Neutral Citation Number: [2023] EWHC 1274 (Admin)

Case No: CO/1517/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 May 2023

Before :

MRS JUSTICE MAY DBE

- -

Between :

BACAU DISRICT COURT, ROMANIA

Appellant

- and -

ANDY-RICHARD IANCU

Respondent

- -
- -

Joel Smith (instructed by CPS Extradition Unit) for the Appellant
Graeme Hall (instructed by Taylor Rose MW Solicitors) for the Respondent

Hearing dates: 4 May 2023

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Mrs Justice May DBE:

1. The appellant judicial authority appeals the decision of District Judge Michael Snow ("DJ Snow") dated 22 April 2022 to discharge the respondent on the basis that the extradition proceedings were an abuse of process. Leave was granted on the papers by order of Bourne J dated 30 January 2023.

The current arrest warrant

2. The surrender of the respondent was sought pursuant to a conviction warrant issued on 2 November 2021 by the appellant and certified by the NCA on 8 November 2021 ("AW2"). The warrant relates to six offences:

   (1) Theft of a mobile phone committed on 20 April 2014

   (2) Theft/burglary of a computer from an apartment between 8-9 July 2011

   (3) Theft of a laptop from an office on 26 July 2013

   (4) Driving a Fiat Doblo motor vehicle without a licence on 17 March 2016

   (5) Damage to a slot machine on 3 November 2016

   (6) Driving a Fiat Doblo motor vehicle without a licence on 15 April 2016

3. On 4 July 2019 the respondent was sentenced to a combined sentence of 2y1m reflecting all of the above conduct. That sentence became final, due to a lack of appeal, on 23 July 2019. The hearing was conducted in the respondent's absence and he has a right to a re-trial.

The earlier arrest warrant

4. The respondent was first arrested on 3 January 2020 pursuant to a European Arrest Warrant issued on 14 August 2019 ("AW1"). AW1 sought the respondent's extradition to serve the same sentence passed by the Romanian court on 4 July 2019, based on the same offences set out above. He was brought before Westminster Magistrates' Court on 4 January 2020. The respondent resisted extradition on a number of grounds, including an Article 3 ground alleging a real risk that prison conditions in Romania would expose him to inhuman and degrading treatment and submitting that there had been no assurance served which could rebut that risk.

5. Proceedings on AW1 were adjourned and eventually listed for hearing on 11 September 2020. Shortly before the hearing the appellant served an assurance, dated February 2020 ("the February 2020 assurance"), as to prison conditions which the respondent contended was inadequate. At the hearing District Judge Hamilton ("DJ Hamilton") directed that the CPS send a request for further information in relation to prison conditions, in terms to be approved by him in writing. He further directed that the appellant should respond to that request by 12 October 2020. The case was listed again on 4 December 2020.

6. At the hearing on 4 December 2020 no response had been received from the appellant. Counsel sought no adjournment, the appellant wishing to contend that the February 2020 assurance was adequate. DJ Hamilton heard argument and adjourned to consider his ruling.

7. On 14 December 2020, before the ruling had been finalised or handed down, the appellant provided a further assurance. DJ Hamilton declined to receive this further assurance into evidence. Two days later, on 16 December 2020, DJ Hamilton gave his reasons for refusing to admit the further assurance into evidence and discharged the respondent on AW1, finding that the February 2020 assurance was inadequate. DJ Hamilton noted that:

   (1) The appellant had known since the decision in *Georghe v Romania* [2020] EWHC 722 (Admin), handed down in March 2020, that the February 2020 assurance was inadequate. Nevertheless it served that assurance in September and sought to rely on it as sufficient at the reconvened hearing on 4 December 2020.

   (2) In the interim the Romanian authorities had provided at least 3 further informations dealing with other matters but had inexplicably failed to deal with prison conditions;

   (3) Despite the extradition hearing on 11 September 2020 having been adjourned for 3 months, the appellant had failed to respond to the request for further information issued by the CPS as directed in September, and had failed to make any contact with the CPS to explain why.

   DJ Hamilton concluded that this was "an exceptional case where 'the surrender procedure should be brought to an end'".

8. The judicial authority appealed DJ Hamilton's decision. The appeal was heard and dismissed by Chamberlain J on 29 April 2021: *District Court of Bacau, Romania v Iancu* [2021] EWHC 1107 ("Iancu 1"). In the course of his decision Chamberlain J observed that "it is inherent in the concept of a time limit that failure to comply with it may have consequences" (Iancu 1 at [22]). In addition to the reasons given by DJ Hamilton he pointed out that admitting the further assurance would almost certainly have required a further hearing, in circumstances where "the time limits set out in Article 17 [of the Framework Decision] had long ago been exceeded". In response to the appellant's submission that the district judge had not considered the strong public interest in extradition he found that the district judge had been aware of this but was entitled to conclude, in accordance with the court's observations in *Aranyosi* [2016] QB 921 at [104], that this was "an exceptional case" in which "the surrender procedure should be brought to an end".

Proceedings on AW2

9. As indicated above, AW2 was issued some 6 ½ months later, in November 2021, based on the same conduct, and the same sentence, as that cited and relied on in AW1. The respondent appeared before Westminster Magistrates' Court on 10 December 2021 and has been on bail since then.

10. On 5 January 2022 the appellant provided an assurance as to prison conditions. The Respondent, who was unrepresented at the hearing before DJ Snow, did not then dispute

the adequacy of this assurance. I am told that he may seek to revisit this issue upon remission, in reliance upon the recent decision in *Marinescu v Romania* [2022] EWHC 2317 (Admin).

11. The hearing came on before DJ Snow on 22 April 2022. The respondent gave evidence. At the end of the hearing DJ Snow invited representations on abuse of process. Having heard submissions he proceeded to stay proceedings on AW2 as an abuse of process

Ground of appeal

12. The single ground of appeal is that DJ Snow's decision was wrong.

Legal framework

Appeals from extradition decisions

13. The court's powers on an extradition appeal are set out in Section 29 of the 2003 Act, which materially provides that:

> (1) On an appeal under section 28 the High Court may-
> (a) allow the appeal
> (b) dismiss the appeal
> (2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.
> (3) The conditions are that-
> (a) The judge ought to have decided the relevant question differently;
> (b) If he had decided the question in the way he ought to have done, he would not have been required to order the person's discharge. …"

14. The practical application of the statutory requirement has been encapsulated by Lord Burnett CJ in *Love v Government of the USA* [2018] 1 WLR [2889] at [25]-[26] as follows:

> "25. The true focus is not on establishing a judicial review type of error, as a key to opening up a decision so that the appellate court can undertake the whole evaluation afresh. This can lead to a misplaced focus on omissions from judgments or on points not expressly dealt with in order to invite the court to start afresh, an approach which risks detracting from the proper appellate function. That is not what Shaw's case or Belbin's case was aiming at. Both cases intended to place firm limits on the scope for re-argument at the appellate hearing, while recognising that the appellate court is not obliged to find a judicial review type error before it can say that the judge's decision was wrong, and the appeal should be allowed.
>
> 26 The true approach is more simply expressed by requiring the appellate court to decide whether the decision of the district judge was wrong. What was said in the *Celinski* case and *In re B (A Child)* are apposite, even if decided in the context of article 8. In effect, the test is the same here. The appellate court is entitled to stand back and say that a 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."

Abuse of process

15. There is no principle of res judicata or issue estoppel in extradition. In cases where one party attempts to re-litigate matters determined in proceedings on a previous warrant the appropriate remedy is abuse of process: see *Auzins v Latvia* [2016] 4 WLR 75 at [36]-[37] per Burnett LJ (as he then was).

16. The principle in *Henderson's Case* (1843) 3 Hare 100, requiring parties to litigation to bring their whole case before the court on the first occasion, does not apply where a requesting state fails to secure extradition on a first attempt and thereafter institutes fresh proceedings on a further warrant: see *Camaras v Baia Mare Local Romania Court* [2018] 1 WLR 1174 (Admin) at [27] to [29]. Abuse of process in the context of extradition arises as an aspect of the public interest in giving effect to extradition arrangements, which includes effective management of cases and of court time.

17. Having reviewed relevant authorities including *Auzins* and *Belbin v Regional Court of Lille, France* [2015] EWHC 149 (Admin) Ousley J, giving the judgment of the court in *Camaras* concluded as follows at [32]-[35]:

> "32. It would be neither fair nor consonant with that public interest for the issuing judicial authority, failing to comply with the district judge's directions, or unable to produce the further evidence it wanted, simply to issue a further EAW, to reverse the effect of its non-compliance with court orders, or its failure to put its case forward. This is not an option open to defendants, though they have some more constricted routes to the same end. A court must be able to give effect to its own procedural directions, and to prevent their being circumvented on appeal or by a further EAW. That furthers rather than undermines the statutory scheme. Whether the attempted enforcement of a further EAW, in circumstances falling short of Belbin abuse of process, so undermines the interest of the statutory scheme in speedy finality, and in upholding the decisions and orders of the courts, that enforcement should be denied, cannot be answered without consideration of all the circumstances.
>
> 33. In my judgment, the right approach must be a balance reflecting the extent of the public interests at stake, as well as any unfair prejudice caused to the individual in all the circumstances of the case. These will involve the gravity of the actual or alleged offending, the nature and cause of the failure of the issuing authority or CPS which has led to the further EAW, the effect which that might have in consequence on the public interest in that particular extradition, the effect which that has had on the defendant both in his family and private life, and on his trial, retrial, and punishment, whether through change in circumstance or passage of time.
>
> 34. In reality, this involves consideration of s 14, s21 or s21A oppression and human rights, which is where those balances can be struck. Such an approach,

> placing this issue within the context of the statutory bars to extradition, avoids extending the residual jurisdiction to areas where its language shows it was not intended to venture. It permits the court to weigh the competing interests raised by the sort of circumstances in which the application of the public policy in Henderson v Henderson in extradition may arise. The issues cannot in such circumstances and on this analysis be neatly compartmentalised."

18. *Camaras* was considered further in *Giese v Government of the United States of America (No 4)* [2018] EWHC 1480 (Admin). That case involved the provision of an assurance (regarding civil commitment) in re-issued proceedings, in circumstances where the US authorities had failed to provide an adequate assurance in earlier proceedings, and had thereafter tried (and failed) to get the High Court to re-open the appeal in those proceedings in order to receive an improved assurance. The Divisional Court (Burnett LJ and Dingemans J) dismissed an appeal against a district judge's decision not to dismiss proceedings on a fresh warrant as an abuse. In the course of its review of relevant cases the court observed as follows:

> "30. It should not be overlooked that in a case governed by the Framework Decision and the European Arrest Warrant procedure, the requested person would be liable to arrest in, and extradition from, any member state to which he travelled. Abuse of process arguments of a Henderson nature based upon an earlier failure to secure extradition from another state would be unlikely to prevail. Similarly, in a case governed by treaty and Part 2 of the 2003 Act, the failure to secure extradition here would be unlikely to hold sway in another country.
>
> 31. There will be cases where a judicial authority has, for example, failed to comply with court orders in the first extradition proceedings, where a question of abuse of process may arise for consideration in connection with a second set. Similarly, where in the first set of proceedings the requesting state has abjectly failed to get its evidential house in order. But a mechanistic approach to abuse is inappropriate. "

After referring to the passage from *Camaras* at [32] which I have set out above the court went on:

> "32. The key, in our judgment, to cases where it is said that the requesting state failed in the first set of proceedings such that the second set are an abuse of process is to make a "broad, merits-based judgment which takes account of the public and private interest involved and also takes account of all the facts of the case", see Johnson v Gore Wood [2002] 2 AC 1 at [31] and Arranz v High Court of Madrid [2016] EWHC 3029 (Admin) at [32] and [33]. Such a broad, merits-based judgment should take account of the fact that there is no doctrine of res judicata or issue estoppel in extradition proceedings.
>
> 33. Underlying extradition are important public interests in upholding the treaty obligations of the United Kingdom; of ensuring that those convicted of crimes abroad are returned to serve their sentences; of returning those suspected of crime for trial; and of avoiding the United Kingdom becoming (or being seen as) a safe haven for fugitives from justice. The 2003 Act provides wide protections to requested persons through the multiple bars to extradition Parliament, originally

> and through amendment, has enacted. There are likely to be few instances where a requested person fails to substantiate a bar but can succeed in an abuse argument."

19. The requested person in *Jasvins v General Prosecutor's Office, Latvia* [2020] EWHC 603 (Admin) resisted the first warrant on the basis that he had paid a fine for a lesser offence but police had charged him with the more serious offence (upon which the warrant was based) after he had filed a complaint about them. On appeal from the district judge's decision to order his extradition the High Court made an order requiring the Latvian authority to provide evidence responding to the allegations of police misconduct. The information was provided late, the High Court refused to admit it and allowed the appeal. The authority then issued a second warrant, attempting to rely on information which the previous decision had prevented them from deploying. The district judge rejected the arguments on abuse and ordered extradition. The Divisional Court allowed the appeal, concluding as follows:

> "16. Like the Court in *Giese*, and for that matter also like the Divisional Court (Burnett LJ and Cranston J) in *Auzins v Prosecutor General's Office of the Republic of Latvia* [2016] 4 WLR 75, we readily acknowledge the existence of the abuse jurisdiction. The comments of Ouseley J at paragraph 34 in *Camaras v Baia Mare Local Court, Romania* [2018] 1 WLR 1174 to the effect that the role of the abuse jurisdiction went no further than informing the way in which in the bars to extradition on the face of the 2003 Act could be interpreted and applied should now be read subject to these two judgments.
> …
>
> 20. Mr Jones's submission in this case is that wherever proceedings on a subsequent EAW amount to collateral attack on decisions taken in proceedings on an earlier materially identical EAW, the second proceedings must amount to an abuse of process and must be dismissed. We do not agree that the matter can be put in such absolute terms. Where there are successive warrants or successive extradition requests, if proceedings on the subsequent warrants can properly be characterised as a collateral attack on a decision in proceedings on the first warrant, the latter proceedings are capable of amounting to an abuse of process. It may be possible to go further and say that ordinarily this will be the case. But the outcome in any given situation must depend on the overall merits based assessment of public interests and careful evaluation of the facts, referred to at paragraph 32 in judgment of *Giese*.
>
> 21. There is a particularly important public interest that the system of enforcement of EAWs is not undermined. That public interest covers a number of objectives. One objective, plainly, is that those who are charged with criminal offences overseas or have been convicted overseas and are wanted for punishment are provided to requesting authorities. But maintaining the integrity of the EAW system includes ensuring that decisions can be made expeditiously and that courts are able to exercise effective case management powers. Put bluntly, if such orders are made, the starting presumption is that they will be complied with. Where, as in this appeal, the claim of abuse of process arises from a failure in earlier proceedings to comply with a court order, the court in the later proceedings must assess the significance of permitting the Requesting Authority to avoid the

> consequences of the earlier decision, while also taking account of the public interest in that particular extradition. This will also include considering the gravity of the alleged or actual offending, and the prejudice (if any) to the requested person arising from pursuit of the further warrant. In other words, a *Giese*-style broad, merits-based judgment taking account of the public and private interests as they are manifest on the facts of the particular case."

20. *Warwryzczek v Poland* [2021] EWHC 64 (Admin) concerned proceedings on a second warrant, issued after the requested person had been discharged on the first, the judicial authority having failed to comply with directions for the supply of further information. The decision to discharge on the first warrant came about in relation to a s.20 point involving a right of re-trial, in circumstances where there was an issue as to whether the requested person had been aware of the trial process such that he could be said to have absented himself from it deliberately. The requested person denied any knowledge, saying that he had not received any summons and that he had been in the UK at the time. The Magistrates' Court directed a response from the judicial authority to questions directed at this issue by a certain date but none was received. After the hearing the requested person produced wage slips, showing that he was in the UK on the date of service of the summons in Poland. The district judge declined to consider the wage slips and ordered extradition. On appeal the order was set aside, Supperstone J being satisfied that the s.20 bar was made out. Thereafter the judicial authority issued a second warrant, based on 32 offences, of which 3 had been the subject of the first warrant, belatedly producing evidence to show that the requested person had been aware of proceedings but had intentionally absented himself. The district judge declined to stay proceedings on the second warrant in respect of these 3 offences as an abuse of process. On appeal it was argued that the second proceedings had been an attempt to circumvent the consequences arising from the authority's failure to supply information on the first warrant, constituting an abuse. Having reviewed the authorities on abuse Julian Knowles J, giving the judgment of the court, held that there had been no abuse of process in this case. His reasoning is at [104] to [106]:

> "104. It is clear from [*R(Kashamu) v Governor of Brixton Prison* [2002] QB 887] and *Giese* …that it is not, without more, an abuse of process for a judicial authority to issue a second EAW even where a first warrant has failed through its own fault. It may, or may not, be so, depending on the facts. What is required, as the Divisional Court said in *Giese* at [32] is a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case in order to determine whether extradition on the second EAW would result in unjust oppression to the defendant.
>
> 105. In my judgment the principal reason why it was not an abuse of process for the Respondent to include [the 3 offences] on EAW2 despite the Appellant's discharge on them in 2015 is because, as the judge set out at length, the Appellant procured his discharge on a false basis. He knew that he had not been served personally with the summonses…and produced payslips to refute a case that he knew was wrong in fact. He knew all along about the criminal proceedings against him in Poland and he left Poland in breach of his obligations in order to avoid them, and was thus a fugitive. The Appellant's evidence…that he 'did not know about the cases in court' was simply not true. It cannot be said to be oppressive,

> nor was the system of extradition usurped, by the Respondent putting forward a corrected case demonstrating the Appellant's falsehoods in the first set of proceedings and all the more so, as the judge rightly found, because he also gave untruthful evidence in the second set of proceedings about this knowledge of the criminal cases against him in Poland.
>
> 106. In saying this, I do not condone the Respondent's failure either to include all of the Appellant's offences on EAW1, or its failure to respond to requests for further information. It could, and should, have done both of these things. When an issuing judicial authority invokes the assistance of the courts of this country to secure extradition then it is under corresponding duties to bring forward the entirety of hits case as soon as possible and to cooperate and supply information where this is sought. If it fails to do so, and the EAW is discharged, then there is a risk, depending on the facts, that a *Giese*-mandated broad merits-based review in relation to a second EAW may reach the conclusion that it is indeed oppressive and so an abuse of process
>
> 107. But I, for my part, am unable to reach that conclusion here because of the judge's findings that the Appellant had given untruthful evidence and was a knowing fugitive from justice in Poland. Given the Appellant's inaccurate and untruthful evidence in the first proceedings, putting the full and correct position before the court in the second proceedings cannot be described as an improper collateral attack on the 2015 judgment or be said to give rise to oppression. Mr Hern was right to submit that to uphold the Appellant's plea of abuse of process would be to impermissible reward his dishonest conduct.".

21. The recent decision in *Konczos v Law Court in Gyor (Hungary)* [2021] EWHC 3287 concerned prison assurances. The Hungarian authority had issued a EAW in January 2015. A prisons assurance was required and directions were made for the authority to provide one. The Hungarian authority failed to provide any assurance and the requested person was accordingly discharged in May 2016. Eleven days later the Hungarian authority issued a second warrant, although no arrest took place for four years pending the outcome of various applications to the Hungarian court. After the requested person's arrest on the second EAW an appropriate assurance was provided and his extradition was ordered. On appeal, Mr Konczos raised various arguments including abuse of process, relying on *Camaras* and *Jasvins*. Fordham J rejected the abuse argument, emphasising the need to avoid any rigid or mechanistic approach. He distinguished *Jasvins*, saying that that case had raised "a live question of historic fact, calling for evidence as to what had happened" whilst the present case involved a guarantee of future action by the Hungarian authorities. Referring to *Giese*, he pointed out that the assurance was needed:

> "so as to "neutralise" a human rights argument, rather than being a situation of seeking to "reargue" points which had been "lost""

Fordham J went on to hold that permitting the Hungarian authority to avoid the earlier consequences of its failure to provide a sufficient assurance gave rise to no unfairness or oppression.

22. Having reviewed recent authorities I turn to the parties' arguments on this appeal.

The parties' arguments

23. Mr Smith, for the appellant judicial authority, submitted that DJ Snow failed to adopt the correct approach. DJ Snow had referred to *Camaras* in his judgment, but was not taken to, and had not considered, more recent authorities discussing and developing the principles set out in those cases. Mr Smith suggested that the judge had applied paragraph 32 of *Camaras* (set out at [17] above) without going on and considering paragraphs 33 and 34; in doing so he had omitted to apply the "broad merits-based assessment" required by the court in *Giese*.

24. The decision in *Jasvins* can be distinguished, Mr Smith argued, on the basis that the original directions of the court in that case concerned the service of evidence in order to deal with a factual dispute, whereas this case (and the case of *Konczos*) concerned the provision of a sufficient assurance regarding prison conditions in the event of extradition being ordered. One involved a disputed issue of fact which the judicial authority had "lost", the other an unsuccessful attempt at producing a satisfactory assurance regarding future prison conditions, in order to allay Article 3 concerns which might otherwise give rise to a statutory bar.

25. Referring to *Wawrzyczek*, Mr Smith submitted it showed that the principle of finality is not a trump card in the context of extradition. He pointed out that an extradition warrant, when issued, is effective across all countries with whom the originating state has extradition arrangements. A decision in England to discharge a warrant for procedural failure to comply with court directions, say, could not be effective to discharge the warrant in France, for instance. This explains why the doctrines of res judicata, issue estoppel or *Henderson v Henderson* have no strict application in the context of extradition. As to this, it works both ways, he pointed out: it is open to a requested person to re-canvas, or to raise for the first time, arguments resisting extradition on a subsequent warrant which may not have been deployed, or having been deployed did not find favour, the first time round.

26. Mr Smith argued that the situation in the present case is similar to that in *Giese*, involving the re-issue of a warrant, relying on a fresh assurance in circumstances where a previous assurance, provided in response to the court's directions, had been insufficient. It was also similar to the circumstances in *Konczos*, where extradition was upheld.

27. Mr Hall, for the respondent, argued that DJ Snow reached a conclusion that cannot be characterised as "wrong" (referring to *Love v USA* [2018] 1 WLR 2889 at [26]). It was evident from the district judge's judgment that he had turned his mind to all the considerations relevant to a broad based assessment: he had considered the chronology of proceedings, the nature of the offences in Romania, the offending in the UK since the respondent's arrival here in 2016, his partner, lack of children and current employment status, in arriving at his conclusions on section 14 and Article 8. Mr Hall submitted that although the final conclusion on abuse of process is expressed briefly in the judgment, all that came before shows that these matters must have been in the district judge's mind when arriving at his conclusion on whether proceedings on the second warrant amounted to an abuse.

28. Mr Hall further submitted that, in discharging the respondent on AW1, DJ Hamilton had addressed the merits, refusing to admit the further assurance and finding that the

February 2020 assurance was inadequate. Chamberlain J had reviewed that decision, dismissing the appeal on the basis that DJ Hamilton's case management decision to refuse the additional assurance had not involved any error of law or principle, nor could it be characterised as wrong. In essence, he said, both DJ Hamilton and then Chamberlain J had conducted a merits-based assessment in deciding that the surrender procedure should be brought to an end; since nothing had changed between then and the hearing on AW2, in circumstances where the Romanian authority had still not given any explanation for the long delay in providing a *Georghe*-compliant assurance, DJ Snow was bound to come to the same conclusion.

29. Mr Hall went on to suggest that even if it were the case that DJ Snow had not conducted a full merits-based assessment in arriving at his conclusion, the appellant had not established that his decision would have been different if he had, as required by section 29 of the 2003 Act. Referring to the observations of Lord Neuberger in *re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, discussed by the court in *Love* (see above), he argued that if this court, in addressing the merits, were to reach the conclusion that the issue was finely-balanced, and that a decision to stay proceedings as an abuse was a possible outcome, then the result of the hearing before DJ Snow could not be said to be "wrong".

30. In any event, Mr Hall argued, even if this court were itself to undertake a merits-based assessment, then the only proper conclusion would be that proceedings on AW2 are an abuse, given the following:

(1) The appellant must have known since the judgment in *Rezmiveş and others v. Romania* (App. Nos. 61467/12 etc.), 21 March 2017 that it would need to provide an assurance regarding the prison conditions in which the respondent would be held on return.

(2) The repeated failures of the appellant to provide a sufficient assurance during proceedings on the AW1. Mr Hall submitted that these are a very powerful factor pointing to abuse, more so when taken together with the failure then and now to provide an explanation for such failures.

(3) The similarity between the present case and *Jasvins*, there being no good reason for the failure to comply with the court's directions given by DJ Hamilton.

(4) The appellant's decision, at the hearing before DJ Hamilton on 4 December 2020, not to seek any further time to produce a further assurance but instead to rely on the February 2020 assurance provided in September 2020.

(5) The agreement between representatives for the parties at the hearing on 4 December, that DJ Hamilton could confine his judgment to the Article 3 issue and not consider the other grounds which the respondent had raised, and on which he had served evidence. If the appellant is permitted to proceed on AW2 then it will be able to evade the decision it took at the time of the hearing on AW1 to give up these points.

(6) The fact that, as noted by Chamberlain J in his judgment, admission of the later assurance would have required further hearings when there had already been many

previous hearings and the time limits set out in the Framework Decision had long-ago already been exceeded.

(7) The delay of 6 ½ months after discharge on the first AW before the appellant issued the second AW. Mr Hall compared this to the 5-month delay in *Jasvins*.

(8) The fact that the offending underlying both warrants is relatively minor.

31. Mr Hall compared the judicial authority's attempt, through the issue of a second warrant to neutralise the effect of the earlier decision of DJ Hamilton upheld by Chamberlain J on appeal, with actions of judicial authorities discussed in the cases of *Camaras* and *Jasvins*. He argues that the present case is on all fours with *Jasvins*.

Discussion and decision

32. Where there has been a failure to comply with court orders "a question of abuse of process may arise", but the approach to abuse in the context of extradition must not be mechanistic: see *Giese* at [31]. Instead, each case "must depend on the overall merits-based assessment of public interests and careful evaluation of the facts." (*Jasvins* at [20]).

33. It is not apparent from DJ Snow's brief ruling on abuse of process, set out at paragraphs 91 and 92 of his judgment, that he conducted such a merits-based assessment in relation to that question. His reasoning is comprised in one sentence, at paragraph 92:

> "Whilst I accept that the JA are not intentionally seeking to manipulate the process, the effect of the issuance of this AW is to attempt to circumvent the DJ's enforcement of his directions."

No criticism attaches to DJ Snow, since he did not receive full argument on the point, the respondent being unrepresented. He was not taken to the recent authorities, post-dating *Camaras*, which I have set out above.

34. In the present case DJ Snow dismissed any s.14 argument, finding that the respondent came to the UK in 2016 as a fugitive from justice (see paragraph 49 of his judgment). He found that the assurance which the appellant has (finally) provided deals satisfactorily with any Article 3 Convention point (paragraph 59 of his judgment). He conducted a *Celinski* balancing exercise, concluding that extradition would not disproportionately impact the respondent's Article 8 rights, or those of his current partner. The respondent has no children and only casual employment as an occasional painter and decorator. He has been convicted in this country of domestic abuse offences against previous partners since his arrival in 2016.

35. In dismissing the potential bars to extradition under section 14 and section 21, DJ Snow necessarily covered many of the considerations identified as relevant to abuse of process by the court in *Camaras* (at [33]), approved in *Giese*. He also found that there was no prosecutorial misfeasance or bad faith (paragraphs 89 and 90 of his judgment) and accepted that the appellant was not seeking "intentionally…to manipulate the process". Having made all these findings tending against abuse, however, he did not then proceed to explain how he arrived at the decision that proceedings on the second

AW should nevertheless be stayed, his reasoning being restricted to the short passage I have set out above.

36. Had DJ Snow had the benefit (as I have) of full argument on the caselaw relating to abuse, in particular had he been referred to the more recent cases of *Giese*, *Jasvins*, *Wawrzyczek* and *Konczos*, then I believe that his reasoning in relation to the abuse issue would have addressed the various considerations involved in a broad merits-based assessment much more fully than he did. Whilst it is evident that DJ Snow had considered matters relevant to such an assessment earlier in his judgment when tackling issues of fugitivity, oppression, delay and Article 8, it is not clear that he brought all these considerations into the balance alongside the appellant's "attempt to circumvent [DJ Hamilton's] enforcement of his directions". It follows that, in my view, there was a failure to set out and consider all the features which must be comprised within a broad merits-based approach as advocated by the court in *Camaras*. These include the gravity of the offending, the nature and cause of the failure of the Romanian judicial authority to ascertain and/or provide a sufficient assurance during proceedings on AW1 resulting finally in the issue of AW2, the effect of that on the extent of the public interest in this extradition, together with the effect on the respondent, "whether through change of circumstance or passage of time".

37. *Camaras* appears to confine a consideration of abuse to the existing routes of challenge via s.14, s.21 and s.21A (see [87]), yet it is apparent from subsequent decisions that abuse of process may, exceptionally, be found to exist independently of these statutory bars. As the court in *Giese* observed, however, such cases are likely to be rare.

38. Having reached the conclusion that DJ Snow did not adopt the correct approach to his assessment of whether proceedings on the second AW amounted to an abuse, I next consider Mr Hall's submissions as to the approach which I should take on this appeal.

39. I do not accept that, had he adopted the correct approach, DJ Snow must have made a decision on AW2 consistently with the decision of DJ Hamilton to refuse to admit the further assurance and end the surrender process on AW1. I accept, as did Chamberlain J on the appeal, that DJ Hamilton took the public interest in extradition into account when deciding to bring proceedings on AW1 to an end. I also accept that there has been no change in circumstances since then. But a court addressing the question of whether proceedings on a re-issued warrant are an abuse is required to address the merits afresh by reference to the principles discussed in relevant caselaw. None of the cases on abuse of process in the context of extradition was raised with, or considered by, DJ Hamilton when making his case management decision, or by Chamberlain J when considering whether that decision was wrong. There was no reason why either of them should have considered the *Camaras/Geise/Jasvins* line of authority, since neither of them could have supposed that their decision on AW1 would conclusively dictate what would happen if and when the appellant were to decide to re-issue. The outcome of the case management decision made in relation to AW1 provides no answer as to whether proceedings on a re-issued warrant are an abuse; the questions being asked on each occasion are different. I agree with Mr Smith that, if Mr Hall's argument is right on this point, then at any time a case management decision is made bringing extradition proceedings on a warrant to an end, the judicial authority would effectively be precluded from re-issuing. The correct position is that a failure to comply with case management directions will give rise to a risk that proceeding on a subsequent warrant may be stayed as an abuse, but no more than that.

40. I also reject Mr Hall's argument to the effect that if, on a consideration of the merits, a finding of abuse is a possible outcome, then DJ Snow's decision cannot be said to be "wrong" and the appeal cannot be allowed, applying section 29 of the 2003 Act. The observations of Lord Neuberger in R*e B* at [93], which Mr Hall relied on, were made in relation to the outcome of a multi-factorial balancing exercise, where the correct approach has been taken but where there may be more than one possible conclusion which a court could reach. In that event, an appeal court is not entitled to intervene unless it is satisfied that the conclusion which the lower court reached is "wrong". But that situation is to be distinguished from one where the lower court has adopted the wrong approach, as I have found that the district judge did here. The correct approach of the appeal court in the latter situation is that set out by the court in *Shaw v Government of the United States* [2014] EWHC 4654, where Aikens LJ said this, at [42]:

> "There is therefore a threshold question on an appeal concerning a Forum Bar issue: on what basis can this court interfere with the judge's "value judgment"? Plainly, if the judge has erred in misconstruing the statutory wording of one of the specified matters, or if he has failed to "have regard" to a specified matter or he has had regard to other matters, or lastly if his overall "value judgment" is irrational or unreasonable, this court, as an appellate court, can interfere. If this count decides that the DJ has erred in any one of those ways, that must, in my view, invalidate the DJ's "value judgment". In those circumstances this court would have to re-perform the statutory exercise and reach its own "value judgment"."

41. Having found that the district judge adopted the wrong approach, it is for this court to conduct a broad merits-based assessment of the type advocated by the court in *Giese* and applied in subsequent decisions. In doing so I bear in mind that whilst there may be cases of abuse falling to be considered outside the strict confines of the statutory bars, such cases are likely to be very rare. As the court in *Giese* observed:

> "Underlying extradition are important public interests in upholding the treaty obligations of the United Kingdom; of ensuring that those convicted of crimes abroad are returned to serve their sentences; of returning those suspected of crime for trial; and of avoiding the United Kingdom becoming (or being seen as) a safe haven for fugitives from justice. The 2003 Act provides wide protections to requested persons through the multiple bars to extradition Parliament, originally and through amendment, has enacted. There are likely to be few instances where a requested person fails to substantiate a bar but can succeed in an abuse argument."

42. The facts and circumstances of each case will be different. As I see it, therefore, decided cases are of limited assistance, save only insofar as they provide further elucidation of the principles to be applied. But what may be a strong indicator of abuse in one case may be of less weight in another, when assessed against all the other relevant considerations. For instance in *Jasvins*, the (by then) old and minor nature of the single cannabis possession offence put the 5-month delay before re-issue, and the earlier failure to comply with directions about evidence, into stronger relief. In *Wawrzyczek* the requested person's misrepresentation of the evidence in proceedings on the first warrant rendered the judicial authority's failure to comply with directions less strong.

43. The cases demonstrate the kinds of factors to which it will be necessary to have regard, and to weigh up, when considering an abuse argument, but they cannot show that one consideration will necessarily be of greater account than another. There is no issue of principle involved in attribution of weight. It follows that I accept Mr Hall's point in relation to *Konczos* that there is no principled distinction between directions as to evidence of past fact (*Jasvins*) and directions as to the provision of a *Georghe*-compliant assurance covering future prison conditions (*Konczos*). In each case it is a question of weight to be attributed to each individual factor, when considered overall; I do not read Fordham J's remarks in *Konczos* as going any further than that.

44. Having considered all the factors bearing on abuse in this case, I conclude that this is not one of the rare instances where, although he has failed to succeed on a statutory bar, the respondent is entitled to have proceedings stayed for abuse of process.

45. I fully accept that the appellant's dilatoriness in the matter of providing a sufficient assurance is an important factor telling in favour of a finding of abuse. The degree of delay, the ignoring of court directions made for the purpose of eliciting a sufficient response together with the absence of any explanation given, the avowed intent to rely on the February 2020 assurance when the authority must have known of its inadequacy, only add to the weight of this factor. To adapt an observation made by Lady Hale in connection with delay (in *H (H) v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor intervening)* [2013] 1 AC 338 at [8(6)]) the extent of the appellant's repeated failures to "get its house in order" regarding the provision of a sufficient prisons assurance diminishes the weight to be attached to the public interest in extradition in the case of this respondent.

46. But although it diminishes the public interest, it does not extinguish it altogether. There remains a:

> "constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back." (per Lady Hale in HH at [8(5)]

47. The respondent in this case is a fugitive. On the findings of DJ Snow, he came to the UK in 2016 in order to evade proceedings against him in Romania. There is force in Mr Smith's point, made by reference to the observations of the Divisional Court (Lord Burnett CJ and Holroyde LJ) in *Government of the United States of America v Assange* [2022] 2 WLR 11, that a refusal to consider the Romanian prison assurance solely because it has been submitted late would result in a windfall to the respondent. The observations to which Mr Smith referred appear at [42] of the court's judgment in *Assange*:

> "In our view, a court hearing an extradition case, whether at first instance or on appeal, has the power to receive and consider assurances whenever they are offered by a requesting state. It is necessary to examine the reasons why the assurances have been offered at a late stage and to consider the practicability or otherwise of the requesting state having put them forward earlier. It is also necessary to consider whether the requesting state has delayed the offer of

> assurances for tactical reasons or has acted in bad faith: if it has, that may be a factor which affects the court's decision whether to receive the assurances. If, however, a court were to refuse to entertain an offer of assurances solely on the ground that the assurances had been offered at a late state, the result might be a windfall to an alleged or convicted criminal, which would defeat the public interest in extradition. Moreover, as Mr James Lewis QC pointed out on behalf of the USA, a refusal to accept the assurances in this case, on the ground that they had been offered too late, would be likely to lead only to delay and duplication of proceedings: if the appeal were dismissed on that basis, it would be open to the USA to make a fresh request for extradition and to put forward from the outset the assurances now offered in this appeal, subject, of course, to properly available abuse arguments."

48. I accept, as Mr Hall pointed out, that the circumstances of the present case are very different to those in *Assange*: there was no question here of the authority striving to work towards giving a satisfactory assurance, it had been clear since the decision in *Georghe* what form a compliant assurance should take. Over the course of many adjourned hearings, despite an *Aranyosi*-type request mandated by the court and with no explanation, there were repeated failures to supply a sufficient assurance. Finally, the authority specifically disavowed any intention to rely on a further assurance, submitting that the one it had already served was sufficient. Nevertheless, I must also bear in mind that DJ Snow specifically rejected any bad faith or manipulation on the part of the Romanian authorities. If, as I find, the public interest in extradition remains a factor with some weight in the present case, what else is there here that may tip the balance towards a finding of abuse and the consequent discharge of this respondent?

49. Turning to the gravity of the offending, whilst each of the individual offences comprised in AW2 may be relatively minor, the collection of offences taken together cannot be so described incurring, as they did, a sentence of over 2 years' immediate imprisonment. Unlike the requested person in *Jasvins*, the respondent here was a repeat offender, committing a string of offences more than one of which involved dishonesty. The time that has passed since their commission is still not unduly long; it gives rise to no Article 8 bar, still less to any oppression or hardship, as DJ Snow concluded. Moreover the respondent's behaviour since his arrival in the UK has been far from exemplary: "[he] has a series of convictions in this country. He has been sentenced on 4 occasions for 8 offences consisting of offences of battery and harassment" (DJ Snow's judgment at paragraph 42). DJ Snow further noted that the offences of battery and harassment were committed against "at least one ex-partner", ie in a domestic context, rendering them much more serious.

50. When I asked what prejudice his client may have sustained as a result of proceedings on AW2, Mr Hall pointed to the fact that the respondent had represented himself before DJ Snow, not taking the points on specialty and right of re-trial in respect of which his representatives had obtained evidence before the hearing on AW1. Mr Hall said nothing about the strength of any defence of specialty or right of re-trial so far as his client is concerned. But irrespective of the strength of such defences in this case, I do not accept that any prejudice from these points not being taken in relation to AW2 rightly arises as a consequence of the issue of a second warrant. The prejudice (if there is any) stems from the respondent choosing not to deploy these points again for himself in resisting

extradition on AW2 and/or from the fact that he found it necessary to represent himself before DJ Snow.

51. I cannot find that allowing the Romanian authority to avoid the earlier consequences of its failure to comply with DJ Hamilton's directions gives rise to any unfairness or oppression in the respondent's case.

52. For these reasons I conclude, applying a broad merits-based approach, that proceedings on AW2 do not amount to an abuse of process. Accordingly this appeal must be allowed and the case will be remitted back to the magistrates' court with a direction to that effect.