Neutral Citation Number: [2021] EWHC 3098 (Admin)

Case No: CO/733/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL
19th November 2021

Before:

MR JUSTICE FORDHAM

- -

Between :

KAROLY MAROSAN	**Appellant**
- and -	
COURT OF CLUJ-NAPOCA (ROMANIA)	**Respondent**

- -

- -

Alex Tinsley (instructed by Coomber Rich Ltd) for the **Appellant**
Hannah Burton (instructed by Crown Prosecution Service) for the **Respondent**

- -

Hearing date: 16/11/21

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This is an extradition case which raises this question of law for determination:

> *Where the requested person was previously detained for a period on "dual" remand – both (a) in relation to the extradition Arrest Warrant and (b) in relation to a domestic (UK) criminal investigation – and where that period has not subsequently been treated as 'time served' for the purposes of a domestic (UK) criminal sentence, should an executing (UK) court in considering the Article 8 ECHR proportionality of extradition treat the period as qualifying remand deductible under Article 26 of the EU Framework Decision?*

This was the question of law which this Court (King J) left open in Petkowski v Poland [2013] EWHC 4709 (Admin) at §27. That was a case where disposal of the appeal did not turn on resolving the question. In the present case, as is common ground, I must determine the issue. Mr Tinsley's primary argument for the Appellant is that the answer to the question of law is: "yes". Ms Burton's argument for the Respondent is that the answer is "yes, but only if the issuing state authorities have said so clearly, this being a question of application of Article 26(1) for those authorities".

2. The Appellant is aged 32 and is wanted for extradition to Romania. That is in conjunction with a conviction European Arrest Warrant (EAW) issued on 7 December 2018 and certified by the NCA on 21 January 2019. The index offending was an offence akin to burglary committed in Romania by the Appellant in November 2016, in respect of which he was convicted in his deliberate absence and sentenced to 2 years imprisonment. All but one day of that two year custodial sentence remains to be served, the Respondent having confirmed that a deduction applies for a period of 24 hours when the Appellant was held in Romania. Extradition was ordered by DJ Radway on 24 February 2021, after an oral hearing.

3. The hearing before me was in person, listed for one hour, which was needed for the oral submissions. I announced that the appeal would be allowed with an immediate order for discharge, with reasons to follow in a written judgment to be handed down subsequently. Neither Counsel objected to that course which I was satisfied was appropriate given that (a) I had reached a clear conclusion (b) there was not time to deliver judgment ex tempore while doing justice to the next case in my list and (c) this case concerned the liberty of the individual who in light of my conclusion on the question of law in the case was entitled to be discharged and released.

Article 3 ECHR (prison conditions) is stayed

4. There is an extant application for permission to appeal on Article 3 ECHR grounds, related to prison conditions. On 24 September 2021 Sir Ross Cranston stayed that application, pending the judgment of the Divisional Court in the lead cases appeals of Marinescu v Romania CO/4264/2020 and others. Those lead cases have been listed for hearing on 29 and 30 March 2022. They, together with the stay, give the Appellant – until at least the end of March 2022 – a "freestanding durable basis" to stay in the United Kingdom: see Molik v Poland [2020] EWHC 2836 (Admin) at §30(i).

Qualifying remand and Article 26

5. It is common ground that qualifying remand is deductible in the present case by operation of Article 26(1) of the EU Framework Decision, as authoritatively discussed by the Luxembourg Court in the case of JZ Case C-294/16 PPU (28 July 2016). Article 26 contains two paragraphs which read as follows:

> ***(1) The issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed.***
>
> ***(2) To that end, all information concerning the duration of the detention of the requested person on the basis of the European arrest warrant shall be transmitted by the executing judicial authority or the central authority designated under Article 7 to the issuing judicial authority at the time of surrender.***

In this case, the "issuing" state is Romania. The "executing" state is the UK.

6. Article 26 has an autonomous core legal meaning (JZ at §35), by way of a uniform interpretation, informed by its terms, context and objectives (JZ at §37). It was common ground that the autonomous interpretation cannot be 'driven' by any domestic law provision (which is why I am not persuaded by Mr Tinsley's argument that the provisions of the Criminal Justice Act 2003 are an aid to interpretation). Article 26 is a 'floor' not a 'ceiling', setting a minimum standard beyond which an issuing state can choose to be more 'generous' (JZ at §55). This can be thought of as a margin for 'generosity'. The act of deduction (Article 26(1)), and the question of a more 'generous' approach, is a matter for the issuing state (Romania). The executing state (the UK) has a duty (Article 26(2)) to transmit the relevant information. The executing state court also has to consider the Article 8 ECHR implications of extradition, in which Article 26 can be an important feature.

7. I record here two arguments which were not advanced. First, neither Counsel submitted that the correct, autonomous legal meaning of Article 26 is "periods of detention arising *exclusively* from the execution" (Article 26(1)) and "detention of the requested person *exclusively* on the basis of" (Article 26(2)). This interpretation would allow for no "dual" detention to be counted, except as an act of 'generosity'. Secondly, neither Counsel submitted that the correct, autonomous legal meaning of Article 26 is "periods of detention *where the requested person would otherwise have been at liberty* arising from the execution" (Article 26(1)) and "detention of the requested person *where they would otherwise have been at liberty* on the basis of" (Article 26(2)). This interpretation would involve asking what would have happened, absent the extradition proceedings. On the latter point, I record that Ms Burton's submission – having gathered further instructions – was that the Appellant "could possibly have been remanded in the domestic proceedings in any event".

Directing a rolled-up hearing

8. Sir Ross Cranston considered the position at 24 September 2021 and concluded that it was inappropriate to grant permission to appeal on Article 8, "since at this point the appellant's accumulated remand still means he has some eight weeks to serve of the two year sentence the Romanian courts imposed". Having formally refused permission to appeal, Sir Ross Cranston went on to give a direction – rightly interpreted by the

Appellant's legal representatives as referable to an envisaged request by them for reconsideration of permission to appeal at an oral hearing – that the Article 8 issue would be heard in open court in the week beginning 14 November 2021, on a rolled-up basis. He explained: "by mid-November the position will be different, hence the above order". He clearly had in mind that the 'bright line' (see Molik §17), where having regard to the operation of Article 26 relevant 'time on remand served' would exceed the 'time to serve', thus rendering extradition at that point necessarily inappropriate in the application of Article 8 proportionality. He anticipated that this 'bright line' position was due to arrive in mid-November 2021. In the event, that has become hotly disputed.

The central dispute

9. The central disputed issue on the Article 8 appeal was whether that position had indeed been reached as at the date of the hearing before me, or whether it is still some 9 weeks away. What divided the parties is a period of some 64 (or 68) days, within the two years on which the Appellant has been on remand. Mr Tinsley for the Appellant submits that those 9 weeks are part of the qualifying remand for the purposes of Article 26(1), giving Article 26 its core autonomous meaning. Alternatively, he submits that – even if governed by Romanian domestic law – this Court should presume, absent evidence from the Respondent as to Romanian domestic law, the same position as reflected in sections 240ZA and 243 of the Criminal Justice Act 2003. Ms Burton for the Respondent contests that point, and argues that the Applicant is 9 weeks short of the qualifying remand he would need to cross the 'bright line', unless and until there is a clear statement from the Respondent – in the exercise of the function entrusted to it in the application of Article 26(1), having regard to the margin for 'generosity' – that it has decided to treat the 9 weeks as deductible qualifying remand.

What if the Appellant is 9 weeks short?

10. If Ms Burton is right, she submits that the appropriate order at this hearing would be to refuse permission to appeal. That is because 9 weeks (of the two years) left to serve is no basis to characterise extradition as disproportionate. What happens in 9 weeks' time can be the subject of liaison and agreement and, were it necessary, the Appellant could apply to reopen the appeal. Mr Tinsley for the Appellant, on the other hand, submits that if Ms Burton is right then permission to appeal should be granted and the appeal should be allowed. That is because the 9 weeks to serve are a sufficiently reduced and modest period, alongside other features of the case which he emphasises – to render extradition disproportionate in Article 8 terms, citing Chechev v Bulgaria [2021] EWHC 427 (Admin) at §79.

11. On this point, I am unable to agree with either of them. If I had concluded that Ms Burton is right about the 9 weeks, I would have taken the following course. I would have granted permission to appeal and would have directed that substantive hearing be listed for a further 9 weeks' time. That would involve 'decoupling' the rolled-up nature of this hearing, it being in the interests of justice to do so. That approach would be entirely consonant with the position which Sir Ross Cranston sought to achieve. There is a known date of 29/30 March 2022 for the Article 3 hearing in Marinescu. That date is 4½ months away, a period which comfortably exceeds the contested 9 weeks. The position before me – as before Sir Ross Cranston – is that the Appellant is on remand and stands to continue to be on remand. He has the "freestanding durable basis" which allows the Court to approach permission to appeal by "projecting forward": Molik at

§30(ii). In fairness to Ms Burton, she confirmed that she would have been content with this course.

12. It follows that I would not have accepted Mr Tinsley's submissions that extradition to face 9 weeks custody is a disproportionate interference with the Article 8 rights of the Appellant or any member of his family, notwithstanding the other features which he emphasised: including the clear and creditable progress that the Appellant has made while in custody (about which there is putative fresh evidence in the form of two glowing references); the impact for the family members; the prospect of discretionary early release in Romania; and the fact (he told me) of reparations having been made. In my judgment – in agreement with Sir Ross Cranston – the Article 8 proportionality exercise cannot avail the Appellant unless and until the 'bright line' is approached. The index offending is serious and the public interest considerations in favour of being accountable for it, to the full extent assessed by the Romanian sentencing court, are weighty. Especially given that the Appellant was unimpeachably found to have come to the United Kingdom as a fugitive in February 2017, after which he proceeded to commit burglaries of dwellings in this country. I agree with Ms Burton that the 9 weeks left to serve (more than 90% of time served), in light of the other features of the case, is no basis for finding extradition to be disproportionate: cf. Molik at §11. The public interest considerations in support of extradition, in respect of what is now an unserved 9 weeks, decisively outweigh those features which weigh in the balance against extradition. Like Sir Ross Cranston, I do not consider arguable the Article 8 proportionality ground, except on the scenario of qualifying remand crossing the 'bright line'. Had the Appellant been very close to doing so, I would have adopted the solution of a 'deferred discharge order': see Molik §18.

13. In those circumstances, the Appellant could only succeed if I was satisfied that Ms Burton is wrong – and Mr Tinsley is right – about the 9 weeks and Article 26. I turn to address the central and crucial issue which was before me.

The 9 weeks of "dual" remand

14. The relevant context is as follows. On 15 November 2019 the Appellant was arrested on suspicion of the theft of a bicycle here in the UK, an offence which was said to have taken place on 14 August 2019. On 16 November 2019 he was formally arrested in these extradition proceedings, in execution of the EAW, in relation to the index offending in Romania, the date of that index offending being November 2016. Subsequently, on 29 November 2019 (according to one CPS document) or 3 December 2019 (according to the police national computer print-out), he was then remanded in custody in relation to the domestic UK matter (theft of the bicycle). That means that during a period, either from 29 November 2019 or from or 3 December 2019 onwards, and until the determination of the UK domestic proceedings (relating to the theft of the bicycle), the Appellant was on remand on a "dual" basis. He was on remand in relation to the domestic (UK) bicycle theft. He was also on remand in relation to the EAW. The "dual" remand came to an end on 5 February 2020, when the Appellant was convicted and sentenced to a £100 fine for the theft of the bicycle and a further £100 fine for a failure to surrender, with the sentencing court identifying one day of custody in default of payment of those fines. As a consequence, the domestic sentence was "deemed served" by reference to one day taken from the period of the "dual" remand. From 5 February 2020 the Applicant continued to be on remand, in conjunction only with the EAW and these extradition proceedings. I have indicated that the parties have

calculated the period of dual remand as being either 64 days or 68 days. Nothing turns on the disagreement. Neither Counsel invited me to determine whether it is 64 or 68 days. I will continue to refer to "9 weeks".

The common ground in Orsos

15. I mentioned to the parties that I had heard an extradition appeal the previous week in a case called Orsos, in which I had reserved judgment. The confidential draft judgment in that case had been written and circulated on 12 November 2021, to be handed down on 19 November 2021: see [2021] EWHC 3097 (Admin). I said nothing about the contents of that confidential judgment. But I explained to Counsel that in Orsos there was a period of "dual remand" and it was common ground – expressed as such by Counsel in open court – that the appellant in that case could rely on the dual remand as constituting qualifying remand for Article 26 purposes. In that case, there had been a domestic criminal investigation which was subsequently not proceeded with. The point can be seen in the judgment in Orsos at §21. Since that was a point which was the subject of agreement in that case – where other issues were contested and are grappled with in that judgment – having mentioned it to the parties, I told Counsel I would put Orsos entirely to one side and would proceed to address the issue which was contested in this case, in the light of the arguments advanced on each side. That is what I did.

The further information

16. In questions posed to the Respondent by the Crown Prosecution Service, the Respondent was asked to state its position as to whether the 9 weeks is regarded by the Respondent as a period of deductible qualifying remand pursuant to Article 26(1). The Respondent's answer came in the form of further information dated 27 October 2021. This has been adduced by the Respondent, sensibly unopposed by the Appellant's representatives, as fresh evidence. The further information confirms that the Appellant is entitled to a deduction of one day from when he was initially detained in Romania, neatly cancelling out the one day which was deemed to be served in relation to the theft of the bicycle. The further information contains two relevant statements. The first statement is this (emphasis added):

> ***"We hereby confirm that the Romanian authorities will treat the whole time spent on remand since 16 November 2019 as time served, pursuant to Article 26 of the Framework Decision, as long as the time spent by [the Appellant] on remand was based on the [EAW]".***

I interpose that the phrase "based on the [EAW]" reflects the transmittable information from the UK as executing judicial authority at the time of an extradition surrender pursuant to Article 26(2) ("all information concerning the duration of the detention of the requested person on the basis of the [EAW]"). The second statement is this (emphasis added):

> ***As regards the 68 days in custody in respect of an offence committed in United Kingdom, they may be taken into account and deducted from the sentence of two years' imprisonment which is the subject of the present case only in so far as the judgment of the English authorities will be recognised in Romania.***

The second statement has been characterised by both Counsel in their skeleton arguments as being unclear. I was told that clarification been sought by the Respondent. No party asked me to adjourn the hearing pending receipt of any clarification; nor did

I consider it necessary or appropriate to do so. Mr Tinsley says that "the judgment of the English authorities" must be a reference to this court's judgment. Mr Burton submitted that it could be a reference to a domestic (UK) sentencing decision.

Two questions of principle

17. There are two linked questions of principle, in my judgment, which arise out of the question which I posed at the outset of this judgment. They arise out of the situation where: (1) there is a period of "dual" remand, being simultaneously both (i) remand in the execution of an EAW and (ii) remand in relation to a domestic (UK) criminal investigation or prosecution; and (2) that period has not been subsequently treated by reason of domestic (UK) sentencing law as "time served" within a sentence of custody which has been imposed. The two questions are these. First, whether, in those circumstances, the period of dual remand falls to be treated as a deductible period of detention for the purposes of Article 26. On that question, Mr Tinsley says yes; Ms Burton says no. Second, whether an exclusive responsibility for answering the first question lies with the authorities of the issuing state (Romania), in their application of Article 26. On that question, Ms Burton says yes; Mr Tinsley says no (or alternatively that the Court should presume that a Romanian court would decide in the same way as this Court).

Two answers

18. In my judgment, the correct answers are as follows. The answer to the first question is yes: in the circumstances set out, the period of dual remand does fall to be treated as a deductible period of detention for the purposes of Article 26. The answer to the second question is no: this Court has a responsibility to give its answer to the first question. I will turn to explain why I have arrived at those answers.

Authorities: three scenarios

19. There are authorities which were cited to me by Counsel and which touch on the issue of "dual" custody and Article 26 deductibility. The following three scenarios have arisen in those cases cited to me.

    i) The first scenario is this. A requested person may already be serving a domestic (UK) custodial sentence at the time when they are also arrested on an EAW. After arrest on the EAW the requested person is detained on a "dual" basis: serving the custodial sentence imposed by the UK court; and on remand by reason of execution of the EAW. This was the factual scenario which faced the Divisional Court in Newman v Poland [2012] EWHC 2931 (Admin): see §4. That Court rejected the argument "that if the requested person is in custody serving a separate United Kingdom sentence and is contemporaneously detained under a [EAW] to await the extradition, the time spent counts for the purposes of Article 26. This was also evidently the factual scenario in Rzeczkowski v Poland [2011] EWHC 1698 (Admin), a judgment from which the full and precise chronology is not apparent, but where the appellant was on extradition remand having been "sentenced last year to a period of three months imprisonment" (§2), suggesting a UK custodial sentence overlapping with extradition remand. In this first scenario the "dual" remand does not count as qualifying remand for Article 26 purposes.

ii) The second scenario is this. A requested person may have served a period of remand in relation to a domestic (UK) alleged crime, at the same time as being on remand in the execution of an EAW, but where the sentence of the UK court has subsequently treated as "time served" that period of dual remand. That is the position in the present case as regards the "one day" of remand, deemed as the sentence for the theft of the bicycle. That was the factual scenario in Berk v Poland [2009] EWHC 3583 (Admin). There, the Appellant was arrested for a domestic (UK) offence and subsequently "was remanded in custody in respect of that alleged offence … but… also remanded in custody in consequence of her pending extradition" (see §4). She then received a domestic (UK) custodial sentence, the period of "dual" remand being treated as relevant for the purposes of calculating the release date. The dates were as follows: four months of "dual" remand (November 2007 to March 2008) together with a further 11 months post-sentence (to February 2009) constituted the 15 month half-way early release date in the context of a 30 month UK prison sentence (see §§4-5). In that factual context, the Court treated only the period after February 2009 as Article 26 qualifying remand, emphasising that the Article 26(1) deduction exercise was a matter for the issuing member state (Poland): see §§16-17. In this second scenario the "dual" remand is not Article 26 qualifying remand.

iii) The third scenario is this. A requested person may serve a period of "dual" remand – in the execution of an EAW, and simultaneously in relation to the investigation or prosecution for a domestic (UK) criminal offence – but where the remand period does not subsequently count as "time served" in relation to any sentence of UK custody. That was said to be the position in Petkowski: see §27. There, the domestic alleged offence had resulted not in a custodial sentence but rather in a "discharge" on "no evidence" being offered by the CPS (see §27). In fact, in that case, the argument based on proportionality or abuse of process arising from qualifying remand and Article 26 could not succeed. That was because the "dual" remand was insufficient to 'cross the line', unless there was also a substantial period of time served in Poland. The Court did not have a reliable picture as to what period of custody had indeed been served in Poland before the requested person had come to the United Kingdom (§18). Moreover, there was held to be no onus on the Respondent to provide that information (§21). Having concluded that the Article 8 proportionality argument could not for that reason succeed, the Court went on to explain that it was "not making any finding", on the material before it, as to whether remand in execution of the EAW would not fall to be deducted under Article 26 (see §27). The judge said this: "It is not clear to me whether the period of detention spent between February and 17 May of this year was in fact arising from the execution of the arrest warrant, or was pursuant to a domestic offence of burglary upon which [the appellant] had been arrested and upon which on 17 May he was discharged on no evidence being offered". The question presented by this third scenario was left unanswered in that case. It is the question which arises squarely in the present case.

It follows, as can be seen from this description of the caselaw, that there is no authority which determines the issue arising on the present appeal.

20. In my judgment, the legally correct analysis is as follows.

i) The first step is that remand is not capable of being qualifying remand deductible under Article 26 unless it is a period of detention "arising from the execution of a [EAW]" (Article 26(1)), which in my judgment is in substance synonymous with detention "on the basis of the [EAW]" (Article 26(2)). The starting point is therefore to ask whether at a relevant time the requested person was being detained "arising from the execution of" the EAW or – put another way – "on the basis of" the EAW. Once the individual has been arrested in execution of the EAW, their status will either be that they are detained (on remand) in conjunction with the EAW, or that they are on bail in conjunction with the EAW. Bail may be revoked in the extradition proceedings if the individual is arrested and remanded on a domestic (UK) alleged offence: that was the position in Berk at §4. That is the principled starting-point.

ii) The next question – having identified whether remand is capable of being Article 26 qualifying remand – is to consider whether the period remains deductible having regard to the object and purpose of Article 26. The autonomous interpretation of Article 26 must be derived having regard to its context and objectives (JZ at §37). That involves an assessment of the nature and quality of the period at the time when the question of ordering extradition arises. The answer may depend on what has happened to the period of remand – or any part of it – and whether it has been deployed and become subsumed within a domestic sentence of custody. The period of extradition remand may, from the time when it was first being served, already have clearly formed part of a domestic custodial sentence: that was the first scenario position in Newman and Rzeczkowski. Alternatively, by the time the relevant court is considering the question of qualifying remand, the relevant period has been relied upon and included within a domestic sentence of custody as 'time served'. That was the second scenario position in Berk.

iii) It would constitute obvious 'double counting' if the requested person were able to rely on a period during which they were on remand in relation to extradition, in circumstances where that same period of custody was always – or has become subsumed as – part of a custodial sentence being served for a domestic crime. Putting this in principled terms, to allow the "dual" custody to be deducted under Article 26 would not promote the purpose of Article 26, as recognised by the Luxembourg Court in JZ at §42. As the Luxembourg Court explained:

> ***the objective pursued by Article 26(1) … is designed to meet the general objective of respecting fundamental rights…, by preserving the right to liberty of the person concerned… and the practical effect of the principle of proportionality in the application of penalties.***

This principle of proportionality in the application of penalties is the key which unlocks Article 26 for the purposes of the question in this case. To allow "double counting" of a period which serves as part of a domestic criminal sentence would not promote, but would serve to undermine and defeat, that principled objective.

iv) The operation of a principled exclusion of "double counting" can be seen by taking another example. Suppose a case involving multiple EAWs, where the same requested person is formally arrested on more than one of them. That is a

form of "dual" remand. Suppose the period of "dual" remand has arrived at 12 months. Suppose there are two separate and self-standing conviction EAWs, each referable to separate and self-standing criminal conduct, each having attracted a period of 12 months' custody. The EAWs are cumulative in effect. The requested person is wanted to serve 24 months in aggregate. Plainly, the requested person would be entitled to have the 12 months deducted pursuant to Article 26, but not in relation to both EAWs simultaneously. It would be one or the other. This is to avoid "double counting". Again, the principled objective of Article 26 – identified clearly by the Luxembourg Court – would not be promoted but would be undermined by "double counting". Once the remand period has changed its nature and quality, by reason of its deployment, it ceases to be deductible as qualifying remand.

21. In the present case, the UK domestic sentencing court explicitly relied on one day only from the period of dual remand as being deemed to constitute the sentence relating to the theft of the bicycle and the failure to surrender. That leaves all but one day of the period from 16 November 2019 to today, 16 November 2021. On every day during that period, were the question asked – what is the Appellant's status in the extradition proceedings – the answer would have been he is on remand in execution of the EAW. That was detention arising from the execution of the EAW. It was detention on the basis of the EAW. There was no question of "double counting", once the single day is removed (replicated by the one day served in Romania). I find it impossible to see how it could promote the object and purpose of Article 26, still less be consistent with the interests of justice, for the Appellant to be disentitled to deduction of the period of "dual" remand. That is why I have given the answer which I have, to the first question of principle.

22. But the question remains whether I am wrong, by reason of the second question of principle, in giving an answer at all? In my judgment, the analysis identified above does not involve 'trespassing' on an issue which it is the exclusive province of the Respondent to decide, whether as a matter of application or within the margin for 'generosity'. I will explain why. First, as a matter of principle:

    i) It is true that Article 26(1) is directed at the Romanian authorities, as the "issuing" state. That point was – as Ms Burton emphasised and as I have mentioned above – made by the Court in Berk at §17, a passage cited in Petkowski at §27, and in Newman at §17. It is the Romanian authorities who have the Article 26(1) obligation to deduct all periods of detention arising from the execution of an EAW from the total period of detention to be served in Romania.

    ii) On the other hand, the mandatory duty to deduct "all periods of detention arising from the execution of a [EAW)" is an obligation to apply a provision of an instrument having an autonomous meaning. That is the point explained in JZ at §35. That, as I see it, is what the Courts were doing in the first scenario cases, where they answered the Article 26 question straightforwardly, without deferring to any judgment from the issuing state authorities.

    iii) Furthermore, the duty of the issuing member state (ie. Article 26(1)) is accompanied by a duty on the "executing" judicial authority (or its designated central authority) (ie. Article 26(2)) to transmit the relevant information

concerning duration of the "detention of the requested person on the basis of the [EAW]". That suggests the executing authority needs itself to address what it is looking for, in providing that information.

iv) Next, it is well established that the Article 8 proportionality exercise – conducted by the "executing" state's court – involves consideration of the position so far as Article 26 qualifying remand is concerned. It would be most odd, given that position, if it were an impermissible act of 'trespass' for this Court to grapple with the true meaning of Article 26 in the present context. In principle, I do not see that there is any act of 'trespass'.

v) The interpretation which I have identified is, in my judgment, addressing what is properly a question of interpretation, rather than of application, still less of the margin of 'generosity'. I cannot accept Ms Burton's submission that the correct interpretation is that deductibility depends, not on autonomous meaning in light of the wording, context and objective of Article 26, but on awaiting a clear statement of a 'judgment call' under the domestic law or policy of the issuing state.

23. Secondly, turning to the circumstances of the present case:

i) I agree with both counsel that the further information of 27 October 2021 lacks clarity in relation to its second statement. I must make the best sense of it, in the context and circumstances of this case. In my judgment the position is as follows. The first statement confirms that the whole period will be deducted pursuant to Article 26 "as long as the time spent by [the Appellant] on remand was based on the [EAW]". The second statement says that the deduction of the 9 week (68 day) component will take place "only in so far as the judgment of the English authorities will be recognised in Romania". Putting those two statements together, in my judgment, the Respondent is looking to this Court to identify the correct characterisation of the period spent by the Appellant on remand. The Respondent is looking for a "judgment of the English authorities". As I read the phrase "the judgment of the English authorities will be recognised in Romania", this is in the nature of a reassuring statement that there will be recognition. If the judgment of the relevant English authorities is that the 68 days does not stand to be deducted then they would not be deducted. Thus deductibility is "only insofar as" has been identified in the "judgment of the English authorities", which "will be recognised in Romania". Anything else is utterly opaque, and unhelpful and would not have provided any clarity. There is no suggestion in the second statement that there could be a "judgment of the English authorities" on this point which would not be "recognised in Romania". Were that the position it would have been very easy to say so. I cannot accept Ms Burton's suggestion that the "judgment of the English authorities" is a reference to a UK sentencing court. That would be a baffling thing to be saying in the context of the present case. The further information was surely intended to say something helpful, and meaningful. I think it did.

ii) But there is a further point, concerning the special features of the present case. In the present case there is no question of the Appellant being extradited at this point to Romania. That is because of the extant Article 3 ECHR point and the stay pending test cases. The Appellant has remained on remand and stands to

> continue to be on remand. The 'bright line' will – necessarily – be crossed while the Appellant is in this jurisdiction and detained. It will either be crossed today or in some 9 weeks' time. In these circumstances it is not only appropriate, but it is inescapable, in my judgment, that in the particular circumstances of the present case this Court should grasp the nettle as regards Article 26. There is no question of this court 'waving the Appellant off to Romania' for the Romanian courts to determine whether a further 9 weeks need to be served. I accept that if the question of deductibility in this case were purely one for the margin of 'generosity' within the 'ceiling' allowed by Article 26, this Court would need to sit and wait until a clear statement of a legal or policy position taken by the Respondent had been communicated.

In my judgment, it is this Court which must grapple with Article 26, applying the principled approach to liberty and proportionality described by the Luxembourg court in JZ at §42.

Conclusion

24. For those reasons, I was satisfied that the full period of two years (less one day) from 16 November 2019 to today 16 November 2021 is deductible as qualifying remand for the purposes of Article 26(1), and would be notifiable for the purposes of Article 26(2). That is the correct interpretation of Article 26. It also constitutes the "judgment of the English authorities" on the point, for the purposes of the second statement in the Respondent's further information. The two years' (less a day) time spent on remand "was based on the [EAW]", for the purposes of the first statement in the Respondent's further information. It follows that the 'bright line' (Molik §17) was crossed as at the date of the hearing before me, and that extradition was necessarily inappropriate. The prism of Article 8 was appropriate and quite sufficient, it being unnecessary to analyse the same issue through Mr Tinsley's fall-back prism of abuse of process. On that basis, the appeal succeeded and the Appellant was discharged.