Neutral Citation Number: [2022] EWHC 1025 (Admin)

Case No: CO/3319/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday 4th May 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

LUCIAN FLORIN BADEA	**Appellant**
- and -	
ROMANIAN JUDICIAL AUTHORITY	**Respondent**

- -
- -

George Hepburne Scott (instructed by Bark & Co) for the **Appellant**
Hannah Burton (instructed by CPS) for the **Respondent**

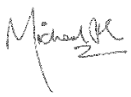
- -

Hearing date: 22.3.22

- -

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

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00 on 4.5.22

MR JUSTICE FORDHAM:

Introduction

1. This was an in-person substantive hearing of an Article 8 ECHR extradition appeal, for which Griffiths J gave permission to appeal on 9 February 2022. The Appellant is aged 37 and is wanted for extradition to Romania. That is in conjunction with a conviction Extradition Arrest Warrant ("AW") issued by the Romanian authorities on 18 February 2020 and certified by the National Crime Agency on 1 June 2021. The Appellant was arrested on the AW on 16 June 2021 which means that his is a case to which the post-Brexit Trade and Cooperation Agreement ("TCA") applies.

2. The index offences were two criminal offences of driving without a licence, committed on 28 May 2017 and 5 June 2017. In respect of one of those offences the Appellant had appeared in court in Romania on 13 March 2019 and on 5 April 2019, he was convicted in absence on 10 May 2019 and was sentenced in absence on 13 September 2019 to 9 months custody. In respect of the other offence the Appellant had appeared in court in Romania on 8 February 2019, and was subsequently convicted in absence and sentenced to 12 months custody on 8 November 2019. The Romanian court (also on 8 November 2019) "merged" the two sentences, to produce a single sentence of 15 months' custody. All 15 months remain to be served. The facts therefore bear some similarity to the facts in Saptelei v Romania [2021] EWHC 506 (Admin) [2021] RTR 484. In that case there was a "merged" Romanian sentence of 17 months custody (see §§3-4) arising out of two offences involving driving without a licence. One difference is that in Saptelei the requested person had a recognised unfettered right to request a retrial (§5). That made Saptelei a "retrial-conviction case" (§17). By contrast, the present case is a straight "conviction" case: the Appellant would be being surrendered to serve his criminal sentence; not to face a trial; nor a retrial.

3. The Appellant's extradition to Romania was ordered by DJ Clews ("the Judge") on 23 September 2021. That followed an oral hearing before the Judge on 11 August 2021 at which the Appellant, his sister and his girlfriend all gave oral evidence. The Appellant was found by the Judge to have come to the United Kingdom originally in 2016 after which he had returned to Romania. He had come back to the UK in December 2017, having committed the two index offences of driving without a licence in Romania in May and June of that same year. As I have explained, he was back in Romania and in court there in early 2019, but he was then absent for court hearings there later in 2019. At the hearing before the Judge the Appellant accepted: that in the course of the Romanian criminal proceedings he had, in March 2019, been informed of – and was aware of – his obligation to notify any change of address to the Romanian authorities; that he had come back to the UK without giving such notification; and that he had come here knowing about the outstanding proceedings against him. The Judge found the Appellant to be a "fugitive" for the purposes of these extradition proceedings and Mr Hepburne Scott recognises that there is no basis for impugning that finding. One further feature of the case is that, as is common ground, the Judge did not have before him the picture regarding the Appellant's prior convictions in Romania. That picture, recorded in an international convictions document, has properly been put before this Court by the Respondent, as fresh evidence.

‘Conventional’ Article 8

4. The Judge conducted the familiar, conventional Article 8 ECHR ‘balance-sheet’ exercise, in accordance with the guidance of the Divisional Court in Poland v Celinski [2015] EWHC 1274 (Admin) [2016] 1 WLR 551. As one of three distinct lines of argument as to why extradition in this case is incompatible with Article 8, Mr Hepburne Scott submits that, even viewed on a ‘conventional’ Article 8 basis, the “outcome” at which the Judge arrived was “wrong” in the sense described by the Divisional Court in Love v USA [2018] EWHC 172 (Admin) [2018] 1 WLR 2889 at §26.

5. Griffiths J was not impressed by that submission. In granting permission to appeal, he made clear that he did not consider it reasonably arguable that this appeal could succeed on a ‘conventional’ Article 8 basis.

6. In my judgment, viewed in conventional Article 8 terms, the appeal is unsustainable. The key features of the case are these. There are strong public interest considerations in favour of extradition. They are strengthened by the fact that the Appellant left Romania, came here, and remains here as a fugitive. It is relevant that the index offences are not (relatively speaking) serious offences and are not imprisonable offences under UK law. Nevertheless, the sentence of 15 months imprisonment is a significant one. It corresponds to the seriousness of the offending, as characterised by the Romanian courts under Romanian law, which attracts mutual respect in the extradition context. The index offending of driving without a licence arose in the context where the licence had been cancelled on 7 June 2013 and where, as the fresh evidence shows, the Appellant has previous convictions in Romania including a conviction in June 2011 for driving without a licence and refusing to give a sample, for which he had received a two-year custodial sentence. He also had four convictions for aggravated theft in Romania between 2003 and 2014 for which he received substantial custodial sentences. There has been no substantial delay on the part of the Romanian authorities: the passage of time since the offences in 2017 is explained by reference to the criminal proceedings in Romania, then the extradition pursuit of a requested person who had absconded and was a fugitive, together with the passage of time associated with the pursuit by the Appellant of his due process rights before the Judge and now before this Court. As the Judge explained, the family circumstances are these. The Appellant had – at August 2021 – been living for 18 months with his girlfriend, in a home which they shared with the Appellant’s sister and brother. The girlfriend had come to the United Kingdom back in 2014. The Appellant and his girlfriend are unmarried. They have no children. The girlfriend works and is financially dependent on the Appellant. The Appellant has no UK convictions. He has employment here. He and his sister send money to their elderly mother in Romania, who relies on it.

7. On a ‘conventional’ Article 8 exercise, weighing the various features of the case by way of an overall assessment of proportionality, the public interest considerations in favour of extradition decisively outweigh those capable of counting against it, and extradition is a proportionate interference with the private and family life of those affected. I will therefore be focusing on the two other ways in which Mr Hepburne Scott argues that extradition would be incompatible with Article 8. Each involves a ‘modified’ Article 8 approach.

'Modified' Article 8 ECHR

8. For the reasons which I have explained, if this Article 8 appeal is to succeed it could only be by reference to a 'modified' Article 8 approach. It was because of the reasonable arguability of a 'modified' Article 8 argument that Griffiths J granted permission to appeal. In the event, Mr Hepburne Scott developed two alternative 'modified' Article 8 approaches: one 'narrow'; one 'broader'. Several reference points which are central to an understanding of those 'modified' Article 8 arguments were advanced by Mr Hepburne Scott on this appeal. I will turn to those reference points.

The Judge's judgment at §43

9. A first reference point is a passage in the Judge's judgment. The context is that the Judge had already said, in his Article 8 'balance-sheet' exercise, that:

> ***The offences are not serious and would not be imprisonable in the UK***

The Judge then said this (at §43, emphasis added):

> ***The most difficult aspect of the balancing exercise is that the offending cannot be said to be serious, certainly not by the standards of this country where the offences are not even imprisonable. If this was an accusation, rather than a conviction warrant I would have little hesitation in discharging the [Appellant] under s.21A.***

10. To put that observation in its place, it is right to explain that the Judge then went on to pose the question: "how much difference does it make that this is a conviction warrant?" He discussed the convictions and merged sentence in Romania, recognising that the sentence "may partly have reflected" the fact of other, prior convictions in Romania. As I have explained, he did not have concrete evidence of these. The Judge then acknowledged that it was "no task of mine to substitute my own view for how I think the offences might have been dealt with, nor can I simply adopt a 'UK centric' view of how they might have been dealt with here. I must have due regard to the principle of mutual confidence and respect". He went on to explain why the balance was "very clearly" in favour of extradition and that extradition would not be disproportionate.

The "proportionality bar": s.21A(1)(b)

11. The second reference point is the "proportionality bar", as it is termed in Saptelei at §19. This is found in section 21A(1)(b)(2)(3) of the Extradition Act 2003 ("the 2003 Act"). It is what the Judge had in mind in the passage which I have quoted from §43 of his judgment. As the Judge recognised – as a consequence of section 11(5) of the 2003 Act – section 21A applies only in "accusation" warrant cases: where the requested person has "not" been "convicted", but is wanted as an accused person, to stand trial. In relation to a "conviction" warrant case – including a "retrial-conviction" case as in Saptelei – the applicable statutory provision is section 21 which requires the extradition judge to decide "whether the [requested] person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998" (s.21(1)).

12. The material provisions of section 21A of the 2003 Act are as follows:

> ***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.***
>
> ***…***
>
> ***(8) In this section "relevant foreign authorities" means the authorities in the territory to which D would be extradited if the extradition went ahead.***

Distinctiveness of the proportionality bar

13. A leading case on the application of the proportionality bar is Miraszewski v Poland [2014] EWHC 4261 (Admin) [2015] 1 WLR 3929. One of the points emphasised in that judgment concerns the distinctiveness of the proportionality bar, which involves a specific and narrow question of proportionality, addressed solely (see s.21A(2)) to the three "specified matters" (s.21A(3)). This contrasts with the broad question of Article 8 proportionality with its overall balancing act, involving all relevant features of the case, in the context of the impact on private and family life. This distinctiveness of the proportionality bar is reflected in the Court's description of "two separate bars to extradition in an accusation case" which, although there is an 'overlap", require separate consideration (see Miraszewski at §29).

14. Accordingly, the application of the 'conventional' Article 8 'balance-sheet' exercise is a 'proportionality' analysis which is separate and distinct from the proportionality bar. Article 8 overall proportionality is a test which would not necessarily lead to the discharge of a requested person who would stand to be discharged on the narrower and more specific proportionality bar basis. That is significant. It means that if there were some source requiring the application of an equivalent "proportionality bar" in a conviction case, a separate and distinct proportionality exercise would be legally necessary, and a 'conventional' Article 8 assessment could not be legally sufficient. It also means that, if a 'modified' Article 8 approach is being relied on to perform the function of a "proportionality bar" test, then Article 8 would need to perform two distinct functions: conventional 'balance sheet' proportionality; and a "proportionality bar" test.

The proportionality bar: the CrimPD guidance

15. The next reference point is this. As the Court explained in Miraszewski (at §19), the Lord Chief Justice has issued "guidance" pursuant to section 2(7A) of the 2003 Act, for the application of the proportionality bar. At its heart is the guidance provided in relation to the application of the first specified feature, namely: "the seriousness of the conduct alleged to constitute the extradition offence" (s.21A(3)(a)). The extradition judge is to determine that issue "on the facts as set out in the warrant" subject to this "guidance". It provides that, "unless there are exceptional circumstances", the judge should "generally" determine that extradition would be "disproportionate" – so that the requested person is to be discharged – if the conduct alleged to constitute the offence falls within one of the categories set out in a Table. The guidance also gives specified examples of "exceptional circumstances". All of this can be seen in §§50A.2-50A.5 of the Criminal Procedure Rules Practice Direction XI ("CrimPD").

16. What follows is this. In the application of the proportionality bar, a 'narrow' consideration which focuses on the first specified feature (seriousness of the conduct), and which uses a putative domestic sentencing exercise as a 'proxy', can – of itself – yield the conclusion that extradition would be "disproportionate" and that the requested person should be discharged.

TCA Articles 596-598 and 613(1)

17. The next reference point are provisions of the TCA within Title VII (Surrender), a Title whose "objective" – as expressly articulated Article 596 – is:

> ***… to ensure that the extradition system between the Member States, on the one side, and the United Kingdom, on the other side, is based on a mechanism of surrender pursuant to an arrest warrant in accordance with the terms of this Title.***

Within that mechanism of surrender, which is expressed as forming the basis of that extradition system, Articles 597, 598(a) and 613(1) provide as follows:

> ***ARTICLE 597. Principle of proportionality. Cooperation through the arrest warrant shall be necessary and proportionate, taking into account the rights of the requested person and the interests of the victims, and having regard to the seriousness of the act, the likely penalty that would be imposed and the possibility of a State taking measures less coercive than the surrender of the requested person particularly with a view to avoiding unnecessarily long periods of pre-trial detention.***
>
> ***ARTICLE 598. Definitions. For the purposes of this Title, the following definitions apply: (a) "arrest warrant" means a judicial decision issued by a State with a view to the arrest and surrender by another State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order; …***
>
> ***ARTICLE 613. Surrender decision. 1. The executing judicial authority shall decide whether the person is to be surrendered within the time limits and in accordance with the conditions defined in this Title, in particular the principle of proportionality as set out in Article 597…***

Konecny

18. The next reference point is Konecny v Czech Republic [2019] UKSC 8 [2019] 1 WLR 1586, decided by the Supreme Court on 27 February 2019. The case concerned the 'passage of time' extradition bar in section 14 of the 2003 Act. Section 14 poses the

question whether "it would be unjust or oppressive" to extradite a requested person "by reason of the passage of time" which has elapsed since an identified start-date. In an accusation warrant case, the identified start-date is the date on which the requested person is alleged to have "committed the extradition offence". In a conviction warrant case, the identified start-date is the date on which the requested person is alleged to have "become unlawfully at large". Konecny was a "retrial-conviction" case (see §§1, 3). An argument by the requested person (described in the Supreme Court's judgment as the "defendant") which had traction in Konecny, was that an 'unfairness' arose from the design of section 14. The 'unfairness' was that a requested person in a "retrial-conviction" case, unlike a requested person in an accusation warrant case, could not rely on the earlier start-date (the date of commission of the offence): see Konecny at §§52-54. In the judgment, Lord Lloyd-Jones (for the Supreme Court) discussed earlier authorities. These had recognised the 'unfairness', and had described Article 8 ECHR as a "safety net" which permitted consideration of "injustice and oppression to the full extent", with the full "passage of time… brought into account" (see §55). Lord Lloyd-Jones said this (at §57):

> ***It seems to me that until such time as section 14 can be amended by Parliament, article 8 provides an appropriate and effective alternative means of addressing passage of time resulting in injustice or oppression in cases where the defendant has been convicted in absentia. Passage of time is clearly capable of being a relevant consideration in weighing the article 8 balance in extradition cases. (See HH v Deputy Prosecutor of the Italian Republic, Genoa [2013] 1 AC 338, paras 6 and 8, per Baroness Hale JSC.) It is capable of having an important bearing on the weight to be given to the public interest in extradition. In the article 8 balancing exercise, the relevant period of time will not be subject to the restrictions which appear in section 14. I note that in Lysiak v District Court Torun, Poland [2015] EWHC 3098 (Admin), a conviction case, the Divisional Court (Burnett LJ and Hickinbottom J) attached great weight to the nine years the criminal proceedings in Poland took to come to trial and the further 2½ years it took for the conviction to be confirmed in appeal proceedings, when concluding that it would be disproportionate under article 8 to return the defendant to Poland. Furthermore, in cases where it is maintained that passage of time would result in injustice at the retrial to which the defendant is entitled, this consideration could also be brought into account under article 8. The risk of prejudice at a retrial would be highly relevant in the balancing exercise which the extradition court would be required to undertake. Moreover, the threshold test to be satisfied would not be one of injustice or oppression but the lower one of disproportionality. This feature also makes reliance on article 8 a more effective solution than abuse of process where the burden on an appellant would be a much heavier one.***

Mr Hepburne Scott characterised this passage as recognising a 'modified Article 8' approach, in which the same passage of time and the same consequences which would made extradition oppressive in an accusation warrant case when analysed under section 14, would fall to be given "determinative weight" to make extradition disproportionate in Article 8 terms in a retrial-conviction case.

Saptelei

19. Saptelei, the next reference point, was a sequel to Konecny. It was decided by the Divisional Court on 9 March 2021. As I said at the outset of this judgment, it was a "retrial-conviction" case. It involved an 'unfairness' argument concerning the design of the section 21A proportionality bar and a 'modified approach' to Article 8. The argument was one which had been foreshadowed in Konecny, where Lord Lloyd-Jones had recorded the reference that had been made to "further instances of substantive unfairness which might result from the characterisation of a case as a conviction case

where the person whose return is sought has a right to a retrial" (at §71). The argument in Saptelei was, in essence, this. A requested person in a "retrial-conviction" case was unfairly denied – by the statutory scheme – the application of the proportionality bar, with its 'narrow' and distinct focus on the first feature (seriousness of the act) as a basis for discharge. That unfairness called for a 'modified' approach to Article 8 ECHR.

20. The Divisional Court rejected the argument. The Court explained the following key points: that the applicability of the proportionality bar to accusation warrant cases was underpinned by a rationale which saw the four-month minimum custody in a conviction warrant case (s.65(3)(c) of the 2003 Act) as a "sufficient proportionality safeguard" (§§30-33); that the second and third specified matters in the proportionality bar (s.21A(3)(b)(c)) were "clearly otiose" in a conviction warrant case; that the first specified matter, "seriousness of the conduct" (s.21A(3)(a)), in a conviction warrant case was conclusively disposed of by reference to the prison term imposed by the criminal court in the issuing state (§36); that the domestic sentencing 'proxy' of the guidance in the Criminal Practice Direction had "no application" in a conviction warrant case, where the sentence imposed by the criminal court of the issuing state indicated the proper categorisation of the offending (§38); that there was no need "to modify the approach to Article 8" in the instant case "given that all the matters on which the [requested person] relie[d] under the concept of proportionality were covered by a conventional assessment of his Article 8 rights" (§40); and that, just as in Konecny, Article 8 "provided the appropriate means to address the suggested disadvantage created by the wording of section 14 of the Act because the passage of time is already a relevant factor in the article 8 balancing exercise", so it was "similarly" the position that the suggested lack of seriousness of the index offending is already a relevant factor in the Article 8 balancing exercise, and therefore it was similarly appropriate to address any disadvantage to the requested person in that way (§40). The 'modified' Article 8 argument failed. Conventional Article 8 was the legally correct approach.

The 'narrow' and 'broader' modified Article 8 arguments

21. Having identified all of these reference points, I can turn to Mr Hepburne Scott's two 'modified Article 8' arguments.

    i) First, there is his primary ('narrow') argument. In it, he submits that "the principle of proportionality" in Article 597 of the TCA necessitates – in both accusation warrant and conviction warrant cases (see TCA Article 598(1)) – a distinctive and narrow evaluation of the "seriousness of the act", viewed in terms of how a sentencing judge in the executing state would deal with the question of sentence. In other words, it involves the equivalent exercise to the one performed under the Criminal Practice Direction in the context of the proportionality bar. If there is a lack of "proportionality", in performing that distinctive and 'narrow' evaluation, the extradition court is required to discharge the requested person in the conviction warrant case. In an accusation warrant case, this position is already achieved by virtue of the proportionality bar in section 21A, applied in accordance with the Criminal Practice Direction guidance. That is the exercise necessitated by the terms of Article 597, on its correct interpretation. The legal consequence is that, on a "conforming interpretation" of section 21(1) and Article 8 as scheduled to the Human Rights Act 1998 ("HRA"), the same distinct exercise is equally necessitated in all conviction warrant cases. The consequence is that the "seriousness of the act"

as assessed through this distinctive and narrow evaluation falls to be given "determinative weight" in the Article 8 balancing exercise. In the present case, in light of the reasoning in paragraph 43 of the Judge's judgment, the outcome of the distinctive and narrow evaluation necessitated by Article 597 is clear and there is no basis to disturb it. Indeed, even if this Court were re-evaluating the same question, it should come to the same conclusion. Either way, the Appellant must be discharged because extradition is incompatible with his Article 8 rights.

ii) Then there is Mr Hepburne Scott's secondary ('broader') argument. Here, he submits as follows. The "principle of proportionality" found in Article 597 of the TCA necessitates – in both accusation and conviction warrant cases – a distinctive evaluation of proportionality in light of the "seriousness of the act" than arises on a conventional Article 8 balance sheet evaluation. That is a distinctive evaluation, albeit that it is 'broader' than the specific exercise for which the Criminal Practice Direction guidance calls in an accusation warrant case. The distinctive 'broader' evaluation involves having close regard to the seriousness of the act, and taking account of how a sentencing judge in the executing state would deal with the question of sentence had the trial been in the executing state. This 'broader' exercise is necessitated by Article 597 on its correct interpretation, achieved by a conforming interpretation of section 21(1) and Article 8. What follows is that "the seriousness of the act", and the putative sentence which the judge in the executing state would impose, are given greater "weight" in the overall Article 8 evaluation of proportionality than is 'conventionally' the case. As is reflected in paragraph 43 of the Judge's judgment, the outcome of the modified Article 8 balancing exercise stands to be materially affected by this 'broader' but distinctive approach. The correct outcome, which this Court should reach on this appeal, is that surrender of the Appellant is disproportionate and he should be discharged because extradition is incompatible with his Article 8 rights.

Two foundational questions about Article 597: (i) applicability and (ii) meaning

22. In order to succeed, Mr Hepburne Scott would need to be right on each of two foundational questions concerning Article 597 TCA.

i) One foundational question is about applicability in law of Article 597. The 'narrow' and the 'broader' arguments each entail the proposition that Article 597 can, in law, be relied on in the application of the domestic statutory framework; specifically, in the approach to Article 8.

ii) The other foundational question is about the meaning of Article 597. The 'narrow' argument, and the alternative 'broader' argument, each involves an analysis of the true meaning of Article 597, correctly interpreted.

Applicability of Article 597 TCA: the arguments

23. In this part of the judgment, I will describe the competing arguments of the parties in relation to the first foundational question: the applicability of Article 597 as a source.

24. Mr Hepburne Scott submits that it is legally and constitutionally permissible to invoke Article 597 TCA, so as to influence the interpretation of section 21(1) read with Article

8, to secure conformity with Article 597. His argument – including his answers to key points made by Ms Burton for the Respondent – was in essence, as I saw it, as follows:

i) Several important points can be derived from Polakowski v Westminster Magistrates' Court [2021] EWHC 53 (Admin) [2021] 1 WLR 2521 at §§15-18. First, that the correct "starting point" for the legal analysis is the 2003 Act, being the Act of Parliament which governs extradition, and not any external international instrument or agreement: see Polakowski at §15. Second, that the TCA – which addresses the ongoing relationship between the UK and the EU – is an international agreement which is "not part of UK domestic law save to the limited extent that it is specifically incorporated by statute": see Polakowski §17. Third, that it is important that any legal question involving rights or obligations in the extradition context should be approached "in the first instance" through "the lens of domestic law": see Polakowski at §18. However, the phrases "starting point" and "in the first instance" are significant. True, the TCA is "not part of UK domestic law". But the question is whether the TCA can properly affect the interpretation of those provisions which are part of UK domestic law. In this case, that means section 21(1) read with Article 8. The answer is yes. There can be a principled justification for interpreting the domestic provisions of the statute in conformity with an international instrument.

ii) It is also true that in R (Norris) v Secretary of State for the Home Department [2006] EWHC 280 (Admin) [2006] ACD 57 the Divisional Court (at §§44 and 46) described the constitutional position in the UK in an extradition context in the following way: that the rights of those being extradited are "governed by domestic legislative arrangements" and that a treaty arrangement between states addressing the principled approach to extradition were not to be regarded "standing alone" to have "created personal rights enforceable by … individual citizens". But Norris is not authority for the proposition that the domestic statute is the 'ending point'. Even if it were, it would have been overtaken by subsequent cases, including Polakowski where the domestic statute is instead the "starting point". Norris was not a case about whether and when the domestic statute could be interpreted in conformity with an international instrument. The issue in Norris was whether it was unlawful or unreasonable for the Secretary of State to have continued the designation, by statutory instrument, of the United States as a Category 2 territory. The argument that this was unlawful or unreasonable was based on a conflict between (i) the 'prima facie case' precondition contained in a subsisting 1972 US-UK extradition Treaty and (ii) express statutory provisions of the 2003 Act (applicable to extradition to designated Category 2 territories) which 'disapplied' the domestic statutory precondition needing a 'case to answer' (see §§27, 29). The argument was that the Secretary of State's maintained Category 2 designation of the US was legally unjustifiable given that conflict. That argument was rejected. No question or argument as to compatible interpretation arose. That is unsurprising. The 'disapplication' was doubtless an aspect of the clear and unequivocal language of the Act, so that no 'compatible interpretation' would have been 'possible'. That is not the case when it comes to section 21(1) read with Article 8.

iii) When the European extradition arrangements were underpinned by the EU Framework Decision 2002/584/JHA, it was recognised as sometimes "necessary" to interpret the UK domestic legislation in conformity with that undomesticated international (regional) instrument. That 'conforming interpretation' course was only to be taken "exceptionally", in situations "where the domestic law was unclear or failed properly to implement the underlying EU instrument": see Polakowski at §16. This is the familiar principle of conforming interpretation articulated by the Supreme Court in Konecny at §16, when Lord Lloyd-Jones said: "The provisions of Part 1 of the 2003 Act must … be interpreted as intended to give effect to the Framework Decision and, so far as possible, construed consistently with its terms and purpose".

iv) This principle of conforming interpretation was the reason, to take one concrete example, why the provisions of section 20 of the 2003 Act (which address trial in absence) were interpreted compatibly with Article 4a of the Framework Decision: see Cretu v Romania [2016] EWHC 353 (Admin) [2016] 1 WLR 3344 at §34. That example brings the point in the present case into sharp focus. The provisions which were previously found in Article 4a of the Framework Decision are now to be found within Article 601(1)(i) of the TCA. Just as the principle of conforming interpretation entailed that section 20 be interpreted compatibly with Framework Decision Article 4a, an equivalent principle of conforming interpretation now equally entails that section 20 would still be interpreted compatibly with those same substantive requirements, through interpretation compatibly with TCA Article 601. The legislative changes that were made to the domestic legislation upon withdrawal from the EU did not entail amendment of section 20 to mirror Cretu, because Parliament understood that compatible interpretation could and would continue.

v) It is right to say (as Ms Burton does) that when domestic extradition judgments emphasised the status of the Framework Decision within EU law, they did so in the context of the particular provisions of the European Communities Act 1972 ("the 1972 Act"), including section 2(1) of the 1972 Act. The importance of the status of the Framework Decision, including its change to an enhanced 'status', were moreover aspects emphasised in Cretu at §§16-18. That means the position of the TCA with its distinct status, after the repeal of the 1972 Act, is not identical to the position which applied to the Framework Decision when section 20 was reinterpreted, in Cretu. However, a 'conforming' – or 'compatible' – interpretation is still appropriately secured through "the canon of statutory construction the Parliament does not intend to legislate contrary to the United Kingdom's international obligations", albeit that this was identified as a "weaker" principle than the principle of conforming interpretation with the Framework Decision (see Cretu at §16). That other "canon of construction" was the route by which a 'compatible interpretation' had been derived by the Supreme Court in Assange v Sweden [2012] UKSC 22 [2012] 2 AC 471 (see Lord Phillips at §10, with whom Lord Walker and Lord Brown agreed, Lord Kerr at §112 and Lord Dyson at §122). Even if not as strong as the principle of conforming interpretation seen in Cretu, the Assange canon of compatible interpretation is itself a "strong presumption": see Assange at §122.

vi) It does not matter that the provisions of the 2003 Act were enacted prior to the TCA. It is enough that Part 1 of the 2003 Act has been maintained (with amendments) with the purpose of giving effect to objective of Title VII of the TCA (see TCA Article 596 and Polakowski at §17): to provide for the single uniform system involving the United Kingdom and EU member states for the surrender of those accused or convicted. In a similar way, it was no answer that the 2003 Act had been enacted prior to the Framework Decision and its securing an enhanced 'status' (Cretu §13).

vii) Insofar as it is argued that a 'conforming' or 'compatible interpretation' is legally unjustifiable because reliance on the Framework Decision arose in the context of section 2(1) of the 1972 Act, there is a further point. The TCA is itself the subject of a specific provision of the European Union (Future Relationship) Act 2020 – namely section 29 – to which Ms Burton very properly drew the Court's attention. That section provides that, post withdrawal from the EU: "Existing domestic law" – which includes "any existing enactment" – "has effect … with such modifications as are required for the purposes of implementing in that law the [TCA] … so far as [the TCA] is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the UK under the [TCA]". That reinforces – or constitutes, if one is needed, a domestic statutory provision to underpin – the appropriateness of a 'conforming' or 'compatible interpretation'.

viii) As with section 20 of the 2003 Act in Cretu (and unlike the position in Norris), there is no difficulty in finding a provision of the statutory scheme apt for a 'conforming' or 'compatible interpretation'. Section 21(1) of the 2003 Act requires that extradition must not violate Article 8 ECHR. Article 8 is invariably engaged, since any extradition will by its nature involve an "interference" with, at least, the requested person's "private life". Article 8 'proportionality' can, perfectly properly, be applied so as to give "determinative weight" to a narrow feature which – of itself – necessarily renders extradition disproportionate, whatever the particular strength of the private life (or family life). It can achieve this outcome, just as it could identify as disproportionate extradition which in section 14 terms (in an accusation warrant case) would be oppressive (see Konecny). Konecny is not the only illustration of Article 8 giving "determinative weight" to features of a case. Another example is the way that the deductibility of 'qualifying remand' under Framework Decision Article 26 (now TCA Article 624) can of itself, in a case where the 'qualifying remand' extinguishes the time to serve, constitute "a necessary violation of Article 8": see the Article 8 cases cited in Molik v Poland [2020] EWHC 2836 (Admin) at §17. Article 8 involves necessity and proportionality. If there is a 'modified' proportionality exercise necessitated by the principle of proportionality in Article 597, it is an exercise which fits with Article 8, which can be interpreted and applied compatibly with the obligation.

ix) Finally, this analysis is reinforced by the recognition of the fact that the application of the proportionality test in a qualified ECHR right such as Article 8 should be interpreted and applied so as to promote the state in question honouring its international law obligations. This is powerfully illustrated by the judgment of the Strasbourg Court (Grand Chamber) in Demir v Turkey

Application No. 34503/97 (2009) 48 EHRR 54. In that case, the Grand Chamber discussed, in detail, the principled approach to the interpretation and application of a qualified ECHR right (Article 11), by reference to relevant international law obligations: general; regional (European); emerging practice or consensus; and international agreements entered into by the relevant State (Turkey): see §§65-86. Further, when the Grand Chamber came to apply the "necessary in a democratic society" test under Article 11, it did so by reference to international law instruments including emphasis on instruments which Turkey had ratified: see §§121-125. Those international law obligations informed the Grand Chamber's conclusions (§§125-127): that the Turkish domestic statutory provisions precluding civil servants from engaging in trade union activity, restrictively interpreted by the Turkish courts, had produced an unjustified and disproportionate interference with the Article 11 rights of the civil servants whose unionising activities had been outlawed.

25. Ms Burton submits, in response, that Article 597 is in principle legally irrelevant. She submits that there is no principled basis for any 'conforming' or 'compatible interpretation'. She relies, straightforwardly, on the points which were made in Polakowski, Norris and Cretu (seen above) which, she says, Mr Hepburne Scott's argument on applicability does not convincingly answer. Ms Burton submits, in essence – as I see it – as follows:

i) The TCA operates only on the 'international plane'. It is no part of UK domestic law. In principle, international obligations in an extradition treaty are legally irrelevant to the meaning and application of the domestic statutory scheme. The sole question is the proper, natural and freestanding interpretation of the domestic statute, as was explained in Polakowski. The TCA is an instrument which reflects the relationship agreed between the UK and the EU member states. But it does not give rise to any enforceable freestanding rights. The points made in Norris at §§44, 46 apply equally here.

ii) There is no safe analogy between the TCA and the Framework Decision, and no legitimate invocation of the principle of 'conforming interpretation' which allowed the Framework Decision to be relied on, since that was an EU principle and the specific consequence of a particular status of instrument in EU law, in the context of section 2(1) of the 1972 Act. That is why the principle did not apply until the Framework Decision was given its enhanced 'status': Cretu §§16-18. Nor could the "weaker" Assange canon of statutory construction justify an interpretation of section 21(1) with Article 8, so as to 'modify' the Article 8 proportionality exercise, any more than the Framework Decision could at the time of its prior and weaker 'status' have warranted a reinterpretation of section 20 by reference to Article 4a. Any and all rights or obligations are governed by domestic legislative arrangements. That is the beginning and the end of it.

iii) Konecny was a case about interpreting and applying the domestic statute. It did not involve any external international instrument. Nor, correctly understood, did it involve any 'modification' to Article 8.

iv) As to qualifying remand and Article 26 of the Framework Decision, and the effect for Article 8 seen in the Article 8 cases cited in Molik, these are an unsafe

analogy. The Article 26 deduction of qualifying remand is a matter for the issuing state. True, it can be a feature of Article 8 proportionality, but that is not a 'conforming' or 'compatible interpretation' of the 2003 Act in the light of the Framework Decision. Indeed, uncontroverted evidence about the operation of a clear domestic statutory provision in the issuing state could also be a feature of Article 8 proportionality. Not because it is an aid to interpretation, but because it is one of the features of the individual case.

v) As to the Cretu-interpretation of section 20, it "may be" that the Cretu approach to section 20, previously interpreted in 'conformity' with Article 4a of the Framework Decision, is no longer the correct interpretation of section 20, given the absence of a principle of 'conforming interpretation' with TCA Article 601(i). But that is "not this case" and the answer would turn on an analysis specific to those provisions.

vi) Even if the correct meaning of Article 597 were that it is providing for a narrow proportionality bar – like section 21A(1)(b)(2)(3) – applicable to conviction warrant cases, it would be impermissible to apply that new bar to extradition through the 'compatible interpretation' of section 21(1). Whether, and to which species of warrants, to apply a proportionality bar is for Parliament in the primary legislation. Parliament has addressed that question in the design of the Act: see section 21A read with section 11(5).

vii) If there is an inconsistency between the 2003 Act and Article 597, the situation is covered by the proposition identified in the Tin Council case (J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418, 512A per Lord Oliver): "If the treaty contained such a provision and Parliament had not seen fit to incorporate it into a municipal law by appropriate legislation, it would not be for the courts to supply what Parliament had omitted and thus to confer on the Crown a power to alter the law without the intervention of the legislature". It is not the role of the domestic court to seek to fill gaps in primary legislation by reference to an undomesticated international instrument.

viii) There is no equivalent to section 2(1) of the 1972 Act, which (together with the status of the Framework Decision in EU law) was crucial to the conforming interpretation. The extent to which the TCA is implemented in the extradition field (section 29 of the 2020 Act) is exclusively governed by the 2003 Act. That includes amendments deliberately made by Parliament. An example is section 12(2)(b) of the 2020 Act. Previously, there was a reflection, achieved by virtue of section 64(5)(c) of the 2003 Act, with a list of offences by reference to which the condition of double criminality was disapplied, that list being found in the Framework Decision Article 2(2). By virtue of section 12(2)(b) the equivalent list – now found in TCA Article 599(4) – is not now reflected in the domestic statute.

ix) In light of all of these considerations, Article 597 can simply be put to one side as being incapable of having any legal effect on the application of the domestic statutory provisions.

Meaning of Article 597

26. I have endeavoured to summarise the important legal debate on the foundational question of applicability of Article 597 of the TCA. I am going to put it to one side for now, and turn to the other foundational question: the true meaning of Article 597.

27. In my judgment, there is good reason to take that course. It will bring into focus where the debate leads in the present case, so far as concerns Article 597 TCA alongside 'conventional' Article 8 ECHR. Moreover, as the Court explained in Polakowski at §16, the principle of 'conforming' (or 'compatible') interpretation – in cases where it can apply – is called for only "in cases where the domestic law [has] failed properly to implement the underlying … instrument". I can take Article 597 and the other key provisions of the TCA as the "underlying … instrument". I can see their wording and structure. I can assume – in favour of the Appellant, taking his case at its highest – an applicable principle of 'conforming' interpretation. I can take the 'conventional' Article 8 ECHR evaluative approach in an extradition case. I can ask whether there is any 'mismatch' between conventional Article 8 evaluation and the meaning of Article 597, capable of standing as a failure of proper implementation, requiring a conforming (or compatible) interpretation. I can ask that question both in relation to the 'mismatch' identified in Mr Hepburne Scott's 'narrow' argument, and the 'mismatch' identified in his 'broader' argument. Having done so, I can answer whether a 'conventional' Article 8 evaluation would be a situation in which there has been a failure "properly to implement" Article 597.

28. Mr Hepburne Scott submits that the correct meaning of TCA Article 597 is that it requires his 'narrower', or alternatively his 'broader', approach to proportionality in which the focus and weight given to the seriousness of the index criminality – including how a domestic sentencing court in the executing state would have approached it – are approached materially differently from a 'conventional Article 8 evaluation. Ms Burton submits that the correct meaning of TCA Article 597 is that it is satisfied by a conventional Article 8 balancing exercise. Who is right?

29. I accept that the Article 597 "principle of proportionality" is, by virtue of the wording and structure of the TCA, an important condition to be applied by the executing judicial authority in deciding whether to order extradition or discharge. I accept each of the following: (1) that the "principle of proportionality" set out in Article 597 is one of the "conditions defined in" Title VII, in accordance with which the "executing judicial authority" is required to ("shall") decide "whether the [requested] person is to be surrendered" (Article 613(1)); (2) that Article 597 is the condition which is singled out in that regard (see Article 613(1): "in particular"); and (3) that the Article 597 principle of proportionality is not simply a description of the nature of the "cooperation through the arrest warrant" between an EU member state on the one side and the UK on the other (Article 597). I also accept, in this context, that there is an important point to be made about "executing", and not just "issuing", states. Judging from the discussion in Miraszewski at §§22-24 there was a history, back to 2010/2011, involving the identification of a "proportionality" principle which was applicable to the actions and decisions of an "issuing" state. TCA Article 597, by contrast, is clearly concerned with a principle which is applicable to the "executing" state and to the judicial authority in the "executing" state.

30. Turning to points which concern "accusation" and "conviction" warrants and the "proportionality bar", I would also accept the following: (1) that the three "proportionality bar" considerations which are found in the domestic statute (2003 Act

s.21A(3)(a)-(c)) as being applicable to an "accusation" warrant case, are strikingly reflected in the later phrases found within the language of Article 597; and (2) that this is so, in a provision which is applicable to "accusation" warrant cases, to "retrial-conviction" warrant cases, and to straight "conviction" warrant cases (see Article 598(a)).

31. I have explained that the design of section 21A(2)(3) involves a narrow and distinct proportionality evaluation in which the discharge of the requested person can arise from consideration of the seriousness of the conduct constituting the extradition offence. Moreover, by virtue of the guidance in the Criminal Practice Direction, that consideration falls to be addressed using the proxy of sentence in the executing state.

32. I accept that a narrow and distinct "proportionality bar" evaluation of that kind involves no inconsistency with the language and structure of Article 597. That means the UK could, entirely consistently with Article 597, continue to prescribe a narrow distinct "proportionality bar" evaluation which focuses only on some of the aspects of the principle of proportionality there set out. The UK could, moreover, have amended section 21A to prescribe an equivalent narrow distinct "proportionality bar" evaluation in conviction warrant cases. That would have been consistent with Article 597.

33. But what I cannot accept is that Article 597 necessitates a narrow, distinct "proportionality bar" evaluation – even in "accusation" warrant cases, still less in "conviction" warrant cases – which focuses on the 'seriousness of the act' and which requires the discharge of the requested person by reference to consideration of the 'seriousness of the act' (still less which does so by a focus on the proxy of a putative sentencing exercise by a court in the executing state). If that were right, the effect of Article 597 would be that all member states of the EU, in extradition cases involving the UK, would have signed up to a "proportionality bar" as specifically designed in section 21A(1)(b)(2)(3) of the 2003 Act (together, indeed, with the focus of the Criminal Practice Direction). It would mean that the UK would have signed up to a "proportionality bar" as specifically designed in section 21A(1)(b)(2)(3) of the 2003 Act (together with the focus of the Criminal Practice Direction) for "conviction" warrant cases.

34. It would have been very easy for the drafters of Article 597 of the TCA to replicate the "proportionality bar" as it is found within section 21A, with an exclusive focus on specified matters (seriousness of the conduct; likely penalty; possibility of less coercive measures). It would have been very easy for the drafters of Article 597 to go further and replicate the sentencing proxy found in the criminal procedure rules practice direction, as a mandating focus through the principle of proportionality in Article 597. But that is not what the language and structure of Article 597 does.

35. In my judgment, what Article 597 of the TCA necessitates is clear:

    i) Applied as a condition for the surrender of the requested person (Article 613(1)), the executing judicial authority has to decide whether the surrender of the person is "necessary and proportionate".

    ii) In deciding that question, the executing judicial authority is to "take into account" both "the rights of the requested person" and "the interests of the victims", and is to "have regard" to three further specified matters.

iii) The three further specified matters are the seriousness of the act, the likely penalty that would be imposed and the possibility of a stay taking measures less coercive than surrender (particularly with a view to avoiding unnecessarily long periods of pre-trial detention).

iv) Even viewed in terms of the three further specified matters, the Article 597 "principle of proportionality" will apply in a different way in different kinds of cases, including a different way in "accusation" and "conviction" warrant cases. As Mr Hepburne Scott accepts, as the Divisional Court in Saptelei said (at §35), the second and third of the three further specified matters are "otiose" in the context of a conviction warrant. Certainly, there is no "likely" penalty that "would be" imposed (rather there is an "actual" penalty that "has been" imposed). Whether or not 'less coercive measures' could have a role in a conviction warrant case, the reference to the avoidance of periods of "pre-trial detention" is plainly inapt.

v) Another example of that contextual application of features of the Article 597 "principle of proportionality" is that "the interests of the victims" will only be a feature of a case in which the public interest in the requested person serving their sentence or standing trial engages interests of "victims" of the index criminality. The present case – involving the criminal conduct of driving a car without a licence – may illustrate that there can be cases where there are no identifiable "victims" whose "interests" are to be taken into account.

vi) The features identified in Article 597 as informing the application of the "principle of proportionality" are, clearly, not exhaustive. Express reference is made to necessity and proportionality taking into account the rights of the requested person and the interests of the victims. No reference is made to taking into account the rights of family members of the requested person. No reference is made of the best interests of a child. Express reference is made to the likely penalty that would be imposed. No reference is made to the nature of the penalty that has been imposed.

vii) It is not difficult to understand why. Article 597 is describing a single, overall evaluation of necessity and proportionality which by reason of Article 613(1) is to be applied by an executing judicial authority, as a condition applicable to the decision whether the requested person is to be surrendered. It is identifying a general test (necessity and proportionality) and a number of identified relevant considerations which feed into the consideration of that test. It is not providing an exhaustive and prescriptive set of features. And it is not indicating "determinative weight" being given to features to which regard is to be had.

36. Article 597 necessitates consideration by the executing judicial authority of the question whether extradition of the requested person is "necessary and proportionate" taking into account "the rights of the requested person". The arguments – on both sides – in the present case arise out of the situation where there are rights protected by Article 8. It was common ground that the extradition of any requested person can be taken, necessarily, to constitute an interference with their private life. The same may not be true of family life: the requested person may have no relevant family or family life. Mr Hepburne Scott submitted and Ms Burton accepted – each, in my judgment, correctly – that even an individual encountered in a transit zone at Heathrow airport who comes

to the attention of the UK authorities by reason of an outstanding extradition arrest warrant issued by an EU member state, and who resists surrender to that state, would be having their "private life" interfered with by extradition to that issuing state. That is because of the impact of the decision on their personal autonomy, freedom of movement and choice. But of course there could be Article 8 rights of a third party who is not the requested person, for example a young child.

37. I cannot accept Mr Hepburne Scott's interpretation of the principle of proportionality in Article 597, whether his primary and 'narrow' argument or his secondary and 'broader' argument. I agree with Ms Burton. Article 597 is not framed to require a narrow and distinct enquiry into the seriousness of the act – still less viewed through the proxy of an executing state sentencing court – whose outcome of itself provides a basis for discharge of the requested person. Nor is Article 597 framed to require special weight, or determinative weight, to the lesser or greater 'seriousness of the act'. Putting the Article 597 "principle of proportionality" alongside the 'conventional' balancing exercise under Article 8 in an extradition case, there is no conflict or incompatibility. Rather, there is a clear consistency and congruence. There is no identifiable deficit: in an Article 8 ECHR case, TCA Article 597 does not prescribe anything which the Article 8 balancing exercise would fail to deliver. In explaining why, I will factor into the discussion the 'conventional' Article 8 balancing exercise itself and reference to some of the key cases to which both Counsel made reference.

    i) The word "necessary" reflects the language of Article 8 itself ("necessary in a democratic society…"). The words "and proportionate" and the phrase "principle of proportionality" reflect the proportionality principle which is the recognised governing test for evaluating the justification in Article 8 terms for the act of extraditing the requested person, given the interference with private life (and frequently family life) which extradition would entail.

    ii) In an Article 8 case "the rights of the requested person" are naturally at the forefront, including the rights to respect for private life and family life. But third party rights – for example the partner or child – are also highly relevant and their principled protection is consistent with the language and structure of Article 597. Article 597 does not say that the only relevant rights are those of the requested person.

    iii) In an Article 8 case although the interests of the victims do not have the statutorily prescribed status seen in relation to issues of "forum" (cf. 2003 Act s.19B(3)(b)), the nature of the interests of any victims of the requested person's criminal conduct (in a conviction warrant case) or alleged criminal conduct (in an accusation warrant case) are part of the familiar 'public interest' considerations in favour of extradition. To take an example, the link between the rights of the victims of criminal offences and the public interest imperatives in favour of extradition was identified by Lord Judge CJ in the leading 'conventional' Article 8 case of HH v Italy [2012] UKSC 25 [2013] 1 AC 338 at §121. I can see that an extradition judge might be encouraged by reference to the language of Article 597 to make explicit reference to whether there are "victims" whose "interests" fall to be weighed in the public interest balance, but I cannot accept that such explicit reference would in substance materially change the nature and outcome of the conventional Article 8 balancing exercise, including in the present case.

iv) Under a 'conventional' Article 8 ECHR balancing exercise, "regard" is had "to the seriousness of the act". The principled approach under 'conventional' Article 8 was described by Lady Hale at §8(5) of HH, when she explained that the public interest in extradition "will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved". That 'variable weight' can only be calibrated because regard is being had to "the seriousness of the act". Under a 'conventional' Article 8 balance sheet exercise the extradition court will, in a conviction warrant case, have regard to the seriousness as characterised and reflected in the sentence which was imposed by the issuing state's sentencing court: see Celinski §13. That is what the Judge did in this case. But that is a part of having "regard" to "seriousness" of the "act", in the contextual application of a necessity and proportionality standard, in an area underpinned by appropriate mutual respect.

v) In an accusation warrant case the three features which govern the proportionality bar can all in principle be relevant to an overall assessment of proportionality, which is why there is an "overlap" between Article 8 proportionality and the distinct proportionality bar: see Miraszewski §29. Under the 2003 Act, proportionality is addressed in an accusation warrant case by reference to a distinct proportionality exercise which has regard to those three matters. That, as I have explained, is compatible and consistent with Article 597, albeit not necessitated by the wording and structure of Article 597.

vi) Given all these features, I can see no lack of 'conformity' or 'consistency' between the 'conventional' application of Article 8 conventionally and the language and structure of Article 597. The article 8 proportionality balancing exercise is conducted "taking into account' and 'having regard to" the matters identified in Article 597, to the extent that they are relevant to the nature of the warrant and on the facts and circumstances of the case. No particular recalibration would be called for, because no part of Article 597 attributes primacy, hierarchy or specific weight to any particular feature.

38. Mr Hepburne Scott accepts that the prism through which his argument would need to be applied is the proportionality evaluation under Article 8. Article 8 is, by its nature and express design, concerned with proportionality of the interference with the rights to respect for private and family life. It is inevitable that a necessity and proportionality test in the context of Article 8 will be asking whether the interference is justified. Indeed, the wording and structure of Article 613(1) emphasises that the principle of proportionality set out in Article 597 is one which is applied as a condition in deciding whether the requested person should be surrendered. In my judgment it is rightly recognised by Mr Hepburne Scott that Article 8 ECHR, through its analysis of whether the inevitable interference with Article 8 rights to respect for private and family life are justified as proportionate, is the domestic statutory provision – applicable through section 21(1) of the 2003 Act – which would need to achieve the application of the principle of proportionality described in Article 597. But it does achieve that.

39. Accordingly, there is no lack of 'conformity' between the 'conventional' application of the Article 8 principle of proportionality and the language and structure of Article 597. This is not one of those situations where any "lack of clarity" or failure "properly to implement" an underlying international instrument which could call – exceptionally –

for an exercise of 're-interpretation': Polakowski §16. Indeed, given the way that Article 8 ECHR is interpreted and applied – through the well-established approach to the principle of proportionality – it is entirely understandable that when amendments to the statute were made in the context of the Brexit transition from the EAW system and the Framework Decision to the AW and TCA arrangements, no legislative amendment has been introduced reflective of Article 597. It follows that, rather in the same way that the Divisional Court found in Saptelei that the matters on which the requested person there relied under the concept of proportionality were "covered by conventional assessment of his article 8 rights" (see §40), I have reached an equivalent conclusion in relation to the arguments advanced in the present case, to which that Court alluded (see §26).

Applicability revisited

40. In those circumstances the hotly disputed question as to whether, in the case of a mismatch between the 'conventional' application of Article 8 and the correct meaning of TCA Article 597, a 'confirming' or 'compatible interpretation' could in principle be adopted does not arise. It is not necessary that I should seek to resolve the conundrum as to whether the Cretu 'conforming interpretation' of section 20 with the then Article 4a of the Framework Decision is similarly matched today by a 'confirming' or 'compatible interpretation' of section 20 with the now TCA Article 601(i). Nor do I need to decide whether there is a difference in principle between the 'status' of the Framework Decision in EU law and the application of section 2(1) of the 1972 Act on the one hand, and the TCA together with section 29 of the 2020 Act on the other hand.

41. Having heard full argument on the question of applicability, and having earlier in this judgment set out the arguments in both directions, I will say – in the interests of transparency – what I would have made of the arguments, had it mattered. If Mr Hepburne Scott had demonstrated, within the language and structure of TCA Article 597, a material and potentially weighty feature whose consideration were required by Article 597 as part of the evaluation of the necessity and proportionality of the requested person's extradition, but which a 'conventional' Article 8 evaluation omits (and which the 2003 Act does not elsewhere address), then in those circumstances I would have accepted that the principle of 'compatible interpretation' would warrant a 'modified' Article 8 approach which includes that feature. I would have accepted and preferred his arguments on applicability, whose essence I set out earlier in this judgment. Based on the issues and arguments that were ventilated in this case, if it had mattered and there had been some necessary feature of the TCA consistently with which it was possible to interpret a provision of domestic law in order to avoid patent incompatibility, I would have accepted that it is proper for the court to adopt an interpretative solution to achieve conformity. I would also have accepted that Article 8 within the human rights act and applicable by virtue of section 21(1) would constitute a provision of domestic law which could in principle be interpreted compatibly in that way. To illustrate the logic, suppose Article 597 were the first provision to say that in the evaluation of the necessity and proportionality of the extradition of a requested person "the best interests of an affected child shall be a primary consideration", and suppose a 'conventional' Article 8 evaluation did not currently include that consideration. I think, in such a situation, Mr Hepburne Scott's legal logic as to applicability would have won the day.

'Modified' Article 8 revisited

42. In the circumstances, it has not been necessary for me to resolve the disputed question as to whether Konecny at §57 was describing a 'modified' approach to Article 8 ECHR, or was treating the 'conventional' approach to Article 8 ECHR as one which operated to avoid any prejudice. On that question, if it mattered, the phrase "until such time section 14 can be amended" (Konecny §57) and the phrase "Article 8 provided the appropriate means to address the suggested disadvantage" (Saptelei §40) indicate that there is a 'modification' in the application of Article 8 and it is not simply 'business as usual'. Moreover, whether Konecny at §57 was describing a 'modified' Article 8 approach or a 'conventional' Article 8 approach, I would have accepted that a 'modified' Article 8 approach would in principle be a permissible 'conforming interpretation', in an exceptional case where one is necessary (Polakowski §16).

Paragraph 43 of the judgment revisited

43. Finally, I return to the Judge's analysis at paragraph 43 of his judgment. This was put at the forefront of Mr Hepburne Scott's argument for a modified Article 8 approach, especially the 'narrow' argument. By advancing an interpretation of Article 597 of the TCA which would necessitate a 'proportionality bar', of the same nature as found in accusation warrant cases in section 21A(1)(b)(2)(3) and in the Criminal Practice Direction guidance, Mr Hepburne Scott was building the platform from which he would then be able to embrace the Judge's paragraph 43 observation to drive the Appellant home to a favourable outcome for this appeal. In the event, it is not a platform which Mr Hepburne Scott has been able to build. For her part, Ms Burton submitted that the Judge's observation at paragraph 43 would not be a sound basis for allowing this appeal, even if Mr Hepburne Scott were right about everything else. Nothing now turns on this, but I think Ms Burton was right. I will explain briefly why:

    i) It is true that the Judge specifically addressed section 21A and referred to discharging the Appellant as something which he would have had "little hesitation" in doing, had this been an "accusation case". It is also true that a finding in the application of section 21A(3)(a) and the terms of the Criminal Practice Direction would be an evaluative judgment for the Judge, with which this court would not readily interfere, and would not do so simply on the basis of substituting a different evaluative judgment. It is also right to record that, in the Order granting permission to appeal, Griffiths J made clear that – for his part – he saw paragraph 43 of the Judge's judgment as a "clear finding".

    ii) The section 21A proportionality bar point did not, however, arise. It was not necessary to the Judge's decision. In making his comment, he did not in my judgment – unsurprisingly, in those circumstances – make a specific "finding". Nor, moreover, did he give any reasons for any finding. Nor did he consider the terms of the Criminal Practice Direction. None of that is by way of criticism: the point did not arise for determination. Nor were the Appellant's previous convictions before the Judge and they are in principle relevant to the application of the guidance in the Practice Direction. Unlike the position before the Judge, the section 21A analysis has been invoked as central to the arguments ventilated in this appeal. In all these circumstances, had it mattered, I would have been persuaded by Ms Burton that it would have been right and appropriate that this Court should scrutinise the soundness of the premise that the Appellant would stand to have been discharged pursuant to the proportionality bar had this been an accusation warrant case where he was facing trial for the alleged index

offences of 28 May 2017 and 5 June 2017 rather than a conviction warrant case in which he faces serving sentence having been convicted of that offending.

iii) Turning to what I made of the application of the guidance in the Criminal Practice Direction, and recognising that it is a floor and not a ceiling (Miraszewski §28; Saptelei §37), the issue would need to be determined on the facts of the case (CrimPD §50A.2) and the guidance that for offences listed in the Table the judge should "generally" determine that extradition "would be disproportionate" is subject to the caveat "unless there are exceptional circumstances". It is right to identify the index offending within the description in the Table of the category "minor road traffic", "driving-related offences" where "no injury loss or damage" was incurred. The two instances listed within the Table are examples. Driving without a licence is a further example. But the "exceptional circumstances" guidance expressly includes (CrimPD §50A.4) "multiple counts" and "previous offending history". Either one of those would constitute exceptional circumstances. In the present case they are both present. The "multiple counts" arise – treating this as if it were an accusation warrant – because of the index offence of 28 May 2017 together with the later offence of 5 June 2017. Those would constitute multiple counts even had they been the subject of a single accusation AW. The "previous offending history" involves four convictions of aggravated theft in September 2003, September 2004, May 2013 and July 2014, each of which attracted a substantial custodial sentence. But more significantly in evaluating the seriousness of the index offending of driving without a licence are these circumstances. In June 2011 the Appellant was convicted of driving without a licence or while disqualified. On the same occasion he refused or objected or evaded the giving of a sample or breath test. The ultimate sentence for that offending was a custodial sentence of two years. Subsequently, the driving licence which he held was cancelled on 7 June 2013. That was the context the Appellant, on returning to Romania, committing the (multiple) offences of driving without a licence. In my judgment, these features would take the case above the triviality "floor", and would also lead to an outcome of declining to characterise the circumstances as attracting the section 21A "proportionality bar". I repeat: the Judge is not to be criticised because (a) this point was not a live point and (b) he did not have the details relating to the previous offending history.

iv) It follows that I would not have accepted the premise that there is an "injustice" in this case, when a comparison is made between accusation warrant scenario and a conviction warrant scenario. Moreover, in my judgment, the strong public interest considerations in favour of extradition would have outweighed the features capable of weighing against extradition, in the Article 8 balance, even were this an accusation warrant case.

Conclusion

44. In all the circumstances and for all these reasons the Article 8 ECHR appeal in this case is dismissed. The Judge's order for the Appellant's extradition to Romania to serve his 15 month sentence of imprisonment is upheld.