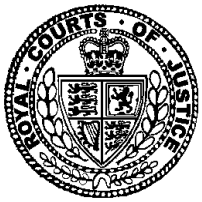

Neutral Citation Number: [2023] EWHC 513 (Admin)

Case No: CO/831/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 March 2023

Before :

MRS JUSTICE YIP DBE

- -

Between :

VALERIU-COSMIN ARGESEANU

Appellant

- and -

PETROSANI COURT OF LAW, ROMANIA

Respondent

- -
- -

Martin Henley (instructed by) AM International Solicitors for the Appellant
David Ball (instructed by) The Crown Prosecution Service for the Respondent

Hearing dates: 16 February 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 9 March 2023 by circulation to the parties' representatives by e-mail and by release to the National Archives.

.....

Mrs Justice Yip DBE:

1. The appellant, Mr Argeseanu, appeals against the decision of District Judge Bristow on 4 March 2022 to extradite him to Romania to serve a sentence of imprisonment of 3 years and 1 month.

2. There are four grounds of appeal:

   i) The District Judge was wrong to find that the appellant was a fugitive;

   ii) The appellant should have been discharged under section 14 of the Extradition Act 2003 on the ground of passage of time;

   iii) The District Judge was wrong to dismiss the appellant's Article 8 claim under section 21 of the Extradition Act 2003;

   iv) The extradition proceedings on the current warrant were an abuse of process and the District Judge erred in his approach to that.

3. Leave to appeal was granted by Thornton J at an oral renewal hearing on 7 October 2022.

The European arrest warrant

4. The appellant's extradition is sought pursuant to a European arrest warrant issued on 1 November 2018 and certified on 14 November 2018 ("EAW3"). EAW3 is a conviction warrant which relates to four offences, one offence of "outrage against morality and public disturbance" committed in 2005 and three assaults committed on a single night in 2004.

5. At the hearing before me, the 2005 offence was described as "criminal damage", although that does not fully encapsulate the offending. It appears that this was a public order offence, during which criminal damage was caused (breaking windows). There is no dispute that all four offences are extradition offences.

6. Although no other offence is referred to in EAW3, there is a further relevant offence, details of which were provided in further information served by the respondent on 20 February 2020. The appellant had previously been convicted of an assault committed on 17 July 2002. On 17 June 2003, he was conditionally pardoned with a sentence of 1 year 6 months' imprisonment in default should he commit a further offence within 3 years ("the suspended sentence"). His conviction for the 2004 and 2005 matters put him in default of the suspended sentence. On 25 January 2006, the Hunedoara Court of Law sentenced the appellant to two years' imprisonment for the 2004 assaults. This sentence was made up of 6 months' imprisonment for the new offences and activation of the suspended sentence. On 15 May 2007, the Petrosani Court of Law sentenced the appellant to 1 year 6 months' imprisonment for the 2005 offence and also activated the suspended sentence in full, making a total of three years' imprisonment. It appeared therefore that the suspended sentence had been activated twice.

7. On 25 September 2018, the Romanian court allowed an application by the appellant to unmerge the previous sentences and to merge all sentences into one. The appellant did not attend the re-sentencing hearing but knew of it and had instructed his lawyer to

appear on his behalf. The court unmerged the sentence imposed for the three assaults into its component parts and then merged these sentences with the sentence for the 2005 offence, arriving at a sentence of 1 year 7 months' imprisonment. The sentence of 1 year 6 months' imprisonment for the 2002 offence remained activated and was added to that, making a total to serve of 3 years and 1 month. This new sentence became irrevocable on 30 October 2018 and forms the basis of EAW3.

Previous extradition proceedings

8. Attempts to extradite the appellant have had a somewhat troubled history. His extradition was first sought by way of an arrest warrant issued on 26 August 2010. This warrant related to the 2005 offence. It was not certified until 17 February 2012. I shall refer to this warrant as "EAW2" since that is how it was described in earlier proceedings to which I shall refer. However, DJ Bristow chose to refer to it as "EAW1" since it was the first warrant issued. A second warrant (which I shall refer to as "EAW1" as described in the earlier proceedings; "EAW2" in DJ Bristow's judgment) which related to the 2004 offences was issued on 27 July 2012 and certified on 24 August 2012. Following separate extradition hearings, the appellant was discharged on both warrants because they were not sufficiently particularised.

9. EAW1 and EAW2 were both reissued in 2016. EAW1 sought the appellant's extradition to serve a sentence of 2 years and EAW2 a sentence of 3 years. There were continuing failures in the supply of sufficient and accurate particulars. In particular, neither warrant particularised the 2002 offence which gave rise to the original sentence of 1 year 6 months and which is now known was a component part of both sentences. Both warrants were considered at an extradition hearing before District Judge Branston who delivered his decision on 4 October 2016. DJ Branston found that the appellant was a fugitive, having been present at his trials and being aware of the outstanding proceedings. Given the lack of particularity about the 2002 offence, he discharged the appellant on those parts of both EAW1 and EAW2 that related to the sentence of 1 year 6 months for that offence. However, he concluded he could excise those parts and uphold the remainder of the warrants as valid. This led to him ordering the appellant's extradition on EAW1 for the three assault offences for which he received a sentence of 6 months and on EAW2 for the 2005 offence for which he received a sentence of 18 months.

10. The appellant appealed to this court. His appeal was dismissed by McGowan J on 28 March 2018 (see *Argeseanu v Romania* [2018] EWHC 670 (Admin)). Those proceedings were not finally concluded as the appellant sought the certification of a point of law of general public importance. While the outcome of that application was awaited, the appellant's request for his sentences to be unmerged and dealt with together led to him being re-sentenced as set out above. The respondent then issued EAW3 based on the new sentence and withdrew EAW1 and EAW2.

11. It can be seen from the above summary that had the appellant been extradited on EAW1 and EAW2, following the refusal of his appeal in 2018, he could have expected to serve a total of 2 years. If extradited pursuant to EAW3, he will be required to serve 3 years and 1 month. The appellant claims that EAW3 represents an abuse of process because it is an attempt to reinstate the 2002 offence in relation to which he was discharged in 2012 and again in 2016 and would have the effect of increasing the sentence he faced in 2016. The respondent says it is not an abuse at all. EAW3 relates to the revised

sentence imposed in 2018 following a request by the appellant. The respondent argues that the appellant can hardly complain that a new warrant was issued in relation to the new sentence when it was his action that led to that sentence.

The District Judge's decision

12. The District Judge found that the appellant came to this country in 2007, sometime after May 2007. He did so on the basis that the appellant had been present at the trial in the Petrosani Court on 15 May 2007. He rejected the appellant's evidence that he came in January 2007. The respondent now accepts that it cannot be asserted that the appellant was at the May 2007 hearing. However, there was clear evidence he was present at court in January 2007.

13. The judge found that the appellant was a fugitive when he came from Romania in 2007 and that he continued to be a fugitive after he was arrested here in 2012. On the appellant's status after 2012, the District Judge said:

> "He chose to continue to remain beyond the reach of Romanian justice. He could have consented to extradition or chosen to return voluntarily to Romania. He may have been living in plain sight in the UK, but I am sure one of his reasons for remaining in the UK was to avoid the punishment imposed by the Romanian court – the same reason he fled to Romania in 2007."

The judge noted that when asked why he did not go back to Romania in 2007/2008, the appellant said, "It did not appear correct that I should go to prison."

14. Having found that the appellant was a fugitive both before and after his arrest in 2012, the District Judge concluded that he could not rely upon the passage of time to bar his extradition under section 14 of the 2003 Act.

15. In considering section 21 of the 2003 Act, the District Judge dealt with the appellant's Article 3 and Article 8 rights. Given the issues on this appeal, I do not need to say anything about Article 3. In considering Article 8, the judge balanced the factors for and against extradition, following *Poland v Celinski* [2015] EWHC 1274 (Admin). The judge gave weight to the public interest in ensuring extradition arrangements are honoured and in discouraging fugitives such as the appellant from seeing the UK as a safe haven. He also took account of the seriousness of the offences and the length of sentence, all of which remained to be served. He also noted that the appellant had committed an imprisonable offence in this country which was serious enough to attract a community order (failing to provide a specimen of breath after a road traffic collision). Against that, he recognised the interference with the appellant's family life and that of his family. He recognised that the interests of his children carried particular weight. He also took account of the age of the offences.

16. In analysing the appellant's family life. The judge noted that he was then aged 39 and had been in this country for around 14 years 9 months. He found the children would remain with their mother and that she had support from other family members. The children had no special needs or health problems. The judge highlighted that Mrs Argeseanu had acknowledged that they knew the appellant might be required to return to Romania to serve his sentence. The judge noted the appellant might be concerned

about whether he could return to the UK after serving his sentence. The appellant had some health problems (some of which stem from being seriously assaulted himself in the course of the incident that led to the 2004 assault convictions) but there was no evidence such could not be managed in Romania. He has family members in Romania.

17. Having balanced these factors, the judge found that the factors in favour of extradition significantly outweighed those against. He said, "The scales fall decisively in favour of extradition." He was therefore satisfied that extradition was compatible with the appellant's Convention rights.

18. The District Judge then dealt with the abuse of process argument. He identified that the appellant complained about the history of the proceedings, in particular their length, the issue and re-issue of the two previous arrest warrants, their complexity and the failure of the judicial authority to bring the whole of the case at first instance. The judge then said:

> "The burden lies with the Requested Person to prove an abuse of process to the civil standard, that is on the balance of probabilities. The Requested Person must bring cogent evidence of the abuse."

19. He found that the appellant had not identified with specificity what was alleged to constitute the abuse and had not brought cogent evidence that the matters complained of constituted abuse. He said:

> "In my judgment, he cannot complain that [the previous arrest warrants] were withdrawn by the Judicial Authority and that EAW3 was then issued as this was brought about by his application for the sentences to be unmerged. That application was to his benefit as the length of sentence was reduced and EAW3 then particularised with clarity the offences and the sentence to be served. The Judicial Authority has brought the whole of its case in relation to EAW3 once that case was reconfigured in consequence of the Requested Person's application."

The judge found that the abuse of process argument could not be sustained.

Ground 1: The finding that the appellant was a fugitive

20. At the start of the extradition hearing, Mr Henley conceded that the appellant was a fugitive when he arrived in the UK in 2007 until his arrest in 2012. The appellant did not maintain that concession in evidence. Mr Henley says that he was wrong to have made it. The concession having been withdrawn, the District Judge did not treat the appellant as bound by it and made findings of fact on the issue.

21. The appellant says that the judge was wrong to find that he was a fugitive at all. It is argued that the judge's erroneous conclusion that the appellant did not leave Romania until after May 2007 impacted on his view of the appellant's credibility and must have played a part in his other factual findings.

22. I do not accept that. While it is now agreed that the evidence does not establish that the appellant was at the hearing in May 2007, it is clear that he was in attendance in January 2007.

23. In his 2016 ruling, DJ Branston found that the appellant was a fugitive when he came to the UK in 2007. He had confirmed in evidence that he left Romania knowing about the criminal proceedings. McGowan J upheld that finding in refusing a renewed application for permission to appeal on a ground under section 14 at the time of hearing the substantive appeal.

24. The respondent bears the burden of proving that the appellant was a fugitive to the criminal standard. The test is whether the requested person has knowingly placed himself beyond the reach of the criminal justice system concerned (see *Wisniewski v Poland* [2016] EWHC 386 (Admin) at [59] to [60]). The judge found that the proximity of the proceedings in Romania and his departure for the UK was no coincidence. The judge found that the appellant's reason for fleeing Romania and one of the reasons for him remaining in the UK was to avoid the punishment imposed by the Romanian court, noting his evidence, "It did not appear correct that I should go to prison."

25. Mr Henley argues that the appellant remained engaged with the legal process and that there is no evidence that there was an prohibition on him residing in the UK. However, the judge was plainly entitled to find that he came to the UK to put himself beyond the reach of the Romanian courts. It makes no material difference whether he came before or after May 2007. The judge's finding was consistent with the finding in the earlier proceedings, and no basis has been identified for going behind this. Although the judge did not hold the appellant to the concession made on his behalf that he was a fugitive between 2007 and 2012, that concession was in fact properly made.

26. From 2012, following his arrest in the UK, the Romanian authorities knew where the appellant was. He engaged with the extradition proceedings, which first began in 2012. He was discharged following the first hearing in 2012. His extradition was then ordered in part in 2016 but was subject to appeal, which appeal had not been finalised before the warrants were withdrawn and EAW3 was issued in 2018. District Judge Branston found that the appellant bore no responsibility for the delay between 2012 and 2016. The further delay since then was caused by the appellant exercising his appeal rights until the end of 2018. Thereafter, the warrants on which extradition were withdrawn and the extradition process began again on the basis of the re-sentencing decision initiated by the appellant's application. In relation to the period from the issue of EAW3 (November 2018) to the extradition hearing in February 2022, the District Judge said:

> "Some further delay was also brought about by the Requested Person committing the failure to provide offence in the UK, though I accept that adjournments of these proceedings resulting from the coronavirus pandemic cannot be his fault."

27. Mr Henley argues that, even if the appellant was a fugitive from 2007 to 2012, his fugitive status ceased on his arrest.

28. In *Gomes v Trinidad and Tobago* [2009] UKHL 21, it was said that where an accused had deliberately fled the jurisdiction it did not lie in his mouth to suggest that the

requesting state should share responsibility for the ensuing delay in bringing him to justice because of some supposed fault on their part.

29. In *Done v Romania* [2020] EWHC 3192 (Admin), May J allowed an appeal against an extradition order brought by a man who had been the appellant's co-defendant in relation to the May 2005 offence. She upheld the decision of the court below that Mr Done was a fugitive when he came to the UK in 2007 and did not accept that his status changed following his arrest in 2013. This was the same argument as is advanced here. May J said (at [54]):

> "In the present case the appellant remained out of reach of the domestic Romanian legal process whilst he remained in the UK, whether or not he had been arrested on the first, or any subsequent, warrant."

Mr Henley contends that May J was wrong about this. He asserts that the extradition proceedings were an integral part of the legal process in Romania, so too was the appellant's discharge (in 2012) part of the Romanian legal process.

30. Following the reasoning in *Gomes*, I agree with May J that a person who has left the jurisdiction of the requesting state as a fugitive does not cease to be treated as a fugitive simply because he has been arrested and then takes part in extradition proceedings. However, whether the appellant is to be classed as a fugitive from 2012 or not does not create a hard line on one side of which he is entitled to rely on the undoubtedly significant delay and on the other side of which all delay must be ignored. May J found in *Done* (at [56]) that there had been periods of delay which could not properly be attributed to Mr Done's fugitive status. His whereabouts were known since 2013, there had been two occasions when the warrant was discharged and the warrant on which extradition was then sought was not issued until 2019. May J found that the effect of the finding that Mr Done was a fugitive was necessarily nuanced when it came to the assessment of the Article 8 balance. The same can be said here. Whether or not the appellant is treated as having retained his fugitive status after 2012, that status does not properly explain the delay since 2012. The finding of DJ Branston was to the effect that the delay after 2012 was not the appellant's fault. If DJ Bristow's conclusion on this differed (which is not clear), I prefer the conclusion of DJ Branston since it is plain that after 2012, the delay stemmed from the troubled history of the extradition proceedings (coupled with some delay due to the Covid-19 pandemic after the EAW3 proceedings were initiated).

31. The term "fugitive" is not a statutory one. It is a concept developed in the case law to prevent someone who has fled the jurisdiction to avoid justice benefiting from the consequences of his own conduct. In *Wisniewski*, the Divisional Court said (at [59]):

> "Where a person has knowingly placed himself beyond the reach of a legal process he cannot invoke the passage of time resulting from such conduct on his part to support the existence of a statutory bar for extradition." (My emphasis added.)

As the court made clear, it is more fruitful to consider the applicability of that general principle on a case by case basis than to seek a comprehensive definition of the term "fugitive".

32. For my part, I consider it may be open to the appellant to say on the facts of this case that the passage of time since 2012 was not due to conduct on his part and therefore does not prevent him seeking to rely on the statutory bar under section 14 in relation to the passage of time since then.

33. Whether that is right or not, following the observations of the Supreme Court in *Konecny v Czech Republic* [2019] UKSC 8 (at [57]), Article 8 provides an appropriate and effective alternative means of addressing the passage of time even where section 14 is not available. There it was stated:

> "Passage of time is clearly capable of being a relevant consideration in weighing the article 8 balance in extradition cases. (See *H(H) v Deputy Prosecutor of the Italic Republic, Genoa (Official Solicitor intervening)* [2013] 1 AC 338, paras 6 and 8, per Baroness Hale JSC.) It is capable of having an important bearing on the weight to be given to the public interest in extradition. In the article 8 balancing exercise, the relevant period of time will not be subject to the restrictions which appear in section 14."

34. In the circumstances, I find it unnecessary to resolve the question of whether the District Judge was wrong to treat the appellant as a fugitive after 2012. That question is not determinative of the appeal. That is because the arguments on delay can be fully accommodated under Article 8. That allows for a more nuanced consideration, based upon the finding that the appellant was a fugitive when he came to this country in 2007 and the conclusion that he cannot be held responsible for the delay since 2012. Indeed, both parties conceded in the course of argument that the most obvious and appropriate way for the appellant's arguments based upon the troubled history of the extradition proceedings, and the resulting delay, was via Article 8.

Ground 2: Section 14

35. In light of that agreement, I shall deal with section 14 briefly.

36. For the respondent, Mr Ball argued that even if section 14 is in play, time for these purposes would run only from 30 October 2018. That date is the date upon which the sentence imposed following the appellant's application for his sentences to be merged became final. Mr Ball contends that "time runs for s14 purposes from the date the decision on which the warrant is based is made final." He relies upon *Konecny*, specifically at [53] of the judgment.

37. In his skeleton argument, Mr Henley had contended that the appellant would be entitled to rely on the passage of time from 2012, if not from January 2006. However, in replying to the respondent's submissions, he said that he did not press the section 14 point although it "seemed wrong" that a sentencing hearing which redetermines the length of sentence resets the clock.

38. Given the way the appeal was argued before me, the parties did not explore their respective arguments further. No further authorities were cited for or against the proposition that the clock for section 14 purposes was reset upon the appellant being resentenced. For my part, I am not convinced the respondent's position is correct.

Konecny dealt with the position where a person had been convicted but had the right to a retrial. It confirmed that this was to be dealt with under section 14(b) and that time would run from the date of the conviction, not the date of the offence. This is what is set out at [53]. I do not read that paragraph as supporting the respondent's proposition in this case.

39. However, I agree with the parties that any arguments as to the passage of time can be dealt with appropriately and effectively within the required Article 8 balance, allowing for a more nuanced consideration of the delay and the reasons for it. On the facts of this case, it cannot be the case that the appellant might succeed in obtaining his discharge under section 14 yet fail on an Article 8 challenge. I therefore do not need to reach a separate decision on section 14 since it is not determinative of the appeal. I will accordingly adopt the approach ultimately taken by both sides and address the passage of time within Article 8.

Ground 3: Article 8

40. The District Judge referred to the relevant authorities and conducted a balance sheet enquiry, following the approach in *Celinski* (above). The appellant contends that he reached the wrong conclusion in finding that his extradition represented a proportionate interference with his Article 8 rights and those of his family.

41. In considering that argument, I remind myself of the role of the appellate court as set out in *Celinski*, namely that he single question is whether or not the district judge made the wrong decision and that the focus must be on the outcome. In *Love v USA* [2018] EWHC 172 (Admin), Lord Burnett CJ said at [26]:

> "The true approach is more simply expressed by requiring the appellate court to decide whether the decision of the district judge was wrong…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 weighted so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed."

42. The appellant identified four factors which he claims led to the District Judge's overall evaluation being wrong:

i) Although the offences of violence were serious, the judge failed to recognise a strong element of self-defence in the second 2004 offence and that "self-defence under Romanian law might well operate differently than it does in UK law." Further, the 2002 offence was committed days after his 20th birthday and he has committed no violent offence since 2004.

ii) Reissuing the EAWs was an abuse of process. Even if not of the sort as to fall within the court's residual jurisdiction to refuse extradition on the ground of abuse, the judicial authority's failure to provide all required information at the outset, leading to the appellant's discharge in 2012 and partial discharge in 2016 and the multiplicity of proceedings falls to be considered within the Article 8 balancing exercise: see *Camaras v Romania* [2016] EWHC 1766 (Admin).

iii) The District Judge was wrong to class the appellant as a fugitive and to find that he remained in the UK beyond the reach of the Romanian authorities. They knew his UK address at least from 2012 and had the respondent particularised the earlier EAWs correctly he would have been extradited.

iv) Although the judge noted that the offences dated back to 2002 – 2005, he failed to recognise that the very long delays meant that the appellant and his family have been subject to lengthy periods where the appellant has had stringent bail conditions. Further, the District Judge failed to treat the considerable delay as a significant factor in the proportionality check.

43. The respondent argues that the judge's conclusion on Article 8 was not wrong. The respondent replies to the four specific points as follows:

i) There was nothing even approaching an error in the judge's treatment of the 2004 offence. It would be wrong to look behind the appellant's conviction and sentence for this offence.

ii) The judge plainly had the extensive chronology of the multiple proceedings well in mind having set it out in his judgment. It would be unrealistic to say it was ignored in considering whether extradition was disproportionate. The appellant was plainly a fugitive at least from 2007 to 2012 and has not served any part of his sentence. Extradition was ordered in part on both EAW1 and EAW2 and EAW3 came about only as a result of the new sentence delivered in 2018.

iii) The finding that the appellant was a fugitive from 2007 to 2012 is beyond dispute. Even if he was not thereafter, this does not turn back the clock. The appellant is entitled to rely on delay, as the judge acknowledged but such delay is limited really only to the period 2012 to 2016. Extradition was ordered in 2016 and upheld on appeal in 2018. He cannot complain about the withdrawing of EAW1 and EAW2 and the issue of EAW3, which resulted from his own actions. This should not lead to him now being allowed to stay in the UK and escape his sentence.

iv) The dates and nature of the bail restrictions are not clear. The judge cannot be criticised for failing to take uncertain conditions into account. In any event, this was deeply troubling and sustained offending and the fact that his bail may have caused some restrictions does not mean he should escape the sentence of 3 years 1 month for the offences.

44. I agree with the respondent that there is no merit in the appellant's first point. I acknowledge that the appellant apparently sustained worse injuries than those he inflicted in the 2004 incident. That may have been reflected in the relatively light sentence for the three assaults. There is nothing unusual about the prosecution of those who are both aggressor and victim. Unfortunately, violence is often two-sided. There is no reason to speculate that self-defence may be treated differently in Romania. The judge did take account of the appellant's health conditions, including the consequences of the assault on him. That was all that was required.

45. I also do not consider that the argument about bail conditions forms a basis for saying the decision of the District Judge was wrong. There was no evidence about the bail

conditions either before the District Judge or before me. Mr Henley told me that the restrictions meant that the appellant and his family could not travel and were "very draconian". The District Judge cannot be criticised for not dealing with a matter which did not feature in the evidence and there has been no application to rely on fresh evidence. In any event, I am not persuaded that any evidence about bail conditions would have tipped the balance in itself. The fact that the appellant has been subject to bail for a prolonged period is something that can be considered as part of the arguments about delay and the multiplicity of proceedings.

46. That brings me to consider the question of delay and the history of the earlier proceedings. Although these are separate points, the arguments on them overlap and so I shall consider them together.

47. The appellant complains that the previous EAWs were not fully particularised. Even when EAW3 was issued, particulars of the 2002 offence were missing and not provided until February 2020. The appellant says that it took the respondent eight years to provide the required information. While the District Judge referred to the earlier decision of DJ Branston, the appellant contends that he did not appear to have taken note of the fact that the 2002 offence was excised from EAW1 and EAW2 and that he was discharged in relation to that offence. It is argued that these proceedings represent an attempt to reinstate the 2002 offence and as such are a collateral attack on the decision of DJ Branston, upheld by McGowan J, which effected a partial discharge.

48. The appellant also relies upon the long delay and contends that has diminished the public interest in extradition. He complains that the District Judge did not mention delay except with the sections of his judgment dealing with section 14 and abuse of process. Mr Henley argues that other than mentioning the dates of the offences, he appears to have disregarded delay in the Article 8 balance. Parallels are drawn with the case of *Done*. This case is said to be closely related as Mr Done and the appellant were co-defendants to the 2005 offence and the procedural history is said to be similar, albeit with the distinction that Mr Done was discharged completely in 2016 and was then arrested on a third warrant in 2019. May J accepted that delay after the first arrest in 2012 was not the fault of Mr Done and highlighted that delay was occasioned by failure to frame the original warrants correctly. She allowed Mr Done's appeal on Article 8 grounds, despite his fugitive status.

49. The respondent contends that the judgment of the court below must be read as a whole and that it is plain that the judge had the delay well in mind. As to the argument that this is an attempt to reinstate those parts of the earlier warrants upon which the appellant was previously discharged, the respondent denies this. EAW3 was issued on the basis of the sentence delivered in September 2018. It was the appellant's actions that led to this new sentence being passed and the respondent argues that it was entirely legitimate to issue the new warrant on the basis of that sentence. While there was delay, some of this was explained in the earlier judgment of DJ Branston and does not wholly rest with the judicial authority. Further, it cannot be overlooked that extradition was ordered in 2016. The withdrawal of the warrants upon which extradition had been ordered and the issue of EAW3 only came about because the sentences had been merged at the behest of the appellant. The appellant should not then be entitled to stay in the UK and escape

sentence when the whole time he has been here he has known that he was wanted for the criminal offences in Romania and had been convicted.

50. I have considered the judgment of the District Judge carefully. He gave appropriate weight to the appellant's settled family circumstances. At the time of the hearing, he had been settled in the UK for just short of 15 years, he had been in employment for over 13 years. He had acquired the one conviction for the driving offence but had committed no other offences. His children aged 17 and 11 were settled. The judge also took account of the appellant's health conditions.

51. Although the judge did specifically refer to the dates of the offences (and by implication the passage of time since) within the balance sheet exercise, his analysis did not deal with the impact of the delay on the public interest or with the effect of the procedural history, previous discharge and the multiplicity of proceedings during which the appellant had been under restrictions on his liberty. He did not analyse the reasons for the delay, including the repeated failure to provide the required information for EAW1 and EAW2. These were important factors and the judge should have included them in his analysis. I do not accept the respondent's argument that it is implicit from other parts of the judgment that he did so. I must consider then whether the failure to include these points in his analysis led to the wrong outcome.

52. Although the District Judge referred to the Supreme Court decision in *HH v Italy* [2012] UKHL 25, he did so only in relation to the constant and weighty interest in extradition and the fact that there should be no safe havens to which people can flee in the belief they will not be sent back. He did not go on to consider the observations of Baroness Hale that the delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life.

53. While the appellant came to this country as a fugitive and cannot rely on any delay up to 2012, the passage of time since was not due to his fugitivity. By the time the District Judge reached his decision, almost a decade had passed. On any view, this is a very significant period of delay and it does affect the weight to be attached to the public interest in extradition. Had the respondent provided the proper information at the outset, the appellant would have been extradited much sooner.

54. By 2016, the appellant's extradition had been ordered albeit on a partial basis. He exercised his right to appeal as he was entitled to. That appeal was dismissed and the appellant's extradition was upheld. From this time, he cannot claim to have been under any illusion that he was free to stay in the UK. Although he continued with his settled life, he did so knowing that his extradition had been ordered. EAW1 and EAW2 were withdrawn only after his sentence had been revised and EAW3 issued. The withdrawal of the earlier warrants created no impression that proceedings were at an end nor is the issue of EAW3 to be viewed as representing at collateral attack on the earlier decision. The history here differs materially from that in both *Done* and *Camaras*, where the requested persons had been discharged fully only for new warrants to be issued. Both could point to aspects of their private life which had changed in the intervening period and their belief that the proceedings were at an end and that their lives could resume. By contrast, the appellant's wife confirmed in evidence that the family had known for

a long time that there was a possibility that the appellant would be required to return to Romania to serve his sentence.

55. If the judicial authority had withdrawn EAW1 and EAW2, upon which extradition had been ordered and issued EAW3 simply to reverse the partial discharge ordered in 2016, it could be argued that this would be prejudicial to the appellant and unfair. However, this is not what happened. After his extradition was ordered on a partial basis, the appellant chose to apply to the Romanian court for merger of his sentences. The 2016 extradition decision meant he could not be extradited to serve the sentence relating to the 2002 offence. However, it did not extinguish that sentence. As the District Judge found, the appellant benefitted from his application in achieving a reduction in his overall sentence. It was not inappropriate for the respondent to withdraw EAW1 and EAW2 in circumstances where the sentences underpinning them had been merged into a new sentence. Following the merger, the sentences for the offences on which his extradition had been ordered could no longer be isolated in the way that DJ Branston had done in 2016. It was therefore proper to withdraw those warrants and to issue a new one on the basis of the new merged sentence. The fact that this allows the respondent to seek the appellant's extradition to serve longer in prison than he would if the extradition had been effected on the basis of DJ Branston's order is something that the appellant may now regret but it is not something for which the respondent is to be blamed.

56. The troubled procedural background and the resulting delay is something that was required to be put into the balance. However, even when that is done, I am unable to conclude that the overall evaluation under Article 8 was wrong.

57. The appellant had come to this country as a fugitive knowing that he had been convicted of serious offending. He and his family always knew he was at risk of being returned to serve his sentence. His family life here was established in that context. Each case must turn on its own facts and comparison with other reported decisions is rarely helpful. I have though given careful consideration to the cases of *Done* and *Camaras*, since some similarities emerge. As Mr Done was the appellant's co-defendant for one of the offences, it is natural that he will look to the outcome in that case. However, there are material differences. Mr Camaras's offending was much more minor. Mr Done faced a different combination of offences. Family circumstances are never identical. Further the procedural histories were not the same. Significantly, the appellant's extradition had been ordered in 2016 and it was his actions which led to the withdrawal of the earlier warrants and the issuing of EAW3. Even though this brought the 2002 offence back into play, the issue of EAW3 cannot be described as an attempt to get around the earlier decision. It flowed from the appellant's choice to seek the merger of his sentences after his extradition had been ordered on some, but not all, offences.

58. I conclude that the decision on Article 8 was more finely balanced than the District Judge appeared to recognise but that he was not wrong to conclude that the factors in favour of extradition outweighed those against. The judge's conclusion that extradition was compatible with the appellant's Convention rights was not therefore wrong and the argument under section 21 accordingly fails.

Ground 4: abuse of process

59. In dealing with the appellant's abuse of process argument, the District Judge said:

> "The burden lies with the Requested Person to prove an abuse of process to the civil standard, that is on the balance of probabilities. The Requested person must give cogent evidence of abuse."

The appellant contends that this is a misstatement of the law.

60. In *Haynes v Malta* [2009] EWHC 880 (Admin), Richards LJ said at [6]:

> "To sustain an allegation of abuse of process in relation to proceedings under the Act, it is necessary, first, to identify with specificity what is alleged to constitute the abuse; secondly, to satisfy the court that the matter complained of is capable to amounting to an abuse; and thirdly, to satisfy the court that there are reasonable grounds for believing that such conduct has occurred. If the matter gets that far, then the court should require the judicial authority to provide an explanation. The court should not order extradition unless satisfied that no such abuse has taken place (see R (on the application of The Government of the United States of America) v Bow Street Magistrates' Court and Tollman [2007] 1 WLR 1157, in particular at paragraphs 84 to 89)."

61. I was referred to a passage in Extradition Law: A Practitioner's Guide (Grange & Niblock, Legal Action Group, 3rd Edition, 2021 at [5.114]),. Having quoted the test in *Haynes v Malta*, the authors state:

> "As stated above, the requested person bears the burden of satisfying the judge (on the balance of probabilities) that, not only is the issue raised capable of amounting to an abuse, but also that there are reasonable grounds for believing that the abuse has occurred. It will be essential therefore for the requested person to bring cogent evidence of the abuse in order to satisfy the court that the conduct has occurred."

Mr Ball argues this expresses the test in the same way as the judge did. I note too that in *Marlaz v Poland* [2018] EWHC 28 (Admin), Simon LJ said, at [54]:

> "the court will only exercise the jurisdiction to stay the extradition proceedings as abuse of process if satisfied on (a) cogent evidence that (b) the requesting authority has acted in a way that subverts or impugns (the word 'usurped' is sometimes used) the integrity of the domestic process, acting in breach of the mutual trust that exists between Judicial Authorities."

62. With respect, I consider the test remains as set out in *Tollman* and *Haynes*. That test is clear and, in my view, requires no further elaboration. It does not place a burden of

proof on the requested person. In *Tollman*, the court observed that the 2003 Act places a duty on a judge to decide a large number of matters before acceding to a request for extradition. If put on inquiry as to the possibility of abuse of process, the judge must also decide whether the process is being abused. The court said that no steps should be taken to investigate an alleged abuse of process unless the judge is satisfied there is reason to believe that an abuse may have taken place.

63. In requiring the appellant to prove an abuse of process, albeit to the civil standard, and to give cogent evidence of abuse, I do consider that the District Judge made an error of law. He should have followed the approach summarised in *Haynes v Malta*. If there is sufficient basis for the court to consider that an abuse of process may have occurred, the judge should not order extradition unless satisfied no such abuse has taken place.

64. The abuse of process alleged is what Mr Henley described as a collateral attack on the decision in 2016, upheld on appeal in 2018, which effected a partial discharge. Where successive warrants or successive extradition requests can be viewed as such a collateral attack on an earlier decision, the subsequent proceedings may be capable of amounting to an abuse of process: *Jasvins v Latvia* [2020] EWHC 602 (Admin).

65. I have dealt with this argument, on the particular facts of this case, including the detail of the procedural history, when considering the Article 8 arguments. I have found that the respondent acted properly in withdrawing EAW1 and EAW2 and that the issuing of EAW3 was not a collateral attack on the decisions of DJ Branston and McGowan J. The fact that the appellant may now be required to serve longer in prison than if he had been extradited in accordance with the 2016 decision does not make these proceedings an abuse of process. That results from the application he made to merge his sentences. It would not be right for those actions to now be relied upon to prevent the appellant's extradition.

66. It follows that the arguments advanced by the appellant that EAW3 represents an abuse of process have been fully considered as part of the merits-based assessment of public and private interests under Article 8. This is not one of those rare instances where a requested person might fail to substantiate a bar yet succeed on an abuse argument. In my judgment therefore, the court's residual jurisdiction to refuse extradition on the ground of abuse cannot assist the appellant on the facts of this case. The error of law made by the District Judge in relation to the burden of proof on this issue had no bearing on the outcome.

Conclusion

67. It follows from my conclusions on each of the four grounds of appeal that this appeal must be dismissed.