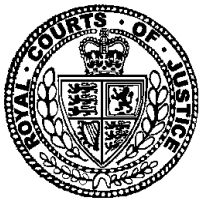

Neutral Citation Number: [2019] EWHC 2898 (Admin)

Case No: CO/1569/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/10/2019

Before:

LADY JUSTICE NICOLA DAVIES DBE
MR JUSTICE JAY

- -

Between:

BOGDAN ALEXANDER ADAMESCU	**Applicant**
- and -	
BUCHAREST APPEAL COURT CRIMINAL DIVISION, ROMANIA	**Respondent**

- -
- -

Hugo Keith QC and Ben Watson (instructed by **Karen Todner**) for the **Applicant**
Tim Owen QC and Daniel Sternberg (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 23 October 2019

- -

Approved Judgment

Lady Justice Nicola Davies and Mr Justice Jay:

1. This is the judgment of the court to which we have each contributed.

2. The applicant seeks permission to appeal the decision of District Judge Zani made at the Westminster Magistrates' Court on 13 April 2018 ordering his extradition to Romania. The extradition was sought by a European Arrest Warrant ("EAW") issued on 6 June 2016 by the 1st Criminal Division of the Bucharest Appeal Court.

3. At Box B the EAW records the underlying arrest warrant is that issued by the Bucharest Appeal Court 1st Criminal Division on 19 May 2016. The conduct constituting the two offences for which the applicant (the requested person) is sought is set out at Box E. Firstly; during June 2013 and December 2013, together with Dan Adamescu and with the help of Daniel Onute and Monica-Angela Borza, the requested person remitted €10,000 in June 2013 and €5,000 in December 2013 to Magistrate Ion Stanciu, the judge within the Bucharest Court 7th Civil Division in order to secure a favourable decision from that judge in insolvency proceedings. Secondly; on 10 December 2013, together with Dan Adamescu and with the help of Onute and Borza, the requested person remitted 23,000 Romanian Lei, the equivalent of €5,000 to Elena Roventa, the judge of the Bucharest Court 7th Civil Division, in order to obtain a favourable decision in two cases. This conduct constitutes offences of bribery, contrary to the Romanian Criminal Code, punishable with imprisonment of between six months and five years.

4. The applicant was born in Bucharest in 1978. He is a German national. Since 2012 he has resided in the United Kingdom and presently does so with his partner and children. His father, Dan Adamescu, founded a significant business conglomerate in Romania, the Nova Group. It was successful, the business included a large insurance company, Astra, and a newspaper, Romania Libera. The applicant was involved in the companies established by his father. Within the background material it is stated that Romania Libera was critical of Romania's Social Democratic Party, in particular Prime Minister Ponta who held office from May 2012 until November 2015. In or about 2014 Astra became insolvent.

The criminal proceedings in Romania

5. Onute gave evidence to the Romanian investigation that on 9 August 2013 a bribe was paid to Judge Stanciu at the behest of the applicant and his father. In a statement dated 13 May 2014 he recorded that he helped the applicant and his father to make payments of €10,000 and €5,000 to Judge Stanciu with a view to obtaining a favourable decision in case 33293/3/2012. In December 2013 he paid €5,000 on behalf of the Adamescus to Judge Roventa for giving favourable decisions in cases 41848/3/2012 and 19950/3/2013. Onute's account was recorded by another witness, Daniella Firestain. The applicant's father is alleged to have pressurised Firestain in an attempt to make her change her statements which she gave to the prosecutors but she did not do so. Both judges were prosecuted for accepting bribes, they were convicted and sentenced to terms of imprisonment. Stanciu pleaded guilty to receiving from Borza €10,000 in June 2013 and €5,000 in December 2013 "in regard to solving file number 33293/3/2012 on SC Baumeister SA".

6. Dan Adamescu was tried and convicted upon the offences of bribery. In February 2015 he was sentenced to four years and four months' imprisonment. In January 2017 he died when serving his sentence of imprisonment in Romania.

The applicant's extradition proceedings

7. Pursuant to the EAW the applicant was arrested in London on 13 June 2016. From the outset he has contested the extradition proceedings. As Kerr J noted in his judgment refusing a bail application ([2018] EWHC 794 (Admin)) the applicant "has, quite properly and is his right, taken every point he can, with assistance from his legal representatives, to avoid being extradited under the warrant".

8. The full extradition hearing took place over six days between November 2017 and January 2018. Following the final submissions, and the production to the court of a forged document by the applicant, which resulted in his remand in custody, the District Judge ordered the applicant's extradition.

9. The applicant sought permission to appeal. By an order sealed on 24 July 2018 Elisabeth Laing J refused permission on all six grounds of appeal. The applicant renewed his application which came before King J on 30 October 2018. The hearing was adjourned, the applicant was ordered to serve submissions explaining the admissibility of each piece of fresh evidence on which he sought to rely. Eventually the matter came before Whipple J on 28 February 2019. In her judgment ([2019] EWHC 525 (Admin)) Whipple J refused the renewed application for permission on ground one (abuse of process), and stayed a decision on permission on grounds two to five pending the decision in *Varga & Turcanu v Romania* [2019] EWHC 890 (Admin). It was mistakenly understood that ground six had been abandoned. Directions were given for the progress of the application for permission. The applicant was granted conditional bail.

Grounds of appeal

10. The applicant seeks permission on five grounds of appeal, ground one cannot be pursued. The grounds, using original numbering, are:

    - Ground two: The lower court erred in deciding that Mr Adamescu's extradition was not barred by the first limb of the "extraneous considerations" bar (section 13(a), 2003 Act).

    - Ground three: The lower court erred in deciding that Mr Adamescu's extradition was not barred by the second limb of the "extraneous considerations" bar (section 13(b), 2003 Act).

    - Ground four: The lower court erred in deciding that Mr Adamescu's extradition would not be incompatible with his rights under Article 6, ECHR (section 21A(1)(a), 2003 Act).

    - Ground five: The lower court erred in deciding that Mr Adamescu's extradition would not be incompatible with his rights under Article 3, ECHR (section 21A(1)(a), 2003 Act).

- Ground six: Mr Adamescu's extradition is barred by reason of specialty under sections 11(1)(f) & 17 of the 2003 Act.

Grounds two to five are each advanced on the two statutory bases of appeal in Part 1 of the Extradition Act 2003 ("the 2003 Act"):

(i) under section 27(3)

> "(a) the appropriate judge ought to have decided a question before him at the extradition hearing differently; (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge";
>
> and alternatively,

(ii) under section 27(4)

> "(a) […] evidence is available that was not available at the extradition hearing; (b) the […] evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently; (c) if he had decided the question in that way, he would have been required to order the person's discharge".

Ground six is pursued under section 27(4) only and on the basis that:

> "(a) an issue is raised that was not raised at the extradition hearing […]; (b) the issue […] would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently; (c) if he had decided the question in that way, he would have been required to order the person's discharge."

The Extradition Act 2003

> "11. Bars to extradition
>
> (1) If the judge is required to proceed under this section he must decide whether the person's extradition to the category 1 territory is barred by reason of—
>
> …
>
> (b) extraneous considerations;
>
> …
>
> (f) speciality;
>
> …
>
> 13. Extraneous considerations

A person's extradition to a category 1 territory is barred by reason of extraneous considerations if (and only if) it appears that—

(a) the Part 1 warrant issued in respect of him (though purporting to be issued on account of the extradition offence) is in fact issued for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or

(b) if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions.

…

17. Speciality

(1) A person's extradition to a category 1 territory is barred by reason of speciality if (and only if) there are no speciality arrangements with the category 1 territory.

(2) There are speciality arrangements with a category 1 territory if, under the law of that territory or arrangements made between it and the United Kingdom, a person who is extradited to the territory from the United Kingdom may be dealt with in the territory for an offence committed before his extradition only if—

(a) the offence is one falling within subsection (3), or

(b) the condition in subsection (4) is satisfied.

(3) The offences are—

(a) the offence in respect of which the person is extradited;

(b) an extradition offence disclosed by the same facts as that offence;

(c) an extradition offence in respect of which the appropriate judge gives his consent under section 55 to the person being dealt with;

(d) an offence which is not punishable with imprisonment or another form of detention;

(e) an offence in respect of which the person will not be detained in connection with his trial, sentence or appeal;

(f) an offence in respect of which the person waives the right that he would have (but for this paragraph) not to be dealt with for the offence.

(4) The condition is that the person is given an opportunity to leave the category 1 territory and—

(a) he does not do so before the end of the permitted period, or

(b) if he does so before the end of the permitted period, he returns there.

(5) The permitted period is 45 days starting with the day on which the person arrives in the category 1 territory.

(6) Arrangements made with a category 1 territory which is a Commonwealth country or a British overseas territory may be made for a particular case or more generally.

(7) A certificate issued by or under the authority of the Secretary of State confirming the existence of arrangements with a category 1 territory which is a Commonwealth country or a British overseas territory and stating the terms of the arrangements is conclusive evidence of those matters.

…

21A. Person not convicted: human rights and proportionality

(1) If the judge is required to proceed under this section (by virtue of section 11), the judge must decide both of the following questions in respect of the extradition of the person ("D")—

(a) whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998;

(b) whether the extradition would be disproportionate.

(2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); but the judge must not take any other matters into account.

(3) These are the specified matters relating to proportionality—

(a) the seriousness of the conduct alleged to constitute the extradition offence;

(b) the likely penalty that would be imposed if D was found guilty of the extradition offence;

> (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D.
>
> (4) The judge must order D's discharge if the judge makes one or both of these decisions—
>
> (a) that the extradition would not be compatible with the Convention rights;
>
> (b) that the extradition would be disproportionate.
>
> (5) The judge must order D to be extradited to the category 1 territory in which the warrant was issued if the judge makes both of these decisions—
>
> (a) that the extradition would be compatible with the Convention rights;
>
> (b) that the extradition would not be disproportionate.
>
> …"

The permission to appeal application

11. The application being one of permission to appeal, the threshold is identified in Criminal Procedure Rule 50.17(4)(b), namely that the court finds the ground reasonably arguable. Fifteen lever arch files of documents and a separate bundle of authorities were filed for the purpose of this application. The mass of documentation served by the applicant, to which the respondent, understandably, had to file evidence in response, has been a feature of the entirety of the extradition proceedings. Four separate bundles of new evidence were served in respect of this appeal by the applicant, running to in excess of 1,800 pages. Mindful of the respondent's point that the greater the quantity of new evidence served since the original hearing, the further the case could drift from being an application to appeal the District Judge's decision and become an application to retry the matter *de novo*, the primary focus of our determination has been the judgment of the District Judge and the evidence which was before the court at the extradition hearing.

Grounds two to four

12. The essence of the applicant's appeal in respect of grounds two to four is that the reasoning and analysis of the District Judge was inadequate, he failed to grapple with the extensive evidence before the court, in particular from the expert witnesses Dr Basham and Dr Bratu as to the political system in Romania. It is the applicant's case that such evidence demonstrated an abusive and politically motivated process, directed at the applicant (and his father), initiated upon the direction of the former Prime Minister Ponta.

13. Dr Basham is the founding Director of the Democracy Institute in Washington, in written reports and oral evidence he described the political system in Romania, the anti-corruption campaign led by Romania's Anti-Corruption Directorate ("DNA"), judicial independence, he referred to statements made by the then Prime Minister Ponta in

respect of the applicant's father and the family's business. Dr Basham concluded that the criminal prosecution of the applicant bears many of the hallmarks of a politically motivated undertaking.

14. Dr Bratu, an academic research associate in global and European anti-corruption policies at University College London, provided reports and gave evidence upon the political system in Romania, the role of Prime Minister Ponta, the role of the DNA and concluded that the applicant's prosecution is politically motivated.

15. In his judgment at [200] the District Judge observed that Dr Basham is not legally qualified and at [201] noted that Dr Basham had not carried out any review of the evidence presented by the Romanian authorities in the prosecution of the applicant, nor had he interviewed or spoken to any of the judges, witnesses or co-defendants involved in case, nor attended the trial. At [217] Dr Bratu was noted as stating that there are likely to be "elements of political motivation and/or political interference in the prosecutions brought against Mr Adamescu (Sr)/Mr Adamescu". The District Judge also observed that she had not conducted any review of the evidence in the case against the applicant, nor had she spoken to the judges or any witnesses.

16. The District Judge appeared to be dismissive of or to have rejected the evidence of both experts. However, it is at least reasonably arguable that no reasoned explanation was given for any such approach. The reasoning of the District Judge, in respect of any link between alleged political interference and the prosecution of the application, appears to be confined to [324] of his judgment when the point is made that the EAW was issued by the judge on 6 June 2016, over seven months after former Prime Minister Ponta left office. In our judgment, there is force in the applicant's submission that this ignores the process which led to the issue of the EAW to which the thrust of the evidence regarding political motivation was directed. No reason is given for the time limited nature of this finding. At [328] the District Judge stated:

> "I return to one of the basic principles of extradition. It is a rebuttable assumption that requests are made in good faith and that, absent compelling evidence to the contrary, assertions made by or behalf of requesting Judicial Authorities should be accepted by the requested State. The onus is on the defence to rebut the presumption with compelling evidence. I have not received such evidence in this case."

17. We find, as reasonably arguable, the appellant's contention that the District Judge was wrong to state that he had "not received such evidence in this case". He had; the difficulty is that the District Judge gave no adequate reasons for his apparent rejection of that evidence. In our judgment, the District Judge did not grapple with such evidence, in particular, the expert evidence of Dr Basham and Dr Batu, nor with the issue of whether or not any nexus could be identified between the political and prosecutorial processes in Romania and the prosecution of the applicant. The District Judge was faced with a plethora of evidence and we are not unsympathetic to the position in which he found himself. However, we have concluded that in respect of grounds two to four it is reasonably arguable that his reasoning for rejecting the evidence called on behalf of the applicant was inadequate and was insufficient to permit an understanding of the route to his final conclusion. Accordingly, we grant permission to appeal upon grounds two to four. However, our ruling upon these grounds is subject

to a significant qualification, namely the evidence provided by SC Strategy and Lord Carlile QC.

SC Strategy

18. Mr Keith submits that the District Judge erred in law in ruling that the reports of SC Strategy and the oral evidence of Lord Carlile QC was inadmissible and in any event should carry practically no weight.

19. Below, there were four reports prepared by SC Strategy dated 19 September and 29 September 2016, and 4 January and 9 November 2017. These were co-authored by three highly eminent and knowledgeable individuals: Dr Jonathan Eyal, born in Romania and International Director at the RUSI; Sir John Scarlett, former head of MI6; and Lord Carlile QC, the Independent Reviewer of Terrorist Legislation for ten years and whose credentials generally are well-known. We can take it that all three men are well-versed in interpreting intelligence material.

20. The District Judge did not exclude the SC Strategy reports *in limine*, as he might well have done. The reports provided general background evidence as to the political situation in Romania, the role and activities of the DNA, and the independence of the judiciary. However, these were not the real reasons why the applicant was keen to adduce this evidence. The report writers relied upon source evidence from ten individuals, known only as sources A to J, who were apparently well-placed to opine on whether the prosecution of the applicant was politically motivated. For example, source A was said to possess a "very knowledgeable understanding of the … DNA". No further information about him was provided, and the report writers were unaware of his identity or indeed whether his credentials were as proclaimed. The source evidence was supplied to SC Strategy through intermediaries on an anonymised basis. In addition, there were redacted statements from three other unidentified witnesses said to have provided their statements to SC Strategy personnel from the UK.

21. The reports concluded that the prosecutions had all the hallmarks of a politically motivated campaign against the applicant and his father.

22. The reports were confirmed by Lord Carlile QC when he gave oral evidence. We understand that he was robustly cross-examined by Mr Owen QC. The principle purpose of the cross-examination was to seek to demonstrate that Lord Carlile QC was not qualified to give expert evidence at all. The witness said in cross-examination that he was a "rule of law" expert, that he was expert in the political situation in Romania, and that he also possessed expertise in the analysis of intelligence.

23. Approaching these answers at a very high level of generality, we would have little difficulty with the proposition that Lord Carlile QC fully understands the rule of law, whether by its breach or observance, and that he has considerable experience in analysing intelligence.

24. Having received and heard this evidence *de bene esse*, and having also received detailed submissions upon it, the District Judge concluded that the entirety of the SC Strategy evidence was inadmissible. His analysis of and reasoning on this admittedly important topic was very full, in arguable contradistinction to his approach elsewhere. At [182] of his ruling, by way of paraphrase the District Judge held that Lord Carlile QC was not

an expert in Romanian politics, that he had no first-hand knowledge of anything of materiality coming from the sources, and that he could not assist as to whether this evidence bearing on a highly-contested fact in issue was credible or reliable. None of the sources ever provided a witness statement or affidavit. The District Judge concluded in the alternative that all this evidence should carry practically no weight.

25. Mr Keith QC submitted that the District Judge erred in law. Questions of admissibility and weight should be strictly segregated, and they were not. His headline submission was that this evidence was admissible under the breadth and generosity of the *Schtraks* principle, which had not been diluted or qualified by subsequent authority. The point made under [47] of Mr Keith QC's skeleton argument is that the report writers were well equipped to assess this intelligence for its cogency notwithstanding that it had been anonymised. In the alternative, it was submitted that the evidence as to what the sources had said was admissible direct evidence of fact: "i.e. the fact of what these sources had said". We should say at once that we cannot accept this alternative submission. SC Strategy could give direct and admissible evidence of the bare fact that source A had given a report through an intermediary, but such evidence availed nobody. Of course, this is distinct from evidence as to *what* the sources had said. Whether SC Strategy could give admissible evidence about that was the issue raised by Mr Keith QC's primary submission.

26. Attractively though the argument was presented, we cannot accept it. In *Schtraks v Government of Israel* [1964] AC 556, the House of Lords made clear that in extradition proceedings the strict rules of evidence do not apply. As Lord Reid put it, at page 582:

> "In fact some of the material which your Lordships have admitted could not normally have been received as evidence. No doubt such material may carry less weight than properly sworn statements, but it does not surprise me that the Parliament of 1870 intended that on this question of the political character of an offence committed by a refugee nothing of any value should be excluded from consideration."

Mr Keith QC places emphasis on Lord Reid's "any value". However, this was material whose only evidentiary defects were that it was hearsay and may well have included inadmissible opinion. It was not material which was anonymised and whose credibility and reliability on key facts in issue were simply incapable of fair testing and evaluation.

27. *Schtraks* was considered by the Supreme Court in *R (B and others) v Westminster Magistrates' Court and Others* [2015] AC 1195. This case is authority for the proposition that that there is no basis on which a closed material procedure could be justified without express statutory underpinning. Lord Mance reviewed *Schtraks* and noted that the legislative scheme had changed since 1964 [23]. We agree with Mr Keith QC that in general terms the principle in *Schtraks* was not materially qualified. Lord Mance also held that:

> "In any event, any relaxation in the areas of extraneous considerations, human rights and abuse of process cannot affect the normal rule that applies to a witness called to give evidence before a court, viz that his or her evidence must be given and capable of being tested *inter partes*. Any relaxation, on whatever

> basis, does not therefore help on the present issue whether the district judge can operate a closed material procedure without any statutory authority."

28. There is some force in the submission that in this passage Lord Mance was directing himself to the question of whether evidence could be received *ex parte*, but the general principle must remain that evidence must be capable of being tested.

29. Lord Hughes adopted a slightly different approach. He held that anonymous evidence could in principle be admitted but only under strict conditions. The party tendering the witness would have to give "the maximum possible information" about him or her to the other party. This would enable the evidence to be tested and challenged.

30. The present case falls well outside Lord Hughes' principle. No anonymous witness gave evidence. His identity was unknown to everyone. There was no basis for challenging it directly or indirectly, and Lord Carlile QC could not sensibly be asked questions which amounted to any effective form of testing or challenge.

31. The issue here was whether the SC Strategy reports and Lord Carlile QC's oral evidence was admissible or not. This was a straightforward binary question to which matters of weight were not relevant. However much Lord Carlile QC wished to interpret or analyse this evidence, he could not say as a logically prior matter whether it was credible or reliable. No one could. In our judgment this evidence was correctly excluded, although our reasons for doing so are perhaps slightly narrower than those put forward by the District Judge.

Ground five

32. Before the District Judge was evidence from two psychiatrists as to the mental health of the applicant. Professor Eastman, instructed on behalf of the applicant, and Dr Joseph, on behalf of the respondent. It was the applicant's case that a diagnosis of bipolar disorder, which was made by Professor Eastman, was an important factor to be taken into account when considering the article 3 challenge. At [348] the District Judge dismissed this point and stated:

> "Having received expert testimony from Prof. Eastman and Dr. Joseph I am not persuaded that such health difficulties of Mr Adamescu may have, add any significant weight to this challenge."

The diagnosis of bipolar disorder was not seriously disputed by Dr Joseph. It is a disorder which is controlled by medication, the condition requires monitoring and appropriate adjustment of medication. No reasons are given for the dismissal of this aspect of the applicant's case, nor for the finding that the mental health difficulties of the applicant would not add "any significant weight to the applicant's case". On this point alone we would grant permission in respect of the article 3 ruling. In so doing we accept that the issue of the assurances given by the Romanian Government and the criticism of them by the applicant, will form a part of the applicant's case in respect of ground five at the hearing of the appeal.

Ground six – speciality

33. This was not an argument raised before the District Judge. Predecessor Leading Counsel originally abandoned the point in his skeleton argument but it was resurrected in a further written submission. On the evidence available to her, Elizabeth Laing J rejected ground six on the basis that the formal arrangements between the UK and Romania are sufficient.

34. The applicant does not on our understanding contest that conclusion; he seeks to rely on fresh evidence.

35. The legal framework is not in contest, and we can take as read [102] of Mr Keith QC's skeleton argument.

36. Although his submission engages section 27(4) of the 2003 Act and the need to point to *decisive* evidence, Mr Keith QC submitted that this was so in relation to the evidence in the form of witness statements from three recent Romanian prisoners or former prisoners, Messrs Edutanu, Ticu and Balan. According to these statements, which we have read and have been carefully summarised under [104] to [106] of Mr Keith QC's skeleton argument, these men were dealt with in Romania for offences completely separate from those for which their extradition had been ordered by these courts.

37. The answer to this assertion is to be found in [64] of Mr Owen QC's skeleton argument. He relies on documents from the Romanian authorities collected in file 14 which we have considered. In our judgment, the responses from Romania on this issue are clear and detailed. Edutanu's sentences were merged at his request; Ticu was not proceeded against for other matters without the consent of the courts of this jurisdiction; Balan's sentences were merged at his request. Their witness statements amount to no more than a series of assertions which have been effectively contradicted by compelling documents.

38. Permission on ground six must therefore be refused.

39. A considerable amount of new evidence has been filed by the applicant since the extradition hearing ([8] above). Following the principles enunciated in *Szombathely City Court, Hungary v Fenyvesi* [2009] EWHC 231 (Admin) we considered a limited part of such evidence. Given the grant of permission upon grounds two to five, we do not consider it appropriate to make any ruling upon such evidence, this will be a matter for the court at the full hearing.

40. Accordingly, and for the reasons given, permission to appeal is granted upon grounds two to five (subject to the refusal to admit the evidence of SC Strategy and Lord Carlile QC). Permission to appeal upon ground six is refused.