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

[2024] EWHC 1613 (Admin)

Case No: AC-2022-LON-000448

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/06/2024

Before:

MRS JUSTICE MCGOWAN

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Between :

Doru Constantin Giana	**Appellant**
- and -	
Court of Roman, Romania	**Respondent**

- -
- -

Ben Cooper KC and Mary Westcott (instructed by **Dalton Holmes Gray**) for the **Appellant**
David Ball (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing date: 21 June 2023

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APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 25 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives

Mrs Justice McGowan:

Introduction

1. The extradition of Doru Constantin Giana to Romania was ordered by District Judge Pilling, ("the Judge") sitting at Westminster Magistrates Court on 22 April 2022. He appeals against that decision.

2. His appeal is allowed and he was discharged on 27 July 2023.

3. His extradition was sought by the Court of Roman, Romania, the Judicial Authority, ("JA"), on a European Arrest Warrant, ("EAW") which had been issued on 23 February 2021 and certified by the National Crime Agency on 2 September 2021. He was wanted for return to serve a total sentence of 3 years and 10 months under the terms of an order issued by the Bacau Court of Appeal, which became final on 4 February 2021.

4. He has settled status in the UK, having lived here since 2007, whilst returning to Romania from time to time. He has also spent some time in Germany. He is married and has three children, two of school age. He has no convictions recorded against him in the UK.

5. The Appellant was arrested on the EAW on 23 September 2021 and the extradition hearing took place on 28 March 2022. Judgment was given on 22 April 2022. He had been held in custody since 9 March 2022. By the date of the appeal hearing he had served 16 months in custody and 5 months on curfew.

6. His application for permission to appeal on the Art. 3 of the European Convention on Human Rights, ("the Convention"), ground was stayed and consideration of permission on the Art. 8 and s. 25 of the Extradition Act 2003, ("the Act"), grounds was adjourned behind ***Marinescu & Ors v Judecatoria Neamt, Romania & Anor [2022] EWHC 2317 (Admin) (12 September 2022)***.

7. Permission to appeal was granted on 23 February 2023 as was his application to adduce fresh evidence and updated submissions. On the same date the Respondent was given leave to adduce fresh evidence and file updated submissions.

8. On 23 May 2023 the Appellant applied to adduce fresh evidence, a witness statement from Renata Pinter, his solicitor, and new material relating to prison conditions. Additionally he sought to add a new ground of appeal based on the case of ***Merticariu v Judecatoria Arad, Romania [2022] EWHC 1507 (Admin) (17 June 2022)***, in which permission to appeal to the Supreme Court had been granted on a ground relating to his entitlement to a retrial if returned to Romania. As is set out in the application, this is a matter which would only need to be determined if the appeal fails on the original grounds.

Background Facts

9. The EAW is a conviction warrant, relating to four offences. The Appellant was convicted of the theft of a car battery on 20 January 2013, it was valued at about the equivalent of £30. He was sentenced to a term of 3 years imprisonment which was suspended for 5 years.

10. On 29 December 2017 he committed two offences of theft by shoplifting of items worth £20 in total.

11. On 15 May 2018 he committed another offence of theft by shoplifting of goods worth £40.

12. The three offences of theft activated the 3 year suspended sentence and attracted a further term of 10 months. That made the total sentence to be served 3 years and 10 months.

13. The appellant was involved in a car accident in June 2015. He suffered serious injuries which led to the amputation of his left leg. He became dependent on the use of a wheelchair.

The Extradition Hearing

14. The Judge gave her decision in writing on 22 April 2022. At paragraph 10 of her judgment, she summarised the issues raised under the Act as,

    i) Section 2, there was inadequate particularisation given there has been a suspended sentence,

    ii) Section 2, Romanian courts cannot properly be considered to be judicial authorities with the meaning of section 2,

    iii) Section 14, it would be unjust or oppressive to extradite him by reason of the passage of time, and the amputation of his leg in the interim,

    iv) Section 20, Box D is ambiguous because it is not clear whether it refers to the three shoplifting offences or also the earlier theft of the car battery,

    v) Section 21/Article 3, prison conditions would risk inhuman treatment, particularly for a wheelchair user,

    vi) Section 21/Article 8, disproportionate consequences to his private and family life,

    vii) Section 25, it would be unjust or oppressive because of his physical condition.

15. She found that the appellant was a fugitive, that there were no bars to extradition and that his return would not be incompatible with his Convention rights.

16. The issue of prison conditions in Romania was an important question in the hearing, given the Appellant's physical disabilities. The Judge was aware of the pilot decision in ***Rezmives and others and Bragadireanu v Romania (61467/12 and 22088/04)*** and the general proposition that prison conditions in Romania remain unsuitable and the need for the provision of assurances. The first assurance in this case is dated 14 October 2021 and the second is dated 21 October 2022 but was not provided until after the Judge's ruling.

17. The first assurance set out that the Appellant would spend a quarantine period of 21 days in Rahova Prison. After the quarantine period "it is highly probable" that he would start serving his sentence in the closed regime in Margineni Prison. His "age and health status" was one of a number of criteria that would be taken into consideration by the "specialized commission" in determining the "enforcement regime". The assessment of age and health is a general assessment of all detainees. After one fifth of the penalty the commission carries out another evaluation, based on the prisoner's conduct, it is possible at that stage to be transferred to the "half-open regime" in Miercurea Ciuc Prison. Finally a prisoner might progress to Iasi Prison to serve the last part of the sentence in the open regime. The assurance sets out, in generic terms, details of room size, lavatory and bathroom facilities, visits, exercise and association. It is noteworthy that the opportunity "to walk" is a significant part of the exercise regime.

18. In the first assurance there is no information about what facilities would be available or special provisions made for any wheelchair user or this Appellant in particular. The following entry deals with provision for health care:

> *"Right to health care and treatment*
>
> *The right to health care and treatment of detainees is ensured with no discrimination as to their legal status. The right to health care includes the medical intervention, the primary medical assistance, the emergency medical assistance and the specialised medical assistance. The right to medical care includes both health and palliative care. Health care and treatment in prisons are ensured with qualified staff, free of charge, according with the applicable legislation, upon request or anytime necessary. Detainees have the right according with the applicable legislation free of charge to healthcare, treatment and medication."*

19. In response to questions from the Respondent about the "facilities and adjustments" that could be made for him, further information, dated 8 February 2022, was provided.

> *"In case of the detainee who has such a disability, moving in a wheelchair, the committee of the prison where he is to be incarcerated will analyse the situation and order the appointment of a supporting convict from the ones who meet the*

> *requirements of the provisions in force. (emphasis added) Moreover, after an orthopaedics revaluation, the consultant will make recommendations regarding the possibility of the patient to move, including making a lower limb prosthesis, which the health insurance authority may approve.*
>
> *We mention the fact that, currently, the penitentiary system arrests patients with such a disability.*
>
> *Therewith, the detainees have the possibility of requesting interruption of execution of punishment according to the provisions of Article 589 of the Criminal Procedure Code:*
>
> *"(1) Enforcement of the imprisonment sentence or life imprisonment may be postponed in the following situations:*
>
> *(a) When it is found, based on a forensic examination, that the convicted person suffers of a disease that cannot be treated in the Health Network of the National Administration of Penitentiaries and which makes the immediate serving of the sentence impossible, if the specific of the disease do not allow treating it with permanent guard in the Health Network of the Ministry of Health and if the court appreciates that postponing the enforcement and the release is not a danger to the public order. In this situation, the enforcement of the sentence is postponed for a fixed period;……."*

20. The Judge accepted that the further information provided was reliable and adequately dealt with the position of wheelchair users. She recognised that dependence on the support and assistance of other prisoners would make the Appellant more vulnerable. She found at [63] that if the Appellant's *"disability or mobility issues are such that if his needs cannot be met within the penal system, it is clear that the JA will suspend the sentence of imprisonment".* At [64] she went to say, *"I can and must accept the assurance from the JA, coupled with specific information about wheelchair bound prison inmates. I am not persuaded that there are cogent reasons to go behind that to find that it cannot be accepted".*

21. The Judge also had a report from APADOR-CH following a visit to Miercurea Ciuc Prison on 1 April 2019 setting out difficulties about staff shortages, uncertainty about the provision of healthcare and the fact that shower facilities were only available on the first floor.

22. Fresh evidence in the 2022 CPT report on Margineni Prison relates to a visit a few months before the date of the written assurance and lists many criticisms but in particular, *"the right of access to healthcare was not a reality".* The response of the JA to this report acknowledges an unsuccessful campaign to recruit personnel to fill vacant roles in mental healthcare provision. A later APADOR-CH report reveals widespread

problems over overcrowding and cleanliness. It also describes increasing staff vacancies, especially in healthcare.

Grounds of Appeal

23. He appeals on three grounds.

    i) Article 3, namely that the Judge was wrong not to conclude that extradition would give rise to a real risk of a breach of s.21 of the Act. Arising in particular from the Appellant's physical disability set against the background of more general deficiencies in the prison estate in Romania. The assurances given were inadequate.

    ii) Oppression because of the appellant's physical condition pursuant to s.25 of the Act, the Judge was wrong in that she did not undertake a more intensely fact specific approach when considering his medical and physical requirements. The proposal that the prison authorities would provide the "allocation of a supporting convict" would not remedy the deficiencies and would risk the Appellant being subject to undignified and oppressive treatment.

    iii) Article 8, that the Judge failed properly to consider the effects on the Appellant, his wife and his children of extradition and she was therefore wrong to conclude that the inevitable interference would not be disproportionate. Further that the balancing exercise was wrongly conducted by giving insufficient weight to the delay and the nature of the offences in combination with all his other personal circumstances.

24. There are many areas of overlap between the grounds. In essence the thrust of the appeal is that insufficient weight was placed on the difficulties arising from the Appellant's physical difficulties when balanced against the nature of the offending, the length of sentence and the delay. Further that the assurances did not cure the problems.

Statutory Framework

25. Romania is a Category 1 territory, and Part 1 of the Act 2003 applies.

26. The Judge is required by s. 21 of the 2003 Act to consider whether extradition would be compatible with the Convention rights of the Appellant under the Human Rights Act 1998.

27. A specific bar to extradition in cases of physical or mental condition is provided by s. 25 of the Act, which provides:

> *"(1) This section applies if at any time in the extradition hearing it appears to the Judge that the condition in subsection (2) is satisfied.*

(2) The condition is that the physical or mental condition of the person in respect of whom the Part 1 warrant is issued is such that it would be unjust or oppressive to extradite him.

(3) The Judge must—

(a) order the person's discharge, or

(b)……."

28. Under s 26 of the Act, s 27 applies:

"(1) On an appeal under section 26 the High Court may—

(a) allow the appeal;

(b) dismiss the appeal.

(2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.

(3) The conditions are that—

(a) the appropriate Judge ought to have decided a question before him at the extradition hearing differently;

(b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.

(4) The conditions are that—

(a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;

(b) the issue or evidence would have resulted in the appropriate Judge deciding a question before him at the extradition hearing differently;

(c) if he had decided the question in that way, he would have been required to order the person's discharge."

Legal Principles

29. In ***Magiera v District Court of Krakow, Poland [2017] EWHC 2757 (Admin)*** the court dealt with an appeal under s.27, Julian Knowles J set out a distillation of the principle from earlier authorities in cases where a specific bar is raised under s.25 on grounds of health and disability.

"27. In assessing whether extradition would be a disproportionate interference with those rights, the effect of the decisions of the Supreme Court in Norris¸ supra, and HH, supra, and Celinski, supra, is that the issue is whether the interference with Article 8 is outweighed by the public interest in extradition. It is likely that the public interest in extradition will outweigh the Article 8 rights of the requested person (and any relevant member of his family where that factor is relied upon) unless it would result in an ***exceptionally severe interference*** *with family life. That public interest always carries great weight, though the weight to be attached to it in a particular case will vary according to the nature and seriousness of the crimes of which the requested person has been convicted or stands accused. As was made clear in HH, supra, delay since the relevant crimes were committed may both diminish the weight to be attached to that public interest and increase the impact of extradition upon family life.*

28. In relation to s 25 of the EA 2003, the proper approach was set out by the Divisional Court (Sir John Thomas P. and Ouseley J) in Dewani v. Government of the Republic of South Africa [2012] EWHC 842 (Admin) at paras 73 – 74:

> *[73] In our view, the words in s 91 and s 25 set out the relevant test and little help is gained by reference to the facts of other cases. We would add it is not likely to be helpful to refer a court to observations that the threshold is high or that the graver the charge the higher the bar, as this inevitably risks taking the eye of the parties and the court off the statutory test by drawing the court into the consideration of the facts of the other cases. The term "unjust or oppressive" requires regard to be had to all the relevant circumstances, including the fact that extradition is ordinarily likely to cause stress and hardship; neither of those is sufficient. It is not necessary to enumerate these circumstances, as they will inevitably vary from case to case as the decisions listed at para 72 demonstrate. We would observe that the citation of decisions which do no more than restate the test under s 91 or apply the test to facts is strongly to be discouraged …*
>
> *[74] … We agree with the observations of Maurice Kay LJ in* Prancs *at para 10 that the words are plainly derived from Kakis. The Parliamentary history of the Extradition Bill suggests that the provision was introduced into what is Pt II for the reasons we have given at para 67 and then the Bill was amended to add the provision to Pt I. Although that may not assist in determining whether s 25 (and hence s 91) is to be read as reflective of art 23.4, the use of the term "unjust or oppressive" plainly indicates that Parliament intended its own test."*

29. In Kakis v Government of the Republic of Cyprus [1978] 1 WLR 799, Lord Diplock, explained the terms "unjust" and "oppressive" in a well-known passage in his speech at p782:

> *"'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair."*

> *30. Where the decision of a district judge on Article 8 is challenged on appeal in the absence of fresh evidence, the decision in Celinski, supra, makes it clear that the single question for this court is whether the district judge made the wrong decision. However, where fresh evidence is relied upon, the approach is different. This Court must decide for itself whether the court below, had it had that evidence, would have decided the question arising under Article 8 differently. In doing so I must make my own assessment of the proportionality question on the basis of all of the material which is before me: Olga C v. The Prosecutor General's Office of the Republic of Latvia [2016] EWHC 2211 (Admin), para 26.*
>
> *31. On an appeal by an Appellant against an adverse finding under s 25 it is for this Court to decide for itself on the material before it whether the Appellant's medical condition is such that it would be unjust or oppressive to extradite him: Dewani v. Government of South Africa [2012] EWHC 842 (Admin), para 63; Howes v Her Majesty's Advocate [2009] SCL 341, para 91; Government of the United Sates v Tollman [2008] 3 All ER 350, para 95.*

30. An additional factor in this case is the proposed solution of the Appellant's likely problems in the form of the provision of a 'supporting convict'. The general principles in such circumstances were established by the European Court of Human Rights in ***Rooman v Belgium*** ***18052/11/31 January 2019*** at [145] et seq,

> "*in determining whether the detention of an ill person is compatible with Article 3 of the Convention, the court takes into consideration the individual's health and the effect of the manner of execution of his or her detention on it... It has held that the conditions of detention must under no circumstances arousing the person deprived of his liberty feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance... On this point, it has recognised that detainees with mental disorders are more vulnerable than ordinary detainees...*
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> *146. The court also takes account of the adequacy of the medical assistance and care provided in detention... A lack of appropriate medical care for persons in custody is therefore capable of engaging a state's responsibility under Article 3... In addition it is not enough for such detainees to be examined and a diagnosis made; Instead, it is essential that proper treatment for the problem diagnosed should also be provided... by qualified staff...*
>
> *147. In this connection, the "adequacy" of medical assistance remains the most difficult element to determine. The Court reiterates that the mere fact that a detainee has been seen by a doctor and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical assistance was adequate. The authorities must also ensure that a comprehensive record is kept concerning the detainees state of health and his or her treatment while in detention, the diagnosis and care are prompt and accurate, and that where necessitated by the nature of a medical condition supervision is regular and systematic and*

involves a comprehensive therapeutic strategy aimed at adequately treating the detainees health problems or preventing their aggravation, rather than addressing them on a symptomatic basis. The authorities must also show that the necessary conditions were created for the prescribed treatment to be actually followed through. Furthermore medical treatment provided within prison facilities must be appropriate, that is, at a level comparable that which the state authorities have committed themselves to provide to the population as a whole."

31. In ***Potoroc v Roamnia 37772/17 2 September 2020*** the ECHR dealt with a case in which the Applicant was a wheelchair user, albeit with more severe additional health problems than the Appellant. It dealt very fully with the provision of care by "supporting convicts".

(ii) Quality of medical care

75. ……. The court cannot substitute its views for those of the domestic courts. However, it cannot be overlooked that the domestic courts, in rejecting the application for an interruption of the sentence, did not address the issues raised by the applicant concerning the actual conditions of his detention and the inadequate medical treatment he had been provided with, in particular with reference to the fact that no special measures had been taken to accommodate a person with his medical history who was confined to a wheelchair ……

76. ……..Several medical reports as well as findings by the domestic courts dated from 2013 onwards confirmed the fact that the applicant needed constant help for current tasks, help that was to be provided by a personal assistant……. In spite of this assessment, the applicant did not have the benefit of such assistance, except for when he was helped on an official basis by some inmates who provided collective assistance……. or unofficially by fellow inmates……

77. However, the court reiterates that it has already voiced doubts as to the adequacy of assigning unqualified people responsibility for looking after an individual suffering from a serious illness……. Furthermore, the court has already found a violation of Article 3 of the Convention in circumstances where prison staff felt that they had been relieved of their duties to provide security and care to more vulnerable detainees who cell mates had been made responsible for providing them with daily assistance or, if necessary, with first aid……..

78. In the present case, it cannot be ascertained whether the prisoners who agreed to assist the applicant were qualified to provide appropriate support or whether the applicant actually received such support……

> *79. Furthermore, the court cannot ignore the applicant's submissions, uncontested by the government, that the wheelchair was provided to him at own expense (sic), in the lack of any assistance to that effect from the prison authorities.*
>
> *80. While accepting that in the instant case there was no suggestion of intent to humiliate or debase the applicant, the court reiterates that the absence of such intent cannot conclusively rule out a finding of a violation of article three of the convention……..*
>
> *81. The court reiterates that where the national authorities decide to place or keep a person with disabilities in detention, they should demonstrate special care in guaranteeing such conditions as correspond to the special needs resulting from the detainees disability…(emphasis added)"*

32. Again the ECHR also dealt with such provision in ***Epure v Romania (73731/17) 11 May 2021*** when it questioned at [71] whether the national authorities in that case, *"did everything that could reasonable be expected of them to provide him with the medical care he needed……."*. That was a case involving a prisoner with mental health problems. However the court found in that case that the provision of a supporting convict in place of qualified staff meant that the authorities *"failed to implement and provide a coherent and appropriate therapeutic strategy capable of responding adequately to the applicant's medical needs, so as to avoid subjecting him to treatment contrary to Article 3 of the Convention".*

33. Of broader application at [83] the court said, "*Having regard to the above and noting that the personal care assistants provided to the applicants on a somewhat occasional basis were clearly not trained to provide him with any first-aid measures, the court considers that in the present case the help offered by the applicant's fellow inmates did not form part of any effective assistance by the State to ensure that the applicant was detained in conditions compatible with respect for his human dignity. Such help cannot therefore be considered suitable or sufficient".*

Analysis

34. There may be circumstances in which the offer and acceptance of assistance between prisoners is a commendable thing. Assistance with literacy, language or communication may be beneficial and appears to be unlikely to affect the dignity of the recipient of such help. However that is not to say that unqualified fellow prisoners should be required to provide care and support to a detainee confined to a wheelchair. It is not difficult to see how that would detrimentally affect the dignity of the individual, particularly in showering or bathing.

35. In this case the Judge did not deal adequately with the material available to her at the hearing. The "appointment of a supporting convict" is not an adequate substitute for professional care. The Judge did not find there to be any concerns arising from the lack

of adequate day to care para-medical care, rather she concentrated on the provision of care by a GP. It is apparent that the Appellant needs regular care and help with getting to a bathroom, (possibly on a different floor), and other mundane tasks which should not be provided by an untrained fellow convict. There is a real risk that that is capable of "humiliating and debasing him". He is vulnerable by virtue of his physical disability, that vulnerability could only be aggravated by any dependence on a fellow prisoner.

36. The Judge found that she could be satisfied that the assurance and further information was reliable, but she did not adequately assess the detail. She found at [63] that "If the RP's disability or mobility issues are such that his needs cannot be met within the penal system, it is clear that the JA will suspend the sentence of imprisonment."

37. That finding required deeper analysis. The ability to "interrupt" or postpone a sentence is contained in Art 589 of the Criminal Procedure Code which allows such a course where a 'disease' cannot be treated and which makes serving the sentence 'impossible' and the prisoner poses no risk to the public. It is not clear how that provision would work in this case. The Appellant already suffers from a disability, he is wheelchair dependant. How would it become apparent that it was impossible for him to serve the sentence? On the face of it, it might mean waiting until the impossibility had become detrimental to his physical and mental health before consideration would be given to a 'forensic examination' to determine whether it was impossible for the sentence to continue. It is not difficult to see the risks to health, wellbeing and dignity in such a course.

38. As Julian Knowles J set out in *Magiera*, following *Dewani*, the court is required to undertake an intensely fact specific approach. That exercise can only properly be undertaken where the requesting state has provided a response which deals with the specific concerns and needs of the individual. A general discussion on space and facilities is not helpful if it is not fact specific. The court would have been assisted by information about the location of bathroom facilities, provision of safety rails and other adjustments. Particularly in light of the apparent complaint that the shower facilities are on the first floor, if that is right, this Appellant might only have access to the shower or the exercise yard but not both.

39. When s.25 is raised as a potential bar to extradition the court must establish what precisely the individual requires to achieve a basic standard of health and wellbeing. Only then can the provision offered be assessed to see if it adequately meets the need. In this case the provision offered was the help of a "supporting convict" backed up by recourse to Art 598 so that the sentence would be postponed if it became "impossible" for the individual to continue. As is clear from *Magiera* the requesting state should not be expected to provide a detailed care plan or similar but information about the special measures available must be part of the Judge's assessment.

40. The current position in respect of prisons in Romania means that assurances are required before requested persons can be returned. That is the general requirement

before able-bodied individuals can be sent back to serve sentences in the general prison population. It is not difficult to see that more detail of specific provision is required for those who suffer from serious physical disability.

41. On the basis of the above this appeal succeeds on Ground 2. The risk of oppression arising from there being no provision of trained assistance and consequent dependence on the care of a fellow prisoner arises is clear. There was insufficient evidence before the Judge to allow her to reach a conclusion that there was no risk of a violation of s.25.

42. The fresh evidence would have driven me to that conclusion, but I am also satisfied that the Judge should have decided the question differently, it would be unjust and oppressive to return the appellant to serve the sentence.

43. This appeal also succeeds on Ground 1 in so far as the assurance provided dated 14 October 2021 was inadequate to deal with the obvious concerns arising from the Appellant's condition.

44. It is not necessary to review the *Celinski* exercise on the more usual considerations. The Appellant's physical condition and the lack of evidence of adequate provision being made within the prison estate is sufficient. It would be a highly artificial exercise to attempt to carry out the balancing exercise whilst ignoring his disability. Although it should be observed that this was not offending of the worst type.

45. In light of the above it is not necessary to consider his potential rights to a retrial if returned.

46. As all the authorities make clear such cases are entirely fact specific. It may be that other requested persons with similar disabilities could properly be returned on the basis of adequate information about the proper provision of care and assistance.