Neutral Citation Number: [2025] EWHC 409 (Admin)

Case No: AC-2024-LON-000656

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2025

Before :

MR JUSTICE DOVE

- -

Between :

CIPRIAN CHIRILA

Appellant

- and -

COURT OF APPEAL IASI (ROMANIA)

Respondent

- -
- -

Peter Caldwell (instructed by **Coomber Rich Ltd**) for the Appellant
Reka Hollos (instructed by **CPS Extradition Unit**) for the Respondent

Hearing date: 5th December 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 26 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE DOVE

Mr Justice Dove:

Introduction

1. This is an appeal against a decision to order the extradition of the appellant to Romania. The appellant is wanted pursuant to a conviction arrest warrant (the "AW") which was issued on 19 February 2019 and certified by the NCA on 8 June 2022. The AW relates to two offences of making an organised crime group and money laundering. There is a sentence of five years and four months imprisonment which remains to be served for these offences. The appeal is advanced with permission on one ground only, namely reliance upon section 21 of the Extradition Act 2003 and the contention that it would be a breach of article 5 of the ECHR for the appellant to be extradited.

Facts

2. The offences with which the AW is concerned were committed in 2006 and are described as involving the creation of a criminal association with three others for the purpose of using false statements and documentation to enable them to obtain real estate which was the property of local authorities. The AW is not clear in relation to the dates of the investigation but sets out that the indictment in the appellant's case was dated 10 December 2012.

3. The appellant was ultimately convicted on 8 August 2017 after having attended his trial. He was sentenced to nine years and eight months imprisonment and he appealed. He was not required to begin serving his sentence and was not placed under any restriction to remain in Romania. He left Romania to come to the UK in November 2018. On 27 November 2018 the High Court of Cassation and Justice (the "HCCJ") in Romania annulled the appellant's original conviction and acquitted him of two of the offences of which he had originally been convicted (namely swindlery and perjury) and as a consequence that court substituted a sentence of five years and four months as set out above.

4. The AW was amended on 28 March 2019 to reflect that fact that it only related to the two offences for which the appellant's surrender was sought. The appellant was arrested in the UK on 20 August 2022 in pursuance of the AW. Also in August 2022, the appellant launched an appeal against the decision of the HCCJ as a result of developments in the Romanian criminal law which had recently occurred and which are described in evidence from his Romanian lawyer and also an expert in Romanian law, Dr Cristina Munteanu, who gave evidence before the judge.

5. The issues concerned the provisions of Article 155(1) of the Romanian Criminal Code which deals with questions of limitation of liability for crimes. Under Article 155 the limitation period can be interrupted by the performance of "any procedural act in the case". The Constitutional Court of Romania accepted in its Decision No 297 of 26 April 2018 that the provisions of Article 155 were unconstitutional, ruling that procedural acts performed in the case could only interrupt the limitation period if they were communicated to the accused person. If the procedural act was not communicated to the accused, then it did not interrupt the limitation period.

6. Subsequent to this, in a case unrelated to the appellant, the HCCJ in its Decision No 25 of 2019 noted that the application of the interpretation of Article 155 reached by the Constitutional Court in Decision No 297 of 26 April 2018 was uneven, but as a result of its established jurisprudence it appears from Dr Munteanu's evidence that the HCCJ were unable to issue a general binding ruling in relation to the application of the Constitutional Court's ruling. Subsequently in Decision 358/2022 the Constitutional Court concluded that Article 155(1) was unconstitutional in its entirety.

7. Following these decisions a revised legal framework for the consideration of the question of limitation was enacted which applies retrospectively, a position subsequently confirmed by the HCCJ. In her report Dr Munteanu advises that the limitation period for the offence of setting up an organised crime group is five years and the limitation period for the offence of money laundering is eight years. It therefore follows that the limitation period in respect of both of the offences underlying the AW had expired before the appellant was convicted of these offences on the basis of this new understanding of the constitutionality of Article 155(1) of the Criminal Code.

8. It is against this background that the appellant commenced an application in August 2022 to the HCCJ relying upon the unconstitutional nature of Article 155(1) and pursuant to Article 426 (which makes provision for an application for annulment) sought the annulment of his conviction. Prior to the consideration of the appellant's application the HCCJ gave its judgment in Decision No 67/2022 on 25 October 2022, in which it appears that the HCCJ concluded that a person who was entitled to the retrospective operation of the revised limitation law and who had not raised this point in their trial or subsequent appeal could make an application for annulment of the proceedings. By contrast, the defendant who conscientiously raised the limitation argument during their trial and appeal unsuccessfully would not be entitled to an annulment of their conviction since the remedy of annulment pursuant to Article 426 only applied to procedural errors and not a substantive legal error in a decision in relation to the validity of the proceedings.

9. The HCCJ ruled on the appellant's application on 14 February 2023. The Court noted that the decision on limitation in the appellant's 2018 cassation appeal in respect of his convictions was inconsistent with the Constitutional Court's decision of 2022, but held that it had no jurisdiction to reopen the cassation appeal to give effect to the substantive change in the law. The effect of this conclusion led the HCCJ to question whether the provisions of Article 426 were constitutional, on the basis that the limited nature of the remedy of annulment created an unreasonable discrimination in cases of the type brought by the appellant between those who had diligently raised the limitation point during the proceedings leading to their conviction and those who had not.

10. The HCCJ's decision, which was contained in the evidence before the judge, provides as follows:

> "The High Court considers that the exception of unconstitutionality of the provisions of s426(1)(b) Code of Criminal Procedure by reference to s155(1) of the Criminal Code as interpreted by decision no 10/2017 and decision no 67/2022 delivered by the High Court of Cassation and Justice-

> Panel for Deciding Questions of Law in Criminal Matters is well founded as it creates a different legal treatment between litigants.
>
> The High Court has regard to the differential treatment provided for by the two decisions delivered by the High Court of Cassation and Justice-Panel for Deciding Questions of Law in Criminal Matters, namely in favour of the respondent who remained inactive during the hearing of his appeal and not in favour of the respondent who pleaded that the limitation period had occurred and requested that the criminal proceedings be discontinued, does not ensure the necessary balance and thus affects the right to a fair trial, and thus considers that the discrimination infringes the principle of equal rights
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> …
>
> According to the considerations of Decision no 67 of 25.10.2022 delivered by the High Court of Cassation and Justice-Panel for Deciding Questions of Law in Criminal Matters, the interpretation of s426 of the Code of Criminal Procedure is within the meaning that if the court of appeal has examined the application of limitation, an appeal for annulment is inadmissible, and if the issue of limitation has not been examined, then the judiciary system can assume the responsibility of correcting the error and bringing things back to the constitutional level.
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> This criterion creates a difference in treatment between persons in the same situation, convicted of time-barred acts, on the basis of an element that is neither objective nor reasonable, so that the difference in treatment becomes discrimination. The distinction between the situation where the court wrongly did not discuss the statute of limitations and generated a procedural error and the situation where it wrongly discussed the statute of limitations and generated an error of judgment is far from reasonable."

11. As a consequence of these conclusions the HCCJ ordered that the question of the unconstitutionality of Article 426 should be referred to the Constitutional Court for determination.

12. In her second report Dr Munteanu explains that no hearing date exists as yet for the appellant's case in the Constitutional Court and that in principle this procedure could take one and a half years. Thereafter, if the Constitutional Court were to rule that Article 426 was unconstitutional, this would lead to legislative changes and the opportunity for the appellant to make an application for an extraordinary appeal seeking the annulment of his conviction. Dr Munteanu concludes that this whole process could take several years, and in her evidence to the hearing she confirmed that it would not be possible to postpone the appellant serving his sentence to await the

outcome of these proceedings. He would be required to serve his sentence on the basis that as the proceedings stand the sentence is entirely lawful.

13. In respect of the appellant's case under Article 5 the judge observed as follows:

> "38. The challenge therefore rests on whether the RP is *"entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court"* within Article 5(4). That enshrines the protection against arbitrary arrect and detention without recourse to a court. It is plainly aimed at the start of the criminal process, by contrast with Article 6 which ensures a determination of any criminal charge "*within a reasonable time*". The ECtHR has confirmed that the RP's rights are incorporated in the decision made by a court at the end of proceedings when a sentence of imprisonment is pronounced after "conviction by a competent court" [*De Wilde, Ooms and Versyp v Belgium (No1)* (1971) 1 EHRR 373 at [76]].
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> 39. In the RP's case I prefer the submissions of behalf of the JA as there is in my judgment no real risk that if extradited the RP would be serving an arbitrary sentence contrary to Article 5(4). On the contrary he had a fair trial and was convicted by a competent court and the sentence was determined after the RP's exercise of his rights of appeal. The argument on the issue of limitation which the RP asserts was wrongly decided at trial and on appeal, was fully litigated and decided against him. This is in stark contrast to the authority of *Todorov v Bulgaria* (App 71545/11 ECtHR, 19 January 2017) relied upon by the RP, which can accordingly be distinguished. The RP has an appeal pending before the Constitutional Court which has the potential to put him in a position, only if that court rules in his favour, in which he could seek to challenge the legality of this conviction and sentence back at the High Court. Accordingly, per the ECtHR in De Wilde & Ors, the RP's Article 5(4) rights are deemed to be satisfied unless and until that eventuality occurs. Even then he would have recourse to the High Court in Romania to invoke them. But as matters stand my conclusion is that the RP's extradition would not be incompatible with this Article 5(4) rights."

The Law

14. Section 21 of the 2003 Act provides that it is a ground of appeal against extradition that it would be a breach of the requested person's human rights for them to be extradited. As set out above, in the present case the appellant (notwithstanding he raised other grounds before the judge) contends that it would be a breach of his rights under Article 5 of the ECHR for his extradition to be ordered. Article 5 of the ECHR, so far as relevant, provides as follows:

> "**Article 5 of the Convention- Right to liberty and security**

> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> …
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

15. The requirements of Article 5(4) were considered in *De Wilde v Belgium* [1979-80) 1 EHRR 373 which provided as follows in relation to the nature of the right that is guaranteed and the involvement of a court in the supervision of deprivation of liberty.

> "76. At first sight, the wording of Article 5(4) might make one think that it guarantees the right of the detainee always to have supervised by a court the lawfulness of a previous decision which has deprived him of his liberty. The two official texts do not however use the same terms, since the English text speaks of "proceedings" and not of "appeal", "recourse" or "remedy" (compare Art.13 and 26). Besides, it is clear that the purpose of Article 5(4) is to assure to persons who are arrested and detained the right to a judicial supervision of the lawfulness of the measure to which they are thereby subjected; the word "court" ("tribunal") is there found in the singular and not in the plural. Where the decision depriving a person of his liberty is one taken by an administrative body, there is no doubt that Article 5(4) obliges the Contracting States to make available to the person detained a right of recourse to a court; but there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings. In the latter case, the supervision required by Article 5(4) is incorporated in the decision; this is so, for example, where a sentence of imprisonment is pronounced after "conviction by a competent court" (Art. 5(1)(a) of the Convention). It may therefore be concluded that Article 5(4) is observed if the arrest or detention of a vagrant, provided for in paragraph (1)(e), is ordered by a "court" within the meaning of paragraph (4). It results, however, from the purpose and object of Article 5 as well as from the very terms of paragraph (4) ("proceedings", "recourse"), that in order to constitute such a "court" as authority must provide the fundamental guarantees of procedure applied in matters of deprivation of liberty. If the procedure of the competent authority does not provide them, the State could not be dispensed form making available to the person concerned a second authority which does provide all the guarantees of judicial procedure. In sum, the Court considers

> that the intervention of one organ satisfies Article 5(4), but on condition that the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question."

16. In the case of *Stafford v UK* (2002) 35 EHRR 32 the applicant had been convicted of murder in 1967 and sentenced to life imprisonment. He was released on licence in 1979 but his licence was revoked in 1980 when he left the United Kingdom in breach of its conditions. In 1990, following a recommendation of the Parole Board, he was released on licence again. In 1994 he was convicted of forgery and sentenced to six years imprisonment. When he was due for release from that sentence the Parole Board considered his case in the light of his life sentence and recommended that he be released on licence in particular in the light of the absence of violent reoffending in his case. The Secretary of State refused to accept this recommendation and the applicant challenged that decision. The ECtHR found that the applicant's continued detention after the recommendation of the Parole Board was arbitrary and that there had been a breach of Article 5(4) for the following reasons.

> "87. The Court has found above that the tariff comprises the punishment element of the mandatory life sentence. The Secretary of State's role in fixing the tariff is a sentencing exercise, not the administrative implementation of the sentence of the court as can be seen in cases of early or conditional release form a determinate term of imprisonment. After the expiry of the tariff, continued detention depends on elements of dangerousness and risk associated with the objectives of the original sentence of murder. There elements may change with the course of time, and thus new issues of lawfulness arise requiring determination by a body satisfying the requirements of Article 5(4). It can no longer be maintained that the original trial and appeal proceedings satisfied, once and for all, issues of compatibility of subsequent detention of mandatory life prisoners with the provisions of Article 5(1) of the Convention.
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> 88. The Government contended that the fact that the Parole Board had a power to direct the applicant's release on revocation of his life licence in 1994 was sufficient in itself to comply with Article 5(4). However, the Court notes that the applicant's life licence was revoked which he was serving a fixed term of imprisonment for fraud. When the fixed term sentence expired on 1 July 1997, the applicant remained in prison under the life sentence. Though the Parole Board had recommended his release at that date, the power of decision lay with the Secretary of State. In the circumstances of this case, the power of the Parole Board to direct release in 1994 is not material.
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> 89. From 1 July 1997 to the date of his release on 22 December 1998, the lawfulness of the applicant's continued detention was not reviewed by a body with a power to release or with a

> procedure containing the necessary safeguards, including, for example, the possibility of an oral hearing.
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> 90. There has, accordingly, been a violation of Article 5(4) of the Convention."

17. The observations in paragraph 87 of the judgment in *Stafford* gives rise to the question of whether there are new issues arising as a result of the passage of time which mean that it can no longer be maintained that the original trial and sentencing procedure can be relied upon to satisfy the requirements of Article 5(4), and there is a need for the opportunity of a review of a person's continued detention with necessary procedural safeguards.

18. This question was further considered by the ECtHR in the case of *Todorov v Bulgaria* (App No 71545/11). The applicant was convicted in 1987 and sentenced to 20 years imprisonment. Whilst serving the sentence the applicant applied to the Supreme Court for a review of his sentence and, as a result of the applicant's state of health, he was released in 1991. The Supreme Court then dismissed his application for revision and confirmed his conviction in 1992. Thereafter the authorities could not find the applicant in 1993: this was as a result of the applicant having left Bulgaria for the United States where he obtained a residence permit and subsequently citizenship. In 2005 the applicant wrote to the President of the Bulgarian Republic requesting a pardon, but the response in 2007 was that there no reason to examine his request in so far as it concerned a contention that time for enforcement of the sentences had elapsed under the statute of limitations. The applicant then returned to Bulgaria in early 2008 and upon arrival he was arrested and imprisoned in enforcement of the 20-year prison sentence from 1987. The applicant lodged an appeal to the Prosecutor's Office on the basis that the limitation period for the enforcement of the sentence had elapsed. This appeal and a subsequent appeal on the same basis were dismissed and an approach to the Supreme Court of Appeal were all unsuccessful in getting the applicant's case re-examined. Further applications, including for a Presidential pardon, were likewise fruitless. Ultimately the applicant was released from prison in 2014.

19. The applicant's application to the ECtHR was based on a breach of Article 5(4). The court's assessment was set out in the following terms.

> "58. The Court recalls that article 5(4) recognises that right of any person deprived of his or her liberty to lodge an appeal before a court in order to check that the procedural requirements and merits necessary for legality are met, in the meaning of the Convention, for his or her deprivation of liberty. The court responsible for this review must be competent to order the release in the case of illegal detention (see, among others, *Rahmani and Dineva*, aforementioned, paragraph 75).
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> 59. According to the Court's case law, in the hypothetic case of a detention consecutive to a "conviction by a competent court" within the meaning of article 5(1)(a), the review required by article 5(4) is incorporated in the judgment and this provision does not demand a separate review of the legality of the detention. (*De Wilde, Ooms and Versyp v Belgium,* 18 June

1971, paragraph 76…and *Stoichkov*, aforementioned, paragraph 64). However, when new questions relating to the detention's legality arise after the judgment, article 5(4) is again applicable and requires a judicial review of the legality of the detention. (*Thynne, Wilson and Gunnell v UK*, 25 October 1990, paragraph 68, *Stoichkov,* aforementioned, paragraph 65, *Gavril Yossifov,* aforementioned, paragraph 57, and *Sancranian v Romania* no 71723/10, paragraph 84, 14 January 2014).

60, In this present case, the Court has already established above that the applicant had been detained from 27 January 2008 to 27 May 2014 to complete the remainder of a prison sentence handed down in 1987 and that his detention fell within the scope of application of article 5(1)(a). It must therefore decide if new questions relating to the legality of the applicant's detention, which would not have been dealt with in the sentencing judgment, could have arisen during the course of this detention period and, if so, if the party concerned had had access to a judicial remedy in accordance with the requirements of article 5(4).

61. The Court notes in this respect that at the time of his incarceration in January 2008, the applicant argued that the limitation period for the enforcement of his sentence had elapsed and that his detention had no legal grounds. The pardons commission through the President of the Republic had also expressed this opinion in response to the request for pardon formulated by the applicant in 2007. However, the authorities of the Prosecutor's Office, competent for deciding if the sentence should or should not be enforced, were of the opposite opinion. In these circumstances, the Court considers that the question of the time limitation of the sentence imposed on the applicant was decisive for the legality of his detention and finds that this had not, of necessity, been examined at the time the conviction judgement was handed down in 1987 or of the examination of the applicant's request for review in 1992. Therefore, the domestic legal system was required to supply the applicant with the access to a judicial remedy meeting the requirements of article 5(4) of the Convention for deciding on this question.

62. The Court observes in this regard that Bulgarian law does not provide a specific judicial remedy for challenging the legality of a detention carried out in enforcement of a criminal conviction. Only the Prosecutor's Office is competent to decide on matters relating to the enforcement of sentences, in particular when there is a dispute on the limitation period, the partial enforcement of a sentence or the discounting of the period spent in provisional detention and that the legality of the detention is at issue. Orders given in this domain are subject to

> a hierarchical revision by the superior prosecutor and not to judicial review (paragraphs 17-18 above). Yet, the Court has already established it in similar preceding matters, the prosecutor cannot pass for a "court" meeting the requirements of article 5(4) (*Gavril Yossifov,* aforementioned, paragraph 60, and *Svetoslav Dimitrov,* aforementioned, paragraph 71). In domestic law there is no longer a general procedure of the *habeas corpus* type enabling a review of the legality of a detention, whatever the basis, and the release of the person detained should this prove illegal (*Gavril Yossifov,* aforementioned, paragraph 61, and the case law cited there)."

20. In the light of these conclusions the court concluded that there had been a breach of Article 5(4) for the duration of the applicant's detention between January 2008 and May 2014 as he had not had access to a judicial remedy enabling him to have his detention reviewed and in the event of illegality obtain his release from custody.

21. In the case of *Popoviciu v Curtea De Apel Bucharest* [2023] 1 WLR 4256 the Supreme Court had to consider the question of the standard to be applied when assessing whether there would be a breach of Article 5 as a result of a flagrantly unfair trial process. In the judgment of Lord Lloyd-Jones, with which the other members of the court agreed, it was concluded that it was necessary (save where evidence was the product of torture) for the requested person to show on the balance of probabilities that their trial had been so flagrantly unfair as to deprive them of their rights under Article 6.

22. In addition to these points the appellant relied upon fresh evidence to establish that if he were extradited to Romania, he would face the real risk of a prospective flagrant denial of his right to liberty under Article 5 and to a fair trial under Article 6. In particular he would not have effective legal procedures available to him to challenge the legality of his detention. In connection with these issues Lord Lloyd-Jones provided the following conclusions:

> "104 Mr Summers, on behalf of the appellant, very properly accepted that article 5(4) requires that there must be a legal mechanism which is capable of assessing the lawfulness of detention when, following a conviction, new issues arise concerning the lawfulness of the detention.
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> 105 *Etute v Luxembourg* (Application No 18233/16) (unreported) 30 January 2018 is a case in point. There the applicant had been imprisoned following his lawful conviction for a drugs offence. He was granted conditional release from detention but the conditional release was revoked on grounds of breach of conditions. The Strasbourg court held (at paras 25 and 26):
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> "25. According to the court's case law, in the case of detention following 'conviction by a competent court' within the meaning of article 5(1)(a), the supervision intended by article 5(4) is included in the judgement and this provision does

not require separated oversight of the lawfulness of the detention (*De Wilde, Ooms et Versyp v Belgium* [(1971) 1 EHRR 373], para 76). However, if new issues regarding the lawfulness of the detention were to arise after the judgement, article 5(4) applies again and requires judicial review of the lawfulness of the detention (see *Todorov v Bulgaria* (Application No 71545/11) (unreported) 19 January 2017, para 59, as well as the references cited therein).

26. Thereupon the court must decide any new issues of lawfulness and if there are any, which ones can arise over the return to prison of the applicant in 2015 and his subsequent detention to enforce his sentence, and if the remedies open to him were in line with article 5(4) (*Weeks v United Kingdom* [(1987) 10 EHRR 293]."

106 It was common ground between the parties that in addressing this issue the court is concerned with the situation which will confront the respondent if he is returned to Romania and that the applicable standard of proof is whether there is a real risk that he will be denied an effective means of challenging the legality of his detention on the ground that his trial was a violation of his article 6 rights.

107 We are here concerned with the availability of an effective remedy in Romania. The availability of an application to the Strasbourg court does not meet the requirements of article 5. Contrary to the submission on behalf of the appellant, the experts are not agreed that there is an effective remedy in Romania pursuant to article 20 of the Constitution. Furthermore, contrary to the submission on behalf of the appellant, the present proceedings before the courts of England and Wales cannot be considered as relieving Romania of the obligation to provide an effective remedy. The review which has taken place here is within the limited jurisdiction of proceedings on a European arrest warrant. The respondent maintains that he has encountered difficulty in obtaining information and evidence. The Romanian authorities would be obliged to co-operate with any article 5 and 6 compliant proceedings in Romania.

108 Having regard to the findings of the High Court in these proceedings, I am persuaded that the point is arguable. Notwithstanding the manner and the late stage in the proceedings at which the issue of the availability of an effective remedy in Romania has arisen, I consider that, in order to comply with the *Soering* principle, it would be necessary to remit this specific issue to the High Court with a direction that it consider the availability to the respondent, if returned to Romania, of an effective legal procedure which would enable him to make his case concerning the fairness of the Romanian

> proceedings and the legality of his detention. Had the appellant not withdrawn the European arrest warrant, I would, therefore, have remitted this issue to the High Court for its consideration."

Submissions

23. On behalf of the appellant, Mr Caldwell poses three questions, which he submits are critical to the analysis of whether or not there would be a breach of Article 5(4) if the appellant were to be extradited to Romania. Firstly, there is the question of whether or not a new issue has arisen in the appellant's case and, if so, when did it arise? Secondly, if there is a new issue bearing upon the legality of him serving his sentence in Romania, is there a remedy by which it is possible for the appellant to test the new issue which has arisen? Thirdly, is any remedy which might be identified an effective remedy for the purpose of Article 5(4)?

24. Mr Caldwell notes that the appellant was not informed until 2019 of the Constitutional Court Decision No 297 of the 26th of April 2018. Whilst the question of a limitation was raised in the appellant's case before the HCCJ leading to the decision of the 27th of November 2018, the HCCJ dismissed his application in respect of the limitation period and issued the warrant of imprisonment for the sentence which he is wanted to serve. Mr. Caldwell points out that subsequent to this decision, the HCCJ noted in its Decision No 25 of 2019 that the decision of the Constitutional Court in relation to the application of Article 155(1) and whether it was itself constitutional had been "uneven". Thereafter, the particular new issue, which Mr Caldwell draws attention to, is the further decision of the Constitutional Court on the 26th of May 2022, in which it concluded that Article 155(1) was unconstitutional in its entirety, along with the subsequent determination of the HCCJ on the 25th of October 2022 that the more favourable revision to the limitation period identified in the Constitutional Court's decision of the 26th of May 2022 was to be applied retrospectively. Thus, as a consequence of this new issue arising from the decision of the Constitutional Court, Mr Caldwell submits that there is a new issue in the appellant's case which, were he required to serve his sentence, would bear upon the legality of his detention, since the retroactive application of this decision would render his convictions unlawful as in breach of the limitation periods applicable to the offences.

25. Mr Caldwell further submits that the expert evidence of Dr Munteanu demonstrates that cassation is not available as a remedy in respect of the warrant of imprisonment. He submits that this has been demonstrated by the appellant's application to the HCCJ, which was rejected by them on the 14th of February 2023, on the basis that it had no jurisdiction to reopen the cassation appeal The HCCJ decided that the question of law arising from the retroactive effect of the Constitutional Court's decision of 2022 was beyond its jurisdiction, leading to the reference to the Constitutional Court of the question of whether Article 426 was constitutional. Thus, Mr Caldwell submits there is no effective remedy. The Constitutional Court have that unresolved issue before them at present.

26. Thirdly, Mr Caldwell submits that, as a consequence of these matters, there is no effective remedy available to the appellant. The unchallenged evidence of Dr Munteanu was that the reference to the Constitutional Court would take one to two years to resolve, following which there will be a further period of delay whilst that

decision was applied by the HCCJ if favourable. Mr Caldwell drew attention to the observations in paragraph 107 of *Popoviciu* in which Lord Lloyd-Jones identified that a reference to the European Court of Human Rights is not an adequate remedy. Nor, he submitted, was the suggestion that Parliament might change the law any form of available effective remedy in the circumstances.

27. It was accepted that the appellant would not be eligible for bail and would be immediately required upon return to commence serving his sentence. The appellant had already spent eighteen months in custody, and on the basis that he would be entitled to release two thirds of the way through his sentence in Romania, Mr Caldwell submitted that he would have served his sentence in its entirety long prior to him having the prospect of any effective remedy to question the legitimacy of his detention in the light of the decision reached by the Constitutional Court in 2022, which the expert evidence explains, ought to lead to the limitation period being applied so as to enable the appellant's release.

28. In response to these submissions Ms Hollos, on behalf of the respondent, submitted that in truth any new issues occurred prior to the rejection of the appellant's appeal to the HCCJ on the 27th of November 2018, and not as a consequence of the decision of the Constitutional Court in 2022. In particular, Ms Hollos drew attention to a note from the appellant's lawyer, Mr Druga, which was prepared for the purposes of the hearing before the judge and submitted to him. In that note, Mr Druga observes that the Constitutional Court's conclusion that Article 155(1) of the Criminal Code comprised in the Decision No 297 of 2018 had the consequence that the phrase "any procedural act in question" was repealed from the legislative background as a result of the inaction of the legislator. Mr Druga notes that after the 10th of August 2018, the failure of the legislator to act upon the Constitutional Court had this effect. Ms Hollos submits that is a position reinforced by Dr Munteanu when she observes that the whole provision was effectively concluded to be unconstitutional. Thus, it is submitted by Ms Hollos that the arguments in relation to limitation were available to the appellant, and in fact considered and rejected, as part of his appeal on the 27th of November 2018.

29. What occurred by virtue of the decision of the Constitutional Court in 2022 was, Ms Hollos submitted, no more or less than a restatement of the position which had been determined in 2018. Thus, the issue in this case, which is still alive, namely whether the appellant may be entitled to a cassation appeal in respect of this point, is a narrow one. It is not a new issue of law bearing upon the legality of the sentence and does not affect the fact that the appellant is wanted in order to serve a lawful sentence.

30. Ms Hollos further submits that there is, in reality, no new issue that could arise until the Constitutional Court rules on the point that has been referred to it by the HCCJ. If they rule that it was unconstitutional for the appellant not to have access to a cassation appeal, then he will be in a position to apply to the HCCJ for that remedy to be made available. As a consequence, the conclusions reached by the judge in paragraph 39 of his judgment were entirely appropriate.

Conclusions

31. It is clear from the authorities in my judgment that the three-stage analysis which was provided by Mr Caldwell accurately sets out the stages for the consideration of

whether or not the extradition of the appellant would give rise to a breach of Article 5(4). The effect of the authorities summarised in paragraphs 104 to 106 of the judgment of Lord Lloyd-Jones in *Popoviciu* make clear that it is a settled approach to Article 5(4) that, if and when a new issue arises concerning the question of the lawfulness of a person's detention, the requirement of Article 5(4) is that there is a legal mechanism capable of addressing that question. The first issue therefore in this case is whether or not there has in fact been a new issue arising concerning the lawfulness of the appellant's detention. Since the detention of the appellant would be pursuant to the sentence which was imposed upon him, the question is directly related to the lawfulness of that sentence, which itself depends upon the lawfulness of the appellant's conviction.

32. The position in relation to the appellant is not without its complexity. It is necessary, however, in my view, to analyse carefully the history of the appellant's case and how the question of limitation and the constitutional status of Article 155(1) has been addressed. In particular, it is important to understand how his initial appeal was dealt with when it was determined on 27 November 2018. This is significant because at the heart of Ms Hollos' submissions is that in the hearing of the appellant's appeal before the HCCJ at that time, the question of limitation and the status of Article 155(1) was considered and, as a consequence, those questions are not new issues, but ones which were determined in the particular circumstances of this appellant's case.

33. What occurred in the decision of 27 November 2018 by the HCCJ in their Decision No 312/A is dealt with in some detail in the submission of Mr Druga, prepared for the hearing before the judge. In that report, Mr Druga provides the following information:

> "At the time of delivery - November 27, 2018 - of the criminal decision no. 312/A by the High Court of Cassation and Justice in case no. 1004/45/2012*, a court judgment on the basis of which the warrant for the enforcement of the prison sentence was issued, **if the court of appeal had started from a correct premise - the absence of grounds for interrupting the limitation period of criminal liability - as a result of Decision no. 297/2018, taking into account the evidence in the case file, it should have found that the criminal proceedings had been terminated, since in respect of all the charges the general limitation periods had expired**.
>
> Constitutional Court Decision no. 297/2018 was in force at the time when the sentencing judgment was delivered, **but was interpreted by the appeal court contrary to the meaning attributed to it by the issuing court - the Constitutional Court**.
>
> Thus, in the sentencing judgment (criminal decision no. 312/A of November 27, 2018) on pages 285 - 286 it is held that:
>
> "The simplistic legal variant promoted by the defendants that, at the present time, in interpreting S. 155 (1) of the Criminal Code by means of Decision no. 297/2018 of the Constitutional Court, given that the legislator did not actively

> intervene within 45 days of its publication in the Official Gazette in order to bring the legal provisions in question into line with the solution ruled by the Constitutional Court, the cause for interrupting the course of limitation of liability, the entire text of S. 155 (1) of the Criminal Code becomes inapplicable, is unacceptable.
>
> In conclusion, the question of law raised by the defendants starts from a false premise, namely that de lege lata the provisions of S. 155 (1) of the Criminal Code are no longer in force, that the expression "by any procedural act carried out in the case" would have left the active substance of the criminal legislation without the legislator having introduced another phrase in its place. Or, that the decisions of the Constitutional Court declaring unconstitutional certain provisions of the law (even though this has not yet been done) are tantamount to repealing laws. In practice, in the view of the defendant appellants, only the general limitation periods for criminal liability are now applicable, and it is no longer possible to interrupt them under S.155(2) of the Criminal Code, given the fact that the legislator has remained inactive, contrary to Section 147 of the Constitution".” (emphasis added)

34. It is evident from this that whilst the HCCJ were aware of the Constitutional Court’s Decision No 297/2018, they do not appear to have been persuaded that the decision of the Constitutional Court was of retroactive effect so as to apply to the appellant’s case and render his conviction unlawful as being in breach of the requirements in relation to limitation periods. Thus, it appears that whilst the question of the Constitutional Court’s decision was considered by the HCCJ in their decision of 27 November 2018, they did not accept that the decision applied retrospectively to the conviction of the appellant. Further, they appear to have rejected the argument that the failure of the legislature to act rendered the legal provisions in relation to limitation within Article 155(1) inapplicable. As is noted above, it appears that in Decision No 25 of 2019 of the HCCJ that they noted that the practice of applying the decision of the Constitutional Court in other cases had been “uneven” or “inconsistent”. It may be that the HCCJ’s decision in the appellant’s case is evidence of that inconsistent practice.

35. Importantly, the further development which occurred in relation to the issues concerning Article 155(1) was the decision of the Constitutional Court on 26 May 2022 in Decision No 358/2022 that not only was Article 155(1) unconstitutional in its entirety, but also that the effect of that ruling was retroactive and would therefore apply to the appellant’s case. In my view, this clearly amounts to a new issue bearing upon the legality of the appellant’s detention since it bears directly on the legality of the source of that detention, namely his conviction.

36. It is a new issue because it is clear from the history, which has been set out above, that prior to the decision of the Constitutional Court on the 30th of May 2022 it was not clear that the unconstitutional nature of Article 155(1) had such a retroactive effect. Clearly, that was not the position adopted in the appellant’s case where the HCCJ considered such a submission unacceptable. It appears from the material before the

court that the submission that Article 155(1) was unconstitutional and that the declaration to that effect by the Constitutional Court should have retroactive effect, is now orthodox. That raises new issues in the appellant's case which have not been effectively considered, and which bear upon the legality of his detention. It follows that I am unable to accept the submission made by Ms Hollos that the questions around the applicable limitation period are not new and were considered previously in the appellant's case.

37. The next question which arises is whether there is any identified remedy in respect of this new issue. The starting point for the consideration of that matter is the application which the appellant made in order to bring to bear this new understanding of the provisions of the criminal law in relation to limitation upon his conviction. As set out above, the appellant made an application to the HCCJ relying upon the unconstitutional nature of Article 115(1) in August 2022. In their ruling on that application, the HCCJ concluded that a person who had conscientiously raised the limitation argument during their trial and appeal unsuccessfully would, notwithstanding the illegality of their conviction in respect of the law as now understood, not be entitled to an annulment of their conviction as a result of Article 426 only applying to procedural errors and not substantive illegality.

38. The anomalous consequences of provisions of Article 426, which led a person in the position of the appellant to have no remedy before the HCCJ, led firstly to the clear concerns identified by the HCCJ in respect of the discrimination which that provision gives rise to, and secondly as a consequence, their referral of the question of whether or not Article 426 was unconstitutional to the Constitutional Court. In principle, therefore, this evidence demonstrates that the appellant has no conventional remedy by way of an appeal before the HCCJ founded upon the newly identified retroactive effect of the unconstitutionality of Article 155(1). As Mr Caldwell points out, whilst the reference has been made to the Constitutional Court, they do not have original jurisdiction in respect of the appellant's conviction, and at most they would be able to determine that Article 426 was unconstitutional as a result of the discrimination which it has given rise to in the appellant's case and, consequentially, to seek to expand the jurisdiction of the HCCJ to enable a further application by the appellant.

39. The possible consequence of the HCCJ's reference to the Constitutional Court is therefore the closest, on the evidence, that the appellant gets to having a remedy in relation to the new issue which has been identified. Given the limitations on the possibility of any substantive relief in respect of the appellant's incarceration pursuant to an unlawful conviction which are evident it is difficult to conclude that this is in truth an available remedy for the purposes of Article 5(4).

40. I accept the submissions made by Mr Caldwell that the potential possibility of Parliament changing the law, which is presently clearly against the appellant, is not capable of amounting in this context to an effective remedy. Nor is the possibility of a reference to the European Court of Human Rights adequate, based upon the observations of Lord Lloyd-Jones in paragraph 107 of his judgment in *Popoviciu*.

41. In any event, in my view Mr Caldwell has further valid submissions to make in respect of whether or not the remedy of awaiting the outcome of any decision by the Constitutional Court, and such process as might arise consequential to that ruling, does not amount in this case to an effective remedy for the appellant. On the time

estimates provided, and not materially challenged, as to the lengths of time it will take for the Constitutional Court to reach a decision and, if favourable, for any further process to give rise to an ability of the appellant to seek vindication in respect of the new understanding of the constitutionality of Article 155(1) the delays will be of such a length that he will have served his sentence by the time the remedy is of any use to him.

42. As Ms Hollos accepts, and indeed submits, the reality is that the Romanian authorities will, as matters stand, take the sentence which the appellant has to serve (less the time he has served in the UK on remand) as an immediate, effective sentence of imprisonment. Bearing in mind the potential for his release after serving two thirds of the balance of his sentence, the prospects are that the appellant would have to serve the entirety of his sentence before there is any possibility of his conviction being quashed. Even if it were concluded that the reference to the Constitutional Court could amount to a remedy, it is not, in the particular circumstances of this appellant's case, one which is effective.

43. It follows that for the reasons which have been set out above, I am satisfied that the judge's conclusions in relation to Article 5(4) were wrong. The decision of the Constitutional Court in May 2022 clearly gives rise to a new issue, namely the retroactivity of their conclusions as to the unconstitutionality of Article 155(1), which is a new legal issue bearing upon the legality of the appellant's detention. Given the conclusions of the HCCJ on 14 February 2023, when they declared his challenge on this basis inadmissible, he does not have an effective remedy, and even were the consequential reference by the HCCJ to the Constitutional Court to be regarded as a remedy, it is not one which is effective since the length of time that it will take to play out in order to provide the possibility of any challenge by the appellant to the lawfulness of his detention, that challenge will have become moot as a result of the appellant having already served his sentence by the time the opportunity arises. I am therefore satisfied that the appeal must be allowed.