Neutral Citation Number: [2022] EWHC 1929 (Admin)

Case No: CO/3447/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

22nd July 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

NICOLETTA PRUSIANU	**Appellant**
- and -	
BRAILA COURT OF LAW	**Respondent**

- -
- -

Mary Westcott (instructed by Lawrence & Co Solicitors) for the **Appellant**
David Ball (instructed by CPS) for the **Respondent**

- -
Hearing dates: 5.7.22 & 6.7.22
- -

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

MR JUSTICE FORDHAM :

Introduction

1. This is an appeal in an extradition case. Permission to appeal was granted on three grounds. The Appellant is aged 23 and is wanted for extradition to Romania. That is in conjunction with a conviction Extradition Arrest Warrant ("ExAW") issued on 16 November 2020 and certified on 19 April 2021. She was arrested on that ExAW on 18 April 2021 and was granted conditional bail the following day. This is a case to which the Trade and Cooperation Agreement ("TCA") applies. Extradition was ordered by District Judge Griffiths ("the Judge") for the reasons given in a detailed and impressive judgment dated 5 October 2021, after an oral hearing on 6 September 2021. The Judge had three formal documents filed by the Respondent, in addition to the ExAW. First, there was a "Further Information" document dated 6 May 2021, dealing with the Romanian criminal proceedings and the sequence of events. Secondly, there was a formal document which has been described as a "prison assurance", dated 18 May 2021. Thirdly, there was a further formal document, also described as a "prison assurance" dated 15 June 2021. The index offending to which the conviction ExAW relates was described by the Judge as "one offence" with "five instances of conduct" of shoplifting committed on five separate occasions in Romania, when the Appellant was aged 19 and 20: 21 August 2018; 3 September 2018; 27 September 2018; 17 October 2018 and 15 May 2019. The Appellant had been arrested and interviewed as a "suspect" on 15 May 2019 and appeared again as a "defendant" on 20 July 2019. By October 2019 she had travelled to Denmark and had soon (18 October 2019) been fined for a further shoplifting offence there. In relation to the index offending in Romania, the Appellant was convicted in her absence on 5 October 2020. A 12 month custodial sentence was imposed. The Romanian authorities have confirmed that the Appellant has a right to a retrial, at which guilt or innocence would be considered, as would the appropriateness of any sentence if convicted.

2. The Judge made adverse credibility findings against the Appellant in relation to certain aspects of her description of events. The Judge accepted other aspects. It will be necessary to keep clearly in mind those parts of the Appellant's description of events which were and were not accepted as reliable and truthful by the Judge who, although she appeared "remotely", nevertheless had the advantage of oral evidence with cross-examination. Ms Westcott for the Appellant – although recording the Appellant's disagreement with the Judge's adverse findings on certain aspects of the case – has sensibly recognised that, for the purposes of the appeal to this Court, she is not able to impugn the Judge's findings rejecting aspects of the Appellant's evidence. The Judge found that the Appellant had left Romania after the appearance on 20 July 2019; that she had been informed that she was being prosecuted for the shoplifting offences; she had been informed of an obligation to notify any change of address, but did not comply with that obligation; she was warned that failure to comply would mean that summonses to her previous address would be valid; and she had signed the documents which recorded all of this. In consequence, the Judge made what is accepted to be an unassailable finding that the Appellant left Romania as a "fugitive". As the Judge also explained, the Appellant had – through a Romanian lawyer – filed an appeal with the Romanian courts in Romania, seeking to overturn the conviction and sentence. By then, the ExAW had been issued, on which she was arrested five months later. The Judge found that the Appellant had come to the UK at some time after October 2019 and probably after April

2020. That meant she had only been in the UK for a period between 12 and 18 months at the time of her arrest, and only between 18 and 24 months at the time of the oral hearing before the Judge in September 2021.

3. The three grounds of appeal are advanced by Ms Westcott, both on the basis that the Judge was wrong on the evidence as it stood before her (ie. s.27(3) of the Extradition Act 2003 ("the 2003 Act")), and alternatively on the basis that the outcomes were demonstrably wrong in light of "fresh evidence" together with the evidence as a whole (ie. s.27(4) of the 2003 Act). On all three appeal grounds, Ms Westcott says the Judge made errors of approach, and that this "appellate court" should "stand back and say that [the] question ought to have been decided differently because the overall evaluation was wrong: crucial factors should have been weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed": Love v USA [2018] EWHC 172 (Admin) [2018] 1 WLR 2889 at §26. It was common ground that I should consider all of the evidence, including the putative "fresh evidence", and evaluate its capability of being dispositive.

4. A fourth ground of appeal has been stayed. It is whether extradition would be incompatible with Article 3 ECHR. The stay is pending the test case of Marinescu v Romania which deals with prison conditions and assurances. It was common ground that deciding the Article 3 compatibility of extradition in this case would need evaluation in light of the Divisional Court's awaited judgment in Marinescu CO/4264/2020 (argued on 29 March 2022). These things were also common ground: that the Article 3 arguments in the present case overlap with the three grounds which have not been stayed; but that I ought to proceed to deal with those three grounds (including points regarding assurances) and not to adjourn this case part-heard.

The Equal Treatment Benchbook

5. Before proceeding further with a legal analysis of this case, I want to recognise some insights from the Equal Treatment Benchbook (February 2021). The Benchbook is a public domain resource. It stands as an essential reference-point for judges and lawyers. Both Ms Westcott and Mr Ball were familiar with it. Chapter 12 (pp.324-343) is entitled "Trans People". On the topic of the "treatment of trans people in court" (p.326) the Benchbook explains:

> ***[I]t should be possible to recognise a person's gender identity and their present name for nearly all court and tribunal purposes regardless of whether they have obtained legal recognition of their gender … [But] in … rare circumstances … it [may be] necessary in the proceedings to disclose a person's previous name and transgender history.***

As the Benchbook also explains (p.325):

> ***Trans, transgender or transgendered are umbrella terms often used to describe many different people who cross the conventional boundaries of gender. Not all people who have adopted a social or legal gender different from their birth gender will be happy to be referred to as 'trans' … It is important to respect a person's gender identity by using appropriate terms of address, names and pronouns. Everyone is entitled to respect for their gender identity, private life and personal dignity.***

Speaking of the UK, the Benchbook records (p.325-326):

> ***Awareness, knowledge and acceptance of trans people has greatly increased over the last decade. Unfortunately, however, there remains a certain mistrust of non-conventional gender appearance and behaviour, and many transgender people experience social isolation and/or face prejudice, discrimination, harassment and violence in their daily lives. Many trans people avoid being open about their gender identity for fear of a negative reaction from others. This applies in all contexts, but particularly when out in public because of safety issues. Social isolation, social stigma and transphobia can have serious effects on trans people's mental and physical health…***

Again speaking of the UK, the Benchbook says this about "trans offenders" (pp.326):

> ***Trans people are likely to be highly apprehensive about being sentenced to a term of imprisonment because of concerns about safety and also about access to any medically necessary hormonal support. A Ministry of Justice/NOMS policy on 'The Care and Management of Individuals who are Transgender' (reissued 27 January 2020) applies to prisons and providers of probation services. The policy is concerned to protect the rights and welfare of trans prisoners as well as those of others around them.***

I add two footnotes to this. (1) The MoJ/NOMS policy was considered in R (FDJ) v Secretary of State for Justice [2021] EWHC 1746 (Admin), where the terms "transgender" (§7), "transgender women" and "transgender women with a [Gender Recognition Certificate]" (§10) are explained. (2) When the European Commission against Racism and Intolerance (ECRI) released its 2019 Country Report on Romania, in discussing the need in Romania for "further training for police, prosecutors and judges on how to deal with racist and homo-/transphobic acts of violence" the ECRI identified two "vulnerable groups" which it emphasised "in particular" (at §63), namely "the Roma and LGBT communities": see the judgment of the European Court of Human Rights ("ECtHR") in Association ACCEPT (§11 below) at §43.

The Appellant

6. The Appellant is a transgender woman of Roma ethnicity. It is necessary, in these proceedings, to disclose her transgender history. What follows in this paragraph are features of the evidence which the Judge accepted and which the Respondent accepts. This is my encapsulation, expressed in the first person, to try and see her perspective:

> ***My name is Nicoletta Prusianu. I am 23. I am a transgender woman, of Roma ethnicity. My pronouns are she/her. My gender identity is female. I was born in Romania in May 1999. My parents gave me a male name: Taison. I have lived as a woman since being a young teenager. I received abuse and discrimination from members of the public in Romania and when I was at school. I was distressed by this abuse and discrimination and suffered depression as a result. I knew as a child and young person that I was female. My family initially refused to accept this. I was bullied and abused physically and verbally at school and by members of the public as a result of my gender identity. My teachers did not help me because I am of Roma ethnicity. I saw a psychologist when I was 14 years of age in about 2013. I went with my mother and the psychologist explained things to me. I started hormone treatment at the age of 14 and it lasted 2 ½ or three years. I was advised that I could have breast implants and other procedures to transform my body into a woman's body. It was at this point that my mother began to accept me as a woman. Abuse from members of the public continued in Romania and I found it frightening and unbearable. I found solace in the support I received from my family. I had nightmares and depression but never tried to self-harm or take my own life. I went to Denmark and then came to the UK, and I have found people in both those countries respectful. In Denmark I underwent medical procedures. I had facial and body hair removal treatment. I had breast, cheek and bottom implants. I had no surgery, lip surgery and eyebrow tattoos. I have not had any other procedures. I have a settled life in the UK where I can be myself. I have a partner who lives and works in Denmark. He visits me occasionally and financially supports me that we live apart. I have not been able to visit him in Denmark since April 2021 because of my bail conditions.***

Strasbourg

7. I was assisted by Counsel citing a number of cases in the ECtHR relating to human rights issues in Romania. They help to set the scene for the issues in this case. I will identify and describe the key cases here.

MC

8. In June 2006 the non-governmental organisation ACCEPT, whose goal is to provide information and assist the LGBTQI+ community in Romania, organised the annual march in Bucharest. The march was given police protection. Six participants in the march left the area, using routes and means of transport recommended by the Romanian authorities and the march organisers, and wearing no distinctive clothing or badges that would identify them as participants. On an underground train they were attacked by a group of seven assailants, who punched and kicked their heads and faces. Six years later, in February 2012, two of the victims filed a human rights claim in the ECtHR in Strasbourg. There were various interveners including the European arm of the International Lesbian Gay Bisexual Trans and Intersex Association (ILGA). By a judgment dated 1 March 2016 the ECtHR ruled as follows. The physical and verbal abuse had been directed at their identity and was incompatible with respect for human dignity so as to reach the requisite threshold of severity to fall within the ambit of ECHR Article 3 read with Article 14 (§119). The shortcomings in the Romanian authorities' investigation of the victims' criminal complaints constituted a failure to take reasonable steps to conduct a meaningful enquiry into the discriminatory motives of the attack (§124) constituting a violation of Article 14 (§125). The ECtHR recorded the "precarious situation" in which "the LGBTI community" found itself in Romania (§118) having regard to a study (§46) conducted by the Commissioner for Human Rights of the Council of Europe examining "discrimination on grounds of sexual orientation and gender identity in Europe" (September 2011) and the "several reports" submitted by ILGA (§101) "revealing a general climate of hostility towards LGBTI individuals in Europe" and placing Romania as the fifth highest in the level of "discrimination on grounds of sexual orientation" (§101). This was the case of MC v Romania (Application No. 12060/12 12 April 2016 ECtHR). What followed was supervision by the ECtHR's Department for the Execution of Judgements. One recent communication in the context of supervision of the MC judgment is a "rule 9.2 communication" dated 17 November 2021 to the Council of Europe's Directorate General of Human Rights and Rule of Law (Department for the Execution of Judgments of the ECtHR) from the Anti-Discrimination Coalition of Romania ("ADC Communication 2021"). According to the ADC Communication 2021, a revised action plan was filed by the Romanian state authorities on 24 August 2018, but "no hate crime against an LGBTI person has been prosecuted and the perpetrator punished in Romania", in the five years since the judgment in MC. The ADC Communication 2021 also refers to the absence of any systematic training programme in the field of hate crime and law enforcement and give a "list of recent cases showing how these systematic failures perpetuate discrimination".

Rezmives

9. In December 2009 Mr Moşmonea was imprisoned in Romania's Rahova prison "for a few months" before being transferred to other prisons. In July 2013 he filed an application with the ECtHR. The case was joined with a number of others and concerned detention conditions in a number of Romanian prisons. On 21 March 2017 the Strasbourg

court gave a "pilot judgment" recognising general overcrowding and poor conditions in Romanian prisons. This was Rezmires v Romania (Application No. 61467/12 21 March 2017 ECtHR). Subsequent cases have found similar violations. A recent example is Duţă v Romania (Application No. 5836/16 25 February 2021 ECtHR) where the Strasbourg court found Article 3 ECHR breaches including in respect of the detention between December 2019 and continuing at February 2021 of Sorin Tronaru, who for part of that time was at Brăila Prison. The Rezmires pilot judgment and subsequent cases is the context for the need for Article 3 prison assurances in UK extradition proceedings involving Romania, which has led most recently to the Marinescu test cases.

Coman

10. In January 2013, Relu-Adrian Coman (a Romanian citizen) and Robert Hamilton (a US citizen), who had married in Belgium in November 2010, were told by the Romanian General Inspectorate for Immigration that Mr Hamilton would be entitled only to a right of residence in Romania for three months. That was because the Romanian civil code did not recognise marriage between people of the same sex. On a reference, the Court of Justice of the EU in Luxembourg ruled (5 June 2018) that Mr Hamilton had an EU-based derived right of residence: see Coman v Inspectoratul General Case C-673/16 [2019] 1 WLR 425. The domestic Romanian courts then rejected the residence claim on delay grounds. By an application lodged with the ECtHR on 23 December 2020 Mr Coman and Mr Hamilton, supported by ACCEPT, alleged breaches of ECHR Articles 6, 8, 12 and 14: Coman v Romania (Application No. 2663/21). The case is pending.

Association ACCEPT

11. In February 2013, ACCEPT organised a series of cultural events to celebrate "LGBT History Month" in Romania. The programme included the free public screening of a film portraying a same-sex family. The screening was in a cinema situated at a national museum in Bucharest. 20 people attended. During the film, 50 people entered the cinema room and shouted homophobic verbal abuse. The police attended. Three years later, on 2 April 2016, ACCEPT lodged an application with the Strasbourg Court. The case is Association ACCEPT v Romania (Application No. 19327/16 1 June 2021). The ECtHR ruled that the violent verbal attacks on the cinema audience, viewed in the context of evidence of patterns of violence and intolerance against a sexual minority, attained a level of seriousness falling within the scope of Article 8 given the appropriate breadth of private life as covering physical and psychological integrity (§§63 and 68); that the Romanian authorities had failed adequately to respond to protect individual dignity against homophobic attacks (§113); that the authorities had failed effectively to investigate whether the verbal abuse had been motivated by homophobia, a failure which showed bias against members of the LGBT community (§126). These failures constituted a violation of Article 14 taken in conjunction with Article 8 (§128).

X & Y

12. In July 2013 a transgender man ("X") brought proceedings in a Bucharest court seeking a court order for legal gender recognition, authorising the change in his gender from female to male so that his identity documents and other official documents would correspond to his gender identity. On 12 June 2014 the Bucharest court refused to issue the order because X had not undergone gender reassignment surgery, an order which was upheld in March 2015 on appeal. In August 2014 because of the impossibility faced by

having identity papers rectified and living according to his gender identity, X moved to the UK where he changed his name by deed poll, obtained a UK driving licence in his male name and subsequently obtained a UK gender recognition certificate. In a parallel case, in December 2011 a transgender man ("Y") had brought proceedings in another Bucharest court for an equivalent order, which failed for the same reason. In December 2015 and April 2016 X & Y filed applications with the ECtHR. The cases were linked. X subsequently obtained a legal gender recognition court order in Bulgaria (December 2019), without having undergone gender reassignment surgery. Y also obtained a court order, having undergone gender reassignment surgery. By judgment dated 19 January 2021 the ECtHR found that X & Y's Article 8 ECHR rights to respect for private life had been violated, in two respects. First, because the Romanian legal framework with regard to legal gender recognition was not clear and not foreseeable (§§157, 168). Secondly, because the Bucharest courts had refused the orders on the grounds that X & Y had not had gender reassignment surgery, which refusals constituted an unjustifiable interference with the right to respect for private life breaching the Article 8 fair balance (§§167-168). The case is X & Y v Romania (Application No.2145/16 19 April 2021 ECtHR). This judgment was recently cited to the UK Supreme Court in the case of R (Elan-Cane) v Secretary of State for the Home Department [2021] UKSC 56 [2022] 2 WLR 133 (see 136D). What follows is taken from the best translation that was available for the hearing before me – a machine translation – except where I have been able to substitute the text of primary sources which the ECtHR quoted.

13. The materials before the ECtHR in X & Y included an intervention by the Office of the United Nations High Commissioner for Human Rights (§§132-134), a combined intervention by the NGOs Transgender Europe and ILGA Europe (§§135-139) and an intervention by ACCEPT (§§140-144). In its intervention (§134), OHCHR highlighted "the steps taken by the World Health Organization to remove 'gender identity disorder' from its official diagnostic manual, namely the International Classification of Diseases (ICD-11), and thus to requalify the identification as transgender in terms of sexuality and not of "mental disorder". In its intervention, ACCEPT (§§140-144) criticised the judicial nature of the Romanian legal recognition procedure, as an obstacle to the effective protection of the right to self-determination, which undermined the dignity of transgender people. The written intervention by Transgender Europe/ILGA Europe (§§135-139) emphasised the internationally recognised need for rapid transparent and accessible procedures and criticised the requirement of a medical diagnosis or medical treatment. That joint written submission (26 June 2018) was placed before this Court. It summarises the international legal standards on gender recognition (Submission §§2-15) and references previous ECtHR cases (§16) and the position in the EU (§17). It records the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as having stated (A/HRC/31/57) that the refusal to change one's gender marker may lead to "grave consequences for the enjoyment of their human rights, including obstacles to accessing education, employment, health care and other essential services."

14. Regarding gender identity, the Transgender Europe/ILGA Europe intervention summarised the position from previous ECtHR cases (§16, citing Van Kück v. Germany Application No. 35968/97, §§56, 75; YY v. Turkey Application No. 14793/08, §§102, 78; and AP, Garçon and Nicot v. France, Application No. 79885/12 §§94-95) as follows:

> ***The [ECtHR] has described gender identity as "one of the most intimate areas of a person's private life", a free-standing "right", "a fundamental aspect of the right to respect for private***

> ***life" and as "one of the most basic essentials of self-determination," linked to the "right to sexual self-determination," itself an aspect of the right to respect for private life. These pronouncements benefit all individuals, regardless of whether they had undergone gender reassignment treatment or not.***

The ECtHR judgment said this (§106, citing AP, Garçon and Nicot §§92-94 and X v Former Yugoslav Republic of Macedonia Application No. 29683/16 §38):

> ***The Court observes that the right to respect for private life encompasses sexual identification as an aspect of personal identity. This concerns all individuals, including transgender persons, such as the applicants, whether or not they wish to begin gender reassignment treatment approved by the authorities.***

The ECtHR (§147, citing Hämäläinen v Finland Application No. 37359/09 §§62-64, AP, Garçon and Nicot §99, SV v. Italy Application No. 55216/08 §§60-75 and X v Macedonia §§63-65) spoke of Article 8 ECHR as giving rise to:

> ***… positive obligations to guarantee respect for the sexual identity of individuals.***

The ECtHR also (§148, citing AP, Garçon and Nicot §123 and SV §62) emphasised the "restricted margin of appreciation" applicable given

> ***… the particular importance of questions relating to one of the most important aspects of private life, namely the right to [sexual] identity.***

In context, these references to "sexual identification" and "identity" are plainly references to gender identity.

15. Regarding Europe, the ECtHR's judgment in X & Y recorded (at §82) that:

> ***In its resolution, adopted on 16 January 2019 in Strasbourg, on the situation of fundamental rights in the European Union in 2017 [2018/2103(INI)], the European Parliament expressed itself in these terms [from the resolution itself]: [The European Parliament …] 36. Deplores the fact that in 2017 LGBTI people were still victims of bullying, harassment and violence and were facing multiple discrimination and hatred in areas including education, health, housing and employment; is concerned at the continuous experiences of gender-based stigma, violence and discrimination by LGBTI people and the lack of knowledge and lack of intervention on the part of law enforcement authorities, particularly towards trans people and marginalised LGBTI people, and encourages the Member States to adopt laws and policies to combat homophobia and transphobia; strongly condemns the promotion and practice of LGBTI conversion therapies, and encourages Member States to criminalise such practices; also strongly condemns the pathologisation of trans and intersex identities.***

Regarding Romania, the ECtHR's judgment recorded (at §89) that (in a source which OHCHR had also referenced: at §134):

> ***The United Nations Human Rights Committee, the body responsible for monitoring the implementation of the International Covenant on Civil and Political Rights, examined Romania's fifth periodic report and, at its 3444th meeting on 6 November 2017, adopted its concluding observations (CCPR/C/ROU/CO/5), the relevant extracts of which read as follows: "Discrimination based on sexual orientation and gender identity. 15. The Committee is concerned at reports that of discrimination against ... transgender … persons, particularly in employment and education, incidents of verbal and physical attacks against such persons and stereotypical attitudes and prejudice against them. representations and prejudices to which they are subjected. The Committee is also concerned about reports of attempts to revise domestic law that would limit rights guaranteed under the Covenant. It is further concerned about the lack of clarity in legislation and procedures concerning the change of civil status with respect to gender***

> ***identity (arts. 2 and 26). 16. The State party should take measures to eliminate discrimination and combat stereotypical attitudes and prejudices against … transgender … persons; ensure that acts of discrimination and violence against such persons are investigated, that perpetrators are held accountable and that victims have access to reparation. It should ensure that legislation concerning the change of civil status with respect to gender identity is clear and applied in accordance with the rights guaranteed under the Covenant.***

16. Following the ECtHR judgment in X & Y an "enhanced supervision" mechanism has been adopted by the Council of Europe Committee of Ministers' Deputies. I was referred to another pending case: Csata v Romania Application No. 65128/19 lodged on 3 December 2019 and communicated on 16 September 2021. Under the "enhanced supervision" mechanism submissions are made to and considered by the Ministers' Deputies. The submissions made by ACCEPT on 27 May 2021 to the Ministers' Deputies include the following:

> ***Transgender people are subject to structural discrimination in Romania. Transgender people are a vulnerable social category, due to repeated exposure to abuse, intersectional discrimination and marginalization, which reduce their prospects of a decent life in Romania. The lack of a clear and accessible procedure for legal gender recognition is considered the most important obstacle that transgender persons deal with in Romania and the current judicial procedure cannot effectively address their situation. a. Transgender people's perceptions and experiences of discrimination. Discrimination against transgender people in Romania is profound, and is reflected at many levels of society (from doctors, to civil servants, police and even in the family, at school, at work, etc). The risk of facing discrimination, transphobic reactions, harassment or physical or verbal violence is widespread. The discrimination in the workplace or even blocking access to the labour market, abusive dismissals and harassment due to transphobia are realities that have affected transgender people in Romania and this has dramatic consequences: vulnerability, financial insecurity, precarious living conditions, etc. Furthermore, the absence of or ignorance of coherent anti-discrimination policies often leads to abuses by the officials and employees of different institutions, in relation to the transgender people. The effects of discrimination are very serious for transgender people, because they face depression, suicidal ideation, even putting into practice such thoughts, social exclusion, dropping out of school and education. In addition, due to discrimination, transgender people do not participate in the labour market, they do not go to specialist doctors, do not access the existing procedures for changing the name and gender in identity documents, etc. This intersectional discrimination can be mitigated only by systematic measures…***

The submissions referenced a study conducted by ACCEPT in November 2020 "Trans in Romania" ("Community, Individual and Legal Experiences of Transgender People in Romania"), a study to whose contents ACCEPT returned in its these submissions to the Ministers' Deputies dated 2 May 2022 ("ACCEPT Communication 2022"):

> ***[A]ccording to the study carried out by ACCEPT, "Trans in Romania", the transgender people are affected by discrimination in a variety of contexts: family, profession, legal reality, bureaucracy, also identifying the following problems: marginalization and social stigma, negative reactions from their family of origin, difficult procedures for amending their civil status documents, other people's expectations regarding gender identity, discrimination from their workplace, difficulties within the transition process, lack of certainty in access to justice, the social and economic status which prevents the access for specific medical services, abuses suffered by the transgender people in the medical system, depression and anxiety. All these issues lead to a raised percentage of suicide risk and of suicidal ideation towards the transgender people.***

17. In the "enhanced supervision" of the ECtHR X & Y judgment, the formal decision of the Committee of Ministers' Deputies CM/Del/Dec(2022)1436/H46-19, 10 June 2022) addresses the steps taken by the Romanian authorities towards general measures to provide an Article 8 compliant legal framework for recognition of gender identity, as follows:

> ***The Deputies: … (3) noted that for the execution of [the X & Y] judgment, the Romanian authorities must ensure that there are clear and foreseeable provisions in place regulating the conditions and the procedure for legal recognition of gender identity in line with the Convention principles as established in the European Court's case law; (4) expressed their strong support to the ongoing process of reflection by the relevant authorities, with significant input from the Ombudsperson's Institution and civil society, to determine the concrete measures by which they will address the legislative gaps, and to the promising synergies established in this context also with the Council of Europe Sexual Orientation and Gender Identity Unit; (5) strongly encouraged the authorities to maintain their momentum, to inform the Committee of Ministers of the progress made in the steps already announced and to provide details on the further stages of this process and the timeframe envisaged for its completion; (6) in the meantime, underlined the importance of ensuring, so far as possible in the present legal circumstances, that the national authorities directly apply the relevant Convention standards, as laid down in this and in other judgments of the European Court, and in particular that they no longer require people seeking legal recognition of their gender identity to first undergo gender reassignment surgery; (7) noted with interest the information provided by the authorities on relevant judicial practice as of 2019 showing that in all but one of 36 cases reported to them, the national courts had authorised requests relating to legal gender reassignment without making them subject to prior gender reassignment surgery; (8) called upon the authorities to pursue and intensify their capacity-building action to secure the systematic incorporation of the relevant Convention standards in the practice of the courts of first instance and of the county courts, which are at present competent to authorise requests related to gender reassignment, and of the other relevant authorities, and to keep the Committee informed of the additional measures taken in this area.***

Other Materials

18. Other sources to which I was referred, but which have not yet been referenced, included the following. There are the materials arising out of visits to Romanian custody facilities conducted by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT"). The sequence of key materials before me was as follows. (1) The CPT Report 2019 (19 March 2019) on visits between 7 and 19 February 2018 to 11 police establishments and 5 prisons (Aiud, Bacău, Galaţi, Gherla and Iaşi Prisons). (2) The Romanian Government's CPT Response 2019 (also 19 March 2019). (3) The CPT Report 2022 (14 April 2022) on visits between 10 and 21 May 2021 to 7 police establishments and 4 prisons (Craiova, Galaţi, Giurgiu and Mărgineni Prisons). (4) The Romanian Government's CPT Response 2022 (also 14 April 2022). In addition to these and the other public domain materials to which I have made reference, other materials were placed before the Court. They included the ILGA "Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Romania" covering the period January to December 2021 ("ILGA 2021") and the equivalent annual review for 2020; the European Union Agency for Fundamental Rights ("FRA") report entitled "A Long Way to Go for LGBTI Equality" (2020) ("FRA 2020"); and the US State Department Human Rights Reports on Romania for 2020 and 2021 ("USSD 2021"). I have considered all contents of all materials to which my attention was invited by Counsel on both sides.

The Assurances

19. This was the Judge's summary of the contents of the Assurance dated 18 May 2021:

> ***a. The document sets out the different prison regimes that are applied to persons serving varying terms of imprisonment. The open regime applies to persons sentenced to up to one years of imprisonment. b. Following a 21 day period of quarantine a detainee is assigned to a prison and enforcement regime considering the length of their sentence, their risk level, criminal history, age and health condition, their conduct, their needs and abilities including educational, psychological and social assistance they may require and their ability to work and participate in***

> ***education, cultural, therapeutic, psychological counselling and other training activities. c. The document records that each detainee is assigned an individual bed and mattress in rooms with sufficient ventilation and lighting. Prisoners have permanent access to water and sanitation items. d. Prison management ensures that each prison unit provides proper and sufficient food and access to outdoor exercise and psychological and social assistance. Prisoners also have the right to medical assistance without discrimination regardless of their legal situation including regular and terminal care. e. If a prisoner's presence could prejudice the safety of the detention place or other persons they may be transferred to another prison unit. If the requested person is transferred to another prison unit then the management of the receiving prison will take steps to comply with the undertakings provided. f. The inclusion of persons in custody in the category of vulnerable prisoners is carried out by prison units. The criteria for vulnerability are provided for by Romanian law on criminal enforcement. The criteria on vulnerability of prisoners include sexual orientation together with any other situations or conditions that may make a prisoner vulnerable. Functional spaces are provided for in prison units to protect vulnerable prisoners. The criteria are considered together with whether the prisoner is a threat to himself or to others or the safety of the place of detention. The initial assessment is carried out when a prisoner is assigned to a sentence execution regime and can be re-assessed at the request of the prisoner to maintain or terminate protection measures. g. Measures to protect vulnerable prisoners include accommodation in a single room, setting up specific places and schedules to carry out activities including movement routes and the persons with whom they come into contact, supervision, creating a system to eliminate threats and carrying out appropriate educational, psychological and social assistance programmes. If needed a transfer to another prison or prison hospital can be ordered. h. So far as the suggestion that the requested person will face discrimination is concerned, prison staff carry out their duties in a professional manner in accordance with Law 254/2013 which prohibits any discrimination on grounds including gender and sexual orientation. Further, the same law prohibits other prisoners from discriminatory expression restrict the exercise of fundamental rights. Prison management works constantly to avoid adverse effects that could prejudice vulnerable people. i. The requested person is guaranteed three square metres of personal space throughout the execution of their sentence, including their bed and excluding the floor space of the sanitary facility.***

20. This was the Judge's summary of the contents of the Assurance dated 15 June 2021 in relation to prison conditions:

> ***a. If surrendered the requested person will be held in Bucharest Rahova prison for 21 days in a room ensuring a minimum personal space of three square metres. During this time, the requested person may exercise all rights provided for by law and will undergo a programme for adjustment into custodial conditions. Sentenced persons are accommodated separately in B1 p66 6 accordance with their age and gender and other legal requirements. At the end of the quarantine period a personalised assessment plan for educational and therapeutic intervention is set for each inmate. In the event of a need to transfer a person due to epidemic or pandemic conditions the undertakings provided by the Romanian state will be complied with. b. At the end of the quarantine period the requested person will be transferred to a unit to execute their sentence. This requested person is most likely to serve their sentence in open conditions at Braila Prison. c. Details of the physical conditions of detention are set out. d. In the open regime, prison rooms are open at all times other than meal times and roll call and prisoners have unlimited access to courtyards for walking. They also have access to phones to make calls as well as opportunities to carry out work and cultural, educational, therapeutic and psychological activities as well as formal and vocational education outside of the prison unsupervised. Prisoners have free access within the prison and can organise themselves in accordance with the schedule set by the prison management including the opportunities to work and to play sports. e. The information regarding access to medical care set out in the earlier document of further information is repeated as are the criteria for designation of prisoners as vulnerable and the steps taken to protect such prisoners, together with the prohibitions on discrimination by staff to prisoners and prisoners to other prisoners. f. The further information concludes by re-iterating the guarantee of three metres of personal space to the requested person, including if held in the category of vulnerable prisoners.***

Section 13

21. The first ground of appeal invokes section 13(b) of the 2003 Act. Section 13 provides:

> ***Extraneous considerations. A person's extradition … is barred by reason of extraneous considerations if (and only if) it appears that— (a) the [ExAW] issued in respect of him (though purporting to be issued on account of the extradition offence) is in fact issued for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or (b) if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions.***

The parties cited the following authorities in which section 13 – or its mirror-image in section 81 – were discussed and applied: Lendvai v Hungary [2009] EWHC 3431 (Admin) (Hickinbottom J 7.12.09); Zadvornovs v Latvia [2011] EWHC 1257 (Admin) (Collins J 19.4.11); Nikolics v Hungary [2013] EWHC 2377 (Admin) (Burnett J 30 1.7.13); Turkey v Ozbek [2014] EWHC 3469 (Admin) (Laws LJ and Cranston J 10.10.14); Antonov v Lithuania 2015 EWHC 1243 (Admin) (Aikens LJ and Simon J 6.3.15) and Adamescu v Romania [2020] EWHC 2709 (Admin) (Holroyde LJ and Garnham J 20.10.20).

22. The essence of the argument advanced by Ms Westcott for the Appellant was as follows. True, there is no evidential basis for concluding under section 13(a) that the ExAW was "issued for the purpose of prosecuting or punishing [the Appellant] on account of [her] race, … gender [or] sexual orientation". True, there is no evidential basis for concluding that the Appellant's October 2020 conviction and sentence – or the rejection of her November 2020 appeal – constituted the Appellant being "prejudiced at [her] trial or punished, detained or restricted in [her] personal liberty by reason of [her] race, … gender [or] sexual orientation". However, looking to the future, there is an evidential basis for concluding under section 13(b) that if extradited the Appellant "might be prejudiced at [her] trial or punished, detained or restricted in [her] personal liberty by reason of [her] race, … gender [or] sexual orientation" (where "sexual orientation" includes "perceived" sexual orientation). The threshold for "might be" requires a "reasonable chance", "substantial grounds for thinking" or "a serious possibility": Ozbek §16; Antonov §27; Adamescu §67. True, there must be "cogent evidence" (Antonov §33). There is cogent evidence of the relevant risk that the Appellant would be prejudiced at her retrial by reason of her gender identity, or perceived sexual orientation, or Roma ethnicity, or a combination of those intersecting characteristics. There is, moreover, cogent evidence of the relevant risk that the Appellant would – within the retrial as the "criminal process" (Zadvornovs §5) – be "punished" or "detained" or "restricted" by reason of one or more of those characteristics. Further, on the correct and broad meaning of section 13(b) ("or punished, detained or restricted in [her] personal liberty") at treatment by state agents (or their delegates) within the custodial setting and not just at the "criminal process" (cf. Zadvornovs §5). Otherwise, section 13(b) would – oddly – be empty of meaning in a straight conviction ExAW case (there being no trial or retrial process). Solitary confinement, imposed for discriminatory reasons, would fall within the ordinary and natural meaning of section 13(b). There is cogent evidence of the relevant risk that the Appellant would – in the custodial arrangements – be "punished" or "detained" or "restricted" by reason of one or more of those characteristics. In all these respects, any discriminatory prejudice at retrial or in being punished, detained or restricted in her personal liberty, by reason of the Appellant's "gender identity" would fall within "gender" given a "broad" interpretation (cf. Antonov §24). In all of this, the word

"gender" would incorporate relevant discriminatory treatment against a transgender person, whose gender identity does not correspond to the gender assigned to them at birth. In all these respects – any one of which is sufficient – the s.13(b) test is met, based on all the evidence and the widespread discrimination and transphobic attitudes pervading Romanian society, including manifested by those in government and other state roles.

23. Ms Westcott advanced these further arguments. (1) TCA Article 601(1)(h) provides that the execution of an ExAW may be refused "if there are reasons to believe on the basis of objective elements that the [ExAW] has been issued for the purpose of prosecuting or punishing a person on the grounds of the person's sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of those reasons". The phrase "position may be prejudiced" supports the broader interpretation to the custodial setting and beyond the trial process. Although the same language was found in recital (12) of the EU Framework Decision 2002/584/JHA with which no decided case adopted a broad "conforming interpretation" (cf. Cretu v Romania [2016] EWHC 353 (Admin) [2016] 1 WLR 3344 at §34), Article 601(1)(h) now supports one (cf. Badea v Romania [2022] EWHC 1025 (Admin) §40), especially in light of section 29 of the European Union (Future Relationship) Act 2020 (Badea §24(vii)) and Lipton v BA City Flyer Ltd [2021] EWCA Civ 454 [2021] 1 WLR 2545 §§78-83. (2) A broad interpretation of "gender" is supported when regard is had to the protected characteristic of "gender reassignment" in section 4 of the Equality Act 2010, itself broadly interpreted to include a person describing themselves as non-binary or gender fluid (Taylor v Jaguar Land Rover Ltd Case No. 1304471/2018 Employment Tribunal, 26 November 2020 at §178: cited at Benchbook p.363 fn.7). (3) A measure which involves any greater restriction in personal liberty, even if "well-intentioned", to protect against ill-treatment from other prisoners by reason of the Appellant's gender identity, would fall foul of section 13(b). Since, as the Assurances and the Judge recognised, there is a very real prospect that the Appellant could need such measures as a vulnerable prisoner, the section 13(b) bar must be met, and she must be discharged.

"Gender"

24. Mr Ball for the Respondent advanced three distinct lines of resistance to Ms Westcott's section 13 arguments. The first was this. Any section 13(b) argument requires that "gender" be interpreted to include "transgender" or "gender status". But that interpretation is incorrect. In domestic UK legislation the word "gender" is used in the "binary" sense, meaning "male" or "female": Elan-Cane at §§52-53. The Appellant would not be being discriminated against by reason of being a "woman", but by reason of being a "transgender woman". Parliament used "gender" and not "gender reassignment", so there is a deliberate contrast with the Equality Act 2010. Parliament did not include a "catchall" category of "other reasons" or "other characteristics". Gender identity is distinctive but familiar, and Parliament did not include it. It is not for the Court to rewrite the statute book. Insofar as protection is needed in an extradition case, it would arise in an appropriate case by the invocation of the real risk on substantial grounds of being subjected to a "flagrant" breach of Article 14 ECHR (freedom from discrimination) or of Article 6 ECHR (fair trial rights).

25. I cannot accept those submissions. In my judgment, the section 13 extradition bar is capable in principle of applying where relevant discriminatory action is or would be

visited on the requested person by reason of being a "transgender" woman or man, as that term is "commonly associated" (Benchbook p.325): a person "whose gender identity does not correspond to the gender assigned to them at birth" but "who identif[ies] with the opposite gender". I put to Mr Ball this example. Suppose an extradition case involving an "accusation" ExAW, where there is cogent evidence that – if convicted at trial in the requesting state – the requested person would be sentenced to custody because they are a convert from one religion to another. Mr Ball accepted, rightly in my judgment, that this would fall within being detained "by reason of" the requested person's "religion". So too, in my judgment, custodial sentences imposed on individuals because they are a "transgender woman", or a "transgender man", would be action "by reason of" their "gender". That is so, even assuming that Lord Reed's observation (Elan-Cane §13) holds for section 13(b). That is not rewriting the statute but giving the words "by reason of … gender" their ordinary and natural meaning and straightforward application. Moreover, the fact that Parliament did not make separate provision for "sex", supports "gender" having a broad and inclusive meaning. It follows that, if the Appellant could identify a proper evidential basis with the appropriate degree of risk, of facing prejudice at trial or punished, detained or restricted in her personal liberty by reason of her female gender identity not corresponding to the gender assigned to her at birth, she is entitled to invoke the statutory extradition bar in section 13(b).

"Criminal process"

26. Mr Ball's second line of resistance was this. The Appellant's section 13(b) argument fails to recognise other key limitations in the design and operation of section 13(b), authoritatively recognised in the case law. The only relevant "prejudice" is "at … trial"; not "prejudice" in punishment, detention or restriction of liberty (Ozbek §15). Moreover, section 13(b) is concerned with "the fact of" punishment, detention or restriction in personal liberty, "not its quality" (Ozbek §15). Importantly, what section 13(b) is describing are those decisions of state authorities – not delegates – within the "criminal process" (Zadvornovs §5) which decide to punish, detain or impose a restriction in personal liberty. That makes sense alongside "trial", and alongside section 13(a). True, an order imposing solitary confinement within prison could be a relevant section 13(b) act subjecting the individual to a restriction in personal liberty, but only if imposed within the "criminal process" (eg. by a sentencing judge). It is possible that section 13(b) could apply to a straight conviction ExAW case, for example if the previous "criminal process" involved a relevant act of discrimination which would be implemented post-extradition, which would sufficiently fall within what is to happen "in the future" (Adamescu §67). The wording of TCA Article 601(1)(h) repeats pre-existing recital (12) of the EU Framework Decision 2002/584/JHA and the relevant species of "may be prejudiced" are those spelled out in section 13(b). Decisions of state authorities about how a custodial sentence is to be served, or about what the arrangements are to be within a custodial setting, fall outside section 13(b) because they are outside the "criminal process". The caselaw is well settled. The Appellant's arguments require an impermissible, expansive interpretation.

27. I do not think section 13(b) is as restricted as Mr Ball contends. However, in light of my conclusions on his third line of resistance, nothing turns on this. I accept that section 13(b) "prejudice" is "at trial". I accept that the focus is on the "fact" and not the "quality" of punishment, detention or restriction of liberty. I accept that the relevant discriminatory act would need to be that of a requesting state authority. And I cannot see in TCA Article

601(1)(h) – or its predecessor recital (12) – such clarity as could drive any expanded 'conforming interpretation'. I agree with Mr Ball that "restriction of liberty" could be solitary confinement in the serving of a custodial setting. But I cannot accept that such solitary confinement would necessarily need to be imposed by a sentencing judge at a trial. The context in which Collins J in Zadvornovs spoke of section 13(b) as focusing on the "criminal process" was in rejecting arguments based on "general" restrictions on the way in which non-citizens "can conduct their lives in Latvia" (§4), which he said applied "quite independently of" and were "unaffected by" the "criminal process" (§5). Suppose there is an instrument or law, policy or practice – which could have come into force before or after the trial process – which means that all sentenced prisoners of a particular "race" will now serve their sentences in solitary confinement. Or suppose there is an instrument which means sentenced prisoners of a particular "political opinion" are excluded from automatic early release. These could be implemented by courts who supervise sentence. These measures are not part of the trial or sentencing. But nor would I regard them as "wholly" independent of, or "unaffected" by, the criminal process. I think they would fit within the ordinary and natural meaning of section 13(b), and I do not think authority would preclude that conclusion. But whether any of this would matter in the present case depends on what I make of the third line of resistance: the evidential basis.

Evidential basis

28. Mr Ball's third line of resistance was this. There is nothing in this case which approaches the standard of being an evidential basis constituting "cogent" evidence (Antonov §33), establishing as a "serious possibility" that the Appellant faces action by a Romanian judge or other state entity which would conduct a trial or retrial with prejudice, impose a punishment (or greater punishment) or impose a detention (or a longer detention) or impose a restriction on personal liberty (or a longer restriction on personal liberty), "by reason of" the Appellant's Roma ethnicity, her gender identity as a transgender woman, or any perceived sexual orientation. The materials make reference to discrimination against Roma in the criminal justice system. An example is the USSD 2021 p.28, but the description is about some lawyers refusing to defend Romani persons and about police, prosecutors and judges holding negative stereotypes. The materials before the Court reference societal discrimination including transphobia, within Romania, and seen in other countries too. Similar observations could be made, on similar evidence, relating to other protected characteristics. It would be a blindspot for anyone to assert that the UK is free of such social discrimination. There is no evidence before the Court of any judicial or executive decision-making which constitutes prejudice in a trial, or which constitutes convicting, punishing, detaining or imposing restrictions on personal liberty on any of these grounds. The only specific reference to judicial decision-making concerns the Romanian courts dealing with the grant or refusal of a court order for legal gender recognition. That is under the processes considered in the X & Y case, where structural Article 8 violations were found by the ECtHR. In that context it has been said that the legal process of seeking the court order can involve transgender people being "humiliated in front of the court" (ACCEPT Communication 2022 §II), though this was not the basis of the ECtHR's ruling of Article 8 breaches in X & Y. No case has been identified where there has been held to be an Article 14 ECHR breach in trial, punishment, detention or restriction on person liberty "by reason of" Roma ethnicity, gender identity as a transgender woman (or man), or perceived sexual orientation. There is one example in the materials of one Romanian tribunal judge expressing transphobic views, extra

judicially, by social media (ADC Communication 2021 §7; ACCEPT Communication 2022 §V). There are materials which discuss the position of persons of Roma ethnicity in Romanian society, including within the Romanian criminal justice system. But there is nothing which can be said properly to support as cogent evidence the suggestion that there is a realistic risk that whether at a retrial or in any other decision-making as to punishment or detention or restraint on personal liberty the Appellant faces a decision being made against her which is based not on the criteria which identify guilt or trigger punishment, detention or restriction on liberty, but rather a decision based on or influenced by the fact that she is a transgender woman and/or the fact that she is of Roma ethnicity. As the Judge rightly recognised, a powerful feature of this case – so far as concerns what may lie in the future – is the fact that the Appellant has been tried and convicted and sentenced by a Romanian criminal court. Her appeal was rejected. It is accepted by the Appellant that there is no evidence which would support any assertion that any of those actions were based or materially influenced by the fact that she is a transgender woman and/or of Roma ethnicity. Just as there is no evidence relating to what has happened in the past, against the backcloth of evidence relating to discrimination in Romania, so there is no evidence which could cogently support an adverse conclusion in relation to the future. That leaves the distinct point made by Ms Westcott (§23(3) above) about genuine and justified action which protects a vulnerable prisoner from harm at the hands of other prisoners, where that risk of that harm arises by reason of their gender identity. Protective action could involve a greater restriction on personal liberty than would apply if such protection were not needed. But that would not be a restriction in personal liberty as a discriminatory act; but rather as a consequence of action protecting against discriminatory acts.

29. I accept those submissions. In my judgment, the Appellant falls very appreciably short of being able to point to "cogent evidence" of a "reasonable chance" of an act of prejudice at a retrial or of an act of punishment, detention or restriction in personal liberty by reason of her gender (as a transgender person whose gender identity does not correspond to the gender assigned to her at birth but who identifies with the opposite gender); nor by reason of her Roma ethnicity; nor by reason of her perceived sexual orientation; nor due to those or any of those as intersecting characteristics. As Ms Westcott accepted – in my judgment, rightly – she cannot point to any cogent evidence that the previous trial or punishment or detention (the custodial sentence including its duration) involved prejudice by reason of any of these characteristics or punishment or detention imposed by reason of any of these characteristics. On the evidence, the Appellant was convicted because the Romanian court was satisfied of her guilt of the index shoplifting offences; she was sentenced by reference to the seriousness of the matters and the appropriateness of a sentencing response, on the objective legal merits, as assessed by the Romanian court under the Romanian criminal process. The Judge rightly emphasised that aspect of the case as assisting her in relation to whether there was "cogent" evidence of a "reasonable chance" of discriminatory action for the purposes of section 13(b) following extradition. Nothing in the Further Information or Assurances stands as cogent evidence of a reasonable chance of discriminatory action within section 13(b). Ms Westcott can point to references relating to discrimination and Romanian criminal process, largely referable to Roma ethnicity, but they come nowhere near constituting cogent evidence capable of satisfying the section 13(b) test. As the Judge convincingly put it, the Appellant has shown no "causal link" between any section 13 action and the Appellant's gender identity, (perceived) sexual orientation and/or ethnicity.

30. As to the distinct part of the Appellant's argument which concerns genuine protective action (§23(3) above), I agree with Mr Ball's response. Protective action in the context of ensuring safety from discriminatory harm at the hands of other prisoners where that is its genuine purpose, could not fall within section 13(b) as a restriction on personal liberty by reason of a protected characteristic. Where the state authorities genuinely take protective measures to secure the welfare of a prisoner and protect them from the risk of harm at the hands of other prisoners, where that harm would be by reason of a protected characteristic, the state authorities are acting because the prisoner is vulnerable to discriminatory harm. Take the case of X v Turkey Application No. 24626/099 October 2012 ECtHR, a case to which I was referred at the hearing. That was a case in which a gay prisoner had asked the Turkish prison authorities for a transfer for safety reasons because he was being intimidated and bullied by fellow inmates because of his sexual orientation. The prison authorities responded by placing him in solitary confinement. The ECtHR held that he had suffered discrimination "on grounds of his sexual orientation" (§57). That was because solitary confinement had not been imposed as a legitimate safety measure to protect him from discriminatory harm at the hands of other prisoners (§30). The ECtHR was "not satisfied that the need to take security measures to protect the applicant from bodily harm was the predominant reason for totally excluding him from prison life" (§57). Rather, the ECtHR found that the "applicant's sexual orientation was the main reason for adopting that measure".

Article 8

31. It is common ground, as the Judge found, that the Appellant's Article 8 ECHR right to respect for private life is engaged and interfered with by the proposed extradition, so that the question is whether extradition is a disproportionate interference with that right. It is also common ground that the Judge conducted the requisite 'balance-sheet' exercise and accurately identified general principles derived from that trilogy of three leading cases: Norris v USA [2010] UKSC 9; HH v Italy [2012] UKSC 25; and Celinski v Slovakia [2015] EWHC 1274 (Admin). I agree with Mr Ball that the real question for me in the present case is the "Love 26" question (§3 above). That is whether I conclude – based on all the material – that the question of Article 8 proportionality ought to have been decided differently or ought now to be decided differently because the overall evaluative outcome was wrong, because crucial factors should have weighed so significantly differently as to make the decision wrong such that the appeal in consequence should be allowed. I will identify what I see as the key themes in the case in Article 8 proportionality terms.

General public interest factors in favour of extradition

32. A first key theme in Article 8 proportionality terms comes to this. There are strong, constant and general public interest considerations in the UK complying with its international extradition treaty obligations, honouring extradition arrangements, and in not being or being regarded as a haven for those fleeing foreign jurisdictions or seeking to avoid criminal proceedings in other countries. There is a very high public interest in ensuring that extradition arrangements are honoured. The decisions of a judicial authority of an EU state, in and in conjunction with the making of a request, should be accorded a proper degree of mutual confidence and respect. The independence of prosecutorial decisions should be borne in mind. Principles of trust and respect apply. All of this remains the case under the TCA. Cooperation is based on longstanding respect for democracy, the rule of law and the protection of fundamental rights – including the

ECHR rights – and on the importance of giving effect to those rights domestically, including in the requesting state. See eg. HH §8(4), Celinski §6, 9-10; TCA Art 524(1).

Fugitivity and safe haven

33. A second key theme in Article 8 proportionality terms is this. The Judge unassailably found the Appellant to be a fugitive (§2 above). The Judge found that she left Romania knowing proceedings were ongoing, having just been interviewed and informed she was being prosecuted, breaching a duty to notify a change of address, and deliberately put herself out of the reach of the Romanian judicial authorities and the court process. This feature of the case engages further strong public interest considerations, about the UK not standing as a safe haven for fugitives from justice and not encouraging people seeing the UK as a state willing to accept fugitives from justice. There are important public interests in preventing the UK being a safe haven for a fugitive as the appellant has been found to be. It is to be expected that very strong counterbalancing factors would be required before extradition could be disproportionate. See eg. HH §167, Celinski §§9, 37, 39.

A 12 month sentence

34. A third key theme in Article 8 proportionality terms is this. This is a conviction and sentence case. That means the Romanian criminal process has reflected the seriousness of the index criminal conduct. It has done so by means of a sentence which is 12 months custody, all of which remains to be served. A sentence of 12 months immediate custody, imposed on a 19/20 year old with no prior convictions, is a sentence which is relatively short but nevertheless substantial. It embodies a characterisation of seriousness of the index criminality which must be accorded a proper degree of confidence and respect. The extradition court in the UK does not have the detailed knowledge of the proceedings of background of the appellant's detailed history which a sentencing judge would have. Ordinarily, factors capable (or incapable) of mitigating gravity or culpability are matters for the criminal court in Romania to address and weigh. That would be so on any retrial, were there any conviction. A requesting state is entitled to set its own sentencing regime and levels of sentence provided that they are ECHR compatible. It is not for the extradition court to "second-guess" Romanian sentencing law or policy. Types of offending may have a prevalence or significance which are matters for Romania and its judiciary to decide. Currency conversions may tell little of the real monetary value in cases of theft or dishonesty. It is rarely appropriate for the extradition court to consider whether the sentence was significantly different from what UK sentencing court would have imposed, let alone substitute its view of what the appropriate sentence should have been, and caution is needed not to impose the extradition court's views about the seriousness of an offence of the level of sentences. See eg. Celinski §13.

Limited time, limited ties

35. A fourth key theme in Article 8 proportionality terms is this. The Appellant has limited Article 8 ties to the UK, which have arisen within a limited timeframe. When she left Romania in 2019, she went to Denmark. That is where her partner is and where she underwent the medical procedures (§6 above). As the Judge found, the Appellant came to the UK after October 2019 and probably after April 2020. By April 2021 she had been arrested in conjunction with these extradition proceedings. She has built a life in the UK. She has no convictions here. She describes being treated with respect here. As the Judge

found, she has a "settled intention to remain" here. But her partner, who supports her financially and whom she sees him occasionally, is in Denmark and theirs is a long-distance relationship. Her family is supportive and in Romania. If – after any retrial and after serving any sentence – the Appellant could not return to the UK or go to Denmark, she could resettle again, as the Judge observed, elsewhere in the EU. She has no dependents. No children, still less young children, are impacted by extradition. The Appellant has been here less than 3 years. The passage of time can be linked (up to her arrest in April 2021) to her fugitivity and (after that arrest) to her extradition proceedings taking their course while she invokes her legal rights. At the time of the hearing before the judge in September 2021, and now, the duration of time in the UK is relatively short. There is in this case no passage of time which, of itself, significantly diminishes the weight attached to the public interest in extradition or significantly increase the impact on private and family life: see HH §8(6).

Risks and Assurances: General

36. A fifth key theme in Article 8 proportionality terms is this. The Appellant is a transgender woman facing extradition for the purpose and with the prospect – subject to the outcome of any retrial – of serving a sentence within the Romanian prison system. As the Judge accepted, based on the evidence from the Respondent she is likely to be held (i) for an initial 21 day quarantine and observation period ("QOP") at Rahova Prison and (ii) for the rest of the sentence in open prison conditions at Braila Prison (in the Open Prison Hostel there). As is common ground, and as the Judge recognised, the issues – objective and subjective – arising out of that prospect are relevant to be factored into the Article 8 proportionality balance. As has been seen, the following points were recognised by the Judge. The Appellant is a transgender woman aged 23 who has lived her life as a woman since she was a young teenager. She suffered discrimination while living in Romania to the age of 20, as a result of her gender identity, as is consistent with the open source material. It is not possible to say whether this included physical abuse (the Judge rejected the Appellant's account of physical abuse at the hands of the police on arrest in 2019). But there was discrimination and verbal abuse. There is no doubt that she was distressed by this abuse and discrimination and that she suffered depression as a result.

37. The Judge did not accept that "the material" relied on by the Appellant supported the conclusion that she has "well-placed fears regarding her treatment and that she would be discriminated against and subjected to ill-treatment should she be extradited and sent to prison". In discussing this aspect of Article 8 proportionality, the Judge adopted her earlier conclusions and reasons from her consideration of Article 3 ECHR. There, the Judge had considered the submissions and evidence about the level of discrimination that the Appellant would suffer should she be extradited, viewed against the backcloth of failures in Romania to protect and recognise the rights of the LGBT community in general and the transgender community in particular. The Judge observed that the material was "of a general nature", which did not address "the specific risk to this [requested person]" of "the situation in the context of extradition proceedings or where the [requested person] has an assurance", which was "important" given the two Assurances in this case. The Judge emphasised the importance, in the context of those facing detention in Romania, that assurances should be specific to the individual and not generalised. She concluded that the Assurances in this case were "thorough, clear, precise and specific", "specific and unequivocal" and a "solemn undertaking"; a "detailed assurance which is specific to this [requested person]". She referred to the absence of any

evidence, including any expert evidence, of the insufficiency of the Assurance. Here there was an Assurance: dealing "specifically with persons who are identified as vulnerable"; through the application of non-"exhaustive" criteria which would "apply to a transgender person" so that gender identity "can quite properly be considered in relation to this assessment"; and explaining "how persons are identified as vulnerable and the measures that would be considered to protect the person and put in place if necessary", including the use of particular "functional units" within Braila Prison to protect threatened vulnerable prisoners. The Judge recorded, based on the Assurances, that "the initial state assessment as to vulnerability is made by the Commission which establishes the execution regime, based on the criteria" and "can be reassessed at the Commission's own motion or at the request of the prisoner, in order to maintain or terminate protection measures". The Judge said she rejected the submissions for the Appellant, "because of the assurance I have in this case", which "eliminates the risks … identified".

38. In my judgment the Judge was right, and certainly entitled: to recognise that relevant risks had been identified, arising from a vulnerability as a transgender woman being detained with male prisoners at Rahova and Braila Prisons; to recognise that the criteria identified in the Assurances, as applied in the Commission's initial assessment, were non-exhaustive and protective of vulnerability from ill-treatment by reason of gender identity; and to ask whether the contents of the Assurances were "thorough, clear, precise and specific", "specific and unequivocal" information which "eliminates the risks". Ms Westcott's submissions have persuaded me that there is a straightforward protection gap in the Assurances.

Risks and Assurances: a Protection Gap

39. The protection gap relates to the 21 day QOP which the Appellant would serve at Rahova Prison. As the Judge said, this period would be served with "convicted persons … accommodated in separate rooms, depending on age and gender". This is derived from the Assurance of 15 June 2021 which deals with separation during the initial QOP. What it says about that is that "set and sentenced persons are accommodated separately, in accordance with their age and gender, as well as in accordance with other legal requirements or requirements related to the interior order or safety". It is clear that here "gender" would mean the Appellant being incarcerated for 21 days with young male prisoners, who have been convicted. The "initial state assessment as to vulnerability is made by the Commission". It can then be "reassessed". Measures are taken in respect of those "identified as vulnerable", "once an assessment of vulnerability has taken place". The problem is that the Commission is the body which "establishes the execution regime". That is the regime which is to be applied after the 21 day QOP. The Assurance dated 12 May 2021 says this (emphasis added):

> ***Depending on the length of the custodial sentence, after the quarantine and observation period (which lasts for approximately 21 days from the inmate's surrender to a prison facility), the inmate will be applied the provisional regime. Later on, the enforcement regime of custodial sentences applied to the sentenced person shall be established by the Commission for the establishment, individualization and change of the enforcement regime of custodial sentences, at its first meeting, taking into account: a) the length of the custodial sentence; b) the risk level of the sentenced person; c) the criminal history; d) the age and health condition of the sentenced person; e) the conduct of the sentenced person, positive or negative, including in the previous detention periods; f) the needs and abilities of the sentenced person, identified thereby and necessary for the inclusion in the educational programs, psychological assistance and social assistance programmes; g) the availability of the sentenced person to perform work and to participate in educational, cultural, therapeutic, psychological counselling and social assistance***

> ***activities, moral-religious, school education and vocational training activities. In this context, the person concerned shall serve his sentence in a prison profiled according to the category of inmates he is part of, being included in one of the four execution regimes: maximum security, closed regime, semi-open and open regime, located close to his residential area…***
>
> ***The inclusion of persons held in custody in the category of vulnerable prisoners is carried out by the prison units. The criteria on vulnerability and the measures for the protection of the vulnerable prisoners are provided for in the Romanian law in force on criminal enforcement. In these prison units, functional spaces may be delimited in order to protect threatened witnesses and vulnerable prisoners. The criteria on the vulnerability of prisoners are: sexual orientation, disabilities; mental disorders, ethnicity, HIV/AIDS infection, crimes committed against juveniles or sexual integrity and freedom, special socio-familial situation, lack of help from the support environment, diminished socioeconomic status or socioeconomic status well above average, profession or position held before arrest, providing information to institutions with public order and national security responsibilities regarding the perpetration of a crime or disciplinary offenses, any other such situations, conditions or circumstances that may make a prisoner vulnerable. The criteria do not in themselves determine the classification of the prisoner as vulnerable, but only if the prisoner is a threat for himself, to others or to the safety of the place of detention. The initial vulnerability assessment is performed by the Commission which establishes, personalises and changes the execution regime of custodial sentences when it personalises and establishes the execution regime, based on the criteria presented above.***

The Assurance dated 15 June 2021 reiterates that the Appellant would:

> ***… be initially taken to … Rahova Prison to be held in quarantine, for a period of 21 days… At the end of the quarantine period, a Personalised Plan for Assessment and Educational and Therapeutic Intervention is set for each inmate … After the end of the quarantine period, the National Prison Administration shall decide in respect of the prison unit in which the person concerned follows … The initial vulnerability assessment is performed by the Commission which establishes, personalises and changes the execution regime of custodial sentences …***

40. In my judgment, there is no lack of clarity in what is being said. It is "later on" that there will be a "first meeting" of the Commission to establish the appropriate enforcement regime – maximum security, closed regime, semi-open and open regimes – for the individual prisoner, to take effect "after" the 21 day QOP. And that is "when" the Commission conducts the "initial" assessment of vulnerability under the criteria. But this means that the Appellant, as a transgender woman, faces incarceration for 21 days "quarantine" with young men – convicted of various crimes, with different lengths of custodial sentence, different risk levels, different criminal histories, and different positive or negative conduct (all matters which will come to be considered by the Commission) – some of whom will be heading to maximum security or closed regimes. The Commission will apply the vulnerability criteria and make an assessment. It is an "initial" assessment. But it is not an assessment in respect of the QOP, and not at the outset of the QOP. Nothing is said about an assessment, on vulnerability criteria, for the QOP itself. There is no body (or commission) identified which would have the function of making that assessment. This is not a subtle point, but a straightforward one. It is not a new point. There has been ample opportunity to address it. A key concern raised on behalf of the Appellant about the Assurances asked: "How does the quarantine period interact with the vulnerability assessment?" That was a point expressed in the Perfected Grounds of Appeal (1 November 2021), repeated in the skeleton argument (30 June 2022). The Assurances, as I have explained, are clear. The Respondent's Notice (15 November 2021) and Respondent's skeleton argument (3 July 2022) themselves describe the Assurances as stating that: "Following a 21 day period of quarantine a detainee is assigned to a prison and enforcement regime"; that the "inclusion of persons in custody in the category of vulnerable prisoners is carried out by prison units" applying "criteria for vulnerability";

and that "the initial assessment is carried out when a prisoner is assigned to a sentence execution regime". That is the protection gap.

41. Both Counsel addressed me on this picture viewed alongside the CPT Reports and Responses. Ms Westcott emphasises the CPT Report 2019 where the topic of inter-prisoner assaults and abuse is discussed (as is referenced in the USSD 2021 at p.6). CPT Report 2019 discusses a CPT intervention where vulnerable prisoners had been severely abused in an "admission cell" (§71), that being a reference to the 21 day QOP, at Bacau Prison. The CPT rejected (fn.51) the Romanian Government's claim to have already identified the vulnerability; and recorded (fn.53) that "one officer was allegedly heard to say to one of the abused prisoners when he left the cell: 'Have you been sexually initiated yet?'". In the context of high levels of inter-prisoner violence including sexual violence beatings and bullying (§72), the CPT stated (§73): "there is a need to put in place a cell-share risk assessment process in every prison for each person entering prison (especially young persons) before they are placed in an admission (quarantine) cell for 21 days". Under a heading "reception and first night procedures and information to prisoners" (§124) the CPT said this: "in the prisons visited there were no rigorous admission procedures whereby all new prisoners would undergo a cell-share risk assessment before being allocated to a cell … The severe consequences of not having a proper cell-share risk assessment before allocating prisoners to a cell meant that the CPT's delegation met several prisoners who had been beaten and sexually abused during the first few days of their stay in prison… notably … at Bacău and Galaţi Prisons concerning young adult prisoners and prisoners who were thought to be sex offenders. In introducing such a first night procedure, prisons should have at least one or two cells available where potentially vulnerable prisoners may be allocated until the risks have been analysed … The CPT recommends that the Romanian authorities introduce proper reception and first night procedures". The same passage (§124) made a distinct point about the QOP and a "proper induction programme to acquaint prisoners with the regime".

42. Mr Ball has two answers. First, he points out that the CPT Response 2019 (in response to CPT Report 2019 §73) says: "The initial allocation of prisoners in detention rooms expressly dedicated to quarantine and observation is conducted taking into consideration the separation criteria provided for by the legislation". But that reflects what is said in the Assurance of 15 June 2021 that: "Sentenced persons are accommodated separately, in accordance with their age and gender, as well as in accordance with the legal requirements or requirements related to the interior order or safety". It is then said that "potential problems in terms of adjustment to prison life, acute depressions, self-harming, suicide attempts, acts of aggression etc. are under strict monitoring", while there is "a semi-structured interview by psychologists with prisoners on the day of their incarceration (to the extent possible during the working hours) or the next morning, at the latest, with the purpose to identify, as soon as possible, the presence/absence of the suicide risk", with a "full psychological assessment … conducted later". But that falls well short of describing the vulnerable prisoner criteria being the subject of an assessment at the start of the QOP, as they are in the "initial assessment" by the end of the QOP. Other passages in the response deal with the distinct question of an induction programme. Secondly, Mr Ball says the CPT Report 2022 does not repeat the concerns that were stated in the CPT Report 2019 §§73, 124. But nor does the 2022 Report record that they have been addressed. Moreover, the CPT Report 2022 records that inter-prisoner violence remains a concern, notably at Giruigiu and Galati Prisons (Bacau was not visited); says (p.5), in the context of bullying, that "a proper cell share risk assessment

must be carried out before placing a person in a particular cell"; and refers (§74) to "issues over the cell share risk assessment that should be carried out before prisoners are allocated to a cell". I cannot read the CPT materials as plugging the protection gap in the Assurances.

43. With the benefit of the materials before this Court, and the submissions made to this Court, I cannot agree that there are clear and specific Assurances which – in this respect – do eliminate the risk. I make clear that I do not accept other suggested protection gaps: for example, Ms Westcott submitted, based on CPT Report 2022 §87, that there is a 'catch-22' where the Appellant would be facing intimidation and violence or a protective regime involving segregation with "severe problems" (cf. Love at §§119-120); she also submitted that there was an evidenced prospect of humiliating strip searches. I do not accept these points. Ms Westcott accepted that, notwithstanding domestic recognition that this can be appropriate (FDJ §83), there is no human rights guarantee that a transgender woman serve her sentence in a women's prison. I do, however, accept that there is this protection gap as to vulnerability-protection mechanism and the QOP. The Assurances describe an important protective mechanism operated against statutory criteria by a specialist body, inapplicable to the 21 day QOP. That is the time when the Appellant, as a transgender woman, faces incarceration for 21 days "quarantine" with young men – convicted of various crimes, with different lengths of custodial sentence, different risk levels, different criminal histories, and different positive or negative conduct (all matters which will come to be considered by the Commission) – some of whom will be heading to maximum security or closed regimes. It is a time when the CPT has expressed serious concerns. As well as the objective risk to which this protection gap gives rise, there is what I accept on the evidence is the Appellant's subjective anxiety. The Judge – having decided that the Assurances eliminated the risks – characterised the distress which the Appellant would "no doubt suffer" a degree of "emotional distress" which was "some emotional distress" and was "not unusual in extradition cases". That characterisation was linked to the finding that risks had been eliminated but, in my judgment, it cannot stand once the protection gap is identified.

Another concern: regarding respect and gender identity

44. The Judge accepted that the Assurances constitute clear and specific assurances referable to the Appellant's individual case and circumstances. They refer to the Appellant's case and date of birth and the Assurance of 15 June 2021 refers to "the issue of a possible discrimination in the case of extradition of the person concerned". The Assurances begin by describing the requested person as "Taison (also known as Nicoletta) Prusianu". To the Appellant, "Taison" would be what the Benchbook (p.341 §71) describes as "dead-naming" which can be "highly disrespectful". The Romanian official identity documents – on which the Appellant has to continue to rely – continue to use "Taison". So did the record of extradition bail here. Having also used "Nicoletta", in this official document recording "the issue of … possible discrimination", the Assurance describes "his surrender" and Rahova Prison where "he shall be initially taken" and Braila Prison where "he will … serve his sentence". It also emphasises "sexual orientation" and "ethnicity" as the relevant grounds for any protective measure. The Judge described the use of the male pronoun throughout the Assurances as "unfortunate". In my judgment, there is more to say than that. This is an Assurance designed to be "thorough, clear, precise and, specific". It contains a statement that "staff within the prison perform duties in a professional manner and without showing different attitudes towards vulnerable persons

and that the law prohibits discrimination on the grounds of ethnicity, sexual orientation or other similar reasons". The male pronoun cannot be an accident. The Assurances profess to understand the issues in this case and "Nicoletta" is used. And, as Ms Westcott pointed out, "she/her" pronouns were used in the CPS questions precipitating the Further Information. The pronouns are deliberate. The emphasis on "sexual orientation" is also deliberate. The message, openly and from the very top, being communicated in these extradition proceedings, is that the authorities will treat the Appellant and address her as a man, who is a gay man, with a man's name, within men's prisons. That is a choice. It is a good – the best – indication of what is in store. This, in a context where the ECtHR (§14 above) has described gender identity as "one of the most intimate areas of a person's private life", a free-standing "right", "a fundamental aspect of the right to respect for private life", "an aspect of personal identity", "respect" for which there are "positive obligations to guarantee".

45. Mr Ball powerfully submitted that it is no part of the function of the extradition court to act as "an international ombudsman" in relation to arrangements within the Romanian justice and prisons. I accept that submission. But my statutory duty is to consider Article 8 proportionality, including the impacts of extradition, specifically in terms of private life and respect for the right to private life, which includes gender identity. Identity and respect for it are things that matter to the Appellant. The study Trans in Romania (at p.68) describes use of the appropriate pronoun as "one of the first signs that the interlocutor respects that person's gender identity" and intentionally insisting on using the inappropriate pronoun as "invalidating the experience of the transgender person". The Respondent has had every opportunity, in three rounds of Further Information and Assurances, to say what it means and mean what it says. What it has said speaks loud and clear. It is a clear signal, from those who are in the highest authority, about what is to be expected. Insofar as legal gender recognition by Romanian court order would achieve respect for her gender identity, in the light of X & Y the Appellant has no realistic prospect of achieving this before any incarceration. These considerations are relevant to the impact of extradition on the appellant, viewed objectively and subjectively, in terms of dignity, respect and freedom from humiliation. They are considerations which do appropriately form part of the Article 8 evaluative exercise.

Seriousness of the offending

46. I will now return to a specific aspect of Article 8 proportionality. It is closely linked to one of the key themes addressed already (§34 above). I have explained the extradition court's principled approach to the Romanian 12 month sentence. I have characterised that sentence as "relatively short but nevertheless substantial". I have recorded that it is rarely appropriate for the extradition court to consider whether the sentence is significantly different from what a UK sentencing court would have imposed, let alone substitute its view of the appropriate sentence (Celinski §13). The weight to be attached to the public interest in favour of extradition will vary according to the nature and seriousness of the crime or crimes involved (HH §8(5)). To take an example, in HH the crimes (§36) were of having "misappropriated clothing entrusted to her for sale to a value equivalent to £4,307, between 19 June and 24 August 2001", of "falsifying customs documents in relation to an imported car between 17 November 1997 and 24 January 1999", of "seven instances of fraud involving a total equivalent to £1,160 between 19 May and 12 June 2000" and of "a further instance of a similar fraud, on 21 June 2000". Lady Hale said these were "by no means trivial" but "of no great gravity" (§45); Lord Hope said they

were "relatively minor" and "certainly not … seriously criminal" (§91). The word "relatively" is important. Lord Judge CJ encapsulated this truth (at §125) when he said: "Self-evidently theft by shoplifting of a few items of goods … raises different questions from those involved in an armed robbery of the same shop or store: possession of a small quantity of Class C drugs for personal use is trivial when set against a major importation of drugs".

47. In my judgment, the index offences in the present case are of "low seriousness", and certainly of "relatively low seriousness". That is not to second-guess the Romanian authorities. This is the description taken by the Judge from the Respondent's documents:

> ***a. On 21 August 2018, in Braila, [the requested person] stole a pair of shoes worth 180 Lei from a store which is named.***
>
> ***b. On 3 September 2018, in Braila, [the requested person] stole cosmetic products worth 128 Lei from a pharmacy which is named.***
>
> ***c. On 27 September 2018, in Braila, [the requested person] attempted to steal a bottle of whisky from a shop which is named.***
>
> ***d. On 17 October 2018, in Braila, [the requested person] stole cosmetics from a pharmacy, which is named.***
>
> ***e. On 15 May 2019, in Braila, [the requested person] stole cosmetic products worth 259.89 Lei from a store, which is named.***

It is impossible to understand this without having some "feel" for what sort of "scale" the given amounts reflect. That is not falling into the 'conversion' trap: Res v Czech Republic [2021] EWHC 2939 (Admin). Indeed, as Nicola Davis J explained in Simulescu v France [2014] EWHC 3285 (Admin) at §16(2), absent a "monetary value" it is difficult to say "where in the spectrum of seriousness or otherwise this offence falls". After all, Lady Hale in HH at §36 took £-equivalent values (see §46 above). In the present case, the aggregate equivalent is – as is not in dispute – less than £100. The Judge described the index offending as not "trivial" but as "not insignificant". She accepted that they are "not the most serious offences". She emphasised that there are five offences and the period of time which they span. The Judge also addressed her mind to the position in the UK. She said: "in this jurisdiction each offence would be characterised as a low-level shop theft or attempted theft". Having said that "as this is a conviction warrant, it is not for me to criticise the Romanian [judicial authority] for the seriousness that they determined the offences to be and/or the sentence that they imposed", the Judge went on to say that "in any event" the Appellant "would likely be at risk of being sentenced to a term of imprisonment, had the 5 offences taken place in the UK over a period of time as these were", as a "repeated course of conduct which clearly aggravates the offences and the seriousness".

48. The Judge was entitled to use the 'cross-check' of considering the position as it would be in this country, as part of considering the question of comparative seriousness. She did that with understandable and appropriate circumspection. She was using the same reference point as was emphasised in Swiercz v Poland [2019] EWHC 1387 (Admin) where Yip J said (at §35) that the district judge "ought to have acknowledged that [the index offence] was not particularly serious and would be unlikely to attract a custodial sentence, having regard to the sentencing guidelines". Yip J was referring to relative seriousness and the cross-check of considering our own "sentencing guidelines". The

Judge disagreed with Ms Westcott's contention that "the offences would be unlikely to attract a custodial sentence in this jurisdiction". I have been assisted by Ms Westcott and Mr Ball in relation to the domestic sentencing guideline. I am unable to agree that that cross-check indicates a likely term of imprisonment in this jurisdiction. The Appellant was aged 19 and 20. She had no previous convictions. She was not in breach of any order or earlier condition. The "harm" is squarely Category 3 (based on value), and the "culpability" is squarely Category C, which means the "range" would be up to the maximum of a "band B fine". There are 5 offences over a period of time. But in aggregate, the "harm" is still Category 3. Even if "culpability" were treated as Category B, the starting point would be a Band C fine, and the top of the "range" would be a low level community order. Even if "culpability" were Category B and "harm" were Category 2, the starting point would be a low level community order and the top of the sentencing range would be a medium level community order. I have been unable to see – and the Judge did not explain – how against that Guideline the range of 5 instances of shoplifting would be "likely" to involve a "custodial sentence".

Other circumstances and nuances of the case

49. Article 8 proportionality cases are intensely fact specific. The Court will take into account specific nuances of the facts and circumstances. (1) In this case, there is an unassailable finding of fugitivity. There is the further nuance of the Judge's unassailable rejection of the Appellant's account of physical ill-treatment on arrest by the Romanian police. But there are the further nuances that the Judge found the Appellant to have suffered discrimination; and that the country to which she went was Denmark where people were more accepting of her. The ILGA "Rainbow Europe Map and Index' of 12 May 2022 records Denmark "taking the lead in filling in anti-discrimination gaps"; the ECtHR had recorded Denmark leading place in rights to self-determination in legal recognition of the gender identity (X & Y §§85-88), the Supreme Court has noted that Denmark was the first Council of Europe country to allow passports to include markers other than male and female (Elan-Cane §16); the FRA has reported Denmark as having the highest share of people who report being "very open" about being LGBTI and the lowest share who feel discriminated against when looking for work (FRA 2020 pp.24-25, 32). (2) In this case, there is the index criminal conduct of the 5 offences of shoplifting with the 12 month Romanian sentence, but there is the nuance that the Respondent's own Further Information (6 May 2020) records the Appellant admitting the offence of theft on 15 May 2019, explaining that she "stole those goods because [she] has no income and has no job". That nuance can be put alongside ILGA 2021, recording "the first study on trans, non-binary, and intersex people's experiences in employment" in Romania "finding that over 50% of respondents had to take out loans to cover food and basic necessities in the past year". There is the nuance, which counts against the Appellant, that she has a single further conviction in Denmark, for shoplifting, for which she received a fine, and the nuance that she has no other criminal convictions including in the UK. (3) There are the unmistakeable facts and circumstances about the short period of time in the UK; the absence of impacts on a partner, dependents or children; but the "settled intention" to stay here. There are the nuances that 2½ years is a significant period for a 23 year old who has lived her life as a transgender woman for less than a decade; a significant period in living openly with dignity and identity; finding in the UK what the ECtHR described for applicant X (X & Y §§27-33). The Judge accepted, as does Mr Ball, that extradition will involve an interference in established private life, and this is a 'rupture' case (not a 'flagrant denial' abroad case). (4) Finally, there is the nuance of the curfew. The Judge

was right to say that the curfew could not "render extradition disproportionate" by reason of "reducing the sentence". But the nuance of an electronically-monitored curfew (12 midnight to 4am each night), and reporting to a police station three times a week, is that the Appellant has been subjected to a real restriction on freedom of movement and autonomy since 18 April 2021 (now 15 months) in conjunction with these extradition proceedings. As Ouseley J did in Einikis v Lithuania [2014] EWHC 2325 (Admin) of the non-qualifying nightly curfew for 19 months together with reporting to a police station 3 times a week (§§10, 14-15), so do I consider it appropriate to "bear in mind" that the Appellant has "undergone a degree of deprivation of liberty" albeit "not itself qualifying as a period to be deducted from sentence" (Einikis §14). Ouseley J would not have accepted the rigidity of Mr Ball's submission that, because sentence-reduction is for the Romanian courts, "spent on tagged curfew" is "not a matter … to weigh in the balance against extradition". Nor do I.

Article 8: Conclusion

50. I have arrived at the conclusion, on the special combination of facts and circumstances in the present case, and with the benefit of the submissions made to this Court and the fresh material relied on in this Court, that the extradition of the Appellant would be a disproportionate interference with her private life (and her right to respect for her private life). I have concluded – based on all the material – that the question of Article 8 proportionality ought to have been decided differently and ought now to be decided differently because the overall evaluative outcome was wrong, because crucial factors should have weighed so significantly differently as to make the decision wrong such that the appeal in consequence should be allowed. I have concluded that – together with the material which was before the Judge – the fresh evidence is capable of being decisive and I formally admit it as evidence. The crucial factors which I am satisfied must weigh significantly differently are the protection gap and unrecognised gender identity in the Assurances, the impact on the Appellant; and the low (and relatively low) seriousness of the 5 shoplifting offences. In revisiting the Article 8 balance, I have considered all the material including the material which was not before the Judge. I have taken into account the concern relating to the Appellant's unrecognised gender identity, and all the circumstances and nuances of the case. The outcome is that the cumulative effect of those features of the case which weigh in favour of extradition are, in my judgment, outweighed by the cumulative effect of those features which weigh against it.

Section 25

51. This is the third ground of appeal. Section 25 of the 2003 Act is headed "physical or mental condition". It requires the extradition judge, if the requested person's "physical or mental condition… is such that it would be unjust or oppressive to extradite [them]", to discharge the requested person or adjourn the extradition hearing until that condition is no longer satisfied. A parallel provision is found in section 91. In considering section 25 the Judge squarely focused on "health". She described section 25 as being a provision concerning "physical or mental health". She described the agreed issue as "whether the physical and/or mental health of the [requested person] is such that it would be unjust and/or oppressive to extradite her", that being an "issue specifically raised in relation to the [Appellant's] gender identity". She described Ms Westcott as having "relied upon both the physical and mental health of the [Appellant] if she were to be extradited". Adopting that focus, the Judge rejected the section 25 arguments. She did so on the basis that the Appellant "does not have any physical or mental health condition"; that there

was no 'medical evidence' of the Appellant suffering from any "physical or mental health condition'; that the Appellant could not identify any health risk other than the possibility of "a deterioration in her mental health as she has suffered with this in the past as a result of discrimination when she lived in Romania"; and that in the absence of evidence of a "physical or mental health condition" there was no question of finding extradition to be unjust or oppressive in section 25 terms.

52. Relying squarely on "oppression", Ms Westcott's key submission is that "condition" is wider than "health". Parliament did not say "physical or mental health" but "physical or mental condition". From that premise she argues that the same considerations as arise in the context of an Article 8 disproportionate interference with private life also support a conclusion of oppression by reason of physical condition. The "physical condition" relied on is identified as those physical changes to the Appellant's body and appearance, from hormone treatment in Romania and medical procedures in Denmark, and the absence of full gender reassignment surgery. Ms Westcott submits that to recognise these as a "physical condition" is not to pathologize a transgender person as mentally unwell or having a personality disorder. That is wrong, grossly outdated and stigmatising (Benchbook p.330 §8, p.339 §61; X & Y §134). Rather, it is to understand that section 25 "condition" is broader than "health". The Appellant's "physical condition" makes her susceptible to ill-treatment in Romania, rendering extradition oppressive.

53. Having found Article 8 disproportionality, it is tempting not to deal with section 25 oppression. But I will be transparent and say what I made of the argument and Ms Ball's response. The starting point is that the Judge is not alone in focusing on "health". Mr Ball and Ms Westcott agreed that no section 25/91 case of which they are aware involves any "condition" which is not a "health" condition. In South Africa v Dewani [2012] EWHC 842 (Admin) [2013] 1 WLR 82 the Divisional Court said at §66 that sections 25 and 91 were "provisions introduced into extradition procedures give the court, as opposed to the Secretary of State, the duty to make the decision in cases of ill-health". In HH at §109 Lord Judge CJ used as a shorthand for section 91 whether extradition would be unjust or oppressive "because of the physical or mental ill-health of the person to be extradited". I accept that Parliament could have used "health" but did not do so. I can see that disability (described in other UK legislation as "impairment") may illustrate something within "condition" but which would not be aptly described as "health". I would not accept that skin colour would fall within "condition". There may be a grey area, the dividing line may be a question of interpretation or of application, and there may be a case which necessitates grappling with that. I am quite sure that this is not such a case. Insofar as the Appellant's section 25 "physical condition" – as identified by Ms Westcott – is an aspect of those proportionality concerns which I discussed under the Article 8 ground, it is an important aspect of the case. But that aspect does not, of itself, drive a conclusion of disproportionality in private life terms. Many of the proportionality considerations in this case are not a function of what medical interventions the Appellant has or has not had. Put another way, many of them would arise if the Appellant had not undergone those procedures in Denmark. It would be very odd if a case in which gender identity is central should turn on such matters. The "physical condition" relied on by Ms Westcott, even if she is right about the scope of section 25, cannot cross the high threshold of oppression. The section 25 and Article 8 prisms will overlap and often the answer will be the same in relation to both. I am not persuaded that the factors which combine to demonstrate Article 8 disproportionate interference with private life also combine to demonstrate section 25 oppression by reason of physical condition.

Conclusion

54. For the reasons which I have given, the appeal fails on the section 13 and 25 grounds. But it succeeds on the Article 8 ground. The terms of the Order, giving effect to this judgment, were helpfully agreed by the parties, as follows: (1) The fresh evidence is admitted. (2) The appeal is dismissed on Ground 1 (s.13 Extradition Act) and Ground 3 (s.25 Extradition Act). (3) The appeal is allowed on Ground 2 (s.21 Extradition Act and Article 8 European Convention on Human Rights). (4) In the light of the paragraph (3), and the appeal being allowed on Article 8 grounds, it is not necessary for the Article 3 ground to remain stayed or be determined. (5) There shall be no order for costs save for detailed assessment of the Appellant's publicly funded costs.