Neutral Citation Number: [2023] EWHC 405 (Admin)

Case No: CO/3263/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 March 2023

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

VICTOR – MARIAN BANICA	**Appellant**
- and -	
POGOANELE DISTRICT COURT, ROMANIA	**Respondent**

- -
- -

Martin Henley (instructed by **AM International Solicitors**) for the **Appellant**
David Ball (instructed by **CPS**) for the **Respondent**

Hearing date: **9 June 2022**

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Judgment Approved by the court for handing down (subject to editorial corrections)

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Mr Justice Julian Knowles:

Introduction

1. This is an appeal with leave of the single judge against the decision of District Judge Rimmer dated 20 September 2021 ordering the Appellant's extradition to Romania.

2. The Appellant is represented by Mr Henley. The Respondent is represented by Mr Ball. I am grateful to them both. As well as my notes, I have a full recording of the hearing.

3. The Appellant is the subject of a conviction arrest warrant. It is dated 9 December 2020 and was certified by the National Crime Agency on 27 May 2021. The Appellant's extradition is sought on the basis of the judgment of the Respondent on 27 November 2019, which was made final by the decision of Buzau County Court on 17 September 2020. A sentence of two years and 10 months imprisonment was imposed, all of which remains to be served. This was imposed following the revocation of the suspended sentence which was originally imposed.

4. Because the Appellant was arrested after 11pm on 31 December 2020, the relevant provisions are; at the domestic level, the Extradition Act 2003 (EA 2003) as amended by the European Union (Future Relationship) Act 2020; and at the UK/EU level, by the Trade and Cooperation Agreement between the EU and the UK (TACA), and specifically Title VII of Part 3 of TACA. Hence, the warrant in this case is just referred to as an arrest warrant, rather than a European arrest warrant (see TACA, Article 632, in the renumbered version).

5. The Appellant's sentence was imposed for offences of driving otherwise than in accordance with a licence, and failing to provide a specimen. The offences were committed on 19 August 2018 in Comuna Scutelnici, Bradeanu, Romania. The Appellant drove a motor vehicle on a public road for four kilometres and then failed/refused to supply a sample to establish his blood alcohol level when requested to do so by a police officer.

6. Let me say at once that, to English eyes at least, the Appellant's sentence (in its activated form at least) would seem to be very long. That submission lay at the heart of Mr Henley's submissions, as I shall explain.

7. The warrant confirms that the Appellant was summoned in person and informed of the date and place for the trial. On 11 December 2018 he was sentenced.

8. The district judge found the Appellant to be a fugitive [judgment, [41(g)]. In his evidence, the Appellant explained that he came to the UK on 12 December 2018. He confirmed that he knew he was being prosecuted for offences in Romania when he left. He also confirmed that he knew he was avoiding any sentence he might get after the trial (district judge's judgment (hereafter 'judgment'), [23]).

9. As I have said, the Appellant's original sentence was a suspended sentence. The suspension period was four years. During the term of suspension, the Appellant was required to attend the Probation Service at dates to be set; to receive visits from them; and to notify any change of home lasting longer than five days. He was also required to

perform 90 days unpaid work. Further Information from the Respondent highlighted that in the event of non-compliance, the suspended sentence would be revoked, and the Appellant would be required to serve his sentence (as happens in this country).

10. The Appellant did not comply with the terms of his suspended sentence and as the judge found, he left Romania as a fugitive. As a result, the Probation Service requested the revocation of his suspended sentence, which is what occurred.

11. The Appellant was arrested in this country on 8 June 2021 and produced at Westminster Magistrates' Court the following day.

12. The issue raised in the court below was that, pursuant to s 21 of the EA 2003, extradition would be a disproportionate interference with the Appellant's and his family's rights to a private and family life (Article 8 of the European Convention on Human Rights (ECHR)).

13. The issue on this appeal is whether the district judge was wrong in his conclusion that extradition would not be disproportionate.

14. Title VII of TACA is entitled 'Surrender'. Article 596 sets out its objective:

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

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

> "ARTICLE 597. Principle of proportionality. Cooperation through the arrest warrant shall be necessary and proportionate, taking into account the rights of the requested person and the interests of the victims, and having regard to the seriousness of the act, the likely penalty that would be imposed and the possibility of a State taking measures less coercive than the surrender of the requested person particularly with a view to avoiding unnecessarily long periods of pre-trial detention.
>
> ARTICLE 598. Definitions. For the purposes of this Title the following definitions apply: (a) "arrest warrant" means a judicial decision issued by a State with a view to the arrest and surrender by another State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order; …
>
> …

> ARTICLE 613. Surrender decision. 1. The executing judicial authority shall decide whether the person is to be surrendered within the time limits and in accordance with the conditions defined in this Title in particular the principle of proportionality as set out in Article 597…"

16. The principal issue argued by Mr Henley on this appeal is whether TACA necessitates a new and stricter approach to extradition, as compared to that which applied pursuant to the Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between member states of the European Union (the EAW Framework Decision).

17. This referred, in [10] of the Preamble, to the fact that, 'The mechanism of the European arrest warrant is based on a high level of confidence between Member States.' As to this, in *Ministerio Fisca v Gordi* (Case C-158/21), 14 July 2022, for example, the CJEU said at [80]:

> "It must be remembered in this connection that Framework Decision 2002/584 seeks, by the establishment of a simplified and effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the attainment of the objective set for the European Union of becoming an area of freedom, security and justice, and has as its basis the high level of trust which must exist between the Member States."

18. Mr Henley says there is now a different approach, and that that this principle no longer applies in the same way as it did under the EAW Framework Decison, so that (my words), this country should be less indulgent and in particular, should scrutinise more strictly sentences passed by foreign courts on the basis of a proportionality assessment.

19. His argument was based upon what he said was the excessive sentence passed on the Appellant in Romania. He said the district judge erred in assuming that the principle of mutual trust still applied, in a way which infected his Article 8 assessment. Mr Henley's subsidiary argument was that the district judge had also been wrong to find the Appellant to be a fugitive, and that this also wrongly influenced his Article 8 finding.

20. In granting permission to appeal, the single judge said:

> "So far as I am aware the point of law as to whether the approach that the Court should take to allegedly excessive sentences remains the same under the Trade and Co-Operation Agreement as it was under the Framework Agreement has not previously been considered, and it may be helpful if the matter is raised before the Court for clarification. It is just arguable that this is an exceptional case in which the sentence was wholly disproportionate (notwithstanding that I note that the sentence as originally imposed was suspended). Accordingly, I have granted permission to appeal.

> If the only ground of challenge in relation to Article 8 was the finding that the Appellant was a fugitive, I would not have granted permission to appeal, especially in light of the Appellant's own evidence as referred to at paragraph 23 of the District Judge's judgment. However, as the Article 8 issue must be considered in the round, I do not think that it is appropriate to limit the arguments that may be advanced on appeal."

Submissions

21. On behalf of the Appellant, Mr Henley submitted as follows.

22. Mutual trust and confidence in extradition only arose under the EAW Framework Decision and the jurisprudence of the CJEU, neither of which applied in this case. The judge did not properly address the issue. He simply proceeded on the basis that the former approach is unmodified by TACA, and so was wrong.

23. The judge also wrongly found that the Appellant is a fugitive, this despite the Respondent in its Further Information stating that it had no information to suggest that he was a fugitive.

24. The Respondent had had the opportunity to place restrictions on the Appellant (ie, the equivalent of bail in the UK), if it had so wished, but it did not.

25. In any event, the Appellant had instructed a lawyer, who represented him at the trial and lodged an appeal, and so it could not be said that he evaded legal process at all. Given that the burden for proving fugitive status fell on the Respondent to the criminal standard, then the judge, by failing to reconcile the further information, erred in law.

26. Mr Henley said that the judge had then, in evaluating the seriousness of the offence, relied on the acceptance of the sentencing practice of Romania (judgment at [55(j) and (k)] and failed to remind himself that mutual trust and confidence do not apply to TACA warrants, and so erred.

27. Had the judge had regard to TACA, said Mr Henley, he should have applied this principle from the Preamble: (emphasis added):

> "CONSIDERING that in order to guarantee the efficient management and correct interpretation and application of this Agreement and any supplementing agreement as well as compliance with the obligations under those agreements, *it is essential to establish provisions ensuring overall governance, in particular dispute settlement and enforcement rules that fully respect the autonomy of the respective legal orders of the Union and of the United Kingdom, as well as the United Kingdom's status as a country outside the European Union."*

28. Mr Henley also cited Article 577 and principle of proportionality (see above). He said the judge's relying on EAW case law failed to give effect of these provisions of TACA

and especially the importation of a proportionality check which had never formed a part of the Framework Decision (see *H(H) v Deputy Public Prosecutor* [2013] 1 AC 338, [45]). The TACA invokes respect for the UK's legal order as well as of that of EU Member states, but emphasises that that respect must include the UK's status as a sovereign state outside the EU.

29. Simple reliance on the length of sentence imposed as a means of assessing seriousness was wrong. The judge should have principally looked at the conduct alleged, these driving offences were not the most serious in the "criminal canon" as he had already recognised. Looking at the sentence length in Romania is no more helpful than looking at sentence length in the UK.

30. Mr Henley contended that the length of sentence – nearly three years for driving offences – was 'disproportionate' and 'unconscionable' (see judgment at [37]). The judge did not appear to have ruled on this contention. The judge was wrong to conclude that it was a matter for the Respondent.

31. On behalf of the Respondent, Mr Ball submitted as follows.

32. The issue on the appeal is whether the approach to allegedly excessive sentences remains the same under TACA as under the EAW Framework Decision. Mr Ball said that further to *Badea v Romanian Judicial Authority* [2022] EWHC 1025 (Admin) there is no reason to find that the approach under TACA is materially different to that under the EAW Framework Decision.

33. The district judge was not wrong to find that extradition was proportionate and was not wrong to find that the Appellant was a fugitive. The sentence of two years 10 months may be a significant one, but it was passed in circumstances where the Appellant had every opportunity to avoid it. For whatever reason, he chose not to comply with any of the conditions of the suspended sentence. The day after it was passed, he instead came to the UK, failing to keep in touch with probation, and failed to perform any community service as required. Instead, the very private life he now relies on to stay in the UK he actually spent committing almost exactly the same offences here. On repeated occasions he drove with excess alcohol, drove whilst disqualified and failed to provide a specimen. In line with *Polish Judicial Authority v Celinski* [2016] 1 WLR 551, [13(ii)]. The UK courts should respect the importance Romania has properly placed on seeking to enforce compliance with the terms of its suspended sentence. Extradition is proportionate.

Discussion

34. It was common ground that I can only allow the appeal if the judge was wrong in the sense explained in *Celinski* and other cases. It is a well known test and does not need repeating.

35. I am have come to the conclusion that I am far from persuaded the judge was wrong in a way which would properly permit me to interfere with the judge's decision.

36. A very similar submission to the one made by Mr Henley on this appeal was argued before Fordham J in *Badea*.

37. As I have said, Article 597 of TACA contains the proportionality principle ('Cooperation through the arrest warrant shall be necessary and proportionate …'). In *Badea* the appellant had been sentenced to 15 months for two offences of driving without a licence. The appellant argued that: there was no express proportionality bar in s 21 of the EA 2003 (for conviction cases) but there was in s 21A (for accusation cases); he argued now that the principle of proportionality had been expressly set out in Article 597, the court should use it to interpret s 21 to secure conformity with Article 597 (*Badea,* [24]). In other words, Article 597 could and should be used to bring s 21 into line with s 21A.

38. Fordham J found that Article 597 did not necessitate any distinct proportionality bar assessment which required discharge of a conviction defendant by reference to consideration of the 'seriousness of the act.' Still less did it do it do so by requiring any focus on the proxy of a putative sentencing exercise of what the UK court would do.

39. It followed that no proportionality bar is incorporated or conviction cases under s 21 as it is for accusation cases under s 21A by virtue of TACA. If the drafters of the TACA had wanted to do that, then they could have drafted Article 597 in the same terms as s 21A, but they chose not to do so.

40. Fordham J said at [32]-[37];

> "32. I accept that a narrow and distinct "proportionality bar" evaluation of that kind involves no inconsistency with the language and structure of Article 597. That means the UK could, entirely consistently with Article 597, continue to prescribe a narrow distinct "proportionality bar" evaluation which focuses only on some of the aspects of the principle of proportionality there set out. The UK could, moreover, have amended section 21A to prescribe an equivalent narrow distinct "proportionality bar" evaluation in conviction warrant cases. That would have been consistent with Article 597.
>
> 33. But what I cannot accept is that Article 597 necessitates a narrow, distinct "proportionality bar" evaluation – even in "accusation" warrant cases, still less in "conviction" warrant cases – which focuses on the 'seriousness of the act' and which requires the discharge of the requested person by reference to consideration of the 'seriousness of the act' (still less which does so by a focus on the proxy of a putative sentencing exercise by a court in the executing state). If that were right, the effect of Article 597 would be that all member states of the EU, in extradition cases involving the UK, would have signed up to a "proportionality bar" as specifically designed in section 21A(1)(b)(2)(3) of the 2003 Act (together, indeed, with the focus of the Criminal Practice Direction). It would mean that the UK would have signed up to a "proportionality bar" as specifically designed in section 21A(1)(b)(2)(3) of the 2003 Act (together with the focus of

the Criminal Practice Direction) for "conviction" warrant cases.

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

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

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

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

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

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

v) Another example of that contextual application of features of the Article 597 "principle of proportionality" is that "the

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

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

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

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

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

41. Fordham J therefore found that the principle of proportionality, 'will apply in a different way in different kind of cases'. He found that it will apply differently to conviction cases to accusation cases (35(iv)).

42. It follows that Article 597, 'does not prescribe anything which the Article 8 balancing exercise would fail to deliver.' There is no conflict or incompatibly with Article 8 and Article 597. On the contrary the Article 8 exercise is conducted 'taking into account' and 'having regard to' the matters identified in Article 597. ([37(vi)], [38]).

43. I therefore conclude, as Mr Ball submitted, that Article 8 requires a contextual approach to proportionality which is the same as that which is required by Article 597. So the requirements of Article 597 can simply be subsumed within the Article 8 exercise.

44. It therefore seems to me that *Badea* answers Mr Henley's main argument, to wit, that TACA requires a different approach to proportionality for non-EAW arrest warrants than the predecessor scheme did. It does not. The well-established and well-known Article 8 jurisprudence (chiefly *H(H), Norris v Government of the United States (No 2)* [2010] 2 AC 487, and *Celinski*) remains applicable. The principles are well-known and do not require repetition; see in particular *H(H),* [8], save perhaps to note again Lady Hale's observation that it is likely that the public interest in extradition will outweigh the Article 8 rights of the family unless the consequences of the interference with family life will be 'exceptionally severe.'

45. What of Mr Henley's point that mutual trust and confidence – and what he said had been its removal by TACA as compared with the EAW Framework Decision ?

46. I remain unpersuaded that TACA had anything like the profound effect in this area that Mr Henley contended for. I made this point during the hearing, but to recap.

47. For those of us of a certain age, who conducted non-EU extradition cases under the predecessor legislation to the EA 2003 (the Extradition Act 1989) (and even non-EU cases under the EA 2003), the idea that we implicitly trust and respect our extradition partners and have confidence in them, has been long established. It seems to me that there was nothing especially unique about this principle applicable only to EU Member states as expressed in the EU Framework Decision and given effect to in Part 1 of the EA 2003.

48. For example, *Ahmad v Government of the United States of America* [2006] EWHC 2927 (Admin) Laws LJ approved the statement of Kennedy LJ in *Serbeh v Governor of HM Prison Brixton* (unreported) 31 October 2002, at [40]:

> "There is still a fundamental assumption that the requesting state is acting in good faith."

49. In *Khan v Government of the United States* [2010] EWHC 1127 (Admin) the Divisional Court (Thomas LJ (as he then was) and Griffiths Williams J) heard the appeal of a British citizen against an extradition order requiring him to face trial for drug trafficking conspiracy offences in the United States. In dismissing the appeal, Griffiths Williams J stated ([23]):

> "There is a fundamental presumption that a requesting state is acting in good faith and the burden of showing an abuse of process rests upon the person asserting such an abuse with the standard of proof on the balance of probabilities."

50. In *Gomes v Government of the Republic of Trinidad and Tobago* [2009] 1 WLR 1038 was a domestic extradition case concerning s 82 of the EA 2003 (delay, making identical provision to s 14 in Part 1 of the Act). Amongst the issues arising was the correct approach to the question raised by s 82 as to whether the passage of time makes extradition unjust. In giving the judgment of the Privy Council, Lord Brown said this (emphasis added)::

> "36. …. [W]e would . . . stress that the test of establishing the likelihood of injustice will not be easily satisfied. *The extradition process, it must be remembered, is only available for returning suspects to friendly foreign states with whom this country has entered into multilateral or bilateral treaty obligations involving mutually agreed and reciprocal commitments. The arrangements are founded on mutual trust and respect. There is a strong public interest in respecting such treaty obligations. As has repeatedly been stated, international co-operation in this field is ever more important to bring to justice those accused of serious cross-*

> *border crimes and to ensure that fugitives cannot find safe havens abroad.* We were told that the section 82 (or section 14) 'defence' is invoked in no fewer than 40% of extradition cases. This seems to us an extraordinarily high proportion and we would be unsurprised were it to fall following the Committee's judgment in the present case." (para 36)

51. There are many cases where similar sentiments have been expressed in relation to non-EU extradition partners: see eg *Norris (No 2)*, [98]. In the mutual assistance context the same sentiment was expressed in *R v Secretary of State for the Home Department, ex parte Abacha* [2001] EWHC Admin 787, [7].

52. In *Patel v Government of India* **[**2013] EWHC 819 (Admin), the Court said at [14]:

> "India and the United Kingdom have had extradition relations for many years through the Commonwealth Scheme for Extradition. There is an extradition treaty between the UK and India, signed in 1992, intended specifically to "make more effective the co-operation of the two countries in the suppression of crime by making further provision for the reciprocal extradition of offenders". This relationship supports the presumption of good faith which is the starting point in considering any ground based upon abuse of process.

53. To my mind, there is no real or significant material difference between these different formulations of language, and that of [10] of the Preamble to the EAW Framework Decision. They are all expressing the same idea, namely, we are to have trust and confidence in our extradition partners and assume they are acting in good faith. Mr Henley relied on *Zabolotnyi v Hungarian Judicial Authority* [2021] 1 WLR 2569 but I do not think this avails him. As Mr Ball said, principles of international comity still apply in extradition, just as they always did. He also said that on close analysis TACA does not differ all that much from the EAW Framework Decision. As a broad proposition I agree with that (but without going into a line by line comparative analysis). There are differences (for example Framework Preambles are not reproduced), as Mr Henley emphasised, but there are many parts which are very similar, if not identical.

54. The Appellant's criticism is, I think, ultimately that 'Simple reliance on the length of sentence imposed as a means of assessing seriousness is wrong. (Skeleton, [15]). It is suggested the judge should have looked more closely at what sentence might have been passed if the sentence had occurred in the UK as an indicator that this is not serious offending.

55. As I remarked earlier, the Appellant's sentence does seem long to English eyes (but it can also be said that he has only got himself to blame for that by breaching the terms of his suspended sentence).

56. However, once it is recognised, per *Badea*, that TACA does not require a different approach to proportionality than Article 8 as it applied under the

EAW scheme, the greater problem for the Appellant, however, is that the Appellant's argument flies in the face of *Celinski*, where the Lord Chief Justice said:

> "13 Sixth in relation to conviction warrants:
>
> (i) The judge at the extradition hearing will seldom have the detailed knowledge of the proceedings or of the background or previous offending history of the offender which the sentencing judge had before him.
>
> (ii) Each member state is entitled to set its own sentencing regime and levels of sentence. Provided it is in accordance with the Convention, it is not for a UK judge to second guess that policy. The prevalence and significance of certain types of offending are matters for the requesting state and judiciary to decide; currency conversions may tell little of the real monetary value of items stolen or of sums defrauded. For example, if a state has a sentencing regime under which suspended sentences are passed on conditions such as regular reporting and such a regime results in such sentences being passed much more readily than the UK, then a court in the UK should respect the importance to courts in that state of seeking to enforce non-compliance with the terms of a suspended sentence.
>
> (iii) It will therefore rarely be appropriate for the court in the UK to consider whether the sentence was very significantly different from what a UK court would have imposed, let alone to approach extradition issues by substituting its own view of what the appropriate sentence should have been. As Lord Hope of Craighead DPSC said in H(H) [2013] 1 AC 338, para 95 in relation to the appeal in the case of PH, a conviction warrant:
>
> > "But I have concluded that it is not open to us, as the requested court, to question the decision of the requesting authorities to issue an arrest warrant at this stage. This is their case, not ours. Our duty is to give effect to the procedure which they have decided to invoke and the proper place for leniency to be exercised, if there are grounds for leniency, is Italy."
>
> Lord Judge CJ made clear at para 132, again when dealing with the position of children, that:
>
> > "When resistance to extradition is advanced, as in effect it is in each of these appeals, on the basis of the article 8 entitlements of dependent children and the interests of society in their welfare, it should only be in very rare cases that extradition

> may properly be avoided if, given the same broadly similar facts, and after making proportionate allowance as we do for the interests of dependent children, the sentencing courts here would nevertheless be likely to impose an immediate custodial sentence: any other approach would be inconsistent with the principles of international comity. At the same time, we must exercise caution not to impose our views about the seriousness of the offence or offences under consideration or the level of sentences or the arrangements for prisoner release which we are informed are likely to operate in the country seeking extradition. It certainly does not follow that extradition should be refused just because the sentencing court in this country would not order an immediate custodial sentence: however it would become relevant to the decision if the interests of a child or children might tip the sentencing scale here so as to reduce what would otherwise be an immediate custodial sentence in favour of a non-custodial sentence (including a suspended sentence)."

57. The passage from *Celinksi* which I have quoted does not shut the door on an argument that a sentence could be so disproportionate or plainly and obviously long and wrong that it would violate Article 8 (or for that matter, Article 3) of the ECHR. But it makes clear that such cases would be rare and extreme.

58. That theoretical possibility was countenanced in two earlier cases in particular. The first was the House of Lords' judgment in *R (Wellington) v Secretary of State for the Home department* [2009] 1 AC 335, which was concerned with the proportionality of life sentences in murder cases as applied in the United States (which of course is not bound by the ECHR but has its own set of constitutional guarantees), and whether they were incompatible with Article 3 of the ECHR, but the House took a more general look at proportionality of sentencing. At [32] Lord Hoffman referred to a Canadian Supreme Court case and stated as follows:

> "32. …In *R v Smith (Edward Dewey)* [1987] 1 SCR 1045 it decided that a law which imposed a mandatory sentence of seven years' imprisonment for importing, for whatever reason, any quantity of prohibited drugs, was unconstitutional because it was inevitable that in some cases it would lead to a grossly disproportionate and therefore "cruel and unusual" punishment. On the other hand, in *United States v Burns* [2001] 1 SCR 283 and *United States v Ferras* [2006] 2 SCR 77 it was decided that only in extreme cases (something which "shocked the conscience" was the phrase used) would the potential sentence in the receiving country justify a refusal to extradite. A long mandatory sentence for drug dealing was not sufficient."

59. And at [35] he said:

> "However, even if the sentence is irreducible and might therefore contravene article 3 if imposed in the United Kingdom, there remains the question of whether it would contravene article 3 as interpreted in the context of extradition. In my opinion it would only do so if one would able to say that such a sentence was likely, on the facts of the case, to be clearly disproportionate. In a case of extradition we are not concerned, as the Canadian Supreme Court was in *R v Smith* [1987] 1 SCR 1045, with the constitutionality of the law under which the mandatory sentence is imposed. In such a case, it is sufficient to invalidate the law that it would be bound in some cases to produce disproportionate sentences. In extradition, however, one is concerned with whether in this case the sentence would be grossly disproportionate. The fact that it might be grossly disproportionate in other cases is irrelevant."

60. The second case was *Inzunza v Government of the United States* [2011] EWHC 920 (Admin). Gross LJ said at [12]-[19]:

> "12. *The extradition context:* If Art. 3, ECHR has a very limited application to life sentences within the domestic context, the scope of its application to life sentences, for unlawful killing or other very grave offending, in the extradition context, is likely to be no greater and, it is suggested, should be still more limited. The ECHR has, as is to be expected, a territorial reach, limited to the jurisdiction of the Contracting States: *Soering*, at [86]. Further (*ibid*):
>
> > " …the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States."
>
> 13. There can, accordingly, be no question of adjudicating on the responsibility of the receiving country in respect of its treatment of an individual surrendered by a Contracting State; liability, if any, under the ECHR can only be incurred by the extraditing Contracting State: *Soering*, at [86] – [90]. The Strasbourg jurisprudence imposes what may be described as a residual liability on extraditing Contracting States by way of the absolute prohibition on "…inhuman or degrading treatment or punishment". If, therefore, the applicant establishes (the burden being on him to do so) that there are substantial grounds for believing that he faces a real risk of treatment incompatible with Art. 3 if extradited to a (non-ECHR) receiving state, then the extraditing Contracting State will not be absolved from responsibility under Art. 3

for "all and any foreseeable consequences of extradition": *Soering*, at [86]; *Saadi*, at [124] *et seq*.

14. This is, however, a difficult area, crying out for tempering excesses of theory with practical good sense. Art. 3 embodies a fundamental value, it must be hoped, across Europe and beyond; but only cynicism and the devaluation of this fundamental principle can result if the balance struck by the courts fails properly to reflect the needs of the community as well as the rights of the individual. Fortunately, as it seems to me, in the field of extradition, the route to be followed in order to achieve a sensible balance has been clearly mapped out by the European Court of Human Rights ("the Strasbourg Court") and the House of Lords.

15. First, as recognised in *Soering* itself (at [89]), inherent in the ECHR is the search for a "fair balance" between the demands of the community and the protection of the individual. In this regard, there is a strong policy interest in an effective system of extradition. As the Strasbourg Court observed (*loc cit*):

> ‘As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.’

16. Secondly, in my respectful view, the logic of this reasoning points to the underlying strength of the speeches of the majority in *Wellington* (Lord Hoffmann, Baroness Hale of Richmond and Lord Carswell), in adopting a "*relativist*" view of the application of Art. 3 in the extradition context. As expressed by Lord Hoffmann (at [24]):

> ‘Punishment which counts as inhuman and degrading in the domestic context will not necessarily be so regarded when the extradition factor is taken into account.’

As Baroness Hale explained (at [51]), though the Art. 3 prohibition is absolute once it has been determined that there

is a real risk of treatment contrary to Art. 3, the assessment of whether there is such a risk is relative. In all this, the alleged conduct of the party resisting extradition may be "central to the assessment" of whether the punishment is inhuman or degrading. For his part, Lord Carswell spoke, with respect, tellingly (at [62]), of seeing matters:

> ‘ …through the prism of an application for extradition….

17. Thirdly, by treating Art. 3 as applicable only in "an attenuated form" in the extradition context (*Wellington*, at [28]), the test of whether a potential sentence in the receiving state is such as to justify a refusal to extradite, is set necessarily high. For my part, I would respectfully adopt either of Lord Hoffmann's formulations, namely, that to justify a refusal to extradite to a non-ECHR state, the potential sentence must be one which ‘shocked the conscience’ or was likely, on the facts of the case to be ‘clearly disproportionate’: *Wellington*, at [32] and [35]. Any lesser test would fail to give proper effect to the public interest in effective extradition arrangements and could only serve to bring the law in this area into disrepute.

18. Fourthly, though as a practical matter it is difficult for an English Judge to avoid having regard to sentences in this jurisdiction by way of a frame of reference, I am unable to accept that sentencing practice in this jurisdiction is entitled to any greater weight than that. Mr. Blaxland QC's "speaking note" included the following submission:

> "In order to maintain objectivity in the assessment of what is disproportionate the court should start by taking into account the sentence which would be imposed in the domestic jurisdiction. If the sentence to be imposed would significantly exceed that which would reasonably be expected in the UK that is a highly relevant consideration."

I respectfully disagree. Merely because on a given set of facts, the sentence in England would likely be X years, whereas in (say) Florida it would likely be 2X years, cannot justify a refusal to extradite. The danger of such an approach is that, however indirectly, it seeks to impose English sentencing policy on other states, while failing to give effect to the proper interest in effective extradition arrangements. Moreover, as Davis J pointed out in argument, were such an approach to be adopted, it is not self-evident why *English* sentencing levels as opposed to those found in ECHR Contracting States generally (which can of course vary

> between such States themselves), should provide the benchmark."
>
> 19. Fifthly and confining myself throughout to unlawful killing or other very grave offending, it would seem to follow from the discussion of the domestic context, that neither (i) a determinate sentence nor (ii) a discretionary life sentence (whether irreducible or not) will readily give rise to any Art. 3 issue in the extradition context. In this field, as elsewhere, over-rigidity is unwise; I would therefore be reluctant to conclude that such sentences could *never* give rise to Art. 3 issues but it would be distinctly curious if Art. 3 had a greater scope of application in the extradition context than it has in the domestic context. Accordingly, although the test for a refusal to extradite (see above) is whether the potential sentence "shocked the conscience" or "is clearly disproportionate", it must (at the least) be unlikely that either a determinate sentence or a discretionary life sentence (whether irreducible or not) will satisfy that test."

61. But whatever else might be said about the present appeal case, there is nothing about it which begins to suggest that it should be one of those rare or exceptional cases where a court should now start looking behind the sentence which has been imposed. My conscience is not shocked and I do not regard the sentence as disproportionate or 'savage and unconscionable' as Mr Henley described it below (judgment, [11] and [37]). Mr Ball said there would need to be compelling evidence, and I agree, and it also seems to me there is no such evidence.

62. There is also nothing to show exceptional hardship in Article 8 terms. That is for the following reasons.

63. Firstly, Romania is governed by the ECHR. There is a presumption that it will comply with it.

64. Second, the Appellant was given a chance in Romania in the form of a suspended sentence. He did not take that chance. He is only in the position that he is in now through his own choice.

65. Third, the Appellant went on to commit a number of similar offences after coming to this country. including driving whilst uninsured, driving with excess alcohol and failing to provide a specimen. He also has a theft conviction for shoplifting.

66. Fourth, although the Appellant has four children (and another relative who lives with him), there is nothing to suggest that they have any particularly acute needs which could not be met if the Appellant were to serve the sentence which was lawfully imposed. Indeed, as Mr Ball pointed out, it is of note that the Appellant and his partner both came to the UK together in December 2018, and left their children behind for the first six months (Judgment, [27]). The children have obviously managed before, not just without the Appellant, but without both parents. This was a separation of choice.

67. So too, the evidence is that the Appellant's partner currently in receipt of child allowance. The judge properly found that she may either work again as she has previously or have recourse to further state benefits (judgement, [57]). There is nothing approaching the specific circumstances of this family which might require the court to carry out the exceptional exercise of looking behind the sentence passed, and inquiring what might be passed in this jurisdiction.

68. I have considered the judge's treatment of the Article 8 argument in his judgment at [52] onwards. The judge directed himself correctly on the law and listed the factors for and against extradition. This was the orthodox approach, but for the reasons I have given, TACA does not require any different approach. The judge was not wrong on this account.

69. I turn to the second limb of Mr Henley's submissions, namely that the judge was wrong to find the Appellant was a fugitive. It is said this wrong finding fatally infected the judge's Article 8 analysis.

70. I find the judge was not wrong. The Appellant's clear evidence, as recorded by the judge at several points, was that he had left Romania knowing that he was being prosecuted, because he had been charged by the police and so had that knowledge albeit he had not been sentenced. For example, the judge said at [23]-[24]:

> "23. In cross-examination, the RP confirmed that on 19 August 2018, he was arrested for driving without a licence and refusing to provide a breath sample. He confirmed that he was charged with those offences, instructed a lawyer, then left Romania on 12 December 2018. He said that at that point, his lawyer was still representing him, and appeared at his trial after he left. Asked whether it followed that, before he left Romania, he knew he was being prosecuted for the EAW offences, the RP confirmed that he did, and that he left before his trial knowing that it would go ahead without him. He confirmed that he also knew that he was avoiding any sentence that he might get after the trial.
>
> 24. It was put to the RP that, accordingly, when he left Romania, he did so to avoid being prosecuted for the EAW offences. The RP said that was not so. He accepted that he had not been back to Romania since 2018, but said that was not in order to avoid having to face a sentence."

71. At [41(g)-(i)] the judge said:

> "(g) I find the RP to be a fugitive because, on his own evidence (summarised above), he accepts that he left Romania in the full knowledge of his proceedings, and knowing that he would miss his trial and escape any sentence that would be imposed if he were to be convicted, as indeed he was. I find striking the proximity between his departure date of 12 December 2018 and his arrest 3 months and 24

> days earlier on 19 August 2018. I find he was deliberately and knowingly placing himself beyond the reach of the Romanian legal process. He candidly accepted in his evidence that he knew he was being prosecuted for the EAW offences, and that he left before his trial knowing that it would go ahead without him. He confirmed that he also knew that he was avoiding any sentence that he might get after his trial.
>
> (h) I accept that the RP left Romania before his sentence was imposed, and did not find out about it until some 5-6 months later. He therefore could not realistically have complied with its
> requirements of unpaid work and probation supervision, but that is only because he did not care to remain for his trial and potential sentence, because he had fled Romania as a fugitive from justice.
>
> (i) I find he objectively became unlawfully at large at the latest on 17 September 2020 (the date the JA consider he became unlawfully at large in the Further Information), when the decision as to his outstanding sentence became final."

72. Against the background of this evidence and findings of fact, the judge's finding of fugitivity is virtually unchallengeable. The approach of this Court to its task of deciding whether the district judge should have decided the case differently (the test for allowing an appeal), particularly in the context of her evaluation of the evidence, was set out in *Wiejak v Olsztyn Circuit Court of Poland* [2007] EWHC 2123 (Admin), and has been acted upon regularly since then In *Wiejak*, Sedley LJ said at [23]:

> "23. The effect of sections 27(2) and (3) of the Extradition Act 2003 is that an appeal may be allowed only if, in this court's judgment, the District Judge ought to have decided a question before her differently. This places the original issues very nearly at large before us, but with the obvious restrictions, first, that this court must consider the District Judge's reasons with great care in order to decide whether it differs from her and, secondly, that her fact-findings, at least where she has heard evidence, should ordinarily be respected in their entirety."

73. At [42]-[43] the judge directed himself correctly by reference to *Wisniewski v Polish Judicial Authority* [2016] 1 WLR 3750 where Lloyd-Jones LJ (as he then was) said that a person subject to a suspended sentence who voluntarily left the jurisdiction in question, thereby knowingly preventing himself from performing the obligations of that sentence, and in the knowledge that the sentence might as a result be implemented, was a fugitive at common law and so would be precluded from relying on the passage of time bar in sections 11 and 14 of the Extradition Act 2003 if his sentence were, as a result, subsequently activated; that it would be irrelevant that the person's motive for leaving the

jurisdiction had not been a desire to avoid the sentence or that the person had not been aware that the suspended sentence had been activated.

> "48. The test for fugitive status is whether the requested person knowingly placed himself beyond the reach of a legal process. It is to be noted that, unlike the test for being unlawfully at large (which is objective), the test for fugitive status is subjective – the requested person must be shown deliberately and knowingly to have placed himself beyond the reach of the relevant legal process."

74. At [60] he said:

> "60. 1 consider that a person subject to a suspended sentence who voluntarily leaves the jurisdiction in question, thereby knowingly preventing himself from performing the obligations of that sentence, and in the knowledge that the sentence may as a result be implemented, cannot rely on passage of time resulting from his absence from the jurisdiction as a statutory bar to extradition if the sentence is, as a result, subsequently activated. The activation of the sentence is the risk to which the person has knowingly exposed himself. In my view, such a situation falls firmly within the fugitive principle enunciated in *Kakis's* case [1978] 1 WLR 779 and *Gomes's* case [2009] 1 WLR 1038. The fact, if it be the case, that a person's motive for leaving the jurisdiction was economic and not a desire to avoid the sentence, does not make the principle inapplicable."

75. At [44] the judge directed himself by reference to *De Zorzi v French Judicial Authority* [2019] 1 WLR 6249, [48]:

> "It is to be noted that, unlike the test for being unlawfully at large (which is objective), the test for fugitive status is subjective – the requested person must be shown deliberately and knowingly to have placed himself beyond the reach of the relevant legal process."

76. The judge concluded at [45]:

> "Considering the foregoing principles, for the reasons set out in my findings, I find that it has been demonstrated to the criminal standard that the RP is a fugitive. He left Romania in full knowledge of his proceedings, having instructed a lawyer, and caring neither to participate in his trial nor whether he would be sentenced nor to comply with any consequential terms. He placed himself beyond the reach of the Romanian authorities, consistent with his evidence that he has never returned since."

77. This was an impeccable finding. Whether or not he was under an obligation to stay in Romania (and I will assume he was not) is neither here nor there. He left Romania to put himself out of reach of the Romanian judicial system.

78. As Mr Ball pointed out, the Appellant was legally represented (at least for some of the time) and could easily have found out about the status of his case in Romania (if he really did not know about his sentence, which is what the judge found). Someone who leaves a foreign country to come to this country knowing that they are going to be prosecuted cannot be heard to argue they are not a fugitive if they deliberately close their eyes and ears to the realities of the situation so they do not find out about their sentence: see *Makowska v Polish Judicial Authority* [2020] 4 WLR 161, [28] ('A person whose location changes, with a lack of information, becoming elusiveness can be seen as a paradigm case of a fugitive.')

79. Overall, therefore, the Judge was not wrong to find that the Appellant was a fugitive.

Conclusion

80. For these reasons, the appeal is dismissed.