKIA)
- and -
GABRIEL SOLTES**

Claimant

Defendant

Laura Herbert (instructed by **CPS Extradition**) for the **Claimant**
Matthew Keliris-Thomas (instructed by **Noble Solicitors**) for the **Defendant**

Hearing dates: 23 October 2024

Approved Judgment

This judgment was handed down remotely at 10:00am on 30 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain:

Introduction

- 1 This is an appeal by the Slovakian judicial authority against a decision handed down on 4 June 2023 by District Judge Clews sitting at Westminster Magistrates' Court. The District Judge found that the extradition of the respondent, Gabriel Soltes, would not be compatible with the respondent's Article 8 rights and would be disproportionate. He therefore discharged the respondent pursuant to s. 21A(4)(a) and (b) of the Extradition Act 2003 ("the 2003 Act").
- 2 The Slovakian judicial authority now appeals, with the permission of Kerr J, granted on the papers on 22 February 2024.

Background

- 3 The respondent was sought by Slovakia pursuant to an accusation warrant issued by a judge of the District Court of Bratislava II under Part 1 of the Trade and Cooperation Agreement on 4 November 2021 and certified by the National Crime Agency on 8 August 2022. It seeks the respondent's surrender for trial on an indictment dated 3 April 2017.
- 4 The offence for which surrender is sought is described in the warrant as "fraud under §221(1) of the Criminal Code". The particulars are as follows:

"Under the pretence of sale, the perpetrator extorted from the victim [named] the amount of €950 and from the victim [named] the amount of €780 in such a way that after previous email communication from the address [supplied], telephone communication from the telephone number [supplied] and a previous personal meeting with the victims [names supplied] on 16.1.2015 in Bratislava, [place specified], at this place acting under the name of Mirsolav Kubicek in the position of seller, he concluded during the days 22.1.2015 to 23.1.2015 with the victim [named] purchase contract [number given] regarding an agricultural truck (tractor) [details specified] for the amount of €22,800, on the basis of which the victim [named] handed him cash in the amount of €800 and sent him the amount of €150 to his account, and further in Bratislava, [place specified], acting under the name of Mirsolav Kubicek in the position of seller, he concluded with the victim [named] a sailing purchase contract [number given] regarding an agricultural truck (tractor) [details specified], for the amount of €8900 and tractor [details specified] for the amount of €970, on the basis of which the victim [named] handed him on 16.1.2015 cash in amount of €80 and subsequently another cash in the amount of €700, which he stopped communicating with the victim, whereby he did not handover the object of purchase to both the victim[s]..., thereby causing the victim [named] damage in the amount of €950 and the victim [named] damaging the amount of €780."

- 5 Further information provided by the Slovakian judicial authority is to the following effect:

- (a) The Respondent had been interrogated by an investigator on 9 November 2016, and had fully confessed to committing the act of which he had been accused.
 - (b) The Respondent was aware of the proceedings as the Resolution of Indictment was served on him on 9 November 2016. He waived his right to appeal it and further confirmed with his signature that he fully agreed with its contents.
 - (c) There had been personal contact between the investigator and the Respondent during his interview on 9 November 2016. He had further communicated in writing with the court on 18 April 2017 that he was personally appealing against the issued criminal conviction order, and asked the court to schedule a date for the main hearing. On 21 June 2017, the Respondent personally delivered a letter of apology for not attending the main hearing to be held on 4 July 2017, and stated that he would appear before the court unconditionally on the alternative date of hearing. Since that date, the Respondent has not contacted the court in any way and has not collected his summons.
 - (d) The Respondent was not prohibited from leaving the jurisdiction but he was required to report to the authorities any change in his current address, to attend main hearings and to provide full cooperation with law enforcement agencies, which he has not done since 2017.
 - (e) The Respondent was obliged to inform the authorities of his whereabouts and he did not fulfil this obligation in any way.
- 6 It appears from the above that the “criminal conviction order”, which seems to have been entered following the respondent’s full confession, is not treated by Slovakian law as conclusive because the respondent has applied to re-open it. The warrant makes clear that the Slovakian authorities are treating this as, in substance, an accusation case.

The District Judge’s judgment

- 7 The respondent relied on four bars against extradition: passage of time (s. 14); proportionality (s. 21A(1)(b)); health (s. 25) and Article 8 (s. 21A(1)(a)).
- 8 The respondent gave oral evidence, as did his wife. The District Judge made the following findings:

“34... I did not find the RP to be a particularly credible witness... There are notable differences between his proof of evidence and the information from the JA. When he said he was never questioned about these offences and it was a shock to learn of them that was clearly a deliberate untruth. He knew perfectly well he had been questioned, had engaged with the court and even asked for a hearing date to be changed. I do not believe he ever told the authorities he was living in the UK nor was it true that he was living abroad temporarily.

35. The RP denies being in Slovakia on 9.11.16 and says he came to the UK in late February 2016. He said he could prove that was the case but no documentation was provided. The import of the information from the JA is clearly that he was present in person in Slovakia on that date, indeed he is

said to have signed a document. It is also said that he ‘personally’ delivered a letter on 21.6.17. There is no reason for me not to accept the information provided to me by the JA, indeed following the principle of mutual confidence and respect I should do so, and I do so.

36. There is nothing to support the RP’s assertion either that he has been advised to have heart surgery. Also it is difficult, to accept the evidence of his wife about the state of her health as there is limited support for it. I am prepared to accept that she does have some mobility issues and I am sceptical about a good deal of her evidence as well as that of the RP.

37. I am satisfied to the criminal standard that the RP was made aware of an obligation to notify the Slovakian authorities of his address and whereabouts whilst he was still in Slovakia and that he left without fulfilling this obligation and that his failure to do so was deliberate. I am sure he did not tell the Slovakian authorities where he was as he did not wish them to know. I am sure he deliberately put himself beyond the reach of the Slovakian authorities as he wished to avoid the court proceedings for these offences. In accordance with *Wisniewski and Dziel v Poland* [2019] EWHC 251 (Admin), I am satisfied if he was unaware of the hearing date it was his own fault as he deliberately put it beyond the power of the prosecutor or court to inform him. In these circumstances I am satisfied so that I am sure he is a fugitive from Slovakian justice.”

9 As to s. 14, the District Judge noted at [38]-[41] that this was not addressed in the respondent’s counsel’s written closing submissions, but dealt with it anyway, saying that 8 years was not a particularly long time, there was no clear evidence of any material change to the respondent’s circumstances in that time and, in any event, there was authority that a fugitive could not rely on the passage of time, save in exceptional circumstances. There were no such circumstances here.

10 Challenges under Articles 2 and 6 ECHR were rejected at [42]-[46].

11 As to s. 25, the District Judge noted that the challenge was based on the respondent’s physical health. He concluded as follows:

“50. As I have already foreshadowed, I am far from convinced that the RP has any serious or life threatening health conditions that are a cause for major concern or that are notably debilitating. He may have some ailments and conditions perhaps typical of a man who has turned 60 years of age but the evidence adduced does not satisfy me there is anything greater. I cannot accept what he says about his heart condition without corroboration.

51. But moreover, in the case of *Kowalski v. Regional Court in Bielsko-Biala, Poland* [2017] EWHC 1044 (Admin), Holroyde J (as he then was) held that there was a rebuttable presumption that the authorities in the issuing EU Member State could afford the necessary medical treatment in detention [para 20]. Even if the RP was to need any medical treatment or medication (even at a higher level than I have found) no substantial argument has been adduced as to why the presumption should not apply and no evidence has been adduced that is capable of rebutting the presumption.

52. This challenge must fail.”

12 In relation to Article 8 ECHR, the District Judge referred to *Norris v USA* [2010] UKSC 16, [2010] 2 AC 487, *HH v Italy* [2012] UKSC 25, [2013] 1 AC 338 and *Celinski v Poland* [2015] EWHC 1274 (Admin), [2016] 1 WLR 551: see [53]-[56]. Approximately 8 years had passed since the offending, but proceedings had been commenced promptly and the delay since August 2017 was solely the fault of the respondent, who was a fugitive: see [57]-[58]. The factors in favour of extradition were set out at [61]:

- “• There is a constant and weighty public interest in the UK honouring its Treaty obligations
- The public interest in ensuring that extradition arrangements are honoured is high
- Decisions of and requests by the judicial authority of a member State should be afforded a proper degree of mutual confidence and respect
- The UK must not be, and must not be seen to be a safe haven willing to accept and shelter fugitives from justice including those who wish to avoid proceedings in another country
- The RP is a fugitive
- The RP is accused of offences of fraud which carry a maximum of 2 years imprisonment
- The RP does not own property or have any financial obligations in the UK such as secured loans
- He has no dependent children
- His wife is capable of supporting herself and could rely on the NHS and state benefits.”

13 The factors against extradition were set out at [62]:

- “• The RP has now been living in the UK for some 7 yrs
- He has built a life for himself here
- He has been in employment here
- The RP’s health has deteriorated since he came to the UK and he is now 60 yrs of age.
- The RP’s wife also has health difficulties and the RP provides her with support. There is no other family member who could reliably provide such help in his absence.
- The RP is accused but not convicted

- He has no other convictions in Slovakia (or elsewhere)
- The amount of money actually obtained by fraud was limited to €1730 [approx. 1500 GBP]”

14 After referring back to Lady Hale’s judgment in *HH*, the District Judge said this:

“64. In all the circumstances it is submitted in this case the constant and weighty public interest is outweighed by Article 8 considerations. And I am urged to find exceptional features in [the respondent’s] circumstances that would entitle me to find in his favour. Unfortunately, extradition necessarily involves forced separation, angst, upheaval and all of the emotional turmoil and physical displacement that goes with it, sadly such things are unavoidable. This case involves what might be said to be only the ordinary and usual difficulties that are inherent in any case of extradition. I take account of [the respondent’s] age, and the state of health of both he and his wife which do diminish the public interest to some degree. His lack of other convictions both before and since are also important which leads me on to another point. Whilst I have not been able to accept [the Respondent’s] account of how the offences came to be committed it is surprising, to say the least, that someone in their 50s should suddenly commit offences of this kind. Whilst I cannot be at all sure of the extent of it, I am prepared to accept that he may have been given encouragement of some kind to commit the offences. Also, I am prepared to accept that he did not intend any wider fraud than to defraud the complainants of the deposits they paid for the tractors. On the information provided I cannot be sure he intended to go on and defraud them of the balance of the purchase prices as well. The offences are thus of no great gravity which is further illustrated by the maximum sentence being 2 years imprisonment. Although it is said, as I have already pointed out, that [the Respondent] admitted these offences to the police they remain accusations rather than convictions.

65. I find this to be a finely balanced decision but I find I would be justified, if only just, in declining to extradite the RP on Article 8 grounds. The fact of fugitivity heightens the public interest but there are other features that suggest the public interest is not otherwise of the highest. I will give my article eight decision at the end of this judgement.”

15 As to proportionality under s. 21A(1)(b), the District Judge noted at [69] that he had to take into account the three matters specified in s. 21A(3) and only those matters, namely: (a) the seriousness of the conduct alleged to constitute the extradition offence; (b) the likely penalty that would be imposed if the respondent was found guilty of the extradition offence; and (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of the respondent. The District Judge went on to refer to the Lord Chief Justice’s guidance under s. 2(7A) of the 2003 Act, published in the form of Practice Directions Amendment No. 2 [2014] EWCA Crim 1569.

16 The District Judge noted that para. 17A.5 of that instrument included a table of minor offences and para. 17A.3 provided that, if the conduct alleged to constitute the offence fell into any of the categories in that table, the judge should generally determine that extradition would be disproportionate, save in exceptional circumstances, examples of

which are given in para. 17A.4, which includes “multiple counts”. One category in the table is “Minor theft (not robbery/burglary or theft from the person)”, examples of which include (a) theft of an item of food from a supermarket, (b) theft of a small amount of scrap metal from company premises and (c) theft of a very small sum of money. A second category is “Minor financial offences (forgery, fraud and tax offences)”. Next to this, in the column marked “Example”, the following appears: “Where the sums involved are small and there is a low impact on the victim and/or low indirect harm to others, for example (a) Failure to file a tax return or invoices on time, (b) Making a false statement in a tax return, (c) Dishonestly applying for a tax refund, (d) Obtaining a bank loan using a forged or falsified document, (e) Non-payment of child maintenance”.

17 At [70], the District Judge said:

“I have to ask myself what would be the position here, for example, if the RP had unsuccessfully attempted to obtain a bank loan of around €1750 using, perhaps, a forged contract of employment? Based on the guidance I have quoted, it seems to me these are capable of being described as ‘minor financial offences’.

At [71], he said that there were no exceptional circumstances because, although the offences involved two complainants and two offences, that did not amount to “multiple counts”. At [72], he summarized what he understood to be the effect of the judgment of the Divisional Court in *Miraszewski v Poland* [2014] EWHC 4261 (Admin), [2015] 1 WLR 3929 and of Fordham J in *Antochi v Germany* [2020] EWHC 3092 (Admin).

18 As to seriousness, the District Judge said at [74]-[75] that he was not satisfied that the triviality of the offence alone would require discharge. This was not an offence that could properly be described as trivial based on the sorts of examples given in the guidance. Nor was it “at the very bottom of the scale of seriousness”. But the offending did not appear to be particularly serious either.

19 As to the likely penalty, the District Judge said this:

“77. Using the Fraud Bribery and Money Laundering Offences Definitive Guideline issued by the Sentencing Council in the UK (the only yardstick available to me to measure by), under Fraud by False Representation (which would seem to encapsulate this alleged offending) following Table 1 in the guidance at p8 it would be a Category 5 case (Less than £5000, starting point based on £2500 actual or intended loss) with ‘lesser impact’. Culpability would appear to be B Medium. It is by no means out of the question that Culpability could be at level A High because of there being two victims, the possibility of the offending involving others, and it might be said there is some sophistication or significant planning. I do not know to what lengths the RP went to convince the victims the tractors existed. However, I do not have the necessary information to justify coming to conclusions on such matters and I must also bear in mind the overall totality of the offending and I must keep a sense of proportion. At Culpability B Medium the sentence starting point is a Medium Level Community Order with a range of Band B fine to 26 weeks custody. It is to be noted that the guidance is for those convicted after a trial. A guilty plea would attract a discount of up to one third

depending on when it was entered. The RP is of previous good character, is 60 years of age and in less than perfect health. It seems to me, in England and Wales, the most likely sentence would be a community order. I cannot conclude that it is likely the RP would receive a custodial sentence if he was prosecuted in this jurisdiction, although such a sentence would not be altogether out of the question.

78. In assessing the likelihood of him receiving a custodial sentence I must also take account of the possibility of him receiving a suspended sentence which for these purposes would count as a non-custodial disposal.”

- 20 At [79], the District Judge said that less coercive measures did not appear to be available. At [81], having reminded himself of the terms of s. 21A(4), he said this:

“Finding: for the reasons given above, I find that there is no likelihood of a custodial sentence and that extradition would thus be disproportionate and therefore pursuant to s.21A(4)(b) I must order the RP’s discharge on that ground.”

- 21 At [84]-[86], the District Judge explained that, while his decision on proportionality under s. 21A(1)(b) took account only of the three statutorily specified factors, his decision under Article 8 could be based on a wider range of factors. His conclusion was that extradition would also constitute a disproportionate interference with the respondent’s Article 8 rights.

Submissions for the appellant judicial authority

- 22 Laura Herbert for the appellant judicial authority submitted that the District Judge had made three material errors in his reasoning on proportionality.
- 23 First, he had failed properly to apply *Miraszewski*. At [72] of that judgment, the Divisional Court made clear it did not necessarily follow from a finding that an offence was unlikely to attract a custodial sentence that the requested person was entitled to be discharged; but an analysis of the District Judge’s reasoning shows that he did not appreciate this. Second, the District Judge made an error of fact in concluding less coercive measures did not appear to be available. In fact, the respondent had invited the judicial authority to consider less coercive measures and the judicial authority had declined to do so, making clear in the Further Information that the respondent is a fugitive. Third, the District Judge failed to give proper weight to the fact that the respondent is a fugitive.
- 24 As to Article 8, the District Judge wrongly relied on the fact that the respondent has not been convicted, failed to demonstrate why (on his own findings) extradition would have an exceptional impact on the respondent’s Article 8 interests, incorrectly took into account his own assessment of the respondent’s culpability and failed to give weight to the deliberate lies the respondent had told the court.
- 25 Overall, the District Judge’s decision was wrong and this Court ought to quash the order for discharge and remit the case to the judge under s. 29(6) of the 2003 Act.

Submissions for the respondent

- 26 Matthew Keliris-Thomas for the respondent submitted that the District Judge made no material error in relation to proportionality. He noted at [72] that the likelihood of a custodial sentence was “the principle [sic] focus”. He did not say it was the only relevant question and indeed recognised expressly that “it does not follow that the likelihood over non-custodial penalty precludes the judge from deciding that extradition would be proportionate”. The District Judge’s analysis covers a wide range of factors. There is no misdirection of law. The District Judge’s comment that less coercive measures did not appear to be available did not involve any material error, because, even though the possibility of such measures had been raised by the respondent, these had not been pursued by the judicial authority. A fair reading of the judgment as a whole shows that the district Judge was well aware that the respondent was a fugitive, a finding he recorded at [37] and referred back to at [61].
- 27 As to Article 8, the reference to the fact that this was an accusation case must be understood in context. The context included the submission made by the appellant judicial authority that the respondent had made a full confession. In finding that extradition would be incompatible with the respondent’s Article 8 rights, the District Judge set out the factors he had relied upon. A fair reading of the judgment shows that it was the effect on the respondent’s wife’s health which was the most important of these. There was no error in considering the seriousness of the offence. This was a factor relevant to the Article 8 balancing exercise. The District Judge did take account of the lies he found the respondent had taken. His conclusion was that, despite these lies, the balance came down against extradition. There was no error of law or approach.

Discussion

Proportionality under s. 21A(1)(b): the case law

- 28 As Pitchford LJ noted in *Miraszewski*, the predecessor of the current proportionality provisions was s. 11(3) of the Extradition Act 1989, which required the court to discharge if (among other things) “by reason of the trivial nature of the offence... it would, having regard to all the circumstances, be unjust or oppressive to return him”. However, the current provisions owe their origin to an amendment to Framework Decision 2002/584/JHA. This came about because of a particular feature of Polish law, known as the principle of legality, which precluded the exercise of prosecutorial or judicial discretion in the decision whether to seek extradition.
- 29 Section 21A(1)(b) requires the court to consider whether extradition would be disproportionate in a statutorily defined sense. In doing so, the court is obliged by s. 21A(2) to take into account three specified matters (so far as it considers it appropriate to do so) and no others.
- 30 In *Miraszewski*, it was said at [31] that s. 21A(1)(b) applies to all accusation cases, not only those from countries which apply the principle of legality. The test is not framed in terms of triviality. Within the boundaries set, the scope for judgment is comparatively broad. The judgment is to be made against a background of mutual respect between the UK court and the issuing authority, but the court is not limited to considering what the issuing authority would have done if it had not been constrained by the principle of

legality. The court may, depending on its evaluation of the factors, conclude that extradition would be disproportionate if (i) the conduct is not serious and/or (ii) a custodial penalty is unlikely and/or (iii) less coercive measures to ensure attendance are reasonably available to the requesting state in the circumstances.

- 31 Pitchford LJ noted that the Lord Chief Justice’s guidance identified offences which are trivial, but these were not the only ones which would count as trivial and, in any event, triviality was not the touchstone: [32]. The seriousness of the conduct alleged was to be judged in the first instance against domestic standards, although the court would respect the view of the requesting state if offered: [36]. When considering the likely penalty on conviction, the court’s principal focus should be on the question whether it would be proportionate to extradite a person who is not likely to receive a custodial sentence in the requesting state: [37]. The court was not obliged to require evidence about likely penalty from the issuing state in every case. Where such information is absent, the broad terms of s. 21A(3) permit the judge to “draw inferences from the contents of the EAW and to apply domestic sentencing practice as a measure of likelihood”. However, “[i]n a case in which the likelihood of a custodial penalty is impossible to predict the judge would be justified in placing weight on other subsection (3) factors”: [38]. If a non-custodial penalty is likely, this does not preclude the court from concluding that extradition would nonetheless be proportionate; and the case of a fugitive with a history of disobeying court orders may require increased weight to be given to sub-s. 3(c) because “it would be less likely that the requesting state would take alternative measures to secure the requested person’s attendance”: [39].
- 32 As to less coercive measures, s. 21B enables either the requesting state or the requested person to apply to the court for the requested person’s temporary return or for communication to take place between the parties and their representatives: [40]. However, it would be a reasonable assumption that in most cases the requesting state has already considered less coercive measures. There is an evidential burden on the requested person to identify less coercive measures that would be appropriate in the circumstances. Where the requested person has left the requesting state with knowledge of his obligations but in breach of them, it is unlikely that the judge will find less coercive measures appropriate: [41].
- 33 In *Antochi*, Fordham J addressed in more detail how to apply domestic sentencing practice when considering the likely penalty. In particular, should the judge consider evidence about the circumstances of the alleged offending? As to that, Fordham J accepted the judicial authority’s submission that questions of duress and intent were for the requesting state’s judicial system, but wider questions about the background to the offence (including the requested person’s personal circumstances at the time) could be taken into account: [6]-[8].
- 34 Fordham J held that the judge had adopted the wrong approach in asking if there was a “realistic possibility of a custodial sentence”. The court should, rather, focus on the question of what was the “likely” penalty: [19]. On the facts as set out in the warrant, the application of the Sentencing Council’s Definitive Guideline for Theft Offences produced a range from a low level community order to 36 weeks’ custody; and that the likely sentence was a short custodial sentence, which would be suspended given the requested person’s lack of previous convictions and her role as a primary carer of a child:

[20]. A suspended sentence fell on the non-custodial side of the line drawn in *Miraszewski*: [21].

35 In *Vascenkovs v Latvia* [2023] EWHC 2830 (Admin), Swift J said this:

“10. I consider the position in light of the judgment in *Miraszewski* to be this. Section 21A(1)(b) and (3) establish a bespoke notion of proportionality which is a condition for extradition pursuant to an accusation warrant. The Practice Direction contains guidance on seriousness but is not exhaustive and does not remove the court’s responsibility to apply its own assessment of this notion of proportionality. The proportionality assessment required is an overall appreciation of a situation rather than an exercise of precise calibration. While information offered by a requesting judicial authority may be considered, the court is under no obligation to request information and such requests will be relatively rare. In most instances a court will apply this proportionality requirement using domestic practice as a measure. Resort to domestic practice is inevitable since even if an English court were to be equipped with information from the requesting judicial authority it would, from the perspective of the principle of mutual recognition, ill-behave it to subject that information to anything approaching penetrating analysis. Moreover, the same principle of mutual recognition requires, so far as this proportionality analysis rests on consideration of domestic practice, the court should allow a significant margin before concluding extradition would be disproportionate, since reaching such a conclusion too readily could call into question the requesting authority’s decision to issue the warrant (as a disproportionate use of that court’s power). A conclusion that extradition would be disproportionate would not necessarily be at odds with the notion of mutual recognition. For example, it might rest on information not available to the requesting authority when it made its decision to issue the warrant. However, the principle of mutual recognition means that a conclusion that extradition is disproportionate in this sense will be an occurrence more rare than common, likely to arise only in unusual circumstances.

11. Putting the matter another way, the judgment *Miraszewski* does not suggest that the bar on extradition contained within section 21A(1)(b) exists to pursue a purpose that goes any further than explained by the Home Secretary in her statement in parliament in July 2013 and the statement by the Home Office Minister made when the amendment was introduced (see, the judgment in *Miraszewski* at paragraph 30): i.e., to provide a further brake on extradition for ‘very minor offences’. A further brake because the definition of extradition offence in section 64 of the 2003 Act already excludes the possibility of extradition for some types of minor offending.”

36 At [24], Swift J said this:

“Any resort to the Sentencing Council Guidelines to consider the type of sentence that might be imposed for similar offending in England is undertaken only to obtain a general idea of the seriousness of the allegation and the likely consequence of conviction. It is a hypothetical exercise. A district judge is not in a position to undertake the sort of precise sentencing exercise that would be performed following a trial. There has been no trial

and the precise circumstances of the offending and of the accused when the offending took place are not known. Given the absence of this information the conclusion reached by the District Judge at paragraph 42 was an appropriate conclusion. The task for this court, on appeal, is not to mark the judge's approach to a sentencing exercise as if she had passed sentence following trial and this appeal court was acting as the Court of Appeal Criminal Division. There is no need to determine matters of fine detail when resort is had to the Sentencing Council Guidelines for this purpose. On appeal, the only issue is whether the approach taken to the hypothetical application of the Guidelines was one that, in broad terms, was appropriate and fitted with a correct assessment of proportionality for the purposes of section 21A of the 2003 Act. I am satisfied that the District Judge used the Guidelines correctly. I do not consider that the conclusions she reached both as to the likely outcome had the same matters happened in England or as to the likely outcome for Mr Vascenkovs in the event of conviction, should be reversed."

Proportionality under s. 21A(1)(b): the proper approach

37 In considering the seriousness of the conduct alleged to constitute the extradition offence for the purposes of s. 21A(3)(a) and the "likely penalty" for the purposes of s. 21A(3)(b), the UK court must address that question itself. It may do so by drawing such inferences as it considers are safe about the facts of the offence and applying "domestic sentencing practice" to those facts: *Miraszewski*, [38]. But the principle of mutual respect entails that the principal source for such inferences must be the warrant itself and any further information supplied by the requesting state. Judges in this jurisdiction should bear in mind that they are not trying the offences themselves and often have only a small portion of the evidence that would be considered by the courts of the requesting state if extradition were ordered. In many cases, it may be impossible to say much about the facts beyond what is stated in the warrant itself. The courts of this jurisdiction should resist the temptation to make findings of fact about the circumstances of the offence based on the evidence of the requested person, save where that evidence is accepted in terms by the judicial authority of the requesting state or is plainly uncontentious. This was the point made by Fordham J in *Antochi* at [6]-[8].

38 Relatedly, in many cases, the information supplied by the requesting state will be insufficient to form any view about some of the factors relevant to sentence. In such cases, it may be impossible to predict the "likely penalty" with any degree of confidence. I do not read [19] of Fordham J's judgment in *Antochi* as saying that the judge must always alight on a particular penalty as "likely" for the purposes of s. 21A(3)(b), irrespective of the quality of the information available. In this respect I would respectfully endorse what Swift J said at [24] of his judgment in *Vascenkovs*: the application of domestic sentencing practice is a "hypothetical exercise", which is undertaken "only to obtain a general idea of the seriousness of the allegation and the likely consequence of conviction". A requirement in all cases to perform a precisely calibrated sentencing exercise, of the kind that would be undertaken by a sentencing judge in the Magistrates' or Crown Court or the Court of Appeal (Criminal Division), would be inconsistent with the obligation to accord proper respect to the judicial authority of the requesting state and would be an artificial exercise. In some cases, it may be impossible to say more than that the offence might or might not attract a custodial penalty, depending on the view taken

by the trial court as to particular factors. In such a case, s. 21A(3)(b) does not require the judge to go further in considering the “likely penalty”.

- 39 The point of the exercise required by s. 21A(3) is to identify the “likely penalty” that would be imposed *by the courts of the requesting state*: see *Miraszewski*, [37]. The application of domestic sentencing practice is a useful heuristic in cases where the information supplied by the requesting state does not specify the likely sentence. It is no more than that. Judges do not have to shut their eyes to the fact that some aspects of sentencing practice are likely to vary between states. In this jurisdiction, one key factor in sentencing for theft, fraud and kindred offences is the value of the property involved. What counts as “low value” in one jurisdiction may not be categorised in that way in another jurisdiction where the cost of living is lower. This point was made by Sir Stephen Silber, sitting as a Judge of the High Court, in *Kreski v Poland* [2015] EWHC 1423 (Admin), at [25]-[26]. In my judgment, this is a factor that may properly be borne in mind when considering the “likely penalty” (or the range of likely penalties) under s. 21A(3)(b).
- 40 Consideration of the possibility of the requesting state taking less coercive measures. 21A(3)(c)) can weigh against the proportionality of extradition, but it can also weigh in favour of it. As the Divisional Court made clear in *Miraszewski* at [39], where the requested person is a fugitive, that may well suggest that less coercive measures are unlikely to be appropriate. If so, that may be a factor tending to suggest that extradition would not be disproportionate.

The flaws in the District Judge’s approach

- 41 With those principles in mind, in my judgment, the District Judge fell into error in three critical respects.
- 42 First, in the passage I have quoted from [64] of the judgment (see [14] above), the District Judge went beyond the facts set out in the warrant and further information and made findings of his own, based on what he had been told by the respondent and on his own assessment of the likelihood that the respondent would have committed offences of this kind unprompted. Although the District Judge rejected much of what the respondent had said, he was “prepared to accept that [the respondent] may have been given encouragement of some kind to commit the offences”. This together with the fact that the maximum sentence was 2 years’ imprisonment, appears to have supplied the basis for the conclusion that the offences were “of no great gravity”.
- 43 In my judgment, the judge should have confined himself to the information in the warrant and the further information from the judicial authority, namely, that the appellant was alleged to have engaged in a fraud on two individuals, which involved his posing as another individual and fraudulently inducing them to pay him £1500 in total. The extent (if any) to which he had been encouraged by others to do so was a matter for trial. The judge was in no position to make findings about that. Nor was the two-year maximum sentence a reliable indicator that the offences were of “no great gravity”.
- 44 Second, having found these facts, the District Judge conducted a notional sentencing exercise of the kind that would be expected of a sentencing court in this jurisdiction. The exercise involved: applying the Definitive Guideline to the facts found to determine the

harm and culpability categories (harm category 5, culpability B, giving a range of “Band B fine-26 weeks’ custody”); applying a discount for plea; and taking into account the respondent’s previous good character, age and health problems. This exercise enabled the District Judge to fix a precise “likely” sentence within the category range (a high-level community order). The judge also took into account the “possibility” of a suspended sentence, which would also count as non-custodial.

- 45 To my mind, this exercise was artificial and problematic. The harm categories set out in the Definitive Guideline depend critically on the value of the property involved, but it is quite possible that offences with a total value of £1500 might be assessed differently in terms of their harm in Slovakia (noting that the offences are alleged to have been committed in 2014). That injects a level of uncertainty into the notional sentencing exercise. Furthermore, it is not at all clear that a discount for plea (itself a matter on which the approach is likely to differ between jurisdictions) would be appropriate on the present facts. Although the respondent is said to have admitted the facts of the offences, he has applied to re-open the provisional convictions and is sought for trial (rather than sentence). He is also a fugitive from justice. That may have a bearing on whether and to what extent his good character would count in his favour. In my judgment, the only safe conclusion in this case was that, applying domestic sentencing practice in the way I have described, the offences charged could give rise to a range of penalties, which would include custody. Whether custody is imposed will depend on the view taken by the Slovakian court as to the intention with which the offence was committed, the degree (if any) of encouragement by others, the harm caused to the two victims and the weight given to the respondent’s personal mitigation, given that he is a fugitive from justice.
- 46 Third, although the District Judge correctly noted at [72] of his judgment that extradition might be proportionate even if a non-custodial penalty were likely, the passage at [81] (set out at [20] above) does indicate that the finding that a non-custodial penalty was likely is what drove him to the conclusion that extradition would be disproportionate. The finding was that “there is no likelihood of a custodial sentence” and that “extradition would *thus* be disproportionate” (emphasis added). This left out of account the fact that the respondent was a fugitive in the sense described in the further information. As noted in *Miraszewski* at [39], this was a factor which made it less likely that it would be appropriate to take less coercive measures. It is therefore not surprising that the respondent’s request for less coercive measures was not taken up by the requesting state. All this counted against the respondent in the proportionality analysis.

Proportionality: conducting the balance afresh

- 47 In the light of these flaws in the District Judge’s approach, I have to decide for myself whether extradition would be disproportionate by considering the matters in s. 21A(3).
- 48 Turning first to the seriousness of the offence, the respondent was charged with a fraud offence against two individuals who (from context) I can properly infer were farmers. The respondent is alleged to have impersonated another individual and induced the two victims to part with money with an approximate sterling value of £1500. In terms of the Lord Chief Justice’s guidance, this was not a “very small” sum of money, nor do I consider that an analogy can properly be drawn with procuring a bank loan using a false instrument. This was not, in my view, a “minor financial offence” as that term is used in the guidance. I would draw no further inferences as to the circumstances in which the

offence was committed. In particular, I would leave out of account the respondent's explanation that he had been encouraged to commit the offences by another, since matters of that kind are for the trial court. I would not describe the offence as trivial, nor would I say that it was "of no great gravity".

- 49 As to "likely penalty", in this context some caution is required in the applying domestic sentencing practice because what may be seen as low value in one jurisdiction may not be so regarded in another and because the sentence is likely to depend on the resolution of factual issues at trial. Given that the respondent applied to re-open the apparently provisional conviction, and on the District Judge's findings is a fugitive from justice, I would not assume that any discount will be applied for a guilty plea. Nor would I assume that any custodial sentence would be suspended. Performing the notional sentencing exercise in the way I have described, and consistently with the approach of Swift J in *Vascenkovs*, I would conclude that it is not possible to say more than that there is a range of possible sentences, which includes a custodial sentence. I do not consider it possible to say, on the limited information I have, that a custodial sentence is unlikely or that a non-custodial sentence is likely.
- 50 As to the possibility of the relevant authorities taking less coercive measures, I note what was said in *Miraszewski* at [40]-[41]. Applying the approach set out there, and in light of the contents of the requesting state's further information, I infer that requesting state has considered whether less coercive measures are appropriate and has concluded that they are not. Given the District Judge's factual findings as to fugitivity, I consider that conclusion a reasonable one.
- 51 The question whether extradition would be disproportionate for the purposes of s. 21A(1)(b) requires me to take a holistic view in light of my conclusions on the three matters set out in s. 21A(3). Approaching the matter in that way, I conclude that extradition would not be disproportionate.

The District Judge's conclusions on Article 8

- 52 I can deal with the District Judge's conclusions on Article 8 relatively briefly. As can be seen from the passage at [64] of the judgment, quoted at [14] above, the District Judge's view about the gravity of the offences was the starting point for the Article 8 balancing exercise. The conclusion that a non-custodial sentence also appears to have played a part in the conclusion on Article 8 (albeit wider factors were also considered). For the reasons I have given, the conclusion as to the gravity of the offence, and as to the likely sentence, were flawed. It follows that the Article 8 balancing exercise was also flawed and I must therefore perform the balancing exercise afresh.

Article 8: conducting the balance afresh

- 53 Even where extradition would not be disproportionate, the court may still conclude that it would be contrary to Article 8 ECHR. In deciding whether it would, the court may have regard to a wider range of factors than is permitted by s. 21A(3).
- 54 In this case, it may be inferred that the authorities have considered whether to seek extradition and have decided to do so (even though there was a request for less coercive measures). There is accordingly a public interest in extradition. The seriousness of the

offence is not such as to justify the submission that this public interest is particularly weighty. Nonetheless, the fact that the respondent is a fugitive means that it is also far from negligible.

- 55 Against that must be weighed the facts that the respondent has now been living in the UK for some eight years, has built a life for himself here and has been in employment. These matters would have greater weight if it were not for the finding of fugitivity. Nonetheless, they have some weight. The main matters relied upon by Mr Keliris-Thomas, however, were the respondent's and his wife's health problems. The difficulty with placing much weight on these, however, is that the District Judge found both the respondent and his wife to be unreliable witnesses: see [36] of the judgment (set out at [8] above). In those circumstances, it is difficult to justify giving any substantial weight to what they said about their own health conditions. In any event, their conditions are far from unusual in people of their age: the extent of the District Judge's factual finding about the respondent's wife was that she has "some mobility issues". It can be assumed that NHS treatment would be available if required. Insofar as reliance was placed on the respondent's own health the conditions, there is nothing to indicate that his conditions would not be treatable in the prison system of the requesting state.
- 56 Overall, the public interest in extradition outweighs the Article 8 interests of the respondent and his family. Accordingly, extradition would be compatible with the ECHR rights of the respondent and his family for the purposes of s. 21A(1)(a) of the 2003 Act.

Conclusion

- 57 For these reasons, applying s. 29 of the 2003 Act, I conclude that the District Judge ought to have decided both the proportionality and the Article 8 questions differently; and that, if he had decided those questions as he ought to have done, he would not have been required to order the respondent's discharge.
- 58 Accordingly, the appeal will be allowed, the order discharging the respondent quashed and the case remitted to the District Judge with a direction to proceed in accordance with this judgment.